

FAAAA Preemption in the Supreme Court: AMERICAN TRUCKING ASSOCIATIONS V. CITY OF LOS ANGELES

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Currently pending before the Supreme Court is Docket No. 11-798, *American Trucking Associations, Inc. v. City of Los Angeles, California*, an appeal of the decision of the United States Court of Appeals for the Ninth Circuit in *American Trucking Associations, Inc. v. City of Los Angeles, et al.* The Natural Resources Defense Council, the Sierra Club, and the Coalition for Clean Air, Inc. intervened before the Ninth Circuit in support of the City. Respondents at the *certiorari* stage in the Supreme Court are these same intervenors; and, in addition, the following parties filed papers in opposition to the City and in support of the ATA: the United States Chamber of Commerce and The National Industrial Transportation League (jointly), the Center For Constitutional Jurisprudence and Harbor Trucking Association (jointly), Owner-Operator Independent Drivers Association, Inc., and Airlines for America.

The issue is whether the motor carrier provisions of the Federal Aviation Administration Authorization Act (“FAAAA”), 49 U.S.C. § 14501, *et seq.* preempts an action of the City of Los Angeles (“City”) regulating drayage services at the Port of Los Angeles (“Port”).

The Port is an independent division of the City managed by its Board of Harbor Commissioners for the Ports of Los Angeles and Long Beach (“Board”). Beginning in 1997, the Port tried to expand and met with significant environmental opposition. One of the issues was emissions from trucks that provided drayage services to and from the Port. Drayage is an element of intermodal freight transportation that consists of the movement of containerized cargo by trucking companies between ocean

ports to rail ramps or to the docks of local shippers or warehouses. For example, warehouses unpack and re-sort the contents of containers for delivery in a larger semi-trailer to a final customer such as a retail store outside of the area of the Port.

The Port develops terminal facilities and then leases those facilities to shipping lines and stevedoring companies that then process the continued movement of the containers. The Port handles more shipping container and cargo volume than any other Port in the United States.

In response to the opposition to Port expansion, the Board adopted a Clear Air Action Plan (“CAAP”) in November 2006. In the CAAP, the Port announced its intention to “grow green” and achieve a 45% reduction in total emissions by 2012. Recognizing that trucks are a major source of air pollution at the Port, the CAAP directed Port staff to undertake a 5-year effort to replace or retrofit the entire fleet of over 16,000 trucks that regularly serve the Port. In addition, the CAAP issued an Order approving Concession Agreements and providing that, effective October 1, 2008, terminal operators shall not permit access into any terminal in the Port to any drayage truck unless it is registered under a Concession Agreement or a Day Pass from the Port. The Concession Agreements created a direct contractual agreement between the Port and the motor carriers providing drayage services.

The five provisions of the Concession Agreements that were at issue before the Ninth Circuit require the motor carriers, known as Concessionaires, to: (1) transition over five years to using 100%

employee drivers rather than using independent owner-operators; (2) submit for approval an off-street parking plan that includes off-street parking locations for all permitted vehicles (“Permitted Trucks”) and requires Concessionaires to ensure that Permitted Trucks are in compliance with parking restrictions by local municipalities; (3) be responsible for vehicle condition and safety and must ensure that the maintenance of all Permitted Trucks is conducted in accordance with the manufacturer’s instructions; (4) post placards on all Permitted Trucks when the trucks are entering and leaving Port’s property and while on port property (the placards shall refer members of the public to a phone number to report concerns regarding truck emissions, safety, and compliance to the Concession Administrator and to the authorities); and (5) demonstrate financial capability to perform their obligations under the Concession Agreements.

The American Trucking Associations, Inc. (“ATA”) challenged the City’s action as pre-empted under a provision of the FAAAA, 49 U.S.C. Section 14501(c)(1), that states: “. . . a State, political subdivision of a State, or political authority of 2 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” Moreover, ATA contended, the safety exception found in 49 U.S.C. §14501(c)

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(2)(A) that exempts safety regulation from preemption is not applicable.

The Ninth Circuit, in a 2-1 decision authored by Judge Betty B. Fletcher, affirmed in part and reversed in part the unreported opinion of the District Court and the Board's Order finding no preemption except with respect to the employee-driver provision.

The Court's decision turned on two primary points: (1) the City acted as "market participant" and thus akin a private entity as opposed to a governmental agency; and (2) the City was not regulating interstate commerce in the way a government body was in the U.S. Supreme Court's decision in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 75 S.Ct. 191, 99 L.Ed. 68 (1954), where Illinois suspended a motor carrier's operations for habitual safety violations.

Regarding the "market participant" doctrine, the Ninth Circuit Court stated:

We hold that when an independent State entity manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State's position, the State may claim the market participant doctrine. Here, the Port leases its facilities to terminal operators, and permits drayage trucks to access its facilities, for the purpose of moving cargo through the Port and increasing Port revenues. The Port has a financial interest in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent with the Port's overall goals for facilities management.

The Ninth Circuit then went on to uphold all of the above provisions of the Concession Agreement under the "market participant" doctrine except the employee-driver condition. Reversing that holding of the District Court, the Ninth Circuit stated that:

. . . the employee driver provision seeks to impact third

party behavior unrelated to the performance of the concessionaire's obligations to the Port. One of the Port's primary motives in adopting the employee driver provision was to increase stability in Port drayage by ensuring that drivers were paid higher wages. As a facilities provider, the Port has an interest in continued provision of drayage services, but it may not obtain that stability by unilaterally inserting itself into the contractual relationship between motor carriers and drivers.

Turning now to the *Castle* argument by the ATA, *Castle* involved a motor carrier transporting goods to and from points in Illinois and seven other states under a certificate of public convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act in effect at the time. Illinois had a statute which limited the weight of freight that can be carried in commercial trucks over Illinois highways and provided for a balanced distribution of freight loads in relation to a given truck's axles. The punishment for repeated violations of these provisions was total suspension of the carrier's right to use Illinois state highways for periods of ninety days and one year. The motor carrier here sought to restrain Illinois from prosecuting it and prevailed in the lower courts. Illinois appealed and, in a unanimous decision authored by Justice Hugo Black, the U.S. Supreme Court held that only the Interstate Commerce Commission could suspend or revoke a motor carrier's right to do business in interstate commerce.

The Ninth Circuit distinguished *Castle* and applied the safety exception in the FAAAA stating:

[*Castle*] does not stand for the proposition that the States have no power to limit motor carrier access to particular land in order to further safety. Even if the FAAA Act incorporated (rather than modified)

Castle's limitations on the State's authority, *Castle* does not preclude the Port from permitting access only to motor carriers that comply with its safety restrictions. Unlike a ban on using *all* of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in 'transport [of] interstate goods to and from that State' or eliminate 'connecting links to points in other states.' *Id.* at 64, 75 S.Ct. 191. While a denial of access to the Port may have more effect on motor carriers than a traditional fine, it does not rise to the level of the comprehensive ban at issue in *Castle*.

The ATA and its supporting parties persuaded the Supreme Court to review the Ninth's Circuit decision. The ATA, of course, contends that the Port's action was regulatory and not the action of a "market participant," and that the Supreme Court is bound by its precedent in *Castle*.

An interesting comparison here is between a traditional state agency such as a Department of Transportation or Public Utilities Commission, on the one hand, taking an action affecting rates, routes, or services, and on the other hand, a quasi-state agency like a Port that does compete in the marketplace. This case presents an opportunity for the U.S. Supreme Court to clearly define the distinction between a Port and other state agencies. If the Court does so, the decision could have ramifications beyond the FAAAA. Briefing is underway and oral argument is scheduled for April 16, 2013. Notably, the U.S. Solicitor General has filed a brief in support of ATA. 