



U.S. Department
of Transportation

Pipeline and Hazardous
Materials Safety
Administration

1200 New Jersey Avenue, SE
Washington, DC 20590

MAR 23 2017

Mr. Tom Forbes
Public Utilities Commission of Ohio
Transportation Department
Field Supervisor Enforcement Division
180 East Broad Street
Suite 421
Columbus, OH 43215

Reference No. 16-0118

Dear Mr. Forbes:

This letter is in response to your July 5, 2016, email requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) applicable to agricultural operations as prescribed in § 173.5(a)(2). In your email, you ask a series of questions related to a clarification issued by this Office on May 27, 2016, under Reference No. 16-0002, that you believe may have been in error as the result of a possible misunderstanding of the facts as presented in your original letter.

We have paraphrased and answered your questions as follows:

- Q1. As prescribed in § 173.5(a), for other than a Class 2 material, the transportation of an agricultural product over local roads between fields of the same farm is excepted from the requirements of the HMR if it is transported by a farmer who is an intrastate private motor carrier and the movement of the agricultural product conforms to requirements of the State in which it is transported and is specifically authorized by a State statute or regulation in effect before October 1, 1998. Does the Ohio statute in effect prior to October 1, 1998 “specifically authorize” such movement?
- A1. The answer is yes. Section 4923.02 of the Ohio statute, which was in effect prior to October 1, 1998, explicitly authorized the movement by a private motor carrier engaged in the transportation of farm supplies to the farm or farm products from farm to market.
- Q2. Answer A1 in your May 27, 2016, clarification states that the current State law or regulation must have come into effect before July 1, 1998. It is our understanding that you meant October 1, 1998. In 2013, the State of Ohio adopted the HMR by reference. If you find that the 1998 Ohio statute specifically authorized the movement described in Question Q1, what impact, if any, does the revised statute have on use of the exception authorized in § 173.5(a)?

- A2. The State of Ohio's adoption of the HMR by reference in a 2013 statute amendment is not relevant. Unless otherwise excepted, the HMR has been applicable to the intrastate transportation of hazardous materials since October 1, 1998. However, because the movement of the agricultural product conformed to the requirements of the State in which it was transported, and was specifically authorized by a State statute or regulation in effect before October 1, 1998, the exception in § 173.5(a) is authorized. Further, the Federal hazmat transportation law does not prohibit a State from enacting a law or regulation that would restrict or repeal the agricultural exceptions provided by § 173.5(a) of the HMR regardless of the effective date.
- Q3. Answer A2 in your May 27, 2016, clarification appears to be in conflict with Answer A1. In Answer A1, you state the current State law or regulation must be in effect before July 1, 1998 (October 1, 1998). In Answer A2, you state that a State statute or regulation does not have to exist authorizing movement in accordance with § 173.5(a)(2) and that the HMR independently excepts shipments from any State law that came into effect after July 1, 1998 (October 1, 1998). Please explain.
- A3. Answers A1 and A2 of this response clarify the authorization to use the exceptions provided by § 173.5(a)(2) of the HMR either before, after, or before and after October 1, 1998. However, in retrospect, it is the opinion of this Office that the four conditions prescribed in § 173.5(a) are not mutually exclusive; all four conditions must be met. Consequently, the exception from the requirements of the HMR for other than a Class 2 product must be transported by a farmer who is an intrastate private motor carrier, and the movement of the agricultural product must conform to requirements of the State in which it is transported and be specifically authorized by a State statute or regulation in effect before October 1, 1998.

We apologize for the inconsistency in our previous response and for any inconvenience it may have caused. Please contact us if we can be of further assistance.

Sincerely,



T. Glenn Foster
Chief, Regulatory Review and Reinvention Branch
Standards and Rulemaking Division

Stevens
§ 173.5(a)(2)
Packaging General
16-0118

Dodd, Alice (PHMSA)

From: Rivera, Jordan CTR (PHMSA)
Sent: Wednesday, July 06, 2016 11:47 AM
To: Hazmat Interps
Subject: FW: Interpretation Request
Attachments: Farmer Local Roads 160002.pdf; 4923 Statute 2013.docx

Hi Shante/Alice,

Please submit this as a letter of interpretation. Eileen wrote the interpretation letter in question.

Please let me know if you have any questions.

Thanks,
Jordan

From: tom.forbes@puco.ohio.gov [mailto:tom.forbes@puco.ohio.gov]
Sent: Tuesday, July 05, 2016 7:02 PM
To: PHMSA HM InfoCenter
Subject: Interpretation Request

Dear Sir or Madame:

This letter is to seek clarification of your response to my request for interpretation regarding 173.5(a)(2) (attached 16-0002) as it relates to Ohio law as it stood in 1998 and as it stands today. I believe the facts at issue may have been misunderstood. 173.5(a)(2) requires that the movement of the agricultural product conform to the requirements of the state and is specifically authorized by a state statute or regulation in effect before October 1, 1998. In 1998, Ohio had in place a state statute that excepted farmers from all motor carrier safety and hazardous materials regulations in intrastate commerce (see 4923.02(A)(6) attached). In 2013, as a results of a FMCSA audit Ohio changed the statute so that farmers now have to comply with the HMRs. My questions are as follows:

1. Did the 1998 version of 4923.02(A)(6), which exempted farmers from the FMCSRs and HMRs, "specifically authorize" the transportation contemplated in in 173.5(a)?
2. In your letter you state that the current state law or regulation must have come into effect before July 1, 1998. As mentioned above, Ohio changed the statute in 2013 so that farmers now must comply with the HMRs. If you find that the 1998 version of 4923.02(A)(6) did specifically authorize the transportation at issue, how does the fact that the statute was later amended affect the analysis?
3. Your answer to Q2 in your letter appears to be in conflict with your answer to Q1. Again, in A1 you state that the current state law or regulation must have come into effect before July 1, 1998. In the answer to Q2, you state that 173.5 independently excepts shipments from the HMRs and from any state law that came into effect after July 1, 1998. Is it PHMSA's position that 173.5 prohibits a state from enacting a law or regulation that would abrogate the 173.5 exemption that an intrastate farmer may have enjoyed under a prior state law or regulation? It would seem to me that 173.5 allows a farmer to enjoy such exemption only as long as a state has an applicable pre-October 1998 law or regulation on the books, which the state can amend or repeal at any time.

Thank you for your assistance with this matter.

Tom Forbes

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This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

2013 Ohio Statute

4923.02 Exemption from provisions of chapter.

(A) As used in this chapter, "private motor carrier" does not include a person when engaged in any of the following in intrastate commerce:

- (1) The transportation of persons in taxicabs in the usual taxicab service;
- (2) The transportation of pupils in school busses operating to or from school sessions or school events;
- (3) The transportation of farm supplies to the farm or farm products from farm to market or to food fabricating plants;
- (4) The distribution of newspapers;
- (5) The transportation of crude petroleum incidental to gathering from wells and delivery to destination by pipe line;
- (6) The transportation of injured, ill, or deceased persons by hearse or ambulance;
- (7) The transportation of compost (a combination of manure and sand or shredded bark mulch) or shredded bark mulch;
- (8) The transportation of persons in a ridesharing arrangement when any fee charged each person so transported is in such amount as to recover only the person's share of the costs of operating the motor vehicle for such purpose;
- (9) The operation of motor vehicles for contractors on public road work.

(B) The public utilities commission may grant a motor carrier operating in intrastate commerce a temporary exemption from some or all of the provisions of this chapter and the rules adopted under it, when either of the following applies:

- (1) The governor of this state has declared an emergency.
- (2) The chairperson of the commission or the chairperson's designee has declared a transportation-specific emergency.

(C) The commission may adopt rules not incompatible with the requirements of the United States department of transportation to provide exemptions to motor carriers operating in intrastate commerce not otherwise identified in divisions (A) and (B) of this section.

(D) Divisions (A) to (C) of this section shall not be construed to relieve a person from compliance with the following:

(1) Rules adopted under division (A)(2) of section 4923.04 of the Revised Code, division (E) of section 4923.06 of the Revised Code, division (B) of section 4923.07 of the Revised Code, and section 4923.11 of the Revised Code;

(2) Rules regarding commercial driver's licenses adopted under division (A)(1) of section 4923.04 of the Revised Code;

2013 Ohio Statute

(3) Rules adopted under section 4921.15 of the Revised Code regarding uniform registration and permitting of carriers of hazardous materials and other applicable provisions of that section and division (H) of section 4921.19 of the Revised Code.

Amended by 130th General Assembly File No. TBD, HB 483, §101.01, eff. 9/15/2014.

Added by 129th General Assembly File No.127, HB 487, §101.01, eff. 6/11/2012.

4923.04 Rules applicable to transportation of persons, property, or hazardous materials; authority of commission to obtain warrant or subpoena.

(A) The public utilities commission shall adopt rules applicable to all of the following:

(1) The transportation of persons or property by motor carriers operating in interstate and intrastate commerce ;

(2) The highway transportation and offering for transportation of hazardous materials by motor carriers, and persons engaging in the highway transportation and offering for transportation of hazardous materials, operating in interstate or intrastate commerce;

(3) The use and interchange of intermodal equipment, as those terms are defined in section 4923.041 of the Revised Code.

(B) The rules adopted under division (A) of this section shall not be incompatible with the requirements of the United States department of transportation.

(C) To achieve the purposes of this chapter and to assist the commission in the performance of any of its powers or duties, the commission, either through the public utilities commissioners or employees authorized by it, may do either or both of the following:

(1) Apply for, and any judge of a court of record of competent jurisdiction may issue, an appropriate search warrant;

(2) Examine under oath, at the offices of the commission, any officer, agent, or employee of any person subject to this chapter. The commission, by subpoena, also may compel the attendance of a witness for the purpose of the examination and, by subpoena duces tecum, may compel the production of all books, contracts, records, and documents that relate to compliance with this chapter or compliance with rules adopted under this chapter.

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Added by 129th General Assembly File No.127, HB 487, §101.01, eff. 6/11/2012.

Edmonson
Packaging General
§173.15
16-0002

Dodd, Alice (PHMSA)

From: Geller, Shelby CTR (PHMSA)
Sent: Monday, January 04, 2016 4:40 PM
To: Hazmat Interps
Subject: FW: Interpretation Request
Attachments: 1998 Ohio Statute.pdf

Dear Shante and Alice,

Forwarded is a request for a formal letter of interpretation.

Thanks,
Shelby

From: tom.forbes@puc.state.oh.us [<mailto:tom.forbes@puc.state.oh.us>]
Sent: Saturday, January 02, 2016 3:12 PM
To: PHMSA HM InfoCenter
Cc: tom.forbes@puc.state.oh.us; joseph.turek@puc.state.oh.us
Subject: Interpretation Request

Dear Sir or Madame:

I am requesting a written interpretation of the Hazardous Materials regulations. Specifically 173.5(a)(2) what is meant by the phrase "is specifically authorized by a State statute or regulation in effect before October 1, 1998." The regulation states:

173.5 Agricultural operations.

(a) For other than a Class 2 material, the transportation of an agricultural product over local roads between fields of the same farm is excepted from the requirements of this subchapter. A Class 2 material transported over local roads between fields of the same farm is excepted from subparts G and H of part 172 of this subchapter. In either instance, transportation of the hazardous material is subject to the following conditions:
(1) It is transported by a farmer who is an intrastate private motor carrier; and
(2) The movement of the agricultural product conforms to requirements of the State in which it is transported and is specifically authorized by a State statute or regulation in effect before October 1, 1998.

Ohio had a State statute in place in 1998 that excepted farmer from all motor carrier safety and hazardous materials regulations while in intrastate commerce. Does this exception allow a farmer moving agriculture products other than class 2 over local roads between fields of the same farm to utilize the exception in 173.5(a) or did their need to be a State statute specifically authorizing this for the except in 173.5(a) to be utilized. In 2013 Ohio changed it statute stating farm moves had to comply with the hazardous materials regulations they continue to be exempt from the motor carrier safety regulation in intrastate commerce

An Ohio Inspector recently stopped a cargo tank operated by a farmer between fields of the same farm transporting diesel fuel in a cargo tank. The diesel fuel was leaking from the cargo tank and had no hazard communications on the package and no shipping paper. We need to understand if this shipment is exempt from the hazardous materials regulations based on 173.5(a) and the attached 1998 Ohio statute 4923.02(A)(6).

Thank you for your assistance on this matter.

Tom Forbes

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This message and any response to it may constitute a public record and thus may be publicly available to anyone who requests it.

C.J.S. Motor Vehicles §§ 16, 44 et seq.

OJur 3d: 5, Appellate Review § 496; 7, Automobiles and Other Vehicles § 254; 13, Carriers § 8, 99; 77, Public Transit § 212

4923.02 Definitions

As used in sections 4923.01 to 4923.17 of the Revised Code:

(A) "Private motor carrier" or "contract carrier by motor vehicle" includes every corporation, company, association, joint-stock association, person, firm, or copartnership, their lessees, legal or personal representatives, trustees, or receivers or trustees appointed by any court, not included in the definition under section 4921.02 of the Revised Code, when engaged in the business of private carriage of persons or property, or both, or of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, over any public highway in this state, but does not include any corporation, company, association, joint-stock association, person, firm, or copartnership, their lessees, legal or personal representatives, trustees, or receivers or trustees appointed by any court:

(1) Engaged or proposing to engage, directly or indirectly, as a private owner or operator of motor vehicles employed or used by a private motor carrier, or by a motor transportation company as defined in section 4921.02 of the Revised Code;

(2) Insofar as they are engaged in the transportation of persons or property, or both, exclusively within the territorial limits of a municipal corporation or within such limits and the territorial limits of municipal corporations immediately contiguous to such municipal corporations;

(3) Engaged in the transportation of persons in taxicabs in the usual taxicab business or in hotel busses operating to and from hotels;

(4) Engaged in the transportation of pupils in school busses operating to or from school sessions or school events;

(5) Engaged, as a motor transportation company holding a certificate of public convenience and necessity for the transportation of persons, in the carriage of persons in emergency or additional motor vehicles on charter party trips to or from any point within the county or counties in or through which such motor transportation company provides regular route scheduled service, provided that such use of such emergency or additional motor vehicle is reported and the tax paid as prescribed by the public utilities commission by general rule or temporary order;

(6) Engaged in the transportation of farm supplies to the farm or farm products from farm to market;

(7) Engaged in the operation of motor vehicles for contractors on public road work;

(8) Engaged in the transportation of newspapers;

(9) Engaged in the transportation of crude petroleum incidental to gathering from wells and delivery to destination by pipe line;

(10) Engaged in the towing of disabled or wrecked motor vehicles;

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(11) Engaged in the transportation of injured, ill, or deceased persons by hearse or ambulance;

(12) Engaged in transportation of compost (a combination of manure and sand or shredded bark mulch) or shredded bark mulch;

(13) Engaged in the transportation of persons in a ridesharing arrangement when any fee charged each person so transported is in such amount as to recover only the person's share of the costs of operating the motor vehicle for such purpose.

(B) "Motor vehicle" includes any automobile, automobile truck, tractor, trailer, semitrailer, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

(C) "Charter party trip" means the carriage of persons in one or more motor vehicles under a special contract for the exclusive use of each such vehicle for each trip, which contract shall not provide for continuing operations between the same termini, and which operation shall in no event become regular. The limitations of section 4921.18 and any other sections of the Revised Code as to the seating capacity of such emergency or additional motor vehicles operated by a motor transportation company do not apply to charter party trips.

(D) "Ridesharing arrangement" has the same meaning as in section 4921.02 of the Revised Code.

(1988 H 708, eff. 4-19-88; 1982 H 406; 1981 H 53; 1973 H 941; 129 v 1706; 1953 H 1; GC 614-103)

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 119 v 163;
118 v 407, § 1; 117 v 349, § 1; 115 v Pt 2, 96;
115 v 254

Cross References

Changes by city transit company, 4921.24	Motor transportation companies, certificate of regular route bus service, conditions, 4921.101
Contract carriers by motor vehicle, enforcement of rules and laws by state highway patrol, 5503.02	No additional tax paid by city transit company, 4921.20
Contract carriers by motor vehicle, registration as hazardous materials carriers, 4905.80	Public utilities commission, interstate operating authority; definitions, 4919.75
	Restrictions for union terminal company service, 4953.04

Ohio Administrative Code References

Definitions, knowledge of rules and regulations required, OAC 4901:2-5-01

Library References

Automobiles ☞ 60.
WESTLAW Topic No. 48A.
C.J.S. Motor Vehicles §§ 16, 44 et seq.

OJur 3d: 13, Carriers § 8
Am Jur 2d: 13, Carriers § 8, 9

4921.02 Definitions

As used in sections 4921.01 to 4921.32 of the Revised Code:

(A) "Motor transportation company," or "common carrier by motor vehicle," includes every corporation, company, association, joint-stock association, person, firm, or copartnership, and their lessees, legal or personal representatives, trustees, and receivers or trustees appointed by any court, when engaged or proposing to engage in the business of transporting persons or property, or the business of providing or furnishing such transportation service, for hire, whether directly or by lease or other arrangement, for the public in general, in or by motor-propelled vehicles of any kind, including trailers, over any public highway in this state. All laws regulating the business of motor transportation, their context notwithstanding, apply to such motor transportation company or common carrier by motor vehicle. "Motor transportation company," as so used, does not include any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated:

(1) Engaged or proposing to engage as a private motor carrier as defined by section 4923.02 of the Revised Code;

(2) Insofar as they own, control, operate, or manage motor vehicles used for the transportation of persons or property, operated exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous to such municipal corporation;

(3) Insofar as they are engaged in the transportation of persons in taxicabs in the usual taxicab service or in hotel busses operating to and from hotels;

(4) Engaged in the transportation of pupils in school busses operating to or from school sessions or school events;

(5) Engaged in the transportation of farm supplies to the farm or farm products from farm to market or to food fabricating plants;

(6) Engaged in the distribution of newspapers;

(7) Engaged in the transportation of crude petroleum incidental to gathering from wells and delivery to destination by pipe line;

(8) Engaged in the towing of disabled or wrecked motor vehicles;

(9) Engaged in the transportation of injured, ill, or deceased persons by hearse or ambulance;

(10) Engaged in the transportation of compost (a combination of manure and sand or shredded bark mulch) or shredded bark mulch;

(11) Engaged in the transportation of persons in a ridesharing arrangement when any fee charged each person so transported is in such amount as to recover only the person's share of the costs of operating the motor vehicle for such purpose.

(B) "Trailer" means any vehicle without motive power designed or used for carrying property or persons and for being drawn by a separate motor-propelled vehicle, including any vehicle of the trailer type, whether designed or used for carrying property or persons wholly on its own structure, or so

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designed or used that a part of its own weight or the weight of its load rests upon and is carried by such motor-propelled vehicle.

(C) "Public highway" means any public street, road, or highway in this state, whether within or without the corporate limits of a municipal corporation.

(D) "Fixed termini" refers to the points between which any motor transportation company usually or ordinarily operates, provides, or proposes to operate or provide motor transportation service.

(E) "Regular route" refers to that portion of the public highway over which any motor transportation company usually or ordinarily operates, provides, or proposes to operate or provide motor transportation service.

(F) "Irregular route" refers to that portion of the public highway over which is conducted or provided any other operation of any motor vehicle by a motor transportation company transporting property.

(G) "Ridesharing arrangement" means the transportation of persons in a motor vehicle where such transportation is incidental to another purpose of a volunteer driver, and includes ridesharing arrangements known as carpools, vanpools, and buspools.

Whether or not any motor-propelled vehicle is operated or such transportation service is provided or furnished by such motor transportation company, between fixed termini or over a regular route, or over an irregular route, or whether or not a corporation, company, association, joint-stock association, person, firm, or copartnership, or their lessees, trustees, or receivers or trustees appointed by any court, is engaged as a motor transportation company, are questions of fact. The finding of the public utilities commission on such questions is a final order which may be reviewed as provided in section 4921.17 of the Revised Code. The commission has jurisdiction to receive, hear, and determine such questions upon complaint of any party, or upon its own motion, upon not less than fifteen days' notice of the time and place of such hearing and of the matter to be heard.

(1981 H 53, eff. 7-1-82; 1973 H 941; 129 v 1706; 1953 H 1; GC 614-84)

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 118 v 407; 118 v 277; 117 v 349; 113 v 482; 111 v 512; 111 v 19; 110 v 211

Cross References

Motor transportation companies, enforcement of rules and laws by state highway patrol, 5503.02

Motor transportation companies, registration as hazardous materials carriers, 4905.80

Motor transportation company, defined, 4905.03

Private motor carriers, granting of permit; contract of carriage effective, 4923.07

Private motor carriers, ridesharing arrangement defined, 4923.02

Railroads, highway and aerial transportation authorized, 4961.03

Transportation terminal companies, restrictions for union terminal company service, 4953.04



U.S. Department
of Transportation

Pipeline and Hazardous
Materials Safety
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MAY 27 2016

Mr. Tom Forbes
Public Utilities Commission of Ohio
Transportation Department
Field Supervisor Enforcement Division
180 East Broad Street, Ste. 421
Columbus, OH 43215

Reference No. 16-0002

Dear Mr. Forbes:

This letter is in response to your January 2, 2016 e-mail requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) applicable to agricultural operations as prescribed in § 173.5(a)(2). In your request, you indicate that an Ohio Inspector recently stopped a farmer with a leaking cargo tank containing diesel fuel. You would like to know if the shipment is exempt from the HMR. Your questions are paraphrased and answered below.

Q1. What is the meaning of the phrase "is specifically authorized by a State statute or regulation in effect before October 1, 1998"?

A1. The phrase "is specifically authorized by a State statute or regulation in effect before October 1, 1998" in § 173.5(a)(2) means movement of the agricultural product must conform to any law or regulation of the State in which it is transported. The current State law or regulation must have come into effect before July 1, 1998. It is important to note that this exception only applies to "local roads." According to the Federal Highway Administration, "Local Roads in rural areas typically serve very low density, dispersed developments with relatively low traffic volume. . . . Local Roads are often classified by default. In other words, once all Arterial and Collector roadways have been identified, remaining roadways are classified as Local Roads" (See "Highway Functional Classification Concepts," 2013 Edition.)

Q2. Must a State statute or regulation exist to authorize the use of § 173.5(a)(2)? You enclosed a copy of Ohio Revised Code, Title [49] XLIX Public Utilities, Chapter 4921: MOTOR CARRIER AUTHORITY AND PERMITTING, 4921.02 Definitions, and Chapter 4923: MOTOR CARRIER OPERATIONS, 4923.02, Definitions.

A2. The answer to your question is no. This provision, 49 CFR § 173.5, independently exempts shipments of "other than a Class 2 material" from the requirements of 49 CFR Parts 171 – 180 and from any state law that came into effect after July 1, 1998.

I hope this information is helpful. Please contact us if we be of further assistance.

Sincerely,

A handwritten signature in cursive script, reading "T. Glenn Foster". The signature is written in black ink and is positioned above the typed name and title.

T. Glenn Foster
Chief, Regulatory Review and Reinvention Branch
Standards and Rulemaking Division