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ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS

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September 23, 1996

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FHWA
Office of Chief Counsel
HCC-10
U.S. Department of Transportation
400 Seventh St., SW
Washington, DC 20590

RE: Docket No. MC-96-25'

Dear Sir or Madam: FHWA-97-2349-3

On behalf of the Association of Waste Hazardous Materials Transporters (AWHMT), I am submitting comments to FHWA's advance notice of proposed rulemaking to replace the current DOT identification number system, the single state registration system (SSRS), the registration/licensing system, and the financial responsibility information system with a single, on-line federal system.

The AWHMT represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous wastes, in North America. The Association is a not-for-profit organization that promotes professionalism and performance standards that minimize risks to the environment, public health and safety; develops educational programs to expand public awareness about the industry; and contributes to the development of effective laws and regulations governing the industry.

The ICC Termination Act of 1995 promised profound change to the manner and standards by which motor carriers are qualified to engage in interstate commerce. In general, we support the consolidation of DOT's current regulatory programs into a single, on-line federal system.

General Principles

Several principles guide our views on the scope and operation of the single, on-line federal system:

- Federal-State Roles: It is appropriate that the federal government develop the standards for and maintain the system. The role of states should be confined to enforcement with support through the MCSAP.

[1] 61 FR 43819 (August 26, 1996).

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- Private v. For-Hire: The enactment of the ICC Termination Act clearly signals a shift from economic to safety regulation. Safety does not distinguish between "private" and "for-hire" carriage. All interstate motor carriers should be treated the same under the single, on-line federal system.

- Definition of "Property": In March 1995, the AWHMT submitted comments to DOT in the context of its request for comments concerning its study of the ICC.[2] Our comments focused on the importance of designating a competent authority to determine what is "property" should the ICC be terminated.[3] The reasons why the meaning ascribed to the term "property" need to be reviewed are even more relevant with the enactment of the ICC Termination Act. In addition to the justifications we put forward in 1995 concerning the importance of finding that the "negative value" of hazardous waste gives it standing as "property", FHWA should consider two more evidences of the need to clarify that interstate carriers, whether private or for-hire, of hazardous waste should be treated no differently than motor carriers of other cargos. First, the basis of the single, on-line federal system is safety not economic regulation. On the basis of "safety", FHWA's sister administration, RSPA, has determined that "hazardous waste constitutes property within the meaning of §5102(12)."[4] Second, FHWA has historically focused on vehicle safety. Vehicles operating in interstate commerce must met certain safety standards whether a vehicle is carrying cargo or not. The "property" that FHWA should regulate under the single, on-line federal system is first and foremost the vehicle.

- Fees: We are not adverse to paying fees for the benefit of a single, on-line federal registration/licensing system as long as the fees are limited to the costs of operating the system. We are uncomfortable about the prospect of holding states harmless for fees they have collected to operate registration programs in the past.[5] If the federal government assumes this task, states should be relieved of such administrative burdens. We are comfortable, however, with the idea that some of the federal "registration" fee be

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[2] 60 FR 10772 (February 27, 1995).

[3] See attached letter to Docket 49848, from Charles Dickhut, Chairman, March 8, 1995.

[4] Letter to Charles Dickhut, AWHMT, from Alan Roberts, RSPA, March 27, 1995.

[5] 61 FR 43820 (August 26, 1996).

returned to states to ensure that states have access to the information in the single, on-line federal system.

Questions for Comment

FHWA asks a number of specific questions aimed at focusing respondents comments on the issues presented by the rulemaking. We will not attempt to respond to all in the order presented by FHWA, but will provide comment where necessary to support our views of the replacement federal on-line motor carrier registration/ licensing system.

I. Four Existing Systems -- Replacement System

A. The US DOT Identification Number System

Recently, FHWA requested comments impacting the US DOT identification number system in the context of its rulemaking on the revamping of the safety rating system.[6] The AWHMT filed comments expressing its views on the DOT Identification Number System.[7] We assume that FHWA is coordinating comments received on this topic from both rulemakings.

Some points, however, deserve reemphasis. We believe all interstate motor carriers -- private and for-hire -- should use the US DOT identification number system. We believe that the Form MCS-150 should be updated periodically, but no more frequently than once a year.

B. 49 U.S.C. Sections 13901-13905 Registration System

As noted above, all carriers, private and for-hire -- should be required to register. The registration process should not differ depending on whether the carrier is "for-hire" or "private." Likewise, FHWA should not operate separate registration programs based on "for-hire" or "private" carrier labels. Congress is asking FHWA to regulate carriers for reasons of safety not economics.

The USDOT identification number should be centrally issued. This is how numbers are assigned through the current hazmat registration program administered by RSPA.[8]

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[6] 61 FR 18866 (April 29, 1996).

[7] Letter to Office of the Chief Counsel, FHWA, from Michael Carney, AWHMT, July 22, 1996.

[8] 49 CFR 107 Subpart G.

A registration should be suspended only if (1) the carrier falsifies registration information; (2) the carrier cannot demonstrate financial responsibility; or (3) the carrier's safety fitness is compromised because the carrier is judged to be an "imminent hazard" or, as a transporter of hazardous materials or passengers, the carrier receives an "unsatisfactory rating" and refuses to cease transporting such materials or persons.' Congress also stipulates conditions under which registrations will be withheld or suspended.[10] The duration of the suspension or withholding should be until the offense(s) for which the suspension or withholding was effected is(are) corrected. However, falsification of a federal form may violate 18 U.S.C. 1001.

C. 49 U.S.C. Section 13906 Financial Responsibility System

We do not think that in all cases there is a relationship between safety and financial responsibility coverage. While the cost to obtain coverage from private sector underwriters may be influenced by a carrier's "safety" record, all carriers, in fact, have access to financial responsibility coverage directly or through assigned risk plans. Moreover, even "safe" carriers are subject to "accidents."

All carriers -- private and for-hire -- should demonstrate financial responsibility. All carriers have the potential to cause bodily injury, property damage, or environmental degradation. How a carrier is compensated has no relationship to safety factors.

Self-insurance should continue to be offered as a means of complying with financial responsibility. Carriers should be required to periodically offer proof of financial responsibility compliance. We believe the least burdensome way to accomplish such filing is in conjunction with the carrier's filing for motor carrier registration. A carrier should only have to renotify the Department between registration events when the carrier no longer complies with financial responsibility requirements and when the carrier has reinstated compliance.

Service of process agent information should continue to be required. However, this information only needs to be filed once with the federal on-line system. States should access the information, as needed, through the on-line system.

D. Single State Registration System

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9 49 CFR 385 and 386.72.

10 49 U.S.C. 13902(a)(3) and 13905(c).

The SSRS is not needed in **a** single, on-line federal system.

E. Conceptual Design Suggestions

FHWA has a unique opportunity to unburden itself from past program requirements. We hope that FHWA will feel it has the flexibility to design a the single, federal on-line replacement system independent of the components of the existing systems.

FHWA lists several existing federal programs that potentially have a nexus to the single, federal on-line registration system and asks if "there [are] other current Federal, State, or private information systems which could or should be utilized to construct or expand the replacement system?"[11] We understand that FHWA already has an initiative -- "CVISN" -- to link existing information systems. We assume that the single, federal on-line registration system would be one of those linked systems. If the question is to identify other non-FHWA information systems that contain information about motor carrier qualifications, FHWA is aware of the Federal HazMat Registration program administered by RSPA and the, yet to be federally-implemented, Uniform State-based HazMat Registration and Permitting program.[12]

FHWA asked respondents to comment on an optional approach to current systems that would, among other things, allow information that must be filed to vary depending of the "type of carrier."[13] FHWA does not define what it means by "type." We oppose distinctions by "private" or "for-hire". However, we can understand differences by size or type of commodity.

We, emphatically, disagree with the option that a carrier could file "either directly [with the federal system] or <u>throush a State agency</u>."[14] There should be no reason that all carriers cannot file conveniently with a single entity. Carriers are not advantaged by allowing an "option". They must finance the costs to support the program. At best, an option demands that carriers support at least two possible systems. A state-based option means that personal and resources in 50 states must be set up in anticipation that some carrier may choose to file "through a state agency" rather than with the single source.

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11 61 FR 43820 (August 26, 1996).

12 49 CFR 107 Subpart G and 49 U.S.C. 5119.

13 61 FR 43820 (August 26, 1996).

14 61 FR 43820 (August 26, 1996).

II. Polices, Programs and Requirements -- Registration and Financial Responsibility

A. Strategic Vision for this Rulemaking

FHWA requests comment on registration options. The options include "self-certification, a centralized federal program, or a decentralized state-based program. FHWA does not define what it means by "self-certification." If by self-certification, FHWA means that it will establish a standard but will not attempt any verification, recordkeeping beyond issuing a registration number, or oversight, we are not convinced this approach is wholly desirable. Such a self-certification system would be difficult to police and thus would potentially create an unequal playing field that could have market consequences. In addition, we do not believe that states will accept such a system. Our views on a state-based program have already been declared. Another advantage of a centralized federal program is that the FHWA will know from one source who it regulations and how to reach such carriers, if necessary.

B. Needs and Demands -- Registration and Financial Responsibility

FHWA asks how valuable is the information that could potentially be collected under a single, federal on-line system and how the information might be used. The AWHMT often needs to compare the segment of the hazardous materials industry that transports waste. This information is collected on the MCS-150 form at items 23 and 24. However, we have been frustrated in our efforts to use either the MCS-150, Motor Carrier Identification Report, or the U.S. Environmental Protection Agency's application be receive a transporter identification number because neither filing must be updated to reflect changed activity or systemically purged. Our only source of information in this area is the Vehicle Inventory and Use Survey (VIUS) produced by the U.S. Department of Commerce's Bureau of the Census. However, VIUS is published only at five-year intervals and the data is a "survey" not a "census." We not only have an interest in knowing more about the industry we represent, but FHWA should want to have updated information about the industry it regulates.

C. Requirements -- Registration and Financial Responsibility

As noted above, only states have the resources to adequately enforce federal requirements.

We believe that registration and financial responsibility requirements must be periodically filed. We believe annually is a reasonable filing period. We think, however, from a resource point of view, that FHWA must find a way to spread filings throughout the year so that the Department is not inundated with

filings on, for example, January 1st of each year. Filings might be spread quarterly based on the first letter of a carrier's name. In any event, carriers should be encouraged, perhaps with a financial incentive, but not forced to file registrations directly with the on-line system in order to avoid having to re-key entries when they are received in other hard-copy formats.

Conclusion

This rulemaking presents a significant opportunity to eliminate administrative redundancy and burden and provide a valuable information resource. We appreciate the opportunity to submit these comments. Please contact me or Cynthia Hilton, Executive Director, AWHMT, if additional input if necessary on any of the points raised above.

Sincerely,

Michael Carney

Michael Carney
Chairman

Enclosure

2200 Mill Road, Alexandria, VA 22314

ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS

(703) 838-1703 Fax (703) 519-1866

March 8, 1995

Docket 49848
Office of Documentary Services (C-55)
U.S. Department of Transportation
Plaza Level
400 Seventh St., SW
Washington, DC 20590

RE: DOT Study of the Interstate Commerce Commission'

Dear Sir or Madam:

On behalf of the Association of Waste Hazardous Materials Transporters (AWHMT), I am submitting comments to DOT's analysis of possible organizational changes to the duties and function of the Interstate Commerce Commission (ICC). Our concern, at this time, is to ensure the some competent authority be delegated to determine what is "property" within the meaning of 49 U.S.C. 10521.

The AWHMT is affiliated with the American Trucking Associations federation. The Association represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous wastes, in the United States, Canada, and Mexico. The AWHMT is a non-profit organization that promotes professionalism and performance standards that minimize risks to the environment, public health and safety; develops educational programs to expand public awareness about the industry; and contributes to the development of effective laws and regulations governing the industry.

Interest of the AWHMT

These comments are being filed on behalf of those AWHMT members that transport hazardous waste. The ICC does not consider hazardous waste destined for disposal to be "property", and thus carriers of such material are not within the scope of the Commission's jurisdiction. On the other hand, hazardous waste destined for recycling is considered "property."

This situation has resulted in several problems for our industry. First, it is not always possible to determine before hand the recycling potential any given shipment of hazardous waste prior to arrival at the facility to which the hazardous waste is transported for purposes of treatment, storage or disposal. Second, since the physical transportation of hazardous waste for disposal or recycling does not differ, it is rare that

[1] 60 FR 10772 (February 27, 1995).

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a transporter limits its business only to nonICC-regulated wastes destined for disposal. In fact, the transporter must go through the mechanics of obtaining ICC authority no matter how few ICC-regulated load the carrier may transport. Third, recent Congressional efforts to deregulate motor carrier transportation have been frustrated with respect to carriers of hazardous waste destined for disposal because federal statutes only apply to ICC-regulated property' and several states claim jurisdiction under their own statutes to economically regulate such transportation. We believe, however, that the conditions which led the ICC to determine that hazardous wastes are not property when destined for disposal have changed. It is no longer clear to us that hazardous waste destined for disposal is not "property" as the term in currently used by the ICC.

Interstate Commerce Commission Use of the Term "Property"

The Interstate Commerce Act (ICA) defines "transportation" to include "the movement of . . . property." Neither the Act nor its implementing regulations, however, define "property." Nevertheless, in 1982, the Interstate Commerce Commission (ICC) "determined that hazardous wastes . . . destined for disposal do not constitute 'property' within the meaning of 49 U.S.C. 10521."[3] (Emphasis added.)

On the other hand, in 1979, the ICC reversed an earlier Commission decision and determined that radioactive waste destined for disposal is "property" within the meaning of ICA.[4] It reached this conclusion by finding that (1) "economic value" is not the "sole criterion for determining whether . . . commodities are 'property"', (2) "'[p]roperty' connotes ownership, (3) the "public interest" supports a "broader definition of 'property"', (4) the meaning of "property" cannot so narrow the definition of transportation as to be inconsistent with national policy objectives, and (5) inasmuch as "[n]uclear waste materials are often transported over long distances[,] generate significant public concern, and carriers may consider

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[2] The Motor Carrier Act of 1991, the Negotiated Rates Act of 1993, the Trucking Industry Regulatory Reform Act of 1994, and Title VI of the Federal Aviation Administration Authorization Act of 1994 dealing with intrastate transportation of property.

[3] 47 FR 29403 (July 6, 1982).

[4] Nuclear Diagnostic Laboratories, Inc., Contract Carriers Application, Motor Carrier Cases, ICC, No. MC-141218, decided June 4, 1979.

them unattractive commodities to transport . . . the Commission must retain jurisdiction."[5]

Some of the conditions that led the ICC to define nuclear waste as property **may** not have been applicable to hazardous waste transportation when the ICC issued its 1982 decision. At that time, the hazardous waste transportation industry **was** hardly a distinct segment of the solid waste collection industry. The Uniform Hazardous Waste Manifest, which is a defining criteria of hazardous waste transportation both for DOT and states, was not even in place until 1984. Today, however, the regulatory requirements and technical aspects of hazardous waste transportation clearly separate our industry from solid waste collection.

Both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA/Superfund) and the Resource Conservation and Recovery Act (RCRA) impart "ownership" to hazardous waste that is supported by the "cradle to grave" regulatory scheme of RCRA and the onus of strict, joint, and severable liability that is imposed under Superfund when hazardous waste causes environmental harm.[6] The fact that thirty-four states impose some kind of registration/permitting/ licensure requirements on hazardous waste transporters implies some level of public interest. It cannot be disputed that it is a national policy objective to provide for the environmentally protective management of hazardous waste, including transportation when waste must be moved off the site of generation to achieve such management. It can certainly be said that "[hazardous] waste materials are often transported over long distances[,] generate significant public concern, and carriers may consider them unattractive commodities to transport." In short, we believe that if the ICC reviewed this issue today it would reverse its 1982 determination, and find, as it did for nuclear waste, that hazardous waste destined for disposal constitutes "property." Regrettably, a demonstrated by this proceeding, the future of the ICC is tenuous at best and it is considered unlikely that such a petition under the current ICC structure would merit attention.

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[5] Ibid, page 580-l.

[6] P.L. 96-510 and P.L. 94-580, respectively.

Significance of Retaining Some Authority to Determine What is Property Pursuant to the ICA

The ICC has, at different times, expanded and contracted the categories of waste that constitute property.[7] Based on the Commission's "record after rulemaking and adjudicatory proceedings as having construed its jurisdiction", courts have refused to interfere with the precedents and interpretations of the ICC with regard to what is "property" within the meaning of 49 U.S.C. 10521.[8]

Recommendation

In spite of changes that may be made to the organization, duties, and functions of the ICC, we request that some competent authority be given responsibility to render decisions on what is "property" for purposes of economic regulation of interstate or intrastate commerce.

We appreciate your attention to this matter. Please contact me or Cynthia Hilton, AWHMT, 703/838-1703, in the event addition elaboration on this issue is needed.

Sincerely,

Charles Dickhut

Charles Dickhut
Chairman

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[7] Joray Trucking Corp., Common Carrier Application, 99 M.C.C. 109 (1965) ; Long Island Nuclear Service Corp., Common Carrier Application, 110 M.C.C. 398 (1969); Nuclear Diagnostic Laboratories, Inc., Contract Carriers Application, 129 M.C.C. 339 (1978) and 131 M.C.C. 578 (1979).

[8] ICC v. Brownins-Ferris Industries, Inc., 529 F.Supp. 287, 292.