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STATE OF NEBRASKA
OFFICIAL
MAY 22 1991
DEPT. OF JUSTICE

DATE: May 21, 1991

SUBJECT: LB 829 - Constitutionality of Amendment Exempting From Property Taxation Certain Personal Property of Transportation Common Carriers.

REQUESTED BY: Senator Jerome Warner
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of a proposed amendment to LB 829 which would provide an exemption from property taxation for certain "personal property of transportation common carriers - railroad rolling stock, motor carriers and airplanes." Your question is whether the establishment of an exemption of this type would cure the constitutional defects found by the court in declaring unconstitutional the exemption of railroad rolling stock under LB 7 in Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991) ("NGPL").

In NGPL, the per curiam majority held, in part, that the exemption of railroad rolling stock established under LB 7 (1989 Neb. Laws, Spec. Sess.) created an unreasonable classification in violation of the prohibition against special legislation in Neb. Const. art. III, § 18, and violated the uniformity clause of Neb. Const. art. VIII, § 1. 237 Neb. at 371, 466 N.W.2d at 470. The court quoted the following language from State ex rel. Cone v. Bauman, 120 Neb. 77, 82-83, 231 N.W. 693, 695 (1930), setting forth the standards to be applied in judging the reasonableness of a legislative classification:

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> The rule is well established that the legislature may, for the purpose of legislating, classify persons, places, objects or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class.

237 Neb. at 370, 466 N.W.2d at 470.

Applying these principles to the railroad rolling stock exemption created by LB 7, the court stated:

> The Legislature's exemption of railroad rolling stock is not based on any real distinction between railroads and other common carriers. If `size' and `weight,' mentioned in the Legislature's stated justification for the classification, refer to things which are large and heavy and the `restrictions or conditions' means that speed is not required, then the expressed legislative justification could just as easily refer to trucks and trucking companies as to railroads. On the other hand, if one thinks in terms of things which are small and light and must be moved quickly, the expressed justification could just as easily refer to airlines and airline companies.
>
> The Legislature's stated justification is illusory. We fail to see any real and substantial difference between personal property used for income production by one type of business and the same type of income-producing personal property used by another type of business.
>
> The Legislature's effort to exempt railroads is not based on a reasonable classification and violates both the proportionality and special legislation requirements of the Nebraska Constitution. There is no reasonable basis for treating railroads differently from other common carriers; therefore, the distinction, as a classification and basis for an exemption from personal property tax, reflected in L.B. 7, results from special legislation prohibited by Neb. Const. art. III, § 18, and violates the uniformity clause of Neb. Const. art. VIII, § 1.

237 Neb. at 371, 466 N.W.2d at 470.

The apparent theory underlying your proposal is that the basis for the court's finding that the exemption of railroad rolling stock under LB 7 was unconstitutional was the court's determination that the classification was unreasonable because it was not "based on any real distinction between railroads and other common carriers." 237 Neb. at 371, 466 N.W. at 470. This interpretation would view the court's declaration that LB 7 was constitutionally prohibited special legislation to be limited to a finding, in effect, that the "class" of railroad rolling stock was unreasonable solely because it was too narrowly drawn due to the non-inclusion of personal property of other common carriers. Your proposed amendment would seek to cure this defect by creating a class of exempt personal property under the authority vested in the Legislature under Neb. Const. art. VIII, § 2, consisting of personal property of transportation common carriers, specifically, railroad rolling stock, trucks and airplanes.

In our opinion, this proposed "solution" may well rest on an unduly narrow interpretation of the decision in NGPL. First, while it is true the court referred to the absence of any real distinction between railroad rolling stock and trucks and airplanes in striking down the classification in LB 7, it did so in the specific context of discussing how the Legislature's stated justification for the exemption (contained in subsection (3) of LB 7, § 1) was not based on any substantial difference to support the disparate tax treatment of such property. Thus, while the court focused on the expressed justification for the exemption stated in the bill in striking down the rolling stock exemption, it is not at all clear that the court would view exempting all personal property of transportation common carriers as creating a "reasonable" classification for purposes of Neb. Const. art. VIII, § 2. In this regard, we note that, in addition to its discussion of the absence of any justification to differentiate the property of railroads and other common carriers in the manner attempted under LB 7, the court further stated: "We fail to see any real and substantial difference between personal property used for income production by one type of business and the same type of income-producing personal property used by another type of business." 237 Neb. at 371, 466 N.W.2d at 470. This passage may indicate the court views the natural classification requiring uniformity of treatment for property tax purposes as consisting of some broader class of "personal property used for income production," as opposed

to your proposal to establish a class of exempt property limited to certain transportation property used by common carriers.[1]

Furthermore, it should be noted that at least three members of the court joined in a concurring opinion in NGPL which reflected the view that the exemption of railroad rolling stock under LB 7 violated Article III, Section 18, for the reason that this exemption, when considered in connection with the extensive exemptions already provided for other commercial and industrial personal property, merely created "even greater discriminatory treatment against that commercial and industrial property which is not exempted." 237 Neb. at 374, 466 N.W.2d at 472 (White and Fahrnbruch, J. J., concurring). The concurrence further stated:

> When property, regardless of whether it is real or tangible personal property, is classified so that it provides exemption from taxation to all but a small amount of property, the classification and exemption may well be unreasonable and arbitrary and may fall within the prohibition of Neb. Const. art. III, § 18, which is this state's 'equal protection clause.'

Id. at 375, 466 N.W.2d at 472 (White and Fahrnbruch, J. J., concurring); See also 237 Neb. at 376-77, 466 N.W.2d at 473 (Grant, J. concurring) (joining in concurring opinion of White and Fahrnbruch, J. J.); and 237 Neb. at 381-82, 466 N.W.2d at 476 (Caporale, J., concurring) (stating "there may be merit in much of what the majority has declared with respect to L.B. 7, and perhaps too in much of what Judges White and Fahrnbruch have expressed in that regard, . . . .").

While the opinions expressed by these members of the court in their concurrences in NGPL are not precedent, and do not represent the holding of a majority of the court, it is nevertheless significant to note that at least three (and possibly four) judges have clearly indicated that, in their view, the invalidity of the exemption for railroad rolling stock under LB 7 extended beyond a mere failure to include such property in a broader class of "personal property of transportation common carriers." Rather, these judges indicated their belief that the classification of property in a manner providing exemption from taxation "to all but

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[1] While your amendment seems to contemplate establishing a class exempting "personal property of transportation common carriers," it appears the class would be limited to railroad rolling stock, trucks, and airplanes, as opposed to all personal property owned by railroads, truck companies or air carriers.

a small amount of property" may violate Article III, Section 18. 237 Neb. at 375, 466 N.W.2d at 472 (White and Fahrnbruch, J. J., concurring). In the event that five members of the court were to adhere to this view, it is evident that an attempt to establish as a class of exempt personal property certain property used by transportation common carriers (including railroad rolling stock, trucks, and airplanes), in addition to the various other classifications of exempt personal property currently provided under Nebraska law, would not withstand constitutional scrutiny under Article III, Section 18 and would also likely be viewed as violating the uniformity requirement of Article VIII, Section 1. It is impossible to tell, of course, if five members would adopt this interpretation if squarely faced with this issue.[2]

In sum, while it is possible to narrowly construe the court's basis for declaring the exemption of railroad rolling stock under LB 7 to be unconstitutional special legislation in violation of Neb. Const. art. III, § 18 (and the uniformity clause of Neb. Const. art. VIII, § 1) as being limited to a determination that it was impermissible to establish a class of exempt personal property of this type without including other common carrier personal property, we believe serious questions exist as to the propriety of adopting this limited interpretation. In our view, it is not at all clear that the court would accept as reasonable a classification exempting some personal property used for the production of income (consisting of the types of transportation common carrier personal property previously identified) while other income-producing personal property remained subject to taxation, at least where the amount of personal property taxed represented a small part of the total amount of personal property of this nature available for taxation.

In light of the views expressed by various members of the court in NGPL relating to this issue, and the nature of the per curiam majority's discussion of LB 7, we cannot provide a definitive answer to the question you have raised. We urge caution, however, in that legislative action taken on the assumption this "narrow" interpretation of the court's basis for declaring LB 7 unconstitutional is correct, such as enactment of your proposed amendment to expand the class of exempt personal

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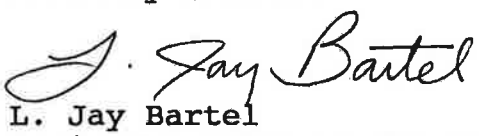
[2] Five of the seven judges of the Nebraska Supreme Court must agree to hold a law unconstitutional. Neb. Const. art. V, §2.

property to include other common carrier transportation personal property, would undoubtedly expose substantial future property taxes to risk in the event such action is subsequently declared unconstitutional.

Very truly yours,

DON STENBERG
Attorney General



L. Jay Bartel
Assistant Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

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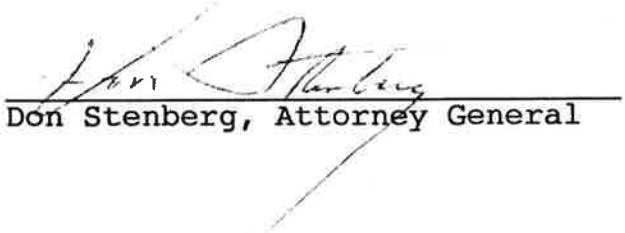

Don Stenberg, Attorney General