



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

Office of the
Chief Counsel

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

AUG 28 1995

Dr. Burton Z. Davidson, Ph.D., P.E.
5 Hamlet Court
Somerset, NJ 08873

Dear Dr. Davidson:

This responds to your August 21, 1995 letter concerning the regulations applicable to the transportation of concentrated nitric acid (98% by weight) in non-bulk packagings during the 1985-86 period.

In 1985-86, the Hazardous Materials Regulations (HMR) consisted of 49 C.F.R. Parts 171-179 and applied to the transportation of:

1. all hazardous materials by all air, rail, and water carriers;
2. all hazardous materials by interstate and foreign highway motor carriers; and
3. hazardous wastes, hazardous substances, and flammable cryogenic liquids in cargo tanks and portable tanks by intrastate highway motor carriers.

This means that the HMR did not (and they presently do not) apply to non-bulk shipments of nitric acid (if not a hazardous waste) by an intrastate motor carrier by highway. It is the status of the carrier, not the individual shipment, that determines the applicability of the HMR. (For example, a local shipment of hazardous materials by United Parcel Service (UPS), within one city, is always subject to the HMR, because UPS is an interstate carrier.) Please note that RSPA has proposed to extend the coverage of the HMR to all intrastate carriers in rulemaking docket No. HM-200. 58 Fed. Reg. 36920 (July 9, 1993), correction 58 Fed. Reg. 38111 (July 15, 1993). Also, State requirements equivalent to the HMR may have applied to a 1985-86 shipment by an intrastate highway motor carrier.

Both §§ 173.268(c)(1) and 173.268(d)(1) of the HMR (1985 ed.), among other requirements, applied to shipments of nitric acid with a concentration of 90% or more. By its terms, § 173.268(c) applied to nitric acid with any concentration of 80% or more; it was not limited to nitric acid between 80% and 90%.

During 1985-86, a knowing violation of the HMR was subject to a civil penalty of not more than \$10,000 per violation, per day. A wilful violation was subject to criminal penalties. There is no requirement that there be an "incident in transportation" for the Department of Transportation (DOT) to propose or assess civil penalties for violations of the HMR. Most civil penalties are assessed in cases where there has not been an "incident" in transportation.

I do not understand your analogy to exceeding the speed limit, inasmuch as speeding tickets are routinely issued in instances where there is no accident or other "incident." If the available facts establish a violation of the HMR, an enforcement case may be brought, even if the shipment has reached its destination and transportation has ended. A DOT investigator need not actually observe the improper shipment while it is in transportation.

The HMR apply to transportation that is "in commerce." RSPA has uniformly interpreted this to mean that movements of property, and their storage, solely within the confines of private property, are not subject to the HMR. At the same time, loading, unloading, and storage "incidental to" transportation are covered by the HMR.

Your example of company B receiving a container of nitric acid, storing it, then emptying it, and finally reloading it is unclear. If that container is being reloaded by company B, for transportation to a location away from company B's premises, then the loading process is subject to the HMR, and RSPA must be advised of any reportable incident during loading. See §§ 171.15 and 171.16. At the time hazardous materials are offered for transportation, they must be packaged, marked, labeled, and accompanied by a shipping paper as required in the HMR. On the other hand, if no transportation off company B's premises is involved, the HMR do not apply.

I hope this information is helpful. If you have further questions, please do not hesitate to contact me or Frazer Hilder of my staff, at the above address or by telephone at 202-366-4400.

Sincerely,

A handwritten signature in dark ink, appearing to read "Edward H. Bonekemper, III". The signature is fluid and cursive, with a prominent "E" and "B".

Edward H. Bonekemper, III
Assistant Chief Counsel for
Hazardous Material Safety and
Research and Technology Law