

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 09-10772  
Non-Argument Calendar

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| FILED<br>U.S. COURT OF APPEALS<br>ELEVENTH CIRCUIT<br>SEPTEMBER 1, 2009<br>THOMAS K. KAHN<br>CLERK |
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D. C. Docket No. 08-00655-CV-UWC-S

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

versus

ALABAMA DEPARTMENT OF REVENUE,  
TIM RUSSELL, Commissioner of the Alabama  
Department of Revenue,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Alabama

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(September 1, 2009)

Before BLACK, BARKETT, and HILL, Circuit Judges.

PER CURIAM:

CSX Transportation, Inc. (CSXT) appeals the one-page order of the district court dated December 16, 2008, dissolving its preliminary injunction from the imposition of Alabama's sales and use tax on diesel fuel. The district court *sua sponte* dismissed CSXT's case on the basis that *Norfolk Southern Railway Co. v. Alabama Dept. of Rev.*, 550 F.3d 1306 (11th Cir. 2008) was dispositive.

CSXT asserts that the sales and use tax on diesel fuel discriminates against railroad companies in violation of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4) (Section 306). CSXT concedes that the *Norfolk Southern* panel considered an identical challenge by the Norfolk Southern railroad to the sales and use tax on railroad diesel fuel under Section 306, and ruled in favor of the Alabama revenue department.

CSXT further concedes that the three-judge panel assigned to hear this appeal is bound by the panel's decision in *Norfolk Southern*.<sup>1</sup> We agree. We affirm the judgment of the district court. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

AFFIRMED.

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<sup>1</sup> CSXT filed a petition for hearing *en banc* of this case, pursuant to Rule 35 of the Federal Rules of Appellate Procedure. No judge in regular service in this court requested that the court be polled on hearing *en banc*; the petition for hearing *en banc* has been denied.