DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–98–3665 (PDA–21 (R))]

Application by Association of Waste Hazardous Materials Transporters for a Preemption Determination as to Tennessee Hazardous Waste Transporter Fee and Reporting Requirements

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

ACTION: Public notice and invitation to comment.

SUMMARY: Interested parties are invited to submit comments on an application by the Association of Waste Hazardous Materials Transporters (AWHMT) for an administrative determination whether Federal hazardous materials transportation law preempts requirements of the State of Tennessee, applicable to transporters of hazardous waste, for the payment of a remedial action fee and the filing of a written report of any hazardous waste discharge within the State.

DATES: Comments received on or before May 26, 1998, and rebuttal comments received on or before July 8, 1998, will be considered before an administrative ruling is issued jointly by RSPA's Associate Administrator for Hazardous Materials Safety and FHWA's Administrator. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and all comments received may be reviewed in the Dockets Office, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW, Washington, DC 20590–0001. The application and all comments are also available on-line through the home page of DOT's Docket Management System, at ''http://dms.dot.gov.''

Comments should be submitted to the Dockets Office at the above address. Three copies of each written comment should be submitted. Comments may also be submitted by E–mail to ''rspa.counsel@rspa.dot.gov.'' Each comment should refer to the Docket Number set forth above. A copy of each comment must also be sent to (1) Mr. Michael Carney, Chairman, Association of Waste Hazardous Materials Transporters, 2200 Mill Road, Alexandria, VA 22314, and (2) Mr. Milton Hamilton, Jr., Commissioner, Tennessee Department of Environment & Conservation, 401 Church Street, 21st Floor, L&C Tower, Nashville, TN 37243. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: ''I certify that copies of this comment have been sent to Messrs. Carney and Hamilton at the address specified in the **Federal Register**.'')

A list and subject matter index of hazardous materials preemption cases, including all inconsistency rulings and preemption determination issued, are available through the home page of RSPA's Office of the Chief Counsel, at ''http://rspa-atty.dot.gov.'' A paper copy of this list and index will be provided at no cost upon request to the individual named in ''For Further Information Contact'' below.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

AWHMT has applied for a determination that Federal hazardous material transportation law preempts Tennessee statutory and regulatory requirements that transporters of hazardous waste pay a remedial action fee and file written reports of any discharge of hazardous waste within the State.

According to AWHMT, each person who is issued a hazardous waste transporter permit under the Tennessee Hazardous Waste Management Act must pay both a registration fee and a Superfund Remedial Action Fee. The Superfund Remedial Action Fee is currently set at $650 per year, under Tennessee Code 68–212–203(a)(6) and Rule 1200–1–13–.03(1)(e) of the Tennessee Department of Environment & Conservation (DEC). It appears that a transporter must hold a permit from the Tennessee DEC in order to transport, within the State, hazardous waste that originates or terminates in Tennessee. DEC Rule 1200–1–11–.04(2)(a).

AWHMT also states that a transporter of hazardous waste must submit a written report to DEC of ''each hazardous waste discharge during transportation that occurs in this state.'' DEC Rule 1200–1–11–.04(4)(a)(4). The Note to that section states that a copy of DOT form 5800.1, as required by 49 CFR 171.16, ''shall suffice for this report provided that it is properly completed and supplemented as necessary to include all information required by this paragraph.''

AWHMT asserts that Tennessee's Superfund Remedial Action Fee is preempted because the proceeds are not used exclusively for purposes related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. AWHMT also contends that this is a ''flat fee'' that is preempted because it has no relation to the transporter's operations within the State. AWHMT states that Tennessee's requirement to submit written reports of any hazardous waste discharge is preempted because it is not substantively the same as DOT's requirements in 49 CFR 171.16.

The text of AWHMT's application and a list of the attachments are set forth in appendix A. A paper copy of the attachments to AWHMT's application will be provided at no cost upon request to the individual named in ''For Further Information Contact'' above.

II. Federal Preemption

Section 5125 of Title 49 U.S.C. contains several preemption provisions that are relevant to AWHMT's application. Subsection (a) provides that—in the absence of a waiver of preemption by DOT under section 5125(e) or specific authority in another Federal law—a requirement of a State, political subdivision of a State, or Indian tribe is preempted 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 the accomplishing and carrying out of this chapter or a regulation prescribed under this chapter.

These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria which RSPA had applied in issuing inconsistency rulings prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Public Law 93–633 112(a), 88 Stat. 2161 (1975). The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.*, 435 U.S. 151 (1978).

Subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning any of the following subjects, that is not ''substantively the same as'' a provision of Federal hazardous material transportation law or a regulation prescribed under that

law, is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption:

(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.

To be ''substantively the same,'' the non-Federal requirement must ''conform[] in every significant respect to the Federal requirement. Editorial and other similar de minimis changes are permitted.'' 49 CFR 107.202(d).

Subsection (g)(1) of 49 U.S.C. 5125 provides that a State, political subdivision, or Indian tribe may

impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

These preemption provisions in 49 U.S.C. 5125 carry out Congress's view that a single body of uniform Federal regulations promotes safety in the transportation of hazardous materials. In considering the HMTA, 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). When it amended the HMTA in 1990, Congress specifically found that:

(3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements.

(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Public Law 101–615 section 2, 104 Stat. 3244. A Federal Court of Appeals has found that uniformity was the ''linchpin'' in the design of the HMTA, including the 1990 amendments which expanded the original preemption provision. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991). (In 1994, the HMTA was revised, codified and enacted ''without substantive change,'' at 49 U.S.C. Chapter 51. Pub. L. 103–272, 108 Stat. 745.)

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated authority to RSPA the authority to make determinations of preemption, except for those concerning highway routing which have been delegated to FHWA. 40 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination must be published in the **Federal Register.** Following the receipt and consideration of written comments, RSPA will publish its determination in the **Federal Register.** *See* 49 CFR 107.209(d). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

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. A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon,* above, 951 F.2d at 1581 n.10.

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. 12612, 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 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 preemption provisions, which RSPA has implemented through its regulations.

III. Public Comments

All comments should be limited to the issue whether 49 U.S.C. 5125 preempts the Tennessee requirements challenged by AWHMT. Comments should:

(A) Set forth in detail the manner in which the Tennessee Superfund Remedial Action Fee and discharge reporting requirements are applied and enforced, including but not limited to:

(1) The total amount of Superfund Remedial Action Fees collected by Tennessee for fiscal year 1996–97 and all purposes for which those fees were used (including an identification of the specific accounts into which those fees were deposited); and

(2) Whether the information required to be submitted on a written report of a hazardous waste discharge exceeds the information required to be reported to RSPA on DOT form 5800.1; and

(B) Specifically address the preemption criteria set forth in Part II, above.

Persons intending to comment should review RSPA's standards and procedures governing consideration of applications for preemption determinations, set forth at 49 CFR 107.201–107.211.

Issued in Washington, DC, on April 2, 1998.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.

Appendix A

Before the United States Department of Transportation Office of Hazardous Materials Safety

Application of the Association of Waste Hazardous Materials Transporters to initiate a proceeding to determine Whether Certain Fees and Incident Reporting Requirements Imposed By the State of Tennessee on Persons Involved in the Transportation of Hazardous Wastes to or From Locations Within The State are Preempted by the Hazardous Materials Transportation Act. March 23, 1998.

Application of the Association of Waste Hazardous Materials Transporters to initiate a proceeding to determine whether certain fees and incident reporting requirements imposed by the State of Tennessee on persons involved in the transportation of

hazardous wastes to or from locations within the State are preempted by the Hazardous Materials Transportation Act.

Interest of the Petitioner

The Association of Waste Hazardous Materials Transporters (AWHMT) represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous materials, throughout the United States, including within the State of Tennessee (State). Despite full compliance with the hazardous materials regulations (HMRs), members of the AWHMT are precluded from transporting manifested shipments of hazardous waste within the State unless, among other things, certain fees are paid to the Department of Environment and Conservation (DEC). In addition, transporters are in violation of DEC requirements and in jeopardy of losing their permits to transport hazardous waste until they file written reports following any hazardous waste incident. The AWHMT asserts that the State requirements are in contravention to the Hazardous Materials Transportation Act (HMTA).

Background

The Association of Waste Hazardous Materials Transporters (AWHMT) was invited to provide comment on several bills before the Tennessee legislature earlier this year. These bills dealt with reforming permit requirements currently imposed on transporters of hazardous waste in the State. Part of our review disclosed that the DEC annually imposes a flat $650 remedial action fee on transporters of hazardous waste. We presented arguments that suggested the DEC's fee violates federal law. The DEC has rejected our argument.

Further review of the DEC requirements suggests to us that a requirement to file written incident reports with the Department also violates federal law.

Despite the questionable legality of these requirements, the DEC imposes such stringent penalties for non-compliance that transporters comply. First, the Code declares it ''unlawful to * * * refuse or fail to pay to the department fees assessed pursuant to the provisions of (the Code or to) fail to provide information in violation of the rules, regulations, or orders of the (DEC).'' [1] The Code then makes clear that transporters are precluded from transporting hazardous waste to or from any location in the state without first obtaining a permit from the DEC.[2] Failure of a permit applicant or permittee to pay the required annual remedial action fee is grounds for denial or revocation of a permit.[3] Finally, any person who violates or fails to comply with any provision, term or condition of any permit issued, or any rule, regulation or standard adopted pursuant to the Code is subject to a civil penalty of up to $50,000 per day for each day of violation. Each day upon which such violation occurs constitutes a separate punishable offense.[4] As proof that the DEC applies and enforces its fees, a current permit application package is attached.

State Requirement for Which A Determination is Sought

This application seeks preemption of the following State requirements:

- Tennessee Code (Code) section 68–212–203(a)(6) concerning remedial action fees
- Tennessee DEC Rule (Rule) section 1200–1–13–.03(1)(e) concerning remedial action fees
- Rule section 1200–1–11–.04(4)(a)4 concerning written incident reports

RCRA does not shield State Hazardous Waste Requirements from Scrutiny Under The HMTA

The challenged requirements pertain to the transportation of hazardous waste. Tennessee is authorized by the U.S. Environmental Protection Agency (EPA) to administer the federal hazardous waste program. Many states have pointed to such authorization as a defense against the preemptive authority of the Hazardous Materials Transportation Act (HMTA). This defense, however, is without merit.

All hazardous wastes are designated ''hazardous substances'' under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[5] As such, hazardous wastes are explicitly required to be ''listed and regulated as * * * hazardous materials under the Hazardous Materials Transportation Act.'' [6] The U.S. Department of Transportation (DOT) defines the term ''hazardous material'' to include ''hazardous waste.'' [7] The hazardous materials regulations (HMR) issued pursuant to the HMTA apply to the transportation of hazardous wastes by intrastate, interstate, and foreign carriers.[8]

In enacting the Resource Conservation and Recovery Act (RCRA) in 1976, Congress provided that EPA's regulations on transporters of hazardous waste must be consistent with the requirements of the HMTA and the HMR.[9] The deferral to the HMTA and the HMR for the regulation of hazardous waste in transportation was intended to avoid duplicative requirements. EPA's concern about such inefficiency and confusion lead the Agency to state that the HMR are ''capable of being modified under the HMTA to address the transportation hazards of waste materials and that RCRA affirms the need for such a modification.'' [10] When EPA delegates its authority to issue regulations to a state, as it has in Tennessee, the state's hazardous waste program must be equivalent to the federal program and consistent with other state authorized programs.[11]

EPA has consistently maintained that its approval of a state's hazardous waste program does not preclude preemption under the HMTA.[12] Provisions of RCRA which allow states to impose ''more stringent'' requirements than those established by EPA,[13] must be read consistently with the HMTA.[14] Thus, while RCRA does not contain a procedure for prohibiting states from imposing requirements on the transportation of hazardous waste that are more stringent or broader in scope that those imposed by EPA, states may not rely on RCRA to shield such requirements from review under the HMTA.

The HMTA Provides for the Preemption of Non-Federal Requirements When Those Non-Federal Requirements Fail Certain Federal Preemption Tests

The HMTA was enacted in 1975 to give the DOT greater authority ''to protect the Nation adequately against the risks of life and property which are inherent in the transportation of hazardous materials in commerce.'' [15] By vesting primary authority over the transportation of hazardous materials in the DOT, Congress intended to ''make possible for the first time a comprehensive approach to minimization of the risks associated with the movement of valuable but dangerous materials.'' [16] As originally enacted, the HMTA included a preemption provision ''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.'' [17] This preemption provision was implemented through an administrative process where DOT would issue ''inconsistency rulings'' as to, [w]hether compliance with both the State or political subdivision requirement and the Act or the regulations issued under the Act is possible; and [t]he extent to which the State of political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.[18]

These criteria, commonly referred to as the ''dual compliance'' and ''obstacle'' tests, ''comport[ed] with the test for conflict between Federal and State statutes enunciated by the Supreme Court in *Hines* versus *Davidowitz*, 312 U.S. 52 (1941).'' [19]

In 1990, Congress codified the dual compliance and obstacle tests as the Act's general preemption provision.[20] The 1990 amendments also expanded on DOT's preemption authorities, setting four other standards under which non-federal requirements could be subject to preemption

[1] Tenn. Code 68–212–105(4) & (5).

[2] Tenn. Code 68–212–108(a)(1).

[3] Tenn. Code 68–212–110(d).

[4] Tenn. Code 68–212–114(b)(1).

[5] 42 U.S.C. 9601(14)(C).

[6] 42 U.S.C. 9656(a).

[7] 49 CFR 171.8, definition of ''hazardous materials.''

[8] 49 CFR 171.1(a).

[9] 42 U.S.C. 6923(b).

[10] 43 FR 22626 (May 25, 1978).

[11] 42 U.S.C. 6926.

[12] 57 FR 32726, 32728 (July 23, 1994), and letter to Cynthia Hilton, Chemical Waste Transportation Institute (CWTI), from Devereaux Barnes, EPA, October 29, 1992.

[13] 49 U.S.C. 6929.

[14] *Morton* versus *Mancari*, 417 U.S. 535, 551 (1974).

[15] Pub. L. 93–633 sec. 102.

[16] S. Rep. 1192, 93rd Cong., 2d Sess., 1974, page 2.

[17] S. Rep. 1192, 93rd Cong., 2d Sess, 1974, page 37.

[18] 41 FR 38171 (September 9, 1976).

[19] 41 FR 38168 (September 9, 1976).

[20] 49 U.S.C. 5125(a).

review. Two of these standards are of significance to this petition:

• First, Congress expressly preempted non-federal requirements in five covered subject areas if they are not ''substantively the same'' as the federal requirements. Among these covered subject areas is the written notification, recording, and reporting of the unintentional release in transportation of hazardous materials.[21] ''Substantively the same'' was defined to mean ''conforms in every significant respect to the Federal requirement. Editorial and other similar de minimis, changes are permitted.''[22]

• Second, non-federal fees related to the transportation of hazardous materials are preempted unless the fees are ''fair and used for a purpose related to transporting hazardous materials.''[23]

DOT's preemption authority is limited only to the extent that non-federal requirements are ''otherwise authorized'' by federal law. As noted above, state requirements affecting transporters of hazardous waste are not ''authorized by another law of the United States,'' within the meaning of 49 U.S.C. 5125, simply because they are contained in an EPA-authorized state hazardous waste program.[24]

Our review of federal law and the Code leads us to believe that the following specific requirements, absent further modification and/or clarification, are subject to preemption pursuant to 49 U.S.C. 5125(a)(2) and (b)(1)(D).

The Remedial Action Fee Imposed by the Code and Rule is not ''Fair'' Or ''Used for a Purpose Related to Transporting Hazardous Material'' and is Subject to Preemption Under the Obstacle Test

Code § 68–212–203(a)(6) and Rule Section 1200–1–13–.03(1)(e) authorize and impose an annual assessment of $650 on transporters of manifested hazardous waste shipments moving to or from locations in the State. The revenue from this fee collection is deposited in the DEC's ''Hazardous Waste Remedial Action Fund'' (Fund)[25] Code § 68–212–205 outlines the uses to which the revenues in the Fund can be applied.

As noted above, the HMTA provides that ''a State * * * may impose a fee related to transporting hazardous materials only if the fee is fair and used for a purpose related to transporting hazardous materials, including enforcement and planning, developing, and maintaining a capability for emergency response.''[26] DOT considered ''transportation-related fees'' to include fees imposed ''as a condition for authority or permission to transport any hazardous materials into, through, or within'' a state.[27] DOT has affirmed that fees imposed by a State that did not meet the standards set forth in the law would ''create an obstacle to the accomplishment and execution of the [HMTA]'', and consequently, be subject to administrative preemption under the ''obstacle test.''[28]

• Used For Test

The DEC is in violation of federal law because the revenue collected from hazardous waste transporters in the Fund is used for ''identifying and investigating inactive hazardous substance sites * * * and for investigating and reasonably and safely containing, cleaning up, monitoring and maintaining such sites as provided in the [Code].''[29] The Fund may also be used, in conjunction with the above purpose, for consultants and personnel, for equipment, or ''other necessary expenses.''[30] The Fund may be used to match federal funds available under CERCLA.[31] Other authorized uses of the Fund are to provide technical assistance to generators; to promote the DEC's waste reduction and pollution prevention programs; to operate an information clearinghouse for generators; to coordinate an award program for innovative approaches to reducing hazardous waste generation; to conduct training sessions and publish reports targeted to segments of industry concerning hazardous waste reduction; to prepare an annual report to the State Legislature; to accept gifts and grants; to provide grants to generators of hazardous waste; to provide research grants to develop new technology for the reduction or better treatment of hazardous waste; and to review waste reduction plans. Despite the exhaustive uses of the Fund, none address enforcement and emergency response for transportation of hazardous materials within the meaning of 49 U.S.C. 5125(g)(1). DOT has already preempted non-federal fees based on the non-federal entity's unauthorized use of a hazmat transportation-related fee. DOT should not tolerate the continuation of the Remedial Action fee for the same reason.

• Fairness Test

The DEC's remedial action fee is set at a flat rate and unapportioned to each motor carrier's presence in the State. The U.S. Supreme Court has declared fees which are flat and unapportioned to be unconstitutional under the Commerce Clause because, among other things, such fees fail the ''internal consistency'' test.[32] The Court reasoned that a state fee levied on an interstate operation violates the Commerce Clause because, if replicated by other jurisdictions, such fees lead to interstate carriers being subject to multiple times the rate of taxation paid by purely local carriers even though each carrier's vehicles operate an identical number of miles.[33] In addition, because they are unapportioned, flat fees cannot be said to be ''fairly related'' to a feepayer's level of presence or activities in the fee-assessing jurisdiction.[34] In a number of subsequent cases, courts have relied on these arguments to strike down, enjoin, or escrow flat hazardous materials taxes and fees.[35]

We submit that the DEC's flat remedial action fee also runs afoul of the HMTA because it is inherently ''unfair.'' Some motor carriers, otherwise in compliance with the HMRs, will inevitably be unable to shoulder multiple flat fees, and thus be excluded from some sub-set of fee-imposing jurisdictions. If the State's flat fee scheme is allowed to stand, similar fees must be allowed in the Nation's other 30,000 non-federal jurisdictions. The cumulative effect of such outcome would be not only a generally undesirable patchwork of regulations necessary to collect the various fees, but the balkanization of carrier areas of operation and attendant, unnecessary handling of hazardous materials as these materials are transferred from one company to another at jurisdictional borders. The increased transfers would pose a serious risk to safety, since ''the more frequently hazardous material is handled during transportation, the greater the risk of mishap.''[36]

In recognition of these outcomes, Congress amended the HMTA, in 1990, to provide, in addition to the ''used for'' test, the hazardous materials transportation-related fee ''fairness'' test. Augmenting this authority, Congress further provided, in the 1994 amendments to the HMTA, that DOT collect information about the basis on which the fee is levied.[37] The then-Chairman of the Senate Subcommittee to authorize the amendment explained that DOT was to use this authority to determine if the hazardous materials fees are ''subject to preemption.''[38] When determining what constitutes, ''fair,'' the Chairman clarified that ''the usual constitutional commerce clause protections remain applicable and prohibit fees that discriminate or unduly burden interstate commerce.''[39] In closely analogous circumstances, the Supreme Court considered the meaning of 49 U.S.C. 1513(b), which authorizes States to impose ''reasonable'' charges on the users of airports. The Court read the statute to apply a ''reasonableness standard taken directly from * * * dormant Commerce Clause jurisprudence.''[40] In the absence of any

[21] 49 U.S.C. 5125(b)(1)(D).

[22] 49 CFR 107.202(d).

[23] 49 U.S.C. 5125(g).

[24] *Colo. Pub. Util. Comm'n* versus *Harmon*, 951 F.2d, 1571, 1581 n. 10, (10th Cir. 1991).

[25] Code section 68–212–204.

[26] U.S.C. 5125(g)(1).

[27] Letter to Robert Shinn, New Jersey Dept. of Environmental Protection, from Alan I. Roberts, RSPA, May 24, 1995.

[28] Letter to Cynthia Hilton, CWTI, from Alan I. Roberts, DOT, October 6, 1993.

[29] Code section 68–212–205(a).

[30] Code section 68–212–205(b).

[31] Code section 68–212–205(c).

[32] *American Trucking Assn's* versus *Scheiner*, 483 U.S. 266 (1987).

[33] *Ibid.*, 284–86.

[34] *Ibid.*, 290–291 (citing *Commonwealth Edison Co.* versus *Montana*, 453 U.S. 609, 629 (1981).

[35] *American Trucking Assn's, Inc.* versus *State of New Jersey*, No. 11562–92 (N.J.T.C., March 11, 1998) (oral opinion declaring flat, annual $250 per truck hazardous waste transporter fee unconstitutional under the Commerce Clause), *American Trucking Assn's Inc.* versus *State of Wisconsin*, No. 95–1714, 1996 WL 593806 (Wisc. App. Ct., October 1996) (holding flat, annual per-company hazardous materials fees to be violative of the Commerce Clause). *American Trucking Assn's Inc.* versus *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993) (finding unconstitutional annual, flat per-vehicle hazardous waste fee). *American Trucking Assn's Inc.* versus *Secretary of State*, 595 A.2d 1014 (Me. 1991) (finding unconstitutional flat per-vehicle hazardous materials fees).

[36] *Missouri Pac. R.R. Co.* versus *Railroad Comm'n of Texas*, 671 F. Supp. 466, 480–81 (W.D. Tex. 1987).

[37] 49 U.S.C. 5125(g)(2).

[38] *Cong. Record*, August 11, 1994, page 11324.

[39] *Ibid.*

[40] *Northwest Airlines* v. *State of Kent*, 510 U.S. 355, 374, 127 L.Ed. 2d 183, 114 S.Ct. 855 (1994).

evidence the Congress meant to sanction non-federal fees that are discriminatory or malapportioned, a ''fair'' fee within the meaning of 49 U.S.C. 5125(g)(1) surely is one that, at a minimum, complies with the requirements of the Commerce Clause.

Additionally, it must be remembered that the Code and Rule impose the challenged flat fee only on transporters engaged in the transportation of manifested shipments of hazardous waste moving to or from locations in Tennessee. However, AWHMT has reviewed the hazardous materials incident reports filed with DOT pursuant to 49 CFR 171.16 and discovered, for the five-year representative period 1992–1996, that 1819 hazardous materials incidents were reported in Tennessee of which 102 involved the transportation of hazardous waste.[41] Forty-six percent of the hazardous waste incidents involved shipments by transporters technically unpermitted by the State and not subject to the remedial action fee because the shipments were not destined to or from locations in the State. Of the 1819 incidents, 42 met DOT's definition of ''serious;'' only one of the 42 involved the transportation of hazardous waste.[42] The State clearly has unfairly burdened certain hazardous waste carriers with fees and requirements that are unsupported by the risk presented to the citizens and/or environment of the State.

For the above listed reasons, we assert that flat fees are inherently ''unfair'' and that the State's fee scheme should fall to the obstacle test pursuant to 49 U.S.C. 5125(a)(2).

The Written Notification, Recording, and Reporting of the Unintentional Release in Transportation of Hazardous Material Is Reversed to the Federal Government

Rule 1200–1–11.04(4)(a)4 requires written notification of each hazardous waste discharge during transportation that occurs in the State. These reports must be filed with the DEC within 15 days. The written notification must provide information about the incident. The DEC allows the filing of form F5800.1, the DOT incident report, to suffice if it is ''properly completed and supplemented as necessary to include all information required by the (DEC).''[43]

It is clear that the DEC's written notification requirements are not substantively the same as corresponding federal requirements.[44] The HMTA expressly preempts such requirements.[45] DOT has even moved to preempt non-federal written incident reports when the non-federal requirement has been only ''to provide copies of the incident reports filed with (DOT) * * * .''[46]

Conclusion

The State's hazardous waste remedial action fee requirements imposed on the transportation of manifested shipments of hazardous waste are preempted by federal law. The State is enforcing the above suspect requirements. We request timely consideration of the concerns we have raised.

Certification

Pursuant to 49 CFR 107.205(a), we hereby certify that a copy of this application has been forwarded with an invitation to submit comments to: Milton Hamilton, Jr., Commissioner, Department of Environment & Conservation, 401 Church St., 21st Floor, L&C Tower, Nashville, TN 37243.

Respectfully submitted,

Michael Carney,

Chairman.

Enclosures.

cc: Ed Bonekemper, Asst. Chief Counsel for, Hazardous Materials Safety, RSPA–DCC–10, U.S. Department of Transportation, 400 Seventh St., SW., Washington, DC 20590.

Attachments

(A) Tenn. Code 68–212 §§ 101–121
(B) Tenn. Code 68–212 §§ 203–206
(C) DEC Rule 1200–1–11–.04
(D) DEC Rule 1200–1–11–.08
(E) DEC Rule 1200–1–13
(F) Hazardous Waste Transporter Permit Application

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[41] Hazardous Materials Information System, U.S. Department of Transportation—1992–1996, January 28, 1998.

[42] ''Serious'' incidents are those that result in one or more of the following: death; accident/derailment of vehicle; evacuation of six or more individuals; injury requiring hospitalization; or road closure.

[43] Rule 1200–1–11.04(4)(a)4. *Note*.

[44] 49 CFR 171.16.

[45] 49 U.S.C. 5125(b)(1)(D).

[46] IR–31, 55 FR 25582 (June 21, 1990).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–391 (Sub–No. 4X)]

Red River Valley & Western Railroad Company—Abandonment Exemption—in Benson County, ND

Red River Valley & Western Railroad Company (RRVW) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon an approximately 10.55-mile line of railroad from milepost 79.08, approximately 0.6 miles north of Oberon, to milepost 89.63, in Minnewaukan, in Benson County, ND. The line traverses United States Postal Service Zip Codes 58357 and 58351.

RRVW has certified that: (1) no local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic moving over the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment— Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on May 9, 1998, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by April 20, 1998. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by April 29, 1998, with: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to applicant's representative: Jo A DeRoche, Weiner, Brodsky, Sidman & Kider, P.C., 1350 New York Avenue, N.W., Suite 800, Washington, DC 20005–4797.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

RRVW has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by April 14, 1998. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565–1545. Comments on environmental and historic preservation

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each offer of financial assistance must be accompanied by the filing fee, which currently is set at $1000. *See* 49 CFR 1002.2(f)(25).