The ABCs of Access Fees

BY TERENCE R. BOGA

Recently, the Miami-Dade County Board of Supervisors prevailed in a lawsuit challenging an access fee for limousines dropping off passengers at Miami International Airport. That fee was $2.50 per trip and did not apply to taxis operating at the airport. A federal district court ruled that the differential treatment was justified by the increased congestion caused by limousines and their need for special parking areas. The court also concluded that the fee was not an unreasonable burden on interstate commerce.

This decision is one of the latest additions to a long line of cases addressing the legality of access fees for off-airport companies. Access fees have been contested, on constitutional and statutory grounds, in federal and state courts throughout the country. This article explains basic principles that are now settled and offers suggestions for airport operators who seek to generate revenue from access fees.

The Evansville Test

Modern access fee law largely has developed from a 1972 U.S. Supreme Court case involving two government charges on commercial airline passengers and airlines. One of them, levied by the **Evansville-Vanderburgh Airport Authority District**, was a "use and service charge" in the amount of $1 per passenger enplaning a commercial aircraft operated from **Dress Memorial Airport**. The airlines had to collect and remit the charge, less 6% allowed for their administrative costs. The airport authority devoted the revenue from the charge to construction, improvement, equipment and maintenance of the airport and its facilities.

The other charge at issue was a "service charge" imposed by the State of New Hampshire. That charge was levied on airlines, but they were allowed to pass it on to passengers. The charge was in the amount of $1 or $.50 per passenger enplaning an aircraft at any of the state's public airports, depending on the gross weight of the aircraft. Half of the revenue went to the state's aeronautical fund and the other half went to the airport operators in the form of unrestricted general revenues.

The U.S. Supreme Court upheld both charges against constitutional challenges filed by several airlines. Those challenges involved claims that the charges violated the right to travel, that they intruded into Congress' regulatory jurisdiction over interstate commerce, and that they denied equal protection of the law. The court characterized the two charges as a fee for the use of airport facilities, and its analysis focused primarily on the airlines' interstate commerce argument. In the key passage from its decision, the court ruled that a user fee is valid if it satisfies three criteria (commonly referred to as the "Evansville test"):

- The fee is based on some fair approximation of use or privilege for use.
- The fee is not discriminatory against interstate commerce.
- The fee is not excessive in comparison with the government benefit conferred.

Unhappy with the result in this case, Congress enacted the Anti-Head Tax Act the following year. Subject to a variety of exceptions, that statute prohibits state and political subdivisions from levying or collecting a "tax, fee, head charge, or other charge" on any of the following: individuals traveling in air commerce; the transportation of such individuals; the sale of air transportation; or the gross receipts from that air commerce or transportation. As explained below, the statute has been invoked unsuccessfully in preemption challenges to access fees for off-airport rental car companies.

Setting the Fees

The Evansville test is highly deferential to the business judgment exercised by airport operators in the establishment of access fees. If a fee passes the test, it is irrelevant that some other formula might reflect more exactly the relative use of airport facilities by individual users.

Two federal court cases illustrate this principle. In one, the Eleventh Circuit Court of Appeals applied the Evansville test to the **Sarasota-Manatee Airport Authority's** off-airport rental car "user fee" for **Sarasota-Bradenton Airport** (SRQ). That fee was 10% of gross receipts derived from automobile rentals to airport passengers. By contrast, hotels and motels were charged a "courtesy vehicle fee" of $50 or $100 (depending on vehicle size) or $800 per vehicle for an annual fee. The court characterized the gross receipts formula as "imperfect." It upheld the user fee,

however, on the basis that the formula was not an unfair approximation of the use being made of the airport facility.

More recently, a federal district court in Virginia applied the Evansville test to the **Norfolk Airport Authority's** off-airport parking operator "privilege fee" for **Norfolk International**. That fee was 8% of gross revenues derived from transporting customers to or from the airport. Limousines, taxis and hotel vehicles were subject to a different fee. The court concluded that it was rational for the airport authority to impose a percentage-based fee on companies that operated almost exclusively to supplement the airport's existing services.

The Evansville test is not the only standard that must be satisfied for access fees to survive constitutional challenge. If such fees are not rationally related to a legitimate government interest, they will be invalidated for violating equal protection rights or for resulting in a deprivation of property without due process of law. This "rational basis review" also is highly deferential.

Airport operators thus enjoy considerable discretion with respect to the amount and applicability of access fees. Appropriate factors to consider in the setting of the fees include:

- Fee amounts can be based on an approximation of the overall commercial benefit derived from the exploitation of the airport's presence.
- Fee amounts can reflect the airport's debt service, equipment, maintenance and planned future development costs.
- Formulas can be flat rate, per trip or a percentage of gross receipts attributable to airport customers.
- Formulas can vary according to business type and vehicle size.

Neither the Evansville test nor rational basis review requires airport operators to make formal findings when access fees are established. Still, airport operators should have an articulable and credible justification ready in case a challenge is filed.

The Preemption Myth

The most common statutory challenge to access fees is that they are preempted by federal law. Virtually all such challenges have failed.

Most preemption claims to date have been based on the Anti-Head Tax Act. In one case, for example, a rental car company invoked that statute in an effort to invalidate the City of Palm Springs' access fee for the **Palm Springs Regional Airport** (PSP). The Ninth Circuit Court of Appeals concluded that neither the text nor the legislative history of the statute suggests that it was intended to apply to fees on ground transportation service. Federal district courts in Louisiana and New York have made similar determinations.

Recently, two preemption claims have been asserted based on the Interstate Commerce Commission Termination Act of 1995 (ICCTA). With various exceptions, a provision in that statute prohibits state and political subdivisions from levying or collecting a "tax, fee, head charge, or other charge" on any of the following: individuals traveling in interstate commerce by motor carrier; the transportation of such individuals; the sale of passenger transportation in interstate commerce by motor carrier; or the gross receipts from that transportation. This provision is similar to the Anti-Head Tax in more than just language. Congress enacted this provision in response to a U.S. Supreme Court decision upholding an Oklahoma sales tax on purchases of interstate bus tickets.

Neither ICCTA preemption claim succeeded. In a state court case, the Appellate Court of Illinois determined that neither the text, structure or history of the statute indicates a congressional intent to preempt taxes on motor carrier departures from airports to nearby or out-of-state homes, hotels and businesses. The First Circuit Court of Appeals later reached the same conclusion in a federal court case concerning an access fee on ground transportation providers operating at Boston's Logan Airport.

Anti-Trust Defenses

Another, albeit less frequent, statutory challenge to access fees is that they contravene federal antitrust laws. One defense available to airport operators is the Local Government Antitrust Act of 1984. That federal statute precludes claims for monetary damages for antitrust violations.

State statutes also can provide a defense. U.S. Supreme Court precedent makes local government agencies exempt from federal antitrust laws when they implement a clearly expressed state policy. This exemption applies if suppression of competition is explicitly authorized by, or is the foreseeable result of, the enabling legislation. The state legislature's intent is critical if the enabling legislation lacks explicit authorization.

A comparison of two federal court decisions is instructive. One case involved the City and County of Denver's access fee and operating regulations for off-airport parking companies that provided shuttle bus service at the former **Stapleton International Airport**. The Tenth Circuit Court of Appeals determined that Denver was immune from an antitrust challenge because Colorado law expressed a state policy of displacing competition in the operation of airports and related activities, including off-airport shuttle bus parking. A more recent case involved the **Susquehanna Area Regional Airport Authority's** award of an exclusive contract for taxi pick up of passengers at **Harrisburg International** (MDT). A federal district court ruled that the airport authority was not immune from an antitrust claim because the enabling Pennsylvania statute did not explicitly or impliedly authorize competition-displacing contracts. Ironically, the court still dismissed the antitrust claim because only monetary damages were sought.

Airport operators thus should identify any provisions in their state statutes that authorize displacement of competition. In California, for example, the State Aeronautics Act actually requires public airport operators to limit or prohibit "destructive" business competition when managing their facilities and granting concessions.

Conclusion

Courts nationwide repeatedly have upheld access fees against constitutional and statutory challenges. These decisions confirm that access fees are a valuable means for airport operators to generate revenue for operating, maintenance and capital improvement expenses.

Terence R. Boga is a shareholder of the law firm Richards, Watson & Gershon in the Los Angeles office. He is a member of the firm's Transportation Practice Group and provides general counsel services for the Burbank-Glendale-Pasadena Airport Authority. He can be reached at 213.626.8484 or tboga@rwglaw.com.