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ATTORNEY GENERAL OPINION NO. 91- 62

Gary Stotts
Secretary
Department of Transportation
Docking State Office Building
Topeka, Kansas 66612

Re: Automobiles and Other Vehicles--Uniform Act Regulating Traffic on Highways -- Size, Weight and Load of Vehicles, Permits for Excess Size and Weight

Synopsis: The Federal-Aid Highway Act of 1956, as amended and codified at 23 U.S.C. § 127, contains a grandfather clause which has been interpreted by the courts to provide that a state may allow divisible loads in excess of 80,000 pounds today if in 1956 state statutes or regulations would have permitted the issuance of special permits for divisible excess loads, regardless of actual state practice at that time. Congress has acquiesced in this broad interpretation. Kansas statute K.S.A. 8-5,122 (Corrick, 1956) was broad enough to authorize the issuance of special permits for divisible loads. Therefore, the Kansas department of transportation can do so now pursuant to the grandfather clause. Cited herein: K.S.A. 8-5,122 (Corrick, 1956); K.S.A. 1990 Supp. 8-1911.

* * *

Dear Secretary Stotts:

You inquire whether the department of transportation (KDOT) may issue special permits for divisible loads over 80,000 pounds within the protection afforded by the grandfather

clause of the Federal-Aid Highway Act of 1956, codified at 23 U.S.C. § 127. You indicate that section 127 of title 23 provides that federal highway appropriations shall be withheld from any state not in compliance.

The Federal-Aid Highway Act of 1956, P.L. 84-627, as amended (P.L. 101-427, October 15, 1990, 104 Stat. 927), specifies the maximum weight that may be carried on individual axles of a vehicle and sets a limit on overall gross weight. It states in part:

> "No funds authorized to be appropriated for any fiscal year under provisions of the Federal-Aid Highway Act of 1956 shall be apportioned to any state which does not permit the use of the Dwight D. Eisenhower System of Interstate and Defense Highways within its boundaries by vehicles with a weight of twenty thousand pounds carried on any one axle . . . including a gross weight of at least eighty thousand pounds for vehicle combinations of five axles or more. . . .
>
> [discussion of an axle weight formula]
>
> "Provided, That such overall gross weight may not exceed eighty thousand pounds, including all enforcement tolerances, except for those vehicles and loads which cannot be easily dismantled or divided and which have been issued special permits in accordance with applicable State laws, or the corresponding maximum weights permitted for vehicles using the public highways of such State under laws or regulations established by appropriate State authority in effect on July 1, 1956, except in the case of the overall gross weight of. . . . This section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof which the State determines could be lawfully operated within such State on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of

enactment of the Federal-Aid Highway Amendments of 1974." (Emphasis added).

The federal statute exempts from the gross weight limit: (1) nondivisible loads that have been issued special permits and (2) corresponding maximum weights permitted vehicles pursuant to state laws or regulations in effect July 1, 1956. If the overweight permits issued by a state do not come within either exception, the nondivisible load exception or the maximum weight exception of July 1, 1956 (known as the grandfather clause), the state jeopardizes the receipt of federal funds.

Your inquiry regarding special permits for divisible loads over 80,000 pounds is not directly addressed by the federal legislation. The grandfather clause in it authorizes a state to permit higher maximum weights if they fall within "maximum weights permitted for vehicles . . . under laws or regulations established by appropriate State authority in effect on July 1, 1956." For instance, if state law allowed a maximum weight of 95,000 pounds on or before July 1, 1956, then the state can still permit such weights today. However, the ability of a state to issue special permits for divisible loads higher than 80,000 pounds does not constitute the setting of maximum weight limits by state law. The literal language of the act authorizes special permits for excess weight only in cases involving nondivisible loads. But such a literal reading of section 127 has not survived the scrutiny of the courts which have interpreted its meaning, nor is it supported by Congress actions since 1956.

Though there is nothing in the federal act that discloses that Congress expressly considered the applicability of the grandfather provision to the states' 1956 special permit authority, the consistent interpretation of section 127 by the states has been to reason that the existence of any special permit authority existing in 1956 allows a state to issue special permits for divisible loads over the federal maximum weight standard without jeopardizing federal funds.

In State of Montana, ex rel. Dick Irwin, Inc. v. Anderson, 525 P.2d 564 (Mont. 1974), the Montana Supreme Court addressed whether the state's apportionment of federal funds would be jeopardized by the issuance of special permits for overweight divisible loads of up to 105,500 pounds pursuant to a 1967 statutory amendment. The court held that in 1956 the laws of Montana authorized special permits for both divisible and nondivisible loads and that such could be issued without jeopardizing federal funds notwithstanding the state highway

commission's policy in 1956 of not granting special permits for divisible loads. Similarly in South Dakota Trucking Association v. South Dakota Department of Transportation, 305 N.W.2d 682 (S.D. 1981) the South Dakota Supreme Court held that the state transportation board could issue special permits for overweight vehicles pursuant to the statutory authority in existence in 1956, notwithstanding a maximum weight limit then of 64,650 pounds in South Dakota's administrative regulations. See also state determinations in the following states: Colorado, Washington, New York, Arizona, Utah, Ohio, Oregon, New Mexico and Massachusetts.

The federal act's evolution since 1956 supports the conclusion that divisible load special permit authority is grandfathered, if such authority existed in 1956 in state statutes or regulations. Evidencing Congress' awareness of, and in response to testimony and reports of widespread use of special permit practices circumventing federal weight limits, Congress enacted a provision directing the federal highway administration (FHWA) to inventory annually the state's practices and submit reports [§ 123(b), (c) Title I, Surface Transportation Assistance Act of 1978, 92 Stat. 2701, P.L. 95-599]. In its 1981 annual report entitled "Overweight Vehicles -- Penalties and Permits In Inventory of State Practices," the FHWA criticized the grandfather clause as archaic and unwieldy and included letters expressing disapproval of states' broad construction of the grandfather clause. Despite varied testimony and reports, and despite the awareness of cases like the South Dakota and Montana decisions, Congress rejected all proposals to repeal or curtail the grandfathering of special permit practices for divisible loads. See New York Attorney General Opinion No. 86-F13 pp. 6-9 (for other references to reports and testimony.) Congress instead sided with the states in their broad interpretation of the grandfather clause. In the Surface Transportation Assistance Act of 1982, 96 Stat. 2123, P.L. No. 97-424 Congress amended section 127 by adding the words "which the state determines" (see quote, supra) and thereby directed the FHWA to defer to the state's determination of grandfathered special permit authority. See also Janklow v. Dole, U.S. District Court, Southern District, unpublished opinion, Civ. 84-4268 (June 17, 1985) (invalidating a FHWA regulation requiring that state determinations be approved by the FHWA).

It is therefore clear that Congress has acquiesced in the interpretation of section 127 adopted by the cases. Under this interpretation a state may allow divisible loads in

excess of 80,000 pounds today if, in 1956 state law or regulations would have permitted the issuance of special permits for divisible excess loads, regardless of actual state practice at that time.

Applying the broad interpretation that the grandfather provision applies to the operation of vehicles which could lawfully have operated under special permit in 1956 we find that Kansas law in 1956 authorized the issuance of special permits for divisible loads notwithstanding that the state highway commission chose not to exercise the authority. (The 1956 regulation K.A.R. 36-12-19 did not authorize issuance of special permits for divisible loads and by incorporated policy established a maximum weight limit of 63,890 pounds.)

On July 1, 1956 Kansas special permit law was contained in K.S.A. 8-5,122 (L. 1956, ch. 47, sec. 1; Laws of Kansas, Budget Session 1956, First Budget Session May 10, 1956):

> "(a) The state highway commission with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in this act or otherwise not in conformity with the provisions of this act upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible: Provided [farm machinery exception]. . . ." (Emphasis added).

The heart of the statute, subsection (a) is broadly drafted providing the state highway commission the discretion for good cause to issue special permits authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight or load exceeding the maximum specified in the act or otherwise not in conformity with the act. The law is not restricted to nondivisible loads, nor to a certain number of trips [subsection (b)] except to allow the commission to prescribe conditions of operation of such vehicle or vehicles to assure against undue damage to the road [subsection (c)]. [These broad powers are currently found at K.S.A. 1990 Supp. 8-1911.]

Under the interpretation discussed previously, if either Kansas law or regulation on or before 1956 could have authorized special permits for divisible loads then the law comes within the scope of the grandfather provision. K.S.A. 8-5,122 is silent as to whether permits may be issued for divisible loads. No limitations regarding the authority to do so may be implied. Even though the regulations in 1956 authorized special permits only for nondivisible loads, the statute in 1956 was clearly broad enough to authorize the issuance of permits for both non-divisible and divisible loads.

For purposes of our question, it is irrelevant that the state highway commission chose not to exercise the authority. See Janklow v. Dole, unpublished opinion, U.S. District Court, Southern District, South Dakota Civ. 84-4268, June 17, 1985 (overturning a federal regulation that would have retained federal review over these state determinations and confirming that the test is one of power or authority existing in 1956, irrespective of actual practice).

In conclusion, given the interpretation and evolution of the grandfather clause, it is our opinion that the state highway commission had the authority to issue special permits for greater gross weights for divisible loads in 1956, and the Kansas department of transportation can do so now pursuant to the grandfather clause without jeopardizing federal funding.

Very truly yours,

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