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INTERNATIONAL TRADE ALERT

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ATA Finally Wins

On Friday, March 20, the Ninth Circuit issued its decision in the case the American Trucking Association brought against the Ports of Los Angeles and Long Beach. Interveners in the case were the National Resources Defense Counsel, the Sierra Club, and the Coalition for Clean Air, Inc. The trial court refused to issue a preliminary injunction against certain sections of the Clean Air plans of the Ports. In issuing its decision, the appellate court held the likelihood of success favored the ATA regarding many of its claims, and so reversed and remanded the case for further action by the trial judge.

The ATA challenged the Ports' concession agreements on the grounds that they violated the federal preemption contained in the Federal Aviation Administration Authorization Act, 49 USC § 14501(c), which deregulated the trucking industry. The ATA argued the concession plans of the Ports attempted to regulate the "price, route, or service" of its trucker-members. The trial court held the actions of the Ports were valid under an exemption which allows States to regulate the safety of motor vehicles. The Court of Appeals completely disagreed.

The concession agreements are similar in many ways. They took effect on October 1, 2008, and had the goal of imposing a progressive truck ban on pre-1989 trucks, but did not stop there.

The Los Angeles concession agreement also required truckers to:

1. remain licensed and in good standing;
2. enter, verify, and update identifying information for each truck and driver;
3. be equipped with RFID tags;
4. provide off-street parking outside the Port area;
5. submit maintenance and parking plans for each truck; and
6. the most controversial provision - mandated that after five (5) years, all drivers must be employees rather than independent owner-operators.

Los Angeles also expected truckers to comply with federal and state laws, obtain automobile liability insurance, obtain workers' compensation insurance, agree to safety and security inspections, submit to audits, and file numerous reports.

The Long Beach concession agreement required truckers to:

1. comply with state and federal law;
2. enter and update information for trucks and drivers;
3. be equipped with RFID tags;
4. prove drivers were notified about available health insurance;
5. ensure drivers properly maintain trucks and comply with laws regulating on-street parking and truck routes;

6. maintain general liability and automobile liability insurance;
7. permit safety and security inspections; and
8. agree to audits and file numerous reports.

Both Ports also required financial disclosures, including for public companies, annual reports, SEC filings, and notice of pending legal action. If the company was privately held, balance sheets, tax statements, and disclosure of pending legal action was required.

Finding first the intent of the law deregulating trucking was unquestionable, the Court of Appeals went on to reinforce the broad scope of that law, making clear that, "if the regulation has more than an indirect, remote or tenuous effect on the motor carrier's prices, routes or services," it must be struck down. In this case, the trial court held ATA would succeed with its argument that the programs of both Ports were an attempt to regulate "prices, routes or services."

The Ports and amicus parties argued environmental concerns, as well as safety and security concerns. Despite these important considerations, the Ninth Circuit held both plans went too far, finding many of the provisions had little, if anything, to do with regulating the safety of the trucks. Put another way, the test for the court was "whether the provision is intended to be, and is, genuinely responsive to motor carrier safety. It is rather clear that some, indeed many, of the provisions of the Concession agreements are not likely to live in the light cast by that strobe."

The Court noted in particular LA's requirement for truckers to be employees as denigrating the role of small business and insisting that individuals work for large employers or "not at all." At the same time, the Court also noted the job posting and experienced-drivers first requirements, as well as the financial disclosure, notification to drivers about health insurance, bans of on-street parking, and compliance with parking, and truck routes criteria, are all provisions which are likely to be struck down as the lawsuit proceeds.

The ATA sought an injunction before the trial court, and so, after finding the ATA met the first prong - likelihood of success - the Court of Appeals spent the rest of its decision analyzing the remaining elements which apply.

1. Likelihood of Irreparable Harm - the Ninth Circuit held the Hobson's choice presented by sign or lose your business was sufficient to establish irreparable injury, especially in light of what the Court described as the "unconstitutional" provisions in the concession agreements.
2. Balance of Equities - acknowledging the Ports have significant concerns, the Ninth Circuit found the public interest in enforcing Congressional intent as enacted along with the Constitution's declaration that federal law is supreme outweighed the legitimate concerns of the Ports.

The Ports included severance provisions in their concession agreements, meaning that, if a particular provision is found to be unenforceable, it may be severed from the remaining provisions but the overall agreement remains in effect. Recognizing that several key provisions are likely to be struck down as the matter progresses, the Court sent the matter back to the trial judge to decide whether the entire agreement of each Port should be enjoined, or whether the injunction should be issued against only certain provisions. The Court indicated it did so in order that a proper determination could be made whether it would be practical to continue to enforce either concession agreement as major portions are being enjoined.

So what happens next? At this stage, the matter goes back to the trial judge for further action, the exact form of which remains to be determined. It is, of course, possible, under the right circumstances,

to appeal an injunction, but first the specific terms need to be in place and that has not happened here yet. So will the parties now settle? Will the politics that particularly permeated the LA plan finally get directed elsewhere? Will the Ports figure out a way to proceed with their worthy environmental goals without mucking up the trucking industry in the process? Stay tuned; this issue is far from resolved.

Mexico Plays Hardball

When President Obama recently signed the budget bill, it included a provision which eliminated funding for the pilot program that allowed Mexican trucks to enter the U.S. No sooner was that bill signed than the Mexicans did what they have been threatening to do for some time if the U.S. did not live up to its NAFTA obligations - retaliate. And retaliate they did, with a vengeance. The list of products on which sizable additional duties are being imposed can be found at http://www.msk.com/download_files/MexicoTrucking.pdf, and is thought to involve $2.4 billion worth of U.S. exports ranging from food, fruit, beer, and wine, to books, yarn, toilet paper, sunglasses, and washing machines. H.R. 1611 has been introduced to repeal the language that ended the pilot project.

Whether or not you subscribe to the motives being suggested as behind this move to end the trucking access program, the fact remains that President Obama will be visiting Mexico in April and Secretary of State Clinton is there this week. It seems likely something will be worked out shortly, but this set of circumstances does suggest international traders need to carefully monitor protectionist measures as they arise.

It is also worth keeping in mind that, in a recent interview with CNN, DHS Secretary Napolitano identified the Mexican drug war and the related violence it is causing as one of the two biggest security concerns facing the U.S. right now, the other being the state of the economy. It certainly does not bode well for Mexico's continued cooperation on the security front when basic trade agreement provisions are unilaterally altered.

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