



U.S. Department of Transportation
**Pipeline and Hazardous Materials
Safety Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

AUG 29 2013

Mr. Jim Lawless
Battery USA
1840 S Combee Rd.
Lakeland, FL 33801

Ref. No.: 13-0134

Dear Mr. Lawless

This is in response to your June 20, 2013 email requesting clarification of exceptions for wet (electric storage) batteries under the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Specifically you request confirmation that your company's practice of exchanging a new battery for a used battery complies with the condition found in § 173.159(e)(4). You contend that after the transaction is completed you become the shipper of all of the batteries on the transport vehicle. You ask if this practice complies with the requirements found in § 173.159(e)(4).

Section 173.159(e) provides relief from the requirements of the HMR for highway or rail shipments of electric storage batteries containing electrolyte or corrosive battery fluid when the following conditions are met:

- (1) No other hazardous materials are transported in the same vehicle;
- (2) The batteries are loaded or braced to prevent damage or short circuits during transportation;
- (3) Any other material loaded in the same vehicle is blocked, braced, or otherwise secured to prevent contact with or damage to the batteries; and
- (4) The transport vehicle does not carry material shipped by any person other than the shipper of the batteries.

For purposes of the HMR, an "offeror" is any person who performs, or is responsible for performing a pre-transportation function required under the HMR for transportation of a hazardous material in commerce, or who tenders or makes the hazardous material available to a carrier for transportation in commerce (see § 171.8). The conditions required to be a shipper are independent of possession or ownership of cargo. If after taking possession of the battery your company performs all pre-transportation functions necessary for the shipment you are acting as the shipper of the batteries.

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

Sincerely,

A handwritten signature in black ink that reads "Duane Pfund". The signature is written in a cursive style with a large, prominent "D" and "P".

Duane Pfund
International Standards Coordinator
Standards and Rulemaking Division

Webb
§173.159
Batteries

Drakeford, Carolyn (PHMSA)

From: INFOCNTR (PHMSA)
Sent: Tuesday, June 25, 2013 11:18 AM
To: Drakeford, Carolyn (PHMSA)
Subject: FW: HQ Feedback: Hazardous Materials Regulations Question

13-0134

Hi Carolyn,

This caller requested we submit this e-mail as a formal letter of interpretation.

Thanks,
Victoria

-----Original Message-----

From: PHMSA Webmaster
Sent: Thursday, June 20, 2013 4:50 PM
To: HMIS (PHMSA); PHMSA Webmaster
Subject: HQ Feedback: Hazardous Materials Regulations Question

Trying to get an interpretation of 173.159(e)(4) Batteries, Wet.

We are being told by a DOT official that when we sell a battery to a customer off of our route trucks, the exchange(old) battery traded in for this purchase is voiding the exemption. Reason given was that the customer becomes another 'shipper'. We contend that after the transaction is completed, the old trade in battery which is required as 'exchange' becomes property of our company, therefore not creating another shipper. This is typical day to day route delivery business similar to Interstate Battery, the largest battery distributor in the US. Can you provide info for us?

Jim
Affiliation: Other ()
Address: 1840 S Combee Road
Lakeland FL 33801
Phone: 863-665-6317
Fax: 863-666-5004
Email: Lawless



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

Office of
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**Hazardous Materials Safety
Law Division**

LETTER OF INTERPRETATION

Ref. No.: 10-0025

November 4, 2009

Mr. Thomas E. Evans
Wal-Mart Stores, Inc.
601 North Walton Boulevard, MS-L20
Bentonville, Arkansas 72716-0710

Dear Mr. Evans:

This letter is in response to the meeting that occurred on September 22, 2009 between Messrs. Sharkey, Dragash, yourself, and PHMSA. You asked PHMSA to clarify whether exception four in 49 C.F.R. §173.159(e) applies to only one shipper.

The answer to your question is yes, 49 C.F.R. §173.159(e)(4) applies to only one shipper. You suggest there is ambiguity in reading exception four: *the transport vehicle may not carry material shipped by any person other than the shipper of the batteries*. The Rules of Construction, which are found in 49 C.F.R. §171.9, state that "words imparting the singular include the plural" and vice versa. Based on 49 C.F.R. §171.9, the word shipper can be a singular shipper, or it can be multiple shippers. This creates ambiguity.

If a regulation is ambiguous, we would consult the preamble of the final rule as evidence of context or intent of the agency promulgating the regulations. The preamble provides guidance. In this situation, the preamble to the final rule stated that:

"interested persons were afforded an opportunity to participate in this rule making. Of the comments received no objection was taken to the provisions of the basic proposal except that one commenter believes the exemption extension is discriminatory because rail transportation was not included. The Board will consider this comment as a petition for further rule making since such a proposal was not made by the Board in the notice." HM-21, 34 Fed.Reg. 13871 (1969), 8/29/1969

The preamble was silent with respect to this exception. There was no mention of any objections, therefore no changes were proposed from the Notice of Proposed Rulemaking (NPRM.) In order to fully understand the intent of the exception, the preamble to the NPRM must be examined to determine the regulatory intent. It can be found under docket number HM-21, 34 Fed.Reg. 6444 (1969), 4/12/1969, which states:

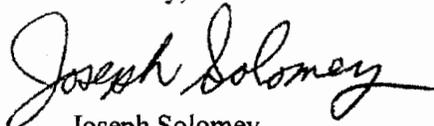
the Board believes that the exception should cover only those shipments where a motor vehicle is carrying only one shipper's goods. This limitation will thus achieve substantially the same type of control that is available in a private carriage shipment while not so limiting the types of carriage that may be used.

The plain language of the preamble to the NPRM clearly states only one shipper's goods are allowed on a transport vehicle under the exception. Interested parties had the opportunity to comment on the NPRM. In the final rule, no one proposed a change to the NPRM, therefore the original intent of the NPRM should stand.

To be consistent with the intent of the NPRM, only one shipper's goods are allowed on a transport vehicle under the exceptions listed in 49 C.F.R. §173.159(e).

I hope this information is helpful.

Sincerely,

A handwritten signature in cursive script that reads "Joseph Solomey". The signature is written in black ink and is positioned above the typed name and title.

Joseph Solomey,
Assistant Chief Counsel for
Hazardous Materials Safety