



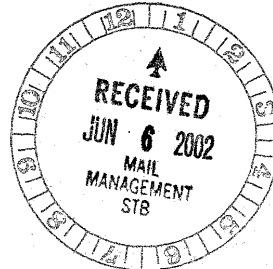
U.S. Department of
Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

205563

June 6, 2002



Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 34192

Dear Secretary Williams:

Enclosed herewith are the original and ten copies of the Comments of the United States Department of Transportation in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: John F. McHugh, Esq.
Victoria A. Flynn, Esq.
Edward J. Fishman, Esq.

ENTERED
Office of the Secretary
JUN 07 2002
Part of
Public Record

Before the
Surface Transportation Board
Washington, D.C.



_____)
Hi Tech Trans, LLC –Petition for a _____)
Declaratory Order – Hudson County, New Jersey _____)

Fin. Dkt. 34192

Comments of the
United States Department of Transportation

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Introduction

The central issue in this proceeding concerns whether federal law preempts state and local law regarding the interstate transportation of construction waste and contaminated soil. The petitioner herein asserts that provisions of various federal statutes as well as the Commerce Clause of the United States Constitution preempt certain laws of the State of New Jersey and related regulatory provisions promulgated by a unit of county government, the Hudson County Improvement Authority (“HCIA”).¹ The United States Department of Transportation (“Department” or “DOT”) administers one of the statutes relied upon by the petitioner as preemptive of the State and local laws at issue, the Hazardous Materials Transportation Act (“HMTA”), 49 U.S.C. §§ 5101 *et seq.*² Although the petition asserts that the jurisdiction of the Surface Transportation Board (“STB” or “Board”) in this matter is “exclusive,” as to the HMTA that is not so. The

^{1/} A letter of counsel in the STB’s docket dated May 6, 2002, indicates that the Essex County Utilities Authority will also participate in this case.

^{2/} Technically the HMTA was repealed in 1994 when Title 49 was recodified, but its substantive terms remain unchanged. For convenience we will continue to refer herein to the HMTA.

jurisdiction, specialized expertise, and jurisprudence to address questions of preemption arising under the HMTA in fact reside in the Department. We therefore urge the Board to avoid reaching a decision in this matter based on any interpretation or application of the HMTA.

The Petition

The petitioner in this case, Hi Tech Trans, LLC (“Hi Tech”), operates a facility in Essex County, New Jersey, involved in the interstate transportation of waste material. Hi Tech states that its facility is on the property of an affiliate of the Canadian Pacific Railway, that it accepts construction and demolition debris and contaminated soil transported by truck from sites in the State of New Jersey, and that it loads such waste materials onto railcars for transport in interstate commerce. Petition at 1-2. Hi Tech further avers that none of the matter it processes at this facility is “hazardous material” within the meaning of federal law. *Id.* at 2. The petitioner also indicates that New Jersey law makes it a crime for anyone to transport or cause to be transported “hazardous waste” to other than facilities authorized by appropriate local government entities. *Id.* at 2-4, citing N.J.S.A. §§ 13:1E-9 and -12. The HCIA has licensed another facility in the County to process the materials at issue, which facility only accepts waste from, and loads it onto, trucks. *Id.* at 4-5. Hi Tech is not licensed by the HCIA, and alleges that as a result it and the motor carriers that transport construction debris to its facility for subsequent transport by rail face penalties under this State/local regulatory regime. It seeks a declaration from the Board that the State and county laws are preempted by the Commerce Clause and by provisions of various federal statutes, including the HMTA.

Federal Hazardous Materials Transportation Law

The Research and Special Programs Administration (“RSPA”), an operating administration within the Department, primarily administers federal hazardous material transportation law, including the HMTA and related statutes. This law establishes a comprehensive federal framework for the transport, packaging, and handling of “hazardous material,” defined as that deemed by the Secretary of Transportation to “pose an unreasonable risk to health and safety or property.” 49 U.S.C. §§ 5103. The statute charges the Secretary with identifying hazardous materials and promulgating regulations for their safe transport “in intrastate, interstate, and foreign commerce.” *Id.*³ These rules govern handling, employee training, and the manufacture and use of packaging or containers; they prescribe inspections, documentation, highway routing controls, and placarding (specialized signage); and they cover all modes of transportation. 49 U.S.C. § 5103; *see also* 49 U.S.C. §§ 5101 – 5127. DOT regulations promulgated pursuant to the HTMA reflect the statute’s broad coverage, and they are extremely detailed. 49 C.F.R. Parts 171 – 180. Within the Department, other operating administrations in addition to RSPA oversee the application and enforcement of the hazardous materials regulations (“HMRs”) to their respective transportation industries. These include the Federal Railroad Administration, the Federal Aviation Administration, and the Federal Motor Carrier Safety Administration. *See, e.g.*, 49 C.F.R. §§ 1.49(s)(1); 1.47(j)(1), (k); 1.73(d)(1).

³/ The Secretary has delegated this authority to RSPA. 49 C.F.R. § 1.53(b)(2).

Central to Congress' purpose in this legislation, both originally and as amended over the years, is the notion that a single, uniform body of law in this area enhances safety. See S. Rep. No. 1102, 93rd Cong., 2nd Sess. 37 (1974) (Congress wished "to preclude a multiplicity of State and local regulations"); H. Rep. No. 101-444, 101st Cong., 2nd Sess. 33-34 ("near-uniformity ... is crucial" with respect to major substantive areas); Colorado Public Utility Commission v. Harmon, 951 F.2d 1571, 1575 (10th Cir. 1991) (uniformity is the "linchpin" of federal hazardous materials law). That purpose is very clearly reflected in the statute's preemption provision, 49 U.S.C. § 5125. In general, State, local, and tribal law in this area is preempted if compliance with such law and a federal requirement is not possible, or if such law stands as an obstacle to carrying out federal law. 49 U.S.C. § 5125(a). Such law is also preempted if it is not "substantively the same" as federal law with respect to broadly described subject areas, including the designation, description, classification, and handling of hazardous materials. 49 U.S.C. § 5125(b).⁴

Those seeking an authoritative determination of whether a particular State, local, or tribal law is preempted by the HMRs may obtain such a ruling from DOT or from the courts. 49 U.S.C. § 5125(d).⁵ Alternatively, parties may seek from DOT a waiver of preemption, so long as the law in question provides "at least as much protection" to the

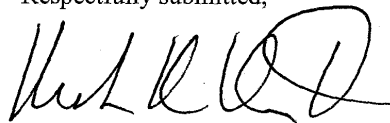
⁴/ Because the State provisions at issue impact transportation by rail, they may also be subject to analysis under the preemption provision of the Federal Railroad Safety Act of 1970, 49 U.S.C. § 20106. See CSX Transp. Inc. v. Public Utilities Comm'n of Ohio, 901 F.2d 497 (6th Cir. 1990) *cert. den.* 498 US 1066, 112 L.Ed.2d 845, 111 S.Ct. 781 (1991).

⁵/ The Department offers both formal decisions and informal interpretations on preemption. For example, a recently issued formal preemption determination addresses restrictions imposed by New Jersey on the transport of blasting caps. 66 Fed. Reg. 30985 (June 8, 2001). The RSPA also offers legal opinions on preemption and other subjects; these are contained in letters, which are available on the RSPA website at <http://rspa-atty.dot.gov>.

public as the pertinent HMRs and does not unreasonably burden interstate commerce. 49 U.S.C. § 5125(e).

It is therefore clear that it is the Department that has the primary legal responsibility for regulating hazardous materials and for ascertaining whether pertinent laws or standards imposed by other governmental entities are preempted. DOT is the agency charged by Congress with administering the HMTA. It is the agency that has the technical expertise, the established procedures, and the accumulated body of jurisprudence to identify the existence, extent, and appropriate resolution of preemption issues such as those raised by the instant petition. We take no position at this time as to whether the transportation at issue is subject to the HMTA, or, if it is, whether the relevant State and local laws are preempted thereby. But as a jurisdictional matter the Department urges the Board to avoid reaching any conclusion concerning preemption in this proceeding premised on the HMTA. As noted, any affected party wishing a definitive determination on that subject should seek one not from the STB, but from the DOT or from a court of competent jurisdiction.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kirk K. Van Tine', written in a cursive style.

Kirk K. Van Tine
GENERAL COUNSEL

June 6, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the Comments of the United States Department of Transportation in STB Finance Docket No. 34192 to be served by first class mail, postage prepaid, upon John F. McHugh, Victoria A. Flynn, and Edward J. Fishman at their addresses of record.


Paul Samuel Smith

June 6, 2002