

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY

TRANSPORTATION LAW ALERT

This is an update to inform you of the most recent development in the American Trucking Associations' ("ATA") challenge to the Port of Los Angeles ("POLA") and Port of Long Beach ("POLB") Concession Agreements. The firm is helping to represent the ATA in this matter and today the ATA received an important victory for its constituents in the form of a decision issued by the 9th Circuit Court of Appeals. In its decision, the court sided with the ATA and remanded the case to the federal district court with instructions to decide, as quickly as possible, whether each Concession Agreement should be subject to a preliminary injunction in its entirety, or whether only parts of the Concession Agreements should be subject to a preliminary injunction. American Trucking Associations, Inc. v. City of Los Angeles, C. No. 08-56503 (9th Cir., March 20, 2009). In either event, the POLA's independent contractor phase out provision will be subject to the preliminary injunction.

The ports did not appeal the district court's conclusion that the Concession Agreements were a regulation of motor carrier prices, routes, or service under the Federal Aviation Administration Authorization Act ("FAAAA"). What was appealed, by the ATA, was the district court's conclusion that the Concession Agreements were nevertheless likely to escape preemption under the safety regulatory exception to the FAAAA. The Court of Appeals disagreed with the district court on this important point. The district court had found that the ATA was not likely to succeed because the Concession Agreements were protected from preemption by the FAAAA exception for the "safety regulatory authority of a State with respect to motor vehicles." The Court of Appeals stated that "the narrow question, again, is whether the provision is intended to be, and is, genuinely responsive to motor vehicle safety." Id. at 16. Unlike the district court, the Court of Appeals then considered whether each individual requirement in the Concession Agreements was preempted.

With respect to the Ports' purported safety justifications, the court stated "We see little safety-related merit in those thread-paper arguments, which denigrate small businesses and insist that individuals should work for large employers or not at all." Id. at 18. Thus, the court held that the contractor phase-out provision of the POLA Concession Agreement was "highly likely to be shown to be preempted." Id. The court then went on to consider other provisions of the Concession Agreements. Among the other provisions the court deemed likely to be preempted as unresponsive to motor vehicle safety were the job posting and "experienced driver first" provisions in each ports' Concession Agreement. Likewise, financial disclosure requirements were deemed unlikely to survive preemption. Lastly, the court determined that POLA's on-street parking ban was likely preempted. Id. at 19.

The next step was for the court to determine whether ATA had shown a likelihood of irreparable harm. The district court had held that the ATA failed to do so, but once again, the Court of Appeals disagreed. The court characterized the choice imposed upon carriers by the Concession Agreements as follows:

A motor carrier can refuse to sign the likely unconstitutional Concession agreements, and what will ensue, according to the record, is at the very least a loss of customer goodwill- or, indeed, of the carrier's whole drayage business. It is apparent that a carrier could not pick up a customer's goods at the Ports, if it could not even get to those goods. That goodwill would evaporate does not appear speculative at all . . . If a motor carrier, however, signs a Concession agreement, or both Concession agreements, its plight is not much better. First, it will have been forced to sign an agreement to conditions which are likely unconstitutional because preempted. Second, especially as to the Los Angeles Port Concession agreement, the carrier will be forced to incur large costs which, if it manages to survive those, will disrupt and change the whole nature of its business in ways that most likely cannot be compensated with damages alone.

Id. at 22. Having found likelihood of preemption, and likelihood of irreparable harm, the court remanded to the district court whether all or only portions of the Concession Agreements should be subject to preliminary injunction. Id. at 26. Prompt action is expected by the district court as the Appellate Court's decision is effective immediately.

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