APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ILLINOIS CENTRAL RAILROAD COMPANY, *Plaintiff-Appellant*, v. TENNESSEE DEPARTMENT OF REVENUE; REAGAN FARR, Commissioner of Revenue of the State of Tennessee, *Defendants-Appellees*.	No. 17-5553 D.C. No. 3:12-cv-01261-MO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Filed August 31, 2018

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BEFORE: COOK, McKEAGUE, and STRANCH, Circuit Judges.

Opinion

COOK, Circuit Judge.

Federal law prohibits states from imposing a tax "that discriminates against a rail carrier." 49 U.S.C. § 11501(b) (4). This appeal concerns whether Tennessee violated that prohibition by imposing sales or use taxes on rail carriers when they bought or consumed diesel fuel while exempting competing motor carriers. Because the motor carriers instead paid another, comparable fuel tax, we conclude that Tennessee did not discriminate against rail carriers and AFFIRM.

I. BACKGROUND

A. Tennessee's Tax Laws

Tennessee taxes the sale, consumption, or use of personal property. *See* Tenn. Code Ann. § 67-6-201 *et seq*. From 2006 through mid-2014, the state taxed railroads' purchase or use of diesel fuel at 7% of the retail price. Because railroads paid a 7% sales tax on every fuel purchase, their effective tax rate per gallon of diesel fuel fluctuated depending on its price. In contrast, motor carriers competing with railroads are exempt from sales and use taxes on diesel fuel. *See* Tenn.

Code Ann. § 67-6-329(a)(2). They instead pay a fixed diesel tax of 17 cents a gallon on fuel they consume in Tennessee.[1] *See* Tenn. Code Ann. §§ 67-3-202 (2013), 67-3-1204.

In July 2014, Tennessee enacted a new tax scheme that effectively repeals the sales and use tax on railroads' diesel fuel purchases and instead subjects railroads to the same per-gallon diesel fuel tax the state levies on motor carriers. *Compare* Tenn. Code Ann. §§ 67-3-1405 to -1406 (Transportation Fuel Equity Act), *with* Tenn. Code Ann. § 67-3-202 *and* Tenn. Code Ann. § 67-3-1201 *et seq*. Illinois Central and other railroads challenged this amended tax scheme in a separate lawsuit. *See BNSF Ry. Co. v. Tenn. Dep't of Revenue*, 800 F.3d 262, 275 (6th Cir. 2015).

B. Procedural History

Illinois Central sued the Tennessee Department of Revenue and its Commissioner in 2010, claiming that Tennessee's sales and use taxes discriminated against railroads under the Railroad Revitalization and Regulatory Reform Act ("4-R Act") because the state exempted motor carriers from those taxes. After a bench trial, the district court agreed with Illinois Central and enjoined Tennessee from taxing the railroad's purchase or consumption of diesel fuel. *Ill. Cent. R.R. Co. v. Tenn. Dep't of Revenue*, 969 F. Supp. 2d 892, 901 (M.D. Tenn. 2013).

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[1] Although the parties stipulate to the amount of the tax during the period relevant to this lawsuit, Tennessee has since amended the tax statute. *See* Tenn. Code Ann. §§ 67-3-202 to -205.

While the case was on appeal to this court, the Supreme Court evaluated a similar challenge to an Alabama sales and use tax scheme that exempted motor carriers, but not railroads. *See Ala. Dep't of Revenue v. CSX Transp., Inc.*, —— U.S. ——, 135 S.Ct. 1136, 1139–40, 191 L.Ed.2d 113 (2015) ("*CSX II*"). Previously, the Court held that a tax discriminates under the 4-R Act when it treats similarly situated groups differently without "sufficient justification" for the difference in treatment. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 288 n.8, 131 S.Ct. 1101, 179 L.Ed.2d 37 (2011) ("*CSX I*"). Clarifying what *CSX I* meant by sufficient justification, *CSX II* explains that "an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory." 135 S.Ct. at 1143.

Because the district court did not initially consider whether Tennessee's tax on motor carriers was "roughly equivalent" to the sales and use tax, we remanded this matter for further proceedings "in light of [*CSX II*]." On remand, Illinois Central and Tennessee both moved for summary judgment. The district court granted summary judgment to Tennessee, finding that the state sufficiently justified the tax on railroad diesel fuel for two reasons. *Ill. Cent. R.R. Co. v. Tenn. Dep't of Revenue*, No. 3:10-cv-00197, 2017 WL 1347269, at *7–9 (M.D. Tenn. Apr. 12, 2017). First, the court found that Illinois Central and motor carriers paid alternative, roughly equivalent taxes. *Id.* at *7–8. Second, it concluded that any discrimination was effectively self-imposed because railroads chose to burn dyed diesel fuel, rather than clear diesel—even though the railroad could avoid paying sales and use taxes by switching to clear fuel. *Id.* at *8–9. Illinois

Central appeals, claiming that the taxes were not roughly equivalent and that the clear fuel ruling exceeded the scope of the remand.

After this court heard oral argument on Illinois Central's instant appeal, the Eleventh Circuit, on remand from *CSX II*, released its opinion in *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 888 F.3d 1163 (11th Cir.) ("*CSX III*"), *opinion modified on denial of reh'g*, 891 F.3d 927 (11th Cir. 2018).[2]

C. The 4-R Act

The 4-R Act bars various forms of discriminatory taxation against rail carriers. 49 U.S.C. § 11501(b). It provides that states and their subdivisions may not:

> (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.
>
> (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

[2] The Eleventh Circuit later modified this opinion on panel rehearing in a two-page opinion for reasons not relevant to this appeal. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 891 F.3d 927, 928 (11th Cir. 2018) (per curiam).

> applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

Id. Illinois Central challenges Tennessee's tax scheme under § 11501(b)(4), a "catch-all provision" against discriminatory taxes not otherwise covered by the first three provisions. *CSX I*, 562 U.S. at 281, 131 S.Ct. 1101.

II. DISCUSSION

We review de novo the district court's grant of summary judgment. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 489 (6th Cir. 2004) (per curiam). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A. The Taxes Are Roughly Equivalent

1. Railroads and Motor Carriers Pay Similar Tax Rates on Diesel Fuel

Illinois Central first challenges the district court's ruling that motors carriers and railroads paid roughly equivalent taxes on diesel fuel. The court examined the respective taxes on diesel fuel that motor carriers and railroads paid from 1941 through June 2014, when Tennessee began implementing its amended tax scheme. *Ill. Cent. R.R. Co.*, 2017 WL 1347269, at *3, *7–8. During that time, the district court found that motor carriers paid more taxes per gallon of diesel fuel

than railroads in every year except for when fuel prices spiked in 2008 and between 2011 and June 2014. *Id.* at *7–8. Because, "on average, motor carriers have a higher tax burden," the district court concluded that the railroads and motor carriers paid roughly equivalent taxes on diesel fuel. *Id.* at *8.

CSX II did not tell us how to discern whether taxes are roughly equivalent. Like the district court here, however, the Eleventh Circuit, in *CSX III*, decided that " 'roughly equivalent' bears its ordinary meaning and that two taxes are roughly equivalent if the rates they impose approximate one another.... It does not mean 'perfectly equivalent.'" *CSX III*, 888 F.3d at 1179. Because the average rates that railroads and motor carriers paid in Alabama over a nine-year period differed only "by some quantity between less-than-half-of-one cent and 3.5 cents" per gallon of diesel fuel, favoring railroads as many times as motor carriers, the Eleventh Circuit found that the taxes were roughly equivalent. *Id.* (quoting *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 247 F. Supp. 3d 1240, 1250–51 (N.D. Ala. 2017)).

Although the district court applied a similar test, Illinois Central maintains that rather than comparing tax rates, we should apply the compensatory tax doctrine—a negative Commerce Clause test for scrutinizing in-state and out-of-states taxes. Despite *CSX II* never mentioning that doctrine, the railroad insists that the Supreme Court directed courts to adopt it. But in *CSX II*, the Court simply observed that "[o]ur negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax." 135 S.Ct. at 1143 (citing *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479–

80, 52 S.Ct. 631, 76 L.Ed. 1232 (1932)). Though this is all *CSX II* said about the negative Commerce Clause, Illinois Central interprets the Court's citation to *Gregg Dyeing* as endorsing the compensatory tax doctrine.

We disagree. *Gregg Dyeing* held that a South Carolina tax on gasoline shipped into the state did not discriminate against out-of-state commerce because a separate, in-state tax ensured that all gasoline consumers paid the same amount of tax. 286 U.S. at 481–82, 52 S.Ct. 631. Regardless of the railroad's assertion, we fail to see how that citation requires us to apply the compensatory tax doctrine. On the contrary, we simply read it as support for the general proposition that a state may be justified in exempting a competitor from one tax if it levies an alternative tax on that competitor. *See CSX III*, 888 F.3d at 1178 (interpreting *CSX II*'s citation to *Gregg Dyeing* "as simply a reference to the general principle that courts should consider other taxes a state imposes when assessing a facially discriminatory tax for 4-R Act purposes"). Indeed, had the Supreme Court wanted us to employ a Commerce Clause test under the 4-R Act, we would have expected them to say so.

Rather than apply the compensatory tax doctrine, we agree with the Eleventh Circuit that taxes are roughly equivalent if they impose similar rates. *Id.* at 1179. In comparing the taxes, Illinois Central's expert asks us to focus on the period between 2007 and June 2014. But even looking only at that seven-year stretch, the tax rates were roughly equivalent. According to the railroad's own expert, between 2007 and June 2014, the railroads' and motor carriers' tax rates differed by between less-than-half-of-one cent and approximately

five cents per gallon. The railroads paid a higher rate in 2008 and again from 2011 through June 2014, but motor carriers paid more in every other year. The excess tax burden for railroads was, at most, an extra 5.2 cents per gallon; motor carriers paid up to 4.2 extra cents per gallon. This difference correlates with the disparity that the Eleventh Circuit considered in *CSX III*. We likewise conclude that the taxes are roughly equivalent.

2. Tennessee's Tax Revenue Allocation

Undeterred, Illinois Central presses us to consider Tennessee's allocation of tax revenue in evaluating its discrimination claim. The motor carriers' fuel taxes fund public highways, says Illinois Central, benefiting trucks. But the railroads' taxes go to state funds that allegedly afford little benefit to large railroads.

Unfortunately for Illinois Central, this train has already left the station. In *BNSF Ry. Co. v. Tennessee Dep't of Revenue*, we evaluated a challenge to Tennessee's amended tax scheme and determined that "how Tennessee uses the proceeds of its taxation of diesel fuel is irrelevant to the question of whether the Railroads have been discriminated against within the meaning of the 4–R Act." 800 F.3d at 274. Similarly, *CSX III* found that the statute's plain language thwarts any call to examine how states allocate their tax revenue. 888 F.3d at 1175–76. Section 11501(b)(4) provides that no state shall "[i]mpose another tax that discriminates against a rail carrier." The syntax of that sentence "makes clear that the source of discrimination must be the state's imposition of a tax." *Id.* at 1175. The railroad's reading de-

pends on equating "tax" with "revenue," and the Eleventh Circuit refused to adopt that interpretation. *Id.* at 1175–76. Instead, the court looked to the definition of "impose"—meaning "[t]o levy or exact (a tax of duty)"—and concluded that a state cannot "levy or exact" a revenue expenditure. *Id.* at 1175 (citing Black's Law Dictionary (10th ed. 2014)). We agree and decline the invitation to revisit *BNSF*.

B. The District Court's Clear Fuel Ruling

In the alternative, the district court held that Illinois Central's choice to use dyed diesel fuel rather than clear fuel also justified their differential tax treatment. *Ill. Cent. R.R. Co.*, 2017 WL 1347269, at *8–9. The court explained that the railroad could avoid paying sales and use taxes by operating on clear diesel fuel. *Id.* at *9. Because the railroad opted to burn dyed fuel to bypass applying for tax refunds on clear fuel, the district court concluded that Tennessee has "offered sufficient justification that its tax structures for diesel are not discriminatory against railroads." *Id.* Illinois Central claims that ruling exceeds the scope of our earlier remand.

"We interpret the scope of a mandate with fresh eyes." *United States v. Patterson*, 878 F.3d 215, 217 (6th Cir. 2017). In assessing whether we issued a limited remand, we look to any "limiting language" in the instructions and the broader context of the opinion. *Id.* (citing *United States v. O'Dell*, 320 F.3d 674, 679–81 (6th Cir. 2003)). Our order stated that, "[u]pon consideration of [Illinois Central]'s motion to remand this matter to the district court for further proceedings in light of *Alabama Dep't of Revenue v. CSX Transportation, Inc.*, —— U.S. ——, 135 S.Ct. 1136, 191 L.Ed.2d

113 (2015), the response in opposition, and the reply in support," the case is remanded to the district court for further proceedings.

Put simply, we narrowed the remand to consideration of *CSX II*. There, the Supreme Court directed the Eleventh Circuit "to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption." 135 S.Ct. at 1144. Interpreting those instructions on remand, the Eleventh Circuit decided that the district court's task was merely to appraise whether those taxes were roughly equivalent. *CSX III*, 888 F.3d at 1173–74. As a result, the Eleventh Circuit concluded that the Alabama district court overstepped its bounds by opining on a similar clear fuel argument. *Id.*

Likewise, we agree that the district court here ventured beyond the *CSX II* inquiry. Notably, in their response to Illinois Central's motion to remand, Tennessee acknowledged that "the *only* thing left to be determined in this case is whether Tennessee's imposition of a fuel-excise tax on motor carriers sufficiently justifies their exemption from the general sales-and-use tax paid by railroads." Given that concession and our order, the district should not have considered the clear fuel argument. But because we agree with the district court's rough equivalence holding, the error is harmless.

III. CONCLUSION

We AFFIRM the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT, M. D. TENNESSEE, NASHVILLE DIVISION

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff, v. TENNESSEE DEPARTMENT OF REVENUE and Reagan Farr, Commissioner of Revenue of the State of Tennessee, Defendants.	)	No. 3:10-cv-00197

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Talmage M. Watts, Tennessee Attorney General's Office, Nashville, TN, for Defendants.

MEMORANDUM

KEVIN H. SHARP, UNITED STATES DISTRICT JUDGE

This action is brought under Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("Section 306" or the "4-R Act"), 49 U.S.C. § 11501(b)(4), which prohibits state and local governments from discriminating against railroads with respect to taxation. Plaintiff contends that the sales and use tax assessments imposed by the State are discriminatory because motor carriers are exempt from the tax, but rail carriers are not exempt. Plaintiff seeks injunctive and declaratory relief pursuant to Section 306. The matter is before the Court on the following motions, which were filed following remand of this matter by the United States Court of Appeals for the Sixth Circuit, (Docket No. 107): *Plaintiff Illinois Central Railroad Company's Motion for Summary Judgment* (Docket No. 85); *Defendants' Motion for Summary Judgment* (Docket No. 93); and *Defendants' Motion to Exclude Affidavit and Testimony of Richard Pomp* (Docket No. 102).

I. PROCEDURAL HISTORY

This Court held a bench trial in this matter on June 5 and 11, 2012. In its Findings of Fact and Conclusions of Law, (Docket No. 59), this Court found that the imposition of Tennessee sales and use tax on railroad diesel fuel, but not on diesel fuel used by interstate motor carriers, placed rail carriers at an overall disadvantage. The Court further found that Defendants had not provided sufficient evidence that the differential tax treatment is justified. The Court concluded

that the imposition of the sales and use tax on railroad diesel fuel violates 49 U.S.C. § 11501(b)(4). (Id.). By an accompanying order, this Court declared that the imposition of sales and use taxes authorized by Tennessee law on Plaintiff's purchases or consumption of diesel fuel for rail transportation purposes violates § 11501(b)(4).[1] The order further permanently enjoined Defendants from assessing, levying, or collecting sales and use taxes on or from Plaintiff on its purchase or consumption of diesel fuel for rail transportation purposes. See (Docket No. 60).

Defendants appealed the judgment to the Sixth Circuit Court of Appeals. See Circuit Case No. 13-6348. After briefing and oral argument, but before the issuance of an opinion by the Sixth Circuit, the United States Supreme Court issued its opinion in Alabama Dept. of Revenue v. CSX Transportation, Inc., 135 S.Ct. 1136, 1143 (2015) ("CSXT II"), ruling that "an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory."[2] Following the Supreme Court's decision, Plaintiff filed a motion in the Sixth Circuit to remand the

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[1] A two-step inquiry is used to evaluate a claim of discrimination in violation of § 11501(b)(4). See CSX Transp., Inc. v. Ala. Dep't of Revenue, 131 S.Ct. 1101, 1105 & 1109 n.8 (2011) ("CSXT I"). A plaintiff has the initial burden to establish a prima facie case of discriminatory tax treatment. If a plaintiff does so, the burden shifts to the defendant taxing authority to establish that the differential tax treatment is justified and does not discriminate against the railroad. Id. If the defendant cannot meet its burden, the tax treatment violates § 11501(b)(4). Id.

[2] In its previous opinion, this Court relied upon CSXT I as well as the Eleventh Circuit's decision in CSX Transp., Inc. v. Ala. Dep't of Revenue, 720 F.3d 863 (11th Cir. 2013). Subsequent to

matter to this Court for further proceedings in light of CSXT II. The Sixth Circuit granted that motion by order entered May 11, 2015 and remanded the matter to this Court for further proceedings.

The parties then filed a joint motion to schedule a status conference, which was granted. (Docket No. 77). That status conference was held on August 20, 2015, and as a result, the Court issued an order calling for supplemental briefs, responses to supplemental briefs, and reply briefs.

II. RELEVANT FACTS [3]

Plaintiff Illinois Central Railroad Company ("Plaintiff" or "ICRR") is an Illinois corporation with its principal office in Homewood, Illinois. ICRR is engaged in interstate commerce as a common carrier by railroad. ICRR is the corporate holding company for some of the U.S. properties of Canadian National Railway and is the entity that pays taxes in Tennessee. ICRR does business under the trade name CN, and CN is sometimes used to refer to the Plaintiff in this case.

The Tennessee Department of Revenue ("Department") is the department of the State of Tennessee charged with the responsibility to administer and collect sales and use taxes within Tennessee. Tenn. Code Ann. § 67-1-101(b). The Department is also charged

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this Court's previous decision, Alabama successfully sought review of the Eleventh Circuit's decision by *writ of certiorari*, resulting in the Supreme Court's decision in CSXT II.

[3] The parties have stipulated to many of the underlying facts in this matter. The Court admitted the stipulated facts at trial. See (Docket Nos. 45 & 52). Unless otherwise noted, the facts are drawn from the parties' stipulations, statements of material facts, and related declarations and exhibits.

with the responsibility to administer and collect motor fuel taxes within Tennessee. Id. Defendant Commissioner of Revenue of the State of Tennessee ("Commissioner," or collectively with the Department, hereinafter, "Defendants" or the "State") is named in this action in his official capacity only. The Commissioner exercises general supervision over administration of the assessment and collection of sales and use taxes and motor fuel taxes in Tennessee. The Tennessee Department of Transportation ("TDOT") is charged with building and maintaining public roads in Tennessee.

Generally, Tennessee imposes a tax on the sale, consumption, and use of tangible personal property in Tennessee. See Tenn. Code Ann. § 67-6-101 *et seq*. The sales tax is collected by the seller at retail from the purchaser and paid over to the Commissioner by the seller. See Tenn. Code Ann. §§ 67-6-502-504. The Tennessee sales tax applies unless a sales tax on such property has previously been paid in another jurisdiction. Tenn. Code Ann. §§ 67-6-201(2) and (5), 67-6-202, and 67-6-203.

Railroads are subject to sales or use tax on their purchase, consumption, or use of diesel fuel in Tennessee. For years 2006 through June 2014, the tax was imposed by the State at the rate of 7% of the retail price. ICRR holds a direct pay permit issued by the Department and pays state sales and use taxes upon its purchase of diesel fuel within this State directly to the Commissioner.

On-highway motor carriers compete with rail carriers for the transportation of property in interstate commerce in Tennessee. Motor carriers are exempt from

the Tennessee sales and use tax imposed by chapter 6 of Title 67 on the purchase or consumption of diesel fuel in Tennessee. See Tenn. Code Ann. § 67-6-329 (a)(2).

In lieu of the sales tax, motor carriers pay a motor fuel tax totaling 18.4¢ a gallon. Tenn. Code Ann. § 67-3-202-205. Under Tenn. Code Ann. §§ 67-3-203 and 204, 1¢ of the 18.4¢ is a special privilege tax, and 0.4¢ is an environmental assurance fee. Approximately 70% of the motor fuel taxes collected from motor carriers is allocated to the Tennessee Department of Transportation. Approximately 28% is allocated to cities and counties and designated for use on roads. Approximately 2% is allocated to the general fund. In addition to the sales and use tax, railroads also pay the 1¢ special privilege tax and 0.4¢ environmental assurance fee imposed under Tenn. Code Ann. §§ 67-3-203 and 204.

Tennessee's motor fuel tax was first enacted in 1941 and has been applied to motor carriers since then. The broadly applicable sales and use tax, which applies to railroads, was first enacted in 1947, and motor carriers have always been exempt from that tax. Under the respective tax rates (17¢ per gallon for motor carriers, in contrast to 7% of the purchase price for railroads) in effect since before 2006 through June 30, 2014, motor carriers were taxed more per gallon of diesel fuel than railroads were taxed unless fuel prices exceeded $2.62 per gallon. In fact, from 1941 through 2010, motor carriers actually paid more tax per gallon than railroads paid in every year except one, which was in 2008 when fuel prices spiked. The State of Tennessee has no control over the price of diesel fuel.

Tennessee, along with the other 47 contiguous states and bordering Canadian provinces, is a party to the International Fuel Tax Agreement ("IFTA"), the purpose of which is to simplify the collecting and reporting of taxes on motor fuel used by motor fuel carriers operating in more than one jurisdiction. State participation in IFTA is essentially mandated by federal legislation. See 49 U.S.C. §§ 31701–07. IFTA requires that the fuel use tax imposed by member jurisdictions be measured by the consumption of fuel in a motor vehicle. See 49 U.S.C. § 31701(2). Motor carriers register and file tax returns in a single base jurisdiction, which, in turn, is responsible for distributing the tax proceeds to other jurisdictions in which the carrier operates. Motor carriers receive in each jurisdiction a credit or refund for taxes paid on fuel used outside the jurisdiction where it was purchased. There is no similar multi-state agreement with respect to fuel purchased, used, or consumed by railroads.

III. ANALYSIS

I. Motion to Exclude Affidavit and Testimony of Richard Pomp

As a preliminary matter, Defendants have moved to exclude the affidavit of Plaintiff's expert, Richard Pomp, under Rules 702 and 703 of the Federal Rules of Evidence. The Court will first address this issue and then move on to the substantive claims.

Plaintiff engaged Professor Richard Pomp, law professor at the University of Connecticut Law School and adjunct professor at NYU Law School in the L.L.M. Program for Taxation, to render an expert opinion regarding "the meaning of a 'comparable' or 'roughly

equivalent' tax as that term is understood by practitioners and scholars in the field of state taxation." (Docket No. 90 at ¶ 5).

Defendants argue that "[b]eyond a bare recitation of qualifications and facts, the affidavit consists entirely of a discussion of purportedly applicable law, legal conclusions, and arguments concerning the central legal issue now before the Court—whether the sales tax paid by railroads on diesel fuel purchases in Tennessee and the motor fuel excise tax paid by trucks are "alternative, roughly equivalent" taxes within the meaning of [CSXT II]." (Docket No. 103 at 1). Plaintiff counters that "Professor Pomp does not opine on the ultimate legal issue of whether the sales tax assessed to ICRR is discriminatory[.]" (Docket No. 105 at 2). Regardless, Plaintiff argues "his testimony fits squarely within the scope of permissible expert testimony under the Federal Rules of Evidence and Sixth Circuit precedent." (Id.).

Expert testimony may be introduced in summary judgment proceedings through an affidavit or declaration that satisfies the general requirements for summary judgment affidavits and declarations set forth in Fed. R. Civ. P. 56(c)(4). See 11 James Wm. Moore *et al.,* Moore's Federal Practice § 56.94[4][a] (3d ed. 2011). Reports and the underlying opinions are subject to all other rules of evidence, including traditional standards for the admissibility of expert testimony. See Fed. R. Evid. 702; Pride v. BIC Corp., 218 F.3d 566, 577 (6th Cir. 2000) (citing Daubert v. Merrell Dow Phar., 509 U.S. 579 (1993)). Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of

> fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Defendants seek to exclude Pomp's testimony under Rules 702 and 703 of the Federal Rules of Evidence (Docket No. 103 at 3-9), arguing that (1) Pomp's affidavit is legal argument and advocacy—and improper as expert testimony; (2) Rule 702 does not permit expert testimony on conclusions of law; (3) "calling a brief an affidavit" does not make it admissible; (4) "couching the affidavit as 'policy' rather than law does not alter its true character;" and (5) Pomp's affidavit is not reliable and because of his lack of qualifications.

"Rule 702 imposes a special obligation upon a trial judge to ensure that scientific testimony is not only relevant, but reliable." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (citing Daubert, 509 U.S. at 579). This basic gatekeeping obligation applies to all expert testimony.

Kumho Tire Co., 526 U.S. at 147.[4]

The requirement that expert testimony be relevant and reliable "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Decker v. GE Healthcare Inc., 770 F.3d 378, 391 (6th Cir. 2014) (citations omitted). "In short, under Daubert and its progeny, a party proffering expert testimony must show by a 'preponderance of proof' that the expert whose testimony is being offered is qualified and will testify to scientific knowledge that will assist the trier of fact in understanding and disposing of relevant issues." Id. (citations omitted). "The [Rule 702] inquiry is a flexible one ... [and its focus] must be solely on principles and methodology, not on the conclusions that they generate." Lee v. Smith & Wesson Corp., 760 F.3d 523, 526 (6th Cir. 2014) (citing Daubert, 509 U.S. at 595).

Daubert provides a non-exclusive, flexible checklist of factors to consider when evaluating reliability, including the following: "whether [the theory or technique] can be (and has been) tested"; "whether the theory or technique has been subjected to peer review and publication"; "in the case of a particular scientific technique, ... the known or potential rate of error"; and the degree of acceptance within the relevant scientific

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[4] Courts may also review the factual basis for an expert's testimony under Rule 703 of the Federal Rules of Evidence. Under Rule 703, expert opinions based on otherwise inadmissible facts and data are to be admitted only if the facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703.

community. Daubert, 509 U.S. at 593–94. "[T]he Daubert factors do not constitute a 'definitive checklist or test,' but may be tailored to the facts of a particular case." In re Scrap Metal Antitrust Litig., 527 F.3d 517, 529 (6th Cir. 2008) (citations omitted). "[T]he Daubert factors 'are not dispositive in every case,' and should be applied only 'where they are reasonable measures of the reliability of expert testimony.'" Id. (citations omitted).

An expert opinion "is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). Indeed, the "[Sixth Circuit has] held that an expert opinion may opine on a legal conclusion so long as his testimony would not determine an ultimate issue before the jury." U.S. v. Geiger, 303 Fed.Appx. 327, 331 (6th Cir. 2008). The Court's discretion to admit expert testimony in bench trials is particularly broad at earlier stages in the proceeding, such as summary judgment. Gonzalez v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 635 (6th Cir. 2000) ("[D]istrict courts conducting bench trials have substantial flexibility in admitting proffered expert testimony at the front end, and then deciding for themselves during the course of trial whether the evidence meets the requirements of Kumho Tire Co. and Daubert and deserves to be credited.").

Here, the Court finds that Plaintiff's expert, Professor Pomp, has displayed sufficient knowledge of the subject matter that his opinion will assist the trier of fact in evaluating this case. However, given that this case is a bench trial, the Court is mindful it can weigh its probative value and reject any improper inferences. Defendants' complaints about Professor Pomp's opinions go to the weight of the testimony as opposed to

their admissibility. Plaintiff, as the proponents of the testimony, do not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable. Here, the Court finds that Professor Pomp's opinions are reliable. Thus, Defendant's motion is denied.

II. Cross Motions for Summary Judgment

Finally, the parties have filed cross motions for summary judgment quarrelling over whether the State can meet its burden to prove that the use tax paid by interstate motor carriers constitutes sufficient justification for the exemption of motor carriers from the sales tax, which is imposed on railroads.

A. *Standard of Review*

A party may obtain summary judgment if the evidence establishes there are not any genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Covington v. Knox County School Sys., 205 F.3d 912, 914 (6th Cir. 2000). The moving party bears the initial burden of satisfying the Court that the standards of Rule 56 have been met. See Martin v. Kelley, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact that is disputed. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); Covington, 205 F.3d at 914 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). If so, summary judgment is inappropriate.

To defeat a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue of material

fact for trial. If the party does not so respond, summary judgment will be entered if appropriate. Fed. R. Civ. P. 56(e). The nonmoving party's burden of providing specific facts demonstrating that there remains a genuine issue of material fact for trial is triggered once the moving party shows an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court must construe the evidence in the light most favorable to the nonmoving party, drawing all justifiable inferences in its favor. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The standard remains the same when both parties move for summary judgment. Taft Broad. Co. v. United States, 929 F.2d 240, 248 (6th Cir. 1991). "When reviewing cross-motions for summary judgment, the court must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." Wiley v. United States (In re Wiley), 20 F.3d 222, 224 (6th Cir. 1994).

B. *Analysis*

The issue before this Court on remand is whether Defendants can offer sufficient justification for subjecting railroads and motor carriers to different tax treatment of their purchases and consumption of diesel fuel for transportation purposes. See CSXT I, 131 S.Ct. at 1109 n.8. The Supreme Court has instructed that "an alternative, roughly equivalent tax is one

possible justification that renders a tax disparity non-discriminatory," CSXT II, 135 S.Ct. at 1144.

The Court must first address the parties' dispute on whether the compensatory tax doctrine is applicable to this case. Plaintiff insists that "CSXT II's direct reference to the Supreme Court's negative Commerce Clause jurisprudence (i.e., the Compensatory Tax Doctrine) is the clearest direction that the lower courts have received from CSXT II." (Docket No. 108 at 8). Defendants maintain the doctrine is inapplicable.

Plaintiff argues "[i]n holding that a facially discriminatory tax on railroads—as we unquestionably have here—can possibly be justified by a 'roughly equivalent' or 'roughly comparable' tax on their competitors," the Court was "invoking a rich history of Supreme Court jurisprudence establishing a specific and settled standard under its 'negative Commerce Clause' cases." (Docket No. 86 at 10). Plaintiff contends that the Court cited Gregg Dyeing Co. v. Query, 286 U.S. 472, 479–80 (1932) to invoke its "negative Commerce Clause cases," which afford "a guiding light for deciding when two different taxes are 'roughly equivalent.'" (Id. at 12). Defendants counter "[i]f the Supreme Court had intended to define the precise analytical parameters of 'roughly equivalent' for use by lower courts in 4-R Act cases it would have done so. It did not." (Docket No. 100 at 4).

In CSXT II, the Supreme Court cited Gregg Dyeing and observed that "[o]ur negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax." 135 S.Ct. at 1143. This is the first and only

time either Gregg Dyeing or the Commerce Clause is mentioned. In Gregg Dyeing, the Supreme Court was addressing the threshold issue of whether a state tax violated the Commerce Clause. The Court rejected a negative Commerce Clause challenge to a South Carolina tax on imported gasoline stored for use or sale within the state "upon which a like tax ha[d] not been paid under other statutes." 286 U.S. at 479. The Court held that, because the taxpayer had not established that it had suffered discrimination as a result of the state tax, it had not proved that the state tax violated the Commerce Clause.

This Court does not interpret the Supreme Court's single reference of the Commerce Clause as explicit direction to apply the compensatory tax doctrine here. The plain language of the opinion instructs that "an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory," CSXT II, 135 S.Ct. at 1144—and the Court will proceed with that instruction, simply analyzing whether the taxes paid by motor carries is roughly equivalent to those paid by the locomotives.

Proceeding to the substantive issues before the Court, as stated *supra*, the Supreme Court directed the Eleventh Circuit (and now this Court pursuant to the Sixth Circuit's remand Order) to consider "whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption." CSXT II, 135 S. Ct. at 1144. Therefore, this Court must determine the same as it pertains to the Tennessee taxes. As Plaintiff correctly points out in

its brief, [5] the burden is now on Defendants to prove sufficient justification for exempting motor carriers from the sales tax, which is imposed on railroads. Defendants' Motion for Summary Judgment relies on two arguments supporting that justification. First, Defendants argue that "motor fuel taxes paid by motor carriers and sales and use taxes paid by railroads are alternative, roughly equivalent taxes on the same activity within the meaning of CSX[T] II[.]" (Docket No. 94 at 5-6). Second, they argue that "railroads choose tax treatment different from that of motor carriers because railroads choose to use dyed diesel fuel, which is not exempt from sales and use taxes." (Id. at 6).

1. *Motor Fuel Taxes and Sales and Use Taxes are Roughly Equivalent*

Defendants first point to CSXT II, wherein the Supreme Court stated, "[w]e think Alabama can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax," arguing the same applies here. (Docket No. 94 at 6) (citing CSXT II, 135 S.Ct. at 1143). Defendants posit that motor fuel taxes paid by motor carriers and sales and use taxes paid by railroads "are alternative, roughly equivalent taxes imposed by the same taxing authority on the same activity, the purchase or consumption of diesel fuel for freight-transportation purposes within the meaning of CSX[T] II." (Id.). In comparison, Defendants argue "[f]or 61 successive years, from the inception of the

[5] "One principle is clear from the Supreme Court's two decisions in the Alabama CSXT cases—the burden is now on the State." See (Docket No. 86 at 7).

sales tax in 1947 through 2007, the per gallon level of the sales tax on fuel purchases by railroads was less than the per-gallon level of the motor fuel excise tax paid by trucks." (Docket No. 100 at 13) (citing [Doc. 72-10, Defendants' Trial Exh. D-10] Fox Affidavit, ¶ 5). Plaintiff makes the following arguments rebutting Defendants' position:

> At the previous trial of this matter, the State heavily relied on the calculation of a "tax rate" comparison to show that the "rate" of the motor fuel tax on a gallon of motor carrier fuel exceeded the "rate" of the sales tax on a gallon of railroad fuel. Obviously, this comparison depends solely on the fluctuating cost of fuel. The cost of fuel makes no difference in the rate of 17¢ per gallon for motor fuel, but the cost of fuel makes all the difference in a sales tax applied to a purchase price. Indeed, the basic tax rate on diesel fuel has been 17¢ per gallon since 1989. And as the affidavit of Benjamin Blair demonstrates, more recent data show that the "rate" of the sales tax is now often exceeding the rate of the motor fuel tax. See Blair Affidavit, ¶ 13. For five of the eight years between 2007 and the first half of 2014, the sales tax rate of 7% on ICRR's purchase of railroad diesel fuel in Tennessee exceeded the rate of 17¢ per gallon paid by interstate motor carriers on their consumption of diesel fuel in Ten-

> nessee. Thus, the State's heavy reliance on an equivalent tax rate is invalid factually.

(Docket No. 86 at 16) (internal citations omitted). Defendants respond that "while it is true that per-gallon fuel taxes for Illinois Central exceeded the per gallon cost for trucks from 2011 through June 30, 2014, this three and one-half year stretch was a gross historical anomaly." (Docket No. 100 at 14). Further, "based on current fuel prices, if the sales tax regime on railroad fuel were still in effect today the per-gallon rate for railroads would again be less than 17¢, which is consistent with historical norms." (Id.) (citing Fox Affidavit, ¶¶ 4-5).[6]

The CSXT II Court said

> [w]e think Alabama can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax. It does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay another comparable tax from which the rail carrier is exempt. If that were true, both competitors could claim

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[6] Another issue of contention is the allocation of tax proceeds. However, the Court need not expand upon this argument because the Sixth Circuit recently provided direction on this very issue: "[H]ow Tennessee uses the proceeds of its taxation of diesel fuel is irrelevant to the question of whether the Railroads have been discriminated against within the meaning of the 4-R Act." BNSF Railway Co. v. Tennessee Department of Revenue, 800 F.3d 262, 274 (6th Cir. 2015).

> to be disfavored—discriminated against—relative to each other.

135 S.Ct. at 1143. In this instance, the Court finds the taxes paid by motor carriers and rail carriers roughly equivalent. It is undisputed (and even stipulated to in the prior trial) that from 1941 through 2010 motor carriers actually paid more tax per gallon than railroads paid in every year except one, which was in 2008 when fuel prices spiked. While it is true, and not contested, that the sales tax rate of 7% on ICRR's purchase of railroad diesel fuel in Tennessee exceeded the rate of 17¢ per gallon paid by interstate motor carriers on their consumption of diesel fuel in Tennessee in recent years, on average, motor carriers have a higher tax burden—which refutes the railroads being at an overall disadvantage. Accordingly, Defendants have presented sufficient evidence to support their contention that the fuel tax placed on motor carriers and the sales and use tax paid by railroads are roughly equivalent.

2. *Railroads Choose to Use Dyed Diesel Fuel, Which is Not Exempt From Sales and Use Taxes*

Finally, Defendants insist that Plaintiff pays sales and use taxes only because it selects to burn dyed diesel fuel, as opposed to clear diesel fuel in its railroads. (Docket No. 94 at 9). Defendants argue further that no state or federal law prevents Plaintiff from burning clear diesel fuel, "in which case it would have been subject to the same motor fuel tax, Tenn. Code Ann. § 67-3-202, that motor carriers paid." (Id.). By it terms, Defendants contend, "the exemption from sales and use tax that applies to motor carriers," Tenn. Code Ann. § 67-6-329(a)(2), "is not an exemption for any

particular class of taxpayers but rather for fuel taxed under Tenn. Code Ann. § 67-3-202, which applies only to clear (undyed) diesel fuel. The dyed fuel used by railroad locomotives is thus not exempt." (Id. at 9). It is the opinion of Defendants that since clear diesel is subject to a federal fuel tax,[7] Plaintiff chooses to use dyed diesel to sidestep the administrative burden involved in applying for tax refunds (which are available if clear diesel is used off-road). (Id.).

Plaintiff agrees in part. Plaintiff contends if it were to "choose" to use clear diesel fuel for off highway purposes, it would have to pay not only Tennessee's motor fuel tax, but also the federal excise tax. (Docket No. 96 at 11). This in turn, according to Plaintiff, would require it to petition the Internal Revenue Service for refunds of the federal excise tax because the fuel was used for off-highway purposes. (Id.). Thus, Plaintiff argues, the notion that Tennessee is "justified in denying the sales tax exemption to railroads because railroads could 'choose' to purchase clear diesel fuel is ludicrous." (Id. at 13).[8]

Plaintiff further purports there are practical problems if it were to elect to use clear diesel fuel. (Docket No. 96 at 12). First, Plaintiff argues, the purchase of clear diesel fuel in tanks of locomotives fueled in other

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[7] See 26 U.S.C.A. § 4041.

[8] In support of its contention, Plaintiff cites Kraft Gen'l Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71 (1992). In Kraft, the Supreme Court held that an Iowa statute that denied a dividend-received deduction to foreign subsidiaries while allowing it for domestic subsidiaries discriminated in violation of the Foreign Commerce Clause. 505 U.S. at 82. The Court finds there is no meaningful distinction between the discrimination held unconstitutional in Kraft and the discrimination challenged here.

states would result in the mixing of clear and dyed fuel, a practice prohibited by federal law. (Id.) (citing Declaration of Mathieu Lefebvre, ¶¶ 5, 6; Supplemental Affidavit of Benjamin Blair, ¶ 2). Second, Plaintiff would pay the full state motor tax to Tennessee on "a 'point of purchase' basis, without apportionment based on use in Tennessee, in contrast to interstate motor carriers under IFTA." (Id.) (citing Affidavit of Benjamin Blair [Doc. 88], ¶ 7. See Declaration of Mathieu Lefebvre, ¶¶ 5, 6; Supplemental Affidavit of Benjamin Blair, ¶ 2).

It is undisputed that railroads choose tax treatment different from that of motor carriers because railroads choose to use dyed diesel fuel, which is not exempt from sales and use taxes, and no state or federal law prevents Plaintiff from burning clear diesel fuel. Consequently, the Court finds Defendants have offered sufficient justification that its tax structures for diesel are not discriminatory against railroads.

IV. CONCLUSION

The Court finds that no genuine issues of fact remain, and Defendants have shown sufficient justification for the disparate sales tax treatment of rail carriers compared to motor carriers. Therefore, the imposition of the sales and use tax on railroad diesel fuel does not violate 49 U.S.C. § 11501(b)(4).

For all of the reasons stated, the Court will grant *Defendants' Motion for Summary Judgment* (Docket No. 93) and deny *Plaintiff Illinois Central Railroad Company's Motion for Summary Judgment* (Docket No. 85). Further *Defendants' Motion to Exclude Affidavit and Testimony of Richard Pomp* (Docket No. 102) will be denied.

An appropriate Order shall be entered.

APPENDIX C

Case: 17-5553 Document: 47-1 Filed: 10/03/2018

No. 17-5553

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff-Appellant, v. TENNESSEE DEPARTMENT OF REVENUE; REAGAN FARR, COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE, Defendants - Appellees.	ORDER

Before: COOK, McKEAGUE, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Deborah S. Hunt, Clerk

APPENDIX D

49 U.S.C. § 11501. Tax discrimination against rail transportation property

(a) In this section—

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of 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.

(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.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the

true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff, v. TENNESSEE DEPARTMENT OF REVENUE and REAGAN FARR, Commissioner of Revenue of the State of Tennessee, Defendants.	No. 3:10-00197 JUDGE SHARP

STIPULATED FACTS

Pursuant to this Court's Order entered on April 27, 2012, counsel submit the following stipulated facts. The parties reserve the right to object on grounds of relevancy to the stipulations below.

1. Plaintiff Illinois Central Railroad Company ("ICRR") is an Illinois corporation with its principal offices in Homewood, Illinois. ICRR is engaged in interstate commerce as a common carrier by railroad. (Complaint, ¶ 5.)

2. ICRR is the corporate holding company for some of the U.S. properties of Canadian National Railway and is the entity that pays taxes in Tennessee. ICRR does business under the trade name CN, and CN is sometimes used to refer to the Plaintiff in this case.

3. The Tennessee Department of Revenue ("Department") is the department of the State of Tennessee charged with the responsibility to administer and collect sales and use taxes within Tennessee. Tenn. Code Ann. § 67-1-101(b).

4. The Department is also charged with the responsibility to administer and collect motor fuel taxes within Tennessee. Tenn. Code Ann. § 67-6-101(b).

5. Defendant Commissioner of Revenue of the State of Tennessee ("Commissioner") is named in this action in his official capacity only. The Commissioner exercises general supervision over administration of the assessment and collection of sales and use taxes and motor fuel taxes in Tennessee.

6. The Tennessee Department of Transportation ("TDOT") is charged with building and maintaining public roads in Tennessee.

7. Cars, motorcycles, trucks--large and small, cyclists, and pedestrians use roads.

8. Generally, Tennessee imposes a tax on the sale, consumption, and use of tangible personal property in Tennessee. *See* Tenn. Code Ann. § 67-6-101 *et seq*.

9. The sales tax is collected by the seller at retail from the purchaser and paid over to the Commissioner by the seller. *See* Tenn. Code Ann. §§ 67-6-502 - 504.

10. Tennessee imposes a tax on the use, consumption, or storage for use or consumption of tangible personal property unless the sales tax on such property has been paid. Tenn. Code Ann. §§ 67-6-201(2) and (5), 67-6-202, and 67-6-203.

11. Railroads are subject to sales or use tax on either their purchase or consumption or use of diesel fuel in Tennessee. For years 2006 to the present, the tax is imposed by the State at the rate of 7% of the retail price. (Complaint, ¶ 11.)

12. ICRR holds a direct pay permit issued by the Department and pays state sales and use taxes upon its purchase of diesel fuel within this State directly to the Commissioner.

13. The principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Tennessee are on-highway motor carriers of property in interstate commerce ("motor carriers"). (Complaint, ¶ 13.)

14. Water carriers are secondary competitors to rail carriers in the transportation of property in interstate commerce in Tennessee.

15. Motor carriers are exempt from the Tennessee sales and use tax imposed by chapter 6 of Title 67 on the purchase or consumption of diesel fuel in the State of Tennessee. *See* Tenn. Code Ann. § 67-6-329(a)(2).

16. Water carriers are not exempt from the sales and use tax imposed by chapter 6 of Title 67 on their

purchase or consumption of diesel fuel in the state of Tennessee. In 2007-2009, TDOT reported that it received less than $100,000 in sales and use taxes from water carriers. (Multimodal Transportation Alternatives Status 2007 Annual Report, p. 4-4; Multimodal Transportation Status 2008 Annual Report, p. 4-3; TDOT Multimodal Transportation Resource Division 2009 Annual Report, p. 4-4).

17. Tennessee, along with the other 47 contiguous states and bordering Canadian provinces, is a party to the International Fuel Tax Agreement ("IFTA") the purpose of which is to simplify the collecting and reporting of taxes on motor fuel used by motor carriers operating in more than one jurisdiction.

18. IFTA requires that the fuel use tax imposed by member jurisdictions be measured by the consumption of fuel in a motor vehicle. *See* 49 U.S.C. § 31701(2).

19. The standard IFTA tax return shows tax rates for each member jurisdiction in terms of per-gallon or per-liter taxes. (*See* Rowen Depo., Exh. 4).

20. Fuel costs incurred in the transportation of property in interstate commerce are a significant annual operating expense of both rail carriers and motor carriers. For the years 2005 through 2010, fuel costs as a percentage of total operating expenses for railroads were 16.5, 19.8, 20.9, 25.8, 15.3 and 18.5 respectively. (Railroad Facts 2011, p. 61).

21. The State of Tennessee has no control over the price of diesel fuel.

22. The Surface Transportation Board (STB) classifies freight railroads into three classifications --

Class I, those with at least $398.7 million in operating revenue -- Class II, those with $31.9 million to $398.7 million in operating revenue -- Class III, those with less than $31.9 million in operating revenue. These thresholds are adjusted annually for inflation. The Class I railroads account for the majority of the U.S. rail freight activity, and since 1980 have been the only railroads required to report financial and operating information to the STB. Six Class I railroads operate in Tennessee. (Railroad Facts 2011, p. 3)

23. ICRR is a "common carrier by railroad" within the meaning of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501. (Complaint, ¶ 18.)

24. Motor carriers pay a motor fuel tax totaling 18.4¢ a gallon. Tenn. Code Ann. § 67-3-202 - 205. Under Tenn. Code Ann. § 67-3-203 and 204, 1¢ of the 18.4¢ is a special privilege tax and .4¢ of the 18.4¢ is an environmental assurance fee. Approximately 70% of the motor fuel taxes collected from motor carriers are allocated to the highway fund, which is allocated to TDOT. Approximately 28% is allocated to cities and counties and designated for use on roads. Approximately 2% is allocated to the general fund.

25. In addition to the sales and use tax, railroads also pay the 1¢ and .4¢ tax imposed under Tenn. Code Ann. § 67-3-203 and 204.

26. In the tax years 2006 through 2010, ICRR paid the following amounts of Tennessee sales tax on its diesel fuel:

2006	$1,838,217
2007	$1,839,288

2008	$2,745,049
2009	$1,341,981
2010	$1,689,664

[Defendants are not bound, in any other proceeding, by the amounts shown in Stipulation 26.]

27. In the tax years 2006 through 2010, ICRR paid the following amounts of Tennessee state and local sales tax on track material:

2006	$635,168
2007	$826,606
2008	$990,641
2009	$401,040
2010	$283,971

[Defendants are not bound, in any other proceeding, by the amounts shown in Stipulation 27.]

28. In the tax years 2006 through 2010, ICRR paid the following amounts of property tax to cities and counties in Tennessee on its track structure, right of way, and signals:

2006	$1,885,344
2007	$2,148,995
2008	$2,418,641
2009	$2,581,751
2010	$2,517,645

[Defendants are not bound, in any other proceeding, by the amounts shown in Stipulation 28.]

29. ICRR owns its track and rights-of way. No other railroad can operate trains over ICRR's track or rights-of-way without Plaintiff's permission.

30. ICRR's total employment at work locations in Tennessee was 496 employees as of December 31, 2011. The employment numbers were substantially the same during the years 2005-2010 as during 2011. (Rogers Depo., p. 38).

31. Under Tennessee law, any county or municipality, or any combination thereof, may establish Rail Authorities, for the purpose of maintaining railroad services within the governmental jurisdiction establishing the authority. A number of Rail Authorities have been established in Tennessee, and it is these Rail Authorities that receive grants from the TDOT of funds from the Transportation Equity Trust Fund for short line track and bridge rehabilitation. *See* Tenn. Code Ann. § 7-56-201.

32. ICRR has direct connections with two of the short line railroads in Tennessee. Eleven other short lines have traffic which may originate or terminate on a Tennessee short line, but interconnect through another Class I carrier with the ICRR somewhere out of state.

33. Plaintiff owns and operates an intermodal facility in Memphis, Tennessee. Approximately 20-25% of Plaintiff's business is intermodal -containers that can move by rail, vessel, barge, or truck, or trailers that can move by rail or truck. (Jakubowski Depo., p. 16, l. 24-p. 20, l.23).

34. Every intermodal container or trailer that Plaintiff handles travels by truck at some point on its

route. (Jakubowski Depo., p. 15, l.24 through p. 20, l. 23).

35. Other products that move by rail, for example, automobiles, may also move by truck at some point along the route.

36. Plaintiff has the ability to route cars on the open network of all Class I and all short line railroads in Tennessee (Jakubowski Depo., p. 41, l. 15-p. 42, l.3).

37. Railroads pay to construct and maintain their own rights-of-way. (Jakubowski Depo., p. 14, ll. 1-7).

38. The Transportation Equity Trust Fund is a fund that was established in fiscal year 1987-1988, and is described in Tenn. Code Ann. §67-6-103(b)(1). The Transportation Equity Trust Fund is a fund to which is directed the sales and use tax paid on fuel purchased or used by aeronautics, railroads, and barges, the railroad portion of which is granted to Rail Authorities for the short line railroad track and bridge rehabilitation programs administered by TDOT. (Tennessee Rail System Plan Policy and Procedures Manual, page 2, Coleman Depo. Exh. 4).

39. Since July 1, 1987, sales and use tax revenues at the rate of 5 1/2 % of the purchase price generated from the purchase or use of diesel fuel by all railroads have been allocated to the Transportation Equity Trust Fund and have been used by TDOT for the short line railroad track and bridge rehabilitation program. Revenues from later increases in the sales and use tax rate from 5 1/2 % to 7% have been allocated to the general fund and/or for educational purposes. Tenn. Code Ann. § 67-6-103(b) and (c).

40. On occasion, the General Assembly has allocated supplemental funds to the Transportation Equity Trust Fund.

41. The needs assessment is an engineering study to determine costs to bring short line tracks and bridges up to a desired engineering standard, including the capability to handle car loads of 286,000 pounds. (Collier Depo., p. 27; Coleman Depo. Exh. 3, pp. 28, 37). The needs assessment studies are not based on the economic viability of the short lines. (Collier Depo., p. 27 and Linn 11/16/2011 Depo., p. 27). The existing short lines' track is capable of handling 286,000 pound cars; the rehabilitation standard is to allow the operation of trains without speed restrictions. (Linn 11/16/2011 Depo., p. 30).

42. The initial needs assessment studies for rehabilitation were performed in the early 1990s and were supplemented periodically through 2005. In fiscal year 2003-2004, identified total needs for the short line Rail Authorities were $151,198,589.27. (Coleman Depo. Exh. 1). After a 2005 update of the track needs assessment study, by fiscal year 2007-2008, the total needs for the short line Rail Authorities were stated to be $294,713,386. (Coleman Depo. Exh. 1).

43. TDOT does not gather financial information relative to the short line operator's or short line Rail Authorities' revenues or profits. (Collier Depo. Exh. p. 32)

44. The Transportation Equity Trust Fund, including rail rehabilitation funds, are set up to support the local communities and economic development in those communities. (Collier Depo., p. 31).

45. Twenty-two short line Rail Authorities receive funds from the Transportation Equity Trust Fund in proportion to their needs as determined by track and bridge needs studies.

46. Rehabilitation spending for the TennKen Railroad Authority totaled $597,881 in 2009. (2009 Multimodal Transportation Report, p. 3-45; Collier Depo. p. 29-30).

47. According to a TDOT financial report, the amounts spent from all sources contemplated by the report from 1980, through 2011, for track and bridge rehabilitation by the TennKenn Railroad Authority was $19,133,247.58. Of that amount, $15,109,352.56 was from the Transportation Equity Trust Fund. (Coleman Depo. Exh. 3, Bates # 001750).

48. The West Tennessee Railroad Company operates two different segments of track. The "Kenton Branch" from Kenton, Tennessee to Carroll, Tennessee (near Jackson), is owned by the West Tennessee Railroad Company, which purchased it from the Illinois Central Railroad in 1984. Transportation Equity Trust Fund allocations to the Kenton Branch are administered by the Gibson County Railroad Authority. The line from Fulton, Kentucky to Corinth, Mississippi is owned by Norfolk Southern Railroad Company, which leased it to the West Tennessee Railroad Company in 2001. Transportation Equity Trust Fund Allocations to the Fulton-to-Corinth line are administered by the West Tennessee Railroad Authority. Each branch has its own rehabilitation funding needs documented by TDOT. (Linn 5/16/2012 Depo. p.22; 2009 Multimodal Transportation Report, pp. 3-17 and 3-49).

49. According to a TDOT financial report, the amounts spent, from all sources contemplated by the report, from 1984 through 2011, for track and bridge rehabilitation by the Gibson County Railroad Authority was $17,278,084.12. Of that amount, $13,303,145 was from the Transportation Equity Trust Fund. (Coleman Depo. Exh. 3, Bates #1719). Similar spending by the West Tennessee Railroad Authority from 2002 through 2011, was $15,133,073.32. Of that amount, $12,271,465 was from the Transportation Equity Trust Fund. (Coleman Depo. Exh. 3, Bates #1756).

50. Based on the most current track and bridge needs assessments, the West Tennessee Railroad Company, through the Gibson County Railroad Authority and the West Tennessee Railroad Authority, is entitled to a distribution of 18.9% of the Transportation Equity Trust Fund collections annually. (Linn 5/16/2012 Depo., p. 23).

51. Plaintiff has pending in the Chancery Court for Davidson County, Tennessee a refund action seeking a refund of all sales and use taxes paid on its purchases of diesel fuel in Tennessee from 2005 through 2010.

52. Transportation Equity Trust Fund receipts for use in the short line track and bridge rehabilitation program from 2006 through 2010 total $60,965,691.54 (Bates #1844).

Respectfully submitted,

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