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## *South Dakota Airplane Tax Hangs by a Technical Thread*

by Jeffrey S. Lehman

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Western Airlines, Inc.

v.

South Dakota Board of Equalization  
(Docket No. 85-732)

*To be Argued November 3, 1986*

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State property tax laws, by their nature, discriminate. Some property is included, some exempted. Real property is taxed one way, personal property another. Over the years, the usually benign discriminations found in these laws have sometimes turned malignant, and on occasion Congress has seen a need to step in.

One form of discrimination that has been of particular concern to Congress is the type that burdens interstate commerce. In three separate statutes, Congress has acted to protect the railroads, the motor vehicle carriers and the airlines from state property tax discrimination. This case explores the limits of the statute dealing with discrimination against airlines.

### ISSUE

The Airport and Airway Improvement Act of 1982 prohibits states from taxing commercial airplanes at higher rates than they tax "other commercial and industrial property"—property (other than transportation property, farmland and timberland) that is used commercially or industrially and is "subject to a property tax levy." This case asks what one is to make of a state that has no other "property tax levy." May it tax commercial airplanes at any rate it chooses? Or may it not tax them at all?

### FACTS

Until 1961, South Dakota had a general personal property tax that treated commercial airlines like other businesses but did not apply to their airplanes. In that year, however, South Dakota established a new, special airplane tax, applying the general property tax rates to the portion of the airplanes' value that is due to their use in South Dakota. Unlike most property taxes, the new tax was assessed "centrally"—at the state level instead of

by the municipalities. The proceeds were designated exclusively for use at airports in the states.

In 1978, South Dakota repealed its general personal property tax in response to mounting criticism that it was nothing but a "liar's tax." The repeal did not, however, affect the "centrally assessed" property taxes. Thus, since 1978, the only personal property taxed in South Dakota has been commercial airplanes and the property of other public service companies, such as railroads, telephone companies, electric utilities and pipeline companies.

In 1982, Congress passed section 532 of the Airport and Airway Improvement Act (49 U.S.C. section 1513 (d)) in response to certain state taxes that it found to "unreasonably burden and discriminate against interstate commerce." The statute provides that a state may not tax commercial airplanes at a higher rate than it taxes other "commercial and industrial property." The statute defines "commercial and industrial property" to mean commercial and industrial property (other than transportation property, farmland and timberland) "subject to a property tax levy."

Until 1982, Western Airlines, Republic Airlines, Frontier Airlines and Ozark Airlines dutifully paid the South Dakota airplane tax. After Congress passed the new law, however, the airlines paid the tax under protest for 1983 and immediately sued the appropriate county treasurers for a refund. The trial court denied the refund, declaring that South Dakota's airplane tax does not run afoul of the federal law. On appeal, the South Dakota Supreme Court also sustained the tax, by a vote of four to one (372 N.W. 2d 106 (S.D. 1985)). The majority ruled that, in deciding whether the airplanes were being discriminated against, they should be compared only with other "centrally assessed" property. According to the majority, the fact that most personal property in South Dakota was tax exempt did not make the airplanes the subject of discrimination; it simply made that property irrelevant to the comparison required under the federal law.

Justice Henderson dissented. He noted that, according to the majority, the federal statute prohibits a state from taxing other property at a lower rate than airplanes *unless* that lower rate is cut all the way to zero. He suggested that it was "a palpable absurdity" to think that the statute permits a more extreme discrimination than it prohibits. Justice Henderson observed that his views

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coincided with the unanimous views of the Supreme Court of North Dakota (*Northwest Airlines v. State Board of Equalization*, 358 N.W. 2d 515 (N.D. 1984)).

#### BACKGROUND AND SIGNIFICANCE

The fate of the republic does not turn on this case. Very few states are in South Dakota's position, and it seems unlikely that many others would abolish their personal property taxes to be able to soak the airlines. Nor is the legal question of particular theoretical interest—Congress could conceivably have meant either interpretation of its statute, and the point is unlikely to arise in many other situations.

Nevertheless, the case is of great significance to the parties involved. While the airlines have been paying the South Dakota tax for many years, they will no doubt continue to be somewhat miffed if they lose. If the tax is sustained, their airplanes will continue to be taxed (conceivably at ever-higher rates) while the newspapers' word processors will remain exempt. If the tax is stricken, however, South Dakota will be forced to find a new source of revenue to support its airports.

#### ARGUMENTS

*For Western Airlines, Inc., Republic Airlines, Inc., Frontier Airlines, Inc. and Ozark Airlines, Inc. (Counsel of Record, Raymond J. Rasenberger, 888 17 Street NW, Suite 600, Washington, DC 20006-3959; telephone (202) 298-8660)*

1. The purpose of the federal statute is to prohibit state property tax discrimination against commercial airplanes—a discrimination embodied in the South Dakota tax.

2. The words "subject to a property tax levy" may be construed to describe all tangible personal property other than a few limited classes traditionally exempt from state taxation.

*For the Board of Equalization of South Dakota (Counsel of Record, Mark V. Meierhenry, State Capitol, Pierre, SD 57501; telephone (605) 773-3215)*

1. Congress intended only to prohibit certain specific forms of discrimination.
2. Earlier drafts of the legislation had used broader language in defining "commercial and industrial property," so Congress must have intended the narrow interpretation chosen by the South Dakota Supreme Court when it used narrow final language.
2. Earlier drafts of the legislation had used broader language in defining "commercial and industrial property," so Congress must have intended the narrow interpretation chosen by the South Dakota Supreme Court when it used narrow final language.
3. The airlines' argument that the language refers only to property traditionally exempt from state taxation does not make sense, since that property is not "commercial or industrial."
4. In any event, the South Dakota tax does not discriminate against airlines.

#### AMICUS BRIEFS

##### *In Support of the Airlines*

The Air Transport Association of America, the Railway Progress Institute and the Association of American Railroads.