No. 125262

IN THE
SUPREME COURT OF ILLINOIS

DALE GILLESPIE and CHRISTINE GILLESPIE, *Plaintiffs-Appellees,* v. EAST MANUFACTURING CORPORATION, *Defendant-Appellant,* and ROBERT EDMIER, THOMAS EDMIER, TRAIL QUEST, INC., *Defendants.*	Appeal from the Appellate Court of Illinois, First District, No. 1-17-2349 There Heard on appeal from the Circuit Court of Cook County, Illinois, No.: 13 L 8261 The Honorable John H. Ehrlich, Judge Presiding

BRIEF OF AMICUS CURIAE TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC.

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POINTS AND AUTHORITIES

Other Authorities

STATEMENT OF INTEREST

Amicus Curiae Truck Trailer Manufacturers Association, Inc. ("TTMA") is a nonprofit, nonstock trade association that represents the interests of manufacturers of truck trailers across the United States and internationally. TTMA members produce approximately 90% of the heavy-duty truck trailers sold in the United States each year. These products are towed by separate power units, usually a tractor or other heavy-duty truck. *See* 49 C.F.R. § 523.10. TTMA members produce many types of heavy-duty trailers, including among others: dry-freight vans, refrigerated vans, household moving vans, flatbed trailers, low-boy trailers for hauling heavy equipment, cargo tank trailers for transporting liquid products, dry bulk commodity trailers for hauling products such as grain or dry cement, garbage and refuse trailers, logging trailers, livestock trailers, auto-transport trailers, container chassis used to transport intermodal containers, plus dump trailers—bottom dump trailers, side dump trailers and, like the trailer involved in this lawsuit, frameless end-dump trailers. Although Appellant, East Manufacturing Corporation ("East"), is a member of TTMA, given the wide variety of trailer products and their very different uses and modes of operation, all TTMA members have a direct interest in the outcome of the present appeal, since the Court has been asked to consider the admissibility of a recommended practice published by TTMA, and the admissibility of certain safety standards promulgated by the Occupational Safety and Health Administration ("OSHA"), as evidence of a defect in trailer design. TTMA is uniquely positioned to address

the applicability of its own recommended practice and the OSHA regulations as they may apply to the design and manufacture of heavy-duty truck trailers.

ISSUES PRESENTED FOR REVIEW

Should OSHA standards that govern employers and workplace safety, and specifically the OSHA ladder regulations found at 23 C.F.R. § 1910.23, be admissible as evidence of defective design by manufacturers of heavy-duty trailers, where OSHA has expressly declined to regulate commercial motor vehicles, including trailers, and the trailer manufacturers neither employ the plaintiffs nor own, select or control the workplaces where they were injured?

Should TTMA's Recommended Practice RP 59-15, which contains recommendations for optional ladder and walkway installation for tank trailers and, when practicable, dry bulk trailers, be admissible as evidence of defective design by manufacturers of different types of heavy-duty trailers to which RP 59-15 was expressly not intended to apply?

STATEMENT OF FACTS

TTMA adopts Defendant/Appellant East's Statement of Facts with the following emphasis and additional background information pertaining to the manufacture and operation of heavy-duty trailers. First, TTMA emphasizes that Plaintiff/Appellee Dale Gillespie ("Gillespie") fell from a position on top of a modification to the trailer (an end cap for a Shur-Co tarp system) that was installed on the front of the trailer without any input or direction from East and after East had delivered the trailer to the purchaser, Defendant Trail Quest, Inc. ("Trail

Quest"), which in turn had leased it to Gillespie's employer, Barge Terminal Trucking, Inc. ("Barge"). The specifications to East for this custom-built trailer came from an experienced independent dealer, Jim Rohr of Ken's Truck Repair, Inc. ("Ken's Truck"), who worked with Robert Edmier, an officer of both Trail Quest and Barge, to develop the specifications for a trailer that would serve the operational needs of Barge in transporting cargo for Barge's customers. Together, Rohr and Edmier decided that Ken's Truck would install the Shur-Co tarp system after taking delivery of the trailer. East was not told that a tarp system would be installed, and it was not involved in selecting the Shur-Co tarp system that was installed.

TTMA emphasizes these facts because they accurately reflect the highly customized nature of trailer manufacturing and the unpredictability of after-market additions or modifications by customers to meet operational needs that may not be known by or disclosed to the trailer manufacturer. Unlike automobile manufacturers, trailer manufacturers rarely produce stock inventory for a dealer. Instead, trailers are almost always made to order for a specific customer. And yet the customer may also engage others to modify or install additional equipment on a finished trailer. As noted, there are many different heavy-duty trailer models, and even with respect to a particular trailer model, there are many component and accessory options that must be specified before a trailer is manufactured. These options include body size, shape, and material composition; wheel size, number and placement; air-ride or spring suspension; number and type of cross members

or other structural supports for the trailer body; round, angled or flat bottoms or floors; static floors or walking floors; round, angled or flat tops or roofs, or fully open tops with no roofs; swing or roll-up access doors; ramp, liftgate, or step/ladder options for ingress/egress, or direct access across deck plates at warehouses where the trailer floor aligns with the warehouse floor; and anchors, load bars, chains, straps, and other cargo securement systems.[1]

The customer typically specifies basic options for the trailer manufacturer in advance, depending the anticipated operational needs and restrictions—especially depending on the types of cargo that will be transported, how much the cargo will weigh, how it will be secured, and how it will be loaded and unloaded. These operations must comply with federal and state laws that limit height, width, length, weight and weight-per-axle on the loaded trailer and the tractor that is towing it. Simply put, the customer's unique operations will define the specifications for the trailer and any subsequent modifications or additions. The trailer manufacturer does not control how the trailer will be used after it is delivered to the customer or what additional equipment the customer may install after taking delivery. Nor does the manufacturer control any aspect of the trailer operations by any subsequent owner if the trailer is used and then later sold to a

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[1] TTMA has approximately 70 trailer manufacturer members. The annual Mid-America Trucking Show, where the newest heavy-duty trucking equipment is displayed, hosts over 1,000 exhibitors. Most represent manufacturers of components and after-market accessories.

different owner. It is the customer's undertaking and responsibility to know its intended operations and to match those to a trailer, whether new or used, that is built with the specifications necessary to perform those operations safely and in accordance with federal and state motor carrier regulations.

Here, the trailer manufactured by East had an open top, end-dump body with a swing gate at the rear that allows for unloading by way of a hydraulic piston that lifts the front of the dump body high enough that the contents will slide out the rear. The trailer was designed to be loaded through the open top. There was no requirement that a tarp be installed; it depends on the type of cargo that is transported. Many types of cargo can be loaded into a dump trailer from the top and transported without a tarp. Dense aggregate products—a load of stone, for example—will not blow out of the trailer at highway speeds, and they do not need to be protected from rain. The weight of such products will likely cause the loaded tractor-trailer to reach the maximum combined weight limit before the trailer is filled to the top. The rig will "weigh-out" before the volume is fully utilized. And the airflow over the top of the trailer when towed at highway speeds will not blow these products out. By contrast, lighter, drier products may fill the trailer completely before the combined tractor-trailer weight limit is reached—a "cubed-out" condition—and the airflow may cause some product to blow or spill out, thus requiring a tarp system for safe and effective operations. *See* 625 ILCS 5/15-109.1. The important point is that the trailer can be used to transport a wide range

of products over its useful life, and the manufacturer, East, will not know and cannot control those operations.

As for loading an end-dump trailer, there are multiple possibilities, depending on the type of cargo and the facility where it is loaded. Some facilities have elevators, conveyors, screw augers or other material handling systems that automatically feed product into the top of an open trailer. These systems may be controlled such that the trailer remains in a fixed, parked position, and the end of the feeding system is moved about overhead to fill all portions of the trailer. In other systems, the overhead feeding end is fixed, and the trailer is re-positioned forward or backward so that the trailer is evenly filled from front to rear. Or, as in this case, the trailer may be filled using a front-end loader with a bucket that scoops product from a pile and drives to the side of the trailer, lifts the bucket, maneuvers it over the top of the trailer, and then dumps the load into the trailer, repeating that process until the trailer is fully loaded. These operations may differ in the speed and precision with which they can complete a load. In none of these operations, however, is there usually any need for any operator to be inside the trailer. An operator may wish to climb on the trailer side sufficiently high to see if the load is full and whether it is evenly distributed, but again, the loading process does not normally require climbing into the trailer.

Barge's employee, Gillespie, climbed into the subject trailer in this case only because the loader filled the trailer to a level above some of the arched bows that Ken's Truck had installed as part of the Shur-Co tarp system. [C 1861 at 58-59.]

Furling or unfurling this tarp across the trailer top does not require that the operator climb the steps on the trailer side and crawl over the top of the trailer wall and into the trailer itself. Instead, the tarp is controlled from the ground using a crank at the rear of the trailer. Turning the crank one direction carries the tarp across the top of the trailer; turning the crank the opposite direction returns the tarp to its stored position. The arched bows simply provide intermittent rests for the tarp. They are arched so that any rain will roll off and not puddle in the middle of the tarp. Here, because he was paid more for hauling a heavier load, [C 1875 at 117], Gillespie had asked the operator of the front-end loader to put extra mulch in the trailer, and the loader did not maneuver his dumps to even out the load below the arched bows. The mulch was piled above the roof bows, so Gillespie decided to get into the trailer to manually spread it into areas below the bows.[2] [C 1861 at 58-59.]

It is rare for *any* truck driver to climb on top of a trailer as part of loading operations. Van trailers are usually loaded by forklifts placing pallets, or by hand

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[2] This decision was unusual even for dump trailer operations. Tarp systems can be specified to have greater area coverage than just what is covered across the arched bows, so that certain types of cargo can be "heaped" above the height of the bows. The extra width of the tarp enables the roll tube to unfurl the tarp over the "heaped" contents and still reach the latch plate on the other side. Additional cranking of the roll tube will then tighten the tarp and compress the load to a legal height. The height is thereby fully tarped without the truck driver ever leaving the ground. Shur-Co makes a "belt 'n ratchet" tarping system for hauling heaped loads of "light yet bulky materials like wood chips…." https://www.shurco.com/media/4431/2019-shur-lok-guide.pdf.

stacking, with entry provided from a warehouse floor that is level with the trailer floor. Flatbed trailers are usually loaded by forklift, crane or some other lift equipment. In some instances, an operator will have to climb on top of the cargo to place tie-down straps and chains, but the loading facilities can also provide ground-based ladders for this purpose. Tank and dry bulk trailers, if designed to be top-loaded, will have ports on top to connect with pipes through which liquid product is pumped or dry product is pneumatically delivered. Again, if access is needed to the ports, the loading facilities can provide ground-based steps and walkways above the trailers for access. Thus, most facilities where cargo is frequently loaded provide ground-based access where it is needed to get to the top of a trailer—either permanent steps, ladders and catwalks that reach over the top of the trailer, or portable steps, ladders and catwalks.[3] Loading facilities may also have fall-arrest equipment such as lanyards and personnel harnesses anchored to building structures overhead to stop an operator who may fall. The point here is that the need for access to the top of a trailer is extremely rare, and falls from the tops of a trailer are rarer still, because the facilities or workplaces where cargo is loaded will typically provide ground-based access systems, and the motor carriers

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[3] For examples of ground-based access systems, see https://www.saferack.com/product/flatbed-fall-protection/ and https://goldlinesafewalk.com/productline/loading-rack/tank-truck-type-page-1.html.

who are contracted to pick up loads will coordinate with those facilities to know what equipment is available and what trailers are suitable for loading and transporting the cargo.

ARGUMENT

1. OSHA standards that govern employers and workplace safety, and specifically the OSHA ladder regulations found at 23 C.F.R. § 1910.23, do not apply to commercial motor vehicles, including heavy-duty trailers, and therefore should not be admissible to prove a design defect in the East dump trailer at issue in this case.

The Appellate Court reversed the trial court's ruling that "OSHA does not apply to dump trailers." (Sup. R244.) The Appellate Court relied on this Court's decisions in *Rucker v. Norfolk & Western Ry, Co.*, 77 Ill. 2d 434 (1979), and *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299 (1982), to find that "OSHA is a relevant standard in this case." *Gillespie v. Edmier*, 2019 IL App (1st) 172549, ¶ 44. In both *Rucker* and *Moehle*, however, the federal safety standard relied upon by the respective manufacturer to prove no defect in its product was expressly applicable to the product at issue. Chrysler wanted to show the jury in *Moehle* that its rear seat anchoring system complied with Federal Motor Vehicle Safety Standard No. 207. 49 C.F.R. § 571.207. This safety standard was promulgated by the National Highway Traffic Safety Administration, and it applied directly to Chrysler's manufacture of the New Yorker automobile at issue in that case. *See* 49 C.F.R. § 571.7(a). Similarly, in *Rucker*, the manufacturer of a liquified petroleum gas tank car wanted to show the jury that its tank had been built to comply with the standards put forth in Part 179 of the Department of Transportation's Pipeline and

Hazardous Materials Safety Administration regulations, which require certain specifications for pressurized tank cars. *See* 49 C.F.R. Part 179 (1971). These regulations expressly applied to the "tank builder." *See* 49 C.F.R. § 179.1.

By contrast, in the present case, in an attempt to prove a product defect, Gillespie and his expert witness want to show the jury that the East dump trailer does not comply with the OSHA ladder safety standards found at 23 C.F.R. § 1910.23. Yet nothing in the OSHA regulations provides for the application of these standards to a trailer manufacturer or any trailer design. By their express terms, OSHA regulations apply to "employments performed in a workplace." 23 C.F.R. § 1910.5. The OSHA enabling statute similarly provides that the "employer" and "employee" shall comply with the standards promulgated by OSHA, and the employer shall furnish "employment and a place of employment" free from recognized hazards. 29 U.S.C. § 654. Consistent with these provisions, the OSHA ladder standards do not mention motor vehicles, much less heavy-duty trailers, as the subject of regulation, and OSHA has not promulgated standards that impose ladder or fall protection requirements on trailer manufacturers.

Whether OSHA could exercise jurisdiction to regulate trailer manufacturers has been an unresolved issue for many years. The OSHA Act of 1970 provided that "nothing in the Act shall apply to working conditions of employees" with respect to which another federal agency had exercised statutory authority "to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). In this context, TTMA has relied upon exchanges

between OSHA and the federal agency that governed interstate motor carriers, the Federal Highway Administration (FHWA), on the issue of whether OSHA's jurisdiction extended to tractor-trailers or whether FHWA exercised primary authority to regulate the safe operation of those vehicles. In September, 1989, for example, the assistant chief counsel at the FHWA Motor Carrier and Highway Safety Law Division wrote a letter to the Office of Solicitor in the U.S. Department of Labor, which had requested an opinion on whether FHWA was exercising jurisdiction over a truck driver who was engaged in loading operations on top of a tank trailer that was not equipped with OSHA-compliant railings, apparently at a facility that did not have a ground-based loading rack that provided guarded access to the top of the trailer. In that letter, a copy of which is attached to TTMA's RP 59-15 [C 2152; *see also* Exhibit A hereto[4]], the FHWA counsel explained that FHWA regulated safety in the workplace of interstate truck drivers, it did not require railings, and, pursuant to 29 U.S.C. § 653(b)(1), the top of a trailer was exempt from OSHA regulations.

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[4] While the body of TTMA RP 59-15 is included in the record, the appended documents are missing. Therefore, TTMA attaches the referenced FHWA letter as Exhibit A hereto. "A court may take judicial notice of administrative materials. Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case." *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill. App. 3d 720, 724 (1st Dist. 1995); *see also Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper.")

More recently, in 2010, in conjunction with a wholesale review of its fall protection standards, OSHA published a notice of proposed rulemaking asking for comments on, among other things, whether OSHA should promulgate specific regulations to cover falls from commercial motor vehicles. 75 Fed. Reg. 28862, 28867 (May 24, 2010). OSHA's final rule, published in 2016, took the position that because FHWA and its successor agency, the Federal Motor Carrier Safety Administration (FMCSA), had not issued regulations addressing fall protection on commercial motor vehicles (except with regard to steps for access into truck and tractor cabs in cab-over-engine configurations, 49 C.F.R. Part 399), OSHA could promulgate safety standards for those vehicles. 81 Fed. Reg. 82494, 82,509 (November 18, 2016).

But the important point for purposes of the present appeal is that, in this most recent, comprehensive final rule, OSHA did ***not*** include any fall protection requirements for commercial motor vehicles. OSHA had not proposed any such requirements and expressly did not include any specific requirements for commercial motor vehicles in the final rule. *See* 81 Fed. Reg at 82509. In other words, the ladder standards relied upon by Gillespie and his experts in this case were expressly not extended to apply to tractors or trailers. Thus, without having to resolve the question of OSHA's jurisdiction, the Court in this case can hold that the basis for distinguishing the *Rucker* and *Moehle* decisions remains intact—the specific OSHA ladder standards do not apply to heavy-duty trailers. This alone should preclude the admission into evidence of the ladder standards that OSHA

expressly declined to apply to products like the East end-dump trailer that is at issue in this case.

This result would be entirely consistent with OSHA's published position, and it would also avoid the unprincipled task of having to decide in future cases if there are other OSHA standards that might apply to the design of commercial motor vehicles where OSHA has also not specifically applied those standards to such vehicles. If the OSHA ladder standards were deemed applicable to trailer design for this loading operation, then courts would be asked to decide if a tractor or trailer manufacturer could be found liable for not complying with other OSHA standards that were never intended to apply—for example, an OSHA fire protection regulation, lighting regulation, electrical equipment regulation, chemical exposure regulation, noise or sanitation regulation, or some other regulation that plaintiffs might argue would have made a difference at some other location while performing some other trucking operation in, on, or about a tractor-trailer.

In order to avoid that entangled result, OSHA has clearly decided not to regulate the day-to-day operations of truck drivers in all of the possible locations they may travel or for all of the specific tasks they may undertake; nor has OSHA undertaken to regulate the manufacturers of their equipment. For the same reasons, the Court here should not enable juries to establish de facto regulation of tractor or trailer manufacturers based on a manufacturer's alleged failure to adopt

and follow OSHA standards that OSHA itself expressly has not extended to cover that equipment.

2. TTMA's Recommended Practice RP 59-15 provides for the installation of optional ladders and walkways on tank trailers and, when practicable, dry bulk trailers, but it does not apply to other types of trailers and therefore should not be admissible to prove a design defect in the East dump trailer at issue in this case.

With respect to the admissibility of TTMA RP 59-15, the trial court ruled that "industry standards are not mandatory, and there was no evidence in the record indicating that the industry has standards for features used to get on or off a dump trailer." [Sup R244.] On appeal, however, citing *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 298 (2002), the Appellate Court held that, like the OSHA ladder standards, TTMA's RP 59-15 was also "relevant for the jury's consideration." *Gillespie, 2019 IL App (1st) 172549, at ¶ 45*. This holding is wrong for several reasons.

First, RP 59-15 is not an "industry standard." TTMA does not undertake to define safety standards of any type, and it does not set "industry" standards for its members. Compliance with TTMA recommended practices is not a condition of membership in TTMA. TTMA does not conduct safety audits of its members' products or issue any kind of "Good Housekeeping" seal. Rather, as the preface to RP 59-15 clearly states, it is furnished as "a guide to general practices" and conformity is expressly "voluntary." Any non-conforming practice "is not indicative of [that practice] being deficient." [C 2141.] Given the many types of trailers and many different types of operations they are engaged in, this approach

to providing voluntary and limited guidance should offer no surprise. A recommended practice becomes a "standard" for a trailer manufacturer only if it decides internally to make the practice applicable to the design and manufacture of its product. The recommended practice then becomes an internal company standard, but it does not thereby become an "industry standard" that applies to other manufacturers' products.

Nor is RP 59-15 a "standard" that is applicable to the design of an end-dump trailer like the East trailer involved in this case. RP 59-15 does not speak to ladders and walkways for general use in trailer design. Its title makes clear that it was developed as a guide for ladders and walkways on "tank" trailers, and the text refers only to one other trailer type, "bulk trailers," to which the recommended practice "may be applied" if the bulk trailer manufacturer determines it is "practicable" and elects to do so. [C 2142 ¶ 2.4.] Tank trailers and bulk trailers typically have rounded or angled tops and historically (though not always) have been loaded through portals on the top of the trailer body under circumstances where, to open and close the portals, the operator would need access to the trailer top. A ladder and walkway system provides access where no ground-based system is available.[5] This is very different from circumstances where a truck driver decides to climb over a trailer wall and down into an open dump trailer body, both

[5] RP 59-15 provides that cargo tank ladders are intended to be used "only when it is not possible to supply a loading platform, movable stairs, or other access devices, which meet OSHA requirements." [C 2142 ¶ 2.2.]

in the rarity of the latter scenario and physical movements required to do so. RP 59-15 does not envision or account for that different scenario. Nor have Gillespie and his expert shown that a ground-based loading platform or movable access system could not be provided where the mulch was being loaded.

And finally, the *Schultz* decision is not controlling. *Schultz* did not focus on an "industry standard" but rather on an OSHA regulation that the court ultimately determined was not binding on the defendant railroad. The court did go on to hold that the regulation could be considered as evidence of "the standard of care"– that is, what a reasonable person would have done under the circumstances. 201 Ill. 2d at 298. However, and of critical importance, those circumstances involved a defendant-employer of the plaintiff who had control over the unguarded drop in elevation over a retaining wall where the plaintiff was working when he fell. The plaintiff's expert called this an "unsafe workplace" because there was nothing to prevent falling over the change in elevation. *Id*. at 295. The OSHA regulation's relevance to proving what a reasonable employer would do in those circumstances to provide "a reasonably safe place to work" presents a very different inquiry from deciding that an OSHA regulation is relevant to what a product manufacturer should do where the manufacturer does not employ the plaintiff or control his workplace, and where the product itself does not require the plaintiff to work in a dangerously unguarded position.

For the same reason, the *Shultz* court's decision to allow consideration of other safety standards found in various building codes does not support allowing

consideration of TTMA's RP 59-15 in the present case. The defendant-employer in *Schultz* owned and controlled the workplace and could fairly be expected to consider how the building codes might define reasonable care for guarding along a retaining wall, since the employer knew and controlled the manner and scope of work that would assigned at that location. By contrast, a trailer manufacturer like East does not assign or control how a dump trailer will be used after it is delivered to the customer. Most dump trailers are loaded and unloaded without any need for an operator to climb inside the trailer. The great variety in dump operations and in the facilities where dump trailers are loaded should preclude any finding that a TTMA recommended practice for cargo tanks and bulk trailers can reliably inform a jury about how to define a dump trailer manufacturer's duty of care.

Finally, if TTMA's recommended practices are applied in product liability litigation to trailers that were not contemplated by TTMA in drafting the recommended practices, then the likely outcome will be for TTMA to withdraw recommended practices from publication and cease future cooperation among manufacturers in developing any similar guidelines. TTMA has never undertaken to set industry safety standards. Therefore, its recommended practices should not be interpreted to inform "standards of care," especially where the recommended practices expressly do not apply to the trailer at issue, and the trailer manufacture has not made the recommended practice an internal company standard.

CONCLUSION

Neither the OSHA ladder regulations, found at 23 C.F.R. § 1910.23, nor the TTMA Recommended Practice RP 59-15 applies to an end-dump trailer, and therefore neither should be admitted into evidence to prove a defect in an end-dump trailer. TTMA asks the Court to reverse the Appellate Court's determination that they are relevant and admissible. The cases cited by the Appellate Court do not mandate or support admissibility in these differing circumstances, and sound policy reasons militate against that finding.

Respectfully submitted this 10th day of June, 2020.

/s/Mark D. Brookstein

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 18 pages.

/s/ Mark D. Brookstein

EXHIBIT A

U.S. Department of Transportation
Federal Highway Administration

400 Seventh St. S.W.
Washington D.C. 20590

SEP 1 1989

In Reply
Refer To: HCC-20

Mr. Oscar L. Hampton, III
Office of the Solicitor
U. S. Department of Labor
911 Walnut Street
Kansas City, Missouri 64106

Dear Mr. Hampton:

This responds to your letter of August 23 requesting an opinion regarding the exercise of jurisdiction of our agency over the workplace of truck drivers in interstate commerce. The opinion is to assist you in determining whether enforcement of Occupational Safety and Health Administration (OSHA) regulations is appropriate in a particular situation.

It has been the Federal Highway Administration (FHWA) position, as more fully described in the enclosed memorandum, that our regulation of safety in the workplace of interstate truck drivers under authority provided in 49 U.S.C. § 3102 (1984) and 49 U.S.C. app. 2505 serves to exempt such workplaces from OSHA jurisdiction pursuant to Sec. 4(b)(1) of the Occupational Safety and Health Act (29 U.S.C. § 653(b)(1)). While present regulations appearing in 49 C.F.R. Part 399, Employee Safety and Health Standards, do not specifically address the factual circumstances of the enforcement action initiated by OSHA, those regulations reflect FHWA's exercise of primary jurisdiction over the workplace of truck drivers to the extent currently believed necessary. The FHWA has determined that the workplace of the truck driver extends to the area in, on and around the vehicle operated by that driver so long as he/she is on duty performing functions related to the transportation responsibility.

In the situation you describe, the driver was engaged in a loading operation and was physically located on a platform on top of the tank trailer, which was not equipped with railings or equivalent protection in violation 29 C.F.R. § 1910.23(c)(1). The driver was operating in a workplace subject to our jurisdiction. In exercising that jurisdiction, we have not required safety rails, but it is our opinion that the absence of such requirement does not negate the exemption of that workplace from OSHA jurisdiction.

I hope this information is helpful to you in determining the appropriate course of action. If I can be of any further assistance, please contact me.

Sincerely yours,

Paul L. Brennan
Assistant Chief Counsel
Motor Carrier and Highway
Safety Law Division

Enclosure

HHWA:HCC-20:PLBrennan:tkm:61352:8/29/89
cc: HCS-1, HPO-1, HPO-30(Bleakley), Chron 4213, D.F. 4224,
MCHSL Reader 4224
kay/brennan/hampton