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DEPARTMENT OF TRANSPORTATION
Research and Special Programs Administration

[Docket No. IRA-39]

Southern Pacific Transportation Company Application for
Inconsistency Ruling

AGENCY: Research and Special Programs Administration; DOT

ACTION: Public Notice and Invitation to Comment

SUMMARY: Southern Pacific Transportation Co. (SP) has applied for an administrative ruling to determine whether sections 705.310 - 705.380 of the Nevada Administrative Code, promulgated by the Nevada Public Service Commission (NPSC), are inconsistent with the Hazardous Materials Transportation Act (HMTA) and the Hazardous Materials Regulations (HMR) issued thereunder, and, therefore, preempted under section 112(a) of the HMTA. The NPSC regulations establish a permit system which governs the rail transportation, storage, loading and unloading of certain hazardous materials in Nevada.

DATES: Comments received on or before January 8, 1987, and rebuttal comments received on or before February 23, 1987, will be considered before an administrative ruling is issued by the Director of the Office of Hazardous Materials Transportation. 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 any comment received may be reviewed in the Dockets Branch, Research and Special Programs Administration, Room 8426, Nassif Building, 400 7th Street, S.W., Washington, D.C. 20590. Comments and rebuttal comments on the application may be submitted to the Dockets Branch at

the above address, and should include the Docket Number IRA-39. Three copies are requested. A copy of each comment and rebuttal comment also must be sent to SP's counsel, John MacDonald Smith, Esq., Southern Pacific Building, One Market Plaza, San Francisco, CA 94105 and to Mr. Scott M. Craigie, Chairman, Public Service Commission of Nevada, 505 East King Street, Carson City, NV 89710, and that fact certified to at the time the comment is submitted to the Dockets Branch. (The following format is suggested: "I hereby certify that copies of this comment have been sent to Messrs. Smith and Craigie at the addresses specified in the Federal Register.")

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Office of the Chief Counsel, Research and Special Programs Administration, 400 7th Street, S.W., Washington, D.C. 20590, Telephone 202-366-4401.

SUPPLEMENTARY INFORMATION:

1. Background

The HMTA (49 U.S.C. app. § 1801 et seq.) at section 112(a) (49 U.S.C. app. 1811(a)) expressly preempts "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement" of the HMTA or the HMR issued thereunder.

Procedural regulations implementing section 112 of the HMTA are codified at 49 CFR §§ 107.201 - 107.225. These regulations provide for the issuance of inconsistency rulings and nonpreemption determinations. Briefly, an inconsistency ruling is an administrative opinion as to the relationship between a state or political subdivision requirement and a requirement of the HMTA or HMR. Section

107.209(c) sets forth the following factors which are considered in determining whether a state or political subdivision requirement is inconsistent:

(1) whether compliance with both the state or political subdivision requirement and the HMTA or HMR is possible (the "dual compliance" test); and

(2) the extent to which the state or political subdivision requirement is an obstacle to the accomplishment and execution of the HMTA and the HMR (the "obstacle" test).

2. Application for Inconsistency Ruling

Southern Pacific Transportation Company (SP) has filed an application for an administrative ruling seeking a determination that sections 705.310 - 705.380 of the Nevada Administrative Code are inconsistent with the HMTA and the HMR. The Nevada provisions require railroads to obtain permits from NPSC before the railroads may load or unload certain hazardous materials onto or from railroad equipment while on railroad property; transfer certain hazardous materials from property owned or controlled by the railroad to another means of transportation; or store defined hazardous materials on property owned or under the control of a railroad, except on a through track. These regulatory provisions contain permit application requirements, application evaluation criteria, permit expiration and renewal procedures, suspension or revocation criteria, and notice procedures. Sections 705.310 - 705.380 are reprinted as Appendix A to this Notice.

SP contends that the Nevada provisions are inconsistent for five general reasons:

(1) They require different treatment and handling of certain commodities because of their DOT classifications as hazardous materials.

(2) They require the preparation of lengthy, cumbersome permit applications, replete with irrelevant and extraneous detail, before the defined hazardous materials may be loaded, unloaded, transferred, stored or temporarily held in transit.

(3) They involve extensive delays and require hazardous materials to be held in other states pending admission into Nevada.

(4) The required application information goes far beyond that required on Department of Transportation (DOT) shipping papers.

(5) Permit processing delays result in NPSC having uncontrolled discretion over the transportation of hazardous materials in Nevada.

SP asserts that NPSC is not empowered under HMTA to dictate in what manner (i.e., trailer on flatcar or container on flatcar) hazardous materials may be transported to or from transfer points in Nevada. Additionally, SP states that NPSC may not exercise general regulatory control over the loading, unloading, and storing of hazardous materials and is not empowered to dictate when, where and under what conditions these activities may take place on railroad property. SP specifically alleges that NPSC's prohibition against holding cars at any rail yard, siding or intermediate point for more than 48 hours is inconsistent with 49 CFR § 174.14.

The applicant alleges the below-described specific conflicts between the Nevada regulations and the following Federal regulations:

(1) 49 CFR §174.5, which exempts from regulation under the HMR railway torpedoes or fusees;

(2) 49 CFR § 218.37(a)(1)(iii), which requires a trainman to place a track torpedo on the rail or drop a lighted fusee on the truck for rear-end protection;

(3) 49 CFR § 174.16, which requires certain unloading from rail cars or storage on the carrier's property; and

(4) 49 CFR § 174.103, which requires certain unloading or immediate removal of damaged or astray shipments.

SP contends that the permit process takes months and ultimately leaves to the uncontrolled discretion of NPSC whether railroads may transport hazardous materials to or from Nevada. SP supports this allegation by pointing to an ongoing application which allegedly has been filed and not acted upon for 10 months.

Also, the applicant contends that Federal laws and regulations require SP, as a common carrier, to promptly transport all hazardous materials which are prepared, packaged and tendered in accordance with DOT regulations; therefore, SP states, it does not have authority to refuse shipments from customers and connecting carriers until a state permit is obtained. In essence, SP contends it cannot comply with both the Federal and state requirements.

SP further contends that NAC § 705.330(1)(i) improperly attempts to place the governmental responsibility for contingency planning on railroad carriers.

Additionally, SP requests an expeditious determination of whether NPSC's regulations are inconsistent because, it asserts, 21 criminal proceedings have been instituted against SP or its employees because of alleged noncompliance with the Nevada regulations. These criminal proceedings relate to movements of explosives to and from the Army Ammunition Plant at Hawthorne, Nevada. SP has attached to its application an affidavit of William R. Lucas, Deputy Director for Inland Traffic of the Military Traffic Management Command (MTMC), in which he asserts that prompt and efficient railroad service is necessary to support the national defense effort and that Nevada's regulations adversely affect such service.

Finally, SP asserts that the amount of information needed to comply with the permit regulation causes an inherent time lag and adversely affects SP and its customers. Consequently, SP states, the regulations of NPSC are an obstruction to the free flow of commerce.

3. Public Comment

Comment should be restricted to the issue of whether the challenged NPSC regulations are inconsistent with the HMTA or the HMR issued thereunder.

Persons intending to comment on the application should examine the complete application in the RSPA Dockets Branch, the procedures governing the Department's consideration of applications for inconsistency rulings (49 CFR §§ 107.201-107.211), and the cited NPSC regulations in Appendix A to this notice.



Alan I. Roberts
Director, Office of Hazardous
Materials Transportation

Issued in Washington, D.C. on NOV 19 1986, 1986.

APPENDIX A

NEVADA ADMINISTRATIVE CODE

TRANSPORTATION OF HAZARDOUS
MATERIAL BY RAIL

705.310 Definitions.

As used in NAC 705.310 to 705.380, inclusive, unless the context otherwise requires:

1. "Commission" means the public service commission of Nevada.
2. "Hazardous material" means low specific activity material as defined in 49 C.F.R. § 173.403(n) and radioactive material as defined in 49 C.F.R. § 173.403(y) and:

- (a) Class A explosives as defined in 49 C.F.R. § 173.53;
- (b) Class B explosives as defined in 49 C.F.R. § 173.88;
- (c) Poison A as defined in 49 C.F.R. § 173.26; and
- (d) Flammable solids (DANGEROUS WHEN WET labels only) as defined in 49 C.F.R. § 173.150, which are subject to the requirements for placards in Table 1 of 49 C.F.R. § 172.504.

3. "Storage" means keeping any hazardous material for more than 48 hours.

705.320 Activities for which permit required.

A person shall not:

1. Load or unload hazardous material or containers carrying hazardous material onto or from railroad equipment on property owned by or under the control of a railroad;

2. Transfer hazardous material from property owned by or under the control of a railroad to another means of transportation; or

3. Store hazardous material on property owned by or under the control of a railroad, except a through track, without a permit issued by the commission.

705.330 Application for permit; fee.

1. An application for a permit must include:

- (a) A map of the proposed site for loading, unloading, storage or transfer, including the indicators of its location on the track and all structures at the site;
- (b) A report identifying each switch, siding, spur or branch of track at the site and its purpose;
- (c) A copy of any report made by a federal or state inspector during the preceding 6 months on defects in the track and the remedial action taken;
- (d) A summary of all major construction or other work on the track at the site during the preceding year;
- (e) A summary of all hazardous material carried by the railroad during the preceding 12 months;
- (f) A summary of all unintended releases of hazardous material during the preceding 12 months which were reported by the applicant pursuant to 49 C.F.R. §§ 171.16 and 171.17;
- (g) An outline of the procedure to be used in the loading, unloading, transfer or storage of the hazardous material;

- (h) A description of the measures to be used by the railroad to ensure that the hazardous material is safe from vandalism, theft or sabotage; and
 - (i) An outline of all plans to be used in the event of an accident.
2. The application must be accompanied by a fee of \$200.

705.340 Evaluation of application.

In evaluating an application for a permit, the commission will consider:

1. The topography of the proposed site;
2. The proximity of the proposed site to:
 - (a) Centers of population;
 - (b) Heavily traveled highways;
 - (c) Hospitals;
 - (d) Schools;
 - (e) Sources of water; and
 - (f) Other sites for the storage of hazardous material;
3. The expected duration of the operation at the site;
4. The availability of alternative sites;
5. The quality of the track;
6. The security at the site;
7. The plans to be used in the event of an accident at the site;
8. The equipment and resources available in the event of an accident at the site; and
9. Any other pertinent information requested by the commission.

705.350 Expiration and renewal of permit.

1. A permit issued by the commission is valid for 1 year. Upon a showing of compelling need, the commission may issue a temporary permit which is valid while the application for an annual permit is pending.

2. An annual permit may be renewed if the applicant:

(a) Certifies that the information submitted in the original application is still correct, or he files such amendments to previously submitted information as are necessary to keep the information current; and

(b) Files a statement:

(1) Describing any relevant accident or release of hazardous materials since the issuance or renewal of the permit, or if an accident or release has not occurred, a certification to that effect; and

(2) Summarizing the loading, unloading, transfer or storage conducted pursuant to the permit, as well as any incident involving the hazardous material.

3. An application for renewal must be submitted at least 60 days before the expiration of the permit and be accompanied by a fee of \$200.

4. If, at least 60 days before the expiration of the permit, the holder of a permit files an application for renewal which is complete and conforms with the requirements of this section, the permit does not expire until the application for renewal has been finally determined.

705.360 Suspension or revocation of permit.

A permit may be suspended or revoked by the commission if:

1. An activity is being performed in violation of the terms of the permit;
2. The suspension or revocation is necessary to protect against risks to life and property; or
3. The permit was issued on the basis of false, fraudulent or misleading representations or information.

705.370 Notice of application; dismissal of application for lack of information.

1. The commission will give notice of any application received by it for a permit or renewal of a permit at least 30 days before the date on which the commission intends to take action.
2. The commission will dismiss an application for a permit without prejudice if:
 - (a) There is insufficient information upon which to issue a permit; or
 - (b) Additional information is requested by the commission from the applicant but not submitted.

705.380 Adoption of federal regulations by reference.

1. Every railroad subject to regulation by the commission shall comply with the provisions of 49 C.F.R. Parts 171, 172, 173 and 174, as those parts existed on November 1, 1985. Those parts are hereby adopted by reference.

2. A copy of a publication containing Parts 100 to 177, inclusive, of Title 49 of the Code of Federal Regulations may be obtained at a price of \$14 from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402.