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Issued on: August 26, 2011.

Ray LaHood,

Secretary of Transportation.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2010-0387]

Identification of Interstate Motor Vehicles: The Port Authority of New York and New Jersey's Drayage Truck Registry Sticker Display Requirements; Petition for Determination

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; Denial of petition for determination.

SUMMARY: FMCSA denies the New Jersey Motor Truck Association's (NJMTA) petition requesting that FMCSA determine the Port Authority of New York and New Jersey's (Port Authority) Drayage Truck Registry (DTR) sticker display program is preempted by Federal law. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) prohibits States and their political subdivisions from requiring motor carriers to display in or on commercial motor vehicles (CMVs) any form of identification other than forms required by the Secretary of Transportation (Secretary), with certain exceptions. FMCSA determines that the Port Authority's sticker display program is not preempted.

DATES: This decision is effective September 2, 2011.

FOR FURTHER INFORMATION CONTACT: Genevieve D. Sapir, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366-7056; e-mail Genevieve.Sapir@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

The Port Authority amended its marine tariff (PAMT FMC No. 10) to require trucks entering marine terminal facilities to display a sticker showing compliance with its new DTR. In response, by letter dated September 2, 2010, NJMTA petitioned the Secretary for a determination that the Port Authority's sticker display requirement is preempted by Federal law. Effective October 15, 2010, and in response to the NJMTA's petition, the Port Authority amended its tariff to clarify that the compliance stickers are a voluntary way to demonstrate compliance with the DTR and that no truck will be denied access to marine terminal facilities for failure to display a sticker.

The NJMTA is a non-profit trade association that represents over 500 trucking companies with operations in New Jersey. NJMTA states that its mission is to foster and promote sound, economical, and efficient service by motor carrier transportation; to promote safety and courtesy in highway transportation; to foster and support beneficial laws and regulations affecting the motor carrier industry and highway transportation; to promote and encourage the construction and maintenance of an adequate system of safely engineered highways; to foster and promote sound and reasonable taxation at the State and Federal levels on highway users; and to engage in any and all activities that will advance the interests of highway transportation and highway users generally.

The Port Authority is a bi-State entity established by interstate compact with the consent of Congress (42 Stat. 174, Aug. 23, 1921). It conceives, builds, operates, and maintains infrastructure critical to the New York/New Jersey region's trade and transportation network. These facilities include the New York/New Jersey airport system, marine terminals and ports, the PATH rail transit system, six tunnels and bridges between New York and New Jersey, the Port Authority Bus Terminal in Manhattan, and the World Trade Center.

In an effort to reduce port-related diesel and greenhouse gas emissions, the Port Authority is implementing a truck phase-out plan that will deny old drayage trucks access to its marine terminal facilities. Under this plan, the Port Authority began denying drayage trucks with pre-1994 model year engines access to Port Authority marine terminal facilities effective January 1, 2011. Effective January 1, 2017, the Port Authority will deny drayage trucks equipped with engines that fail to meet or exceed 2007 model year Federal heavy-duty, diesel-fueled, on-road engine emission standards access to marine terminal facilities. In order to implement the truck phase-out plan, the Port Authority will require drayage trucks accessing Port Authority marine terminal facilities to be registered in the DTR. The Port Authority will issue compliance stickers to drayage trucks that are compliant with the phase-out plan to facilitate and expedite transit of those trucks onto, through, and out of marine terminal facilities. As noted above, the Port Authority has amended its tariff to clarify that the compliance stickers are a voluntary way to demonstrate compliance with the DTR, that no truck is required to display a compliance sticker, and that no truck

will be denied access to marine terminal facilities for failure to display a sticker.

Section 4306(a) of SAFETEA-LU, codified at 49 U.S.C. 14506(a), prohibits States, political subdivisions of States, interstate agencies, or other political agencies of two or more States from requiring motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary. Section 14506(b), as amended, however, establishes several exceptions to this prohibition:

(b) Exception.—Notwithstanding subsection (a), a State may continue to require display of credentials that are required—

(1) under the International Registration Plan under section 31704 [of title 49, United States Code];

(2) under the International Fuel Tax Agreement under section 31705 [of title 49, United States Code] or under an applicable State law if, on October 1, 2006, the State has a form of highway use taxation not subject to collection through the International Fuel Tax Agreement;

(3) under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate;

(4) in connection with Federal requirements for hazardous materials transportation under section 5103 [of title 49, United States Code]; or

(5) in connection with the Federal vehicle inspection standards under section 31136 [of title 49, United States Code].

The exception relevant to NJMTA's petition is § 14506(b)(3), which provides that "a State may continue to require display of credentials that are required * * * under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate."¹ The Secretary's authority under § 14506 is delegated to FMCSA by 49 CFR 1.73(a)(7).

Through a notice published in the **Federal Register** on December 3, 2010 (75 FR 75540), FMCSA sought comment on whether the Port Authority's sticker display requirement is preempted by Federal law. Specifically, the Agency sought comment on whether the Port Authority's sticker display requirement should qualify for the exception in 49 U.S.C. 14506(b)(3).

Discussion of Comments

In response to the December 3, 2010 notice, FMCSA received ten comments, of which five were from trade associations, two were from individuals,

¹ FMCSA previously concluded that for the purposes of the exceptions at 49 U.S.C. 14506(b), "State" means a State, political subdivision of a State, interstate agency, or other political agency of two or more States (75 FR 64779, Oct. 20, 2010). Because it is a political agency of two or more States, the Port Authority is a "State" for the purposes of § 14506(b).

one was from a motor carrier, one was from a coalition, one was from the Commercial Vehicle Safety Alliance (CVSA), and one was from the Port Authority. All commenters except for the coalition and the Port Authority supported preemption.

The American Trucking Associations (ATA) commented that the Port Authority's credential display requirement does not differ significantly from other displays FMCSA recently preempted (Identification of Interstate Motor Vehicles: New York City, Cook County, and New Jersey Tax Identification Requirements; Petition for Determination, (75 FR 64779, Oct. 20, 2010)). ATA also commented that, based on FMCSA's previous decision on tax credential displays in Oregon (72 FR 9996, Mar. 6, 2007), the Port Authority's display should not be eligible for the exception at 49 U.S.C. 14506(b)(3). ATA further commented that it is not determinative that the requirement is voluntary.

The National Solid Wastes Management Association (NSWMA) commented that the exception at 49 U.S.C. 14506(b)(3) should be interpreted narrowly so as not to interfere with Congress's intent to preempt credential display requirements. NSWMA also commented that if FMCSA does not grant NJMTA's petition, numerous State and local governments will enact similar, burdensome requirements. Finally, NSWMA commented that if Congress had intended for there to be an exception for displays designed to reduce emissions, then it would have written one in 49 U.S.C. 14506(b).

The Owner-Operator Independent Drivers Association (OOIDA) commented in support of NJMTA's petition. OOIDA does not believe that the Port Authority's requirement is voluntary because trucks that opt out would be subject to additional delays in the port. OOIDA also commented that, following the canon of statutory construction *ejusdem generis*, FMCSA should interpret the exception at 49 U.S.C. 14506(b)(3) to be limited to matters related to motor vehicle licensing.

The Truck Renting and Leasing Association (TRALA) commented in support of NJMTA's petition, strongly objecting to the Port Authority's credential display requirement. The TRALA also commented that many carriers lease CMVs and trailers and that the requirement would be burdensome not only to carriers, but to lessors whose equipment may be used in several multi-modal operations during their lifetimes. Finally, TRALA disagreed that

it would be appropriate for FMCSA to exercise its delegated discretion under 49 U.S.C. 14506(b)(3) in this matter.

In support of its own petition, NJMTA commented that it is not relevant whether the Port Authority's requirement is voluntary because 49 U.S.C. 14506(b) does not contain an exception for voluntariness. In addition, NJMTA disputed that the Port Authority's display requirement is voluntary because trucks that do not display the sticker will be subjected to lengthy stops and inspection. NJMTA further commented that this lengthy stop and inspection process will cause delays and traffic jams, inhibit operators' ability to make multiple trips, and increase pollution.

One individual commented that the Port Authority's credential display requirement should be preempted because it is similar to other credential displays that FMCSA recently preempted. Another individual commented that ports currently have too many credential requirements.

United Parcel Service (UPS) stated that it agreed with the comments NJMTA and ATA filed in this docket. UPS specifically agreed that characterizing the requirement as voluntary does not make it any less mandatory because carriers that do not participate will be subjected to inspections and delays at the port.

The Coalition for Healthy Ports (Coalition) commented that NJMTA's and ATA's comments are inconsistent with the positions they have taken with respect to other programs including the Port of Los Angeles's drayage truck program, which is currently the subject of litigation. The Coalition also commented that without the sticker program, the Port Authority would be unable to enforce the DTR. Finally, the Coalition commented that invalidating the Port Authority's program would place other ports' programs in jeopardy.

CVSA commented that it believes that the Port Authority's credential display requirement is preempted and not eligible for any of the exceptions in 49 U.S.C. 14506(b). CVSA commented that instead of stickers, the Port Authority should use existing identifiers to meet its needs as well as build technological capabilities and "back office infrastructure" to manage the DTR program.

The Port Authority commented that its credential display requirement does not violate 49 U.S.C. 14506 because it is voluntary. Alternatively, the Port Authority commented that the requirement is not preempted because it promotes public health and safety.

FMCSA Decision

Section 14506(a) Does Not Preempt the Port Authority's Sticker Display Program

Section 14506(a) preempts State requirements that mandate motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary. The Port Authority's DTR sticker display program is not preempted because it does not require trucks to display the compliance sticker. Accordingly, FMCSA denies the NJMTA's petition for preemption.

According to the Port Authority, all vehicles servicing the marine terminal must register with the DTR. Vehicles that do not meet the DTR's requirements are denied registration. The Port Authority issues all registered vehicles a set of stickers, at no cost to the registrant, that demonstrate compliance with the registration requirements. Trucks are briefly stopped so the Port Authority can determine whether they are displaying a compliance sticker. Motor carriers that choose not to display the sticker are subject to a short wait while a Port Authority Police officer checks the truck's license plate against the DTR database.

Section 14506(a) states that:

No State, political subdivision of a State, interstate agency, or other political agency of two or more States may enact or enforce any law, rule, regulation standard, or other provision having the force and effect of law that *requires* a motor carrier, motor private carrier, freight forwarder, or leasing company to display any form of identification on or in a commercial motor vehicle (as defined in section 14504a [of title 49, United States Code]), other than forms of identification required by the Secretary of Transportation under section 390.21 of title 49, Code of Federal Regulations. (emphasis added).

The preemption language of this provision turns on a State's *requirement* that a motor carrier display some kind of identification, such as a compliance sticker. In this case, however, the Port Authority does not require motor carriers to display the compliance sticker. Instead, motor carriers have the option of either displaying the sticker or having Port Authority officers verify compliance with the DTR through a license plate check. No vehicle will be issued a citation if it is properly registered, but not displaying a compliance sticker.

Several commenters correctly noted that given the choice between displaying a no-cost compliance sticker or being subjected to delays during a license plate check, most carriers would choose to display the sticker. That does not change the fact that the Port

Authority does not mandate their display. Nor is the alternative option (license plate check) so onerous that it acts as a penalty to drivers choosing not to display the sticker. While it might take more time to run the license plate check than verify the existence of a sticker, the few extra minutes the Port Authority asserts this would take is a reasonable and minimally-burdensome alternative for motor carriers who object to using the stickers. Accordingly, FMCSA finds that the Port Authority's sticker display program is not preempted.

The Port Authority's Sticker Display Program Is Appropriate

Even if the Port Authority's display program were mandatory, FMCSA would nonetheless determine that the program is appropriate, in accordance with FMCSA's delegated discretion to make such a determination pursuant to 49 U.S.C. 14506(b)(3). The U.S. Department of Transportation generally supports initiatives designed to reduce emissions at port facilities. The sticker display aspect of the DTR is a minimally-burdensome method of achieving the goals of the DTR without causing undue burden on interstate commerce at the Port Authority's marine terminals.

Even though the burden of stopping trucks to verify registration with a license plate check is minimal, it requires both motor carriers and the Port Authority to expend additional resources. Each stop would require trucks to spend more time at the marine terminal, delaying motor carriers, however briefly, and increasing emissions from a potentially long line of idling trucks. The Port Authority's alternative, a no-cost sticker, would help reduce emissions and expedite traffic through marine terminal. FMCSA does not agree with the NJMTA that the sticker program would have the opposite effect: Increasing pollution and delays at the port. To the contrary, in this particular case, FMCSA believes that not using the stickers would increase pollution due to idling and would create a greater burden on commerce moving in and out of the port.

FMCSA does not agree with commenters that believe the sticker display requirement would create a burden on carriers by making them responsible for maintaining a patchwork of stickers from multiple jurisdictions. First, this determination applies only to the Port Authority's DTR program. FMCSA does not extend this determination to any other jurisdiction's credential display requirement. Second,

there is a discrete population of trucks entering the marine terminals on a daily basis. The vast majority of drayage trucks coming through a port are dedicated to serving that particular port. While some trucks service other ports as well, the effect on these motor carriers would be minimal. The nominal burden of placing a sticker on a truck that visits the same port over and over again is greatly outweighed by the benefits of expedited access through the port.

FMCSA disagrees with NSWMA's assertions that Congress did not intend for FMCSA to exercise its authority in this manner. The statute grants FMCSA the authority to except those requirements it deems appropriate. There is no additional language limiting this authority. The more reasonable interpretation is that Congress granted this broad discretion so that FMCSA could have the flexibility to except those requirements, such as the Port Authority's, that serve important national policy objectives.

NSWMA also contends that FMCSA's analysis should be governed by the principle of statutory construction that exceptions to general rules should be construed narrowly. FMCSA does not believe that this principle prohibits it from determining that the Port Authority's sticker program is appropriate. FMCSA's decision not to preempt the Port Authority's sticker program does not grant a sweeping exception for State credential displays. To the contrary, FMCSA's decision is limited to the specific circumstances presented by the Port Authority's program and is based on having balanced important policy objectives with the minimal effect the sticker program will have on interstate commerce. Notably, the discretion Congress granted at § 14506(b)(3) does not mandate FMCSA except State displays; nor does it entitle States to enact requirements that otherwise conflict with § 14506. It simply grants FMCSA the discretion to determine whether display requirements are appropriate. In the absence of such a determination, display requirements are presumed to be preempted.

FMCSA also disagrees with OOIDA's assertion that application of *ejusdem generis* precludes FMCSA from determining that the Port Authority's program is not preempted. *Ejusdem generis* is a "canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." [Black's Law Dictionary 9th ed. 2009]. The concept, however, is only used to ascertain the

correct meaning of words when there is uncertainty, *Garcia v. United States*, 469 U.S. 70, 74–75 (1985), and the Agency finds no uncertainty warranting its application. If the meaning is clear from the language of the statute, there is no need to resort to legislative history or other extraneous source. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997). The plain language of § 14506(b)(3) excepts “other displays that the Secretary determines are appropriate.” FMCSA rejects any attempt to insert ambiguity into this straightforward provision.

Even if the provision were ambiguous, moreover, it would nonetheless be inappropriate to apply the rule of *ejusdem generis*. *Ejusdem generis* is relevant when there is a list of specific terms with a particular attribute or character followed by a more general or catchall phrase or term. *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 131 S. Ct. 1101, 1113 (2011). “The absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase.” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008). More important, without a list of specific items, it is not apparent what common attribute connects the specific and general categories. *Id.*

Section 14506(b)(3) contains only two categories of exceptions under State law: Motor vehicle license plates and other displays that the Secretary determines are appropriate. Although the phrase “other displays that the Secretary determines are appropriate” is something of a catchall, no list of specific items precedes it. Without a list

of specific items, *ejusdem generis* does not apply because it would not be possible to determine what common attribute, if any, Congress may have intended to ascribe to the catchall phrase.

This matter is distinguished from FMCSA’s previous decisions regarding credential displays in Oregon (72 FR 9996, Mar. 6, 2007), and Cook County, New York City, and New Jersey (75 FR 64779, Oct. 20, 2010). In those cases, motor carriers were subject to penalty for failure to display certain credentials, regardless of whether they had complied with the substance of the law requiring registration or payment of a fee. Here, the Port Authority assesses no penalty on motor carriers for failure to display the sticker credential. It uses the sticker as a tool for expediting verification of compliance with the DTR and offers an alternative method for demonstrating compliance. No carrier is cited for failing to display credentials; the Port Authority only issues citations for failing to comply with the substantive requirements of the DTR.

Furthermore, in FMCSA’s previous decisions, the entities enforcing the credential display requirements failed to identify important policy reasons that would support FMCSA’s determination that their requirements were appropriate. In the most recent decision involving credential displays in Cook County, IL, New York City, and New Jersey, FMCSA specifically requested that these jurisdictions justify or present reasons that could support a determination that the display requirement would be appropriate under the exception at 49 U.S.C. 14506(b)(3). Cook County responded,

conceding preemption, but neither of the other jurisdictions made any effort to justify their requirements.

In a previous credential display decision, Oregon petitioned the FMCSA for a declaration that its weight-mile tax credentials were appropriate. Oregon’s principal argument in support of its display requirement was that eliminating it would increase its enforcement burden. However, the increased burden on enforcement efforts did not present a compelling policy reason, especially in the absence of exploring other solutions to enforcement.

In this case, the Port Authority identified two important policy reasons to support use of credential display stickers: Facilitating movement through the port and reducing emissions. In addition, the stickers present a less burdensome method for *motor carriers* (as opposed to the Port Authority) for proving compliance with the DTR. These factors present compelling policy reasons justifying FMCSA’s determination that the Port Authority’s sticker program is appropriate.

Conclusion

In consideration of the above, FMCSA denies the petition submitted by the NJMTA. The Port Authority is not preempted from implementing its credential display program.

Issued on: August 29, 2011.

Anne S. Ferro,
Administrator.

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