



U.S. Department of
Transportation

DOT LITIGATION NEWS

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Supreme Court Litigation

Supreme Court Remands FAA Drug Testing Challenge

On June 5 the United States Supreme Court issued a per curiam decision in Whitman v. DOT, (Supreme Court No. 04-1131), remanding the case to the U.S. Court of Appeals for the Ninth Circuit. The case was originally brought by an FAA employee who sued the agency claiming he had been unconstitutionally subjected to a disproportionate number of drug tests.

In its decision the Supreme Court directed the U.S. Court of Appeals for the Ninth Circuit on remand to consider whether the Civil Service Reform Act precludes Federal courts from hearing such constitutional challenges under their broad Federal question jurisdiction. It also suggested that the Ninth Circuit should decide whether the FAA employee had exhausted his administrative remedies and whether exhaustion is required by the applicable statutory scheme.

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 concluded that his 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.

The Supreme Court's decision remanding jurisdictional issues back to the Ninth Circuit is available at:

<http://www.supremecourtus.gov/opinions/05pdf/04-1131.pdf>

The Ninth Circuit's decision is available at:

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

The Supreme Court merits briefs filed by all parties are available at:

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

Court Will Determine Level of Deference Owed to an Agency's Regulatory Preemption Pronouncements

The Supreme Court has granted a certiorari petition in Wachovia Bank, N.A. v. Watters, (Supreme Court No. 05-1342), an appeal from a decision of the U.S. Court of Appeals for the Sixth Circuit holding that a statement in regulations promulgated by the Office of the Comptroller of the Currency to the effect that OCC regulations preempt

State banking regulations is entitled to Chevron deference. In agreeing to hear the case the Court is poised to decide a split amongst the circuits concerning whether Chevron deference or a lesser deferential standard should be utilized in challenges concerning regulatory preemption pronouncements. Oral argument has been scheduled for November 29.

While the Department has not been directly involved in the litigation we are monitoring the matter closely since the issue of the deference to be accorded to an agency's preemption determinations is one that directly affects DOT programs. As an example, NHTSA's proposed rule on automobile roof standards states, in the preamble, that "if the proposal were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law." Similarly, and as discussed below in "Recent Litigation News From DOT Modal Administrations," NHTSA's new CAFE standard for light trucks has a preemption provision in its preamble.

Oral argument has been scheduled for November 29.

The Sixth Circuit's decision in Wachovia is available at:

<http://www.ca6.uscourts.gov/opinions.pdf/05a0476p-06.pdf>

NHTSA's proposed rule on automobile roof standards is available at:

http://dmses.dot.gov/docimages/pdf92/342723_web.pdf

Supreme Court to Hear Challenge to EPA Refusal to Regulate CO₂ Emissions

On June 26, the Supreme Court granted certiorari in Massachusetts v. EPA, (Supreme Court No. 05-1120), an appeal of a decision of the U.S. Court of Appeals for the District of Columbia Circuit affirming EPA's denial of rulemaking petitions asking the agency to regulate CO₂ emissions, which are alleged to contribute to global warming, under the Clean Air Act. EPA took the position in its decision that it lacks authority under the Clean Air Act to regulate CO₂ and other emissions that have been associated with climate change.

Although the Department is not a party to this case, the outcome could have an impact on NHTSA's CAFE standards, which do not currently limit CO₂ emissions, and on the ongoing litigation in the U.S. Court of Appeals in the Ninth Circuit, Center for Biological Diversity v. NHTSA, (9th Cir. No. 06-71891), challenging NHTSA's light truck CAFE standards. Petitioners in that case will likely argue, among other things, that NHTSA improperly failed to consider the impact of CO₂ emissions in promulgating those regulations.

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

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200507/03-1361a.pdf>.

Departmental Litigation in Other Federal Courts

District Court Enjoins Strike by Northwest Flight Attendants

On September 14 Judge Victor Marrero of the U.S. District Court for the Southern District of New York issued a 104 page decision in Northwest Airlines Corp. v. Ass'n of Flight Attendants – CWA, (S.D.N.Y. No. 06-1679) enjoining the Association of Flight Attendants (AFA) from commencing a strike or taking other self-help action against Northwest Airlines. The United States filed a statement of interest in the case urging the court to grant the injunction sought by Northwest.

Northwest has been in bankruptcy proceedings since September of 2005

and has been unable to reach a new collective bargaining agreement with its flight attendants. As a result, under provisions of the bankruptcy code set forth at 11 U.S.C. § 1113 the bankruptcy court last summer authorized Northwest to terminate its previous collective bargaining agreement with AFA and impose specific new terms and conditions that the AFA had previously agreed to but that its flight attendant members had voted down. These conditions are intended to remain in place while mediation before the National Mediation Board continues.

However, when Northwest did so AFA gave fifteen days' notice of its intention to strike, a step generally prohibited by

the Railway Labor Act (RLA), 45 U.S.C. § 152, while the RLA/NMB mediation process is still ongoing. AFA argued that it legally could strike in these circumstances since in its view Northwest's implementation of new contractual terms amounted to "self-help," which effectively terminated the RLA bargaining process. Northwest and the United States countered that resort to section 1113 of the Bankruptcy Code did not terminate the mediation process and that allowing an AFA strike in these circumstances would eviscerate section 1113 as a reorganization tool.

In an August 17 decision the bankruptcy court refused to enjoin the threatened strike, holding that it lacked jurisdiction to preclude a strike by AFA since Federal courts normally cannot enjoin threatened strikes under the terms of the Norris-LaGuardia Act ("NLGA"), 28 U.S.C. § 101 *et seq.* Northwest appealed this decision to the district court, and the United States filed a statement of interest on August 23 supporting Northwest. Both Northwest and the United States argued that an injunction could properly issue under the RLA notwithstanding the general anti-injunction provisions of the NLGA.

In its September 14 decision the district court determined that it had jurisdiction under the RLA to enjoin a threatened strike by employees of an air carrier. Specifically, the district judge held that it would be "ironic for the Court to conclude that a debtor's lawful resort to a Bankruptcy Code provision meant to keep an insolvent business running while it reorganizes its debts would serve as the automatic trigger point to end the procedures Congress mandated to

govern amicable settlement of major labor disputes involving carriers, and thereby prompt an immediate strike that could spell doom by liquidation to that airline."

The AFA has filed a notice of appeal in the U.S. Court of Appeals for the Second Circuit and has sought expedited review.

The district court's decision is available at:

http://www.nysd.uscourts.gov/rulings/M47_%20Northwest_September_14_2006_1012am.pdf

D.C. Circuit Hears Argument in Challenge to Department's Order on Increased Terminal Charges at Newark Airport

On September 11, the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument in Port Authority of New York and New Jersey v. DOT, (D.C. Cir. No. 05-1122). The litigation involves challenges by both the Port Authority of New York and New Jersey ("Port Authority") and by a group of U.S. and foreign air carriers to various findings set forth in the Department's 2005 final decision issued by the Deputy Assistant Secretary for Aviation and International Affairs involving airport charges at Newark Liberty International Airport ("Newark"). Mary Withum, a senior trial attorney in the Office of the Assistant General Counsel for Litigation, argued the case on behalf of the Department. The Department's final decision found unreasonable a portion of the Port Authority's increase of two terminal charges imposed on airlines

servicing International Terminal B, but in other major respects upheld the Port Authority's increases.

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. 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 determined that certain unsubstantiated elements 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 carriers for the fees they paid while the proceeding was pending. Under the

Department's decision, the amount of the fee increases are approximately \$10 million per year less than the \$22 million per year increase originally imposed by the Port Authority.

Following the commencement of the D.C. Circuit proceedings by the Port Authority the airlines filed a motion to intervene and thereafter also filed their own petition for review of the Department's decision. In addition, the Airports Council International – North America and the United Kingdom filed amicus briefs.

The principal issues before the D.C. Circuit raised by the Port Authority are (1) whether foreign air carriers are allowed to file complaints under the terms of the statute, which defines complainants as "air carriers," a term that usually does not extend to foreign air carriers, and (2) whether certain expenses disallowed by the Department should have reasonably been included in computing the fees. The principal issues raised by the carriers are (1) whether the Department should have found all of the fee increase to be unreasonable, and (2) whether the Department allowed sufficient discovery for the carriers to prove their case.

We are now awaiting the D.C. Circuit's decision.

The Department's final decision is available at:

http://dmses.dot.gov/docimages/pdf92/35643_web.pdf

United States Will Not Appeal Decision Subjecting U.S. Agencies to Rule 45 Subpoenas

On June 16 the U.S. Court of Appeals for the District of Columbia Circuit in Yousuf v. Samantar, (D.C. Cir. No. 05-5197) held that the Department of State is a “person” for purposes of Rule 45 of the Federal Rules of Civil Procedure. While DOT was not involved in the litigation, DOJ sought the views of all executive branch agencies concerning whether the matter should be further appealed, either through a request for reconsideration en banc or via a petition for certiorari review by the Supreme Court. The Department of Justice ultimately decided not to pursue either course.

The Yousuf litigation involves the employee testimony regulations of the State Department and arose in the context of a dispute between two private litigants in U.S. District Court for the Eastern District of Virginia. The State Department’s regulations are premised on the Supreme Court’s decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), which established that Federal employees may properly refuse to testify or produce documents requested under subpoena where employee testimony regulations are in place and where those regulations restrict production or testimony without the consent of the agency. The Touhy holding has been the basis for employee testimony regulations promulgated throughout the Federal government, including those published by DOT at 49 C.F.R. Part 9.

In Yousuf the plaintiff served the State Department with both a Rule 45 subpoena and a request for records under the State Department’s Touhy regulations. After the United States, on behalf of the State Department, objected to the subpoena, and while the State Department was still processing the request for documents under its Touhy regulations, the plaintiff filed a motion to compel in the U.S. District Court for the District of Columbia.

The United States intervened and opposed the motion, principally arguing that the State Department was not a “person” subject to subpoena under Rule 45. In support of that argument the United States relied on dicta from Al Fayed v. CIA, 229 F.3d 272 (D.C. Cir. 2000) to the effect that the court might need to re-think whether the government was a person for purposes of Rule 45. The district court agreed with the United States and denied plaintiff’s motion, relying upon what it termed a “longstanding interpretive presumption” in the D.C. Circuit that the term “person” as used in the Federal Rules of Civil Procedure does not include the United States.

The D.C. Circuit’s June 16 decision reversed the district court and remanded the matter, holding that “plaintiffs’ motion to compel should not have been denied on the ground that Rule 45 is inapplicable to the Department of State.” Slip op. at 17. The court concluded that the Federal Rules should be interpreted to include the United States within the meaning of the word “person” as used in Rule 45. The court did not preclude the use of other objections based upon the agency’s Touhy regulations.

Although the D.C. Circuit's decision may invite other litigants to attempt to short-circuit agency Tuohy regulations by seeking to compel discovery while Tuohy requests are pending, DOJ ultimately determined not to pursue en banc consideration or Supreme Court review since there is, as yet, no split amongst the Circuits on the issue.

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

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200606/05-5197a.pdf>

Seventh Circuit Hears Constitutional Challenge to Illinois DBE Program

On April 13, the U.S. Court of Appeals for the Seventh Circuit heard oral argument in the appeal of the decision of the U.S. District Court for the Northern District of Illinois in Northern Contracting, Inc. v. Illinois, (7th Cir. No. 05-3981).

The District Court had ruled that Illinois' Federal and State Disadvantaged Business Enterprise (DBE) Programs were constitutional as applied in Illinois. The district court held that the evidence proved that Illinois' DBE Program was narrowly tailored to serve the compelling interest of remedying the effects of racial and gender discrimination within the construction industry. In so ruling, the court repeated its prior summary judgment determination that the Federal DBE Program was facially constitutional as a program narrowly tailored to serve a compelling governmental interest. The

court expressly held that the appropriately high level of DBE participation on contracts resulted from the success of IDOT's program and not from a lack of discrimination.

On appeal Northern Contracting, a non-DBE highway subcontractor, contested this holding, arguing instead that the evidence showed that DBE subcontractors would be fully utilized in the State without the use of race-conscious DBE goals, and that, in any event, Illinois employed a flawed methodology in calculating its race-conscious goal.

The State argued that the evidence before the district court supported the court's holding and that Illinois' DBE plan and annual race-conscious goals were narrowly tailored in that the program relied heavily on race-neutral components and that the State's goal-setting methodology complied with all applicable DOT regulations. The appellant did not appeal the district court's earlier summary judgment decision that the Federal DBE Program was facially constitutional as a program narrowly tailored to serve a compelling governmental interest, and accordingly, the Department did not participate in this appeal.

United States Will Not Appeal Ninth Circuit Decision Allowing Risk of Terrorist Attacks to Be Weighed During NEPA Process

On June 2, in San Luis Obispo Mothers for Peace v. NRC, (9th Cir. No. 03-74628), the Ninth Circuit concluded that the Nuclear Regulatory Commission

violated NEPA by categorically refusing to assess the environmental impacts of any potential terrorist strike at a nuclear waste storage facility when reviewing the facility's permit application in an EA. In so holding the court reversed a line of NRC administrative decisions that had held that categorically no issues relating to damages resulting from possible terrorist attacks need to be examined during any NEPA review.

Although DOT was not directly involved in this litigation, but the Department of Justice sought the views of all Executive Branch agencies concerning whether further review should be sought. The Department of Justice ultimately decided that it would seek neither rehearing nor certiorari review.

The Ninth Circuit's decision relies on two related analytical threads that may prove to be problematic for NEPA compliance in the future. First, the court concludes that there is a sufficient causal link between the approval of the storage facility's permit and the increased threat of a terrorist strike at the storage facility to require analysis in NRC's EA of the probability of environmental impacts stemming from such a terrorist strike.

Having found the relationship between "the Federal act, or the licensing of the storage installation, and the change in the physical environment, or the terrorist attack," to be the type of causal link appropriate for NEPA analysis, the court proceeded to address the question of whether the possibility of a terrorist attack is so remote and speculative that the threat of such an attack may be categorically disregarded during the agency's NEPA analysis. In this second

analytical thread, the court relied upon NRC's actions in non-NEPA contexts to address the risk of terrorist attacks and to prepare for such attacks at all NRC licensed facilities. The court concluded that NRC's analyses of possible terrorist threats in non-NEPA contexts are sufficient evidence that such attacks are foreseeable, thereby requiring evaluation of terrorism in the licensure EA as well.

As such, the court rejected NRC's blanket decision to categorically exempt from the NEPA process any weighing of the possibility or effect of a terrorist attack, holding that the categorical exemption was unsupported.

As a policy matter, the decision threatens to make the NEPA process more complex by requiring analysis of potential terrorist attacks that previously were deemed too remote for NEPA analysis.

The Ninth Circuit's decision is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/2BFBC6088AF13AA98825718000723C79/\\$file/0374628.pdf?openement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/2BFBC6088AF13AA98825718000723C79/$file/0374628.pdf?openement)

D.C. HazMat Litigation Enters Summary Judgment Stage

CSX Corp., Inc. v. Williams, (D.D.C. No. 05-338 (EGS)), 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 been in the discovery

phase for some time, with the bulk of discovery directed by defendant/intervenor Sierra Club at the United States. Discovery has now been completed and all briefing on cross motions for summary judgment will be completed by November 17.

CSX, supported by the United States, had originally sought injunctive relief last February against the emergency version of the D.C. 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 Commerce Clause of the Constitution. 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 as well under the HMTA, administered by PHMSA.

Following 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. However, 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.

The United States vigorously opposed any discovery against it in a motion for

protective order, arguing that because it has only filed a statement 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 somewhat limit the scope of discovery.

After the United States produced documents 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. Discovery and responses to requested admissions were completed by early September, but the majority of responsive documents have been withheld as either privileged or Sensitive Security Information.

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

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

District Court Vacates EPA Clean Water Act Exception for Vessel Discharges

On September 18, the U.S. District Court for the Northern District of California in Northwest Environmental Advocates v. EPA, (N.D. Cal. No. 03-05760) vacated EPA's longstanding regulatory exclusion of ballast water and other discharges incidental to the normal operation of a vessel from the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES)

permitting requirements. The court ordered EPA to issue permitting regulations by September 2008.

Environmental groups had challenged the exclusion, focusing on the fact that the exclusion allowed ballast water discharges, which potentially introduce invasive species into U.S. waters. DOT has a strong interest in ensuring the safety and efficiency of the U.S. maritime transportation system, which is fulfilled primarily through the work of MarAd and the Saint Lawrence Seaway Development Corporation. Although we were not a party in this litigation, DOT officials submitted declarations in support of EPA's briefs in the remedies phase of the case.

In the merits phase of the case, the environmental groups argued that the exclusion exceeded EPA's authority under the CWA, which requires that the discharge of pollutants, including invasive species, into U.S. waters is subject to NPDES permitting requirements and does not generally except discharges from commercial vessels. EPA contended that its construction of the CWA was reasonable because it would be unworkable to subject vessels to the NPDES permitting regime. EPA also argued that, in any event, there is strong evidence in the legislative record that Congress has acquiesced to the exclusion and intends invasive species issues to be addressed in a different manner under a separate statutory scheme.

In an earlier March, 2005 decision, the court rejected all the government's merits arguments. The court read the CWA's NPDES permit provisions as

providing no basis for a regulatory exclusion of discharges incidental to the normal operations of vessels and rejected the government's evidence of congressional acquiescence as falling short of that required under recent Supreme Court precedence.

In the remedies phase of the case, plaintiffs and a group of state intervenors sought an injunction imposing an accelerated rulemaking schedule on EPA and the immediate imposition of certain vessel discharge controls. EPA countered that such a remedy exceeded the court's authority under the Administrative Procedure Act and would unduly involve the court in internal agency affairs. EPA proposed instead that the Court vacate the agency's decision denying plaintiffs' rulemaking petition and remand the case to EPA to take further action on the petition consistent with the court's 2005 decision on the merits without specifying a timetable for such action. EPA also argued that the court should modify its merits decision by limiting its reach to ballast water discharges.

The September 18 decision rejected EPA's argument, vacated the rule, and gave EPA two years to issue permitting regulations for all discharges incidental to the operation of vessels, a longer period of time than requested by plaintiffs and intervenors. The court declined to require EPA to impose any immediate restrictions on vessel discharges. The court also denied, without prejudice, a request by an intervenor group for a stay of its

decision pending appeal. The United States is considering filing an appeal from both the merits and remedies decisions and a separate request for a

stay of those decisions. The notice of appeal is due on November 17.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Upholds FAA Decisions Funding O'Hare Modernization Plan

On August 4 the U.S. Court of Appeals for the District of Columbia Circuit in Village of Bensenville v. FAA, (D.C. Cir. No. 05-1383) denied a challenge to the FAA's approval of the City of Chicago's airport layout plan (ALP) and the FAA's Record of Decision (ROD) approving the O'Hare International Airport Modernization Plan (OMP). The OMP is a major undertaking of the City of Chicago and the FAA aimed at addressing overcrowded airspace and delays at O'Hare, which often create delays throughout the National Airspace System.

Chicago's ALP called for realigning three of the seven existing O'Hare runways and adding an eighth runway. To accomplish this, the ALP provides that the City will acquire 440 acres of adjacent land, and will relocate two cemeteries. Two towns adjacent to the airport and other parties challenged the ALP and the ROD.

The court rejected the challenge to the ALP holding that the Religious Freedom

Restoration Act (RFRA), upon which the parties principally relied in support of their argument that the relocation of the cemeteries would infringe on their religious freedoms, was inapplicable since the relocation of the cemeteries would be by the City of Chicago, not by the FAA. The court noted that RFRA is applicable only to actions taken directly by the Federal government, and concluded that "the FAA's peripheral role in the City's relocation of [the cemeteries] is not sufficient to hold the agency responsible for purposes of RFRA." The court therefore did not reach the issue of whether there was a compelling interest sufficient under RFRA to justify relocating the cemeteries.

The court also rejected the challenge to FAA's Letter of Intent, which expresses FAA's intention to obligate Federal funds to carry out the OMP once Chicago has submitted its grant application. The court held that the LOI was not final agency action and that, in any event, any harm caused by the project would not be redressable in a challenge to the LOI since the OMP would likely go forward even were there no Federal funding. Thus, the court found petitioners lacked Article III standing to challenge the LOI.

The court also rejected challenges under the Administrative Procedure Act and the Due Process provisions of the Constitution.

Petitioners filed a request for rehearing with a suggestion of rehearing *en banc* on September 15, arguing that the panel's conclusion that there was no Federal action for purposes of the RFRA does not comport with applicable Supreme Court precedent. In a September 25 order the D.C. Circuit has requested responses to be filed by the City of Chicago and the United States by October 10. The United States' response to the petition is due on October 26.

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

<http://pacer.cadc.uscourts.gov/docs/comm/opinions/200608/05-1383a.pdf>

Ninth Circuit Upholds Honolulu Ban on Aerial Banner-Towing; Certiorari Petition Likely

On May 23, the U.S. Court of Appeals for the Ninth Circuit in Center for Bio-Ethical Reform v. Honolulu, (9th Cir. No. 04-17496) affirmed a prior district court decision and held that FAA regulations generally allowing operations by aircraft towing banners do not preempt a local Honolulu ordinance restricting the display of signs.

The case was begun in 2004 by an advocacy organization seeking to tow an anti-abortion message. The group challenged the ordinance arguing that State regulation of banner towing operations was preempted by FAA

regulations, and that in any event the protection afforded political speech by the First Amendment outweighed enforcement of the Honolulu ordinance. The United States did not participate in this case, but in an earlier case decided four years ago we successfully argued that FAA regulations did not preempt Honolulu from imposing signage restrictions on aircraft seeking to tow banners.

In its May 23 decision the Ninth Circuit again rejected the preemption argument and also held that the Honolulu ordinance passed constitutional muster because it was a reasonable, viewpoint-neutral restriction on speech in a non-public forum for which alternative avenues were available.

Reportedly the advocacy group will seek *certiorari* review by the Supreme Court on October 4.

The Ninth Circuit's decision is available at:

<http://caselaw.lp.findlaw.com/data2/circs/9th/0417496ap.pdf>

District Court Dismisses Complaint Alleging Air Traffic Control Negligence in Florida Crash

A district court judge in Florida has dismissed the complaint filed against the FAA in Landry v. United States, (M.D. Fla. No. 0:02-cv-691-Orl-28JGG). The litigation involved a fatal crash that occurred in December 1999, when a single-engine Piper Cadet collided with a twin-engine Piper Seminole just after

the Cadet took off from Deland airport, an uncontrolled airport. The accident occurred at an altitude of about 500' as the Seminole maneuvered in the Deland traffic pattern.

The plaintiffs (parents of the Cadet pilot) claimed that the FAA was negligent because prior to the accident the Seminole had been in contact with air traffic control while it was engaged in a practice IFR approach to Deland. ATC was not, however, in contact with the Cadet at Deland; nor was it in contact with the Seminole at the time of the accident. Although the Seminole had cancelled its IFR clearance several minutes prior to the accident (and, therefore, was operating VFR), the plaintiffs alleged that the controller should have advised the Seminole as to what runway was "in use" at Deland, should have switched the Seminole to the UNICOM frequency sooner, and should have advised the Seminole of its position relative to Deland when IFR was cancelled.

The court rejected all of these contentions because there was no evidence that the controller was required to provide such information or services. Further, in connection with the allegation that the controller should have advised the runway in use at Deland, the court accepted the evidence that the controller had no way of ascertaining such information with certainty in connection with operations at an uncontrolled airport.

Repair Station Contractors Challenge FAA Drug Testing Program

In March 2006 the Aeronautical Repair Station Association, Inc. ("ARSA") filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit in Aeronautical Repair Station Association v. FAA, (D.C. Cir. No. 06-1091), challenging the FAA's final rule clarifying certain aspects of the agency's drug testing requirements.

Historically, the FAA has required a drug testing program for a "regulated employer," which included Part 121 or 135 certificate holders; however, the FAA did not directly regulate drug testing programs for the contractors and subcontractors of these regulated employers. The challenged rule now makes it clear that each person who performs a safety-sensitive function directly or by contract, including by subcontract at any tier, for a regulated employer is subject to drug testing.

In general, the opponents of the FAA's rule complain that it substantially expands the scope of the FAA's drug and alcohol testing programs without any evidence that it would enhance safety.

ARSA sought an administrative stay of the rule, scheduled to take effect on October 2, and that request was denied by the FAA on September 28. ARSA is expected to ask the D.C. Circuit to stay the effectiveness of the rule pending appeal.

A briefing schedule has not yet been set by the court.

Lighting Contractor Challenges FAA Product De-Certification Decision

On April 27 a lighting manufacturer in Safe Extensions, Inc. v. FAA, (D.C. Cir. No. 06-1150), sought review of the FAA's February 27 decision removing its products from the list of certified airport lighting equipment in FAA advisory circular 150/5345-53C, Airport Lighting Equipment Certification Program.

The FAA's February 27 letter, sent by the Manager of the Airport Engineering Division in the Office of Airport Safety and Compliance, notified Safe that its products were being removed from the list of certified airport lighting equipment because of safety concerns and failure to comply with agency certification procedures. This is the first time that the FAA has had to remove a product from the list of certified products.

Safe alleges that the FAA's decision was arbitrary, capricious and an abuse of discretion, or otherwise contrary to law, and further alleges that the FAA treated it differently than other similarly-situated manufacturers certified by Detroit Testing Laboratory ("DTL"), Safe's former, now de-certified, third-party certifying entity.

The court has not yet issued a briefing schedule.

D.C. Circuit Summarily Affirms Dismissal of Challenge to FAA Drug Testing Rules

In March of 2005, the U.S. District Court for the District of Columbia dismissed lawsuits against both DOT and individual DOT and FAA employees that challenged various aspects of the Department's drug testing rules and their administration. A detailed summary of the cases and the district court's favorable decision is set forth in the September, 2005 edition of DOT Litigation News.

Following the district court's decision a notice of appeal was filed with the U.S. Court of Appeals for the D.C. Circuit, Drake v. Capelle (D.C. Cir. No. 05-5199). In response, the government moved for summary affirmance. On August 3 the D.C. Circuit granted the government's motion in an unpublished one-page opinion. The court ruled that generalized constitutional challenges to the drug testing rules were barred by res judicata, that the plaintiff had failed to state a claim for any Fourth Amendment violations or "Bivens" Constitutional torts, and that the court had previously ruled against substantially identical APA contentions in an earlier suit against the agency.

Federal Highway Administration

Ohio District Court Confirms Competition Requirements; Briefing Completed in Sixth Circuit Appeal

On January 13 the U.S. District Court for the Southern District of Ohio in Cleveland v. Ohio, (S.D. Ohio No. 2:04-CV-805), a challenge to FHWA's contracting regulations, granted FHWA's motion for summary judgment. This case arose after the FHWA informed the Ohio Department of Transportation ("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 the FHWA 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 complaint originally filed by the City of Cleveland challenged the State's disapproval of Cleveland's local labor

preferences as applied to the Kinsman project in Cleveland. The State of Ohio and ODOT then filed a third party complaint in State court to join FHWA. The complaint was later removed to Federal court.

The district court found that the State and ODOT met the constitutional and prudential requirements for standing. The court further found that 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 district court's 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.

]The City of Cleveland has appealed the district court decision to the U.S. Court of Appeals for the Sixth Circuit. The case has been fully briefed, and the parties are presently waiting for oral argument to be scheduled.

Public-Private Partnership Challenged in West Virginia District Court

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 for construction of a portion of the King Coal Highway, a 93-mile portion of the overall I-73/74 Corridor that runs through southern West Virginia.

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 is being accomplished because the West Virginia Department of Transportation has allowed slight shifts in the alignment of a 12-mile portion of the highway in order to allow private industry to remove coal and then utilize excess mining material in a constructive fashion to shape future highway fills.

Plaintiffs have challenged the project seeking declaratory judgment and injunctive relief. They allege that FHWA supported or approved an agreement between the West Virginia Department of Transportation Division of Highways and a private contracting company and that this allegedly violated Federal competitive requirements and was contrary to wage provisions set forth in the "Davis-Bacon" Act.

On July 10, the United States filed a motion for summary judgment arguing that FHWA's decisions were not arbitrary and capricious and that its decision should be afforded deference under the APA. The government also argued that FHWA followed required procedures for a negotiated contract and that plaintiffs had not exhausted administrative remedies concerning the Davis-Bacon Act. Plaintiffs cross-moved for summary judgment, arguing essentially that FHWA's actions exceeded its authority. The parties are now waiting for a decision.

District Court Upholds Missouri Highway Noise Barrier Project

On August 17 the district court in City of Clarkson Valley v. Mineta, (E.D. Mo. No. 4:04CV301), held that FHWA and the Missouri Department of Transportation properly allowed noise barriers to be built to benefit homeowners with excessive noise levels created by a newly widened road.

The case was brought in 2004 by various groups within the City of Clarkson Valley that alleged deficiencies in the original 1986 Environmental Assessment (EA) that was prepared for the widening of Clarkson Road from two lanes to five lanes. The road was constructed in the mid 1990's.

In 1999, MODOT reviewed the EA and determined that a noise study had not been completed for the project. MODOT thereafter conducted two noise studies, both before and during the lawsuit, and concluded that certain

impacted residences were eligible for noise abatement (sound walls).

The City of Clarkson Valley opposed the construction of the noise walls on aesthetic principles, claiming, among other things, that property values would be affected. The City claimed that it, and its citizens were "impacted residents" under 23 CFR 772.11 (f), and as such their views should have been considered. FHWA argued, and the court agreed, that studies to build the noise walls had been properly conducted and that those studies were limited to a consideration of noise abatement for "impacted residents," which the court held covered only those residents impacted by highway noise.

Connecticut District Court Remands Merritt Parkway Challenge

In Merritt Parkway Conservancy v. Mineta, (D. Ct. No. 3:05CV860 (MRK)), a Connecticut district court has ruled that the FHWA's administrative record relating to the Merritt Parkway highway project did not adequately support the agency's environmental 4(f) decision and has therefore remanded the matter to the agency to clarify the basis for its actions. The court did not issue an injunction, but mandated that the parties discuss continuation of a voluntary moratorium on construction. The opinion highlighted the importance of insuring that the administrative record fully documents the actions of the agency and details the basis for its analysis and decision.

The plaintiffs had challenged the actions of FHWA and, when added as a party, the Connecticut Department of Transportation, alleging that the interchange improvements to the Merritt Parkway in Connecticut failed to adequately address mitigation measures under Section 4(f). They also claimed that the EA failed to comply with NEPA, and that there was inadequate compliance with Section 106 of the National Historic Preservation Act.

The project involves reconstruction of a major interchange on the Merritt Parkway, an historic parkway on the National Register, and would impact several features of the parkway. The FHWA, in conjunction with ConnDOT, prepared a 4(f) statement, a Memorandum of Understanding (MOU), and an Environmental Assessment (EA) concluding that there would be no significant impact from the construction of the project.

The 4(f) statement, EA, and MOU specifically committed the agency to work with stakeholders, including the Merritt Parkway Advisory Group, in developing the project and to incorporate the Merritt Parkway Guidelines into project development plans to the extent feasible. The Merritt Parkway Guidelines were specifically developed by the State to assist in project development.

However, the district court found that the agency had failed to adequately document in the administrative record and its 4(f) statement how it intended to comply with the guidelines and what mitigation efforts it would make. The court emphasized that it was not finding

that the design as proposed failed to minimize harm, but rather that the administrative record failed to document the intended measures.

Since the court remanded the matter to the agency to comply with 4(f), it declined to rule on the NEPA and NHPA issues, stating that the agency should address those concerns on remand. The court refused to enjoin the project and encouraged the parties to agree on a narrowly tailored schedule that would allow construction to proceed without causing harm to any of the parties.

Federal Railroad Administration

Former Locomotive Engineer and Union File Bivens Suit Against FRA, LERB, and Railroad

On May 18, Charles Daniels, a former Union Pacific Railroad Company (UP) locomotive engineer, and the Brotherhood of Locomotive Engineers and Trainmen filed a lawsuit, Daniels v. Union Pacific Railroad Company, (D.D.C. No. 1:06-CV-00939), against FRA, FRA's Locomotive Engineer Review Board (LERB), and the railroad in the U.S. District Court for the District of Columbia.

The suit alleges that the defendants committed constitutional torts against Mr. Daniels. In particular, the complaint alleges that UP, acting under color of Federal law (FRA's locomotive engineer certification regulations), denied Mr.

Daniels' certification without a pre-deprivation hearing or a prompt post-deprivation hearing, in violation of the Due Process clause. The complaint further alleges that FRA and the LERB acquiesced in UP's denial decision and were biased against Mr. Daniels in denying his petitions for administrative review.

Meanwhile, Mr. Daniels filed an administrative appeal of FRA's administrative hearing officer's adverse ruling, which the Administrator affirmed on July 31 in a decision that constitutes final agency action. To date, Mr. Daniels has not filed a petition for judicial review of the Administrator's decision. The plaintiffs seek money damages as well as equitable relief.

On August 24, the Government filed a dispositive motion to dismiss the lawsuit on the grounds that (i) the complaint improperly identifies Government entities as named defendants, (ii) an alternative administrative remedy is available to the plaintiffs, and (iii) FRA and the LERB did not violate Mr. Daniels' procedural due process rights. The plaintiffs' response to the motion was filed on September 27, and the United States' reply is due on October 4. The district court has not yet scheduled a date for a hearing.

National Highway Traffic Safety Administration

D.C. District Court Remands NHTSA's Confidentiality Rule on Early Warning Data

On March 30, the U.S. District Court for the District of Columbia in Public Citizen v. Mineta, (D.D.C., No. 04 CV 00463), remanded NHTSA's confidentiality rule on early warning data, holding that the agency had not given the public adequate notice and an opportunity to comment on the final rule.

Public Citizen and the Rubber Manufacturers Association challenged NHTSA's rule providing that some, but not all, of the "early warning data" required by the Transportation Recall Enhancement, Accountability, and Documentation Act of 2000 ("TREAD Act"), P.L. No. 106-414, will be treated as confidential information and not be released in response to Freedom of Information Act requests.

The TREAD Act requires vehicle and tire manufacturers to submit "early warning data," such as data on warranty claims, consumer complaints, and reports of deaths and injuries, in order to give NHTSA the ability to identify potential safety defects. 49 U.S.C. 30166. NHTSA determined through a rulemaking proceeding that some, but not all, of the early warning data consists of confidential material that should not be publicly released in response to a Freedom of Information Act request. NHTSA therefore created a class

determination stating these types of early warning data will be treated as confidential information without any need for the manufacturer to file a request for confidential treatment.

Public Citizen had contended that FOIA does not allow an agency to issue class determinations by rule, that NHTSA failed to give adequate notice of its intention to establish a class determination that much of the data will be deemed confidential, and that the record does not support NHTSA's decision. The court rejected Public Citizen's argument on the first issue but agreed that NHTSA's rulemaking procedures were inadequate because NHTSA had failed to inform the public that the final rule might categorically determine that certain types of information were confidential instead of establishing a presumption that those types of information were confidential. The court did not consider whether NHTSA rationally determined that some types of information were entitled to confidential treatment.

The Rubber Manufacturers Association had counter-argued that the TREAD Act created a categorical exemption under Exemption 3 of FOIA that bars the release of any early warning data unless the Secretary makes certain findings prescribed by Congress.

On July 30 the court issued a supplemental opinion holding that Exemption 3 is inapplicable. The district court thereafter granted the tire manufacturers' request to issue a final judgment on this issue under Rule 54(b), which will enable the tire manufacturers to appeal the court's determination on

the Exemption 3 issue during the remand. A notice of appeal was subsequently filed on September 28.

While the court remanded the rule, it rejected the argument that NHTSA lacked legal authority to issue rules determining that specified categories of information are confidential.

NHTSA's final rule is available at:

http://dmses.dot.gov/docimages/pdf87/249581_web.pdf

The court's supplemental opinion is available at:

<http://www.dcd.uscourts.gov/opinions/2006/Leon/2004-CV-463~13:49:0~8-22-2006-a.pdf>

D.C. Circuit Affirms Dismissal of Challenge to Enforcement Policy Allowing Regional Recalls

On June 23 the U.S. Court of Appeals for the District of Columbia Circuit in Center for Auto Safety v. NHTSA, (D.C. Cir. No. 04-5402), affirmed the district court's dismissal of a suit by two public interest groups that had challenged NHTSA's informal enforcement policy on "regional recalls." The policy allows manufacturers to issue recalls for automobiles with safety defects that are restricted to vehicles in designated States. 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.

The court agreed with NHTSA that the enforcement policy was unreviewable because it imposes no legal obligations on either car manufacturers or NHTSA – the policy does not dictate NHTSA's decision on whether any specific regional recall would be lawful and therefore does not represent final agency action. The court noted as well that the principal agency official who established the policy, the Associate Administrator for Safety Assurance, had no authority to adopt regulations or issue binding interpretations of statutes administered by NHTSA.

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 on regional recalls, but NHTSA has neither formally approved regional recalls nor adopted rules establishing standards for such recalls. The public interest groups were 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 had 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 of appeals did not reach the issue of whether the statute in fact permits manufacturers to use regional recalls.

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

<http://pacer.cadc.uscourts.gov/docs/comm/mon/opinions/200606/04-5402a.pdf>.

Consolidated Suits Challenge NHTSA's Light Truck CAFE Standards

Several suits challenging NHTSA's final rule setting Corporate Average Fuel Economy (CAFE) standards for light trucks have been filed in the U.S. Courts of Appeals for the Second and Ninth Circuits and have been consolidated in the Ninth Circuit. NHTSA issued the standards on April 6.

The suits are brought by the Center for Biological Diversity, the Sierra Club, Public Citizen, Environmental Defense, Natural Resources Defense Fund, the State of Minnesota, and a coalition of twelve States and cities (including California, the State and City of New York, and the District of Columbia). The Ninth Circuit selected a number of the cases filed there for consideration for inclusion in its appellate mediation program, but the cases ultimately were not included in the program when all parties agreed that the issues were not susceptible to mediation.

The petitioners' filings do not yet reveal the specific grounds for their challenges, but they are likely to challenge the sufficiency of NHTSA's environmental review of the standards, including whether NHTSA improperly failed to consider the impact of CO₂ emissions, NHTSA's position that the standards preempt state requirements limiting CO₂ emissions, and the merits of the standards themselves. Additionally, petitioners might challenge the completeness of the administrative record for the standards.

Petitioners' briefs are due October 13, NHTSA's brief is due December 22, and petitioners' reply briefs are due January 26, 2007. Oral argument would likely be scheduled for the latter half of 2007. The lead case is Center for Biological Diversity v. NHTSA, (9th Cir. No. 06-71891).

NHTSA's Final Rule is available at:

<http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=608335319654+2+0+0&WAIAction=retrieve>

State of California Seeks NHTSA Preemption Documents in FOIA Suit

The State of California has named NHTSA, DOT, and OMB as defendants in a suit filed in the U.S. District Court for the Northern District of California appealing decisions of DOT and OMB denying California's FOIA requests for all documents related to NHTSA's statements in the preamble to its light truck CAFE standard regarding the preemptive effect of the standards on

state requirements limiting CO₂ emissions. The case, California v. NHTSA, (N.D. Calif. No. 06-02654), originally named only OMB as a defendant, but was subsequently amended to include NHTSA and DOT.

The Department has filed an answer in the case and is preparing an index of the documents in dispute. Summary judgment briefing will take place in late 2006 and early 2007, and a summary judgment hearing is scheduled for March 16, 2007.

**Auto Industry Preemption
Challenge to California Limits
on Vehicle CO₂ Emissions
Survives State Defendant's
Motion for Judgment on the
Pleadings**

On September 22, the U.S. District Court for the Central District of California largely denied the motion of the defendant, the Executive Director of the California Air Resources Board (CARB), seeking judgment on the pleadings in a federal preemption challenge to CARB regulations limiting the release of CO₂ from new motor vehicles sold in California beginning in the 2009 model year. The court has scheduled trial to commence on January 30.

The coalition of plaintiffs in this case, Central Valley Chrysler-Jeep, Inc. v. Witherspoon, (C.D. Cal. No. 04-06663), is composed primarily of automobile dealers and manufacturers. The Department is not participating in this case as a party or otherwise, but some of

the issues raised in the case are related to those arising in litigation concerning CO₂ emissions generally and NHTSA's minimum corporate average fuel economy (CAFE) standards specifically.

Plaintiffs allege five grounds for challenging the regulations: (1) the regulations are preempted because they conflict with the federal Energy Policy and Conservation Act (EPCA), which authorizes NHTSA to set CAFE standards for manufacturers' fleets of new vehicles; (2) the regulations are expressly preempted by the federal Clean Air Act as the Act has been construed by EPA; (3) the regulations are preempted because they conflict with the federal government's policies regarding the impact of greenhouse gases on global warming and weaken the United States' diplomatic leverage in negotiations with other nations on greenhouse gas standards; (4) the regulations violate the dormant Commerce Clause of the U.S. Constitution because the economic burdens they create outweigh any economic benefits they might create; and (5) the regulations are contrary to the federal antitrust laws because they would require cooperation among competing manufacturers in the California new-vehicle market.

In its September 22 decision, the court granted defendant's motion as to the Commerce Clause and antitrust law claims, but denied the motion as to the other claims. Accordingly, the case is expected to proceed to trial on these claims.

Of particular interest to the Department in this case is plaintiffs' EPCA

preemption argument, which is consistent with the EPCA preemption position taken by the Department in issuing its April 2006 CAFE standards for light trucks. The Department's position on EPCA preemption might be raised in the ongoing challenge to the light truck CAFE standards in the U.S. Court of Appeals for the Ninth Circuit, and internal departmental documents related to that position are at issue in FOIA litigation brought by the State of California in the U.S. District Court for the Northern District of California.

Additionally, all three issues that survived judgment on the pleadings in the Witherspoon case are relevant to the issues raised in the challenge to EPA's decision not to regulate CO₂ emissions currently before the Supreme Court in the Massachusetts v. EPA case. That case, and the CAFE standard and FOIA cases are discussed above in this edition of Litigation News.

Court Sets Briefing Schedule in Challenges to Rule on Warning Systems for Low Tire Pressure

The U.S. Court of Appeals for the District of Columbia Circuit has consolidated several petitions challenging two NHTSA decisions on tire pressure monitoring systems ("TPMSs") and established a briefing schedule for the cases in Public Citizen v. Mineta, (D.C. Cir. Nos. 05-1188). The petitioners filed their brief on August 30, and NHTSA's brief is due October 16. The court has not set an argument date.

Public Citizen, several tire manufacturers, and the tire manufacturer trade association challenged the final NHTSA rule requiring car manufacturers to install TPMSs in new cars that will warn drivers when one or more of a car's tires is under-inflated. NHTSA adopted that 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. The petitioners argue that NHTSA's rule is inadequate because it does not require TPMSs for replacement tires and because the warning will not, in their view, appear soon enough.

The tire manufacturers are also challenging a related NHTSA decision, the denial of their petition for a rule requiring car manufacturers to establish recommended tire pressures based on a maximum load for automobiles that would include a tire pressure reserve. The tire 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.

Federal Transit Administration

First Circuit Upholds FTA's Decision Funding Rehabilitation of Boston's Copley Station

On September 14 the U.S. Court of Appeals for the First Circuit in Neighborhood Association of the Back Bay and the Boston Preservation Alliance, Inc. v. Federal Transit Administration, (1st Cir., No. 06-1029) upheld FTA's decision funding a station rehabilitation project in Boston. The appeal was from a November 8, 2005, decision by the U.S. District Court for the District of Massachusetts denying a motion to preliminarily enjoin the project.

The citizens' group challenging the project originally alleged that FTA violated Sections 106 and 110 of the National Historic Preservation Act and Section 4(f) when it issued its Finding of No Significant Impact (FONSI) for the Copley Station, in Boston, MA. The Massachusetts Bay Transportation Authority (MBTA) is renovating the station to make it accessible under the Americans with Disabilities Act (ADA). The plaintiffs claimed that the FTA failed to conduct a proper Section 110 and Section 106 review and that the administrative record did not support the finding of no adverse effect. They also claimed that the Advisory Council for Historic Preservation (ACHP) should have been consulted. The station is adjacent to two National Historic Landmarks, the Old South Church and the Boston Public Library.

The case involved the weighing of compliance with the ADA versus compliance with historic preservation regulations. Although the court ruled in FTA's favor, it stated that FTA "while adequately performing its assigned task [compliance with conflicting statutes], has fallen short of distinction in doing so, giving little more than the bare minimum attention to historic preservation issues." The court also noted that in its opinion the other agencies responsible for drafting the historic preservation regulations (ACHP, DOTA, ATBCB) have created regulations that are "cryptic and confusing."

However, on the merits the panel determined that FTA had complied with the requirements of both Section 106 and 110 of the National Historic Preservation Act (NHPA). The court found that even in the context of National Historic Landmarks there needs to be an adverse effect finding before a Federal agency is required to consult with the ACHP, and here, by contrast, there was no finding of such an adverse effect.

The court also determined that FTA had complied with Section 4(f), ruling that an alternative is not prudent if it does not meet the transportation needs of the project. In the 4(f) discussion, the court agreed that the ADA's regulations requiring the same path of circulation for disabled riders as the general public only to the extent that it is "feasible" and "practicable," relates to engineering and cost considerations, not historic preservation concerns.

The court therefore affirmed the district court's ruling denying the preliminary and final injunctions.

The First Circuit's decision is available at:

<http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=06-1029.01A>

Coalition of 9/11 Families Voluntarily Dismiss Challenge to Proposed Site for New York City Transit Terminal

On March 30, a group of family members representing certain victims of the 9/11 terrorist attacks on the World Trade Center ("WTC") voluntarily dismissed their lawsuit filed 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), against the Department, FTA, and the Port Authority of New York and New Jersey. The complaint, filed on October 13, 2005, challenged a proposed new terminal for Port Authority Trans Hudson ("PATH") trains at the WTC site.

The complaint alleged that the decision approving construction at the proposed site violated 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 contended that the project violated 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 contended 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 have used Section 4(f) property within the larger WTC area.

The plaintiffs have a companion complaint pending against the Lower Manhattan Development Corporation regarding the 9/11 Memorial at the WTC site, which does not involve the Department or the FTA. That suit remains active and, when dismissing this case, the plaintiffs advised the Department that they will pursue their claims regarding the 9/11 Memorial solely through that litigation with the LMDC.

Construction of the new terminal began on September 6 and is ongoing.

Second Circuit Upholds Random Search Program for New York City Subway

On August 11, the U.S. Court of Appeals for the Second Circuit in MacWade v. Kelly, (2d Cir. No. 05-6754-cv) rejected a Fourth Amendment challenge to New York City's program to randomly search bags carried onto New York's subway system. Applying the "special needs"

doctrine, the court agreed that New York City demonstrated such a need given previous thwarted attempts to bomb New York's subway system, New York's continuing desirability as a terrorist target, and recent subway bombings in London, Madrid, and Moscow.

The court rejected an argument that a "special need" cannot exist absent evidence of an imminent attack. The court then balanced the four factors relevant to a "special needs" case. First, the court agreed that New York had an "immediate and substantial" need for the program. Second, the court held that the plaintiffs' privacy interests must not be viewed in isolation or accorded dispositive weight. Third, the court held that the searches, which typically lasted a matter of seconds, were only "minimally intrusive." Finally, the court affirmed the district court's finding, based on expert testimony, that the program deterred terrorist attacks and thus was "reasonably effective."

The court, summarizing its decision, stated as follows: "In sum, we hold that the Program is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a special need; (2) that need is weighty; (3) the Program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree."

Ninth Circuit Remands Challenge to ADA Regulations for Failure to Join Department as Necessary Party

Following a hearing on February 13 in George v. Bay Area Rapid Transit District, (9th Cir. No. 04-15782), the U.S. Court of Appeals for the Ninth Circuit remanded a challenge to FTA's ADA regulations to the district court so that the Department could be added as a necessary party under Rule 19 of the Federal Rules of Civil Procedure.

The action was first instituted in the U.S. District Court for the Northern District of California by two visually impaired riders who sued 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 involved 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, in any event, 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.

In addition to remanding the matter, the Ninth Circuit also reversed the district court's order finding the Department's ADA regulations to be arbitrary and capricious. The district court subsequently granted the Department's motion to intervene and ordered it to file a brief in support of the specific regulations in dispute.

The Department filed its brief on August 25. BART and the plaintiffs filed responses on September 8. It is unclear at this juncture whether the district court will hear oral arguments.

Saint Lawrence Seaway Development Corporation

Settlement Reached in Mohawk Tribe's Challenge to Opening Date for the St. Lawrence Seaway

In St. Regis Mohawk Tribe v. Jacquez, (N.D.N.Y., No. 7:04-cv-00305) the St. Regis Mohawk Tribe challenged 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. After 19 months of negotiations, the SLSDC, DOT, the Canadian Saint Lawrence Seaway Management Corporation (SLSMC) and the Canadian Ministry of Transport agreed to a settlement of these cases on July 18.

The settlement is intended to promote transparency, mutual respect, and dialogue between the Seaway (SLSDC and SLSMC) and the Mohawks. It does so while protecting the authority of the Seaway entities to determine the actual opening date of the Seaway. The settlement is encompassed in a Memorandum of Understanding (MOU).

Under the terms of the MOU, the Seaway management has retained its authority to set the dates for the navigation season, subject to consultations with the Tribes, however the Seaway management's decision is

final and not subject to challenge or review. Also, the trigger dates agreed upon by the parties as dates that will not be challenged provide the Seaway management with considerable flexibility in establishing the annual navigation season opening and closing dates. In addition, these trigger dates are subject to change for reasons of National Security and for emergency conditions.

In return for this assurance of operational flexibility, the Seaway management has agreed to consult with the Tribes and utilize transparent procedures, including the sharing of environmental data on weather and ice conditions, with Tribal representatives prior to setting the opening and closing dates. The Seaway management also has agreed to assist in the funding of an observational study of the effects, if any, of ice breaking, and although it is not bound by any findings of the study, those findings could lead to further study or result in other actions by the Seaway management.

Maritime Administration

First Circuit Affirms MarAd's Bidder Qualification in Former Shipyard Sale

On June 9 the U.S. Court of Appeals for the First Circuit in Quincy Commerce Center, LLC v. Maritime Administration, (1st Cir. No. 05-1527) affirmed the prior decision of the U.S. District Court in favor of MarAd, and held that Quincy Commerce Center ("QCC") forfeited its rights to challenge MarAd's sale of the Quincy shipyard property in

2003 because it failed to apprise the agency of its positions in a timely manner, *i.e.*, before the agency had awarded the contract to the high bidder. As a result, QCC deprived the agency of "a timely opportunity for meaningful consideration of the objecting party's position prior to taking action."

The First Circuit also dismissed QCC's contention that one of its rival bidders for the personal property had learned from MarAd's auctioneer the night before the auction that it would have up to twelve months to remove any personalty. The court found no real prejudice to QCC, given the absence of any evidence that QCC would have bettered the high bid for the personal property. The court held that MarAd did not act arbitrarily or capriciously in permitting the sale to be completed to the high bidder. Finally, the court held that MarAd acted reasonably in excluding a party that wished to be certified as a bidder an hour before the auction, but that did not present the requisite documents.

The court's decision is available at:

<http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=05-1527.01A>

Appeal Challenges AID Interpretation of Cargo Preference Exception

On May 17, America Cargo Transport, Inc. ("ACT") filed a notice of appeal in America Cargo Transport, Inc. v. Tobias and Nelson, (D.C. Cir. No. 06-5147) seeking to reverse the April 19 order of Judge Walton of the U.S. District Court

for the District of Columbia. The United States filed a motion for dismissal or, in the alternative, for summary affirmance, on July 7.

In the case below, ACT argued that the Agency for International Development had improperly invoked a “notwithstanding any other provision of law” clause to avoid cargo preference requirements and to reject an offer from a qualified U.S.-flag carrier to transport food aid cargoes to Somalia. Judge Walton declined to second guess AID’s decision to consider the cargo in question to be “emergency” cargo, which is a predicate for use of the notwithstanding clause. ACT argued that AID’s determination that the cargo at issue was emergency cargo was not rationally based, in that the U.S.-flag vessel would have delivered the cargo faster and the additional cost of using a U.S.-flag vessel is borne by MarAd.

Litigation on Hold in AID Cargo Preference Challenge While DOJ Determines United States’ Litigation Position

In America Cargo Transport, Inc. v. United States, (W.D. Wash. No. C05-393 JLR) American Cargo Transport (“ACT”), an operator of ocean going vessels registered in the United States, alleges that it was deprived of its right to carry U.S. preference cargo, which, consistent with the Cargo Preference Act of 1954, codified in section 901(b) of the Merchant Marine Act, 1936, 46 App. U.S.C. § 1241(b), is statutorily reserved in substantial part for carriage on vessels flying the U.S. flag.

ACT’s amended complaint specifically names two Federal agencies as defendants: the Agency for International Development (“AID”) – the agency statutorily charged with the obligation to arrange shipment of certain government impelled relief cargo, and MarAd – the agency statutorily charged with administering the cargo preference laws of the United States. DOJ’s early representation in the case did not completely take into account the competing policy concerns of the two named Federal defendant agencies. The case is presently on hold as DOJ determines the ultimate litigation position the Federal government will take.

Summary Judgment Granted for MarAd in Challenge to Guam Ship Repair Discretion

On July 24 the U.S. District Court for the District of Columbia granted the United States’ motion for summary judgment in Guam Industrial Services Inc. d/b/a Guam Shipyard v. Rumsfeld, (D. D.C. No. 05-1599). The complainant, a Guam shipyard, had sought to enjoin repairs to Ready Reserve Force (RRF) vessels that had been contracted for with foreign shipyards, alleging that the failure to contract with complainant, a U.S. yard in Guam, violated 10 U.S.C. § 7310.

The court previously denied a TRO, allowing the foreign repairs to begin on the SS PETERSBURG, a specialized RRF tanker that had been prepositioned in Guam. Thereafter the court partially dismissed the case last December, ruling that the “Buy America” provisions of 10

U.S.C. § 7310 were not applicable to the Maritime Administration's RRF soliciting bids for the repair work. The court accepted the MSC Instruction excluding the RRF from the definition of "vessels under the jurisdiction of the Secretary of the Navy" as a reasonable interpretation the statute.

The July 24 decision granted summary judgment with respect to the remaining count, which argued that MarAd had violated a memorandum of agreement between DoD and DOT when it permitted foreign ship repairs. The court found the MOA language did not require MarAd to perform ship repairs in accordance with 10 U.S.C. § 7310.

Plaintiff has filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia Circuit. A legislative challenge to the precedent is also possible.

Pipeline and Hazardous Materials Safety Administration

Ninth Circuit Affirms Dismissal of Challenge to DOT Radioactive Materials Regulations and Denies Petition for Review of Companion NRC Regulations

On July 24 the U.S. Court of Appeals for the Ninth Circuit in Nuclear Information & Resource Service v. DOT, (9th Cir. 05-16327) affirmed the decision of the U.S. District Court for the Northern District of California dismissing a

challenge to a PHMSA radioactive materials transportation rule on the grounds that, under the Hobbs Act, the matter should have been filed in a court of appeals in the first instance and was in any event filed after the expiration of the applicable statute of limitations.

On the same day the court denied a petition for review brought by the same parties, and consolidated with the DOT case for oral argument, challenging the Nuclear Regulatory Commission's companion regulations. The court held that the petitioners lacked Constitutional standing to bring their suit. On September 22, petitioners sought panel or, in the alternative, en banc rehearing of that determination.

The PHMSA and NRC regulations at issue conformed the agencies' existing radioactive material transportation regulations to those of the International Atomic Energy Agency.

In the suits, five environmental and public interest groups had alleged that NRC's environmental assessment addressing the two rules was inadequate and thus violated the National Environmental Policy Act because, among other things, the assessment failed to properly assess purported increases in radiation exposure that would be caused by the rules.

The Ninth Circuit's decision concerning the PHMSA rule is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F268A92654F8D80F882571B500591658/\\$file/0516327.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F268A92654F8D80F882571B500591658/$file/0516327.pdf?openelement).

The Ninth Circuit's decision concerning the NRC rule is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D971CE9443AF2981882571B50058B9BA/\\$file/0471432.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D971CE9443AF2981882571B50058B9BA/$file/0471432.pdf?openelement).

D.C. Circuit Hears Oral Argument in Challenge to Rules Defining Scope of DOT's Hazardous Materials Regulation

On March 20, the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in American Chemistry Council v. DOT (D.C. Cir. No. 05-1191), a challenge to the "HM-223" rulemaking in which the Department clarified where DOT's regulation of the shipment of hazardous materials begins 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 analyze and address security concerns. The petitioners are supported by five additional associations that have intervened in the case.

During the argument, the court questioned the petitioners' standing to bring the case and later ordered supplemental briefing on the standing issue. In its supplemental brief, the Department maintained that while some or all petitioners might have standing, no petitioner had provided sufficient information to definitively establish such standing.

We are now awaiting the court's decision.

Writ of Mandamus Sought to Compel PHMSA to issue LNG Facility Safety Standards

On September 8, a petition for a writ of mandamus was filed in the U.S. Court of Appeals for the First Circuit, in In re City of Fall River, Massachusetts, (1st Cir. No. 06-2310). The petition was filed by the States of Massachusetts and Rhode Island, and the City of Fall River, and seeks to compel DOT to prescribe minimum safety standards for deciding on the location of new liquefied natural gas (LNG) facilities. Petitioners allege that DOT has failed to comply with a mandate to prescribe such standards under the Pipeline Safety Act of 1979, and failed to act on a petition for rulemaking filed two years ago.

The court has issued a briefing schedule pursuant to which the United States' response to the petition is due on October 10 and petitioner's reply is due October 20. The case is on the court's November argument schedule.

Federal Motor Carrier Safety Administration

Briefing Completed in Hours of Service Cases

In Public Citizen, Inc. v. FMCSA, (D.C. Cir., No. 06-1078) and Owner-Operator Independent Drivers Association, Inc. v. FMCSA, (D.C. Cir. No. 06-1035) FMCSA and other parties in this latest round of motor carrier hours of service ("HOS") litigation submitted their final briefs on September 29.

In July 2004 the court vacated FMCSA's 2003 HOS rule, holding that the agency failed to satisfy its duty to consider effects on driver health. Congress directed the agency to adopt a new rule within one year. The agency did so in August 2005 and was again sued, this time by both Public Citizen and other advocacy groups, and by industry. The court consolidated the cases prior to briefing but has not yet set a date for oral argument.

The 2005 rule requires that drivers may not operate vehicles more than 11 hours (a 1-hour increase over the pre-2003 limit) without 10 consecutive hours off duty (a 2-hour increase). The new rule also requires driving to cease after 14 hours following the time a drivers begins duty. The pre-2003 rule allowed drivers to extend their on-duty periods by taking short breaks. The new rule also provides a "restart" of weekly on-duty limits if the driver is off duty 34 consecutive hours. The 2005 rule allows drivers to accumulate 10 hours "off-duty" time by taking 8 consecutive hours in the sleeper

berth and a separate period of 2 hours in the sleeper berth or off duty.

Public Citizen and the other advocacy groups argue the rule is contrary to law and arbitrary and capricious in increasing daily and weekly driving hours without establishing that the increases are safe. Petitioners allege (a) an inconsistency between FMCSA's safety analysis and its cost/benefit analysis, (b) the increased risk from crashes during the 11th driving hour is not justified, (c) the 34-hour restart increases cumulative fatigue and inhibits recovery, and (d) the agency's regulatory impact analysis is flawed. Petitioners also argue that the rule is arbitrary and capricious because it fails to "ensure" protection of driver health. Petitioners claim an increased risk of lung cancer, hearing loss, back disorders, and other health effects from working longer hours.

FMCSA maintains the evidence on risk from driving 11 hours is inconclusive, but that even if there is some increased risk, the costs of imposing a 10-hour limit outweigh the safety benefits. The agency also claims the 34-hour recovery period is sufficient. Moreover, the non-extendable 14-hour on-duty driving window and new 10 hours off duty rule create more opportunity for rest under the new rule. The agency also disputes Public Citizens' characterization of FMCSA's burden to ensure protection of driver health.

In their separate petition for review the Owner-Operator Independent Drivers Association has challenged other aspects of the new rule, principally the requirement that all sleeper berth drivers

remain in the berth 8 consecutive hours. They allege the agency failed to deal with loading and unloading issues and violated APA notice and comment requirements. OOIDA argues the sleeper berth provisions are arbitrary and capricious because FMCSA failed to consider positive effects of nap breaks, the conflict with FMCSA rules on hazardous materials drivers, and the adverse economic impacts on team drivers. OOIDA also claims FMCSA ignored driver health issues, including circadian rhythms and the effects of discouraging rest breaks.

FMCSA counters that the rule did address loading and unloading issues and that the sleeper berth provision is based upon sound science demonstrating the risk of split sleep and higher crash rates for sleeper berth drivers.

The Insurance Institute for Highway Safety filed an amicus brief in support of Public Citizen. ATA, NASSTRAC, the Health & Personal Care Logistics Conference, UPS and the National Industrial Transportation League intervened in support of the rule. The International Brotherhood of Teamsters and three trucking associations intervened in support of the OOIDA.

The court's July 16, 2004 opinion is at

<http://pacer.cadc.uscourts.gov/docs/commopinions/200407/03-1165a.pdf>

Information concerning FMCSA's 2005 rule, including the rule itself, is available at:

<http://www.fmcsa.dot.gov/rules-regulations/topics/hos/hos-2005.htm>

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

In Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration (D.C. Cir. No. 05-1436) petitioners Peter Pan Bus Lines, Inc. and Bonanza Acquisition LLC have sought 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"). Fung Wah is a private bus carrier that does not receive governmental assistance in connection with its transportation of passengers.

FMCSA issued certificates of operation to Fung Wah on May 12 and 13, 2005, pursuant to 49 U.S.C. § 13902(a)(1), which gives FMCSA 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 concluded that the applicable FMCSA licensing regulations do not permit FMCSA to withhold registration for failure to comply with ADA requirements. FMCSA also determined that the regulatory requirement that a carrier must comply with "other applicable regulations of the Secretary" does not encompass ADA regulations, and rather was intended to refer to 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 ADA violations and referred the matter to DOJ.

In their petition for review, the bus lines urge that 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. They also argue that FMCSA's action in issuing the certificates should be set aside because FMCSA, in their view, erred in concluding 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 seek to intervene in the court case.

Briefing was completed in the case on August 28. No date has yet been set for oral argument.

Motor Carrier Challenges Administration of FMCSA Self-Insurance Program

In KLLM, Inc. v. FMCSA, (D.C. Cir., No. 06-1152) a self-insured interstate motor carrier has filed a petition for review seeking to reverse a decision of FMCSA imposing heightened financial security conditions on the carrier.

FMCSA regulations require interstate motor carriers to meet financial security standards in order to provide liability protection for the public. These carriers may either secure commercial liability insurance or seek to become self-insured; for the latter, they must satisfy conditions tailored by FMCSA according to the relative financial strength of each carrier, including size, claims history, and similar factors. Self-insured carriers must also submit regular reports on their financial condition and claims exposure.

KLLM has been self-insured since 1990. After considering reports submitted by KLLM that disclosed high levels of claims and a weak financial position, in 2003 FMCSA imposed additional conditions that raised the level of security required for the carrier to remain self-insured. These included submission of an additional irrevocable letter of credit, attaining a higher tangible net worth level, and providing a written guarantee to pay KLLM's self-insurance obligations from the carrier's corporate parent. KLLM requested reconsideration and FMCSA agreed to stay its decision. In March of 2006 FMCSA denied the petition on the basis

of continuing increased claims exposure and decreased net income.

Two business days before the decision was to take effect and KLLM would either have to meet the new standards or obtain an insurance policy, the carrier requested an administrative stay from the agency. On that same day KLLM filed a petition for review of FMCSA's new conditions with the D.C. Circuit. One day later KLLM filed with the court seeking an emergency stay of the agency's decision.

The carrier argued that it would suffer irreparable harm in the absence of a stay since it needed to devote its assets to defrauded shareholders of MCI and WorldCom (former WorldCom CEO Bernard Ebbers was the majority shareholder of KLLM), and that the public interest was adequately protected by its original collateral held by FMCSA (a \$1 million letter of credit). KLLM also contended that it was likely to prevail on the merits because the agency had acted arbitrarily by treating the carrier differently from other similarly situated trucking firms.

The D.C. Circuit issued an ex parte order that same day granting an administrative stay in order to provide sufficient time to consider the merits. It also set an accelerated briefing schedule.

The government's subsequent response denied that KLLM would be irreparably harmed, countered that the public interest lay in assuring liability protection for third parties rather than in enhancing the recovery of a narrow class of investors, and explained that there was no inconsistency among agency

decisions regarding self-insured carriers. FMCSA later denied KLLM's request to the agency for a stay of its March 2006 decision.

The D.C. Circuit lifted its administrative stay on May 25. On June 1, the day KLLM was required to satisfy the conditions set in the March 2006 decision to remain self-insured, the carrier informed FMCSA it could not meet those conditions. It suggested alternative conditions and the agency entered into negotiations. FMCSA and KLLM subsequently agreed upon new conditions, which included submission of additional collateral; KLLM tendered an irrevocable letter of credit in the amount of \$3.8 million. Later the carrier reported that it could not satisfy the remaining revised conditions, so it left the self-insurance program and obtained commercial liability insurance.

KLLM in July sought the return of the \$3.8 million letter of credit sent in partial satisfaction of the new self-insurance standards. On August 23 FMCSA refused, pointing out that the carrier's new insurance policy would not protect members of the public whose claims arose prior to the date of the policy, and that the potential amount of such claims exceeded the total collateral held by the agency. The motor carrier has threatened litigation on the basis that the FMCSA has no legal authority to withhold this collateral.

The original lawsuit is technically still pending even though the conditions imposed by the agency in March 2006 that gave rise to the lawsuit have been superseded.

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