

ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION, INC.,

Plaintiff-Appellee,

v.

VILLAGE OF SEVILLE BOARD OF
INCOME TAX REVIEW, *et al.*,

Defendants-Appellants.

Case Nos. 2012-1589 & 2012-1592

On Appeal from the Court of Appeals for
Medina County, Ninth Appellate District,
Case Nos. 11CA0092-M & 11CA0093-M

BRIEF OF *AMICUS CURIAE* CON-WAY FREIGHT, INC.
IN SUPPORT OF APPELLEE PANTHER II TRANSPORTATION, INC.

Marc S. Blubaugh (0068221), *Counsel of Record*
mblubaugh@beneschlaw.com
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
41 South High Street, 26th Floor
Columbus, Ohio 43215
(614) 223-9300
FAX: (614) 223-9330

Counsel for Amicus Curiae Con-way Freight, Inc.

John L. Alden (0002697), *Counsel of Record*
jalden@aldenlaw.net
Anthony E. Palmer (0082108)
tpalmer@aldenlaw.net
ALDEN LAW
One East Livingston Avenue
Columbus, Ohio 43215
(614) 221-1306
FAX: (614) 221-3551

*Counsel for Amicus Curiae Ohio Trucking
Association*

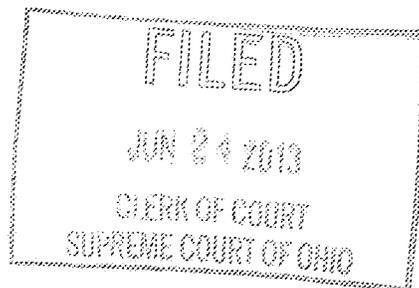
James F. Lang (0022850), *Counsel of Record*
ilang@calfee.com
Trevor Alexander (0080713)
CALFEE HALTER & GRISWOLD LLP
1400 Key Bank Tower
800 Superior Avenue
Cleveland, Ohio 44114
(216) 622-8200

*Counsel for Plaintiff-Appellee Panther II
Transportation, Inc.*

Theodore J. Lesiak (0041998)
lesiak@lhhlaw.com
3995 Medina Road, Suite 210
PO Box 1329
Medina, Ohio 44258
(330) 764-3200
FAX: (330) 764-3202

*Counsel for Defendant-Appellant Village of
Seville Board of Income Tax Review*

(Counsel continued on next page)



Barbara A. Langhenry (0038838)
Interim Director of Law
Linda L. Bickerstaff (0052101), *Counsel of Record*
Assistant Law Director
lbickerstaff@city.cleveland.oh.us
City of Cleveland, Department of Law
205 West St. Clair Avenue
Cleveland, Ohio 44113
(216) 664-4406
FAX: (216) 420-8299

*Counsel for Defendants-Appellants Tax Administrator
Nassim M. Lynch and The Central Collection
Agency*

Philip Hartmann (0059413), *Counsel of Record*
philip.hartmann@icemiller.com
Rebecca K. Schaltenbrand (0064817)
rebecca.schaltenbrand@icemiller.com
Stephen J. Smith (0001344)
stephen.smith@icemiller.com
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
(614) 462-4941
FAX: (614) 222-3443

John Gotherman (0000504)
jgotherman@columbus.rr.com
Ohio Municipal League
175 South Third Street
Suite 510
Columbus, Ohio 43215-7100
(614) 221-4349
FAX: (614) 221-4390

*Counsel for Amicus Curiae Ohio Municipal
League*

Michael M. Briley (0006252)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, Ohio 43604
mbriley@slk-law.com
(419) 321-1325
FAX: (419) 241-6894

*Counsel for Amicus Curiae
The Ohio Dump Truck Carriers Conference*

Richard C. Farrin (0022850)
Zaino, Hall & Ferrin, LLC
41 South High Street, Suite 2600
Columbus, Ohio 43215
rfarrin@zhftaxlaw.com
(614) 349-4811

*Counsel for Amicus Curiae
United Parcel Service, Inc.*

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF THE CASE AND THE FACTS.....	1
STATEMENT OF CON-WAY’S INTEREST.....	1
ARGUMENT	2
<u>Amicus Curiae’s Proposition of Law:</u>	
FORMER R.C. § 4921.25—NOW § 4921.19(J)—IS PART OF A UNIFORM, STATEWIDE REGULATION OF MOTOR CARRIERS AND EXPRESSES THE GENERAL ASSEMBLY’S UNAMBIGUOUS INTENT TO PREEMPT MUNICIPAL TAXATION OF MOTOR CARRIERS.....	
CONCLUSION.....	6
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>City of Cleveland v. Pub. Util. Comm. of Ohio</i> , 130 Ohio St. 503, 512, 200 N.E. 765 (1936).....	2
 <u>Statutes</u>	
R.C. § 4921.25	1 – 5
R.C. § 4921.19(J).....	2
R.C. Chapter 4923.....	2
49 U.S.C. § 14503(a)	3
 <u>Other</u>	
MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 29 (10 th Edition, 1993).....	3
Seville Ord. No. 2005-65, 2:05.....	5

INTRODUCTION

As *amicus curiae* on behalf of Appellee Panther II Transportation, Inc. (“Panther”), Con-way Freight, Inc. (“Con-way”) urges the Court to affirm the decision of the Ninth District Court of Appeals because any contrary outcome would not only constitute an erroneous construction of the plain and unambiguous language of R.C. § 4921.25 but would also subject Con-way and the rest of Ohio’s critical motor carrier industry to an unprecedented, unexpected, and unsustainable level of new taxation.¹

STATEMENT OF THE CASE AND THE FACTS

This case is an appeal from the Ninth District Court of Appeals’ decision that held that R.C. § 4921.25 expressly preempts municipalities from assessing a “net profits” tax against motor carriers. Appellant Village of Seville Board of Income Tax Review (the “Village”) appealed that decision. After reconsideration, the Court accepted jurisdiction of the Village’s appeal. Con-way incorporates by reference the Statement of Facts set forth in Panther’s merit brief.

STATEMENT OF CON-WAY’S INTEREST

Con-way is a multibillion dollar provider of Less-Than-Truckload (“LTL”) motor carrier services to large and small customers located throughout the country, including in Ohio. In other words, Con-way consolidates freight from several shippers and transports that freight in a single trailer to numerous destinations. Although headquartered in Ann Arbor, Michigan, Con-way has engaged in business in Ohio since 1983. As of December 2012, Con-way’s thirteen (13)

¹ Throughout this brief, Con-way refers to “R.C. § 4921.25” since that was the appropriate citation during the time period at issue. The operative language of R.C. § 4921.25 was recodified as R.C. § 4921.19(J) effective June 11, 2012, pursuant to 129 H.B. 487.

different Ohio locations reported over \$200 million in Ohio revenues on its 2012 Ohio Commercial Activity Tax returns and paid approximately \$65 million in compensation to Ohio employees. Con-way has consistently responded to municipalities seeking to tax its income by advising that R.C. § 4921.25 precludes such a tax. To date, each and every Ohio municipality that has attempted to collect such a tax from Con-way has properly accepted this explanation and declined to pursue collection of the tax. Con-way—and the rest of Ohio’s motor carrier industry—would be subjected to unprecedented, unexpected, and unsustainable new tax liability exposure if municipalities were in fact permitted to assess and collect such a tax.

ARGUMENT

Amicus Curiae’s Proposition of Law:

FORMER R.C. § 4921.25—NOW § 4921.19(J)—IS PART OF A UNIFORM, STATEWIDE REGULATION OF MOTOR CARRIERS AND EXPRESSES THE GENERAL ASSEMBLY’S UNAMBIGUOUS INTENT TO PREEMPT MUNICIPAL TAXATION OF MOTOR CARRIERS.

Chapters 4921 and 4923 of the Ohio Revised Code provide a uniform, statewide framework for regulating motor carriers in a variety of contexts. For instance, these chapters require motor carriers to obtain certain intra-state operating authority from the Public Utilities Commission of Ohio (“PUCO”), to pay various state taxes, to have minimum insurance coverage in place, and to pay monetary forfeitures to the PUCO for violations of various safety and registration requirements. The PUCO itself, pursuant to Chapter 4921, has promulgated regulations that govern motor carrier operations in a host of different ways in areas ranging from driver qualifications to compliance with various safety standards to recordkeeping obligations.

Ohio courts have long recognized that this thorough statewide framework was developed in order to ensure that Ohio motor carriers are treated uniformly throughout the state. *See, e.g.,*

City of Cleveland v. Pub. Util. Comm. of Ohio, 130 Ohio St. 503, 512, 200 N.E. 765 (1936) (“It is most evident that the General Assembly since the creation of the Public Utilities Commission of Ohio has subordinated the right of the municipality to regulate transportation lines within its limits to the authority granted the Public Utilities Commission.”). This uniform, statewide framework materially enhances Ohio’s business environment—both for users and providers of transportation services—by providing greater predictability to parties doing business, or seeking to do business, in Ohio. Indeed, this effort to create uniformity on a statewide basis parallels the effort to create uniformity on a federal basis. *See, e.g.*, 49 U.S.C. § 14503(a) (relieving railroads and motor carriers from federal income taxes that could be imposed if employees earn part of their income while passing through a state).

As part of Ohio’s uniform, statewide framework governing motor carriers, the General Assembly plainly and expressly provided that, while motor carriers are subject to state income tax, they are unequivocally **not** subject to any municipal income tax. The unambiguous language of R.C. § 4921.25 provides:

The fees and charges provided under section 4921.18 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other sections of the Revised Code, except the assessments required by section 4905.10 of the Revised Code, but **all** fees, license fees, annual payments, license taxes, or **taxes** or other money exactions, except the general property tax, assessed, charged, fixed, or exacted by local authorities such as municipal corporations, townships, counties, or other local boards, or the officers of such subdivisions **are illegal** and, are **superseded** by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code.

(emphasis added). The General Assembly’s use of the word “all” in drafting the statute is dispositive. The plain and ordinary definition of the word “all” is “the whole amount or

quantity” and “as much as possible” or “every” and “any whatever.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 29 (10th Edition, 1993). Accordingly, the word “all” must be understood in R.C. § 4921.25 as comprehensively covering every conceivable tax (except for the general property tax expressly excluded) that could be imposed on motor carriers in Ohio. The General Assembly conspicuously did **not** identify any other exceptions to this broad prohibition (beyond general property tax) or indicate that the prohibition only applies to taxes that were in effect when the statute was first enacted in 1923.

From a practical perspective, R.C. § 4921.25 ensures that motor carriers need not fear exposure to a patchwork quilt of various overlapping or inconsistent local taxes when electing to do business in Ohio. The inherent nature of the trucking industry is such that motor carriers invariably cross municipal boundaries. Absent the preemptive power of R.C. § 4921.25, every city, village, and township in Ohio through which a truck passes with a load of freight could impose its own taxing schemes (and other regulatory burdens) on the motor carrier in question. Each such political subdivision could likewise adopt its own definition of taxable income, apportionment, and taxable activities, creating a chaotic and wholly unworkable taxing regime with which it would be nearly impossible for a multistate trucking company to comply and which would most certainly dampen economic vitality in Ohio. This is particularly the case since the trucking industry itself operates on notoriously thin profit margins (measured by an “operating ratio” consisting of total expenses divided by total revenue).² For instance, Con-way

² Cottrell, Wayne D. “Performance Metrics Used by Freight Transport Providers,” California State University San Bernardino, Project 2007-SGP-1011, September 30, 2008 <http://leonard.csusb.edu/research/documents/1011FinalReport.pdf> (last accessed on June 19, 2013).

achieved an operating ratio of only 98.1 in the first quarter of 2013, meaning that net income before interest and taxes was 1.9% of total revenues.³ Many smaller trucking companies have even higher operating ratios, earning a penny or less on each dollar of revenue. Subjecting such a thin profit margin to many levels of local taxation could quickly leave even the best-managed trucking company unable to recapitalize and, ultimately, unable to operate at all in Ohio.

Such a regulatory landscape—a landscape consisting of contradictory and overlapping taxation—is precisely what the General Assembly intended to avoid when it enacted R.C. § 4321.25. The breadth of the Village’s net profits tax is breathtaking, seeking to impose tax on net profits “derived from sales made, work done, services performed or rendered and business or other activities conducted in Seville” and “whether or not such corporations have an office or place of business in Seville.” Seville Ord. No. 2005-65, 2:05. Other municipalities will undoubtedly follow the Village’s lead if the Court reverses the decision of the Ninth District Court of Appeals. Such a radical change in Ohio’s tax system would severely undermine the successful operation of Ohio’s trucking industry and, by extension, Ohio’s economy as a whole. The Court should not permit the Village—or any other Ohio municipality—to subject companies like Panther and Con-way to these unprecedented, unexpected, and unsustainable new tax liabilities.

³ Con-way Inc. “Form 10-Q For the quarterly period ended March 31, 2013,” May 1, 2013 www.con-way.com/en/about_con_way/newsroom/press_releases/May_2013/2013_may_01/ (last accessed on June 19, 2013).

CONCLUSION

For the foregoing reasons, and for the reasons stated by Plaintiff-Appellee Panther II Transportation, Inc., *Amicus Curiae* Ohio Trucking Association, *Amicus Curiae* The Ohio Dump Truck Carriers Conference, and *Amicus Curiae* United Parcel Service, Inc. (all of which are incorporated herein and adopted by reference), *Amicus Curiae* Con-way respectfully urges this Court to affirm the decision of the Court of Appeals for the Ninth Appellate District.

Respectfully submitted,



Marc S. Blubaugh (0068221), *Counsel of Record*
mblubaugh@beneschlaw.com

BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
41 South High Street, 26th Floor
Columbus, Ohio 43215
(614) 223-9300
FAX: (614) 223-9330

Counsel for Amicus Curiae Con-way Freight, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via regular U.S.

Mail Service, postage prepaid, this 24th day of June 2013 to the following:

James F. Lang
Trevor Alexander
CALFEE HALTER & GRISWOLD LLP
1400 Key Bank Tower
800 Superior Avenue

John L. Alden
Anthony E. Palmer
ALDEN LAW
One East Livingston Avenue
Columbus, Ohio 43215

Theodore J. Lesiak
3995 Medina Road, Suite 210
PO Box 1329
Medina, Ohio 44258

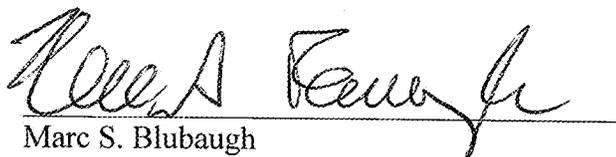
Barbara A. Langhenry, Interim Director of Law
Linda L. Bickerstaff, Assistant Law Director
City of Cleveland, Department of Law
205 West St. Clair Avenue
Cleveland, Ohio 44113

Philip Hartmann
Rebecca K. Schaltenbrand
Stephen J. Smith
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215

John Gotherman
Ohio Municipal League
175 South Third Street
Suite 510
Columbus, Ohio 43215-7100

Richard C. Farrin
Zaino Hall & Ferrin, LLC
41 South High Street, Suite 3600
Columbus, Ohio 43250

Michael M. Briley
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, Ohio 43604


Marc S. Blubaugh