No. _____

IN THE

Supreme Court of the United States

_____

TIENERGY, LLC,

Petitioner,

v.

WISCONSIN CENTRAL, LTD.,

Respondent.

_____

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

For a consignee to be liable for demurrage it must agree to be a consignee for the goods being shipped as the liability for such charges is based in contract. In this case the District Court granted the Plaintiff's motion for summary judgment and found that the Defendant was liable for demurrage charges even though it never agreed to be a consignee and was designated by the shipper as a consignee without its knowledge or consent. The Seventh Circuit affirmed.

The question presented is whether a party who has not agreed to be a consignee can nevertheless be liable for demurrage charges as a matter of law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was Defendant-Appellant below, is TiEnergy, Inc. ("TiEnergy").

Respondent, who was Plaintiff-Appellee below, is Wisconsin Central Ltd. ("Wisconsin Central").

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PETITION FOR A WRIT OF CERTIORARI

Petitioner TiEnergy respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet.App. 1a) is reported at 894 F.3d 851. The opinion and order of the District Court for the Northern District of Illinois (Pet.App. 20a) is not reported.

JURISDICTION

The Seventh Circuit entered judgment on July 3, 2018. Petitioners timely filed a petition for rehearing *en banc* on July 17, 2018, which was denied by order of the court on August 8, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 10743

STATEMENT OF THE CASE

1. Wisconsin Central is a company based in Homewood, Illinois. (R. 58 ¶ 3). Wisconsin Central is a subsidiary of CN, a railway company based in Montreal, Canada. (R. 58 ¶ 5).

2. TiEnergy is an Illinois limited liability company that owns and operates facilities in Ashland and Superior, Wisconsin. (R. 58 ¶ 7). TiEnergy is in the business of disposing of materials, including railroad ties. (R. 58 ¶ 8). Steve Berglund ("Berglund") is TiEnergy's President. (R. 66-2 ¶ 1).

3. Swift Railroad Contractors Corporation ("Swift") was a railroad contractor located in Smithville, Ontario. (R. 58 ¶ 10). After the events giving rise to this lawsuit Swift was purchased and rebranded as Allied Track Services, Inc. ("Allied") based in Grimsby, Ontario. (R. 58 ¶ 11).

4. In 2013 Swift entered into an agreement with its customer Huron to dispose of approximately 100,000 railroad ties located between Sudbury, Canada and Sault Ste. Marie, Canada. (R. 58 ¶¶ 14, 17). Because Huron's railroad ties contained creosote, this agreement required Swift to have the subject ties disposed of, and further that they be disposed of in an environmentally proper method, specifically through incineration. (R. 58 ¶ 15). Huron remained the owner of the subject railroad ties through the time they were disposed of. (R. 58 ¶ 16). Pursuant to this agreement Swift was paid by Huron $7 per tie for a total of approximately $700,000. (R. 62 p. 11 ¶ 3).

5. Swift subsequently entered into a contract with TiEnergy to have TiEnergy dispose of Huron's railroad ties. (R. 58 ¶ 18). Under that agreement, Swift would have Huron's railroad ties

delivered by TiEnergy, and TiEnergy was to have those ties incinerated and after doing so would supply Swift with written proof that the ties were incinerated. (R. 58 ¶ 18). TiEnergy had no ability to incinerate the ties and advised Swift that the ties would be incinerated by Xcel Energy ("Xcel"). (R. 62 p. 11 ¶ 6).

6. Swift advised TiEnergy that it would have the ties delivered to TiEnergy's Ashland, Wisconsin location. (R. 62 p. 12 ¶ 9). TiEnergy advised Swift that the Ashland siding has limited capacity to store railcars, 10 railcars or less depending on the size of the railcars. (R. 62 p. 12 ¶ 9). As a result, Swift agreed to not send more than 8 to 10 railcars at a time. (R. 62 p. 12 ¶ 9).

7. After entering into the agreements with Huron and TiEnergy, Swift entered into an agreement with CN to have CN ship the ties by rail to the Ashland facility. (R. 58 ¶ 19). Swift never told CN about the size limitations at TiEnergy's Ashland location. (R. 62 p. 12 ¶ 9). The CN-Swift contract provided that Swift was to pay CN the charges relating to the shipments. (R. 58 ¶ 19). The subject tariffs for the shipments provided that Swift had the ability to list TiEnergy as a "[c]are of party". (R. 64 p. 17 ¶ 40). The tariffs further required CN to work with Swift in demurrage situations "to make it right". (R. 64 p. 17 ¶ 40).

8. Swift's manager Richard Middaugh ("Middaugh") set up the shipments with CN on behalf of Swift. (R. 58 ¶¶ 21-22). Middaugh was not experienced in doing so, and had never made those types of arrangements before. (R. 58 ¶ 21). The way the CN system worked the shipper, in this case Swift, would enter into CN's website system the point of origin, the consignee and/or "care of party" along with a destination and the route of the railcar. (R. 58 ¶ 23). Without knowing what the term consignee meant, Middaugh, listed TiEnergy as the consignee for the shipments. (R. 58 ¶¶ 21-24).

9. Swift never told TiEnergy that TiEnergy was going to be listed as consignee for the shipments. (R. 58 ¶ 30). TiEnergy did not receive the contract for the shipment of the ties or any bills of lading for the shipments. (R. 64 p. 11 ¶ 19). It was TiEnergy's understanding that Swift would be responsible for any charges relating to the shipments of the subject ties, including any demurrage charges. (R. 64 p. 11 ¶ 20). Swift paid CN the freight for the shipments. (R. 62 p. 12 ¶ 10).

10. After the railcars were loaded CN was unable to transport them over the U.S.-Canadian border because Swift did not identify the proper code. (R. 62 p. 18 ¶ 34). Because of these coding issues large numbers of railcars were stacked at the border and then released at one time. (R. 62 p. 18 ¶ 34).

11. Other than emails sent on November 11, 2013 and November 21, 2013 from Middaugh to Berglund, TiEnergy was not advised that the subject railcars were on their way. (R. 62 pp. 13, 17 ¶¶ 13, 30). Instead, TiEnergy was alerted by its neighbor, Chicago Steel, that railcars were on the siding. (R. 62 p. 13 ¶ 13). No one advised TiEnergy that it had to order in railcars or that railcars were being held. (R. 62 p. 13 ¶ 13).

12. When the railcars were first delivered CN attempted to deliver far more railcars than the siding could hold. (R. 62 p. 13 ¶ 14). CN was unable to place most of these railcars on the Ashland siding due to the siding being full because CN and Swift were sending more than 10 railcars at a time more than the size limitations at the siding. (R. 62 p. 18 ¶ 35). The CN engineer told TiEnergy that CN was storing 40 to 50 additional railcars that were unable to be placed at the siding. (R. 62 p. 13 ¶ 14).

13. TiEnergy had no control over the shipment of the railcars into the Ashland siding. (R. 62 p. 15 ¶ 22). TiEnergy never ordered the railcars and was usually not told when the railcars were on their way. (R. 62 p. 15 ¶ 22). Railcars showed up and TiEnergy unloaded them. (R. 62 p. 15 ¶ 22). TiEnergy diligently emptied all the railcars that had the subject ties within two days of their being placed on the siding. (R. 62 p. 15 ¶ 23). Once TiEnergy emptied the first rail railcars TiEnergy informed Swift that the railcars were empty. (R. 62 p. 15 ¶ 23). Swift informed

TiEnergy that Swift could not release the railcars from the Ashland facility because Swift did not have a proper account set up to do so. (R. 62 p. 4 ¶ 23). As a result, TiEnergy agreed to release the railcars after they were unloaded. (R. 62 p. 4 ¶ 16).

14. During the subject time period when the demurrage charges accumulated (November, December 2013 and January 2014) Ashland had heavy and large snowfalls, at times with over 2 to 4 feet of snow on the ground with snow drifts at time higher at times. (R. 72 p. 14 ¶ 25). Because of the snowfalls at times during those months, at times TiEnergy was unable to push the railcars off of the Ashland siding. (R. 64 p. 13 ¶ 26). This was caused by CN's failure to clear the snow off its siding, so it was physically impossible to push the railcars off the Ashland siding and onto CN's track. (R. 64 p. 13 ¶ 27). Due to this condition TiEnergy contacted CN both by telephone and email and told CN to stop bringing railcars until they plowed their track. (R. 64 p. 13 ¶ 26). Despite this CN kept bringing more railcars and placed them against the area of its tracks that were unnavigable due to the snow and CN's failure to clear the snow off its siding. (R. 64 p. 13 ¶ 26). As a result, it was physically impossible to push the railcars off the Ashland siding and onto CN's track, so during the time that the subject demurrage charges were accruing there was no way for TiEnergy to push the railcars off the siding and onto CN's track. (R. 64 p. 13 ¶ 26). TiEnergy also asked CN to plow the snow, but CN failed to do so. (R. 64 p. 13 ¶ 27). As a result,

TiEnergy was forced to plow the snow off CN's tracks and the surrounding easement, but it took TiEnergy a number of days to do so. (R. 64 p. 13 ¶ 27).

15. TiEnergy began receiving demurrage invoices from CN in late November 2013. (R. 66-2, p. 3, ¶ 14). The subject invoices state that the charges were a result in the delay of releasing railcars and more railcars available than the customer could fit at their industry. (R. 64 p. 14 ¶ 30). After receiving the first invoice Berglund immediately objected and contacted CN and Swift to advise CN that TiEnergy never agreed to and should not have been listed as the consignee on the shipments and was not responsible for the demurrage charges. (R. 58 ¶ 35). TiEnergy was not aware that it had been listed as a consignee on the shipments until it started receiving demurrage invoices. (R. 58 ¶ 36).

16. TiEnergy sent the demurrage invoices to Swift. (R. 58 ¶ 36). The subject invoices demonstrate that Swift and CN attempted to deliver more than 10 railcars at a time, and when those railcars could not be placed CN began immediately charging demurrage to TiEnergy. (R. 62 p. 16 ¶ 27). Swift acknowledged to TiEnergy that it was sending too many railcars at one time. (R. 62 p. 16 ¶ 27). At the time that it received the invoices Swift did not know what demurrage charges were. (R. 58 ¶ 37). After being contacted by TiEngery on the demurrage charges, Swift promised TiEnergy that it would get the situation "corrected". (R. 58 ¶ 38).

17. The validity of the subject invoices was disputed within CN. (R. 62 p. 17 ¶ 31). After learning that TiEnergy was improperly named consignee CN sought payment of the demurrage charges from Swift. (R. 58 ¶ 40). Swift tried to convince CN to drop the charges. (R. 62 p. 18 ¶ 33). TiEnergy then received additional demurrage invoices from CN, to which it continued to object and refused to pay. (R. 58 ¶¶ 44-45).

a. The District Court granted summary judgment to Plaintiff on April 21, 2017.

18. The District Court held that TiEnergy is a consignee by operation of law because it had an interest in or control over the goods. TiEnergy filed a notice of appeal of that order on June 29, 2017.

b. The Seventh Circuit affirmed.

In an opinion authored by Judge Amy Barrett, the Seventh Circuit affirmed the District Court's ruling.

19. The Seventh Circuit's judgment is now final, because Petitioner's motion for rehearing en banc was denied. Accordingly, Petitioner now seeks review of the Seventh Circuit's holding.

REASONS FOR GRANTING THE PETITION

This case presents an important case in which there is a conflict between the circuits as to whether liability for demurrage against a consignee can arise

by operation of law. Since consignee demurrage status is contractually based, the answer to this question should be resolved by this Court in the negative.

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER DEMURRAGE LIABILITY FOR A CONSIGNEE SHOULD BE CONTRACTUALLY BASED

When a rail carrier seeks to impose liability for freight charges, including demurrage, it "may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom." *Evans Prods. v. ICC*, 729 F.2d 1107, 1113 (7th Cir. 1984). A non-party to a transportation contract generally cannot be held liable for demurrage as "[i]t is a fundamental tenet of contract law that parties to a contract cannot bind a non-party". *Union Pacific R. v. Carry Transit*, 2005 WL 6788447, *5 (N.D.Tex. Oct. 27, 2005) ("[t]he Court declines to untether the law of demurrage from its contractual moorings. Carry Transit was not a party to the transportation contract between Union Pacific and the shippers"). In this case the sole basis for Plaintiff seeking demurrage from TiEnergy is its allegation that TiEnergy was the consignee for the shipments.

There is a conflict in the circuits as to whether consignee status may arise solely from contract or if it can arise by operation of law. Some courts hold that

consignee status must arise from a contractual relationship. These courts hold that like any contractual relationship, there must be a meeting of the minds that the party against whom consignee status is being sought agreed to be a consignee. *See Norfolk Southern Rwy. v. Brampton Enterprises and Groves*, 2008 WL 4298478 (S.D.Ga. Sept. 15, 2008), *aff'd*, 586 F.3d 1273, 1282 (11th Cir. 2009) ("A party's status as consignee is a matter of contract....[l]ike any contractual relationship, there must be a meeting of the minds"); *CP Rail v. Leeco Steel*, 2015 WL 6859287 (N.D.Ill. Nov. 9, 2015). *CP Rail* is instructive. In that case a railroad sought demurrage against a defendant who was designated as the consignee on bills of lading, that the defendant was a closed gate facility that the railroad would not deliver cars to its facility until its request for placement had been approved by the defendant. The court dismissed the case because there was no "meeting of the minds concerning [defendant's status] as consignee". *Id.* at *3. designation as consignee on a bill of lading does not establish legal consignee status. *Illinois Cent. R.R. v. South Tec Dev. Warehouse*, 337 F.3d 813, 821 (7th Cir. 2003); *Evans Prods.*, 729 F.2d at 1113 ("No liability exists merely on account of being named in the bill of lading."). Thus, consistent with the meeting of the minds requirement, these courts hold that a party must assent to being named as a consignee on a bill of lading to be held liable as such.

Another instructive case is *Brampton Enterprises/Groves*. In that case the district court

granted summary judgment to a warehouse business listed as a consignee on a bill of lading and accepted delivery of the railcars who the plaintiff railroad attempted to collect demurrage, finding that defendant had no knowledge that it was listed as consignee until after the delays occurred and "cannot be made a consignee by the unilateral action a third party", and further that given the lack of its notice of it being named a consignee it was not required to give notice to the carrier of its agent status. *Brampton Enterprises*, 2008 WL 4298478, *5. The Eleventh Circuit affirmed, reasoning that it is a tenant of contract law that "a third party cannot be bound by a contract to which it was not a party", and "a party must assert to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly." *Groves*, 586 F.3d at 1282.

Conversely, other circuits hold that consignee status may be found by operation of law. *See Norfolk S. Ry. Co. v. Groves,* 586 F.3d 1273, 1281 (11th Cir. 2009); *CSX Transp. Co. v. Novolog Bucks County,* 502 F.3d 247 (3d Cir. 2007), *cert. denied,* 552 U.S. 1183 (2008). In *Groves*, the court noted the conflict between the circuits on this issue. *Groves*, 586 F.3d at 1280. Here despite its earlier decision in *South Tec* to the contrary, the District Court found that TiEnergy was a consignee by operation of law because it accepted delivery of the ties and had a beneficial interest in them. (R. 87 at 11-12).

This Court should adopt the view that demurrage liability against a consignee should be contractually based. This is the better view as it is in line with the requirement that a party accepting goods should agree to being identified as the consignee before any it can be held liable for demurrage as parties to a contract should not be able to bind a non-party.

Here the facts show the justification for adopting this view. TiEnergy was not a party to the shipping agreement between Swift and CN. (R. 58 ¶¶ 23, 26). In fact, there were no communications between CN and TiEnergy in establishing the shipments. (R. 58 ¶ 27). There was thus no meeting of the minds that TiEnergy would be consignee for the shipments. Not only did TiEnergy not agree to be a consignee, it was not aware that it had been designated as a consignee until it later received the demurrage invoices. (R. 58 ¶¶ 30-32). It was thus unjust for TiEnergy to be named as the consignee against its will and without its knowledge.

II. EVEN IF CONSIGNEE DEMURRAGE LIABILITY COULD BE FOUND BY OPERATION OF LAW THE RULING AGAINST TIENERGY WAS STILL ERRONEOUS

Even if such were sufficient, the District Court's finding that TiEnergy had a beneficial interest in the subject ties was based on contested facts. A "beneficial owner" is "[o]ne recognized in equity as the owner of

something because use and title belong to that person, even though legal title may belong to someone else; esp., one for whom property is held in trust." *Stable Investment Partnership v. Vilsack*, 2014 WL 1017032, *3 (N.D.Ill. Mar. 17, 2014). TiEnergy was never a beneficial owner of the subject ties – it never held any ownership rights in the ties, which always were owned, both legally and beneficially by Huron. In fact, Allied concedes that at all relevant times its customer Huron remained the owner of the ties through the time they were incinerated. Instead, TiEnergy was merely performing a service and acting as an agent for its customer Swift in facilitating the environmentally safe destruction of the ties.

The District Court's conclusion that TiEnergy "sold" the ties to Xcel is also incorrect and contrary to the evidence. (R. 87 at 12). TiEnergy did not have the ability to sell the ties because it never owned them. (R. 62 p. 11 ¶ 5). The ties were not "sold" to Xcel – they were merely delivered to Xcel to be incinerated. (R. 62 p. 11 ¶ 6). Given this record the District Court should have at the very least denied Wisconsin Central's summary judgment motion. *See Canadian Nat. R. v. Matrix Polymers*, 2009 WL 2905614 (S.D.N.Y. Sept. 2, 2009) (denying carrier's motion for summary judgment for demurrage against company who it argued became consignee when it accepted the cargo and was listed on bills of lading as consignee; finding genuine issues of material fact as to whether defendant was consignee liable for charges, and citing

in support the fact that the defendant did not hold title to cargo).

CONCLUSION

Accordingly, TiEnergy's petition for a writ of certiorari should be granted.

Respectfully submitted,

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