

Railroad/Hazardous Materials Transportation: Federal Appellate Court Addresses Constitutional/Preemption Challenge to California Fee



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The United States Court of Appeals for the Ninth Circuit (“Court”) addressed in a September 13th opinion a judicial challenge to California Senate Bill 84 (“SB 84”) which requires railroads to collect fees from customers shipping certain hazardous materials. See *BNSF Railway Company v. California Department of Tax and Fee Administration*, 2018 WL 4354380.

BNSF Railway Company and Union Pacific Railroad Company (collectively “Railroads”) filed suit in United States District Court (“District Court”) asking that SB 84 be enjoined, arguing that it violated three federal statutes and the United States Constitution.

The District Court determined that the Railroads were likely to succeed on the merits and entered a preliminary injunction. The Defendant California State Board of Equalization (“California”) appealed.

The Court notes that in 2014 a California interagency working group released a report noting an increase (both nationally in in California) in spills of oil transported by rail. It concluded that California was not prepared to handle such spills. SB 84 was stated to be a response enacted by the California Legislature in response to such concerns.

SB 84 charges a fee to “each person owning any of the 25 most hazardous material commodities . . . that are transported by rail in California. By way of example, it encompasses:

- Diesel fuel
- Ethanol
- Gasoline
- Chlorine
- Crude Oil

The fee is \$45.00 per loaded rail car. It is triggered if the rail car is loaded in California and imposed when the material is loaded onto the car. If the car is loaded outside California, the fee is imposed when the car enters the state. Such fee is charged irrespective of the distance traveled in California. Further, a railroad may charge shippers an additional fee of up to five percent of the established fee “to offset the administrative cost to collect the fee.”

The Railroads are tasked with collection of the fee from shippers of the hazardous materials. The fee is deposited in the Regional Railroad Accident Preparedness and Immediate Response Fund. After taking into account administrative expenses, money from the previous referenced fund is used to reimburse a state fund that provided start-up costs for the SB 84 program.

In further describing the purposes for which the funds can be used, the Court notes:

Emergency response equipment purchased with money from the Fund may be used to respond to hazardous material spills resulting from truck accidents. SB 84 specifically provides that such equipment may be “used for emergency response activities unrelated to regional railroad accident preparedness and immediate response,” provided that the Fund is reimbursed for such use.

The Railroads sought to invalidate SB 84, arguing that it violates:

- Interstate Commerce Commission Termination Act of 1995 (“ICCTA”)
- Hazardous Materials Transportation Act (“HMTA”)
- Railroad Revitalization and Regulatory Reform Act (“4-R Act”)

The Railroads also argued that the California legislation violates the Constitution’s dormant Commerce Clause.

The Court upholds the District Court decision, concluding:

- ICCTA would preempt SB 84 but the HMTA protects from preemption certain state, local and tribal fees related to the transportation of hazardous materials
- Fees authorized by SB 84 are stated to favor trucking companies over railroads and, therefore, not “fair” as defined by the HMTA, therefore not encompassed by the exemption and, consequently, are preempted by the ICCTA

The Court does not address the dormant Commerce Clause argument because of its holding that SB 84 is preempted by federal statute.

The Court also upholds the District Court’s finding that the Railroads would suffer irreparable harm if an injunction was not issued. This holding was based on a finding that some shippers would choose to ship hazardous materials by truck, or by other means, in order to avoid paying the fees mandated by SB 84. As a result, the District Court found that a weighing of the equities favored the Railroads.

The Court found that the District Court did not abuse its discretion in making these findings.

A [copy of the opinion](#) can be found here.