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BEFORE THE ADMINISTRATOR

RESEARCH & SPECIAL PROGRAMS ADMINISTRATION

UNITED STATES DEPARTMENT OF TRANSPORTATION

in the matter of:

Docket No. IRA-~~36~~⁴³

City of Maryland Heights (Missouri)
Application for Inconsistency Ruling

comments submitted by:

National Tank Truck Carriers, Inc.
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Clifford J. Harvison, President

July 29, 1988

Before the Administrator:

National Tank Truck Carriers, Inc. (NTTC) is the trade association of the tank truck sector of the trucking industry. Our 200 corporate members specialize in the bulk distribution, via the highway mode, of thousands of products throughout the Continental United States.

Given the nature of tank truck transportation, we estimate that over 70 percent of the transportation provided by NTTC members involves hazardous materials, hazardous substances and hazardous wastes. Thus, our interest in this docket is substantial.

NTTC is well aware that many states and local political jurisdictions have implemented so-called "fee structures" which are imposed on transporters of hazardous materials. For instance, the State of Maine has enacted legislation calling for fees on rail and truck transporters. New Hampshire has a system which (basically) replicates that of Maine, but only applies to trucks. Ohio has a scheme involving carrier registration, together with fees, on both modes. California imposes a fee for the inspection of certain bulk transportation vessels. Colorado and Nevada have similar programs.

Additionally, the cities of Pittsburgh (PA), Tucson (AZ), New Orleans (LA) have ordinances which trigger "fees" against tank truck carriers.

Without further elaboration, we feel safe in stating that (for whatever purpose or objective) there is a growing trend among non-Federal jurisdictional entities to raise revenues through fee structures imposed on transporters of hazardous materials. Given the elemental fact that transportation (by nature) involves the crossing of many jurisdictional boundaries, the ramifications of this "growing trend" are obvious. Transportation is delayed and safety is compromised as carriers, for reasons founded in simple economics, seek to avoid taxing jurisdictions.

In this context, NTTC believes that both the Administrator's ruling--as well that the rationale used to justify this ruling--are critical to the tank truck industry's ability to operate safely in an economically competitive environment.

STATEMENT OF GENERAL POLICY

NTTC has no quarrel with the basic right of jurisdictions to tax persons and property within its jurisdiction. We agree that a "fee" is a "tax". For decades, jurisdictions have taxed trucks (in a variety of methods). There is nothing new or unique in that fact.

However, we also hold to the proposition that when a tax is applied to a vehicle BECAUSE OF THE HAZARDOUS NATURE OF THE COMMODITY TRANSPORTED, such taxes create conditions compromising the Congressional mandate to the Secretary to "...protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce."

With regard to the application under consideration, NTTC holds that Maryland Heights, Missouri has "crossed the threshold" from the application of a legitimate tax (or fee) to a scheme which--when enforced--will prompt delays in transportation and corresponding violations of the Administrator's regulations issued pursuant to the Hazardous Materials Transportation Act of 1974 (HMTA).

ASSUMPTIONS DERIVED FROM THE TEXT
OF THE MARYLAND HEIGHTS ORDINANCE

As so often is the case in these matters, we respectfully suggest that the text of the Maryland Heights ordinance (88-378) embodies terminology not common to the transportation community, thus NTTC (and, we presume other respondents) must adopt certain assumptions (about the meaning of such terminology) in order to

comment. For instance;

1) We assume that "haul" means to provide transportation services in a "transport vehicle" as defined in 49 CFR 171.8;

2) We assume "hazardous" is used as an adjective modifying the word "waste";

3) We assume "bond" to be a money guarantee;

4) We assume that the owner or operator of the vehicle "hauling...hazardous...waste" is to arrange for and provide the "bond";

5) We assume that the City of Maryland Heights, Missouri is to be the beneficiary of the bond;

6) Given the fact that a City representative has sought a ruling from RSPA, we further assume that the City would lay claim to the proceeds of the bond because of some unspecified incident related to vehicle safety; and,

7) We assume that the ordinance will apply to the operation of all vehicles "hauling...hazardous...waste", regardless of vehicle origin, destination or domicile.

NTTC holds that these "assumptions" are important. If, for instance, the City would lay claim to the bond proceeds in the event of a violation of regulations of the U.S. Interstate Commerce Commission and/or the Missouri Public Service Commission, different questions of jurisdiction would arise. If, for example, the City required the bond only for vehicles "hauling...hazardous...wastes" strictly within the geographic boundaries of the City, our response would be amended.

Resultantly, we ask the Administrator to view our comments (herein) within the context of these "assumptions".

PRIOR JUDICIAL AND ADMINISTRATIVE DECISIONS
RELEVANT TO THIS PROCEEDING

NTTC believes that certain prior rulings of the Administrator as well as language contained in a decision by the United States Court of Appeals for the First Circuit, in the matter of NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL., v. RICHARD M. FLYNN, ET AL. (No. 84-1226, December 26, 1984) give guidance (to the Administrator) relative to the Maryland Heights application.

In the court action, the First Circuit declined to overturn a New Hampshire statute which imposed specified fees on transporters of hazardous materials and hazardous wastes. The court weighed the state action against the strictures of the Constitution's Commerce Clause and the Hazardous Materials Transportation Act.

Herein, there is no "constitutional challenge", however, both "Maryland Heights" and "New Hampshire" are parallel in that they seek a ruling under HMTA. More important, both cases involve determinations of "unnecessary delay" and the threat that other political jurisdictions will impose similar fee structures.

The First Circuit dealt, directly, with both issues. Regarding the question of "unnecessary delay", the court relied on an amicus brief filed by DOT. Therein, the Department declined to "take a position" because of fears that future petitioners might use the courts to "end run" the Administrator's IR process. Importantly, in this context, the court concluded that even if judicial decisions on "...inconsistency questions'..." were in error, "...DOT has adequate legal power in any event to alter the result." (at p. 17).

With regard to the potential for additional political jurisdictions to replicate a particular tax or fee scheme, the court was even more explicit in yielding to the expertise of the Administrator. Two extracts from the decision bear out our contention, to wit:

"...the truckers separately argue that if New Hampshire can impose these fees so can other states. If many or all states do so, the resulting fee system will greatly raise transport costs and seriously burden interstate commerce." (at p. 13)

"Should the circumstances that the truckers fear come to pass, a remedy is close at hand. DOT can promulgate a regulation prohibiting or controlling the imposition of excessive license fees." (at pg. 14.)

We bring these elements of the First Circuit decision to the attention of the Administrator for two reasons: (1) clearly, the courts are willing to defer their primary jurisdiction to the expertise of the Administrator in making determinations based on technical questions (i.e. "what constitutes unnecessary delay?") (even to the point of acknowledging that the DOT can reverse, by regulation, a judicial decision based upon an incomplete record); and, (2) the court recognizes that a nexus exists between an economic issue (tax or fee scheme) and safety.

Administrative rulings also play a precedential role in this matter. For example, the Administrator told the First Circuit, on brief, that a "bare permit" was not, in and of itself, inconsistent. In IRA-34, the Administrator held that, "...the transit fee's consistency depends on the consistency of the program it supports." In that same ruling, however, the Administrator contrasted a "consistent" fee (imposed by the State of Illinois on certain shipments of radioactive fuel) with an "inconsistent" fee (imposed by the City of Tucson, Arizona).

The basis of the contrast, drawn by the Administrator, was "time". In "Illinois (IRA-34)", DOT noted that "delays (which) support compliance with Federal regulations are consistent..." Furthermore, the Administrator found that delays prompted by the Illinois requirements "involved long lead times". Respondents acknowledged that there were few carriers involved in the subject transportation; arrangements for transportation (between carrier, shipper and consignee) are made well in advance of the performance of transportation services; the carrier knew well in advance which specific vehicle would transport the load; all parties were well aware of the Illinois requirements; the nature of the commodity transported (radioactive) mandated special concerns; and, within the total truck population, few loads were ever transported. This the Administrator compared with the "short notice" provisions of the "inconsistent" Tucson ordinance.

IRA-34 contains additional guidance of value, here.

Therein, the Administrator found that the docket contained no substantial evidence that other states and/or political subdivisions would replicate the Illinois fee structure (should DOT find the fee "consistent"). Thus, the Administrator ruled such arguments "speculative". In this context, it is significant to note that IRA-34 was issued on September 18, 1987. Since that time Ohio, Colorado, Nevada, Maine, New Orleans and Pittsburgh have all begun to enforce fee structures.

ARGUMENT

So far, the Courts and the Administrator have told us that: (1) DOT is to be given considerable latitude in deciding on fee-related inconsistency matters; (2) that there is a viable relationship between a "fee or tax scheme" and safety; (3) that hazardous materials transportation fees are not "per se" inconsistent; and (4) the factors and circumstances involved in transportation (as opposed to a literal reading of the statute and regulations issued pursuant thereto) are dispositive in determining consistency or inconsistency.

Given these paths and directions, NTPC holds that the Maryland Heights ordinance fails both the "obstacle test" and the "dual compliance test" and are, therefore, inconsistent with the HMTA and the HMR.

THE DUAL COMPLIANCE TEST

In IRA-34 the Administrator noted that Illinois' requirements for vehicle inspections, escorts, etc. did cause delays, but were in furtherance of Federal regulatory compliance programs, and (thus) hardly could be called unnecessary.

The Administrator has also held that a permit system (with or without a fee) must rise or fall on the program that supports it.

Simply stated, the Maryland Heights ordinance offers nothing in furtherance of any compliance program (Federal or otherwise). Thus, precedent demands that it be ruled inconsistent.

Furthermore, practical realities demand a similar ruling.

The City sits at the confluence of major Interstate highways. Even if one were to assume minimal enforcement efforts (by the City), the prospect of seeing scores of vehicles, pulled off the road for a determination of whether or not they were (appropriately) bonded and were (at the same time) "...hauling...hazardous...wastes..." begs contemplation and exemplifies unnecessary delay.

Another "practical" consideration is a fact of economic life, to wit: those carriers knowledgeable about the Maryland Heights ordinance and having no pick up or delivery points within that City, will follow their business instincts and go "off route" to avoid the taxing jurisdiction. A bond--regardless of any other factors--costs money. Call it a tax or a fee, the reality presented by the ordinance is that a carrier, engaged in the transportation of specified commodities, must make additional expenditures to do business in that community. Whether alternative Interstates or other highways are used, the ordinance will prompt carriers (wishing to avoid such "additional expenditures) to reroute, causing extra miles and increasing the potential for exposure to an accident.

The knowledgeable carrier is faced with a "devil's alternative". On the one hand, it may suffer the cost of the bond and operate in the community; or, on the other hand, it may elect circuituous routes which tend to increase accident exposure. Of course, the carrier may choose to "run the gauntlet", and operate within the City without meeting the bonding requirement, hoping for non-enforcement. In any event, said carrier is confronted with a "no win" situation.

Further, we hold that even if a carrier did have a pick-up and/or delivery point within the City of Maryland Heights, the ordinance still fails the dual compliance test, in that transportation will be delayed until the carrier selects the vehicle, makes arrangement for the bond, obtains written verification that the bond is issued and transmits a copy of the bond to the vehicle driver (for verification in the event of a compliance action by Maryland Heights' officials). Again, and in reference to one of IRA-34's "tests", we submit that there is no regulatory or compliance program advanced or enhanced which would justify such activity.

THE OBSTACLE TEST

The Administrator adopted the obstacle test to protect the Congressional mandate against a "multiplicity" of state and other non-Federal regulations which would detract from the objectives of the HMTA. One of those objectives is put upon the Secretary, DOT to adequately protect the nation against the risks inherent in the transportation of hazardous materials.

The fact that the Congress was aware of the possibility that a "multiplicity" of regulatory structures would detract from hazmat safety is reinforced by the inclusion of the "preemption" and "waiver of preemption" sections within the statute. The Congress knew that special or unique circumstances in a community might well justify additional non Federal rules. Herein, however, Maryland Heights offers no such considerations on the record.

Simply stated, the Congress foresaw "multiplicity" as a potential problem, and gave the Secretary the means to deal with it.

NTTC respectfully submits that the potential threat of multiplicity has become reality. In IRA-34, the Administrator declined to rule the Illinois fee inconsistent--on the basis of its potential replication by other states--stating that such a finding would be "irrevelant". At the heart of this finding is the fact that the record (in IRA-34) is devoid of any material which would substantiate a claim that non-Federal jurisdictions would replicate a "consistent" fee structure. Furthermore, the Administrator held that such was a "burden on commerce" argument, therefore inappropriate for consideration in a Section 112 (a) proceeding.

NTTC acknowledges that the record (in IRA 34) may be lacking. At the same time, however, we submit that a general finding that a transit fee is "irrevelant" (to HMTA/HMR consistency) is a serious error and should be rectified in this docket.

In seeking refuge behind the "burden on commerce" argument, the Administrator has created a huge loophole through which jurisdictions, attempting to "export risk", could easily undermine the objectives of the HMTA. All such jurisdictions need do is enact a transit fee (regardless of the amount or

methodology (i.e. bonding vs. direct payment vs. hold harmless vs. named insured vs. etc.)); refuse to initiate a "waiver of preemption" proceeding; then, sit back and point to the immunity granted in IRA-34's "irrevelancy" finding.

Absent overt stupidity by the enacting jurisdiction, those challenging such fee structures would have to "play God" in attempting to prove that the real objective of the "transit fee" was to "export risk" (as opposed to the promotion of a bona fide safety program).

As noted above, even the First Circuit (a tribunal not schooled in transportation safety issues) recognized the potential for such abuse and pointed to the Department's inconsistency process as the ultimate safeguard.

In the case at hand, we will illustrate the dilemma, and NTTC will "play God". The ordinance, as enacted, will provide no monies to the community. There is no compliance methodology. The bonding requirement specifies neither guarantor nor beneficiary. There are no conditions (stated or implied) under which either the community or its representatives could lay claim to the bonded funds, for indemnity or otherwise.

Thus, guided by the Administrator's admonition (in IRA-34) that "the actual language of the law must govern", we can only conclude that the sole purpose of the Maryland Heights ordinance is to discourage "...hauling...hazardous...waste" in that community. Clearly, such is exportation of risk, and is a per se violation of the obstacle test.

SUMMARY

The political leadership of any community wants to protect its citizens against exposure to hazardous materials. Obviously, one way of doing so is to discourage the transportation of such commodities into, out of and through that community by the erection of administrative and/or financial barriers designed to impede transportation operations. More plainly stated--"...make life difficult enough for the truckers, and they'll go elsewhere".

Wittingly or unwittingly, the leadership of Maryland Heights is attempting to do exactly that. Moreover, and more importantly, a finding (by the Administrator) that such an ordinance is "consistent" with HMTA/HMR would be an open invitation to other non Federal jurisdictions to replicate the Maryland Heights action, and introduce chaos into the transportation of hazardous materials.

The potential for replication by other political entities is not "irrelevant". It is a real fact of life which (the Administrator must realize) can compromise safety by causing massive disruptions in traffic flows, as carriers seek to avoid jurisdictions which have enacted such financial and administrative barriers.

We respectfully remind the Administrator that while she is, indeed, subject to the constraints of the HMTA, she is also subject to the mandate of the DOT enabling act which directs the Secretary to "promote" transportation.

For those carriers seeking to comply with the Maryland Heights ordinance, it will cause delays in transportation as carriers seek to arrange bonding for specific vehicles, for specific amounts and to be applicable only while the vehicle is operated within specific geographic boundaries. There is no overall safety program being advanced or enhanced. As such, these delays are unnecessary and would prompt violation of the HMR.

For those carriers which elect to avoid Maryland Heights, they must reroute or decline to perform transportation services. Again, unnecessary delay is prompted.

QUESTIONS RAISED BY THE ADMINISTRATOR

In the FEDERAL REGISTER publication, the Administrator raised certain questions concerning bonds, and the costs thereof. NTTC believes that such should not be of material consideration in this proceeding.

Basically, a bond is a surety (or guarantee) reserved to meet obligations under a given set of circumstances. It is money held, generally by a third party, which may never be used. The cost of a bond (to a truck operator) will vary (generally) according to the financial stability of the operator. Bonds cost money, but there is no, one, set fee for bonding services. If one is a carrier with a good relationship with a bank (an entity which often provides bonding), the cost will be low or marginal. If the carrier has a poor or marginal credit standing, the cost will be quite high (since the bank "guarantees" the money--even though the money may never be "spent"--it has the accounting standing of an "outstanding loan")

(Note--I hereby certify that I have sent a copy of this filing to Mr. Moran as specified in the Federal Register.)

Respectfully submitted,


Clifford J. Harvison