STATE OF MICHIGAN

COURT OF APPEALS

YELLOW TRANSPORTATION, INC.,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and MICHIGAN PUBLIC SERVICE COMMISSION,

Defendants-Appellants.

FOR PUBLICATION
July 22, 2003
9:05 a.m.

No. 194703
Court of Claims
LC No. 95-015706 CM

ON REMAND

Updated Copy
September 12, 2003

Before: Griffin, P.J., and Jansen and O'Connell, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. On remand, the primary issue in the present case is to determine if the statutory phrase, "collected or charged as of November 15, 1991," is ambiguous. As I stated in my dissent in the previous appeal of this case, I would hold that the phrase is unambiguous. See *Yellow Freight Sys, Inc v Michigan*, 231 Mich App 194, 209-212; 585 NW2d 762 (1998) (O'Connell, J., concurring in part and dissenting in part) (*Yellow Freight II*). On remand, I continue to be of the opinion that the phrase is unambiguous. See *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001) ("If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written.").

Nothing in the Michigan Supreme Court's opinion, 468 Mich 862 (2003) (*Yellow Freight III*), or the United States Supreme Court's opinion in this matter, *Yellow Transportation, Inc v Michigan*, 537 US 36; 123 S Ct 371; 154 L Ed 2d 377 (2002) (*Yellow Transportation IV)*, persuades me that my original position was incorrect. I note that Justice O'Connor specifically stated in *Yellow Transportation IV, supra* at 44, that neither the Michigan Supreme Court nor the United States Supreme Court addressed the issue raised by my previous dissent. Justice O'Connor stated:

> The Michigan Supreme Court did not consider respondents' argument that the fees petitioner paid Michigan for the 1992 registration year were "collected or

> charged as of November 15, 1991." 49 USC § 14504(c)(2)(B)(iv)(III). . . . The only issue before this Court, therefore, is whether States may charge motor carrier registration fees in excess of those charged or collected under reciprocity agreements as of November 15, 1991.

Because neither the United States Supreme Court opinion nor the Michigan Supreme Court opinion addressed the issue raised by my previous dissent, my previous dissent remains unaffected by these subsequent decisions. In fact, I am slightly encouraged by the Michigan Supreme Court's statement in *Yellow Freight III* that the Interstate Commerce Commission's (ICC) interpretation of the Intermodal Surface Transportation Efficiency Act (ISTEA), PL 102-204, was contrary to the plain language of the statute, and, consequently, unworthy of deference. *Yellow Freight III*, *supra* at 29-31. Indeed, if the ICC interpretation of the ISTEA is contrary to the plain language of the statute and if it is unworthy of deference, then the majority's affirmance of the ICC's interpretation of the unambiguous ISTEA is erroneous. See *Wickens*, *supra*.

In my previous dissent, I determined that the phrase "collected or charged as of November 15, 1991" is unambiguous. If I could conclude that this phrase is ambiguous, and if I was not cognizant of the Michigan Supreme Court's edict in *Yellow Freight III* cited above, I might consider approving the majority opinion. However, because the phrase is obviously clear on its face, I reaffirm and republish my previous dissent:

> I respectfully dissent from part II of the majority opinion. I find no ambiguity in the statutory provision in dispute and accordingly would instruct the Court of Claims to apply the statutory language according to its plain meaning and not according to the ICC's strained construction.
>
> The primary goal of statutory interpretation is to ascertain and give effect to legislative purpose. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995). The language of the statute itself is the primary indicator of legislative intent. *Folands Jewelry Brokers, Inc v City of Warren*, 210 Mich App 304, 307; 532 NW2d 920 (1995). "If the plain and ordinary meaning of the statute is clear, judicial construction is normally neither necessary nor permitted." *Dep't of Transportation v Thrasher*, 196 Mich App 320, 323; 493 NW2d 457 (1992), aff'd 446 Mich 61; 521 NW2d 214 (1994).
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> The pertinent language in [former] 49 USC 11506(c)(2)(B)(iv)(III) provides for establishment of a fee system that "will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." The majority reasons that this language calls for identifying a "pertinent period" ending November 15, 1991, but that it reveals no congressional intent concerning when this period begins. The majority then resolves this supposed ambiguity by concluding that the provision refers to fees charged for the registration year that includes November 15, 1991. However, this construction disregards the word "collected," and broadens the specific reference, "as of November 15, 1991," to indicate the whole

registration year that happens to include November 15, 1991. This distortion of the plain wording of the statute is unnecessary and inappropriate. Legislative intent "is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995). The ambiguity that the majority finds is the result of the majority's failure to accept the statutory wording at face value. When a statute is clear on its face, judicial construction is unnecessary and inappropriate. *Thrasher, supra*.

As the majority states, it was the intent of Congress to "freeze fees at the level as of November 15, 1991." To determine the particulars of that intent, I would restore "collected" as the companion of "charged," and respect the specificity of "November 15, 1991." A court should presume that every word has some meaning and avoid rendering any word nugatory. *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439, 457; 553 NW2d 7 (1996). Accordingly, I would read "fee . . . that such State collected or charged as of November 15, 1991" as fixing fee levels by reference to what the state charged on, or had actually collected by, November 15, 1991.

The statute does not refer to a "period" ending on November 15, but simply to that specific date. It does not refer only to the fee structure in place at the specified time, but to fees "collected or charged" at that time, identifying fees payable to the state, or already paid to the state (for whatever the reason), as establishing the level at which the fees are to be frozen. The words "as of" in reference to a specific date clearly refer to the status quo in place on that date. Thus, the congressional intent to freeze fees at the rates "collected or charged as of November 15, 1991" plainly recognizes for this purpose both the rates actually charged and those according to which fees were actually collected on that date.

Accordingly, because the state had collected plaintiff's fees as envisioned for the 1992 registration year "as of November 15, 1991," 49 USC 11506(c)(2)(B)(iv)(III), by its plain terms, allows the state to continue to assess plaintiff's fees according to the new scheme under which plaintiff had tendered payment by November 15, 1991.

At stake here is the state's interest in collecting higher fees from plaintiff in accordance with recent changes in the state's regulatory scheme, and plaintiff's interest in avoiding those fee increases and continuing to operate under the old scheme. Each party argues that the other stands to receive a windfall if the other's interpretation of the statutory language at issue is adopted. That statutes have the effect, intentionally or not, of benefiting some and burdening others is not a matter of dispute, and the Intermodal Surface Transportation Efficiency Act is no exception. Under any interpretation of 49 USC 11506(c)(2)(B)(iv)(III), someone will win and someone will lose. Although the state's reading of the statute to cause plaintiff to have to continue to pay much higher fees simply because plaintiff chose to pay 1992 fees before November 15, 1991, may seem a harsh

result, the result is equally harsh if the state is obliged to forgo receiving the higher revenues to which its own laws entitle it simply because the federal statute articulated a date of late 1991 instead of early 1992. For these reasons, I would avoid any concern for who benefits, or who gets burdened, from 49 USC 11506(c)(2)(B)(iv)(III) and simply give effect to its plain language.

Although I express no disagreement with the reasoning of part V of the majority opinion, I do not join in that part because it concerns the relief to which plaintiff is entitled, where under my reading of the statute in question plaintiff is not entitled to any relief. I concur with parts III, IV, and VI. [*Yellow Freight II, supra* at 209-212.]

/s/ Peter D. O'Connell