



U.S. Department
of Transportation
**Research and
Special Programs
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

DEC 19 2003

Mr. Neill Boutilier
Refrigeration Supplies Distributor
26021 Atlantic Ocean Drive
Lake Forest, CA 92630

Ref. No. 03-0007

Dear Mr. Boutilier:

This is in response to your letter requesting clarification of the requirements under the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) regarding over-the-counter sales of hazardous materials. You ask for additional clarification of our response to a previous interpretation letter (Ref. No. 01-0290) dated May 6, 2002. You state that your questions pertain to hazardous materials that do not meet the materials of trade exceptions in § 173.6 and that your employees are aware that the customers are transporting hazardous materials in commerce. We have framed our response in the following series of questions and answers.

Q1. As part of our company training, is it acceptable to instruct our employees not to provide a verbal interpretation of the HMR, at the time of will call, when not asked by the customer?

A1. The HMR do not require the offeror to provide an interpretation of the hazardous materials regulations to the customer; however, we strongly encourage such actions to the extent that it may be appropriate with regard to over-the-counter sales.

Q2. Is the seller required to include the total weight, shipper's certification and address of the recipient of the hazardous materials on the shipping paper?

A2. In accordance with § 172.200(a), a hazardous material offeror must describe the hazardous material on the shipping paper, therefore, the offeror is responsible for providing a shipping paper as required by Part 172, Subpart C of the HMR, that includes the total weight and shipper's certification. The offeror is not required to enter the recipient's (consignee's) address on the shipping paper.

Q3. Is it acceptable to load over 1000 pounds of a Class 2 refrigerant gas onto a customer's vehicle and provide temporary placards, upon request, without verifying whether or not the driver of the vehicle has a valid commercial driver's license (CDL) with a hazardous materials endorsement?

A3. The HMR do not require the offeror to verify whether the driver has a valid CDL with a hazardous materials endorsement,

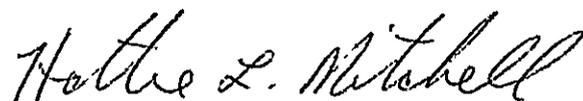
Q4. Is the seller responsible for ensuring that the purchaser has properly secured the hazardous materials into their vehicle at the time of will call?

A4. An offeror who loads hazardous material into a transport vehicle must perform the function in conformance with the applicable requirements in Part 177. (See § 173.30.) However, the carrier is ultimately responsible for ensuring that the load is properly loaded and secured before transporting the material in commerce.

For your information, on March 25, 2003, a final rule was published in the Federal Register (68 FR 14510) under Docket No. RSPA-02-12064 (HM-232) requiring security awareness to be included in all hazardous material employee training (see § 172.704(a)(4)). In addition, persons who offer for transportation or transport certain hazardous materials (see Part 172, Subpart I) must develop and implement security plans.

I hope this information is helpful. If you have additional questions, please do not hesitate to contact this office.

Sincerely,



Hattie L. Mitchell
Regulatory Review and Reinvention
Office of Hazardous Materials Standards



REFRIGERATION SUPPLIES DISTRIBUTOR



TOTAL CONTROL

a division of RSD

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1/16/03

McIntyre
§ 171.1
§ 173.6(c)(4) 12/20/02
Applicability/
MOT
03-0007

Edward Mazzullo, Director
Office of Hazardous Materials Standards
Research and Special Programs Administration
U.S. Department of Transportation
400 7th Street, SW
Washington D.C. 20590-0001

Dear Mr. Mazzullo,

I am writing you in regards to your letter of interpretation to Mr. Romach (reference # 01-0290). Our company is Refrigeration Supplies Distributor, a wholesaler of commercial refrigeration and heating products for the HVAC industry. Our customer base is exclusive to licensed contractors who, for the purpose of this letter, 'will call' material in weights above the material of trade exceptions. This letter does not pertain to our own deliveries or to those of a contracted carrier. The regulations that require training for companies involved in the transportation of hazardous materials are well known among our industry. This has been the subject of multiple articles within our trade publications. We are requesting further clarification to some of your responses to Mr. Romach's questions, as well as, additional concerns that our company has pertaining to our specific business situation. Our specific goal is to determine the legality of drafting a disclaimer to our 'will call' customers. One that would indicate that at the time of the 'will call' of a hazardous material; the purchaser would become the shipper of the hazardous material. The purchaser would then be subject to all of the regulations of the HMR that would apply to a shipper transporting a hazardous material in commerce.

I am framing this next portion of our letter in a bullet format summary of questions taken from Mr. Romach's letter, each directly followed by your response in italics. I am including your responses as a point of reference for further clarification that will be requested in the form of numbered questions of interpretation directly from our company.

- For the purpose of the materials of trade exceptions, who is responsible for informing the operator of a motor vehicle of the requirements found in the HMR? (Referring to 173.6)

"The motor vehicle operator's employer would be responsible for providing this information. However, in practice, it may be necessary for an over-the-counter sales employee to be able to distinguish between those types and quantities of hazardous materials that qualify for the materials of trade exceptions, and those that do not, in order to determine whether the material of trade exemptions apply."

- If the requirements of the materials of trade exceptions are not met (for example, the total quantity exceeds 440 pounds gross weight or an individual package is larger than allowed), do the HMR apply to over-the-counter sales of hazardous materials?

"Yes. The seller of hazardous materials over-the-counter is an 'offeror' who is responsible for assuring that the materials are packaged, labeled, and described on a shipping paper as required by the HMR whenever the over-the-counter sales employee knows (or has reason to know) that the customer will transport the hazardous material in commerce (such as the customer is transporting the hazardous material as part of a business)."

- Does the over-the-counter purchaser of hazardous materials become the shipper (offeror) responsible for compliance with the HMR when it takes 'ownership' of the materials upon purchase?

"No. The status of an offeror does not depend on ownership. Under most circumstances, the purchaser of hazardous materials over-the-counter is a carrier (or transporter) who may not accept and transport hazardous materials that are not in compliance with responsibilities of an offeror."

- Is an over-the-counter sales employee responsible for asking purchasers of hazardous materials whether they will be transporting the materials in commerce?

"The HMR do not require a person selling hazardous materials to ask specific questions, but it may be appropriate under the circumstances of over-the-counter sales. The over-the-counter sales employee must consider readily apparent facts that indicate a customer will transport the purchased hazardous materials in commerce. The employee would not be 'absent the knowledge' its customer will transport the purchased hazardous material in commerce when a reasonable person would realize that the customer is purchasing the hazardous material for use at (or delivery to) another location as part of any type of business enterprise."

Before, I move on to our own specific questions, it should be clear that our employees, for the most part, would not be 'absent the knowledge' that our customers will be transporting hazardous material in commerce. This is due largely to the fact that when material is purchased in weights above the material of trade exceptions our employees typically load it on our customer's vehicle as a service to our customers.

Q1 – As part of our company training, is it acceptable to instruct our employees to not provide a verbal interpretation of the HMR, at the time of the will call, without being prompted by our customers to do so? Furthermore, to not provide shipping papers, placards, or material safety data sheets without first being requested to do so.

Q2 – Would it be acceptable to provide our ‘will call’ customers (not a contracted carrier), upon request, with a pre-printed shipping paper listing the proper description of the hazardous material, while excluding the ‘ship to’ address, weight totals, and certification (signature)? Our position would be that our company would still be in compliance with 173.22 of the HMR by ensuring that the materials have been properly packaged, labeled, and described on a shipping paper. It would be the customer’s responsibility to record the ‘ship to’ address (this information would only be pertinent to the purchaser), weight totals (there is always a possibility of more material already on their vehicle at the time of will call), and finally the certification (signature), which in our opinion due to the fact that they are not a contracted carrier, must be made by the individual who has purchased and is transporting the hazardous material.

Q3 – As part of our compliance with 172.506 of the HMR, is it acceptable to load over a 1000 pounds of a class 2 refrigerant gas onto a customer’s vehicle, provide temporary placards, upon request, without verifying whether or not the driver of the vehicle has in their possession a valid commercial drivers license with a hazardous materials endorsement?

Q4 – Would it be the responsibility of the seller to ensure that the purchaser has properly secured the hazardous material onto their vehicle at the time of will call?

In closing, as stated before our main reason for writing this letter of interpretation is for clarification regarding the legality of drafting a disclaimer to our customers. One that would indicate that at the time of ‘will call’ of a hazardous material; the purchaser would become the shipper of the hazardous material. The purchaser would then be subject to all of the regulations of the HMR that would apply to a shipper transporting a hazardous material in commerce.

Your response to our specific request and to our related questions would be greatly appreciated.

Refrigeration Supplies Distributor

Neill Boutilier

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