U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave., SE
Washington, DC 20590

FEB 24 2009

Mr. Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Ave., NW
Washington, DC 20036

Ref. No. 08-0288

Dear Mr. Spitulnik:

This responds to your November 14, 2008 letter requesting clarification of our November 7, 2008 letter (Ref. No. 08-0232) in which we discussed the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) to certain transfer operations. We stated that the conditions on delivery of a tank car containing a Class 3 (flammable liquid) material set forth in § 174.304 do not apply to the operation of a transloading facility on the property of a rail carrier where the lading is transferred directly from the rail tank car to other packaging, such as a cargo tank motor vehicle, for further transportation to its final destination.

Your inquiry relates specifically to the Van Dorn Yard in Alexandria, VA, owned by the Norfolk Southern Rail Company (NS), which is adjacent to the lines of, and served by, NS. We understand that rail tank cars containing ethanol arrive at the Van Dorn Yard, where the ethanol is transferred directly to cargo tank motor vehicles that transport the ethanol to the purchaser with no further involvement from NS. You indicate the waybills – which are generated by a rail carrier(s) to provide details and instructions of the rail transportation – identify only the Van Dorn Yard as the destination of the shipment.

The Federal Railroad Administration reviewed the transfer operations at the Van Dorn Yard and advises that the original shippers' bills of lading – the underlying shipping documents that identify the recipients of the shipment – clearly indicate that each rail tank car shipment is consigned to the company (i.e., the purchaser) to which the ethanol is ultimately delivered. Because the companies purchasing the ethanol do not have rail service, RSI Leasing, Inc. (RSI) receives the shipments arriving at the Van Dorn Yard. RSI transfers the ethanol from the rail tank cars to cargo tank motor vehicles and prepares shipping papers for the subsequent motor vehicle transportation. These transfer operations meet the definition of transloading in § 171.8 of the HMR: "the transfer of a hazardous material by any person from one bulk packaging to another bulk packaging ...for the purpose of continuing the movement of the hazardous material in commerce." We discussed transloading operations in a recent rulemaking under Docket No. RSPA-98-4852 (HM-223), in which we established

that a "transloading operation at an intermodal facility – i.e., the act of directly transferring hazardous materials from one bulk packaging to another – is a function that should be regulated under the HMR" (68 FR 61906, 61919; October 30, 2003; see also 70 FR 20018, 20020; April 15, 2005).

Specific requirements in § 174.67 apply to transloading a hazardous material from a rail tank car to a cargo tank motor vehicle, including employee training; securing rail tank cars against movement and preventing entry by other rail equipment; posting caution signs that transloading is taking place; maintaining and implementing written safety procedures; and attending or otherwise continuously monitoring transloading operations by an employee who is familiar with the nature and properties of the hazardous material, is aware of the procedures to be followed in the event of an emergency, and has the ability and authority to take appropriate actions should an emergency occur. Additional requirements in §§ 177.834 and 177.837 apply to the operator of a cargo tank motor vehicle into which a hazardous material is transloaded, including employee training and attending the cargo tank motor vehicle during operations. Moreover, both the owner/operator of the facility at which transloading operations take place and the motor carrier receiving the material from the rail carrier must develop and adhere to security plans which must include: (1) an assessment of possible transportation security risks for the hazardous material(s) being transloaded at that facility; and (2) appropriate measures to address those risks, including, at a minimum, elements on personnel security, unauthorized access, and en route security (see § 172.802(a)).

Transloading operations that are a part of present-day intermodal transportation of many commodities, and are necessary for products to reach their final destinations, did not exist when the conditions now found in § 174.304 were first adopted by the Interstate Commerce Commission (ICC) in 1930, to address problems related to uncontrolled unloading operations and long-term storage of partially unloaded rail tank cars. In the first edition of the Code of Federal Regulations (1938), § 80.110(d) of Title 49 contained provisions on shipping inflammable liquids in rail tank cars, including the following:

> (d) Shipment in tank cars. * * *
>
> (5) Tank cars containing inflammable liquids having a flash point of 80 °F or below, except liquid road asphalt, must not be shipped and must not be delivered, unless originally consigned or subsequently reconsigned to parties having private-siding or railroad-siding facilities, equipped for piping the liquid from the tank cars to permanent storage tanks of sufficient capacity to receive contents of car.

In 1940, when the ICC issued a completely revised set of Regulations for Transportation of Explosives and Other Dangerous Goods in eight parts of 49 CFR 71-85 (combined), it revised former § 80.110(d)(5) to add "tar" to the exception from these restrictions and deleted the words "must not be shipped" in new § 4.560(a) (5 FR 4905; December 12, 1940 and 5 FR 5091; December 14, 1940), to read as follows:

560. Tank Car Delivery.

(a) Tank cars containing inflammable liquids having a flash point of 80 °F or below, except liquid road asphalt or tar, must not be delivered, unless originally consigned or subsequently reconsigned to parties having private-siding (see Note 1 [defining private track]) or railroad-siding facilities, equipped for piping the liquid from the tank cars to permanent storage tanks of sufficient capacity to receive contents of car.

Between 1940 and 1976, this provision was renumbered as § 74.560(a), the term "inflammable" was changed to "flammable" (14 FR 2014; April 23, 1949); the words "or flammable poison gas" were added (24 FR 5641; July 14, 1959), but later deleted in 1976 (see below); the section number was changed from § 74.560 to § 174.560 (32 FR 5606; April 5, 1967); and this provision was then revised and relocated to § 174.304 (41 FR 15988, 16154; April 15, 1976) with no substantive change, to read as follows:

§ 174.304 Flammable liquids in tank cars.

A tank car containing a flammable liquid, other than liquid road asphalt or tar, may not be transported by rail unless it is originally consigned or subsequently reconsigned to a party having a private track on which it is to be delivered and unloaded (see § 171.8) or to a party using railroad siding facilities which are equipped for piping the liquid from the tank car to permanent storage tanks of sufficient capacity to receive the entire contents of the car.

Since 1976, the only changes to this section were adding the words "of this subchapter" following the parenthetical reference to § 171.8 (43 FR 48644; October 19, 1978), and replacing "flammable liquids" in the section heading and text with "Class 3 (flammable liquid) material" (55 FR 52683; December 21, 1990).

This history makes clear that the conditions presently set forth in § 174.304 were intended to apply to the delivery of flammable liquids transported in rail tank cars, and not to modern-day transloading of these materials at a rail carrier's facility. For this reason, we do not interpret this section to apply to the transloading operations at the Van Dorn Yard or similar facilities.

We recognize the concerns that your client has regarding the applicability of § 174.304 to the ethanol transloading operations at the Van Dorn Yard, and we believe that these concerns are sufficiently addressed by the HMR as discussed above. However, if your client believes that the existing requirements in the HMR are not sufficient, it may submit a petition to amend the HMR in accordance with the procedures set forth in 49 CFR part 106.

I hope this information is helpful. Please contact us if you require additional assistance.

Sincerely,

Edward T. Mazzullo

Edward T. Mazzullo
Director
Office of Hazardous Materials Standards

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KAPLAN KIRSCH ROCKWELL

November 14, 2008

Ms. Susan Gorsky, Acting Chief
Standards Development
Office of Hazardous Materials Standards
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Dear Ms. Gorsky:

We are counsel for the City of Alexandria, Virginia, and have received a copy of your November 7, 2008 letter to Mr. Lawrence Bierlein (your reference number 08-0232). After reviewing that letter, we are writing to seek further clarification of the applicability of 49 C.F.R. § 174.304 to certain shipments of hazardous materials by rail.

Your letter responded to an email from Mr. Bierlein dated September 24, 2008, requesting clarification of the applicability of 49 C.F.R. § 174.304 of the Hazardous Materials Regulations (HMR; 49 C.F.R. Parts 171-180) to a "transloading facility" located on the property of a rail carrier where lading is loaded from rail cars to other packaging, *e.g.*, tank trucks, for further transportation to its "final destination." Your response was that 49 C.F.R. § 174.304 does not apply to such an operation because it:

> is intended to apply to unloading operations at the facility that is the final destination for the material. The conditions established in § 174.304 are not applicable to operations of a transloading facility on the property of a rail carrier where the material is transferred to other packaging for further transportation to the final destination.

Because this guidance regarding the applicability of 49 C.F.R. § 174.304 is framed very broadly and presupposes that the activity being performed meets the regulatory definition of "transloading," I am writing to seek further clarification of the applicability of 49 C.F.R. § 174.304 to a transfer operation being conducted by a railroad in a way that may affect the applicability of Section 174.304.

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49 C.F.R. §174.304 provides as follows:

> A tank car containing a Class 3 (flammable liquid) material . . . *may not be transported by rail* unless it is originally consigned or subsequently reconsigned *to a party having a private track* on which it is to be delivered and unloaded . . . or to a party using railroad siding facilities which are equipped for *piping the liquid from the tank car to permanent storage tanks* of sufficient capacity to receive the entire contents of the car.

49 C.F.R. § 174.304 (emphasis added).

The facility that is the focus of my inquiry is located in Alexandria, Virginia, known as the Van Dorn Yard, and is adjacent to the lines of, and served by, the Norfolk Southern Railway Company ("NSRC"). NSRC owns the property on which the facility is located. Lading arrives by rail at the facility. The lading is identified by waybills on which the only destination listed is the address of the Alexandria facility. At this facility, the lading is consigned to another entity by the shipper, therefore the waybills specify that the lading is to be delivered to the facility "care of" the consignees. The lading—a Class 3 flammable liquid—is transferred at the facility from rail cars into waiting tank trucks using portable pumps. Those tank trucks then transport the lading to another destination, with no further involvement from NSRC.

It appears that the operation described above does not comply with 49 C.F.R. § 174.304. By its terms, Section 174.304 applies regardless of whether an activity is considered "unloading incidental to movement," "transloading" or arrival at a "final destination"; it applies simply to the "transport" of Class 3 flammable materials by rail. The provision unambiguously permits the transport of a Class 3 flammable material by rail *only* if one of two conditions is met: 1) the rail car containing the material is transferred to a party with private track, or 2) it is piped into a stationary storage tank. There is no private track here – the facility is owned by the railroad, and operated for it by a third party contractor. There is no piping at this facility and, to the best of my knowledge, no storage tank that would permit NSRC to satisfy the second alternative.

Moreover, even if the final destination of the commodities that move through the Alexandria transload facility is somewhere other than that facility (although the information on the waybills would cause one to believe that this facility *is* the final destination), the movement still violates the requirements of Section 174.304. At the facilities to which this product is destined, there is no private track used for unloading the commodity – it arrives on a truck. In addition, to the best of our knowledge, it is not piped from a rail car into a stationary storage tank – again, it arrives by truck.

In this circumstance, please provide guidance regarding the applicability of 49 C.F.R. § 174.304 to the Alexandria facility. It seems that if your November 7 opinion letter is correct in that Section 174.304 does not apply to such an operation, that any shipper could readily evade the safety measures mandated in Section 174.304 simply by arranging for a transload en route to

the final destination. We do not believe you intended such a result and write to seek further clarification.

Sincerely,

Charles A. Spitulnik
Kaplan Kirsch & Rockwell, LLP

cc: Ignacio B. Pessoa, Esq., Office of the City Attorney
Christopher P. Spera, Esq., Office of the City Attorney

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