



OHM Newsletter

Office of Hazardous Materials

DEPARTMENT OF TRANSPORTATION / OFFICE OF THE SECRETARY / WASHINGTON, D.C. 20590

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NOTICES AND AMENDMENTS PUBLISHED DURING DECEMBER

None

Notice of Special Permits issued or denied during December 1972
(38 F. R. - 1/8/73)

INTERNATIONAL ORGANIZATIONS

Following is an addition to the subject list published in the September edition of the Newsletter:

Agency for International Development

CARRIER OF HAZARDOUS MATERIALS FINED

The Federal Highway Administration's Bureau of Motor Carrier Safety announced that a motor carrier was fined \$3,000 for violating the Department's Hazardous Materials Regulations.

The carrier was found guilty of accepting hazardous materials not properly described on shipping papers, failure to require a driver to have in his possession papers describing the hazardous materials, and failure to properly secure a shipment of hazardous materials to prevent movement within a motor vehicle. A fine of \$1,000 was assessed for each violation charged.

SHIPPING PAPERS MUST BE COMPLETE AND ACCURATE

Many shipping papers that are forwarded to our Office with incident reports are incomplete or inaccurate. In order for the carrier to take the necessary precautions, it is essential that the proper shipping name and classification be shown on the shipping papers. See section 172.5(a) of the Hazardous Materials Regulations for the list of proper shipping names.

NEW CODE IS AVAILABLE

The new Code of Federal Regulations covering the Hazardous Materials Regulations, Title 49, Parts 100 to 199, is now available at the Government Printing Office. When ordering please use the following title:

Code of Federal Regulations
Title 49--Transportation
Parts 100 to 199

and enclose your check, in the amount of \$5.75 made out to "Superintendent of Documents," and mail to the:

Superintendent of Documents
Government Printing Office
Washington, D. C. 20402

As announced in the November 4, 1972 issue of the Federal Register (37 F.R. 23604), the various Titles within the Code of Federal Regulations will still be reprinted annually but during different quarters of the year. This is being done in the hopes of giving better service to the public. Title 49, Parts 100 to 199 will be printed after the close of the third quarter and dated October 1.

A new edition of Title 46, Parts 146 to 149 is also now available. It is also dated October 1, 1972. These parts of Title 46 cover transportation of hazardous materials by water. It may be ordered from the above address. The price is \$5.75 per copy. The complete title is:

Code of Federal Regulations
Title 46--Shipping
Parts 146 to 149

STRICT LIABILITY RULES APPLIED IN TANK ACCIDENT

The Supreme Court for the State of Washington has ruled that the transportation of hazardous materials, especially gasoline in huge quantities, poses hazards so great to other motorists as to be almost beyond calculation and strict liability rules must be applied if an accident occurs.

Justice Frank Hale stated that, "Danger from great quantities of gasoline spilled on the public highway is extreme and extraordinary, for any spark, flame or heat is likely to ignite it... (The transportation of gasoline) creates dangers that cannot be eliminated by the exercise of reasonable care. ... The evidence in a very high percentage of instances will be destroyed..." (Siegler v. Kuhlman, Nov. 15, 1972)

HUMAN RADIOACTIVE PACKAGES?

We are aware that some persons could be considered packages of radioactive materials during transportation. This arises either as a result of medical patients receiving quantities of radioactive materials for diagnostic or therapeutic purposes as outpatients, or implants within their bodies of radioisotopic powered pacemakers. The quantities of radioactive materials in these pacemakers as well as the materials used for certain therapeutic purposes may be in excess of the quantities that are exempt from the Department's regulations for the packaging, marking, and labeling of radioactive materials.

During the period of formulation and promulgation of the present radioactive materials regulations, it was not contemplated that a person traveling in interstate or foreign commerce would be subject to the radioactive materials regulations as a package. This fact can best be illustrated by consideration of the package requirements for radioactive materials that are not exempt. A pacemaker could conceivably contain type B quantities of materials. If a person having such a pacemaker implanted in him were considered subject to the requirements, he would have to be able to withstand a 30-foot drop test and a 30-minute fire test at 1475°F. He would also have to be marked and labeled and would be subject to the shipping document requirements during transportation. Obviously, this was not intended.

Under the regulations of the U. S. Atomic Energy Commission (USAEC) and agreement states, the conditions for human implantation and administration of radioactive materials are carefully controlled. The National Council on Radiation Protection, in its Publication Nos. 37 and 39, has identified conditions under which persons containing radioactive material may be released from hospital care, i.e., treated as "outpatients." Additionally, the USAEC requires physicians administering radioactive materials to advise each patient of the necessary precautions for limiting radiation exposure to other persons at all times.

In summary, we do not consider persons treated with radioactive materials, or persons having implanted pacemakers containing radioactive materials, to be subject to the Department's Hazardous Materials Regulations; and in view of the regulatory procedures imposed by the USAEC and the agreement states, we do not consider regulations in this area to be necessary.

APPLICATION OF HAZARDOUS MATERIALS REGULATIONS AND MOTOR CARRIER SAFETY REGULATIONS TO LOCAL CARTAGE OPERATORS

The Federal Highway Administration's Bureau of Motor Carrier Safety has issued the following opinion regarding application of DOT Safety Regulations to local cartage companies that have contracted under a so-called "Master Agreement" to perform pickup and delivery services for line-haul motor carriers:

Some attorneys have expressed the opinion that the local carters are not subject to the (DOT) regulations because they are merely agents for the line-haul (motor) carriers. It is said that, because an agency relationship exists, we (DOT) must look solely to the line-haul carrier for compliance.

It is the opinion of the Bureau, reached after consultation with the Chief Counsel's Office, that the local carters operating under the "Master Agreement" are subject to the Motor Carrier Safety Regulations and the Hazardous Materials Regulations. We reach this conclusion for two reasons.

First: In section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), Congress considered the nature and extent of any exemption from regulation local cartage operations ought to enjoy and expressly declined to provide carriers conducting those types of operations with an exemption from amenability to safety regulation. Section 202(c) provides that the provisions of the Motor Carrier Act, "except the provisions of section 204 of this Act relative to qualifications and maximum hours of service of employees and safety of operation and equipment shall not apply--

* * * * *

"(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for...a motor carrier subject to this Act ...in the performance within terminal areas of transfer, collection, or delivery service..."

By expressly limiting the scope of exemption to economic matters only, Congress clearly indicated its intention to make cartage companies responsible for compliance with safety regulations during operations conducted pursuant to arrangements to perform pickup and delivery services for line-haul carriers within a local metropolitan area. In this connection, it should be noted

Application of Hazardous Materials Regulations and Motor Carrier Safety Regulations to Local Cartage Operators Cont.

that the Explosives and Other Dangerous Articles Act, 18 U.S.C. 831, provides that if an entity is a "carrier" for purposes of the Interstate Commerce Act it is likewise a "carrier" within the meaning of the Explosives and Other Dangerous Articles Act.

Second: It has been the Bureau's general policy that amenability to the safety regulations follows ability to achieve compliance with safety regulations. In other words, we will, as a general rule, regard the entity that makes the decisions that determine whether motor carrier operations will be conducted safely as the party responsible for conducting those operations in accordance with the regulations. In the present case, the contract between the line-haul carriers and the local carters clearly fastens responsibility for performing the functions that are critical to safe operations upon the local carters. Under the contract, it is the local carter, not the line-haul carrier, who hires drivers. Similarly, the purchase or lease of equipment (and so, presumably, responsibility for inspecting and maintaining it) is a function of the local carter under paragraph 1 of the "Master Agreement". The contract also makes the local carter responsible for any damages resulting from personal injury or death of third parties during operations under its provisions, and the local carter is expressly burdened with the obligation to insure against these events. Since third-party damages are the natural consequence of defective equipment and incompetent or unqualified drivers, it seems fair to say that the parties thought of the local carter as the person responsible for conducting a safe operation.

In these circumstances, the argument that local carters are contractual agents of line-haul carriers (a rather dubious contention, as a matter of law, since the contract expressly denominates them "independent contractor(s)") is simply irrelevant. Whatever arrangements the parties make among themselves, they cannot, without a complete alteration in the locus of control over the safety-related activities of local carters, absolve them of the duty to comply with the Motor Carrier Safety Regulations and the Hazardous Materials Regulations.

NATIONAL SYMPOSIUM ON HAZARDOUS MATERIALS TRANSPORTATION

The first National Symposium on the transportation of hazardous materials will be held in Washington, D. C., May 30 - June 1, 1973. Details will be provided at an early date.

USE OF THE "EMPTY" LABEL

Several questions have been raised concerning the application of "Empty" labels (§ 173.413) to packagings covered by § 173.29. Paragraph (e) of that section requires that the "Empty" label must be affixed to packagings that have contained radioactive materials--while paragraph (f) authorizes use of the label to completely cover other labels. Section 173.402(a)(13) indicates that the "Empty" label must be used; however, since § 173.29(f) does not make its use mandatory, and § 173.29 is the basic section applying to empty containers that are covered by that section, the use of an "Empty" label is not mandatory except as specified for radioactive materials packagings.



W. J. Burns
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The Secretary of Transportation has determined that publication of this periodical is necessary in the transaction of the public business required by law of this Department. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget through November 30, 1976.

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OFFICE OF THE SECRETARY
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