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May 21, 2010

To: ATA Executive Committee
ATA Litigation Center Board of Directors

From: Robert Digges, Jr.

Re: Litigation Update – May 2010

An update on the primary ATA litigation matters is provided below:

- California Port Challenge - ATA presented its case against the Port of Los Angeles Concession Agreement requirement during a two-week trial in late April. Then on May 14, 2010, ATA submitted its post-trial brief concluding the trial process and effectively submitting the matter for final decision by the District Court. A decision by the Court is expected within a relatively short time frame, likely before the end of June. The District Court's decision is then expected to be appealed to the Ninth Circuit by the losing party, a process that will take more than another year to reach a final decision.

The trial focused on three primary issues. First, at issue was whether the various provisions of the Concession Agreement impact motor carriers' rates, routes, and services so as to trigger possible preemption. While the port contested this point, the testimony established that various provisions of the Agreement, most notably the owner-operator ban, would restrict the types of services provided by motor carriers and greatly increase their costs which would lead to a significant impact on rates. The evidence supported the Ninth Circuit's earlier observation that the Concession Agreement's impact on rates, routes, and services could "hardly be doubted."

The second issue involved whether the four elements of the Concession Agreement specifically challenged by ATA (the owner-operator ban, the financial capability requirement, the maintenance provision, and the placard requirement) were protected from preemption as regulations enacted in response to a genuine motor vehicle safety concern (an express exception to the otherwise broad preemptive scope of the statute). On this issue, ATA presented evidence that the port had never identified any safety problems that were supposedly related to these requirements; had never done any studies, collected any data, or otherwise confirmed that there was a problem; and had not factored in its existing safety enforcement authority which could be used to address any legitimate safety concern. The testimony focused on the owner-operator ban provision and aided by the testimony of Annette Sandberg, former Federal Motor Carrier Safety

Administrator, and four motor carrier representative witnesses, ATA showed that the port's only stated safety justification for the owner-operator ban, an alleged lack of motor carrier accountability for owner-operators and their trucks, was simply wrong. It was shown that motor carriers, for safety regulatory purposes, have the same legal responsibility for and control over owner-operators and their trucks as they do for employee drivers and company-owned trucks. It was also demonstrated that the port, via its gate-check process, has a perfect enforcement environment by which to assure satisfaction by all motor carriers of those safety obligations. We concluded, in short, that the ban, far from being enacted to respond to a safety concern, was simply an excuse for the port to impose economic-type regulation on the drayage industry to advance the port's non-safety goals.

The third issue presented was whether the port's regulations could be excused as those of a participant in the drayage market and not as a government regulator, a general exception to preemption. Although the District Court had rejected this defense at the injunction stage (a ruling applauded by the Ninth Circuit as "cogent"), the port placed a great deal of emphasis on this issue at trial. In short, the port claimed that because it is running a port that competes with other ports around the country, all of its operations are proprietary in nature and protected from preemption. The port also contended that its subsidies for clean truck purchases made it a participant in the drayage market. Our evidence at trial supported our legal analysis that for the market participant exception to apply, the port must itself be directly engaging in the purchase or sale of drayage services, an activity with which it is admittedly not involved. We further presented evidence that the truck subsidies do not make the port a participant in the drayage market, rather they reflect normal governmental expenditures designed to further broad governmental goals including economic development and environmental responsibility.

In my view, the trial went exceptionally well and ATA provided compelling evidence supporting every one of our legal claims. We can only hope, however, that the District Judge shares that view and is guided by the strong Ninth Circuit decision that led to the establishment of a preliminary injunction against the challenged elements of the Concession Agreement.

- Supporting Documents - In January 2010, with the Executive Committee's approval, we filed a mandamus action with the U.S. Court of Appeals seeking an order that would require the FMCSA to issue a regulation defining the supporting documents that must be retained to verify hours-of-service compliance. This action was taken because the agency had ignored a Congressional directive from 1994 to promulgate such a regulation that would have precisely defined what constituted a supporting document and done so in a way that retention costs for motor carriers would be reasonable. Instead, by informal guidelines, the agency adopted as broad a definition of supporting document retention as is possible, identifying up to 45 categories of records and ruling that any document that "could" possibly be used to verify hours-of-service records needed to be retained; an expansive view which by the agency's own estimate would cost the trucking industry over \$1.1 billion annually in retention costs. The problems associated with this broad interpretation were exacerbated in 2008 when the FMCSA reversed its policy on

electronic records and announced that such records must in the future be made immediately available to hours-of-service compliance auditors upon their request.

Because securing a final rule via the litigation process would take at least a year and probably longer, we approached FMCSA in an effort to reach a settlement that would more quickly address our concerns. Following an initial meeting, we submitted to the agency a proposal by which we would agree to a more relaxed schedule for the adoption of a final supporting-documents regulation. Coupled with this, however, would be the issuance by the agency of appropriate regulatory guidance that would mitigate the industry's concerns with the current application of the supporting documents regulation while the new regulation was being developed. While we appreciated that we could not dictate to the agency the terms of this guidance, we explained what we would find acceptable in such guidance. In short, we suggested that the guidance should narrow the current all-inclusive approach and limit the documents that must be retained to a much more manageable and limited set of records. We also suggested that with respect to electronic records the guidance should notify the carriers that they were under no obligation to keep such records in a particular format so as to make them more useful for hours-of-service compliance review unless the carrier itself chose to use the electronic record for log verification purposes. Finally, we suggested that the agency instruct its auditors to review a carrier's existing supporting-document system before resorting to requests for electronic records not used by the carrier.

Based on these discussions and our proposal, we agreed with the agency at a March 18 meeting that we would hold the litigation in abeyance for a 10-week period while the agency developed the regulatory guidance discussed. It was understood that the agency was not bound to adopt the proposed elements of the guidance suggested by ATA. It was also understood that if the guidance did not in our view sufficiently address our concerns, ATA would be free to pursue its litigation options. The 10-week deadline falls on May 28, ten days before the Executive Committee meeting. We anticipate being able to brief the Committee on the terms of the regulatory guidance and to make a recommendation as to whether the guidance sufficiently protects our interests so as to allow us to continue to keep the litigation on hold while the agency undertakes completion of a final supporting-documents rule in a more relaxed time frame.

- California TRU - In an April decision, the District of Columbia Circuit, in a 2-1 decision, denied ATA's appeal of an Environmental Protection Agency (EPA) ruling that allows California to enforce its Transportation Refrigeration Unit (TRU) regulation. The regulation requires all TRUs more than seven years old to meet emission standards more stringent than federal requirements. ATA argued that by applying the TRU regulation to any unit that entered the State even once in its useful life, California was creating a *de facto* national standard that would effectively regulate the vast majority of TRUs nationwide. ATA submitted that this virtual national impact of the regulation violated the Clean Air Act (CAA), which mandates that other states must have the option of either adopting or not adopting this type of unique California air-quality requirement.

Despite recognizing that the affect of the TRU regulation would be “that TRUs carried on vehicles based primarily in another state must comply with the California rule,” the majority found that the fact that other states retained the option of not formally adopting the regulation was all that was necessary. Referring to the sweeping application of the TRU rule, the dissenting Judge agreed with ATA that it “would effectively vitiate other states’ prerogative to choose whether to embrace [the TRU regulation] themselves.” He then opined that the regulation should be sent back to the EPA for it to determine whether in its view rules that create *de facto* national standards are consistent with the CAA and if not, the permissible level of “spillover effects on other states” that a unique California rule may have.

On May 17, 2010 ATA filed a petition asking the Court of Appeals to reconsider the divided panel’s decision. The petition is seeking what is referred to as an *en banc* rehearing, a process by which all of the judges in the Circuit would reconsider the decision of the original 3 judge panel. While *en banc* review is seldom granted, ATA’s chances are enhanced by the strong dissent which concluded that the agency’s decision was “a paradigmatic instance of an agency’s failure to examine relevant data and articulate a satisfactory explanation for it action.”

- Other Litigation Matters - Three of the cases in which ATA filed *amicus* briefs were decided in favor of the industry’s interests.

Hertz Decision - In a United States Supreme Court case, the Court unanimously ruled that a corporation’s principal place of business should not be determined based upon the state where it does the plurality of its business. Rather, the principal place of business is its “nerve center” or headquarters from which its corporate actions are directed and controlled. The decision was important because a company’s principal place of business controls jurisdictional issues as to accessibility to federal court. Applying a plurality of business standard would have resulted in many national companies being viewed as having their principal place of business in California because of its size and economic importance. That would have forced them to litigate more often in California state court against California plaintiffs because removal to federal court on diversity grounds would not be available.

Kansas Overtime Case - The Kansas Court of Appeals rejected a class action claim by interstate drivers that they are eligible for overtime under the State’s overtime statutory provisions. The federal Fair Labor Standards Act exempts drivers and other motor carrier personnel whose work has a relation to motor vehicle safety from application of the federal overtime requirement. However, federal law in this area may be trumped by a state law that does not follow the federal system, but instead includes the drivers in those to whom overtime compensation must be paid. The plaintiffs in this matter alleged that that was the scenario in Kansas and that under state law drivers must be paid overtime. The Court of Appeals disagreed. The Court found that any employer that is jurisdictionally subject to the FLSA is entirely exempt from the Kansas wage and hour state law provisions.

Texas Workers Compensation Case - A Texas Court of Appeals reversed a lower court and dismissed a case in which a motor carrier was found liable for over \$350,000 in compensatory and \$3 million in punitive damages in a workers compensation case. The Court agreed with the motor carrier that the Indiana Workers Compensation Board had exclusive jurisdiction over the employee driver's fraud claim related to the administration of his workers compensation claim. Because the driver failed to first present his claims to the Board, the Court found that he had not properly exhausted his administrative remedies and that the Texas trial court lacked subject matter jurisdiction.