

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NORTHWEST AIRLINES, INC., ET AL., Petitioners
v. COUNTY OF KENT, MICHIGAN, ET AL.

CASE NO: 92-97

PLACE: Washington, D.C.

DATE: Monday, November 29, 1993

PAGES: 1-55

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NORTHWEST AIRLINES, INC., :

4 ET AL., :

5 Petitioners :

6 v. : No. 92-97

7 COUNTY OF KENT, MICHIGAN, :

8 ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Monday, November 29, 1993

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:01 a.m.

15 APPEARANCES:

16 WALTER A. SMITH, JR., ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 EDWARD C. DuMONT, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Respondents.

22 WILLIAM F. HUNTING, JR., ESQ., Grand Rapids, Michigan; on
23 behalf of the Respondents.

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25

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	WALTER A. SMITH, JR., ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	EDWARD C. DuMONT, ESQ.	
7	On behalf of the United States, as amicus curiae,	
8	supporting the Respondents	28
9	ORAL ARGUMENT OF	
10	WILLIAM F. HUNTING, JR., ESQ.	
11	On behalf of the Respondents	37
12	REBUTTAL ARGUMENT OF	
13	WALTER A. SMITH, JR., ESQ.	
14	On behalf of the Petitioners	53
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 92-97, Northwest Airlines, Inc., versus the
5 County of Kent.

6 ORAL ARGUMENT OF WALTER A. SMITH, JR.

7 ON BEHALF OF THE PETITIONERS

8 MR. SMITH: Mr. Chief Justice, may it please the
9 Court:

10 The Court has agreed in this case to decide
11 whether the user fees that are imposed on the airlines and
12 their passengers at the Kent County Airport are reasonable
13 within the meaning of the Federal aviation laws and within
14 the meaning of the Commerce Clause. All parties here
15 appear to be agreed that the criteria by which the Court
16 should decide this question are those set out by the Court
17 in the Evansville decision, and we believe those are the
18 minimum criteria that the Court ought to apply in this
19 case, and when the Court applies those criteria, we
20 believe the Court should find that the methodology used by
21 Kent County in fact violates the criteria in at least
22 three different ways.

23 First, the fee methodology is not based on a
24 fair approximation of use by the various users at the
25 airport -- that is, that the costs are not fairly

1 allocated among users -- second, the revenues that are
2 produced by the fee methodology are vastly in excess of
3 the airport's own costs in delivering service to the
4 users, and finally, the airport's fee methodology
5 deliberately discriminates against the airlines in favor
6 of local aviation.

7 I would like to comment on each of these three
8 requirements, and then, if time allows, I would also like
9 to comment on an issue that we do not think is properly
10 before the Court, but that the Solicitor General and the
11 airport do -- that is, whether or not, even if the fees
12 are unreasonable, whether the airlines are permitted to
13 bring a legal action to challenge them. So let me start
14 if I may with --

15 QUESTION: That would be the private right of
16 action point?

17 MR. SMITH: Yes, Your Honor.

18 QUESTION: And that is one of the questions
19 presented in the petition, is it not?

20 MR. SMITH: It is not, Your Honor. It was not
21 presented in the petition, and it was not raised in the
22 cross-petition, and in our view it is not properly before
23 the Court.

24 QUESTION: Very well.

25 MR. SMITH: Nevertheless, we realize the Court

1 may elect to reach it, so we have briefed the matter in
2 our reply brief.

3 I was going to start with the allocation issue
4 first. Under this Court's Evansville decision, airport
5 fees must, in the first instance, be based on what the
6 Court called "some fair approximation of use," and as the
7 Solicitor General points out in his brief at page 7, this
8 means that the fee should not be higher than the airline's
9 properly allocated costs, but in our view, this airport
10 has not even attempted to comply with this requirement.

11 As the Court knows, at this airport, as at most,
12 there are two main groups of users. There are the
13 airlines on the one hand, and the concessions on the
14 other. Both of these two groups of users benefit
15 significantly from costs that the airport expends on what
16 are called the air operations costs, and the reason for
17 that is, without the airport spending money on taking and
18 landing -- takeoff and landing facilities, there would be
19 no customers, either for the airlines or for the
20 concessions, and for that reason, in our view, in order to
21 fairly approximate the use, the airport was required to
22 allocate at least some of the costs to the concessions,
23 but they did not do so.

24 They allocated none of the costs to the
25 concessions, and the result necessarily was, and

1 mathematically so, as Judge Flaum found in the
2 Indianapolis decision, the fair share of the costs to the
3 airlines was too high. They were in fact paying more than
4 their fair share of the cost.

5 QUESTION: Mr. Smith, how many other Federal
6 statutes are there that confer ratemaking responsibilities
7 upon Federal courts? I mean, that is essentially what
8 you're asking us to engage in here, isn't it, the whole
9 process of ratemaking?

10 MR. SMITH: I think not, Your Honor.

11 QUESTION: You're saying what you're entitled to
12 are reasonable rates, which are going to be determined by
13 Federal courts. I know one Federal statute that requires
14 that. I don't know any others.

15 MR. SMITH: I think the court is often in the
16 business of determining whether or not impositions made by
17 a State in the form of user fees are reasonable. After
18 all, Evansville was a Commerce Clause decision, and we
19 believe when Congress adopted the AHTA it essentially
20 adopted in part the Evansville requirements, and the Court
21 has often decided other cases where reasonableness in that
22 context was required to be decided.

23 QUESTION: You don't allow any profit in your
24 assertion of reasonableness. As I recall, one of the
25 elements you've challenged was including within it what

1 interest payments would have been made had they borrowed
2 the money in order to provide these facilities.

3 MR. SMITH: I think that's right. Congress
4 intended that --

5 QUESTION: In normal ratemaking, you're allowed
6 a fair return on your capital. Why isn't that reasonable?

7 MR. SMITH: Not under the AHTA, Your Honor,
8 because under the AHTA Congress recognized that the vast
9 bulk of the revenues that fund airports are going to come
10 from the Federal Government through taxes paid by
11 passengers, and Congress wanted no further additional fees
12 to be imposed on users of airports except those that would
13 be absolutely --

14 QUESTION: But the reason --

15 MR. SMITH: -- necessary to keep -- and to keep
16 the airport self-sustaining. That's the word in 2210.

17 QUESTION: So you'd allow depreciation, would
18 you?

19 MR. SMITH: I'm sorry, Your Honor?

20 QUESTION: Is depreciation absolutely necessary?

21 MR. SMITH: They can recover their costs, Your
22 Honor, and to the extent they had costs that they had to
23 expend to purchase assets to serve users. They can
24 recover their costs, but --

25 QUESTION: And can they retain some of those

1 costs for future construction?

2 MR. SMITH: I think they can, Your Honor, so
3 long as they are costs absolutely necessary for additional
4 assets or for replacement of assets.

5 QUESTION: Well, the airport is saying here, you
6 know, we're facing construction fees on reasonable
7 projections of -- you know, multiple millions of dollars,
8 so there's nothing for example, terribly impressive about
9 this surplus of \$9 million, if they could anticipate
10 future expense to that extent in, as you put it,
11 recovering their costs. Why is it wrong for them simply
12 to, in effect, put the same amount of money aside calling
13 it a surplus?

14 MR. SMITH: Because, Your Honor, here they
15 accumulated surpluses far beyond airport needs. As we
16 show, that --

17 QUESTION: Well, airport needs judged at what
18 point, at what time?

19 MR. SMITH: Defined even by the airport itself,
20 Your Honor, after they had met all of their costs, all of
21 their debt service, and had purchased every conceivable
22 future capital expenditure that they could think of in
23 their wish list all the way through the end of the decade,
24 this airport still has substantial surpluses left over.
25 In fact, the airport was asked at trial, their expert

1 witnesses, what were the purposes of these additional
2 revenues?

3 QUESTION: Weren't those surpluses generated by
4 payments from the concessioners, not from the airline?

5 MR. SMITH: Part of them were, Your Honor.

6 QUESTION: I thought it all was, basically.

7 MR. SMITH: No, Your Honor --

8 QUESTION: I mean, the reason they have a
9 surplus is the payments from the concessioners.

10 MR. SMITH: No, Your Honor, that isn't so,
11 because if they had fairly allocated costs at this airport
12 it would then have become apparent that the surpluses are
13 coming from the airlines, and if they hadn't attempted to
14 recover their assets two and three times over through this
15 mythical mortgage of pretending there was an 8-1/2 percent
16 mortgage attached to assets they had acquired, they were
17 recovering surpluses from the airlines through the
18 mythical mortgage --

19 QUESTION: Isn't it true that under --

20 MR. SMITH: -- something on the order of
21 \$1 million a year.

22 QUESTION: -- under the Federal law, whatever
23 surplus is there can only be used for airport purposes, it
24 can't be diverted to general State coffers?

25 MR. SMITH: That is correct, Your Honor, but as

1 the Solicitor General points out in his brief, revenues
2 may not be accumulated indefinitely or in unlimited
3 amounts, and what has happened here is --

4 QUESTION: If that's true, that's a violation of
5 a different statute. You don't claim a cause of action
6 under the Airport and Airway Improvement Act, do you?

7 MR. SMITH: No -- well, we did below, Your
8 Honor.

9 QUESTION: It's a violation of that statute that
10 you're describing.

11 MR. SMITH: We believe, Your Honor, that when --

12 QUESTION: Or perhaps a violation.

13 MR. SMITH: -- when Congress imposed the
14 requirement of reasonable fees, it did so in the light of
15 the requirements of the grant assurance provisions, which
16 all parties here have agreed ought to be taken into
17 account in determining the meaning of reasonableness in
18 the AHTA.

19 QUESTION: Is it essential to your case that
20 there be a finding that there has been an unreasonable
21 surplus that violates section 2210?

22 MR. SMITH: No, Your Honor. If you agree with
23 us on the allocation question, then the methodology has to
24 be set aside on that ground alone.

25 QUESTION: And I wonder if there was any duty

1 to -- the duty in that section is to spend the money on
2 airport improvements, and they -- you're not alleging
3 they've spent the money on anything else, and then the
4 Government says, you also can't accumulate too large a
5 surplus, but I don't know that you've alleged they've
6 accumulated too large a surplus, have you?

7 MR. SMITH: We have alleged, Your Honor, that
8 they have to have some evident purpose for the surplus.
9 Congress intended that they --

10 QUESTION: In order to avoid the violation of
11 that statute.

12 MR. SMITH: In our view, Your Honor, the
13 reasonableness of requirement of AHTA must be read in
14 light of the AAIA, and its requirements that the airport
15 only earn enough to be self-sustaining but not so much as
16 to create financial windfalls.

17 I mean, as the Court knows, the only
18 explanation --

19 QUESTION: If there were no section 2210, they
20 could go into the business of selling parking spaces and
21 so forth and make all the money in the world and not use
22 it on the airport. It's only because of the existence of
23 2210 that you have a claim based on the excess surplus.

24 MR. SMITH: I think that's not right, Your
25 Honor. I think that the reasonableness requirement from

1 Evansville on the surplus issue -- and let me read from
2 the Court --

3 QUESTION: Now, Evansville was a dormant
4 Commerce Clause case?

5 MR. SMITH: Right. It was a Commerce --

6 QUESTION: And you think that the dormant
7 Commerce Clause analysis means that you achieve this
8 result? There can't be a surplus?

9 MR. SMITH: I think, Your Honor, the
10 requirement --

11 QUESTION: That strikes me as a very tough
12 argument to make.

13 MR. SMITH: Well, let me try to persuade you
14 otherwise. The requirement of Evansville was that an
15 airport not receive -- receive funds that exceed the
16 airport's costs and should do no more than meet past as
17 well as current deficits, and we think in the AHTA
18 Congress in fact intended to go further than that and
19 impose even stricter requirements on an airport than even
20 those the Court had imposed in Evansville, and this is an
21 airport that has gone far beyond even what this Court
22 would have permitted in Evansville.

23 QUESTION: But Evansville was dormant Commerce
24 Clause, and certainly your principal case here isn't under
25 the dormant Commerce Clause, is it?

1 MR. SMITH: No, the principal case, Your Honor,
2 is under the AHTA, which was adopted by Congress in light
3 of the Evansville decision expressly, and the AHTA was
4 intended by Congress to go even further than this Court
5 had gone in its dormant Commerce Clause.

6 QUESTION: What's your authority for that
7 proposition?

8 MR. SMITH: Oh, the legislative history, Your
9 Honor, of the AHTA, which is cited in our brief, makes
10 clear --

11 QUESTION: But -- you know, we have a section of
12 the statute here. Why go back to the legislative history?

13 MR. SMITH: Well, Your Honor, the meaning of the
14 word that's here at issue is the word "reasonable" in the
15 AHTA, and we believe that the Court should interpret the
16 meaning of the word "reasonable" in light of the very
17 purpose for which the AHTA was adopted, and that purpose
18 was to strengthen the requirements of Evansville, and if
19 Evansville would not have permitted the surpluses that
20 have been developed by this airport and we --

21 QUESTION: Where does Evansville say you can't
22 have surpluses?

23 MR. SMITH: Well, Your Honor, I started to read
24 from Evansville -- we say that what this airport has done
25 violates Evansville because that case says at 404 U.S. at

1 720, "the funds received by local authorities should not
2 exceed airport costs and should do no more than meet
3 passed as well as current deficits."

4 This airport, when asked to explain surplus in
5 this case, as you know, either said they didn't know what
6 the purpose of it was --

7 QUESTION: But you're using a case that was --
8 in which the airport succeeded in retaining its charges,
9 right? Wasn't that the case in Evansville?

10 MR. SMITH: No. In fact, Your Honor, the
11 opposite was true. In that case, the Court found
12 expressly, in applying the criteria of the Commerce
13 Clause, that in that case the airport had not received
14 more revenues than were necessary to make --

15 QUESTION: That's what I mean.

16 MR. SMITH: Yes -- sorry.

17 QUESTION: The airport won the case, and you're
18 using that case to say, but in this case the airport
19 loses.

20 MR. SMITH: Yes, because the Congress said in
21 letting the airport win, the Court didn't apply as strict
22 prohibitions as it should have, and the Congress went
23 further in the AHTA.

24 QUESTION: And said, no head tax.

25 MR. SMITH: It said a lot more than no head tax,

1 Your Honor. It prohibited all charges, fees, head taxes
2 of any kind, on passengers either directly or indirectly
3 or on the carriage of air transportation.

4 QUESTION: Mr. Smith, now, you could -- your
5 client could have gone the administrative route, I guess,
6 here --

7 MR. SMITH: Presumably so.

8 QUESTION: -- to make its complaints about these
9 charges.

10 MR. SMITH: Yes, Your Honor, that contention is
11 made here, but we believe Congress didn't require us to do
12 that, and certainly didn't make it administratively
13 exclusive.

14 QUESTION: And in any event, no effort was made
15 here to go administratively.

16 MR. SMITH: None was made, Your Honor. None was
17 made in part because Congress, when it adopted the AHTA,
18 didn't give any authorities directly to the Secretary to
19 act in this area at all, and in fact the Secretary to our
20 knowledge had very little experience or expertise in
21 determining the reasonableness of fees. In fact --

22 QUESTION: He already decided one case, at
23 least, involving the reasonableness of fees, didn't he?

24 MR. SMITH: The Secretary?

25 QUESTION: Yes.

1 MR. SMITH: I believe so, Your Honor. Only one,
2 and I believe it's from Massport, the Logan Airport case,
3 and of course, that case came in 1988-1989, which was some
4 15 or 16 years after the AHTA was adopted, and at the time
5 it was adopted, to my knowledge there had been no cases in
6 which the Secretary had actually reviewed the
7 reasonableness of fees.

8 QUESTION: In your view, does the Secretary have
9 the authority to make any more refined or precise
10 allocations than does a court when you bring an action
11 before the court rather than the agency?

12 MR. SMITH: He may, Your Honor, but the very
13 policies that the Solicitor General describes that are the
14 views of the Secretary are very much our own. I mean,
15 although he opposes them from --

16 QUESTION: From your standpoint, a court can do
17 whatever the agency can do, and vice versa, in this area
18 of allocating?

19 MR. SMITH: Perhaps not, Your Honor. What we're
20 asking you to do here is simply apply the bright line test
21 of Evansville, and because we think all three of those
22 bright line tests --

23 QUESTION: The point of my question is, is to
24 the extent the Court thinks that what you're asking for is
25 simply too cumbersome and precise for courts to be

1 involved in, if there's an equivalency, then it follows
2 that the agency can't be involved in it, either.

3 MR. SMITH: Well, Your Honor, as I say, we are
4 not in this case, contrary to what the airport says,
5 asking this Court to become involved in the intricacies of
6 ratemaking. We are merely asking the Court to apply the
7 three bright line tests of Evansville, which, of course,
8 was a case that merely applied bright line tests to the --

9 QUESTION: When, when we decide the adequacy of
10 a surplus and allocations between fuel taxes and other
11 sorts of charges, it seems to me that's very close to
12 ratemaking.

13 MR. SMITH: Your Honor, with regard to
14 allocation, we would merely ask the Court to require the
15 airport to come up with some kind of allocation.

16 QUESTION: Well, all we can do is decide this
17 case, Mr. Smith. Other courts, if your view prevailed,
18 would be deciding lots of other cases, and we'd have the
19 Indianapolis airport in the Seventh Circuit perhaps coming
20 out different from the Grand Rapids airport in the Sixth
21 Circuit. At least if it went to the Secretary, the
22 Secretary could establish a uniform system for the whole
23 country, or the same machinery would be applied to
24 determine reasonableness.

25 MR. SMITH: We think the uniform system that's

1 described in the Secretary's policies, as stated in the
2 S.G.'s brief, are the same ones we are espousing.

3 QUESTION: You can have the same standards, but
4 if you turn them over to 93 different district courts to
5 apply, you're probably going to get a lot more differences
6 than if you have one administrative agency applying them.

7 MR. SMITH: I would suggest not, Your Honor.
8 The difference between the Sixth and Seventh Circuits that
9 are now before the Court are fundamental differences about
10 how to apply the Evansville standards, and if both parties
11 had gone to the Secretary first in those two cases, there
12 still would have been an appeal available to the circuit
13 courts from the Secretary's decision, and we would still
14 have had a difference of opinion about what the meaning is
15 of the word reasonable in the AHTA.

16 QUESTION: You say all we're talking about is
17 applying the Evansville standards. Well, certainly it
18 isn't apparent from the face of the statute that we're
19 talking about here that it incorporated the Evansville
20 standard. All it uses is the word "reasonable."

21 MR. SMITH: That is true, Your Honor, and when
22 the judicial action is brought, of course, the courts are
23 required, as both the Sixth and Seventh Circuit
24 recognized, to determine what Congress intended when it
25 used the word "reasonable" in this statute, and both of

1 them, in fact all of the many courts that looked at the
2 issue, have agreed that what Congress was doing was in
3 fact strengthening the prohibitions of the Evansville
4 decision. That was the entire --

5 QUESTION: That may be one reason why we should
6 decide there isn't any private right of action.

7 MR. SMITH: Well, of course, Your Honor, we
8 don't think you should decide there isn't a private right
9 of action unless that's what Congress contemplated.

10 QUESTION: Well, naturally. Are you -- you said
11 you were going to address that?

12 MR. SMITH: Yes.

13 QUESTION: Before you get to that, even your
14 statement that it's clear from the legislative history
15 that Congress was strengthening the Evansville standards,
16 I mean, that leaves a lot of running room. You're
17 strengthening standards developed for dormant Commerce
18 Clause purposes. Strengthening them to what extent? All
19 we know is that they were strengthen -- strengthening them
20 to what extent? To the extent that from now on it's going
21 to have to be reasonable -- not just enough to comply with
22 the dormant Commerce Clause, but reasonable -- and it
23 seems to me it leaves open the whole field of ratemaking.

24 MR. SMITH: Well, except for the fact that this
25 Court itself was in substance, in Evansville itself,

1 deciding what were reasonable fees.

2 QUESTION: Well, that may have been an erroneous
3 approach under the dormant Commerce Clause. What other
4 examples can you think of where in a dormant Commerce
5 Clause we decided we have to get into reasonableness of
6 rates?

7 MR. SMITH: Your Honor, I would suggest to you
8 that in all of your Commerce Clause decisions where fees
9 or taxes or impositions by a State are being imposed on
10 Commerce, you are in effect deciding -- you do this in the
11 Complete Auto --

12 QUESTION: Well, isn't the Court looking more at
13 whether there's a discrimination or an excessive burden on
14 interstate commerce? Isn't that the focus?

15 MR. SMITH: That is true, Your Honor, and we
16 believe, in fact, we have an excessive burden on
17 interstate commerce in this case for the reason that I've
18 said, because we have an airport not fairly allocating its
19 costs and producing revenues far in excess of costs.

20 QUESTION: Do you know any case where we
21 validate a discriminatory tax, discriminatory as to out-
22 of-State participants, on the ground that the revenue is
23 recovered by some other tax that's imposed on local
24 entities? I know of no such principle.

25 MR. SMITH: Are you talking about the

1 justification that's been offered for the --

2 QUESTION: Yes. I'm just talking to that
3 straight Commerce Clause analysis.

4 MR. SMITH: I don't think --

5 QUESTION: Do we compare two or three different
6 taxes to see the total burden on all of the participants?

7 MR. SMITH: I don't think this Court has ever --

8 QUESTION: Correct me if I'm wrong.

9 MR. SMITH: Well, I don't think this Court has
10 ever approved what happened here on the discrimination
11 point, which was essentially robbing --

12 QUESTION: But has the Court --

13 MR. SMITH: -- Peter to pay Paul.

14 QUESTION: -- ever entertained an analysis of a
15 whole State's tax system to determine the burdens imposed
16 upon interstate and -- in-State and out-of-State
17 participants? No. We look at -- simply at the tax on its
18 face.

19 MR. SMITH: I think that's right, Your Honor,
20 but I would suggest to you that inasmuch as the AAIA
21 prohibits all manner of unjust discrimination among users,
22 it wouldn't matter whether it was an interstate --
23 interstate or intrastate commerce situation, that here, by
24 undertaxing general aviation, they've made up the money
25 they say by overtaxing the concessions, and of course, as

1 the Court knows, the concession fees here are paid for by
2 the passengers.

3 So once again the end result is that the total
4 fees being extracted by this airport from the airlines and
5 their passengers are vastly in excess of this airport's
6 cost of delivering services to those users, and that is
7 the precise thing that Congress intended to prohibit in
8 the AHTA.

9 QUESTION: Well, it seems to me that your
10 argument is valid under the standard, conventional
11 Commerce Clause analysis if you show a discrimination
12 between general aviation and the commercial aviation, but
13 when you then have the concessions, and you start
14 balancing revenues, it seems to me that's a very strange
15 dormant Commerce Clause argument.

16 MR. SMITH: Well, but we believe there is
17 discrimination just by looking at how they treated general
18 aviation as compared with the airlines, Your Honor.

19 QUESTION: Mr. Smith, I'd like you to back up on
20 one point.

21 MR. SMITH: Surely.

22 QUESTION: Why do you equate general aviation
23 with intrastate commerce and commercial with inter-? What
24 in the record supports -- I know you get it from a
25 decision in the Seventh Circuit that made this comment

1 offhand, but I don't see anything in this record that
2 tells us that the general aviation category is intrastate.

3 MR. SMITH: There was not explicit evidence on
4 that issue, Your Honor, you're right about that, and the
5 reason there was not was because the district judge
6 dismissed our Commerce Clause claim at the beginning, and
7 if we prevail here that we were entitled to have at least
8 raised a Commerce Clause contention, we believe we would
9 be entitled on remand to adduce the kind of evidence that
10 you're talking about.

11 QUESTION: Well, did you allege in your
12 Commerce -- the Commerce Clause section of your complaint
13 that the general aviation was intrastate and the airport
14 was -- airlines was commercial?

15 MR. SMITH: That was our position, Your Honor.

16 QUESTION: I said, did you allege it?

17 MR. SMITH: I believe that we did, Your Honor,
18 but I'm not certain.

19 QUESTION: Because certainly the -- I don't see
20 really why you're entitled to a remand just because the
21 district court dismissed your complaint, unless you
22 brought that out in your complaint.

23 MR. SMITH: Well, I guess I would argue, Your
24 Honor, as you know from our second presented question
25 here, that if, in fact, we were entitled to raise our

1 Commerce Clause claim, which was dismissed prior to trial,
2 had he correctly allowed us to proceed on the Commerce
3 Clause claim, we would then have attempted to adduce the
4 kind of evidence that Justice Ginsburg is referring to.

5 QUESTION: What was the basis for the district
6 court's dismissal of your Commerce Clause claim?

7 MR. SMITH: I think it was that he thought
8 because Congress had taken some action in this area --
9 that is, under the AHTA -- we were precluded from bringing
10 a Commerce Clause claim.

11 QUESTION: It wasn't, then, as you understand
12 it, a dismissal on the merits?

13 MR. SMITH: Oh, absolutely not, Your Honor. He
14 never reached the merits. He thought when there was
15 legislation in the area it necessarily precluded there
16 being a Commerce Clause claim.

17 QUESTION: Did you concede, and do you now
18 concede, that under the statute the distinction between
19 burdens on intrastate and interstate commerce are
20 irrelevant -- is irrelevant?

21 MR. SMITH: Are irrelevant, Your Honor?

22 QUESTION: Yes.

23 MR. SMITH: We do not believe that for purpose
24 of the AHTA, that we have to show, as the airport
25 contends, that there was interstate as against intrastate

1 discrimination. Congress intended through the AHTA to
2 prohibit discrimination against the airlines in favor of
3 local aviation. We cite legislative history in our brief
4 to that effect. Congress didn't limit it. Nothing in the
5 language of the statute or the legislative history
6 suggested that Congress intended to limit discrimination
7 only among competitors or only between interstate or
8 intrastate users of an airport.

9 QUESTION: Mr. Smith, may I ask you a question?
10 Just going to the excess profits made by the concessions
11 and putting on one side the general aviation question for
12 the moment, would your objection to that aspect of the
13 case be cured if the county charged -- cut the rent to the
14 concessionaires in half, or whatever it was, so they did
15 not make any profit any more out of the concessions? They
16 would continue to pay -- charge the airlines exactly the
17 same.

18 MR. SMITH: Your Honor, if they fairly allocated
19 the costs between the two --

20 QUESTION: No. I gather those -- the concession
21 revenues and all, they make money by renting out parking
22 spaces and the rental car agencies and things like that.
23 If they charged them a lesser rent so it was no longer
24 quite as profitable as it is, would your objection then,
25 to the reasonableness of the fees you pay, be cured?

1 MR. SMITH: It would not, Your Honor, because
2 they would still not be fairly allocating costs between
3 the users. They have not attempted by any measure that we
4 know of to try to assess how much of the air side costs
5 should be charged to the concession, and that's a point we
6 make wholly apart from the fact that the airlines and
7 their passengers together -- and the airline passengers
8 pay the concession --

9 QUESTION: These costs you're talking about, are
10 they costs in the terminal, or are you talking about
11 runway maintenance, or what are you talking about?

12 MR. SMITH: When we talk about unfair
13 allocation, we're talking only about the air side costs as
14 they benefit the concessions, and that they create the
15 customers for the concessions.

16 QUESTION: By air side costs, you mean the
17 nonoperational stuff?

18 MR. SMITH: Exactly, Your Honor, all of those
19 costs that produce the takeoff and landing facilities.

20 QUESTION: Well, if they totally eliminated
21 that, they just closed all those concessions but continued
22 to operate the same runways and charge you the same --
23 well, they couldn't do that, because they'd have to have
24 the terminal then, I guess.

25 MR. SMITH: They would.

1 QUESTION: The thing that puzzles me is that I
2 don't understand you to be challenging the reasonableness
3 of the charges for what you actually use.

4 MR. SMITH: But we do, Your Honor. Wholly apart
5 from the allocation issue, which is why our fees are too
6 high, we also claim that they're not permitted to charge
7 us for this 8-1/2 percent carrying charge. Those are the
8 two points we make about the fees that are assessed
9 directly on us -- misallocation and the carrying charge.

10 QUESTION: Mr. Smith, are you going to say
11 something about private right of access?

12 MR. SMITH: Yes, I was going to, Your Honor.

13 QUESTION: I was very interested in that. As I
14 understand it, your point is that if we reach that issue,
15 it's apt -- and the Respondent is normally allowed to
16 raise any issue to sustain the judgment below -- you say
17 it would expand the relief. Why would it?

18 MR. SMITH: It would, because we won in part
19 below, Your Honor.

20 QUESTION: I --

21 MR. SMITH: You could not -- because the Sixth
22 Circuit ruled in our favor on a portion of our --

23 QUESTION: On the CFR costs.

24 MR. SMITH: Exactly.

25 QUESTION: That's the only item to which it

1 would expand it. They assert that the CFR costs have
2 already been assessed and that whatever happens here it
3 won't make any difference as to whether you get that --
4 whether you get that relief.

5 MR. SMITH: Well, but --

6 QUESTION: Is that true or false?

7 MR. SMITH: That's false, because the Sixth
8 Circuit affirmed in part and reversed in part, and that
9 entire judgment is now before the Court, and the Court, if
10 it now reaches the private right of action issue, cannot
11 affirm this judgment. It will have to modify the judgment
12 to take away from us the victory that we won in the Sixth
13 Circuit. It would have to, as the telephone case said,
14 expand the relief in favor of the Respondent.

15 QUESTION: That issue's fairly well joined.

16 MR. SMITH: Thank you, Your Honor. I'd save the
17 remainder for rebuttal.

18 QUESTION: Very well, Mr. Smith. Mr. DuMont,
19 we'll hear from you.

20 ORAL ARGUMENT OF EDWARD C. DuMONT

21 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

22 SUPPORTING THE RESPONDENTS

23 MR. DuMONT: Thank you, Mr. Chief Justice, and
24 may it please the Court:

25 The United States appears today primarily to

1 support Respondent's position that ratemaking disputes
2 such as this one concerning user fees charged to air
3 carriers by the Nation's numerous local airports belong
4 initially in an administrative rather than a judicial
5 forum.

6 Neither the Anti-Head-Tax Act on which
7 petitioners' claim relies, nor the FAA -- Federal Aviation
8 Act of which it is a part -- nor any other statute
9 provides explicitly for the private enforcement of any
10 right that may be conferred by section 1513(b), which
11 petitioners rely on.

12 QUESTION: If the airlines refuse to pay the
13 fees, they would be sued in court, would they not? In
14 other words, the airport authority would simply take them
15 into a State or conceivably a Federal court to collect the
16 money?

17 MR. DuMONT: They might very well.

18 QUESTION: Okay, so there's no way to insulate
19 these issues from court review.

20 MR. DuMONT: Well, we think that proceeding
21 would normally be brought in State court. First of all,
22 that issue arises whether or not there's a private right
23 of action for the airlines affirmatively to go in and
24 challenge those.

25 QUESTION: Oh, I grant you that, but just in

1 sort of making the calculus of what Congress might have
2 assumed, Congress certainly did -- presumably started with
3 the assumption that there was at least some circumstances
4 in which these issues would be litigated as between
5 private parties and in the kind of action that we've got
6 here, except that it would be brought by the airport on
7 the airlines' refusal to pay.

8 MR. DuMONT: We think the Congress assumed, or
9 intended, that these issues would be dealt with primarily
10 by the Secretary, and -- for instance, we believe that a
11 State court faced with this issue might very well say one
12 of two things, either that it would defer to the
13 Secretary's determination of reasonableness, to the extent
14 that was the issue, or that it would simply refuse to hold
15 the fees unreasonable unless the airlines could produce
16 evidence from the Secretary that the Secretary believed
17 them to be so. That would be a fairly conventional sort
18 of deference to administrative agency primary jurisdiction
19 theory.

20 QUESTION: They must do that, or just -- they'll
21 be nice guys and will do it?

22 MR. DuMONT: We have no position on whether a
23 State court would be required to do that. We think it
24 would be appropriate for a Federal court if the issue
25 arose in that posture.

1 QUESTION: Are there cases in which State courts
2 apply the doctrine of primary jurisdiction with respect to
3 a Federal agency? I just don't know.

4 MR. DuMONT: I'm not aware of a specific case,
5 Your Honor, no.

6 QUESTION: I'm not, either.

7 QUESTION: So at least it's an open question in
8 your mind as to whether or not, in a State court action,
9 the anti-head-tax statute is valid Federal defense.

10 MR. DuMONT: We think that's an open question,
11 yes, and we also think that, as I said, it arises no
12 matter what the decision is on the private right question,
13 and that the question should be looked at independently.
14 For instance, there are cases this court has looked at --
15 for instance, the second Pennhurst decision, which quite
16 clearly state the view that whether or not a Federal issue
17 may be diverted to State court by the appropriate decision
18 on a particular point of Federal law, that is simply a
19 consequence that may be accepted.

20 QUESTION: I should think the airlines and the
21 Congress would be quite amazed that the enactment of the
22 anti-head-tax statute took away a Federal defense in State
23 courts.

24 MR. DuMONT: We think the defense remains in one
25 guise or another, and for instance, we think it would be

1 quite appropriate for an airline to pay this tax under
2 protest and then either sue for a refund or, for instance,
3 go straight to the Secretary at that point, having paid
4 the tax, and ask the Secretary to entertain a
5 reasonableness challenge.

6 If the Secretary finds that he has the authority
7 to do that and that the fees are unreasonable, then we
8 think the Secretary would have the authority to issue
9 affirmative relief at that point to the airport authority
10 requiring a refund of those fees.

11 QUESTION: Mr. DuMont, what's your response to
12 the assertion that none of this is properly before us
13 because if we acknowledged your contention we would expand
14 the relief below and therefore this can't be entertained?

15 MR. DuMONT: Well, as you said before, Your
16 Honor, that issue is fairly joined. We don't agree that
17 this would expand the relief granted below in any way.
18 What the court of appeals said was that crash, fire, and
19 rescue costs had been unreasonably allocated, and it
20 remanded to the court -- the district court to determine a
21 reasonable allocation.

22 The respondents have not challenged that, so
23 when this goes back to the district court, the district
24 court can assess a reasonable allocation of costs for
25 those particular fees, and that will control.

1 QUESTION: The remand has not been challenged?

2 MR. DuMONT: The remand has not been challenged
3 as it relates to crash, fire, and rescue costs.

4 QUESTION: How do we determine that?

5 MR. DuMONT: The -- because there was no cross-
6 petition filed on that particular issue.

7 QUESTION: But if we were to say there is no
8 private right of action, then the respondent would lose
9 the benefit of the -- or the petitioner would lose the
10 benefit of the remand on that issue.

11 MR. DuMONT: We don't think that's necessarily
12 true, Your Honor. Although the decision that there was no
13 prior right of action would undercut the logical basis for
14 the remand, the remand would remain the law of the case
15 because it has not been challenged in this Court, and the
16 Court decision would only affect the fact that no other
17 issues could be resolved on remand in the district court.

18 QUESTION: Even if we were to say there's no
19 private right of action, nonetheless the case would go
20 back to the district court for deciding the proper
21 allocation of the CFR fees?

22 MR. DuMONT: Assuming the parties are not able
23 to resolve that issue amicably in light of this Court's
24 decision, it would go back for remand on that one
25 particular issue.

1 QUESTION: Well, if we were to decide this, that
2 there's no private cause of action, is that
3 jurisdictional, then, for the district court? Would we be
4 saying there was no jurisdiction there at all?

5 MR. DuMONT: We don't think so, again, Your
6 Honor. We think, for perhaps the same reasons that this
7 issue cannot be raised no matter whether it was raised
8 below or not, simply because it's jurisdictional, for
9 those same reasons the jurisdictional question would not
10 control, and although this Court's decision would remove
11 the rest of the district court's authority with respect to
12 the case, that particular remand which was not challenged
13 would remain in the district court and could be resolved
14 as a matter of law of the case.

15 QUESTION: May I ask you a question about your
16 argument on the merits, assuming it's here for a second.
17 You cite a case involving the Boston airport which arose
18 under the Anti-Head-Tax Act.

19 Are there any administrative proceedings that
20 have been pursued under the other statute, the Airport and
21 Airway Improvement Act, where you've challenged an
22 airport's building up an excess of surplus or improper use
23 of funds that have accumulated?

24 MR. DuMONT: I'm not aware of a formal
25 proceeding that has been brought under the AAIA on that

1 issue.

2 QUESTION: So there's really no law on this
3 issue about whether a surplus can sometimes be too large,
4 or something, or they can review it after the fact,
5 because that statute speaks in terms of conditions for a
6 monetary grant, as I understand it.

7 MR. DuMONT: There is no decisional law on that
8 issue. There is administrative law in the sense that the
9 FAA has issued an order under the AAIA, among other
10 statutes, providing, among other things, for standards for
11 reasonableness for airport user fees, and that authority,
12 that order, does talk about --

13 QUESTION: But those would be standards that
14 would apply --

15 MR. DuMONT: -- the unlimited accumulation of
16 surpluses.

17 QUESTION: -- in advance to future grants of
18 money to -- are there any proceedings where a particular
19 airport authority has been punished in any way or
20 sanctioned in any way for failure to comply with that
21 statute?

22 MR. DuMONT: I'm not aware of any. I believe
23 most of those issues are resolved on an informal level.

24 QUESTION: Before the money is delivered, yes.

25 MR. DuMONT: Before the money is delivered, or

1 without the necessity to resort to a former adversarial
2 proceeding before the Secretary.

3 Because none of the statutes involved here
4 confers an explicit private right, we have to look to
5 Congress' intent, and it is the petitioner's burden to
6 persuade the Court that Congress, with the single word
7 "reasonable" in section 1513(b), whose major function,
8 after all, is merely to make clear that the head-tax
9 prohibition of section 1513(a) does not apply to user
10 fees, petitioners must rely on that one word "reasonable"
11 to engage the district courts all over the country in what
12 is essentially a ratemaking proceeding, and we think that
13 quite clearly contravenes the intent of Congress in
14 placing the Anti-Head-Tax Act in the Federal Aviation Act,
15 which provides quite a comprehensive remedial scheme.

16 In the FAA, section 1354, which is reprinted on
17 page 6a of our brief, provides broad general powers to the
18 Secretary, section 1482 makes it clear that any person may
19 file a complaint raising any sort of issue within the
20 jurisdiction of the FAA -- I might point out, for
21 instance, that my colleague, Mr. Smith, on behalf of many
22 of the same airlines who are involved in this proceeding,
23 has filed such a complaint last Wednesday with respect to
24 Los Angeles airports, again raising claims under the
25 AAIA -- thank you, Your Honor.

1 QUESTION: Thank you, Mr. DuMont. Mr. Hunting,
2 we'll hear from you.

3 ORAL ARGUMENT OF WILLIAM F. HUNTING, JR.

4 ON BEHALF OF THE RESPONDENTS

5 MR. HUNTING: Mr. Chief Justice, and may it
6 please the Court:

7 There is no precedent of this Court that
8 mandates that a local governmental unit as owner and
9 landlord must lease its facilities to a commercial tenant
10 at rates that are less than the acquisition cost of the
11 facilities so provided.

12 Likewise, there is no precedent of this Court
13 that requires an airport to adjust its rates to one tenant
14 based upon the varying business results of yet another
15 different category of tenant. The traditional fees at
16 issue in this case are very simply landing fees and
17 terminal rental rates, which clearly are permitted under
18 the clarification language of section 1513(b) of the Anti-
19 Head-Tax Act.

20 These charges being landing fees and terminal
21 rental rates, are not direct or indirect taxes or illegal
22 fees under section (a) of 1513 of the Anti-Head-Tax Act.

23 QUESTION: You say, Mr. Hunting, that the crash,
24 fire, and rescue charges are not at issue?

25 MR. HUNTING: They are not at issue, and if I

1 could explain further --

2 QUESTION: You agree that no matter what happens
3 here, you've lost on that, and the district court should,
4 on remand, decide that issue as though there is a private
5 right of action.

6 MR. HUNTING: Yes, but I need to define loss.
7 All the Sixth Circuit said was, it was inappropriate to
8 allocate 100 percent of CFR costs to the commercial
9 airlines.

10 QUESTION: Right.

11 MR. HUNTING: We did not appeal that decision.
12 We do expect, depending on whether the remand holds up and
13 whether they're amicable proceedings or not, to litigate
14 before the district judge what percent less than
15 100 percent would be appropriate.

16 QUESTION: And will not interpose the absence of
17 any private right of action even if that were to be the
18 conclusion of this Court.

19 MR. HUNTING: I am authorized to so represent.
20 We have made that position known in our brief. We are not
21 seeking to circumvent the rules of this Court as it
22 relates to needs for cross-petition, and in particular I
23 think the Solicitor General in the footnote on page 8 of
24 its brief cited a number of cases that support the
25 proposition that this Court can address that issue.

1 In addition, we are representing that we are not
2 going to interpose any affirmative defense if the Court
3 were to so rule that the CFR issue would not then be
4 before the district court.

5 QUESTION: Do you further represent that you
6 cannot do it, even if you wanted to, or are you just being
7 a good fellow?

8 MR. HUNTING: I believe that I could not do it,
9 Your Honor.

10 QUESTION: Well, but you certainly can't
11 represent that the district judge when he looks at the
12 case and reads our opinion that can argue -- we may say
13 there's no cause of action here -- might say, well,
14 there's nothing for me to do, then. Isn't that a
15 possibility?

16 MR. HUNTING: I would not --

17 QUESTION: Even though you urged him otherwise,
18 faithfully to your representation to us?

19 MR. HUNTING: I think among the permutations
20 that could arise from the unusual circumstance we have,
21 that could be one of the permutations. I only speak for
22 what I'm authorized to --

23 QUESTION: But if that happened, the petitioner
24 would lose the benefit of a portion of his judgment.

25 MR. HUNTING: In that event, if the district

1 judge were to abstain, or to decline to take the case, or
2 to defer it to the agency, under any one of those somewhat
3 similar scenarios it would go to the agency, and we would
4 then expect to abide by whatever the agency decision was
5 on the allocation of CFR costs that are imposed under FAA
6 rules and regulations.

7 QUESTION: But the agency then -- the agency
8 would not be precluded by what the Sixth Circuit
9 determined in this case, would it? It would just be a
10 fresh matter.

11 MR. HUNTING: Well, I think in a sense that all
12 the Sixth Circuit decided was that it could not be
13 100 percent allocation to the commercial airlines, so I
14 would submit to this Court that the agency would at least
15 be bound by the narrow decision and the law of the case as
16 it relates to this particular action, that the CFR costs
17 could not in fact be 100-percent allocated to the
18 commercial airlines.

19 QUESTION: But the law of the case would be
20 there never was a private cause of action in the first
21 place. That would be the law of the case.

22 MR. HUNTING: We recognize that, and I --

23 QUESTION: That's the law of the other part of
24 the case.

25 (Laughter.)

1 MR. HUNTING: I will be candid to acknowledge
2 that it's with some reluctance that -- having prevailed at
3 the lower court that we've raised the issue, but we raised
4 the issue at the trial court level dealing with the
5 private cause of action as well as exhaustion of
6 administrative remedies and other related concepts of
7 deference to primary jurisdiction.

8 QUESTION: No, but you did not cross-petition on
9 it.

10 MR. HUNTING: We did not cross-petition, and we
11 are not seeking to expand relief that could be obtained by
12 the airport or relief that would be detrimental to the
13 airlines. I am authorized to make that representation to
14 the extent it's relevant to the Court's inquiry on what
15 might happen.

16 I would like to address briefly the three bright
17 line tests, as Mr. Smith has called them, of the
18 Interstate Commerce Clause test in the Evansville case.
19 This airport does not retreat from any kind of analysis of
20 the merits of its methodology and the results of its
21 methodology.

22 First, the charges must reflect a fair
23 approximation of the use of the airport facilities from
24 which the airlines do benefit. In very simple terms, it
25 would appear that could mean one, two, or three things,

1 either that the user charged must receive some benefit
2 from the item for which the user is charged. We certainly
3 pass that test, and to the extent that is a subpart, we
4 agree.

5 To the extent that the benefit may mean that an
6 airport cannot goldplate its facilities -- for instance,
7 to have Vermont marble on the ticket countertops or
8 oriental rugs on the floor, we agree that benefit can mean
9 that.

10 What we would suggest that is the critical issue
11 in this case, whether it be viewed under the Evansville
12 standard or any other standard, is a serious warping by
13 the airlines of what benefit means when they suggest that
14 somehow an airport in determining its charges to one
15 tenant must look, either by cross-credit or by change in
16 cost allocation to the varying benefit that yet a
17 different category of tenant might receive from its
18 business results.

19 We suggest that there is no precedent of this
20 Court in any airport or other local governmental setting
21 that would require that a local government as owner and
22 landlord engage in such an evaluation of benefits.

23 With reference to benefits, I would point out
24 very simply that the district court found in unchallenged
25 fashion that the totality of all airport charges,

1 including the reduced overnight aircraft parking fee and
2 including 100 percent of CFR, constituted only
3 1-1/2 percent of the gross revenues received by the
4 airlines at this particular airport.

5 The second, and I think the simplest of the so-
6 called Evansville bright line tests, are that the airport
7 charges may not be excessive in relation to incurred
8 costs. In that regard, I would point out that the
9 district court found as a specific critical finding of
10 fact that only break-even costs as defined under the
11 methodology and as shown under the evidence were charged
12 to the airlines and as such I think that automatically
13 satisfies the second charge.

14 And certainly I would indicate further that the
15 Solicitor General has indicated that there is a reasonable
16 latitude even above the incurrence and the allocation of
17 actual costs and clearly that has been satisfied in this
18 case.

19 The third criteria of Evansville is that the
20 charge does not discriminate against interstate travel,
21 and I would point out first that general aviation and the
22 airlines are not in the same category of tenant under the
23 Airport and Airway Improvement Act or under any other
24 analysis that might be applied. They do not, in fact,
25 compete, and there is no evidence to show that they

1 compete. I would --

2 QUESTION: Apart from that, is there a reason
3 why the break was given to general aviation?

4 MR. HUNTING: There are several reasons. The
5 economy of collection, which is a quotation from a portion
6 of the Airport and Airway Improvement Act, certainly
7 indicates that as to general aviation flights that are
8 unscheduled it is very difficult, when they land without
9 prior notice at an airport such as ours, to be able to
10 apply a standard landing fee, and then to have a separate
11 billing and to know where that billing should be sent.

12 And consequently this airport and, as the
13 testimony indicates, other airports have gone to different
14 means, which traditionally have included hangar fees, tie-
15 down charges, and more often, also in accordance with the
16 Airport and Airway Improvement Act, so-called fuel flowage
17 charges on the gasoline sold by a local airport to those
18 general aviation entities who may land there, or land
19 there and stay there, and it is in that respect that the
20 airport has chosen to approach the collection.

21 QUESTION: Do I understand you to be arguing it
22 would be too difficult to collect a landing fee from a
23 private aircraft?

24 MR. HUNTING: No. I'm saying that with the
25 commercial airlines, at this airport and most airports,

1 there are predicted scheduled flights.

2 QUESTION: I understand that, but then I thought
3 you went on to say because you don't know what the
4 schedule is you couldn't collect a uniform fee from the
5 general aviation --

6 MR. HUNTING: With general aviation, there is --
7 these are not scheduled landings.

8 QUESTION: I understand that.

9 MR. HUNTING: So it is --

10 QUESTION: Every time they land the tower
11 knows --

12 MR. HUNTING: The tower knows. It has been
13 determined by this and many airports to be more difficult
14 to use a pure landing fee as the only mechanism by which
15 to collect appropriate charges.

16 QUESTION: It's certainly not impossible.

17 MR. HUNTING: No, it is not impossible.

18 QUESTION: But you're saying --

19 QUESTION: It's done in a lot of airports.

20 QUESTION: -- then it's just administrative
21 convenience, as opposed to a decision that this category
22 of transportation should be preferred?

23 MR. HUNTING: I don't believe that it's any
24 intentional decision to prefer this particular category.
25 I think it is a reflection of practices that have

1 prevailed here and elsewhere. It is an economy of
2 collection situation.

3 I think that what I think is perhaps more
4 relevant on the general aviation issue is that they are
5 not in the same category. They do not compete. The
6 airport does not in any way financially impact the
7 commercial airlines by virtue of this practice.

8 The concession revenues, which are not covered
9 by the Anti-Head-Tax Act, are used to cover the so-called
10 shortfall as that term has been used here. Concession
11 fees are not under the airport -- excuse me, under the
12 Anti-Head-Tax Act, and when you couple the finding of the
13 district court that the airline charges did not in any way
14 contribute to the surplus, I think that this becomes more
15 of what the Court properly recognized as a lack of
16 standing issue than as the airlines have characterized it.

17 QUESTION: Mr. Smith doesn't concede that, does
18 he --

19 MR. HUNTING: No, he does --

20 QUESTION: -- that the concession fees are not
21 covered by the AHTA?

22 MR. HUNTING: He does not concede that, no, and
23 I did not mean to suggest that he did. I would submit to
24 the Court that the Anti-Head-Tax Act in its legislative
25 history demonstrated no indication that concession

1 revenues should at all be addressed by that statute.

2 The legislative history indicates that in fact
3 Congress was aware that certain airports were in fact
4 generating profits or accumulating surpluses. I think the
5 bottom-line analysis when looking at the statutes and the
6 legislative history is that Congress chose to regulate the
7 mandatory air side aspects of an airport and chose not to
8 regulate the discretionary purchase concession side of the
9 airports. That's a decision that Congress has made.

10 QUESTION: Well, I don't know how -- I think
11 it's a good argument, frankly. I'm not sure it's all that
12 clear. You know, whether you're going to have something
13 to eat while you're waiting for a plane, how discretionary
14 is that?

15 Suppose the airport, you know, imposes a \$20
16 charge on use of the restrooms in the airport? Would that
17 not be covered by the AHTA? That would not be considered
18 a charge on the persons traveling? I think it --

19 MR. HUNTING: We -- it could be considered a
20 charge on the persons traveling. We do not believe that
21 that is covered by the Anti-Head-Tax Act.

22 QUESTION: Oh, really? All right.

23 MR. HUNTING: It would not --

24 QUESTION: Directly or indirectly?

25 MR. HUNTING: Directly or indirectly.

1 QUESTION: Other charge, directly or indirectly?
2 And you think that that's a good way around it -- just
3 really hit them for the use of the mens room.

4 (Laughter.)

5 MR. HUNTING: I -- there certainly could be a
6 mandatory aspect of the question you ask, but I do not
7 believe that the charge for that facility is covered by
8 the Anti-Head-Tax Act, and I would suggest, Your Honor,
9 that perhaps the simplest analysis of whether concessions
10 are included in section 1513(a) of the Anti-Head-Tax Act
11 is to analyze the argument of the airlines. They claim
12 concessions are included in section (a), and they claim
13 that section (b) is a so-called savings clause.

14 If both of those premises are true, it is clear
15 that section 1513(b) did not save concession charges as
16 being illegal under 1513(a), which would leave you with
17 the absurd and I think illogical result that all
18 concession charges at the airport would be illegal, and I
19 suggest that that simple analysis is perhaps the easiest
20 way to approach the very important issue here as to
21 whether concession revenues are at all addressed by or
22 regulated by the Anti-Head-Tax Act.

23 And we suggest that there is no such regulation,
24 that Congress has simply chosen to regulate the mandatory
25 side of airports through, initially, the Airport and

1 Airway Improvement Act, and secondarily, the Anti-Head-
2 Tax Act, certainly in indicating by clarifying language
3 that these types of charges are to be permitted.

4 QUESTION: Mr. Hunting, I'm perplexed as to why
5 the Secretary hasn't gotten involved in this thing more.
6 I mean, you and the United States are proposing that we
7 leave all this to the Secretary, but the strange
8 phenomenon is that the Secretary's had only one case
9 involving this legislation, and there are very major
10 issues such as the one we're just talking about, about
11 whether, you know, concession fees are included, and so
12 forth. How can it be that it's really his bailiwick and
13 yet he hasn't done anything?

14 MR. HUNTING: I would suggest something that I
15 think is outside the record, but yet I think is certainly
16 known, and that is that in many instances with other
17 airports there have been leases that could be of duration,
18 10, 20, or 30 years, so that these charges have been
19 established in one form or another by negotiated leases
20 that cover long periods of time.

21 Consequently, much of the period of time that
22 would have been taken care of in the seventies and
23 eighties were, I think, at many airports covered by leases
24 of very long duration, and I think that to that extent the
25 issue is now percolating I think to a greater extent than

1 it has before.

2 But I would suggest to the Court that in the
3 very complex situation of the Massport case that the
4 agency in fact did choose to entertain a complaint by a
5 general aviation entity, chose to intervene in the other
6 proceedings, and continued with an active role throughout
7 all of that, and it was in fact the Massport proceeding
8 that caused this airport to raise the affirmative defenses
9 when it did in late December of '89 and early January of
10 1990.

11 And if I could address I think several questions
12 that came from the Court, the dismissal by district court
13 Judge Bell of the interstate commerce case was not solely
14 on issues of law.

15 I hesitate to be before this Court and talking
16 about answers to interrogatories and discovery, but the
17 airport filed a combined motion under Rule 56 for summary
18 judgment and 12(b)(6), and for the combined reasons of no
19 factual proofs either to support an interstate commerce
20 claim or, perhaps more importantly, to distinguish that
21 claim from an Airport and Airway Improvement Act claim, or
22 an Anti-Head-Tax Act claim, relying on that absence of
23 factual proof and the rationale of the Merrion case, the
24 district court so ruled.

25 And I would point out to the Court that the

1 Sixth Circuit observed the nature of that ruling on pages
2 30 and 31 of its opinion, commenting that there was a
3 factual aspect and lack of proof as well as to legal, and
4 we stand here today, even without the absence of proof
5 that in my judgment would indicate any violation of the
6 Interstate Commerce Clause.

7 QUESTION: Are you then taking issue with
8 Mr. Smith, who said because it was cut off so early in the
9 district court they didn't have a chance to show that
10 general aviation coincides with intrastate traffic?

11 MR. HUNTING: I am. Those records exist in the
12 FAA tower independent of discovery directed to the
13 airport. The ruling by district court Judge Bell was in
14 an opinion in the middle of January 1990. We went to
15 trial February 12, 1990. That opinion was on the eve of
16 trial, after considerable opportunity to adduce facts that
17 would distinguish and/or support an Interstate Commerce
18 Clause claim, so I'm suggesting that there were two
19 prongs, or two aspects of the ruling of the district court
20 as affirmed by the Sixth Circuit, and the Sixth Circuit
21 noted the contentions of the airport on page 30 and 31 of
22 its opinion in that regard.

23 QUESTION: Is it your position that the airlines
24 can't be in a deficiency position coming to court, that
25 they have to pay and complain later, is that -- it's only

1 a refund that they can get. Suppose they're sued in a
2 State or Federal court? They have to pay up, and then
3 they can seek a refund?

4 MR. HUNTING: If I could explain to you
5 specifically what we have done in our instance, I would
6 hope that would answer you. We reached a stipulation with
7 the airlines, filed in this case at the district court
8 level, that would make the payments from them to this
9 airport subject to whatever the final results of this
10 decision is.

11 We have a judgment supported by bonds for the
12 difference between the old rates and the new rates from
13 April 1, 1988 to the end of 1989, which was the end of the
14 period of time covered. In addition, we have a
15 stipulation that would make the results of any CFR
16 allocation, and/or any decision of this Court would be
17 taken into account quantitatively by virtue of that
18 stipulation.

19 QUESTION: I mean for the future. Your position
20 is that there is no lawsuit that the airlines can
21 institute. They must either be in a defensive posture,
22 resisting a suit for them to pay, or they can go to the
23 FAA, or they can go to the Department of Transportation,
24 but they can't -- they can't come to court as a plaintiff.

25 MR. HUNTING: We are saying that the resort in

1 the first instance for the airlines, if they are to
2 challenge reasonableness, is to go to the agency.

3 The second question which I think you were
4 positing to me is, as a practical matter, what position
5 would be airport take about the interim usage of the
6 airport during the period of time that a reasonableness
7 dispute might be existing, I would hope that we would, if
8 such a situation again arose, reach another amicable
9 stipulation as we did at the trial court level.

10 QUESTION: Thank you, Mr. Hunting.

11 MR. HUNTING: Thank you very much.

12 QUESTION: Mr. Smith, you have 2 minutes
13 remaining.

14 REBUTTAL ARGUMENT OF WALTER A. SMITH, JR.

15 ON BEHALF OF THE PETITIONERS

16 MR. SMITH: Thank you, Your Honor.

17 First of all, at page 46-A of the appendix to
18 the cert petition is where the district court quite
19 clearly dismissed our Commerce Clause claim solely on the
20 ground that Congress had taken action in the area.

21 Second, with regard to Justice Scalia's question
22 about whether or not concessions are covered by the AHTA,
23 we take the view that whether or not they are covered,
24 whereas here the concession fees are being paid ultimately
25 by the passengers, the right reasoning is the one that

1 Judge Posner used in Indianapolis, and that is to say that
2 whereas here the total fees being imposed on the airlines
3 and their passengers through this fee methodology vastly
4 exceed the airport's costs, that is precisely what
5 Congress intended to prohibit in the AHTA.

6 And finally, let me address Mr. DuMont's point
7 that we are relying only on the word "reasonable" in 1513
8 on the merits of the private right of action issue. That
9 is not true at all, as we explained in our brief, but most
10 importantly, whereas here Congress was intending to
11 strengthen the prohibitions of Evansville, a case in which
12 a right of action by the airlines had been recognized, it
13 would be perverse to suppose that Congress was there by
14 sub silentio taking away the most effective way of
15 carrying out the indications in the AHTA of what the
16 Congress wanted to achieve, and that, to us, is grounds
17 enough alone to find we ought to win the private right of
18 action issue even if the Court reaches it.

19 Finally, I would mention that even if
20 Mr. Hunting is kind enough to give away the CFR issue, if
21 this Court reaches the private right of action issue, it
22 will have to modify the judgment below, and under this
23 Court's precedents the Court is not permitted to do that,
24 whereas here, Mr. Hunting elected not to file a cross-
25 petition.

1 Thank you.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.

3 The case is submitted.

4 (Whereupon, at 12:01 p.m., the case in the
5 above-entitled matter was submitted.)

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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:

NORTHWEST AIRLINES, INC. ET AL. V. COUNTY OF KENT, MICHIGAN, ET AL.

CASE 92-97

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

BY Ann Marie Federico

(REPORTER)

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