DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 99–6207, Notice 2]

Bombardier Motor Corporation of America, Inc.; Grant of Application for Decision of Inconsequential Noncompliance

This notice grants the application by Bombardier Motor Corporation of America, Inc. (BMCA) to be exempted from the notification and remedy requirements of 49 U.S.C. 30118 and 30120 for vehicles that fail to comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 209, *Seat Belt Assemblies*. By not complying with FMVSS No. 209, the vehicles also fail to comply with FMVSS No. 500, *Low Speed Vehicles*. BMCA has filed an appropriate report pursuant to 49 CFR Part 573 ''Defect and Noncompliance Reports.'' BMCA has also applied under 49 CFR Part 556 to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301 ''Motor Vehicle Safety.'' The basis of the petition is that the noncompliance is claimed to be inconsequential to motor vehicle safety.

Notice of receipt of the application was published in the **Federal Register** November 8, 1999 and an opportunity afforded for comment (64 FR 61178). The comment closing date was December 9, 1999.

No comments were received.

Background

BMCA is a Delaware corporation with its principal place of business at 730 East Strawbridge Avenue, Melbourne, FL 32901. BMCA is the importer (manufacture) of a Low-Speed Vehicle (''LSV'') under the brand name Bombardier NV neighborhood vehicle. This vehicle is built by Bombardier, Inc., in Canada. On May 6, 1999, BMCA sent the National Highway Traffic Safety Administration (NHTSA) a letter pursuant to Title 49, Part 573 of the Code of Federal Regulations, for the purpose of reporting to NHTSA a noncompliance with FMVSS No. 209, S4.1(j)—''Marking.'' FMVSS No. 500 *Low-Speed Vehicles,* requires vehicles such as the Bombardier NV to be equipped with seat belt assemblies that comply with FMVSS No. 209.

FMVSS No. 209 S4.1 (j) requires that each seat belt assembly be permanently and legibly marked or labeled with the year of manufacture, model, and name or trademark of manufacturer or distributor, or of importer if manufactured outside the United States. The seat belt assemblies, manufactured by Good Success Corporation, model AB401 (309), installed in Bombardier NVs sold between June 17, 1998 and April 9, 1999 do not have the requisite marking or labeling. With the exception of the marking, the seat belt assemblies in question are said to comply fully with FMVSS No. 209.

Bombardier argues that, because the labeling noncompliance has no bearing on the materials or performance standards specified in FMVSS No. 209, all the seat belt assemblies in question were properly installed as original equipment, and BMCA's replacement part system would preclude the purchase and installation of an improper replacement seat belt assembly for a Bombardier NV, the noncompliance poses no motor vehicle safety risk.

Discussion

NHTSA has reviewed BMCA's application and, for the reasons discussed below, has decided that the noncompliance of the BMCA seat belt assemblies and the Bombardier NVs with the specified labeling requirements, is inconsequential to motor vehicle safety. Included in the petition was a letter from Erlin, Himes Associates to the seat belt assembly manufacturer, Good Success Corporation, indicating that the seat belt assemblies tested meet the performance requirements of FMVSS No. 209 for the type of seat belt assemblies tested.

NHTSA agrees that the lack of the correct label would not have any effect on occupant safety in these circumstances. BMCA produces only one vehicle model for highway use, and there is only one model of seat belt retractor for these vehicles. Therefore, it is highly unlikely that the wrong assemblies will be provided for replacement.

NHTSA has granted similar petitions for noncompliance with seat belt assembly labeling standards. *See, generally, TRW, Inc.,* Dkt. No. 92–67; Notice 2, 58 FR 7171 (1993); *Chrysler Corporation,* Dkt. No. 92–94–No.2, 57 Fed. Reg. 45,865 (1992). In both of these cases, the petitioners demonstrated that the noncompliant seatbelt assemblies were properly installed, and due to their respective replacement parts ordering systems, improper replacement seat belt assembly selection and installation would not be likely to occur.

In consideration of the foregoing, NHTSA has decided that the applicant has met its burden of persuasion that the noncompliance that it describes is inconsequential to safety. The determination is limited to the vehicles and equipment covered by the Part 573 report.

Accordingly, BMCA's application is granted, and it is exempted from providing the notification of noncompliance that is required by 49 U.S.C. 30118, and from remedying the noncompliance, as required by 49 U.S.C. 30120. All products manufactured or sold on and after the April 9, 1999, including any replacement seat belt assemblies, must comply fully with the requirements of FMVSS Nos. 500 and 209.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.50 and 49 CFR 501.8.

Issued on: October 4, 2000.

Stephen R. Kratzke,

Associate Administrator for Safety Performance Standards.

[FR Doc. 00–25972 Filed 10–6–00; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Preemption Determination No. PD–13(R); Docket No. RSPA–97–2581 (PDA–16(R))]

Nassau County, New York, Ordinance on Transportation of Liquefied Petroleum Gases

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

ACTION: Decision on petition for reconsideration of administrative determination of preemption.

Petitioner: New York Propane Gas Association (NYPGA)

Local Laws Affected: Nassau County, New York, Ordinance No. 344–1979, Sections 6.7(A) & (B) and Section 6.8.

Applicable Federal Requirements: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR Parts 171–180.

Modes Affected: Highway.

SUMMARY: Based on additional information provided by NYPGA and persons submitting comments on NYPGA's petition for reconsideration, RSPA finds that the requirement in Sections 6.7(A) and (B) of Ordinance No. 344–1979 for a permit to deliver liquefied petroleum gas (LPG) within Nassau County is preempted with respect to trucks that are based outside of Nassau County. As applied to and enforced against those vehicles, that requirement causes unnecessary delays in the transportation of hazardous

materials to Nassau County from locations outside the County and, accordingly, creates an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the HMR. Nassau County's permit requirement does not create unnecessary delays in the transportation of hazardous materials, and is not preempted, with respect to trucks that are based within Nassau County.

No person requested reconsideration of that part of RSPA's August 25, 1998 determination which found that Federal hazardous material transportation law preempts Section 6.8 of Ordinance No. 344–1979 for a certificate of fitness, insofar as that requirement is applied to a motor vehicle driver who sells or delivers LPG, because Section 6.8 imposes more stringent training requirements than provided in the HMR.

This decision constitutes RSPA's final action on NYPGA's application for a determination that Federal hazardous material transportation law preempts Sections 6.7(A) and (B) and 6.8 of Nassau County Ordinance No. 344–1979.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590–0001, telephone 202–366–4400.

SUPPLEMENTARY INFORMATION:

I. Background

A. Preemption Determination (PD) No. 13(R)

NYPGA applied for a determination that Federal hazardous material transportation law preempts Sections 6.7(A) and (B) and Section 6.8 of Nassau County, New York, Ordinance No. 344–1979, concerning Fire Department permits and ''certificates of fitness'' for the delivery of liquefied petroleum gas (LPG) within Nassau County. RSPA published the text of NYPGA's application in the **Federal Register** and invited interested parties to comment. 62 FR 61661 (June 10, 1997). Comments were received from the National Propane Gas Association, National Tank Truck Carriers, Inc. (NTTC), New York State Motor Truck Association, Star-Lite Propane Gas Corp. (Star-Lite), the Association of Waste Hazardous Materials Transporters (AWHMT), and Nassau County. NYPGA submitted rebuttal comments.

On August 25, 1998, RSPA published in the **Federal Register** its determination that the requirement in Section 6.8 for a certificate of fitness is preempted, insofar as that requirement is applied to a motor vehicle driver who sells or delivers LPG, because Section 6.8 imposes on drivers of motor vehicles used to deliver LPG more stringent training requirements than provided in the HMR. PD–13(R), 63 FR 45283.

At the same time, RSPA concluded that there was insufficient information to find that Federal hazardous material transportation law preempts the requirement in Sections 6.7(A) and (B) of Ordinance No. 344–1979 for a permit to pick up or deliver LPG within Nassau County. NYPGA's application and the comments failed to show that: (1) the inspection and fee required to obtain a permit cause an unnecessary delay in the transportation of hazardous materials; (2) the permit fee is unfair or used for purposes other than relating to transporting hazardous materials, including enforcement and planning, developing, and maintaining a capability for emergency response; or (3) the permit sticker is a labeling or marking of hazardous material within the meaning and intent of the HMR's hazard communication requirements. *Id.*

In Part I.B. of its August 25, 1998 determination, RSPA explained that propane is a form of LPG that is used throughout the United States for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean-air alternative fuel for both over-the-road vehicles and industrial lift trucks. 63 FR at 45284. Many propane gas dealers are small businesses that serve customers within 50 miles, although larger dealers may deliver to customers farther away. *Id.* Because New York has adopted the HMR as State law, any company that delivers propane in Nassau County has long been subject to the HMR's substantive requirements, even if that company was an intrastate carrier and not directly governed by the HMR before October 1, 1998. *Id.*

In Part I.C. of PD–13(R), RSPA discussed the standards for making determinations of preemption under the Federal hazardous material transportation law. 63 FR at 45284–85. As RSPA explained, unless there is specific authority in another Federal law or DOT grants a waiver, a local (or other non-Federal) requirement is preempted if:

—it is not possible to comply with both the local requirement and a requirement in the Federal hazardous material transportation law or regulations;

—the local requirement, as applied or enforced, is an ''obstacle'' to the accomplishing and carrying out of the Federal hazardous material transportation law or regulations; or

—the local requirement concerns any of five specific subjects and is not ''substantively the same as'' a provision in the Federal hazardous material transportation law or regulations. Among these five subjects are ''the designation, description, and classification of hazardous material'' and the labeling or marking of hazardous material or a packaging or container certified as ''qualified for use in transporting hazardous material.''

See 49 U.S.C. 5125(a) & (b).

In addition, 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.'' 49 U.S.C. 5125(g)(1).

These preemption provisions stem from congressional findings that State and local laws which vary from Federal hazardous material transportation requirements can create ''the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting * * * regulatory requirements,'' and that safety is advanced by ''consistency in laws and regulations governing the transportation of hazardous materials.'' Pub. L. 101–615 §§ 2(3) & 2(4), 104 Stat. 3244.

RSPA also explained that its ''[p]reemption determinations do not address issues of preemption 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.'' 63 FR at 45285.

B. Petition for Reconsideration and Further Submissions

Within the 20-day time period provided in 49 CFR 107.211(a), NYPGA filed a petition for reconsideration of RSPA's determination in PD–13(R) that there was insufficient information to find that Federal hazardous material transportation law preempts the requirement in Sections 6.7(A) and (B) of Ordinance No. 344–1979 for a permit to pick up or deliver LPG within Nassau County. NYPGA certified that it had mailed a copy of its petition to the County Executive and all others who had submitted comments.

Neither NYPGA nor any other party has petitioned RSPA to reconsider that part of PD–13(R) that found that the certificate of fitness requirement is preempted. In its January 19, 1999 ''Affirmation in Opposition to Petition for Reconsideration,'' Nassau County stated,

> As of November 23, 1998, the County of Nassau has stopped enforcing the provision of Section 6.8 dealing with the requirement for a Certificate of Fitness for LP truck drivers.[1]

On September 17, 1998, RSPA received an undated letter from NTTC requesting reconsideration of RSPA's determination with respect to Nassau County's permit requirement. Because this request was submitted more than 20 days after publication of PD–13(R) in the **Federal Register**, it is not a timely petition for reconsideration. 49 CFR 107.211(a). Nonetheless, NTTC's letter is being treated as a comment in support of NYPGA's petition for reconsideration.

RSPA has also received the following additional submissions, all of which have been placed in the docket:

—an October 26, 1998 letter from Long Island Bottle Gas with an undated extract from the *New York Law Journal* and a copy of its brief to the Appellate Division in the appeal of the Suffolk County Supreme Court's dismissal of its actions against the Towns of Smithtown and Brookhaven.

—November 14, 1998 rebuttal comments submitted by AWHMT in Docket No. RSPA–98–3579 (PDA–20(RF)), expressing concerns about RSPA's decision in PD–13(R);

—a January 18, 1999 letter from Atlantic Bottle Gas Co., Inc., of Hicksville, New York, describing its inability to make deliveries of propane in Nassau County for more than two days until it had its ''spare truck'' inspected by the Nassau County Fire Marshal;

—the January 19, 1999 ''Affirmation'' from Nassau County in opposition to NYPGA's petition for reconsideration and NTTC's submission;

—a February 16, 1999 response by NYPGA to Nassau County's Affirmation;

—a facsimile transmission on March 2, 1999, from Long Island Bottle Gas, forwarding a copy of a March 1, 1999 memorandum issued by the Oil Heat Institute of Long Island concerning inspection requirements in 49 CFR 396.11 and 395.17;

—a further undated extract from the *New York Law Journal*, received from Long Island Bottle Gas on March 8, 1999;

—a September 7, 1999 ''Addenda'' to NYPGA's petition for reconsideration discussing and attaching a hearing transcript in *New York* v. *Star Lite Propane Gas Corp.,* Nos. 19595/98, 20872/98 & 20879/98 (Nassau Cty. Dist. Ct. Aug. 11, 1999), dismissing a summons issued to Star Lite for transporting LPG without a permit from Nassau County;

—September 27 and October 1, 1999 letters from Nassau County requesting an opportunity to respond to NYPGA's Addenda (Nassau County did not submit any further response to NYPGA's petition for reconsideration, February 16, 1999 response, or September 7, 1999 Addenda); and

—a facsimile transmission on June 26, 2000, from NYPGA forwarding a March 20, 2000 decision of the District Court of Suffolk County that Federal hazardous material transportation law preempts Section 164–109(A) of the Smithtown Town Code requiring any person filling containers where LPG is sold or transferred to hold a certificate of fitness issued by the County Fire Marshal.

At a March 29, 2000 public meeting held by RSPA in Secaucus, New Jersey, Star Lite's president (who stated he was also the president of NYPGA) expressed concerns about the length of time since NYPGA's original application and RSPA's failure to call him with questions. A summary of his remarks has been placed in the docket.

Throughout this proceeding, and as recently as September 2000, various persons interested in this proceeding have inquired as to the status of RSPA's decision on NYPGA's petition for reconsideration. In each instance, RSPA stated that it was in the process of preparing its decision, but that it was impossible to predict when the decision would be issued. Because there was no discussion of the substantive issues involved in this proceeding, it was not considered necessary to place in the docket a summary of these inquiries. All the information on which this decision is based is contained in the docket and, to the extent considered relevant, discussed below.

II. Discussion

NYPGA's petition for reconsideration and Nassau County's response contain many disagreements as to how Nassau County's permit and inspection requirements are administered. When all the arguments are sorted out, however, NYPGA's petition for reconsideration appears to raise the following five issues: (1) Whether permit and inspection requirements apply only to LPG and not to other hazardous materials; (2) whether Nassau County is authorized and qualified to conduct leak testing or inspections of cargo tanks and vehicles; (3) whether the permit and inspection requirements cause an unreasonable delay in the transportation of hazardous materials; (4) whether the permit fee is fair and used for purposes relating to transporting hazardous materials, including enforcement and planning, developing, and maintaining a capability for emergency response; and (5) whether the permit ''sticker'' is a marking or labeling of hazardous material, or of a packaging represented as qualified for transporting hazardous material, that is not substantively the same as provided in the HMR. Each of these issues is discussed below.

A. Materials Regulated by Nassau County

NYPGA and Atlantic Bottle Gas Co. both assert that a permit is not required for the delivery of any other hazardous material within the County. Nassau County replies that the ''same requirements [for inspections, fees and permits] are required by Nassau County ordinance for oxidizers, compressed gases, and combustible liquids.''

Federal hazardous material law preempts a State, local or Indian tribe law on ''the designation, description, and classification of hazardous material'' that is not ''substantively the same as'' the HMR. 49 U.S.C. 5125(b)(1)(A). However, in numerous circumstances, RSPA has found that a State or locality may regulate *some* hazardous materials in a manner that is consistent with the HMR, so long as the non-Federal jurisdiction has not attempted to create new hazardous materials definitions or classifications.

In IR–5, City of New York Administrative Code Governing Definitions of Certain Hazardous Materials, 47 FR 51991, 51993 (Nov. 18, 1982), RSPA found that the former HMTA preempted definitions of hazardous materials that

[1] According to materials submitted by Long Island Bottle Gas Supply and Service Corp. (Long Island Bottle Gas) in October 1998 and March 1999, that company challenged similar requirements of the Towns of Smithtown and Brookhaven, in Suffolk County, that drivers hold a certificate of fitness to deliver LPG. These materials appear to indicate that a trial court granted summary judgment in favor of the two Towns against Long Island Bottle Gas, but that the Appellate Division of the New York Supreme Court reversed the trial court's decision. In March 2000, the District Court of Suffolk County found that Federal hazardous material transportation law preempts Suffolk County's certificate of fitness requirement and referred to RSPA's decision in PD–13(R).

broaden the scope of materials that are subject to the City's requirements to materials that are not subject to the HMR [and] * * * classify some materials differently, for purposes of the City's requirements, from their classification for purposes of application of the HMR.

Similarly, when a city assigned ''an entirely different meaning'' to the term ''radioactive material,'' which ''in effect, created a new hazard class,'' RSPA concluded that this differing definition was inconsistent with the HMR. IR–16, Tucson City Code Governing Transportation of Radioactive Materials, 50 FR 20872, 20874 (May 20, 1985). RSPA has also found that imposing local requirements on six specified types of radioactive materials ''created, in effect, a new hazard class * * *'' IR–18, Prince Georges County, MD; Code Section Governing Transportation of Radioactive Materials, 52 FR 200, 202 (Jan. 2, 1987), decision on appeal, 53 FR 28850 (July 29, 1988). RSPA stated that:

If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of radioactive materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety.

Id., quoting from IR–12, St. Lawrence County, New York; Local Law Regulating the Transportation of Radioactive Materials Through St. Lawrence County, 49 FR 46650, 46651 (Nov. 27, 1984).

As RSPA also noted in IR–19, Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials, 52 FR 24404, 24406 (June 30, 1987), decision on appeal, 53 FR 11600 (Apr. 7, 1988),

ambiguity and selectivity of [a non-Federal] hazardous materials definition are troublesome. State and local hazardous materials definitions and classifications which result in regulation of different materials than the HMR are obstacles to uniformity in transportation regulation and thus are inconsistent with the HMR.

In contrast, however, RSPA has found that a State or locality may regulate hazardous materials in a manner consistent with the HMR even if it does not reach as broadly as the HMR. In IR–18, 52 FR at 202, RSPA found that ''an otherwise consistent requirement will not be found inconsistent merely because it applies only to certain modes of transportation.'' In a similar manner, RSPA has considered numerous challenges to non-Federal requirements that applied to only specific hazardous materials without finding that the specific requirements were preempted because they did not apply to all hazard classes and all materials listed in the Hazardous Materials Table in 49 CFR 172.101.

In these cases, the non-Federal requirements covered such materials as (1) LPG, IR–2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, 44 FR 75566 (Dec. 20, 1979), decision on appeal, 45 FR 71881 (Oct. 30, 1980); (2) flammable and combustible liquids, PD–4(R), California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids, 58 FR 48933 (Sept. 20, 1993), decision on petition for reconsideration, 60 FR 8800 (Feb. 15, 1995); PD–5(R), Massachusetts Requirement for an Audible Back-up Alarm on Bulk Tank Carriers Used to Deliver Flammable Material, 58 FR 62707 (Nov. 29, 1993); and PD–14(R), Houston, Texas, Fire Code Requirements, 63 FR 67506 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33949 (June 24, 1999); (3) hazardous wastes, IR–25, Maryland Heights (Missouri) Ordinance Requiring Bond for Vehicles, 54 FR 16308 (Apr. 21, 1989); IR–32, Montevallo, Alabama Ordinance on Hazardous Waste Transportation, 55 FR 36736 (Sept. 6, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992); PD–1(R), Maryland, Massachusetts, and Pennsylvania Bonding Requirements for Vehicles Carrying Hazardous Wastes, 57 FR 58848 (Dec. 11, 1992), decision on petition for reconsideration, 58 FR 32418 (June 9, 1993), reversed on other grounds, *Massachusetts* v. *United States Dep't of Transp.,* 93 F.3d 890 (D.C. Cir. 1996); PD–6(R), Michigan Marking Requirements for Vehicles Transporting Hazardous and Liquid Industrial Wastes, 59 FR 6186 (Feb. 9, 1994); and PD–12(R), New York Department of Environmental Conservation Requirements on the Transfer and Storage of Hazardous Wastes, 60 FR 62527 (Dec. 6, 1995), decision on petition for reconsideration, 62 FR 15970 (Apr. 3, 1997), judicial review dismissed, *New York* v. *United States Dep't of Transp.,* 37 F. Supp. 2d 152 (N.D.N.Y. 1999); and (4) radioactive materials, *e.g.,* IR–7–15, 49 FR 46632 (Nov. 27, 1984); IR–16, above; IR–18, above.

Nassau County's permit requirement in Section 6.7 does not designate any material as hazardous that is not regulated by the HMR, nor does Nassau County describe, define, or classify LPG in a different manner than in the HMR. Accordingly, that requirement is not preempted merely because it applies to those trucks that pick up or deliver LPG, and not other hazardous materials, within Nassau County. There is no necessity that a State or locality always regulate all materials, although a specific non-Federal requirement that applies only to one hazardous material may, indeed, be an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR. *See, e.g.,* IR–15, Vermont Rules for Transportation of Irradiated Reactor Fuel and Nuclear Waste, decision on appeal, 52 FR 13062, 13064 (Apr. 20, 1987), finding that a State may need to justify a decision to ''single out radioactive materials for different types of [traffic] control than hazardous materials generally.''

B. Nature of the Test or Inspection

NYPGA repeatedly states that Nassau County conducts a leak test of the propane tank on the vehicle, and that the Fire Marshal may also conduct a ''walk around'' safety check of the vehicle at the same time. NYPGA indicates that the Fire Marshal also inspects rack trucks that transport LPG cylinders and other service vehicles of propane companies. NYPGA contends that the Fire Marshal is not qualified to conduct the annual testing required under 49 CFR 180.407(c), and that only the New York State Department of Motor Vehicle Regulations is authorized to perform ''an annual truck 'Safety/Emission' inspection.'' As discussed in further detail below, both NYPGA and AWHMT complain that Nassau County does not recognize the inspection conducted by New York State officials, as required by 49 U.S.C. 31142(d). AWHMT also suggests that the purpose of Nassau County's inspection is to ''qualify the vehicle to contain hazardous materials,'' and that RSPA should apply the ''substantively the same as'' standard in 49 U.S.C. 5125(b)(1) to the actual inspection process.

In response, Nassau County states that it does not ''test'' tanks, but only checks ''the accessories, *e.g.,* pipes, fittings, and connections,'' for leaks. The County ''does not certify the tank,'' but rather ''checks to see that the tank has been certified by such an expert.'' Nassau County states that its

inspection includes checking the motor fuel relief valve, head lights, brake lights, turn signals, back-up lights, tires, horn, wipers, inspection stickers, condition of the windshield, defroster, air-brake indicators, registration, and crash bar for roll-over protection.

Nassau County also states that its ''inspections are the same for new trucks and trucks already in service'' but that ''the computer and secretarial work

needed for processing the paperwork for new trucks'' makes the amount of time ''longer for new trucks.'' NYPGA asserts that the County's position in this regard contradicts the County's prior statements that it conducts a ''modified'' inspection of vehicles with less than 1,000 miles.

See 63 FR at 45285.

Cargo tank motor vehicles used to transport LPG must meet DOT specifications MC–330 or MC–331. 49 CFR 173.315(a). Certain requirements for the continued qualification, maintenance, and periodic testing of MC–330 and MC–331 cargo tank motor vehicles are set forth in 49 CFR Part 180, subpart E, beginning at 49 CFR 180.401.[2] The specific tests and inspections are contained in § 180.407, and a cargo tank that successfully passes a specified test or inspection must be marked in accordance with § 180.415. While a person must possess certain qualifications to perform the tests and inspections specified in § 180.407, as set forth in § 180.409, DOT has not established qualifications for non-Federal personnel who inspect cargo tank motor vehicles to determine whether (1) the tank is marked as required in § 180.415, (2) the vehicle otherwise appears to meet the applicable specification, or (3) the vehicle meets the applicable requirements in the Federal Motor Carrier Safety Regulations (FMCSR), 49 CFR Parts 350–399.

As discussed in PD–13(R), DOT encourages States and localities to adopt and enforce requirements that are consistent with the HMR and the FMCSR. 63 FR at 45286. However, DOT does not specify which State or local agencies may enforce such consistent non-Federal requirements, or which personnel within a State or local agency may conduct inspections. That is a matter for State or local discretion, within the boundaries of the governing legal authority. Thus, issues of whether State or local personnel lack authority to enforce a non-Federal requirement should be raised in the appropriate State or local forum—the same as issues related to whether a State or locality is properly interpreting its own requirement. RSPA has recently reiterated that:

> As a general matter, an inconsistent or erroneous interpretation of a non-Federal regulation should be addressed to the appropriate State or local forum, because isolated instances of improper enforcement (*e.g.*, misinterpretation of regulations) do not render such provisions inconsistent with Federal hazardous material transportation law.

PD–15(R), Public Utilities Commission of Ohio Requirements for Cargo Tanks, 64 FR 14965, 14967 (Mar. 29, 1999), decision on petition for reconsideration, 64 FR 44265, 44266 (Aug. 13, 1999), judicial review dismissed, *William E. Comley, Inc.* v. *U.S. Dep't of Transportation,* Civil No. C1–99–880 (S.D. Ohio, June 6, 2000) (citations and internal quotation marks omitted).

The record does not show that a Nassau County's fire inspectors are purporting to certify that a cargo tank motor vehicle has passed the tests and inspections specified in 49 CFR 180.407. Nor is there any indication that a cargo tank motor vehicle that passes all DOT requirements for transporting LPG must meet some additional requirements of Nassau County or will somehow fail to pass Nassau County's inspection. Federal hazardous material transportation law does not preempt inspections designed to enforce local requirements that are consistent with the HMR and the FMCSR, unless those inspections cause an unreasonable delay in the transportation of hazardous material as discussed in the next section. Any issues whether Nassau County's fire inspectors are authorized or qualified to perform their inspections cannot be considered by RSPA in a preemption determination but must be determined in an appropriate State or local forum.

C. Unreasonable Delay

In PD–13(R), RSPA found that NYPGA's original application focused on ''the delay experienced by a propane delivery company in being able to compete or do business in the County—rather than any delay in the transportation of trucks loaded with propane.'' 63 FR at 45285. In its petition for reconsideration, NYPGA asserts that ''Long waits to undergo inspection are typically experienced by regulated parties.'' It cites two specific experiences: (1) An instance where a truck owned by Star-Lite carrying propane cylinders was stopped by the Fire Marshal on June 23, 1998, and delayed for three and a half hours ''waiting for an inspection by the Nassau Fire Marshal'' and (2) a separate ''delay of a tractor transport combination of two [hours] and forty-five minutes while awaiting inspection in Nassau County.'' NYPGA disputes the prior statement of Nassau County that the ''two day a month schedule is flexible and does not apply to new vehicles.'' Id. NYPGA also contends that simply checking that the propane tank has been properly inspected by a registered inspector is a delay and an obstacle to transportation.

With its February 16, 1999 response, NYPGA provided an affidavit by the president of Fort Edward Express Co., Inc., located near Glens Falls, north of Albany. He described his company as ''one of the largest propane transporters in the Northeast'' and stated that, while his company's trucks regularly travel through Nassau County to serve customers in Suffolk County, it does not attempt to serve customers in Nassau County because it ''cannot endure the delays and costs of scheduling our tractors and tank trailers for inspection by the Nassau County Fire Marshall.'' He also stated that his trucks are dispatched ''based on customer need,'' and that ''inspection of all vehicles by Nassau would be impractical, and inspection of only a few would require dedicated vehicles to that county.''

AWHMT argues that all non-Federal periodic (as opposed to roadside or ''spot'') inspections should be preempted. It stated that Congress enacted 49 U.S.C. 31142(d) because it recognized ''the unacceptable burden that would result if states, let alone localities, should require motor vehicles to be produced periodically to be inspected.'' This section provides that a periodic inspection under DOT standards (prescribed under § 31142(b)), an alternative State program approved by DOT, or a State program meeting Commercial Vehicle Safety Alliance standards, ''shall be recognized as adequate in every State for the period of the inspection,'' but that a State may continue to make ''random inspections of commercial motor vehicles.''

According to AWHMT, ''motor vehicles operate over irregular routes and the potential of inflicting 'multiple and conflicting' requirements on carriers is self-evident.'' It also states that an annual inspection requirement is burdensome even if it is not applied to vehicles that travel through the County without stopping to pick up or deliver hazardous materials, because

> what is a ''through'' vehicle one day can be a vehicle used in local delivery the next. The requirement to produce a vehicle for inspection applies whether or not any given vehicle engages in local delivery or pick up one day or 365 days of the permit year. RSPA has to consider the consequences if every locality demanded the production of vehicles for inspection prior to transporting hazardous materials. Hazardous materials transportation, at least by motor vehicle, would indeed become ''local,'' as companies

[2] Under 49 CFR 173.315(k), a nonspecification cargo tank motor vehicle with a capacity of 3,500 gallons or less may be used in intrastate commerce where permitted by State law. However, these nonspecification cargo tank motor vehicles must also be ''inspected, tested, and equipped in accordance with subpart E of part 180'' of the HMR. 49 CFR 173.315(k)(5).

would be unable to produce vehicles, without limitation, for inspection by local authorities prior to transporting such materials.

AWHMT also argues that ''unnecessary delay'' should not be the only standard for determining whether there is an obstacle. It asserts that RSPA should specifically consider effects on commerce, rather than just safety, and refers to a congressional finding that ''the movement of hazardous materials in commerce is necessary and desirable to maintain economic vitality and meet consumer demands, and shall be conducted in a safe and efficient manner.'' Pub. L. 101–615 § 2(8), 104 Stat. 3244 (Nov. 20, 1990).

Nassau County specifically addressed the two instances cited by NYPGA as evidence of delay. The County does not dispute that the Star-Lite truck was stopped because it lacked a current permit sticker. However, the County states that this truck was placed out-of-service because it had a flat tire and the three and one-half hour delay was the time that Star Lite took to inflate the tire.[3] With respect to the time involved in the inspection of the tractor transport, the County states that the vehicle arrived early for its scheduled inspection, before the Fire Marshal's starting time at 8:00 a.m. According to the County, the inspection was completed by 10:00 a.m., and two hours is ''not unreasonable, and does not cause any delay in transportation.'' Nassau County also provided a copy of an internal July 31, 1995 memorandum that any new vehicle (less than 1,000 miles) ''shall be inspected as soon as possible after receiving a request for inspection,'' rather than on the two-day-a-month schedule.

Addressing the June 23, 1998 incident involving the Star Lite truck, NTTC assumes that the vehicle could not be used for 14 days, until it could be inspected on July 7 (the next ''first Tuesday'' of the month). In contrast, Atlantic Bottle Gas states that, when it was cited for delivering propane in a truck with an expired permit on the afternoon of December 8, 1998, the Fire Marshal conducted an inspection at 9:00 a.m. on December 11, 1998, and issued a permit in less than two hours. Atlantic Bottle Gas considers ''not being able to use my truck to make deliveries of propane in the winter * * * some 2 plus days would fall into that category of an unreasonable delay.''

RSPA cannot find that Federal hazardous material transportation law provides a basis for preempting all periodic inspections, as AWHMT contends. The obstacle criterion for preemption in 49 U.S.C. 5125(a)(2) is a different standard for preemption than whether there is a improper burden on interstate commerce. If the two standards were meant to be equivalent, Congress would have said so, and it would not require RSPA to make a finding with regard to the burden on commerce in considering whether to waive preemption, under § 5125(e), or to consider whether a non-Federal fee is ''fair'' or not, under § 5125(g)(1).

To the extent that the preemption provisions in 49 U.S.C. 31142 apply, there is a separate statutory procedure in 49 U.S.C. 31141 for DOT to review and decide whether a State or local law is preempted. Under this procedure, a State or local regulation remains in effect until a Commercial Motor Vehicle Safety Regulatory Review Panel reviews the State or local requirement and DOT acts on the Panel's review. *See Interstate Towing Ass'n* v. *City of Cincinnati*, 6 F.3d 1154, 1160 (6th Cir. 1993), where the Court of Appeals stated that, under the prior version of § 31141, ''the statute allows to remain in force individual state regulations which have not been affirmatively found, by the Secretary or the Panel, to conflict with federal regulations.''[4]

As NTTC specifically recognized in its original comments on NYPGA's application, Nassau County's permit and inspection requirements have a different impact on a carrier that operates entirely within Nassau County, as opposed to a carrier that delivers hazardous materials from outside the County and does not know in advance which vehicle may be needed to deliver LPG in Nassau County. In PD–13(R), 63 FR at 45285–86, RSPA discussed NTTC's comment and the prior decision in PD–4(R) that inspection requirements which cause an ''unnecessary delay'' in the transportation of hazardous materials are preempted because they violate the requirement currently set forth in 49 CFR 177.800(d) that:

> All shipments of hazardous materials must be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.

As explained in PD–4(R), an inspection requirement is preempted when, as applied and enforced, it creates unnecessary delay in the transportation of hazardous material. RSPA discussed whether or not an inspection creates unnecessary delay in three situations.

First, RSPA reaffirmed earlier decisions that ''the minimal increase in travel time when an inspection is actually being conducted, or the vehicle is waiting its 'turn' for an inspector to finish inspecting another vehicle that arrived earlier at the same facility'' is not unnecessary delay. 58 FR at 48941, quoted in PD–13(R) at 63 FR at 45286. *Accord*, IR–17, Illinois Fee on Transportation of Spent Nuclear Fuel, 51 FR 20926 (June 9, 1986), decision on appeal, 52 FR 36200, 36205 (Sept. 25, 1987)(a delay of 1.5 to 2 hours during which a State inspection is actually conducted is reasonable and ''presumptively valid'').

Second, RSPA found that a delay of hours or days waiting for the arrival of an inspector from another location is ''unnecessary, because it substantially increases the time [hazardous materials] are in transportation, increasing exposure to the risks of the hazardous materials without corresponding benefit.'' 58 FR at 48941.

Third, RSPA indicated that a State's annual inspection requirement applied to vehicles or tanks that operate solely within the State is presumptively valid because it would not create the potential for delays ''associated with entering the State or being rerouted around'' the State. 60 FR at 8803, quoted at 63 FR at 45286. A carrier whose vehicles are based within the inspecting jurisdiction should be able to schedule an inspection at a time that does not disrupt or unnecessarily delay deliveries, and such inspections are consistent with the traditional authority of a State or political subdivision to license, inspect, and otherwise regulate a motor vehicle based within its jurisdictional boundaries.

Nassau County has an interest in the safe transportation and delivery of LPG

[3] According to the transcript submitted with NYPGA's September 7, 1999 Addenda, the Nassau County District Court found that Star Lite's truck was the subject of an ''illegal stop,'' and the summons was dismissed. The Fire Marshal's inspector admitted that he did not have evidence that the truck had made deliveries within the County when he stopped the truck. According to its January 19, 1999 response in this proceeding, the County states that because the main route through the County is the Long Island Expressway, it assumes that vehicles on other roads are making a delivery. NYPGA asserts that trucks use roads other than the Long Island Expressway to reach Suffolk County to the east of Nassau County.

[4] In the *Interstate Towing Ass'n* case, the Court of Appeals considered a local licensing requirement for tow trucks based within 25 miles of the city limits, including inspection of each truck, and an $80 licensing fee. Besides finding that the licensing requirement was not preempted by the Motor Carrier Safety Act (now codified at 49 U.S.C. 31131 *et seq.*), the Court also found that the licensing fee did not violate the Commerce Clause because it was ''assessed to help defray the costs of inspecting towing vehicles to ensure that all trucks providing towing services within City limits, Ohio-based and out-of-state-trucks alike, meet certain standards of safety and are equipped sufficiently to provide 'first-class' service.'' 6 F.3d at 1162–63.

within the county limits, and that interest extends to any vehicle operating within the County, whether based within the County or outside. Consistent with the principles set forth in PD–4(R), Nassau County may perform roadside or spot inspections on any vehicle transporting a hazardous material within the County, without causing unreasonable delay, so long as the vehicle is not required to wait hours or days for the arrival of an inspector from another location. There is also no obstacle to the County considering such an inspection valid for a year, and issuing an annual permit based on this spot inspection. On the other hand, the County may not require a company to present its vehicles for an annual scheduled inspection when that will prevent a loaded vehicle from completing its delivery for hours or days waiting for the inspection to be performed.

Those propane delivery companies based within Nassau County should be able to present their trucks for an inspection by Nassau County without incurring an unreasonable delay in the delivery of propane. They should be able to plan and schedule inspections without any interruption of deliveries. The few occasions on which an inspection must be scheduled on short notice, for a new truck placed into service or a ''reserve'' truck placed back in service, must be considered to be part of a company's plan for conducting its business, rather than an unreasonable delay in the transportation of a hazardous material between ''the time of commencement of the loading of the hazardous material until its final loading at destination.'' 49 CFR 177.800(d).

On the other hand, NTTC and Fort Edward Express Co. explain that it is not feasible for a company based outside of Nassau County to predict which of its trucks will be needed to deliver propane to Nassau County within the coming year, nor to have all of its trucks permitted and inspected in any jurisdiction to which any truck might travel. Under the principles announced in PD–4(R), a city or county may apply an annual inspection requirement to trucks based outside its jurisdictional boundaries only if the city or county can actually conduct the equivalent of a ''spot'' inspection upon the truck's arrival within the local jurisdiction. The city or county may not require a permit or inspection for trucks that are not based within the local jurisdiction if the truck must interrupt its transportation of propane for several hours or longer in order for an inspection to be conducted and a permit to be issued.

In this case, Nassau County indicates that there is some flexibility in performing inspections, and that a company need not always wait for one of the two regular inspection days each month. However, the County does not appear to be able to conduct inspections and issue permits ''on demand.'' According to Atlantic Bottle Gas, it took the Fire Marshal until the morning of the third day to schedule an inspection and issue a permit, following issuance of a citation for delivering propane without a permit. Nassau County has not shown that it can act more promptly with respect to a truck that arrives without notice in the County.

Based on the limited information provided in the comments in this proceeding, RSPA finds that Federal hazardous material transportation law does not preempt Nassau County's annual permit requirement in Sections 6.7(A) & (B) of Ordinance No. 344–1979 with respect to trucks that are based within Nassau County. On the other hand, RSPA finds that Nassau County's annual permit requirement creates an obstacle to accomplishing and carrying out the HMR's prohibition against unnecessary delays in the transportation of hazardous material on vehicles based outside of Nassau County, as those requirements are presently applied and enforced. Accordingly, Federal hazardous material transportation law preempts Sections 6.7(A) & (B) of Ordinance No. 344–1979 with respect to trucks that are based outside of Nassau County.

D. Permit Fees

In PD–13(R), RSPA rejected NYPGA's argument that Nassau County's permit fees are a ''flat tax'' and violate the Commerce Clause. 63 FR at 45286–87. RSPA found that the fee appeared to be a user fee, ''related in some measure to the work involved in conducting the required inspection,'' and noted the County's statements that it collects less than $70,000 in LPG permit fees per year and spends much more than that amount on administration of the permit program, incident response, and enforcement.

In its comments on NYPGA's petition for reconsideration, Nassau County maintains its position that its inspection fees are fair and proper. The County states that, in 1998, it ''responded to 113 hazardous materials emergencies on the roadways. The fees generated about $70,000, while the hazmat team alone cost about $1.3 million.'' NYPGA asserts that the County did not provide data relating only to vehicles carrying propane and asked for ''a thorough accounting of how the monies are used.''

In PD–21(R), Tennessee Hazardous Waste Transporter Fee and Reporting Requirements, 64 FR 54474 (Oct. 6, 1999), judicial review pending, *Tennessee* v. *U.S. Dep't of Transportation*, Civil Action No. 3–99–1126 (M.D. Tenn), RSPA discussed the ''fairness'' and ''used for'' standards in 49 U.S.C. 5125(g)(1). RSPA noted that fees that cover the cost of a required inspection ''would be expected to be the same amount for both interstate and intrastate companies'' and have not been found to violate the Commerce Clause. 64 FR at 54478 (discussing the *Interstate Towing Ass'n* case). RSPA also indicated that a State or locality need not ''create and maintain a separate fund for fees paid by hazardous materials transporters'' so long as it could show ''that it is actually spending these fees on the purposes permitted by the law.'' *Id.* at 54479. And while ''only the State [or locality] has the information concerning where these funds are spent,'' *id.,* the amount of detail necessary will depend on all the circumstances.

In this case, the information provided by Nassau County appears sufficient to show that it is using its LPG permit fees for purposes ''related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.'' 49 U.S.C. 5125(g)(1).

E. Permit Stickers

In PD–13(R), RSPA found that the permit sticker is not a ''marking * * * of hazardous material,'' under 49 U.S.C. 5125(b)(1)(B), because the County did not require the sticker to be placed ''on the hazardous material itself (or its container).'' 63 FR at 45287. There was no evidence that the sticker caused any unnecessary delay or otherwise created an obstacle to accomplishing and carrying out Federal hazardous material law and the HMR. *Id.*

In its petition for reconsideration and further comments, NYPGA repeatedly refers to the permit sticker as a ''label'' and contends that, until it submitted its petition for reconsideration, Nassau County required that the sticker be placed on the cargo tank of a ''transport'' vehicle or on the fender of a ''bobtail.'' Nassau County states that the permit does not indicate that the vehicle is ''actually carrying hazardous materials'' or ''make the vehicle a designated hazardous material vehicle.'' The County also states that the permit is not a label or a placard, as those terms are used in the HMR, and it submitted

a copy of a September 1, 1998 internal memorandum referring to PD–13(R) and advising the Fire Marshal's staff that ''a permit on a transportation vehicle * * * shall *not* be placed on the tank, but shall be placed on the vehicle.''

It is clear that Nassau County's permit sticker is not a ''label'' as that term is used in the HMR, nor could it be mistaken for a hazard class label. *See* 49 CFR Part 172, subpart E. Nor is the sticker a marking of hazardous material within the meaning and intent of the HMR's hazard communication requirements. Nothing in NYPGA's petition for reconsideration or the comments submitted in response to that petition shows that the requirement to place the permit sticker on the vehicle creates an obstacle to accomplishing and carrying out hazardous material transportation law or the HMR.

III. Ruling

Federal hazardous material transportation law preempts the requirement in Sections 6.7(A) and (B) of Ordinance No. 344–1979 for a permit to deliver LPG within Nassau County with respect to trucks that are based outside of Nassau County. As applied to and enforced against those vehicles, that requirement causes unnecessary delays in the transportation of hazardous materials to Nassau County from locations outside of Nassau County and, accordingly, creates an obstacle to accomplishing and carrying out Federal hazardous material transportation law and the HMR.

Nassau County's permit requirement does not create unnecessary delays in the transportation of hazardous materials, and is not preempted, with respect to trucks that are based within Nassau County.

No person requested reconsideration of that part of RSPA's August 25, 1998 determination which found that Federal hazardous material transportation law preempts Section 6.8 of Ordinance No. 344–1979 for a certificate of fitness, insofar as that requirement is applied to a motor vehicle driver who sells or delivers LPG, because Section 6.8 imposes more stringent training requirements than provided in the HMR.

IV. Final Agency Action

In accordance with 49 CFR 107.211(d), this decision constitutes RSPA's final agency action on NYPGA's application for a determination of preemption as to the requirements in Sections 6.7(A) and (B) of Nassau County Ordinance No. 344–1979 for a permit to pick up or deliver LPG within Nassau County. Any party to this proceeding ''may bring a civil action in an appropriate district court of the United States for judicial review of [this] decision * * * not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

Because no party sought reconsideration of RSPA's determination in PD–13(R) that Federal hazardous material transportation law preempts Section 6.8 of Nassau County Ordinance No. 344–1979 for a certificate of fitness, as applied to motor vehicle drivers, that determination published in the **Federal Register** on August 25, 1998, constituted RSPA's final agency action.

Issued in Washington, D.C. on October 3, 2000.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 00–25953 Filed 10–6–00; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33941]

Pioneer Railcorp and Michigan Southern Railroad Company-Corporate Family Transaction Exemption

Pioneer Railcorp (Pioneer) and Michigan Southern Railroad Company (MSO) have filed a verified notice of exemption.[1] MSO owns 100% of the stock of Michigan Southern Railroad Co., Inc. (MSRR), a nonoperating Class III shortline railroad, which owns a property interest in three segments of railroad currently leased and operated by MSO. The three segments of railroad are described as follows: (1) between milepost 0.0, at Elkhart, IN, and milepost 9.8, at Mishiwaka, IN (Elkhart Segment); (2) between milepost 119.0 and milepost 120.1, at Kendallville, IN (Kendallville Segment); and (3) between milepost 382.5, at or near Coldwater, MI, and milepost 421.2, at or near White Pigeon, MI (Michigan Segment).[2]

The exempt transaction involves the reorganization of the MSO railroad holdings and the creation of two new subsidiaries of MSO: Elkhart & Western Railroad, Co. (E&WR) and Kendallville Terminal Railway Co. (KTR). MSO will assign its operating leases of the Elkhart Segment to E&WR[3] and of the Kendallville Segment to KTR. MSO will continue to operate the Michigan Segment.[4] MSRR will continue to own the three segments of railroad.

The transaction is expected to be consummated on September 29, 2000.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). The parties state that the transaction will not result in adverse changes in service levels, significant operational changes, or changes in the competitive balance with carriers outside the corporate family.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to reopen will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33941, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on John D. Heffner, Esq., REA, CROSS & AUCHINCLOSS, 1707 L Street, N.W., Suite 570, Washington, DC 20036.

Board decisions and notices are available on our website at ''WWW.STB.DOT.GOV.''

Decided: September 29, 2000.

[1] Pioneer is a publicly traded shortline railroad holding company and noncarrier that controls 13 Class III shortline railroads, including MSO.

[2] Pioneer and MSO state that MSRR owns part of the Michigan Segment and that MSRR (despite its description as a ''nonoperating'' railroad) ''operates'' the balance of the Michigan Segment under an agreement with a shipper association. According to the verified notice of exemption, the ownership of part or all of the Michigan segment is presently in dispute.

[3] MSO has a haulage agreement with Norfolk Southern Railway Company (NS) from Elkhart to Fort Wayne, IN, which permits MSO to market Fort Wayne as a station on MSO's line. Upon consummation of this transaction, Fort Wayne will become a station of E&WR.

[4] MSO also has a haulage agreement with NS from White Pigeon to Fort Wayne, which permits MSO to market Fort Wayne as a station on MSO's line. Upon consummation of this transaction, Fort Wayne will continue to be a station of MSO.