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Dormant Commerce Clause - Economic Protectionism and State Tax Incentives - The Supreme Court of Wisconsin Holds That Tax Exemptions for Air Carriers Based Solely on the Amount of Business Done with the State Survive Dormant Commerce Clause Review: *Northwest Airlines, Inc. v. Wisconsin Department of Revenue*

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**THE DORMANT COMMERCE CLAUSE—ECONOMIC
PROTECTIONISM AND STATE TAX INCENTIVES—THE
SUPREME COURT OF WISCONSIN HOLDS THAT TAX
EXEMPTIONS FOR AIR CARRIERS BASED SOLELY ON
THE AMOUNT OF BUSINESS DONE WITH THE STATE
SURVIVE DORMANT COMMERCE CLAUSE REVIEW:
*NORTHWEST AIRLINES, INC. V. WISCONSIN
DEPARTMENT OF REVENUE***

AMBER M. BILLINGSLEY*

THE SUPREME COURT of Wisconsin's recent decision in *Northwest Airlines, Inc. v. Wisconsin Department of Revenue*¹ held that a federal statute governing state taxation of air carriers barred Dormant Commerce Clause review of Wisconsin's tax scheme, which created an *ad valorem* tax exemption for in-state airline hubs.² It reached this conclusion by misconstruing the federal statute as being "unmistakably clear" in its authorization of the tax exemption created by Wisconsin.³ Accordingly, Dormant Commerce Clause review is not precluded, and under such review the statute is facially invalid because it impermissibly burdens interstate commerce. While the court's holding is erroneous, it provides an opportunity to clarify two disputed areas of law: (1) how "clear" must a federal statute be in order to preclude review under the Dormant Commerce Clause, and (2) what economic incentives can states use to promote their economy without violating the Dormant Commerce Clause?

The state of Wisconsin taxes air carriers under an *ad valorem* tax scheme, and in 2001 created an *ad valorem* tax exemption for

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¹ 717 N.W.2d 280 (Wis. 2006).

² *Id.* at 284.

³ *See id.* at 294.

air carriers operating a "hub facility" within the state, providing two definitions under which an air carrier may qualify for the exemption.⁴ The first definition requires a minimum number of outgoing flights each weekday from the state, and a minimum number of nonstop destinations to other states.⁵ The second definition requires an air carrier to locate its headquarters within the state of Wisconsin, in addition to operating a minimum number of flights from the state each weekday.⁶ The stated purpose of the exemption is to encourage the development of air transportation facilities in the state, to protect existing jobs in the airline industry, and to increase the state's competitiveness in attracting and retaining business and industry.⁷ The hub exemption was tailored to benefit Midwest Airlines (Midwest), and in particular, to induce Midwest to proceed with a \$1 billion dollar expansion of its facilities in Wisconsin, rather than in a neighboring competitor state.⁸

Northwest Airlines (Northwest) did not qualify for the *ad valorem* tax exemption because its hub operations are in Minnesota rather than Wisconsin.⁹ Had Northwest met the requirements for the exemption it would have avoided paying more than \$1.5 million dollars in *ad valorem* taxes for the year in question.¹⁰ Accordingly, Northwest sued the Wisconsin Department of Revenue, challenging the tax statute as, *inter alia*, a violation of the Interstate Commerce Clause of the United States Constitution.¹¹ The circuit court granted summary judgment in favor of Northwest, holding that the tax exemption violated the Dormant Commerce Clause because it economically favored in-state air carriers while imposing significant financial burdens on out-of-state air carriers.¹² The court also concluded that the tax exemption could be detached from the remainder of the *ad valorem* tax scheme, allowing the tax to be applied to air carriers

⁴ WIS. STAT. ANN. § 76.01 (West 2004) (providing that the Wisconsin Department of Revenue "shall make an annual assessment of the property of all . . . air carriers . . . within this state, for the purpose of levying and collecting taxes thereon").

⁵ *Nw. Airlines, Inc.*, 717 N.W.2d at 282 (citing WIS. STAT. ANN. § 70.11(42)(a)(2) (West 2004)).

⁶ *Id.* at 283 (citing WIS. STAT. ANN. § 70.11(42)(b)).

⁷ *Id.* at 282.

⁸ *Id.* at 285.

⁹ *Id.* at 282.

¹⁰ *Id.* at 282, 286.

¹¹ *Id.* at 283.

¹² *Id.* at 284.

uniformly, regardless of whether they maintained a hub in the state.¹³

Northwest and the Wisconsin Department of Revenue both appealed the circuit court decision.¹⁴ Northwest argued that the hub exemption was not severable, and therefore the entire *ad valorem* tax scheme was invalid, while the Wisconsin Department of Revenue argued that the hub exemption did not violate the Dormant Commerce Clause.¹⁵ Additionally, Midwest intervened on appeal, asserting that a federal statute¹⁶ barred review of the hub exemption under the Dormant Commerce Clause.¹⁷ The Supreme Court of Wisconsin reversed the circuit court decision and upheld the validity of the hub exemption, concluding that the federal statute precluded Dormant Commerce Clause review of the tax scheme, and that the hub exemption was valid on all other asserted constitutional grounds.¹⁸

The determinative question in this case was whether the United States Congress clearly consented to unequal taxation of air carriers by the states.¹⁹ The Dormant Commerce Clause bars economic protectionism; so laws that benefit in-state economic interests by encumbering out-of-state competitors are unconstitutional.²⁰ However, Dormant Commerce Clause review is precluded when Congress affirmatively legislates in a given area, thereby authorizing the states to regulate interstate commerce in a manner that would otherwise violate the Constitution.²¹ Importantly, a federal statute must be "unmistakably clear,"²² with Congress manifesting unambiguous intent to authorize the state regulation, in order to preclude Dormant Commerce Clause review.²³ State laws that encumber interstate commerce are *presumptively unconstitutional* unless Congress passes legislation that is clearly to the contrary.²⁴ In this case, the Supreme Court of

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 49 U.S.C.A. § 40116 (West 2000 & Supp. 2005).

¹⁷ *Nw. Airlines, Inc.*, 717 N.W.2d at 284.

¹⁸ *Id.* at 284, 297.

¹⁹ *Id.* at 288.

²⁰ *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575 (1997); *Nw. Airlines, Inc.*, 717 N.W.2d at 287.

²¹ *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *Nw. Airlines, Inc.*, 717 N.W.2d at 287.

²² *S.-Cent. Timber Dev. v. Wunnicke*, 467 U.S. 82, 91 (1984).

²³ *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *Nw. Airlines, Inc.*, 717 N.W.2d at 288.

²⁴ *Nw. Airlines, Inc.*, 717 N.W.2d at 288.

Wisconsin upheld the validity of the *ad valorem* tax exemption after determining that Congress had exercised its Commerce Clause power in the field of air carrier taxation,²⁵ thereby precluding review of the tax scheme.²⁶

The Wisconsin Supreme Court first analyzed whether Congress had expressly consented to differential taxation of air carriers through the plain language of the federal statute.²⁷ The court concluded that the federal statute did, in fact, demonstrate with “unmistakable clarity” that Congress had consented to the state tax scheme in question, without addressing the legislative history of the statute or any other extrinsic sources.²⁸ Specifically, the court found that the structure of the federal statute divided air carrier taxes into two categories: those that are pro-

²⁵ The relevant subsections of the federal statute, 49 U.S.C.A. § 40116, provide:

(b) Prohibitions—Except as provided in subsection (c) of this section . . . a State . . . may not levy or collect a tax, fee, head charge, or other charge on—(1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation.

(d) Unreasonable burdens and discrimination against interstate commerce—(2)(A) A State, political subdivision of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce: (i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property. (ii) levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph. (iii) levy or collect an *ad valorem* property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction

(e) Other allowable taxes and charges—Except as provided in subsection (d) of this section, a State or political subdivision of a State may levy or collect—1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and 2) reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.

49 U.S.C.A. § 40116 (West 2000 & Supp. 2005) (emphasis added).

²⁶ *Nw. Airlines, Inc.*, 717 N.W.2d at 290, 293.

²⁷ *Id.* at 290.

²⁸ *Id.*

hibited, denoted in subsections (b) and (d) of the statute; and those that are authorized by subsection (e) of the statute.²⁹ The court further concluded that any taxes not expressly prohibited under subsections (b) and (d) were implicitly authorized under the final subsection (e).³⁰ In the case at hand, the prohibitions in subsection (b) were inapplicable, and subsection (d) failed to mention tax exemptions as a prohibited tax practice.³¹ Given the grant of power to the states to levy and collect taxes from air carriers found in subsection (e), the court concluded that the tax exemption at issue was authorized by the federal statute.³²

In reaching its conclusion, the court also relied on *Department of Revenue of Oregon v. ACF Industries, Inc.*³³ In that case, a number of rail-car leasing companies challenged Oregon's *ad valorem* tax scheme, which provided exemptions to non-railroad businesses.³⁴ In upholding the tax scheme, the United States Supreme Court explained that the power to grant tax exemptions is among the traditional powers of the states used to encourage in-state industrial development.³⁵ The Wisconsin Supreme Court, in turn, found that *ACF Industries* supported its conclusion that differential taxation of air carriers through *ad valorem* tax exemptions was constitutional.³⁶

The Wisconsin Supreme Court also supported its holding with three key findings. First, it found that the federal statute was enacted to replace and circumvent the ominous uncertainty of review under Dormant Commerce Clause jurisprudence.³⁷ Second, the court maintained that under the canon of construction "*expressio unius*," the expression of one thing in a statute acts to exclude any other thing not expressly stated.³⁸ This led to the court's conclusion that the eight listed tax practices in subsections (b) and (d) were the only ones that Congress intended to prohibit.³⁹ Third, the title of subsection (d) in the federal statute, "[u]nreasonable burdens and discrimination against interstate commerce," is the precise language used

²⁹ 49 U.S.C.A. § 40116(b), (d)–(e); *Nw. Airlines, Inc.*, 717 N.W.2d at 290.

³⁰ *Nw. Airlines, Inc.*, 717 N.W.2d at 293.

³¹ 49 U.S.C.A. § 40116(d); *Nw. Airlines, Inc.*, 717 N.W.2d at 290–91.

³² *Nw. Airlines, Inc.*, 717 N.W.2d at 293.

³³ *See id.* at 290 (citing 510 U.S. 332 (1994)).

³⁴ *ACF Indus., Inc.*, 510 U.S. at 335.

³⁵ *Id.* at 344–46; *Nw. Airlines, Inc.*, 717 N.W.2d at 292.

³⁶ *Nw. Airlines, Inc.*, 717 N.W.2d at 293.

³⁷ *Id.*

³⁸ *Id.* at 293–94.

³⁹ *Id.* at 294.

under Dormant Commerce Clause review.⁴⁰ The Wisconsin Supreme Court found that the last factor demonstrated with “unmistakable clarity” the intent of Congress to exercise its Commerce Clause power in the field of air carrier taxation, thereby precluding Dormant Commerce Clause review of the state statute.⁴¹

The Wisconsin Supreme Court erroneously concluded, however, that the federal statute governing state taxation of air carriers was “unmistakably clear” in its intent to allow differential taxation of air carriers based on the amount of business conducted with the state. The court has no authority to write “what Congress probably had in mind” when Congress has not expressly stated its intent.⁴² The federal statute in this case does not expressly authorize tax exemptions for air carriers based on the amount of business done with a state, and therefore does not bar Dormant Commerce Clause review.⁴³

First, the plain language of the federal statute does not exhibit clear congressional intent to authorize the tax exemption found in the case at hand. In order to bar review under the Dormant Commerce Clause, the federal statute must expressly authorize a state to economically discriminate against air carriers based on either (1) the amount of flights conducted from within the taxing state, or (2) the location of the air carrier’s headquarters in the taxing state.⁴⁴ Examining the federal statute in this case, subsections (b) and (d) do not authorize, prohibit, or even address either of these two criteria.⁴⁵ Congress did not make it “unmistakably clear” that a state may provide tax exemptions based on the amount of business an air carrier does within a state, and the tax exemption is therefore subject to Dormant Commerce Clause review.⁴⁶

Second, when defining the scope of a federal statute that preempts the states’ traditional powers, the Supreme Court strictly prohibits inferences regarding the constitutionality of the preemption, and requires unambiguous evidence of con-

⁴⁰ 49 U.S.C.A. § 40116(d) (West 2000 & Supp. 2005); *Nw. Airlines, Inc.*, 717 N.W.2d at 294.

⁴¹ *Nw. Airlines, Inc.*, 717 N.W.2d at 294.

⁴² *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982); *Nw. Airlines, Inc.*, 717 N.W.2d at 298 (Abrahamson, S., dissenting).

⁴³ *Nw. Airlines, Inc.*, 717 N.W.2d at 300 (Abrahamson, S., dissenting).

⁴⁴ See WIS. STAT. ANN. § 70.11(42)(a)(2) (West 2004); *New England Power Co.*, 455 U.S. at 343.

⁴⁵ See 49 U.S.C.A. § 40116(b), (d).

⁴⁶ *Id.*

gressional intent.⁴⁷ The majority's use of "*expressio unius*" to reach its conclusion is inherently flawed, as the Supreme Court requires a federal statute to demonstrate with certainty that it intended to authorize certain discriminatory behavior by the states, and does not permit a default rule that would bar Commerce Clause review of any regulatory provision not specifically addressed within a federal statute governing a particular subject area under the guise of some form of implied authorization.⁴⁸ Even the majority opinion admits that the legislative and statutory history of the federal statute evinces support for both sides of this issue, which forecloses the conclusion that Congress' intent to authorize the hub exemption was "unmistakably clear."⁴⁹ The court's conclusion that the federal statute authorized the tax exemption with unmistakable clarity is incorrect, and the statute should have been subject to Dormant Commerce Clause review.

Third, the majority's reliance on the reasoning in *ACF Industries* is unpersuasive, as that case dealt with discrimination *between industries*, whereas the instant case deals with discrimination *between businesses* in the same industry that compete with each other, based on the amount of business they conduct within the state.⁵⁰ *ACF Industries* does not hold that Congress explicitly authorized *ad valorem* tax exemptions between air carriers, or between businesses within the same industry, which is required in order to preclude Commerce Clause review in the instant case.

Without the shield of the federal statute, the Wisconsin tax scheme is subject to review under the Dormant Commerce Clause. Accordingly, a state regulation that directly favors in-state businesses while placing burdens on out-of-state businesses is virtually *per se* illegal.⁵¹ The United States Supreme Court held in *Boston Stock Exchange v. State Tax Commission*⁵² that while states may structure their tax systems to encourage the growth of intrastate commerce and industry, they may not discriminatorily

⁴⁷ Dep't of Revenue of Ore. v. ACF Indus., Inc., 510 U.S. 335, 345 (1994); Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992).

⁴⁸ See *ACF Indus., Inc.*, 510 U.S. at 345; *Wyoming*, 502 U.S. at 458.

⁴⁹ *Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 717 N.W.2d 280, 290 n. 15 (Wis. 2006).

⁵⁰ *ACF Indus., Inc.*, 510 U.S. at 335; *Nw. Airlines, Inc.*, 717 N.W.2d at 302 (Abrahamson, S., dissenting).

⁵¹ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Nw. Airlines, Inc.*, 717 N.W.2d at 305 (Abrahamson, S., dissenting).

⁵² 429 U.S. 318 (1977).

tax out-of-state operations.⁵³ In *Boston Stock Exchange*, the Court invalidated a New York tax statute that imposed a greater tax burden on out-of-state stock sales than in-state sales, and explained that the Commerce Clause demanded evenhanded treatment of businesses.⁵⁴ The Court held that the Commerce Clause forbids a state from taxing "in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses."⁵⁵ The tax statute in the case at hand possesses the same fatal flaw, as it impermissibly places a heavier tax burden on out-of-state air carriers than those operating in-state hub facilities. The Wisconsin Supreme Court erred when it allowed the tax statute to avoid constitutional review, as the statute wholly undermines the basic premise of the Commerce Clause in its attempt to "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States."⁵⁶

The struggle to distinguish between constitutionally permissible economic incentives and unconstitutional regulations that violate the Commerce Clause has been recognized by the Supreme Court.⁵⁷ However, it is the state's responsibility to establish a system that promotes its legitimate economic interests without discriminating against out-of-state businesses. The Wisconsin tax exemption is guilty of such discrimination, as it allows certain companies within an industry to avoid paying millions of dollars in taxes based solely on the number of flights originating within the state. The stated purpose of the statute is economic protectionism at its plainest: "to maintain Wisconsin's air transportation system, protect existing jobs, encourage the development of additional air transportation facilities, and preserve the state's competitiveness in attracting and retaining business and industry."⁵⁸

Allowing tax exemptions like the one at issue vitiates the purpose of the Commerce Clause, and opens the gates to economic protectionism across state lines over a wide range of industries.

⁵³ *Id.* at 336–37.

⁵⁴ *Id.* at 332.

⁵⁵ *Id.* at 335.

⁵⁶ *Id.* (citing *Guy v. Baltimore*, 100 U.S. 434, 443 (1879)).

⁵⁷ *Id.* at 329; *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (stating that "once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a 'quagmire.'").

⁵⁸ *Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 717 N.W.2d 280, 282 (Wis. 2006).

States undoubtedly have a legitimate interest in promoting their economies and encouraging business growth, but they may not do so at the expense of out-of-state businesses. While the Wisconsin Supreme Court's decision to uphold the tax statute is incorrect, it provides an opportunity to clarify two disputed areas of law. First, the types of economic incentives available for states to promote their economies without violating the Dormant Commerce Clause are unclear. Second, the precise level of clarity needed in federal statutes in order to preclude review under the Dormant Commerce Clause is uncertain. However, despite these unanswered questions, Dormant Commerce Clause review of the tax statute in the case at hand should not have been barred by the ambiguous federal statute, and the Wisconsin tax scheme fails to pass constitutional analysis under the Dormant Commerce Clause.

