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February 16, 1979

Honorable James McBreairty
Maine Senate
State House
Augusta, Maine 04333

Re: Airport Use Charge.

Dear Senator McBreairty:

Since my letter of January 26 relating to airport service charges, it has come to my attention that Congress has enacted legislation which prohibits the imposition of a surcharge on airline tickets. 49 U.S.C. § 1513 provides, in relevant part, that:

> (a) No State (or political subdivision thereof. . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived thereon. . .
>
> (b) Nothing in this section shall prohibit a state (or political subdivision thereof. . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a state (or political subdivision thereof. . .) owning or operating an airport from levying or collecting reasonable charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

This statute was enacted in response to the decision of the United States Supreme Court in Evansville-Vanderburgh Airport Authority v. Delta Airlines, 405 U.S. 707 (1972), which upheld airport service charges based on the number of enplaning passengers. See, 1973 U.S. Code Cong. and Adm. News 1446.

In evaluating the effect of the federal legislation, the Pennsylvania Supreme Court concluded that:

> [t]his legislation, enacted pursuant to Congress' constitutional authority to regulate interstate commerce, has undeniably pre-empted any state, or local, intervention in the field of airport head taxes. Allegheny Airlines v. City of Philadelphia, 309 A.2d 157, 159 (Pa., 1973)

Consequently, my previous opinion was incorrect with respect to the constitutionality, under the commerce clause, U.S. Const. Art. III, § 8, cl. 3, of the surcharge which you propose. Because of the existence of the federal legislation, such a tax now would violate the commerce clause by virtue of the supremacy clause, U.S. Const., Art. VI, cl. 2.

On the other hand, the commerce clause test established by the United States Supreme Court in Evansville, 405 U.S. at 717-720, has continuing validity as applied to landing fees and terminal space charges.1/ See, American Airlines v. Massachusetts Port Authority, 570 F.2d 1036 (1st Cir., 1977); Southern Airways v. City of Atlanta, 428 F. Supp. 1010, 1020 (N.D. Ga., 1977); Raleigh-Durham Airport Authority v. Delta Air Lines, 429 F. Supp. 1069, 1083 (D.N.C. 1976). The test, again, is that a charge must 1) not discriminate against interstate commerce and travel; 2) fairly approximate the actual use of facilities, and 3) not be excessive in relation to costs incurred by the taxing authority.

The Revenue Producing Municipal Facilities Act (30 M.R.S.A. Chapter 235) provides authority for Maine municipalities to levy such landing fees and terminal space charges. 30 M.R.S.A. § 4251 provides, insofar as relevant, that

> [a] municipality is authorized and empowered;
>
> 1. To acquire, construct, reconstruct, improve, extend, enlarge, equip, repair, maintain and operate any revenue producing municipal facility consisting of a[n] . . . airport or part thereof, within or without, or partly within and partly without, the corporate limits of the municipality. . .; . . .

1/ Conversations with officials of the Civil Aeronautics Board, Federal Aviation Agency, Airport Operators Council, and New Hampshire Aeronautics Commission (one of the two taxes upheld in Evansville was New Hampshire R.S.A. 422:43, which has been retained in the statutes but is unenforced) indicate that, since the federal prohibition on ticket surcharges, operators of public airports have relied primarily upon landing fees and terminal space charges to recoup the cost of operating those airports.

> 4. To fix and revise from time to time and to collect rates, fees, and other charges for the use of or for the services and facilities furnished by any revenue producing municipal facility; . . .

30 M.R.S.A. § 4253.1 further provides, in relevant part, that

> [e]xcept as otherwise provided, such rates, fees and charges. . . shall be so fixed and revised as to provide funds which, together with all other funds available for the purpose, will be sufficient at all times to pay the cost of maintaining, repairing and operating such revenue producing municipal facility.

With specific reference to airports, 30 M.R.S.A. § 4253.4 provides that

> . . . the rates, fees and charges may be based or computed upon square footage, gross receipts, landings or other basis which is reasonably related to the use of or service furnished by the revenue producing facility.

The standards set out in this enabling legislation appear to be consistent with the Evansville commerce clause test.

The extent to which a user charge imposed upon an aircraft operator may be based upon the number of enplaning passengers without violating 49 U.S.C. § 1513 is unclear. In Southern Airways v. City of Atlanta, supra, costs related to the terminal building were allocated among airlines by various formulas, some of which reflected the number of enplaned passengers. The District Court, while rejecting Southern's contention that the airlines' relative percentages of enplaned passengers did not receive sufficient weight in the determination of charges, appears to acknowledge that the distribution of enplaned passengers was an acceptable factor in the determination. 428 F. Supp. at 1021-1022. The precedential value of this decision is rendered uncertain, however, by the court's dictum that "[t]he plaintiff does not contend that these formulas contain elements which are inappropriate. Rather, the plaintiff's objection concerns the proportions assigned to the various elements" 428 F. Supp. at 1022. No other case involving enplaned passengers as a measure of use of airport facilities has been located.2/

2/ Officials of the Federal Aviation Agency and Airport Operators Council contacted by this office expressed the opinion that the number of enplaned passengers is commonly used as one element in airport user formulas and that such use, to the best of their knowledge, has not been challenged.

It is also uncertain whether airport user charges may constitutionally be measured by the relative gross receipts of the aircraft operators using the airport. 30 M.R.S.A. § 4253.4 specifically authorizes such a measure as "reasonably related to the use of or service furnished by the revenue producing facility." 49 U.S.C. § 1513(a), however, prohibits a "charge. . . on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived thereon." On the other hand, the second clause of section 1513(b), without excepting charges prohibited by section 1513(a) as the first clause did, provides that "nothing in this section shall prohibit. . . a political subdivision. . . from levying. . . reasonable charges . . . for the use of airport facilities." Since a statutory construction which does not render the statute internally inconsistent is preferred, it appears that section 1513, as a whole, would be construed to permit a user charge measured by relative gross receipts. This result is supported by Maine v. Grand Trunk Ry., 142 U.S. 217 (1891), which upheld a tax, measured by gross receipts, on the privilege of operating a railroad in Maine in a context in which a tax on the gross receipts themselves would have been in violation of the commerce clause. It appears even less likely that use of relative gross receipts to allocate a predetermined total charge would be overturned than the use of gross receipts as a tax base for measuring a privilege tax.

In summary, the maintenance and operation of an airport by a municipality may not be financed by the levy of a surcharge upon enplaning passengers but may be financed by the levy upon the air carrier of a reasonable charge for the carrier's use of the airport facilities. In establishing a reasonable charge, however, there is considerable uncertainty as to whether either enplaned passengers or gross receipts may be employed as the measure of usage. For that reason, the use of other measures[3/] to reasonably reflect usage, and thereby distribute the charge, would appear to be the safest course.[4/]

3/ Allocation of landing fees on the basis of gross weight landed at an airport over the time period in question and allocation of common terminal space charges on the basis of the distribution of exclusive terminal space among airlines have come to our attention as commonly-used measures and appear to be without statutory or constitutional defect.

4/ The use of these measures might also make it easier to comply with the requirement that the total charges not be excessive in relation to the municipality's cost of operating the airport.

In light of the complexity of this subject, I would be happy to have members of my staff meet with you to discuss the matter in more detail.

Sincerely,

RICHARD S. COHEN
Attorney General

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