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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Recovery From Airlines of Customs Service Preclearance Cost]

FILE: B-196342 DATE: April 15, 1980

MATTER OF: Customs Service Recovery of Preclearance (Including TECS) Cost Under User Charge Statute, 31 U.S.C. § 483a

DIGEST: Where Customs Service receives no advantage from conducting passenger preclearance activity on foreign soil vis a vis conducting passenger clearance activities within the United States and preclearance activity was initiated at airlines request, results in substantial cost savings to airlines and permits airlines to better use their resources, record supports determination that airlines are primary beneficiaries of preclearance service. Therefore, under authority of 31 U.S.C. § 483a, Customs may continue to assess user charge against airlines and recover that portion of its costs (including TECS) that are increased by its conducting passenger preclearance on foreign soil.

As directed in the Conference Report (H.R. Rep. No. 96-471, p. 6) accompanying the Treasury, Postal Service and General Government Appropriation Act, 1980, Pub. L. No. 96-74, September 29, 1979, 93 Stat. 559, the Assistant Secretary (Enforcement and Operations), Department of the Treasury requested our views on a dispute between the U.S. Customs Service (Customs) and the airlines as to what portion, if any, of the cost of the Treasury Enforcement Communications System (TECS) should be included in fees assessed airlines using Customs preclearance services provided at some foreign airports. For the reasons explained below, we believe Customs is legally entitled to charge airlines wishing such services the indicated preclearance costs, including the special TECS installations costs.

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Background

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The U.S. Federal Inspection Service (FIS) conducts preclearance inspections of passengers, crew members and their baggage at certain foreign international airports prior to their boarding of a flight bound for the United States. Preclearance services are provided for both U.S. and foreign carriers. Generally the inspection is of regularly scheduled flights, but chartered commercial flights are also inspected whenever resources permit. A preclearance inspection is basically the same inspection an individual would experience if he arrived at a U.S. port

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of entry; however, it is conducted on foreign soil. As a result of this inspection, the individual usually does not have to to go through U.S. Customs inspection again upon arrival in the United States.

Participating in the FIS are Customs, the Immigration and Naturalization Service (INS) and the Animal and Plant Health Inspection Service (APHIS). While preclearance began as an experiment at one location in 1952, it has grown until, in 1979, there were eight preclearance sites in three countries staffed by 177 Customs, 70 INS and 3 APHIS inspectors dedicated to passenger preclearance. In 1978, the total FIS annual budget for preclearance operations was $12,913,472. The serviced airlines paid $5,356,721 in user charges and overtime. Preclearance is handling over 20 percent of the annual air passenger traffic to the United States.

TECS is a computerized data processing system, with the central computers located in San Diego, California, and terminals providing access to the computer at a number of ports of entry and at preclearance sites outside the United States. It contains information on persons or vehicles involved in smuggling activity and interfaces with other computer-based information retrieval systems providing data on individuals involved in other criminal activity.

Customs officials feed information identifying persons or vehicles entering the United States into TECS and it immediately tells them whether the person or individual has previously been involved in smuggling. If so, Customs can take appropriate action which might include requiring the person or vehicle to undergo a more thorough examination or search.

Eighteen years elapsed between the initiation of preclearance in 1952, and Custom's adoption of regulations for recovering certain costs connected with preclearance in 1970. Prior to that date, the only cost recovered was overtime for employees which is reimbursable under specific statutory authority not in question here.

In a 1968 decision commenting on the Commerce Department's proposal to recover certain preclearance costs, we stated that:

> "We agree with the Assistant Secretary that the language of 31 U.S.C. 483a is very broad, and that the section contemplates that those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof, at least to the extent that it appears that a special benefit is conferred. In the instant case the Assistant Secretary's letter discloses that the costs (including related costs) of stationing men and performing services in Canada are considerably greater than

> total costs to Customs would be if all of the Customs operations were performed in the United States. Also, as indicated above, the preclearance operation in Canada is essentially of advantage to the airline rather than the Bureau of Customs. Accordingly, it is our view that to the extent the costs (including employees' compensation) of the requested preclearance services in Canada are in excess of the costs that Customs would incur if all of the Customs operations involved were performed in the United States, a charge covering such excess costs would be authorized by 31 U.S.C. 483a, if fixed in accordance with the provisions of such section." 48 Comp. Gen. 24, 28 (1968).

Thereafter, under authority of section 501 of the Independent Offices Appropriations Act, 1952, 31 U.S.C. § 483a (1976), the so-called User Charge Statute, Customs adopted regulations prescribing costs to be reimbursed by airlines for passenger preclearance in foreign countries. These regulations are set forth in 19 C.F.R. § 24.18.

On June 13, 1979, Customs informed representatives attending the sixth Joint Customs/Air Industry Facilitation Meeting that the entire cost of TECS at preclearance sites would be billed to the airlines under the authority of the User Charge Statute, and invited them to provide any substantive legal or cost issues to Customs for consideration.

By letter dated July 20, 1979, the Air Transport Association (ATA) which represents virtually all Federally certificated United States scheduled airlines, opposes the imposition of the charges. Additionally, the ATA requested that Customs "review the propriety of its excess preclearance cost regulation", which in light of several judicial opinions, it feels are without legal foundation.

In preparation of this decision we have considered both the position of the ATA, as expressed in its July 20, letter as well as Treasury's response to it.

Discussion

Since our decision in 48 Comp. Gen. 24 (1968), and Customs adoption of its regulations on recovering preclearance costs, a number of decisions have been rendered by the Supreme Court and lower Federal Courts construing the User Charge Statute which have caused ATA to question Custom's authority to charge airlines for the cost of preclearance in general and TECS in particular.

In National Cable Television Association v. United States, (NCTA), 415 U.S. 336 (1974) the Court held that fees assessed under the User Charge Statute must be based on "value to the recipient" and not on "public policy" or "interest served" or "other pertinent facts."

In a companion case, Federal Power Commission v. New England Power Co., (New England Power), 415 U.S. 345 (1975), the Court amplified its NCTA decision. The Court held that whole industries are not in the category of those who may be assessed under the User Charge Statute, its thrust reaching only specific charges for specific services to specific individuals or companies. Id. 349-351.

The Court pointed out that Office of Management and Budget Circular A-25 construing the Act states that chargeable services:

> "include agency action which 'provides special benefits ... above and beyond those which accrue to the public at large .... For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:
>
> '(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance or a license to carry on a specific business); or
>
> '(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or
>
> '(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).'" 45 U.S. 349, 350 footnote 3.

Thereafter, the Court of Appeals for the District of Columbia Circuit issued a series of decisions elaborating on the standards laid down in NCTA and New England Power. See Electronics Industries Association, Consumer Electronics Group v. Federal Communications Commission, (EIA), 554 F. 2d 1109 (1976) and National Association of Broadcasters v. Federal Communications Commission, 554 F. 2d 1118, (1976).

Further, while it is clear that any expense incurred to serve the public generally must be excluded from a fee assessed under the User Charge Statute, it is equally clear that a fee may be charged for an activity even though the general public secondarily or incidentally benefits from it, EIA, supra., 1114-1115; National Cable Television Association, Inc. v. Federal Communications Commission, 554 F. 2d 1094, 1104 (D. C. Cir., 1976); Public Service Company of Colorado v. Andrus, 433 F. Supp. 144, 152 (D. C. Colo., 1977).

It is ATA's position that the elaborate, costly analysis required by the courts for setting the proper charge is unnecessary since the excess preclearance costs, including costs associated with TECS, are incurred for services which may be considered as "benefiting broadly the general public" and therefore must be excluded from any fee assessed under the User Charge Statute.

In support of its position ATA cites Treasury's 1979 Report on Passenger Preclearance Operations, (1979 Report), which was submitted to both the House and Senate Appropriations Committees. Among other parts, ATA quotes the following from page 39:

> "In general, preclearance provides a wide variety of benefits. The benefits to U.S. agencies and other interested parties are:
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> -- APHIS is able to interdict illegal products before they enter the U.S.
>
> -- INS is able to interdict inadmissable aliens before their departure for the U.S.
>
> -- U.S. airlines gain commercial advantages and can more efficiently use their resources.
>
> -- Passengers benefit from the greater convenience, especially those traveling on the same airline bound to an airport beyond the initial U.S. gateway airport...
>
> -- Customs is relieved of 20 percent of passenger clearance at U.S. gateway airports."

On the other hand, Customs takes the position that the conduct of preclearance primarily benefits the airlines. It points out that:

> "In 1952, at the request of American Airlines, a pilot preclearance program was intitiated at Toronto, Canada. The airline believed that such a system would aid in the efficient use of its

resources. Four potential advantages were identified over the next few years: 1) greater security with regard to illegal aliens and agricultural products; 2) relief from the need to expand U.S. airports; 3) improved international relations; and 4) increased utilization of aircraft. No real advantages to Customs in its primary mission were identified. This program continued without statutory or treaty authority until 1974, at which time, in order to prevent a termination of the program, agreements were negotiated with the foreign governments. These negotiations were lobbied for, intensely, by the airline and tourist industries." (Emphasis supplied.)

Furthermore, the 1979 Report identifies the following benefits which the airlines have claimed:

"a. Facilitates travel for the international traveler;

"b. Provides competitive advantage;

"c. Utilizes resources better;

"d. Saves the airlines money."

While the report concluded that the evidence concerning the first two of the claimed benefits was inconclusive, as to the latter two it stated:

" c. Better utilization of resources

"According to the airlines, preclearance allows them to save on ground time and this in turn decreases the numbers of aircraft required to service their routes. There are savings accruing to the airlines due to quick turn around capabilities for planes used on preclearance routes. Planes continuing on to other destinations also save time. In addition, aircraft do not have to be ready or available at the preclearance site until flight departure time. Upon arrival in the U.S., the aircraft is free to proceed directly to that carrier's regular terminal. Contrast this with a carrier that first stops off at an international arrival area, deplanes its passengers, and then has the aircraft towed to its regular terminal for further use. In theory, operational costs associated with manpower and equipment tend to increase proportionally with the increase in time required to remain on the ground.

"Figures are not readily accessible on how much additional flying time is available to the airlines because of preclearance. An extensive analysis of alternative use of aircraft equipment, the amount of additional aircraft that would be needed to maintain the present passenger loads, fuel costs, crew times, airports' abilities to handle additional aircraft, etc., would be required to determine the exact extent of resource savings occurring because of preclearance. It can be assumed, however, that the resource savings are extensive based on the airlines continued strong support of preclearance.

"d. Costs/savings to the airlines

"The airlines save money using preclearance because:

(1) preclearance operations are more efficient; airlines need fewer aircraft, crews, less fuel, etc., to accomplish the same task;

(2) the planes spend less time on the ground, therefore, the airlines ground costs are decreased (FAA estimates that ground time costs the airlines an average of $4.07 per minute); and

(3) airlines can use domestic terminals instead of international terminals where user fees are higher for example (the Port Authority of New York charges arriving user airlines $ 5.35 per passenger and $78 per aircraft for the use of the International Arrival Building at JFK).

"Based upon a 1971 ATA study, it was estimated that the American carriers realized a total economic benefit for 10 years of $158,000,000. In 1978 dollars, assuming a 6 percent inflation rate, this is equivalent to an annual saving of $40,500,000. In addition, the claimed additional business the airlines receive as a result of 'passenger facilitation' and 'competitive advantages' should provide the airlines with additional revenue.

"Therefore, for the airlines preclearance is a useful service providing them with significant economic benefits. If the airlines did not have to pay the excess costs or user

charges, $2,190,014 for 1978, then their benefits from preclearance would be even higher." 1979 Rept. pp. 24-25.

ATA has also indicated that airlines taking advantage of preclearance experience substantial savings both in capital outlays and annual operating expenses. It also notes that eliminating preclearance could disrupt the whole operation of an airline. See Hearings on Bureau of Customs Pre-Clearance Activities in Canada, Bermuda, and the Bahamas before Subcommittee on the Treasury, Postal Service, and General Government, House Appropriations Committee, 93rd Cong., 1st Sess., statement of Stuart G. Tipton, Chairman, ATA, pp. 6-8 (1973).

The Customs Service has assumed that its regular clearance activities are conducted primarily to benefit the general public and Customs has excluded all regularly incurred costs from those it would charge the airlines for preclearance. It seeks to recover only that portion of the costs that are increased by its conducting preclearance activities on foreign soil. It should also be noted that two other Federal agencies involved in the preclearance activities i.e., APHIS and INS who agree that preclearance is useful in helping them carry out their particular missions, have elected to absorb any additional costs incurred. Customs, on the other hand, finds preclearance an "expensive and less efficient use of ite limited resources" and, as stressed in the 1979 Treasury report, quoted supra, of no real advantage in carrying out its primary mission. Moreover, as the Customs' submission to us points out, preclearance is not a service provided routinely to the airline industry as a whole but only when specifically requested by a particular airline. In such cases only the airline requesting and receiving the service is charged a fee commensurate with the service. Others, "who clear Customs in the traditional fashion at the border," are not charged. This policy is clearly consistent with the court cases, cited supra.

On the basis of the Treasury report, discussed above, and the arguments presented by ATA and Customs, we cannot say that the Customs Service position is arbitrary or capricious. Customs may, therefore, continue to assess a user charge against the airlines for providing preclearance services on foreign soil.

The costs which Customs assigns to preclearance include, among others, housing allowances, post of duty allowances, home leave and associated transportation costs, and equipment, supplies and administrative costs (including costs of supervising the preclearance installation) over and above that which Customs would normally incur. 19 C.F.R. § 24.18(c). All these costs appear to be proper charges under the User Charge Statute.

As for TECS, Customs has stated that it is not charging for the system's basic costs, but only for installation and monthly recurring costs at precleance sites. It is Custom's position that these are all added costs which it would not incur if the services were performed in the United States since no additional installation of TECS would be required. Assuming that Customs' position is factually correct, we see no legal basis on which to object to Customs' recovery of TECS' cost at preclearance sites.

On the basis of the information before us, we find no legal basis to object to the Customs Service charging the above indicated costs of preclearance, including TECS, to airlines using the service.

Sincerely yours,

Comptroller General
of the United States