

As the Director correctly explained: It is impossible for a common carrier to comply with the City's requirements concerning advance identification of hazardous materials and quantities thereof. As a result, when the carrier/facility operator receives or is offered hazardous materials not previously identified or in quantities exceeding those projected, it faces a dilemma: Whether to comply with its obligations under the HMR to transport the materials without delay, to hold the materials pending an amended application to the City, to divert the materials to another jurisdiction for any necessary transportation-related storage, or to violate its common carrier obligation by refusing to accept any such materials.<sup>34</sup>

The Director also found that "the City's information requirements are inconsistent with the HMR insofar as they require emergency response information as a prerequisite to the loading, unloading, and storage of hazardous materials incidental to their transportation."<sup>35</sup> In reaching this conclusion, the Director stated that:

With the promulgation of these regulations [49 CFR Part 172, subpart G], RSPA's emergency response information requirements for hazardous materials transportation, including the loading, unloading, or storage incidental to such transportation exclusively occupy that field. Therefore, state and local requirements not identical to these HMR provisions will cause confusion concerning the nature of such requirements, undermine compliance with the HMR requirements, constitute obstacles to implementation of those provisions, and thus be inconsistent and preempted.<sup>36</sup>

The rationale used by the Department to preempt the HMMP and HMIS permit requirements in IR-28 (San Jose) applies with equal force with respect to the present Houston requirements. In IR-28 (San Jose), the Department found that where extensive information and documentation is required in order to obtain a permit (such as with a HMMP and a HMIS), such requirements might constitute an unauthorized prior restraint on the shipment of hazardous materials. With respect to the HMIS, the Department held that detailed information concerning the identity and quantity of hazardous materials that a carrier might store at its facility incidental to transportation is impossible to compile and provide in advance since such information depends on what the carrier's customers choose to ship. The Department also found that extensive information and documentation requirements, insofar as they relate to hazardous materials to be stored at a facility incidental to transportation, might constitute an inconsistent advanced notice requirement since they have the potential to delay and redirect traffic. Finally, DOT found that the HMR exclusively occupy the field of emergency response information requirements for the transportation of hazardous materials. In this Application, Air

France respectfully request that RSPA follow its decision in IR-28 (San Jose) by holding that the virtually identical HMMP and HMIS permit requirements contained in the Houston Fire Code are similarly incidental to their movement by air at the Air France cargo facility at IAH.

A similar Department Inconsistency Ruling was upheld by the Ninth Circuit Court of Appeals in *Southern Pac. Transp. Co. v. Public Serv. Comm'n of Nevada*, 909 F.2d 352 (9th Cir. 1990). There the Ninth Circuit reversed an order of the district court granting summary judgment to the Public Service Commission of Nevada ("PSC") and reinstated the DOT Inconsistency Ruling. In that case, Southern Pacific Transportation Company ("SPTC") argued that PSC regulations requiring rail carriers to obtain an annual permit prior to loading, unloading, transferring or storing hazardous material on railroad property within the state of Nevada were preempted by the HMTA and the Federal Railroad Safety Act.<sup>37</sup> In order to obtain the permit, applicants were required to submit, among several other items, "[a] summary of all hazardous material carried by the railroad during the proceeding 12 months[.]"<sup>38</sup>

In reversing the district court's decision for failing to accord sufficient deference to the underlying Inconsistency Ruling issued by DOT (IR-19 (Appeal), 53 FR 11600 (April 7, 1988)), the Ninth Circuit stated that:

The DOT found that its regulations and the Nevada regulations address many of the same matters. For instance, it found that several of its own regulations already addressed storage incident to the transportation of hazardous materials, the primary focus of the Nevada regulations \* \* \* Because the Nevada regulations address matters already covered by the federal regulations, impose substantial burdens on applicants, and create the risk of confusion, conflicts, and delays, the DOT determined that they were inconsistent with the federal regulations.<sup>39</sup>

The court went on to cite numerous HMR provisions that address loading, unloading, and storage (including temporary storage) of hazardous materials during carriage by rail, concluding that "[a]t least one Federal court has recently held that 'the extent of Federal regulation in the area of transportation, loading, unloading and storage of hazardous materials is comprehensive.'"<sup>40</sup> The court found that "[d]espite DOT's extensive regulation of loading, unloading, transfer and storage incidental to the transportation of hazardous materials, the Nevada regulations require a carrier to obtain an annual permit prior to engaging in these activities within the State of Nevada. The Nevada regulations, thus, create a separate regulatory regime for these activities, fostering confusion and frustrating Congress' goal of developing a uniform, national scheme of regulation."<sup>41</sup> In addition, the court noted that "Federal

regulations also impose specific information and documentation requirements deemed necessary for the safe transportation of hazardous materials. \* \* \*" and that the Nevada regulations "indicate the State's attempt to regulate areas clearly addressed in the Federal regulations."<sup>42</sup>

The same can be said of the HMMP and the HMIS requirements contained in the Houston Fire Code. For example, despite the fact that 49 CFR 172.600(c)(2) requires emergency response information to be immediately available to any Federal, State or local government agency representative that responds to an incident involving a hazardous material (including providing the basic description and technical name of the hazardous material as required by §§ 172.202 and 172.203(k), the ICAO Technical Instruction, the IMDG Code or the TDR Regulations as required by § 172.602(a)(1)), Air France is also required by the Fire Code to submit a HMIS on which it must list all hazardous materials that it might store in its cargo facility, including the common names or trade names of the hazardous materials and the maximum aggregate quantity stored at any one time.<sup>43</sup> In addition to being impossible to accurately compile and provide in advance because the amount and type of hazardous materials that are present at the Air France cargo facility is a function of what its customers choose to ship, such a requirement also indicates an attempt by the Houston Fire Department to regulate an area (emergency response information) that is already addressed in the HMR.

Moreover, the confusion that the court in *Southern Pac.* suggested would be fostered by two separate regulatory regimes is illustrated by the inability of Air France to comply with the HMIS requirement to provide common names or trade names for the hazardous material shipped through its cargo facility at IAH. Neither the common names nor trade names of hazardous materials are required by the HMR to be included on a carrier's shipping papers. Air France should not be required to retain a fire protection engineering firm to conduct a survey of prior shipping papers and investigate the common names and trade names of the hazardous materials with the shippers and manufacturers of the materials in order to provide this information to the Fire Department. At best, conducting such a time-consuming and expensive survey only results in a sampling of the common names and trade names of the various hazardous materials shipped through the Air France warehouse and might not even accurately reflect which materials are actually present in the facility at any given time. For these reasons, the local Houston permit, HMIS and HMMP requirements should be preempted by the Department as obstacles to the execution of the HMTA and the HMR.

Interestingly, the Houston Fire Code permit requirements have been the subject of a prior DOT preemption proceeding. In Preemption Determination No. PD-14(R), 64 FR 33949 (June 24, 1999), RSPA affirmed its earlier Preemption Determination (No. PD-14(R), 63

<sup>37</sup> See *id.* at 353.

<sup>38</sup> *Id.* at 354 (citing Nev. Admin. Code § 705.330(e)).

<sup>39</sup> *Id.* at 355-56.

<sup>40</sup> *Id.* at 357 (quoting *Consolidated Rail Corp. v. Bayonne*, 724 F. Supp. 320, 330 (D.N.J. 1989)).

<sup>41</sup> *Id.* at 358.

<sup>42</sup> *Id.*

<sup>43</sup> Fire Code App. II-E, § 2.1

<sup>34</sup> *Id.* at 8892.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*