IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,	CV87-L-29
Plaintiffs,	
vs.	JUDGMENT
DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA,	
Defendant.	

For the reasons stated in the accompanying memorandum of decision,

IT IS ORDERED that the assessment of the plaintiffs' personal property and the imposition, levy or collection of any personal property taxes against the plaintiff pursuant to Neb. Rev. Stat. §77-624 et seq. violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54, now codified as 49 U.S.C. § 11503, and the imposition, levy, and collection of such taxes from the plaintiffs are permanently enjoined.

Dated December 11, 1987.

BY THE COURT

United States District Judge

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FOR THE DISTRICT OF NEBRASKA

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY, Plaintiffs, vs. DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, Defendant.	)	CV87-L-29 MEMORANDUM OPINION FOLLOWING ORAL ARGUMENTS

This memorandum sets forth the court's analysis of the only claim presented in the first part of this bifurcated trial. The plaintiffs, Trailer Train Co., and its wholly-owned subsidiaries, Railbox Co. and Railgon Co., (hereinafter referred to collectively as "Trailer Train") claim that the levy and collection of Nebraska's ad valorem tax on their tangible personal property violates section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. §11503) that prohibits taxes that discriminate against common carriers by rail. The plaintiffs and the defendant, Tax Commissioner Donald Leuenberger, have stipulated to the facts concerning this first claim and oral arguments were presented to the court on the unresolved legal issues.

Trailer Train furnishes rail cars to railroads, thereby enabling railroads to obtain and use standardized types of rolling stock without the individual burdens of ownership. Trailer Train has no property permanently located in Nebraska; its only relationship to Nebraska stems from the fact that its rail cars are located or operated in the state by the railroads. All of the taxes disputed in this lawsuit were assessed after February of 1979, the effective date of the 4-R Act.

Simply put, the controversy is whether Nebraska's personal property taxation system, which provides for extensive exemptions from personal property tax under section 77-202, violates section 306(1)(d) of the 4-R Act. According to the parties' stipulation of facts, the section 77-202 exemptions exclude from taxation 75.75 percent of the commercial and industrial personal property in the state. The plaintiffs contend that the exemptions effectively nullify the nondiscriminatory character of Nebraska's facially neutral statute that requires all personal and real

property that is not specifically exempted to be taxed. See Neb. Rev. Stat. §77-202. The plaintiffs claim that the exemptions violate section 306(1)(d) and the spirit of the 4-R Act. The defendants argue that Nebraska's taxation scheme is nondiscriminatory, and that, in any event, the group of property with which the plaintiffs want their property to be compared is restricted under section 306(3)(c) to that property that is "subject to a tax levy." The defendant contends that this restriction excludes the exempted property from the comparison group and therefore that all the taxpayers are treated fairly and equally.

The cornerstone of Nebraska's personal property taxation system is found in Neb. Rev. Stat. §77-201 (Reissue 1986) that provides that "all tangible personal and real property that is not expressly exempt, is subject to taxation and will be valued at its actual value." The valuation of rail car lines, however, is guided by other statutes. In an attempt to value the car lines as going concerns, section 77-624 requires the president or chief officer of any car company to submit a statement to the tax commissioner that includes "(1) the aggregate number of miles made by each class of their cars on the several lines of railroad in this state during the preceding year ending December 31, (2) the aggregate number of miles made by each class of their cars on all railroad lines during the preceding year ending December 31, and (3) the total number of cars of each class owned by the company, individual, or firm." The information provided in that statement is used by the commissioner to ascertain and fix the valuation of each particular class of cars, as closely as possible to their actual values. The cars are then assessed based on that valuation. See Neb. Rev. Stat. §77-626 (Reissue 1986).

The types of property that are exempt from the tangible personal property tax imposed under section 77-201 are listed in section 77-202 and include motor vehicles; most agricultural income-producing machinery; business inventories; feed, fertilizer, and farm inventory; and grain, seed, livestock, poultry, fish, honeybees and fur bearing animals. Trailer Train's rolling stock does not qualify for any statutory exemption. For the year 1986, Trailer Train's rolling stock will be taxed at 86.81 percent of its value -- the equalization rate applied to all centrally assessed property subject to taxation in Nebraska for that year.

Section 306(1) of the 4-R Act states in part:

> "...It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

> (a) The assessment (but only to the extent of any portion based on excessive value as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
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> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

Pub. L. No. 94-210, 90 Stat 54 (Feb. 5, 1976). Commercial and industrial property as used in section 306 means "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy." Id. at 306(3)(c). Because the original language of section 306 was changed when it was codified, references will be to section 306 rather than to 49 U.S.C. §11503. The parties have stipulated in the order on final pre-trial conference, filing 17, that the provisions of section 306 control.

Some of the legal issues that are important to the resolution of the plaintiffs' claim have been resolved already by the Eighth Circuit Court. In Trailer Train Co. v. State Board of Equalization, 710 F.2d 468, 471-72 (8th Cir. 1983), the court held that the protections of section 306(1)(d) extend to private car lines as well as common carriers by rail. The language of section 306(1)(d) itself was instrumental in the court's reasoning. That section prohibits any tax that "results in discriminatory treatment of a common carrier by railroad." Recognizing the close historic and economic relationship of railroads to car lines, the court stated that any discriminatory tax on rail car lines will "result in discriminatory treatment" to common carriers by railroad. Id. Thus, a tax need not be directly imposed on the railroad in order to be prohibited by section 306(1)(d). This position has been adhered to in Trailer Train Co. v. Bair, 765 F.2d 744 (8th Cir. 1985) and adopted by the Eleventh Circuit in Department of Revenue v. Trailer Train Co., No. 87-3093, slip op., 362, 369 (11th Cir. Nov. 2, 1987). See also General American Transportation Corp., v. Louisiana Tax Commissioner, 680 F.2d at 400, 403

(1982)(finding that car lines should not be denied protection of the 4-R Act under section 306(1)(a)).

A case from the northern district of California, discussed in the defendant's brief, has held that private car lines are not entitled to protection under section 306(1)(d). The court reasoned that the "common carrier by railroad" language of the provision constitutes words of limitation under the traditional doctrines of statutory interpretation. Accordingly, the court held that rail car lines were explicitly excluded from the protection of section 306(d)(1). Trailer Train Co. v. State Board of Equalization, 538 F. Supp. 509 (N.D. Cal. 1982). Nevertheless, this court will follow the precedent of the Eighth Circuit in recognizing that Trailer Train is entitled to the same protection afforded to railroads under section 306(1)(d).

The plaintiffs rely heavily on the Eighth Circuit cases of Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir. 1981), cert denied, 454 U.S. 1086 (1981), and Burlington Northern Railroad Co. v. Bair, 584 F.Supp. 1229 (S.D. Iowa 1984) aff'd 766 F.2d 1222 (8th Cir. 1985), in arguing that the Nebraska personal property tax scheme is discriminatory. Nebraska's tax commissioner relies primarily on statutory interpretation, the definition of commercial and industrial property in section 306(3)(c) and the reasoning of the foregoing case from the Northern District of California in arguing that the Nebraska scheme treats all taxpayers in the same way and, therefore, that the tax is not discriminatory under section 306(1)(d).

In Ogilvie, supra, the Eighth Circuit affirmed the district court's decision that section 306 prohibited North Dakota's assessment of a discriminatory tax against a railroad. The North Dakota system exempted from ad valorem taxation all the personal property of locally assessed businesses but subjected the personal property of centrally assessed businesses to an ad valorem tax on their personal property. North Dakota argued that its system was nondiscriminatory because the locally assessed businesses were subject to a business privilege tax in lieu of a personal property tax.

The Eighth Circuit court's consideration of the case began with a restatement of the goal of the 4-R Act: "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation property." Ogilvie, 657 F.2d at 206 quoting S. Rep. No. 1483, 90th Cong., 2d Sess., 1 (1968). The court, quoting the district court opinion, stated that "'[t]he most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class.'" Id. at 210. The

court applied section 306(1)(d) to find that the distinction between locally assessed businesses and centrally assessed business imposed an unfair tax burden on the railroad. The Eighth Circuit, reiterating that section 306 was designed to "prevent tax discrimination against railroads in any form whatsoever," held that the North Dakota scheme was in violation of section 306. Id.

The plaintiffs also rely on Burlington Northern Railroad Co. v. Bair, supra, in which the railroad challenged Iowa's tax assessment rollback plan that, over time, completely excluded from personal property taxation certain items of and owners of personal property. Under the Iowa plan, the assessed value of most personal property was rolled back to 1973 values and the state granted tax credits against the rolled back, assessed value of most tangible personal property. The personal property owners who benefitted from the plan constituted 95 percent of all personal property owners in the state. The district court likened the credits to exemptions for the purpose of a section 306 analysis because the credits served to reduce the valuation figure to which the tax rate was applied. Burlington Northern R. Co. v. Bair, 584 F. Supp. 1229, 1232 (S.D. Iowa 1985). Those categories of property that were statutorily excluded from the tax rollback plan included any personal property owned by a public service company, any machinery used in manufacturing, computers and transmission towers and antennae. The district court found that the rollback plan violated section 306(1)(d) because the majority of selected classes of property were not subject to the tax and the railroads were.

The Eighth Circuit affirmed the district court's decision and found that Iowa's classification scheme resulted in obvious discrimination against the railroad "by excluding it from the benefits of personal property tax rollbacks and credits which most other taxpayers enjoy." Bair, 766 F.2d at 1224. The court stated that "[t]his type of de jure discrimination clearly falls within the prohibition of section 306(1)(d)." Id. The court rejected the department of revenue director's argument that section 306(1)(d) applied only to taxes other than property taxes in stating :

> [S]ection 306(1)(a) covers claims of unequal valuation ratios between railroad and other commercial and industrial property, but not classification discrimination as is presented here. Section 306(1)(d) is a broad provision intended to reach all types of discriminatory tax treatment. The fact that certain other taxpayers, besides railroads, also are denied the personal property rollbacks and credits does not mitigate the

discrimination.

Id. at 1224. The Eighth Circuit narrowed the effect of its holding, however, in stating:

> Although we find Burlington Northern is entitled to the same benefits as most other taxpayers--rollback and credit--it is not entitled to total exemption. In applying section 306(1)(d), we find that if Burlington Northern's personal property is of such value that tax is still due after the rollback and credit, it must pay tax like any other substantial property owner. A difference in taxation based purely on wealth is not within the prohibition of section 306(1)(d).

Id. at 1224.

The Eighth Circuit in Ogilvie clearly established that the court had adopted a broad interpretation of section 306. The Bair court distinguished between the types of discrimination prohibited by the Act--discriminatory valuation ratios and discriminatory classifications--and found that section 306(1)(d) is available in cases in which section 306(1)(a) or 306(3)(c) seems to prevent a remedy. The scope of section 306(1)(d) was found to extend to classification discrimination according to the Bair court.

A general comparison of Ogilvie, Bair and the case at bar present reflect basic similarities. In Ogilvie, North Dakota imposed a discriminatory tax only on railroad personal property and not on any other class of personal property. In Bair, all the personal property owners in Iowa, with the exception of a minority of statutorily omitted owners including railroads, received the benefits of tax credits and tax rollbacks. Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an ad valorem tax on its actual value. I recognize that the mechanics of the tax schemes involved in these cases differ significantly. The systems in Ogilvie and Bair favored the majority of taxpayers, either by exempting them from taxation or taxing them at 1973 values, but expressly denied the railroads similar favorable treatment. In this case, the Nebraska system favors a majority of the property of possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment. I find that the mechanical differences between the systems are immaterial under the Eighth Circuit court's result-

oriented analysis of section 306(1)(d) claims.

The ultimate effect of the taxation scheme in each case, Ogilvie, Bair and the one commenced by Trailer Train in this court, is that the majority of possible taxpayers or the majority of the property benefitted from the taxation schemes, while a minority, including the railroads and car lines or their property, were burdened. The Bair case indicates that the discrimination caused by the Nebraska scheme is of the type that is prohibited by section 306(1)(d) because the result is to exclude Trailer Train from the benefits of personal property tax exemptions that most other taxpayers enjoy. See Bair, 766 F.2d at 1224. The issue presented in this first claim is not a question of unequal valuation ratios between the car lines and other commercial and industrial property, which would be properly brought under section 306(1)(a) and would invoke the definition of commercial and industrial property under section 306(3)(c). Rather, the issue is one of classification discrimination. Id.

While the Ogilvie and Bair cases are helpful to this court in characterizing the Eighth Circuit Court's approach to alleged violations of section 306, cases from other circuit courts have much to add to the analysis. The plaintiffs direct the court to the Eleventh Circuit Court's opinion in the Department of Revenue v. Trailer Train Co., No. 87-3093, slip. op. 362 (Nov. 2, 1987). In that case, Trailer Train argued that Florida's assessment of its property at 100 percent of its market value, while totally exempting all business inventory from taxation, violated sections 306(1)(a) and 306(1)(d) of the 4-R Act. The Eleventh Circuit Court agreed with the district court's determination that Florida's failure to include the value of business inventory in the assessed value of "other commercial and industrial property" did not violate sections 306(1)(a) and 306(3)(c) because the business inventory was not "subject to a property tax levy" and thus was omitted from the definition of commercial and industrial property. Id. at 365. However, the court found that "§306(1)(d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment." Id. at 369. Finding that the district court was in a more able position to determine whether a total business inventory exemption resulted in discriminatory tax treatment to the car line, the Eleventh Circuit remanded the case to the district court. In doing so, the court noted its agreement with the Fourth Circuit's conclusion:

> In essence, discrimination is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

Id. at 370, quoting Richmond, Fredericksburg & Potomac R. Co. v. Department of Taxation, 762 F.2d 375, 380 n.4, (4th Cir. 1985). I too, agree that this conclusion is prudent and that it can aid me in deciding section 306(1)(d) claims. Furthermore, the Eleventh Circuit recommended:

> In making such determination [as to whether an exemption resulted in discriminatory treatment], the court should consider whether it would be appropriate for it to consider the entire tax structure as applied against railroads and as applied against 'all other commercial and industrial businesses.'

Id. at 370, quoting Alabama Great Southern Railroad Co. v. Eagerton, 663 F.2d 1036, 1041 (11th Cir. 1981).

Trailer Train also relies upon Kansas City Southern Ry. Co. v. McNamara, 817 F.2d 368 (5th Cir. 1987), which involved a challenge to Louisiana's transportation and communications tax that only applied to public utilities as they were defined under Louisiana law. The court acknowledged that in enacting the 4-R Act, "Congress was most concerned with property tax discrimination, and it voiced that concern in detail in §306(1)(a)-(c); but it included [§306(1)(d)] to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections." Id. at 373-74. Accordingly, the court found that section 306(1)(d) prohibited "all forms of tax discrimination against railroads by states." Id. at 374.

The Fifth Circuit determined that "[t]he only simple way to prevent tax discrimination against the railroad is to tie their tax fate to a large group of local taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden." Id. at 377. The court reasoned that a large, local group could rally the economic and political power that a small and foreign group would be unable to muster. Because the Fifth Circuit found that the railway's tax fate was tied to a small, foreign group, the court held that Louisiana's tax system discriminated against railroads in violation of section 306(1)(d).

The court recommended that the railway be "taxed only under taxes applicable to 'other commercial and industrial' taxpayers." Using the 'other commercial and industrial taxpayers' as the large, local group whose fate the railway would tie into was intended to thwart any attempt by the state to "discriminate against the railroads by simply making sure that only a few powerless business taxpayers pay 'the same type of tax' as the railroad." Id. at 375, n.13. The

Eighth Circuit has interpreted section 306(1)(d) of the Act in a result-oriented fashion. Due to this interpretation, the protection from "any other" discriminatory tax has been extended by the Eighth Circuit to rail car lines under section 306(1)(d).

According to the Eleventh and Fifth Circuit court opinions, a broad interpretation of section 306(1)(d) is warranted. The Eleventh Circuit in Department of Revenue, supra, stated outright that exemptions should be considered in determining whether the state has levied a discriminatory tax on the railroad in violation of section 306(1)(d). Moreover, the Eleventh Circuit acknowledged that when a state favors one person to the disadvantage of another person, that state must demonstrate a reasonable distinction which justifies the differential treatment.

The tax commissioner's arguments are not persuasive. Leuenberger asserts that Trailer Train v. State Board of Equalization, 538 F. Supp. 509 (N.D. Cal. 1982) should control the disposition of this case. The plaintiff in that case challenged California's system of personal property taxation as discriminatory under sections 306(1)(a) and 306(1)(d) of the 4-R Act because a statute totally exempted business inventories from taxation. The federal district court in California determined that the exemption was not in violation of the Act. The court reasoned that section 306(3)(c)'s definition of commercial and industrial property, which limits commercial and industrial property, in part, to any property that is subject to a tax levy, demonstrates Congress' intention to exclude exempt property from the total assessed value of taxable property. The court stated that "if a type of property is 'exempted' then it is not subject to such a levy and would not constitute any part of the aggregate property for comparison purposes." Id. at 512. Based on this analysis, the court found that the statutory exemption did not violate section 306(a)(1). However, the court's rejection of the plaintiff's section 306(1)(d) claim was based on two reasons: (1) any discrimination resulted from the "disparate treatment of available tax exemptions as opposed to discrimination in the assessment ratio or tax rate." Id. at 513 and (2) only "common carriers by rail" and not car lines could claim protection under section 306(1)(d) based on a literal reading of that section. Both reasons have been foreclosed in this circuit, where it has been said that car lines, as well as railroads, are protected by section 306(1)(d) and that classification discrimination is prohibited by that section. Burlington Northern Railroad Co. v. Bair, 766 F.2d 1222 (8th Cir. 1985).

The tax commissioner also relies upon Atchison, Topeka & Santa Fe Ry. v. State of Arizona, 559 F. Supp. 1237 (D. Ariz. 1983) and Clinchfield R. Co. v. Lynch, 784 F.2d 545

(4th Cir. 1986). The Atchison, Topeka plaintiffs challenged as discriminatory the state's valuation of their railroad property. The court relied upon the statutory definition of commercial and industrial property found in section 306(3)(c) to find that "property which is for any reason tax-exempt is excluded as a form of commercial and industrial property." Atchison, Topeka, 599 F. Supp. at 1245. Using that definition, the court decided that manufacturers' inventories were not commercial and industrial property under the Act and therefore their value did not have to be calculated into the assessed value of all other commercial and industrial property. The Clinchfield court stated that a partial exemption of 40 percent of the value of stored tobacco inventories violated the 4-R Act. However, the Fourth Circuit court also added that "[t]he 4-R Act does not require a state to tax all business personal property; the state is free to grant any exemptions." Clinchfield, 784 F.2d at 553.

The cases from California, Arizona and Louisiana adopt an analysis of the 4-R Act that differs markedly from that espoused by the Eighth Circuit. The Eighth Circuit established in Trailer Train v. State Board of Equalization, 710 F.2d 783 (8th Cir. 1983) that the "result" language of section 306(1)(d) is key to the interpretation of that section. I believe that the stipulations of the parties establish that the result of Nebraska's taxation system is that the majority of personal property in the state is exempt while Trailer Train pays taxes on all of its personal property in the state. Therefore, the result appears to be discriminatory under section 306(1)(d).

The parties have stipulated that only 24.25 percent of all the tangible personal property in Nebraska is subject to personal property tax, and that Trailer Train's property falls into this minority. Simply because the group of property with which Trailer Train seeks to tie its tax fate is commercial and industrial property, there is no reason to adhere to the restrictions imposed by the definition in section 306(3)(c). The definitional provision was meant to be applied in disputes about the proper valuations for assessment purposes and should not be permitted to thwart the effectiveness of section 306(1)(d), which was intended to be a catch-all provision.

Specifically, I reject the defendant's argument that the definition of commercial and industrial property in section 306(3)(c) precludes a determination of discrimination under section 306(1)(d). The Eighth Circuit in Ogilvie made it plain that section 306(1)(d) should be given a broad interpretation to prevent discrimination in "any form whatsoever." The Bair decisions concluded that section 306(1)(d) is available in situations where a remedy is unavailable under section 306(1)(a) and that classification discrimination should be remedied through section 306(1)(d).

Additionally, I have decided to adopt the Eleventh Circuit's decision to consider exemptions from taxes in determining whether railroads have been subject to discrimination in violation of section 306(1)(d).

Although the exemptions from tangible personal property taxation in Nebraska's scheme appear to result in discrimination, I must determine whether the actual result is an unfair and discriminatory tax burden on the railroads. Having determined that Trailer Train, as a rail car line, is entitled to the protection of section 306(1)(d), that the protections afforded to railroads and car lines under section 306(1)(d) are distinct from those provided by section 306(1)(a), and that the definition of commercial and industrial property found in section 306(3)(c) concerns challenges to tax assessment ratios under section 306(a)(1) and has no significance to a claim based on classification discrimination under 306(1)(d), I must find that Trailer Train is entitled to the protection from unfair classifications that result in discriminatory tax treatment under section 306(1)(d). I conclude that Nebraska's system discriminates against Trailer Train in violation of section 306(1)(d) of the 4-R Act based on the fact that 75.75 percent of the personal property in the state is exempt and none of Trailer Train's personal property is exempt.

A comparison of the effect of the tax and exemptions on the plaintiffs with the effect on all owners of commercial and industrial property in Nebraska reveals that the plaintiffs are taxed on all their commercial and industrial personal property at the rate of 86.81 percent of its actual value, whereas 75.75 percent of the commercial and industrial personal property in Nebraska is except from taxation. Others who own commercial and industrial personal property are obviously taxed substantially less on the same category of property. The tax is discriminatory.

Although the defendants seem to argue that the wording of Nebraska's personal property tax statutes is reasonably based on the type of property rather than the owner of the property, the conclusion that therefore there is no discrimination must be rejected. Taxing only property of a type owned only or almost entirely by railroads would not free the state from a charge of discrimination under section 306(1)(d) on the theory that as long as the statute described only property and not owners or operators there would be no discrimination against railroads. It is the effect on owners and operators as determined by the effect on property that makes the discrimination.

The tax commissioner argues vigorously that § 306(1)(d) was not created to give the plaintiffs a preferential tax treatment, which would be the result if the plaintiffs were given an injunction freeing them of the Nebraska tax. I

agree that § 306(1)(d) is not for the purpose of giving anyone a preferential tax treatment, but I agree with the analysis in that respect of Kansas City Southern Railway Co. v. McNamara, 817 F.2d 368 (5th Cir. 1987), in observing that courts are ill-equipped for the job of determining the specific tax level at which a particular taxpayer should be taxed. The Kansas City Southern case was more complex than this one, but I think the proper solution is, as in that case, to declare that the Nebraska tax violates the requirements of § 306(1)(d) and a collection of the tax from the plaintiffs must be unconditionally enjoined. I have confidence, as the court in Kansas City Southern had, in the ability of the state legislature and tax commissioner to "create tax structures that comply with the 4-R Act while ensuring that the railroads pay their fair share of state taxes." Id. at 378.

Dated December 11, 1987.

BY THE COURT

United States District Judge