IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

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DEPARTMENT OF REVENUE,

PETITIONER,

v.

GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL.,

RESPONDENTS.

CASE NO. 69,756

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DEPARTMENT OF REVENUE,

APPELLANT,

V.

GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL.

APPELLEES.

DCA CASE NO. BI-257

CASE NO. 69,757

Petitioner/Appellant's Brief On The Merits
On Appeal from the First District Court of Appeal
of the State of Florida, Case No. BI-257

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under Fla. R. App. P. 9.030(a)(1)(A)(ii) and 9.030(a)(2)(A)(v).

Fla. R. App. P. 9.030(a)(1)(A)(ii) provides that the Supreme Court shall review, by appeal, decisions of district court of appeals declaring invalid a state statute or a provision of the state constitution. In its opinion filed November 12, 1986, Case No. BI-257, the First District Court of Appeal found that section 193.085(4)(b), Florida Statutes, was applied unconstitutionally and invalidated appellant's central ad valorem tax assessment of migratory rolling stock. Under Snedecker v. Vernmar, Ltd., 151 So.2d 439 (Fla., 1963), an appeal from a judgment holding a statute unconstitutional as applied to specific facts can be taken to the Supreme Court on the ground that the judgment is a decision directly passing upon the validity of the statute. Additionally, the trial court order which the District Court found to be without error, held that the legislature's failure to provide statutory authority to tax property similar to GATC's results in unlawful discrimination. This holds that section 193.085(4) is constitutionally deficient on its face.

Fla. R. App. P. 9.030(a)(2)(A)(v) provides that the Supreme Court has discretionary review of decisions of district courts of appeal that pass upon a question certified to be of great public importance. In its opinion filed November 12, 1986, Case No. BI-257, the First District Court of Appeal certified to this Court the following as a question of great public importance.

> "Is the assessment for ad valorem tax of private-line railcars, pursuant to section 193.085(4)(b), Florida Statutes (1979), unconstitutionally discriminatory in that the similarly situated rolling stock of nonresident railroads is not similarly assessed under Chapter 193?"

Appellant filed timely and simultaneous notices with the Clerk of the First District Court of Appeal under both Fla. R. App. P. 9.030(a)(1)(A)(ii) and 9.030(a)(2)(A)(v). The two notices, assigned Case Numbers 69,756 and 69,757, were consolidated for all appellate purposes by this Court's Order dated December 18, 1986.

SUMMARY OF THE ARGUMENT

The question argued in this brief is whether the trial court, found to be without error by the appellate court below, and given the evidence presented to it under controlling case law, could have concluded as it did that Florida has the power (by situs) to tax the cars of non-resident railroad companies and having not exercised that power through a statute or otherwise, discriminated against the appellees here. Throughout this brief, however, the inverse of this question is also argued since it is legally inseparable: Do the cars of Florida's resident railroads (railroads owning track in Florida) acquire tax situs in states in which her railroads own no track, so as to give those states power to tax them? If they do, Florida may not tax them. Central Railroad Company of Pennsylvania v. Commonwealth of Pennsylvania, 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297, reh. den. (1962).

What Florida did in this case (which is conventional, see R-1064) was tax Florida resident cars wherever they were since under controlling case law, Florida retains jurisdiction to tax her resident railroad cars, (which are non-resident cars in other states) everywhere. Reciprocally, Florida did not tax resident cars of sister states and under federal law directly on point, Florida retains situs to tax her railroad cars everywhere.

Controlling case law is that cars of railroad companies have tax situs in states in which they own track absent evidence which establishes sufficient (for tax situs purposes) contacts with a taxing jurisdiction in which they own no track. Central Railroad Co. of Pennsylvania v. v. Commonwealth of Pennsylvania, supra and Commonwealth v. Union Pacific R.R. Co., 283 S.W. 119 (1926).

The points argued in this brief, while addressing separate legal theories, all relate to the central question of tax situs of railroad cars through interchange. Even the points addressing the equal protection and uniformity of taxation provisions under the Florida Constitution reference the legal concept of tax situs which is the first requisite as to the ability of a state to exercise its taxing power. Finally, even where the absence of taxing power is doubted, the equal protection and uniformity provisions of Florida's constitution do not require the legislature to exercise the power to tax non-resident railroad cars under the facts of this case.

STANDARD OF REVIEW

Florida's taxation of centrally assessed property (rail transportation property) has been held below to violate the state constitution; both facially and as applied. The evidence presented in this cause to prove situs is no different than evidence presented in Central R.R. Co. of Pennsylvania v. Commonwealth of Pennsylvania, 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297, reh. den. (1962). The Department does not challenge proof at trial that certain percentages of cars were present in Florida. Rather, the Department challenges the legal affect of that presence.

Thus, as to all matters of constitutional concern, the Department requests the Court to extend every effort to uphold the validity of Florida's taxation of centrally assessed properties under section 193.085 (4), F.S. As this Court held in Miami Dolphins v. Metro Dade Co.d, 394 So. 2d 981, 988 (Fla. 1981), if an interpretation upholding the constitutionality of an act is available to this Court, it must adopt it.

STATEMENT OF THE CASE AND FACTS

These consolidated cases originated in the circuit court below as challenges to the constitutionality of the Department of Revenue's (The Department's) central ad valorem assessments of the rolling stock of the Appellees, private car line companies (GATC). The assessments and consolidated actions covered the tax years 1980-1984 and were issued pursuant to §193.085(4), F.S.

The complaints (R-1-6) alleged unlawful discrimination as a result of Florida's taxation of GATC's cars in the absence of a tax on non-resident railcars (from railroads of other states) in Florida. At trial GATC produced witnesses to prove that such cars were not taxed in the face of the positions of the Department that they were taxed or constructively taxed. The Trial Court ruled in favor of GATC (R-1474) and the Department timely appealed to the First District Court of Appeal. The Department's legal position before both the Trial and Appellate Courts was that Florida has no power to tax the non-resident railroad cars in Florida (R-620). To the Department, the fact that Florida did not tax these cars was irrelevant.

The First District finding no error in the Trial Court but apparently appreciating the legal significance of this cause and the Department's position, certified its decision to this Court as presenting a question of great public importance.

GATC is engaged in the business of leasing private railroad rolling stock (cars) to shippers. It is not engaged in the business of operating or owning a railroad and it hauls no freight. It provides shippers with

private cars for a fee, and the shippers in turn engage the services of a railroad company to haul the cars. For the purposes of this lawsuit, railroads haul four (4) kinds of cars on their track; their cars, cars of private carline companies, cars of other resident railroad companies, and cars of non-resident railroad companies. Resident railroad companies are those which own track in states other than Florida. The substance of GATC's complaint and the ruling of trial court affirmed on appeal is that their ad valorem assessment denies them the equal protection of the laws under the State Constitution since they are subject to an ad valorem tax under §193.-85(4) while the Department does not assess the railroad cars of non-resident railroads which GATC argues and the trial court held, are similarly situated in Florida.

§193.085, F.S., is the statute which provides for the ad valorem taxation of both railroads and private carlines and is the root of the controversy herein. While §193.085(4), F.S., clearly and admittedly provides for the assessment of private carline rolling stock and all property of railroad companies which own or maintain track in Florida, there is controversy as to whether §193.085(4) or a statute similar to it could reach the rolling stock of railroad companies which operate in other states (own track in states other than Florida) but whose rolling stock (cars) are required to enter Florida by Federal law through the interchange agreement known as the Car Service and Per Diem Agreement of the Association of American Railroads. (R-1035)

Certainly §193.085(4) requires the proper listing of "all railroad property of all types. . .in the appropriate county". However, the statutory apparatus of §193.085(4) which follows to achieve that listing of all railroad property references only resident railroad companies (those

which maintain track in Florida; §193.085(4)(a)) and private carline companies like the taxpayers here; §193.085(4)(b). There is no provision anywhere in the statutes requiring the filing of personal property tax returns by owners of non-resident railroad rolling stock which enter Florida through interchange.

It is the Department's position that the Legislature did not intend for there to be such a provision for three reasons. Foremost is that Florida is without jurisdiction to impose such a tax under the facts of record and limitations imposed by the United States Constitution. Second is that the authors of the State Constitution and the people who adopted it did not intend Art. VII §4 to prevent the Legislature from adopting a reasonable and conventional method of taxing instrumentalities of interstate commerce in harmony with Federal constitutional law and the taxing systems of all or nearly all sister states. Finally, assuming arguendo, that there is jurisdiction to impose such a tax, the exclusion of provisions taxing the cars of non-resident railroad cars is properly within the inherent power of the Legislature to classify property for tax purposes.

Prior to trial, the Department had difficulty with its position as to whether or not its taxation of resident railroads effectively taxed cars of non-resident railroads. In the stipulation of facts filed by the parties (R-547-576) the Department changed its position that it "constructively" taxed these cars (by taxing resident cars which were exchanged) by stating that it taxed these cars. Accounting theories aside, the Department does not appeal the Trial Court's finding that Florida does not tax non-resident cars. By taxing their substitutes, Florida taxation of railroads and

private cars is both reasonable and lawful. The Department's legal theory* at trial and here is that it is irrelevant whether or not Florida taxed non-resident cars since the Department's position is that it is without jurisdiction to tax those cars. This is why the Department offered no testimony to prove it "taxed" non-resident cars.

The only testimony the Department offered was by Mr. Earl Anderson, a retired Seaboard R.R. car utilization official illustrate the handling of railcars, both private and railroad, through the interchange agreements. (R-1159)

The Department's theory of the case thus remains unchanged. It is that under controlling federal law, Florida is without jurisdiction to tax non-resident cars present in Florida. Therefore, the Department's position is that its failure to do so does not discriminate against GATC.

GATC's theory of the case is essentially that they admit jurisdiction to tax their cars but deny the constitutionality of the tax on equal protection grounds so long as non-residential cars similar to GATC's cars are not taxed in Florida.

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*The First District's decision up for review states that the Department raised a new theory on appeal, that of situs. This is incorrect since situs was the thrust of the Department's opening and closing statements, trial memoranda and the testimony of the Department's only witness. (R-922, R-620-674) In all fairness to the trial and appellate courts, however, the Department's legal theory was not well presented or understood at trial, and therefore was likely perceived as new.

To enable this Court to understand this case and others cited herein, a description of the railroad system and a brief definition of a few terms extracted from testimony below or case law used in this brief is provided.

General Terms

1. Railroad - an entity which maintains track, right-of-way, switches, briges, locomotives, freight cars and hauls freight therewith as a common carrier. §193.085(4)

2. Private Car Line Company - an entity which owns freight cars and leases them to shipper. Private Car line companies do not maintain track, right-of-way switches, bridges, locomotives, freight cars nor do they haul freight.

3. Freight Cars - used interchangably unless the context indicates otherwise are the terms rolling stock, tank cars, freight cars, hoppers, box cars or simply "cars."

4. Shippers - any one who seeks to have their freight hauled from one place to another. There are three major kinds of shippers:

   (a) Shippers who own their own cars. These shippers are treated for tax purposes like private car line companies.

   (b) Shippers who lease cars from private car line companies like GATC.

   (c) Shippers who use cars provided by railroads to ship their freight.

Classification of Cars for Situs Purposes

There are four (4) kinds of cars on the track of a major railroad in Florida (Seaboard):

(1) cars of its own

(2) private car line cars (e.g. GATC)

(3) cars of other railroads with track in Florida (e.g. Florida East Coast) also referred to as foreign cars (to Seaboard)

(4) cars of other railroads with no track in Florida (e.g. Conrail, a major Northeast Railroad) also referred to as foreign cars (to Seaboard).

There are two kinds of major railroads in Florida:

(1) Multistate railroads (Seaboard) whose track system extends through several states. Seaboard, during the years 1980-1984, was a major southeastern railroad.

(2) Single state railroads (Florida East Coast) whose track system does not extend outside the State of Florida.

The National Railroad System

A national railroad system of sorts exists in the United States. An introduction to it is best illustrated by Mr. William Lahner, GATC's expert at trial who stated at R-1035-36:

> Q. What is the interchange system?
>
> A. The interchange system is a system of transferring one car from -- a car, freight car, from one railroad to another railroad.
>
> Unfortunately, or fortunately -- I don't know which -- in this country, we don't have any system or railroad that covers the whole entire geographic area, so that on any shipment, you can come to the end of your line, and that still is not the termination point for that shipment. Therefore you have to transfer that car to another railroad.
>
> Now, historically, if we go back to the early days, this created quite a problem, because the original railroads had different guages or widths of track, so there was no way that freight cars could be interchanged.
>
> That was fairly quickly solved, but even so, it was still a matter of voluntarily deciding whether you wanted to interchange your cars with another railroad or not. And if my president got mad at your president, we just didn't interchange freight cars, and you had to unload the freight out of one car and load it in somebody else's freight car.
>
> Eventually, Congress decided that was not a good idea, and they mandated that freight cars be interchanged between railroads. And that is now governed by rules which are generally written by and promulgated by the Association of American Railroads and approved by the Interstate Commerce Commission. (R-1035)

The interchange of cars is really an agreement between the railroads approved and promulgated by the Interstate Commerce Commission to bring about the exchange and ultimate return of a railroad's rail cars given up through interchange. The interchange rules for the movement for railroad cars are different from those for private cars and while the movement and handling of private cars by a railroad are governed by I.C.C. rules, those rules apply only when the private car is being hauled. Private cars are otherwise under the complete control of shippers. This does not apply to railroad cars which are always subject to I.C.C. regulation. (R-1164-72)

Florida's Method of Taxing Railroads and Private Car Lines

Pursuant to §193.085(4), Florida taxes resident railroads (and their cars) by the unit rule method, while private cars are taxed by the average number of cars present rule. These methods are conventional nationwide (R-1075-76)

The unit rule and and average number of cars rule as applied by Florida in the case at bar were described in all material aspects by the Court in Commonwealth v. Union Pacific R.R. Co., 283 S.W. 119 (1926). While the Trial Court rejected the ruling of this case (even though it represents the only decision nationwide specifically on point), the Commonwealth description of the two methods of taxation is succint and restated here (with citations omitted) to illustrate Florida's method of taxation.

"As applied to rolling stock, the unit rule is this: So much of the entire rolling stock of the railroad is regarded as having a taxable situs in the state as is represented by the proportion found by taking the miles of lines of the railroad in the state and comparing them to the total miles of lines of such railroad. To illustrate: A railroad operates 4,000 miles of lines, 1,000 of which lie within the particular state. It has, 20,000

cars. As one-fourth of its mileage is in such state, 5,000 of its cars are regarded as having a taxable situs there. In its generality, the unit rule of taxation as applied to railroads has been upheld by the Supreme Court and, although it has in particular instances been disregarded where its practical workings is shown to result in injustice, yet, unless such injustice be plainly shown, it will, if applied, be upheld. Under this rule, each car of the railroad is taxed once by some state in which the railroad runs. If the state fails to tax the cars of foreign roads found on domestic lines, yet it taxes the cars of domestic lines which are off on foreign roads, and, in the long run, the interchange of cars will, as a practical matter, bring about a balance between such numbers. If the cars of the domestic line acquire no taxable situs elsewhere than in the state or states where their owner is operating its lines, then they may be taxable in such states. And they do not acquire such taxable situs elsewhere under the circumstances disclosed in this case, as we have seen."

"On the other hand, tank line and like companies have no lines of road over which their cars run, so as to enable the state to apply the unit rule to them. If the cars be permanently absent from the domicile of their owner, they may not be taxed there. But such companies are enjoying the protection of the states into which their property goes in the prosecution of the business and purposes of such companies, and, unless they pay their share of the burden of taxation there, they will escape all taxation. By requiring them to pay to the state on the average number of cars they there maintain, employ, and use in the prosecution of their business and purposes, we arrive at the same result as we do in the case of the railroads; that is, each car of the tank line and like companies pays to some state its share of the burden of taxes. 283 S.W. 119, 123."

The Appellate Court below certified this cause to this Court finding no error in the Trial Court's ruling that Florida's taxation of rail property under §193.085(4) pursuant to a structure in all material aspects similar to that quoted above was unlawfully discriminatory. As will be shown both lower Courts herein erred in their rulings.

ARGUMENT

POINT I

FLORIDA'S TAXATION OF GATC'S CARS WHICH GATC ADMITS FLORIDA HAS JURISDICTION TO TAX IS NOT DISCRIMINATORY SINCE THE FACTS IN THE RECORD AND LIMITATIONS OF FEDERAL CONSTITUTIONAL LAW ESTABLISH THAT FLORIDA IS WITHOUT JURISDICTION TO TAX NON-RESIDENT CARS.

The question here concerns the power of Florida to tax the cars of non-resident railroad companies such as Conrail whose track is located exclusively in several Northeastern States. It has never been denied that it is likely that some of Conrail's cars appear in Florida at one time or another. However, it is believed that there is no evidence in the record stating that a Conrail car was in Florida for the tax years in question, nor for that matter is there any evidence in the record that cars of any particular non-resident railroad company were in Florida during the years in question. The only evidence in the record pertaining to the presence of non-resident cars win Florida was by GATC's expert witness, William Lahner, who testified regarding a videocamera survey he conducted at four locations in Florida, eight hours in each location. His findings were stated in gross percentages concluding that 58% of the total cars observed (on 16 total trains) were private car lines cars like GATC's and 42% were railroad cars. Of the 42% railroad cars, 30% were non-resident railroad cars, i.e., 12% of

all cars observed. The record is silent as to the origin of the cars, whether they were loaded or just passing through empty returning to their home road; nothing which would evidence more than simple presence in Florida.

Mr. Lahner further testified in response to interrogation by the Court:

> THE COURT: Does any state in the Union using the unit method of assessment -- or does any state in the Union tax rolling stock of nonresident railroads?
>
> THE WITNESS: No sir, not to my knowledge. Not to my knowledge, no sir. (R-1074)
>
> * * *
>
> THE COURT: But so far as you know, no state attempts to tax -
>
> THE WITNESS: Nonresident railroad cars, no sir.
>
> THE COURT: -- nonresident railroad cars?
>
> THE WITNESS: No, sir. (R-1075)

Mr. Lahner is a tax lawyer with over 30 years experience with railroad taxation and is a former property tax director for Penn. Central Railroad. He has authored 30-40 papers on unit appraisals of railroads. (R-1059). Mr. Lahner further testified regarding the proposed taxation of non-resident railroad cars:

> Q. And Mr. Kielbasa was asking you, in effect, if State Y, which is the domiciliary state, would include the value of that car in its unit assessment of that railroad which is domiciled in that state. And your answer was that yes, it would.
>
> A. That's correct.
>
> Q. And now I would ask you to assume something else. Assume that a special statute was enacted in State X which creates a statutory constructive situs for the nonresident railroad cars owned by the railroad that is domiciled in State Y. And I'll ask you if your answer would be the same.

MR. KIELBASA: I think that requires a legal conclusion. I don't think he has been qualified as an expert lawyer.

THE COURT: He sure is a lawyer, and he sure has a lot of years in this business. I'm going to hear what that lawyer has got to say.

A. This lawyer will say that would end up in a court suit. There certainly would be no voluntary payment in that type of situation. It would have to be - it would be contested in Court. (R-1076)

Mr. Lahner further testified on cross examination:

BY MR. KIELBASA:

Q. Let me ask you just one general question. I think in your testimony you stated that you reached a conclusion that almost universally nonresident cars nationwide are not valued by the nonresident roads. Is that what you said?

A. No, sir, that's not what I said. I said that under the unit method of valuation, nonresident cars would not be included in the unit valuation.

Q. Of what?

A. Of any resident railroad. It would not be included in the -- in the unit value of a resident railroad, the nonresident cars would not be included.

Q. But you're saying they're valued by the home road? They're included in the home road?

A. They would be included in the home state's valuation, depending on how the home state valued. If they used the unit method of valuation, yes.

Q. Okay. So if they used the unit method, their value would be attributed to the home road?

A. Yes, sir.

Q. In the nonresident state.

A. Mm-hmm (affirmative). Well, in the state in which the railroad was a resident. (R-1160)

By their complaint and stipulation entered into evidence, Appellees contested their assessment solely on the basis of Florida's failure to tax non-resident railroad cars (R-549). They do not challenge Florida's power to tax their property.

By final judgment, the Trial Court erroneously held that Florida's failure to tax non-resident rail cars unlawfully discriminated against private car line companies and that therefore the assessments challenged were illegal and void.

By this appeal, the Department does not directly challenge the ruling that non-resident railroad cars are not taxed in Florida. What is challenged here is the Trial Court's ruling that Florida's failure to tax non-resident railroad cars unlawfully discriminates against GATC.

It is the Department's position that before the fact that a property is not taxed in Florida gives rise to a charge of discrimination by a taxpayer whose property is subject to taxation in Florida, the question of Florida's jurisdiction to tax the property not taxed must be addressed. If the property not taxed has acquired tax situs in Florida, it is taxable.* Failure then to tax it gives rise to a charge of discrimination. If the property not taxed has not acquired tax situs in Florida, then Florida has no power to tax it for it is not in this state (§196.001, F.S.), and taxation of it is prohibited by the Federal Constitution.

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*There is a distinction between the acquisition of tax situs and the fact of taxation. It should be clear that unless prohibited by statute or constitution, a state has the power to <u>not</u> tax property that has, by sufficient contacts with the state, acquired, tax situs. The converse is not true. A state may not tax by any means property which has not acquired tax situs and no statute can construct situs which does not in fact exist.

As a result of the decisions below, the plaintiffs will pay no ad valorem taxes in Florida for the tax years 1980 through 1984 (estimated liability 2.39 million dollars) because Florida, in applying its ad valorem tax to instrumentalities of interstate commerce, followed the law as expressed by the United States Supreme Court in Central R.R. Co. of Pennsylvania v. Commonwealth of Pennsylvania, 370 U.S. 607, 8 L.Ed.2d 720, 82 S.Ct. 1297, reh. den. (cit. omit) 1962), [hereinafter called Penn Central] and a prior line of cases it affirmed holding that non-resident cars which are interchanged do not acquire tax situs in states outside their domicile. New York Central R.R. v. Miller, 202 U.S. 584 (1906), Northwest Airlines v. Minnesota, 322 U.S. 291 (1944).

Penn Central was a lawsuit by a resident railroad* against its domiciliary state challenging the state's power to tax any of its cars outside Pennsylvania (the domiciliary). The Court construed the Commerce Clause of the Federal Constitution and held that some 150 cars of the thousands of cars of the Penn Central had, in fact, acquired tax situs in New Jersey. These cars ran between a coal field in Pennsylvania and a terminus in New Jersey, back and forth on regular schedules and routes. Cf. Johnson Oil v. Oklahoma, 290 U.S. 158 (1933).

Significantly however, Penn Central held that as to all other cars of the Central Railroad Company of Pennsylvania, there was no evidence that those cars, like the non-resident cars in this case, acquired tax situs

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*The Penn Central railroad is analogous to the Florida East Coast, no track outside its home state. Multi-state railroads, like Florida's Seaboard, can be analyzed using Penn Central by treating those states in which they maintain track as apportioned domiciled states.

elsewhere. In fact the holding of Penn Central, which is law today is that:

> We conclude, however, that on the record before us Pennsylvania was constitutionally permitted to tax, at full value, the remainder of appellant's fleet of freight cars, including those used by other railroads under the Car Service and Per Diem Agreement of the Association of American Railroads. These were, in the language of the stipulation, "regularly, habitually and/or continuously employed" in this manner, but they did not run "on fixed routes and regular schedules" as did the cars used by CNJ. (at 726) e.s.

There was no evidence in Penn Central, supra, as here there is no evidence, that their presence was habitual. Rather, the Court recognized their movement through interchange to be sporadic absent proof to the contrary. With citations omitted, the Penn Central Court reiterated the rationale to support situs in the domiciliary state:

> Since Miller this Court has decided numerous cases touching on the intricate problems of accomodating, under the Due Process and Commerce Clauses, the taxing powers of domiciliary and other States with respect to the instrumentalities of interstate commerce. None of these decisions has weakened the pivotal holding in Miller--that a railroad or other taxpayer owning rolling stock cannot avoid the imposition of its domicile's property tax on the full value of its assets merely by proving that some determinable fraction of its property was absent from the State for part of the tax year. This Court has consistently held that the State of domicile retains jurisdiction to tax tangible personal property which has "not acquired an actual situs elsewhere."
>
> This is because a State casts no forbidden burden upon interstate commerce by subjecting its own corporations, though they be engaged in interstate transport, to nondiscriminatory property taxes. It is only "multiple taxation of interstate operations," that offends the Commerce Clause. And obviously multiple taxation is possible only if there exists some jurisdiction, in addition to the domicile of the taxpayer, which may constitutionally impose an ad valorem tax.

* * *

> . . .that tangible property for which no tax situs has been established elsewhere may be taxed to its full value by the owner's domicile. If such property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a "tax situs," it is surely appropriate to presume that the domicile is the only State affording the "opportunities, benefits, or protection" which due process demands as a prerequisite for taxation.
>
> * * *
>
> We conclude, however, that on the record before Pennsylvania was constitutionally permitted to tax, at full value, the remainder of appellant's fleet of freight cars, <u>including those used by other railroads under the Car Service and Per Diem Agreement of the Association of American of American Railroads</u>. These were, in the language of the stipulation, "regularly, habitually and/or continuously employed" in this manner, but they did not run "on fixed routes and regular schedules" as did the cars used by CNJ. (8 L.Ed 2D 724, 725)
>
> This Court has consistently held that the State of domicile retains jurisdiction to tax tangible personal property which has "not acquired an actual situs elsewhere." (cit. omit) <u>Penn Central</u>, 8 L.Ed 2d 720, 725. e.s.

Since like <u>Penn Central</u>, (8 L.Ed 2d @ 727) Florida has no evidence that the cars of its domiciled railroads traveled on regular routes through <u>particular</u> non-domiciliary states or had habitual presence, though on irregular missions, in <u>particular non-domiciliary states</u>, the cars of railroads domiciled in Florida had not acquired a tax situs elsewhere and Florida thus retained jurisdiction to tax (and in fact did tax) all cars of her domiciled railroads, though many cars were outside the borders of her domiciled railroad's systems.

Reciprocally, Florida in following the <u>Penn Central</u> rule had no evidence that cars of non-domiciliary railroad companies traveled on regular

routes through Florida or had habitual presence, though on irregular missions, in Florida. Therefore, cars of non-resident (domiciled) railroads were not taxed by Florida. This procedure is the norm nationwide in the taxation of railroads though it functions to tax some property that is actually absent and not to tax some property that is actually here. (R-1035)

It should be stressed that the ruling of the Penn Central decision is that it is not merely the fact of double taxation of interstate enterprises which violates the Commerce Clause of the Federal Constitution, but the risk of it as well. This flows from the holding of Penn Central that:

> . . .the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State, not merely on such property as is subjected to tax elsewhere. . ., (at 726) e.s.

and recognized in Montana-Dakota Utilities v. South Dakota D.O.R., 337 N.W.2d 818 (1983) citing Gwin, White & Prince v. Henneford, 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 279 (1939) and Penn Central. This "risk" was identified at trial by Mr. Lahner, who after stating that no state taxes non-resident railroads, recognized that such an attempted tax would be challenged as double taxation (R-1076) and under Penn Central would be struck down.

The rule of domicile taxation which prohibits Florida from taxing non-resident railroad cars entering Florida through interchange was better expressed in Northwest Airlines v. Minnesota, 322 U.S. 291 (1944) by Justice Frankfurter. There the rule was held to be that railcars and other instrumentalities of interstate commerce are fully taxable in their

domiciled state unless such property has attained "actual situs" in another State. Actual situs of such cars was defined to be a permanent situation* in another state continuously throughout the year, not a fraction thereof (at 298).

Northwest Airlines was a case concerning an airline with a home base to which its airplanes returned, like railroads are interchanged to return to their homeroads (see testimony of Mr. Anderson, R-1164 describing the interchange agreement pertaining to the requirement to move non-resident and foreign cars to the home road after they are unloaded). In Northwest Airlines, the Court continued the right of the domicile to tax all carriers which do not acquire actual situs (absence in another particular jurisdiction for a year) elsewhere, and the prohibition against non-resident states from taxing any such property not acquiring actual situs.

GATC's equipment does not follow this rule since its cars are always (or nearly always) in States other than their domicile. Thus a different method of taxing their property evolved which will be explained later.

The Court in Northwest Airlines spoke further to the viability of altering this system of taxation which GATC seeks to alter today by holding that:

> To introduce a new doctrine of tax apportionment** as a limitation upon the hitherto established taxing power of the home state is not merely to indulge in constitutional innovation.

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*This test is not to be confused with personal property no longer in transit, having come to rest within a State which would apply typically to personal property other than instrumentalities of interstate commerce. Cf. Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 4, 78 L.Ed. 131 (1933)

**By apportionment the Court is referring to the domicile rule of non-apportionment unless actual situs is acquired elsewhere.

> It is to introduce practical dislocation into the established taxing systems of the States. The doctrine of tax apportionment has been painfully evolved in working out the financial relations between the States.
>
> * * *

With the order signed by the trial Court below, GATC is attempting to dislocate the established taxing systems of the states.*

Penn Central and its predecessors, Northwest Airlines, and Miller considered only whether a domiciliary state may tax its carriers everywhere if they had not acquired actual tax situs in another state. While dispositive of this case, it did not rule precisely on the question presented here as to whether such taxation by the domiciliary state of cars everywhere discriminated against private car line companies. The issues in the case sub judice were directly and indentically presented in the case Commonwealth v. Union Pacific R.R. Co., 283 S.W. 119 (1926) where a non-resident railroad challenged the State of Kentucky's attempt (as GATC urges here) to tax non-resident railroad cars within its borders. The Court in Commonwealth held consistent with Penn Central and Northwest Airlines that non-resident cars had not acquired tax situs when they were taken off their home roads pursuant to Federal law. The ruling of that court is again quoted below at length because it describes the situation before this Court exactly including the fairness of this State's taxing system which GATC wrongfully challenges:

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*The undersigned counsel was recently contacted by the Attorney General's Office of the State of Washington where GATC filed a complaint similar to the one at bar with a copy of the order of the trial Court below attached.

In its practical workings, the distinction between the situs for taxation of the cars of the tank line and like companies and that of the cars of these foreign railroads we have thus pointed out, works no injustice and allows no property to escape from paying to some sovereignty its fair burden of taxation. As is conceded by the parties, almost every state, if not all the states of the Union, has adopted the "unit rule" when it has come to tax the rolling stock, the unit rule is this: So much of the entire rolling stock of the railroad is regarded as having a taxable situs in the state as is represented by the proportion found by taking the miles of lines of the railroad in the state and comparing them to the total miles of lines of such railroad. To illustrate: A railroad operates 4,000 miles of lines, 1,000 of which lie within the particular state. It has, 20,000 cars. As one-fourth of its mileage is in such state, 5,000 of its cars are regarded as having a taxable situs there. In its generality, the unit rule of taxation as applied to railroads has been upheld by the Supreme Court (Ky. R.R. Tax Cases, 6 S.Ct. 57, 115 U.S. 321, 29 L. Ed 414), and, although it has in particular instances been disregarded where its practical workings is shown to result in injustice (Fargo v. Hart, 24 S.Ct. 498, 193 U.S. 490, 48 L.Ed 761); Davis, Director General, v. Wallace, 42 S.Ct. 164, 257 U.S. 478, 66 L.Ed. 325), yet, unless such injustice be plainly shown, it will, if applied, be upheld. Under this rule, each car of the railroad is taxed once by some state in which the railroad runs. If the state fails to tax the cars of foreign roads found on domestic lines, yet it taxes the cars of domestic lines which are off on foreign roads, and, in the long run, the interchange of cars will, as a practical matter, bring about a balance between such numbers. If the cars of the domestic line acquire no taxable situs elsewhere than in the state or states where their owner is operating its lines, then they may be taxable in such states. New York Central R.R. v. Miller, supra. And they do not acquire such taxable situs elsewhere under the circumstances disclosed in this case, as we have seen.

On the other hand, tank line and like companies have no lines of road over which their cars run, so as to enable the state to apply the unit rule to them. If the cars be permanently absent from the domicile of their owner, they may not be taxed there. Union

> Refrigerator Transit Co. v. Kentucky, 26 S.Ct. 36, 190 U.S. 194, 50 L.Ed. 150, 4 Ann. Cas. 493. But such companies are enjoying the protection of the states into which their property goes in the prosecution of the business and purposes of such companies, and, unless they pay their share of the burden of taxation there, they will escape all taxation. By requiring them to pay to the state on the average number of cars they there maintain, employ, and use in the prosecution of their business and purposes, we arrive at the same result as we do in the case of the railroads; that is, each car of the tank line and like companies pays to some state its share of the burden of taxes. 283 S.W. 119, 123

Florida, in the case at bar taxes both railroads and private car line companies in a manner absolutely consistent with both the _Commonwealth_ and later _Northwest Airlines_ and _Penn Central_ decisions. Furthermore, responding to the evidence presented at trial, the Trial Court's ruling was in error because it ruled that Florida discriminated against GATC for not taxing something it could not tax. Here below, no proof was made that a Florida resident railroad such as Seaboard lost tax situs of its cars through interchange or that reciprocally, non-resident cars gained by a resident railroad acquired tax situs in Florida through sufficient contacts with Florida as required by _Penn Central_ and _Northwest Airlines_.

POINT II

THE AUTHORS OF THE STATE CONSTITUTION AND THE PEOPLE WHO ADOPTED IT DID NOT INTEND ARTICLE VII §§2 AND 4 TO PREVENT THE LEGISLATURE FROM ADOPTING A REASONABLE AND CONVENTIONAL METHOD OF TAXING INSTRUMENTALITIES OF INTERSTATE COMMERCE IN HARMONY WITH FEDERAL CONSTITUTIONAL LAW AND THE TAXING SYSTEMS OF ALL SISTER STATES.

ASSUMING ARGUENDO THAT THERE IS JURISDICTION TO IMPOSE A TAX ON NON-RESIDENT RAILROAD CARS, THE ABSENSE OF PROVISIONS TAXING THOSE CARS IS PROPERLY WITHIN THE INHERENT POWER OF THE LEGISLATURE TO CLASSIFY PROPERTY FOR TAX PURPOSES, ARTICLE VII §§2 AND 4 NOTWITHSTANDING.

Mr. Lahner testified that in excess of 37 states use the unit method of taxing railroads as Florida does (r-1035) and that no state taxes non-resident railroad cars through interchange (r-1075). This fact is consistent with the Penn Central and Northwest Airlines decisions, supra.

GATC attempts to avoid federal law by a State constitutional theory which is simply erroneous. To support its finding that GATC is mistreated under Article VII §§2 and 4, the order (r-1,474) confuses state and federal constitutional provisions to a blur.

First, the concept of a constructive situs statutes on page 11 of the Order is confused. As has already been demonstrated "actual" situs is required to tax non-resident cars. The constructive situs theory in the Order was taken conceptually out of an early Florida railroad case Atlantic Coast Line R. Co. v. Amos, 115 So. 315 (Fla. 1927) which did not involve Federal limitations on state taxation. Amos concerned apportionment as between counties, not states, and since counties are subdivisions of the state, the legislature is not prevented from constructing situs, whether or not it exists in fact.

Secondly, the Order (r-1474) confuses the uniformity and equality provisions of Article VII §§2 and 4 with general equal protection provisions found elswhere in the State and Federal constitutions. To support its finding that GATC is mistreated under Article VII §§2 and 4, the order (r-1486) holds that the "economics of the relationship between the private car line industry and the railroads, as established in the record before the Court, underscore the importance of even handed ad valorem tax treatment for competing owners of the same type of property." This consideration has nothing to do with Article VII §§2 and 4. The legal significance of those sections is to inhibit the shift of the tax burden to the <u>mass of property</u> which is taxed in a County. Thus the construction of those provisions stand for the proposition that the legislature cannot exempt or exclude property otherwise taxable unless expressly provided by the people through their constitution because such an exemption or exclusion necessitates an increased millage on all property subject to the tax. Article VII §§2 and 4 do not consider the economic affect of taxation of allegedly competing or similar properties. Discrimination as between alleged similar or competing properties is addressed in Article 1 §§2 and 9 of the State Constitution (equality before the law and due process provisions) and the 14th amendment to the U.S. Constitution.

The test for equal protection relief under the 14th amendment to the U.S. Constitution and Article 1, §§2 and 9, state constitution is that the classification be reasonable* and not arbitrary. <u>Kahn v. Shevin</u>, 273 So. 2d 72, <u>aff'd</u> 416 U.S. 351.

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*Certainly considerations of comity, the risk double taxation, ICC control of railroad cars, the requirement under federal law that railroads exchange cars, among others, are reasonable and not arbitrary. These points will be dealt with in more detail in Point IV of this brief.

However, should the Court feel that the power to tax non-resident cars may exist and the legislature has only to try and find out by affirmatively challenging Federal law, certainly the authors of Article VII §§2 and 4 did not intend to require the legislature to test the mettle of Federal law and the resiliency of the taxing systems of sister states whenever there is perceived doubt as to tax situs. Certainly at the outer reaches of a State's jurisdiction to tax, the legislature has the powever to determine expressly, or tacitly by inaction whether or not it has the power to tax. The people could not have intended Article VII §§2 and 4 to have such a far reaching affect, to require the legislature to make Florida a maverick among the states. Under the legislature's inherent power to classify it may choose to be a maverick, but certainly Article VII §§2 and 4 do not require it. See Colding v. Herzog 467 So. 2d 980 (Fla. 1985), approving DOR v. Markham, 381 So. 2d 1101 (Fla. 1st DCA, 1979). Colding and Markham extended the household goods exemption to both residents and non-residents alike, without regard to residency holding that since it would cost more to enforce the tax than it would bring in, all household goods were exempted by Article VII §3(b). The question in Markham and Colding was whether property which is in this state absolutely and taxable but for Article VII §3(b) was exempted by Article VII 53(b). It did not involve the question here as to whether there is situs to tax.

To summarize, Article VII §§2 and 4 require taxation of all property which is clearly taxable in Florida under Federal law other than properties expressly exempted by the State Constitution. It is not a requirement that all property in Florida is taxable notwithstanding Federal law and it is further not a requirement that Florida challenge Federal law even, unlike here, where that law may be in doubt. At the outer reaches of Florida's

power to tax, the legislature is free to exercize its inherent power to classify in a reasonable and not arbitrary manner. Considerations of comity, respect for federal law, avoidance of unnecessary, fruitless* and expensively prolonged litigation all present a reasonable and not arbitrary basis for such classification.

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*If the legislature did attempt to assess the tax against non-resident railroads and successfully defended the tax in the U.S. Supreme Court so as to overrule Penn Central and Northwest Airlines, supra, then all states would adjust their systems accordingly. The result would be the same after years of litigation. Instead of taxing resident cars which are off system they would tax non-resident cars on-system. See Commonwealth of Kentucky v. Union Pacific, supra. The amount of tax they would pay would be materially the same.

POINT III

THE ABSENCE OF PROVISIONS TAXING NON-RESIDENT RAILROAD CARS REPRESENTS A REASONABLE AND NOT ARBITRARY CLASSIFICATION WHICH DOES NOT UNLAWFULLY DISCRIMINATE AGAINST GATC.

Contrary to the order signed by the trial judge, non-resident railroad cars and GATC's private cars do not enter the state in the same manner, are not similarly situated in Florida, are not classified as to ownership, and in many material aspects are recognized as different species of property under the law.

Significantly, the case law illustrates the differences between private cars and non-resident railroad cars. Non-resident railroad cars are heavily regulated by the Federal Government while GATC's cars are not. Illustrative of this is Evans Product Company v. I.C.C., 729 F 2d 1107 (7th Cir, 1984):

> A brief review of the railroad transportation system is helpful to an understanding of the present dispute. Railroad common carriers are required to offer shippers complete transporation services; as part of these services, carriers must provide shippers with the cars in which freight is moved. See Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U.S. 121, 35 S. Ct. 484, 59 L.Ed. 867 (1915); In the Matter of Private Cars, 50 I.C.C. 652 (1918); 49 U.S.C. §11121 (Supp. V 1981). Because the cars in the railroads' fleet often were not promptly available to shippers or were not adapted to the special needs of certain goods, a privately-owned car industry grew to provide cars as necessary for use as instrumentalities of transporation. Private Cars, 50 I.C.C. at 657-58. While the Commission does not regulate private car owners, which are not common carriers, the Commission has regulatory authority over the operation of private cars through control over the railroads. Ellis v. I.C.C., 237 U.S. 434, 443-44, 35 S.Ct. 645, 646-47, 59 L.Ed. 1036 (1915); Private Cars, 50 I.C.C. at 677 at 1108. e.s.

The extent of this regulation can be illustrated by the case I.C.C. v. Oregon Pacific Industries, Inc., 420 U.S. 184, 43 L.Ed. 121, 95 S.Ct. 909 (1975). There, due to an emergency, the length of time log shippers were allowed to hold railroad cars under demurrage (penalty charge for detaining cars) was reduced to 5 days by an Order of the I.C.C. The reason for this was a common practice in existance historically which the demurrage addressed:

> "Another cause of car shortage is the holding of cars on the part of shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that is quite a universal evil throughout the United States, but it is ude in some measure to the lack of warehouse and elevator facilities at the terminals. Id. @ 420 U.S. 188.

In a footnote, the Court in Oregon Pacific Industries, supra, defined demurrage:

> "[D]emurrage charges are in part compensation and in part penalty;....in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis. Historically, textualy in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They could not have been sustained as carrier charges or as penalites. As an integral part of the rules and regulations in respect to car service, they fall within the provisions of Section 1(15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges."

GATC's cars on the other hand, are not subject to demurrage. The very essence of a private car like GATC's is that it is free from this regulation as to use. See Evans Product Co., supra. The reason the private car line

industry came into being was to provide services railroad cars were prevented by Federal law from providing.

From the Oregon case cited above, it is clear that railroad cars and private cars are inherently different. Private Cars, like GATC's can be and often are used as warehouses. A boat manufacturer in Florida may need a large quantity of acetone or other caustic chemicals on hand in the fiberglassing process, yet cannot afford a holding tank. It may use a private car for such purposes indefinately. It may not so use a railroad car.

As indicated in Evans, supra and contrary to the finding of fact of the trial court (without competent* evidence) that the private car industry is at the mercy of the railroad industry (r-1080), the private car industry is a complement to the railroad industry, responding to a market railroads cannot serve. If there is encroachment, it is likely because the private car industry has sought to expand its market.

At trial, Mr. Anderson, a former Seaboard official in charge of car utilization testified that he responded to an I.C.C. emergency order to move Seaboard cars to the Appalachian coal fields in 1979-80 apparently due to the heavy reliance on coal for electric steam generation plants all over the country likely brought on by the Arab oil embargo. He testified that while he was required by I.C.C. rule to release his company's cars to relieve the shortage, he did not, nor could he have released any private cars because under the rules "They're controlled by the shippers or owners." (r-1171)

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*The only witnesses at trial which testified that the private car industry is in direct competition with and at the mercy of railroads were corporate officers of the plaintiff private car line companies seeking a tax advantage.

Additionally, as testified to by Mr. Lahner at trial (r-1035-36), non-resident cars are, at least historically, in states other than those in which they own track on an involuntarily basis. Railroads are required to give up their cars at interchange by federal law. That they have developed compensation systems which may be satisfactory does not alter this fact.

Also, railroads are required to provide most kinds of cars pursuant to its public service obligation as a common carrier. See St. Louis and San Fransisco Railway Co. v. Oklahoma, 184 P. 442 (Okla. 1919). Private car line companies and shippers are not, but do so for their own benefit or profit, not for the public welfare.

Finally, the federal regulations controlling non-resident railroad cars are generally (except for some free-runners) promulgated to direct non-resident railroad cars back to their home roads. (r-1164-72) Mr. Anderson, the retired Seaboard car utilization official, testified as to the differences between the private car fleet and national railroad fleet and their different presence in Florida:

> Rules 1 and 2 describe the handling of the national railroad freight car fleet. And while those rules specify that foreign freight cars at a junction must be returned to the owner at the junction with the owner, and that it must move in the direction of home when they're made empty, there are modifications to those rules.
>
> * * *
>
> I think that -- if I may, I'll use the blackboard. We would look at the frieght car fleet, and we would say that it is divided into a pie shape. We'll say this is private, this is foreign, and this home (drawing diagram). And if you think about the national car fleet, the railroad fleet, and the private car fleet, this is what you would really wind up with. You would have the national railroad fleet of cars, and you would have the private cars.

Now, the difference in these cars is that this car can be used to replace this car, and vice versa (indicating). The home car can be used to replace the foreign car, and the foreign car can be used to replace the home car and ulitized.

* * *

THE COURT: You do not include privately owned cars in the railroad fleet?

THE WITNESS: No, sir.

THE COURT: That's home cars and foreign cars?

THE WITNESS: Yes, sir. The private car, Your Honor, is controlled by the owner or lessee. The railroad car is controlled by the rules set out in the Official Equipment Register, based upon agreement among carriers. And those rules are set up as a unit to control the freight car fleet.

Q Sir, is it not correct that the car hire payments and the mileage -- let me start again. Is it not correct that the car hire payemnts for railroad cars, railroad owned cars, and the mileage payments for private cars as set out in PHJ 6007 are both designed to insure efficient control and utilization of the rail fleet?

A No, I don't think I could -- I don't think I can testify to that. I will testify that the hourly charge and the mileage charge of a railroad car is designed to help improve utilization. But the private car is a different story, because we only pay mileage on it when it is under load.

Q Yes, sir.

A So, therefore, a private car could sit on a shipper's siding, and nothing would cause you to move that car unless the shipper directed it to be moved.

Clearly, non-resident railroad cars and private cars are, as to their presence and function in Florida, completely different. Under the legislature's inherent power to classify, its tax treatment of these cars in a manner consistent with federal law and the taxing structures of sister states is reasonable and not arbitrary.

POINT IV

THE TRIAL COURT'S ORDER IS ILLOGICAL IN THAT IT LEADS TO ABSURD RESULTS.

The order signed by the trial court holds that Florida's tax structure of rail transportation property is unlawfully discriminatory because it taxes private car line cars but not non-resident railroad cars. If this is true, then it leads to the inescapable conclusion that it could also discriminate against resident railroads because their cars, like GATC's are taxed. All resident railroad cars, whether solely a Florida railroad (F.E.C.) or a multi-state railroad (Seaboard) are constructively placed back on their systems as if they never left the state. In the case of a multi-state road, they are then apportioned to Florida based on the ratio of Florida miles to system miles. In the case of the Florida East Coast, 100 percent are taxed in Florida. Yet the order on appeal says until Florida taxes non-resident cars, it cannot tax private cars. By logical, if not legal, extension of this rule, Florida could not tax resident cars until it taxes non-resident cars. The disharmony in the law created by the order below is the result of several factors.

First, Florida's taxation of rail property under §192.035(4), F.S., evolved over time obviously responsive to federal decisional law in an area which is confusing and sometimes incomprehensible to the uninitiated. Due to personnel and memberships changes in both the executive and legislative branches of state government, much of the understanding of why legislative schemes are structured the way they are, are lost unless preserved in the case law or scholarly works.

Florida's taxation of rail property was dislocated by legislative and administrative accident during and shortly after the 1970 legislative session. See GATC v. Askew, 310 So. 2d 46, (Fla. 1st DCA, 1975).

In Askew, due to a legislative error, it was found that prior statutory authority to tax GATC was eliminated and that corrective legislation was required to render GATC's property taxable. This was because certain amendments left only the term "railroad properties" on the books. Thus, the Department was forced into the position to argue that GATC's property was intended by the Legislature to be included within the term "railroad property."

The Askew Court recognized the inconsistency. In determining legislative intent behind the word "railroad property" the court noticed that historical "railroad property" was defined to be resident railroad property; that is to say, property of a railroad with track in Florida. Therefore, since the Department assessed Railroads only by Florida track and admitted as to never having taxed railroads without track in Florida (non-resident railroads) the legislative intent behind the use of the term "railroad property" as further evidenced by administrative practice, had to be to limit "railroad property" to resident railroad property. Since non-resident railroads were not taxed neither could GATC's property. Having been forced to argue the inclusion of GATC's property within the term "railroad property," the Department, through Counsel laid the State bare to a charge of discrimination. As the Askew Court held:

> We do not mean to say that by proper legislative enactment, the Department of Revenue can not tax the properties of this appellant, but in so doing, we find it well to point out that taxes must be uniformly administered, and if the type of property of appellant is brought under the taxing authority, then all other non-resident railroad companies and their properties must be treated with similarity. (e.s.) at 52.

By use of the above underlined language, the Askew* Court equated private carline companies with non-resident railroads. Private car line companies are not a species of railroad. The Askew Court should have only held that Florida was without statutory authority to tax GATC's cars by virtue of a legislative omission and stopped there because the case was decided. Its prospective dictum was unwarranted.

This dislocation has continued to date. Apparently, GATC has paid no taxes to the State of Florida since the early 1970's although the legislature certainly intended that they pay and federal law permits the assessment. There is no organic state or federal prohibition to the tax assessed against GATC under the facts of this case and this Honorable Court should enter an order so holding, reversing the decisions of the appellate and trial Courts below.

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*The 1926 Kentucky Commonwealth decision, supra. and the Department's situs argument as presented here, were not presented to the Askew court.

CONCLUSION

WHEREFORE, for the reasons above stated, it is respectfully requested that this Honorable Court reverse the decisions of the Courts below and enter an order upholding the constitutionality of the Department's assessments at issue herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been furnished by mail to Robert S. Goldman, Attorney for Appellee, P. O. Box 1876, Tallahassee, Florida 32302, this 12th day of January, 1987.

JEFF KIELBASA