



U.S. Department of  
Transportation

# DOT LITIGATION NEWS

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## **Supreme Court Litigation**

### **Court Hears Argument on Whether the Civil Service Reform Act Confers Jurisdiction for Federal Court to Decide Drug Testing Challenge**

On December 5 the Supreme Court heard argument in Whitman v. DOT, (Supreme Court No. 04-1131), a challenge to a decision by the U.S. Court of Appeals for the Ninth Circuit holding that an FAA employee's charge that he has been subjected to disproportionate drug testing is not cognizable in Federal court and must, instead, be pursued, if at all, under the negotiated grievance procedures of the employee's collective bargaining agreement. Even though the United States prevailed in the litigation before the Ninth Circuit, the Solicitor General's Office in its response to petitioner's certiorari petition urged the Court to hear the case in order to resolve a split among the circuits.

Petitioner Terry Whitman works for the FAA in Alaska as an Air Traffic Assistant. Since his duties include responsibility for safety-sensitive functions, Whitman is subject to random testing for illegal use of controlled substances under 49 U.S.C. 45102(b). In June 2001, acting pro se, he filed an unfair labor practice charge with the Federal Labor Relations Agency (FLRA), alleging that the FAA had subjected him to a disproportionate number of drug and alcohol tests, and claiming that the FAA's drug and alcohol testing program was impermissibly non-random. The FLRA denied the unfair labor practice charge, explaining that it did not fall within the

FLRA's jurisdiction because the claim did not allege discrimination based on protected union activity. The FLRA explained that petitioner's recourse instead should be through the grievance procedures of the relevant negotiated agreement between Whitman's union and the FAA.

Whitman did not initiate the grievance procedures set forth in the collective bargaining agreement, but instead, again acting pro se, filed suit in district court alleging that the FAA's drug testing practices violated 49 U.S.C. 5331(d)(8) and 45104(8), which state that the Secretary of Transportation must develop requirements that ensure that employees are selected for drug testing by nondiscriminatory and impartial methods.

The district court dismissed the case on jurisdictional grounds, holding that "federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the [Civil Service Review Act ("CSRA")] or elsewhere." The court concluded that Whitman's sole remedy was that set forth in the collective bargaining agreement (which also provided for binding arbitration), and that his failure to pursue that remedy precluded judicial review. The Ninth Circuit affirmed, holding that the CSRA does not provide Federal employees subject to the FAA Personnel Management System direct judicial review of work related grievances.

As noted above, the Solicitor General's response to the certiorari petition urged

the Court to hear the case to resolve the meaning of a 1994 amendment to the CSRA. Until 1994, Section 7121(a)(1) of the CSRA provided that the procedures available under the Act "shall be the exclusive procedures for resolving grievances which fall within its coverage." As part of a 1994 technical and conforming amendment, the word "administrative" was added to Section 7121(a)(1), which now provides that "the [collective bargaining agreement grievance] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

The United States urged that the addition of the word "administrative" was non-substantive and did not confer jurisdiction on Federal courts to otherwise hear such complaints. While the Ninth Circuit had so ruled, other circuit courts addressing the issue, notably the Federal Circuit and the Eleventh Circuit, have held that as a result of the amendment judicial review now lies.

We are now awaiting the Court's decision.

The United States' brief urging the Court to grant certiorari is available at:

<http://www.usdoj.gov/osg/briefs/2004/0responses/2004-1131.resp.pdf>

The Ninth Circuit's decision is available at:

<http://caselaw.lp.findlaw.com/data2/circs/9th/0335303p.pdf>

The merits briefs before the Court for all parties are available at:

<http://www.abanet.org/publiced/preview/briefs/dec05.html#whitman>

### **Court Will Not Review Decision Upholding Federal DBE Program, But Finding Washington State Implementation Unconstitutional**

On February 21, the Supreme Court denied a joint petition filed by the City of Vancouver and Clark County, Washington seeking review of the decision of the U.S. Court of Appeals for the Ninth Circuit in Western States Paving Co. v. United States (Supreme Court No. 05-591).

The Ninth Circuit had unanimously upheld the constitutionality of DOT's Federal-aid highway Disadvantaged Business Enterprise (DBE) program, but split on Washington's implementation of the Federal program, with the majority holding that the State's program was not narrowly tailored because Washington had failed to adequately show the existence of discrimination or its effects on highway contracting in the State, and, if discrimination or its effects did exist, which groups were affected by it.

The only issues before the Supreme Court concerned the City and the County: whether they were still properly defendants in the case and, if so, whether the City and County should have been dismissed as defendants because there was no evidence that they were responsible for implementing the Federal program. The case will now return to the U.S. District Court for the Western District of Washington, which will consider whether Western States Paving

Co. is entitled to any damages from the State, County, or City.

The Ninth Circuit's decision is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DA4A050DCFAD553288256FFC00572DFC/\\$file/0335783.pdf?open\\_element](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DA4A050DCFAD553288256FFC00572DFC/$file/0335783.pdf?open_element)

### **Court Will not Review Sixth Circuit's Decision Finding OIG Authority to Conduct Criminal Investigations of DOT-Regulated Entities**

On October 3, the United States Supreme Court denied a certiorari petition filed by AirTrans, Inc. (AirTrans) seeking Supreme Court review of the November 18 decision of the U.S. Court of Appeals for the Sixth Circuit upholding summary judgment in favor of Defendants, DOT Inspector General Kenneth Mead and Special Agent, Joseph Zschiesche in AirTrans, Inc. v. Mead, (Supreme Court No. 05-10). The Sixth Circuit ruled that the defendants acted within their authority under Section 228 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA), P.L. 106-159, in executing a search warrant of AirTrans, an FMCSA-regulated carrier, and seizing operator records for alleged violations of Federal criminal laws. AirTrans is the first case in which a court has decided a challenge to an Office of Inspector General (OIG) search and seizure executed after passage of the MCSIA.

AirTrans challenged the search and seizure in the U.S. District Court for the Western District of Tennessee alleging

that the OIG lacked the authority to obtain and execute a criminal search warrant under the Inspector General Act (IGA), 5 U.S.C. § 3, and the MCSIA. The primary issue before the court was the scope of OIG's authority to conduct criminal investigations. Prior to the enactment of the MCSIA, the IGA was the sole legal basis for a criminal investigation of DOT-regulated entities.

In 1999, following adverse court decisions holding that OIG was not authorized to conduct criminal investigations of DOT-regulated motor carriers (see, e.g., In re the Matter of Northland Trucking, No. 98-1822 (D. Ariz., September 22, 1999); In re Search of Florilli Corp., 33 F.Supp.2d 799 (S.D. Iowa 1998)), Congress passed the MCSIA. The MCSIA specifically authorized the OIG to investigate fraudulent or criminal activity relating to DOT programs and operations. According to Congress, "this important safety legislation . . . clarifies Congressional intent with respect to the authority of the IG, reaffirming the IG's ability and authority to continue to conduct criminal investigations of parties subject to DOT laws or regulations, whether or not such parties receive Federal funds from the Department."

The Sixth Circuit upheld the district court's determination that the MCSIA authorized the search and seizure, concluding that given the plain language of section 228, "there can no longer be any question" as to the OIG's authority to obtain and execute a criminal search warrant for DOT-regulated entities." According to the court, the investigation and search were confined to criminal activity relating to DOT operations and

programs and therefore, complied with section 228 of the MCSIA. In refusing to hear the case the Supreme Court left this favorable decision standing.

The Sixth Circuit's decision is available at:

<http://pacer.ca6.uscourts.gov/opinions.pdf/04a0400p-06.pdf>

## **Departmental Litigation in Other Federal Courts**

### **D.C. Circuit Upholds DOT's Final Decision on Compensable 9/11 Losses and Denies FedEx Challenge**

On January 20 the U.S. Court of Appeals for the District of Columbia Circuit in Federal Express Corp. v. Mineta, (D.C. Cir. No. 04-1436) denied a petition for review filed by Federal Express Corporation challenging the Department's final decision that determined the amount of compensation due FedEx under the Air Transportation Safety and Systems Stabilization Act. The Act, passed shortly after the terrorist attacks of September 11, authorized the Department to pay compensation for losses incurred by air carriers resulting from the attacks.

The Department's final decision employed a presumption that economic injuries related to 9/11 could be measured by comparing projected air carrier profits pre-9/11 with actual results following the terrorist attacks. Despite its temporary losses resulting from 9/11, FedEx in fact had profits of over \$800 million for all of 2001. After receiving payments in excess of \$72 million for lost profits, FedEx sought an additional \$48 million in Federal

compensation under the Stabilization Act, arguing that its compensation should not be limited by its pre-9/11 forecasted profit.

In denying the petition for review the court noted that "determining carrier compensation under the Act is inherently inaccurate because of the impossibility of determining how a carrier would have performed had September 11 never occurred." Thus, the court held that "given the situation after September 11, it was reasonable for the Secretary to adopt a general presumption in order to accomplish the statutory objective" of stabilizing the airline industry. The court noted that it was also a reasonable view that "a windfall" would occur were FedEx to receive "greater profits than it had forecasted before September 11." Finding that FedEx had demonstrated to the Secretary no credible basis for its claims for additional compensation, the court denied FedEx's challenge.

FedEx has informally informed the Department that it will not seek either rehearing or certiorari review by the Supreme Court. As a result, the favorable D.C. Circuit decision stands.

The D.C. Circuit's January 20 decision is available at:

<http://pacer.cadc.uscourts.gov/docs/mon/opinions/200601/04-1436a.pdf>

The D.C. Circuit's prior decision is available at:

<http://pacer.cadc.uscourts.gov/docs/mon/opinions/200407/02-1190a.pdf>

The Department's final rule is available at:

<http://dmses.dot.gov/docimages/p73/184858.pdf>

### **Litigation Commenced Challenging Purchase of Marine Terminal Operator by Dubai Ports World**

On February 24 the State of New Jersey filed a complaint against the United States in the U.S. Federal District Court in Trenton, New Jersey in Corzine v. Snow, (D. N.J.) The complaint challenges the United States' decision to approve an agreement that would allow Dubai Ports World, a state-owned business in the United Arab Emirates, to acquire Peninsular and Oriental Steam Navigation Co. (P & O), an operator of a number of marine terminals in the United States. The complaint names Treasury Secretary Snow and other Federal officials but names no DOT officials. It alleges that the United States approval process employed by the Committee on Foreign Investment in the United States ("CFIUS") should have involved a full investigation of the proposed transaction, and that New Jersey should have access to all underlying documents reviewed during the CFIUS process. The CFIUS process is invoked pursuant to 50 U.S.C. § 2170, which authorizes the President to review

proposed transactions involving the merger, acquisition or takeover by an entity owned or controlled by a foreign government where the entity is engaged in interstate commerce in the United States.

In a separate action, Port Authority of New York and New Jersey v. Port Newark Container Terminal LLC, (Superior Court, Essex County No. C-44-06), filed on February 25 in state court, the Port Authority of New York & New Jersey has sought to terminate its lease with Port Newark Container Terminal, a current terminal operator at Port Newark that is owned by P & O. The action alleges that under the terms of the lease the agreement allowing Dubai Ports World to acquire P & O requires prior written approval from the Port Authority and that none was sought or given.

Finally, in a Florida State court complaint filed last week, Continental Stevedoring & Terminals, Inc. v. P & O Florida, Inc. (Circuit Court No. 06-03233 CA 05) Continental Stevedoring & Terminals, Inc., a stevedoring company with various ties to P & O, has alleged, among other things, that the proposed transaction should be enjoined because of security concerns.

A copy of the complaint filed by New Jersey in the Federal district court case is available on-line at:

<http://www.state.nj.us/lps/newsreleases06/2006-comp-dubai.html>

## **D.C. Circuit Affirms DOT CRS Jurisdictional Decision**

On November 22 the U.S. Court of Appeals for the District of Columbia Circuit in Sabre, Inc. v. DOT, (D.C. Cir. No. 04-1073), affirmed a jurisdictional ruling issued by the Department in its final computer reservations system ("CRS") rulemaking. Sabre, the largest U.S. CRS, had challenged that decision.

In its final rulemaking decision on CRS matters, the Department concluded that it would phase out its longstanding CRS rules because industry developments had made the rules unnecessary and possibly counterproductive. At the same time, the Department also stated that CRSs were subject to Departmental authority under 49 U.S.C. § 41712, which authorizes the Department to prohibit unfair and deceptive practices and unfair methods of competition by airlines and "ticket agents" in the marketing of airline tickets.

The statute defined ticket agents as persons other than airlines and airline employees who sell, offer for sale, or hold themselves out as selling or arranging for air transportation. The Department reasoned that CRSs are ticket agents because they enable travel agent users to book seats for their customers and to pay for them. This is so because airlines are obligated to accept bookings made in a CRS, and because the systems charge airlines fees when travel agents make bookings.

Sabre sought review only of the determination that Sabre and other systems no longer owned by air carriers are nonetheless still subject to Departmental jurisdiction under 49 U.S.C. § 41712.

The rules governing CRS operations were originally adopted because Sabre and the other systems were then owned and controlled by airlines, which had used the systems to undermine the competitive position of rival airlines. In the last several years, however, U.S. airlines have divested all of their CRS ownership interests, a factor that led the Department to conclude that it should not maintain the CRS rules.

The Court held that Sabre had standing to challenge the Department's interpretation and that its challenge was ripe, because the final rule contained statements indicating that the Department would probably consider unlawful certain business practices that Sabre wished to adopt.

On the merits, the Court agreed with the Department's interpretation and rejected Sabre's argument that it was merely providing information to travel agents. The Court's decision reaffirms the Department's broad discretion to interpret the statutory provisions administered by it in light of changed circumstances in the airline industry. The Court affirmed the Department's interpretation concluding that it was a permissible reading of the statute, even though that interpretation might not be required by the statute's literal language.

Tom Ray, a senior trial attorney in the Office of the Assistant General Counsel for Litigation argued the case before the D.C. Circuit.

The Court's decision, published at 429 F.3d 1113 (D.C. Cir. 2005), is available at:

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200511/04-1073a.pdf>

The Department's final rule is available at:

[http://dmses.dot.gov/docimages/pdf88/263952\\_web.pdf](http://dmses.dot.gov/docimages/pdf88/263952_web.pdf)

### **Ninth Circuit Upholds Constitutionality of Airline Passenger Identification Policy**

On January 26, the U.S. Court of Appeals for the Ninth Circuit in Gilmore v. Gonzalez (9th Cir. No. 04-15736) upheld the policy of airlines to require airline passengers either to present identification to airline personnel before boarding an aircraft or, in the alternative, to be subject to a search that is more exacting than a routine search. The policy was challenged by a passenger who alleged he was unconstitutionally deprived of his right to travel and threatened with an unconstitutional search as a result of the policy.

In upholding the policy the court reviewed in camera various airline security directives that had been classified as "sensitive security information" and ultimately determined that the policy set forth in the directives deprived the complaining party of no constitutionally protected rights. The court specifically held that no unlawful search and seizure was involved since, in requiring either identification or a more thorough search, the passenger was in fact "free to reject either option . . . and leave the airport." The court also noted the availability of other non-airline means of travel for the passenger, and rejected out-of-hand the allegation that the identification policy could have deprived Gilmore of a right to travel.

On the issue of the lower court's jurisdiction to hear challenges to the

security directives, the Ninth Circuit, based on its in camera review of the security directives, determined that the directives were properly issued final orders and that the lower court lacked jurisdiction to hear challenges to the identification policy. The panel concluded that the plaintiff should have brought his claims on the legality of the security directives to the court of appeals. The panel then asserted its own jurisdiction under the Transfer Act, 28 U.S.C. 1631, and upheld the policy.

The Ninth Circuit's decision is available at:

<http://caselaw.lp.findlaw.com/data2/circs/9th/0415736p.pdf>

### **Challenge to DOT, SBA, and Delaware DBE Programs Dismissed by Delaware District Court**

On January 6, the U.S. District Court for the District of Delaware in Enterprise Flasher Co. v. Mineta, (D. Del. 03-00198) granted plaintiff's unopposed motion to voluntarily dismiss its constitutional challenge to the DOT and SBA Disadvantaged Business Enterprise (DBE) programs and the implementation of the Department's DBE program by the Delaware Department of Transportation.

The challenge was brought by Enterprise Flasher, a non-DBE traffic control contractor that was represented by Mountain States Legal Foundation, which also represented Adarand Constructors, Inc. in its various challenges to the Department's DBE program.



As noted in "Supreme Court Litigation," the Supreme Court has declined to review the Western Paving decision concerning the State of Washington's implementation of the DOT program. With the dismissal in Enterprise Flasher, which was filed in February 2003, there are for the first time in 15 years no outstanding Constitutional challenges to the Department's DBE programs, although an unsuccessful challenge to the State of Illinois' implementation of the DOT program is currently on appeal before the U.S. Court of Appeals for the Seventh Circuit.

The Illinois case is being briefed, and oral argument is expected to be held this summer. The Washington case is being appealed by two local government co-defendant/appellants who are now only challenging the applicability of the Ninth Circuit's decision to them, rather than the merits of court's constitutional rulings. Both the Illinois District Court decision and the Ninth Circuit decision in the Washington case found that DOT's DBE statute and implementing regulations were constitutional. These federal DBE provisions are no longer at issue in those cases, and the United States is not participating in the Illinois and Washington appeals.

### **District Court Litigation Continues Concerning D.C. HazMat Ordinance**

A challenge by CSX Transportation ("CSX") to a District of Columbia ordinance that purports to restrict any through rail or highway movements of certain hazardous materials within 2.2 miles of the United States Capitol has entered the discovery phase, with the bulk of discovery directed by

defendant/intervenor Sierra Club at the United States.

CSX, supported by the United States, had originally sought injunctive relief last February against the emergency version of the ordinance, arguing that it was preempted under the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA"), and that it violated the Constitution's Commerce Clause. The District Court denied CSX's motion for a preliminary injunction, but in May 2005, the U.S. Court of Appeals for the District of Columbia Circuit in CSX Transportation, Inc. v. Williams, (D.C. Cir. No. 05-5131) reversed the District Court and ordered it to enjoin enforcement of the emergency measure. The D.C. Circuit's decision rested solely on the FRSA, administered by the FRA, although a concurring opinion suggested that the ordinance is likely preempted under the HMTA, administered by PHMSA, as well.

Since the D.C. Circuit's decision, the District enacted new but substantively identical temporary and permanent hazmat ordinances, and the latter is now in effect. Pending the outcome of the litigation CSX has agreed not to haul hazmat on one of its two rail lines that enter the ordinance's exclusion zone, while the District has agreed not to enforce the ordinance against CSX.

CSX has filed a renewed motion for summary judgment, supported by the United States, making the same preemption and Commerce Clause arguments it made at the preliminary injunction stage of the case. Resolution of CSX's motion has been delayed, however, pending completion of discovery. The United States vigorously

opposed any discovery against it in a motion for protective order, arguing that because it has only filed Statements of Interest in the litigation it is not a party and that, in any event, the preemption issues are purely legal issues that can be resolved without discovery. The District Court disagreed, but did limit the scope of discovery.

After the United States produced document and answered interrogatories pursuant to its understanding of the Court's discovery order, the Sierra Club moved to compel additional document production, claiming that the United States had construed the Court's order too narrowly. The Court granted Sierra Club's motion, and the United States completed the additional document production in mid-February.

The majority of responsive documents have been withheld as either privileged or Sensitive Security Information, and we expect defendants to contest these claims. Defendants have also indicated that they will seek additional discovery, including depositions of DOT personnel.

The D. C. Circuit's decision is available at:

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200505/05-5131a.pdf>

### **Recent Developments in Port Authority of New York and New Jersey Challenge to Department's Order on Increased Terminal Charges at Newark Airport**

On June 22, the Port Authority of New York and New Jersey ("Port Authority") filed a petition with the U.S. Court of

Appeals for the D.C. Circuit seeking review of a final decision issued by the Deputy Assistant Secretary for Aviation and International Affairs involving Newark Liberty International Airport ("Newark"). Port Authority of New York and New Jersey v. DOT, (D.C. Cir. No. 05-1122). The final decision found unreasonable a portion of the Port Authority's increase of two terminal charges imposed on airlines serving International Terminal B.

On February 14, 2005, one domestic and twelve foreign-flag airlines filed a complaint with the Department against the Port Authority and asked the Department to institute a proceeding to determine whether the increased per passenger Federal inspection service charge and general terminal charge imposed at Newark Terminal B since February 1, 2005 are "reasonable" within the meaning of 49 U.S.C. § 47129. The Department issued an instituting order on March 16, 2005, which sent the complaint to an Administrative Law Judge ("ALJ"). The ALJ issued a recommended decision on May 9, and the Department issued its final decision on June 14, 2005.

The final decision largely adopted the Recommended Decision of the ALJ, but went further in two areas. First, the Department expanded upon the ALJ's finding that the methodology used by the Port Authority to determine the amount of city rent allocated to Terminal B is unreasonable. By rendering this decision on city rent, the Department did not disallow the entire city rent cost component of \$7.2 million, but only disallowed as unreasonable the \$2.2 million annual city rent increase for 2005. Second, the Department rejected the ALJ's determination that the Port

Authority's fee calculation is reasonable, even though it results in an annualized \$5 million surplus to the Port Authority. The final decision determined that element of the fee increases to be unreasonable.

A supplemental proceeding was then commenced to determine the appropriate amount of refunds to be paid to the complainants for the fees paid while the proceeding was pending. Based upon this decision, the amount of the fee increases are approximately \$10 million per year less than the \$22 million per year increase sought by the Port Authority.

Following the commencement of the D.C. Circuit proceedings the airlines filed a motion to intervene and also filed their own petition for review of the Department's decision. On August 26, the court consolidated the separate appeals. On October 14, the court issued an order granting the motions to intervene filed by the airlines and the Port Authority. In addition, the Airports Council International – North America has filed a Notice of Intention to file an amicus brief in the case. The United Kingdom also filed a motion for leave to intervene to file an amicus brief in support of the airlines, which the court granted on December 9.

The court recently issued the briefing schedule for the case, but has not yet set a date for oral argument. Petitioners must file their initial briefs by March 23 with the Department's brief due on April 24. Petitioners' reply briefs must be filed by May 24. Final briefs are due June 13.

The Department's final order that is the subject of the petition for review is available at:

[http://dmses.dot.gov/docimages/pdf92/335643\\_web.pdf](http://dmses.dot.gov/docimages/pdf92/335643_web.pdf)

### **Department Settles Lawsuit with Alaska Bush Mail Carrier**

On March 16, Peninsula Airways, Inc., a carrier of bush mail in the State of Alaska, filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit, Peninsula Airways, Inc. v. DOT, (D.C. Cir. No. 05-1155). The Petition sought review of an order issued by the Department granting an exemption to the United States Postal Service permitting the Postal Service and any bush mail carrier to agree to pay and accept rates of compensation for carriage of bush mail in any Alaskan markets that are higher than the rates established by the Department of Transportation under prior orders issued pursuant to 49 U.S.C. §§ 41901, 41902, and 41904. The exemption, as originally issued, was for one year's duration.

The Department's order was prompted by an emergency petition filed by Frontier Flying Service seeking an emergency rate increase in the Alaskan markets it serves. The Postal Service was inclined to agree to pay Frontier the higher rates requested in order to keep it flying the relevant routes, but was required by statute to pay only the rates established by the Department.

The Department's order denied Frontier's specific request for a rate increase, finding that it had not been adequately supported, and instead granted the relevant exemption to allow

the Postal Service to agree with any Alaskan carriers to pay higher rates for part 121 bush mail service (service utilizing larger aircraft) between selected city pair markets. Without some relief Frontier had stated that it would have been forced to drop back its service to smaller part 135 aircraft, a result that would be inconsistent with recent legislation governing Alaska mail carriage. As a result of the Order, the Postal Service has begun paying higher bush mail rates to Frontier in some markets where Frontier continues to utilize part 121 aircraft.

Peninsula Airways' Petition for Review argued that the Department's order allowing the Postal Service voluntarily to agree to pay higher rates on certain routes unfairly discriminated against it and other similar bush mail carriers, as to whom such rates are, as a practical matter, unavailable. Peninsula claimed that the exemption should have applied universally to all part 121 bush mail markets in Alaska, not just to specific city pairs where the Postal Service voluntarily agrees to pay higher compensation.

The case was scheduled to be briefed beginning in September 2005, but early that month the D.C. Circuit ordered that the parties participate in the court's mediation program. On October 17, Peninsula Airways and the Department met for mediation, along with Frontier and the U.S. Postal Service. The parties ultimately entered into an agreement resolving Peninsula Airways' dispute concerning the current level of Alaskan bush mail rates.

Under the terms of the settlement agreement, Peninsula Airways agreed to dismiss its petition for review and the

Department agreed to issue a new order making the disputed exemption order applicable statewide through March 18, 2006, subject to Postal Service agreement to pay the "exempted" rates statewide. The Department also agreed to convene a postal rate conference in late November, which we did, to discuss mail rate issues, including the possible establishment of a single Part 121 bush mail rate, an approach the carriers and the Postal Service strongly urged during mediation. Finally, The Department also agreed to undertake its best efforts to issue a new mail rate order resulting from the conference prior to the expiration of the current rate exemption (March 18, 2006).

The case was formally dismissed by order of court on December 28.

### **Litigation Seeking National Energy Policy Development Group Records Ends**

On December 23, following a remand by D.C. Circuit, the district court administratively closed the Freedom of Information Act case (Judicial Watch v. Department of Energy, D.D.C. No. 01-981) that had sought the release of records relating to the President's National Energy Policy Development Group (NEPDG) headed by Vice President Cheney. There was a companion case filed pursuant to the Federal Advisory Committee Act (FACA) that had also sought NEPDG documents that was resolved earlier in 2005.

In both cases, the Department, along with a number of other agencies, produced a substantial number of documents in response to FOIA requests and FACA discovery requests, and DOT

also filed a 300 page Vaughn Index/Privilege Log to support the withholding of thousands of additional pages of documents.

The D.C. Circuit's decision reversed a district court holding that certain federal employees who were detailed to the Office of the Vice President to work on the NEPDG remained agency employees and could not be viewed as distinct from their departments or agencies. Under the district court's reasoning, any documents they created or obtained while working as part of the NEPDG or its Working Group remained agency documents subject to disclosure under the FOIA. The district court ruled that the records of the DOE employees detailed to the Office of the Vice President to work on the NEPDG or the Working Group were created or obtained by DOE, remained under the control of DOE, and thus were agency records for purposes of the FOIA.

The D.C. Circuit disagreed, holding that although the NEPDG was not itself an "agency" for purposes of the Freedom of Information Act, the agencies involved with the NEPDG lawfully withheld, pursuant to Exemption 5, documents bearing upon the deliberative processes of the NEPDG. The court also held that the records created by employees detailed from an agency to the NEPDG are not "agency records" subject to disclosure under the FOIA.

Following the D.C. Circuit's remand, the district court ordered certain agencies, but not DOT, to conduct further searches for relevant documents. The government then produced additional documentation and revised the agencies' Vaughn Indices. The plaintiffs indicated they were satisfied with this additional

production. Having resolved all production matters the district court then ordered the case to be administratively closed. This action ended almost five years of litigation concerning the release of NEPDG documents.

### **Minnesota District Court Dismisses Complaint Seeking to Require the Secretary to Define When States May Tax the Income of Airline Employees**

On January 6, 2006, in Enyeart v. State of Minnesota, (D. Minn. No. Civil 05-1291), the U.S. District Court in Minnesota dismissed a complaint filed by two former Northwest Airlines pilots that sought an order requiring the Secretary to take action protecting the plaintiffs' alleged right to avoid paying Minnesota income taxes.

The plaintiffs relied on a federal statute, 49 U.S.C. § 40116, that defines which states may tax the income of airline employees and authorizes the Secretary to enforce its terms. The plaintiffs had been convicted of evading Minnesota's income tax after the state courts rejected their claims that neither was a Minnesota resident. The plaintiffs essentially sought Department action that would retroactively have overturned their convictions.

The Secretary has never taken steps to enforce section 40116, the terms of which have not generated any controversy in the past. The District Court held that it had no jurisdiction to tell the Secretary how he should exercise his discretionary enforcement authority over the statutory restrictions on state taxation.

Insofar as the plaintiffs had sued the State and State officials as well, the Court held that it had no jurisdiction to overturn the plaintiffs' convictions for tax evasion. The plaintiffs' action as a practical matter would have required the court to consider whether the State court judgments were correct, which the court declined to do. The court also held that the two pilots in any event were also collaterally estopped from challenging their convictions.

The Court's opinion is available at:

<http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/06-00108.PDF>

### **Coalition of 9/11 Families Challenges Proposed Site for New York City Transit Terminal**

On October 13, a group of family members representing certain victims of the 9/11 terrorist attacks on the World Trade Center ("WTC") filed a complaint in the U.S. District Court for the Southern District of New York in Coalition of 9/11 Families, Inc. v. Mineta, (S.D.N.Y. No. CV-05-9709). The complaint was filed against the Department, FTA, and the Port Authority of New York and New Jersey and challenges a proposed new terminal for Port Authority Trans Hudson ("PATH") trains.

The complaint alleges that the proposed site for the new terminal violates Section 4(f) of the Department of Transportation Act, which provides for the protection and preservation of historical sites that are eligible for inclusion in the National Register of Historic Places. Specifically, Section 4(f) prohibits the Department from funding a project affecting historic property unless the Department finds

that no "prudent and feasible" alternative exists and the project minimizes harm to the historic property. The Coalition contends that the project violates Section 4(f) because one of the rail platforms in the proposed rail terminal will cross the footprints of the WTC Twin Towers. The Coalition contends that the Department, FTA, and Port Authority acted arbitrarily and capriciously when they rejected as "not prudent" two alternative sites for the PATH terminal. The alternative sites proposed by the Coalition also would use Section 4(f) property within the larger WTC area.

In early January the court held a status conference and established a briefing schedule for the case. The parties will submit cross-motions for summary judgment, oppositions, and replies thereto between mid February and April.

Construction of the new terminal began on September 6 and is ongoing. As of this writing plaintiffs' have not sought to enjoin construction.

### **Government Settles Complaint Alleging DOT Failed to Purchase a Sufficient Number of Alternative Fuel Vehicles**

On November 30 the court approved a settlement agreement offered by DOT in Center for Biological Diversity v. DOE, (N.D. Calif. No. 05-1526). In the case the Department and 14 other agencies and departments were sued for alleged failure to comply with the Energy Policy Act of 1992 (EPA Act) requirement that a set percentages of new vehicle purchases by all Federal agencies must be Alternative Fuel Vehicles (AFVs).

This is the second time the Center for Biodiversity has sued the government

for failure to comply with the EAct. In July 2002, in Center for Biodiversity v. Abraham, 218 F. Supp.2d 1143 (N.D. Cal. 2002), the court found that the Department, along with a number of other Federal agencies, was out of compliance with the Act's requirements. In this case the plaintiffs again alleged that DOT and other agencies had failed to meet the EAct's current requirement that at least 75% of the agency's new vehicles purchases are to be AFVs.

Under the terms of the approved settlement DOT and other defendant agencies agreed to meet EAct's new

purchase requirements and specifically agreed to a schedule that would bring them into compliance with the 75% new purchase requirement. Under the terms of the settlement, for fiscal year 2006, DOT agreed that 50% of newly acquired vehicles would be AFVs; for fiscal 2008, 65% of the would be AFVs; and for fiscal 2009, 75% would be AFVs.

The litigation continues with respect to a challenge to the Department of Energy's interpretation of several other EAct requirements but DOT is not involved in that aspect of the litigation.

## Recent Litigation News from DOT Modal Administrations

### Federal Aviation Administration

#### D.C. Circuit Declines to Review FSIP Decision Refusing on Jurisdictional Grounds to Resolve a Labor Dispute Between FAA and Two Unions

On February 17 the U.S. Court of Appeals for the District of Columbia Circuit in National Air Traffic Controllers Association, AFL-CIO v. Federal Service Impasses Panel and Federal Labor Relations Authority (D.C. Cir. No. 05-5076) affirmed a district court decision which, in turn, had left standing a decision of the Federal Service Impasses Panel declining to assert jurisdiction in the context of an FAA labor dispute.

The FSIP, an entity within the Federal Labor Relations Authority, is generally authorized to resolve impasses between agencies and union representatives, but

declined to do so in a dispute between two unions and the FAA concerning compensation and benefits. The FAA argued before the FSIP that the FSIP was statutorily barred from resolving FAA compensation and benefit disputes and that, instead, the FAA, by statute, must simply implement its own solution and report that fact to Congress. In support of that conclusion the FAA relied upon provisions set forth in the 1996 Department of Transportation and Related Agencies Appropriations Act that directed the FAA to establish its own personnel management system, exempt from many of the provisions of federal personnel law. See 49 U.S.C. § 40122(g).

In light of the FAA's jurisdictional argument the FSIP declined to assert jurisdiction over the dispute, concluding that it was "unclear whether the Panel has the authority to resolve the parties' dispute."

The D.C. Circuit's holding noted that an order of the FSIP is not reviewable

except in extraordinary circumstances, as specifically addressed in the case of Leedom v. Kyne, 358 U.S. 184 (1958). The court agreed with the United States that no such extraordinary circumstances had been shown in the present case. Specifically, the court held that no clear and mandatory statutory duty of the FSIP to assert jurisdiction had been shown, and that the challenging unions in any event have a meaningful and adequate means of vindicating their alleged statutory rights by presenting their jurisdictional arguments to the FLRA.

While the FLRA defended the FSIP's decision during oral argument, Andrew Steinberg, Chief Counsel for the FAA, argued separately on behalf of FAA that there was a strong Congressional basis underlying FAA's position that disputes such as the one at issue cannot be heard by the FSIP.

The D.C. Circuit's decision is available at:

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200602/05-5076a.pdf>

### **Developments in O'Hare Modernization Program Litigation**

There are four cases pending against the FAA and the City of Chicago relating to the expansion of O'Hare International Airport and one pending solely against the City of Chicago. Two of the FAA cases are in the U.S. Court of Appeals for the District of Columbia Circuit and two are in the U.S. Court of Appeals for the Seventh Circuit.

In Village of Bensenville v. FAA, (D.C. Cir No. 05-1383), on September 30, the

day that the FAA issued its Record of Decision approving revision of the layout plan for the expansion of O'Hare International Airport, the Village of Bensenville, Elk Grove Village, and St. John's Church of Christ filed a petition for review in the U.S. Circuit Court of Appeals for the District of Columbia challenging the FAA's decision.

The petitioners also filed motions for an administrative stay and an emergency motion for a stay pending appeal. The court granted the motion for an administrative stay to review the matter. The FAA and City of Chicago filed briefs in opposition to the motion for emergency stay. As part of its response, the City committed not to disturb graves in St. Johannes Cemetery pending decision on the appeal. This cemetery lies in the path of the Modernization Program that the FAA approved for O'Hare International Airport.

On October 25, the court dissolved the administrative stay and denied the emergency motion for a stay. The FAA has filed the index to the administrative record and the court has granted the City of Chicago's motion to intervene.

This case has been consolidated for briefing and oral argument with a subsequent petition for review (discussed below) filed by the same parties challenging the FAA's issuance of a Letter of Intent awarding discretionary and entitlement funds for expansion of O'Hare.

In the other cases, St John's United Church of Christ v. City of Chicago, (N.D. Ill. No. 05 4418 and related cases Nos . 05-4450 and 05-4451), in May 2003, at the very outset of the environmental review process for the



proposed expansion of O'Hare, the Village of Bensenville, Village of Elk Grove, and Roxanne Mitchell (Village plaintiffs), St. John's United Church of Christ and two individuals (the St. John's plaintiffs), and the Rest Haven Cemetery Association and two individuals (Rest Haven Cemetery Association plaintiffs) filed a complaint against the City of Chicago and the FAA in the U.S. District Court for the Northern District of Illinois.

The bulk of the complaint consisted of constitutional and statutory claims that the City's proposal to relocate St. Johannes and Rest Haven cemeteries violated religious liberties. The complaint also alleged that the FAA and the City of Chicago were violating the National Environmental Policy Act because the FAA was not stopping the City from acting prematurely to acquire and demolish homes, parks, and cemeteries.

The City of Chicago filed a motion to dismiss the case, which the FAA supported. In July 2003, the City and the plaintiffs entered into an agreed order. Under this agreed order, the City stipulated that, with certain exceptions, it would not proceed with actions in Bensenville and Elk Grove until the FAA completed its EIS and issued its Record of Decision.

The case was dormant for over two years until October 11, 2005, when the Judge in the District Court case (Judge Coar) held a status conference. He issued a tentative order to show cause why the NEPA claims against the FAA and all but three claims against the City relating to destruction of St. Johannes Cemetery should not be dismissed as moot. The FAA responded by concurring with the

proposed disposition of the claims and citing 49 USC § 46110, which grants exclusive jurisdiction to hear the claims asserted against the FAA to the Circuit Courts of Appeals.

On October 26, the Village of Bensenville, Elk Grove Village, St. John United Church of Christ, and others responded to Judge Coar's order by opposing dismissal and filing a motion to amend the complaint. The amended complaint alleges that the FAA and the City will violate NEPA if the City is permitted to take action before the FAA issues its Federal funding decision. Plaintiffs noted that the D.C. Circuit Court of Appeals had just lifted the administrative stay halting work on the O'Hare expansion and accordingly filed a motion for a temporary restraining order and preliminary injunction in the district court.

On November 1, Judge Coar concluded that the motion to amend the complaint rendered his order to show cause moot. He directed the City and FAA to respond to the motion to amend the complaint. On November 3, the District court granted the motion for a temporary restraining order pending further review of the matter, staying land acquisition by the City of Chicago until November 16.

On November 16, however, the court vacated the TRO and denied the motion for preliminary injunction as moot. Judge Coar dismissed all of the claims in the Plaintiffs' first amended complaint and denied plaintiffs' motion for leave to file a Second Amended Complaint except as it related to their claim against the FAA under the Freedom of Information Act. The court reasoned that the issues in these complaints were not ripe and were inextricably tied to the

claim before the D.C. Circuit in Village of Bensenville v. FAA.

On November 23, the Village plaintiffs, St. John's plaintiffs, and Rest Haven Cemetery Association plaintiffs each filed separate notices of appeal to the U.S. Circuit Court of Appeals for the Seventh Circuit. The St. John's plaintiffs limited their appeal to the portion of the order dismissing claims against the City of Chicago. The St. John's plaintiffs also filed motions for summary reversal of that portion of the order and for an injunction pending appeal (to prevent the acquisition of St. Johannes Cemetery), and for an expedited appeal.

On December 2, 2005, the Seventh Circuit Court of Appeals denied the motion of the St. John's plaintiffs for summary reversal of Judge Coar's decision. The Seventh Circuit also denied the motion for an injunction except to the extent of stopping the City of Chicago from receiving title to the land upon which St. Johannes Cemetery is located pending appeal. The court also granted the St. John's plaintiffs' motion to expedite the appeal.

Briefing in the St. Johns plaintiffs' case, which involves only the City of Chicago, was completed on January 3. Oral argument was held on January 10. That case is now pending for decision.

The Seventh Circuit has consolidated the other two cases for briefing and argument. Petitioners' filed their briefs on January 9. The FAA's brief is due on February 8 and the petitioners' reply brief is due on February 22. Oral argument has not yet been scheduled in that case.

## **Ohio District Court Remands FAA's Contract Towers Decision**

The FAA classifies air traffic towers on a scale from Level 1 to Level 5 depending on the volume and complexity of the air traffic that each tower handles. Level 1 towers use only visual flight rules and are not equipped with any of the radar equipment used for instrumental flight rules.

The National Air Traffic Controllers Association ("NATCA") instituted an action in the Northern District of Ohio in National Air Traffic Controllers Association v. Mineta, (N.D. Ohio No. 99CV1152), challenging the FAA's decision to privatize ATC services at certain Level 1 airfields. NATCA contended that the privatization decision was unlawful under OMB Circular A-76 since, in NATCA's view, (1) ATC is an inherently governmental function and therefore is ineligible for privatization, and (2) the FAA did not conduct a full analysis showing that private contractors could perform such services more economically than government employees.

One year ago presiding judge held that a change in the statutory language concerning the contract tower program reflected Congress' determination that "Level 1" air traffic control is not inherently governmental. The court then granted each party an opportunity to submit briefs concerning whether FAA had complied with OMB Circular A-76's cost comparison requirements. In its brief NATCA raised three issues: (1) FAA had not complied with the circular's requirements for a national security review; (2) FAA had not properly done the cost comparison; (3)

many of the towers in the program either at the time of the conversion or after are not Level 1 (and therefore not covered by the statutory language) and FAA's determination that the work done at those towers is commercial in nature rather than inherently governmental is wrong.

In a subsequent decision issued on February 23, 2006, the court has now held that the national security argument raised by NATCA has no merit, and has also agreed with the FAA that NATCA lacks standing to challenge the cost comparison. On the remaining issue, however, the court held that neither the Secretary's decision that all of air traffic is a commercial function nor the then head of Air Traffic's decision that the air traffic function performed by the towers currently in the contract tower program is not inherently governmental was supported in the record. As a result, the court remanded those issues to the FAA.

### **No-Fly Zone Litigation Update: Sixth Circuit Denies Cleveland Air Show Challenge**

The FAA has long maintained "no-fly" zones of specific dimensions in particular areas of the country. Historically, some are of permanent or indefinite duration (e.g., around the White House and Capital) and some are limited to a greater or lesser period of time (e.g., around a president's personal residence for the length of his administration). Most of these zones are established via Notices to Airmen (NOTAMs) that are issued without notice and comment procedures.

After the terrorist attacks of September 11, the FAA set up standardized zones around a great many outdoor assemblies

of large numbers of people. These zones were later limited to prominent sporting events and to the Disney theme parks in Florida and California, and the FAA allowed a great many waivers (usually for aerial banner towers) following security screenings.

Congress subsequently codified the no-fly zones around specified sporting events and Disney properties, made them indefinite in duration, ended the agency's waiver program, and prescribed its own limited list of circumstances in which flight operations would be permitted within the zones. Challenges to these "no-fly" zones have been successfully turned back in every case completed thus far.

The last pending case has also now been resolved in the FAA's favor. Cleveland National Air Show, Inc. v. FAA, (6th Cir. No. 04-4089), involved a challenge to a 2004 decision by the FAA to bar portions of Cleveland's air show, which is held every Labor Day weekend. The planned air show activities underlying the Cleveland dispute were to have taken place within a no-fly zone established around a nearby major sporting event taking place at the same time. The FAA refused to grant a waiver allowing aerial activities on the ground that those activities did not qualify for an exception from the general ban.

Congress allowed only a limited number of exceptions, related to the "operational purposes" of the "events" or locales over which no-fly zones exist. This legislation also continued exemptions included in the earlier NOTAMs for military, law enforcement and aeromedical operations. The Air Show contended that the FAA's action in denying it a waiver was arbitrary and capricious, and premised on an

unreasonable reading of the statute. The Air Show attempted to argue that it was an “event” for purposes of the statutory exemption. It also argued that if the FAA’s view of the statutory language was reasonable, then the legislation itself was unconstitutional as a violation of the Equal Protection Clause.

On December 1, the Sixth Circuit ruled that although the 2004 Air Show had concluded, the controversy nevertheless was not moot since it was capable of repetition. On the merits the court held that the FAA had reasonably interpreted the statutory waiver provisions, and that the legislation did not violate the Constitution.

The Sixth Circuit determined that the FAA was entitled to Chevron deference even in the absence of notice and comment procedures, and that its reading of the statutory exceptions to no-fly zones was reasonable. The Court found that, “read most naturally,” the exception allowing flights relating to the “operational purposes” of an “event, stadium or other venue” referred to the “event, stadium or other venue” over which a no-fly zone was established in the first place. The Air Show’s interpretation, by contrast, would have permitted the FAA to grant waivers “for anything that could be characterized as an event – making the exception the rule and the rule the exception.”

The opinion also rejected the petitioner’s argument that the denial of a waiver was unreasonable because it arguably did not serve the purpose of the no-fly zones (providing security). The Court explained that Congress had been very clear and had simply not provided an exception for air shows.

Lastly, the Sixth Circuit held that the statutory provisions establishing the no-fly zones and the limited exception thereto did not violate the Equal Protection clause. The Air Show had contended that it was unconstitutional to provide preferential treatment only to certain events and venues. The strong presumption in favor of legislation not infringing fundamental constitutional rights requires only a rational basis to withstand such a challenge. The Court found that the statute “satisfies these modest requirements.” Although Congress could have plausibly adopted different categories of places and activities for no-fly zones and exceptions, the choice to focus on major sporting events and Disney theme parks as especially attractive terrorist targets “assuredly was a rational one.”

The decision is available at:

<http://www.ca6.uscourts.gov/opinions.pdf/05a0461p-06.pdf>.

### **Federal Circuit Affirms Dismissal of Heliport’s Claims of Post-9/11 Damages Stemming from FAA Ban on D.C. Air Operations**

The dismissal of a claim for 9/11 related damages filed by an operator of a heliport in Washington, D.C. has been affirmed in Air Pegasus of D.C. Inc. v. United States, (Fed. Cir. No. 04-5108). The Federal Circuit has also denied rehearing in the case.

Following the terrorist attacks on September 11, 2001, Air Pegasus, the operator of a heliport business and the lessee of the South Capitol Street Heliport, sued the United States under a

Fifth Amendment takings theory based on its contention that “the economic value of Air Pegasus’s business and its leasehold interest in the Property had been destroyed” by the FAA’s ban on flight operations around Washington, D.C. See, Air Pegasus of D.C. Inc. v. United States, 60 Fed. Cl. 448 (2004). The trial court granted the United States’ motion for summary judgment, holding that Air Pegasus did not have a cognizable property interest over the navigable airspace above the South Capitol Street Heliport.

The U.S. Federal Court of Appeals for the Federal Circuit has now affirmed that determination, but reached its conclusion in a slightly different manner. Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1210 (Fed. Cir. 2005). After discussing the principles involved in takings cases, the court concluded that Air Pegasus based its takings argument on the perceived taking of property owned by others, i.e., a “taking” from the helicopter operators who wanted to transit navigable airspace to use the Air Pegasus heliport. The court concluded that such a claim failed because the “Fifth Amendment does not provide a remedy for such a derivative claim.” Id. at 1219.

The court also commented that, in addition, Air Pegasus “appears to assert a right of access to the navigable airspace from the South Capitol Street Heliport.” In rejecting this argument, the court held that a “right of access” to navigable airspace is not a cognizable property interest under the Fifth Amendment.

The Federal Circuit’s decision is available at:

<http://www.fedcir.gov/opinions/04-5108.pdf>

### **Government Seeks Summary Affirmance of Dismissal of Challenge to Drug Testing Rules**

In March of 2005, the U.S. District Court for the District of Columbia dismissed two lawsuits against individual DOT and FAA employees, as well as DOT itself, that attacked various aspects of the Department’s drug testing rules and their administration. The plaintiff filed a notice of appeal with the U.S. Court of Appeals for the D.C. Circuit, Drake v. Capelle (D.C. Cir. No. 05-5199), and the government has moved for summary affirmance. A detailed summary of the two cases and the district court’s favorable decision is set forth in the September, 2005 edition of DOT Litigation News.

### **Federal Highway Administration**

#### **District Court Upholds Illinois DBE Program in Constitutional Challenge**

On September 8, the Northern District Court for Illinois in Northern Contracting, Inc. v. Illinois, (N.D. Ill. No. 00-C-4515) ruled that Illinois’ Federal and State Disadvantaged Business Enterprise (DBE) Programs were constitutional as applied in Illinois.

In a two-week trial, Defendant Illinois Department of Transportation (IDOT) defended the DBE Program against the as applied constitutional challenge raised

by plaintiff, a guardrail and fencing highway contractor.

IDOT presented detailed evidence explaining Illinois' DBE Program administration and goal-setting process. Part of the evidence presented to the court involved IDOT's "Zero Goal" experiment, which had allowed a predetermined portion of contracts to be entered into without DBE goals. The experiment resulted in approximately 1.5% DBE participation on the zero goal contracts, as compared to approximately 17% DBE participation on contracts that had DBE goals.

The court held that the evidence proved that IDOT's DBE Program was narrowly tailored to the previously proven compelling interest of remedying the effects of racial and gender discrimination within the construction industry. In so ruling, the court repeated its prior determination that the Federal DBE Program was facially constitutional as a program narrowly tailored to a compelling governmental interest. The court also found that IDOT met its strict scrutiny burden. The court explicitly held that the appropriately high level of DBE participation on goals contracts resulted from the success of IDOT's program and not from a lack of discrimination, relying on the zero goal study.

### **Ohio District Court Confirms Competition Requirements**

On January 13, the U.S. District Court for the Southern District of Ohio in Cleveland v. Ohio v. FHWA, (S.D. Ohio No. 2:04-CV-805) granted FHWA's motion for summary judgment in a challenge to FHWA's contracting regulations.

This case arose after the FHWA informed ODOT that it was withdrawing funds for the Kinsman Road project in Cleveland, Ohio, because Cleveland's local hiring preference violated the provisions of 23 C.F.R. 635.117(b), which forbids a State from imposing requirements that operate to discriminate against the employment of labor from another state. Cleveland's ordinance requires that 20% of construction worker hours on City projects be performed by residents of the City. FHWA has consistently taken the position that this regulation applies to preferences that discriminate against employment within a State as well. It has been FHWA's position that local labor preferences also violate the requirements for full and open competition contained in 23 U.S.C. § 112 and 23 C.F.R. 635.104.

The State of Ohio and the Ohio Department of Transportation (ODOT) filed a Third Party Complaint in state court to join FHWA in a lawsuit originally filed by the City of Cleveland against the State of Ohio. The Complaint was later removed to Federal court. The complaint filed by the City of Cleveland challenged the State's disapproval of Cleveland's local labor preferences as applied to the Kinsman Road Project in Cleveland.

The district court found that the State and ODOT met the constitutional and prudential requirements for standing. The court further found that the FHWA's decision to withdraw federal funds from the Kinsman Road project is subject to review under the Administrative Procedure Act. Applying this standard, the court held that FHWA did not act arbitrarily or capriciously in determining that the local hiring requirement violated the competitive

bidding requirements of 23 U.S.C. § 112.

The court held that the statute unequivocally states Congress' intent that highway contracts be awarded in an environment of free and open competition and that FHWA's interpretation is entitled to substantial deference. The court found that Cleveland's ordinance acts as a specification that would discourage potentially qualified bidders. The local ordinance operates to award highway contracts in Cleveland on the basis of the contractor's willingness and ability to conform to the local hiring requirement – not on the basis of being the lowest responsive bidder. The court concluded that the ordinance imposes a condition on a contractor that has nothing to do with the contractor's ability to complete the project in a safe and responsible manner.

The court rejected FHWA's argument that the Cleveland ordinance violated 23 C.F.R. § 635.112(d), which requires that nondiscriminatory bidding procedures be afforded to all qualified bidders regardless of National, State or local boundaries. The court held that section 635.112(d) only applies to bidding procedures, not the potential effect of those bidding procedures. Accordingly, FHWA's reading of section 635.112(d) as prohibiting local labor preferences that have the effect of limiting competition was held to be too broad.

However, the court held that Cleveland's ordinance nonetheless violates 23 C.F.R. 635.110(b), which prohibits procedures or requirements for bonding which, in the judgment of the FHWA Division Administrator, may operate to restrict competition. The Cleveland ordinance

included a penalty provision, which allowed the City to punish a violating contractor by imposing a bonding requirement of 20 percent of the contract price for any subsequent contract awarded to the contractor for a period up to five years after the violation.

In addition, the court held that the Cleveland ordinance violated 23 C.F.R. §635.117(b), which prohibits procedures or requirements that operate to discriminate against the employment of labor from any other State, possession or territory of the United States in the construction of a Federal-aid project. Cleveland had argued that the regulation prohibits discrimination against out of state labor but that intrastate discrimination against non-Cleveland residents was not prohibited. The court held that it is axiomatic that discrimination, whether interstate or intrastate, prohibits open competition. Therefore, FHWA's action in withdrawing federal funding for the Kinsman Road project under section 635.117(b) was not, in the court's view, plain error.

Finally, the court rejected the City's contention that its ordinance was consistent with the Common Rule (the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) set forth at 49 C.F.R. 18.36. The court found that as a subgrantee, the City was subject to the provisions of 49 C.F.R. 18.37, which require compliance with Federal statutes and regulations.

This decision is significant because in most respects it confirms a long-standing interpretation by FHWA. It is also significant because interest in local hiring preferences appears to be

increasing as local governments are examining ways to increase employment among their residents. This interest may increase further in light of Section 1920 of SAFETEA-LU, which contains a “sense of Congress” provision encouraging local workforce investment.

### **Ongoing challenge to implementation of Competition and Davis-Bacon Federal Contracting Obligations**

Affiliated Construction Trade Foundation v. DOT, (S.D. W. Va, No. 2:04-01344) involves a joint development initiative or innovative partnership concept between the West Virginia Department of Transportation and private industry. The King Coal Highway is a 93-mile portion of the overall I-73/74 Corridor that runs through southern West Virginia. Specifically, in the Red Jacket Project portion of the corridor traditional construction costs would have reached approximately \$300 million but under the public private partnership costs are expected to be approximately \$155 million. This concept involves having the West Virginia Department of Transportation allow slight shifts in the alignment of a 12-mile portion of the King Coal Highway in order to allow private industry to remove coal and place excess material from the mining in a constructive fashion to shape future highway fills.

Plaintiff filed a first amended petition for declaratory judgment and injunctive relief. Plaintiffs allege that the Federal defendant supported or approved an agreement between the West Virginia Department of Transportation Division of Highways and a private contracting company that allegedly violated federal

competitive requirements and federal “Davis-Bacon” wages. On December 14, 2005, the United States Department of Transportation filed a motion to dismiss asserting that the plaintiffs claims should be dismissed because there is no private right of action, no final agency action and no waiver of sovereign immunity. Plaintiffs filed a response on December 23, 2005 and U.S. DOT filed a Reply on January 4, 2006. Plaintiffs essentially requested that the court allow them to amend their claims against the Federal defendant to include claims under the Administrative Procedure Act.

### **Federal Railroad Administration**

#### **Ninth Circuit Upholds FRA Engineer Certification Regulations Decision**

On December 29, the U.S. Court of Appeals for the Ninth Circuit denied a petition for review in Carpenter v. Mineta (9th Cir. No. 04-71221), a challenge to the scope of FRA’s authority, and the remedies available in its review of railroad’s locomotive engineer certification decisions.

Robert E. Carpenter, who participated in the locomotive engineer certification training program of the Atchison, Topeka and Santa Fe Railway Company (now known as BNSF), sought review of FRA’s February 19, 2004 decision that upheld BNSF’s decision to deny the petitioner certification as a locomotive engineer, pursuant to FRA’s engineer certification regulations in 49 C.F.R. Part 240 (Part 240).



Mr. Carpenter pursued his claims administratively, as provided for by Part 240, before FRA's Locomotive Engineer Review Board, in a de novo review before FRA's Administrative Hearing Officer (AHO), and finally in an appeal of the AHO's decision to FRA's Administrator, before petitioning the Ninth Circuit. At each level of the administrative process, BNSF presented evidence that Mr. Carpenter failed to achieve the required score on the locomotive simulator tests taken at the conclusion of his training. Without achieving the minimum score petitioner could not be certified under the terms of BNSF's FRA-approved training program.

Throughout the litigation Mr. Carpenter alleged that various inadequacies in BNSF's training program and the lack of competence of its instructors, resulted in his failure to pass the certification tests. Mr. Carpenter sought an AHO order alternatively requiring that he be certified, that he be retrained and retested, or setting forth factual findings as to the adequacy of the training program and its instructors.

FRA concluded, however, that Mr. Carpenter's allegations and requested remedies were beyond the scope of its review under Part 240, which is limited to determining whether a prospective engineer meets the requirements for certification. Because Mr. Carpenter did not meet those requirements, FRA found that the decision to deny certification was proper.

The Court upheld FRA's decision in all respects.

The Civil Division of the Justice Department assigned this case to the

Department for briefing and argument, and Colleen A. Brennan, a trial attorney in FRA's Office of Chief Counsel, argued the case on behalf of the Department.

The Ninth Circuit's decision is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/853D2A94E8D687B9882570E60003652D/\\$file/0471221.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/853D2A94E8D687B9882570E60003652D/$file/0471221.pdf?openelement)

## **National Highway Traffic Safety Administration**

### **District Court Refuses to Dismiss Mandamus Action Seeking to Compel NHTSA to Decide Exemption Application**

On February 7, the United States District Court for the Eastern District of Michigan in InterModal Technologies v. Mineta (E.D. Mich. No. 05-10204-BC) denied the United States motion to dismiss, which had sought the dismissal of a petition seeking a writ of mandamus. The plaintiff sought the writ in order to require NHTSA to act on a pending application for an exemption from certain existing safety standards for braking systems promulgated by NHTSA.

Plaintiff InterModal Technologies manufactures truck trailers that are required, under NHTSA regulations set forth at 49 C.F.R. 571.121, to be equipped with anti-lock brakes with certain warning features. InterModal has chosen to outfit its trailers with a non-electronic pneumatic airbrake system that NHTSA, in a 2001 opinion letter, has stated do not comply with regulatory

standards due to the fact that no warning signals are installed on the exterior of the trailer.

Air Brake Systems, which manufactures the system at issue, previously attempted to challenge the NHTSA opinion letter, but the district court and then the U.S. Court of Appeals for the Sixth Circuit each found that the opinion letter was not final agency action for purposes APA review. The Sixth Circuit's decision, Air Brake Systems v. Mineta, 357 F.3d 632 (6th Cir. 2004), noted however that the parties challenging NHTSA's opinion letter were free to seek an exemption from the relevant regulation and, if denied, that determination could be judicially appealed.

InterModal filed such an exemption request on January 26, 2004. NHTSA issued a notice concerning the petition on August 18, 2004, which was published in the Federal Register, but NHTSA has not as yet acted on the exemption request. On August 9, 2005 InterModal filed its complaint seeking the issuance of a writ of mandamus.

Before the district court the United States sought dismissal, arguing that NHTSA could not be compelled to act on the pending exemption request. The district court, however, disagreed, holding that while NHTSA had the discretion to either grant or deny the requested exemption it must ultimately do one or the other. The court noted, however, that it could not, on the record before it, determine whether the delay in the proceeding was justified. As a result the court ordered discovery to determine whether NHTSA's delay has been reasonable.

The Sixth Circuit's prior decision in Air Brake Systems v. Mineta is available at:

<http://www.ca6.uscourts.gov/opinions.pdf/04a0044p-06.pdf>

### **D.C. Circuit Hears Argument in Challenge to NHTSA Enforcement Policy Allowing Regional Recalls**

In Center for Auto Safety v. NHTSA, (D.C. Cir. No. 04-5402), two public interest groups are appealing the dismissal of their suit challenging NHTSA's informal enforcement policy allowing car manufacturers to issue recalls for cars with safety defects that are restricted to vehicles in designated States. The case was argued before Judges Randolph and Griffith and Senior Judge Edwards of the U.S. Court of Appeals for the District of Columbia Circuit on December 9. The Court's questions gave no indication on how it may decide the case.

The district court previously granted NHTSA's motion to dismiss the case. The plaintiffs, the Center for Auto Safety and Public Citizen, had argued that the applicable statute, 49 U.S.C. § 30118(c), required that all recalls must be nationwide, and that NHTSA's "regional recall" policy constituted a binding rule adopted without notice and comment.

Car manufacturers typically issue regional recall notices only when the relevant defect will affect safety after long exposure to weather-related conditions, such as very high temperatures, that occur in some but not all States. NHTSA staff officials have set forth guidelines addressing NHTSA's

use of its enforcement discretion for regional recalls, but NHTSA has neither formally approved regional recalls nor adopted rules establishing standards for such recalls. The public interest groups are not challenging any specific regional recall and had never exercised their right to file a petition asking NHTSA to open a formal investigation of a regional recall under 49 U.S.C. § 30162(a)(2).

The district court dismissed the case on the grounds that NHTSA's governing statute allowed manufacturers to use regional recalls, that the policy would not dictate NHTSA's decision on whether any specific regional recall was lawful, and that the policy, as a result, did not represent final agency action. The court held, however, that it could review the lawfulness of NHTSA's adoption of a general enforcement policy, even though the courts ordinarily could not review NHTSA's exercise of enforcement discretion in a specific case.

### **Public Interest Group and Tire Manufacturers Challenge NHTSA Rule on Warning Systems for Low Tire Pressure**

In Public Citizen v. Mineta, (D.C. Cir. No. 05-1188), Public Citizen v. Mineta, (D.C. Cir. No. 05-1209); and Tire Industry Ass'n v. NHTSA, (D.C. Cir. No. 05-1309) Public Citizen, several tire manufacturers, and the tire manufacturer trade association have filed petitions for review challenging a final NHTSA rule requiring car manufacturers to install tire pressure monitoring systems ("TPMSs") in new cars that will warn drivers when one or more of a car's tires is under-inflated.

NHTSA adopted the rule pursuant to section 13 of the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 ("TREAD Act"), P.L. No. 106-414. That statute directed NHTSA to establish a rule requiring car manufacturers to install TPMSs on all vehicles.

NHTSA's first TPMS rule was vacated by the U.S. Court of Appeals for the Second Circuit, which held that the rule violated the statutory mandate and was irrational because it allowed manufacturers to use systems that could detect only half of all under-inflated tires. Public Citizen, Inc. v. Mineta, 340 F.3d 39 (2d Cir. 2003). In the present litigation petitioners argue that NHTSA's new rule is inadequate because it does not require TPMSs for replacement tires and because the warning will not, in petitioners' view, appear soon enough.

In a related case, Goodyear Tire & Rubber Co. v. Mineta, (D.C. Cir. No. 05-1265), tire manufacturers have challenged NHTSA's denial of their petition to establish a rule that would have required car manufacturers to establish recommended tire pressures based on a maximum load for automobiles that would have included a tire pressure reserve. The manufacturers argued that such a rule was needed to ensure that drivers would always be aware of significantly under-inflated tires. NHTSA denied the petition after concluding that the rule sought by the tire manufacturers was unnecessary, costly, and based on incorrect assumptions.

The Court of Appeals has not set a briefing schedule in either of these cases, which the petitioners have sought to

consolidate. NHTSA and the intervenors supporting NHTSA have filed motions to dismiss the cases on various grounds; among other things, NHTSA contends that the Court should dismiss case no. 05-1265 because only the district courts, not the Courts of Appeals, have jurisdiction to review NHTSA's denial of a rulemaking petition.

## **Federal Transit Administration**

### **District Court Dismisses Challenge to Ardmore Transit Center Project**

On November 9, the U.S. District Court for the Eastern District of Pennsylvania dismissed the complaint in Save Ardmore Coalition v. Lower Merion Township, (E.D. Pa., No. 05-1668). Plaintiffs had sued FTA and the Southeastern Pennsylvania Transportation Authority, among others, challenging the proposed Ardmore Transit Center project near Philadelphia. They alleged violations of the National Environmental Policy Act, the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act of 1966.

Although Congress designated \$6,000,000 in FTA funds for the project in a conference report to an appropriations act, FTA has not received a funding application for the project yet, nor has FTA issued any NEPA determination. Thus, FTA argued, the case was not ripe for adjudication and the Court lacked subject matter jurisdiction. FTA's co-defendants similarly argued that the claims against them were not ripe for adjudication

because the environmental and related reviews had not been concluded.

The court dismissed the complaint against all defendants. Although the decision does not insulate FTA (or its co-defendants) from future claims concerning the project, FTA hopes to manage its liability risk by ensuring that FTA funding decisions and project management comply with applicable laws.

### **District Court Upholds FTA Charter Decision**

On November 2, the U.S. District Court for the Southern District of New York upheld an FTA charter decision in Blue Bird Coach Lines, Inc. v. Thompson, 2005 WL 2923558 (S.D.N.Y. 04 Civ 7168). The plaintiffs challenged FTA's decision rejecting a claim that the Rochester-Genesee Regional Transportation Authority (RGRTA) operated charter service prohibited by 49 U.S.C. Section 5323(d) on local university campuses.

The Court noted that in September 2002, FTA had ruled that RGRTA service at the Rochester Institute of Technology ("RIT") violated Section 5323(d) because the university controlled many aspects of the service. In response to that decision, RGRTA modified its RIT service, and FTA approved the revised service in June 2003.

RGRTA then broadened its service to other universities, leading to the plaintiff's challenge in this case. As the court stated, "[p]laintiff does not dispute that the characteristics of RGRTA's current campus bus service are essentially the same as those of its earlier, revised RIT service [approved by

FTA].” The district court noted that RGRTA’s revised service differed from its previous service in several respects: (1) RGRTA retained control over its campus schedules and routes; (2) the universities subsidized its students’ use of the service not by setting RGRTA’s service schedules and paying by the hour, but through a straightforward annual fee; (3) RGRTA publicized the routes on its website and maintained standard bus stops on campus; and (4) RGRTA linked its campus routes to other RGRTA routes.

In this Administrative Procedure Act case, the court held that FTA’s Regional Administrator “considered the arguments made by the parties and weighed these against agency regulations, the validity of which plaintiffs do not contest.” Specifically, she found that the new terms of the agreement placed the service under the control of the RGRTA. In addition, she noted characteristics such as the use of signs, shelters, web links and connections to off-campus routes indicating that the service was designed to benefit the public at large and was open door.” Also noting that FTA’s decision followed its own precedent in defining charter service, the Court concluded, “[i]n light of the Regional Administrator’s application of accepted regulations, her consideration of relevant factors and the consistency of her decision with agency precedent, we cannot say that [FTA’s] assessment was arbitrary, capricious, or an abuse of discretion.”

## **District Court Refuses to Enjoin Rehabilitation of Boston’s Copley Station**

On December 28 the U.S. District Court for the District of Massachusetts denied an application for an injunction prohibiting FTA from funding a station rehabilitation project in Boston. Neighborhood Association of the Back Bay, Inc. v. Federal Transit Administration, (D. Mass. No. 05-11211 (JLT)).

Two public interest groups brought the action to stop the Massachusetts Bay Transportation Authority (MBTA) from proceeding on a proposed project to bring Copley Station into compliance with the Americans with Disabilities Act. The complaint alleged violations of the National Historic Preservation Act (NHPA) and Section 4(f) of the Department of Transportation Act of 1966.

In an opinion that includes a thorough description of the procedural and substantive requirements under Section 4(f) and Sections 106 and 110 of the NHPA, the court permitted the project to go forward, and held that FTA complied with these laws. Among the court’s favorable rulings, it rejected an argument that FTA relied too heavily on information it received from the MBTA: “Section 106 requires a [Federal] agency to make an independent evaluation of the undertaking. The term ‘independent,’ however, does not mean that FTA had to conduct its own research, analysis and plans. Nor does it prohibit FTA from relying on work conducted and reports prepared by other parties....The federal agency ultimately remains responsible for all required findings and must ensure that any documents prepared by another

party meet the standards set forth in the regulations.”

The court held that FTA fulfilled its obligation in a variety of ways, specifically, by reviewing its own consultant’s monthly reports on the project, attending meetings on the project’s effect on historic properties, and reviewing a great deal of information from the MBTA and other sources before approving the project. The court thus deferred to FTA’s determination that the project had no adverse impact on adjacent historic properties, and that the project design minimized the limited “visual” impacts on those properties.

Plaintiffs have appealed the court’s decision to the U.S. Court of Appeals for the Third Circuit.

### **Parties Reach Proposed Settlement in Maryland ADA Litigation**

On January 26, the U.S. District Court for the District of Maryland approved a proposed settlement agreement in Smith v. Flanagan, (D. Md. No. L:03-CV-2895), an action against the Maryland Transit Administration (MTA) alleging violations of the Americans with Disabilities Act (ADA). Because the Court had certified the case as a class action for purposes of settlement discussions, it held a hearing on the proposed agreement in accordance with Rule 23(e)(1)(C) of the Federal Rules of Civil Procedure, before approving the settlement as “fair, reasonable, and adequate.” As of the date of this report, the settlement agreement remained subject to the approval of Maryland’s Board of Public Works.

The plaintiffs in the litigation allege that the MTA’s paratransit service violated the ADA due to capacity constraints, long waits for trips, an inadequate telephone reservation system, long travel times, and other problems. Pursuant to a compliance review that pre-dated the lawsuit, FTA also had concluded that the MTA’s paratransit system violated the ADA. The settlement agreement obligates the parties to continue their ongoing work with an independent consultant to resolve these problems, and establishes a dispute resolution process in the event that the MTA disagrees with the consultant’s recommendations. The agreement also obligates the MTA to maintain a minimum annual budget for paratransit services for several years, and provides for certain MTA payments to the plaintiffs and their attorneys.

In their brief supporting the settlement agreement, the plaintiffs agreed that the MTA has made some improvements in its paratransit service, an opinion shared by FTA. Nevertheless, FTA will continue to closely monitor the MTA’s paratransit system to ensure its full compliance with the ADA.

Also worth noting is that during the proceedings, the MTA subpoenaed documents and noticed a deposition from FTA, which FTA resisted through a motion to quash. Pursuant to an interim agreement reached before the resolution of that motion, the MTA instead submitted a request for information to FTA under the Freedom of Information Act. In response to the MTA’s initial FOIA request and subsequent administrative appeal, FTA produced hundreds of pages of documents.

As of the date of this report, the MTA still has the right to challenge FTA's response to the MTA's administrative appeal in Federal Court. However, given FTA's thorough FOIA production and the proposed settlement agreement, it is not clear that the MTA will still attempt to challenge the FOIA decision in Court.

### **United States Settles ADA Case with Detroit Department of Transportation**

On November 3, the U.S. District Court for the Eastern District of Michigan approved a settlement order proposed by the U.S. Department of Justice and the Detroit Department of Transportation (DDOT) in Dilworth v. City of Detroit, (E.D. Mich. No. 2:04-cv-73152).

The plaintiffs originally brought their action against DDOT and the U.S. Department of Transportation alleging violations of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. Pursuant to a stipulation between DOT and the plaintiffs, the Court dismissed DOT as a defendant in the action. Later, however, the United States intervened as a plaintiff.

The complaint stemmed from problems with DDOT's fixed route paratransit bus service. Provisions in the settlement order include, among others: (1) DDOT has brought all of its fixed route buses into ADA compliance; (2) DDOT will implement a comprehensive program to ensure the maintenance and repair of wheelchair lifts; (3) DDOT will conduct training to ensure that drivers properly operate lifts, assist wheelchair riders, and obtain alternative transportation

when necessary; (4) DDOT will establish a comprehensive system to address ADA-related complaints; and (5) DDOT will retain an independent auditor to evaluate its compliance with the settlement order.

FTA conducted an ADA audit of DDOT's fixed route system in February 2005, following commencement of the litigation, and participated in the mediation that ultimately resolved the action.

### **Ninth Circuit Hears Argument Concerning Whether to Remand Challenge to ADA Regulations for Failure to Join Department as Necessary Party**

On February 13, in George v. Bay Area Rapid Transit District, (9th Cir. No. 04-15782), the Ninth Circuit heard arguments to determine whether to remand a challenge to FTA's ADA regulations to the district court so that the Department of Transportation could be added as a necessary party under Rule 19 of the Federal Rules of Civil Procedure.

The action was instituted in the United States District Court for the Northern District of California by two visually impaired riders against the Bay Area Rapid Transit District ("BART"), San Francisco's public transit system. The riders claimed that public entrances at four BART stations were not accessible to persons with visual impairments and sought additional markings and signage on the public access routes.

The issue on appeal involves the interpretation of regulations promulgated by DOT and the Department of Justice

under Title II of the ADA, which prohibit discrimination against individuals with disabilities in the provision of public services. Part B of that Title governs public transportation provided by public entities. The district court held that DOT's Title II regulations, which require a single accessible route in transit stations, are arbitrary and capricious even though neither BART nor the low-vision Plaintiffs briefed that question.

On appeal, the United States filed a brief as amicus curiae on behalf of appellants and argued that the district court did not analyze the question properly and that DOT's regulations were neither arbitrary nor capricious. DOJ further argued that DOT's regulations reasonably interpret the accessibility requirements of the ADA when viewed as a whole and are thus entitled to deference.

Before ruling on the merits of the appeal, the Ninth Circuit notified the Department of Justice and the other parties that it wished to hear oral argument on the applicability of three Ninth Circuit cases in which the court previously declined to rule on the merits of the appeals because the plaintiffs had failed to join a necessary party under Rule 19 of the Federal Rules of Civil Procedure. Because DOT's regulations are at issue but the United States is not a party to the suit, the Ninth Circuit is considering whether DOT should be added as a necessary party.

We are now awaiting the court's determination of that issue.

## **Saint Lawrence Seaway Development Corporation**

### **Settlement Negotiations Continue in Tribe's Challenge to Opening Date for the St. Lawrence Seaway**

In 2004 St. Regis Mohawk Tribe v. Jacquez, (N.D.N.Y., No. 7:04-cv-00305) was filed by the St. Regis Mohawk Tribe challenging the procedures utilized by the SLSDC in determining the annual opening date for the St. Lawrence Seaway. Representatives of the Mohawk Tribes in Canada had filed a companion case concerning the Seaway's opening date against the Canadian government, Barnes v. Her Majesty the Queen, Court File No: T-567-04.

As reported previously, the United States has been involved in prolonged settlement negotiations with the St. Regis Mohawk Tribe in an attempt to resolve the Tribes concerns regarding the procedures used to establish the opening date of the Seaway.

Settlement negotiations are continuing and are aimed at reaching an agreement that would end the litigation on both sides of the border in a manner acceptable to both governments and all the tribal parties. The settlement negotiations have included representatives of the Canadian Departments of Justice and Transport as well as representatives of the United States and the Canadian Mohawk Tribes.



## Maritime Administration

### District Court Grants MarAd's Summary Judgment Motion in James River Fleet Litigation

After over two years of litigation, the U.S. District Court for the District of Columbia has dismissed on summary judgment Basel Action Network v. Maritime Administration, (D.D.C. No. 03CV2000), a complaint that sought to enjoin MarAd from exporting from moorings on the James River in Virginia thirteen vessels from the National Defense Reserve Fleet for dismantling and recycling in the United Kingdom. Plaintiff's contended that the export of these vessels, containing PCBs, violated the Toxic Substances Control Act ("TSCA"), the Resource Conservation and Control Act ("RCRA"), the National Maritime Heritage Act ("NMHA"), the Administrative Procedure Act, and the National Environmental Policy Act of 1969 ("NEPA").

In an October 2, 2003 decision, the district court allowed four of the thirteen vessels to depart the United States after finding that the plaintiffs did not have a likelihood of success on the merits with respect to the TSCA, APA, and NMHA issues.

An environmental assessment with respect to the remaining nine vessels was then performed and the assessment concluded that the project could continue.

The summary judgment motion granted by the court had been pending for over two years. The district court also recently dismissed plaintiffs request for attorney's fees based on the cataly

theory of recovery under TSCA. Both MarAd and EPA have received correspondence from the Sierra Club that indicates we can expect to see further litigation should MarAd attempt to export for disposal the remaining nine James River vessels.

### District Court Partially Grants MarAd's Summary Judgment Motion in Guam RRF Repair Dispute

In late December the U.S. District Court for the District of Columbia in Guam Industrial Services v. Rumsfeld (D. D.C. No. 05-1599) partially granted MarAd's motion to dismiss. The case is a challenge to MarAd's determination to utilize a foreign shipyard to perform repair services on a MarAd Ready Reserve Force (RRF) vessel stationed in Guam.

Plaintiff, a Guam shipyard, sued DOD, the Navy, DOT and MarAd sought to enjoin planned repairs of an RRF vessel at a foreign shipyard in Singapore. The complaint alleged that foreign repairs to the RRF vessel located in Guam, or repairs to any RRF vessels in a foreign shipyard, violated the "buy America" provisions of 10 U.S.C. § 7310, a statute applicable to vessels "under the jurisdiction of the Secretary of the Navy." The suit also alleged such foreign repairs violate a Memorandum of Agreement between DoD and DOT and a prior 1993 contract between the MARAD and its Ship Manager.

The district court originally denied a requested TRO and repairs proceeded to the specialized tanker in Singapore. The United States thereafter filed a motion to dismiss, which the court partially granted in December. In doing so the

court held that the "Buy America" provisions of section 7310 were not applicable to DOT vessels in the RRF. The Court deferred ruling, however, on the United States' motion regarding the unenforceability of the MOA or Ship Manager contract by a non-party. The court has requested supplemental briefing on those issues, and briefs were subsequently submitted in January 2006.

### **U.S. Carrier Challenges Award of AID Cargo to Foreign Flag Vessel**

In America Cargo Transport, Inc. v. United States, (W.D. Wash. No. C05-393 JLR) a commercial ocean-going carrier registered in the United States has filed suit against the United States, alleging that AID failed to comply with cargo preference laws in booking humanitarian aid cargo bound for India. Before booking the cargo AID did not consult with MarAd as arguably required by MarAd's cargo preference regulations.

In defending the case the Department of Justice did not consult with MarAd and, in fact, filed an answer that only reflected the position of AID. We have raised our concerns formally with the Department of Justice, which is determining the ultimate approach that will be taken in the litigation.

### **Deep Water LNG License Challenge to Be Argued Before Fifth Circuit**

On March 8 the U.S. Court of Appeals for the Fifth Circuit will hear arguments in Gulf Restoration Network v. Maritime Administration (5th Cir. No. 05-60321) in the U.S. Court of Appeals for the Fifth

Circuit. Petitioners, represented by the Tulane Environmental Law clinic, challenge MarAd's issuance under the Deepwater Port Act ("Act") of a license to construct and operate a deepwater LNG port to Gulf Landing LLC, a Shell Oil subsidiary. The Act vests original jurisdiction in the "[U.S.] Court of Appeals for the circuit within which the nearest adjacent coastal State is located." 33 U.S.C. § 1516.

Petitioners also claim that MarAd's interpretation of the "best available technology" clause in the Act is arbitrary and capricious and thus violative of the APA.

### **District Court Dismisses Sierra Club Challenge to MarAd's Hawaiian Super Ferry Decision**

On October 31, the U.S. District Court for the District of Hawaii in Sierra Club v. Maritime Administration, (D. Hawaii No. cv-05-00487HGBMK) dismissed a complaint filed by the Sierra Club alleging that MarAd breached its duties under the National Environmental Policy Act ("NEPA") in conjunction with issuing a "Record of Categorical Exclusion" issued on March 15, 2005. The Record of Categorical Exclusion was completed in conjunction with the issuance of vessel construction guarantees to Hawaii Superferry, Inc. under Title XI of the Merchant Marine Act of 1936 as amended. The plaintiffs contend that MarAd failed to properly analyze environmental consequences relating to the operation of the proposed ferry in Hawaiian waters, notably, the possible detrimental effects of high speed operations on whale populations.

MarAd's successful motion to dismiss primarily relied on the holding of Kirby

Corp. v. Peña, 109 F.3d 258 (5th Cir. 1997), which essentially states that all MarAd decisions regarding Title XI are incontestable. After undertaking a comprehensive review of the legislative history of Title XI, the court in Kirby held that Congress, in enacting a certain provision of Title XI, intended to “ensure[ ] that MarAd’s decision to issue loan guarantees is insulated from [legal] challenge, thereby . . . minimizing the risk to investors.” Agreeing with that argument, the district court dismissed the complaint for want of jurisdiction.

The Sierra Club has not appealed the order of dismissal.

### **Pipeline and Hazardous Materials Safety Administration**

#### **Government Files Brief in Ninth Circuit Appeal of Dismissal of Challenge to Radioactive Materials Regulations**

On January 13, the Justice Department filed a brief on behalf of DOT in Nuclear Information & Resource Service v. PHMSA, (9th Cir. No. 05-16327), the appeal of the June 2005 dismissal by the U.S. District Court for the Northern District of California’s of appellants’ challenge to PHMSA’s final rule addressing the compatibility of its radioactive materials regulations with similar International Atomic Energy Agency regulations.

The groups’ complaint alleged that the environmental assessment of the rule was inadequate for various reasons, and that therefore the rule was issued in violation of NEPA. The district court

agreed with the Department’s argument that the case should be dismissed on the ground that it should have been filed in a Federal circuit court of appeals pursuant to the jurisdictional provisions of the Hobbs Act rather than in district court pursuant to that court’s general Federal question jurisdiction.

The same groups also challenged NRC’s companion final rule directly in the Ninth Circuit, and that Court has consolidated the NRC case with the PHMSA case, although the cases were briefed separately. Oral argument before the Ninth Circuit is expected to be held early next year.

#### **United States Files Brief in D.C. Circuit Challenge to Rules Defining Scope of DOT’s Hazardous Materials Regulation**

On January 13, the Justice Department filed a brief on behalf of DOT in American Chemistry Council v. DOT (D.C. Cir. 05-1191), a challenge to the “HM-223” rulemaking in which the Department clarified where in the process of shipping hazardous materials DOT’s regulation of those materials begins and ends and where state, local, and other federal agency regulations instead apply. The Department’s rule clarifies this process by defining the statutory terms “loading,” “unloading,” and “storage” incidental to the movement of hazardous materials.

The petitioners are ten industry associations. They allege that the rules violate the hazardous materials laws and are arbitrary and capricious because they allegedly do not extend the scope of DOT regulation far enough, to the exclusion of state, local, and other federal regulation that would otherwise

apply. Additionally, petitioners claim that the rule failed to take into account security concerns. They are supported by five additional associations that have intervened in the case.

The D.C. Circuit has scheduled oral argument in this case for March 20.

## **Federal Motor Carrier Safety Administration**

### **D.C. Circuit Upholds FMCSA's Interpretation of Supporting Documents Regulations**

On January 20, the U.S. Court of Appeals for the D.C. Circuit denied the petition for review filed in Commodity Carriers, Inc. v. FMCSA (D.C. Cir., No. 04-1286). The petitioning motor carrier, Commodity Carriers, Inc. (CCI), challenged FMCSA's requirement that motor carriers collect and maintain supporting documents – specifically, toll receipts – for its owner-operator drivers. The Court ruled in favor of FMCSA, finding the agency properly required motor carriers to collect and maintain toll receipts for owner operators without first conducting notice and comment rulemaking.

FMCSA assigned CCI a "Conditional" safety rating after finding CCI failed to comply with FMCSA's regulation requiring the motor carrier to maintain records-of-duty status and all supporting documents for each driver it employs. The FMCSA investigator found that although CCI collected and retained toll receipts for its employee drivers, CCI had no toll receipts for its owner-operator drivers. FMCSA's regulations

require each motor carrier to maintain records of duty status and all supporting documents for each driver it employs. The agency's definition of "employee" includes "an independent contractor while in the course of operating a commercial motor vehicle."

The issues raised by CCI included whether FMCSA reasonably interpreted the "supporting documents" regulation to apply to owner-operator drivers employed by the motor carrier and whether FMCSA was required to conduct notice and comment rulemaking before applying the "supporting documents" regulation to owner operators.

The Court ruled that CCI's challenge to FMCSA's interpretation of its regulations was foreclosed by the Court's 2002 decision in Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120, in which the Court upheld FMCSA's interpretation that its regulation requiring carriers to maintain supporting documents encompasses toll receipts. In Darrell Andrews, however, the Court did not rule on whether the interpretation applied to owner operator drivers. The Court's decision in the CCI proceeding affirms the agency's interpretation that the requirement to maintain toll receipts applies to both employee drivers and owner operators. Additionally, the Court found that earlier FMCSA decisions did not compel a different interpretation. Moreover, CCI was the subject of an earlier enforcement action that placed it on individual notice that the agency required a carrier to maintain the toll receipts of owner operators.

The D.C. Circuit's decision is available at:

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200601/04-1286a.pdf>

The D.C. Circuit's 2002 decision in Darrell Andrews Trucking, Inc. v. FMCSA is available at:

<http://pacer.cadc.uscourts.gov/common/opinions/200207/01-1118a.txt>

### **D.C. Circuit Remands Minimum Training Requirements Rule for Further Consideration**

On December 2, the U.S. Court of Appeals for the District of Columbia Circuit granted the petitions for review filed in the consolidated proceeding Advocates for Highway and Auto Safety v. FMCSA (D.C. Cir., No. 04-1233), Owner-Operator Independent Drivers Ass'n, Inc. v. FMCSA (D.C. Cir., No. 04-1236), and United Motorcoach Ass'n v. FMCSA (D.C. Cir., No. 04-1418). These three groups challenged FMCSA's rule establishing minimum training requirements for entry-level commercial motor vehicle operators ("Training Rule"). In granting the petitions, the court remanded the case to FMCSA for further consideration but did not vacate the rule.

On May 21, 2004, FMCSA published a final rule establishing standards for mandatory training of entry-level Commercial Drivers License holders in the following subjects: (1) driver qualification requirements; (2) hours of service; (3) driver wellness; and (4) whistleblower protection. In their consolidated brief, the petitioners argued that FMCSA should have mandated stricter training requirements. One petitioner, the United Motorcoach Association ("UMA"), contended that

FMCSA should not impose the training requirements on the motorcoach industry at all.

The Court remanded the case to FMCSA for further consideration, focusing on the disparity between the higher level of training recommended by the agency in a statutorily mandated report to Congress and the comparatively smaller level of training required by the agency in the Training Rule. The Court concluded that FMCSA ignored evidence that effective training must include on-street training. The Court found UMA's arguments that the training requirements should not apply to the motorcoach industry to be without merit.

The D.C. Circuit's decision is available at:

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200512/04-1233a.pdf>

### **Bus Lines Seek Review of FMCSA Decision to Grant Certificates of Operation to Curbside Bus Carrier**

Peter Pan Bus Lines, Inc. and Bonanza Acquisition LLC filed a petition for review with the U.S. Court of Appeals for the District of Columbia on November 22 in Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration (D.C. Cir. No. 05-1436). The Petition seeks review of a decision by the FMCSA to grant two certificates of operation for interstate and intrastate commerce between New York, NY and Boston, Mass. to Fung Wah Bus Transportation, Inc. ("Fung Wah"), a private bus carrier that does not receive governmental assistance in connection with its transportation of passengers.

FMCSA issued the certificates of operation to Fung Wah on May 12 and 13, 2005, pursuant to 49 U.S.C. § 13902(a)(1), under which FMCSA has authority to register a for-hire carrier if the agency finds that the applicant is willing and able to comply with “applicable regulations of the Secretary,” as well as safety and financial responsibility requirements.

Peter Pan and Bonanza objected to the application on the basis that Fung Wah does not comply with the Department’s regulatory requirements promulgated under the Americans with Disabilities Act and set forth at 49 C.F.R. part 37. The petitioners specifically allege that Fung Wah has denied transportation to a blind passenger. The timely-filed objection to that incident did not reach the FMCSA licensing team until after the certificates were issued, due to an apparent mailroom delivery delay.

On reconsideration of the objection, FMCSA stated that the applicable FMCSA licensing regulations do not permit FMCSA to withhold registration for failure to comply with ADA requirements, and that the FMCSA regulatory requirement for a carrier to comply with “other applicable regulations of the Secretary” does not refer to the ADA, but pre-existing

registration requirements formerly administered by the Interstate Commerce Commission. FMCSA concluded that the U.S. Department of Justice has authority to investigate the potential violations and referred the matter to DOJ.

In their appeal, the bus lines have raised two issues for the court to decide. First, whether the FMCSA’s action in issuing the certificates to Fung Wah should be set aside as arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law and made without observing the procedure required by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. The second issue is whether FMCSA’s action in issuing the certificates should be set aside because FMCSA’s determination was that compliance with the applicable provisions of the Americans with Disabilities Act is not a “fitness” standard to be considered under 49 U.S.C. § 13902(a)(1).

Fung Wah did not file a motion to intervene in the court case. No briefing schedule has been set as of this writing.

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