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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–00–7096 (PD–27(R))]

Louisiana Requirements for Hazardous Materials Incident Notification

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

ACTION: Notice of administrative determination of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

Local Laws Affected: Louisiana Revised Statutes (La. R.S.) 32:1510.

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: Rail and highway.

SUMMARY: Federal hazardous material transportation law: (1) Does not preempt Louisiana's immediate telephone notification requirement in La. R.S. 32:1510A, and (2) preempts Louisiana's written incident reporting requirements in La. R.S. 32:1510B & C.

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SUPPLEMENTARY INFORMATION:

I. Background

ATOFINA Chemicals, Inc. (ATOFINA) has applied for an administrative determination whether Federal hazardous material transportation law preempts the incident reporting requirements in La. R.S. 32:1510. Subsections A and B of La. R.S. 32:1510 require ''[e]ach person involved'' in a hazardous materials incident, accident, or the clean up of an incident or accident that has certain consequences to: (1) Make an immediate telephone report to the Louisiana Department of Public Safety and Corrections (DPSC), and (2) submit a follow-up written report ''on an approved form'' to DPSC. With respect to a hazardous materials transportation incident or accident that is not subject to the reporting requirements in subsections A and B, but must be reported to DOT, La. R.S. 32:1510C requires the carrier to submit a copy of the written report it files with DOT in accordance with 49 CFR 171.16. Other subsections of La. R.S. 32:1510, concerning the issuance or implementation of an emergency response system and exceptions from these reporting requirements for incidents that must be reported under another statute, do not appear to be relevant to ATOFINA's application.

In its application, ATOFINA explained that it had received a notice of violation from the Louisiana State Police for failing to provide immediate notification of an incident when it ''believed that the carrier would make any necessary notification since it was directly present on the scene.'' Additional background on this incident and ATOFINA's application is contained in DPSC's comments and ATOFINA's rebuttal comments, submitted in response to RSPA's October 17, 2000 notice in the **Federal Register** inviting interested persons to comment on ATOFINA's application. 65 FR 61370.

According to those comments, approximately a year before ATOFINA's application, employees of the New Orleans Public Belt Railroad discovered that ethyl acrylate (a hazardous material) was leaking from a tank car. ATOFINA stated that it had manufactured this material and (through its agent, StanTrans) shipped it on the Burlington Northern Santa Fe Railway (BNSF). ATOFINA explained that, when it learned of the incident several hours after it occurred, it sent a representative to the scene. At that time, according to ATOFINA, the New Orleans Fire Department and the Louisiana State Police were already present, and the Fire Department ''had assumed control of the situation and, in fact, refused to permit the contractors who were called in by ATOFINA to assist with the repairs to the railcar.'' ATOFINA stated that the Louisiana State Police received notice of the incident from both StanTrans and BNSF although apparently that notice ''was not considered to be timely.''

DPSC acknowledged that ATOFINA's representative arrived at the scene of the incident ''within five hours of its being made aware of the situation,'' but stated that ''the ATOFINA employee took no action whatsoever,'' and ''neither Burlington, the carrier, nor ATOFINA, the manufacturer/shipper, notified the Louisiana State Police of the incident.'' DPSC stated that notices of violation were issued to both ATOFINA and BNSF ''for failure to make the required telephonic notification.''

DPSC also referred to Inconsistency Ruling (IR) No. 31, Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572, (June 21, 1990), appeal dismissed as moot, 57 FR 41165, 41167 (Sept. 9, 1992). In that decision, RSPA previously considered the incident reporting requirements in 32:1510A–C and found that ''the State's requirements for telephonic notification concerning hazardous materials incidents/accidents are consistent with the HMTA and the HMR,'' but that ''the provisions of State law which require the submission of written accident/incident reports, are redundant with Federal requirements (particularly 49 CFR 171.16), tend to undercut compliance with the HMR requirements, and thus are inconsistent.'' 55 FR at 25582. In IR–31, RSPA also found that provisions in La. R.S. 32:1502 are

> inconsistent with the HMTA and the HMR insofar as they authorize the State's Secretary of the Department of Public Safety and Corrections to designate as ''hazardous materials'' any materials, including hazardous wastes, other than those designated as such in the HMR. It follows that the State's section 32:1502(b) definition of ''explosives'' is inconsistent with the HMR to the extent that it defines ''explosives'' any materials other than those defined as such in the HMR.

55 FR at 25581.

National Tank Truck Carriers, Inc. (NTTC) and the Institute of Makers of Explosives (IME) also submitted comments on ATOFINA's application, in response to RSPA's October 17, 2000 notice in the **Federal Register.**

II. Federal Preemption

As discussed in the October 17, 2000 notice, 49 U.S.C. 5125 contains express preemption provisions that are relevant to this proceeding. 65 FR at 61371–72. As amended by Section 1711(b) of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2320), 49 U.S.C. 5125(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, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
>
> (2) The requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive

issued by the Secretary of Homeland Security.

These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria that 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 section 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 is preempted—unless authorized by another Federal law or DOT grants a waiver of preemption—when the non-Federal requirement is not ''substantively the same as'' a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Secretary of Homeland Security:

(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).

The November 2002 amendments to the preemption provisions in 49 U.S.C. 5125 reaffirmed Congress' long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. Thirty years ago, when it was 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 expanded the preemption provisions 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. (In 1994, Congress revised, codified and enacted the HMTA ''without substantive change,'' at 49 U.S.C. Chapter 51. Public Law 103–272, 108 Stat. 745.) A United States Court of Appeals has found that uniformity was the ''linchpin'' in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991).

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to RSPA to make determinations of preemption, except for those that concern highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.53(b).

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. 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, the Fifth Amendment or other provisions 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, or whether a fee is ''fair'' within the meaning of 49 U.S.C. 5125(g)(1). 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 policies set forth in Executive Order No. 13132, entitled ''Federalism.'' 64 FR 43255 (Aug. 10, 1999). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence that Congress intended to preempt State law, 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. Discussion

A. Reporting Incidents and Accidents Involving Hazardous Materials in Transportation

Louisiana's hazardous material incident reporting requirements in La. R.S. 32:1510A–C provide as follows:

A. Each person involved in an incident, accident, or the cleanup of an incident or accident during the transportation, loading, unloading, or related storage in any place of a hazardous material subject to this Chapter shall report immediately by telephone to the department if that incident, accident, or cleanup of an incident or accident involves:

(1) A fatality due to fire, explosion, or exposure to any hazardous material.

(2) The hospitalization of any person due to fire, explosion, or exposure to any hazardous material.

(3) A continuing danger to life, health, or property at the place of the incident or accident.

(4) An estimated property damage of more than ten thousand dollars.

B. A written report shall be submitted to the department on an approved form. Each report submitted shall contain the time and date of the incident or accident, a description of any injuries to persons or property, any continuing danger to life at the place of the accident or incident, the identify and classification of the material, and any other pertinent details.

C. In the case of an incident or accident involving hazardous materials which is not subject to this Chapter but which is subject to Title 49 and Title 46 of the Code of Federal Regulations, the carrier shall send a copy of the report filed with the United States Department of Transportation to the department.

B. Summary of Comments

In its application, ATOFINA asserted that the Louisiana statute ''is much broader'' than the incident reporting requirements in the HMR and is preempted because it ''is a non-federal requirement relating to the written notification and reporting of an unintentional release in transportation of hazardous materials that is not ''substantively the same as'' the federal regulations in 49 CFR 171.15 and 171.16. However, ATOFINA's application and the other comments focused on the immediate telephone notification required by La. R.S. 32:1510A, rather than the follow-up written reports required by La. R.S. 32:1510B and C.

ATOFINA argued that, ''to the extent that Louisiana believes that immediate notification is necessary for emergency response purposes, that concern is satisfied by imposing the immediate notification obligation on the carrier rather than on each person involved in the incident, some of whom may not be present at the scene.'' It stated that ''[t]here can be many persons involved in an accident, such as the carrier, the owner of the goods, or agents of each of them,'' and ''duplicate reporting * * * could be confusing to those who may have to respond to an incident.'' ATOFINA also stated that Louisiana's immediate reporting requirement is impractical for ''the manufacturer of the goods'' that has made arrangements with the carrier ''to make the immediate notification required under the federal regulations,'' and that it is

> impractical and a burden on interstate commerce to require a large national company to comply with a multitude of different reporting requirements in the different state jurisdictions, particularly those like Louisiana which impose the same duty on multiple parties. Procedures would become so cumbersome that ultimately they would not be useful at all.

In its rebuttal comments, ATOFINA urged that Louisiana's immediate reporting requirement in La. R.S. 32:1510A is preempted ''as applied to persons other than carriers,'' under the ''obstacle'' test in 49 U.S.C. 5125(a)(2). ATOFINA acknowledged that ''states are permitted to impose some notification requirements for emergency response purposes,'' but these requirements ''should not apply to persons other than the person who has possession or control of the leaking vehicle or container (*i.e.*, the carrier).'' It stated that ''it is unclear how Louisiana defines 'each person involved' in a hazardous materials incident,'' and concluded that, if it had not sent a representative to the incident scene and ''attempted to assist in the response effort, it would not have been fined.'' ATOFINA stated that, in this manner, the immediate reporting requirement in La. R.S. 32:1510A ''discourage[s] persons from responding to an incident involving the release of a hazardous substance.''

ATOFINA also noted that the Louisiana State Police is ''a non-911 number and is not specified in the regulations.'' It supported the position advanced by IME that requirements for telephone notification should be limited to ''911'' calls. IME stated that ''notifications to locally-specified telephone numbers is unacceptable in a transportation setting, and is a burden that is exacerbated for motor carriers that operate over irregular routes.'' IME referred to the decision in *Colorado Pub. Util. Comm'n* v. *Harmon*, above, 951 F.2d at 1578, that Federal hazardous material transportation law preempts a State requirement for a carrier of hazardous materials to carry the telephone number of the State Patrol in the vehicle because that requirement is not substantively the same as the shipping paper requirements in the HER. ATOFINA stated that it would be a ''tremendous burden * * * to maintain and continuously update a directory of emergency numbers for more than 30,000 or so local jurisdictions,'' and, without such a directory, ''the carrier (and other entities, if required) would be forced to divert valuable resources away from responding to an incident in order to ensure compliance with local notification requirements.''

In its comments, DISC stated that RSPA has previously stated that the immediate notification requirement in La. R.S. 32:1510A is not one of the subjects in 49 U.S.C. 5125(b)(1) where non-Federal requirements must be ''substantively the same as'' requirements in the HMR. It referred to a brief filed by the United States (on behalf of DOT) in *Union Pacific RR* v. *California Pub. Util. Comm'n*, No. C–97–3660–THE (N.D. Cal.), which stated that ''DOT interprets [the 'substantively the same as' test in] 49 U.S.C. 5125(b)(1)(D), to preempt only state and local requirements to provide notification or reports in writing.'' From the same brief, DPSC also quoted language in a 1990 report of the House Committee on Energy and Commerce concerning the nature of the provision in 49 U.S.C. 5125(b)(1)(D) that non-Federal requirements on the ''[w]ritten notification, recording, and reporting of the unintentional release in transportation of hazardous materials'' must be ''substantively the same as'' requirements in the HMR:

> The oral notification and reporting of unintentional releases has specifically been excluded from this paragraph in order to permit State and local jurisdictions to develop the full range of possible alternatives in emergency response capabilities (such as requiring carriers to telephone local emergency responders).

In their comments, IME and NTTC raised questions about the definitions of ''hazardous materials'' and ''explosives'' in La. R.S. 32:1502(5). As already discussed, IME argued that requirements to make immediate telephone notifications should be limited to ''911'' numbers, and that additional ''locally-specified telephone numbers'' constitute such a burden that RSPA should find that they are preempted under the ''obstacle'' test. IME commented that ATOFINA ''overreached in suggesting that'' the ''substantively the same as'' standard in 49 U.S.C. 5125(b)(1)(D) applies to immediate telephone reports of hazardous materials incidents in transportation, in contrast to Louisiana's written follow-up reporting requirements in La. R.S. 32:1510B & C, to which the ''substantively the same as'' standard applies. IME also stated that the exceptions in La. R.S. 32:1510E for incidents at fixed facilities involving certain materials have ''no bearing on 'transportation-related releases' '' which are covered under La. R.S. 32:1510A–C.

NTTC argued that both the immediate telephonic and follow-up written reporting requirements are not ''substantively the same as'' the requirements in the HMR because ''the monetary thresholds for property damage(s) differ'' Louisiana has exceptions for incidents involving certain materials that occur at a fixed facility; and the HMR require reports for incidents involving ''etiologic agents, marine pollutants and transportation by aircraft not found within Louisiana's rules.''

C. Decision

There does not appear to have been any change to the Louisiana incident reporting requirements that were previously considered in IR–31. 55 FR at 25582. In that decision (*id.*), RSPA carefully differentiated between immediate telephonic notification and follow-up written reports, as follows:

Requirements for immediate telephonic hazardous materials transportation accident/incident reports for emergency response purposes are generally consistent with the HMTA and the HMR. IR–2, IR–3, IR–28, all *supra; National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983).

* * * * *

Therefore, the State's requirements for telephonic notification concerning hazardous materials incidents/accidents are consistent with the HMTA and the HMR.

Furthermore, the provisions of State law which require the submission of written accident/incident reports, are redundant with Federal requirements (particularly 49 CFR 171.16), tend to undercut compliance with the HMR requirements, and thus are inconsistent. IR–2, IR–3 (Decision on Appeal), all *supra;* IR–30, 55 FR 9676 (Mar. 14, 1990), correction, 55 FR 12111 (Mar. 30, 1990). This rationale also applies to requirements to provide copies of the incident reports filed with [RSPA]; as indicated in IR–3, *supra,* such a requirement is inconsistent but [RSPA] is prepared to routinely send copies of those reports to a designated state agency on request.

Additional explanation of RSPA's decision in IR–31 is contained in the prior decisions cited in the above quotations. In IR–2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas, etc., 44 FR 75566 (Dec. 20, 1979), RSPA stated that ''when an accident does occur, response is, of necessity, a local responsibility'' (*id.* at 75568), and that a State's ''requirement for immediate notification in certain situations furthers the State's activity in protecting persons and property through emergency response measures.'' *Id.* at 75572. RSPA's findings in IR–2 were upheld in Federal court, which stated that, while ''[t]he need for uniform written report standards is imperative,'' immediate ''emergency notice to the State Police * * * promotes the public safety by facilitating a prompt emergency response. * * * It is neither inconsistent nor in conflict with nor contrary to the purpose of Congressional policy.'' *National Tank Truck Carriers, Inc.* v. *Burke*, 535 F. Supp. 509, 519 (D.R.I. 1982), aff'd, 698 F.2d 559 (1st Cir. 1983).

Similarly, in IR–3, City of Boston Rules Governing Transportation of Certain Hazardous Materials, etc., 46 FR 18918 (Mar. 26, 1981), decision on administrative appeal, 47 FR 18457 (Apr. 29, 1982), RSPA stated that:

> For an incident that requires the City to undertake emergency response, we reiterate our agreement that the City must be able to require the carrier to notify it immediately. If the City wishes to conduct a thorough investigation of the events at the scene, it may do so then * * * For data the City thinks it must have immediately from the carrier, the appropriate time to acquire it is in the emergency response phase.

47 FR at 18462. On the other hand, ''[w]ritten incident reports * * * do not provide time-sensitive data,'' and a State or local government is able to ''directly access the computer data base where all of the information from written incident reports [to RSPA] is kept.'' *Id.* RSPA concluded that:

> If the City in fact intends to make serious use of the information in DOT incident reports, the effort to obtain it from [RSPA] should not be significant. Accordingly, we reaffirm our previous conclusion that Boston's requirement that carrier submit written incident reports is redundant, unnecessary and inconsistent with the HMTA and the HMR. *Id.*

The different nature of immediate telephonic notification and follow-up written reports was specifically recognized in the amendments to the HMTA enacted in the Hazardous Materials Transportation Uniform Safety Act (HMTUSA) of 1990 (Pub. L. 101–615, 104 Stat. 3244, Nov. 16, 1990). Section 4 of HMTUSA amended the preemption provisions in the HMTA to provide that a State requirement on the ''written notification, recording, and reporting of the unintentional release in transportation of hazardous materials'' is preempted unless it is ''substantively the same as'' the Federal requirements in the HMR. 49 U.S.C. 5125(b)(1)(D). However, ''oral notification and reporting of unintentional releases'' was ''specifically excluded'' from Federal preemption ''to permit State and local jurisdictions to develop the full range of possible alternative in emergency response capabilities.'' H.R. Report No. 101–444, Part 1, at 35 (Apr. 3, 1990).

In the *Union Pacific RR* case, above, the court noted that ''DOT has long construed the HMTA to preempt only state laws pertaining to written reports, and not those that require oral notice to local emergency response teams.'' Order on Motion for Reconsideration, pp. 6–7 (slip op., Dec. 14, 1998). The court found that the ''notification and reporting' subject area delineated in 49 U.S.C. 5125(b)(1)(D) does not include the subject area of providing immediate verbal reports to local entities so that emergency personnel can effectively respond to a release or other incident involving the transportation of hazardous materials.'' *Id.*, p. 8. Accordingly, State requirements for immediate telephone notification of an accident or incident need not be ''substantively the same as'' Federal requirements in the HMR, and these requirements are not ''preempted as an 'obstacle' since they do not interfere with the federal government's ability to obtain prompt reports of serious accidents or to otherwise investigate those accidents and compile data for transportation planning.'' *Id.*

There is no evidence that it is impossible for persons that are ''involved'' in an incident (or its cleanup) in Louisiana, in addition to the carrier or other person who had physical possession of the hazardous material at the time of the incident, to immediately notify DPSC. Nor is there evidence that requiring immediate notification by each person ''involved in an incident, accident, or the cleanup of an incident or accident'' will interfere with either the specific notification requirements in the HMR or the safe transportation of hazardous materials overall. In a recent rulemaking, RSPA recognized that other persons who are not carriers (such as operators of transportation facilities) may have ''physical control of a hazardous material when an incident occurs during transportation [and] should be responsible for reporting that incident.'' *See* the preamble to the final rule in Docket No. RSPA–99–5013 (HM–229), Revisions to Incident Reporting Requirements, etc., 68 FR 67746, 67750 (Dec. 3, 2003), corrections, 69 FR 30114 (May 26, 2004). Effective January 1, 2005, the incident reporting requirements in 49 CFR 171.15 and 171.16 will apply to the ''person in physical possession of the hazardous material'' at the time of the incident. 68 FR at 67759.

ATOFINA's claim that Louisiana's requirement is a ''burden on interstate commerce'' does not meet the preemption criteria in 49 U.S.C. 5125, for RSPA's administrative determinations do not address issues of preemption arising under the Commerce Clause, except in the limited situations discussed in Part II (Federal Preemption), above. Additional issues raised by ATOFINA concerning the proper interpretation of the immediate reporting requirement in La. R.S. 32:1510A are for State administrative or judicial bodies to resolve, such as:

—Whether ATOFINA was considered to be ''involved'' in the incident or its cleanup as the shipper of the ethyl acrylate, or only when its representative arrived at the incident scene about five hours after learning of the incident;
—whether timely telephone notification by the carrier (BNSF) or ATOFINA's agent (StanTrans), on behalf of ATOFINA, would satisfy an obligation for ATOFINA to ''immediately'' telephone DPSC;
—whether notification within five hours of learning of the incident satisfies the requirement to ''immediately'' notify DPSC of the accident, and whether telephonic notification is still required once the State Police have arrived at the scene of the incident; and
—whether there is sufficient notice of the ''non-911'' telephone number to satisfy substantive due process requirements.

It is the role of the State, not RSPA, to interpret and apply its own requirements and, moreover, ''isolated instances of improper enforcement (*e.g.*, misinterpretation of regulations) do not render such provisions inconsistent.'' IR–31, above, 55 FR at 25584. Thus, ''[a]s a general matter, an inconsistent or erroneous interpretation of a non-Federal [statute or] regulation should be addressed to the appropriate State or local forum.'' PD–14(R), Houston, Texas, Fire Code Requirements, etc., 63 FR 67506, 67510 n.4 (Dec. 7, 1998), decision on petition for reconsideration, 64 FR 33949 (June 24, 1999). In making administrative determinations of

preemption, RSPA's role to is to interpret and clarify the Federal-State relationship in the regulation of hazardous materials transportation, ''within the rule-making process lying at the center of the responsibilities of federal executive agencies,'' and not to ''adjudicate'' specific cases as a substitute for (or reviewing the decision of) the cognizant State or local forum. *Tennessee* v. *U.S. Department of Transportation,* 326 F3d 729, 736 (6th Cir.), *cert. denied,* ____ U.S., _____, 124 S.Ct. 464 (2003). There is also no basis for finding that Louisiana's interpretation of ''immediately'' in La. R.S. 32:1510A must be the same as the standard of ''no later than 12 hours after the occurrence'' adopted in the revisions to 49 CFR 171.15(a) in HM–229. 68 FR at 67759.

In the HM–229 rulemaking, RSPA considered, and declined to adopt, the recommendation of the American Trucking Associations, Inc. ''to incorporate one-call notification for both local and national requirements'' for immediate notification of an incident involving hazardous material in transportation. In the preamble to the final rule, RSPA stated that, ''In the case of any incident involving hazardous materials that requires immediate emergency response, the local authorities should be immediately notified.'' *Id.* at 67750. While ''contacting emergency response entities may be of primary concern immediately following an incident * * * notification of federal authorities through the NRC [National Response Center] is also essential.'' *Id.* at 67752. RSPA also noted that it ''has a system for identifying duplicative reporting,'' *id.* at 67751, and we must assume that DPSC is able to deal with the possibility of duplicate reports without being confused, as ATOFINA seems to fear. In any event, that potential concern does not create an ''obstacle'' to accomplishing and carrying out Federal hazardous material transportation law or the HMR.

There is also insufficient information to find it is impossible to comply with a State or local requirement to call a ''non-911'' number for emergency response, or that this requirement will frustrate the Federal law or regulations. In its comments to the docket in HM–229, Norfolk Southern Railway Company asked RSPA to confirm that it is not ''the specific individual in physical control of the hazardous materials (who could be the engineer or conductor)'' who must make the telephone call. ''In other words, carriers can continue their existing practice of designating persons within the company to make such calls (such as the Chief Dispatcher or the Control Center) and file the follow-up written reports.'' In this circumstance, it would not be practicable to limit immediate telephone reporting to ''911'' numbers because, whenever the designated company representative (such as the Chief Dispatcher or Control Center, as suggested by Norfolk Southern) is located at a distance from the scene of the incident, its call to a local ''911'' number would not reach the appropriate emergency response personnel. In the absence of information to the contrary, it must be assumed that a designated company representative is able to obtain and contact the required emergency response telephone number within a brief period of time after learning of an incident involving hazardous materials in transportation, without diverting resources from responding to the incident. It must also be assumed that a call to the local ''911'' number in the vicinity of the incident would yield the appropriate ''non-911'' telephone number of the State Police or other agency required to be notified.

In sum, RSPA's prior decisions make it clear that a State's immediate notification requirement need not be ''substantively the same as'' 49 CFR 171.15, as the *Union Pacific* case recognized. ATOFINA's application and the other comments submitted in this proceeding do not show that it is impossible for persons that are ''involved'' in an incident (or its clean-up) in Louisiana to immediately notify DPSC, in addition to (and perhaps before) making the required telephonic notification to the National Response Center under 49 CFR 171.15. There is also insufficient information to find that La. R.S. 32:1510A as enforced and applied, to require another person besides the carrier to provide immediate telephonic notification of an incident, is an ''obstacle'' to accomplishing and carrying out Federal hazardous material transportation law, the HMR, or a DHS security regulation or directive.

IV. Ruling

For all the reasons set forth above and in IR–31, Federal hazardous material transportation law: (1) Does not preempt Louisiana's immediate telephone notification requirement in La. R.S. 32:1510A, and (2) preempts Louisiana's written incident reporting requirement in La. R.S. 32:1510B & C.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register**. Any party to this proceeding may seek review of RSPA's decision ''in an appropriate district court of the United States * * * not later than 60 days after the decision becomes final.'' 49 U.S.C. 5125(f).

This decision will become RSPA's final decision 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of this decision is filed within 20 days of publication in the **Federal Register**, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 49 CFR 107.211(d).

Issued in Washington, DC on November 22, 2004.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 04–26352 Filed 11–29–04; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34531][1]

The Indiana Rail Road Company—Acquisition Exemption—Line of Monon Rail Preservation Corporation

The Indiana Rail Road Company (INRD), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire from Monon Rail Preservation Corporation (Monon), approximately 3.98 miles of rail line between milepost Q217.67 at Hunters, IN, and milepost Q213.69 at Ellettsville, IN, in Monroe County, IN. In 2001, INRD entered into an operating agreement with Monon, whereby INRD became the operator of the line.[2]

INRD certifies that its projected annual revenues as a result of this transaction will not result in the creation of a Class I or Class II rail carrier.

INRD indicates that the parties would like to consummate the transaction on or shortly after December 6, 2004.

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

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34531, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on John Broadley, 1054 31st Street, NW., Suite 200, Washington, DC 20007.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 22, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–26301 Filed 11–29–04; 8:45 am]

BILLING CODE 4910–01–P

[1] In a decision in this proceeding served on November 22, 2004, the Board granted a request by INRD for waiver of the 60-day advance labor notice requirement of 49 CFR 1150.42(e).

[2] *See The Indiana Rail Road Company—Operation Exemption—Monon Rail Preservation Corporation,* STB Finance Docket No. 33670 (STB served Feb. 21, 2001).