

*Petitioner* PEMCO AEROPLEX INC.  
*Regulations Affected* CAR  
 4b.362(c)(1), 4b.362(e)(7), and 4b.382(d).  
*Description of Petition* PEMCO  
 AEROPLEX INC. petitions for  
 exemption from the noted requirements  
 to permit the accommodation of two  
 supernumeraries forward of a rigid  
 cargo bulkhead and smoke-tight door,  
 on 727-200 aircraft with Class E  
 compartments.

#### **Petitions for Exemption**

*Docket No.* 29148.  
*Petitioner:* Performance Designs, Inc.  
*Sections of the FAR Affected:* 14 CFR  
 91.307(a)(1) and 105.43(a)(1).

*Description of Relief Sought:* To  
 permit an owner or operator of a PDI  
 Ram-Air reserve parachute to operate  
 the parachute on a progressive  
 inspection program consisting of an  
 annual repack and detailed external  
 inspections every 120 days.

*Docket No.* 29196  
*Petitioner:* Lucent Aviation  
*Sections of the FAR Affected:* 14 CFR  
 61.57(b)(1)(ii)

*Description of Relief Sought:* To  
 permit pilots employed by Lucent to  
 meet the night currency requirements to  
 act as pilot in command of an aircraft by  
 accomplishing three takeoffs and three  
 landings in the same category and class,  
 but not type, of aircraft in which the  
 pilot will act as pilot in command. The  
 proposed exemption would also permit  
 those pilots to maintain pilot-in-  
 command night currency by  
 accomplishing the required takeoffs,  
 and landings in a flight simulator  
 representative of the category and class,  
 but not type, of aircraft to be flown.

#### **Dispositions of Petitions**

*Docket No.* 28639.  
*Petitioner:* PenAir.  
*Sections of the FAR Affected:* 14 CFR  
 121.574(a)(1) and (3).

*Description of Relief Sought/*  
*Disposition:* To permit the carriage and  
 operation of oxygen storage and  
 dispensing equipment for medical use  
 by patients requiring emergency or  
 continuing medical attention while on  
 board an aircraft operated by PenAir  
 when the equipment is furnished and  
 maintained by a hospital treating the  
 patient. *GRANT, May 22, 1998,*  
*Exemption No. 6523A.*

*Docket No.* 28485.  
*Petitioner:* Polar Air Cargo, Inc.  
*Sections of the FAR Affected:* 14 CFR  
 121.583(a)(8).

*Description of Relief Sought/*  
*Disposition:* To permit up to three  
 dependents of Polar employees who are  
 accompanied by an employee sponsor

traveling on official business only and  
 who are trained and qualified in the  
 operation of the emergency equipment  
 on Polar's Boeing-747 cargo aircraft to  
 be added to the list of persons Polar is  
 authorized to transport without  
 complying with the passenger-carrying  
 requirements of §§ 121.309(f), 121.310,  
 121.391, 121.571, and 121.587; the  
 passenger-carrying operation  
 requirements in §§ 121.157(c), 121.161,  
 and 121.291; and the requirements  
 pertaining to passengers in §§ 121.285,  
 121.313(f), 121.317, 121.547, and  
 121.573. *GRANT, May 22, 1998,*  
*Exemption No. 6530A.*

*Docket No.* 17145.  
*Petitioner:* United Airlines.  
*Sections of the FAR Affected:* 14 CFR  
 121.665 and 121.697(a) and (b)

*Description of Relief Sought/*  
*Disposition:* To permit UAL to use  
 computerized load manifests that bear  
 the printed name and position of the  
 person responsible for loading the  
 aircraft, instead of that person's  
 signature. *GRANT, May 22, 1998,*  
*Exemption No. 2466K.*

*Docket No.* 29188.  
*Petitioner:* Civil Air Patrol.  
*Sections of the FAR Affected:* 14 CFR  
 61.113(e).

*Description of Relief Sought/*  
*Disposition:* To permit the CAP to  
 reimburse CAP members who are  
 private pilots for fuel, oil, supplemental  
 oxygen, fluids, lubricants, preheating,  
 deicing, airport expenses, servicing, and  
 maintenance expenses and certain per  
 diem expenses incurred while serving  
 on official USAF-assigned CAP  
 missions, subject to certain conditions  
 and limitations. *GRANT, May 28, 1998,*  
*Exemption No. 6771.*

*Docket No.* 29013.  
*Petitioner:* Vintage Flying Museum.  
*Sections of the FAR Affected:* 14 CFR  
 91.315.

*Description of Relief Sought/*  
*Disposition:* To permit Vintage to  
 operate its Boeing B-17G (B-17G)  
 aircraft, which is certificated in the  
 limited category, for the purpose of  
 carrying passengers for compensation or  
 hire. *GRANT, May 27, 1998, Exemption*  
*No. 6775.*

*Docket No.* 29097.  
*Petitioner:* Daniel Webster College.  
*Sections of the FAR Affected:* 14 CFR  
 141.35(d)(2)(i).

*Description of Relief Sought/*  
*Disposition:* To permit Mr. Joyce to be  
 eligible to serve as the chief flight  
 instructor for DWC without meeting the  
 required minimum flight training  
 experience of 1,000 flight hours.  
*DENIAL, May 21, 1998, Exemption No.*  
*6774.*

*Docket No.:* 29209.  
*Petitioner:* AirNet Systems, Inc.  
*Sections of the FAR Affected:* 14 CFR  
 135.143(c)(2).

*Description of Relief Sought/*  
*Disposition:* To permit AirNet to operate  
 eight Learjet aircraft under the  
 provisions of part 135 without a TSO-  
 C112 (Mode S) transponder installed on  
 those aircraft. *GRANT, May 22, 1998,*  
*Exemption No. 6772.*

*Docket No.:* 29201.  
*Petitioner:* Capt. Richard P. Siano.  
*Sections of the FAR Affected:* 14 CFR  
 121.383(c).

*Description of Relief Sought/*  
*Disposition:* To permit the petitioner to  
 act as pilot in operations conducted  
 under part 121 after reaching his 60th  
 birthday. *DENIAL, May 22, 1998,*  
*Exemption No. 6773.*

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

#### **Petition for Declaratory Order Regarding Application of Federal Motor Carrier Truth In-Leasing Regulations**

**AGENCY:** Federal Highway  
 Administration (FHWA), DOT.  
**ACTION:** Notice of denial of petition for  
 declaratory order.

**SUMMARY:** The Owner-Operator  
 Independent Drivers Association, Inc.  
 (OOIDA), Howard Jenkins, Marshall  
 Johnson, Susan Johnson and Jerry  
 Vanboetzelaer filed with the FHWA a  
 petition for declaratory order (the  
 OOIDA petition) seeking a formal ruling  
 by the FHWA that New Prime, Inc., dba  
 Prime, Inc. (Prime) and Success Leasing,  
 Inc. (Success) violated certain  
 provisions of the federal motor carrier  
 truth-in-leasing regulations (49 CFR part  
 376). This petition was filed after the  
 U.S. District Court for the Western  
 District of Missouri dismissed  
 petitioners' class action complaint  
 against Prime and Success, seeking  
 enforcement of these regulations, on the  
 ground that FHWA has primary  
 jurisdiction to determine whether the  
 regulations have been violated.

The FHWA is denying the OOIDA  
 petition because it fails to raise any  
 issues not adequately addressed by  
 existing legal precedent which require  
 the special expertise of this agency.  
 Although denials of petitions for  
 declaratory orders will not ordinarily be  
 published in the **Federal Register**, the  
 FHWA is publishing this decision to

provide guidance to courts, carriers, owner-operators and other interested parties regarding the agency's general policy in handling such petitions, particularly those involving issues arising under the truth-in-leasing regulations. This policy applies to all petitions for declaratory orders, regardless of whether filed in connection with private litigation.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael J. Falk, Motor Carrier Law Division, Office of the Chief Counsel, (202) 366-1384, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**The OOIDA Petition**

On March 5, 1998, OOIDA and four owner-operators filed a petition for declaratory order seeking a ruling from the FHWA that Prime and Success violated the truth-in-leasing regulations. Petitioners initially sought damages and enforcement of these regulations by filing a class action complaint, under 49 U.S.C. 14704, in the U.S. District Court for the Western District of Missouri. However, the court dismissed the complaint on the ground that the FHWA had primary jurisdiction to resolve the issues in controversy.

According to the OOIDA petition, several owner-operators leased equipment to Prime which they obtained through lease-purchase agreements with Success, an equipment leasing company allegedly under common ownership with Prime. Under the terms of these lease-purchase agreements, Prime deducted rental/purchase payments for the equipment from the owner-operators' compensation and remitted the money to Success. Owner-operators were also required to remit money into several reserve funds maintained by Success to cover the cost of repairs and maintenance of the equipment. Owner-operators who terminated their leases with Prime were not refunded their reserve fund balances.

Petitioners claim that Prime violated 49 CFR 376.12(i) because its leases failed to specify the terms of any lease-purchase agreement authorizing the carrier to deduct lease purchase payments from lessor compensation. They also allege that the reserve funds maintained by Success are escrow funds within the meaning of 49 CFR 376.2(f), and that any balances in these funds must be returned to them with interest,

within 45 days of termination of their leases, under 49 CFR 376.12(k).

Petitioners contend that the district court's dismissal of their complaint, potentially with prejudice: (1) conflicts with their right to seek private enforcement by filing a civil action under § 14704; (2) conflicts with congressional intent to eliminate DOT's role in resolving private disputes; and (3) improperly applied the doctrine of primary jurisdiction, which is limited to cases where the reasonableness of a federal regulation is in dispute and an agency's technical expertise is necessary to resolve the issues before the court. Petitioners have appealed the dismissal of their complaint to the Court of Appeals for the Eighth Circuit. Consequently, petitioners request, in the alternative, that the FHWA rule that it lacks primary jurisdiction over regulatory issues where a private party has elected to litigate these issues in federal district court under 49 U.S.C. 14704. Petitioners further contend that FHWA's technical expertise is not needed in this case because the Interstate Commerce Commission (ICC) previously ruled on the applicability of the part 376 escrow provisions to carrier-affiliated equipment leasing companies in *Dart Transit Company—Petition for Declaratory Order*, 9 I.C.C. 2d 700 (1993).

**Petitions for Declaratory Orders**

Although fairly new to the FHWA, petitions for declaratory orders were a common device for obtaining guidance from the ICC in resolving disputes within that agency's jurisdiction. An agency's authority to issue declaratory orders comes from § 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e), which gives agencies "sound discretion" to issue declaratory orders to "terminate a controversy or remove uncertainty". The FHWA intends to exercise this authority much more selectively than the ICC because Congress, in transferring several ICC functions to the Department of Transportation (DOT) through the ICC Termination Act of 1995 (ICCTA), envisioned that DOT would generally not become involved in resolving disputes between private parties.

The ICCTA expanded the rights and remedies of persons injured by carriers by providing for private enforcement of its provisions in court. Under 49 U.S.C. 14704, an injured party may seek both damages and injunctive relief against a motor carrier in federal district court to redress violations of part 376. In discussing this provision, the House Transportation and Infrastructure Committee stated that DOT should not

allocate its scarce resources to resolving essentially private disputes, and that the right of private enforcement "will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved—by the parties". H. Rep. No. 104-311, pp. 87-88.

The FHWA believes that issuing declaratory orders, except in extraordinary circumstances, would undermine the Congressional intent to keep DOT out of private commercial disputes, particularly where one of the parties has filed suit in federal court under § 14704. Accordingly, although the FHWA reserves the right to issue declaratory orders to resolve controversies between third parties in appropriate circumstances, it will generally do so only in cases having industry-wide significance that raise issues not adequately addressed by existing legal precedent.

**Primary Jurisdiction**

The doctrine of primary jurisdiction is "a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258 (1993), at 268. In contrast to the doctrine of exhaustion of administrative remedies, it does not require parties to seek relief from the agency before invoking the jurisdiction of the court. The court, when faced with an issue it believes requires the special expertise of an agency, has equitable discretion to give that agency the first opportunity to pass on the issue by staying further proceedings and giving the parties a reasonable opportunity to seek an administrative ruling. However, an agency is not required to rule on issues directly referred to it by a court or, as in this case, indirectly referred to it following a court's order of dismissal. If an agency declines to issue a ruling, the court must then resolve the issues without the benefit of the agency's views. See *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir., 1958).

Although the FHWA does not agree with petitioners' contention that the doctrine of primary jurisdiction applies only to issues involving the reasonableness of a federal regulation, it does agree that special expertise is generally not needed to resolve disputes regarding the part 376 truth-in-leasing regulations. These regulations contain specific, straightforward, non-technical requirements which a court is ordinarily competent to construe. Consistent with the Congressional intent underlying 49 U.S.C. 14704, the FHWA will generally

decline to exercise its primary jurisdiction with regard to court referrals involving violations of part 376.

### Conclusion

The OOIDA petition does not raise issues which require special expertise by the FHWA. The questions of whether Prime's leases contain the necessary terms required by § 376.12(i), or whether escrow funds were returned within 45 days of lease termination, are fairly straightforward matters clearly within the competence of a court to resolve. Although part 376 does not expressly apply to carrier-affiliated equipment leasing companies, the ICC fully addressed the applicability of the regulations to such entities in the *Dart* decision. The FHWA sees no reason to revisit this issue. Accordingly, OOIDA's petition for declaratory order is denied.

In Washington, District of Columbia, this 29th day of May, 1998.

**Gloria J. Jeff,**

*Deputy Administrator, Federal Highway Administration.*

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Finance Docket No. 33407]

#### **Dakota, Minnesota & Eastern Railroad Corporation—Construction and Operation of New Rail Facilities in Campbell, Converse, Niobrara, and Weston Counties, Wyoming, Custer, Fall River, Jackson, and Pennington Counties, South Dakota, and Blue Earth, Nicollet, and Steele Counties, Minnesota**

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice of Availability of Draft Scope of Study for the Environmental Impact Statement (EIS) and Request for Comments.

**SUMMARY:** On February 20, 1998, the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) filed an application with the Surface Transportation Board (Board) for authority to construct and operate new rail line facilities in east-central Wyoming, southwest South Dakota, and south-central Minnesota. The project involves a total new construction of 280.9 miles of rail line. Additionally, DM&E proposes to rebuild 597.8 miles of existing rail line along its current system to standards acceptable for operation of unit coal trains. Because the construction and operation of this project has the potential to result in

significant environmental impact, the Board's Section of Environmental Analysis (SEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate. SEA will hold agency and public scoping meetings as part of the EIS process, as discussed in the Notice of Intent to Prepare an Environmental Impact Statement (EIS), Request for Comments on the Proposed EIS Scope, and Notice of Scoping Meetings published by the Board on March 27, 1998. As part of the scoping process, the SEA has developed a draft Scope of Study for the EIS. The draft Scope of Study presents those issues that would normally be evaluated in an EIS for a project of this nature.

**DATES:** Written comments on the draft Scope of Study are due July 10, 1998.

#### **FILING ENVIRONMENTAL COMMENTS:**

Interested persons and agencies are invited to participate in the EIS scoping process. A signed original and 10 copies of comments should be submitted separately to: Office of the Secretary, Case Control Unit, STB Finance Docket No. 33407, Surface Transportation Board, 1925 K Street, NW, Washington, D.C. 20423-0001.

To ensure proper handling of your comments, you must mark your submission: Attention: Elaine K. Kaiser, Chief, Section of Environmental Analysis, Environmental Filing.

**FOR FURTHER INFORMATION CONTACT:** Ms. Victoria Rutson, SEA Project Manager, Powder River Basin Expansion Project, (202) 565-1545 or Mr. Steve Thornhill of Burns & McDonnell, SEA's third party contractor, at (816) 822-3851.

#### **SUPPLEMENTARY INFORMATION:**

##### **Draft Scope of Study for the EIS**

###### *Proposed Action and Alternatives*

The proposed action, referred to as the Powder River Basin Expansion Project, would involve the construction and operation of 280.9 miles of new rail line and the rebuilding of 597.8 miles of existing rail line by the Dakota, Minnesota & Eastern Railroad Corporation (DM&E), Brookings, South Dakota, as described in the February 20, 1998 application for construction and operation authority for the project filed by DM&E and in the March 27, 1998 Notice of Intent to Prepare an EIS published in the **Federal Register** by the Board.

Consistent with its jurisdiction under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), the Board intends to conduct an environmental analysis of the new construction and the increase in operations over DM&E's existing system.

The EIS will not consider any proposed construction or improvements to DM&E's existing system, but will address the anticipated impacts of the projected increases in train traffic over the entire existing system.

The reasonable and feasible alternatives that will be evaluated in the EIS are (1) the no-action alternative (2) construction of the project along the identified preferred alignments in Wyoming and South Dakota for the mainline extension and in Minnesota for the Mankato Bypass and Owatonna connecting track and (3) construction of the project along each of the identified alternative alignments in Wyoming and South Dakota for the mainline extension and in Minnesota for the Mankato Bypass and Owatonna connecting track.

#### **Environmental Impact Analysis**

##### *Proposed New Construction*

Analysis in the EIS will address the proposed activities associated with the construction and operation of new rail facilities and their potential environmental impacts, as appropriate. The scope of the analysis will include the following activities:

1. Proposed construction of new rail mainline extension to access coal mines south of Gillette, Wyoming.
2. Proposed construction of new rail mainline to bypass DM&E's existing trackage rights on Union Pacific Railroad in Mankato, Minnesota.
3. Proposed construction of new rail line connection between DM&E and I&M Rail Link south of Owatonna, Minnesota.

##### *Impact Categories*

The EIS will address potential impacts from the proposed construction and operation of new rail facilities on the human and natural environment. Impacts areas addressed will include the categories of land use, biological resources, water resources, geology and soils, air quality, noise, energy resources, socioeconomics as they relate to physical changes in the environment, safety, transportation systems, cultural and historic resources, recreation, aesthetics, and environmental justice. The EIS will include a discussion of each of these categories as they currently exist in the project area and address the potential impacts from the proposed project on each category as described below:

##### 1. Land Use

The EIS will:

- A. Describe existing land use patterns within the project area and identify those land uses and the amounts of each