No. 06-3397

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Union Pacific Railroad Company; and Soo Line Railroad Company, d/b/a Canadian Pacific Railway,

Plaintiffs/Appellants,

vs.

Dan Salomone, Commissioner of Revenue, Department of Revenue of the State of Minnesota; Department of Revenue of the State of Minnesota; and the State of Minnesota.

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF OF AMICUS CURIAE MULSTISTATE TAX COMMISSION IN SUPPORT OF THE STATE OF MINNESOTA

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INTEREST OF AMICUS CURIAE MULTISTATE TAX COMMISSION[1]

Amicus Curiae Multistate Tax Commission (Commission) files this brief in support of Defendant-Appellee Dan Salomone, Commissioner of Revenue, Department of Revenue of the State of Minnesota and the State of Minnesota (Minnesota). The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. (See RIA State & Local Taxes: All States Tax Guide ¶ 701 *et seq*. (2005).) Twenty States have legislatively established full membership in the Compact, including Minnesota,[2] which enacted the Compact in 1983.[3] In addition, four States are sovereignty members and twenty-three States are associate members.[4] The U.S. Supreme Court upheld the validity of the Compact in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

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[1] No counsel for any party authored this brief in whole or in part. Only Amicus Multistate Tax Commission and its member States through payment of their membership fees made any monetary contribution to the preparation or submission of this brief. Finally, this brief is filed pursuant to the consent of the parties.

[2] In addition to Minnesota, the full members are the states of Alabama, Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington, and the District of Columbia.

[3] MINN. STAT. § 290.171.

[4] The sovereignty members are Kentucky, Louisiana, New Jersey and Wyoming. The associate members are Arizona, Connecticut, Florida,

The genesis of the Commission was the threat that Congress would limit the States' sovereignty to impose tax on multistate businesses.[5] To forestall that threat, States joined into the Multistate Tax Compact to safeguard state taxing authority—an essential governmental power for States to fulfill their constitutional role—from federal encroachment. Preserving state tax sovereignty under our vibrant federalism remains a key purpose of the Commission.

The importance the Commission attaches to the present case, and its motivation for filing this brief today, lies in its goal of preserving States' authority to determine their own tax policies within the limits of federal constitutional and statutory law, and in protecting that authority from calls for unintended expansion of the federal limitations. The Commission agrees with Minnesota and the federal district court below (*Union Pacific R.R. Co. v. Salomone*, Civ. No. 04-924, 2006 U.S. Dist. LEXIS 59630 (8/22/06)) that the State's sales tax structure, in particular its exemption for purchases of fuel upon which the petroleum excise tax has been paid, does not

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Georgia, Illinois, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin.

[5] See Pub. L. No. 86-272, 73 Stat. 555 Title II, which provided for congressional studies of state taxation of interstate commerce.

discriminate against railroads under subsection (b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11501 et. seq. (4R Act); and that the Act should not be given the expansive interpretation suggested by Appellants which would result in a pre-emption of Minnesota's lawful tax structure.

ARGUMENT

This case presents the question of whether Minnesota sales tax exemptions that apply to purchases of motor fuel upon which a petroleum excise tax has been paid[6] amount to impermissible discrimination against a rail carrier in violation of § 11501(b)(4) of the 4R Act.

A determination of whether a state tax (other than a property tax) "is another tax that discriminates against a rail carrier providing transportation…" under §11501(b)(4) requires consideration of three questions: first, is the tax at issue "another tax" subject to review under subsection (b)(4); second, what constitutes the proper comparison class of taxpayers by which the discrimination should be measured; and third, does the tax impermissibly discriminate against railroads. The 8th Circuit has already considered the first two questions. In *Burlington Northern, Santa Fe*

[6] MINN. STAT. § 296A.07, subd. 3(3) (2004) (motor carriers) and MINN. STAT. § 296A.09 (2004) (aviation).

Ry. Co. v. Lohman, 193 F.3d 984 (8th Cir.), *reh'g and reh'g en banc denied* (8th Cir. Nov. 26, 1999), *cert. denied sub nom. Wilson v. Burlington Northern, Santa Fe Ry. Co.*, 529 U.S. 1098, 120 S. Ct. 1832 (2000), this Court held that sales tax falls within the scope of "another tax" which is subject to consideration under subsection (b)(4).[7] It further held that the proper comparison class by which any alleged discrimination should be measured is the competitive modes of transportation, rather than a class comprised of commercial and industrial taxpayers.[8] It is the third question that is at issue in the case at bar. In this case, that question asks whether the application of sales tax exemptions constitutes discriminatory treatment against railroads under subsection (b)(4). The answer to that question is "no."

Based upon the reasoning established by the U.S. Supreme Court in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 342, 127 L.Ed.2d 165, 114 S. Ct. 843 (1994), 510 U.S. 344-346, principles of federalism compel a determination which upholds the exemptions. Furthermore, given the *ACF* Court's holding that property tax exemptions are not prohibited discrimination under subsection (b)(4), it would be

[7] *Lohman*, 193 F.3d at 986.

[8] 193 F.3d at 986.

inconsistent to hold that sales tax exemptions are prohibited discrimination under the very same statutory language. And finally, while both the U.S. Supreme Court and the 8th Circuit Court of Appeals have recognized an exception to these principles where railroads are "singled out for discriminatory treatment,"[9] the premise for applying that exception does not exist in this case.

I. Principles of Federalism Compel Against The Pre-emption of State Tax Sovereignty In This Case.

The Commission respectfully suggests this case is governed by the reasoning established in the U.S. Supreme Court's decision in *ACF*. Though the issue before the *ACF* Court concerned the permissibility of *property* tax exemptions under subsection (b)(4), and its holding was based first upon a statutory construction of the 4R Act that does not apply here directly, the Court also found that principles of federalism not only "support, [but] in fact, compel our view."[10] In applying these federalist principles, the Court considered that the property tax exemptions reflect important state tax policy which pre-date the 4R Act,[11] and that Congress made no expression of intent to limit the States' power to grant such exemptions, either in the language of

[9] *ACF*, 510 U.S. at 347.

[10] 510 U.S. at 345.

[11] 510 U.S. at 344.

the statute or in its legislative history.[12] Each of these considerations is equally true with respect to sales tax exemptions, and the application of federalist principles is no less compelling in the present case.

A. Sales Tax Exemptions Are Important State Tax Policy.

The States' power to tax implicitly includes the power to grant exemptions from tax,[13] a concept recognized by the *ACF* Court.[14] Just as with property tax exemptions, sales tax exemptions are a vital mechanism through which sound state tax policies are developed. Exemptions are a technique state legislatures routinely use to appropriately allocate the cost of government. And—whether sales tax exemptions or exemptions from other types of taxes—they are an integral part of a state's ability to foster industrial and economic development within its borders.[15]

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[12] 510 U.S. at 344-345.

[13] Jerome R. Hellerstein & Walter Hellerstein, State And Local Taxation, (7th ed. 2001) p. 24.

[14] The *ACF* Court's recognition of this concept was unequivocal: "[p]roperty tax exemptions are an important part of state tax policy." 510 U.S. at 344.

[15] *E.g.*, Hager, Douglas A., *Kansas Sales and Use Tax Law: Exemptions for Manufacturing Machinery and Equipment and the Integrated Plant Theory,* 37 Washburn L.J. 543 (1998) at 558-559 ("There are several broad conceptual categories within which most of the sales tax exemptions…can be placed [including] exemptions for the encouragement of industrial location or the stimulation of capital business investment generally[.]"); Daniel P. Petrov, *Prisoners No More: State Investment Relocation Incentives and The Prisoner's Dilemma,* 33 Case. W. Res. J. Int'l L. 71 (2001) at 72.

In *ACF*, the Supreme Court acknowledged that "property tax exemptions are an important aspect of state and local tax policy,"[16] and that at the time §11501(b)(4) was enacted, property tax exemptions were common in the states. In these respects, sales tax exemptions are no different. In the 8th Circuit States, as in most states, the sales tax exemptions for petroleum excise tax paid long predate the 4-R Act. Of the seven States within the 8th Circuit's jurisdiction, all of them exempt from sales tax fuel purchases on which a petroleum excise tax has been paid. [17] In six of those States, the sales tax exemption predates the 4-R Act. In three States, the sales tax exemption predates the Act by almost forty years.

B. Neither Statutory Language Nor Legislative History Indicate Congress Intended to Prohibit Sales Tax Exemptions as a Form Of Impermissible Discrimination.

("Tax incentives are typically exemptions, credits, refunds or abatements from state taxes[.] Regardless of type, these tax incentives all share a common purpose: to enhance the state's attractiveness as a place for businesses to locate their facilities and jobs.")

[16] 510 U.S. at 344

[17] North Dakota: N.D.CENT.CODE § 57-39.2-04(10), (enacted 1937); South Dakota: S.D. CODIFIED LAWS § 10-45-11, (enacted 1939); Arkansas**:** ARK. CODE ANN. § 26-55-208 (state sales tax), ARK. CODE ANN. § 26-55-209 (local sales tax), (enacted 1941); Iowa: IOWA CODE, § 423.3(56) (enacted 1973); Minnesota: MINN. STAT. § 297A.25(f) (enacted 1967); Nebraska: NEB. REV. STAT. § 77-2704 (b)(iii) R.S. SUPP. (enacted 1967); Missouri: MO. REV. STAT. § 144.030.2(1) (enacted 1988).

The language of subsection 11501(b)(4) does not reference a State's authority to grant exemptions from sales tax (or from any other type of tax, for that matter). The subsection only states in the most general terms that States are prohibited from "imposing another tax that discriminates against railroads[.]" Nor does anything in the legislative history of §11501, and in particular of §11501(b)(4), suggests Congress intended to take away that authority. As the *ACF* Court observed, had Congress intended to prevent States from granting tax exemptions under subsection (b)(4), "we are confident that it would have spoken with clarity and precision."[18]

In fact, viewing the statutory language of subsection (b) as a whole suggests Congress did not intend to include state tax exemptions as an act that may constitute discrimination. Subsections (b)(1)-(3) lists of the acts that constitute discrimination in the context of property tax for purposes of subsection (b):

> (b) *The following acts* unreasonably burden and *discriminate* against interstate commerce, and a State…may not do any of them:
>
> > (1) *Assess* rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

[18] *ACF*, 510 U.S. at 344.

(2) *Levy or collect a tax on an assessment* that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property *at a tax rate* that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(Emphasis added.)

The list of prohibited discriminatory acts involves property tax rates, assessment, levy and collection. The list does not involve exemptions. Subsection (b)(4) only prohibits states from imposing "another tax which *discriminates*," and as provided in (b)(1)-(3), that term does not include exemptions.

C. Where Congress Has Not Expressed Any Intent to Pre-empt Important, Pre-existing State Tax Policy, Principles of Federalism Compel That Such Policy Be Upheld.

It is a cornerstone of our federalist system that Congressional intent to pre-empt state tax sovereignty must be made clear and explicit. *ACF*, 510 U.S. 344, (quoting *Cipollone v. Liggett Group, Inc*. 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) ("We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.") (BLACKMUN, J., concurring); *id.*, at 523 (opinion of STEVENS, J., *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140, 93 L. Ed. 2d 449, 107 S. Ct. 499 (1986)). "We will interpret a statute to

pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) 514 U.S. at 655 ("[w]here federal law is said to bar state action in fields of traditional state regulation[,] we have worked on the assumption that the powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (internal quotations omitted)); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994) 514 U.S. at 252 ("a federal statute will be read to supersede a State's historic powers only if this is the clear and manifest purpose of Congress,") (internal cites and quotations omitted)).

With respect to a state's authority to grant sales (as well as property) tax exemptions, an expression of such intent is significantly lacking in (b)(4). "Subsection (b)(4), which prohibits the States from 'imposing another tax that discriminates against a rail carrier', is, at best, vague on the point." *ACF*, 510 U.S. at 343. Likewise, nowhere in the whole of §11501, and especially in subsection (b)(4), did Congress indicate the Act was intended to include sales tax exemptions within its scope. Therefore, as the *ACF*

Court concluded with respect to property tax exemptions, principles of federalism compel the finding that state authority to grant sales tax exemptions has not been disturbed.

II. A Determination That Sales Tax Exemptions Are Discriminatory Under §11501(b)(4) Would Be Inconsistent with the U.S. Supreme Court's Holding in *ACF*.

The U.S. Supreme Court's holding in *ACF* is a simple one: Challenges to a state's property tax exemption scheme are not cognizable under §11501(b)(4). But subsection (b)(4) has been construed by this Court to apply to taxes other than the property tax. So, although the *ACF* Court's statutory construction of the 4R Act was specific to property taxes and therefore not directly on point, its conclusions with respect to the meaning and scope of subsection (b)(4) are still relevant as a general matter.

That *ACF* involved property tax exemptions should not affect the outcome of the present case. The language of subsection (b)(4) is static, not fluid. A tax exemption is a tax exemption, be it from sales tax, property tax, or some other type of tax. The meaning and scope of the words that make up subsection (b)(4) does not change depending on the type of tax exemption under consideration. If, as the *ACF* Court held, the language of subsection (b)(4) does not pre-empt a State's authority to grant property tax

exemptions, there is no logical reason to conclude that the same subsection pre-empts a state's authority to grant sales tax exemptions.

III. Railroads Have Not Been Singled Out for Discriminatory Taxation.

Though the *ACF* Court ruled that discrimination claims based on property tax exemptions cannot be challenged under §11501(b)(4), the Court did acknowledge one instance where such a claim, despite being based on an exemption from tax, might be appropriate. This occurs where "the railroads or some [other] isolated and targeted group" are the only entities subject to tax.[19] In this circumstance, the Court noted:

> it might be incorrect to say that the State 'exempted' the nontaxed property. Rather, one could say that the State had singled out railroad property for discriminatory treatment.[20]

Though not a property tax case, *Lohman* is a clear illustration of this point.[21] In *Lohman*, the 8th Circuit held that the comparison class by which the state's discrimination would be measured was the competitive modes of transportation. Burlington Northern's competitors in Missouri were motor

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[19] 510 U.S. at 346.

[20] 510 U.S. at 346-347. See also this Court's decision in *Burlington Northern R.R. Co. v. Bair,* 60 F.3d 410 (8th Cir. 1995).

[21] The 7th Circuit decided a similar case, *Burlington Northern R. R. Co. v. City of Superior,* 932 F.2d 1185 (7th Cir. 1991). Here, the City of Superior imposed an occupational tax on operators of iron ore concentrates docks. The effect was that was that only those docks used for shipping iron ore, all owned by railroads, were subject to tax.

carriers and barges. But Missouri had exempted both from sales tax on their purchases of fuel.[22] The single mode of freight transport in *Lohman* that was subject to sales tax on fuel purchases was railroads. That is not the case here. The comparison class in the case at bar **is** railroads, barges, Great Lakes vessels, airlines and motor carriers that purchase **or use** fuel in Minnesota. Of these five, three modes of freight transport—railroads, barges, and Great Lakes carriers—are subject to sales tax on such purchases.

Reaching the correct result in the present case does not require conducting an exhaustive analysis of Minnesota's overall tax structure. Nor is this a question of which mode of transportation carries more freight, or who pays more sales taxes on fuel purchases than whom.[23] As this Court said in *Lohman*, "we…look only at the sales and use tax with respect to fuel to see if discrimination has occurred."[24] In this case, out of the five modes of freight transport in the comparison class, over half are subject to Minnesota's sales tax on fuel purchases. In light of this fact, it cannot be said that Minnesota has singled out railroads for discriminatory treatment through

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[22] In *Lohman*, it was undisputed that though motor carriers were subject to a petroleum excise tax, barges were exempt from both the excise tax and the sales tax.

[23] Brief of Appellant at 6-8.

[24] *Lohman*, 193 F.3d at 986.

the State's sales tax exemptions granted to motor carriers and airlines on fuel purchases.

CONCLUSION

In the interest of upholding established principles of federalism, and in preserving Minnesota's sovereign right to shape its own tax policy against unintended expansion of pre-emptive federal law, Amicus Curiae Multistate Tax Commission respectfully suggests this Court follow the reasoning and principles outlined in the U.S. Supreme Court's decision in *Department of Revenue of the State of Oregon v. ACF Industries, Inc.* and find that sales tax exemptions, like property tax exemptions, are not subject to challenge under 49 U.S.C. §11501(b)(4).

Respectfully submitted this 22nd day of December, 2006.

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