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Legal Issues Concerning State and Local Authority to Restrict the Transportation of Hazardous Materials by Rail

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Summary

In the wake of the recent train derailment and chlorine gas leak in South Carolina, state and local officials have begun to examine the scope of their regulatory authority over the transportation of hazardous materials by rail. Specifically, local officials in the District of Columbia have recently authorized a temporary ban on the transportation of certain toxic substances from trains that travel though the District of Columbia. Reviewing the relevant statutes, including the Hazardous Materials Transportation Act and the Federal Railroad Safety Act, it would appear that state and local governments may be preempted from enacting legislation that would prevent or hinder the transportation of hazardous materials in interstate commerce. In addition, the Constitution's dormant, or "negative" Commerce Clause may also prevent a state or locality from imposing such a restriction as it could arguably be seen as imposing an undue burden on interstate commerce. This report will provide an overview of the relevant federal statutes with respect to the transportation of hazardous materials by rail, and will discuss some of the legal issues with respect to both federal preemption and the dormant commerce clause. This report will be updated as events warrant.

Background

On January 6, 2005, a train crash in South Carolina caused a release of chlorine gas resulting in deaths, injuries, and forcing the evacuation of people from the surrounding area.[1] This incident, combined with a similar incident last summer in Texas, has caused state and local officials to examine their authority to restrict the transportation of hazardous materials through their communities. While last year, the District of Columbia's City Council rejected a legislative proposal that would have prevented the

[1] Walt Bogdanich & Christopher Drew, *Deadly Leak Underscores Concerns About Rail Safety,* New York Times, Jan. 9, 2005, available at [http://www.nytimes.com /2005/01/09/national/09rail.html].

transportation of hazardous materials through the District,[2] on February 1, 2005, the Council enacted a 90-day temporary ban on certain hazardous materials traveling through the city by rail.[3] Recent reports have indicated that the Council is again considering taking permanent legislative action in the hopes of reducing the threat to the area's residents and businesses.[4]

Federal Statutes Governing the Transportation of Hazardous Materials

A review of the two relevant federal statutes with respect to the transportation of hazardous materials indicates that proposals by state and/or local officials to regulate the transportation of hazardous materials may be preempted by federal law. The Hazardous Materials Transportation Authorization Act of 1994 (HMTA) provides the Secretary of Transportation with general regulatory authority over both the designation of hazardous materials and their transportation in interstate commerce.[5] The HMTA contains express preemption provisions which state that, absent a waiver by the Department of Transportation (DOT), "the requirements of a State, political subdivision of a state, or Indian tribe are preempted if:

> (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.[6]

Further, the HMTA preempts:

> unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, ...[7]

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[2] *See* Eric W. Weiss, *Ban on Toxic Cargo Sought Anew in D.C.: S.C. Wreck Raises Fears in Capital*, WASH. POST., Jan. 11, 2005 at B1.

[3] *See* Eric W. Weiss & Spencer S. Hsu, *Council Approves 90-Day Ban on Hazmat Shipments in D.C.*, WASH. POST., Feb. 2, 2005 at B1

[4] *See id.* at B8; *see also* Eric W. Weiss, *Ban on Toxic Cargo Sought Anew in D.C.: S.C. Wreck Raises Fears in Capital*, WASH. POST., Jan. 11, 2005 at B4.

[5] Hazardous Materials Transportation Authorization Act of 1994, P.L. 103-311, 108 Stat. 1673 (1994) (codified as amended at 49 U.S.C. §§ 5101-5127 (2004)).

[6] 49 U.S.C. § 5125(a)(1)-(2) (2004).

[7] *Id.* at § 5125(a)-(b). The statute provides for the following "covered subjects:"

(continued...)

These provisions establish what the DOT refers to as the "dual compliance," "obstacle," and "covered subject" tests.[8]

Second, given that both the incidents and proposed legislation relate to rail transportation, the preemption provisions in the Federal Railroad Safety Act (FRSA) also appear to be relevant.[9] The FRSA specifically requires that "laws, regulations, and orders related to railroad safety and security shall be nationally uniform to the extent practicable."[10] Pursuant to the FRSA, state and local officials are permitted to legislate railroad safety and security until such time as the Secretary of Transportation or Secretary of Homeland Security prescribe regulations covering the same subject matter. State and local officials may also enforce a more stringent law and regulation when such law is: "(1) necessary to eliminate or reduce an essential local safety or security hazard; (2) is not incompatible with a law, regulation or order of the United States Government; and (3) does not unreasonably burden interstate commerce."[11]

It would appear that any legislative or regulatory proposal to regulate the transportation of hazardous materials such as enacted by the District of Columbia would likely be considered a "routing" regulation. Routing regulations generally include directions with respect to specific travel route(s) or portion of route(s).[12] Arguably, regulations regarding "routing" do not in and of themselves make it impossible to comply

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[7] (...continued)

> (A) the designation, description, and classification of hazardous material.
> (B) the packing, re-packing, 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.

Id.

[8] *See* 69 Fed. Reg. 69677, 69678 (Nov. 30, 2004). These provisions appear to codify the Supreme Court's preemption doctrine, which has held that in situations where it is impossible to comply with both a federal and a non-federal (i.e., state or local) requirement, the non-federal requirements are preempted (dual compliance test). *See Hines v. Davidowitz*, 312 U.S. 52 (1941). In addition, the Court's preemption doctrine holds that when a non-federal requirement, as applied or enforced, frustrates the purpose or serves as an obstacle to carrying out the full effect of the federal law, it is preempted (obstacle or frustration of purpose test). *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *see also Ray v. Atlantic Richfield*, 435 U.S. 151 (1978).

[9] Federal Railroad Safety Act, P.L. 91-458, 84 Stat. 971 (1970) (codified as amended at 49 U.S.C. §§ 20101-20117 (2004)).

[10] 49 U.S.C. § 20106 (2004).

[11] *Id.* at § 20126(1)-(3).

[12] *See* 49 C.F.R. § 367.65 (2003) (defining routing designations in the context of motor carrier regulations).

with federal regulations; and therefore, are not necessarily obstacles to carrying out the requirements of the HMTA. In addition, routing is not included within any of the covered subjects listed in the statute.[13]

While there do not appear to be any federal court decisions with respect to state or local regulations attempting to route the transportation of hazardous materials via rail, the DOT has issued several administrative "inconsistency rulings" and "preemption decisions" regarding routing regulations, pursuant to HMTA, that affect the transportation of radioactive materials via motor carriers. A review of these decisions indicates that the DOT has consistently held that "the Department through promulgation of 49 C.F.R. § 397.101, has established a near total occupation of the 'field of routing' ..."[14] This occupation means that routing requirements other than "(1) those relating to Federal requirements or (2) state designated alternate routes under 49 C.F.R. § 177.825 are very likely to be inconsistent and thus preempted under 112(a) of the HMTA."[15] If anything, because of the more readily available alternate routes for motor carriers, it can be argued that the HMTA gives state and local officials more flexibility with respect to motor carrier regulations;[16] therefore, if the federal government has occupied the field of routing with respect to motor carriers, it may be that the same result would be reached with respect to rail transportation.

Moreover, such locally enacted legislation could arguably be characterized as not merely a routing requirement, but in effect as a prohibition on a specific form of hazardous material transportation, which would apparently be preempted. The DOT has previously held, with respect to state and local attempts to prevent the transportation of hazardous materials, that "[a] unilateral local ban is a negation, rather than an exercise, of local responsibility, since it isolates the local jurisdiction from the risks associated with the commercial life of the nation."[17]

Turning to the FRSA, given the existence of federal regulations with respect to hazardous materials transportation by rail,[18] should the District or any other state or local government attempt to regulate in this area, they would be required to show that the restriction satisfies the statute's specific requirements. As indicated above, the FRSA permits states and localities enact more stringent regulations provided that the regulations are necessary to eliminate or reduce an essential local safety or security hazard, are not

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[13] *See supra* note 7.

[14] 52 Fed. Reg. 13000, 13003 (Apr. 20, 1987). 49 C.F.R. § 397.101 governs the driving and parking rules for the transportation of hazardous materials by motor carrier. *See* 49 C.F.R. § 397.101 (2004).

[15] *Id.*

[16] *See* 49 U.S.C. § 5125(c) (2004) (establishing preemption rules with respect to highway routing requirements, and providing for more state and local regulatory authority pursuant to the limits established by 49 U.S.C. § 5112(b))

[17] 49 Fed. Reg. 18457, 18458 (Apr. 29, 1982).

[18] *See e.g.*, 49 C.F.R. § 174 (2003).

incompatible with federal law, and do not unreasonably burden interstate commerce.[19] While arguably a regulation narrowly tailored to address a specific local safety or security concern would satisfy the first prong of the test, a local restriction on the transportation of hazardous materials by rail could be found by a court to be in conflict with the HMTA. In addition, such a restriction could place an unreasonable burden on interstate commerce by requiring rail carriers to take potentially longer and more costly routes to deliver their cargo. Given these possibilities, it would appear that any state or local restriction on the transportation of hazardous material by rail could be found to be preempted by the FSRA.

Dormant or "Negative"Commerce Clause

In addition to possible preemption issues, the Constitution's Commerce Clause, which has been interpreted to contain a dormant or "negative" component, may also preclude state and local officials from imposing regulations preventing or hindering the transportation of hazardous materials in interstate commerce.

In this case, it is likely that a state or local restriction on the transportation of hazardous materials by rail would fall into the "undue burden" category of dormant commerce clause cases, as safety and security, rather than economic protectionism, appears to be the state or local government's primary interest. When a state or locality asserts a safety or security rationale, the Court has generally balanced the state's interest in safety and security with the regulation's impact on interstate commerce. Here, the interest in safety is likely to be very strong as a chemical spill in a densely populated area such as Washington, D.C. could potentially have disastrous consequences. Couple that with the post-9/11 terrorist threat and the fact that Washington, D.C. is the nation's capital, and there may be a case that the District's legitimate interest in safety outweighs the potential impact on interstate commerce. Nevertheless, Supreme Court precedent appears to require the opposite result. In *Kassel v. Consolidated Freightways Corp.*, the Court invalidated an Iowa regulation that prohibited the use of 65-foot double tractor trailers on its highways because the regulation substantially burdened interstate commerce.[20] The rule established from the Court's multiple opinions in *Kassel*, appears to be that a state may not enact regulations that effectively shift the burden of interstate commerce away from its citizens for the purpose of protecting their safety.[21] In other words, the problem with the Iowa regulations was that they appeared to protect Iowans from the dangers of 65-foot tractor trailers by diverting them into other states. The result was an effective shift of the burdens and costs of interstate commerce from Iowa onto its neighboring states. Similarly, by diverting the rail cars carrying hazardous materials from the District of Columbia to other regions, the District is arguably shifting the burden, hazards, and costs of interstate commerce onto neighboring regions. Because a lower federal court would likely consider itself bound by the holding in *Kassel*, it would appear

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[19] 49 U.S.C. § 20106(1)-(3) (2004).

[20] *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981).

[21] While the decision in *Kassel* was 6-3 in favor of striking down the Iowa statute, the case did not have a majority opinion. Rather, it produced a plurality decision that included Justices Powell, White, Blackmun, and Stevens. Justices Brennan and Marshall authored a separate concurring opinion agreeing with the result, but offering a different rationale.

that there would be a strong argument for striking down the local statute on dormant commerce clause grounds.

The Court's decision in *Kassel*, however, was handed down in 1981, long before September 11, 2001, and its implications on both national and local security. In light of these changed circumstances, it may be possible, given the more stringent regional safety and security concerns, for a lower court to find *Kassel* distinguishable. Arguably, because the District of Columbia, unlike Iowa, has to be concerned about the heightened risks from terrorists and other threats to national security, a court could decide that while the District's restriction adversely impacts interstate commerce, that effect is substantially outweighed by the security benefits to the District and the national capital region. Should a lower federal court reach such a decision, it is unclear what, if anything, the Supreme Court would decide should it hear the case.