No. 32528 - U.S. Steel Mining Company, LLC, Consolidated 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 v. The Honorable Virgil Helton, West Virginia State Tax Commissioner

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OF WEST VIRGINIA

Davis, J., concurring:

In this proceeding, several coal producing taxpayers challenged six state tax statutes[1] as violating the Import-Export Clause of the federal constitution.[2] The majority opinion, relying upon sound legal analysis, determined that none of the statutes violated the Import-Export Clause. I fully concur in the majority decision and its analysis. I have chosen to write separately to emphasize the correctness of the legal analysis enunciated in the majority decision.

[1]Two of the statutes addressed in the majority opinion, W. Va. Code § 11-13A-4 and W. Va. Code § 22-3-11, were not expressly listed in the "KIND OF PROCEEDING AND NATURE OF THE RULING BELOW" section in the taxpayers' brief as having been contested in the lower courts. However, W. Va. Code § 11-13A-4 was discussed in section 3 of the "DISCUSSION OF LAW" part of the taxpayers' brief. With reference to W. Va. Code § 22-3-11, the State's brief indicated that "Taxpayers' counsel, in his opening remarks to the administrative tribunal, seemed to say that Taxpayers were contesting [W. Va. Code § 22-3-11]."

[2]The majority opinion correctly noted that the record was unclear as to whether all of the taxpayers were challenging each of the statutes in question.

DISCUSSION

The United States Supreme Court has long held that the Import-Export Clause "'was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services.'" *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 70, 94 S. Ct. 2108, 2113, 40 L. Ed. 2d 660 (1974) (quoting *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286, 288, 69 S. Ct. 1075, 1077, 93 L. Ed. 1366 (1949)). Consequently, the Import-Export Clause does not prohibit states from imposing "generally applicable, nondiscriminatory taxes even if those taxes fall on . . . exports." *United States v. I.B.M. Corp.*, 517 U.S. 843, 852, 116 S. Ct. 1793, 1799, 135 L. Ed. 2d 124 (1996) (citing *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978); *Michelin Tire Corp. v. W.L. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976)). For this reason, the Supreme Court has expressly "rejected the assertion that the Import-Export Clause absolutely prohibits all taxation of . . . exports." *I.B.M. Corp.*, 517 U.S. at 857, 116 S. Ct. at 1802 (citation omitted). With these general considerations in mind, I address three issues: (a) the nature and purpose of the severance tax statutes; (b) assessment of severance taxes based upon sale price; and (c) taxing the loading of coal.

A. The Nature and Purpose of the Severance Tax Statutes

The tax statutes at issue in this case are nondiscriminatory. The statutes apply to the production of coal regardless of whether the coal is to be sold within the United States or abroad. That is, the statutes do not set out special taxing provisions for exported coal or coal used domestically. The taxes apply without regard to the ultimate destination of the coal. Further, the taxes do not attach to coal that is in transit or export within the meaning of the Import-Export Clause.[3]

For the sake of presentation here, the taxpayers have challenged five severance tax statutes[4] as violating the Import-Export Clause: a severance privilege tax, a severance tax for local governments, a minimum severance tax, a mining and reclamation operations fund tax, and a special reclamation tax.

First, the "severance privilege tax" is set forth in W. Va. Code § 11-13A-3. This statute imposes a tax "[u]pon every person exercising the privilege of engaging or continuing within this state in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use coal, limestone or sandstone[.]" *Id.* With some

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[3]This issue is squarely addressed in Section C, *infra*.

[4]Only five of the six challenged statutes are discussed herein. The sixth statute involved in this case, W. Va. Code § 11-13A-4, defines certain aspects of mining that may be taxed. This statute is set out and discussed in Section C, *infra*.

exceptions, this tax is imposed at a rate of 5% of the gross income derived from the sale of coal.

Second, the "severance tax for local governments" is set out under W. Va. Code § 11-13A-6. This statute imposes a tax "[u]pon every person exercising the privilege of engaging or continuing within this state in the business of severing coal, or preparing coal (or both severing and preparing coal), for sale, profit or commercial use[.]" *Id.* This tax is imposed at a rate of 0.35% of the sales proceeds of coal. All the taxes collected under this statute are turned over to local governments.[5]

Third, the "minimum severance tax" is set under W. Va. Code § 11-12B-3. This statute imposes a tax on "every person exercising the privilege of engaging within this state in severing, extracting, reducing to possession or producing coal for sale, profit or commercial use[.]"[6] *Id.* This tax is imposed at a rate of $0.75 per ton of coal mined.

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[5]*See* W. Va. Code § 11-13A-6(b) ("Seventy-five percent of the net proceeds of this additional tax on coal shall be distributed . . . to the various counties of this state in which the coal . . . was located at the time it was severed from the ground. . . . The remaining twenty-five percent of the net proceeds of this additional tax on coal shall be distributed among all the counties and municipalities of this state[.]").

[6]This statute further provides that "the minimum severance tax on coal may not be imposed on any ton of coal produced on or after the first day of April, two thousand, on which the severance tax is imposed by the provisions of [W. Va. Code § 11-13A-3]." W. Va. Code § 11-12B-3.

Fourth, the "mining and reclamation operations fund tax" is imposed under W. Va. Code § 22-3-32. This statute imposes a tax "[u]pon every person in this state engaging in the privilege of severing, extracting, reducing to possession or producing coal for sale, profit or commercial use[.]" *Id.* This tax is imposed at the rate of $0.02 per ton of coal mined. Taxes collected under this statute are placed in a mining and reclamation operations fund. The statute states that the moneys in such fund must be used "solely for the purposes of carrying out those statutory duties relating to the enforcement of environmental regulatory programs for the coal industry as imposed by this chapter and the federal Surface Mining Control and Reclamation Act of 1977[.]" *Id.*

Finally, the "special reclamation tax" is set out under W. Va. Code § 22-3-11. Under this statute, a tax is imposed on "every person conducting coal surface mining operations[.]" *Id.* This tax is imposed at the rate of $0.03 per ton of coal mined. The taxes collected under this statute are to be placed in a special reclamation fund. It is further provided by the statute that the taxes collected for the fund are to be expended "for the reclamation and rehabilitation of lands which were subjected to permitted surface mining operations and abandoned . . . and where the land is not eligible for abandoned mine land reclamation funds[.]" *Id.*

The coal severance taxes imposed by the above statutes are not unique. Other

jurisdictions that produce coal have similar coal severance tax statutes.[7] *See, e.g.*, Ala. Code § 40-13-2 (1980) ("There is hereby levied, in addition to all other taxes imposed by law, an excise and privilege tax on every person severing coal within Alabama."); Kan. Stat. Ann. § 79-4217(a) (2005) ("There is hereby imposed an excise tax upon the severance and production of coal[.]"); Ky. Rev. Stat. Ann. § 143.020 (1978) ("For the privilege of severing or processing coal, in addition to all other taxes imposed by law, a tax is hereby levied on every taxpayer engaged in severing and/or processing coal within this Commonwealth[.]"); La. Stat. Ann. § 47:631 (1997) ("Taxes as authorized by Article VII, Section 4 of the Constitution of Louisiana are hereby levied upon all natural resources severed from the soil . . . including . . . coal, lignite, and ores[.]"); Mont. Stat. Ann. § 15-35-103(1) (1995) ("A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule . . . ."); Mont. Const. art. 9, § 5 (1979) ("The legislature shall dedicate not less than one-fourth (1/4) of the coal severance tax to a trust fund[.]"); N.M. Stat. Ann. § 7-26-6(A) (1993) ("The severance tax on coal is measured by the quantity of coal severed and saved. The taxable event is sale, transportation out of New Mexico or consumption of the coal, whichever first occurs."); N.D. Cent. Code § 57-61-01 (2001) ("There is hereby imposed upon all coal severed for sale or for industrial purposes by coal mines within the state a tax[.]"); N.D. Cent. Code § 57-61-01.5(1) (1995) ("The state tax commissioner shall

[7]"Most of the States raise revenue by levying a severance tax on mineral production. The first such tax was imposed by Michigan in 1846. By 1979, 33 States had adopted some type of severance tax." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 n.13, 101 S. Ct. 2946, 2957 n.13, 69 L. Ed. 2d 884 (1981) (citations omitted).

transfer revenue from the tax imposed by this section to the state treasurer for deposit in a special fund in the state treasury, which is hereby created, to be known as the lignite research fund. Such moneys must be used for contracts for land reclamation research projects and for research, development, and marketing of lignite and products derived from lignite."); Ohio Rev. Code § 5749.02(A) (2005) ("For the purpose of providing revenue to administer the state's coal mining and reclamation regulatory program, to meet the environmental and resource management needs of this state, and to reclaim land affected by mining, an excise tax is hereby levied on the privilege of engaging in the severance of natural resources from the soil or water of this state."); Tenn. Code Ann. § 67-7-103(a) (1981) ("There is hereby levied a severance tax on all coal products severed from the ground in Tennessee. The tax is levied upon the entire production in the state regardless of the place of sale or the fact that delivery may be made outside the state."); Tenn. Code Ann. § 67-7-110(a) (2005) ("The [coal] tax shall be levied for the use and benefit of local governments only and all revenues collected from the tax, except deductions for administration and collection provided for in this part, shall be allocated to the county from which such coal products were severed."); Wy. Stat. Ann. § 39-14-103(a)(i) (1999) ("There is levied a severance tax on the value of the gross product for the privilege of severing or extracting both surface and underground coal in the state.").

The general purpose behind coal severance taxes was succinctly stated by a commentator as follows:

> Two rationales are advanced to support the imposition of severance taxes. One is that mining or resource production imposes burdens upon the host community for which it should be compensated. By this view, severance taxes are necessary to repay the levying jurisdiction for damage to its infrastructure, environment, lifestyle and heritage caused by extraction of natural resources. . . .
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> A second rationale supporting imposition of severance taxes is the need of the state for revenues to pay for public services, quite apart from those provided to the severing industry.

John S. Lowe, *Severance Taxes as an Issue of Energy Sectionalism*, 5 Energy L.J. 357, 360-61 (1984). Another commentator has addressed the purposes behind coal severance taxes more extensively as follows:

> Increased coal severance tax rates have enabled coal producing states to achieve a variety of policy goals designed to reduce the burden that coal production places upon them. The first of these goals is to use severance tax revenue to compensate the states' future generations for the irretrievable loss of their coal resource. . . . This is accomplished by placing a percentage of the severance tax revenue into a permanent trust fund to be drawn upon to aid the states' economies when the coal resources inevitably are depleted.
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> A second goal of increased severance taxes is to force coal producers to internalize the impact costs that they impose upon the states. Coal production requires additional state government expenditures to provide environmental monitoring, road construction, and other related services. Despite strict state and federal reclamation laws, coal mining causes irreversible damage to the land and to the natural acquifers beneath it. Indirectly, coal production harms the public health and threatens the social well-being of mining communities. The states, by including these costs in the calculation of severance tax rates, compel coal producers to raise the price of coal to levels that reflect the public costs of coal production.

> Use of coal severance taxes as regulatory mechanisms to control mining rates and methods is another goal of increased severance tax rates. In many instances, when states raise their severance tax levels, the price of coal may rise high enough to reduce the rate of extraction. A slower extraction rate can soften the harsh effects of rapid coal development. Levying a higher severance tax on coal mined by undesirable methods can encourage producers to use less objectionable methods.
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> The emergence of state severance taxation as a means of protecting local interests from rapid coal development affords coal states greater control over coal development. In light of the history of mineral exploitation . . . and the shortcomings of federal aid, the assertion of state sovereign powers to meet the increasing social and economic demands created by coal production has come as no surprise. The rise of severance taxation, in fact, has been welcomed as an effective means of meeting the distinctive demands place[d] upon each coal producing state by the new coal rush. The legislatures of coal producing states have shown great care in crafting severance tax schemes that ensure adequate revenues to provide for the needs of impacted areas, while preserving the health of the local coal industry.

Daniel L. Harris, *Western Coal Severance Taxes and Congress: A Question of State Sovereignty*, 61 Or. L. Rev. 589, 591–611 (1982).

It is clear from the above discussion that the coal severance tax statutes assailed in this case are presumptively a valid exercise of the State's sovereignty. *See Central Realty Co. v. Martin*, 126 W. Va. 915, 920, 30 S.E.2d 720, 723 (1944) ("The power to tax property and the citizens of a state is an attribute of sovereignty derived from necessity, and is one of the inherent powers of government."). The taxpayers have attempted to overcome this strong

presumption by making the two Import-Export Clause arguments that are discussed below.

B. Assessment of Severance Taxes Based upon Sale Price

The first argument raised by the taxpayers is that, to the extent that the amount of severance taxes for exported coal is determined by the exported sale price, the taxes violate the Import-Export Clause.[8] This argument is disingenuous because it looks at the severance taxes in isolation from the purpose for which they are imposed. To buttress their flawed argument, the taxpayers rely upon *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S. Ct. 156, 91 L. Ed. 80 (1946).

Richfield involved a general sales tax that the state of California imposed upon the sale of all goods. This tax was imposed upon the sale of oil that was made to a foreign entity. The Supreme Court struck down the tax as violating the Import-Export Clause. The taxpayers in the instant case take the position that *Richfield* stands for the proposition that the Import-Export Clause prohibits assessment of a tax based upon the contract sale price. Nothing in *Richfield* remotely stands for such a proposition. *Richfield* simply stands for the proposition that a tax, regardless of how it is determined, cannot be imposed upon goods that are in export transit. *See Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900

[8]As I previously mentioned, none of the severance taxes impose a different tax or taxing method upon coal. To the extent that a sale price is used to determine the amount of a severance tax, the method applies regardless of whether the coal is sold in the United States or abroad.

F.2d 816, 821 (5th Cir. 1990) (applying *Richfield* to strike down a tax that was imposed upon goods that were in transit).

The argument raised by the taxpayers in this case was examined in the context of the Commerce Clause in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981). *Commonwealth Edison* was filed by several Montana coal producers, and their utility customers in other states, challenging Montana's coal severance tax. One of the issues raised in *Commonwealth Edison* was that the tax was discriminatory "because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States." *Commonwealth Edison*, 453 U.S. at 617-18, 101 S. Ct. at 2953-54. The Supreme Court rejected this argument and upheld Montana's coal severance tax.

The coal severance tax that was imposed by Montana, like West Virginia, allowed for the tax to be determined based upon the contract sale price. *Commonwealth Edison* stated that under Montana's statute, "the value of the coal is determined by the 'contract sales price' which is defined as 'the price of coal extracted and prepared for shipment f. o. b. mine[.]'" *Commonwealth Edison Co. v. Montana*, 453 U.S. at 613 n.1, 101 S. Ct. at 2951 n.1. More importantly, *Commonwealth Edison* stated that "the Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this even-handed

formula." *Commonwealth Edison*, 453 U.S. at 618, 101 S. Ct. at 2954. Finally, the decision in *Commonwealth Edison* placed Montana's severance tax in the proper context of its general purpose:

> Furthermore, there can be no question that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity. In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs State (quite apart from the right of that or any other State to tax income derived from use of the property). When, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within the State, the State is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society.

Commonwealth Edison, 453 U.S. at 624-25, 101 S. Ct. at 2957 (internal quotation marks and citations omitted).

Although *Commonwealth Edison* was litigated in the context of the Commerce Clause,[9] the opinion nevertheless stands for the proposition that a state may impose a coal

[9]"The policies animating the Import-Export Clause and the Commerce Clause are much the same." *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 449 n.14, 99 S. Ct. 1813, 1822 n.14, 60 L. Ed. 2d 336 (1979). *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 77, 113 S. Ct. 1095, 1106, 122 L. Ed. 2d 421 (1993).

severance tax that is determined by the contract sale price of the coal, regardless of where the coal is ultimately destined. *See* Ky. Rev. Stat. § 143.010(6)(a) (2005) ("For coal severed and/or processed and sold during a reporting period, gross value shall be the amount received or receivable by the taxpayer."); Mont. Code Ann. §15-35-103 (1995) (formula for tax based upon contract sale price); N.M. Stat. Ann. § 7-26-6(A) (1993) ("The taxable event is sale, transportation out of New Mexico or consumption of the coal, whichever first occurs."); Wy. Stat. Ann. § 39-14-103(b)(vii)(A) (1998) ("The sales value of extracted coal shall be the selling price pursuant to an arms-length contract.").

C. Taxing the Loading of Coal

The final issue raised by the taxpayers involves W. Va. Code § 11-13A-4(a)(1). Under this statute, treatment processes that are considered part of mining and are taxable include "[c]leaning, breaking, sizing, dust allaying, treating to prevent freezing and loading for shipment."[10] *Id.* *See also* Ky. Rev. Stat. § 143.010(8) (2005) ("'Processing' includes cleaning, breaking, sizing, dust allaying, treating to prevent freezing, or *loading or unloading for any purpose*." (emphasis added)); Wy. Stat. Ann. § 39-14-101(a)(vii) (1998) ("'Processing' means crushing, sizing, milling, washing, drying, refining, upgrading, . . . compressing, storing, *loading for shipment*[.]" (emphasis added)). The taxpayers contend that the Import-Export Clause prohibits taxing the loading of coal for shipment. The majority

[10]This statute applies only to the severance privilege tax under W. Va. Code § 11-13A-3, and the severance tax for local governments under W. Va. Code § 11-13A-6.

opinion in this case has correctly rejected this argument.

An "essential problem in cases involving the constitutional prohibition against taxation of exports has . . . been to decide whether a sufficient commencement of the process of exportation has occurred so as to immunize the [goods] at issue from state taxation." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 67, 94 S. Ct. 2108, 2111, 40 L. Ed. 2d 660 (1974). An early Supreme Court case addressing this issue was *Coe v. Errol*, 116 U.S. 517, 6 S. Ct. 475, 29 L. Ed. 715 (1886). *Coe* involved a shipment of logs that were floated down the Androscoggin River for manufacture and sale in Lewiston, Maine. The logs were detained by low water in the town of Errol, New Hampshire, where a number of taxes were assessed against them. The owners of the logs protested the assessments, in part, on the grounds that the logs were immune from taxation under the Import-Export Clause. The Supreme Court of New Hampshire sustained the tax, and the United States Supreme Court affirmed. In doing so, *Coe* provided the following analysis:

> There must be a point of time when [goods] cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected, and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports; nor are they in process of exportation; nor is exportation begun until they are committed to the common carrier for transportation out of the state to . . . their

> destination. . . . Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed, without any discrimination, in the usual way and manner in which such property is taxed in the state.

Coe, 116 U.S. at 525, 6 S. Ct. at 477. *See Kosydar v. National Cash Register Co.*, 417 U.S. at 67, 94 S. Ct. at 2111 (discussing *Coe*).

The initial decisions by the Supreme Court addressing the issue of the actual loading and unloading of vessels held that this activity was immune from local business taxes. *See Puget Sound Co. v. Tax Comm'n*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937); *Joseph v. Carter & Weekes Co.*, 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993 (1947). In a later decision, *Canton Railroad Co. v. Rogan*, 340 U.S. 511, 71 S. Ct. 447, 95 L. Ed. 488 (1951), the Supreme Court revisited the subject. In *Canton* a railroad company argued that the Import-Export Clause prohibited the state from taxing goods loaded on and unloaded from its trains. The Supreme Court found that it did not have to address that issue because the railroad company did not actually perform loading and unloading. However, the Court noted the following in dicta:

> To export means to carry or send abroad; to import means to bring into the country. Those acts begin and end at water's edge. The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would

> hauling them to or from distant points or perhaps mining them or manufacturing them. The phase of the process would make no difference so long as the goods were in fact committed to export or had arrived as imports.

Canton, 340 U.S. at 515, 71 S. Ct. at 449.

The decision in *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 98 S. Ct. 1388, 55 L. Ed. 2d 682 (1978), marked a departure from the Supreme Court's earlier ban on taxing the incident of loading and unloading exported goods. The decision in *Stevedoring* involved a tax imposed by the state of Washington on companies that loaded and unloaded imported and exported goods from vessels. The courts in the state found that the tax violated the Import-Export Clause and Supreme Court precedents in *Puget Sound Co. v. Tax Commission*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937), and *Joseph v. Carter & Weekes Co.*, 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993 (1947).[11] The case was appealed to the United States Supreme Court.

In determining whether the tax violated the Import-Export Clause, the Supreme Court noted that under *Michelin Tire Corp. v. W.L. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976), the analysis under that Clause had changed dramatically:

> Previous cases had assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause. Before *Michelin*, the primary

[11]The lower courts also found the tax violated the Commerce Clause.

> consideration was whether the tax under review reached imports or exports. . . .
>
> *Michelin* initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the [goods] were imports. Instead, it analyzed the nature of the tax to determine whether it was an Impost or Duty. Specifically, the analysis examined whether the exaction offended any of the three policy considerations leading to the presence of the Clause[.]

Stevedoring, 435 U.S. at 752, 98 S. Ct. at 1400 (internal citations omitted). Using the test under *Michelin*, the Supreme Court found that Washington's tax on loading and unloading goods did not violate the Import-Export Clause:

> A similar approach demonstrates that the application of the Washington business and occupation tax to stevedoring threatens no Import-Export Clause policy. First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. The assessments in this case are only upon business conducted entirely within Washington. No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.
>
> Second, the effect of the Washington tax on federal import revenues is identical to the effect in *Michelin*. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct ad valorem property tax on the imported goods themselves.
>
> Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause. 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. . . .
>
> Under the analysis of *Michelin*, then, the application of the Washington business and occupation tax to stevedoring violates no Import-Export Clause policy and therefore should not qualify as an "Impost or Duty" subject to the absolute ban of the Clause.

Stevedoring, 435 U.S. at 754-55, 98 S. Ct. at 1401-02 (internal citation omitted).

Stevedoring stands for the proposition that taxing the service of "loading or unloading" imported or exported goods does not offend the Import-Export Clause. The taxpayers have attempted to distinguish *Stevedoring* by arguing that the tax in that case was not imposed on the actual goods. This point is well taken, because the decision in *Stevedoring* expressly stated that it did "not reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit." *Stevedoring*, 435 U.S. at 734 n.23, 98 S. Ct. at 1403 n.23. However, two problems exist with the taxpayers' attempt to distinguish the application of *Stevedoring* to the tax imposed for loading under W. Va. Code § 11-13A-4(a)(1).

First, W. Va. Code § 11-13A-4(a)(1) is not a tax on coal. The tax is imposed on the service of "loading" coal for shipment. This is exactly what was taxed in *Stevedoring*. Second, the loading that occurred in the instant case was not the commencement of "in

transit," for the purposes of the Import-Export Clause. The coal would only be considered "in transit" once it was actually on the train cars. *See Richfield*, 329 U.S. at 83, 67 S. Ct. at 164 ("[T]he commencement of the export would occur no later than the delivery of the [goods] *into the vessel*." (emphasis added)).[12] *See also Kanawha Eagle Coal, LLC v. Tax Comm'r of State of West Virginia*, 216 W. Va. 616, ___, 609 S.E.2d 877, 884 (2004) ("The initial loading of fully processed clean coal at the preparation plant for shipment is one of the specified activities viewed as a taxable event associated with the privilege of mining in this state."); *Tradewater Min. Co. v. Revenue Cabinet Com. of Ky.*, 753 S.W.2d 551, 552 (Ky. 1988) ("Loading for shipment at the processing plant is the last step in the continuing mining process."); *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me. 1973) (holding that tax imposed upon off-loading of oil rather than upon oil itself and was not prohibited by Import-Export Clause).

Based upon the foregoing analysis, I respectfully concur.

[12]The taxpayers' attempt to rely upon *Richfield* as barring the tax on loading is simply not persuasive, because *Richfield* did not prohibit a tax on the service of "loading"; rather, it prohibited California from *taxing oil that was in transit* after it was loaded onto a ship.