

§ 175.78 of the HMR.⁶⁰ Air France should not be required to choose between following the Fire Department's storage requirements or complying with the segregation and separation requirements contained in the HMR.

Let us be clear that the local Houston requirement is clearly restricting storage that is incidental to transportation subject to the HMR. All hazardous material shipments at the Air France IAH facility are under active shipping papers (through air waybills); they are in transit prior to continuing transportation by truck or by aircraft to the ultimate consignee.

The local Houston requirement to store certain in transit hazardous materials in a storage cabinet also has the potential to create delays and diversions in the transportation of such materials. Obviously, the storage cabinet required by the Fire Department is only able to hold a limited amount of hazardous materials, *i.e.*, 48 55-gallon drums. When the cabinet is full (or other incompatible hazardous materials are already stored in the cabinet) hazardous materials may have to be shipped through other jurisdictions using a more circuitous routing in order to reach their final destination. Thus, the Fire Department's storage cabinet requirement could have a direct impact on the length of time certain shipments of hazardous materials remain in transit thereby increasing the risk associated with their transportation. In fact, within the first few days of using the storage cabinet, Air France had to delay for two days the acceptance of a shipment of flammable liquid due to the lack of space in the cabinet. As RSPA noted in IR-28 (San Jose) "[t]he manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation."⁶¹

In addition, if the Fire Department's storage cabinet requirement is allowed to remain in place, Air France will be required to load and unload certain hazardous materials into and out of the cabinet increasing the number of times that the hazardous materials are handled. As one court has recognized, "the more frequently hazardous material is handled during transportation, the greater the risk of mishap. Accordingly, these provisions [the HMTA] require that the material reach its destination as quickly as possible, with the least amount of handling and temporary storage."⁶² Since the hazardous materials storage cabinet being required by the Houston Fire Department has the potential to create delays and diversions in the transportation of hazardous materials and will increase the amount that the materials are required to be handled, this requirement should be preempted as an obstacle to the execution of the HMTA and the HMR.

Given the obvious potential for delays and diversions in the transportation of hazardous materials associated with the Houston Fire Department's storage cabinet requirement, the current situation can easily be distinguished from PD-12(R), 62 Fed. Reg. 15970 (April 3, 1997), in which RSPA reversed its earlier decision in the same proceeding concluding that certain secondary containment requirements of the New York State Department of Environmental Conservation were not preempted due to a lack of information from which to determine that the requirements actually cause delays or diversions in the transportation of hazardous materials.

Nor is there a rational and compelling local governmental interest for requiring Air France to use storage cabinets to store certain in transit hazardous materials in its warehouse while not imposing the same requirement on comparably constructed retail establishments like a Home Depot or a Wal-Mart. According to Table 7902.5-A, Air France is required to store a shipment of paint thinner (a class I-B flammable liquid) over 120 gallons in a storage cabinet (the Air France facility is equipped with an approved automatic sprinkler system), while Table 7902.5-B provides a 15,000-gallon to 30,000-gallon exemption (depending on the size of the store) for paint thinner stored in retail establishments. The Houston Building Code also appears to provide an exception to the city's H-occupancy requirements for wholesale and retail establishments that store flammable and combustible liquids.⁶³ The irrational nature of the Fire Department's differing treatment of these two types of facilities becomes even more apparent when one considers that hazardous materials temporarily stored in the Air France warehouse will have the added security of being enclosed in DOT-approved packaging rendering them suitable for carriage by air; hazardous materials stored in retail establishments, on the other hand, are most likely packaged and stored in ordinary boxes or other types of containers. Absent a rational and compelling regulatory scheme, any claim of local governmental interest must be rejected and the local requirement preempted as an obstacle to the execution of the HMTA and the HMR.

VI. Conclusion

Pursuant to 49 CFR 107.205(b), Air France respectfully requests that a notice of this Application be published in the **Federal Register** with an opportunity for public comment. Air France further requests that upon consideration of the comments received and the prior Inconsistency Rulings, Preemption Determinations and court decisions discussed in this Application, that RSPA issue a determination finding that: (1) the Hazardous Materials Management Plan and Hazardous Materials Inventory Statement provisions contained in the Houston Fire Code are preempted to the extent that these items are required to be submitted in order for Air France to obtain

a permit to handle or store in transit hazardous materials at its cargo facility at George Bush Intercontinental Airport; and (2) the Houston Fire Department's requirement that Air France use a hazardous materials storage cabinet for the storage of certain in transit hazardous materials is preempted.

VII. Certification

Pursuant to 49 CFR 107.205(a), I hereby certify that a copy of this Application has been sent via first class mail postage pre-paid with an invitation to submit comments to:

Randy Rivin, Esquire, Legal Department, City of Houston, P.O. Box 1562, Houston, TX 77251-1562.

Mr. Richard M. Vacar, Director of Aviation, Bush Intercontinental Airport, P.O. Box 60106, Department of Aviation, Houston, TX 77205-0106.

Dated: October 15, 2003.

Respectfully submitted,

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List of Exhibits

Exhibit 1—Applicable Houston Fire Code Provisions

Exhibit 2—Fire Department Notice of Violation, dated October 23, 2002

Exhibit 3—HMMPs and HMISs prepared for Air France by Loss Control Associates, Inc.

Exhibit 4—City of Houston permits issued to Air France to handle or store hazardous materials and flammable or combustible liquids

Exhibit 5—Fire Department Violation Citations, dated February 10, 2003

Exhibit 6—Letter Agreement between Lynxs Group and Air France, dated April 15, 2003

Exhibit 7—Certificate of occupancy, issued June 27, 2003

Exhibit 8—Fire Code tables of exempt amounts

Exhibit 9—Applicable Houston Building Code Provisions

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Office of Thrift Supervision

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Office of

⁶⁰ § 175.78 provides a similar hazardous materials segregation and separation chart for air carriers (including air carrier cargo facilities) as that found in § 177.848(d).

⁶¹ 55 FR at 8892.

⁶² *Consolidated Rail Corp. v. Bayonne*, 724 F. Supp. 320, 330 (D.N.J. 1989).

⁶³ See § 307.9, paragraph 4 of the Building Code of the City of Houston, the 2000 edition of the International Building Code as adopted with certain amendments, attached hereto as Exhibit 9.