

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32528

**U.S. Steel Mining Company,
Consolidation Coal Company,
Laurel Run Mining Company,
McElroy Coal Company,
Arch Coal, Inc.,
Mid-Vol Leasing, Inc.
Coastal Coal-West Virginia LLC,
Elk Run Coal Company, Inc.
Paynter Branch Mining, Inc.
Kingston Resources, Inc.,
Pioneer Fuel Corporation,**

Petitioners Below, Appellants

v.

**The Honorable Virgil Helton,
West Virginia State Tax Commissioner,**

Respondent Below, Appellee

**AFFILIATED CONSTRUCTION TRADES FOUNDATION'S
BRIEF AS *AMICUS CURIAE***

Presented by:

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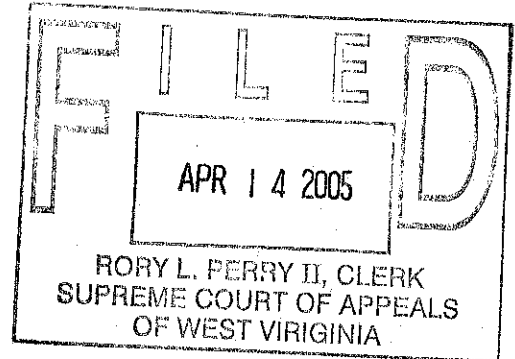


Table of Authorities

Federal Court Cases

<i>Itel Containers International Corporation v. Huddleston</i> , 507 U.S. 60, 113 S.Ct. 1095 (1993)	4
<i>Michelin Tire Corporation v. Wages</i> , 423 W.S. 276, 96 S.Ct. 535 (1976)	4, 5, 6
<i>Richfield Oil v. State Board of Equalization</i> , 329 U.S. 69 (1949)	5
<i>United States v. International Business Machines Corporation</i> , 517 U.S. 843 (1996)	6
<i>Washington Department of Revenue v. Association of Washington Stevedoring Cos.</i> , 435 U.S. 734, 98 S.Ct. 1388 (1978)	4, 5, 6

United States Constitution

U. S. Const. art. 1, §10, cl. 3	3
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West Virginia Statute

W. Va. Code § 11-13A-3	3
W. Va. Code § 11-13A-6	3
W. Va. Code § 11-12B-3	3
W. Va. Code § 22-2-32	3

Introduction and Statement of Facts

As this Court is aware the instant matter involves the request for refunds from the State of West Virginia for severance taxes paid by the coal company Appellants. The coal company Appellants Petitioned this Court urging it to reverse the Circuit Court of Kanawha County's affirmation of the West Virginia State Tax Commissioner's denial of those requests for refunds. This Court accepted the Petition in this matter and this is the *Affiliated Construction Trades Brief as Amicus Curiae* conditionally filed in accordance with Rule 19 of the West Virginia Rules of Appellate Procedure. The Affiliated Construction Trades Foundation urges this Court to Deny this appeal and to affirm the Opinion and Final Order of the Circuit Court of Kanawha County.

Discussion of the law and argument

While seemingly a complex matter involving issues of constitutional interpretation and a review of a series of United States Supreme Court decisions, the issue is surprisingly simple. That is, does the imposition of coal severance taxes by the State of West Virginia on coal severed and processed in West Virginia violate the Import-Export Clause of the United States Constitution (Art.1 § 10, clause 2) when the severance tax is imposed on coal that is exported from the United States. The Tax Commissioner of the State of West Virginia and the Circuit Court of Kanawha County have held that there is no violation of the United States Constitution. ACT agrees with those holdings.

The bottom line on these two holding is the severance taxes at issue (West Virginia Code §§ 11-13A-3, 11-13A-6, 11-12B-3 and 22-2-32) are *nondiscriminatory*,

that is as held by the Circuit Court, “the severance taxes at issue are not levied on coal because it is an export, but the taxes apply equally to every person privileged to sever, extract, reduce to possession or produce for sale, profit, or commercial use coal, and not just the foreign exporters of coal.”

In coming to this holding the Circuit Court correctly looked to the United States Supreme Court’s holdings in *Michelin Tire Corporation v. Wages*, 423 U.S. 276, 96 S.Ct. 535 (1976) and *Washington Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388 (1978). The Circuit Court, like Justice Blackman in *Washington Stevedoring* (435 U.S. at 752) when discussing the *Michelin* decision, “*Michelin* initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires or tubes were imports. Instead it analyzed the nature of the tax whether it was an ‘Impost or Duty.’”¹

The “different” approach cited by Justice Blackman was a break with the U. S. Supreme Court’s early decisions in this area that focused, virtually exclusively, on a determination whether the goods at issue were imports or exports. The “modern approach” to Import-Export looks rather to the concerns Framers of the Constitution sought to alleviate by enacting the Import-Export Clause of the Constitution (see *Michelin*, at 285-286, 540-541, see also *Itel Containers International Corporation v. Huddleston*, 507 U.S. 60, 113 S. Ct. 1095 (1993). The concerns of the Framers, as articulated by the U.S. Supreme Court of Appeals in *Michelin* and *Washington Stevedoring*, involve infringement on the Federal government’s ability to speak with one voice in the area of foreign policy and trade, infringement on the ability of the Federal

¹ Generally speaking, the United States Supreme Court applied the new approach to import cases in the *Michelin* decision and to exports in the *Washington Stevedoring* decision.

government to collect revenues from imports and the maintenance of harmony among the states. In the instant matter it is clear, under the U.S. Supreme Court's analysis, that the second prong is not at issue and the first and third prongs are not violated by West Virginia's generally applicable nondiscriminatory severance tax.

With regard to the issue of infringement on the Federal government's ability to speak with one voice, the instant matter, like the business and occupation tax in *Washington Stevedoring*, creates no violation. The West Virginia severance tax is generally applicable and "has not created any special protective tariff", is based upon extraction conducted in West Virginia and imposes no tax on a foreign business nor vessel. (*Id.* at 754). The same lack of violation is true for the third prong, the maintenance of harmony among the states. In *Washington Stevedoring*, the U.S. Supreme Court stated that the "third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State." (*Id.* at 754-755). As the Circuit Court correctly held in the instant matter, "There is an obvious nexus between the petitioners and the State. Moreover, by availing themselves of the state's natural resources and its accompanying infrastructure, petitioners are merely compensating the State for services rendered." It is clear that the Circuit Court was correct in its application of the modern Import-Export Clause analysis.

The Appellants however, urge this Court to reject any analysis based upon *Michelin* and *Washington Stevedoring* arguing instead that the U.S. Supreme Court's decision in *Richfield Oil v. State Board of Equalization*, 329 U.S. 69 (1949) is the controlling law. In this regard, the Petitioners look to dicta in the Supreme Court's

decision in *United States v. International Business Machines Corporation*, 517 U.S. 843 (1996). However, as stated by the Circuit Court in the instant matter, the U.S. Supreme Court in the *IBM* case was concerned with the application of the *Michelin* and *Washington Stevedoring* analysis to a review of the Export Clause of the United States Constitution (Article 1, § 9 clause 5) and not the scope of the Court's *Michelin* and *Washington Stevedoring* holdings in the context of the Import-Export Clause. In fact, the *IBM* Court clearly stated that it was declining to extend the *Michelin* and *Washington Stevedoring* analysis to the Export Clause context except to the extent that it "informs" their consideration. The Appellants reliance on *IBM* is simply misplaced.

Lastly, the Appellants argue that the taxes at issue in this matter offend two of the concerns of the Founders regarding the Import-Export clause. Much of the Appellants argument turns on factual issues and to the extent that ACT has not addressed the matters herein ACT will defer to the arguments of the West Virginia Attorney General and the State Tax Commissioner of West Virginia.

Conclusion

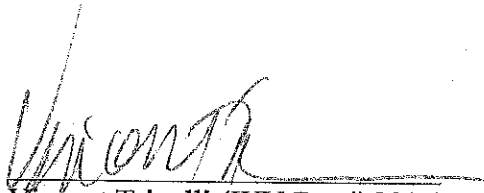
It is clear from the Appellants arguments in this matter that they are essentially asking to be permitted to extract the resources of this State and export those resources without as they state paying the severance tax to "recoup [the State's] expenses for services rendered." The Appellants' are urging this Court to ignore the U.S. Supreme Court's holdings that move away from the "simple question" of its earlier analysis of Import-Export Clause matters. The Tax Commissioner and the Circuit Court have withstood this urging and have undertaken the "modern approach" by looking into the policy concerns raised by the Framers of the Constitution. ACT urges this Court to

uphold the actions of the Tax Commissioner and the Circuit Court by Denying the Appellants request that the Circuit Court Order be reversed. The Appellants request for a refund has been Denied and this Court, for the reasons set out herein and those of the Tax Commissioner, should uphold that Denial.

Respectfully submitted and conditionally filed this 13th day of April, 2005.

The Affiliated Construction Trades Foundation, a
division of the West Virginia State Building and
Construction Trades Council, AFL-CIO

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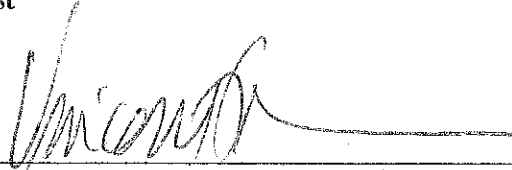
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on April 13, 2005 a true and correct copy of **Affiliated Construction Trades Foundation's Motion for Leave to File Brief as Amicus Curiae** and **Affiliated Construction Trades Foundation's Brief as Amicus Curiae** was sent by U.S. mail, postage prepaid, addressed to the following:

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A handwritten signature in cursive script, appearing to read "Vincent Trivelli", written over a horizontal line.

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