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Air Transport Association

DEPT. OF TRANSPORTATION
DOCKET SECTION

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October 26, 1998

US Department of Transportation
FAA Dockets
400 Seventh St., SW.
Rm. Plaza 401
Washington, DC 20590

Re: Response to NPRM - Docket No. FAA-1998-4458 - 4

Dear Sir or Madam:

The Air Transport Association of America¹ takes this opportunity to respond to the DOT-FAA Notice of Proposed Rulemaking in Docket No. 293 18; Notice 98-12 (Now Docket No. FAA-1 998-4458) - Prohibition on the Transportation of Chemical Oxygen Generators as Cargo in Aircraft contained in *the Federal Register*, Vol. 63, No. 166, dated August 27, 1998. *The Federal Register* Vol. 63, No. 185, September 24, 1998 contained a correction to the NPRM published in the *Federal Register* (63 FR 45912). The correction stated that an incorrect docket number had been published. Docket No. 293 18; Notice 98-12", was revised to read "Docket No. FAA 1998-4458".

ATA is the trade and service organization of the U.S. scheduled airlines and, as such, we assist our members in the formation of air carrier policy with respect to hazardous materials.

Overview

ATA and its members support the goals of the DOT when RSPA proposes to amend the Hazardous Materials Regulations (HMR) in order to appropriately achieve added safety and reduce the risk of human error in the transportation of hazardous materials. However, our members feel strongly that the subject rulemaking of the FAA is an ill-advised break with established hazardous materials regulatory procedure. The proposed rule is misplaced, adding confusion to an already complex regulatory arena. The proposed rule should be withdrawn.

¹The Member airlines are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines Co., Trans World Airlines, United Airlines, United Parcel Service, and US Airways. The Associate members are: Aeromexico, Air Canada, Canadian Airlines International, KLM - Royal Dutch Airlines, and Mexicana.

All rules pertaining to the shipment of hazardous materials properly belong in the Hazardous Material Regulations (HMR) administered by the DOT Research and Special Programs Administration (RSPA).

In 1975, Congress passed the Hazardous Materials Transportation Act. The impetus for that Act came from the 1973 crash of a Pan Am 707 in Boston which was caused by improperly packaged hazardous materials. The inquiries following the disaster provided positive proof that the regulatory scheme for hazardous materials was inadequate because separate agencies were each going their individual ways in regulating the transport of hazardous materials. Drawing these elements together under a single program and single management (later to become known as RSPA) was, and continues to be, appropriate and necessary.

FAA's Flight Standards has the responsibility of administering FAR Parts 91, 121, and 135. Amendments in these areas should pertain only to rules involving the operation of aircraft by air carriers and general aviation. It is as inappropriate for the FAA to enter into the promulgation of rules for the transportation of hazardous materials, as it would be for the Research and Special Programs Administration to enter into rulemaking in connection with the operation of aircraft.

Executive Order 12866 directs agencies to ". . .avoid regulations that are duplicative with other regulations of other Federal Agencies." Unhappily, duplication and unnecessary new complexity in this important areas are exactly what the proposed rule would produce.

The air carriers do not need two regulations dealing with the transportation of hazardous materials. Particularly not a second set of regulations which contradicts the first set of regulations (49CFR § 172.303) by forcing a package which does not contain a hazardous material to become a hazardous material package.

For over two decades, air carriers have operated under an unitary hazardous material regulation regime. That arrangement has served both the travelling public and the airlines well. There is no reason to depart from it now.

Specific Concerns

The rulemaking differentiates between generators that are not fully charged and those that are fully charged.

What does this distinction mean? Does it mean that there is a prohibition against moving, say, an outer case that could later have a chemical core inserted for use as a walk-around oxygen supply? Does it prohibit the shipment of a PSU that lacks the installed oxygen generator? Does it mean that "charging" consists of insertion of the explosive element that initiates the reaction?

FAA needs to be more specific because the terminology used creates confusion as to what is prohibited in transportation. As written, the rulemaking makes it very difficult to assess the full affect of the proposal. A supplemental proposal needs to be issued to clarify the “charged” vs. “not charged” issue.

Accompanying the original comment are actual samples of warning flags (photocopies accompany the remaining 5 copies) that are used by an ATA member airline. The requirement for similar warning flags **and/or** other warning devices can accomplish the intent of FAA and permit the shipment of a PSU which does not have a generator installed.

FAA Flight Standards’ intent to reduce the risk of human error is admirable, however, ignoring the agency, instead of working with the agency that has the responsibility for the transportation of hazardous materials, is truly inappropriate.

The FAR Parts affected by the proposal are 91, 119, 121, 125, 135. What about FAR 129 operations? Why does the FAA not address the issue of foreign air carriers in this rulemaking? Also, what about addressing Part 145, aircraft repair stations? Where will spare parts suppliers, vendors and surplus suppliers be notified of all that is involved?

The proposed text for 12 1.540(a): Except as provided in paragraphs (b) and (c) of this section, no person may carry, or act in any manner that could result in the carriage of, a device designed as a chemical oxygen generator, as defined in paragraph (d) of this section. This section is not intended to affect a person’s obligation to comply with 49 CFR 172.101 and 173.21.

1. How will the average shipper know that a higher standard exists in FARs if it is not published in a conventional location - i.e., 49 CFR and ICAO Technical Instructions? This creates the kind of confusion FAA worries about in the preamble.

2. The proposed regulation appears to apply a strict liability to all shippers and carriers, without a standard such as “knowing violation,” which is defined under the HMTA amendments. A strict liability creates a very difficult, if not an impossible, condition by which to operate -- i.e., liability for items concealed by customers. It would seem that such language would be more commonly found in a criminal code rather than in an airline-operating rule. The intent of operating rules is not to determine degree of guilt.

It would be extremely difficult for an airline to demonstrate compliance with a rule that seeks to prohibit inadvertent and unintentional acts of its employees and its customers.

Conclusion

The Air Transport Association respectfully requests that the FAA NPRM Docket No. FAA-1998-4458 be withdrawn. ATA asks that FAA coordinate with DOT-RSPA so that RSPA can appropriately address the safety concerns of the FAA associated with the transportation of oxygen generators.

We appreciate having the opportunity to respond to the Notice of Proposed Rulemaking Docket No. FAA-1998-4458.

Sincerely,

A handwritten signature in black ink, appearing to read "F. Black", with a long horizontal flourish extending to the right.

Frank J. Black
Director, Cargo Services
& Secretary
Dangerous Goods Board



WARNING
HIGH
TEMPERATURE
DEVICE

AFTER INSERTING
RELEASE PIN
REMOVE TO
ARM GENERATOR

DO NOT REMOVE
UNTIL INSTALLATION
IN THE AIRCRAFT

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PLASTIC
COVER
OVER FIRING
CAP

DO NOT REMOVE UNTIL INSTALLATION IN AIRCRAFT

CAUTION

REMOVES SAFETY CAP
AT TIME OF
INSTALLATION

CAUTION

CONTAINS OXYGEN
GENERATOR-FOLLOW-
REGULATED SHIPPING
PROCEDURES
