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In the

Supreme Court of the United States

Transamerican Freight Lines, Inc.,
Petitioner,

v.

Brada Miller Freight System, Inc., et al.,
Respondents

No. 74-54

Washington, D. C.
October 8, 1975

Pages 1 thru 32

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TRANSAMERICAN FREIGHT LINES, INC., :

Petitioner, :

v. : No. 74-54

BRADA MILLER FREIGHT SYSTEM, INC., :
et al., :

Respondents. :

- -x

Washington, D. C.

Wednesday, October 8, 1975

The above-entitled matter came on for argument at

10:05 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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for the Petitioner.

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for the Respondents.

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear argument first this morning in No. 74-54, Transamerican Freight Lines against Brada Miller Freight Systems.

Mr. Voorhees, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALPHONSO H. VOORHEES

ON BEHALF OF THE PETITIONER

MR. VOORHEES: Mr. Chief Justice, and may it please the Court: My name is Voorhees, from St. Louis, Missouri. I represent Transamerican Freight Lines, the petitioner in this case. The case is here by a writ of certiorari to the Seventh Circuit.

The facts of this case involve a lease of equipment between two trucking companies, two certificated carriers. They start on January 19 of 1968, at which time the lessor, the owner of the equipment, a tractor and trailer, leased the equipment to Transamerican Freight Lines. The lessor was Brada Miller Freight Systems, the respondent here, leased the equipment to Transamerican Freight Lines to carry a load of steel from Detroit, Michigan, at which point the lease was entered into, to Kansas City, Missouri.

During the progress of the lease and the carriage of the steel, the truck was involved in an accident in Illinois injuring one Sandra Wear seriously, and she later filed suit

against both Brada Miller and Transamerican. Prior to trial Sandra Wear dismissed her case against Brada Miller and proceeded to trial against Transamerican Freight Lines, during the course of which trial Transamerican entered into a settlement with Sandra Wear.

The lease agreement between the parties leasing the equipment provided for the lease of the equipment and provided that the lessor, Brada Miller, would furnish a driver, one Hardrick,who would operate the equipment during the term of the lease. The lease also contained an indemnity agreement providing that in the event of a loss, the lessor, Brada Miller, would hold the lessee, Transamerican, harmless from any loss which resulted from the negligence of the lessor or its agents or servants. The lease provided that the driver was to be considered an employee and agent of the lessor during the terms of the lease.

The Interstate Commerce Commission has handed down regulations some 20 years ago governing the relationship of parties involved in the leasing or the transfer of equipment from one person or company to another for a trip, which is what we would call this. In other words, the equipment was leased for one trip. And the regulations of the Commission set forth certain requirements which must be met by the parties to the lease in this kind of a situation.

Applying to our case, one of the regulations states:

And I am quoting out of the middle of section 1057.3(a) of the regulations, that the two carriers involved in the lease must have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee.

This case was argued and decided by the Seventh Circuit, and that court held that the indemnity agreement involved here violated the control and responsibility provisions of the Commerce Commission's regulations. The purpose of this lawsuit is a suit by Transamerican, the lessee, against Brada, the lessor, to recover the amount which Transamerican had paid Sandra Wear to settle the lawsuit, plus the expenses involved.

As I say, the narrow issue is now whether or not the indemnity provision in the lease agreement violates the control and responsibility provisions of the regulations of the Commission.

The Seventh Circuit, among the circuit courts of appeals, stands alone in holding that the indemnity provisions are in violation of these regulations, and on the other side and holding directly opposite are decisions of the Fourth, Fifth, and Sixth Circuits, and by implication a decision of the Tenth Circuit, all of which cases are cited in the briefs.

The question,the Commission has in the past recited that when they talk about control and responsibility -- and I

will quote: "Possibly subject to some qualifications, it may be stated that when a certificate or permanent holder furnishes services in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and the Commission for the transportation."

This lease provided and was complied with in this respect that the equipment during the term of the lease was identified as that of the lessee, the signs, decals, whatever you call them, of the Transamerican Freight Lines were placed on the truck and were on the truck at the time of the accident. The truck was required to and was following the certificated routes of the Transamerican Freight Lines. And Transamerican in carrying out its responsibility, which is provided for by the lease and the regulations, has ultimately paid the injured party in this case.

As I have quoted from comments of the Commission in prior hearings, it is not necessary, it is not the feeling of the Commission, that the lessee has to control the direct minute-to-minute, day-to-day operation of the vehicle. The lessee must control the service, that is, the routes, the identity of the equipment, the things which are provided for in the regulations. But as far as the actual operation of the vehicle itself, the lessee is permitted to allow this equipment

or direct that it be in effect operated by others as long as it, the lessee, is responsible for the operations.

QUESTION: Mr. Voorhees, let me clarify a couple of facts.

MR. VOORHEES: Mr. Justice Blackmun, yes.

QUESTION: Does the agreement provide that the lessee has the right to reject the driver furnished by the lessor? Does it go that far?

MR. VOORHEES: The agreement does not specifically provide that. In fact, the agreement in this case, which is contained in the appendix to the petitioner's brief, provides that the person operating the truck shall be Howard Hardrick, the employee of Brada Miller. It does not -- now, by implication, I guess by actual words, by making that provision the lessee has at least accepted Howard Hardrick as the driver of the equipment. Hardrick was an employee of the lessor, Brada, prior to the time of the lease. He was an employee of Brada after the lease, and by the terms of the lease was an employee of Brada, the lessor, at the time of the lease.

QUESTION: As I understand it, the indemnification clause here doesn't apply to the lessee's own negligence.

MR. VOORHEES: That's true.

QUESTION: Do you think the case would be different if it did?

MR. VOORHEES: No. I think if we read the amici

curiae brief filed by the Interstate Commerce Commission and the United States, they are discussing the fact that ultimately they may enact regulations regulating the area of indemnity agreements. Their brief states quite clearly that they do not feel that their present regulations do control these agreements, and they state that when they do enact such regulations, they would consider allowing indemnity agreements in certain instances and not allowing them in other instances. But at this point, the position is that no regulations have been made controlling the indemnity agreement prohibiting them or allowing them, they are just not mentioned, therefore the indemnity agreement, we contend, is proper.

Now, your question is directed to if it was the negligence of the lessee, and I think if we read the amici curiae brief, their feeling is that when they enact regulations, they would probably provide that negligence of the lessee would preclude its recovery under an indemnity agreement. But this has not been regulated at this time.

QUESTION: What was the basis for Federal jurisdiction in this case, Mr. Voorhees? The diversity?

MR. VOORHEES: It was diversity, Mr. Justice Rehnquist.

QUESTION: I suppose that if the indemnity agreement had been invalid under the law of the State in which the accident occurred or the State in which the case was tried,

would that make it a different case?

MR. VOORHEES: I think that that would.

Now, this question has not been gone into. The agreement was entered into in Michigan, the accident occurred in Illinois, the case was tried and is presently pending in the Federal courts in Illinois.

QUESTION: Most States, though, allow indemnity agreements where the person passively negligent is seeking to recover from the person actively negligent.

MR. VOORHEES: Yes, they do, and Michigan and Illinois--I don't attempt to state which law I think would govern here, but those are the two obvious States to look to -- Michigan and Illinois both provide that a person may indemnify himself against his own negligence if the indemnity agreement specifically so provides.

QUESTION: You say the driver here remained the employee of Brada. I take it he did. If the driver is negligent and injures someone and that victim sues the lessee, Transamerican, on what basis is the claim made?

MR. VOORHEES: That, Mr. Justice White, that question, I'll answer it, but it's not involved, I contend, in the issues before this Court.

QUESTION: I know it isn't, except for one thing. You say -- I think it bears on the control, whether this is really a lessee's operation or not, or whether the lessor is

really just piggy-backing on the lessee's authority.

MR. VOORHEES: If I may go into a little history, then going back years, these type of agreements, I think, generally fell into the category of what was known as the independent contractor relationship. The lessee of the equipment, if sued, would generally defend and say that the person from whom he leased the equipment was an independent contractor, and lessees generally, I think, successfully defended on that ground.

Now, this is one of the things that the Commission was attempting to regulate. I think that individual owners of equipment, probably not well maintained --

QUESTION: Let me -- let's assume there was no indemnity agreement and the third person sued the lessee, whose authority was being used and whose bill of lading had been issued, I guess. Now, assume no indemnity agreement or anything, the third party may recover against the lessee, may he not?

MR. VOORHEES: The third party under the regulations could recover against the lessee. I think this is one of the --

QUESTION: Under the regulations. So that's a Federal question.

MR. VOORHEES: Yes.

QUESTION: That's a question of Federal law.

MR. VOORHEES: Yes.

QUESTION: So that it isn't respondeat superior; it isn't the fact that he is an employee, it's just the fact that the Federal regulation says the lessee is responsible.

MR. VOORHEES: That's correct.

QUESTION: Um-hmm.

MR. VOORHEES: That's correct. And you say if there were no indemnity agreement to follow that on --

QUESTION: I guess the indemnity agreement would be irrelevant as far as the liability of the lessee under the regulations is concerned.

MR. VOORHEES: As far as the liability of the lessee. And it was in this case that there was no question that the lessee was liable and the lessee has accepted the responsibility and paid.

Now, to track back a little bit on this history, the Commission enacted these regulations, and one of the principal things that they were concerned about was lessee's dodging liability, I think. So they said that the lessee should be responsible. And I say all of the requirements of the regulations of the Commission have been carried out in this case, they have been followed by the parties.

Now, this regulation, as has been held by a couple of the cases in the briefs, makes the employee a statutory or special employee for whose acts the lessee is liable. But for the regulations, the driver and his employer would be

independent contractors, whatever that means. It means different things, I suppose, from case to case.

QUESTION: Well, in this case it would have been in Federal court whether it was diversity or not.

MR. VOORHEES: I am not prepared to answer that. I'm not really quite sure if a violation of the --

QUESTION: On your theory, the third party's claim against the lessee is strictly a Federal law question under the regulations.

MR. VOORHEES: Yes.

Again, it probably is. In other words, the liability of the lessee is set by the regulations. Whether that is a sufficient --

QUESTION: Your position is anyway that the driver is not an employee of the lessee for any purpose.

MR. VOORHEES: The regulations make him such.

QUESTION: Well, they make the lessee liable for him, but it isn't because he's an employee.

MR. VOORHEES: I think that that is true using common definitions of the word "employee."

QUESTION: Common law of Illinois might hold the driver to have been a borrowed servant and therefore an agent of the lessee conceivably. But that's -- we really don't need to get into that here because --

MR. VOORHEES: That could be.

QUESTION: -- because the Commission's regulation is clear.

MR. VOORHEES: That's right, Mr. Justice Stewart.

QUESTION: The argument in this case turns around to what extent must the lessee control --

MR. VOORHEES: Yes.

QUESTION: -- the operation. You say he need not control it so much that the driver is his technical employee.

QUESTION: The liable is a matter of Commission regulations.

MR. VOORHEES: That's correct.

QUESTION: The lessee.

MR. VOORHEES: That's correct.

QUESTION: We don't need to go any further. That's conceded in this case.

MR. VOORHEES: Yes.

QUESTION: That is not an issue.

MR. VOORHEES: I find in defining the word "control" of an employee to involve some rather nebulous phrases and sometimes be almost fictitious. An employer is not going to control the minute-to-minute operations of a driver driving a truck. He isn't going to be able to prevent him from going too fast or from failing to stop at an appropriate time. He is going to -- the control involved here is twofold. The lessee controls in that he tells the driver where to go and what

routes to follow and what reports to file and prepare.

The lessor controls because the lessor is the continuing employer. The lessor is the one that the man is going to be working for next week. The chances are the lessee won't see this driver again after the end of this particular trip. So that the lessor is then the one that has the right to discipline the employee if he has violated traffic regulations or has done something wrong, and the lessor is the one that could discharge him or provide some other type of discipline.

Now, there are two, aside from the fact that we have the authority of several of the circuits maintaining that these indemnity agreements are not in violation of the regulations, two basic reasons here which I urge are, first, the basic concept of freedom of contract. I have quoted in the brief from a case that's quite old, from this Court, a 1900 case, and it's Baltimore and Ohio Southwestern Railway Company v. Voigt, provides that the contract between parties should not be invalidated unless it is clearly against public policy, public right, or public welfare.

Additionally, the courts have held, and this Court in the case of Bowles v. Seminole Rock and Sand Company, that the interpretations by an administrative agency of the Government of its own regulations are entitled to great weight, and they become controlling -- this is a quote from the Bowles case -- "become of controlling weight unless it is plainly

erroneous or inconsistent with the regulations."

The amicus brief filed in this case by the Commission and by the United States takes the strong position that they have not attempted to regulate indemnity agreements, that they feel that the indemnity agreement in this case is appropriate and is valid, and that they do discuss the fact that in the future they may attempt to regulate these agreements. I think you can assume from reading their brief that they probably will, but they have not at this point.

I think that basically that concludes my argument, unless the Court has any further questions.

MR. CHIEF JUSTICE BURGER: I think not.

MR. VOORHEES: I have some time reserved.

MR. CHIEF JUSTICE BURGER: Mr. Leritz.

ORAL ARGUMENT OF JOSEPH L. LERITZ

ON BEHALF OF THE RESPONDENTS

MR. LERITZ: Mr. Chief Justice, and may it please the Court: The respondent in this case takes a somewhat different view of the various liabilities and the right of control and the fact of control.

The questions presented by the petitioner, the respondent, and the ICC and the United States -- and I will refer to it as the ICC for simplicity -- are a little bit different. The petitioner states that the question before the Court is where the lessee assumes control and responsibility

for the tractor and trailer,is an indemnity clause in an otherwise valid lease agreement against the regulations?

The respondent sees the question as whether an agreement to indemnify for losses due to the operation of the equipment is in violation of the regulations, and the ICC sees the question as whether the agreement to indemnify for losses -- whether the regulation prohibits the lessor from agreeing to indemnify the lessee for losses caused by the negligence of the lessor.

Now, in the amici curiae brief, the Interstate Commerce Commission claims that indemnity agreements such as we have here are beneficial because they tend to place the responsibility for the loss, for the casualty, where it belongs. The ICC assumes that the negligence of the driver is the negligence of the lessor, and it is respondent's position in this case that the ICC is incorrect in that,for reasons I hope to develop in my argument.

The regulations require that the exclusive possession, control, and use of the equipment remain in the lessee, and of course not in the lessor.

Now, in the ICC brief the Interstate Commerce Commission takes the position that the regulations do not require the lessee to operate the equipment itself, that the lessor can perform that task by furnishing the driver as well as the equipment and that subject to the authority and

responsibility of the regulations it can allow the lessor to perform the ministerial tasks of moving the freight. In other words, it's the Interstate Commerce Commission's position and the petitioner's position that the actual movement of the freight, the actual work is done by the lessor.

On page 8 of the brief it states that the mere performance by the lessor of physical operation of leased equipment does not negate the lessee's control and responsibility. And further, on page 9, under certain circumstances an indemnity clause might help to induce the lessor properly to perform the ministerial tasks that under the regulations can be assigned to it. The indemnity clause might help the lessee influence performance of the lessor and thereby exercise control and responsibility over the lessor.

And finally, on page 16, the amici curiae brief states that providing the driver leaves physical moment-to-moment control of the vehicle in the lessor. This is the control over ministerial tasks, and the ICC states it is not the control and responsibility required by the regulations.

Now, I think the ICC's position that the party who is responsible in fact, and the negligent party, should ultimately bear the loss is the correct position. However, I think it is based on a false premise and therefore, although the logic is good, the conclusion is wrong.

And I say this by going back to the history of the

master-servant relationship. Let us assume that there was no regulation in this case. I think these matters would be governed by traditional questions of respondeat superior, master and servant, agent and principal. I know all of the cases that have considered this particular problem, the State cases and the Federal cases, have held the opposite, that the lessee operates the vehicle and transports the freight under the common law and under the regulation.

Now, getting back to our assumption that this is a common law rather than a regulation matter. There is no regulation. When the lessee takes over control of the truck and of the driver, the driver becomes the special employee of the lessee. He still may remain in the general employ of the lessor, but traditionally under our law -- and I think cases almost all hold this -- that in the event of the negligence of the driver, in that situation, that the responsibility would be the responsibility of the lessor.

We must remember -- of the lessee, I am sorry.

QUESTION: Of the lessee.

MR. LERITZ: Of the lessee. Yes, sir. I'm sorry.

QUESTION: You are talking now about the responsibility of the lessee and lessor inter sese and not about responsibility to the ultimate plaintiff.

MR. LERITZ: Well, I think both, Mr. Justice Rehnquist, as I hope to explain.

A party, a lessor or a lessee, is not negligent itself. It only can be negligent through the act of the driver. Now, in this particular situation and in situations which are generally considered, the driver is driving down the road and commits a negligent act. The act is an act of an individual. Some employor or corporation or other party through a legal fiction is responsible for that person's act.

Now, assuming there was no regulation, who would be the party responsible for the driver's act? Under the common law, and I think I can say this, having investigated it and having practiced in this field for a long time, under the common law the special employer, the lessee in this case, would be responsible.

QUESTION: Responsible to an injured third party?

MR. LERITZ: Yes, sir, responsible to an injured third party.

QUESTION: Supposing you had a single truck owned by an individual owner who drove it himself and he leased it, say, to Transamerican in this case. Now, if there were no regulation, would not Transamerican in many States be able to obtain indemnity against him just under common law if he were negligent?

MR. LERITZ: Yes, sir, they could, against him. In the same way. But in this case Transamerican could obtain indemnity against the driver Hardrick. But you see, they are

not attempting to obtain indemnity from the driver Hardrick but from Brada Miller who is Hardrick's general employer. There is a difference there. The driver is always subject to indemnify his principal, whether he be Brada Miller or Transamerican, the driving, being the ultimately responsible person is always the person who theoretically, at least, must pay. And in the situation you gave, the driver, being the owner of the truck, must pay.

The question in this case is must Brada Miller, being the general employer of the driver of the truck, pay? And I think that's a different issue, your Honor.

Now, under common law principles of respondeat superior -- I am going to refer the Court, and I have, to two Missouri cases, one of which Mr. Voorhees was involved in, that's in my brief, Branneker v. Transamerican, 428 S.W. 2d 524, and Barsh Truck Line v. Jerry Lipps, 424 S.W.2d 81. And I think it's the general law throughout the country and always has been.

The courts generally hold that under the common law principles of respondeat superior for a person to become a special employer three things are necessary. First, the employee must consent to enter into the special employment; second, he must as a matter of fact enter into the special employment and go forward with the employment; and third, the special employer must have the right to control his actions.

If those three conditions are met, then the driver comes into the special employ of, in this case, Transamerican, and Transamerican would then be liable to the general public for any negligence of the driver.

Now, were those three conditions met? I think they obviously were. Hardrick here did agree to enter into the special employ; he did, as a matter of fact, enter into the special employ by driving the truck, and Transmaerican did have the control, in fact as well as under the regulations.

Now, if that's the common law --

QUESTION: Had the control insofar as it said, "You are to drive this truck from Detroit to Kansas City on the following route."

MR. LERITZ: Yes, sir, it had that much control.

QUESTION: That much and no more.

MR. LERITZ: I think it had more control, as I hope to develop. I may be wrong, but I think I can develop some more control.

QUESTION: Mr. Leritz --

MR. LERITZ: Yes, sir, Mr. Justice Powell.

QUESTION: I'm not following entirely your argument about common law. If the common law applied, you are not suggesting that your indemnity agreement would be invalid, are you?

MR. LERITZ: If the common law applied, there would

be -- may I say if the common law applied absent an indemnity agreement, there would be no right of indemnity from Trans-american against Brade Miller.

QUESTION: That's absent such an agreement, but here you have an agreement.

MR. LERITZ: All right. Absent --

QUESTION: You are not attacking the validity of the agreement absent the ICC regulation, are you?

MR. LERITZ: Under the law of many States, sir, an indemnity agreement will not be given any credence unless it agrees to indemnify the indemnitee against his own negligence.

Now, in the State of Missouri that's the law. In some other States, I think in the State of Illinois, that's the law. In other words, I cannot agree to indemnify you against your own negligence unless I specifically in the indemnity agreement state I will do so.

So I would say that the indemnity agreement in this case under the common law is certainly in question. And I think all indemnity agreements of this kind under the common law are in question, whether this particular one --

QUESTION: In which State?

MR. LERITZ: Well, in any State, Mr. Justice Marshall, or in some States. In Missouri, for example, I think it would be questioned.

QUESTION: You keep saying any State and then you

cite Missouri. And I think there are a few others.

MR. LERITZ: The reason I say that, if I may, is that we are looking to the question as to whether or not this agreement is against public policy in general.

QUESTION: Is it against the regulations of the ICC? It's in conformity to those regulations, is it not?

MR. LERITZ: No, sir, I don't think it is.

QUESTION: Oh, I see.

MR. LERITZ: May I explain why I think that?

QUESTION: Let me ask you one question about the remark you made just a moment ago. You said we are looking to the question of whether this agreement is against public policy in general. Now, all the Seventh Circuit held was was that it was contrary to the ICC regulation.

MR. LERITZ: Yes, sir, that's correct. I would say that.

QUESTION: If you are going to sustain the Seventh Circuit's holding, it wouldn't be enough to show that the Seventh Circuit might, if it had taken a different tack, decided that it was against public policy in Illinois or Michigan.

MR. LERITZ: That's correct. I think, though, that the regulations add additional reasons. In other words, we have a situation where the common law absent the regulations states where the negligence lies and where the responsibility

lies.

Now, the regulations come along and reinforce that. They don't take anything away from the common law, they reinforce the common law. They make it clear that under a situation such as this the possession, control, and use of the equipment is in the lessee. That's what the regulation says, control of the equipment.

QUESTION: Does the ICC share your view of this matter?

MR. LERITZ: The ICC does not, sir.

QUESTION: Isn't that quite important? You have consumed half of your time now,counsel, and you perhaps should address that directly.

MR. LERITZ: I believe that the ICC's position is based on a false premise, Mr. Chief Justice. And the false premise is that the control of the equipment and of the driver remains in the lessor. I think that's the false premise.

Now, the ICC has stated, and I quote -- I paraphrase: The objective of safe operation might be frustrated if the indemnity clause also required the lessor to indemnify the lessee for the lessee's negligence. In other words, the ICC, if I understand that statement correctly, takes the position that if the lessor is called upon to indemnify the lessee for the lessee's own negligence, then the indemnity agreement does tend to frustrate the purpose of the regulations. So I think

it's very important for us to determine whose negligence is involved here. Is the negligence of Hardrick the negligence of the lessor or the negligence of the lessee? If the negligence of Hardrick is the negligence of the lessee, then if I read the ICC's brief correctly, then the ICC would take the position, well, there it should remain. And it would not be proper under the regulations and it would not follow that the liability should be shifted from a negligent to a non-negligent party.

There are also some practical reasons, if I might cite some, why these indemnity agreements might be contrary to the regulations and might be against public policy. As the Court knows from reading the respondents' brief, there is a serious question as to whether or not the driver in this case had the right and authority to enter into this contract. I know that's not a question for this Court and I know this Court will not decide that. But it brings up an important point.

Here you have a situation where a driver comes up to the doorway of a trucking company with a truck and solicits a load and takes a load. The lessee describes the cargo, tells him, decides what kind of cargo is to be carried, whether a dangerous cargo or other cargo, how it's to be loaded, where it's to be taken, the route by which it's to be taken. The lessee describes and gives instructions, any special instructions, with regard to the trip itself. The lessee gives the

driver expense money. The lessee checks the driver's medical records. The lessee makes an inspection of the truck itself. In the event of an accident, the driver reports to the lessee and the lessee in turn reports to the Interstate Commerce Commission.

I think all of these taken together show a great deal of practical control of the lessor over the trip and the driver and the equipment itself.

QUESTION: The lessee.

MR. LERITZ: The lessee. I'm sorry. The lessee, yes, sir.

A great deal of practical control. And the law puts that control there, the common law puts that control there, and the regulations put that control there.

QUESTION: The only thing the lessee does not control is the negligence of the driver.

MR. LERITZ: That's correct, sir.

QUESTION: That's the only thing that is involved in this damage suit.

MR. LERITZ: That's correct. But, of course, no one can control that, I suppose. If a driver is going to be negligent, he is going to be negligent. So we have to look elsewhere. Where does the law place the responsibility? Where do the practicalities place the respohsibility? Where do the regulations place the responsibility?

I might just point out again some practical reasons. In this particular case Brada Miller did not know of this accident for 4 months. Its investigation of the accident was impeded. The accident was not reported by the lessor for about 4 months, reported to the ICC for about 4 months. It's respondents' position that if a lessee knows or thinks that it's going to be reimbursed or indemnified for an accident, it doesn't have the incentive to do what it must do and to make a prompt investigation and attempt to make a prompt settlement.

I think a rule such as this -- I'm sorry. I think an indemnity agreement which shifts liability will tend to have an inhibiting effect on investigation and on settlement of claims.

QUESTION: If you are talking about practicalities, Mr. Leritz, as you are, is Transamerican generally insured against this sort of thing? Is Brada Miller insured against this sort of thing?

MR. LERITZ: Brada Miller is insured above a point, Mr. Justice Rehnquist, that does not involve the amount of money here. There is a financial responsibility arrangement.

QUESTION: So it's a self-insurer for purposes of this.

MR. LERITZ: That is my understanding, sir. Yes.

I should -- I would like to close with the following

comments: These indemnity agreements at best are questionable. They at best -- at worst they actually take the responsibility from where the law places it and the regulations place it and the practicalities place it and shift it to where it does not belong. They take it -- the position the respondent takes, the indemnity agreement takes the ultimate financial responsibility from the lessee, who has control under the common law, under the regulations, and under the practicalities, and puts it in the lessor, who does not have those responsibilities and control.

Now, it seems to me that that is contrary to the intent of the regulations despite the position of the Interstate Commerce Commission and contrary to good practice, to good practice in the trucking industry. Why not leave the ultimate responsibility where the law places it? If, for example, the negligence is the negligence of the lessee, through the driver, leave the ultimate responsibility with the lessee. If the negligence is the negligence of the lessee through some other act of the lessee, then leave the responsibility, the ultimate responsibility, with the lessor.

If, on the other hand, the lessor is negligent, the lessor is responsible and the lessee would have a cause of action over without an indemnity agreement, allow the law, not the artificial indemnity agreement, to place the ultimate responsibility where it belongs. I think under those

circumstances the law would best be served, it would cut down on litigation, of which there is considerable amount in this area, and unless the Court does take such a position, these cases are going to continue to be litigated because the only thing, as I understand it, the only question before this Court is whether or not these kinds of agreements are contrary to public policy because of the regulations.

If the Court says, no, they are not and we will allow them, then we will continue to have litigation under the law of the various States under the provisions of the various contracts.

I respectfully submit on behalf of respondents that the Court hold that indemnity agreements which tend to shift liability from that party who was ultimately responsible under the law to some party who was not responsible under the law should be condemned. Then I think, your Honors, that the regulations will be complied with, the common law will be followed, and the litigation will be terminated.

Thank you very much.

QUESTION: Mr. Leritz, does this indemnity agreement on its face purport to shift liability in the manner you have described?

MR. LERITZ: Not on its face, your Honor.

QUESTION: Well, how else can we view it unless we get into the facts of the case and undertake to assess whether

or not the driver himself was the cause of this accident?

MR. LERITZ: Mr. Justice Powell, it does on its face for this reason: It says that the lessor will indemnify the lessee for the lessor's negligence.

QUESTION: Only for the lessor's negligence, not the negligence of lessor's agents or employees.

MR. LERITZ: Right. But also in another part of the agreement, it states that the lessor -- that the driver is not an agent of the lessee but rather remains an agent of the lessor, which is contrary to fact, to common law, and to the regulations. The provisions of the lease in this case which attempt to bolster the indemnity agreement by stating that the driver remains the agent of the lessor and is not the agent of the lessee is contrary to fact and law. There are many provisions of this agreement which attempt to bolster the indemnity agreement, and in doing so they cite statements -- or cite facts, I should say, or attempt to cite facts which are contrary to the true facts.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, counsel?

REBUTTAL ARGUMENT OF ALPHONSO H. VOORHEES

ON BEHALF OF THE PETITIONER

MR. VOORHEES: Mr. Chief Justice, and may it please the Court: I have one or two quick comments.

First, as I mentioned earlier, the question here is

the issue, the narrow issue is what has the Commission done? And I believe that most of Mr. Leritz' argument was directed to what should they do.

Since I don't believe that is the question, I hesitate to get into it. However, I note in one of the footnotes in the briefs of the Interstate Commerce Commission and the United States -- well, as a matter of fact, in a part of their brief including a footnote, they refer to probably what they would do and the beneficial aspects of indemnity agreements in general if they should ever reach the point of regulating these indemnity agreements.

In this footnote they refer to a 1973 University of Chicago Law Review article which tries to assess or appraise the economic approach to accidents and to the master-servant relationship and to the independent contractor relationship. And the gist of the article is that the person writing that article reaches the conclusion that liability should ultimately be with the person who has the most control over the ultimate prevention of the accident. He advocates in this article the use of indemnity agreements to allocate that liability. He says in his view there shouldn't be any distinction between independent contractor and master-servant relationships, that it would be ideal if both parties were at common law liable and then they could adjust their differences between themselves bindings of indemnity agreement and thereby put the blame on

the person who theoretically would be in the best position to prevent accidents. And as we have shown here, Brada Miller is the company that would have the control over determining or analyzing latent defects to their equipment that Transamerican may not be able to find by inspection. Also, Brada, the lessor, is the company that has the ultimate employer-employee control over their driver. They have the means of weeding out drivers with bad driving history. They have the means of discipline or discharging and the best means of providing safe drivers.

So as I say, even though that is not the question in this case, when we consider various authorities on what should be done, this particular authority cited in the amici curiae brief does endorse and advocate the approach of use of indemnity agreements.

I think that concludes the petitioner's argument. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:55 a.m., the argument in the above-entitled case was concluded.]