BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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IN RE: Proceeding for the Purpose of Addressing Competitive Affects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. In Tennessee) Docket No. 98-00559

CONSUMER ADVOCATE DIVISION'S POST-HEARING BRIEF

Comes the Consumer Advocate Division of the Office of the Attorney General, pursuant to the request of the Tennessee Regulatory Authority ("TRA"), and hereby files its Post-Hearing Brief.

The Consumer Advocate Division believes that the proof at the hearing in this case established that the two Contract Service Arrangements ("CSAs") at issue, KY98-4958-00 (the "Store") and TN98-2766-00 ("the Bank"), are part of a plan by BellSouth to unfairly maintain revenue and block competitors from entering the market and to unjustly discriminate in favor of some customers. Accordingly, the two CSAs could be denied by the Authority on the grounds that they are (1) anticompetitive and (2) unjustly discriminatory because the same terms are not available to similarly situated customers.

Recognizing, however, that the two companies that obtained the CSAs should not be penalized for the anticompetitive and discriminatory actions of BellSouth, and that the two companies have an strong and understandable interest in getting lower rates as soon as possible, the Consumer Advocate Division urges the TRA to take the following actions:

1. Eliminate the termination provisions (Termination Liability, Section IX) as written and allow both the Bank and the Store to transfer part or all of their services to another

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provider if they wish with no penalty;

2. Eliminate the provision in Section X, "Business Change," which treats a shortfall in the Minimum Annual Revenue Base caused by using the services of another provider differently from shortfalls caused by other events, such as a business downturn. The elimination of this provision would enable the companies to feel free to review offers form other providers.

3. Order BellSouth to remove the discrimination in service rates between the two contracts and to remove the discrimination between the rates for customers in the same class.

Approval under such circumstances as set forth above would adequately address the concerns of the Bank and the Store, while preventing BellSouth from adding two more stumbling blocks to the road to true competition.

DISCUSSION

I. The Position of the Consumer Advocate Division

Though only two CSAs are directly at issue in this case, BellSouth has promulgated more than 200 CSAs. CSAs discriminate in two ways. First, these special contracts allow the final price paid by the CSA group to be less than the final price paid by non-CSA members of the same class for the same services. Second, BellSouth discriminates within the CSA group; that is, different CSAs contain different prices for the same services. Because BellSouth is inconsistent in its CSA provisions, the final prices charged certain CSA customers are lower or higher than the prices paid by other CSA customers.

In addition to being discriminatory and violative of Tenn. Admin. Rule 1220-4-1.07, CSAs are also anticompetitive; the contracts penalize customers if they terminate the CSA to use another service provider. The termination penalties in many CSAs expressly state this penalty provision. In at least one instance, BellSouth has contracted for a right of first refusal, which requires the customer to choose BellSouth when BellSouth comes within 10% of the lower rate of a competitor. The CAD submits that BellSouth's CSA termination charge, which is unrelated to the cost of any services received, is anticompetitive, unlawful and is contrary to statutorily expressed public policy.

BellSouth defends the different final rates on the grounds of increased and specific competition. Furthermore, it also believes that the rates and termination penalties are valid because they are "negotiated." Finally, BellSouth argues that the termination penalties are justified because it has special obligations, such as universal service, that other telecommunications providers do not have.

The Consumer Advocate Division submits that the TRA should find that the contracts as written (and unless modified by the TRA) are discriminatory and anticompetitive. Thus, the TRA should require the company to remove all provisions calling for discrimination and preferential treatment and render the termination clauses unenforceable because they are unjust and unreasonable penalties.

II. Supporting Law

For nearly 80 years and as recently as December 1998, the Tennessee Supreme Court has firmly adhered to the principle that "a contract with a tendency to injure the public violates public policy." Alcazar v. Hayes, 982 S.W.2d 845, 851 (Tenn. 1998)(insurance-which is regulated) ;

Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 530 (Tenn. 1991)(anti-competitive re: lawyers); Nashville Ry. and Light Co. v. Lawson, 144 Tenn. 78, 87, 229 S.W. 741, 743 (1921)(labor unions).

The more specific language is that:

> Unless a private contract ***tends to harm*** the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it does not violate public policy. The reverse is also true: **A contract with a tendency to injure the public violates public policy**.

Alcazar v. Hayes, 982 S.W.2d at 851.

As a result, the TRA must begin with two (2) fundamental issues: 1) What is the public policy?, and 2) Do the contracts tend to harm the public good, public interest or public welfare or conflicts with the constitution, laws or judicial decisions?

A. Public Policy and Proof of Public Harm

According to the courts, public policy is inferred from the Constitution, laws, and judicial decisions. Courts have consistently followed the rule in Nashville Railway, which states:

> The only authentic and admissible evidence of the public policy of a State on any given subject are its constitution, laws, and judicial decisions. The public policy of a State, of which courts take notice, and to which they give effect, must be deduced from these sources.

Nashville Railway and Light v. Lawson, 144 Tenn. 78, 88, 89, 229 S.W. 741 (1921).

Based on this longstanding rule, the public policy regarding telecommunication competition and rate discrimination is defined in the following statutes:

> **65-4-123. Declaration of telecommunications services policy.**
>
> The general assembly declares that the **policy of this state is to foster the development** of an efficient, technologically advanced, statewide system of telecommunications services **by permitting competition** in all telecommunications

services markets, and **by permitting alternative forms of regulation** for telecommunications services and telecommunications services providers. **To that end, the regulation** of telecommunications services and telecommunications services providers **shall protect the interests of consumers** without unreasonable prejudice or disadvantage to **any** telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-5-208 (c)

(c) Effective January 1, 1996, an incumbent local exchange telephone company shall adhere to a price floor for its competitive services subject to such determination as the authority shall make pursuant to § 65-5-207. The price floor shall equal the incumbent local exchange telephone company's tariffed rates for essential elements utilized by competing telecommunications service providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor. The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.

Tenn. Code Ann. § 65-5-209 (b)

(b) An incumbent local exchange telephone company shall, upon approval of its application under subsection (c), be empowered to, and **shall charge and collect only such rates that are** less than or equal to the maximum permitted by this section and **subject to the safeguards in § 65-5-208(c) and (d) and the non-discrimination provisions of this title.**

(h) Incumbent local exchange telephone companies subject to price regulation may set rates for non-basic services as the company deems appropriate, subject to the limitations set forth in subsections (e) and (g), the non-discrimination provisions of this title, any rules or orders issued by the authority pursuant to § 65-5-208(c) and upon prior notice to affected customers.

Therefore, because the Code is the stated public policy of the State, BellSouth's service rate offerings are "subject to" the non-discrimination provisions of the Code. In other words, BellSouth's authority to charge rates is subordinate, subservient and inferior to the discrimination provisions of Title 65 because Title 65 **is** the public policy of the State .

The non-discrimination provisions of title 65 are:

65-4-122. Discriminatory charges - Reasonableness of rates - Unreasonable preferences - Penalties.

(a) If any common carrier or public service company, directly or indirectly, by any special rate, rebate, drawback, or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service within this state than it charges, demands, collects, or receives from any other person for service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company makes any preference between the parties aforementioned such common carrier or other public service company commits **unjust discrimination**, which is prohibited and declared unlawful.

(b) Any such corporation which charges, collects, or receives more than a just and reasonable rate of toll or compensation for service in this state commits extortion, which is prohibited and declared unlawful. **[termination penalties- BellSouth collects more than a just and reasonable rate when it charges, collects or receives compensation for no service.]**

(c) It is unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or **any particular description of traffic or service**, or **to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage**. *[giving one company a better "negotiated" rate is favoritism and an undue and unreasonable prejudice.]*

65-5-204. Unjust rate, fare, schedule or classification prohibited.

(a) No public utility shall:
(1) Make, impose, or exact any unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, or special rate, toll, fare, charge, or schedule for any product, or service supplied or rendered by it within this state;

In the unreported case, Mattox v. Loretto, 1994 Tenn. App. Lexis 731 (Tenn. Ct. App., Dec. 14, 1994) (attached), the Court of Appeals described what type of proof must by developed with respect to the public policy. According to the Mattox,

A contract's enforceability depends upon its purpose and upon its effect on public

policy reflected in relevant legislation or some other aspect of the public welfare. The courts will decline to enforce a contract if the contract

(1) violates state law,

(2) provides for doing something that is contrary to statute, or

(3) harms the public good.

[ciations omitted]

Similarly, the American Law Institute has concluded that a contract is unenforceable when the "interest in its enforcement is clearly outweighed. . . by a public policy against the enforcement of such terms." According to the Restatement of Contracts, when weighing the interest in the enforcement of a term, an account should be taken of:

(a) the parties' justified expectations,

(b) any forfeiture that would result if enforcement were denied, and

(c) any special public interest in the enforcement of the particular term.

These three factors, however should be counterbalanced by factors which weigh public policy against enforcement of a term, such as:

(a) the strength of that policy as manifested by legislation or judicial decisions,

(b) the likelihood that a refusal to enforce the terms will further that policy,

(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and

(d) the directness of the connection between that misconduct and the term.

Restatement (Second) of Contracts § 178 (1979).

III. Unjust Discrimination

BellSouth's arguments that it can have different rates for the same service to different customers due to the existence of competition must fail. *First,* BellSouth has not proved that competition exists in all markets. Indeed it conceded that it could not show the existence of competition when it withdrew its 271 application. *Second, BellSouth has not shown suffiicient justification for the difference in rates charged to different customers.* See the United States v. Illinois Cent. R. Co., 263 U.S. 515, 44 S.Ct. 189, (this case is attached to the Post-Hearing brief; see especially the bold parts). In Illinois Central, the United States Supreme Court held that a difference in rates constitutes unjust discrimination, though the higher rate is inherently reasonable and the lower rate is not unreasonably low, unless justified by the cost of respective services, or other transportation conditions.

Like the Illinois Central Railroad, BellSouth must be viewed as a "transportation" company. The fact that railroad companies and telephone companies are transportation companies is how they get access to public rights of way. And as a transportation company, BellSouth must not discriminate in rates when there is no difference in costs of transporting messages between a customer with a CSA and a customer without a CSA.

BellSouth witness Randall Frame acknowledged that BellSouth was a transportation company whose business was to transport messages. Transcript, Vol. I D at 288. Furthermore, Mr. Frame acknowledged that for two companies with the same service volume in the same exchange, one with a CSA, and one without, the company with the CSA would pay a lower rate. Transcript,

Vol. I D at 290.

In addition, Mr. Frame acknowledged that BellSouth would not consider two customers who have the same volume of service, but only one of whom has a competitive offer form another carrier, to be "similarly situated" for purposes of receiving a price discount under a CSA (treating "similarly situated" customers similarly is the key to non-discriminatory behavior under Tennessee law; see, e.g., Tenn. Code Ann. § 65-4-122(a)):

> Q. Now, assume two customers. You have the same volume, the same mix of service, and each customer in its own business is doing the same amount of business. Let's say they're both, quote, stores. But one of them does not have what BellSouth considers a competitive offer. Would you consider those customers similarly situated?
> A. No, I would not.
> Q. So a key determinative factor is whether one has a competitive offer?
> A. Yes.

Transcript, Vol. I D at 259-260. Under BellSouth's standards and procedures, therefore, Tennessee customers who are making exactly the same contribution to BellSouth's profitiability are treated differently. This is improper under Tennessee law.

Finally, a Tennessee customer who wishes to determine if he or she is "similarly situated" to another customer is out of luck under the BellSouth plan. BellSouth witness Frame suggested that a customer interested in obtaining a CSA similar to another customer could look at the tariffs filed by BellSouth or certain redacted CSAs. Transcript, Vol. I D at 261. Mr. Frame acknowledged, however, that in no event could a customer find out the product mix or the contribution rates of another customer from publicly filed documents, both essential factors to BellSouth in determining whether a customer is "similarly situated" to another. Id. at 262-263. At best, a customer could hope that the other customer would tell them this information. Id. One must ask, however, how likely it is that a competing business will be glad to supply a competitor with information that would help

it cut expenses by getting lower telephone rates.

The following holdings from Tennessee courts further support the position that BellSouth's CSAs are discriminatory:

1. It is the duty of a railroad common carrier to deal fairly and impartially with all who seek, either as passengers or shippers of freight, to avail themselves of its services. Any contract made by a common carrier by which it discriminates between individuals in like condition, by which the interests of one or more persons of a class are fostered at the expense or to the detriment of others of the same class demanding like services, is illegal and unenforceable. Memphis News Publishing Co. v. Southern Ry., 110 Tenn. 684, 75 S.W. 941, 63 L.R.A. 150 (1903).

2. Where goods not dangerous in their nature and not unfit for shipment are offered at a proper place and time, and the cost of carriage is tendered, a railroad carrier, having facilities for shipment, cannot make distinctions which will give one shipper an advantage over another, either in time or order of shipment, or in the distance of the carriage, or in the conveniences or accommodations which may be afforded. Memphis News Publishing Co. v. Southern Ry., 110 Tenn. 684, 75 S.W. 941, 63 L.R.A. 150 (1903).

3. Preferences are unlawful, and the primary duty of fixing rates is placed on the commission, not on the carrier. Tennessee Cent. Ry. v. Pharr, 29 Tenn. App. 531, 198 S.W.2d 289 (1946).

IV. Anticompetitive Practices

CSAs are meant to protect BellSouth's market share, a fact testified to by CAD witness Brown, (Trans. Vol. 2D page 311 ll. 16-17) and by BellSouth witness Frame under cross examination:

Q. I'll try to ask it again. And that is, we can put this in different language, but the language that I want to try to put it in now is in terms of BellSouth's preserving its market share and its existing revenue stream. Now, isn't that an objective that BellSouth has with respect to these CSAs? (Trans. Vol. 1C page 160 ll. 18-23).

To which Mr. Frame answered:

A. If I can answer the question and partially agree with Mr. Sanford, we are about preserving market share, your term, and growing revenues. The CSAs are something that are used at times in support of those efforts. I mean, the CSA is the means, not the end. (Trans. Vol. 1C page 160 ll. 24-25, page 161 ll.1-3).

The CSAs' anti-competitive nature was made clear by BellSouth's cross-examination of CAD witness Brown:

Q. Let me ask you this. Do you -- is it your position that the TRA should or should not approve the bank's CSA? (Trans. Vol. 2D page 322 ll. 11-13).

To which the witness answered:

A. I say, in my opinion, the Commission should not, and it should not because, if it approves it as it is, it is allowing an anticompetitive contract to go into effect. The most visibly anticompetitive paragraph in this contract is Paragraph 10, the business change, where the incumbent says that in the event of a -- let's see -- a business change, as it is defined, they say that they will, quote, cooperate in efforts to develop a mutually agreeable alternative that will reduce the bank's liability and the minimum annual revenue base, and the annual revenue base, and the discount levels, and so forth.

....There is no floor on that reduction. You could reduce it, as I read it, 10 percent, 50 percent, 95 percent. It is solely at your discretion.

However, in the same paragraph, you say that this provision shall not apply to a change resulting from the customer's decision to transfer portions of its traffic to providers other than BellSouth. (Trans. Vol. 2D page 323 ll. 21-25, page 324 ll. 1-21).

BellSouth's contract imposes liability not according to the customer's performance under the contract, but according to the customer's replacement of BellSouth's services with a competitor's services. The customer's failure to perform is a secondary issue to BellSouth ranking well below the company's priority of preventing that customer from "transfer[ring] portions of its traffic to providers other than BellSouth."

BellSouth's willingness "to cooperate in efforts to develop a mutually agreeable alternative that will reduce the bank's liability" contradicts company witness Frame's answer under cross-examination that the company's policy is to avoid revenue reductions:

> Q. To retain and grow revenues you need to avoid any negative revenue impact that would follow from a general rate reduction, don't you? (Trans. Vol. 1C page 157 ll. 14-16).

To which Mr. Frame answered:

> A. Well, to retain and grow revenues you need to avoid negative rate impacts, **whatever the source**.[emphasis added]. (Trans. Vol. 1C page 157 ll. 17-18).

But the company is quite willing to live with negative rate impacts described in the CSAs' Paragraph X, provided the source is not the "transfer" of the customer's traffic to competitors.

The following question and answers remove all doubt about the contradiction because the witness confirmed that negative rate impacts means a reduction in revenues to BellSouth:

> Q. What is your understanding of that term, "negative revenue impact"?
>
> A. Negative revenue impact would be a result of something that reduces revenue.

Q. Reduces?

A. Revenue. (Trans. Vol. 1C page 161 ll. 14-19).

In addition, the record shows that the termination penalties are not related to costs.

Q. All right. Now, referring, then, to -- to Roman IX(a), at the end of contract year one -- of course, that's already passed, but if it hadn't, it would have been $350,000. What is the basis for that figure?

A. It, as the other portions of this agreement, were negotiated with and agreed to by BellSouth and this customer.

Q. Does it have any relationship to BellSouth's costs?

A. I do not know what that direct relation is.

Q. Does it have any relationship to the damages that BellSouth anticipates that it would incur if the agreement is terminated in the first year?

A. No. (Trans. Vol. 1B page 87 ll. 1-15)

Q. I believe we have decided, Mr. Frame, that you can answer my question, if the court reporter wants to read it back so I won't state it any differently.

(The last question was rread by the court reporter.)

A. No. Rather, it is a financial incentive for the customer to keep the agreement. (Trans. Vol. 1B page 90 ll. 18-25, page 91 ll.1-2)

The penalty is intended to be a deterrent and to prevent other customers from using other service providers. The termination penalties therefore violate Tenn. Code Ann. 65-4-122(b) and the public policy of the State.

This 24th day of August, 1999.

Respectfully submitted,

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Certificate of Service

Comes the Consumer Advocate Division to respectfully certify that this document was served on the parties listed below by U.S. Mail or Hand-delivered on this 24th day of August 1999.

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44 S.Ct. 189
68 L.Ed. 417
(Cite as: 263 U.S. 515, 44 S.Ct. 189)

UNITED STATES et al.
v.
ILLINOIS CENT. R. CO. et al.

No. 40.
WYOMING RY. CO.
v.
UNITED STATES et al.

No. 38.

Argued Nov. 12, 13, 1923.
Decided Jan. 7, 1924.

Appeal from the District Court of the United States for the Southern District of Mississippi.

Appeal from the District Court of the United States for the District of Wyoming.

Actions by the Illinois Central Railroad Company and others and by the Wyoming Railway Company against the United States and others. Decree for plaintiffs in action by the Illinois Central Railroad Company and others, and decree of dismissal in action by the Wyoming Railway Company. From the first decree, the United States and others, and from the second decree the Wyoming Railway Company, appeal. Decree for the Illinois Central Railroad Company and others reversed, and decree of dismissal as to the Wyoming Railway Company affirmed.

****190 *515** The contract by which the Swift Lumber Company acquired the mill property referred to in the opinion, contained the following covenant:

'That Swift Lumber Company, their successors or assigns, shall deliver to the Fernwood & Gulf Railroad Company all and singular the freight tonnage originating on or tributary to the logging railroad of the Swift Lumber Company that may be offered and destined to a point upon said logging railroad or any extensions thereof.'

COMMERCE k132(3)
83k132(3)
Under order of Interstate Commerce Commission directing carriers "according as they participate in the transportation * * * to cease and desist" from discrimination in charging lower through rate from certain points in blanket territory than from another point, the **carriers could remove the discrimination either by decreasing the high rate, or by raising the low rate, or by giving both points an intermediate rate.**

COMMERCE k173
83k173
Interstate Commerce Commission's determination that existing rates subjected shippers from a certain point to undue prejudice, supported by ample evidence, held conclusive in action to enjoin enforcement of order requiring railroads to cease discrimination.

CONSTITUTIONAL LAW k298(2)
92k298(2)
Interstate Commerce Commission's order

requiring railroads to cease unfair discrimination, in charging higher through rate from one point than from other points within blanket territory, held not violative of the due process clause, because lower rate would be confiscatory as to one of the connecting roads, since the order could be complied with by increasing the lower rate from the other points, or by increasing such road's share of the rate.

CARRIERS k26
70k26
A carrier is entitled to initiate rates, and to adopt such policy of rate making as it deems wise.

CARRIERS k32(1)
70k32(1)
Where through rate charged by a railroad from certain points in blanket territory on its branch lines and certain independent short lines was lower than the rate charged from a point within the territory on another independent short line, though the cost of transportation from such point was no greater, the Interstate Commerce Commission could include such independent short line in an order to cease and desist from the discrimination, though it did not join in making the lower rates from other points, since by joining in establishing a through rate it became a party to the discrimination.

CARRIERS k32(1)
70k32(1)
Where through rate charged by railroad from certain points within blanket territory was lower than rate charged from another point within such territory on an independent short line, the Interstate Commerce Commission could require the railroad to desist from unjust discrimination, though the point from which the higher rate was charged was not on its own line; the railroad being in a position to remove the discrimination by increasing the lower rate.

CARRIERS k32(1)
70k32(1)
Condition of contract by which railroad sold mill property to lumber company, requiring lumber company to deliver to the railroad all freight tonnage originating on or tributary to the logging road of the lumber company, did not constitute an assent to a discriminatory rate, though then being charged.

CARRIERS k32(2.3)
70k32(2.3)
Formerly 70k32(21/4)
Mere "discrimination" does not render a rate illegal under Act to Regulate Commerce, § 3, 49 U.S.C.A. § 3, *but the discrimination to violate such statute must be unjust when measured by the transportation standard*; ***that is, the difference in rates, to be illegal, must not be justified by the cost of the respective services, by their values, or by other transportation conditions.***

CARRIERS k32(2.3)
70k32(2.3)
Formerly 70k32(21/4)
Where a railroad company established blanket rates on its man and branch lines within certain territory for transportation of lumber, but did not grant blanket rate to points on connecting lines, except where necessary to meet competition, the Interstate Commerce Commission was warranted in finding that the **refusal to grant the same through rate** to point on independent short line wholly dependent on the railroad, **where cost of transportation and other conditions were the same, constituted unfair discrimination**,

in violation of Act to Regulate Commerce, § 3, 49 U.S.C.A. § 3, **though the higher rate was reasonable, and the only motive of the railroad in making the discrimination was that of self-interest**, in view of Transportation Act, 1920, 49 U.S.C.A. § 1 et seq.

CARRIERS k32(2.3)
70k32(2.3)
Formerly 70k32(21/4)
A difference in rates may constitute unjust discrimination, under Act to Regulate Commerce, § 3, 49 U.S.C.A. § 3, though the higher rate is inherently reasonable and the lower rate is not unreasonably low; the difference being illegal, unless justified by the cost of the respective services, or other transportation conditions.

CARRIERS k32(2.3)
70k32(2.3)
Formerly 70k32(21/4)
Under Act to Regulate Commerce, § 3, 49 U.S.C.A. § 3, prohibiting unfair discrimination, **undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate, and the Interstate Commerce Commission has as much power to remove unjust discrimination in one case as in the other.**

***517** Mr. Blackburn Esterline, of Chicago, Ill., for the United states.

Mr. Robert V. Fletcher, of Chicago, Ill. (Mr. Walter S. Horton, of Chicago, Ill., of counsel), for Illinois Cent. R. Co.

Messrs. Garner Wynn Green and Marcellus Green, both of Jackson, Miss., for Fernwood & G. R. Co.

Messrs. W. T. Alden and H. C. Lutkin, both of Chicago, Ill. (Messrs. C. R. Latham, H. P. Young, and Chas. Martin, all of Chicago, Ill., of counsel), for Wyoming Ry. Co.

Mr. J. Carter Fort, of Washington, D. C. (Mr. P. J. Farrell, of Washington, D. C., of counsel), for Interstate Commerce Commission.

Mr. Justice BRANDEIS delivered the opinion of the Court.

These cases, brought to set aside orders of the Interstate Commerce Commission, were argued together, and present, in the main, the same questions of law. In ***518** each, carriers who were found to have unjustly discriminated against shippers of lumber located on an independent short line, were ordered by the Commission to cease and desist from charging them higher through rates than were contemporaneously charged for like services from other points within what is called blanket territory. [FN1] Each case was heard before three judges on plaintiff's motion for a preliminary injunction, on defendant's motion to dismiss the bill for want of equity, and on final hearing. In each the ****191** whole record before the Commission was introduced. In No. 40 the federal court for Southern Mississppi perpetually enjoined the enforcement of the order issued by the Commission in Swift Lumber Co. v. Fernwood & Gulf R. R. Co., 61 Interst. Com. Com'n R. 485. In No. 38 the federal court for Wyoming dismissed the bill, thus sustaining the order issued for the Commission in Pioneer Lumber Co. v. Director General, 64 Interst. Com. Com'n R. 485. Each case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (Comp. St. § 998).

The facts in No. 40 present most of the questions of law requiring discussion. The so-called blanket territory, which extends south from Jackson, Miss., to the Gulf of Mexico (about 200 miles), and from the Mississippi river into Alabama, produces yellow pine lumber in quantity. Through this territory, the Illinois Central Railroad extends from New Orleans to Jackson and thence to the Ohio river crossings and leading lumber markets of the North. Partly by its main line, partly, also, by branches, and partly by connections with independent lines, it serves a large percentage of the lumber mills in the territory. From all these points on the ***519** Illinois Central main line, from all on its branches, from all on three independent short lines which connect indirectly with it, and from all on the Mississippi Central (a longer independent line which crosses it running east and west) the carriers have established the same through lumber rates to the Northern markets, regardless of the varying distances within the blanket territory. At Fernwood, Miss., a little south of its Monticello branch, the Illinois Central connects with the Fernwood & Gulf, an independent short line, on which the Swift Lumber Company has a mill at Knoxo. The distance from Knoxo to the junction is 27 miles. The joint through rate from Knoxo via Fernwood to Northern points, voluntarily established by these carriers, is 2 cents per 100 pounds higher than the rate from Fernwood, or any other point within the so-called blanket territory on the Illinois Central main or branch lines or on the connections mentioned above. The distance to the Northern markets from many of the points on these lines is much greater than the distance from Knoxo, which lies near the center of the so-called blanket territory.

The Swift Lumber Company instituted proceedings before the Commission against the Illinois Central, the Fernwood & Gulf, and connecting carriers in which it attacked the higher rates from Knoxo both as unreasonable, under section 1 of the Act to Regulate Commerce (Comp. St. § 8563), and as unjustly discriminatory, under section 3 (Comp. St. § 8565). The Commission found that the rates from Knoxo were not unreasonable, but that they subject the Lumber Company to undue prejudice, in view of the lower rates so given competing points within the so-called blanket territory. The order directed the carriers 'according as they participate in the transportation * * * to cease and desist' from the discrimination found. All the carriers except the Illinois Central and the Fernwood & Gulf acquiesced in the order. ***520** These two joined as plaintiffs in this suit, and urge on several grounds that the order is void.

[1][2][3] First. It is contended that the order exceeds the powers of the Commission. The argument is that a carrier cannot be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant; that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced, and hence that it cannot be required to co-operate with the Illinois Central in reducing rates from Knoxo which have been found to be inherently reasonable; that, on the other hand, the Illinois Central cannot be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its own lines, and it is not in a position to remove, by its own act, the discrimination complained of. Neither

proposition is sound. ***Proceedings to remove unjust discrimination are aimed directly only at the relation of rates.*** By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 144, 38 Sup. Ct. 49, 62 L. Ed. 199. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it. [FN2] Moreover, it is not ****192** true that the Illinois Central can ***521** not remove the discrimination without the co- operation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate. American Express Co. v. Caldwell, 244 U. S. 617, 624, 37 Sup. Ct. 656, 61 L. Ed. 1352. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point. [FN3]

[4][5] Second. It is contended that the order of the Commission is unsustained by proof. **That there is discrimination** against Knoxo **is not denied.** The rates charged from that station are higher than those charged from competing points within the so-called blanket territory for transportation of the same commodity, to the same market, for the same or longer distances, mainly over the same route; some of these competing points being located on the Illinois Central main line, some on its branch lines, and some on independent lines. **But mere discrimination does not render a rate illegal** under section 3. **Only such rates as involve unjust discrimination are obnoxious** to that section. Manufacturers' Ry. Co. v. United States, 246 U. S. 457, 481, 38 Sup. Ct. 383, 62 L. Ed. 831. There is no claim that any one of the evidential facts found by the Commission, and relied upon to show ***522** that the discrimination was unjust, is without adequate supporting evidence. The argument is that these facts, even when supplemented by others appearing in the evidence, do not warrant the finding of the ultimate fact, that the higher rates from Knoxo are unduly prejudicial to the Swift Lumber Company to the extent that they exceed the blanket basis of rates from Fernwood (the junction with the Illinois Central) and other points.

[6] **A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise.** Interstate Commerce Commission v. Chicago Great Western Ry., 209 U. S. 108, 118-119, 28 Sup. Ct. 493, 52 L. Ed. 705; Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 92, 33 Sup. Ct. 185, 57 L. Ed. 431. In the exercise of this right, the Illinois Central adopted the policy of establishing blanket, or group, rates on its main and branch lines, by which the remoter lumber producing points were granted, regardless of distances within the territory, the same rates to Northern markets as points located nearer. In the exercise of the same right to initiate rates, the Illinois Central adopted, also, the policy of granting to connecting independent short

lines, and to longer connecting carriers, an allowance (called shrinkage or absorption) by reason of which the Illinois Central's division of the through rate on traffic originating on connections is reduced, by the amount of the allowance, to less than its rate for freight originating on its own line at the junction point. [FN4] The Illinois Central insists that its general policy is not to grant to points on connecting lines the blanket or junction point rate; and that it departs from this policy only when it is compelled by competition to do so. Where the through rate is the ***523** same from points on the connecting line as it is from the junction, the share or division of the connecting carrier consists wholly of this absorption. Where the through rate from points on the connection is higher than the junction point rate, the connecting line receives as its share an additional amount consisting of the difference between these rates. This additional amount is called the arbitrary or differential. Thus, the Fernwood & Gulf receives a division of 4 cents per 100 pounds, consisting of a 2-cent absorption and a 2- cent arbitrary. [FN5]

The Illinois Central argues that the discrimination in charging a higher rate from Knoxo cannot be deemed unjust since the preferential rate to other points was granted solely for the purpose of increasing its own business, and that the lower rate from Knoxo was denied solely in order to preserve its own revenues. **In other words, it granted the blanket rate to all points on its own lines in order to developed business originating thereon.** ***It declined to grant the blanket rate (and to increase the absorption) where the connecting line was wholly dependent upon it; and traffic originating thereon could be secured in spite of the higher rate.*** It granted the blanket rate to points on connection lines (and increased their absorptions) where this was deemed necessary in order to secure traffic which might otherwise go to competitors.

[7] *The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest* *****193*** *which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of* ****524*** *favoritism or malice.* **But preferences may inflict undue prejudice, though the carrier's motives in granting them are honest.** Interstate Commerce Commission v. Chicago Great Western Ry., 209 U. S. 108, 122, 28 Sup. Ct. 493, 52 L. Ed. 705. ***Self-interest of the carrier may not override the requirement of equality in rates.*** It is true that the law does not attempt to equalize opportunities among localities, Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 32 Sup. Ct. 22, 56 L. Ed. 83, *and that the advantage which comes to a shipper merely as a result of the position* of his plant does not constitute an illegal preference, Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445, 35 Sup. Ct. 645, 59 L. Ed. 1036. To bring a difference in rates within the prohibition of section 3, *it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values,* ***or by other transportation conditions.*** *But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be*

unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice. American Express Co. v. Caldwell, 244 U. S. 617, 624, 37 Sup. Ct. 656, 61 L. Ed. 1352.

[8] Every factor urged by the carriers as justifying the higher rate from Knoxo appears to have been considered by the Commission. How much weight shall be given to each must necessarily be left to it. **The Commission found**, among other things, **that the cost of the service from Knoxo was not greater than the cost of the transportation from many other points which enjoyed the lower rate**; *that the value of the service was the same; and that* ***other traffic conditions incident to shipment from Knoxo were so similar to*** **those of shipments from other points enjoying a lower rate** that the prejudice to which ***525** the Swift Lumber Company had been subjected was undue and unreasonable. The ***innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law****, by showing that the preferential rate was given to others for the purpose of devoloping traffic on the carrier's own lines or of securing competitive traffic.* These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920 (Comp. St. Ann. Supp. 1923, § 10071 1/4 et. seq.). Texas & Pacific Ry. v. Interstate Commerce Commission, 162 U. S. 197, 218, 220, 16 Sup. Ct. 666, 40 L. Ed. 940; Interstate Commerce Commission v. Alabama Midland Ry., 168 U. S. 144, 167, 175, 18 Sup. Ct. 45, 42 L. Ed. 414. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore; for now the interests of the individual carrier must yield in many respects to the public need, Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086; New England Divisions Case, 261 U. S. 184, 43 Sup. Ct. 270, 67 L. Ed. 605; and the newly conferred power to grant relief against rates unreasonably low many afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable. The order of the Commission was not an attempt to establish its own policy of rate making. [FN6] See Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 554, 32 Sup. Ct. 108, 56 L. Ed. 308. It merely expressed the judgment of the Commission that existing rates subjected shippers from Knoxo ***526** to undue prejudice. The judgment so exercised, being supported by ample evldence, is conclusive. [FN7]

[9] Third. The Fernwood & Gulf contends that the order is obnoxious to the due process ****194** clause. The argument is that even its present division of 4 cents per 100 pounds is unremunerative, and that a smaller return would be confiscatory. To this argument there are several answers. The order does not require a reduction of the through rate. It may be complied with by raising the rate from Fernwood and other points now being preferred. Moreover, a reduction of the

through rate would not necessarily result in decreasing the amount of the short line's division. The Commission may, upon application, accord to the Fernwood & Gulf the appropriate division. [FN8] The New England Divisions Case, 261 U. S. 184, 43 Sup. Ct. 270, 67 L. Ed. 605. There is no suggestion that the resulting reduction of the Illinois Central's division would result in rendering the rate confiscatory as to it.

[10] ***527** Fourth. The Fernwood & Gulf contends, also, that the Swift Lumber Company is estopped from questioning the rates applicable to it. The argument is that when it acquired the mill property from a predecessor of the short line, an agreement provided that all lumber produced should be shipped over the line, and that the 2-cent arbitrary was then known to be in effect, and was thereby assented to for all time. The contract, which is silent as to rates, is not susceptible of the construction urged. We have, therefore, no occasion to consider whether such an agreement would be valid and what its effect would be. Compare Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283; United States v. Union Stock Yard, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226; O'Keefe v. United States, 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651.

[11] In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, express or implied. [FN9] Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

In No. 40, decree reversed.

In No. 38, decree affirmed.

FN1 Compare St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 138, note 1, 38 Sup. Ct. 49, 62 L. Ed. 199. The carriers insist that the rates are not properly called 'blanket rates,' since they do not apply to all points within the territory, and that they should be termed 'group rates.'

FN2 The cases relied upon by the carriers are not inconsistent with this conclusion. In Central R. R. Co. of New Jersey v. United States, 257 U. S. 247, 42 Sup. Ct. 80, 66 L. Ed. 217, the creosoting privilege was not a part of the joint tariff. It was an item in the local tariff granted without the concurrence of the carriers before the Commission; and the revenues derived therefrom were not shared by them. In Philadelphia & Reading Ry. Co. v. United States, 240 U. S. 334, 340, 36 Sup. Ct. 354, 60 L. Ed. 675, it was pointed out by the court that 'undue discrimination against itself or the locality of its plant, as alleged by the cement company [the petitioner before the Commission] was not found; the community declared to be prejudiced by established conditions [Jersey City] had offered no complaint and was not party to the proceedings.

In Penn Refining Co. v. Western New York and Pennsylvania R. R. Co., 208 U. S. 208, 221, 222, 28 Sup. Ct. 268, 52 L. Ed. 456, it was sought to hold one of the connecting carriers liable for what the court deemed to be the act of another.

FN3 See St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 139 , note 2, 38 Sup. Ct. 49, 62 L. Ed. 199.

FN4 See the Tap Line Cases, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185; Louisiana & Pine Bluff Ry. Co. v. United States, 257 U. S. 114, 42 Sup. Ct. 25, 66 L. Ed. 156.

FN5 As a division of only 2 cents is ordinarily deemed inadequate compensation by a connecting line, and as the trunk line is naturally indisposed to submit to a larger shrinkage of its own division, the through rate is commonly increased by an arbitrary if the traffic will bear it.

FN6 Compare Idaho v. Director General, 66 Interst. Com. Com'n R. 330, with Idaho v. Oregon Short Line, 83 Interst. Com. Com'n R. 4.

FN7 Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. Ed. 280; Interstate Commerce Commission v. Delaware, Lackawanna & Western Ry. Co., 220 U. S. 235, 251, 31 Sup. Ct. 392, 55 L. Ed. 448; United States v. Louisville & Nashville R. R. Co., 235 U. S. 314, 320, 35 Sup. Ct. 113, 59 L. Ed. 245; Manufacturers' Ry. Co. v. United States, 246 U. S. 457, 481, 38 Sup. Ct. 383, 62 L. Ed. 831; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62, 41 Sup. Ct. 24, 65 L. Ed. 129.
In East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 11, 12, 23-26, 21 Sup. Ct. 516, 45 L. Ed. 719; and Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047; the orders of the Commission were only prima facie evidence of facts found by them, since they were entered before the Acts of June 29, 1906, c. 3591, 34 Stat. 584, 589, 591, and the Act of June 18, 1910, c. 309, 36 Stat. 539, 551-554 (Comp. St. §§ 8583, 8584). See Proctor & Gamble Co. v. United States, 225 U. S. 282, 297-298, 32 Sup. Ct. 761, 56 L. Ed. 1091; Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. R. Co. (C. C.) 37 Fed. 567, 613, 2 L. R. A. 289. Moreover, those cases involved primarily a question arising under the fourth section.

FN8 This was done, after removing the unjust discrimination, in McGowan- Foshee Lumber Co. v. Florida, Alabama & Gulf R. R. Co., 43 Interst. Com. Com'n R. 581; Id., 51 Interst. Com. Com'n R. 317.

FN9 See St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 139, note 2, 38 Sup. Ct. 49, 62 L. Ed. 199.

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1994 Tenn. App. LEXIS 731 MATTOX V. LORETTO FIN. SERVS. (Ct. App. 1994)

KEVIN MATTOX, Plaintiff/Appellant,

vs.

LORETTO FINANCIAL SERVICES, Defendant/Appellee.

Appeal No. 01-A-01-9307-CV-00308
COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE
1994 Tenn. App. LEXIS 731
December 14, 1994, FILED

APPEAL FROM THE CIRCUIT COURT FOR LAWRENCE COUNTY AT LAWRENCEBURG, TENNESSEE. No. C-12959. THE HONORABLE JIM T. HAMILTON, JUDGE.

COUNSEL

For Plaintiff/Appellant: Gary Howell, Columbia, Tennessee.
For Defendant/Appellee: Paul Bates, BOSTON, BATES & HOLT, Lawrenceburg, Tennessee.

JUDGES

WILLIAM C. KOCH, JR., JUDGE. CONCUR: HENRY F. TODD, PRESIDING JUDGE, SAMUEL L. LEWIS, JUDGE
AUTHOR: WILLIAM C. KOCH, JR.

OPINION

This appeal involves a pickup truck seized while its owner was using it to transport stolen property. A secured creditor sold the truck and distributed the proceeds according to the Department of Safety's instructions. The truck's owner sued the creditor in the Circuit Court for Lawrence County, alleging that the creditor had breached its agreement to return the truck to him. The trial court granted the creditor's motion for summary judgment and dismissed the complaint. On this appeal, the truck's owner argues that the trial court should not have granted the summary judgment because the creditor's denial of the existence of the agreement to return the truck created a genuine dispute of material fact. We affirm the summary judgment because the existence of the agreement to return the truck was not a material fact for determining whether the agreement was unenforceable on the grounds of public policy.

I.

Sondra Mattox and Kevin G. Mattox borrowed $ 1,000 from Loretto Financial Services ("Loretto") in May 1989. Loretto took the title to Mr. Mattox's 1985 Chevrolet pickup truck as security for the loan. On July 7, 1989, the Loretto police arrested Mr. Mattox while he was using the truck to transport stolen property. The authorities seized the truck and informed Mr. Mattox that it would be disposed of in accordance with the state statutes dealing with the forfeiture of conveyances used to transport stolen goods.

Mr. Mattox quickly informed Loretto's vice president, Jeffrey P. Pettus, of his predicament.

Mr. Mattox and Mr. Pettus have markedly different versions of their conversation. Mr. Mattox states that he paid Mr. Pettus $ 250 after Mr. Pettus agreed to recover his truck. Mr. Pettus, for his part, states that he told Mr. Mattox that Loretto intended to file a claim for the truck to protect its security interest and denies that he solicited or received $ 250 from Mr. Mattox.

The Tennessee Department of Safety released the truck to Loretto after Mr. Mattox pled guilty to the criminal charges against him. In November 1989, Mr. Pettus informed Mr. Mattox and Ms. Mattox by letter that Loretto intended to sell the truck, to apply the proceeds to the balance of the note, and to pay over any remaining funds to the City of Loretto. Approximately one month later, Loretto sold the truck for $ 3,450, and sent the City of Loretto $ 162.28 after applying $ 1,701.72 to the loan and related fees and $ 1,586 to the expenses incurred to ready the truck for sale.

Mr. Mattox filed suit against Loretto in May 1991, alleging that Loretto had violated its fiduciary duty, breached its agreement to return the truck, and converted the truck to its own use. Even though the truck's market value was less than $ 3,500, Mr. Mattox sought $ 10,000 in compensatory and $ 40,000 in punitive damages. In February 1993 the trial court granted Loretto's motion for summary judgment and dismissed the case because "there can be no breach of contract. . . because no such contract could ever be in existence because the same would be illegal."

II.

A summary judgment is a particularly efficient way to resolve cases whose outcome depends solely on the resolution of legal, as opposed to factual, issues. **Byrd v. Hall,** 847 S.W.2d 208, 210 (Tenn. 1993); **Bellamy v. Federal Express Corp.,** 749 S.W.2d 31, 33 (Tenn. 1988). Determining whether a particular contract is contrary to public policy is a question of law. 5 Samuel Williston, **A Treatise on the Law of Contracts** § 12:1 (Richard A. Lord ed., 5th ed. 1993) ("Williston"). Accordingly, a properly supported motion for summary judgment is an appropriate vehicle for deciding whether a contract is unenforceable on the grounds of public policy. 10A Charles A. Wright et al., **Federal Practice and Procedure** § 2734, at 411 (1983).

The standard for reviewing summary judgments on appeal is now well-settled. Appellate courts do not review the record in accordance with Tenn. R. App. P. 13(d). **Gonzales v. Alman Constr. Co.,** 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993). Instead, they review the record to determine whether the moving party has satisfied the requirements of Tenn. R. Civ. P. 56.03. **Cowden v. Sovran Bank/Central South,** 816 S.W.2d 741, 744 (Tenn. 1991); **Mansfield v. Colonial Freight Sys.,** 862 S.W.2d 527, 530 (Tenn. Ct. App. 1993); **Hill v. City of Chattanooga,** 533 S.W.2d 311, 312 (Tenn. Ct. App. 1975). Tenn. R. Civ. P. 56.03 contains only two requirements: first, that there must be no genuine issue with regard to the material facts and second, that undisputed facts must demonstrate that the moving party is entitled to a judgment as a matter of law.

The record need not be free from all factual disputes in order to permit the trial court to grant a summary judgment. Only "genuine issues as to any material fact" are fatal to summary

judgments. Tenn. R. Civ. P. 56.03. A factual dispute becomes material only when it effects the legal elements of the claim or defense embodied in the summary judgment motion. **Walker v. First State Bank,** 849 S.W.2d 337, 340 (Tenn. Ct. App. 1992); **Rollins v. Winn Dixie,** 780 S.W.2d 765, 767 (Tenn. Ct. App. 1989). Accordingly, the Tennessee Supreme Court has held that

> A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. Therefore, when confronted with a disputed fact, the court must examine the elements of the claim or defense at issue in the motion to determine whether the resolution of that fact will effect the disposition of any of those claims or defenses.

Byrd v. Hall, 847 S.W.2d at 215; **see also Brenner v. Textron Aerostructures,** 874 S.W.2d 579, 583 (Tenn. Ct. App. 1993).

Determinations concerning whether a genuine dispute of material fact exists should be made using the same principles applicable to disposing of a motion for directed verdict. **Axline v. Kutner,** 863 S.W.2d 421, 423 (Tenn. Ct. App. 1993). The courts must take the strongest possible legitimate view of the evidence that favors the nonmoving party, must discard all countervailing evidence, and must allow all reasonable inferences in the nonmoving party's favor. **Byrd v. Hall,** 847 S.W.2d at 210-11.

II.

Mr. Mattox first asserts that the trial court should not have granted the summary judgment because Loretto denied that it agreed to recover his truck in return for $ 250. This issue requires us to determine whether the parties' dispute concerning the existence of the agreement is material to the unenforceability issue. We hold that it is not.

Loretto advanced two defenses against Mr. Mattox's claims. First, it denied that it agreed to recover Mr. Mattox's truck for him. Second, it asserted that an agreement to return a forfeited conveyance to a convicted criminal was unenforceable on the grounds of public policy. These defenses are mutually exclusive, and thus the resolution of one does not affect the resolution of the other. Loretto would be entitled to a judgment as a matter of law on all of Mr. Mattox's claims if it succeeds with either defense.

Mr. Mattox testified that he paid Mr. Pettus $ 250 to recover his truck. Mr. Pettus denied that he promised to recover the truck or that Mr. Mattox paid him $ 250. These contradictory statements create an issue of fact concerning the existence of the agreement that can only be resolved at trial. This dispute precludes using a summary judgment on the issue of the agreement's existence. It does not, however, address the question of the agreement's enforceability.

Factual disputes concerning a contract's existence do not necessarily prevent using a

summary judgment to decide enforceability issues. **See Soar v. National Football League Players Ass'n,** 438 F. Supp. 337, 341-42 (D.R.I. 1975), **aff'd,** 550 F.2d 1287(1st Cir. 1977. Since Loretto's unenforceability defense focuses on the substance of the purported agreement, the material facts for the purposes of a summary judgment are only those relating to the agreement's substance. Loretto's proof concerning the agreement's existence does not relate to the agreement's substance and thus does not contradict Mr. Mattox's testimony concerning the agreement's terms. We may, therefore, dispose of the unenforceability issue as a matter of law on the premise that Mr. Pettus agreed to recover Mr. Mattox's truck for him in return for $ 250.

III.

Mr. Mattox also asserts that the summary judgment was inappropriate because Loretto did not prove that his truck was subject to forfeiture and disposition pursuant to Tenn. Code Ann. § 40-33-110. We disagree. Loretto's uncontradicted proof demonstrates that Mr. Mattox's truck was subject to forfeiture and that Loretto disposed of the truck in accordance with state law and the directions of the Department of Safety.

With several exceptions not applicable in this case, state law requires the seizure and forfeiture of all conveyances used to transport stolen property.[1] Tenn. Code Ann. § 40-33-101. A forfeited conveyance must either be sold or be retained by the seizing agency for law enforcement purposes. Tenn. Code Ann. § 40-33-107(2) (Supp. 1994). In either event, the forfeiture is subject to bona fide security interests. Tenn. Code Ann. § 40-33-101(3). If the conveyance is sold, the proceeds must first be used to defray the costs of the sale and to satisfy the secured creditors' claims, and then the remaining funds must be paid over to the seizing agency or the State. Tenn. Code Ann. § 40-33-110 (1990).

The trial court had before it the pleadings, the affidavits supporting Loretto's motion, and Mr. Mattox's oral testimony when it granted the summary judgment.[2] Based on this proof, the trial court made the following findings:

> The vehicle in question in this case was encumbered with a lien in favor of the defendant [Loretto]. The plaintiff [Mr. Mattox] was arrested by the Loretto City Police and the vehicle seized after being utilized in the commission of a felony. The plaintiff pled guilty to the criminal offense. The Department of Safety released the vehicle to the defendant because of the perfected security interest held by the defendant, according to law. The defendant sold said vehicle and applied the proceeds of said sale to its lien, according to law. The balance of the proceeds were paid to the Loretto City Police Department, pursuant to the provisions of T.C.A. 40-33-110, according to law.

The record on appeal contains specific, uncontradicted evidence with regard to each of the trial court's factual findings except for the finding that Mr. Mattox pled guilty to the criminal charges involving the transportation of stolen property. Proof of the disposition of these charges was an essential ingredient in the forfeiture proceeding because Tenn. Code Ann. § 40-33-101

permits forfeitures only "where there is a final judgment of conviction."

The absence from the appellate record of the proof concerning Mr. Mattox's conviction is not, however, fatal to the summary judgment in this case. It does not imply that Mr. Mattox was not convicted of the crime, and it does not create a material factual dispute on that issue. Mr. Mattox has not taken issue specifically with the trial court's finding that he pled guilty and has pointed to no proof, taken in the light most favorable to him, that he was not convicted. We will conclusively presume that sufficient evidence existed to support the trial court's finding that Mr. Mattox pled guilty in the absence of proof raising a genuine dispute concerning this factual issue. **See Dearborne v. State,** 575 S.W.2d 259, 264 (Tenn. 1978) (courts decide cases based on the record presented); **Hailey v. Fowler,** 849 S.W.2d 770, 772 (Tenn. Ct. App. 1992) (where the trial court has heard evidence not included in the record, the appellate courts presume that sufficient evidence existed to support the summary judgment).

Mr. Mattox could have no colorable claim to the truck because he used it to transport stolen property. State law required the forfeiture once he was convicted. Since Loretto was a secured creditor with a bona fide lien on the truck, the law enforcement authorities could properly request it to conduct the public sale required by Tenn. Code Ann. § 40-33-107(2) once the authorities decided not to keep the truck for their own use. Accordingly, the evidence in favor of Loretto's summary judgment motion supports the trial court's determination that the truck was subject to forfeiture and that the manner in which Loretto disposed of it was consistent with the forfeiture statutes.

IV.

As a final matter, we must determine whether the purported agreement between Mr. Mattox and Loretto is unenforceable on the grounds of public policy.[3] We find that it is because it undermines the penal value of the statutes requiring the forfeiture of vehicles used to transport stolen property.

The power of the courts to decline to enforce a contract on the ground that it is contrary to public policy is unquestioned and clearly necessary. Williston, **supra,** § 12:3. We hesitate to wield this power, however, first because of the law's deference to private contracting and second because of our reluctance to be arbiters of public policy in the absence of clear-cut declarations in the state or federal constitutions, the statutes, or settled judicial precedents.[4] As Lord Justice Burrough stated when asked to invalidate a contract on public policy grounds, "it [public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you." **Richardson v. Mellish,** 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (C.P. 1824).

Private parties may generally contract as they wish. **Kendrick v. Alexander,** 844 S.W.2d 187, 191 (Tenn. Ct. App. 1992). Accordingly, courts will decline to enforce a contract on the ground of public policy only when the impropriety is clear, **Home Beneficial Ass'n v. White,** 180 Tenn. 585, 589, 177 S.W.2d 545, 546 (1944); **Stansell v. Roach,** 147 Tenn. 183, 190, 246 S.W. 520, 522 (1923), and is inherent in the contract itself. **McCallum v. McIsaac,** 159 Tenn. 655, 658, 21 S.W.2d 392, 393 (1929).

A contract's enforceability depends upon its purpose, **Hoyt v. Hoyt,** 213 Tenn. 117, 127, 372 S.W.2d 300, 304 (1963), and upon its effect on public policy reflected in relevant legislation or some other aspect of the public welfare. Restatement (Second) of Contracts § 179 (1979). The courts will decline to enforce a contract if the contract (1) violates state law, **Holt v. Holt,** 751 S.W.2d 426, 428 (Tenn. Ct. App. 1988); (2) provides for doing something that is contrary to statute, **Heart v. East Tennessee Brewing Co.,** 121 Tenn. 69, 71, 113 S.W. 364, 364 (1908); or (3) harms the public good. **Spiegel v. Thomas, Mann & Smith,** 811 S.W.2d 528, 530 (Tenn. 1991); **Home Beneficial Ass'n v. White,** 180 Tenn. at 588-89, 177 S.W.2d at 546.

The American Law Institute has succinctly summarized the grounds of unenforceability as follows:

> (1) A promise or other term of an agreement is unenforceable on the grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> (a) the parties' justified expectations,
>
> (b) any forfeiture that would result if enforcement were denied, and
>
> (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> (a) the strength of that policy as manifested by legislation or judicial decisions,
>
> (b) the likelihood that a refusal to enforce the terms will flirther that policy,
>
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and

(d) the directness of the connection between that misconduct and the term.

Restatement (Second) of Contracts § 178 (1979).

The purpose of forfeiture statutes such as Tenn. Code Ann. § 40-33-101 is to provide another form of punishment for persons who traffic in stolen property. While the statute does not explicitly prohibit a secured party from returning a forfeited vehicle to the person who used it to commit a crime, such an agreement would undermine the statute's deterrent purpose. In addition, returning a vehicle to the perpetrator of the crime that caused the vehicle to be forfeited in the first place would be inconsistent with the forfeiture statutes because it is not one of the three statutory disposal options.[5]

Enforcing contracts such as the one relied on by Mr. Mattox would undermine the deterrent value of the forfeiture statutes. The public has a strong interest in the enforcement of these statutes and has no interest in enforcing contracts to circumvent them. Accordingly, the trial court correctly concluded, as a matter of law, that the purported agreement between Mr. Mattox and Loretto was unenforceable on the grounds of public policy.

We affirm the summary judgment dismissing all of Mr. Mattox's claims against Loretto and remand the case to the trial court for whatever further proceedings may be required. We also tax the costs of this appeal to Kevin Mattox and his surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE

SAMUEL L. LEWIS, JUDGE

DISPOSITION

AFFIRMED AND REMANDED

OPINION FOOTNOTES

1 The statute contains exceptions for conveyances owned by common carriers and rental companies. Term. Code Ann. § 40-33-101(1), -101(2) (Supp. 1994). It also contains an exception for owners and other persons with a bona fide interest in the conveyance if they can demonstrate (1) that they acquired the interest in good faith and (2) that they did not know and had no reason to know that the conveyance was being used illegally. Term. Code Ann. § 40-33-108 (a) (Supp. 1994).

2 While Tenn. R. Civ. P. 56 does not specifically authorize the use of oral testimony to support or oppose a motion for summary judgment, Term. R. Civ. P. 43.02 permits the trial court to hear oral testimony with regard to any motion based on facts not appearing in the record. Thus, the trial court may consider oral testimony in a summary judgment proceeding. 6 James W. Moore et al., **Moore's Federal Practice** P56.11[8] (2d ed. 1994); 10A Charles A. Wright et al., **Federal Practice and Procedure** § 2723 (1983).

3 The concept of "unenforceability on the grounds of public policy" has supplanted the concept of "illegality" in modem legal parlance. **See** Restatement (Second) of Contracts Ch. 8, Topic 1 Introductory Note (1979). We have incorporated the new terminology into this opinion because the Tennessee Supreme Court has already embraced it. **Newton v. Cox,** 878 S.W.2d 105, 108-09 (Tenn. 1994); **Fink v. Caudle,** 856 S.W.2d 952, 959 (Term. 1993).

4 The Tennessee Supreme Court, for example, has been reluctant to become an arbiter of public policy in areas where the General Assembly has spoken. **Crawford v. Buckner,** 839 S.W.2d 754, 759 (Tenn. 1992); **Smith v. Gore,** 728 S.W.2d 738, 747 (Term. 1987); **Memphis Publishing Co. v. Holt,** 710 S.W.2d 513, 517 (Tenn. 1986).

5 The three options for disposing of conveyances used to transport stolen property include: (1) returning the vehicle to an innocent claimant who possesses a bona fide interest in the vehicle; (2) making the vehicle available to the local authorities for law enforcement purposes; and (3) selling the vehicle and distributing the proceeds as the statute requires. Tenn. Code Ann. § 40-33-107.

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