



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, D.C. 20590

NOV 26 2007

Mr. David Puhl
Midwest Airlines, Air Cargo
301 W. Air Cargo Way
Milwaukee, Wisconsin 53207

Ref. No.: 07-0163

Dear Mr. Puhl:

This is in response to your letter dated August 13, 2007 concerning the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) to shipments of dry ice transported by aircraft. You state that Midwest Airlines and its subsidiary Skyway Airlines operate as “will-not carry” airlines in accordance with Federal Aviation Administration regulations. Specifically, you ask if a shipment of dry ice which is offered for transportation in accordance with the exception specified in § 173.217(f) is considered a hazardous material under the HMR and whether a “will-not carry” airline operator is authorized to transport dry ice offered for transportation in accordance with the exception. Your concern lies with the statement in § 173.217(f) that reads “...excepted from all other requirements of this subchapter.” You ask whether this statement, when used in this section, and elsewhere in the HMR, indicates that the item in question is no longer considered a “hazardous material” as defined in § 171.8 when all requirements of the paragraph are met.

A hazardous material, as defined in § 171.8, means a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under § 5103 of Federal hazardous materials transportation law (49 U.S.C. 5101 et seq.). The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (HMT; § 172.101), and materials that meet the defining criteria for hazard classes and divisions in Part 173 of the HMR.

Section 173.217(f) provides an exception from all other requirements of the HMR for Carbon dioxide, solid (dry ice), when offered or transported by aircraft, in quantities not exceeding 2.3 kg (5 pounds) per package and used as a refrigerant for the contents of the package provided: (1) the dry ice is packed in a packaging which meets the general packaging requirements of Subpart B of Part 173; (2) the packaging is designed and constructed to permit the release of carbon dioxide gas to prevent a build-up of pressure that could rupture the packaging; (3) not more than 200 kg (441 pounds) of solid carbon dioxide is transported in any one cargo compartment or bin on any aircraft except by specific and special written

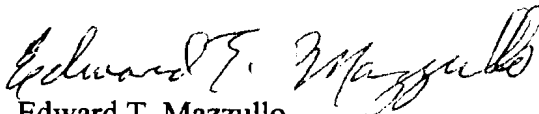
arrangement between the shipper and the aircraft operator; and (4) the package is marked "Carbon dioxide, solid" or "Dry ice", marked with the name of the contents being cooled, and marked with the net weight of the dry ice or an indication the net weight is 2.3 kg (5 pounds) or less.

The statement in the HMR that reads "... is not subject to the requirements of this subchapter," does not indicate that a material is not a "hazardous material," as defined in § 171.8. It does indicate that if the material is prepared for transportation and transported in accordance with the applicable paragraph, it does not have to satisfy any other requirements of the HMR. For the purposes of the HMR, dry ice is considered to be a hazardous material, despite the exception from certain requirements in § 173.217. However, there are some exceptions in the HMR for items that are not considered to be "hazardous materials," which because of design, size, content, and/or packaging have been determined to pose minimal safety risks in transportation (e.g., the exceptions in § 173.134(b) for Division 6.2 (infectious substance) materials).

If you have any questions concerning aircraft operational requirements, including the carriage of excepted hazardous materials by "will-not carry" airlines under 14 CFR, we suggest you contact the Federal Aviation Administration's Office of Hazardous Materials at (202) 267-7530.

I hope this information is helpful.

Sincerely,



Edward T. Mazzullo
Director, Office of Hazardous
Materials Standards



August 13, 2007

Mr. Edward T. Mazzullo
Director, Office of Hazardous Materials Standards
U.S. DOT/PHMSA (PHH-10)
1200 New Jersey Avenue, SE East Building, 2nd Floor
Washington, DC 20590

Eichenlaub
3 172.101
3 173.217
3 175.10
Applicability
07-0163

Dear Mr. Mazzullo,

This letter is a request for formal interpretation regarding the provisions of 49CFR for the transportation by aircraft of certain excepted items.

The language of 49CFR 173.217(f) is exemplary of these exceptions in which the regulation indicates that, when a package containing Dry Ice complies with paragraphs (a) and (d) of this rule along with the other provisions in the paragraph, the package is excepted from all other requirements of Subchapter C. Our concern lies with the statement in 173.217(f) that reads "...excepted from all other requirements of this subchapter." Does this statement mean the item in question is no longer considered a hazardous material as defined under 171.8 when all requirements of the paragraph are met?

Midwest Airlines, and our subsidiary unit, Skyway Airlines, each operate as a "will-not carry" airline for the transport of hazardous materials. The FAA has concluded that airlines with a "will-not carry" status are prohibited from transporting any item described in 49CFR unless specifically provided for in 175.10. We contend that, if an item is described in Subchapter C of 49CFR as "not subject to the requirements of this subchapter", the item no longer meets the definition of a hazardous material and cannot be subject to enforcement action as a hazardous material. This same phrase is found elsewhere, referring to other excepted items, in sections 173.307 for sports balls and tires, 173.164(b) for electrical components containing liquid mercury, 173.134(b) for certain biological substances. We believe your interpretation in the case of Dry Ice will affect all of these other exceptions, and perhaps others.

We look forward to receiving your response in this matter.

Sincerely,

David Puhl
Air Cargo Trainer

Cc: Mr. Doug Myers, Director Safety & Security
Skyway Airlines, Inc.