



U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave. S.W.
Washington, D.C. 20591

DEC 5 1991

**Ms. Susan H. Denny
Director
Transportation Management Program
Office of Technology Development
Department of Energy
Washington, DC 20585**

Dear Ms. Denny:

This is in response to your letter dated May 31, 1991, in which you request our opinion as to whether the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. app. 1801 et seq., as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law No. 101-615, and the Department of Transportation Hazardous Materials Regulations (HMR), 49 C.F.R. Part 171 et seq., apply to the activities of Ross Aviation (Ross).

In your letter, you state that Ross furnishes civilian pilots to fly aircraft owned and operated by the Department of Energy (DOE). You further state that the aircraft are flown exclusively for DOE (i.e., the government) and that the flights involve the transportation of Class A Explosives that are used by DOE in its production of munitions.

Your inquiry raises two basic issues: (1) whether the aircraft in issue are public aircraft within the meaning of Section 101(36) of the FAA Act, 49 U.S.C. app. 1301(36); and if so, (2) whether DOE and/or its contractor, Ross, are required to comply with the HMR.

Section 101(36) defines the term "public aircraft", in pertinent part, as:

[A]ny aircraft used exclusively in the service of any government or any political subdivision thereof...but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes....

Based on DOE's representation that the aircraft are flown exclusively for the government, it is clear that the aircraft are "public aircraft" within the meaning of Section 101(36).

Under Section 3 of the HMTUSA (§103, HMTA; 49 U.S.C. app. 1802), an agency is considered a person subject to the requirements of the HMTA and the HMR if it "offers hazardous materials for transportation in commerce or transports hazardous materials in furtherance of a commercial enterprise." In addition, Section 20 of HMTUSA (§120, HMTA; 49 U.S.C. app. §1818), requires any person, who under contract with an agency, transports, or causes to be transported or shipped, a hazardous material, to comply with the HMTA and its implementing regulations:

in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce is subject to such provisions, orders, regulations, and requirements.

In view of the above, if DOE transports Class A Explosives that it uses in the production of munitions, on board aircraft that it owns, exclusively operates, and provides agency employees as pilots, the production of munitions cannot be considered to be either an offer to transport hazardous materials in commerce or transportation in furtherance of a commercial enterprise under HMTUSA. Under these circumstances, DOE would not be required to comply with the HMTA and the HMR.

However, under Section 20 of the HMTUSA, Ross Aviation, by providing contract pilots to DOE, who operate DOE aircraft that carry explosives used by DOE in its production of munitions, is transporting hazardous materials under a contract with DOE, and, is subject to, and must comply with, the HMTA and HMR "in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce." Additionally, if DOE offers a shipment containing Class A Explosives to a commercial carrier for transportation by air, under Section 3 of the HMTUSA, it would be required to comply with all aspects of the HMTA and the HMR.

Sincerely,

~~Original signed by~~
DONALD P. BYRNE

Donald P. Byrne
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