

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-732

TITLE WESTERN AIR LINES, INC., ET AL., Appellants V.
BOARD OF EQUALIZATION OF THE STATE OF SOUTH
DAKOTA, ET AL.

PLACE Washington, D. C.

DATE November 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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WESTERN AIR LINES, INC., ET AL., :

Appellants :

v. : No. 85-732

BOARD OF EQUALIZATION OF THE :

STATE OF SOUTH DAKOTA, ET AL. :

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Washington, D.C.

Monday, November 3, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

RAYMOND J. RASENBERGER, ESQ., Washington, D.C.;

on behalf of Appellants.

MARK V. MEIERHENRY, ESQ., Pierre, S.D.;

on behalf of Appellees.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear
3 arguments first this morning in No. 85-732, Western
4 Airlines versus Board of Equalization of the State of
5 South Dakota. You may proceed when you're ready, Mr.
6 Rasenberger.

7 ORAL ARGUMENT OF
8 RAYMOND J. RASENBERGER, ESQ.

9 ON BEHALF OF APPELLANTS

10 MR. RASENBERGER: Mr. Chief Justice and may it
11 please the Court:

12 The issue in this case is whether the South
13 Dakota Airline flight property tax discriminates against
14 airlines in violation of 49 U.S.C. 1513(d). That
15 section in a nutshell prohibits states from assessing or
16 from taxing air carrier property at a higher rate than
17 commercial and industrial property in the same
18 jurisdiction.

19 Now, the South Dakota Supreme Court has held
20 that there was no violation of the statute, even though
21 almost no other property, personal property in South
22 Dakota, is taxed except the property of airlines.
23 Indeed, property that is not taxed includes aircraft
24 that's privately owned, it includes corporate aircraft,
25 it includes aircraft used in charter services, it

1 includes even aircraft used in interstate air service.

2 Only the aircraft of interstate airlines or
3 those in foreign commerce is taxed in South Dakota. And
4 needless to say, no competing modes of transportation
5 are taxed insofar as their personal property is
6 concerned, such as buses or taxis or rental cars.

7 Now, the state doesn't deny that its system is
8 discriminatory and the state agrees, as I understand
9 them, that the purpose of 1513(d) is to prevent
10 discrimination. And the state also admits that, if it
11 taxed other commercial and industrial property in the
12 state, the assessment ratios and the tax rates could not
13 be any lower for that property than for air carrier
14 property.

15 But the state says the kind of discrimination
16 it's practicing in this case is permitted by the statute
17 because it's exempting all other property from taxation,
18 rather than taxing it at a lower rate. Now, the South
19 Dakota court has reached that conclusion based on a
20 reading of 1513(d) which it says is clear and
21 unambiguous, so clear and unambiguous, apparently, there
22 was no need to even dwell upon the purpose of Congress
23 in enacting 1513(d), no need to even take a glance at
24 the legislative history of 1513(d), which the court did
25 not do, so clear apparently no need to even consider an

1 opinion of the North Dakota Supreme Court eight months
2 earlier which reached exactly the opposite conclusion as
3 to the meaning of the statute on virtually the same
4 facts.

5 North Dakota had an airline flight property
6 tax and North Dakota exempted other property. And the
7 North Dakota court, in holding that the statute had been
8 violated, noted that it was its duty to avoid what it
9 called ludicrous and absurd results.

10 Now, the language that South Dakota finds to
11 be so clear and unambiguous includes this key phrase:
12 "subject to a property tax levy." That phrase appears
13 in the definition of commercial and industrial property,
14 and that's the comparison class for purposes of
15 determining whether there is discrimination.

16 1513(d) says roughly this: you shall not
17 assess air carrier property at a higher percentage of
18 true value than other commercial and industrial
19 property; second, you shall not tax air carrier property
20 at a higher rate than other commercial and industrial
21 property.

22 And commercial and industrial property is
23 defined in the statute, with few exceptions, as property
24 devoted to a commercial and industrial use and subject
25 to a property tax levy, and those are the key words.

1 And South Dakota says that means, that definition means,
2 property that's being put to a commercial and industrial
3 use and is being taxed, as distinguished from capable of
4 being taxed.

5 QUESTION: In other words, they draw a
6 distinction between subject to and subjected to, I take
7 it?

8 MR. RASENBERGER: Exactly, Justice Black.

9 QUESTION: While I have you interrupted,
10 Continental was a party to this at one time, wasn't
11 it?

12 MR. RASENBERGER: Continental was a party in
13 the lower court. They decided not to pursue the
14 appeal.

15 QUESTION: Are they a respondent here, then, I
16 suppose?

17 MR. RASENBERGER: Well, they would benefit
18 from a favorable decision of the Court. But they have
19 not -- they're not a party to this appeal. I do not
20 know.

21 QUESTION: Are they still flying in South
22 Dakota?

23 MR. RASENBERGER: I can't be sure of that,
24 Justice White, either. There's been a reduction in
25 flying in South Dakota. I don't know whether it's got

1 anything to do with the tax here or not.

2 In any case, the short of it is that South
3 Dakota says, since there is no property being taxed in
4 the state, personal property, there is no property in
5 the comparison class, hence there's no violation of
6 1513(d).

7 Now, the first problem we have with that
8 analysis is the idea that the words "subject to a
9 property tax levy" are all that clear and unambiguous.
10 I mean, the words "subject to," as we all know, are
11 often used to refer to things that could happen as well
12 as things that have happened, like in the phrase
13 "subject to further order of the court," or "subject to
14 change without notice," or "subject to high winds or
15 flooding," or anything.

16 Those are all things that haven't happened
17 yet.

18 QUESTION: *You usually say "subject to
19 further order," just as here it would be more natural to
20 say "subject to property tax levy," rather than "subject
21 to a property tax levy," unless you're referring to a
22 particular one that's in effect.

23 MR. RASENBERGER: I think you could make
24 something out of that distinction, Justice Scalia, but
25 it seems to me that is looking at this with a semantic

1 microscope, really, when Congress was painting a picture
2 here with very broad strokes.

3 As you look at the legislative history, you'll
4 see that the kind of precision that you're suggesting
5 went into the fixing of those words is lacking
6 everywhere else in this statute. And I suggest that it
7 just wasn't that deliberate a choice as between "a" or
8 not using the letter "a".

9 QUESTION: What do you think it means -- what
10 is excluded if it does not refer to a particular
11 property tax? What do you think was -- Congress meant
12 what could constitutionally be subject to a property
13 tax?

14 MR. RASENBERGER: I think it's what could
15 constitutionally, and I think it was also probably meant
16 to exclude property that was traditionally nontaxable by
17 the states.

18 QUESTION: What commercial or industrial
19 property wouldn't constitutionally be subject to a
20 property tax levy, commercial or industrial property?

21 MR. RASENBERGER: Well, there are commercial
22 properties being put to a commercial or industrial use
23 by the Federal Government that are not taxable. There
24 are certain commercial properties of charitable
25 organizations that are not taxable in some states. So

1 those are examples.

2 QUESTION: Well, but I'm not saying not
3 taxable in some states. We're talking about Congress
4 using the language, and you say it doesn't mean actually
5 subject to. When you say some states have not made it
6 subject, you're using actually subject to, and you're
7 telling us that is not what it means.

8 You're telling us it has to mean
9 constitutionally it could be subject to, and you think
10 that what they're referring to is only federal property
11 that is being used for commercial or industrial
12 purposes. Such as what? Give me, you know, five
13 examples?

14 MR. RASENBERGER: Could I answer it this way:
15 The words "subject to a property tax levy" entered the
16 statute quite long before the words "commercial and
17 industrial property." In other words, this statute had
18 like a 15 year history before it finally got enacted,
19 and in the course of that 15 years it was built sort of
20 brick by brick.

21 And the first brick, one of the early bricks
22 that went in there, were the words "subject to a
23 property tax levy." And when they went in there, of
24 course, the words "commercial or industrial property"
25 were not there.

1 The reference class was all other property.
2 So it was all other property subject to a property tax
3 levy. And in those circumstances, the words obviously
4 served a certain function, because otherwise all
5 property, federal lands in the West for example, would
6 theoretically have been covered within the comparison
7 class. So when it went into the statute --

8 QUESTION: Well, Mr. Rasenberger, at the time
9 that the language referred to all property, wasn't
10 traditionally exempt property already excluded from all
11 property?

12 MR. RASENBERGER: Yes.

13 QUESTION: I mean, charitable property wasn't
14 being taxed at that time, or federal owned, or so
15 forth?

16 MR. RASENBERGER: That's right, and an
17 argument can be made that the words "subject to a
18 property tax levy" were in effect unnecessary from the
19 beginning because it was clear --

20 QUESTION: Exactly, just pure surplusage, on
21 your argument.

22 MR. RASENBERGER: From the very beginning you
23 could regard them that way, yes.

24 QUESTION: Well, that's kind of a curious
25 argument, because usually we think when Congress adds

1 new language like that it must be intended to mean
2 something, and on your interpretation it wouldn't.

3 MR. RASENBERGER: Adds new language such as
4 "commercial and industrial property"?

5 QUESTION: Adds language, yes.

6 MR. RASENBERGER: When Congress added the
7 words "commercial and industrial property" it was trying
8 to narrow the comparison class to some extent, to get at
9 what they were really concerned about, which was
10 business property and not all other property. But I
11 fail to see how choosing a narrower class makes the term
12 "subject to a property tax levy" mean something
13 different.

14 QUESTION: But as I understand Justice
15 C'Connor's question and your answer, you agreed that the
16 term "subject to a property tax levy" under your
17 argument was probably surplusage, that it really didn't
18 mean anything.

19 MR. RASENBERGER: Yes. The original phrase
20 was "subject to the same property tax levy." That was
21 -- the original bill was focused only on assessments.
22 That was the concern the railroads had. And it was said
23 assessments subject to the same property tax levy.

24 Later on the railroads began to realize that
25 that wasn't the kind of protection they wanted, because

1 classifications of tax -- tax classifications could be
2 developed which made it possible to discriminate in
3 terms of assessments. You could have a higher tax rate
4 and have therefore a different assessment.

5 So they went into the business of adopting a
6 provision which would have protected against tax rates
7 being discriminatory, as well as assessments. That's
8 when 1(c) was added to the statute in 1967.

9 Have I answered the question?

10 QUESTION: Well, as I understood Justice
11 O'Connor's point, and it commends itself to me to a
12 certain extent, we don't ordinarily -- we're loath to
13 say that a proviso or a clause in an act of Congress is
14 just surplusage, that it really meant nothing.

15 MR. RASENBERGER: I understand that, and I'm
16 saying it still means something even today. Even though
17 the words "commercial and industrial property" exclude a
18 lot of otherwise non-taxable property, there is still
19 property devoted to a commercial or industrial use which
20 is not taxable.

21 QUESTION: Federal facilities?

22 MR. RASENBERGER: Federal facilities: the
23 TVA, Amtrak, property like that. So it's not surplusage
24 in any case.

25 What the state is saying is that the adoption

1 of the words "subject to" -- the adoption of the words
2 "commercial and industrial property" suddenly accomplish
3 a radical transformation in the meaning of the statute,
4 that they suddenly created a different meaning for the
5 words "subject to a property tax levy" than it had
6 before.

7 QUESTION: That's a pretty fine line to draw
8 in a statute that you tell us was sort of thrown
9 together. I mean, you say Congress was being so precise
10 that they thought, well, there is some little bit of
11 commercial and industrial property that can't be taxed,
12 namely federal facilities. I would never have thought
13 of that, but you told me that this was a pretty much
14 rush job, this statute. That's fairly refined, isn't
15 it?

16 MR. RASENBERGER: It was not a rush job in the
17 sense that it took place over a period of 15 years. But
18 all I'm saying is, if you attribute the adoption of the
19 words "commercial and industrial" -- to those words,
20 "commercial and industrial property," a major change in
21 the meaning of the words "subject to a property tax
22 levy," there ought to be some basis for attributing
23 that.

24 I mean, why would Congress, at the same time
25 that it was narrowing the class to business property,

1 have created an opportunity for a huge exception for
2 business property? And that's what the state is
3 basically arguing, that when you changed it from all of
4 the property to commercial and industrial property you
5 changed the meaning of the statute considerably, because
6 the words "subject to a property tax levy" thereafter
7 had no meaning.

8 QUESTION: Perhaps Congress wanted to leave to
9 states the availability of treating some commercial and
10 industrial property specially and not subjecting them to
11 a tax levy at all, such as in order to attract new
12 business or something of that sort. Isn't that a
13 possibility that Congress could have had in mind?

14 As you would have us read the statute, no
15 state could give an exemption or a lower rate in order
16 to attract new commercial enterprise within the state,
17 without at the same time applying that new rate to
18 interstate airlines.

19 MR. RASENBERGER: Well, averaging that rate
20 into the total rate for all property in the state, yes,
21 I think that's right.

22 QUESTION: But isn't that a good reason for
23 Congress conceivably making that exception, that it's
24 only property that is actually subject to a levy that
25 we've talking about?

1 MR. RASENBERGER: Well, as I say, there is no
2 specific legislative history on the subject, except the
3 railroads at one time were asked what they thought the
4 term "subject to a property tax levy" meant. And one of
5 the statements that was made I think was a significant
6 one.

7 One of the railroad representatives said that
8 the issue here is really state policy versus federal
9 policy, and the states can have their tax policies, they
10 can give tax breaks to people they want to give tax
11 breaks to. But we have a federal policy as well.

12 And all that Congress is saying is that that
13 federal policy has to be -- is such that if you give a
14 tax break to any commercial or industrial user, that has
15 to be averaged into the way you treat interstate
16 carriers. And it seems to me that that's a perfectly
17 reasonable conclusion.

18 What we do not have here in all this
19 legislative history is anything that says what Congress
20 meant by the words "subject to a property tax levy."
21 What we do have is what Congress meant to establish by
22 the statute, and I think that's the key point. I mean,
23 you compare the words "subject to a property tax levy,"
24 which are totally unexplained, with the prohibition on
25 discrimination, which is very clearly explained.

1 Let me just read you a few lines out of one of
2 the early Senate reports, and this deals with the words
3 that permit -- that prohibit tax rate discrimination.

4 That's subparagraph (c). It says:

5 "The purpose of subparagraph (c) is to forbid
6 state or local classifications, whether based on
7 constitutional provisions, statutory enactment, or
8 administrative order or practice, which are designed or
9 have the effect of discriminating against carrier
10 transportation property."

11 Now, that we know is what Congress meant by
12 (c). We know that what we have in South Dakota is a
13 scheme which has the effect clearly of discriminating
14 against carrier property.

15 We don't know precisely what "subject to a
16 property tax levy" meant. It is in some legislative
17 history limbo. We simply have very little on it, so we
18 have to speculate. So it's a question, it seems to me,
19 of balancing the thing we know with the thing we don't
20 know.

21 And if we say these words "subject to a
22 property tax levy" override what we clearly know
23 Congress meant in the substantive provisions, we're in
24 effect letting the tail wag the dog here.

25 QUESTION: Mr. Rasenberger, supposing you

1 prevail here. What happens when this case goes back on
2 remand to the South Dakota courts?

3 MR. RASENBERGER: They would have to develop
4 an average rate for personal property in the state that
5 is subject, that is eligible for taxation.

6 QUESTION: Well, that really, you could argue,
7 that's the tail wagging the dog the other way. In other
8 words, in order to enforce the federal mandate here that
9 there should be no discriminatory taxation of airline or
10 railroad property, a state has to subject to personal
11 property tax all of the personal property in the state
12 that it had decided to exempt.

13 MR. RASENBERGER: The state has the option of
14 not taxing airlines. All the statute says, you can tax
15 whoever you want, you can give whatever tax breaks you
16 want, but you have to treat airlines the same as the
17 average way you treat other business property.

18 QUESTION: Well, on that point, there is, of
19 course, a statutory exception for an in lieu tax which
20 is used for airport and aeronautical purposes. In a
21 very curious holding, the court below said this was not
22 an in lieu tax.

23 Now, apparently no appeal was brought to us on
24 that. That isn't raised by the state, is it?

25 MR. RASENBERGER: Well, the lower court, the

1 South Dakota Supreme Court, rejected the argument that
2 it was an in lieu tax, on the theory that it wasn't in
3 lieu of anything, which I think was a correct holding.

4 QUESTION: Do you suppose whether it is or is
5 not is a matter of federal definition, though,
6 ultimately?

7 MR. RASENBERGER: Whether it is or is not in
8 lieu?

9 QUESTION: Whether it's an in lieu tax.

10 MR. RASENBERGER: Well, it seems to me that if
11 you're asking does the Court have that issue before it,
12 I would say no.

13 QUESTION: I think it doesn't, but I'm also
14 suggesting that certainly in this situation it's very
15 possible that a state could indeed single out airlines
16 for tax under this in lieu exemption.

17 MR. RASENBERGER: Yes, it certainly could, it
18 certainly could. And that was clearly a condition to
19 getting the statute passed, was getting that in there.
20 But that's not what South Dakota has chosen to do.
21 Obviously, if they had taxed other personal property and
22 made the airline tax in lieu of that tax, we wouldn't be
23 here today.

24 QUESTION: What do you make of the fact that
25 the provision that applied to railroads, which did

1 explicitly prohibit all other discrimination against
2 interstate commerce in effect, does not exist with
3 respect to airlines?

4 I mean, your argument would have a lot more
5 force, you know, if you come and say it's inconceivable
6 that Congress meant to prohibit just one type of
7 discrimination, but didn't intend to prohibit the
8 other.

9 Now, with railroads you could say that,
10 because they had a provision, a general provision that
11 said all other discrimination is prohibited. That was
12 dropped for airlines. Why was it dropped?

13 MR. RASENBERGER: Well, let me start by saying
14 it was put in for railroads at the very last minute in
15 the legislative history, because the railroads called to
16 the attention of the committee a gross receipts tax that
17 New York was imposing on the New York Dock Railway.
18 That's what the legislative history tells us.

19 Now, when we come to the motor carrier
20 statute, which was the next one after the rail statute,
21 it was perfectly clear from the legislative history that
22 Congress did not mean to prohibit highway user taxes,
23 and the reports say that. So there's a very good reason
24 why, in light of that feeling on Congress' part, it
25 would not have put in the statute that catch-all

1 clause.

2 When it came to the airline, the object was --
3 I mean, the purpose of Congress was to adopt the motor
4 carrier provisions, which it did, which excluded that
5 provision. But in addition, the airlines already had
6 protection against gross receipts taxes in 1315(a). So
7 the reason the railroads needed that blanket provision
8 was not applicable to the airlines, and in any case the
9 airlines themselves did not seek that provision when the
10 proposed the bill to Congress.

11 QUESTION: May I go back to Justice O'Connor's
12 question, please, on the in lieu tax. Am I correct in
13 understanding that the proceeds of this tax are used
14 entirely for airport and aeronautical purposes?

15 MR. RASENBERGER: Yes.

16 QUESTION: And is it not possible that
17 Congress, what Congress was saying is that if you're
18 using -- if you're going to tax airlines for general
19 revenue purposes, then you've got to treat them like
20 others who are being taxed for general revenue purposes,
21 but if you're going to just raise money for airports and
22 aeronautical purposes it's fair to impose the entire tax
23 on the airlines?

24 Wouldn't that make sense out of the statute?

25 MR. RASENBERGER: If you're at the same time

1 excusing the airlines from paying another tax.

2 QUESTION: Well, that's the only tax at issue
3 here, is the one that the trial court thought was an in
4 lieu tax.

5 MR. RASENBERGER: But we're not being excused
6 from paying any other tax, because no other tax would
7 apply to us.

8 QUESTION: Well, they aren't charging other
9 commercial and industrial purposes this same tax. So
10 you're being excused to the same extent that other
11 commerce and industry is excused.

12 MR. RASENBERGER: Well, I think if the statute
13 said it doesn't apply to a tax used for aeronautical
14 purposes, that would be the correct answer. But it says
15 an in lieu tax for aeronautical purposes, not just any
16 tax.

17 QUESTION: It doesn't apply to tax that's used
18 solely for aeronautical, and that's what this one is.

19 MR. RASENBERGER: In lieu.

20 QUESTION: Yes.

21 And another question: Why is not the in lieu
22 issue before us? Because if we disagreed with the
23 Supreme Court of the state of that issue, we could
24 affirm their judgment on a different ground. So I think
25 that issue is open to us.

1 MR. RASENBERGER: Well, neither the state nor
2 the Appellants think it's an in lieu tax.

3 QUESTION: No, but you see, our job is to try
4 and make sense out of the entire statute.

5 MR. RASENBERGER: I understand. Well, I think
6 it would be a terrible mistake to regard this as an in
7 lieu tax, unless you can find some other tax that it's
8 in lieu of.

9 QUESTION: Because you're being very literal
10 here, because the words "in lieu can't be the first tax,
11 can't be -- you're saying it's got to replace something
12 that previously existed. And now you're the one who's
13 being the very literal reader of the statute.

14 MR. RASENBERGER: That's right, yes.

15 QUESTION: But maybe "in lieu" means that it's
16 not an additional tax, but the only tax of a particular
17 type. And the point is it may have -- that term may
18 have a federal definition, not a state definition. The
19 state court makes it turn on the historical accident of
20 whether there was a previous tax, and maybe that isn't
21 the meaning of it.

22 MR. RASENBERGER: Well, yes, of course the
23 Court can read that phrase any way it wants. It seems
24 to me very hard to reach the conclusion that an in lieu
25 tax is an in lieu tax if it's not in lieu of anything.

1 And it isn't in lieu of anything.

2 QUESTION: Supposing that South Dakota were a
3 newly organized state and this was the first time they
4 set out to tax anybody, and they said: We're going to
5 tax all of you people on the traditional personal
6 property tax, all of you commercial and business people,
7 but we're not going to subject you airlines to that;
8 we're going to have a special airlines tax for you, and
9 we're going to use it all to fix up airports.

10 Don't you think that could be arguable a lieu
11 tax under this statute?

12 MR. RASENBERGER: Yes, yes. But that's not
13 our situation here. Yes, definitely, that would be an
14 in lieu tax.

15 QUESTION: So but then you would agree, I take
16 it, that the Supreme Court of South Dakota's opinion
17 about what a lieu tax was is not entirely an accurate
18 reflection of what Congress meant by the term?

19 MR. RASENBERGER: Well, as I understood the
20 reasoning of the South Dakota Supreme Court, it was that
21 it wasn't a tax that replaced any other tax, and
22 therefore --

23 QUESTION: Well, but your answer to the Chief
24 Justice indicates that it doesn't have to replace
25 another tax; it's enough if it's a tax that adjusts for

1 the fact that you don't pay another one.

2 For example, many states have taxes that
3 require you to pay an additional personal property tax
4 on automobiles that you buy in another state, because
5 you don't pay any sales tax within the home state on
6 that. I think that would probably be called an in lieu
7 tax. In lieu of paying the sales tax, if you bought it
8 locally, you can buy it in another state and pay a
9 personal -- an additional personal property tax.

10 Wouldn't you consider that an in lieu tax?

11 MR. RASENBERGER: Sure, Justice Scalia. But I
12 have trouble understanding what this tax is in lieu of,
13 in this case, on these facts.

14 QUESTION: All right.

15 MR. RASENBERGER: There are really two issues
16 that South Dakota has raised here in terms of
17 legislative history, and it seems to me you have to look
18 at the legislative history here, even if the South
19 Dakota court did not do so.

20 One is -- and both of them involve changes
21 that took place along this 15 year history of the
22 railroad bill that supposedly were of some significance
23 to this, to the determination of this Court. And one is
24 when they put in the provision on "subject to a property
25 tax levy" at the tail end of the definition of

1 commercial and industrial property, instead of where it
2 had previously been and that is in the assessment
3 section.

4 And they say that that was a determination
5 that suddenly made the words "subject to a property tax
6 levy" mean something far more, mean that it created a
7 loophole that wasn't here in the bill in the past, even
8 though there is nothing in the legislative history to
9 support that.

10 And I guess I have said this before. It seems
11 to me that if you're going to conclude that the shift of
12 the words from the assessment section to the definition
13 section were intended to have major significance, which
14 is what the state seems to be saying, you have to have
15 some legislative history to support that. And there's
16 no explanation for that anywhere in the legislative
17 history.

18 There's plenty of explanation as to what
19 Congress was trying to accomplish, but nothing about
20 this switch, no explanation from Senator Hartke, who was
21 the principal proponent of it, nothing in the reports.
22 And I think that what we're getting at here is the state
23 is saying there was a major change that took place, but
24 nobody knew it.

25 And that's not the stuff that legislative

1 history is made of.

2 I think I will reserve the rest of my --

3 QUESTION: Before you go, can I ask one other
4 question. You stated earlier in the response to either
5 my question or one of the other Justices that, in the
6 situation where a state gives a special tax break to a
7 business to come in, a lower rate or a lower assessment,
8 whatever, what would their obligation be under your
9 interpretation of the statute with respect to interstate
10 airlines?

11 You said that they would have to try to
12 average --

13 MR. RASENBERGER: The average rate, average
14 tax rate for interstate airlines would have to be --
15 excuse me. The tax rate for interstate airlines would
16 have to be the average rate applied to other business
17 property in the state.

18 QUESTION: The average rate applied to
19 others?

20 MR. RASENBERGER: Yes.

21 QUESTION: What does that mean? You would
22 take an average of the special tax rate and everybody
23 else?

24 MR. RASENBERGER: Lower courts have dealt with
25 this at some length. You could use a weighted mean, you

1 could use a median. There are a lot of different ways,
2 but you have to figure out -- the legislative history
3 says this -- what the average tax was on the other
4 business properties in the state. And that is taxed no
5 higher than -- can be no higher than the tax for
6 aircraft of these airlines.

7 QUESTION: Thank you.

8 MR. RASENBERGER: Thank you. I'll reserve the
9 rest.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Rasenberger.

12 We'll hear next from you, Mr. Meierhenry.

13 ORAL ARGUMENT OF

14 MARK V. MEIERHENRY, ESQ.,

15 ON BEHALF OF APPELLEES

16 MR. MEIERHENRY: Mr. Chief Justice, may it
17 please the Court:

18 We are not talking here today about a new
19 tax. The tax that South Dakota imposes on airlines has
20 been in place since 1961. And since 1961, the state of
21 South Dakota has only taxed aircraft, and I want to make
22 that clear to the Court. We don't tax the trucks that
23 service the airplanes, we don't tax whatever equipment
24 they have in their office. We only tax the airframes.

25 Where did the South Dakota tax come from? It

1 came from and can best be explained, I think, from a
2 decision of this Court, Braniff Airlines versus the
3 Nebraska State Board. If you will harken back to that
4 case, you will find our tax scheme, wherein we use a
5 ratio of how much the airplane is actually used in South
6 Dakota, together with revenue miles and other factors.

7 That scheme of taxation was approved by this
8 Court and Justice Reed wrote that it was a proper tax on
9 interstate commerce at that time. Since 1961, although
10 other business and commercial property paid personal
11 property taxes in South Dakota, up until 1979 the
12 airlines did not.

13 When we imposed this tax on the airframes, the
14 aircraft themselves, we specifically exempted airline
15 companies from other taxes. And I think my colleague
16 misspoke himself when he said private aircraft is not
17 subject to tax. As an aircraft owner, I can tell you it
18 is.

19 If you live in South Dakota and you buy an
20 airplane, you pay a four percent use tax on the purchase
21 price of the airplane. As an airman in South Dakota, I
22 pay an annual fee. We have a statute --

23 QUESTION: Yes, but if you ran a business and
24 you used your airplane in your business, would that tax
25 then be subject --

1 MR. MEIERHENRY: Yes, it would, if I were a
2 resident of South Dakota, four percent.

3 QUESTION: For commercial property?

4 MR. MEIERHENRY: Paid only one time, Justice.
5 What I'm saying is we have a statute that
6 specifically exempts those businesses in interstate
7 commerce, and so I wanted to make clear that this tax
8 was impacted by the passage in 1982 of the federal law.
9 But it is not as if we passed the tax afterward. We had
10 it in place.

11 And we all recognize that airlines are a
12 unique business. They're not the normal business.
13 They're not like railroads, which have miles and miles
14 of real estate in the state which is taxed. So when
15 South Dakota took off or repealed the personal property
16 tax on other commercial and business property, the
17 personal property side of it -- there are other taxes.
18 The history of our state will reveal at that time we
19 were broadening the sale tax and the use tax to other
20 businesses, meanwhile repealing the personal property
21 tax.

22 QUESTION: Well, but General Meierhenry,
23 certainly the legislative history of this Act shows a
24 legislative intent to prevent the state from taxing
25 airlines or, in the case of railroads, railroads for ad

1 valorem property tax purposes at a higher rate and
2 putting them in a separate classification. And that's
3 the thrust of the bill, and your argument certainly goes
4 counter to that.

5 MR. MEIERHENRY: Well, the thrust of the
6 legislation, if I could be so bold as to put it in a
7 sentence, was not to discriminate against interstate
8 commerce and not to penalize in any way companies, like
9 airlines, that operate interstate.

10 And we are talking here today about a tax that
11 raises totally, from all the airlines in the state of
12 South Dakota, about \$200,000 a year. The result if this
13 particular tax is struck down is we will collect zero.
14 Now, if we collect zero I think we would all agree that
15 we are not harming the airlines, if we collect no tax.

16 QUESTION: Well, if the state imposed a very
17 small ad valorem property tax on private aircraft, for
18 example, instead of none, the result here would have to
19 be that the airlines could not be charged more than
20 that, I guess.

21 MR. MEIERHENRY: That's correct.

22 QUESTION: But because the state charges zero
23 ad valorem property taxes against private aircraft and
24 other property, the result you argue for is that the tax
25 stands. And it just is kind of an odd result.

1 MR. MEIERHENRY: Well, I follow through in
2 1315(d), where it makes clear that states can have
3 property taxes on interstate carriers. It also says
4 they can have net income taxes. South Dakota doesn't
5 have an income tax. They can have franchise taxes. We
6 chose not to do that, because it is most fair, as our
7 brief points out, and we try to be fair to airlines.

8 What the airlines say is that, because we have
9 attempted to be fair to the airlines and we have
10 arranged a scheme that was in effect 25 years
11 unchallenged, that this Congressional legislation
12 immediately struck it down.

13 But yet, what are the meaning -- when they
14 define "subject to a property tax," can we assume, as
15 courts have in other cases, that Congress was aware of
16 our tax? After all, Justice O'Connor, we followed the
17 model that was put into effect, recognized by this
18 Court, by the then Civil Aeronautics Board. It was the
19 typical type of tax across the United States.

20 I saw nothing that specifically said in the
21 legislative history they wanted to strike down this type
22 of fair tax.

23 QUESTION: May I also ask you why you dropped
24 the in lieu argument on your response in the appeal in
25 this Court?

1 MR. MEIERHENRY: Well, our trial court, as
2 you're aware, found that it was an in lieu tax and our
3 Supreme Court did not. In reading some of the prior
4 cases about appeals and cross-appeals and the procedure,
5 I guess it's our feeling that if you wish to define
6 under the federal law that it's an in lieu tax, we would
7 willingly accept it and we think that --

8 QUESTION: But you didn't make that argument,
9 certainly.

10 MR. MEIERHENRY: No, we have not, because it
11 was --

12 QUESTION: I just wondered why.

13 MR. MEIERHENRY: Well, it was our feeling that
14 we had to take this case up under what our South Dakota
15 Supreme Court's definition of in lieu tax was, and so we
16 have done it that way, hoping that if we were incorrect
17 this Court would correct that ruling by our court.

18 QUESTION: But at least it was a statement by
19 your court that the state hadn't intended to enact an in
20 lieu tax?

21 MR. MEIERHENRY: That's true, Your Honor,
22 because part of the problem here is this was the initial
23 approach at taxation of the airlines. See, when we
24 passed this tax in 1961, we also allowed the counties
25 where the airlines had their receiving facilities to tax

1 the other personal property, and just the aircraft was
2 centrally taxed and they would tax the items.

3 When we continued this tax, we took off the
4 personal property totally, and so it remained only
5 centrally assessed, as are utilities, railroads, and
6 other factors.

7 So when this federal statute came into effect,
8 it really was as a result of this federal statute that
9 the airlines have challenged it.

10 QUESTION: General Meierhenry, suppose your
11 legislature, when it enacts a tax, says we do not --
12 this is not an in lieu tax, we're not adopting this in
13 order to replace something else, we just want to tax
14 this business, and it says that in the statute. Could
15 we find that to be an in lieu tax?

16 MR. MEIERHENRY: Well, yes, I think you can.
17 I think this Court --

18 QUESTION: What causes a tax to be in lieu
19 unless the fact that it is imposed in lieu of something
20 else? And whether it is imposed in lieu of something
21 else certainly depends upon the imposer, doesn't it?

22 MR. MEIERHENRY: I believe it does, Justice.

23 QUESTION: So maybe that's why you didn't
24 appeal the determination.

25 QUESTION: What is it in lieu of?

1 QUESTION: If the legislature can say it
2 determinatively, certainly the Supreme Court can, can't
3 it, of your state?

4 MR. MEIERHENRY: Yes.

5 QUESTION: What is it in lieu of? What is it
6 in lieu of?

7 MR. MEIERHENRY: It's in lieu of every other
8 tax. This is the only tax --

9 QUESTION: That's a very precise answer.

10 (Laughter.)

11 MR. MEIERHENRY: But it is true. This is the
12 only tax collected from any airline, directly from
13 them. And as was mentioned before --

14 QUESTION: What about all the trucks and
15 things and all? Are they taxed?

16 MR. MEIERHENRY: No, sir, they are not taxed.

17 QUESTION: You mean the trucks that run around
18 the airport?

19 MR. MEIERHENRY: No, we do not tax them.

20 QUESTION: With "Western Airlines" on them;
21 they aren't taxed? Do they have tags on them? Do they
22 pay for the tags?

23 MR. MEIERHENRY: Yes, not in excess of perhaps
24 \$35. A license fee, you mean to license?

25 QUESTION: A tax.

1 MR. MEIERHENRY: That would be the only other
2 tax. But I guess as I stand here I don't recall
3 whether, as long as they're used on the airport
4 facilities, whether they'd be required to be licensed.

5 QUESTION: If I could imagine that one, I bet
6 you could imagine some others.

7 MR. MEIERHENRY: Well, the fact of the matter
8 is that airlines in South Dakota all use public
9 facilities. They're all publicly owned airports of one
10 sort, either by the city or the county. And the income
11 from the airports is from airline rent, landing fees,
12 property taxes of the taxing district, and so forth.

13 The only taxes collected directly from the
14 airlines of any property tax nature is by the central
15 assessment of the airframes or the airplanes
16 themselves.

17 QUESTION: There's no personal property tax at
18 all?

19 MR. MEIERHENRY: None. We have none in South
20 Dakota.

21 QUESTION: For the counters and all that
22 stuff, you don't pay tax on that?

23 MR. MEIERHENRY: Not in South Dakota. And we
24 have no income tax, so they aren't taxed that way.

25 Of the money, the \$200,000 approximately

1 received from the airlines --

2 QUESTION: But you pay fees? You pay fees for
3 landing rights?

4 MR. MEIERHENRY: Yes, they pay landing fees.

5 QUESTION: And fees to have a counter?

6 MR. MEIERHENRY: Rent, yes.

7 QUESTION: The difference between a fee and a
8 tax is?

9 MR. MEIERHENRY: Well, there's a big
10 difference between a fee and a tax. Inasmuch as the
11 airline -- the airport property itself is not on the tax
12 roll because it's publicly owned, a part of their rent
13 certainly does not include that portion that a normal
14 landlord would pay in taxes to the county.

15 So what they pay rent for is the facility, the
16 building, the runways, all these things, to operate
17 their business.

18 And to answer one of the Justices' questions,
19 Continental's coming back November 8th, and that is the
20 nature of the airline business today now that it's
21 unregulated. They come and go out of our state, and we
22 have this huge facility waiting to serve their business
23 purpose, which they now can load all their equipment up
24 on the last plane out of town and we as a state have
25 nothing.

1 So if you go back and look at our tax
2 structure, it's even more fair. It's only when they do
3 business in our state that they pay the tax, according
4 to the amount of business they do.

5 And so the whole purpose of the RRRR Act was
6 to stop discrimination, and we have taken note of that
7 in our state. And we put into our brief and attempted
8 to show this Court that as a state we have ceased the
9 discriminatory practices that many states have used
10 against interstate carriers, and that's why those cases
11 are there.

12 Our Supreme Court has told the state and the
13 counties and everybody that taxes, we must be fair. We
14 have followed the dictates of this Court and we have not
15 discriminated against interstate commerce. And yet,
16 here we're faced today with a case, because of the
17 passage of a statute, that says \$200,000 by all the
18 airlines is discriminatory.

19 That's all we pay, but it's too much. And if
20 we come back and we enact a new tax that's a use tax,
21 and because their business is so unique, how can we come
22 up with a use tax that they won't be back here six years
23 from now saying, you're taxing us differently than all
24 these other businesses that are there, that own real
25 estate, that have a plant and equipment, all of which

1 would pay four percent use tax, all of which pay gross
2 receipts taxes.

3 Congress has exempted them from the gross
4 receipts tax.

5 QUESTION: General Meierhenry, could you focus
6 down maybe on a specific example? Supposing there's a
7 South Dakota intrastate tour business in the Black Hills
8 that has offices and a fleet of buses that take people
9 through the Black Hills. What sort of taxes do those
10 people pay?

11 MR. MEIERHENRY: Intrastate, in the state?

12 QUESTION: Yes.

13 MR. MEIERHENRY: They pay a four percent gross
14 receipts tax.

15 QUESTION: Do the airlines pay any gross
16 receipts taxes?

17 MR. MEIERHENRY: No, Congress has -- the Aloha
18 case has told us we cannot do that. And we have never
19 taxed them on their gross receipts. We call it a sales
20 tax, but it is technically a gross receipts tax on
21 business.

22 So they would pay a sales tax.

23 QUESTION: Yes.

24 MR. MEIERHENRY: They would pay the normal
25 registration fees for a bus, which are very minimal.

1 It's not a tax on vehicles in South Dakota. The maximum
2 registration fee for an automobile is \$35, so it's a
3 registration fee. They would pay that, if you want to
4 call it a tax. I don't.

5 They would pay real estate property taxes if
6 they had a garage. The airlines have no real estate
7 that I'm aware of in South Dakota. Those are the main
8 taxes they would pay.

9 QUESTION: How about a gasoline tax?

10 MR. MEIERHENRY: Yes, motor fuels tax in South
11 Dakota. So to speak, the bus company nor the airlines
12 pay it. The petroleum dealer pays it. In the case
13 where --

14 QUESTION: If the airline buys fuel in South
15 Dakota, it pays -- in effect, it's charged for a tax, a
16 fuel tax?

17 MR. MEIERHENRY: Yes, all of which under a
18 statute --

19 QUESTION: But that's the same sort of tax
20 that everybody else pays?

21 MR. MEIERHENRY: Yes. It's
22 non-discriminatory. And it is all devoted to airport
23 use. All the aviation fuel, the petroleum dealer pays a
24 tax, but it is dedicated to airport use.

25 On the bus company example, it's all donated --

1 QUESTION: But the airline -- as far as you
2 know, the airframes are the only kind of personal
3 property that is subject to an ad valorem tax in South
4 Dakota?

5 MR. MEIERHENRY: That's correct. Our statute,
6 S.D.C.L. 10-46-10, exempts all property used to repair,
7 maintain, equip vehicles in interstate commerce, and
8 that's been the law since 1961, when we made it very
9 clear only the aircraft will be taxed, and only
10 according to a ratio almost exactly like that approved
11 by this Court in the Braniff Airlines case.

12 QUESTION: Then in effect is the intrastate
13 tour business in the Black Hills, it's paying a gross
14 receipts tax that is probably as rough an equivalent or
15 as much of an equivalent as you can say, as compared to
16 the airlines' tax on the airframe?

17 MR. MEIERHENRY: Oh, far higher.

18 QUESTION: But I mean, that's the principal
19 way the state gets money from each of those two
20 businesses, is that right?

21 MR. MEIERHENRY: Yes. Yes, the principal way
22 we would get money from a business within the state
23 would be the gross receipts tax, which is four percent
24 off the top. In the case of the airlines, that's the
25 federal tax which they've preempted the states. That's

1 the eight percent.

2 And really, I don't think it's in the record,
3 but I happen to know, less than six percent of most of
4 the operating money of any of our airports comes from
5 this tax. It's a minimal amount per year, \$200,000.

6 QUESTION: General, (inaudible) on this
7 airframe tax in lieu of a gross receipts tax which we
8 know is invalid.

9 MR. MEIERHENRY: I suppose we could.

10 QUESTION: General Meierhenry, can I take you
11 back to the language of the statute for a minute and
12 suggest to you that, just reading the statute literally,
13 you probably can't collect this tax, because as I
14 understand your argument the definitional section,
15 "subject to a property tax," really has the effect of
16 taking -- saying these is no commercial and industrial
17 property within the assessment jurisdiction. There just
18 isn't any by statutory definition.

19 And therefore, the ratio of the true value of
20 that property, whatever it may be, to the assessed
21 value, is zero. And if you can't tax over the rate of
22 zero, you can't tax these airlines.

23 MR. MEIERHENRY: Well, that is of course this
24 Court's duty, and I know a heavy responsibility, to
25 determine this statute. But I read it a little

1 differently, Justice. I think Congress had to recognize
2 there is 50 states and a number of territories, and that
3 they could not sit here -- and, even though, as my
4 colleague said, it took 15 years to pass this statute,
5 there is unique ways to have all kinds of taxes. And I
6 think they wanted to allow us some latitude down here at
7 the bottom out in South Dakota.

8 And when they said if -- when it says in the
9 definitional section "devoted to a commercial or
10 industrial use," and then they added these words, "and
11 subject to a property tax levy," they recognized that if
12 you in fact are going to tax this property, you have to
13 do it fairly.

14 We have a statute that says we use the average
15 of all property.

16 QUESTION: Well, I understand that. But the
17 effect of what you've done is to remove all of the
18 commercial and industrial property in the state from the
19 statutory definition by not imposing a property tax on
20 it. Isn't that right?

21 There is no -- there is no centrally assessed
22 commercial and airline property in the state of South
23 Dakota.

24 MR. MEIERHENRY: Well, other than other
25 utilities. No personal property, that's correct.

1 QUESTION: And if that's true, then your ratio
2 to market value is zero times market value, which
3 produces zero, which would mean you can't tax above a
4 zero rate if you just read the statute on its plain
5 language.

6 MR. MEIERHENRY: Well, on its face it has to
7 be subject to a property tax before you go up to the
8 ratio.

9 QUESTION: Before you get out of the zero
10 category.

11 MR. MEIERHENRY: That's right. And the only
12 property in this particular class happens to be airline
13 property. But the saving part of our statute I believe
14 is the fact that it wasn't challenged in 25 years as
15 being discriminatory because we used an average of all
16 other property.

17 And so we have been fair, is what I'd like to
18 point out to the Court. We haven't overassessed these
19 airlines.

20 QUESTION: Well, why does that matter? You've
21 made a lot of the fact that you're using the kind of a
22 formula that this Court has approved in the past and
23 that it yields only \$200,000. But if we rule the way
24 you want us to today, there's no reason you couldn't
25 kick that up to \$200 million.

1 As far as this statute is concerned, there's
2 nothing that would prevent you from using the same ratio
3 -- I mean, you can only tax a certain proportion under
4 our earlier decisions of the value of those aircraft.
5 But you could tax them at whatever rate you want, you're
6 telling us.

7 So even though you're only deriving \$200,000
8 this year, next year it could be \$200 million.

9 MR. MEIERHENRY: Well, it's because of the
10 whole way we come up with the ratio. First of all, it
11 would be a burdensome act and it would be a
12 discriminatory act, and that was the purpose of all of
13 this statute, and we wouldn't do it.

14 And if we did it, they could clearly show that
15 it would be a burden on interstate commerce.

16 QUESTION: But would it violate the statute in
17 a way that this act doesn't, and if so why?

18 MR. MEIERHENRY: Because we would have to
19 change how we come up with -- I mean, we're talking
20 about two different ratios, in effect, because our
21 statute now requires us to take a ratio of the ton-miles
22 they operate in our state, the flight time, and the
23 total tonnage boarded and unloaded.

24 We come up with the ratio. They provide that
25 information for us. Then we come up with the value of

1 the plane. Once we come up with the value of the
2 planes, we then assess them, and we have a maximum levy
3 that affects everybody in the state, maximum
4 assessment.

5 QUESTION: Oh, maximum assessment, fine.

6 MR. MEIERHENRY: All right.

7 QUESTION: But then you can apply a 300
8 percent rate to this.

9 MR. MEIERHENRY: No. We can only use the
10 average mill levy on all property within the state.
11 That's real and personal, all property. So we can't.
12 And historically, we can't go out and raise our mill
13 rate on our citizens.

14 We'd have to change the law, we'd have to
15 change the constitution. But assume we did, to come up
16 with your example we'd have to raise that mill levy so
17 high that -- well, it couldn't be done.

18 QUESTION: As a matter of state law, you're
19 saying.

20 MR. MEIERHENRY: As a matter of state law.
21 And it would violate --

22 QUESTION: Lucky for the Federal Government.

23 MR. MEIERHENRY: Well, as a matter -- but the
24 federal law also, the purpose of the RRRR Act was to
25 stop states from going overboard. And I guess when you

1 interpret this statute, inasmuch as our statute was in
2 place before the federal statute, you still must go back
3 and see whether it's burdensome, because property taxes
4 are allowed and we have a property tax.

5 We have a unique industry. We have a unique
6 way of doing business. And the first question we must
7 ask is, are they burdensome. Now, when --

8 QUESTION: Well, I'm not sure that's the
9 question we have to ask. I thought we had to ask the
10 question whether it violated this particular statute.

11 MR. MEIERHENRY: Well, we do. But what I'm
12 saying is, section (b) of 1513 allows the property tax.
13 Section (b) is for this Court to interpret where the
14 words "devoted to a commercial or industrial use and
15 subject to a property tax levy," did Congress intend to
16 take away all the unique methods of taxation across the
17 country, and did they intend that only the slots that we
18 have discussed today are the only methods, because in
19 South Dakota we did change our method of taxation prior
20 to the passage of the statute.

21 We had always taxed airlines and we do today
22 the same as we did, only on their aircraft, not on their
23 personal property. Yet today my colleague would have us
24 talk about the fact that we took away the personal
25 property tax levy.

1 But they were never part of it, Justice. They
2 were never part of the personal property tax levy. They
3 were part of the other type of tax that we had imposed
4 upon them. So the fact that we have no commercial or
5 industrial personal property today, we didn't in 1961 or
6 '71 -- or I should say, they didn't pay any personal
7 property tax.

8 So when we eliminated the personal property
9 tax levy, it really never affected the airlines. Now
10 they're coming in here today under 1513 and saying:
11 Aha, we've got you, because if we win this case -- and I
12 think we all know who else are amicus on this -- if we
13 win this case, we don't have to pay any tax, because as
14 the Attorney General of South Dakota I can't figure out
15 how we'll be able to fashion a tax that ever gets to the
16 uniqueness of interstate carriers.

17 Just as today the personal property of
18 railroads is not taxable in South Dakota, just their
19 real property. And I think it's important in construing
20 the statute to look at that.

21 In closing, I would only like to say that, as
22 was pointed out by this Court, we have frequently
23 reiterated that the commerce clause does not immunize
24 interstate instrumentalities from all state taxation,
25 but that such commerce may be required to pay a

1 non-discriminatory share of the tax burden.

2 We believe that our South Dakota tax is a
3 non-discriminatory share of the tax burden, and it fits
4 within 1513 as a fair and equitable way to collect a
5 very, very small share of the tax burden from the
6 airlines in South Dakota.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, General
9 Meierhenry.

10 Mr. Rasenberger, do you have any more? You
11 have two minutes.

12 REBUTTAL ARGUMENT OF
13 RAYMOND J. RASENBERGER, ESQ.,
14 ON BEHALF OF APPELLANTS

15 MR. RASENBERGER: Yes, just a couple of brief
16 points.

17 First of all, on the in lieu issue, we pay, the
18 airlines that is, every tax that the state may lawfully
19 impose on us, and that includes principally real
20 property taxes, which is their principal source of
21 revenue.

22 The only other point I would make --

23 QUESTION: Yes, but on that point, if I may
24 add, isn't it true that with respect to all other taxes
25 the revenues derived by those taxes go into the general

1 revenue of the state, whereas this is the only tax where
2 the money is earmarked for airport use?

3 MR. RASENBERGER: That is true, although I
4 think that's not really --

5 QUESTION: Well, it makes some difference in
6 the language, in the definition of in lieu tax.

7 MR. RASENBERGER: If it were --

8 QUESTION: What real estate do the airlines
9 own that they pay taxes on?

10 MR. RASENBERGER: I can't tell you a specific
11 piece of real estate.

12 QUESTION: Do you know that they have any
13 specific piece?

14 MR. RASENBERGER: No, I do not know. But if
15 they had it, they would pay it.

16 QUESTION: I'm sure.

17 QUESTION: That's very nice of them.

18 MR. RASENBERGER: All I'm saying is that it's
19 not -- this tax is not in lieu of real estate taxes or
20 any other taxes that the state imposes.

21 The other final point is, remember that this
22 is not just South Dakota that's involved or just these
23 airlines. We're talking about a proposition that would
24 have broad applicability to a lot of states which don't
25 have personal property taxes, which could impose taxes

1 on airlines just as South Dakota did, where we have a
2 lot more aircraft and a lot more train rolling stock and
3 buses, and where a lot more money than \$200,000 could be
4 involved.

5 And if those states were to do that on
6 invitation of the Court in the decision in this case, we
7 would basically simply create exactly the kind of
8 property tax discrimination that this whole project,
9 these three pieces of legislation, were designed to
10 eliminate at the time and in conjunction with, as we
11 know, the carriers were being deregulated by the
12 Congress.

13 QUESTION: Is there any other state that has a
14 tax structure like this which happens to have no
15 property tax and would be able to impose this kind of a
16 system? How many other states have that?

17 MR. RASENBERGER: At this time, none that I
18 can mention. All I'm saying is that, if the Court holds
19 for South Dakota, other states would be free to impose
20 such taxes.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Rasenberger.

24 The case is submitted.

25 (Whereupon, at 10:58 a.m., oral argument in

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the above-entitled case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-732 - WESTERN AIR LINES, INC., ET AL., Appellants V. BOARD OF
EQUALIZATION OF THE STATE OF SOUTH DAKOTA, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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