

approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On January 26, 2000, FRA published a 60-day notice in the **Federal Register** soliciting comment on ICRs that the agency was seeking OMB approval. 65 FR 4297. FRA received no comments after issuing this notice. Accordingly, DOT announces that these information collection activities have been reevaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507(b)-(c); 5 CFR 1320.12(d); see also 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); see also 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The revised requirements are being submitted for clearance by OMB as required by the PRA.

Title: Identification of Cars Moved in Accordance with Order 13528.

OMB Control Number: 2130-0506.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads.

Form(s): None.

Abstract: This collection of information identifies a freight car being moved within the scope of Order 13528 (Order). See CFR part 232, appendix B. Otherwise, an exception will be taken, and the car will be set out of the train and not delivered. The information that must be recorded is specified at 49 CFR part 232, appendix B, requiring that a car be properly identified by a card attached to each side of the car and signed stating that such movement is being made under the authority of the order. The Order does not require retaining cards or tags. When a car bearing a tag for movement under the Order arrives at its destination, the tags are simply removed.

Annual Estimated Burden Hours: 67 hours.

Title: Railroad Police Officers.

OMB Control Number: 2130-0537.

Type of Request: Extension of a currently approved collection.

Affected Public: Railroads and States.

Form(s): None.

Abstract: Under 49 CFR part 207, railroads are required to notify states of all designated police officers who are discharging their duties outside of their respective jurisdictions. This requirement is necessary to verify proper police authority.

Annual Estimated Burden Hours: 155 hours.

Addressee: Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW, Washington, DC, 20503, *Attention:* FRA Desk Officer.

Comments are invited on the following: Whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collections; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

Authority: 44 U.S.C. 3501-3520.

Issued in Washington, DC on April 4, 2000.

Margaret B. Reid,

Acting Director, Office of Information Technology and Support Systems, Federal Railroad Administration.

[FR Doc. 00-8706 Filed 4-6-00; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA-00-7126 (PDA-24 (R))]

Application by the Institute of Makers of Explosives for a Preemption Determination as to New Jersey Restrictions on Transportation of Blasting Caps With Other Commercial Explosives

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

ACTION: Public notice and invitation to comment.

SUMMARY: Interested parties are invited to submit comments on an application by the Institute of Makers of Explosives (IME) for an administrative determination whether Federal hazardous materials transportation law preempts New Jersey law and regulations prohibiting the transportation of blasting caps on the same motor vehicle with more than 5,000 pounds of other commercial explosives.

DATES: Comments received on or before May 22, 2000, and rebuttal comments received on or before July 6, 2000 will be considered before issuance of an administrative ruling on IME's application. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

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

Comments must refer to Docket No. RSPA-00-7126 and may be submitted to the docket either in writing or electronically. Send three copies of each written comment to the Dockets Office at the above address. If you wish to receive confirmation of receipt of your written comments, include a self-addressed, stamped postcard. To submit comments electronically, log onto the Docket Management System website at <http://dms.dot.gov>, and click on "Help & Information" to obtain instructions.

A copy of each comment must also be sent to:

- (1) Ms. Cynthia Hilton, Vice President, Institute of Makers of Explosives, 1120 Nineteenth Street, NW, Suite 310, Washington, DC 20036-3605, and
- (2) Mr. Fred Cohen, Legal Liaison, New Jersey Department of Labor, P.O. Box 110, Trenton, NJ 08625-0110.

A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: "I certify that copies of this comment have been sent to Ms. Hilton and Mr. Cohen at the addresses specified in the **Federal Register**.")

A list and subject matter index of hazardous materials preemption cases,

including all inconsistency rulings and preemption determinations issued, are available through the home page of RSPA's Office of the Chief Counsel, at "http://rspa-atty.dot.gov." A paper copy of this list and index will be provided at no cost upon request to the individual named in **FOR FURTHER INFORMATION CONTACT** below.

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:

I. Application for a Preemption Determination

IME has applied for a determination that Federal hazardous material transportation law, 49 U.S.C. 5125 *et seq.*, preempts New Jersey statutory and regulatory restrictions against the transportation of blasting caps on the same motor vehicle with more than 5,000 pounds of other commercial explosives.

According to IME's application, New Jersey's Explosives Act, as codified in N.J.S.A. 21:1A-128 *et seq.*, includes provisions governing the "Transportation of explosives" at N.J.S.A. 21:1A-137. Paragraph F of that section provides:

Blasting caps or electric blasting caps, or both, may be transported in the same vehicle with other commercial explosives only when the net weight of the other commercial explosives does not exceed 5,000 pounds.

IME also states that, in 1998, the New Jersey Department of Labor adopted and began enforcing regulations governing off-highway transportation of explosives, including the provision in N.J.A.C. 12:190-6.5(d) that:

Blasting caps or electric blasting caps, or both, may be transported in the same vehicle with other commercial explosives only when the net weight of the other commercial explosives does not exceed 5,000 pounds.

IME asserts that these statutory and regulatory restrictions are preempted because they concern the "handling" of a hazardous material and are not substantively the same as the Hazardous Materials Regulations (HMR), 49 CFR Parts 171-180.¹ In 49 CFR 177.835(g), the HMR provide that:

No detonator assembly or booster with detonator may be transported on the same motor vehicle with any Division 1.1, 1.2 or 1.3 (Class A or Class B explosive) material (except other detonator assemblies, boosters

with detonators or detonators), explosives for blasting or detonating cord Division 1.4 (Class C explosive) material. No detonator may be transported on the same motor vehicle with any Division 1.1, 1.2 or 1.3 (Class A or Class B explosive) material (except other detonators, detonator assemblies or boosters with detonators), explosives for blasting or detonating cord Division 1.4 (Class C explosive) material unless—

(1) It is packed in a specification MC 201 (§ 178.318 of this subchapter) container, or

(2) The package conforms with requirements prescribed in § 173.63 of this subchapter, and its use is restricted to instances when—

(i) There is no Division 1.1, 1.2, or 1.3 (Class A or Class B explosive) material or blasting agent loaded on the motor vehicle; and

(ii) A separation of 61 cm (24 inches) is maintained between each package of detonators and each package of detonating cord; or

3. It is packed and loaded in accordance with a method approved by the Department [of Transportation]. One method approved by the Department is as follows:

(i) The detonators are in packagings as prescribed in § 173.63 of this subchapter which in turn are loaded into suitable containers or separate compartments. Both the detonators and the container or compartment must meet the requirements of the Institute of Makers of Explosives' Standard (IME Safety Library Publication No. 22).

IME also contends that these New Jersey statutory and regulatory restrictions are preempted because they are an obstacle to the accomplishing and carrying out the Federal hazardous material transportation law and the HMR. IME states that a person using both blasting caps and more than 5,000 pounds of other commercial explosives at a site within New Jersey must either: (1) Use separate vehicles to transport the blasting caps and the other commercial explosives, from the origin of the transportation to the job site; or (2) at some point before leaving the public highway at the job site, transfer either the blasting caps or the other commercial explosives to a separate vehicle.

IME submitted three affidavits with its application. Each of the affiants stated that his company uses two separate vehicles to transport detonators and other explosives to meet New Jersey's requirements. The President of Maurer & Scott, Inc., an explosives service and transportation company, testified that the use of separate vehicles to transport detonators and explosives

leads to more explosives vehicles on the road, trucks not loaded to capacity, inefficient transportation, excess handling of hazardous materials, and greater exposure to the public. Additionally, more vehicles end

up at the minesite which creates an increased safety hazard.

He also stated that the New Jersey Department of Labor has denied his company's requests for a waiver from the prohibition against transporting blasting caps on the same vehicle with more than 5,000 pounds of other commercial explosives.

IME argues that requiring separate vehicles for detonators and other commercial explosives exposes the public to greater overall risk, presumably both within and outside of New Jersey, because "the more trucks on the road, irrespective of the cargo, the higher likelihood of an accident." IME states that transferring either the detonators or the other explosives to a second vehicle, before leaving the public highway at the job site, also involves "unnecessary truck traffic" and creates "the added risk from the unnecessary handling during loading or reloading." IME notes that, in 49 CFR 177.835(j), the HMR specifically prohibit the transfer of any Division 1.1, 1.2 or 1.3 (Class A or B explosive) material

from one container to another, or from one motor vehicle to another vehicle, or from another vehicle to a motor vehicle, on any public highway, street, or road, except in the case of an emergency.

IME also states that it is unaware of any other State that imposes the same restrictions as New Jersey on the transportation of blasting caps with other commercial explosives. IME has not indicated whether New Jersey's restrictions cause shipments of blasting caps and other explosives to be routed around the State of New Jersey, rather than on highways through the State.

The text of IME's application and a list of the exhibits to the application are set forth in Appendix A to this notice. A paper copy of the exhibits to IME's application will be provided at no cost upon request to the individual named in **FOR FURTHER INFORMATION CONTACT** above.

II. Federal Preemption

Section 5125 of Title 49 U.S.C. contains several preemption provisions that are relevant to IME's application. Subsection (a) provides that—in the absence of a waiver of preemption by DOT under § 5125(e) or specific authority in another Federal law—a requirement of a State, political subdivision of a State, or Indian tribe is preempted if

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

¹ RSPA notes that New Jersey has also adopted, as State law, the requirements in the HMR. N.J.A.C. 16:49-1.3(i).

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

These two paragraphs set forth the "dual compliance" and "obstacle" criteria which RSPA had applied in issuing inconsistency rulings prior to 1990, under the original preemption provision in the Hazardous Materials Transportation Act (HMTA). Public Law 93-633 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, that is not "substantively the same as" a provision of Federal hazardous material transportation law or a regulation prescribed under that law, is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption:

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

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

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

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

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

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

Subsection (c)(1) of 49 U.S.C. 5125 provides that, beginning two years after DOT prescribes regulations on standards to be applied by States and Indian tribes in establishing requirements on highway routing of hazardous materials, a State or Indian tribe may establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the

designation, limitation, or requirement complies with section 5112(b).²

These preemption provisions in 49 U.S.C. 5125 carry out Congress' view that a single body of uniform Federal regulations promotes safety in the transportation of hazardous materials. In considering the HMTA, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). When it amended the HMTA in 1990, Congress specifically found that:

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

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

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

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

III. Preemption Determinations

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated authority to make determinations of preemption

² DOT's standards and procedures for State and Indian tribe requirements for highway routing of non-radioactive hazardous materials are issued under 49 U.S.C. 5112(b) and contained in 49 CFR Part 397, subpart C.

that concern highway routing to the Federal Motor Carrier Safety Administration (FMCSA) and those concerning all other hazardous materials transportation issues to RSPA. 49 CFR 1.53(b) and 1.73(d)(2) (as added October 9, 1999, 64 FR 56720, 56721 [Oct. 19, 1999], and revised January 1, 2000, 65 FR 220, 221 [Jan. 4, 2000]).

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. If the comments show that New Jersey's statutory and regulatory restrictions cause diversions in highway routing of explosives, RSPA's determination may be issued jointly with FMCSA's Administrator. 49 CFR 397.211(a). A short period of time is allowed for filing of petitions for reconsideration. 49 CFR 107.211, 397.223. 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. 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 (and FMCSA) are guided by the principles and policies set forth in Executive Order No. 13132, entitled "Federalism" (64 FR 43255 (August 4, 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 (and FMCSA) have implemented through their regulations.

IV. Public Comments

All comments should be limited to the issue whether 49 U.S.C. 5125 preempts N.J.S.A. 221:1A-137.F and N.J.A.C. 12:190-6.5(d). Comments should specifically address the preemption criteria detailed in Part II, above, and set forth in detail the manner

in which the New Jersey requirements are applied and enforced. Persons intending to comment should review the standards and procedures governing consideration of applications for preemption determinations, set forth at 49 CFR 107.201–107.211 and 397.201–397.211.

Issued in Washington, DC on April 3, 2000.

Robert A. McGuire,

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

Appendix A

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

Application of the Institute of Makers of Explosives to initiate a proceeding to determine whether various requirements imposed by the State of New Jersey on the transportation of certain Class 1 materials to, from or through the State are preempted by the Hazardous Materials Transportation Act February 28, 2000.

Interest of the Petitioner

The Institute of Makers of Explosives (IME) represents companies that transport by truck Class 1 materials throughout the United States, including points to, from and through the State of New Jersey (State). Despite full compliance with the hazardous materials regulations (HMR), members of the IME are precluded from transporting Class 1 materials in amounts in excess of 5,000 pounds if blasting caps are transported in the same vehicle—a practice allowed by the HMR. The IME asserts that the State requirements contravene the Hazardous Materials Transportation Act (HMTA).

Background

The State's Explosives Act (Statute) provides that “[b]lasting caps or electric blasting caps, or both, may be transported in the same vehicle with other commercial explosives only when the net weight of the other commercial explosives does not exceed 5,000 pounds.”¹ The Statute allows for no exceptions. The Statute provides that “[v]iolations of the provisions of this act or rules and regulations made hereunder shall be punishable for the first offense by a penalty of not less than \$100 nor more than \$5,000 and for the third and each succeeding offense by a penalty of not less than \$500 nor more than \$10,000.”² If the State discovers a condition that exists in violation of the provisions of this Act, the State also has power to order such violation to cease.³

Up until 1998, this provision of law did not interfere with the transportation of Class 1 materials because implementing regulations did not address this statutory requirement. In 1998, this oversight was corrected. Rules issued by the NJ Department of Labor (NJDL), which oversees the

implementation of the Act, were amended to include the statutory restriction.⁴

The IME subsequently contracted the NJDL to advise the NJDL of the possible inconsistency with the HMTA. The NJDL acknowledged our concern, but felt that there was no recourse given the provision in the Statute. In fact, the regulatory version appears to temper the Statute by qualifying that the quantity restriction on Class 1 materials only applies when explosives are being transported “off-highway.”⁵ The State Act, on the other hand, clearly pertains to any transportation of these materials by any mode.⁶

State Requirements for Which a Determination Is Sought

This application seeks preemption of the following State requirements:⁷

N.J.S.A. 21:1A–37.F.

N.J.A.C. 12:190–6.5(d)

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

The HMTA was enacted in 1975 to give the U.S. Department of Transportation (DOT) greater authority “to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.”⁸ By vesting primary authority over the transportation of hazardous materials in the DOT, Congress intended to “make possible for the first time a comprehensive approach to minimization of the risks associated with the movement of valuable but dangerous materials.”⁹ As originally enacted, the HMTA included a preemption provision “to preclude a multitude of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.”¹⁰ The HMTA preempted “any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the Act], or in a regulation issued under [the Act].”¹¹ This preemption provision was implemented through an administrative process where DOT would issue “inconsistency rulings” as to, [w]hether compliance with both the State or political subdivision requirement and the Act or the regulations issued under the Act is possible, and [t]he extent to which the State or political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.¹²

⁴ N.J.A.C. 12:190–6.5(d)

⁵ N.J.A.C. 12:190–6.5—Off highway transportation of explosives.

⁶ N.J.S.A. 21:1A–137—Transportation of explosives.

⁷ Attached to this compliant are affidavits that attest to the issues we have submitted for review.

⁸ P.L. 93–633 § 102.

⁹ S. Rept. 1192, 93rd Cong., 2d Sess., 1974, page 2.

¹⁰ S. Rept. 1192, 93rd Cong., 2d Sess., 1974, page 37.

¹¹ P.L. 93–633 § 112(a).

¹² 41 FR 38171 (September 9, 1976).

These criteria, commonly referred to as the “dual compliance” and “obstacle” tests, “comport with the test for conflicts between Federal and State statutes enunciated by the Supreme Court in *Hines v. Davidowitz*, 312 U.S. 52 (1941).”¹³

In 1990, Congress codified the dual compliance and obstacle tests as the general preemption provision of the HMTA.¹⁴ The 1990 amendments also expanded on DOT’s preemption authorities. Among other new authorities, Congress expressly preempted non-federal requirements in five covered subject areas if they are not “substantively the same” as federal requirements. One of these covered subject areas includes “[t]he packing, repacking [and] handling . . . of hazardous materials.”¹⁵

“Substantively the same” was defined to mean “conforms in every significant respect to the Federal requirement. Editorial and other similar de minimis, changes are permitted.”¹⁶ These preemption authorities are limited only to the extent that non-federal requirements are “otherwise authorized” by federal law. A non-federal requirement is not “otherwise authorized by Federal law” merely because it is not preempted by another federal statute.¹⁷

The HMR has been promulgated in accordance with the HMTA’s direction that the Secretary of Transportation “issue regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce.”¹⁸ “Transportation” is defined as “the movement of property and loading, unloading, or storage incidental to the movement.”¹⁹

Our review of federal law and the HMR leads us to believe that the above referenced State requirements, absent further modification and/or clarification, are subject to preemption pursuant to 49 U.S.C. 5125(a)(2) and/or (b)(1)(B). We ask for a determination of preemption based on the authority of 49 U.S.C. 5125(d).

Discussion

The HMR provides that detonators, including blasting caps, may be transported by motor vehicle in commerce with Division 1.1, 1.2, 1.3, 1.4 or 1.5²⁰ materials if the detonators are packaged and loaded on the vehicle under prescribed conditions.²¹ No restrictions are applied to the transportation of detonators and Division 1.6 materials. Because of the State’s broad definition of “explosive,”²² the State’s requirement affects all Class 1 materials.

The IME knows of no other state that imposes limitations on explosives such as are

¹³ 41 FR 38168 (September 9, 1976).

¹⁴ 49 U.S.C. 5125(a).

¹⁵ 49 U.S.C. 5125(b)(1)(B).

¹⁶ 49 CFR 107.202(d).

¹⁷ *Colo. Pub. Util. Comm’n v. Harmon*, 951 F. 2d, 1571, 1581 n. 10. (10th Cir. 1991).

¹⁸ 49 U.S.C. 5103(b).

¹⁹ 49 U.S.C. 5102(12).

²⁰ Along with Division 1.1, 1.2, 1.3, and 1.4 materials, 49 CFR 177.835(g) exceptions apply to “explosives for blasting.” Anything classified as a division 1.5 can be used as an “explosive for blasting.”

²¹ 49 CFR 177.835(g).

²² N.J.S.A. 21:1A–29 (f).

¹ N.J.S.A. 21:1A–137.F.

² N.J.S.A. 21:1A–140.

³ N.J.S.A. 21:1A–130.

imposed in New Jersey. Consequently, shipments of explosives and detonators move in truckload quantities unimpeded in commerce as long as they are in compliance with the HMR until they enter or leave sites in New Jersey.

In order to comply with the State's quantity limitations, companies have few options. They can load detonators and explosives on separate vehicles or they can reconfigure detonator/explosive shipments to meet the State's restriction. These options present unacceptable safety risks.

In the first case, unnecessary truck traffic, and traffic carrying explosives, is added to the roadways. It has been shown that the more trucks on the road, irrespective of the cargo, the higher likelihood of an accident. The public along these routes of travel, which may include jurisdictions outside of New Jersey, is exposed to this relative increased risk.

In the second case, not only are two or more trucks needed to transport the same quantity of explosives that could efficiently be carried by one truck, but there is the added risk from the unnecessary handling during loading or re-loading to conform explosive/detonator shipments to New Jersey's restrictions. In the case of Division 1.1, 1.2, and 1.3 materials, the risk from this unnecessary handling is shifted to locations outside of the State because the HMR prohibit the transfer of these explosive materials "from one container to another, or from one motor vehicle to another vehicle, or from another vehicle to a motor vehicle, on any public highway, street, or road, except in case of emergency."²³ New Jersey cannot, for whatever reason, be allowed to isolate itself from the risks associated with the commerce of these products.

We do not contest the authority of the State to regulate the movement of explosives that is outside of the scope of the HMTA. In short, transportation that is entirely on private property is not transportation in commerce within the meaning of the HMTA and is not covered by the HMR.²⁴ In our discussion with the NJDL over these requirements, we have endeavored to see if any accommodation could be made to restrict the applicability of the rule to vehicles transporting explosives between locations on one site where a public way is never entered or crossed. Regrettably, the NJDL said they could not interpret the rules that way, and that vehicles would be in violation if they carried both explosives and detonators the moment they left a public road. While admitting to the folly of a rule that would allow vehicles carrying explosives to off-load on a public road, rather than in the security of a consignee's site, the NJDL pointed to the plain words of the Statute which state that the quantity limitation for explosives transported with detonators applies to any transportation within the State. Heretofore, we have had to contend with the consequences of the State's requirement when it applies to commercial transportation at off-highway locations. However, we must ask RSPA to consider the

ramifications to safety and commerce if the State decided to implement its law verbatim.

No transportation is risk-free. The packaging and handling provisions of the HMR related to explosives are intended to minimize the consequences of an incident if it should occur. The HMR have been incredibly effective in this regard as they apply to the transportation of Class 1 materials. The IME is aware of no fatalities occurring when detonators and explosives are transported and handled as required. Since 1990, there have been 200 incidents involving explosives of which 53 were serious.²⁵ None of the 200 incidents resulted in a fatality. In all, there were 2 injuries that required hospitalization. Of the 200 incidents, only one, non-"serious" incident occurred in New Jersey and that incident did not involve a detonator/explosive shipment, which is the focus of this proceeding.

Standard of Preemption

While "handling" is not a term defined in the HMTA, RSPA has defined this term to mean "the operation of loading and unloading."²⁶ The State's requirements affect the handling of Class 1 materials being transported in commerce because the restriction demands loading and unloading activity beyond that contemplated in the HMR. Inasmuch as non-federal requirements "about any . . . handling . . . of hazardous materials" that are not substantively the same as the HMR are preempted, we ask that RSPA preempt these requirements on the basis of 49 U.S.C. 5125(b)(1)(B). Otherwise, we ask RSPA to preempt these requirements on the basis of its obstacle test authority at 49 U.S.C. 5125(a)(2). Without doubt, the State's requirements are "an obstacle to accomplishing and carrying out . . . a regulation prescribed under [the HMTA]," and are a detriment to safety.

Conclusion

We believe the State's requirements imposed on the transportation of certain Class 1 materials are preempted by federal law. The State is enforcing the above suspect requirements. Despite efforts to resolve this matter directly with the State, affected parties believe a determination of preemption is the most effective way to address this matter. Consequently, we request timely consideration of the concerns we have raised.

Certification

Pursuant to 49 CFR 107.205(a), we hereby certify that a copy of this application has been forwarded with an invitation to submit comments to: Fred Cohen, Legal Liaison, NJ Department of Labor, P.O. Box 110, Trenton, NJ 08625-0110.

²⁵ Serious incidents are those that result in one or more of the following: death; accident/derailment of vehicle; evacuation of six or more individuals; injury requiring hospitalization; or road closure.

²⁶ 49 CFR 176.2. We recognize that this definition is contained in that section of the HMR dealing with the carriage of hazardous materials by vessel. However, we cannot believe that RSPA would define this term inconsistently as it is applied to other modes of transportation.

Respectfully submitted,
Cynthia Hilton,
Vice President.

Attachments

- (A) N.J.S.A. 21:1A-129(f)—Definition of "Explosives"
- (B) N.J.S.A. 21:1A-130—Enforcement
- (C) N.J.S.A. 21:1A-137—Transportation of Explosives
- (D) N.J.S.A. 21:1A-140—Violations; Penalties; Revocation of Permits; Nonconforming Uses
- (E) N.J.A.C. 12:190-6.5—Off Highway Transportation of Explosives
- (F) Affidavits of:
Jack E. Costello, Maurer & Scott, Inc.
Ronald J. Lutz, Jr., Explo Tech, Inc.
Richard J. Coons, Energetic Solutions
Quarry & Construction Services

[FR Doc. 00-8662 Filed 4-6-00; 8:45 am]

BILLING CODE 4910-60-M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

STB Docket No. MC-F-20964

Laidlaw Inc.—Continuance in Control—the Gray Line of Victoria Ltd.

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving finance transaction.

SUMMARY: In an application filed under 49 U.S.C. 14303, Laidlaw Inc. (Laidlaw), a noncarrier, seeks approval of its continuance in control of The Gray Line of Victoria Ltd. (Gray Line) upon Gray Line's becoming a regulated motor carrier of passengers. Persons wishing to oppose the application must follow the rules under 49 CFR 1182.5 and 1182.8. The Board has tentatively approved the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments must be filed by May 22, 2000. Applicant may file a reply by June 6, 2000. If no comments are filed by May 22, 2000, this notice is effective on that date.

ADDRESSES: Send an original and 10 copies of any comments referring to STB Docket No. MC-F-20964 to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW, Washington, DC 20423-0001. In addition, send one copy of comments to applicant's representative: Fritz R. Kahn, Suite 750 West, 1100 New York Avenue, NW, Washington, DC 20005-3934.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [TDD for the hearing impaired: 1-800-877-8339].

²³ 49 CFR 177.835(j).

²⁴ 49 U.S.C. 5102 (1) and (12).