



121 North Henry Street
Alexandria, VA 22314-2903
T: 703 739 9543 F: 703 739 9488
arsa@arsa.org www.arsa.org

November 22, 2005

BY ELECTRONIC MEANS TO: <http://dms.dot.gov>

U.S. Department of Transportation
Docket Management System
400 7th Street, SW., Room PL 401
Washington, DC 20591-0001

Re: Docket No. FAA-2003-15085, Final rule, Hazardous Materials Training Requirements: Petition to amend repair station notification requirements in § 145.206.

Dear Ladies and Gentlemen:

Pursuant to 14 CFR §§ 11.61 and 11.63¹, the Aeronautical Repair Station Association (ARSA) hereby petitions the Federal Aviation Administration (FAA) for rulemaking to change § 145.206 concerning hazmat status notice requirements for non-hazmat employer repair stations, and the requirement to pass down hazmat status information to contractors and subcontractors.

I. Introduction

ARSA represents entities certificated under Part 145 of the FARs and under similar regulations issued by National Aviation Authorities around the world. Many ARSA members will likely be impacted by this rule before and after the compliance date of February 7, 2007.

ARSA supports the FAA's objective of ensuring uniform compliance with Department of Transportation (DOT) and FAA hazardous materials (hazmat) regulations. ARSA recognizes that implementation of this rule will also ensure that hazmat training requirements will be referenced in Part 145 as well as 49 CFR, thereby increasing the visibility of these important rules.

ARSA is concerned, however, about a provision that is likely to produce onerous compliance burdens for many repair stations. The section in question, § 145.206, should be amended for two reasons. First, although not included in the proposed rule, it places on repair stations the regulatory burden of notifying their contractors and subcontractors of an air carrier's hazmat status (i.e. will-carry or will-not-carry). Second, § 145.206 requires any repair station, **regardless of whether that repair station is a hazmat employer**, to notify employees, contractors or subcontractors when non-hazmat employer repair stations should have no such obligation.

ARSA therefore asks that the FAA amend § 145.206, whether through a spot amendment

¹ All regulations cited in this petition are contained in Title 14 CFR unless otherwise indicated.

or other means, to address these problems and ensure that the application of the new hazmat rules will be consonant with the agency's intent.

II. Which Repair Stations Must Give Notice of Air Carriers' Hazmat Status?

Sections 121.1005(e) and 135.505(e) of the final rule require air carriers to notify repair stations performing work for them of their hazmat status. Both §§ 121.1005(e) and 135.505(e) expressly limit this notification requirement, stating that certificate holders must give notice "only to repair stations that are regulated by 49 CFR parts 171 through 180." The notice requirement is therefore limited to repair stations that are considered hazmat employers under 49 CFR § 171.8.²

Receipt of notice under §§ 121.1005(e) or 135.505(e) triggers two obligations for the repair station under § 145.206.³ The first is to acknowledge receipt of the part 121 or part 135 operator notifications. The second is to convey the information contained in the notice to the repair station's "employees, contractors, or subcontractors" who handle hazmat items. Unlike §§ 121.1005(e) and 135.505(e), however, § 145.206 is not limited to hazmat employer repair stations; both the acknowledgement requirement in § 145.206(a) and the obligation to pass the notification along in § 145.206(b) apply to "each repair station" that receives notice from a part 121 or part 135 operator, regardless of whether that notice was required.

III. To Whom Must Repair Stations Pass Along A Part 121 or Part 135 Operator's Hazmat Status?

In the Notice of Proposed Rulemaking (NPRM), the original notification requirement stated that repair stations "must notify all workers" of the operator's hazmat status.⁴ Several commenters pointed out that the term "workers" was vague and that § 145.27 would require notice to be passed along to administrative staff who would not come into contact with any hazmat items.

The FAA acknowledged this legitimate concern, noting that administrative staff did not need any notification. Therefore, the term "workers" was replaced with the overly broad phrase "its employees, contractors, or subcontractors" that handle hazmat items. Because this change was made in the final rule, ARSA was given no opportunity to comment on it. The Association believes this change was so substantial that it constitutes an

2 Section 171.8 provides in part, "Hazmat employer means a person who uses one or more of its employees in connection with: transporting hazardous materials in commerce; causing hazardous materials to be transported or shipped in commerce; or representing, marking, certifying, selling, offering, manufacturing, reconditioning, testing, repairing, or modifying containers, drums, or packagings as qualified for use in the transportation of hazardous materials."

3 Note that § 145.206 refers to the part 121 "operator notification required under § 121.905(e)," which should read "§ 121.1005(e)."

4 68 FR 24827, Thursday, May 8, 2003. The language of the notification requirement may be found in § 145.27 of the NPRM.

impermissible expansion of the scope of the notice. The comments concerning § 145.27 of the NPRM focused on whether the term “workers” might include administrative staff at a repair station. The FAA acknowledged that this was not its intent. In addressing this problem, the FAA could simply have modified § 145.27 to read “workers who handle or replace aircraft components or other items regulated by 49 CFR parts 171 through 180” in the final rule. Indeed, § 145.206(b) included this limiting language. However, the final rule expanded the concept of “workers” to include contractors and subcontractors. As such, ARSA submits that the FAA should have sought comments on this major change before issuing a final rule.

As currently written, § 145.206(b) presents a significant compliance problem for repair stations. Section 145.206(b) is not limited to contractors or subcontractors working on hazmat items for the specific operator from whom the original repair station received notice. Instead, if a repair station receives notice from an operator, it must pass that notice along to all its contractors and subcontractors who are hazmat employers. This applies even if the operator in question is a will-not-carry operator, the original repair station is not a hazmat employer, and the contractors and subcontractors perform no work on that operator’s equipment.

Moreover, the phrase “its employees, contractors, **or** subcontractors” in § 145.206(b) poses another compliance issue for repair stations. It provides that a repair station would comply with the rule if it provided notice to only one of these groups. Although ARSA submits that the FAA cannot, in the absence of notice and comment, extend the notice requirement to persons who do not work at the repair station, the term “or” in § 145.206(b) appears to be in error.

IV. Justification

ARSA believes the language in § 145.206 is flawed in two ways. First, it places an unintended and unnecessary regulatory burden on non-hazmat employer repair stations by requiring them to acknowledge and pass along notice of part 121 and part 135 operators' hazmat status to their employees, contractors and subcontractors. Second, it creates an impossible obligation for repair stations to pass along notice to parties (i.e., their subcontractors) with whom they have no direct relationship.

a. The Regulations Should Not Require Non-Hazmat Employer Repair Stations to Acknowledge or Pass Along Notice of Hazmat Status

As noted above, §§ 121.1005(e) and 135.505(e) require that operators give notice of hazmat status only to repair stations that are hazmat employers. However, should a non-hazmat employer repair station receive notice, under § 145.206 that repair station must acknowledge receipt of the notice, and convey it to its employees, contractors, or subcontractors that handle hazmat. Even though a non-hazmat employer repair station's employees would not be considered “hazmat employees” under 49 CFR 171.8, the repair

stations' contractors and/or subcontractors could well be hazmat employers. As a result, the non-hazmat employer repair station would be obligated to pass along notice of an operator's hazmat status to all contractors or subcontractors, even though the clear intent of §§ 121.1005(e) and 135.505(e) was to limit this notification scheme to hazmat employer repair stations.

Even though the notice requirements in §§ 121.1005(e) and 135.505(e) are limited to hazmat employer repair stations, in practice it is likely that many operators, especially part 121 air carriers, will send notice of their hazmat status to all vendors, or at least to all repair stations. Air carriers have dozens, sometimes even hundreds of maintenance vendors. Rather than devote excessive time to determining which repair station vendors are hazmat employers, air carriers will likely send a blanket notice to all maintenance providers to ensure compliance with § 121.1005(e). The current language in § 145.206 will then trigger an obligation for that repair station to acknowledge the notice and pass it along to its hazmat employer contractors or subcontractors. This obligation is not only counter to the clear intent of §§ 121.1005(e) and 135.505(e), but will impose a heavy regulatory and financial burden on repair stations, who would have to determine the hazmat employer status of potentially large numbers of contractors and subcontractors, even though they are not hazmat employers themselves.

b. The Regulations Should Not Require Repair Stations to Pass Along Notice to Contractors or Subcontractors

The new language in § 145.206(b), as noted above, requires repair stations to notify employees, contractors or subcontractors of a part 121 or part 135 operator's hazmat status. ARSA agrees that hazmat employer repair stations should inform their employees of the hazmat status of operators for whom they perform work. Similarly, when hazmat employer repair stations engage personnel other than employees (i.e. independent contractors) to perform work at the repair station's fixed location, the repair station should notify those persons concerning the hazmat status of operators as well. ARSA acknowledges that the repair station is best capable of determining which of its own employees and other personnel working at its fixed location may come into contact with hazmat, and can ensure that those persons receive adequate notice of an operator's hazmat status.

ARSA disagrees, however, that this notice obligation should extend to the repair station's contractors and subcontractors. With regard to contractors, even though a hazmat employer repair station knows the identity of its contractors, it will not typically know whether its contractors handle hazmat. In practice, hazmat employer repair stations who receive hazmat status notices from operators will also issue blanket notices to all contractors, regardless of whether those contractors handle hazmat. If those repair stations in turn pass the notices to their contractors, lower-tier repair stations may receive hundreds of notices, many of which would be duplicative. Over time, this will lead to an overabundance of information, with repair stations receiving too many superfluous notices.

The obligation to give notice to subcontractors is even more problematic. Though a hazmat employer repair station will know the names of its direct contractors, some of those contractors will have their own contractors, usually without the knowledge of the original repair station. Even when the hazmat employer repair station knows whether its direct contractors handle hazmat, it will not likely know whether its subcontractors do. This puts hazmat employer repair stations in an untenable position; under the current wording of § 145.206, they may well be obligated to give notice to parties of which they have no knowledge.

An additional problem with the notice requirements of § 145.206(b) is that they exceed those of the operators under §§ 121.1005(e) and 135.505(e). These two provisions require only that “each repair station performing work for, or on the certificate holder’s behalf is notified” of the operator’s hazmat status. There is no requirement for operators to provide this notice to subcontractors. Why should repair stations have a higher notification burden than the operators themselves?

Requiring hazmat employer repair stations to give notice to contractors and subcontractors constitutes an onerous regulatory burden. While ARSA understands that the intent of this rule is to ensure the flow of information from operators to repair stations, the FAA clearly did not intend these provisions to apply to repair stations that are not hazmat employers.

V. Proposed Changes to § 145.206

ARSA submits that minor changes to § 145.206 would eliminate the unintended and onerous burdens described above. ARSA proposes the following wording for § 145.206:

§ 145.206 Notification of hazardous materials authorizations.

(a) Each repair station **that is a hazmat employer as defined in 49 CFR § 171.8** must acknowledge receipt of the part 121 or part 135 operator notification required under §§ 121.1005(e) and 135.505(e) of this chapter prior to performing work for, or on behalf of that certificate holder.

(b) Prior to performing work for or on behalf of a part 121 or part 135 operator, each repair station **that is a hazmat employer as defined in 49 CFR § 171.8** must notify **its employees and persons performing work at the repair station’s fixed location** who handle or replace aircraft components or other items regulated by 49 CFR parts 171 through 180 of each certificate holder's operations specifications authorization permitting, or prohibition against, carrying hazardous materials. This notification must be provided subsequent to the notification by the part 121 or part 135 operator of such operations specifications authorization/designation.

VI. Conclusion

Making the proposed changes to § 145.206 would ensure that the notice provisions in the hazmat training final rule would apply only to hazmat employer repair stations, as the FAA clearly intended. Moreover, removing the obligation to pass along notice to contractors and, in particular, subcontractors with whom a repair station has no direct relationship would ensure the "flow down" of hazmat status information is provided only to the parties intended, while removing an unnecessary burden on repair stations.

If you have any questions or require additional information please feel free to contact the undersigned at 703 739 9543.

Respectfully submitted,



Marshall S. Filler
Managing Director & General Counsel



Broderick C. Grady
Associate Counsel

CC: Rebecca MacPherson, Esq., Assistant Chief Counsel, Regulations (AGC-200)
<rebecca.macpherson@faa.gov>
William Wilkenning, Jr., Director, Hazardous Materials (ADG-1)
<bill.wilkenning@faa.gov>
Tony Fazio, Director of Rulemaking (ARM-1)
<tony.fazio@faa.gov>
Thomas M. Sullivan, Esq., Chief Counsel for Advocacy, Small Business
Administration (SBA) Office of Advocacy
<thomas.sullivan@sba.gov>
Bruce Lundegren, Esq., Assistant Chief Counsel, SBA Office of Advocacy
<bruce.lundegren@sba.gov>
Neil R. Eisner, Esq., Assistant General Counsel for Regulations and
Enforcement, U.S. Department of Transportation (C-50)
<neil.eisner@ost.dot.gov>
Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of
Management and Budget
<ahunt@omb.eop.gov>