

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF TRANSPORTATION

In the Matter of the Application of Old Dutch Foods, Inc., 2375 Terminal Road, Roseville, Minnesota 55113 for a Horizontal Clearance Variance and a Vertical Clearance Variance, Both Pursuant to Minn. Stat. § 219.47 (1996)

FINDINGS OF FACT,  
CONCLUSIONS,  
RECOMMENDATIONS  
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on March 6, 1998 in Minneapolis. The record closed on March 24, 1998, upon receipt of the last memorandum.

Appearing on behalf of the Applicant, Old Dutch Foods, Inc., was Jorn Remmem, Design Engineer, Old Dutch Foods, Inc., 2375 Terminal Road, P.O. Box 64627, St. Paul, Minnesota 55164.

Appearing on behalf of the staff of the Minnesota Department of Transportation was Ronald Mattson, Office of Freight, Railroads & Waterways, 395 John Ireland Boulevard, Mail Stop 470, St. Paul, Minnesota 55155.

Appearing on behalf of public participant United Transportation Union was John Smullen, its Minnesota Legislative Director, 3989 Central Avenue Northeast, Suite 525, Columbia Heights, Minnesota 55421.

Appearing on behalf of public participant Brotherhood of Maintenance of Way Employes was Karl Knutsen, its Minnesota State Legislative Director, 2616 West River Parkway, Minneapolis, Minnesota 55406.

**NOTICE**

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of Transportation shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with the Commissioner of Transportation. Persons desiring to file exceptions should contact Bradley J. Larsen, Rail & Motor Carrier Proceedings, 395 John Ireland Boulevard, Mail Stop 440, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

## **STATEMENT OF ISSUES**

1. Is Minn. Stat. § 219.46 preempted by the Interstate Commerce Commission Termination Act, P.L. 104-88, 49 U.S.C. 101 et seq., (ICCTA)?
2. If the state statute is not preempted, has the Applicant demonstrated that it is entitled to a variance from the horizontal and vertical clearance requirements of that statute?

Based upon all of the testimony and exhibits herein, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

1. Old Dutch Foods, Inc. produces a variety of food products, including potato chips, at a facility on Terminal Road in Roseville. In connection with its potato chip production, Old Dutch receives vegetable oil from both railroad tank cars and tanker trucks. At the present time, railroad tank cars are brought to the facility and left outdoors while they are unloaded. Old Dutch would like to realign the track so that it goes indoors, allowing the railroad tank cars to be unloaded in a heated and protected environment. The area of the existing building which would be used for this purpose, however, has certain size constraints which have caused Old Dutch to request both a horizontal clearance variance and a vertical clearance variance.
2. The type of vegetable oil which Old Dutch uses must be warmed in the winter time before it can be removed from a tank car. Old Dutch currently uses steam heat to do this. If the car could be kept indoors, less steam would be required. Company personnel are also required to climb to the top of the tank car to sample oil when it is received. When there is snow or ice on the car, this creates a dangerous condition for the employees. If the car were indoors, this danger could be reduced. Finally, spills do occur. If a spill occurred while the car was indoors, it could be easily detected and contained, in comparison to a spill which occurs in the current outdoor location.
3. The vertical clearance variance required is for two feet, allowing a 20-foot distance between the top of the rail and the bottom of the ceiling. Old Dutch has agreed to move existing conduits and lighting fixtures to maximize the available space. Old Dutch will also install a loading door with low headroom requirements. The tank cars which will be using the facility are 15 feet, six inches in height (see Ex. 3). That would allow a four-foot, six-inch clearance. The only alternative to the variance would be to raise the entire roof of the facility, which was characterized as "high cost".
4. The affected railroad, which is the Minnesota Commercial Railway, has recommended that the vertical clearance variance be granted, and the UTU representative who inspected the facility and raised issues concerning other parts of the

plan, stated that they could "live with it". He asked that notice of the vertical clearance be published in special instructions bulletins to inform the crew of it. MnDOT staff recommended that a warning sign would be appropriate, to be centered above the track and placed on the outside of the facility, so that it would be visible to persons approaching the door. The staff recommended the standard horizontal "no clearance" sign illustrated in Minn. Rule pt. 8830.9930, a copy of which is in the record as Exhibit 5. Staff further recommended that the sign be required to be lit during periods of darkness, and that the Department be notified upon completion of the project so that the sign and lighting can be inspected prior to the commencement of operations.

5. The horizontal clearance is more complicated than the vertical clearance. This complication arises because the indoor area where the tank car would sit is not a perfectly even rectangle. The proposed area is approximately 85 feet long by 30 feet wide. However, the 30-foot width only exists for the first approximately 47 feet of the 85-foot length. The remaining 28 feet of the 85-foot length is only 24 feet wide, because of the existence of a ramp, which is six feet wide, and begins at ground level at the end closest to the door and then slopes upward to a height of three feet high at the end farthest from the door. This ramp is used to allow forklifts to get from ground level (where the track will be) to the level of the manufacturing floor of the building, which is approximately three feet higher. If the ramp were not present, there would be no need for a horizontal variance. But because of the presence of the ramp, Old Dutch is seeking a variance to allow a horizontal clearance of only six feet six inches from the center of the track for the last 28 feet of the spur. The rail cars in question are ten feet seven inches wide at the widest point, so on the side closest to the ramp, roughly five feet three inches of the available space would be occupied by the car. That leaves only a little more than one foot clearance between the side of the car and the side of the ramp. Old Dutch points out that because the ramp begins at track level, and is only three feet high at its peak, such a small clearance is less threatening than if the ramp were a solid wall because it should be possible for a trainman to jump or pull himself onto the ramp to get out of the way of an approaching car. The ramp currently has a railing, but the Applicant is willing to remove that in order to make the ramp more accessible for a trainman to use if needed. Because this is an enclosed facility, members of the public are not expected to be present.

6. Switching will be performed by personnel of the Minnesota Commercial Railway, who will use an engine to shove the car in to the building. The height and width of the engine is not an issue in this proceeding. The UTU believes that its personnel can "live with it" (the horizontal clearance), but would like the Minnesota Commercial to publish notice of this horizontal clearance problem in its special instructions bulletin so the crew can read it. The Department staff urged that a "standard vertical no clearance sign", meeting the standards set forth in Exhibit 5, be placed on the appropriate side of the doorway of the building, so that trainmen will be reminded of the hazard. The Department also urged that the sign be properly lit, and that the Department be notified upon completion of the signage and lighting so that it could inspect them before operations commenced.

7. The BWME and UTU have raised a number of issues. Reference has already been made to the publication of special instructions. In addition, the BWME asked that a switch point derailer be substituted for an existing flop-over derailer, so that any runaway car would be stopped before leaving the spur line. The proposed switch point derailer would be located on the spur track, before it adjoined any other track. The BMW recommended it be placed approximately at the point marked "CB Top = 934.6" on Ex. 1. The Applicant was agreeable to adding this switch point derailer at that approximate location.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Department of Transportation has jurisdiction of the subject matter of this hearing.
2. The Interstate Commerce Commission Termination Act (ICCTA) does not preempt Minn. Stat. § 297.46 because section 297.46 is a safety regulation, not an economic regulation.
3. The Department gave proper notice of the hearing, and has fulfilled all procedural requirements of law or rule, so that the matter is properly before the Administrative Law Judge.
4. Any of the foregoing Findings of Fact considered more properly as Conclusions are hereby adopted as such.
5. The proposed relocation of a spur track into the existing Old Dutch building will require both a vertical clearance and a horizontal clearance. Neither of them will create a condition unduly hazardous to employees of the applicant or the railroad, so long as the "no clearance" signage referred to in the Findings is posted, and proper illumination is provided to the signage and the close clearance area, and the ramp railing is removed.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

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### **RECOMMENDATIONS**

That the Commissioner grant a variance to Old Dutch Foods, Inc. from the vertical clearance requirements of Minn. Stat. § 219.46 for the installation of a spur track to a minimum vertical clearance of four feet, six inches, on the condition that the

applicant maintain horizontal a "no clearance" sign on the outside of the entrance door, centered above the track. In addition, the sign and the close clearance area must be illuminated during hours of darkness and that after the signage and lighting are completed, there be an inspection by the Department to verify compliance with these requirements.

It is further recommended, that the Commissioner grant a variance to Old Dutch Foods, Inc. from the horizontal clearance requirements of Minn. Stat. § 219.46 to allow the installation of a spur track in the existing Old Dutch building with a minimum clearance of one foot, on the condition that Old Dutch remove the railing at the top of the ramp which is described more fully in the Findings, and that Old Dutch maintain vertical "no clearance" signs on the edge of the doorway leading into the area. The same conditions regarding lighting and inspections should apply.

Dated this 17th day of April 1998.

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ALLAN W. KLEIN  
Administrative Law Judge

Reported: Tape Recorded, No Transcript Prepared

### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

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### MEMORANDUM

There is no real problem with the vertical clearance. All participants agreed that it would not pose a hazard so long as the signage and lighting requirements were complied with.

The horizontal clearance, however, is more problematic. It is more problematic because if the variance is granted, at least a part of the trackage would only have a one-foot clearance between the edge of the car and the edge of the ramp. Normally, this would not be adequate. But in this case, we are talking about a distance between the edge of the car and the edge of a ramp, which is only three feet at its maximum height. Although there is currently a railing which extends beyond the three-foot height, the applicant has agreed to remove the railing as part of this project. Any person caught between the edge of the car and the edge of the ramp need only jump or hoist

himself up onto the ramp in order to avoid the car. This should be possible, and all participants support the granting of the variance.

The most seriously contested issue in this whole proceeding is the question of whether the Commissioner has any authority to grant a variance (or any authority to even enforce the statutory clearance requirements) because of the enactment of the Interstate Commerce Commission Termination Act (49 U.S.C. 101, et seq.), which went into effect on January 1, 1996. This issue has been raised, and decided, in two prior cases before the Commissioner, and the Administrative Law Judge recommends that those decisions be followed in this case as well.

On March 5, 1998, Deputy Commissioner Darryl E. Durgin issued a final decision in the Matter of the Application of Maiers Transport and Warehousing, Inc., MnDOT Docket No. D-5997/R-4396. This decision basically adopted the Findings, Conclusions and reasoning of Administrative Law Judge Richard C. Luis in the Maiers hearing, OAH Docket No. 7-3001-11386-2. Judge Luis concluded that the Commissioner had not been preempted by the ICCTA. The Department's final decision agreed. The gist of the reasoning was that the ICCTA did preempt economic regulation, but not safety regulation. Both decisions pointed to the continued operation of the Federal Railway Safety Act (49 U.S.C. chapter 210, et seq.), which is administered by the U.S. Department of Transportation. The standards imposed by that Act are noticeably different from the economic regulation which was previously conducted by the ICC and which was, clearly, preempted and eliminated by the ICCTA. The decision pointed out that the Federal Railway Safety Act does allow states to regulate in the safety area until the Secretary of Transportation prescribes a regulation or issues an order covering the specific subject matter of the state regulation. Even then, a state may adopt or continue in force an additional or more stringent state law if it meets certain tests. Both decisions noted that rail clearance from obstructions is one area where state regulation has not been preempted by the FRSA, citing Southern Pacific Transp. Co. v. Public Utilities Comm'n of State of Cal., 647 F. Supp. 1220 (No. Dist. Ca., 1996), affd. 820 F.2d 1111 (9th Cir. 1987).

The Brotherhood of Maintenance of Way Employees argues that Judge Luis and the Commissioner were incorrect in the Maiers case, and that this is even more obvious because of the issuance of Surface Transportation Board Ex Parte No. 574, which was issued on December 1, 1997. This was issued after Judge Luis's record had closed in Maiers. That Order is an advanced notice of proposed rulemaking, seeking comments from interested persons on the extent to which railroads should be required to provide certain information to the Board. A fair reading of the Order does not suggest, in any way, that the STB believes that the FRA's safety role has been preempted by the STB or otherwise eliminated by the ICCTA. To the contrary, a fair reading of that Order suggests that the STB envisions continued safety regulation by the FRA.

Finally, the BWME cites a statement from this Administrative Law Judge in a track abandonment case decided in 1996 which suggests that the ICCTA had preempted both economic and safety regulation. The question in that case was

whether the ICCTA had preempted the State's authority to regulate track abandonments. This Administrative Law Judge held that the State was preempted because abandonment of tracks, like agency closures, was essentially an economic regulation of railroads, which was the target of the ICCTA. It had been argued in that case that certain language in the State's statute made track abandonments a safety issue, not an economic issue. The Administrative Law Judge disagreed with that argument, essentially saying that a statute which was economic regulation in substance could not be changed into safety regulation merely by referring to safety in its text. The important thing is the substance of the regulation.

In the case of vertical and horizontal clearances, as we have presented here by Old Dutch Foods' application, the substance of the regulation is safety. The ICCTA was designed to eliminate economic regulation, not safety regulation. Until the Federal Railroad Administration chooses to preempt state prohibitions against obstructions, the State may continue to regulate them.

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