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RSPA 2003-1455-21
227909

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATIONAL TANK TRUCK CARRIERS, INC.,)
and RITTER TRANSPORTATION, INC.,)
)
Plaintiffs,)
v.)
CITY OF NEW YORK, NEW YORK CITY FIRE)
DEPARTMENT, and AUGUSTUS A. BEEKMAN,)
Fire Commissioner,)
)
Defendants.)

80-5909 Civil (TPG)

ORDER *and Judgment*

The above-captioned cause came to be heard before Hon. Thomas

Griese on plaintiffs' prayers for declaratory and injunctive relief and, after hearing and ruling from the bench thereon, it is hereby, ORDERED ADJUDGED and DECREED as follows:

1. Plaintiffs' prayer for injunctive relief with regard to routing requirements for prohibited hazardous gases under Fire Department Directive 5-63, Sections 10.2 and 10.4b, is hereby denied, in accordance with the opinion rendered in the related case of City of New York v. Ritter Transportation, et al., 80 Civ. 5401, June 5, 1981.

2. Times of travel of prohibited hazardous gas shipments in tank trucks, that have been established under Section 10.4b of Fire Department Directive 5-63, are a legitimate local regulatory measure and are not inconsistent with the Hazardous Materials Transportation

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Act, 49 U.S.C. 1811, or regulations issued thereunder by the U.S. Department of Transportation. Plaintiffs' prayer for injunctive relief with regard to these times of travel is hereby denied.

3. Signs or placards required on compressed gas tank trucks and tube trailers under Section 6 of Fire Department Directive 5-63 differ from those required by the U.S. Department of Transportation under the Hazardous Materials Transportation Act, are in conflict with the federal requirements, and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Hazardous Materials Transportation Act. These signs and placards are inconsistent with federal law under 49 U.S.C. 1811 and are hereby declared preempted and permanently enjoined.

4. Compressed gas container testing requirements, under Section 3 of Fire Department Directive 5-63 and Chapter C-19.91 of the Administrative Code of the City of New York, differ from testing requirements for such containers under regulations issued by the U.S. Department of Transportation pursuant to the Hazardous Materials Transportation Act. These differing requirements stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the HMTA, are inconsistent with federal law under 49 U.S.C. 1811, and are hereby declared preempted and permanently enjoined.

5. The court declines to rule on plaintiffs' prayers for declaratory and injunctive relief with regard to hazard classification defini-

tions in Section C19-2.0 of the New York City Administrative Code,
due to an apparent lack of substantive requirements related to those
definitions other than those otherwise enjoined herein.

✓ Dated: New York, N.Y.

Oct. 1, 1981

Thomas P. Grison
V. L. D. J.

JUDGMENT ENTERED 10/13/81

Raymond F. Buschardt
CLERK

Lee Saltman

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2 THE COURT: This will constitute my findings of
3 fact and conclusions of law in this case.

4 In this case, plaintiffs attack certain provisions
5 in Fire Department Regulations known as 5-63. That attack
6 is on Section 10.4b in so far as that section deals with
7 the routing requirements. Also against Section 10.4b
8 in so far as it deals with the times of shipment through
9 New York, what has been referred to in our discussions as
10 the curfew.

11 There is an attack upon Section 6, which deals
12 with the City requirement as far as signs and symbols on
13 trucks. And then there is an attack on Section 3, dealing
14 with testing, which in turn refers to Administrative Code
15 C-1991.

16 What I have listed are four items of attack in
17 this lawsuit. The first, dealing with Section 10.4b
18 in so far as it regulates routing, has been dealt with in
19 my opinion of June 5, 1981 in a companion action, 80 Civil
20 5401. That opinion contained findings of fact and
21 conclusions of law made in connection with a motion by
22 the trucker defendants in that case to vacate a preliminary
23 injunction which had been obtained by the City of New
24 York, which was the plaintiff in that case.

25 I adopt the findings of fact and conclusions of

JEFFERSON - NATIONAL ARMY LABORERS V. CITY OF NEW YORK
J. GRIESE - 9-25-81

Routing

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law in that opinion in ruling on that issue in the present case, and on the basis of those findings of fact and conclusions of law I reject the claim made by the plaintiffs in this case attacking the routing requirements of Section 10.4b.

This leaves us with three items to cover in the present case which were not covered in the other case. It is contended that the provision of 10.4b with the so-called curfew is inconsistent with federal law, namely, Federal Regulation 49 CFR.177.853a. It is contended that Section 6 of the Fire Department Regulation is inconsistent and in conflict with Part 172 of 49 CFR.

It is contended that Section 3 of the Fire Department regulation dealing with testing is inconsistent with 49 CFR, Sections 173.33 and 173.34.

I should note that a discussion of the basic legal framework -- that is, the basic statutes involved and the regulations and the authorities -- are covered in my decision of June 5, 1981, and I won't attempt to repeat them here.

Let me now address the --

MR. BIERLEIN: Your Honor, there is the matter of definitions that you have not touched upon.

THE COURT: I think those all pertain to what

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I am talking about.

Let me talk about the time requirement, or the so-called curfew. It should be remembered that the time requirement is to be considered in some respects along with the routing requirement. That is, the effect of 10.4b is to single out certain so-called prohibited hazardous gases, such as liquefied petroleum gas, known as LPG, and to provide that they cannot in tank truck quantities be delivered or picked up on New York City at all. They can only be carried through New York City, and they can only be carried through New York City pursuant to permission granted by the Fire Department along specific routes and at specified times.

The routes specified by the Fire Department are described in my earlier decision, and basically that requires a trucker to go north of the city, through Westchester County, and in a sense circle the city instead of coming through the city via the George Washington Bridge or the Lincoln Tunnel or something like that.

The main focus of the problem has been trips from points such as New Jersey to Long Island, where it is necessary to pass through the City, and that is where this Section 10.4b comes into play mostly.

It appears that a trip from New Jersey

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2 to Long Island via the prescribed route takes about an
3 hour more than it would take.

4 Not only must the carriers obey the prescribed
5 route, but they must avoid the city during what is defined
6 as rush hour, or thought to be rush hour, which is defined
7 as the hours of 6:00 to 10:00 a.m. and 3:00 to 7:00 p.m.

8 As I indicated, the prescribed route avoids
9 certain portions of New York City, but it does pass through
10 the very easternmost section of the Bronx, it goes down
11 across the Throgs Neck Bridge, and goes through the
12 northeasternmost section of Queens. The prescribed route is
13 in New York City for about fifteen miles.

14 The flat ban as far as the 6:00 to 10:00 a.m.
15 and the 3:00 to 7:00 p.m. hours has been in a sense relaxed
16 in the following manner:

17 The City of New York sought in a state court
18 action an injunction against three trucking companies to
19 force their compliance with Fire Department regulations,
20 and that action was settled.

21 This was another action in addition to the
22 one which is before me. As part of the settlement it
23 was agreed that those three carriers would be allowed, after
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2 delivery of a load of gas, and after the truck is empty,
3 to drive the empty truck free of the requirements of the
4 curfew and free out the routing requirements. They would
5 be required to carry a special sign "Unloaded of Liquid."
6 If they had that sign they would be free of the requirements
7 I have stated.

8 There is an application which has been made
9 by the carriers to the Department of Transportation to
10 get concurrence in this sign, and the City has not objected
11 to such application. The Department of Transportation has
12 had that application some five months or so, and has not
13 managed to let anybody know yet what its views are.
14 In any event, while that is pending the City is not issuing
15 any formal generally applicable rules about the use of the
16 sign and this relief from the curfew and routing requirements
17 but it has stated in this action that it would, upon
18 application, be willing to permit other carriers to have
19 the same benefits as the three carriers involved in this
20 action.

21 Now, a few other facts pertaining to this
22 matter of the curfew. The curfew hours deemed to be the
23 rush hours or the peak hours are the same hours which are
24 adopted by the Triborough Authority and the Port Authority
25 in connection with their rules and regulations about the

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carriage of hazardous materials on their bridges and tunnels.

There is testimony indicating what I think would be obvious, that these curfews present some problems for the truckers. There may be, depending on the precise scheduling of the trucks, substantial dead time. A truck can arrive at the border of New York City at about the time the curfew starts, and there may be a wait of the four hours. Obviously, the truckers attempt to plan against this, but this planning may not always succeed, and unforeseen delays occur, or bad planning occurs, and in any event the planning itself can impose a cost on the truckers.

As far as the unforeseen delays which may cause a trucker to run into the curfew, the City has indicated a willingness, although this has not been formally embodied in any general rule, at least for the people subject to the special concessions, and others who apply, to provide a telephone number and arrange to have calls made to the Fire Department notifying of unexpected difficulties such as accidents, and so forth, which might lead the City to waive the curfew requirements.

In other words, although this hasnot been at all fully developed in any systematic way, the City is

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2 indicating an attempt to be reasonable about the problems
3 of the trucking companies in meeting that curfew,
4 and the basic idea is that the City expects the trucking
5 companies to plan, but if they do all they can in planning
6 and still wind up at the New York City border when the
7 curfew is going on because of something beyond their
8 control, why, the City would waive the curfew.

9 Another problem mentioned by the truckers
10 is the fact that they say they have to pull off the road
11 at locations which are really not fit to accommodate these
12 trucks, and they have to wait at these locations at a siding
13 or on the shoulder for a four-hour curfew.

14 As to legal authorities regarding curfews there have
15 been two administrative rulings of the Department of
16 Transportation, one the so-called Rhode Island ruling in
17 which the Department held a statewide Rhode Island curfew
18 imposed for the rush hours was inconsistent with federal
19 law. There was an informal Department of Transportation
20 ruling about a Boston regulation which banned hazardous
21 materials from the downtown area during workdays from
22 6:00 a.m. to 8:00 p.m. The Department of Transportation
23 held that this was inconsistent with federal law. A district
24 court, however, has declined to enjoin the city rules.

25 . There was discussion in that case both by the

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Department of Transportation and by the District Court of the issue of conferring with other jurisdictions. The Department of Transportation said there had not been such conferring. The District Court found that there had been such conferring. Both the Department of Transportation and the District Court apparently thought that was a relevant consideration.

My finding and conclusion on the basis of all the information and the authorities is that the so-called curfew which I have described is a valid local safety measure. It is not in direct conflict with any federal provision, nor does it interfere with the objectives of federal law.

It has been persuasively stated that the peak hours involve more danger of accident because of the heavy traffic, and that if an accident occurs the effects would be broader from that accident than at other times in that it would be harder for fire fighting equipment to respond at these peak hours with the heavy traffic.

The commodities that are involved in these special regulations under 10.4b are extremely hazardous. The City is well justified in taking maximum precautions.

I see no reason to accept as a relevant consideration the question of whether the Fire Department

of the City of New York did or did not discuss the curfew
with White Plains or Mamaroneck or other neighboring cities.
New York has a unique problem and is entitled to handle its
problem.

As far as the pulling off to the side of the road in unsafe places, the record shows there is an immense toll booth plaza near the border of New York City which could accommodate trucks waiting for the curfew. In any event, that is not a consideration that militates against the curfew, the time requirements, of the City of New York. That is a matter for careful planning by the trucking companies. I am not persuaded at all that the trucking companies cannot plan against the time requirement and do so with reasonable efficiency and economy.

As far as the sign requirements, ~~the specifics~~ of these requirements, as to when they are required by the City of New York and by federal law, all of that has been stated in the record. I think there is a portion of the record yesterday in which Mr. Fishkin was questioned about that by me, and he responded, and we went through it rather systematically, and I don't intend to reiterate that.

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The fact is that New York City has its sign requirements which have been in effect for many years

2 applicable to different kinds of hazardous materials.
3 Basically, the City requirements do not apply when the
4 trucks pass through the city, and do apply when the trucks
deliver or pick up.

The federal requirement is generally for a type of placard plus the name of the substance, such as propane, butane, etc. The name of the substances are required in case of the most dangerous, and are optional with less dangerous substances.

I hold that the local requirements are in conflict with the federal requirements and are an interference with the objectives of the federal requirements. I think that the plaintiffs have argued persuasively that a multitude of requirements regarding signs imposed by various jurisdictions is something that is totally unworkable, that it leads to confusion and constitutes an interference with the objectives of the federal sign requirements.

I think there is very little to be said about the testing issue. The facts are in the record, and the City has basically conceded that it is content with the federal testing requirements. In any event, the two sets of requirements are inconsistent, and the existence of the

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2 two sets of requirements would lead to confusion and
3 probably militate against safety.

4 Consequently, the plaintiffs are entitled
5 to a declaration that the City testing requirements that
6 they are attacking are inconsistent with federal law.

7 All of this means that the plaintiffs are
8 entitled to a declaratory judgment and an injunction as
9 to the provisions about the signs and the testing, and
10 not about the routing and the time requirements.

11 I will expect you to submit an appropriate
12 order promptly which will terminate the case.

13 MR. BIERLEIN: May I ask your Honor about the
14 definition provisions that are in the administrative code
15 and in the Fire Department regulations that are at
16 variance?

17 THE COURT: You keep mentioning that, and I
18 find that in the abstract I am not making any ruling on
19 those. I am not going to strike down the definitions
20 as such because I am only striking down requirements
21 that demand somebody do something, so I will just say
22 that as far as a general attack on the definitions, I
23 wouldn't grant relief.