

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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Attorney General

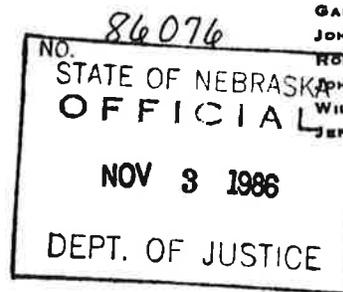
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DATE: November 3, 1986

SUBJECT: Rule-making authority of the Nebraska
Department of Roads.

REQUESTED BY: R. H. Hogrefe, Director-State Engineer
Nebraska Department of Roads

WRITTEN BY: Robert M. Spire, Attorney General
John E. Brown, Assistant Attorney General

In your letter of May 29, 1986, you request the opinion of this office regarding whether or not a proposed rule and regulation involving overweight permits on the Nebraska interstate highway could be promulgated by the Nebraska Department of Roads without violating 23 USCS §127. We have concluded that the permit system proposed does not violate 23 USCS §127, but that it is in violation of Nebraska law, specifically Neb.Rev.Stat. §39-6,181 (Reissue 1984).

23 USCS §127 provides in pertinent part as follows:

"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 any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway Amendments of 1974 [enacted Jan. 4, 1975], whichever is the greater.... 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 [enacted Jan. 4, 1975]..."

Obviously, to avoid the penalties of 23 USCS §127, weight limits on the Nebraska interstate highways must remain at 80,000 lbs., unless the State of Nebraska had laws or regulations in place on July 1, 1956, which could have permitted heavier weight limits on Nebraska roads, or unless Nebraska laws or regulations in place on January 4, 1975, permitted an overall gross weight of any group of two or more consecutive axles of more than 80,000 lbs. on Nebraska highways.

Turning first to the date of July 1, 1956, it is the opinion of this office that on that date, the Nebraska Department of Roads could, by special permit, allow the operation of vehicles weighing in excess of 80,000 lbs. on the public roads of Nebraska. In Opinion No. 84, issued by this office on December 31, 1979, it was concluded that a rule and regulation then being considered for promulgation by the Nebraska Department of Roads, which allowed the operation of vehicles weighing in excess of 80,000 lbs. on the Nebraska interstate highway did not violate the provisions of 23 USCS §127. It was concluded that Neb.Rev.Stat. §39-721 (Supp. 1955) provided the Nebraska Department of Roads with lawful authority as of July 1, 1956, to issue multi-trip permits for the movement of vehicles with divisible loads of unlimited gross weights on the public roads of Nebraska. Section 39-721 (Supp. 1955) provided in pertinent part as follows:

"Provided, the Department of Roads and Irrigation may issue a special permit in writing for a period not to exceed ten days for the moving over highways of the state of vehicles, combinations of vehicles, or other objects, which must of necessity be moved over the highways to reach their intended destinations, such vehicles or objects exceeding the limitations provided herein and provided in any other statute of this state relating to height, width, length, and weight. The Department of Roads and Irrigation may impose such conditions and regulations for each such permit as may be

necessary, including a permit fee of not to exceed five dollars. Such fee shall be in lieu of the license fee in excess of what the truck could legally be licensed to haul."

The provisions of 23 USCS §127 requiring laws or regulations to be in effect on July 1, 1956, in order to allow vehicle weights in excess of 80,000 lbs. on the interstate highway, are satisfied by Neb.Rev.Stat. §39-721. Section 39-721 was in effect on July 1, 1956 and granted the Nebraska Department of Roads authority to issue special permits allowing multiple movements of vehicles carrying divisible loads on Nebraska highways. Section 39-721 set out no limitation on the amount of gross weight that could be allowed by special permit on the public highways of the State on July 1, 1956.

The proposed rule and regulation does not, therefore, violate the terms of 23 USCS §127. However, it does violate existing Nebraska laws in two respects: it allows continuous permits on the Nebraska interstate highway, and it allows a permit to be issued for the movement of divisible loads.

Neb.Rev.Stat. §39-6,181 (Supp. 1986) prohibits the issuance of overweight permits to vehicles carrying divisible loads, unless such vehicles are hauling seasonally harvested products during harvest or storage operations. That prohibition provides as follows:

"No permit shall be issued under subdivisions (a) and (b) of this subsection for a vehicle carrying a load unless such vehicle is loaded with an object which exceeds the size or weight limitations and which object cannot be dismantled or reduced in size or weight without great difficulty and which of necessity must be moved over the highways to reach its intended destination."

Paragraph 015.01 of the proposed rule and regulation provides as follows:

"By promulgation of this Section 015 of Chapter 1 of Title 408 of these Rules and Regulations, the Director-State Engineer hereby determines that circumstances make the issuance of a conditional safety permit necessary to permit movement of certain divisible loads of any commodity over the

safest, most direct and least congested route, in order to provide both safe and efficient highway transportation throughout the State by authorizing vehicles defined herein to make maximum use of the National System of Interstate and Defense Highways within the State."

The proposed issuance of overweight permits to vehicles carrying divisible loads is in conflict with §39-6,181 and therefore, the Nebraska Department of Roads has no authority to promulgate such rules and regulations. Section 39-6,181, supra, also prohibits the issuance of continuous permits on the Nebraska interstate highways:

"The department...is authorized...to issue a continuing permit for use only on highways other than the National System of Interstate and Defense Highways..."

The proposed rule and regulation calls for the issuance of "conditional safety permits" which would allow multiple trips by vehicles carrying divisible loads on the Nebraska interstate highway. Such a permit is a continuous permit and therefore clearly violates §39-6,181.

There is a second date set out in 23 USCS §127 at which a state may establish a "grandfathered" right to allow weights in excess of 80,000 lbs. on its interstate highway system:

"Except in the case of the overall gross weight of any two or more consecutive axles on the date of the Federal-Aid Highway Amendments of 1974, [enacted Jan. 4, 1975] whichever is greater."

The date of January 4, 1975, is therefore relevant to a determination of the authority of the Nebraska Department of Roads to allow weights in excess of 80,000 lbs. on the Nebraska interstate highway.

Questions have been raised as to whether the January 4, 1975, date established a second date from which to determine a state's "grandfather" rights to set interstate weight limits above 80,000 lbs. The language used in this exception is not explicit and the exception is not easily read or understood. The legislative history of the exception is not helpful and there have been no court decisions

interpreting the intent of Congress in this instance. We have been provided with the opinions of the Attorneys General of Oklahoma and Massachusetts which interpret the exception, as well as an opinion rendered by the Chief Counsel of the Federal Highway Administration which sets forth the position of that agency regarding the change brought about by the January 4, 1975, exception.

We are of the opinion that Congress, by this exception, intended to establish a second grandfather date of January 4, 1975. Vehicles lawfully operating on public roads of the state, other than the interstate highway, could, after January 4, 1975, operate on the interstate highway.

On January 4, 1975, vehicles could lawfully operate on Nebraska public roads other than the interstate highway at weights up to 95,000 lbs. The table of weights allowed on such highways was set out in Neb.Rev.Stat. §39-722 (Reissue 1974). No special or individual authorization was necessary to allow vehicles of this weight to use the Nebraska public road system other than the interstate highway. The interstate highway weight limits were set out in the same statute and allowed a gross weight of 80,000 lbs. or less. Vehicles weighing in excess of 80,000 lbs. were allowed to operate on the interstate highway only by special permit.

The January 4, 1975 "grandfather" date allows Nebraska to set the Nebraska interstate highway weight limits at 95,000 lbs. without violating the provisions of 23 USCS §127. However, the prohibitions set out in Neb.Rev.Stat. §39-6,181 remain. The interstate weight limits cannot be implemented by special permit if such permits are to allow the movements of divisible loads or if such permits are issued for more than single trips. The proposed rule and regulation therefore does not benefit from the second "grandfather" date set out in 23 USCS §127. Weight limits may be raised on the Nebraska interstate highway pursuant to Neb.Rev.Stat. §39-6,180.01 (Reissue 1984) which provides as follows:

"Upon finding that no loss to the state of federal highway user funds would result therefrom, the Director-State Engineer may authorize the carrying on the National System of Interstate and Defense Highways of the weights set forth in the table of weights in section 39-6,180 or such part thereof as would result in no loss to the state of such funds."

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A determination and declaration pursuant to §39-6,180.01 would violate neither 23 USCS §127 nor §39-6,181. It would accomplish the purpose of the proposed rule and regulation without the guise of a "special permit" to be issued indiscriminately to vehicles regardless of vehicle type, load, or special circumstance.

The proposed rule and regulation therefore, appears to be not only unlawful, but unnecessary.

Very truly yours,

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Attorney General



John E. Brown
Assistant Attorney General

JEB/ta

APPROVED:



Attorney General