

shipping papers, the engineering firm was required to contact the numerous shippers and manufacturers of the materials in order to obtain the information and complete the HMIS.

In addition to the permit to handle or store hazardous materials, the Houston Fire Department also required Air France to apply for and obtain a permit to handle or store flammable and combustible liquids, including requiring Air France to submit an additional HMMP and HMIS. The HMMPs and HMISs prepared for Air France by Loss Control Associates and finally accepted by the Fire Department are attached hereto as Exhibit 3. Air France spent over \$7,000.00 in its effort to comply with the HMMP and HMIS requirements imposed by the Houston Fire Department to obtain these local permits. The Fire Department issued the annual permit to handle or store hazardous materials on June 17, 2003 and issued the annual permit to handle or store flammable and combustible liquids on June 27, 2003 but refused to deliver the permits to Air France until after a hazardous materials storage cabinet was installed at the carrier's new cargo facility (discussed below). Air France finally received both of the permits from the Houston Fire Department on August 6, 2003 (copies of the permits issued by the Fire Department are attached hereto as Exhibit 4). Since the permits are for a one-year period and expire on June 17 or 27, 2004, Air France will have to re-apply and undergo this same burdensome and costly application procedure next year and every year thereafter.

On February 10, 2003, while Air France was attempting to comply with the Houston Fire Department's permit requirements, representatives of the Fire Department visited the Air France cargo facility and cited Eric Roberts, the local Air France cargo manager, for several alleged violations of the Fire Code, including failure to post the required local permit for flammable liquids storage, handling or use, and failure to provide a proper HMIS for storage of hazardous materials. Mr. Roberts was also cited by the Fire Department for allegedly failing to provide proper H-occupancy for storage of flammable liquids above exempt amounts, as well as for failing to post a valid certificate of occupancy (the citations are attached hereto as Exhibit 5). There is a Houston municipal court trial related to these citations scheduled for November 13, 2003.

On July 8, 2003, Air France moved into a new cargo warehouse facility at IAH. The Lynxs Group developed the new facility for the Houston Airport System ("HAS"), the Houston municipal department responsible for managing the airport. Air France subleases the new facility from the Lynxs Group. As a condition of issuing a certificate of occupancy for the new building, the Houston Fire Department required that a hazardous materials storage cabinet be installed and used at the facility for the storage by Air France of certain in transit hazardous materials. Consequently, the Lynxs Group agreed with the Fire Department to require Air France contractually to use a storage cabinet so that a certificate of occupancy could be obtained

for the new facility. The Lynxs Group agreed to purchase the cabinet and finance its acquisition by assessing Air France additional rent for a 60-month period. The cost of the storage cabinet, including installation, was approximately \$50,000. The specific storage cabinet requirements imposed on Air France by the Fire Department are described in the Letter Agreement between the Lynxs Group and Air France, dated April 15, 2003 (attached hereto as Exhibit 6). The certificate of occupancy was issued on June 27, 2003 with a notation that "HAZARDOUS MATERIAL ABOVE THE EXEMPT AMOUNTS SHALL BE STORED IN LOCKERS PER FIRE MARSHALL" (the certificate of occupancy is attached hereto as Exhibit 7).

While the Houston Fire Department has not identified for Air France the specific Fire Code provisions under which it has required the installation and use of the hazardous materials storage cabinet, various provisions of the Fire Code concern the use of such cabinets. For example, § 8001.10.6 of the Fire Code provides that storage cabinets may be used to increase exempt amounts or to comply with Article 80.7. In addition, § 8001.11.8 provides that, among certain other methods, the separation of incompatible materials may be achieved by storing liquid and solid materials in hazardous materials storage cabinets.<sup>8</sup> Finally, while it does not specifically address the use of hazardous materials storage cabinets, § 8003.1.3.3 provides secondary containment requirements for buildings, rooms and areas used for the storage of hazardous materials liquids and solids.<sup>9</sup> The Fire Department has provided Air France with a copy of Fire Code Tables 7902.3-A, 7902.5-A, 7902.5-B, 8001.15-A and 8001.15-B and indicated that these tables contain the exempt amounts of hazardous materials above which must be stored in the cabinet (the Fire Code tables of exempt amounts are attached hereto as Exhibit 8).

No other U.S. jurisdiction requires Air France to obtain a local permit to store hazardous materials at its cargo warehouses located in the U.S. Of the eleven U.S. cities Air France serves, it operates cargo warehouse facilities at six: Boston, Chicago, Houston, Los Angeles, Miami and Washington. In addition, no other U.S. jurisdiction requires Air France to install and use hazardous materials storage cabinets at any of its U.S. cargo facilities.

Air France therefore requests a determination that § 105.8.h.1, § 8001.3.1, § 8001.3.2, § 8001.3.3 and Appendix II-E of the Fire Code are preempted to the extent that these provisions require Air France to

submit a HMMP or a HMIS in order to obtain a local permit to handle or store hazardous materials at its IAH cargo facility.<sup>10</sup> In addition, Air France requests that Exhibit 6 and § 8001.10.6, § 8001.11.8, § 8003.1.3.3, § 7902.5.9, § 7902.1.6, § 7901.8, or any other provision of the Houston Fire Code or other independent requirement of the Houston Fire Department, are preempted to the extent that these requirements or provisions mandate the installation or use of a hazardous materials storage cabinet at the new Air France cargo facility at IAH.

### III. DOT's Preemption Authority Under Federal Hazardous Materials Transportation Law

The Hazardous Materials Transportation Act ("HMTA"), former 49 App. U.S.C. 1801 *et seq.*, was enacted in 1975 to give 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."<sup>11</sup> The HMTA "replace[d] a patchwork of state and federal laws and regulations concerning hazardous materials transport with a scheme of uniform, national regulations."<sup>12</sup> On July 5, 1994, President Clinton signed Public Law 103-272, codifying the provisions of the HMTA without substantive change, which are now found at 49 U.S.C. §§ 5101-5127.<sup>13</sup>

When Congress substantively amended the HMTA in 1990, it 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 risk 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.<sup>14</sup>

In amending the HMTA, Congress affirmed that "uniformity was the linchpin" of the statute.<sup>15</sup> Accordingly, Congress gave DOT the authority to preempt a requirement of a

<sup>7</sup> In addition, § 7902.5.9 provides quantity limitations and construction requirements when other sections of the Fire Code require that liquid containers be stored in storage cabinets.

<sup>8</sup> § 7902.1.6 also provides that the storage of flammable and combustible liquids are required to be separated from incompatible hazardous materials in accordance with § 8001.11.8.

<sup>9</sup> § 7901.8 also provides that rooms, buildings or areas used for storage or handling of flammable and combustible liquids shall be provided with spill control and secondary containment in accordance with, *inter alia*, § 8003.1.3.

<sup>10</sup> Air France also requests that the Houston Fire Department's requirement that the carrier submit a HMMP and a HMIS in order to obtain a permit to handle or store flammable or combustible liquids (§ 105.8.f.3 and § 7901.3.1) also be preempted.

<sup>11</sup> 49 App. U.S.C. 1801.

<sup>12</sup> *Southern Pac. Transp. Co. v. Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990).

<sup>13</sup> Pub. L. 103-272, 108 Stat. 745 (1994).

<sup>14</sup> Pub. L. 101-615, § 2, 104 Stat. 3244 (1990) (emphasis added.)

<sup>15</sup> *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).