ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION, INC.,	:	Case No. 2012-1589
	:	Case No. 2012-1592
	:	(Consolidated)
Plaintiff/Appellee,	:	
	:	
v.	:	On Appeal from the Ninth District Court of Appeals, Medina County, Ohio
VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW, ET AL.,	:	Court of Appeals Case Nos. 11CA0092-M 11CA0093-M
Defendants/Appellants.	:	

BRIEF OF AMICUS CURIAE UNITED PARCEL SERVICE, INC. IN SUPPORT OF PLAINTIFF/APPELLEE PANTHER II TRANSPORTATION, INC.

RICHARD C. FARRIN (# 0022850)
(COUNSEL OF RECORD)
Zaino Hall & Farrin LLC
41 South High Street, Suite 3600
Columbus, Ohio 43215
Phone: (614) 349-4811 Fax: (614) 754-6368
Email: rfarrin@zhftaxlaw.com

COUNSEL FOR AMICUS CURIAE
UNITED PARCEL SERVICE, INC.

RICHARD D. BIRNS
Birns & Goff, PC
1604 Locust Street, 4th Floor
Philadelphia, Pennsylvania 19103
Phone: (215) 546-3474 Fax: (215) 546-3460
Email: rbirns@birnsgoff.com

OF COUNSEL

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JAMES F. LANG (# 0059668)
(COUNSEL OF RECORD)
Calfee Halter & Griswold LLP
The Calfee Building
1405 East 6th Street
Cleveland, Ohio 44114
Phone: (216) 622-8563
Fax: (216) 241-0816
Email: jlang@calfee.com

TREVOR ALEXANDER (# 0080713)
Calfee Halter & Griswold LLP
1100 Fifth Third Center
21 East State Street
Columbus, Ohio 43215
Phone: (614) 621-1500
Fax: (614) 621-0010
Email: talexander@calfee.com

COUNSEL FOR PLAINTIFF-APPELLEE PANTHER II TRANSPORTATION, INC.

JOHN L. ALDEN (# 0002697)
(COUNSEL OF RECORD)
ANTHONY E. PALMER (# 0082108)
AldenLaw
One East Livingston Avenue
Columbus, Ohio 43215
Phone: (614) 221-1306
Fax: (614) 221-3551
Email: jalden@aldenlaw.net
tpalmer@aldenlaw.net

COUNSEL FOR AMICUS CURIAE THE OHIO TRUCKING ASSOCIATION

THEODORE J. LESIAK (# 0041998)
(COUNSEL OF RECORD)
Roderick Linton Belfance LLP
One Cascade Plaza, Suite 1500
Akron, Ohio 44308
Phone: (330) 434-3000
Fax: (330) 434-9220
Email: tlesiak@rlbllp.com

COUNSEL FOR DEFENDANT-APPELLANT VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW

BARBARA A. LANGHENRY
(# 0038838)
LINDA L. BICKERSTAFF (#0052101)
(COUNSEL OF RECORD)
City of Cleveland Department of Law
205 West St. Clair Avenue
Cleveland, Ohio 44113
Phone: (216) 664-4406
Fax: (216) 420-8299
Email:
lbickerstaff@city.cleveland.oh.us

COUNSEL FOR DEFENDANT-APPELLANTS TAX ADMINISTRATOR NASSIM M. LYNCH AND THE CENTRAL COLLECTION AGENCY

PHILIP HARTMANN (# 0059413)
(COUNSEL OF RECORD)
STEPHEN J. SMITH (# 0001344)
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215
Phone: (614) 464-1211
Fax: (614) 464-1737

COUNSEL FOR AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE

JOHN GOTHERMAN (# 0000504)
Ohio Municipal League
175 S. Third Street, #510
Columbus, OH 43215
Phone: (614) 221-4349
Fax: (614) 221-4390
E-mail: jgotherman@columbus.rr.com

COUNSEL FOR AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE

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INTRODUCTION

United Parcel Service, Inc. ("UPS") submits this amicus brief to offer the Court some wider perspective on motor carrier operations and how reversing the decision below – and thereby suddenly allowing hundreds of Ohio municipalities to impose their local net profits taxes on motor carriers – would adversely affect not only the motor carrier industry but the whole economy of this State.

STATEMENT OF INTEREST OF AMICUS

UPS is the world's largest package transportation company and a leading enabler of worldwide commerce. UPS's domestic ground-based package delivery subsidiary, United Parcel Service, Inc., an Ohio corporation ("UPS-Ohio"), is the largest motor carrier in the United States. It began doing business in Ohio in 1934. Another subsidiary, UPS Ground Freight, Inc. ("UPS-Freight"), is a major nationwide less-than-truckload motor carrier and has also been doing business in Ohio for many years. Both of these motor carriers provide service in every municipality in Ohio. Neither has paid local net profits tax to any Ohio municipality because no such tax is permitted. Over the last ten years, a dozen or so municipalities have inquired of UPS regarding payment of their net profits taxes. In each such case, UPS has responded with an explanation that such taxes

are barred by the express preemption of R.C. 4921.25.[1] No municipality inquiring of UPS has disputed the conclusion that R.C. 4921.25 expressly preempts such municipality from imposing a net profits tax on UPS.

As explained below, if this Court were now to remove the long-established preemption, UPS and other motor carriers would be faced with an impossible burden in attempting to comply with the local net profits taxes of hundreds of Ohio municipalities.

STATEMENT OF THE CASE AND FACTS

UPS provides a domestic ground-based package transportation service that offers transportation to and from every address within the 48 contiguous states in one to four business days depending on the distance. It also provides an expedited air transportation service that offers transportation to and from all points in the United States by the next or second business day depending on the level of service chosen by the customer, and to and from over 200 foreign countries and territories in one to five business days depending on the distance and the level of service chosen by the customer.

Packages enter UPS's transportation system in one of several ways. Regular UPS shippers receive an automatic daily pickup call. One of UPS's

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1. Recodified without substantial change as R.C. 4921.19(J) effective June 11, 2012, pursuant to 129 H.B. 487. R.C. 4921.25, as it existed during the tax years at issue, was repealed in H.B. 487 and a new R.C. 4921.25 was enacted, addressing a different issue. References to R.C. 4921.25 in this document refer to the version of the law in effect for the tax years at issue.

familiar brown vans (which UPS calls "package delivery cars") stops at the customer's place of business each day to pick up whatever packages may have been readied for shipment. Certain larger customers receive pickup calls using trailers and tractors. Thus, a trailer may be left at the shipping dock of a large shipper and loaded with outgoing packages as they are prepared. Once a day, or as needed, such a trailer is picked up by a UPS tractor and an empty trailer is left in its place. More casual shippers can transfer outgoing packages to UPS at UPS Store locations or at drop boxes that UPS maintains in many places. Packages are picked up from these locations by package delivery cars. At the end of the day, all of these packages are consolidated at the local operating center.

At the operating center, the outgoing packages are sorted. Packages destined for the same local area are retained overnight and are loaded in the morning onto a package delivery car for delivery. The remaining packages must be transferred to an operating center that serves the destination. This transfer is accomplished in a variety of ways depending on the level of service and the distance to be covered.

Air packages are moved via tractor-trailers to a nearby airport where they are loaded onto aircraft and flown to one of several central air sorting facilities. There, they are sorted again, loaded onto another airplane, and flown to an airport near the destination. From that airport, they move via tractor-trailer to the destination operating center.

Ground packages are transferred via surface transportation. For shorter distances – up to 600 miles or so – this is accomplished by tractor-trailers moving on the highways. For longer distances, trailers are hauled to a nearby railroad and loaded onto railroad flatcars for transportation by rail to a point near the destination. Once packages reach the operating center serving the destination address they are loaded onto package delivery cars for final delivery.[2]

As of 2012, UPS transported approximately 14 million packages daily. In Ohio, UPS has more than 80 operating facilities and employs over 13 thousand persons with payroll of nearly $600 million. It has over 60 thousand Ohio shipper/customers. Overall, the UPS organization pays over $11 million in Ohio taxes, not including any amounts that are withheld for Ohio state income tax and Ohio local income tax on behalf of UPS's employees.

UPS has no permanent connection to the Village of Seville except for a drop box located in a Pilot Truck Center at the intersection of I-71 and I-76 in the northwest corner of the Village.

UPS retains data regarding the locations of the pickup and delivery of packages only at the level of zip codes. The Village of Seville is located in zip code 44273 and represents only a small portion of this zip code. In 2012, UPS

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2. Less-than-truckload motor carriers such as UPS-Freight operate using a simpler version of the same plan. The carrier establishes a network of sorting centers. It uses pickup and delivery equipment to move freight between shippers and these centers and between these centers and consignees. At the centers, the carrier establishes full trailer loads of freight destined for the same area and uses line-haul equipment to move it to the destination center.

picked up approximately 100 thousand packages in zip code 44273 and delivered approximately 60 thousand to that zip code. UPS has no way of knowing how many of these packages were picked up or delivered in the Village of Seville. I-71 and I-76 pass through the northern portion of the village and UPS has no way of knowing how many of its vehicles pass through the Village on these highways.

UPS maintains records of vehicle miles by state for regulatory and tax apportionment reasons. However, neither UPS nor any other motor carrier maintains – or could feasibly maintain – records of mileage by local jurisdiction.

ARGUMENT

Proposition of Law No. 1: Because the Seville Ordinance does not contain the legal rules that would be needed to define the tax due from a motor carrier, any application of the Seville local net profits tax to a motor carrier would necessarily be arbitrary and capricious.

The Village of Seville Income Tax Ordinance, Ordinance No. 2005-65 (the "Ordinance"), was introduced into evidence as the Tax Administrator's Exhibit 5. It is 56 pages long. By its terms, the Ordinance applies to corporations "whether or not such corporations have an office or place of business in Seville." Ordinance 2:05. The tax is imposed on "the net profits earned … determined by a method of allocation provided in Chapter 3:00 hereof, derived from sales made, work done, services performed or rendered and business or other activities conducted in Seville." *Id.* Because UPS picks up and delivers packages within the Village, the Ordinance applies to UPS by its plain terms. Accordingly, were the Seville tax not preempted, UPS would be required to apply the rules in Chapter

3:00 of the Ordinance to determine its taxable net profits for purposes of the Seville net profits tax.

Chapter 3:00 of the Ordinance provides that the tax base is the "entire net profits" of the taxpayer multiplied "by a business allocation percentage to be determined by a three-factor formula of property, payroll and sales." Ordinance 3:01(A). Determining the factors for transportation companies like UPS would be a virtual impossibility.

Property factor: UPS has no fixed property in the Village with the exception of the drop box at the Pilot Truck Center mentioned above. However, UPS's package cars are frequently present in the Village in the course of making pickups and deliveries. The laws of various states typically assign mobile property for purposes of apportionment based on metrics such as miles, time or other factors. *See, e.g.*, Utah Rule R865-6F-19(4)(b) ("mobile property miles" used to assign mobile property in Utah); 15 A.A.C. 19.1210(a)(3) ("terminal days" used to assign "interstate mobile transportation equipment" in Alaska). The Ordinance, however, contains no provision regarding the assignment of mobile property to the numerator of the property factor. Ordinance 3:01(B)(1). UPS does not maintain records of the mileage its mobile property travels in each municipality in Ohio. Each of its thousands of vehicles travel through many municipalities on every trip. UPS has no feasible means to track the miles traveled in each municipality.

Payroll factor: The provision regarding the payroll factor states that the payroll of an employee who works both inside and outside the Village should

be assigned to the Village based on proportion of "his working time within Seville" to his total working time. Ordinance 3:01(B)(2)(b)(ii).

Sales factor: The Ordinance has no provision whatsoever that identifies what portion of gross receipts from transportation services (or any other service that takes place partially inside and partially outside the Village) should be assigned to the numerator of the sales factor. Some state apportionment laws assign sales of carriers based on the locations of pickups, of deliveries, or of some combination of the two. Other states source carrier sales based on a mileage ratio. See for example R.C. 5751.033(G), which assigns motor carrier sales to Ohio for purposes of the Ohio Commercial Activity Tax based on miles. However, as stated above UPS does not have and cannot reasonably obtain either package volume data or mileage data by local jurisdiction.

Section 3:02 of the Ordinance provides that "[i]n the event a just and equitable result cannot be obtained under the formula, the Administrator … may substitute other factors in the formula or prescribe other methods of allocating net income calculated to effect a fair and proper allocation." But any substitute formula would still require recordkeeping that UPS would not be reasonably able to compile. Moreover, the ordinances and administrators of the net profits taxes of more than 500 other Ohio municipalities would be free to adopt other and conflicting apportionment rules.

Under such circumstances, any tax imposed on UPS (or any other carrier) by the Village of Seville would be arbitrary and capricious. As explained

in the next section, it was exactly to avoid this result that the Ohio General Assembly adopted the preemption contained in R.C. 4921.25.

<u>Proposition of Law No. 2:</u> In adopting R.C. 4921.25, the Ohio General Assembly intended – by the plain and explicit language it expressed – to prohibit all local taxes on motor carriers.

Because of the compliance and uniformity issues described in the last section, it has been the typical practice throughout the United States to exempt motor carriers from local income or gross receipts taxes. Carriers are subjected instead to a panoply of fuel taxes, highway use taxes, vehicle license taxes, and other taxes and fees.

In Pennsylvania, for example, local governments are forbidden under the Local Tax Enabling Act to impose a tax "on a privilege, transaction, subject, occupation or personal property which is … subject to a State tax or license fee." 53 P.S. 6924.301.1(f)(1). Because motor carriers are subject to a tax or fee imposed by the Pennsylvania Public Utilities Commission (the equivalent of Ohio's PUCO), motor carriers are exempt from local taxes.

In Ohio, the preemption applies by the express language of R.C. 4921.25. When the Ohio General Assembly adopted that provision in 1923, it understood that it was establishing a state level structure for the regulation and taxation of motor carriers. It understood that only under such a structure could the nascent industry prosper and grow. Accordingly, when the General Assembly defined what types of local taxes it intended to prohibit, it used an exhaustive

catalog: "all fees, license fees, annual payments, license taxes, or taxes or other money exactions … are illegal."

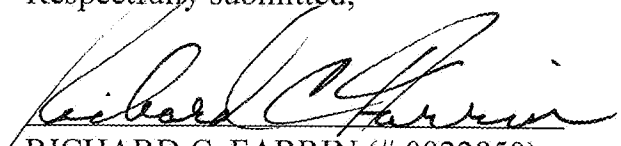
From 1923 until today, the motor carrier industry and Ohio municipalities have operated under that rule. In 2006, for example, the City of Cleveland approached UPS about paying its net profits tax, which, like the Seville tax, was administered by Central Collection Agency ("CCA"). UPS responded with a letter to CCA explaining that the tax was preempted by R.C. 4921.25 and CCA accepted that explanation. Accordingly, CCA's present position that the Seville tax is not preempted appears to be a late thought.

For this Court to disturb long-settled expectations with regard to local taxation of motor carriers would be a windfall to municipalities and impose an impossible compliance burden on the motor carrier industry. It would also be in direct conflict with the clear intent of the General Assembly that expressly preempts the authority of municipalities to tax motor carriers.

CONCLUSION

For the reasons set forth in the foregoing brief and in the briefs filed by Panther II Transportation and other amici supporting it, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,



RICHARD C. FARRIN (# 0022850)
(COUNSEL OF RECORD)
Zaino Hall & Farrin LLC
41 South High Street, Suite 3600
Columbus, Ohio 43215
Phone: (614) 349-4811
Fax: (614) 754-6368
Email: rfarrin@zhftaxlaw.com

COUNSEL FOR AMICUS CURIAE
UNITED PARCEL SERVICE, INC.

OF COUNSEL:

RICHARD D. BIRNS
Birns & Goff, PC
1604 Locust Street, 4th Floor
Philadelphia, Pennsylvania 19103
Phone: (215) 546-3474
Fax: (215) 546-3460
Email: rbirns@birnsgoff.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae United Parcel Service, Inc. was served via Regular U.S. Mail, postage pre-paid, upon the following this 24th day of June, 2013:

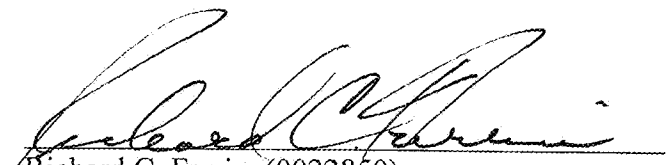
James F. Lang
Calfee Halter & Griswold LLP
The Calfee Building
1405 East 6th Street
Cleveland, Ohio 44114
Counsel of Record for Plaintiff-Appellee
Panther II Transportation, Inc.

John L. Alden
Alden Law
One East Livingston Avenue
Columbus, Ohio 43215
Counsel of Record for Amicus Curiae
The Ohio Trucking Association

Theodore J. Lesiak
Roderick Linton Belfance LLP
One Cascade Plaza, Suite 1500
Akron, Ohio 44308
Counsel of Record for Defendant - Appellant
Village of Seville Board of Income Tax Review

Linda L. Bickerstaff
City of Cleveland Department of Law
205 West St. Clair Avenue
Cleveland, Ohio 44113
Counsel of Record for Defendant – Appellants
Tax Administrator Nassim M. Lynch and The Central Collection Agency

Philip Hartmann
Frost Brown Todd LLC
One Columbus, Suite 2300
Columbus, Ohio 43215
Counsel of Record for Amicus Curiae
The Ohio Municipal League



Richard C. Farrin (0022850)