



The Preemption Argument Against State Licensure Fees and Requirements in the Hazardous Materials Context

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Transporters of hazardous materials are accustomed to dealing with bureaucracy and red tape on both the state and federal level. But while this is a field that warrants regulation, too much regulation can impede the necessary transportation of such materials. This is exactly what happens when hazardous materials transporters are required to pay certain state licensure fees. The federal government has authority over interstate transportation of goods, including hazardous materials. This federal authority trumps or “preempts” the authority of state governments to regulate such transportation. Under the Federal Aviation Administration Authorization Act of 1994 (“Act”), states are specifically prohibited from enacting a law or regulation that affects the price, route, or service of a motor carrier. *See* 49 USC 14501 *et seq.* Any state law or regulation that attempts to regulate these matters can be challenged in court. If the court finds that the state law or regulation is preempted, it will be overturned. One of the goals of the Act was to eliminate the inefficiencies and unnecessary costs of interstate transportation that were caused by non-uniform state regulations. Allowing states to impose purely economic licensure fees on hazardous materials transporters undermines this goal. There is thus a strong case to be made that federal law preempts state regulations that require motor carriers to pay a licensure fee in order to engage in the interstate transportation of hazardous materials.

The exact wording of the Act determines what regulations states are forbidden from enacting. Pursuant to the Act, states may not enforce any law or regulation that is “related to a price, route, or service” of a motor carrier. This is almost the exact language used in the Airline Deregulation Act (“ADA”), which the Supreme Court held to have a conspicuously broad preemptive sweep. The Supreme Court interpreted “related to” as meaning any “connection with” or “reference to” the subject matter of the federal law. This means that states are prohibited from enacting any law or regulation that affects the price, route, or service of a motor carrier. If a state enacts any such law or regulation, it can be overturned in court. However, there is an exception to this general rule. States may enforce laws and regulations that affect such matters if they are based on the state’s safety regulatory authority with respect to motor vehicles, including the hazardous nature of the cargo. The question then becomes whether a state licensure fees constitutes a public safety regulation.

Certain states require motor carriers to obtain a state specific permit or license to transport hazardous materials within that state. For example, in California a motor carrier may not transport hazardous materials within the state without first obtaining a California Hazardous

Materials Transportation License. In order to do so, the hazardous materials transporter must pay an initial fee to obtain the license and an annual fee to renew it. This requirement is clearly related to the service of a motor carrier in that it regulates motor carriers performing a particular service: the transportation of hazardous materials. Furthermore, by increasing the cost of providing service in California, the regulation could affect the price of obtaining the service. Finally, because of the additional cost and requirements, the regulation could discourage motor carriers from transporting hazardous materials through California, thereby affecting their route. It would thus appear that the Act prohibits the California license requirement. However, because the stated purpose of the licensure requirement is to provide additional protection to the public, California has so far been allowed to enforce the regulation. It is questionable, however, whether the effect of the regulation is to increase public safety on the highway. When a court rules on whether or not a state requirement is preempted by federal law, it must look at the *effect* of the requirement and not at its stated purpose.

No examination or experience is necessary to obtain the California license to transport hazardous material. Furthermore, the information contained in the California license is duplicative of the information that is contained in the Hazardous Materials Certificate of Registration, which the federal government requires all motor carriers to obtain before transporting hazardous materials in any state. Thus, no additional training is required to transport hazardous materials in California and no additional information is conveyed to the highway patrol. The California license requirement does not increase public safety in any discernable way. Its only apparent effect is to increase the cost of transporting hazardous materials in California and potentially to discourage motor carriers from performing this service in or through the state. This constitutes precisely the type of economic regulation that the Act prohibits.

In addition to the direct financial impact of state licensing fees, motor carriers face the threat of incurring significant fines as a result of failure to comply with such permitting requirements. For example, in California, a first time violator of the hazardous materials licensing regulation may be punished by a fine of not less than \$2,000. A subsequent violation is punishable by a fine of not less than \$4,000. Motor carriers thus face substantial costs as a result of state licensure requirements. This may increase the cost of obtaining their services or it may discourage transporters from operating in certain states. This may cause them to choose inefficient routes in order to avoid particularly onerous requirements in one state or very high fines in another.

States that require motor carriers to pay a licensing fee in order to transport hazardous materials in or through that state, but that do not increase public safety, are actually veiled economic regulations. Such fees operate as a type of economic entry control. This gives states the power to significantly affect the prices, routes, and services of motor carriers by affecting the ease with which they can gain access to a particular state's highway system. Such transporters will be discouraged from operating in a state that has complicated and/or expensive licensure requirements. This not only affects service to these states, it affects the routes that transporters to take to reach other states. Moreover, it increases the cost of doing business for hazardous materials transporters in that they must research and comply with the specific laws and regulations of each state they enter. Thus, allowing states to enforce such licensure requirements creates significant inefficiencies and obstacles for motor carriers to overcome in order to engage in the transportation of hazardous materials. This is exactly what the Act was intended to avoid.

The First Circuit Court of Appeals explained in a 2006 case that the legislative history of the Act identifies state economic regulation of motor carriers as a “huge problem” for national and regional motor carriers.¹ It was intended to eliminate such economic regulations, including such traditional economic entry controls as the requirement that a transporter pay money to a state before it may operate within its borders. Not only are state licensure fee requirements for transporters of hazardous materials inefficient and burdensome, they are unnecessary in light of current federal requirements.

The federal government has enacted uniform laws and regulations that hazardous materials transporters must comply with in all states. These laws and regulations require transporters to apply for a permit before operating in any state. The application requires motor carriers to identify the applicant as well as the hazardous materials to be transported. Furthermore, motor carriers are required to identify the hazardous cargo within the vehicle with placards. It is thus arguable that all the information that state or federal highway patrol officers need to effectively protect public safety are covered by federal permitting and placarding requirements. In addition, the uniform federal system allows transporters to use the most efficient interstate route without fear of penalty arising from the inadvertent violation of state licensing requirements and without the unnecessary expense of researching and obeying these state-specific laws and regulations.

The argument that the Act preempts state hazardous materials licensure fee laws and regulations is sound. The Act prohibits states from enacting laws and regulations that affect the price, route, or service of any motor carrier, unless they are for the public safety. Many state hazardous materials licensure requirements do not increase public safety because they simply cover the same information as the federal certificate but in a slightly different manner. Such requirements do, however, affect the price of transporting hazardous materials by imposing direct fees, by requiring companies to research and comply with various states laws, and by imposing significant fines on companies that fail to comply with these licensure requirements. Moreover, these permitting laws and regulations can be burdensome. When faced with complex requirements or expensive fees and potentially significant fines, some motor carriers may choose to avoid traveling through certain states and may choose not to provide services in those states. Thus, state licensure requirements affect or have the potential to affect the price, the route, and the service of hazardous materials transporters. Given this, courts should find that the Act preempts such state laws and regulations. The problem is in finding the right time and the right company to present these arguments in court.

It may take significant time and resources to present the preemption argument before a court. More often than not, most motor carriers will find that it is less expensive to pay the licensure fee or even to pay a fine for non-compliance with the relevant state regulation than to fight the legitimacy of the requirement in court. Nevertheless, if the opportunity arises to challenge a state licensure requirement, it may be worth considering fighting it. If a company chooses to comply with these requirements rather than to fight them, it is important to be familiar with the different laws and regulations of each state. If a company has any concerns or questions about regulatory compliance, advice from a professional organization should be sought in order to avoid potentially significant fines.

¹ See *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 77 (1st Cir. 2006).