

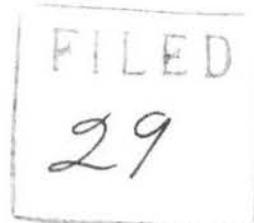
NATIONAL GUARD:
MOTOR VEHICLES:

Section 304.265, RSMo, makes unlawful the operation by a member of the Missouri National Guard of trucks and truck-tractor trailers in possession of the Missouri National Guard unless such vehicles are equipped with rear fenders or mud flaps, regardless of whether the vehicles are owned by the State of Missouri or the United States.

OPINION NO. 29

August 11, 1969

L. B. Adams, Jr., Major General
Adjutant General's Office
Broadway State Office Building
Jefferson City, Missouri 65101



Dear General Adams:

This is in response to your request for an opinion as to the applicability of Section 304.265, RSMo Supp. 1967, to National Guardsmen operating vehicles of the Missouri Guard which do not have rear fenders or mud flaps.

The above statute reads as follows:

"1. It shall be unlawful for any person to operate upon the public highways of this state a truck or truck-tractor trailer, without rear fenders, which is not equipped with mud flaps for the rear wheels. If mud flaps are used, they shall be wide enough to cover the full tread width of the tire or tires being protected; shall be so installed that they extend from the underside of the vehicle body in a vertical plane behind the rear wheels to within eight inches of the ground; and shall be constructed of a rigid material or a flexible material which is of a sufficiently rigid character to provide adequate protection when the vehicle is in motion. No provisions of this section shall apply to a motor vehicle in transit and in process of delivery equipped with temporary mud flaps.

"2. Any person who violates this section is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law."

You state in your letter that the vehicles in question are owned by the Federal Government and are issued to the state for National Guard use, but that they remain the property of the United States and may be withdrawn and distributed elsewhere by the Secretary of the Army or Air Force. This conclusion as to ownership has strong support in the following statutes:

L. B. Adams, Jr., Major General

"(a) All military property issued by the United States to the National Guard remains the property of the United States." (32 USC, §710 (a))

"(c) Whenever he finds it to be in the best interest of the United States, the Secretary of the Army or the Secretary of the Air Force, or his representative, may issue to the Army National Guard or the Air National Guard, as the case may be, supplies of the armed forces under his jurisdiction that are in addition to supplies issued to that National Guard under section 702 of title 32 or charged against its appropriations under section 106 or 107 of title 32, without charge to the appropriations for those components for the cost or value of the supplies or for any related expense.

"(d) Supplies issued under subsection (b) or (c) may be repossessed or redistributed as prescribed by the Secretary concerned." (10 USC, Section 2511, (c) (d)).

Since we do not deem this to be a decisive issue, we will assume for the purposes of this opinion that the vehicles are the property of the Federal Government.

However, the National Guard of Missouri is an agency of the State of Missouri.

"The governor shall be the commander-in-chief of the militia, except when it is called into the service of the United States, and may call out the militia to execute the laws, suppress actual and prevent threatened insurrection, and repel invasion." (Article IV, Section 6, Mo. Const. 1945)

"2. The organized militia shall consist of the following:

"(1) Such elements of the land and air forces of the National Guard of the United States as are allocated to the state by the President or Secretary of Army or Air, and accepted by the state, hereinafter to be known as the national guard and the air national guard." (Section 41.070, RSMo 1959)

L. B. Adams, Jr., Major General

"The National Guard is the modern Militia reserved to the States by Art 1, § 8, cl 15, 16, of the Constitution. It has only been in recent years that the National Guard has been an organized force, capable of being assimilated with ease into the regular military establishment of the United States. From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces. The passage of the National Defense Act of 1916 materially altered the status of the militias by constituting them as the National Guard. Pursuant to power vested in Congress by the Constitution (see n. 8), the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being 'federalized' by units, rather than by drafting individual soldiers. In return, Congress authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments. The Governor, however, remained in charge of the National Guard in each State except when the Guard was called into active federal service; in most instances the Governor administered the Guard through the State Adjutant General, who was required by the Act to report periodically to the National Guard Bureau, a federal organization, on the Guard's reserve status. The basic structure of the 1916 Act has been preserved to the present day.

* * * *

"It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held. . . ." (Maryland v. United States, 381 U.S. 41, 46-47 (1965)).

L. B. Adams, Jr., Major General

Therefore, the state, not the Federal Government is in custody of, and operates these vehicles.

It has long been held that the supremacy clause in Article VI of the United States Constitution prevents a state from imposing restrictions on the Federal Government or its agents. This rule has been generally followed even in areas of highway and traffic laws enacted by the states.

In 1920, the United States Supreme Court denied the power of the State of Maryland to require that a United States postal employee, driving a government vehicle, have a state operator's license.

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. . . ." (Johnson v. Maryland, 254 U.S. 51, 57 (1920)). (Emphasis added).

In 1921, a Federal District Court held that a mail truck driver, employed by the United States Postal Department, could not be convicted of violating an Ohio statute requiring a certain type of headlight to be used on highway vehicles. The truck was owned by the United States, and the employee was required to drive the truck in order to perform his duties.

"To affirm that the authority of the Postmaster General in carrying out the power conferred upon him by Congress is subordinate to the various state laws would be to say that the federal government is not supreme in the selection of instrumentalities for the carrying of the mail. * * * Therefore it must be concluded that the order of the Postmaster General prescribing oil headlights of the type on the truck Willman was driving was a valid exercise of general authority pursuant to law, and that what Willman did in obedience thereto was done pursuant to the laws of the United States, and consequently that he is immune from prosecution by the state for so doing." (Ex parte Willman, 277 Fed. 819, 823 (DCSC, Ohio, 1921)).

The immunity of the United States to restrictive state statutes extends beyond the federal employees. The United States Supreme Court has ruled that a constructor on a Federal construction project in Arkansas was not required to obtain an Arkansas contractor's license. (Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956)).

L. B. Adams, Jr., Major General

In 1963, the Court struck down a Georgia law which prohibited common carriers from allowing reduced rates for the shipment of more than one family's household goods insofar as it interfered with contracting between the General Services Administration and common carriers, for the transportation of Federal Government employee's household goods at rates below the Georgia schedule. (United States v. Georgia Public Service Commission, 371 U.S. 285, 1963)).

It should be noted, however, that in all of the foregoing cases, as well as all related cases we have found, that the only state regulatory laws struck down as incompatible with the supremacy clause or held inapplicable to the Federal Government, its agents, suppliers, or employees, were statutes which placed a restriction on the operation of a recognized function of the Federal Government.

State statutes have been held applicable to federal employees when the violation of such statute was not necessary to the performance of their duties as federal employees. This includes instances where the violation was committed in the performance of these duties (violation of traffic laws while transporting the mails) but was not necessary to the performance of such duties.

Commonwealth v. Closson, 118 N.E. 653 (Mass. 1918);
Hall v. Commonwealth, 105 S.E. 551 (Va. 1921);
State v. Willingham, 143 F.Supp. 445 (D.C. Okla. 1956);
Cline v. United States, 214 F.Supp. 66 (D.C. Tenn. 1962).

In several cases concerning United States' property, the federal courts have ruled that local regulations were inapplicable. However, in each case we have found, the fact that federal property was involved was not considered as decisive. Instead, the courts looked to see if the statute restricted federal functions or disposition of such property.

" . . . local rent control legislation does not affect property of the United States administered by a federal agency." (Grammer v. Virgin Islands Corporation, 235 F.2d 27, 29 (3rd Cir. 1956)). (Emphasis added).

"Since the United States is a government of delegated powers, none of which may be exercised by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any one state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause

L. B. Adams, Jr., Major General

of the Constitution states this essential principle. Article 6. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. . . ." (Mayo v. United States, 319 U.S. 441, 445 (1943)). (Emphasis added).

There is authority for the proposition that a federal employee can be convicted of violating a state maximum vehicle weight statute even though the vehicle is federal property, and the federal employee must violate the statute in order to perform his duties. (Commonwealth of Virginia v. Stiff, 144 F.Supp. 169 (W.D. Va. 1956)). However, in this opinion, we need not decide if this case should be followed completely.

Since Section 304.265, RSMo, does not attempt to regulate any federal activity or impose any restriction on any function of the Federal Government, we believe there is no conflict between the United States Constitution and the statute when applied to Missouri National Guardsmen operating federally owned vehicles issued to the State of Missouri. Thus, the question arises as to whether or not the statute should be applied to state agencies.

A general rule of statutory construction is that governmental units are not within the scope of a statute unless an intention to include them is clearly manifest, especially where prerogatives, rights, titles, or interest of the state would be divested or diminished. (82 C.J.S., Statutes, §318, pp. 555-558).

However, Missouri Courts have tended to disregard this rule when construing highway traffic statutes.

In 1942, the Missouri Supreme Court sitting en banc held that the Missouri Drivers License Act applied to state agents and employees even though there was evidence that such a ruling would cost the state an extra \$35,000 per year.

"Appellants contend that the Drivers' License Act does not expressly mention the state and its agencies and therefore should not be held to include them. That is a rule for statutory construction, still retained by the courts, but which has been somewhat relaxed in modern times.

* * * * *

". . . There is just as much danger to the public in the operation of a state owned car as one which is privately owned. . . ." (Department of Penal Institutions v. Wymore, 165 S.W.2d 618 (Mo. en banc 1942)).

L. B. Adams, Jr., Major General

In 1961, this decision was reaffirmed in holding that the Missouri Motor Vehicle Safety Responsibility Law, Chapter 303, RSMo 1959, applied to municipal employees acting within the scope of their employment. In so holding, the court stated:

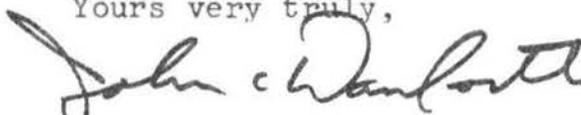
"If the general assembly had intended to make Chapter 303 inapplicable to municipal employees operating motor vehicles owned by the municipality, it could have done so clearly and unmistakably as it has done in other similar instances. . . ." (City of St. Louis v. Carpenter, 341 S.W.2d 786, 790 (Mo. Div. 2, 1961)).

Since the purposes of Chapters 301, 303, and 304, RSMo, are to promote traffic safety and responsibility, we believe, in light of the foregoing cases, that Section 304.265, RSMo, is applicable to employees of state agencies.

CONCLUSION

It is the opinion of this office that Section 304.265, RSMo, makes unlawful the operation by a member of the Missouri National Guard of trucks and truck-tractor trailers in possession of the Missouri National Guard unless such vehicles are equipped with rear fenders or mud flaps, regardless of whether the vehicles are owned by the State of Missouri or the United States.

Yours very truly,



JOHN C. DANFORTH
Attorney General