Clean It Up -- Without the Teamsters

Hot off the presses, the Ninth Circuit has partially reversed Judge Christina Snyder's order in *American Trucking Ass'n v. City of Los Angeles*, an important environment-labor-pre-emption case that I blogged about a little more than one year ago.

The case concerns the Port of Los Angeles' "Clean Ports" program, which, among other things mandates a series of quite specific environmental standards for truck operators at the Port. The ATA argued that the Program was pre-empted by the Federal Aviation Administration Authorization Act (FAAA), 49 USC sec. 14501 *et seq.*, which pre-empts state and local governments from taking actions that "relate to motor carriers' rates, routes, and services." The Ninth Circuit said that the program did not relate to these things because there are lots of ways in which the carriers can maintain the status quo, so any relation is purely tangential and voluntary. Moreover, said the panel, the FAAA contains an implicit exemption for when the City operates as a market participant: the federal statute was supposed to regulate governments, not business, but here, the City was acting as a business.

So far, so good. But the panel reversed Judge Snyder's upholding of the Clean Ports Program's requirements that the truckers be employees of trucking companies, not independent contractors. This was not acting like a private business, because what private business operates to try to unionize its suppliers? I was worried about this provision when Judge Snyder issued her opinion, and at least upon an initial viewing of the summary, it seems as if my concerns have been borne out.

Advocates for the Clean Ports Program say that they wanted the unionization provisions to reduce idling on port property: because there was no order about which trucks got which cargoes, truckers would compete to see who got them, and that required idling, and that meant more exhaust. Having them all work for trucking companies would regularize the process and thus reduce idling exhaust. The Ninth Circuit didn't buy it, suspecting instead that it was the City attempt to foster unionization, which might be legitimate, but would also pre-empt the action.

Even here, the decision was 2-1, as Judge N. Randy Smith argued that in fact the City was acting as a regulator of "drayage services", i.e. it was regulating which trucks could haul which cargo to other places. It was not acting as a market participant in the "port services market."

I wouldn’t be surprised to see this one go higher — the Roberts Court would love to try to prevent cities and states from protecting the environment. But even if it doesn’t, it is a real setback for the unions: perhaps they might take a risk with a 9th Circuit *en banc* panel, but if they win there, the Supremes will be in the background anxious to bust unions and thereby enhance economic inequality.