

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-337

TITLE BURLINGTON NORTHERN RAILROAD COMPANY, Petitioner V.
OKLAHOMA TAX COMMISSION, ET AL.

PLACE Washington, D. C.

DATE March 25, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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BURLINGTON NORTHERN RAILROAD CO., :

Petitioner :

v. : No. 86-337

OKLAHOMA TAX COMMISSION, ET AL, :

- - - - -x

Washington, D.C.

March 25, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:08 o'clock a.m.

1 APPEARANCES:

2 MRS. BETTY JO CHRISTIAN, Washington, D.C.;

3 on behalf of Petitioner

4 ALBERT G. LAUBER, JR., Washington, D.C.;

5 Dep. Sol. Gen.,

6 Department of Justice

7 on behalf of Petitioner

8 DAVID W. LEE, Oklahoma City, Oklahoma;

9 on behalf of Respondent

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C-O-N-T-E-N-T-S

ORAL ARGUMENT OF

PAGE

MRS. BETTY JO CHRISTIAN, Washington, D.C.;

on behalf of Petitioner

4

ALBERT G. LAUBER, JR., Washington, D.C.;

Dep. Sol. Gen.,

Department of Justice

on behalf of Petitioner

22

DAVID W. LEE, Oklahoma City, Oklahoma;

on behalf of Respondent

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: The opinion of the
3 Court in number 85-920, Alaska Airlines v. Brock will be
4 announced by Justice Blackmun. God again, we've got to
5 know, we (Laughter). I'm sorry.

6 If you will sit down Ms. Christian, this is a
7 bad week for me. I have omitted the applicants on both
8 yesterday and today. At this time, the court will
9 consider motions for admissions to the bar of the Court.
10 I'll proceed with the arguments in Burlington Northern v.
11 Oklahoma Tax Commission. Mrs. Christian.

12 ORAL ARGUMENT OF

13 MRS. MARY JO CHRISTIAN

14 ON BEHALF OF PETITIONER

15 MRS. CHRISTIAN: Mr. Chief Justice, and may it
16 please the Court:

17 This case involves the interpretation of Section
18 306 of the Railroad Revitalization and Regulatory Reform
19 Act of 1976. This Act was passed by Congress in response
20 to a major financial crisis in the railroad industry.

21 In addition to providing an immediate infusion
22 of federal funds, the Act took the first steps toward
23 deregulation at the federal level and placed restrictions
24 on the powers of the states with respect to the railroads.

25 In Section 306, Congress declared state tax

1 discrimination against railroads to be an undue burden on
2 interstate commerce and in an express exception to the Tax
3 Injunction Act, granted the federal courts jurisdiction to
4 remedy any violations.

5 The key substantive provision is Section 306(1),
6 which appears at page 20-A to the Appendix to the Petition
7 for Certiorari. Subsection 1 declares that it is unlawful
8 for the states to engage in any of a series of prohibited
9 acts.

10 Subsection A and B are directed to the
11 assessment of railroad property at a percentage of that
12 property's true market value which is higher than the
13 percentage of assessed value to true market value of other
14 commercial and industrial property.

15 Subsection C is directed to and prohibits tax
16 rights which are higher for railroads than for non-
17 railroad property and subsection D prohibits any other tax
18 which results in discriminatory treatment of a railroad.

19 The specific issue in this case is whether
20 Section 306 gives the federal courts jurisdiction over a
21 claim of tax discrimination resulting from the
22 overvaluation of a railroad's property. In its complaint
23 in this case, Burlington Northern alleged that in 1982 the
24 state of Oklahoma had over-valued its property.

25 And that as a result of that overvaluation, its

1 property had been assessed at a percentage of assessed
2 value to true market value which was higher than the
3 percentage of assessed value to true market value for
4 other commercial and industrial property.

5 The District Court dismissed the complaint for
6 lack of jurisdiction. The 10th Circuit, relying on its
7 own prior decision in the Lennen case upheld the dismissal
8 of the complaint, holding that generally Section 306 does
9 not grant the federal courts jurisdiction over state tax
10 discrimination which results from overvaluation of a
11 railroad's property.

12 It carved out one exception holding that the
13 federal courts would have jurisdiction if the railroad
14 could make a strong showing prior to trial of purposeful
15 overvaluation with discriminatory intent and upheld the
16 District Court's conclusion that Burlington Northern's
17 affidavits have failed to make such a showing.

18 The same issue has been considered by two other
19 Circuits. Both the 8th Circuit and the 9th Circuit have
20 held that Section 306 grants the federal courts
21 jurisdiction over all claims of state tax discrimination,
22 specifically including discrimination resulting from the
23 overvaluation of a railroad's property and that no showing
24 of discriminatory intent is required.

25 Before I turn to the text of the statute I

1 believe it is important to emphasize one point and that is
2 that it is clear from the reports of Congress that its
3 goal in enacting this statute was to put an end to state
4 tax discrimination against railroads.

5 As a practical matter, discrimination can result
6 just as readily from the overvaluation of the railroad's
7 property as it can from undervaluation of other commercial
8 and industrial property or from higher tax rates.

9 Thus if Section 306 does not encompass
10 discrimination which results from overvaluation of the
11 railroad's property the statute will be left with a gaping
12 hole and will not accomplish its purpose.

13 QUESTION: Mrs. Christian, there is a pretty
14 well recognized distinction in state property tax law
15 isn't there between valuation relief or valuation and
16 equalization?

17 MRS. CHRISTIAN: I believe that those terms are
18 misleading and confusing, Mr. Chief Justice. Because we
19 --

20 QUESTION: Well why do you think they're
21 misleading and confusing?

22 MRS. CHRISTIAN: Equalization essentially refers
23 to equalizing the percentages of assessed value to true
24 market value. Now, the need for equalization can arise
25 either from the undervaluation of commercial and

1 industrial property or the overvaluation of the railroad's
2 property.

3 QUESTION: Well, I had thought that valuation
4 was the determining what the fair market value of the
5 property was and that equalization meant the desire to
6 assess at the same percentage of fair market value all
7 classes of property. Do you think that's wrong?

8 MRS. CHRISTIAN: No, it is directed to the
9 desire to assess at the same percentage of true market
10 value --

11 QUESTION: Well why do you think --

12 MRS. CHRISTIAN: -- all classes of property but
13 --

14 QUESTION: Why do you think the terms are
15 misleading then?

16 MRS. CHRISTIAN: The petitioners, the
17 respondents in this case have used the term equalization
18 as synonymous with undervaluation. We believe that
19 equalization refers to the process of reaching the same
20 percentage of assessed value to true market value for all
21 classes of property.

22 QUESTION: But as you have used the term and
23 perhaps as, I think I have used it the same, do you find that
24 confusing?

25 MRS. CHRISTIAN: No, not as we have used the

1 term here. Turning now to the text of the statute, we
2 believe that the Section 30C on its face encompasses
3 federal court jurisdiction over discriminatory assessments
4 which result from overvaluation of railroad property.

5 Subsection 1(a), on its face prohibits the
6 assessment of transportation property at a value which
7 bears a higher ratio to the true market value of that
8 property than the ratio of assessed value to true market
9 value of other commercial and industrial property.

10 The only way that the District Court can
11 determine whether that requirement has been met is to make a
12 determination as to what is the assessed value and what is
13 the true market value of both railroad property and other
14 commercial and industrial property.

15 This is the only way that the District Court can
16 determine the percentages to make the mathematical comparison
17 required by the statute. And indeed, in subsection 2(d)
18 of the statute it goes on to provide that the burden of
19 proof with respect to both assessed value and true market
20 value shall be that declared by applicable state law.

21 There is nothing in the statute to indicate that
22 this does not apply to a determination of the true market
23 value of the railroad property as well as other commercial
24 and industrial property.

25 The only textual support offered by the 10th

1 Circuit for its conclusion that the District Court must
2 accept the true market value found by the state as
3 determinative and may not make its own inquiry into the
4 facts, is the fact that there is a proviso to subsection
5 2(e) that prescribes a particular sampling technique for
6 use in the valuation of other commercial and industrial
7 property.

8 But that carries no connotation that the true
9 market value of railroad property is not to be determined
10 at all and indeed that the very proviso of subsection 2(e)
11 goes on to provide that in the event the true market value
12 of the other commercial and industrial property cannot be
13 decided, be determined to the satisfaction of the court
14 through the sales assessment ratio, the sampling technique,
15 then the comparison should be made to the true market
16 value of all other property.

17 And just as in the case of the railroad property
18 there is no direction as to how that determination should
19 be made. We believe that the --

20 QUESTION: Your claim here is that
21 306 Section 28(a) was violated.

22 MRS. CHRISTIAN: Subsection 1(a), that is
23 correct.

24 QUESTION: 1(a).

25 MRS. CHRISTIAN: That is correct, Mr. Chief

1 Justice. We believe that the language of the statute --

2 QUESTION: Mrs. Christian, there is certainly
3 some indication in the legislative history that the
4 representatives of the railroad industry seeking this
5 legislation did not expect it to be applied as you would
6 have us apply it today.

7 MRS. CHRISTIAN: We do not believe that that is
8 a correct characterization of what the railroad witnesses
9 actually said, Justice O'Connor. What the railroad
10 witnesses who were quoting, quoted by respondents actually
11 were saying is that the statute does not require any
12 uniform valuation methodology.

13 This is an entirely different matter from saying
14 that the court cannot inquire into true market value. And
15 indeed the statute does not prescribe a particular
16 methodology of valuation.

17 States are free to use any methodology they
18 choose as long as it results in true market value. In
19 particular the witness most frequently cited by
20 respondents, --

21 QUESTION: Mr. Lanier.

22 MRS. CHRISTIAN: -- Mr. Lanier, expressly stated
23 in written testimony subsequent to the oral exchanges
24 recited by respondents that in his view the valuation of
25 railroad property would be an issue.

1 This same opinion was expressed by the
2 Interstate Commerce Commission and by various
3 congressional sponsors of the bill.

4 Beyond this, Justice O'Connor, it is apparent
5 that the states themselves did not interpret Mr. Lanier
6 and other railroads' testimony at the time, as
7 constituting any promise that railroad valuation would not
8 be an issue because subsequent to those remarks the states
9 continued to vehemently oppose enactment of this
10 legislation, stating as one of their principal reasons the
11 fact that it would require the federal courts to become
12 involved with state railroad property valuation.

13 QUESTION: Mrs. Christian, what does it mean to
14 say, as you just have, that the statute does not require
15 any particular valuation methodology so long as it
16 produces real market value. What does that mean?

17 I mean, if the federal courts are going to
18 decide this uniformly presumably they're going to have to
19 use one methodology. The reason you use different
20 methodologies is that they tend to produce different
21 results.

22 Now there's a broad range of results which you
23 might say are fair even though the methodologies come up
24 with different outcomes, you can say well, they're
25 different but it's arguable that any one of them is the

1 fair market value.

2 But when the federal courts are going to have to
3 review it to determine whether it is in fact the fair
4 market value, doesn't there have to be some uniform federal
5 methodology.

6 Aren't we getting the federal courts involved in
7 federal railroad rate making and in order to do that
8 doesn't there have to be some standard federal methodology
9 if your case is correct?

10 MRS. CHRISTIAN: I see no reason why that would
11 necessarily be the result, Justice Scalia. In valuing
12 railroads virtually all states use what is called the
13 unitary method.

14 That is they determine a value for the system
15 wide property of the railroad. And there are generally
16 three methodologies which are in common use by virtually
17 all states.

18 The original cost depreciated method,
19 capitalized income and the stock and bond method. Now the
20 Burlington Northern and the railroads generally have never
21 taken the position that any one of these is the only
22 appropriate methodology.

23 Indeed most states adopt a weighting of two or
24 sometimes three. The state of Oklahoma uses a weighting
25 average of original cost depreciated and the capitalized

1 income methodologies. Now, --

2 QUESTION: Which one produces the fair market
3 value? When they come out with different results we have
4 a statute that says fair market value. You tell us that
5 federal courts have to determine what is fair market
6 value.

7 We have three different methodologies. Each of
8 them produce significantly different figures. Which is,
9 will the true fair market value please stand up. How do
10 you know which one of them is the true?

11 MRS. CHRISTIAN: First, Justice Scalia, if
12 properly applied all of these methodologies will yield
13 results that are very close together. Not identical
14 perhaps, but there should not be any wide range if they
15 are applied properly and the appropriate adjustments are
16 made to take into account the facts of the particular
17 situation.

18 What the District Court would do would be to
19 hear expert testimony, witnesses produced by both the
20 state and the railroad with respect to the application of
21 the various methodologies to the facts of the particular
22 case before him and then make a determination on the basis
23 of the evidence in that particular case what the true
24 market value has been shown to be with the burden of proof
25 as imposed by state law which would normally be with the

1 railroad carrying the burden of proof.

2 QUESTION: Will you concede then that all the
3 federal court would have to do is use whatever methodology
4 the state used, assuming that was a reasonable
5 methodology?

6 MRS. CHRISTIAN: We think the door would have to
7 be open for the railroad to challenge a particular
8 methodology as not being a reasonable methodology.

9 QUESTION: Right.

10 MRS. CHRISTIAN: But given that caveat, yes his
11 role would be to determine on the basis of the evidence
12 before him, which would include the evidence of the
13 state's expert and the railroad's expert as to whether
14 these methodologies have been properly applied.

15 It would not necessarily result in any uniform
16 methodology of revolving. I would like to turn now very
17 briefly to the --

18 QUESTION: May I ask before you leave the
19 methodology point. What's wrong with the methodology in
20 this case?

21 MRS. CHRISTIAN: In this case, Burlington
22 Northern would be raising two contentions. First with
23 respect to the capitalized income of methodology as
24 applied by the state of Oklahoma. It is Burlington
25 Northern's contention that the capitalization rate chosen

1 by the state was improper because it does not accurately
2 reflect the actual experience of cost of capital for the
3 railroads in this time period.

4 With respect to original cost depreciated,
5 Burlington Northern's position is that the state of
6 Oklahoma in 1982 erred by refusing to apply a deduction to
7 take account of the fact that much of its property is now
8 obsolete because it was built decades ago for other
9 traffic, despite the fact that it had granted such a
10 deduction for obsolescence in past years.

11 QUESTION: In other words, both methodologies
12 were permissible but they were misapplied in this
13 particular case for the reason --

14 MRS. CHRISTIAN: In this particular case,
15 Burlington Northern is claiming that they were misapplied.
16 Very briefly before you --

17 QUESTION: Would the federal court give any
18 deference to the state's judgment on those matters, or, in
19 other words, would the federal court be reviewing the
20 state's rate making or assessments similar more or less
21 the way it would review a rate making by the ICC, giving
22 the agency the benefit of the doubt. Or, does the federal
23 court have to de novo make those determinations?

24 MRS. CHRISTIAN: The federal court has to de
25 novo make those determinations.

1 QUESTION: It's a lot of work.

2 MRS. CHRISTIAN: It would of course determine on
3 the basis of the experience and expertise of the
4 individual expert witnesses what degree of deference
5 should be given to each witness but it would not give
6 deference to the state merely because it was the state.

7 Indeed, one of the principal bases for Congress'
8 enactment of this legislation was stated to be its
9 perception of the inadequacies of state remedies. And one
10 of those inadequacies to which it specifically pointed was
11 the fact that the states determination was generally
12 accorded a presumption of validity (inaudible) --

13 QUESTION: How do you square that with your
14 concession that you have to accept whatever method of
15 valuation the state uses.

16 MRS. CHRISTIAN: Justice Scalia, we certainly
17 remain free to challenge a particular valuation as totally
18 unreasonable. But there --

19 QUESTION: How about within the range of
20 reasonable ones you have, you say we have to, the federal
21 court has to accept the methodology that the state
22 chooses. Why wouldn't you by similar logic have to say
23 that within the possible, reasonable, factual outcomes you
24 have to accept whatever factual outcome the state chooses.

25 MRS. CHRISTIAN: Justice Scalia, I apologize if

1 I said the state would have, the court would have to
2 accept the methodology. Certainly the railroad's
3 witnesses would be free to state that they believe other
4 methodologies were preferable.

5 But generally, in most cases, the methodologies
6 used by the state and by the railroads are essentially one
7 of the three that we have just discussed and if properly
8 applied they will essentially lead to the same, to the
9 result of true market value.

10 QUESTION: And I think they will lead to the
11 result, the same results system wide. But if you have a
12 railroad system that's going through several states the
13 result that they might produce in a particular state could
14 vary significantly, couldn't it?

15 MRS. CHRISTIAN: The states, Justice Scalia, do
16 the valuation of the railroad property on a system wide
17 basis and then they allocate a portion of that to the
18 state on the basis of track miles, or some other
19 technique.

20 QUESTION: Or --

21 MRS. CHRISTIAN: So that the valuation of each
22 state is --

23 QUESTION: Well, I'm including that in the
24 methodology though. I mean, you say on the basis of track
25 miles or some other technique. Isn't that part of the

1 whole methodology? How much you allocate to the state.

2 MRS. CHRISTIAN: That is not normally considered
3 a part of the methodology.

4 QUESTION: Oh.

5 MRS. CHRISTIAN: That would be considered
6 something separate. The allocation.

7 QUESTION: I see. Well what about that? Does
8 the federal court have to accept the method of allocation
9 that the state uses?

10 MRS. CHRISTIAN: In this particular case,
11 Justice Scalia, there is no challenge as to the allocation
12 factor and that is true of all of the cases I'm familiar
13 with. But I would think the railroad would have to be
14 free to challenge the allocation if it is unreasonable.

15 QUESTION: What if it's -- but there, but you
16 know, I mean there are a lot of different reasonable ways
17 of allocating. I really want to know what the railroads
18 expect the federal courts (inaudible).

19 MRS. CHRISTIAN: The railroads expect the
20 federal courts to engage in a de novo determination of
21 whether the true market value has been properly
22 determined.

23 Now in this there normally will not be a serious
24 dispute over the methodology provided that the states have
25 used one of the recognized systems. There could be in

1 individual cases.

2 QUESTION: There normally will be over the
3 allocation.

4 MRS. CHRISTIAN: Thus far, in the cases
5 litigated to date, Justice Scalia, to the best of my
6 knowledge none of the cases has involved a dispute over
7 the allocation to the state. But that certainly could
8 arise. At this juncture, I would like to turn my time
9 over to, yes Justice --

10 QUESTION: Could I ask you, I take it that the
11 earlier Burlington case in Kansas, with respect to Kansas --

12 MRS. CHRISTIAN: Yes.

13 QUESTION: I thought that the Court of Appeals
14 said that this kind of a suit would be entertained if the
15 railroad could make out a decent claim of intentional and
16 purposeful overvaluation?

17 MRS. CHRISTIAN: That is correct, Justice White.

18 QUESTION: Well, isn't it almost inherent in
19 your claim that it was intentional.

20 MRS. CHRISTIAN: We think that it was and that
21 we made that showing. But fundamentally, Justice White,
22 the basic issue in the case is whether the courts have
23 jurisdiction over discrimination resulting from
24 overvaluation at all.

25 QUESTION: Well, --

1 MRS. CHRISTIAN: We certainly --

2 QUESTION: Was there a finding about intentional
3 discrimination in this case?

4 MRS. CHRISTIAN: In this case, Justice White,
5 the District Court received affidavits but did not conduct
6 a hearing, and concluded on the basis of those affidavits
7 that Burlington Northern had not made a strong showing of
8 overvaluation with discriminatory intent. That was upheld
9 by the 10th Circuit.

10 QUESTION: So they said with discriminatory --

11 MRS. CHRISTIAN: Purposeful overvaluation with
12 discriminatory intent. The District Court held that
13 Burlington Northern's affidavits did not constitute such a
14 showing. That was upheld by the 10th Circuit.

15 QUESTION: And so, both courts seemed to say
16 that even if there was overvaluation it wasn't
17 discriminatory, intentionally discriminatory?

18 MRS. CHRISTIAN: Both courts upheld that,
19 Justice White.

20 QUESTION: Mrs. Christian do you defend, or
21 support, or agree with the requirement of intentional
22 discrimination as being an element.

23 MRS. CHRISTIAN: We believe that intent is not a
24 relevant element at all, Justice O'Connor. The statute
25 itself on its face, speaks in terms of acts and results,

1 and in particular subsection 1(a), which we believe covers
2 this case does not even use the term discrimination.

3 It simply declares it unlawful for the state to
4 assess railroad property at a percentage of fair market
5 value higher than that for other property and defines it
6 in terms of a mathematical percentage.

7 We believe there is nothing in either the
8 statute or the legislative history to support the intent
9 requirement.

10 QUESTION: Thank you, Mrs. Christian. We'll
11 hear now from you, Mr. Lauber.

12 ORAL ARGUMENT OF
13 ALBERT G. LAUBER, JR.
14 ON BEHALF OF PETITIONER

15 MR. LAUBER: Mr. Chief Justice, and may it
16 please the Court:

17 The 10th Circuit invented its intentional
18 discrimination test in order to solve what it perceived to
19 be a problem with the statute. The problem it perceived
20 was that letting federal courts inquire into the true
21 market value of railroad property would unduly interfere
22 with state taxing prerogatives and would burden the
23 federal courts, both by increasing their work load and by
24 requiring them to undertake difficult or inappropriate
25 tasks.

1 QUESTION: Both those things are likely to be
2 true of course, aren't they, Mr. Lauber.

3 MR. LAUBER: Well I hope to show that they are
4 not both true. I think that Mrs. Christian has shown that
5 the intentional test was a wrong solution and I hope to
6 show there was really no problem to begin with.

7 In fact, Section 306 is a limited measure that
8 Congress carefully designed to avoid intruding on state
9 tax prerogatives to the greatest possible extent
10 consistent with achieving the objective of eradicating
11 discrimination against railroads.

12 First of all, Congress enacted a three year
13 delay in the effective date of the statute to avoid any
14 kind of shock effect on the states and to give them plenty
15 of time to bring their law into compliance with the
16 statute.

17 Secondly, Congress adopted in the statute the
18 state's rules governing burden of proof as to true market
19 value and that means the railroad is going to have to
20 shoulder whatever difficulties are inherent in proving
21 true market value.

22 Thirdly, the statute only bars discriminatory
23 overvaluation of railroad property. Thus, the railroad
24 can't come into federal court as if it were a home owner
25 and simply argue that my property has been assessed too

1 high in absolute terms.

2 QUESTION: Where do you find this requirement in
3 the statute, Mr. Lauber?

4 MR. LAUBER: Of the discrimination?

5 QUESTION: Yes.

6 MR. LAUBER: Well, it comes from the fact that
7 you have these two fractions, the two assessment ratios
8 that have to either be equivalent or not. The railroad
9 has got to show that its property has been over-valued
10 vis-a-vis non-railroad property. That is the test for
11 discrimination. This mathematical disparity of the two
12 fractions.

13 QUESTION: Well then you're not using
14 discrimination in any intentional sense at all.

15 MR. LAUBER: Exactly right.

16 QUESTION: A disparity is what you're --

17 MR. LAUBER: Exactly right. When Congress
18 defined discrimination in objective terms as a disparity
19 in these two assessment ratio fractions.

20 QUESTION: So your point is if all the
21 property in the state is valued wrong, but it's not done
22 in any way that discriminates against the railroad that
23 would not be an object of (inaudible).

24 MR. LAUBER: Exactly right. Exactly right.
25 So a mere overvaluation per se is not a cause of action.

1 We must have relative over-valuation.

2 QUESTION: Well did you read the word
3 assessment, the second word in subsection (a) as being the
4 same as valuation?

5 MR. LAUBER: Well assessed value --

6 QUESTION: Well, but it doesn't say assessed
7 value. It says assessment of transportation property.

8 MR. LAUBER: At a higher ratio.

9 QUESTION: Yes.

10 MR. LAUBER: (inaudible) assess it, it means, yes
11 the value --

12 QUESTION: Well, why doesn't that refer to the
13 equalization process rather than the valuation process?

14 MR. LAUBER: Well what the two fractions
15 represent is perfect equalization. You have these two
16 fractions of assessed value over fair market value for
17 railroads and everybody else.

18 And the statute says those must be equal. That
19 is equalization. And we think the court has got to look
20 at both denominators of each fraction, to figure out if
21 those fractions are equal or not, if there is
22 equalization. And, getting the value right for
23 both the railroads and everybody else is a necessary
24 step in getting the fractions right and seeing
25 if they're equal or not. And that's what the federal

1 court, we think, has got to do.

2 QUESTION: The thing doesn't really work if you
3 read it literally and if you assess the property higher
4 but tax it at a lower rate. You follow me?

5 MR. LAUBER: Well, taxing at a higher rate --

6 QUESTION: There would not be any discrimination
7 against the railroad if although you violated subsection A
8 by assessing the property too high. Nonetheless, you tax
9 it at a lower rate.

10 MR. LAUBER: Well, the rate disparity is a
11 separate offense (inaudible).

12 QUESTION: You taxed it at a lower rate, the
13 railroad property at a lower rate. You assess it higher,
14 but tax it lower.

15 MR. LAUBER: It could be --

16 QUESTION: It would still violate A wouldn't it,
17 even though the railroad isn't being discriminated against.

18 MR. LAUBER: -- It could be a railroad might, a
19 railroad might be able to defend, the state might be able
20 to defend on the ground that any over-assessment was
21 cured.

22 Any relative over-assessment was cured by a rate
23 disparity, but frankly that was not the problem Congress
24 had. I mean, there was never a case in history where
25 railroads were taxed at a lower rate than everybody else.

1 It simply, historically was not the problem we were
2 dealing with. Furthermore, even after --

3 QUESTION: One would hope not. (Laughter).

4 MR. LAUBER: Even after a railroad proves
5 discrimination in objective terms, the court cannot grant
6 relief unless the railroad proves that the disparity in
7 the two assessment ratios is greater than five percent.

8 This five percent tolerance factor was plainly
9 designed by Congress to keep out trivial or de minimis
10 disputes about overvaluation and to keep the federal court
11 jurisdiction confined to relatively egregious cases of
12 discrimination.

13 Now as far, fifthly, the statute grants the
14 court jurisdiction only to enjoin the discriminatory
15 portion of the tax, not the entire tax. And that means
16 that the state can then go on to assess and collect the
17 balance of the tax so there will be no interruption of its
18 main revenue flow.

19 Now as to the burden on the federal courts there
20 have been only about three dozen cases brought under
21 Section 306 as a whole in the eight years since the
22 statute became effective.

23 Whereover only about ten of those have involved
24 overvaluation claims of the kind involved here. That is
25 so even though only the 10th Circuit has imposed a

1 threshold intent test as a means for discouraging the
2 bringing of overvaluation claims. We don't think ten
3 lawsuits in eight years is particularly burdensome on the
4 federal courts.

5 QUESTION: Mr. Lauber, do you think the statute
6 would permit states to impose a burden of proof by clear
7 and convincing evidence on the railroads in these cases?

8 MR. LAUBER: I don't think the statute would
9 permit that. I mean, it doesn't speak to it.

10 QUESTION: Why not? Doesn't it say that the
11 burden of proof will be as determined by the applicable
12 state law?

13 MR. LAUBER: Oh, so you're saying if state law
14 itself imposed a clear and convincing burden of proof that
15 would be --

16 QUESTION: On the railroads.

17 MR. LAUBER: -- incorporated into federal law.

18 QUESTION: Right.

19 MR. LAUBER: I don't think that was the intent
20 of the statute.

21 QUESTION: Well, now why doesn't the statute
22 provide exactly that in subsection 2(d): the burden of
23 proof with respect to the determination of assessed value
24 and true market value shall be that declared by the
25 applicable state law.

1 MR. LAUBER: Well I would read that, the words
2 "with respect to the determination of" simply to refer to
3 who has the burden of proof, not to the manner in which
4 you must discharge your burden of proof. I don't know if
5 Congress, and like I said, history discussed this
6 question, but the thrust of the statute was to have the
7 federal court undertake de novo review of this because
8 Congress was convinced that the deck was stacked against
9 --

10 QUESTION: I think I might be inclined to give
11 it its ordinary meaning and say it would encompass the
12 level of the burden.

13 MR. LAUBER: Well, the problem is that the state
14 could then have it be beyond a reasonable doubt and kind of
15 get at the railroads that way. And that would completely
16 defeat the purpose of the statute.

17 I mean, Congress thought, the reason they let
18 the federal courts take on these cases is because they
19 thought the deck was stacked against the railroads in the
20 states and that the state assessment boards didn't give them
21 a fair shake and they state courts rubber stamped what the
22 assessment boards did.

23 And if you let the state gin up an impossible
24 burden of proof standard and then bring it into federal
25 court it would be quite a nugatory remedy that Congress

1 can't really have intended. So I would read this as
2 referring to simply who has the burden of proof.

3 Let me make one other point about what I think
4 is a fundamental flaw in the other side's position.

5 They would agree that if a railroad had an
6 undervaluation claim, that is that its property was valued
7 okay but everybody else's was too low that it can bring
8 that claim to federal court. Now it could --

9 QUESTION: Mr. Lauber, oh I'm sorry, go on.

10 MR. LAUBER: It could very well be that the
11 state would respond by saying yes. Well in fact, we have
12 undervalued other people's property, but we've also
13 undervalued your property.

14 We think we made mistakes in assessing your
15 property originally and we would like to prove that we
16 undervalued your property by an equal degree and therefore
17 you have not proven discrimination.

18 We think that a state could surely do that.
19 The state, we think, could definitely interject the true
20 market value of railroad property into litigation as a
21 defense to an undervaluation claim.

22 QUESTION: Mr. Lauber --

23 MR. LAUBER: If that is right, it would be crazy
24 if the railroad couldn't do the same thing.

25 QUESTION: Do you agree with Mrs. Christian as

1 to what has to be accepted? That the federal court has to
2 accept any manner of assessment adopted by state,
3 methodology adopted by the state if it's a reasonable one?

4 MR. LAUBER: I would agree that there are
5 probably some methodologies like undepreciated book cost,
6 that simply would be ridiculous. But I think there is
7 (inaudible) --

8 QUESTION: I understand. But more in the range
9 of reasonable ones, the federal court has to accept
10 whatever the state applies?

11 MR. LAUBER: I would say it ought to accept it.
12 It should listen to arguments that they're out of line, but
13 ought to normally accept the state's methodology.

14 QUESTION: And what about the factual
15 determinations under each of those? You don't give any
16 deference to the state on those, but you do on which
17 methodology?

18 MR. LAUBER: Well generally speaking, you won't
19 really have a lot of factual determinations about how
20 much is that hopper car worth. It'll be more accounting
21 questions. Should you be given an obsolescence allowance?
22 What's the proper capitalization rate?

23 QUESTION: Whatever.

24 MR. LAUBER: Under those questions the court would
25 hear expert testimony about what the ICC would require,

1 the federal tax law would require --

2 QUESTION: Any deference to the state?

3 MR. LAUBER: Pardon me?

4 QUESTION: Any deference to the state if there
5 are various reasonable positions that could be taken.

6 MR. LAUBER: I would think there would be no
7 deference to the state on the subsidiary questions.

8 QUESTION: Thank you, Mr. Lauber.

9 Mr. Lee, we'll hear now from you.

10 ORAL ARGUMENT OF

11 DAVID W. LEE

12 ON BEHALF OF RESPONDENT

13 MR. LEE: Mr. Chief Justice, and may it please
14 the Court:

15 The petitioner in this case, Burlington Northern
16 has filed this federal lawsuit asking a federal district
17 court to enjoin the Oklahoma Tax Commission and the
18 Oklahoma State Equalization Board from assessing ad
19 valorem tax based on what Burlington Northern claimed was
20 an overvaluation of its property for the year 1982.

21 The federal district court dismissed this case
22 finding after reviewing affidavits and interrogatories and
23 depositions submitted by the railroad and the state that
24 the only dispute was over the value that the state was
25 placing on the railroad's property.

1 The 10th Circuit affirmed that ruling holding
2 that Section 306 of the 4-R Act which clearly gives the
3 federal district court the authority to equalize
4 assessment ratios and tax rates that are being applied to
5 railroad property does not give a federal court the right to
6 revalue the railroad's property and become what the 10th
7 Circuit has previously referred to as state assessment
8 boards.

9 It is our contention that Congress, in fact,
10 never did intend for a federal court to become a state
11 assessment board, a fact that is supported by the language
12 of the Act and by its legislative history.

13 Of course, I speak not only for Oklahoma in this
14 regard but also on behalf of 23 other states who ask this
15 Court to reject the petitioner's interpretation of Section
16 306 which would cause massive federal court intrusion into
17 their state revenue gathering processes. I agree with --

18 QUESTION: May I ask, General Lee on that, you
19 mentioned the other states' cooperation. When you have the
20 initial valuation of the railroad which has multi-state
21 operations and you all, as I understand the procedure, you
22 start with the total value and then you apportion a part
23 to the taxing --

24 MR. LEE: Yes, Your Honor.

25 QUESTION: -- jurisdiction. Do the states have

1 some common agency for determining what the value is and
2 do they all start with the same figure or does each state
3 go about it separately?

4 MR. LEE: The valuation of a railroad varies
5 from state to state.

6 QUESTION: It does?

7 MR. LEE: And also --

8 QUESTION: You don't use a multi-state tax
9 commission approach of any kind?

10 MR. LEE: No, there is tremendous disagreement
11 with the methodology that should be applied and I --

12 QUESTION: Isn't it true that most states start
13 with a system-wide value figure and then work back from
14 that?

15 MR. LEE: That's correct, Your Honor. They
16 start with the unit appraisal method which has been
17 noticed by this Court previously in the Rowley Case in
18 1934.

19 QUESTION: So if we got a case involving this
20 particular railroad from Kansas or Missouri, we might find
21 a dramatically different figure as the starting point?

22 MR. LEE: Yes, I think it so. And I disagree
23 with what Mrs. Christian said that there would be a close
24 agreement on what the true market value would be with
25 regard to the experts.

1 There has been a tremendous disagreement between
2 experts in this present case as to what the true market
3 value of the railroad would be. The railroad's expert
4 filed an affidavit saying that the true market value of
5 the railroad would be \$1.4 billion.

6 We filed an affidavit by an outside appraiser,
7 Mr. Goodwin, who has done appraisal for Kansas that said
8 the true market value of the railroad would be \$3.4
9 billion.

10 QUESTION: Well, that isn't what she said. She
11 didn't say that there wouldn't be disagreement, she said
12 that the difference in the methodologies would not
13 necessarily produce great disagreement.

14 MR. LEE: Well, our methodology that we used in
15 1981, we attributed 25 percent to the income, Kevlaw's
16 income method. The next year we moved up to 40 percent.
17 They filed an affidavit saying they disagreed with that.

18 Now we're up to giving 60 to 90 percent to the
19 capitalized income. I disagree with her when she says
20 that there is not much disagreement about methodology.
21 And, of course, that's why we feel like that it's our
22 contention that a federal court should not make these
23 decisions.

24 And we think that Congress never intended for a
25 federal court to make that decision. I agree with Mrs.

1 Christian, that the critical portion of this statute is
2 the subsection (1), subparagraphs (a) and (b) by my
3 reading make it unlawful to apply a different assessment
4 ratio to railroad property than is applied to similar
5 commercial and industrial property in that jurisdiction
6 and to collect a tax based on that unequal assessment.

7 Subparagraph three prohibits a state from
8 applying a different ad valorem tax rate to railroad
9 property. Subparagraph (d) is a catch all provision
10 prohibiting unspecified and un-named taxes from being
11 discriminatorily applied to railroad property.

12 And I agree with Mrs. Christian that their
13 dispute, their contention falls within subparagraph (a).
14 They're claiming that their overvaluation can be interpreted
15 from subsection (a), Section 306.

16 However, we contend that nowhere in Section 306
17 and in particularly in subsection (a) does the law give a
18 federal court the authority to revalue the value, redetermine
19 the value of a railroad property for ad valorem tax
20 purposes.

21 QUESTION: Well, Mr. Lee, part of the equation
22 referred to in subsection (a) is the ratio in relation to
23 true market value isn't it?

24 MR. LEE: Yes, Your Honor.

25 QUESTION: I mean, that's part of the equation.

1 MR. LEE: Yes, Your Honor.

2 QUESTION: And then when you come down to part 2(d)
3 of this section where it deals with burden of proof,
4 it does refer to burden of proof of true market value, so
5 apparently Congress did envision some inquiry into true
6 market value --

7 MR. LEE: We think that --

8 QUESTION: -- as part of the assessment
9 equation.

10 MR. LEE: We think that they meant the inquiry
11 into true market value is to be made only with regard to a
12 determination of the sales assessment ratio study.

13 They set forth a specific means of determining
14 what the appropriate assessment ratio that is being used
15 and being applied to non-railroad property is in that
16 jurisdiction.

17 And they specified the specific manner of making
18 that determination, the sales assessment ratio study.
19 That's a means of determining the value of property by
20 looking at a sampling of sales that have taken place in a
21 county and comparing it with the assessed value.

22 QUESTION: Well, do you think that it's open to
23 the federal court to inquire into the true market value of
24 the commercial and industrial property in the tax
25 jurisdiction?

1 MR. LEE: Yes. Congress specifically said that
2 if the sales assessment ratio study is not adequate then
3 the court can conduct its own study, or adopt whatever
4 study it thinks is appropriate.

5 QUESTION: So as part of the inquiry into
6 subsection (1)(a), the court can examine the true market
7 value by the sampling technique of the commercial and
8 industrial property?

9 MR. LEE: That's correct, Your Honor. But
10 that's --

11 QUESTION: But where in the statute do you see
12 that the court is prohibited from making the same inquiry
13 as to the railroad's true market value?

14 MR. LEE: Well, we think that this is not a
15 plain meaning case. We think that the statute is not
16 clear as to what exactly it means.

17 There was tremendous confusion all 15 years in
18 Congress as to what these various bills would mean. We
19 think there's a particularly, early on in the legislation
20 there's a letter from then Deputy Attorney General Warren
21 Christopher --

22 QUESTION: Well the language of the statute
23 itself could at least support the reading given it by the
24 railroad and the Solicitor General, could it not?

25 MR. LEE: If you take that single sentence out

1 of context. But this Court in the Kelly v. Robinson Case
2 with regard to Interpretation of federal bankruptcy laws
3 with regard to their impact on criminal justice systems
4 said that in interpreting a statute like this you don't
5 take a single sentence out of the context of the statute,
6 you look at the entire statute and its object and its policy

7 We think that looking at subsection (a) in
8 conjunction with the rest of the statute which --

9 QUESTION: If its overall object is to prevent
10 singling out the railroads unfairly in the ad valorem
11 property tax structure of the various jurisdictions then
12 it wouldn't necessarily support you, would it?

13 MR. LEE: We think the Congress was advised
14 that there were only two problems with the way that
15 railroads were being treated. One with the regard to the
16 assessment ratio that was being applied to railroad
17 property and the other was with the unequal taxation
18 rights.

19 That was the entire testimony given throughout
20 the 15 years. I disagree with Mrs. Christian when she
21 said that Mr. Lanier wrote a letter later on saying that
22 this, that it meant to cover valuation.

23 That's mentioned on page 11 of her reply brief,
24 but you read the entire letter and he also says in that
25 letter that the legislation would not mean to change the

1 judicial review that is being applied to state taxation
2 systems.

3 So we think that Congress was confronted with
4 two problems, they crafted a statute which deals with
5 these problems and set forth the specific means for
6 dealing with equalizing assessment ratios.

7 And we think that the fact that they were silent
8 when they had gone into such detail about prescribing the
9 means of determining the assessment ratio, that their
10 silence and the fact that they didn't even talk
11 about what proper methodology is to be used by a federal
12 court in determining the value of the railroad is very
13 significant.

14 QUESTION: Well if you are right about the
15 interpretation it certainly leaves it open to the states
16 to recoup all the money they otherwise would lose by
17 jacking up the value of the railroad property.

18 MR. LEE: Well, I think that's the concern of
19 the 10th Circuit and why they said what they did with
20 regard to their rule. That there is a showing of
21 purposeful discrimination with intent.

22 They meant to insure if they intentionally
23 retaliated against a railroad because of earlier success
24 with regard to 4-R legislation that they wouldn't --

25 QUESTION: Do you support the requirement of

1 finding intentional discrimination and if so where do you
2 find that in the statute?

3 MR. LEE: Well we, Kansas spoke to this in
4 detail in their amicus brief and they felt, their
5 contention was, and we agree with it, that a federal court
6 sits as a court of equity and if there has been a blatant
7 or an egregious retaliation or circumvention of the
8 assessment ratio equalization requirements that a federal
9 court should not cover its eyes to that and can act to
10 prevent a state from doing that.

11 And we think that's what the 10th Circuit was
12 doing. We have problems with that rule though because we
13 fear that it would allow the railroad in every case to
14 delve into the subjective intentions of our taxing
15 authorities.

16 QUESTION: I think you're right. It doesn't
17 make much sense to me. Isn't it true that it's rather
18 strange to have a statute which says you can't
19 discriminate intentionally beyond doing so for five
20 percent?

21 That's a very strange statute. I mean, that
22 five percent requirement doesn't seem to me to go along at
23 all with the notion that intentional discrimination is the
24 only thing that it's directed at.

25 MR. LEE: Well, and we think --

1 QUESTION: I mean, I can see two different
2 statutes. Statute one says, no intentional
3 discrimination.

4 I can see another one that says, doesn't matter
5 whether the discrimination is intentional or not, just so
6 long as it's no more than five percent. But here you're
7 telling us, or the 10th Circuit was telling us that you have
8 a statute which says you can't intentionally discriminate
9 beyond five percent.

10 You can intentionally discriminate five percent,
11 that's okay. Why would you write a statute like that?
12 That's very strange.

13 MR. LEE: Well, we think that the five percent
14 provision of the statute refers strictly to equalization
15 of the assessment ratio. And we agree that equalization
16 is a common legal term.

17 It has a meaning in our state under our state
18 law with regard to our county assessors and our state
19 equalization board. We think that the five percent gives
20 the states five percent flexibility in equalizing the
21 assessment ratio of commercial property with that of the
22 railroad. That give in the statute, we think it applies
23 strictly to equalizing assessment ratios and has nothing
24 to do with overvaluation.

25 We think that was Congress's intention and

1 we think that the legislative history supports our rating.

2 And what I've said here, I think is a reasonable
3 explanation of the statute which is squares and is
4 supported by the fifteen years of the legislative history
5 of the Act. And --

6 QUESTION: Why would it make any sense to
7 conduct the inquiry of fair market valuation of non-
8 railroad property, if you don't have the authority to
9 conduct fair market valuation of railroad property?

10 MR. LEE: Well, because they prescribe the means
11 by which that the inquiry into the true market value of
12 non-railroad property is to be made. The sales assessment
13 ratio's study which is done by sampling. The --

14 QUESTION: Well what difference does that make?
15 The fact that you prescribe a means by which it is to be
16 done, does not show why it is at all useful to do it, if
17 you don't do it for the railroad property as well.

18 MR. LEE: Well, --

19 QUESTION: Because the ratio depends upon the
20 comparison of the one to the other. And you're telling us
21 the federal courts can inquire into the valuation of the
22 non-railroad property and it doesn't matter what that
23 valuation ends up as because we're only looking for a
24 ratio.

25 It's only a ratio that's important not an

1 absolute. But then you tell us we can look into the fair
2 market valuation of the railroad property. So then what's
3 achieved doing fair market valuation of this other
4 property? Nothing.

5 MR. LEE: Well the sales assessment ratio study
6 is a sampling. It's a very easy way to determine what is
7 the uniform assessment ratio that has been established for
8 non-railroad property.

9 QUESTION: I know it's easy, but what's the
10 purpose of doing it?

11 MR. LEE: Because that sets the standard that
12 the federal court is to look at in equalizing the ratio
13 that is to be applied to non-railroad property with that
14 of railroad.

15 They said, here is what the federal judge is to
16 do. He's supposed to conduct a trial on what is the
17 proper sales assessment ratio study and there has been
18 litigation about what components comprise that.

19 Do you include personal property into the
20 sales assessment ratio study? Do you include centrally
21 assessed property in it? Do you use the weighted means,
22 or the median, or the mean in conducting it.

23 Once you have a trial on that the federal judge
24 either adopts what the state has done, and in Oklahoma we
25 do one every year. And in this case there is no

1 disagreement with our sales assessment ratio study and
2 what came out with as 10.7 percent.

3 And once that's been established then the
4 federal judge just simply looks to the assessment ratio
5 that's being applied to railroad property and equalized and
6 that is, there is a lot of discussion in congressional
7 history about the sales assessment ratio study.

8 It's of no value whatsoever with regard to
9 valuation of a railroad because railroads don't sell. And
10 the sales assessment ratio study is a good indicator of
11 true market value because you look at the selling price of
12 a random, of pieces of property in the counties and that's
13 what true market value is. And then you compare that with
14 --

15 QUESTION: I see what you mean.

16 MR. LEE: -- the assessed value and you come out
17 with a ratio.

18 QUESTION: But generally --

19 MR. LEE: And our state wide ratio is 10.87
20 percent.

21 QUESTION: What you're saying, if I understand
22 you is that in, I'm thinking in terms of burden on the
23 courts and the like, that it would be permissible for the
24 railroad to come in and say that the state has to follow
25 the general policy of undervaluing all other commercial

1 and industrial property, and that's how they get a 10.87
2 ratio, because they're really undervalued it all.

3 And so they could prove, they could try to prove
4 what you've done in all other types of property to show
5 that your level was generally lower than it should have
6 been.

7 MR. LEE: Well, I don't think they can. I don't
8 think we said that in our brief.

9 QUESTION: I thought that was what you just
10 said?

11 MR. LEE: No.

12 QUESTION: Didn't you say that it is, the issue
13 of the valuation of non-railroad commercial property can
14 be addressed by a federal court?

15 MR. LEE: That's correct.

16 QUESTION: And the reason for
17 doing it would be to show that that property was all
18 undervalued? Is that not correct?

19 MR. LEE: Well, I guess if you mean assessment
20 value as being undervaluation --

21 QUESTION: Yes.

22 MR. LEE: -- you're correct. Assessed value by
23 our state law, our state constitution, you cannot assess
24 property in excess of 35 percent.

25 QUESTION: All right.

1 MR. LEE: So all properties under --

2 QUESTION: But it's 35 percent of X, of true
3 market value. But if they proved that your true market
4 value people went out and regularly used out of date
5 figures or didn't take obsolescence into account, and
6 consistently came up with a lower figure than the experts
7 would say was appropriate that would be the converse of
8 what they're alleging here?

9 MR. LEE: Well, a trial --

10 QUESTION: As I understand, you're saying that
11 would be permissible.

12 MR. LEE: Well, a trial on the validity and the
13 proper ratio as determined by a sales assessment ratio
14 study has not been a problem and there has been some
15 litigation about it, but it's just not anything compared
16 to what would follow if the federal courts were allowed to
17 look at the entire methodology that a state has applied.

18 And I disagree with Mrs. Christian when she said
19 that they're going to defer to what the state has done
20 generally with regard to the methodology. That has not
21 been done at all. They affidavits submitted --

22 QUESTION: I thought all she said was that there
23 are three general methodologies that are used and both the
24 states and the railroads all agree that any one of the
25 three is generally acceptable. They may be misapplied in

1 particular cases and --

2 MR. LEE: Well there have been disagreements
3 about how much weight to accord each one of them within
4 the different methodologies and income value indicators
5 there's enormous disagreement, tremendous disagreement.

6 And this Court has recognized itself as recently
7 as the Norfolk case in 1968, this is just an estimation of
8 value. And in our case the total bottom line has
9 disagreed, there's been enormous disagreement about.

10 The same way in the 9th Circuit and the same way
11 with the 8th Circuit. All the litigation that's taken
12 place so far with regard to valuation methodology and
13 valuation litigation has been extremely complex.

14 It amounts to a federal judge just listening to
15 expert witnesses testify about incredibly complex
16 methodology for the railroad and then listening to the
17 outside appraisers on behalf of the state testify. And
18 then the judge having to make a decision based on things
19 that are tremendously complex and are --

20 QUESTION: I suppose once he's decided it for
21 1982, it probably wouldn't be as hard to do it in 1983.

22 MR. LEE: Well, that depends. I mean value on
23 all property differs from year to year.

24 QUESTION: Yes, but I mean you've got some
25 basic disagreements that probably would be ironed out

1 after a few years, I would think.

2 MR. LEE: Well, in this particular case the
3 railroad said that, they said that we disagree with what
4 they're saying about our valuation of the property.
5 They're saying that we've valued it at \$2.1 billion.
6 We're saying that the valuation was \$3.6 billion.

7 QUESTION: Well does the federal judge when he
8 hears all these experts, simply sit as a finder of fact
9 and decide what he thinks the right value is?

10 MR. LEE: That's what they want. And that's
11 what we think is one of the great problems with this and
12 we think that Congress, when they asked Mr. Lanier and Mr.
13 Ogden about this they said, no that's not what would
14 happen.

15 We only want equalization of assessment ratios.
16 We only want equalization of tax rates. And, of course,
17 this practice has gone on because the Supreme Court in
18 1940 in the Nashville v Browning case said it was okay for
19 states to classify, to give different assessment ratios to
20 different classification of property (inaudible).

21 QUESTION: Clearly the statute rules that out,
22 doesn't it?

23 MR. LEE: Yes. There is no question. We agree
24 and we've done that. We lowered our assessment ratio that
25 was being applied to railroads from --

1 QUESTION: And promptly raised the valuation.
2 (Laughter).

3 MR. LEE: No, we didn't do that. We didn't do
4 that. Our full system valuation, and I know there's a
5 dispute about what the record reveals --

6 QUESTION: You didn't, you mean you raised it,
7 but not immediately.

8 MR. LEE: No, we didn't. No. (Laughter). It's
9 gradually gone down. Our valuation has gradually evolved
10 in the direction that they want it. The railroads want
11 more weight to be given to the capitalized income
12 indicator of value.

13 We started at 25 percent in 1981 and we've
14 slowly evolved in the direction they want it because it
15 lowers the full system value of their railroad. And every
16 year, '81, '82, our full system value and assessed value
17 and taxes imposed on the railroad have gone down. So the
18 4-R Act has worked with regard to lowering the tax burden
19 on states, on railroads.

20 QUESTION: Then why are the railroads
21 complaining?

22 MR. LEE: Well, because they want more. They
23 made their agreement with Congress and now they're trying
24 to get considerably more out of the courts. And what
25 they're arguing now is completely different than what they

1 told Congress for years.

2 QUESTION: Do you agree that if the railroad
3 made a decent case out of the fact that there was an
4 intentional overvaluation of their property that you could
5 really inquire into the reasonableness of the valuation?

6 MR. LEE: Well, we think there's a real problem
7 with that. In this case --

8 QUESTION: Well, yes or no. Do you --

9 MR. LEE: No, we don't.

10 QUESTION: I would think you're argument would
11 say it doesn't make any difference what they allege. They
12 have to allege a difference in the assessment ratio or
13 they're out of court.

14 MR. LEE: That's correct. That's correct, Your
15 Honor. We've had a real problem and this particular case
16 demonstrates what could happen. In this case all of three
17 of our tax commissioners were deposed, had lengthy
18 depositions about the methodology that was used.

19 QUESTION: So you don't defend the Court of
20 Appeals for the 10th Circuit then in that respect?

21 MR. LEE: If it's interpreted in such a way
22 which would allow them every year to delve into the
23 intention of our tax commissioners or our ad valorem
24 division director --

25 QUESTION: Well that sounds like what they mean.

1 MR. LEE: Well, we can live with the Lennen rule
2 if it's properly applied and if the same protections with
3 regard to summary judgment are given to our tax officials
4 that are given to public employees generally --

5 QUESTION: Well wouldn't the 14th, or wouldn't
6 the equal protection clause give the railroads some
7 constitutional claim in the event of intentional
8 discrimination and without the 4-R statute?

9 MR. LEE: I don't think so. I think the
10 Browning case in 1940 eliminated an equal protection
11 clause, a challenge with regard to that.

12 QUESTION: Even in a showing of intentional
13 discrimination?

14 MR. LEE: I, Your Honor, I really think that and
15 the fair assessment case in 1982 mean that they really
16 can't do that. That the only relief they can get is from
17 Section 306.

18 It's more relief than other taxpayers have. We
19 have a number of other taxpayers in Oklahoma, public
20 utilities that are taxed on the unit system valuation who
21 go through our state system and go through our state
22 procedures .

23 And The 10th Circuit noted that there was no
24 claim in this particular case that our state procedures
25 were inadequate. When they, they got back their valuation

1 and they went directly and filed a federal lawsuit against us

2 QUESTION: I would think you really take this
3 10th Circuit seriously in saying that it's open to proof
4 whether there was an intentional overvaluation,
5 intentional discriminatory overvaluation.

6 I would think that part of the evidence would be
7 what the valuation was. Because if it was gross enough
8 you certainly could infer an intent.

9 MR. LEE: Yes. Yes, Your Honor, I agree with
10 that.

11 QUESTION: And so I, so I just don't understand
12 the 10th Circuit --

13 MR. LEE: Well we think that --

14 QUESTION: -- saying that you can't get into
15 valuation, but you can get into intent.

16 MR. LEE: Yes. We think that there would be a
17 situation that overvaluation would be such that it would
18 meet the test in the Norfolk case in 1986 that if the
19 state is shown to be grossly over-reaching, or if there is
20 not a rational basis for what they've done.

21 But in this case the valuation that we did was
22 under the book value of the railroad. And just because
23 they want to use a methodology which would give them a
24 lower value for the railroad, we don't think that they
25 should be able to go to federal court and get a federal

1 judge to agree with them.

2 QUESTION: It is correct, is it not that your
3 1982 value was a great deal higher than your 1981 system
4 value, a \$2 billion to \$3.5 billion --

5 MR. LEE: That's where we have a disagreement.
6 They have used the figure \$2.1 billion which we don't
7 think they should be using. What happened was that was a
8 negotiated figure.

9 The original valuation that was sent out to the
10 railroad was based on a \$3.6 billion figure which the
11 appraisers had done. Burlington Northern asked for a
12 negotiation conference with Mr. Barr, who was the Ad
13 Valorem Tax Division Director at that time.

14 They had a conference and he just got the book
15 value of the railroad which was \$4.2 billion and during
16 the process of the negotiations, wrote off 50 percent for
17 obsolescence. Just gave them a 50 percent break on
18 obsolescence and moved the assessment ratio --

19 QUESTION: However he arrived at it, that was
20 the final figure that the tax was based on, wasn't it?

21 MR. LEE: Yes, but --

22 QUESTION: Absent the negotiation it would have
23 been \$3.6.

24 MR. LEE: Well, he said even in his deposition
25 that the valuation of that railroad is \$3.6 billion. He

1 said that the \$2.1 billion is, and they get that only from
2 his handwritten notes, computations he made during this
3 negotiation conference.

4 QUESTION: Did he retain his position after --
5 (Laughter).

6 MR. LEE: No. No. The deposition of Mr. Nance
7 makes clear that that was one of the reasons why Mr. Barr
8 is no longer the head of the Ad Valorem Division --

9 QUESTION: (Laughter).

10 MR. LEE: -- is because he was engaging in these
11 and they --

12 QUESTION: Not working for the railroads now, is
13 he? (Laughter).

14 QUESTION: President of the railroad.
15 (Laughter).

16 QUESTION: Mr. Lee, I don't understand. I guess
17 we probably ought to have the 10th Circuit here. Nobody
18 likes the 10th Circuit's position, right?

19 MR. LEE: We like it better than the 8th and the
20 9th.

21 QUESTION: I understand. (Laughter). If I
22 understand your case correctly you acknowledge that
23 federal courts have to get into the evaluation of
24 commercial and industrial property. There is no way to
25 avoid that under your interpretation of the statute?

1 MR. LEE: But Congress told them how to do that.

2 QUESTION: Well, they told them how to do it,
3 but sometimes that doesn't work. And then they have to
4 conduct a full fledged investigation into the value of
5 commercial and industrial property, right?

6 MR. LEE: Well, or they could adopt another
7 ratio study. I mean, they might --

8 QUESTION: Well, whatever, I mean.

9 MR. LEE: Appoint their own appraiser to
10 conduct a ratio study.

11 QUESTION: But, I'm sure you can evaluate
12 railroad property by a ratio study or by some other study.
13 I mean you're just talking about the methodology of
14 valuation.

15 But the fact is that the interpretation you're
16 urging on us tells us that federal courts were under this
17 statute given the authority to come to their own decision
18 about the value of non-railroad property, but they are to
19 close their eyes to the valuation of railroad property.

20 That just seems to me a very strange result when
21 what you're worried about is discrimination against the
22 railroads.

23 MR. LEE: It's consistent with the, with what
24 Congress intended. Because there were discussions in
25 Congress about the sales assessment ratio study and how

1 that's conducted and of how that cannot be done with
2 regard to railroads, because railroads don't sell.

3 They don't sell like regular commercial and
4 industrial property. So it's very easy to do a sales
5 assessment ratio study and set the standard and then
6 equalize the assessment ratio that is to be applied to
7 railroads with that that the ratio study that are
8 previously being conducted.

9 If the federal court doesn't think that it's a
10 good ratio study it can adopt its own, or listen to
11 experts that might have a better one. But, like I say, in
12 our case there was no disagreement with it.

13 Our assessment ratio was 10.8 percent. It's
14 relatively low. The railroads have never challenged that
15 as the assessment ratio. And it's resulted in decreasing
16 assessment values and taxes every year.

17 And we are changing our methodology in
18 accordance with what they want. We're giving more weight
19 to the capitalized income method. They didn't like the
20 fact and we got sued because we didn't give them this
21 enormous break for obsolescence that they got from Mr.
22 Barr for that one year. That's why they --

23 QUESTION: Now how do you explain the burden of
24 proof provision? The burden of proof with respect to the
25 determination of true market value shall be that declared

1 by the applicant. That only applies to true market
2 value of other commercial and industrial property, is that
3 --

4 MR. LEE: But the next sentence says that if the
5 correct ratio cannot be established by using the sales
6 assessment ratio study then the federal court is to be
7 left on its own. The Clinchfield case out of the Fourth
8 Circuit --

9 QUESTION: No, I'm not sure you answered my
10 question. You assert that that burden of proof provision
11 only applies, the reason it's in there is because you have
12 to determine the true market value of non-railroad
13 property.

14 MR. LEE: That's correct. And it's who has the
15 burden of proof under state law. And as I was saying, the
16 Clinchfield decision out of the Fourth Circuit has a
17 very good discussion of, under North Carolina law in that
18 case, they said that the taxpayer has the burden of
19 showing the proper assessment ratio which is to be used.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.
21 The case is submitted.

22 (Whereupon, at 11:11 a.m., oral argument in the
23 above-entitled case was submitted).

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-337 - BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

V. OKLAHOMA TAX COMMISSION. ET AL.

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BY

Paul A. Richardson

(REPORTER)