IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RENZENBERGER, INC.

Appellant/Plaintiff,

v. **No. A-0001-CA-2015-34999**

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Appellees/Defendant.

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S ANSWER BRIEF AND IN RESPONSE TO THE BRIEF OF AMICUS CURIAE

Appeal from the First Judicial District
County of Santa Fe
Honorable David K. Thomson

Benjamin C. Roybal
Betzer, Roybal & Eisenberg, P.C.
4900 Lang Ave., NE, Suite 202
Albuquerque, NM 87109
Telephone: (505) 797-0105
Attorney for Plaintiff/Appellant

Robert J. Desiderio
Sanchez, Mowrer & Desiderio, P.C.
PO Box 1966
Albuquerque, NM 87103
Telephone: (505) 247-4321
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

Cases in Other States

State Rules

Federal and Statutory Provisions

Other

INTRODUCTION

The Department and the Multistate Tax Commission (MTC) (together referred to throughout as "Respondents") open their briefs with extensive discussion of, and emphasis on, "a presumption against preemption [that] garners the proper interpretation of 49 U.S.C. § 14505." **[AB 1-5; B Amicus Curiae at 3-7]** Whether there is such a presumption is not the issue in this case.[1] However, if this presumption does exist, it in effect simply means the Taxpayer has the burden of persuading the Court that, as a matter of law, the unambiguous language of Section 14505(2) and (4) prohibits New Mexico from imposing the gross receipts taxes in this case. Rule 11-301 NMRA ("In a civil case...the party against whom a presumption is directed has the burden...to rebut the presumption."); *see De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (party opposing tax "bears the considerable burden of overcoming the starting

---

[1] The Supreme Court is currently split as to the existence of a presumption against preemption. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 98-103 (2008) (4 Justice dissent arguing the Court has essentially abandoned the presumption in all but name and should explicitly disclaim it); *PLIVA, Inc. v. Mensing,* 564 U.S. 604, 621-622 (2011) (4 Justices rejecting the idea that preemption ought to be disfavored or narrowly construed); *CTS Corp. v. Waldburger,* ____ U.S. ___, 134 S.Ct. 2175, 2188-2189 (2014) (ruling state law was not preempted with only a 3 Justice plurality relying on the presumption and a 4 Justice concurrence specifically disclaiming the presumption); *see also Bruesewitz v. Wyeth LLC,* 562 U.S. 223 (2011); *Pharmaceutical Co., Inc. v. Bartlett,* ___ U.S. ___, 133 S.Ct. 2466 (2013); *Hughes v. Talen Energy Marketing, LLC,* ___ U.S. ___, 136 S.Ct. 1288 (2016) (recent preemption cases decided with no reliance on or mention in the majority opinion of the presumption).

presumption..."); *see also Bruesewitz v. Wyeth LLC,* 562 U.S. 223, 251 M.2 (2011) (Sotomayor, J., dissenting) ("Federal preemption is an affirmative defense upon which the defendants bear the burden of proof") (internal quotation marks omitted). The substance of Taxpayer's Brief in Chief makes clear that Taxpayer has more than met its burden.

The Respondents' extended discussion of a presumption against preemption confuses the true issue in this case – whether the phrase "in interstate commerce" in Section 14505(2) requires that Taxpayer have transported the Railroads' employees across state lines. The Respondents' common theme is that Section 14505(2) applied only if the Taxpayer had transported its passengers across state lines. **[AB 5-15; B Amicus Curiae 8-12]** The Respondents therefore challenge Taxpayer's argument that the phrase "in interstate commerce," when used in legislation such as Section 14505(2), has a well-accepted meaning; that is, intrastate activity is "in interstate commerce" if that activity substantially affects, or is integral or essential to, interstate commerce.

In defense of their interpretation, the Respondents (1) assert that the "plain language" or "natural reading" of Section 14505(2) must mean that "in interstate commerce" requires crossing state lines, **[AB 8-11; B Amicus Curiae 8-9]**, (2) argue that the Court should rely on language found in 49 U.S.C. §§ 14501 and 14504a(c)(2) to interpret the phrase "in interstate commerce" as used in Section

14505 to mean that Taxpayer must cross state lines, **[B Amicus Curiae 9-10; AB 6-8]**, and (3) claim that *Tri-State Coach Lines, Inc. v. Metro Pier & Exposition Auth.*, 315 Ill. App. 3d 179, 732 N.E. 2d 1137, *appeal denied*, 191 Ill. 2d 561, 738 N.E. 2d 936 (2000), *cert. denied,* 532 U.S. 994 (2001) (*"Tri-State"*) and *Jalbert Leasing, Inc. v. Massachusetts Port Auth.*, 449 F.3d 1 (1st Cir. 2006) (*"Jalbert"*), support the District Court's decision, **[B Amicus Curiae 11-12; *see* AB 14-15]**.

In reply, Taxpayer makes the following three arguments:

First, Respondents urge a construction of Section 14505(2) that is inconsistent with the well-established meaning of the language used in that section.

Second, 49 U.S.C. §§ 14501 and 14504a(c)(2) are unrelated in language, intent and purpose to the issue presented in this case.

Third, contrary to the claims of Respondents, the holdings of *Tri-State* and *Jalbert* support the Taxpayer's position and not the District Court's decision.

ARGUMENT

I. RESPONDENTS URGE A CONSTRUCTION OF SECTION 14505(2) THAT IS INCONSISTENT WITH THE WELL-ESTABLISHED MEANING OF THE LANGUAGE USED IN THAT SECTION.

The Respondents agree that Section 14505(2) preempts a state's ability to impose gross receipts taxes on (1) the transportation of passengers, (2) by motor carrier, (3) in interstate commerce. **[AB 5; B Amicus Curiae 3]** The record is clear that the Taxpayer transported passengers by motor carrier, satisfying (1) and (2) of

Section 14505(2). **[*See* RP 159 ¶ 2-160, 161; BIC 7, 10]** (explaining that "by not assessing Taxpayer on its identical transportation of railroad employees in the very same vans that happened to cross state lines, the Department acknowledged that the Railroads' crews were 'passengers' who were being driven 'by motor carrier" within the plain meaning of Section 14505 (2) and (4).")

Thus, the only issue in this case concerns the third element of Section 14505, specifically whether the Taxpayer was engaged "in interstate commerce" when it drove the Railroads' employees to various locations within New Mexico to enable the railroads to continue their travel across the United States without undue delay. The resolution of this case, therefore, depends on the meaning of that phrase. *See Marbob Energy Corp. v. New Mexico Oil Conservation Commn.,* 2009-NMSC-013, ¶ 9, 146 N.M. 24, 209 P.3d 135; **[*see also* RP 162 ¶ 2 ("The primary rule of statutory construction is to ascertain and give effect to the legislature's intent, and that inquiry must begin with the statute's language...")]**.

As explained in Taxpayer's Brief in Chief, the courts have consistently and continuously affirmed that the scope of the statutory phrase "in interstate commerce" encompasses more than movement across state lines; it also includes intrastate activity when that activity substantially affects, or is integral or essential to, interstate commerce. **[BIC 11-18]**. Because Taxpayer's transportation of the Railroads' employees within New Mexico was essential, necessary and integral to

the trains' ability to journey across the U.S., it was "in interstate commerce." But for Taxpayer's transportation of the Railroads' employees in New Mexico, the railroads would be stalled in New Mexico because federal law and union rules limit the number of consecutive hours a crew can work, necessarily unduly burdening interstate commerce. **[*See* BIC 15].**

The Department's unsupported statement that "Taxpayer's intrastate activities were not integral to or a necessary part of interstate commerce," **[AB 11]**, is conclusory and contrary to the facts. **[*See* RP 90 ¶ 4]** Further, its statement that "The District Court found that case law analysis did not establish the Taxpayer's services as integral to or a requisite part of interstate travel by the train," **[AB 12]**, is simply incorrect. The District Court never made such a finding. [2]

Rather than giving the phrase "in interstate commerce" its accepted meaning, Respondents would amend the text of Section 14505(2) by adding language defining "in interstate commerce" that is not found in the statute.

The well-defined body of law is explicit that the statutory phrase "in interstate commerce" includes activity that is solely intrastate so long as that activity substantially affects, or is integral or necessary to, interstate commerce.

---

[2]. Moreover, MTC inaccurately describes the Taxpayer's argument when it asserts that Taxpayer argued that Taxpayer's intrastate activities satisfied Section 14505's "in interstate commerce" requirement "so long as that transportation is *related in some way to interstate transportation.*" **[B Amicus Curiae 3 (emphasis added)]**, Taxpayer has consistently argued that the Taxpayer's transportation had to be, and was, integral to interstate commerce.

See, e.g., United States v. Yellow Cab Co., 332 U.S. 218 (1947), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Brown's Crew Car of Wyoming LLC v. Nevada Transp. Auth.*, 2:08-CV-00777-RLH-LRL, 2009 WL 1240458 (D. Nev. May 1, 2009) (unpublished opinion); **[*see also* BIC 11-18 and cases cited therein]**. And the U.S. Supreme Court has stated that "[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 813 (1989); *see also Bruesewitz v. Wyeth LLC,* 562 U.S. 223, 243 (2011) ("When all (or nearly all) of the relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute."). Accordingly, the presumption is that Congress intended its use of the term "in interstate commerce" in Section 14505 to include intrastate transportation that substantially affects or is integral to interstate commerce.

Neither the District Court nor the Respondents have overcome the Supreme Court's presumption. They do not point to any "express statement" by Congress that it intended the phrase "in interstate commerce" in Section 14505 to mean anything other than the accepted "interpretation placed on that concept by the

courts." Indeed, they do not cite to *any* such contrary Congressional meaning of "in interstate commerce," and nowhere in the statute is the term defined differently.

The District Court and the Department reject, out-of-hand, *Yellow Cab's* and *Brown's Crew Car*'s meaning of "in interstate commerce" as applicable to this case because those cases dealt with regulatory matters while this case deals with taxation. **[RP 168-169; AB 12-13]**. Yet, the District Court and the Department both agree that in construing a statute, the most important factor is the actual language of the statute. **[RP 163 ¶ 2-164; AB 8-9]** The language that Congress chose in Section 14505 was "in interstate commerce," a phrase that has a long-standing judicial meaning to include solely intrastate activity integral to interstate commerce. If Congress had intended that Section 14505 apply only if the motor carrier crossed state lines, it would have enacted language requiring motor carriers to cross state lines, as it did in 49 U.S.C. § 14501(d) [*see* Argument II *infra*]. But Congress did not do so; and it is not for the District Court, or the Department, to change the statute by inserting language into the statute that is not there, and then rely on a distinction between regulatory and tax matters which finds no authority in the overwhelming case law properly defining the words "in interstate commerce."

The MTC adds that the Taxpayer's "reading of the phrase 'in interstate commerce'" proves too much: "taxes on any number of activities undertaken by passengers traveling via motor carrier would be preempted including excise taxes

on a meal purchased by such passengers, or lodger's taxes imposed on the use of hotel rooms." **[B Amicus Curiae 10]**. The MTC, however, fails to recognize that the "in interstate commerce" standard captures intrastate activity only if that activity is substantially related, integral, or necessary to interstate commerce and not merely incidental to interstate commerce. *See Tri-State,* 315 Ill. App. 3d at 196-197, 732 N.E. 2d at 1150-1151. Meals and lodging generally are merely incidental to the transportation of passengers by motor carriers anticipated by Section 14505(2), as illustrated by this case. The Taxpayer's services were necessary for the trains to continue to run; meals and lodging were not involved, and in no way relate to the movement of the trains.

II. 49 U.S.C. §§ 14501 AND 14504a(c)(2) ARE UNRELATED IN LANGUAGE, INTENT, AND PURPOSE TO THE ISSUE PRESENTED IN THIS CASE.

The Department ultimately falls back on language that it finds in 49 U.S.C. § 14501(d) to support its reading that the phrase "in interstate commerce" in Section 14505 means that the motor carrier must cross state lines. **[*See* AB 6-8]**. Specifically, the Department points to Section 14501(d)(1)(C) as *defining* "interstate travel" to mean "transportation by the motor carrier from one State ... to a destination in another State" or "transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State." **[AB 7-8]**.

Characterizing this language as a generally applicable "definition" of "in interstate commerce" is simply incorrect. There is nothing definitional about any part of Section 14501(d); its language simply presents the requirements of that specific statute. Nowhere in Section 14501(d) does the term "interstate commerce" (or even "interstate travel") appear. Moreover, there is no relationship between Section 14501(d) and Section 14505 such that the language of one implies the proper interpretation of the other. Section 14501(d) was enacted as part of an entirely different Act (the Real Interstate Driver Equity Act of 2002), governs an entirely different situation (state licensing and fee requirements on "pre-arranged ground transportation"), and responds to a completely different problem (multiple states imposing multiple, potentially inconsistent, licensing and fee requirements on motor carriers that operated pre-arranged ground transportation services across state lines. *See* S. Rep. No. 107-237, at 1-2 (2002)).

MTC states that the Real Interstate Driver Equity Act of 2002 was enacted in response to the *Tri-State* decision. **[B Amicus Curiae 12]** This assertion is without support (notwithstanding MTC's reference to Hellerstein & Swain, *State Taxation*, ¶ 4.25, at 27 (3rd Ed., W., G. & L., 2016), which, in fact, merely says that *Tri-State* was partially overruled by the Act – a statement that itself is unsupported and seems highly questionable considering the Act only regulates licensing and fees, not taxation). Nothing in the Act's legislative history mentions or even impliedly

refers to *Tri-State* and/or the issues presented in that case as relevant to its introduction or passing. Thus, there is no basis on which to excerpt unrelated language from Section 14501(d) and argue it somehow defines the terms of Section 14505.

In fact, Section 14501(d)(1)(C) illustrates how Congress may limit a statute's application to actual transport across state lines. If the Respondents' proffered definition of "in interstate commerce" was correct, Congress could have simply stated in Section 14501(d)(1)(C) that Section 14501(d) only applies in relation to a contract for transportation "in interstate commerce." Alternatively, if its intent was to restrict the application of Section 14505 to transportation across state lines, Congress could have adopted the same substantive language in Section 14505 as it did in Section 14501(d); or, it could have defined "in interstate commerce" in Section 14505 to require crossing state lines. Congress, however, did none of these. Instead, it used very specific and detailed language in Section 14501(d) to make its intent clear - that the pre-arranged ground transportation governed by the section had to cross state lines – and in Section 14505 simply used the term "in interstate commerce" without definition. This use of "in interstate commerce" in Section 14505(2) is therefore similarly specific and clear; it refers to the accepted definition of that widely-used term of art that Congress is presumed to have adopted. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989).

The MTC draws attention to 49 U.S.C. §§ 14501's and 14504a(c)(2)'s[3] use of both "interstate" and "intrastate" as evidence that Congress recognized a distinction between the two terms and so understood how to use one or the other to specify its intent. **[B Amicus Curiae 9-10]** The conclusion that the MTC wants this Court to reach is that Congress's use of "intrastate" and "interstate" evidences that "in interstate commerce" cannot include purely "intrastate" transportation.

That Congress recognizes a difference between "interstate" and "intrastate" is not disputed and proves nothing in this case. The Taxpayer does not argue that these terms are now unified, with no line drawn between their meaning. The Taxpayer's only contention is that the specific term of art "in interstate commerce," as historically recognized by the courts, has a specific, unambiguous, and well-developed meaning that applies to the unique facts of this case.

The Taxpayer agrees that Congress knew and understood the language it chose in Sections 14501 and 14504a(c)(2), just as it knew and understood the meaning of "in interstate commerce" when it enacted Section 14505. In each case, Congress made specific word choices in order to manifest its intent and properly effectuate the purpose of each Section. Therefore, Congress's use of the language "intrastate" and "interstate" in Sections 14501 and 14504a(c)(2) in no way

---

[3] The MTC actually cites to 49 U.S.C. § 14504(c)(2). **[*See* B Amicus Curiae 9]**. However, Section 14504 was repealed in 2005 and 2007. The MTC most likely intended to refer to 49 U.S.C. § 14504a(c)(2), which was originally enacted in 2005. The MTC quotes and refers to language found in Section 14504a(c)(2).

indicates that that language somehow defines "in interstate commerce" in Section 14505 different from its established meaning.

III. CONTRARY TO THE POSITION OF RESPONDENTS, THE *TRI-STATE* AND *JALBERT* DECISIONS SUPPORT THE POSITION OF THE TAXPAYER.

The Respondents argue that *Tri-State* and *Jalbert*, the only two cases that have addressed Section 14505 fully support the decision of the District Court. **[B Amicus Curiae 11-12; AB 3, 14-15]** This is simply not the case. Both *Tri-State* and *Jalbert* are explicit that the taxes involved were "departure taxes" – taxes on motor carriers leaving an airport - and not taxes on the transportation of passengers by those motor carriers after they left the airport. *Tri-State,* 315 Ill. App. 3d at 195, 732 N.E. 2d at 1149-1150 (Section 14505(2) "is inapplicable to the airport departure tax, which is imposed not on the *transportation* of passengers in interstate commerce, but upon the *departures* of commercial vehicles from O'Hare and Midway. In other words, the "taxable" event to which the airport departure tax attaches is not the interstate transportation of passengers, but, rather the ground transportation departure from the airports") (emphasis in original); *Jalbert,* 449 F.3d at 5 (Section 14505 should not be stretched to cover a departure tax).

Moreover, both cases dealt with whether the tax was an imposition on "the transportation of a passenger," one of the other elements required by Section 14505(2), not on whether any such transportation was "in interstate commerce,"

the issue in this case. The court in *Tri-State* specifically stated that Section 14505 did not preempt the departure tax even if the motor carriers traveled into other states; otherwise, Section 14505, at a minimum, would have preempted the tax on the transportation of the motor carriers' passengers from Illinois to other states. 315 Ill. App. 3d at 192-193, 197-198, 732 N.E. 2d at 1147-1149, 1151. Similarly, in *Jalbert* the court concluded that the "in interstate commerce" qualification was not an issue in the case; both parties had assumed that the requirement was met. 449 F.3d at 6-7.

Further, the *Tri-State* court indicated that any affect that the tax had on interstate aircraft transportation in that case was only *incidental*. That is, the transportation of passengers in *Tri-State* was a "minor adjunct" "of lesser significance" to the airline trips. "Thus, such ground transportation trips are incidental to transportation by aircraft and are, therefore, beyond the scope of section 14505." 315 Ill. App. 3d at 196-197, 732 N.E. 2d at 1150-1151. The situation in this case is just the opposite. Taxpayer's transportation of the Railroads' employees was integral and necessary to the ability of the Railroads to travel in interstate commerce. The railroads would be seriously, and perhaps irreparably delayed without Taxpayer providing the relief services required by federal law and union rules. **[*See* RP 90 ¶ 4]**.

The MTC also states that *Jalbert* "held that [Section 14505] did not go beyond what was necessary to overturn *Jefferson Lines.*" **[B Amicus Curiae 11]**. That statement is also erroneous. After reviewing the history that led up to Section 14505, the court concluded that Section 14505 "is, admittedly, more broadly written than the particular evil, and we would readily apply it according to its terms to any case that came squarely within it." *Jalbert,* 449 F.3d at 5. This is just such a case, and the application of the text of Section 14505 mandates that the tax imposed by the state is legally barred.

CONCLUSION

For the foregoing reasons, and for those reasons put forward in the Brief in Chief, this Court should reverse the district court's grant of summary judgment to the Department, and direct that court to enter summary judgment in favor of the Taxpayer.

Respectfully submitted,

Robert J. Desiderio
Sanchez, Mowrer & Desiderio, P.C.
PO Box 1966
Albuquerque, NM 87103
Telephone: (505) 247-4321

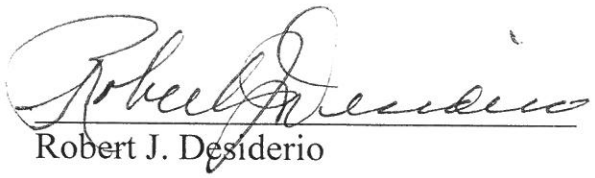
Benjamin Roybal
Betzer, Roybal & Eisenberg, P.C.
4900 Lang Avenue NE, Suite 202
Albuquerque, NM 87109
Telephone: (505) 797-0105

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Brief in Reply to Appellee's Answer Brief and in Response to the Brief of Amicus Curiae was mailed on the 18th day of August, 2016 to the following counsel of record:

Elena P. Morgan
Special Assistant Attorney General
P.O. Box 630
Santa Fe, New Mexico 87504-0734
Telephone: (505) 827-0734
Elena.Morgan@state.nm.us

Helen Hecht, General Counsel
Bruce Fort, Counsel
Multistate Tax Commission
444 N. Capitol Street NW
Washington, D.C. 20001
Telephone: (202) 650-0300



Robert J. Desiderio