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February 20, 1980

Mr. Robert Paullin  
Associate Director  
Office of Operations & Enforcement  
Materials Transportation Bureau  
Department of Transportation  
Washington, DC 20590

Re: Application for Inconsistency  
Ruling; City of Boston

Dear Mr. Paullin:

This letter supplements the application filed on February 4, 1980, on behalf of HMAC and the Massachusetts Motor Truck Association. The Rhode Island ruling, IR-2, was adopted by reference in that application. That adoption was to avoid the unnecessary repetition of principles, regulatory sections, case law, and statutory references in our application. It may be worthwhile, however, to supplement our filing with some of those matters.

The Boston ordinance and the regulations it mandates are inconsistent with specific sections of the Hazardous Materials Regulations and, most importantly with the Congressional call for national uniformity in this field of regulation. If there is a need for restrictions that is not unique to Boston, it is a need that is best addressed from the federal perspective, by the Materials Transportation Bureau. If there is no need for their restrictions, there is a disruption in the safe and expeditious movement of essential freight without any benefit. Any baseless limitation on flow of materials, that is dependent upon the identification of those materials as hazardous, encourages the inaccurate identification of materials, raising substantial safety issues.

In our application for an inconsistency ruling, the conflict between the need for uniformity and the idiosyncratic nature of Boston restrictions is the issue. In addition, certain requirements deviate from specific existing DOT regulations. These may be summarized as follows:

1. Definitions. The definition of hazardous material in the ordinance deviates from that in Section 171.8. Class A explosives cannot be defined completely by Section 173.53 alone, but must include reference to Sections

173.50, 173.51, 173.52, and 173.86, as well as Sections 173.53-173.87. Class B explosives likewise cannot be defined by Section 173.88 alone. Consideration must be given to the same general sections above, as well as to Sections 173.89-173.95. So, too, the definitions of the explosives classification must take into account other materials that are designated by DOT as falling within other classifications, e.g., oxidizers, organic peroxides, flammable solids, etc.

The term "poisonous gases: Poison A (173.326)" is inherently defective, omitting liquids. Flammable liquids and flammable fluids are defined in a manner that deviates significantly from the class defined in Section 173.115.

In short, a jurisdiction technically and legally incompetent to define hazardous materials in interstate commerce has done so, and has adopted restrictions based upon those definitions. Proper classification of hazardous materials for transportation purposes is extremely complex. It involves evaluation of specific sections including, but not limited to, Sections 172.100, 172.101, 173.2, and all sections generally describing each class. The classification and the proper shipping name are the basic building blocks of the national hazardous materials regulatory system. Proper understanding of the process of classification is essential to training of shipper, carrier, packaging manufacturing, and emergency response personnel. It is a federal province that must remain inviolate, to avoid the dangers of chaos.

A ruling is requested declaring that any State or local deviation in definitions of classes of hazard or shipping names for materials is per se inconsistent with the will of Congress in enacting 49 U.S.C. 1801, et seq., and any regulations that might be based upon these deviating definitions are preempted.

2. Curfews. A curfew and the delay inherent in any curfew are inconsistent with the federal principle of expeditious delivery of hazardous materials, as embodied in Section 177.853 and other rules. Any curfew on hazardous materials transportation raises the question, if the material is barred from specific areas during certain times, where is it? It may be parked at the edge of the road awaiting the end of the curfew, it may be deviating around the area exposing a broader public, it may be hurrying to beat the time limits, it may be traveling without its telltale placards, or it may be doing some other things equally inconsistent with a national program of hazardous materials safety.

3. Bans and designation of routes. There is nothing to dispel the conclusion that these two aspects of the Boston ordinance are designed only to change the identity of the populace exposed to the commerce in question. The concepts themselves reflect a lack of confidence in the quality of the national program. If there is a problem, then the cure is to work to improve the national program, not to impose bans or restrictive routes.

4. Placards. The requirements in the Boston ordinance to be effectuated by regulations, unless exactly identical to the federal rules on vehicle markings and placarding, are per se inconsistent with the federal

hazardous materials identification and warning system. This system is implemented in Part 172 Subparts D and F, and under specific commodity entries throughout Part 173.

If something identical were being ordered, this provision would be meaningless, since other provisions of the ordinance call for application of the federal rules to local commerce. Clearly, something that deviates from the federal scheme has been ordered.

5. Written accident reports. This reporting requirement, limited by the terms of the ordinance to hazardous materials motor carriers, is redundant and unnecessary in light of Sections 171.16 and 177.807.

6. Permits. The network of permit requirements imposed in the Boston region, and contemplated in virtually every urban area of the country, threatens to impair the ability of carriers to meet the federal objective of safe and expeditious delivery of cargo, embodied in such sections as 177.853.

These are not vehicle registration requirements applied to all motor carriers. These are not carrier licensing and certification requirements applied to all motor carriers as a classification of business entities. These are not driver licensing provisions — these are bans on the movement of hazardous materials unless the applicant can prove safety and public need in the distribution of his cargo. The safety is a DOT function; the public need has been expressed by Congress. A restriction on movement without local need, based on perceived federal inadequacy, is inconsistent with the national regulatory scheme mandated by Congress in the Hazardous Materials Transportation Act.

Section 2(A)(6) of the Boston ordinance orders the issuance of regulations applicable to hazardous materials motor carriers. There is no discretion to not issue the regulations. In the words of the City Council, as endorsed by the Mayor, those regulations "may extend to, but not limited (sic) to" several specific topics. Among these topics are warning lights in conjunction with placards and vehicle marking requirements that deviate from those prescribed in the federal hazard warning system.

In the preamble to the adoption of procedures in 49 CFR Part 107, the Materials Transportation Bureau declined to provide a free drafting and editorial service to jurisdictions seeking "pre-enactment approval" of restrictions. Thus, the MTB rules contemplate the local development of requirements before they may be the subject of an application. Based upon the facts of this proceeding, this standard has been met and all aspects of the application are ripe for decision. There is no requirement in the rules or in law for there to be a case or controversy sufficient to warrant a declaratory judgment ruling from a court, in order to obtain an administrative determination by DOT under Part 107.

In an enactment passed by the City Council and signed by the Mayor,

regulations must be issued. In the formal enactment, it is stated that requirements of the regulations may include deviations on federal hazard warning systems. By law, as expressed in the Rhode Island ruling, such regulations may not include such deviations. To await issuance of the regulations would merely waste the time and effort of all involved. There is no phrasing of such requirements that could avoid inconsistency. The Materials Transportation Bureau's desire for its own administrative efficiency, shunning the role of federal draftsman for local jurisdictions, must be applied with some consideration for the administrative efficiency of other levels of government. The requirements complained against in this filing are sufficiently definite and procedurally complete to allow and, indeed, to demand decision. Delay would be wasteful and would change nothing insofar as this application is concerned.

If there are any questions on this supplemental filing, please contact me directly.

Sincerely,



Lawrence W. Bierlein

I hereby certify service of copies of this supplemental filing upon all parties who received service copies of the initial application.



Lawrence W. Bierlein