APPEAL NO. 10-56465

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Plaintiffs - Appellants,

v.

THE CITY OF LOS ANGELES, THE HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES,

Defendants-Appellees,

NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, COALITION FOR CLEAN AIR, INC.

Defendants-Intervenors-Appellees.

INTERMODAL ASSOCIATION OF NORTH AMERICA, INC. TO PARTICIPATE AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Intermodal Association of North America, Inc. is a trade association organized as a nonprofit corporation under the laws of the State of Delaware. It has no parent corporation and issues no stock. Therefore, no publicly traded corporation owns 10 percent or more of its stock.

I. IDENTITY AND INTEREST OF *AMICUS CURIAE* INTERMODAL ASSOCIATION OF NORTH AMERICA, INC.

The Intermodal Association of North America, Inc. ("IANA") is North America's only industry trade association representing the combined interests of intermodal freight transportation companies and their suppliers. IANA's more than 900 members include steamship lines, railroads, motor carriers, and intermodal marketing companies. Its motor, water and rail carrier members transport over ninety percent of the Nation's intermodal traffic both throughout North America and overseas. That intermodal transportation service is primarily dependent upon the availability of drayage motor carriers which transport the goods from and to the ports in conjunction with the services provided by the water and/or rail carriers.

The Concession Plan, as implemented at the Port of Los Angeles, will impose adverse and unlawful regulatory requirements on the drayage motor carriers serving that facility, which is the leading container port in the United States based on container and cargo volumes. Additionally, the Concession Plan will adversely affect the water and rail transportation modes which rely on those motor carriers as a necessary link in performing the services they are required to provide in transporting intermodal freight. Any interruption in that transportation link will adversely affect the movement of intermodal freight in interstate and

foreign commerce by IANA's member carriers from and to that port, and negatively impact their ability to serve their customers. Accordingly, IANA has a direct interest in supporting American Trucking Associations, Inc. ("ATA") in its appeal seeking reversal of the District Court's decision that the Concession Plan does not constitute an unreasonable burden on interstate commerce.

IANA has been directed by its Board of Directors to submit this *amicus* brief in support of ATA in seeking reversal of the District Court's decision.

II. SUMMARY OF ARGUMENT

The District Court, relying upon the "market participant" exception to federal preemption, has erroneously concluded that the employee driver, the off-street parking, the placard, and the financial capability provisions of the Concession Plan, although not matters properly within the safety exception to the Federal Aviation Administration Authorization Act of 1994 ("FAAA Act") are not regulatory matters, but are proprietary matters outside the reach of federal preemption. The "market participant" finding is simply a convenient, but incorrect, rationale invoked to evade the patent burdens imposed by the Concession Plan on interstate commerce and on motor carrier rates, routes and services subject to federal preemption. Moreover, even under the "market participation" rationale, the designation of placarding and off-street parking as proprietary matters is contradicted by federal regulations which address such

activities. In sum, the District Court's conclusion that the provisions of the Concession Agreement at issue do not constitute an unreasonable burden on interstate commerce under 49 U.S.C. Section 14504a(c) constitutes reversible error.

III. ARGUMENT

A. The District Court Correctly Found That Key Elements Of The Concession Plan Would Run Afoul Of Federal Preemption, But Failed To Hold That Other Provisions Also Are Preempted.

The parameters of what matters constitute legitimate "safety concerns" falling within the state exception to federal preemption regarding interstate motor carriers have been clearly delineated. Congress enacted the FAAA Act to further deregulate the federal motor carrier industry, and in so doing broadly preempted state regulation of motor carriers. The statute specifically provides that:

> A State, political subdivision of a State, or political authority of two or more States may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier. (49 U.S.C. Section 14501(c)(1)).

As is well recognized, the Act does preserve to the States certain regulatory authority concerning interstate motor vehicles. As stated in 49 U.S.C. Section 14501(c)(2)(A), federal preemption does not:

> [R]estrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to

> regulate motor carriers with regard to minimum amounts of financial responsibility relating insurance requirements and self-insurance authorization.

Historically, as pertains to the regulatory authority of the States over interstate motor carriers it has been recognized that their jurisdiction over safety is limited to the exercise of their general police powers governing the operation of motor vehicles over the highways. *See Coordination of Motor Transportation*, 182 I.C.C. 263, 371 (1932). In *Rubin and Greenfield Common Carrier Application* , 33 M.C.C. 383, 389-90 (1942), the Interstate Commerce Commission ('ICC")concluded that:

> It has been held that, in the absence of national legislation occupying the field, a State may, within certain limits, regulate interstate commerce, and, even in the face of Federal legislation the States retain authority to promulgate appropriate regulations to promote safety upon their highways and the conservation of their use which do not unduly burden interstate commerce and which are applicable alike to vehicles moving in interstate commerce and those of its own citizens. (Citing *Buck v. Kuykendall*, 267 U.S. 307; and *South Carolina State Highway Dept. v. Barnwell Bros, Inc.*, 303 U.S. 177 (1938).

Similarly, in *House Contract Carrier Application*, 1 M.C.C. 725, 735 (1937), the ICC pointed out that all motor carriers operating over a state's highway "must observe all valid regulations and restrictions respecting the use of the highways issued by the States, counties, and municipalities in the exercise of their police powers." That authority, in the absence of Federal legislation, was deemed to

include the ability of a state to prevent the wear and hazards created by the operation of motor vehicles of excessive size or weight over those roads. *See Werner Transp. Co. v. Hughes*, 19 Fed. Supp. 425, 431 (N.D. Ill. 1937); and *Houston & North Texas Motor Frt. Lines v. Phares*, 19 Fed. Supp. 420 (N.D. Tex. 1937).

With the enactment of Section 6(e)(6)(c) of the Department of Transportation Act, Pub. L. 89-670, eff. Oct. 15, 1966, initially codified as 49 U.S.C. Section 303, the ICC's safety regulation of interstate motor carriers was transferred to the U.S. Department of Transportation ("DOT"). DOT's safety oversight was recognized as related to matters pertaining to safety of operation and of motor carrier equipment. *See National Assn. of Motor Bus Owners v. United States*, 370 F. Supp. 408, 419 (D.D.C. 1974). That fact is also abundantly clear from the specific regulatory authority which has been vested in the DOT Secretary of Transportation regarding motor vehicles. In 49 U.S.C. Section 31136(a)(1), the Secretary is to prescribe minimum safety standards to ensure that "commercial motor vehicles are maintained, equipped, loaded, and operated safely."

Read in its historical and regulatory context, it can be seen that the "matters not covered" by the preemption provisions of state law specified in 49 U.S.C. Section 14501(c)(2) properly and exclusively are related to traditional state regulatory authority over motor carrier operations on the State's highways. As

pertinent, Section 14501(c)(2)(A) only codifies those safety regulatory powers which have long been reserved to the States: namely, motor carriers operating over their highways, the control or limitation of the size or weight of the motor vehicles or the hazardous nature of the cargo transported, and the minimum amounts of financial responsibility related to insurance requirements and self-insurance authorization. Any other safety matters are preempted by Section 14501 (c)(1) of 49 U.S.C.

Congress, in enacting the FAAA Act, made it abundantly clear that in excepting the traditional areas of permissible state safety regulation from preemption, it was not expanding that authority. In responding to concerns that the statute granted additional authority to the States to regulate interstate motor vehicles, Congress explained that:

> The conferees emphasize that nothing in these new subsections contains a new grant of Federal authority to regulate commerce and nothing in these sections amends other Federal statutes that govern the ability of States to impose safety requirements (H.R. Conference Rep. No. 103-667 at p. 84 (1994), reprinted in 1994 U.S.C.C.A.N. 1715).

The court below correctly found that the employee driver and the off-street parking provisions in the Concession Plan are preempted. However, it erred in failing to hold that the maintenance, placard, and financial capability provisions also are preempted (*American Trucking Associations, Inc. v. The City of Los Angeles, Et Al.*, Case No. CV 08-4920 CAS (RZx), at PP. 31-33, dated August 26,

2010.) Plainly, vehicle maintenance and placards are matters entrusted to federal regulation, and are not, and have never been, within the domain of state safety regulation. Further, the financial capability provision solely concerning compliance with the Concession Plan does not fall within the limited exemption provided in 49 U.S.C. Section 14501(c)(2)(A) for financial responsibility related to insurance requirements and self-insurance authorization.

B. The "Market Participant" Exception Does Not Apply To Matters Plainly Within The Exclusive Purview Of Federal Regulation.

The court below, citing *Engine Mfrs. Ass'n. v. South Coast Air Quality Management Dist.,* 498 F.3d 1031, 1040-41 (9th Cir. 2007), correctly recognized that "the market participant doctrine distinguishes between the role of the state or local government as a regulator and its role as a market participant; and that the doctrine only applies when the state or local government action is proprietary. The preemption doctrine does not apply when the action is regulatory. *See American Trucking Associations, Inc. v. The City of Los Angeles, Et Al.,* Case No. CV 08-4920 CAS (RZx), at pp. 40-41. Based on its analysis the court held that the Port's Concession Plan is "essentially proprietary" because the action helps the Port to manage its property and facilities. *Id.,* at 45. That finding is in direct conflict with matters that patently are recognized as regulatory in nature and subject to Federal jurisdiction. Accordingly, the court erred in holding that the

Concession Plan falls within the market participant exception to preemption.

The very regulations of the U.S. Department of Transportation, Federal Motor Carrier Safety Administration ("FMCSA") refute the characterization of the involved areas of the Concession Plan as proprietary rather that regulatory. The following provisions of the Code of Federal Regulations establishes areas deemed subject to Federal regulation: Minimum Levels of Financial Responsibility for Motor Carriers (49 CFR Part 307); Qualification of Drivers and Longer Combination Vehicle Driver Instructions (49 CFR Part 391); Driving of Commercial Motor Vehicles (49 CFR Part 392); Parts and Accessories Necessary for Safe Operation (49 CFR Part 393); Transportation of Hazardous Materials, Driving and Parking Rules (49 CFR Part 397); and General Placard Requirements (49 CFR Part 172. 504). Moreover, in a ruling issued by the FMCSA on October 10, 2010, in Docket No. FMCSA-2009-0271, *Identification of Interstate Motor Vehicles: New York City, Cook County and New Jersey Tax Identification Requirements; Petition for Determination* , it was concluded that Section 14506(a) of 49 U.S.C. prohibits States and their political subdivisions from requiring motor carriers to display in or on commercial motor vehicles any form of identification other than forms required by the Secretary of Transportation , with certain exceptions identified in Section 14506(b). Those exceptions refer to the International Registration Plan, the International Fuel Tax Agreement, state

requirements for license plates, Federal hazardous materials regulations, and Federal vehicle inspection standards—none of which involve the placard requirements that are to be established under the Concession Plan.

Unequivocally, the provisions of the Concession Plan pertaining to the employee drivers, off-street parking, truck maintenance, placards, and the financial capability of the motor carriers are already matters within the regulatory reach of the FMCSA, and are not proprietary matters beyond the reach of Federal preemption.

IV. CONCLUSION

To preserve Federal regulation of the interstate motor carrier industry, Congress enacted the FAAA Act preempting any state laws or regulations that are related to the price, route, or service of any motor carrier. It only preserved to the States and their political subdivisions that regulatory authority pertaining to the safe operations of motor vehicles over their highways and the financial responsibility of motor carriers to meet their insurance requirements.

The Concession Plan, as approved by the court, involves provisions which are regulatory and not proprietary. As such, the court erred in not finding that those provisions are preempted by Federal law as they do not, and cannot, fall within the market participation exception to preemption.

Respectfully submitted,

Date: January 4, 2011

s/ Mark I. Labaton
Mark I. Labaton

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because contains 2,547 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: January 4, 2011

s/ Mark I. Labaton
Mark I. Labaton