



National Retail Federation[®]

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**WRITTEN TESTIMONY OF
THE NATIONAL RETAIL FEDERATION
FOR THE RECORD
FOR
THE HOUSE COMMITTEE ON TRANSPORTATION &
INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
HEARING ON
ASSESSING THE IMPLEMENTATION AND IMPACTS OF THE
CLEAN TRUCK PROGRAMS AT THE PORT OF LOS ANGELES
AND THE PORT OF LONG BEACH**

MAY 5, 2010

The National Retail Federation (NRF) welcomes this opportunity to submit these comments to the House Committee on Transportation and Infrastructure Subcommittee on Highways and Transit to be included in the record for its May 5, 2010 hearing on *"Assessing the Implementation and Impacts of the Clean Truck Programs at the Port of Los Angeles and Long Beach."*

NRF applauds the great success of the Clean Trucks Plan as implemented by the Ports of Los Angeles and Long Beach. In the first year of implementation, the ports have achieved 80 percent reduction in diesel air emissions from harbor trucks, reaching their goal two years ahead of schedule. This success was achieved without any changes to federal law. As such, we urge members of the Subcommittee and Congress to reject efforts to re-write longstanding federal trucking rules codified in the Federal Aviation Administration Authorization Act (FAAAA), in particular removing federal preemption of regulations on trucking rates, routes and service.

As the world's largest retail trade association and the voice of retail worldwide, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of \$2.3 trillion.

NRF members are among the country's largest shippers, moving hundreds of billions of dollars of merchandise through the global supply chain. The ability to move freight quickly and efficiently through the supply chain is vital to retailers' businesses, as well as those of American manufacturers, agricultural producers and the millions of workers they employ. At the same time, NRF's members are fully cognizant of the impact commerce can have on the environment, especially at the nation's ports. For this reason NRF's members have long been committed to efforts to reduce diesel emissions associated with short haul dray trucks at the nation's ports.

However, NRF opposes efforts to amend the FAAAA to eliminate federal preemption of trucking rates, routes and service. We feel that such an amendment is not necessary to effect rapid mitigation of diesel truck emissions at the nation's ports. Nor is the amendment necessary to improve security or safety at the nation's ports. Finally, we believe that amending the FAAAA to remove federal preemption is likely to have far-reaching consequences on interstate commerce.

Background

In 2008, the Ports of Los Angeles and Long Beach announced the San Pedro Bay Ports Clean Air Action Plan (CAAP), a program developed to reduce air

pollution in and around the ports located near the San Pedro Bay in Southern California. The CAAP included many provisions, but the one at issue in these hearings relates to diesel emissions from the harbor drayage trucks servicing the port. This portion of the CAAP is called the Clean Trucks Program and includes a ban on the operation of the older, dirtier trucks within the port complex and the imposition of a mitigation fee on beneficial cargo owners for any truck trips that are undertaken by truck that does not meet 2007 EPA emission standards. It's important to note that NRF has never objected to either the truck ban or the mitigation fee, which NRF members pay directly, even though both the fee and the ban increase transportation costs for NRF members. In fact, NRF was endorsing a truck ban and mitigation fee as early as 2006 -- two years before the Clean Trucks Program was ultimately put in place.

The Clean Trucks Program also includes provisions requiring truckers and licensed motor carriers to register with the ports. In Long Beach this is a fairly straight forward matter. In Los Angeles, however, the port insisted on an elaborate concession agreement that includes a requirement that all trucks moving cargo through the ports be driven by employee drivers. This provision is very controversial because it would effectively ban 16,000 independent owner-operator truckers from doing business in the port of Los Angeles.

The environmental necessity of this employee mandate has never been fully demonstrated. Some environmental groups insist that independent owner-operators are incapable of purchasing or operating clean trucks. However the experience of the Clean Trucks Program to date seems to belie this view. In our view the main impetus for this employee-driver provision is not environmental mitigation, but an attempt to make it easier for labor to organize port drivers.

While the environmental necessity for this provision has always been in question, there has been no question about the devastating impact the employee mandate would have on independent truckers at the Port of Los Angeles. The port's own analysis of the mandate, included in a paper entitled "San Pedro Bay Port Clean Air Action Plan: Economic Analysis", by Dr. John Husing concluded that the Los Angeles' truck concession plan would impose a barrier to entry for many independent truckers into the port drayage industry. In addition, the report also found that an employee mandate would lead to an increase in transportation prices of 80 percent.

Because of this impact on independent trucking, the American Trucking Associations (ATA) sued the Port of Los Angeles in 2008 on the grounds that the truck concession portion, and particularly the employee mandate is preempted by federal law under the provisions of the Federal Aviation Administration Authorization Act (FAAAA) which preempts states from regulating "rates, routes and service." The ATA requested a preliminary injunction which was granted by the U.S. District Court for the Central District of California and was affirmed by the U.S. Court of Appeals for the 9th Circuit. The court determined that the

employee mandate provisions of LA's Concession agreement were likely to be overturned at trial, and that the provisions of the mandate would cause irreparable harm to independent owner-operators.

It's important to underscore that the court's injunction did not affect any of the Clean Truck Program's environmental provisions, a fact confirmed by the Port of Los Angeles, itself in an April 29, 2009 press release, quoted below:

“We are pleased that the heart of the Clean Truck Program is in place and we’re moving full steam ahead with removing dirty diesel trucks from our communities and harmful pollutants from our air,” Mayor Villaraigosa said.

“We are committed to implementing the most sustainable program possible,” added Port Executive Director Geraldine Knatz, Ph.D. “Our complete program has already cut truck pollution drastically and it ensures that today’s clean trucks will be replaced by even cleaner trucks in years to come.

“Today’s ruling by U.S. District Court Judge Christina Snyder leaves in place the centerpiece of the Clean Truck Program, allowing the Port of Los Angeles to ban dirty diesel trucks and clean up air pollution from the surrounding port communities...”

Because it is likely that the courts will strike down the employee mandate provisions of the Port of Los Angeles' Clean Trucks Program, a group of interests including the Port, environmental groups and the Teamsters have now launched the effort to rewrite the FAAA. This effort is, quite frankly, a bald face effort to end run what is likely to be an unfavorable court decision. More alarming is the fact that proponents of this assault on federal preemption have speciously argued that this change is necessary to achieve environmental mitigation of truck emissions.

The Clean Trucks Program is a Success without Changes to Federal Law

The Clean Trucks Program has been an amazing success. To date, over 7,000 non-compliant trucks have been replaced by trucks meeting or exceeding 2007 U.S. EPA emissions standards. As both ports acknowledge, the Clean Trucks Program has reduced air emissions by 80%, a full two years ahead of schedule. Over 80% of the cargo entering or leaving the ports is now being drayed by new clean trucks.

This success is a testament to the collaborative effort undertaken by industry and negotiated mostly with the Port of Long Beach. As early as 2006, NRF and other organizations had promoted the idea that a truck ban coupled with a mitigation fee would provide market incentives for shippers and beneficial cargo owners to move rapidly to green trucks. Indeed, we proposed this approach even though

the San Pedro ports seemed to think that the only way to replace old, dirty trucks was for the taxpayers to buy them at huge public expense. The irony is that that economic downturn and California's inability to raise public funds combined with a sensible market mechanism has ultimately won the day.

Indeed, industry has helped lead this success. NRF and other organizations outlined the plan, and a new group, the Coalition for Responsible Transportation (CRT), a shipper organization that includes a number of NRF members, was formed to help shippers and licensed motor carriers collaborate to quickly make the transition to green trucks. Participants in CRT have pledged to help their trucking partners and independent owner-operators serving the Ports to purchase and maintain state of the art green equipment.

The program has been so successful in making the change to cleaner trucks, that if an employee mandate were to be imposed at this late date, it would significantly harm every licensed motor carrier and owner operator that has already invested in green equipment.

The Southern California experience -- particularly the collaborative efforts between the ports and industry are now being copied by other American blue water ports. Over the past year, the Ports of Seattle and Tacoma, Oakland and the Port Authority of New York and New Jersey have all announced their own Clean Truck Programs. None of these programs contain the controversial employee mandate. All focus on reducing diesel air emissions by eliminating older, dirtier trucks over a specified time frame. In fact, because of the great success in Southern California, the American Association of Port Authorities (AAPA) recently passed a policy position that states that the AAPA does not believe there is a need at this time to amend the FAAAA because of the success of current clean truck programs that have been implemented without a change in the law.

FAAAA Amendment Would Have Unintended Negative Consequences

Proponents of amending the FAAAA have also made the claim that eliminating federal preemption is necessary because of security issues. NRF strongly disagrees. Under authority granted by the Maritime Transportation Security Act (Pub. L. 107-295), the Safe Port Act (Pub.L. 109-347) and other federal laws, states and localities already have the ability to coordinate with the Coast Guard Captain of the Port to address site specific security issues. The Federal Transportation Worker Identification Credential (TWIC) program ensures that only credentialed longshore workers, employees, and truckers can have access to ports. The proposed change in FAAAA to address port security concerns is not needed to address these concerns. More important, such a change could confuse security issues at the nation's ports. The issue of port security is rightly a federal issue and falls within the purview of the Coast Guard and the Department of Homeland Security.

Proponents have also argued that eliminating federal preemption is needed to improve truck safety. Again, we disagree. Under provisions of the Federal Motor Carrier Safety Act, state and local entities already have the authority to enforce strict state and federal truck safety standards. In fact, new federal safety and inspection standards for intermodal chassis are about to be announced. A proposed change in FAAAA to address truck safety standards is not needed and would be counter productive.

Finally, and perhaps most important, eliminating federal preemption included in the FAAAA would have far reaching negative consequences on intrastate commerce. Allowing the ports or other local entities the ability to regulate “rates, routes and service” for interstate and international trucking would wreak havoc on the commerce of the United States. Trucking deregulation in the 1980s sought to eliminate the overlapping, inefficient patchwork of local and state regulations of rates, routes and service. The FAAAA preemption provision was enacted to make it absolutely clear that state and local entities had no business regulating in this arena, which is constitutionally reserved to federal government. Congress should eschew taking this dangerous step that is certain to have wide ranging economic impacts on business and industry.

Conclusion

We applaud the success that the Ports of Los Angeles and Long Beach have achieved in reducing air pollution through their Clean Trucks Program. We believe other American ports will achieve similar success through similar collaborative efforts. There is no need for federal action to facilitate environmental mitigation. Indeed, federal action could have significant negative impacts on commerce.

Thank you for the opportunity to submit written comments on this important matter. If you have any questions, please contact Jonathan Gold (goldj@nrf.com), NRF’s Vice President, Supply Chain and Customs Policy.