

Issued on: January 8, 1996.

Gene K. Fong,

Division Administrator, Federal Highway Administration, Washington Division.

Mark E. Yachmetz,

Chief, Passenger Programs Division, Federal Railroad Administration.

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Research and Special Programs Administration

[Docket No. PDA-14(R)]

Application by National Tank Truck Carriers, Inc., for a Preemption Determination as to Hazardous Materials Requirements Imposed by the City of El Paso, Texas

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Public notice and invitation to comment.

SUMMARY: The National Tank Truck Carriers, Inc. (NTTC) has applied for an administrative determination as to whether the Federal hazardous material transportation law preempts certain provisions of Chapter 9.56 of the City of El Paso, Texas Municipal Code requiring motor carriers or operators that transport hazardous materials to obtain a permit based on inspections which are conducted only during limited time periods, from November 1 through December 31 of each year.

DATES: Comments received on or before March 4, 1996, and rebuttal comments received on or before April 18, 1996, will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised in comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comments received may be reviewed in the Dockets Unit, Research and Special Programs Administration, Room 8421, 400 Seventh Street, SW, Washington, DC 20590-0001 (Tel. No. [202] 366-4453). Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number (PDA-14(R)). Three copies of each should be submitted. In addition, a copy of each comment and each rebuttal comment must be sent to: (1) Mr. Clifford J. Harvison, President, National Tank Truck Carriers, Inc., 2200 Mill Road, Alexandria, VA 22314; and (2) Mr. David Caylor, City Attorney, City

of El Paso, #2 Civic Center Plaza, Ninth Floor, El Paso, TX 79901. A certification that a copy has been sent to each person must also be included with each comment. (The following format is suggested: "I hereby certify that copies of this comment have been sent to Messrs. Harvison and Caylor at the addresses specified in the Federal Register.")

FOR FURTHER INFORMATION CONTACT:

Karin V. Christian, Attorney, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW, Washington, DC 20590-0001 (Tel. No. [202] 366-4400).

SUPPLEMENTARY INFORMATION:

I. NTTC'S Application for a Preemption Determination

On December 10, 1995, NTTC applied for a determination that the Federal hazardous material transportation law preempts certain provisions of Chapter 9.56 of the City of El Paso, Texas Municipal Code requiring motor carriers or operators transporting hazardous materials to obtain permits based on inspections conducted only during limited periods of time, from November 1 through December 31 of each year.

Section 9.56.080 of the City of El Paso Municipal Code states:

(a) It is unlawful for any motor carrier or operator to transport hazardous materials from a point of origin within the city or to a point of destination within the city without a permit issued by the Fire Marshal, or his designee.

(b) The annual inspection period shall be from November 1 through December 31 of each year.

(c) A permit fee of Fifty Dollars (\$50.00) per vehicle shall be paid upon inspection of the vehicle. Vehicles failing inspection shall be assessed an additional Twenty-Five Dollars (\$25.00) fee for reinspection.

(d) No permit issued under this Chapter shall be transferable from one person to another nor from one vehicle to another. The permit shall be visibly posted in each vehicle.

The text of NTTC's application is set forth in Appendix A. The attachments to the application, consisting of a copy of the ordinance adopting a new Chapter 9.56 of the El Paso Municipal Code and an El Paso Fire Department letter confirming active enforcement of the ordinance, may be examined at RSPA's Dockets Unit. Copies of the attachments will be provided at no cost, upon request to RSPA's Dockets Unit (see the address and telephone number set forth in the **ADDRESSES** section above.)

II. Preemption Under the Federal Hazardous Material Transportation Law

The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to give the Department of Transportation greater authority "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." Pub. L. 93-633 § 102, 88 Stat. 2156, amended by Pub. L. 103-272 and codified as revised in 49 U.S.C. 5101. A key aspect of HMTA is that it replaced a patchwork of State and local laws. On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified and enacted "without substantive change" by Public Law 103-272, 108 Stat. 745. The Federal hazardous material transportation law is now found in 49 U.S.C. Chapter 51.

A statutory provision for Federal preemption was central to the HMTA. In 1974, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). More recently, the U.S. Court of Appeals for the Tenth Circuit found that uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments which expanded the preemption provisions. *Colorado Public Utilities Comm. v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

Following the 1990 amendments and the subsequent 1994 codification of the Federal law governing the transportation of hazardous material, in the absence of a waiver of preemption by the Department of Transportation (DOT) under 49 U.S.C. 5125(e), "a requirement of a State, political subdivision of a State, or Indian tribe" is explicitly preempted (unless it is authorized by another Federal law) if—

(1) complying with a requirement of the State, political subdivision or tribe and a requirement of this chapter or a regulation issued under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

49 U.S.C. 5125(a). These two paragraphs set forth the "dual compliance" and "obstacle" criteria which RSPA consistently has applied since 1978.

In the 1990 amendments to the HMTA, Congress also confirmed that there is no room for deviations from

Federal requirements in certain key matters involving the transportation of hazardous material. Under the present codified statute, a non-Federal requirement "about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter," is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption. Section 5125(b)(1) lists these five "covered subjects" as:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

RSPA has defined "substantively the same" to mean "conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

Under 49 U.S.C. 5125(d)(1), any person directly affected by a requirement may apply to the Secretary of Transportation for a determination whether a State, political subdivision, or Indian tribe requirement is preempted by the Federal hazardous material transportation law. Notice of an application for a preemption determination must be published in the Federal Register, and the applicant is precluded from seeking judicial relief on the "same or substantially the same issue" of preemption for 180 days after the application, or until the Secretary takes final action on the application, whichever occurs first. Following the receipt and consideration of written comments, RSPA publishes its determination in the Federal Register. See 49 C.F.R. 107.209(d). A party to a preemption determination proceeding may seek judicial review of the determination in U.S. district court within 60 days after the determination becomes final. 49 U.S.C. 5125(f).

The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing, which have been delegated to the Federal Highway Administration. 49

CFR 1.53(b). RSPA's regulations concerning preemption determinations are set forth at 49 CFR 107.201-107.211. Under these regulations, RSPA's Associate Administrator for Hazardous Materials Safety issues preemption determinations. Any person aggrieved by RSPA's decision on an application for a preemption determination may file a petition for reconsideration within 20 days of service of that decision. 49 CFR 107.211(a).

The decision by RSPA's Associate Administrator for Hazardous Materials Safety becomes RSPA's final decision 20 days after service if no petition for reconsideration is filed within that time; the filing of a petition for reconsideration is not a prerequisite to seeking judicial review under 49 U.S.C. 5125(f). If a petition for reconsideration is filed, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration is RSPA's final agency action. 49 CFR 107.211(d).

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policy set forth in Executive Order No. 12,612, entitled "Federalism" (52 FR 41685 [Oct. 30, 1987]). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains 10 an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express provisions, which RSPA has implemented through its regulations.

III. Public Comment

All comments should be limited to the issue of whether the cited provisions of Chapter 9.56 of the City of El Paso Municipal Code are preempted by the Federal hazardous material transportation law. Comments should specifically address the preemption criteria ("substantively the same," "dual compliance," and "obstacle" tests described in Part II above) and whether the City of El Paso Municipal Code requirements are "otherwise authorized by Federal law."

Persons intending to comment should review the standards and procedures

governing RSPA's consideration of applications for preemption determinations, set forth at 49 CFR 107.201-107.211.

Issued in Washington, DC on January 11, 1996.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

Appendix A—A Petition Seeking a "Preemption Determination" With Regard to Specified Laws and Ordinances of the City of El Paso, Texas. Filed by: National Tank Truck Carriers, Inc.

Before The Administrator: National Tank Truck Carriers, Inc. (NTTC) is a trade association representing over 200 motor carriers specializing in the transportation of hazardous materials, hazardous substances and hazardous wastes in cargo tank motor vehicles. Typically, this association's membership operates vehicles over irregular routes throughout the continental United States.

Virtually all of the members of NTTC are involved in the "common carrier" transportation of commodities regulated as "hazardous materials" by the Administrator. Given the nature of "common carriage", individual members of this [association], having neither a domicile nor a terminal in El Paso, Texas, are (nonetheless) called upon to perform transportation services into, out of and through that City. Thus, the interests of this Association (and its individual members) are impacted.

Most recently, this association has become aware that the City of El Paso, Texas intends an active enforcement program relative to provisions of Chapter 9.56 of that city's "Municipal Code" (herein referred to, alternatively, as "the Ordinance"). A copy of Chapter 9.56 (as forwarded to NTTC by the City Clerk's office of the City) is appended to this petition. Also attached is a copy of a letter from the City's Fire Department underscoring the intention of the City to conduct vehicle inspections, during a limited period of time. Presumably, the vehicular inspections are a prerequisite to obtaining a permit mandated by the Ordinance. We enclose this letter only to underscore the fact that active enforcement is contemplated by the City. The issue is not moot.

NTTC's Position

NTTC believes that substantial provisions of the City of El Paso's Chapter 9.56, as enforced, are preempted by the Hazardous Materials Transportation Uniform Safety Act (as amended) ("the Act"), and we ask that

following public notice and opportunity for comment the Administrator issue a formal determination of preemption. Specifically, NTTC believes that the El Paso regulation, as currently applied and enforced, would cause a motor carrier to violate 49 CFR 177.853(a).

A Brief Description of the Issue

On December 29, 1993, officials of the City of El Paso codified revisions of Chapter 9.56 of the city's Municipal Code. Certain provisions of the new Ordinance encompass "findings", various definitions, "minimum safety requirements", a routing scheme (including allowable circumstances for deviation), "permits and fees", "violations and penalties", etc. It would appear that the Ordinance is enforceable against any commercial vehicle laden with hazardous materials, regardless of configuration (e.g. cargo tank vs. van trailer, etc.). Moreover, via the Ordinance the city adopts certain portions of the Administrator's Hazardous Materials Regulations (HMR) as its own.

According to NTTC's interpretation of Chapter 9.56, virtually any transporter having cause to pick-up and/or deliver regulated quantities of any hazardous material (as defined within the HMR), at any time in a given year at any place in the City, would be required to present any and all vehicles used in such transportation at designated points within the city, between November 1 and December 31, each year, for inspection. We assume that the inspection would evaluate compliance with relevant Federal regulations. Presuming satisfactory completion of the inspection, the vehicle owner would pay a fee (for the inspection) and be issued a "permit". That permit would be valid for one year and must be "visibly posted" in the vehicle. Permits may not be transferred from vehicle to vehicle.

The permit is subject to revocation, suspension, modification or denial, and an appeal process is in place. The provisions of the 14 Ordinance are enforceable by designated city employees and the penalties for non-compliance are substantial.

Safety and Operational Considerations

From the standpoint of its impact on the tank truck industry, Chapter 9.56 is little more than a series of enforceable requirements rolled into one. Herein, NTTC will concentrate on two areas of concern; namely, the "permit" and the "inspection".

Historically, the Administrator has charged petitioners (in these disputes) to evaluate state and local restrictions in

terms of the "dual compliance test" and/or the "obstacle test".

Standing alone, neither the inspection program nor the permit scheme invite review. Certainly, NTTC would not question the efficacy of safety inspections conducted by trained personnel and aimed at measuring compliance with Federal safety regulations. Similarly (and beginning with IR#2), the Administrator has held that a permit, per se, is not necessarily preempted.

In the case of the El Paso law, however, the inspection and the permit are linked, inexorably. One cannot obtain a permit without an inspection and one cannot have a vehicle inspected unless he/she presents that vehicle before city officials at specific points and within a very narrow time frame.

Argument

NTTC believes that the Administrator need not go beyond his findings and ruling in the matter of PD-4(R); Docket No. PDA-6(R) "California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids; Decision on Petition for Reconsideration" to justify a ruling that the El Paso Ordinance is (similarly) preempted.

Perhaps unknowingly, the City of El Paso has taken the preempted provisions of the California Vehicle Code and added a new and sharply limiting twist. California required an inbound vehicle to remain in that state (whether loaded or empty) until a safety inspection had been performed. In the alternative, a carrier could "pre-notify" California officials of a shipment bound for its jurisdiction and "schedule" an inspection. El Paso, on the other hand, would not only replicate California's preempted "waiting" period, it would compound the felony by limiting inspection times to a time frame within November 1 and December 31.

As we noted in the California docket, "the call and demand nature of common carriage means that management may be unaware that a given vehicle, dispatched from a given terminal at a given time, is destined for California." Obviously, the same holds true for El Paso.

Even if the City amends its current procedures for performing inspections and issuing permits such must only be done within constraints clearly outlined by the Administrator, to wit: (a jurisdiction) may not require an inspection as a condition of travelling on (that jurisdiction's) roads when the inspection cannot be conducted without delay because an inspector must come to the place of inspection from another

location. (PD-4(R); Docket No. PDA-6(R); Decision on Petition for Reconsideration. Issued February 7, 1995).

We grant the fact that, in the case of El Paso's ordinance some circumstances differ from those explored in the California decision, but the burden is the same, to wit: the carrier is compelled to present its vehicle (whether laden or empty) for inspection at a specific place and within a narrow time frame. The net impact of the city's law replicates the opportunities (and actualities) for delay preempted in California.

Paraphrasing the Administrator's rationale in preempting the California regulations, we suggest that, ". . . (El Paso) is free, and is encouraged, to conduct inspections of cargo tanks and portable tanks at POEs, other roadside inspection locations, and terminals. However, it may not require an inspection as a condition of travelling on (El Paso's) roads when the inspection cannot be conducted without (unnecessary) delay. . . ."

Additionally, and as noted by NTTC in other proceedings, should other state or local jurisdictions enact requirements replicating El Paso's the result would be chaotic. We foresee wandering parades of trucks, of all shapes and sizes, crossing the nation's landscape seeking safety inspections in the off-hand chance that sometime in the next 365 days they might required to pick up and/or deliver a load to one or more of the inspecting jurisdictions. We see the windshields of those trucks so plastered with "permits" that the driver's field of vision is through a "paper tunnel".

Frankly, we doubt that the City has any realistic idea of the tumult that would result from comprehensive enforcement of Chapter 9.56.

Summary

Chapter 9.56 of the El Paso Municipal Code imposes an inspection and permit scheme which, in substance and enforcement, replicates that of the State of California which was preempted by the Administrator. As such, it deserves (indeed, mandates) a similar fate.

(Note: A copy of this petition has been sent via first class mail to the Office of the City Clerk and the Office of the Mayor of El Paso, Texas).

Respectfully submitted:

Clifford J. Harvison,

President.

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