

employee examination and identification card requirements are "more stringent" than the HMR, but it asserts that these requirements are not preempted unless there is "an actual conflict with federal law." It states that, "[i]f a matter is not clearly addressed in the HMR," then RSPA should not find preemption of "local regulations related to but nonetheless distinct from what the HMR specifically covers." New Mexico adds that a "driver may learn what the federal government expects and, absent an inability or refusal to understand New Mexico's safety requirements, may learn what this state expects as well." According to the LPG Bureau Chief, the examination is based on Standard 58 issued by the National Fire Protection Association (NFPA). New Mexico states that this promotes uniformity because the State "is testing prospective drivers from the uniform National Fire Protection Association document 58," which is "nothing more than what any local jurisdiction uniformly requires by ascribing to the NFPA protocols."

ATA contends that New Mexico has misread 49 CFR 172.701, which provides that a State may not impose "more stringent training requirements" on an out-of-state driver. It states that "test taking itself would become an obstacle to the safe and efficient transportation of hazardous materials, as few drivers could devote the time necessary to master the subtle regulatory differences between jurisdictions and sit for examinations in each of those jurisdictions."

NPGA agrees with ATA that imposing examination and licensing on drivers domiciled outside of New Mexico "is in conflict with § 172.701 and, therefore, preempted by the HMTA and HMR." NPGA also states that it supports "adoption of NFPA Standard 58 as part of State's regulation of LPG," but that the NFPA Standard 58 explicitly states that it is intended to apply "to areas not subject to DOT regulation."

In PD-22(R), RSPA discussed the specific provision in 49 CFR 172.701 that allows a State to impose more stringent training requirements on a motor vehicle driver only when the driver is domiciled within the State. 67 FR at 59401, citing PD-7(R), Maryland Certification Requirements for Transporters of Oil or Controlled Hazardous Substances, 59 FR 28913, 28919 (June 3, 1994), decision on petition for reconsideration, 60 FR 10419 (Feb. 24, 1995). RSPA has also specifically found that these additional requirements for drivers of motor vehicles are "more stringent training requirements." PD-7(R), 59 FR at 28919;

PD-13(R), 63 FR at 45287; PD-28(R), 67 FR at 15280. New Mexico acknowledges that its employee examination and identification card requirements are more stringent than the training requirements in the HMR, and there is no basis to reconsider the finding in PD-22(R) that these requirements are an obstacle to accomplishing and carrying out the HMR. Accordingly, RSPA reaffirms its determination that Federal hazardous material transportation law preempts the State's employee examination and identification card requirements in NMSA 70-5-7(A) and NMAC 19.15.4.9.1 through 19.15.4.9.5.

C. Fees

New Mexico asserts that all the fees it imposes on the transportation and delivery of LPG are "based on a fair approximation of use, do not discriminate, and are not excessive. * * * [T]hey are a de minimus charge assessed to ensure the safe handling of LP gas in the transfer of it from one container to another." According to New Mexico, its "licensing process is a means of ensuring safe transfer of LP gas in the State, and each license authorizes unlimited transfer privileges." It states that the annual license

has no logical relationship to the use of roads or other State infrastructure. It does not authorize movement of LP gas within or through the State, or authorize a carrier to enter the State; therefore, there are no border checks. The license relates only to material transfers, not movement, and it is the State's sole means of ensuring that the human beings who engage in the inherently dangerous activity of handling LP gas are qualified to do so.

New Mexico also contends that it would not be practical to construct a graduated fee schedule "based on the number of transfers of gas made by a carrier," because the LPG Bureau lacks sufficient resources to verify the number of transfers, and fees based "on transfer activity * * * would not be collectable by the vendors." New Mexico also raises the possibility that an out-of-state carrier might actually pay "more for a license than an in-state carrier," if it made more deliveries within New Mexico.

According to the affidavit submitted by the LPG Bureau Chief, that office has ten full-time employees, including himself, and the total budget for the LPG Bureau in fiscal year 2001-2002 was approximately \$625,000. New Mexico states that besides "regulating the transfer of LP gas, the program [of the LP Gas Bureau] also investigates accidents and is responsible for inspecting LP activities related to residential and commercial use, bulk

plants, and special events such as the International Balloon Festival, and the State Fair." During fiscal year 2001-2002, the LPG Bureau investigated 18 accidents, but "[n]one of the accidents was related to the transfer of LP gas," according to the affidavit of the LPG Bureau Chief.

The LPG Bureau Chief stated that his Bureau collected approximately \$184,000 in fees during fiscal year 2001-2002 and "[t]hese revenues were deposited in the State's general fund." New Mexico asserts that the fees that it collects for vehicle inspections "are returned 100% to the LP gas regulatory program," because the annual budget far exceeds the revenue generated by vehicle inspections. "Therefore, all vehicle inspection fees were entirely recovered for use in the regulation of LP gas." The vehicle inspection fees represented approximately \$25,000 of the total \$184,000 collected by the LPG Bureau in fiscal year 2001-2002, according to the affidavit of the LPG Bureau Chief. However, he also stated that the LPG Bureau did not directly collect fees for administering examinations and issuing identification cards. "The fees associated with licensure, exams and identification cards are collected by private vendors under contract with [CID] and are the only funding source for the licensing and examination process. These fees are not collected by the Bureau, and are not deposited by the Bureau into the State's general fund."

Both ATA and NPGA state that all of New Mexico's fees are preempted because they are not "fair" and because they are not used for a purpose related to transporting hazardous material. They argue that these "flat fees" discriminate against interstate commerce because they are not apportioned to the motor carrier's presence or level of activity within the State. They also state that it is not possible to determine whether these fees are used for purposes relating to hazardous materials transportation because New Mexico deposits them into its general fund. ATA and NPGA attribute no significance to the fact that the LPG Bureau collected less in fiscal year 2001-2002 than it spent on its entire LPG program because that program includes activities outside transportation, such as inspections of LPG bulk plants.

In one sense, all these fees are a "flat," or fixed amount. However, in PD-22(R), RSPA clearly distinguished New Mexico's annual license fee from the other fees. RSPA found that the annual license fee remained the same regardless of the