

court found no basis to overturn the Board's decision that the transloading activities were conducted by a "rail carrier."

Accordingly, the Board's decision that G&U's transloading activities constituted "transportation" based on concerns of economic efficiency was vacated and remand was required to determine whether the transloading activities facilitated the physical movement of pellets onto the trucks.

Robert Blank

Industria y Distribution de Alimentos v. Trailer Bridge, 797 F.3d 141 (1st Cir. 2015) (holding that a fee charged by the Puerto Rico Ports Authority to shipping operators for the scanning of incoming cargo did not violate the dormant Commerce Clause and was not an unconstitutional burden on the flow of interstate commerce).

In 2011, the Puerto Rico Ports Authority ("PRPA") created Regulation No. 8067, which required the scanning of all incoming non-bulk cargo into the port of San Juan. The PRPA intended this regulation to allow for better identification of unreported taxable goods and improve upon existing security measures. The PRPA equipped three shipping operators at the port with scanning technology, and all importers and shipping operators who used the port were charged an Enhanced Security Fee ("ESF") to cover the costs of the scanning procedures. Twenty-nine importers and the three shipping operators filed suit seeking injunctive relief from scanning requirements and the ESF, alleging the regulations violated the dormant Commerce Clause. The District Court held that the scanning procedures were permissible. However, the ESF as enforced against the twenty-nine importers who were not provided with scanning technology, violated the dormant Commerce Clause. The three shipping operators provided with the scanning technology (the "Plaintiffs") appealed.

The Plaintiffs' complaint asserted that the ESF violated the dormant Commerce Clause because the ESF was excessive, the port operators received no benefit from it, and the burden on interstate commerce outweighed the benefit to the PRPA.

The Appellate Court reviewed the lower court's factual findings and legal conclusions de novo. In accordance with *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), the court held that the ESF was a user fee and a user fee is constitutional if it: "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discrimi-

nate against interstate commerce.” The court also noted that in a challenge to government action the plaintiffs carry the burden of persuasion.

The court first reviewed whether the ESF was based on a fair approximation of the cost of services provided by the facilities. The PRPA stated that it attempted to assess a fee reasonably proportional to the total cargo scanned and imported; however, the court found two flaws with this method. First, the scanning procedures do not require the scanning of bulk cargo. The court suggested that if an operator imported a large amount of bulk-cargo its fee would be disproportionate to its actual imports. Second, during busy times the PRPA exempts some containerized cargo from scanning procedures. The court suggested if this occurred regularly the fee would not match the operators’ use of the scanning service. However, the Plaintiffs did not produce evidence to support either of these possibilities. The court stated that while it is unable to definitively hold that the ESF is a fair approximation of the cost of services provided, the lack of evidence provided to the contrary requires a ruling that the ESF met the first requirement.

The court then addressed whether the cost of the ESF is excessive in relation to the benefits conferred. The Plaintiffs asserted that the ESF provided no benefit to its business or to Puerto Rico because it was ineffective and detrimental to business. The court pointed out that the Plaintiffs used an incorrect standard in defining benefit, noting that the actual service that the government provides is immaterial when considering the constitutionality of a user fee. The correct standard is whether the user fee is comparable to the costs incurred by the taxing facilities. The PRPA demonstrated that 97% of money brought in by the ESF went to paying for the scanning services. The court again found that the Plaintiffs failed to provide evidence to the contrary, requiring a ruling that the ESF met the second requirement.

The court last reviewed if the ESF discriminated against interstate commerce. Citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the court stated that a law will be upheld unless the burden imposed on commerce is clearly excessive to the benefit received. The Plaintiffs argued that because out-of-commonwealth companies exclusively use the Port of San Juan the fee applied exclusively to out-of-commonwealth companies, creating a burden that interfered with commerce. The court disagreed noting that a facially neutral policy having an impact exclusively on an out-of-state company does not, by itself, demonstrate a burden on interstate commerce, but rather a plaintiff must show actual interference with out-of-state commerce. The court found the ESF met the third and final requirement, holding the ESF did not violate the dormant Commerce Clause.

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Accordingly, the Court of Appeals denied Plaintiffs' appeal for injunctive relief.

Jon Wagner

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