

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| AMERICAN TRUCKING ASSOCIATIONS, | : | CIVIL ACTION |
| INC., THE PENNSYLVANIA MOTOR | : | |
| TRUCK ASSOCIATION, THE NEW JERSEY | : | |
| MOTOR TRUCK ASSOCIATION and | : | |
| ROADWAY EXPRESS, | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | NO. 02-8841 |
| | : | |
| DELAWARE RIVER JOINT TOLL | : | |
| BRIDGE COMMISSION, | : | |
| Defendant. | : | |

MEMORANDUM AND ORDER

BUCKWALTER, S.J.

February 8, 2005

I. AGREED FACTS

The identity of the parties and the background of this litigation follows:

1. Plaintiff American Trucking Associations, Inc. (hereinafter "ATA") is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. ATA is the national trade association of the trucking industry. It has over 2,000 direct motor carrier members and, in cooperation with state trucking association and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the national trucking industry, which consists of every type and geographic scope of motor carrier operations in the United States, including for-hire carriers, private carriers, leasing companies and others. On

behalf of its members, ATA advocates the trucking industry's position before the United States Supreme Court and other courts.

2. Hundreds of ATA's members operate into and through Pennsylvania and New Jersey in interstate commerce and must cross the Delaware River over toll bridges operated by the Defendant DRJTBC.

3. Plaintiff The Pennsylvania Motor Truck Association (hereinafter "PMTA") is a trade association of motor carriers, shippers, and allied industries created to protect and promote the interests of the Pennsylvania trucking industry. PMTA has approximately 2,300 members, the large majority of which operate in interstate commerce. Those members include for-hire carriers, private carriers, and owner-operators, many of which use the Delaware River toll bridges in their commercial operations. PMTA represents its members before governmental bodies and in the courts.

4. Plaintiff The New Jersey Motor Truck Association (hereinafter "NJMTA") represents the trucking community that serves the State of New Jersey. NJMTA has more than 1,000 members, most of which operate truck fleets. NJMTA is the voice of those members before state and federal governmental bodies and at times in court. A part of NJMTA's mission is to foster and promote reasonable highway user charges. Most of NJMTA's motor carrier members operate in interstate commerce, including operations that require them to use the Delaware River toll bridges operated by the DRJTBC.

5. Plaintiff Roadway Express (hereinafter "Roadway") is a Delaware corporation with its principal place of business in Akron, Ohio and has operational centers located in Bethlehem, Pennsylvania and Stroudsburg, Pennsylvania. Roadway is an interstate

motor carrier, as defined under the Interstate Commerce Act, 49 U.S.C.A. § 13902, and has authority to haul general commodities between all points in the United States. Roadway operates a motor truck fleet of approximately 10,7000 tractors and 34,500 trailers, a significant portion of which operate in interstate commerce into and through Pennsylvania and New Jersey. Roadway's motor vehicles regularly utilize toll bridges operated by the Defendant DRJTBC.

6. The Delaware River Joint Toll Bridge Commission ("DRJTBC" or "Commission") is a bi-state compact commission created by Pennsylvania and New Jersey with the consent of the United States Congress pursuant to Article I, Section 10, Clause 3 of the United States Constitution.

7. The Commission is made up of five commissioners appointed by the Governor of Pennsylvania and five commissioners appointed by the Governor of New Jersey with the consent of the New Jersey State Senate.

8. The Commission currently operates eighteen vehicular and two pedestrian bridges crossing the Delaware River between Pennsylvania and New Jersey. Of the eighteen vehicular bridges, seven are toll bridges and eleven are non-toll bridges.

9. The Commission's most recent issuance of long-term debt was sold in January of 2003, in the amount of \$158,530,000 of Bridge System Revenue Bonds. The 2003 bonds mature annually between 2003 and 2028, and the true interest cost ("TIC"), as defined below, is 4.782%. The bonds are currently rated "A2" by Moody's Investors Service and "A-" by Standard & Poor's. At this time, the 2003 bonds are the only outstanding long-term debt of the Commission. The TIC is a method of calculating an insurer's borrowing interest cost, which considers the present value of the debt service payments. It is defined as the rate necessary to

discount the debt service payments, compounding semi-annually, to the purchase price received by the issuer at the time of bond closing.

10. In December 2001, the Commission adopted a toll structure to fund its operations, including but not limited to a \$526,500,000.00 Ten Year Capital Plan.

11. Earlier drafts of the Ten Year Capital Plan (that were prepared by the Commission staff but never adopted by the Commission) proposed to use more than \$300 million of revenue over ten years on the “Delaware River Heritage Initiative” (“DRHI”), an economic and community development program. The DRHI plan was not in the final version of the Ten Year Capital Plan because the Commission determined that it needed to concentrate on its Bridge System.

12. As originally presented to the Commission and based on which the Commission adopted its revised toll structure in December of 2001, the Ten Year Capital Plan consists of four main components: \$18.0 million for Bridge System Protection; \$152.6 million for Bridge System Preservation; \$32.9 million for Bridge System Management; and \$323.0 million for Bridge System Enhancement.

13. The final version of the toll structure adopted in December 2001 also included a \$280 to \$300 million self-insurance fund for terrorism.

14. On December 10, 2001, the Commission established new toll rates for the purpose of funding the Ten Year Capital Plan, the terrorism self-insurance fund, “Compact Authorized Investments” and operations. The new toll rates were to be implemented in two phases in one of the Commission’s three districts and immediately upon the opening of the E-Z Pass system in the other two districts.

15. Although originally planned for July 30, 2002, the first phase of the toll increase took effect with the opening of the Commission's EZ-Pass system on November 30, 2002. Cash tolls for cars were increased to \$1.25. Prior to the increase, cash tolls for cars were 50¢ in District 1 and 2 and \$1.00 in District 3. Truck tolls were increased to \$2.25 per axle. Prior to the increase, the average truck toll was about 75¢ per axle. Thus, tolls for a five-axle truck, the most common commercial vehicle, went from an average of about \$3.75 to \$11.25. As part of the December, 2001 toll structure, the truck tolls were scheduled to increase to \$3.25 per axle effective January 1, 2004 in the one district that did not go to that level in the first phase.

16. The second phase of the toll increase for the one district, which increased tolls for trucks but not cars, was planned for January of 2004.

17. On November 18, 2002, just before the initial implementation of the E-Z Pass system and the new toll structure, the Commission voted to implement the phase-in of the truck tolls in all three of its districts, not just in the one district originally planned. This meant that rather than the first phase raising truck tolls to \$2.25 per axle in one district and \$3.25 per axle in the other two districts, all the districts were raised to \$2.25 per axle initially and were to go to \$3.25 per axle on January 1, 2004. Two weeks later, on December 2, 2002, plaintiffs filed this lawsuit.

18. In September 2003 the Commonwealth of Pennsylvania and the State of New Jersey committed to provide the Commission with financial assistance in the event of a terrorism attack on the Commission's facilities. In reliance on this commitment, the Commission eliminated the \$280 to \$300 million terrorism self-insurance fund and adopted a revised toll structure.

19. Under the revised toll structure adopted in September 2003, cash automobile tolls were reduced to 75¢ at all bridges, effective January 2004. Truck tolls became \$2.75 per axle effective January 2004.

20. The revised toll structure adopted in September 2003 is the Commission's current toll policy. Cars pay a cash toll of 75¢. Trucks in excess of two axles pay \$2.75 per axle and, thus, \$13.75 for a five-axle tractor trailer.

II. DISCUSSION

Plaintiffs' objection to the Commission's toll structure is limited to their claim that the toll increases are not "just and reasonable" in violation of 33 U.S.C. § 508 (Federal-Aid Highway Act of 1987). Thus, they seek a declaratory judgment against the Commission declaring that the tolls imposed are not just and reasonable.

Because plaintiffs do not have a private cause of action under Section 508, I do not have to decide whether the tolls imposed are just and reasonable.

My conclusion that the plaintiffs do not have a private cause of action is based upon (1) my reading of the statute itself, which does not explicitly create a private cause of action to enforce it; and (2) my determining, following the applicable caselaw relative to statutory construction, that no implied right of action arises.

First, the statute itself simply says:

Tolls for passage or transit over any bridge constructed under the authority of the Act of March 23, 1906 (34 Stat. 84; 33 U.S.C. 491-498), commonly known as the "Bridge Act of 1906", the General Bridge Act of 1946, and the International Bridge Act of 1972 shall be just and reasonable."

Second, since there is no explicit cause of action provided to enforce the statute, I analyzed this case by considering the familiar factors in Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) to determine whether this statute created a private right of action.

Those factors follow:

1. Are plaintiffs one of the class for whose especial benefit the statute was enacted;
2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;
3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for plaintiffs; and
4. Is the cause of action one traditionally relegated to state law, in an area basically a concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law.

At first blush, it would seem that plaintiffs are one of the class for whose special benefit the statute was enacted. But, in United States v. FMC Corp., 717 F.2d 775 (3d Cir. 1983), the Court at page 781 of its opinion elaborated on the first Cort factor as follows:

Since 1975, the Supreme Court has elaborated considerably on the significance of the first *Cort* factor – the “especial benefit” test. The Court has noted that benefit to certain parties is, by itself, irrelevant: “[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries.” *California v. Sierra Club*, *supra*, 451 U.S. at 294, 101 S.Ct. at 1779. The Court has devoted careful attention to the existence or absence of “right-conferring” language in the act. Language “explicitly confer[ring] a right directly on a class of persons that included the plaintiff in the case” is understood as indicative of congressional intent to establish a cause of action. *See Universities Research Ass’n v. Coutu*, 450 U.S. 754, 770, 101 S.Ct. 1451, 1461, 67 L.Ed.2d 662 (1981), *citing Cannon*, *supra*, 441 U.S. at 690 n. 13, 99 S.Ct. at 1954 n. 13. Conversely, when the statute is of a general proscriptive character – that is, when the statute simply imposes a duty without “an unmistakable focus on the benefited class,” *Cannon*, *supra*, 441 U.S. at 690 n. 13, 99 S.Ct. at 1954 n. 13 – the Court has found

“far less reason” to infer a remedy from a silent statute. *Id.*; see also *California v. Sierra Club, supra*, 451 U.S. at 294, 101 S.Ct. at 1779; *Coutu, supra*, 450 U.S. at 772, 101 S.Ct. at 1462.

In *California v. Sierra Club, supra*, the Court reversed a Court of Appeals decision where the latter Court concluded that the Act in question was designed for the benefit of private parties who may suffer “special injury” because of an unauthorized obstruction of a navigable waterway. The Act in question forbade such obstructions but this did not mean that any person especially harmed by the obstruction was an especial beneficiary. The Court said:

...such a definition of “especial” beneficiary makes this factor meaningless. Under this view, a victim of any crime would be deemed an especial beneficiary of the criminal statute’s proscription. *Cort* did not adopt such a broad-gauge approach. *Cort v. Ash, supra*, at 80-82. The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries. See *Cannon, supra*, at 690-693, n. 13.

In ascertaining this intent, the first consideration is the language of the Act. Here, the statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.

An earlier case, *Cannon v. University of Chicago*, 441 U.S. 677, was cited by the Court in *California v. Sierra* and it referred to the following sentence in *Cannon*: “There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefitted class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.” *Cannon* at pp. 691-693.

In the case now before the Court, the statute appears to me to be simply one of a general proscriptive character without a clear and unmistakable focus on the benefitted class.

Plaintiffs' argument is simply that the statute was clearly enacted to benefit individuals who pay tolls on bridges like those of the Commission, and since plaintiffs pay tolls, they are of the class for whose especial benefit the statute was enacted. This argument is not supported by caselaw.

My analysis of the second Cort factor which tends to overlap with the third factor, the indication of legislative intent, explicit or implicit, to create or deny a private remedy, tends to favor the Commission's argument. As already pointed out, there is no express intent. Indeed, nowhere in the Federal-Aid Highway Act of 1987 (FAHA) is there an express grant of a private right of action.

Plaintiffs make the argument that Congress made a conscious decision to replace the "just and reasonable" requirement eliminated when Sections 494, 503 and 526 were repealed with an identical requirement in § 508. This indicates a legislative intent to create a private remedy, or as plaintiffs argue, an intent not to eliminate the private remedy which under prior law was limited to judicial review of whether the Federal Highway Administrator abused his discretion.

But as the Commission points out, there is strong language in the *Section-by-Section Analysis of Essential Highway Reauthorization Amendments of 1987*, at Section 129, 133 Cong.Rec. S778-02 as follows:

This section amends various Federal statutes to eliminate the authority of the Federal Highway Administrator to regulate the rate of tolls on bridges by determining the reasonableness of those tolls. States and toll

authorities would be given greater flexibility in operating toll facilities. Federal oversight of the reasonableness of tolls has proven to be administratively burdensome, legally unproductive, and has interjected the Federal Government in the role of a mediator in disputes which could more appropriately be settled at the State and local level.

Interestingly, one of the cases cited by plaintiffs for federal courts having twice permitted a private cause of action under § 508, Molinari v. N.Y. Triborough Bridge and Tunnel, 838 F.Supp. 718, (E.D.N.Y. 1993) actually supports the Commission's argument. In Molinari, Judge Korman found there to be a serious question whether a private cause of action lies under § 508. In an analysis that would certainly suggest there is probably no private right of action, Judge Korman concluded, however, that in the case before him, he need not resolve that issue since plaintiffs had failed to create even a triable question of fact (unlike plaintiffs in this case, whom I found in denying an earlier summary judgment motion, did create triable factual issues).

The other federal case cited by plaintiffs, Auto Club of N.Y., Inc. v. Port Auth. of N.Y. and N.J., 706 F.Supp. 264 (S.D.N.Y. 1989) did not address the § 508 issue and merely dismissed plaintiffs' claim on the merits.

In summary, whatever indications can be drawn regarding congressional intent seem to suggest that no private right of action was intended.

As was stated by the Court in American Tel. & Tel. Co. v. M/V Cape Fear, 967 F.2d 864 (3d Cir. 1992), "the first two criteria [in *Cort* analysis] are critical. If they do not point toward a private right, the remaining two "cannot by themselves be a basis for implying a right of

action.” Touche Ross & Co. v. Reddington, 422 U.S. 560, 580, 99 S.Ct. 2479, 2491, 61 L.Ed.2d 82 (1979)¹.

There being no private right of action available to plaintiffs, the Court will not review the merits of this case and make any declaration in that regard.

Based upon the foregoing, the following order is entered:

AND NOW, this 8th day of February, 2005, it is hereby **ORDERED** that the Complaint filed by Plaintiffs on December 2, 2002 is **DISMISSED**.

This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, S.J.

1. The fourth Cort factor is not discussed in the Commission’s brief and only mentioned in one sentence by the plaintiffs, stating that “the bridges are interstate bridges, such that the cause of action is not one traditionally relegated to state law, in an area basically a concern of the states,” a not particularly helpful observation. It seems to me that while actions relative to these interstate bridges of the Commission were traditionally handled federally, Congress decided in 1987 that these disputes over tolls could be settled at the state and local level which makes a lot of sense when one considers that the Commission is the end result of a bi-state compact created by two states. Even though it received congressional consent as constitutionally required, it remains essentially a Commission controlled by the states at the very outset in the appointment process of its commissioners and one which serves the local interests of those two states.