A Case Study: When Hazardous Material Packages are Commingled with Other Packages, is a Motor Carrier Required to Allow Inspection of the Contents in the Trailer While in Transit?

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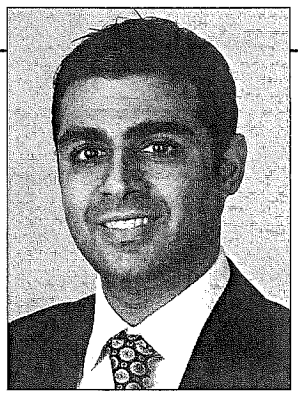

It is normal operating procedure for a less-than-truckload motor carrier to load its cargo for safe transport and efficient unloading at the point of destination, taking into consideration securement methods that are typical within the industry. When multiple destination points are involved, the carrier strategically arranges its cargo in pallets or loads its packages so that merchandise for the first destination is loaded last and placed in the rearmost portion of the trailer; merchandise for the second destination is placed in the next pallet (or groups of pallets) for unloading, and so on. Stated another way, the carrier *first* loads the merchandise for its *last* destination, which is placed in the forward-most position in the trailer, so that all pallets or packages can be removed in order of the carrier's destinations.

As a result of this packing securement method, the cargo on board the trailer is not separated by the type of goods being transported, but rather grouped with different goods all destined for the same consignee or location. The shipment can be unloaded quickly and easily, and the carrier can then proceed to its next destination. In the context of this article, items considered as hazardous materials would be grouped and sealed with other non-hazardous merchandise on a shipment to be unloaded together at their predetermined destination.

A potential issue faced by the motor carrier occurs during a roadside stop by state law enforcement—for whatever reason—when the enforcement official, after reviewing the shipping papers or simply asking the driver about the cargo, demands to inspect the hazardous materials. A federal regulation, 49 C.F.R. § 177.802, mandates that hazardous materials being transported must be made available for inspection, but is silent as to *where* and *when* the inspection must take place. When the cargo is loaded in order of destination as described above, as opposed to segregating hazardous materials in one location on the trailer, the driver likely will not be able to locate and present the hazardous materials to the official for inspection. Can the state official making the stop demand that all hazardous materials be loaded at the rear of the trailer? Such demand by state law enforcement would upset the planning and resources involved in strategically packing the trailer for securement purposes and for quick unloading. Moreover, can the state official demand that the *entire trailer* be unloaded *on the side of the road* for the sake of locating and inspecting the hazardous materials?

A letter of interpretation, issued by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), the federal agency under the U.S. Department of Transportation charged with enforcing 49 C.F.R. § 177.802, specifically states that: (1) hazardous materials are not required to be placed at the rear of the trailer; and (2) in order to comply with the regulation that hazardous materials must be made available for examination and inspection, the driver is not required to unload the contents of the truck at a place other than its origin or destination.[1]

A national retailer (the "Company"), which operates its own private fleet, dealt with this precise dilemma. The Company's trucks had been pulled over and, because hazardous materials had been loaded and grouped with other merchandise, drivers could not make the hazardous materials available for inspection at the roadside without unreasonable delay, extra labor costs, and interference of efficient transit. On several occasions, state law enforcement issued citations and demanded that the hazardous materials be loaded together at the rear of the trailers in order for the product

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to be easily available for its inspection. In certain instances, when the hazardous materials were not located at the rear of the trailer, enforcement officials directed drivers to the nearest rest stop so the entire trailer could be unloaded and inspected. Many times, drivers were unable to locate the hazardous materials because of the way the trailers were loaded. As a result of this enforcement tactic, several tractor trailers were placed out of service.

In addressing the issue of *where* and *when* hazardous materials are to be made available for inspection, the Company inquired directly with PHMSA, and obtained two letters of interpretation from PHMSA addressing these ambiguities. First, PHMSA issued a letter of interpretation determining that nothing in the regulations requires hazardous materials to be loaded at the rear of the trailer.[2] Second, and more significantly, PHMSA issued a follow up letter of interpretation stating that requiring a driver to unload the contents of the trailer, at a place other than the origin or destination, placed an unreasonable burden on the driver.[3]

Within a week after receiving the second letter of interpretation from PHMSA, a Company driver was nevertheless pulled over by the state police and cited for failing to make hazardous materials available for inspection.[4]

I. 49 C.F.R. § 177.802

The trucking industry is closely regulated by both state and federal governments.[5] Transportation of hazardous materials by motor carriers is even more closely regulated.[6] As indicated above, 49 C.F.R. § 177.802 is a federal regulation applicable to the transportation of hazardous materials. That regulation states:

> Records, equipment, packagings and containers under the control of a motor carrier, insofar as they affect safety in transportation of hazardous materials by motor vehicle, must be made available for examination and inspection by a duly authorized representative of the Department [of Transportation].

States may enact their own laws enabling them to enforce federal transportation laws, provided they do not conflict with federal law.[7] Thus, state law enforcement may issue citations for violations of federal transportation laws.

II. PHMSA's Letters of Interpretation

As indicated above, 49 C.F.R. § 177.802 requires that hazardous materials "must be made available for examination and inspection." However, absent from the regulation is any direction of where and when the inspection must occur.

In the example discussed above, the Company first wrote to PHMSA and explained that state law enforcement had demanded that the hazardous materials be loaded at the rear of the trailer. On October 17, 2008, PHMSA issued a letter of interpretation determining that "nothing in the [Hazardous Materials Regulations] specifies that hazardous materials must be loaded on the rear of the transport vehicle."[8]

The Company sought further clarification, particularly on the location of where the inspection must occur. When hazardous materials were not found at the rear of the trailers, state law enforcement officials would order Company drivers to the nearest rest stop, or some other location, and order them to unload the entire trailer for inspection. The result of this practice placed several tractor trailers out of service, delayed scheduled delivery time, and the drivers either received a citation or warning. On March 12, 2010, PHMSA issued the second applicable letter of interpretation specifically finding that "hazardous materials are not required to be stored in the rear of a trailer to allow for an inspection in accordance with 49 C.F.R. § 177.802 and that requiring a driver of a tractor trailer to unload the contents of the trailer, *at a place other than the truck's origin or destination*, places an unreasonable burden to on the driver."[9]

Thus, PHMSA, as the federal agency in charge of enforcing this regulation, provided definitive guidance that: (1) hazardous materials need not be placed at the rear of the trailer; and (2) in order to comply with the requirement that hazardous materials "must be made available for examination and inspection," the driver is not required to unload the contents of the trailer at a place other than the truck's origin or destination, thus alleviating the unreasonable burden placed upon the driver in that situation.

III. *The State of New York v. Gaugh*

Within one week after issuance of PHMSA's second letter of interpretation, a New York State Police officer issued a citation to a Company driver who could not locate hazardous materials in his trailer.[10] The driver had been pulled over during a routine roadside inspection of commercial tractor trailers.[11] Upon being told by the driver that flammable and non-flammable hazardous materials were on board, the officer requested a copy of the shipping papers and directed the driver to open the truck's cargo hold.[12] When the officer discovered that the hazardous materials were not loaded at the rear of the trailer, and when neither he nor the driver could locate the materials, the officer issued a citation for violating 49 C.F.R. § 177.802.[13] The Company contested the citation in the local justice court and presented the recently issued letter of interpretation from PHMSA.[14] Despite the letter of interpretation, the justice court upheld the citation and convicted the driver for violating the federal regulation.[15]

The Company appealed the trial court's conviction and argued that deference must be afforded to an agency's own interpretation resolving any ambiguity of its own regulation. The

appellate court agreed, reversing the conviction and dismissing the citation. In doing so, the court first examined whether Congress had directly spoken to the issue of a commercial driver's obligation to make hazardous materials "available for examination and inspection."[16] The appellate court determined that Congress had never done so.[17] The court actually noted that 49 C.F.R. § 177.802 was ambiguous on this issue.[18]

Second, the appellate court turned its attention to the agency's regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner.[19] And, if the agency's regulation is ambiguous, the court must consult the agency's own interpretation of the regulation for guidance in deciding the case.[20] In this regard, the appellate court held that the two distinct conclusions reached by PHMSA in issuing its second letter of interpretation—(1) that the regulation does not require "a driver of a tractor trailer to unload the contents of the trailer, at a place other than the truck's origin or destination," particularly where hazardous materials are "mixed with general merchandise," and that (2) hazardous materials need not "be stored in the rear of a trailer" to facilitate inspection[21]—were consistent with the regulatory text of 49 C.F.R. § 177.802.[22]

Thus, in light of the foregoing analysis, PHMSA's letter of interpretation must be accepted as correct.[23] The appellate court reversed the conviction against the Company's driver on the grounds that, pursuant to the letter of interpretation,[24] the driver's inability to locate the hazardous materials in the trailer did not constitute a failure to "make hazardous materials available for inspection" in violation of 49 C.F.R. § 177.802.[25]

IV. Conclusion

PHMSA's interpretation of its own regulation provides guidance in that: (1) hazardous materials are not required to be placed at the rear of the trailer; and (2) in order to comply with the requirement of 49 C.F.R. § 177.802 that hazardous materials must be made available for examination and inspection, the driver is not required to unload the contents of the truck at a place other than its origin or destination. Although the Company had successfully contested the citation, in the end, PHMSA's interpretation was upheld in order to assure an uninterrupted free flow of commerce.

Endnotes

1. PHMSA Response Letter, Letter of Interpretation 10-0097 (Mar. 12, 2010), available at http://www.phmsa.dot.gov/staticfiles/PHMSA/Interpretations/2010/100097.pdf.
2. PHMSA Response Letter, Letter of Interpretation 08-0133 (Oct. 17, 2008), available at http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Interpretation%20Files/2008/080133.pdf.
3. Letter of Interpretation 10-0097, *supra.*
4. *See People of the State of New York v. Gaugh*, No. 2011-406 OR CR, 2012 WL 2332026 (N.Y. App. Term June 13, 2012).
5. *See* 49 C.F.R. §§ 101-399; *V-1 Oil Company v. Means*, 94 F.3d 1420, 1426 (10th Cir. 1996); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468-470 (6th Cir. 1991), *cert. denied* 500 U.S. 936 (1991).
6. *See* 49 C.F.R. §§ 177 and 397; *V-1 Oil Company v. Means*, 94 F.3d at 1426.
7. *See, e.g.*, 430 Illinois Comp. Stat. § 30/1, *et seq.*; New Jersey Admin. Code § 16:49-1.1, *et seq.*; New York Transportation Law § 14-f (New York); Ohio Admin. Code § 4901:2-5-02; Texas Admin. Code tit. 37, § 4.1, *et seq.*
8. Letter of Interpretation 08-0133.
9. Letter of Interpretation 10-0097, *supra* (emphasis added).
10. *People of the State of N.Y. v. Gaugh*, 2012 WL 2332026, at 1.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).
17. *Id.* at 2.
18. *Id.*
19. *Id.*, citing *Coeur Alaska, Inc.*, 557 U.S. 261, *supra*; *U.S. v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).
20. *Id.*, citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. —, 131 S.Ct. 871, 880 (2011), citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980).
21. Letter of Interpretation 10-0097, *supra.*
22. *People of the State of N.Y. v. Gaugh*, 2012 WL 2332026, at 2, citing *Chase Bank USA, N.A.*, 562 U.S. —, 131 S.Ct. at 880.
23. *Id.*, citing *Coeur Alaska, Inc.*, 557 U.S. 261.
24. Letter of Interpretation 10-0097, *supra.*
25. *People of the State of N.Y. v. Gaugh*, 2012 WL 2332026, at 2.