



November 24, 2009

Mr. Gabe Klein, Director
District Department of Transportation
Government of the District of Columbia
Frank D. Reeves Municipal Center
6th Floor
2000 Fourteenth Street, N.W.
Washington, DC 20009

Dear Director Klein:

The American Trucking Associations (ATA), the Maryland Motor Truck Association (MMTA), and the Virginia Trucking Association (VTA) are writing you concerning several provisions of the Proposed Commercial Curbside Loading Zone Management Plan (the Plan), a proposal outlined in a document of the same name (a copy is enclosed) submitted by the District Department of Transportation (DDOT) on November 4, 2009. ATA, MMTA, and VTA believe that the Plan's proposed credential requirements violate federal law (49 U.S. Code section 14506) and that the proposed truck permit fees violate the Commerce Clause of the U.S. Constitution.

ATA, based in Arlington, Virginia, is a national federation of all types and sizes of motor carriers, as well as allied industries, individual-member councils, affiliated conferences of specialized carriers, and fifty affiliated state trucking associations, representing altogether some 37,000 motor carrier members.

Founded in 1935, MMTA is a 950-member non-profit trade association that represents the state's trucking industry through a range of informational, educational, regulatory, legislative, and business-development initiatives.

VTA is a statewide, non-profit association of trucking companies, private fleet operators, industry suppliers, and other firms and individuals interested in the well-being of motor freight transportation at the local, state, and national level.

The Plan Provisions

The Plan appears to stem from legislation (the Commercial Curbside Loading Zone Implementation Act of 2009, Act 18-162) enacted earlier this year by the District of Columbia. Our observations below are not directed to this underlying legislation, which does not seem to involve the difficulties we see in the Plan.

Good stuff.



As we interpret the Plan, it would require a motor carrier using a loading zone in the District to pay for and display a permit. The permit would be available to a carrier on either a daily or an annual basis, and would in the first instance evidently take the form of a paper document to be displayed inside a vehicle cab and, in the case of the annual permit, of a decal to be displayed on the outside of the vehicle. We do not find in the Plan a discussion of the fees for daily permits, but fees for the annual permits vary by the length of time a carrier uses a loading zone and the size of the carrier's fleet. It is these provisions which we believe violate federal law.

Federal Law

Section 4306 of the 2005 federal highway reauthorization bill, SAFETEA-LU (P.L. 109-59), effective August 10, 2005, and codified at 49 U.S. Code section 14506, generally preempts state and local requirements for interstate motor carriers to display any form of identification in or on a commercial motor vehicle. The only exceptions are credentials required in connection with (1) the International Registration Plan, (2) the International Fuel Tax Agreement, (3) a state law regarding motor vehicle registration license plates, (4) federal requirements for the transportation of hazardous materials, (5) federal vehicle inspection standards, and (6) state weight-distance taxes. Section 14506 appears clearly to preempt the credential requirements associated with the Plan.

An identification requirement similar to the District's, imposed by Oregon in connection with that state's weight-mile tax system, was earlier determined by the United States Department of Transportation to be preempted. See *Identification of Vehicles: Oregon Department of Transportation Tax Credentials Petition for Determination*, Docket no. FMCSA-2006-25004, 72 *Fed. Reg.* 9996 (Mar. 6, 2007) (copy enclosed).

In finding the Oregon cab-card credential to be preempted, the U.S. DOT noted that "ensuring that the paper documents are distributed to and carried on each vehicle, and that [the] driver has ready access to the document, could add considerably to the paperwork burden of the carrier and driver, especially if similar documents were to be required by other States." The agency further observed that "[t]he fact that enforcement could be 'more challenging' does not outweigh the burden that the additional paperwork places on carriers engaged in interstate commerce" and concluded that tax compliance identification credentials such as the Oregon cab card "are exactly the type of display Section 4306 was enacted to prohibit."

We submit that there is little question that the Plan's credential requirements fall squarely within the scope of preemption found by the U.S. DOT in the Oregon matter. Indeed, the Plan requirement that a decal be affixed to a vehicle and displayed by those holding annual permits is arguably even more burdensome for the industry than the paper cab card found preempted in Oregon.

Commerce Clause

We further believe that the fees outlined in the Plan would most likely be held to violate the Commerce Clause of the United States Constitution. As discussed below, in our view unapportioned flat charges like those proposed in the Plan inherently discriminate against and burden interstate commerce and are unconstitutional. Indeed, direct United States Supreme Court precedent leaves little room for doubt that the proposed fees would violate the Commerce Clause. See *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987).

In *Scheiner*, the U.S. Supreme Court examined two unapportioned per-truck charges imposed by the Commonwealth of Pennsylvania: a \$ 36 per-axle truck tax and a \$25 per-truck fuel identification marker fee. The Court's analysis made clear that such flat taxes are structurally flawed and are both malapportioned and discriminatory in effect. Exposure of interstate transportation activities to a crippling cumulative tax burden is one of the principal structural infirmities of the flat fee form of taxation. Applying its "internal consistency test," which looks at the impact on interstate commerce if all states imposed identical flat fees, the Court concluded that "flat taxes would occasion manifold threats to the national free trade area" and "divide and disrupt the market for interstate transportation services." 483 U.S. at 285.

The fees proposed in the District's Plan would similarly fail internal consistency. A motor carrier with a fleet of twenty trucks operating solely in the District of Columbia would have to pay \$3,154.67 to purchase a Class A, Zone 1, annual permit to use loading zones in the District. If parking fee requirements similar to those proposed in the Plan were in effect in, say, ten other cities around the country, an interstate motor carrier of identical size would have to pay ten times as much, or \$31,546.70, in order to use the loading zones in those cities. The cumulative burden imposed on interstate motor carriers by the proposed \$35 per-truck flat fee leaves "no conceivable doubt that commerce among the states would be deterred." *Scheiner*, 483 U.S. at 284.

The failure of the Plan's proposed parking fees to pass the internal consistency test establishes as a matter of law that the charge would violate the Commerce Clause. See *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). ("A failure of internal consistency shows as a matter of law that a state is attempting to take more than its fair share from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.")

In addition to exposing interstate commerce to a cumulative burden, flat annual fees inevitably lead to a cost per-mile discrimination in favor of locally based carriers. The U.S. Supreme Court in *Scheiner* recognized that intrastate or local motor carriers inevitably, on average, have more concentrated operations in a state than interstate motor carriers. See *Scheiner*, 483 U.S. at 291 (explaining that intrastate carriers, which use the state's roads whenever in operation, are the primary beneficiaries of a flat per-truck tax);

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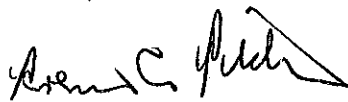
see also *id.* at 284 n. 16 (explaining that “the very nature of market that interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the State.”) For example, under a \$100 flat annual tax, an interstate truck that only uses a state’s roads 100 miles per-year pays \$1.00 per mile, while a local carrier that uses the roads 10,000 miles pays 1 cent per mile. This inevitable result places a discriminatory share of the State’s regulatory costs on interstate motor carriers, while protecting intrastate and local motor carriers from their appropriate share of the state’s costs.

Since the announcement of the *Scheiner* decision, more than a score of flat state taxes and fees on the trucking industry have been struck down under its principles as violative of the Commerce Clause. Based on these precedents, there is little question in our minds that if the District adopts the flat annual parking fees proposed in the Plan, they would be vulnerable to constitutional challenge under the Commerce Clause.

Conclusion

For the reasons stated above, ATA, MMTA, and VTA believe that the Plan’s provisions for loading-zone parking permit fees and the associated credentials are invalid under federal law and the U.S. Constitution.

Sincerely,



Robert C. Pitcher
Vice President, State Laws
American Trucking
Associations



Louis Champion
President & CEO
Maryland Motor Truck
Association



P. Dale Bennett
President & CEO
Virginia Trucking
Association

Enclosures: DDOT Proposed Commercial Curbside Loading Zone Management Plan
U.S. DOT Decision, Docket no. FMCSA-2006-25004

cc: The Honorable Adrian Fenty
Eulois Cleckley, DDOT
William C. Auchter, The Kane Company