

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

**TOYOTA MOTOR
SALES, USA, INC.**

FAA Order No. 94-28

Served: 9/30/94

Docket No. CP93SO0269

ORDER AND DECISION

Complainant Federal Aviation Administration (FAA) (Complainant) has appealed from the oral initial decision¹ rendered by Administrative Law Judge Burton S. Kolko imposing a civil penalty of \$10,000 on Respondent Toyota Motor Sales, USA, Inc. (Toyota) for violations of the hazardous materials regulations contained in 49 C.F.R. Parts 171-173.² Complainant argues that the law judge committed several errors in his conclusions of law that led him to impose a sanction that is too low. Complainant requests that the Administrator increase the civil penalty to \$50,000.

The facts of this case are not in dispute. As a community service, Respondent donates car parts to vocational schools. Respondent's facility in California received a request from a school in Kentucky for two automobile batteries. Two of Respondent's temporary employees obtained the batteries from

¹ A copy of the portion of the hearing transcript containing the oral initial decision is attached.

² In the complaint, it was alleged that Respondent violated 49 C.F.R. §§ 171.2(a)-(b), 172.200(a), 172.202, 172.202(a)(1)-(4), 172.202(b), 172.203(f), 172.204, 172.204(a) or (c)(1), 172.204(c)(2)-(3), 172.400(a), 172.402(b), 173.1(b), 173.3(a), 173.22(a), 173.266(c)(8), 173.6(b)(1), 173.6(b)(4), 173.24(a)(1), 173.25(a)(3), 173.243, 173.260(a)(1). For the text of these regulations, see the Appendix to this decision.

Respondent's warehouse.³ The batteries were "wet"--i.e., they were filled with acid. Wet batteries are classified as hazardous materials.⁴

The employees put the batteries, surrounded by plastic bubble wrap, in a fiberboard box. The box did not contain any marking or labeling to indicate that it contained hazardous materials. The employees then shipped the box to the school in Kentucky by air via United Parcel Service (UPS) on June 3, 1991.

When the box was unloaded at a UPS sort facility in Kentucky, a UPS employee noticed that the bottom portion of the box was stained and damaged. UPS contacted the FAA, which began an investigation. The FAA inspector assigned to this case opened the box and found two automobile batteries inside labeled, "POISON! CAUSES SEVERE BURNING ... DANGER! EXPLOSIVE GASES." The closures on the batteries were unsecured and loose, and the batteries were partially filled with acid. Each battery was surrounded by a 5-sided fiberboard slip cover. The covers were marked "BATTERY, WET, FILLED WITH ACID, UN 2794, POISON - CAUSES SEVERE BURNS." The covers contained a "CORROSIVE 8" hazardous material label. Acid from the batteries had leaked through the fiberboard slip covers and through the exterior fiberboard package. There was no evidence of personal injuries or damage to the UPS aircraft.

Complainant issued a notice of proposed civil penalty in the amount of \$62,500. After an informal conference and exchange of information, Complainant issued a final notice of proposed civil penalty in which it reduced the civil penalty to \$50,000. Complainant reduced the civil penalty from \$62,500 to \$50,000 "based on

³ According to Respondent, the two temporary employees were not in a department that was supposed to be shipping hazardous materials. As a result, they had not been included in the regular Respondent training for employees who ship hazardous materials. Reply Brief at 2.

⁴ See the Table contained in 49 C.F.R. § 172.101 (1990).

mitigating factors presented by Respondent, including its positive compliance attitude and corrective action taken."⁵ Appeal Brief at 2.

At the hearing, the FAA inspector testified about appropriate sanctions for undeclared shipments. The inspector testified that "undeclared" or "hidden" shipments are those that are not properly marked or labeled as containing hazardous materials. Tr. 13-14. He indicated that such shipments are particularly dangerous because the air carrier, not realizing that the package contains a hazardous material, may stow or handle the package incorrectly, causing it to leak. *Id.*

The inspector testified that the amount that is usually proposed in cases involving undeclared shipments is "probably about \$60,000." Tr. 18. According to the inspector, the amount originally sought in the notice of proposed civil penalty, \$62,500, was within the range of proposed civil penalties, especially since the enactment of amendments to the Hazardous Materials Transportation Act in 1990 increasing the maximum civil penalty per violation to \$25,000.⁶ Tr. 19. The inspector testified that the civil penalty of \$50,000 was "fairly consistent" with other cases the agency had recently brought against large companies, especially since the 1990 amendments. Tr. 22. In arriving at the \$50,000 civil penalty, the inspector considered "the size of the company; [the fact that] it was an undeclared shipment,

⁵ See *infra* pp. 9-11.

⁶ Complainant notes in its brief that the complaint in this case was one of the first complaints filed under the 1990 amendments to the Hazardous Materials Transportation Act (HMTA), P.L. 93-6733, 88 Stat. 2156, 49 U.S.C. App. §§ 1801-1819. Appeal Brief at 3, n.1. Prior to 1990, the maximum civil penalty for each violation of the HMTA was \$10,000. The amendments increased the amount of the civil penalty to not more than \$25,000 and not less than \$250 for each violation. Hazardous Materials Transportation Uniform Safety Act of 1990, P.L. No. 101-615.

which is a real big one for us; [and] the fact that the package lost its integrity, broke, leaked." Tr. 22-23.

Respondent admitted all but two of the alleged violations.⁷ The focus of the hearing was on the appropriate amount of the sanction. At the conclusion of the hearing, the law judge issued his oral initial decision. On the one hand, said the law judge, Respondent had committed a serious violation, and it was only fortuitous that no injury to persons or property occurred. Tr. 60. On the other hand, the law judge found, Respondent was an experienced shipper who immediately recognized the problem, was cooperative, and took what the law judge called "sharp and impressive remedial action" by making the decision not to ship batteries any more. Tr. 61. The law judge imposed a civil penalty of \$10,000, a figure substantially lower than the \$50,000 sought by Complainant.

The threshold issue in this appeal is whether Complainant has alleged proper grounds for its appeal. The Rules of Practice for FAA Civil Penalty Actions, which are contained in Subpart G of 14 C.F.R. Part 13, permit a party to appeal only the following issues:

- (1) whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence;
- (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and
- (3) whether the administrative law judge committed any prejudicial errors during the hearing that support the appeal.

⁷ Respondent denied only two allegations in the complaint: (1) that there had been a significant release of hazardous materials into the environment; and (2) that the employees who shipped the batteries were not trained in the shipment of hazardous materials. At the hearing, the FAA inspector testified without rebuttal that the photographs of the box containing the batteries depicted a significant release of hazardous materials to the environment. Tr. 16. Furthermore, Respondent ultimately stipulated that the two employees involved in this incident were not instructed in the shipment of hazardous materials. Tr. 27-28.

14 C.F.R. § 13.233(b).

Respondent argues that the appeal brief contains no credible allegations of error, despite Complainant's characterization of its appeal as one based on legal errors. According to Respondent, Complainant has appealed only because it is dissatisfied with the sanction amount, which Respondent claims is not a proper ground for an appeal. In the absence of credible allegations of error, Respondent contends, *de novo* review of the sanction amount is not a proper exercise of appellate review.

It is held that Complainant has raised several appealable issues. In its appeal brief, Complainant alleges that the law judge erred in reducing the civil penalty when there were no valid mitigating factors. Specifically, Complainant's appeal brief contains the following allegations of legal error:

- (1) that the law judge erred in reducing the civil penalty absent clear and compelling mitigating factors not made known to Complainant prior to the hearing;
- (2) that the law judge erred in treating Respondent's decision to stop shipping batteries as corrective action justifying a reduction in the sanction amount; and
- (3) that the law judge erred in treating Respondent's violation-free history as a mitigating factor.

The appeal brief also contains an allegation of factual error--*i.e.*, that the law judge erred in finding that the batteries were never shipped and never reached the belly of the aircraft. Hence Complainant's appeal will not be dismissed under Section 13.233(b).

Complainant argues in its appeal brief that law judges should reduce the proposed civil penalty "only if clear and compelling mitigating circumstances, not

made known to Complainant prior to the hearing, exist." Appeal Brief at 25-26. Complainant cites no authority to support this assertion.⁸

When the Rules of Practice were first adopted, they required an administrative law judge to explain in the initial decision any reduction in sanction. 53 Fed. Reg. 34,646, 34,652 (September 7, 1988). Section 13.232(a), 14 C.F.R. § 13.232(a), originally contained the following sentence:

If the administrative law judge reduces the civil penalty contained in the order of civil penalty, the administrative law judge shall provide a basis supporting the reduction in civil penalty.

53 Fed. Reg. 34,646, 34,663 (September 7, 1988). Many commenters objected to this requirement, arguing that it improperly shifted the burden of justifying a civil penalty from the agency attorney to the law judge, and created a bias in favor of the agency. 55 Fed. Reg. 7980, 7983 (March 6, 1990). In response to those comments and to eliminate any appearance of bias, the agency deleted the requirement from the Rules of Practice. 55 Fed. Reg. 27548, 27568 (July 3, 1990).

Given the regulatory history of Section 13.232(a), the standard argued for by Complainant must be rejected. The Rules of Practice expressly place upon the agency attorney the burden of proving the agency's case, which includes

⁸ The standard proposed by Complainant is similar to the standard established by the National Transportation Safety Board (NTSB) in Administrator v. Muzquiz, 2 NTSB 1474 (1975). In Muzquiz, the NTSB held that a law judge who has affirmed all of the violations alleged in the complaint may not reduce the sanction chosen by the FAA without clear and compelling reasons. Note, however, that the standard proposed by Complainant goes beyond even Muzquiz in requiring the law judge to base any reduction in sanction on new information not made known to the FAA prior to the hearing.

NTSB case law is not controlling in FAA civil penalty cases. In the Matter of Richardson and Shimp, FAA Order No. 92-49 at 9, n.13 (July 22, 1992), but the Administrator may choose to follow NTSB precedent if it is persuasive. *Id.*

In considering whether to follow the Muzquiz doctrine, it should be noted that the NTSB itself has recently declined to rely on the Muzquiz doctrine, on the ground that Muzquiz has been called into question by the Civil Penalty Assessment Act of 1992. *See, e.g., Administrator v. Stimble*, NTSB Order EA-4177, 1994 NTSB LEXIS 199 (May 25, 1994), and Administrator v. Tweto, NTSB Order EA-4164, 1994 NTSB LEXIS 145 (May 9, 1994).

establishing the amount of a proposed civil penalty by a preponderance of the evidence in the record. *See* 14 C.F.R. §§ 13.224(a) (providing that, except in the case of an affirmative defense, the burden of proof is on the agency).

In determining the appropriate penalty amount in a hazardous materials case, the law judge, like the agency attorney, is statutorily obliged to take into account:

the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

49 U.S.C. App. § 1809(a)(1)⁹ (the Hazardous Materials Transportation Act).

When sanction is an issue, the law judge is expected to give a reasoned explanation of the amount of the civil penalty selected, whether or not the penalty is reduced. The Administrative Procedure Act requires articulation of the law judge's sanction decision.¹⁰ Such articulation facilitates meaningful appellate review.

Complainant's next argument is that the law judge improperly considered Respondent's violation-free history in reducing the amount of civil penalty proposed by Complainant from \$50,000 to \$10,000. To support this argument, Complainant cites the following language from the law judge's decision: "Here we have a one-time event that is not going to happen again." Tr. 63.

As Complainant correctly states, a violation-free history is expected to be the norm,¹¹ and will not be considered as mitigating an otherwise reasonable civil

⁹ 49 U.S.C. App. § 1809(a) was recently recodified without substantive change as 49 U.S.C. § 5123. Pub. L. No. 103-272, 108 Stat. 725 (1994).

¹⁰ *See* 5 U.S.C. § 557(c), providing that "all decisions are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof."

¹¹ Similarly, the NTSB has held, "Fulfillment of a pre-existing obligation is no reason for sanction reduction. ... [T]he norm for behavior must be a good faith attempt at compliance [Footnote continues on next page.]

penalty.¹² In the Matter of TCI Corporation, FAA Order No. 92-77 at 20 (December 22, 1992). Nevertheless, the quoted language does not clearly indicate that the law judge reduced the civil penalty improperly because of Respondent's violation-free history. The quoted language appears to be as much a reference to the future as it is to the past.

In its appeal brief, Complainant notes an error in the law judge's factual findings. In rendering his decision, the law judge stated as follows:

This package chose to leak substantially, as the photographs will show, at an early enough stage in the shipping chain so that there was no harm ... to either person or certainly aircraft, *since it never actually reached the belly of an aircraft.*

... [L]uck was on the side of everybody this time and ... the leakage occurred at an early enough stage *before it was placed on an aircraft.*

Tr. 60-61 (emphasis added). As Complainant points out, though, the shipment did make it on board the aircraft. Respondent admitted in its answer to the complaint that the shipment was transported aboard a regularly scheduled UPS cargo flight in air transportation from California to a UPS Sort Facility in Kentucky. Complaint, p. 1, paragraphs 3 & 4; Answer, p.1. The package was discovered leaking at the sort facility. *Id.*

There is no question that the law judge erred in finding that the package never made it on board the aircraft. This appears to be no more than harmless error, however. The law judge's decision indicates that he did not take this factor into account. The law judge stated:

with the requirements of law." Administrator v. Tweto, NTSB Order EA-4164, 1994 NTSB LEXIS 145 (May 9, 1994).

¹² The Hazardous Materials Transportation Act does require a consideration of "any history of prior violations" in setting the sanction amount. 49 U.S.C. App. § 1809(a)(1). This does not mean that a company's violation-free history justifies a reduction in an otherwise appropriate civil penalty—as stated above, a violation-free history is expected to be the norm. If, however, a company has a history of prior violations, it is subject to an increased civil penalty.

... I have not taken into effect in my mental observations and calculations the fact that luck was on the side of everybody this time and that the leakage occurred at an early enough stage before it was placed on an aircraft. As [the agency attorney] pointed out, that was happenstance--fortunate happenstance--but I have not taken that into account, because the object of the hazardous materials legislation and regulations attempts to be prophylactic in that these materials never reach the skin of an aircraft or the skin of a human being, and it is what might have been that is the intent of the statute.

Tr. 60-61 (emphasis added). This error appears to be inconsequential.

Complainant next argues that the law judge erred in reducing the civil penalty based on corrective action taken by Respondent. According to Complainant, Respondent's decision to stop shipping batteries did not constitute the type of corrective action that justifies a reduction in the civil penalty.

The law judge appears to have given great weight to Respondent's decision to stop shipping batteries. In his oral initial decision, the law judge found that Respondent:

... took very sharp and impressive remedial action afterwards, basically, indicating it wasn't going to send batteries any more, not even hardly ever. This is ever. The person who would be shipping the automotive batteries would be the manufacturer of an automotive battery who presumably would be in the best position to know how to deal with and ship his product and not leave it in the hands of others.

...I am very impressed from the state of the record of the earnestness of this respondent that, by golly, this is not going to happen again, and not just because they say so, but because they have actually removed it from their ken.

Tr. 61-62.

Corrective action is a factor that may, under appropriate circumstances, be considered in setting the civil penalty amount. In the Matter of TCI Corporation, FAA Order No. 92-77 at 21 (December 22, 1992) (stating that although corrective action is not specifically mentioned as a factor to consider in 49 U.S.C. App.

§ 1809(a), it may be considered under the category of "such other matters as justice

may require"). Respondent's change of policy, however, does not constitute the type of positive corrective action that would justify a reduction in sanction.

The problem here was not Respondent's policy. If the policy that existed at Respondent's company at the time--*i.e.*, that hazardous materials would only be shipped by personnel who had been trained in the handling of hazardous materials--had been followed, then in all likelihood, no violations of the hazardous materials regulations would have occurred. The violations in this case occurred because Respondent's existing policy was *not followed*, apparently because of a breakdown in communication within the company and the failure properly to supervise temporary employees. Nothing in the record shows how Respondent's new policy will be implemented any better than the old policy.

As the Administrator has held in the past, a decision not to handle hazardous materials in the future does not represent the type of positive corrective action that warrants consideration in determining the penalty.¹³ In the Matter of TCI Corporation, FAA Order No. 92-77 at 22 (December 22, 1992). The type of corrective action that warrants a significant reduction in the civil penalty is action to ensure that hazardous materials will be handled by this respondent in compliance with the Hazardous Materials Regulations in the future--*e.g.*, sending employees to hazardous materials training, or instituting a program to ensure proper shipping of hazardous materials. *Id.* at 21-22. The law judge erred in

¹³ In its reply brief, Respondent points out an apparent inconsistency in Complainant's position. Complainant concedes that it already reduced the civil penalty from \$62,500 to \$50,000 based on "mitigating circumstances presented by [Respondent] including ... *corrective action taken.*" Appeal Brief at 2 (emphasis added). At the same time, however, Complainant argues that the corrective action taken by Respondent does *not* justify a reduction in the civil penalty. *Id.* at 16-19. While it is true that Complainant failed to follow the Administrator's precedent (*i.e.*, the TCI case) in reducing the civil penalty from \$62,500 to \$50,000 based on corrective action, it makes little sense to reduce the civil penalty even further based on an invalid factor.

reducing the civil penalty based on Respondent's decision to stop shipping batteries. Moreover, because the law judge appears to have given great weight to this factor when he set the sanction amount at \$10,000, an increase in the sanction is both warranted and necessary.

A review of all the factors that must be considered in setting the civil penalty under the Hazardous Materials Transportation Act--including the nature, circumstances, extent, and gravity of the violation, and Respondent's degree of culpability, history of violations, and ability to pay--leads to the conclusion that a \$50,000 civil penalty is warranted in this case. The \$50,000 figure reflects the serious nature of these violations, and yet it takes into account the fact that the circumstances were not as egregious as they could have been. In more egregious circumstances, a figure closer to the maximum civil penalty of \$400,000 would have been appropriate.¹⁴

For a civil penalty to achieve its purpose, it must have a "bite," or deterrent effect. As the legislative history indicated, Congress intended there to be "teeth" in the hazardous materials regulations. 120 Cong. Rec. 41, 410 (1974); 120 Cong. Reg. 40,677-40,679 (1974). Otherwise, Congress would not have increased the maximum penalty for each violation of the hazardous materials regulations from \$10,000 to \$25,000. When the violator is a large company rather than a small company, the penalty may need to be correspondingly larger to achieve the same deterrent effect.

¹⁴ In this case, Respondent committed 16 violations of the hazardous materials regulations. The statute permits a civil penalty of up to \$25,000 for each violation. Thus, the maximum civil penalty that the FAA could have sought in this case was \$400,000. In his decision, the law judge found only 5 basic violations of the regulations--failures of (1) classification; (2) description; (3) packing; (4) marking & labeling; and (5) instruction. Assuming, *arguendo*, the correctness of this finding, the maximum civil penalty would still be \$125,000--a figure substantially higher than the \$50,000 penalty imposed in this decision.

Although Respondent argues in its reply brief that the highest amount that the FAA has imposed in other wet battery cases is \$13,000, this figure is misleading. The documents that Respondent relies upon for this information are summaries of civil penalty cases published by the Department of Transportation's Associate Administrator for Hazardous Materials Safety. Exhibits R-C and R-D. Reliance upon these summaries in determining the appropriateness of a civil penalty is inappropriate. The summaries do not include a discussion of information that is critical to determining the appropriate amount of a penalty, including mitigating factors, if any,¹⁵ financial hardship, if it existed, and company size. Furthermore, settled cases, which stand on a different footing than adjudicated cases, are listed in the summaries. It is within the agency attorney's prosecutorial discretion to settle a case for less than would be imposed after a full adjudication of the matter. Finally, the cases included in the summaries are distinguishable because they were brought before the maximum civil penalty for a hazardous materials violation was increased by Congress from \$10,000 to \$25,000.

The Administrator has issued only two other decisions in hazardous materials cases brought under the Rules of Practice contained in 14 C.F.R. Part 13 that contain a discussion of the appropriate amount of the civil penalty. These cases are In the Matter of TCI, FAA Order No. 92-77 (December 22, 1992) and In the Matter of Pony Express, FAA Order No. 94-19 (June 22, 1994). These cases involve not "wet" or acid-filled batteries, but other types of hazardous materials--in the case of TCI, a highly corrosive and flammable liquid called Photoresist Adhesion Promoter, and in the case of Pony Express, radioactive iodine.

¹⁵ In fact, one of the documents contains the following warning about its own limitations: "The penalties cited do not explain the mitigating or aggravating factors that, in accordance with the statutory assessment criteria, were considered in arriving at the final penalty." Exhibit R-D.

In TCI, the Administrator imposed a civil penalty of \$15,000, while in Pony Express, the Administrator imposed a civil penalty of \$40,000. A comparison of the penalty imposed here with the penalties imposed in these two cases is not apt, however. Both cases were brought under the old statute, which permitted a maximum penalty of only \$10,000 for each violation, rather than \$25,000, as in the instant case. Moreover, in TCI, there were two mitigating factors that are not present here: (1) contributing negligence of another company; and (2) TCI's unfamiliarity with the hazardous materials regulations. No mitigating factors have been proven in the instant case.

The FAA would not be fulfilling its statutory obligations if it did not faithfully and vigorously enforce the Hazardous Materials Transportation Act. This was a serious violation. As the FAA inspector testified, leaking corrosive materials can result in:

- (1) injuries to passengers, crew members, and ground handling people;
- (2) damage to the aircraft, in that corrosive materials can eat away at critical parts of the aircraft, *e.g.*, hydraulic cables; and
- (3) reaction of the corrosive material with other materials stored on board the aircraft, with the potential for an on-board fire or other such dangerous occurrences.

Tr. 16-17. Undeclared or hidden shipments, which increase the likelihood of injury, pose a special risk.

Based on the foregoing, the civil penalty is increased from \$10,000 to \$50,000.¹⁶



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 30th day of September, 1994.

¹⁶ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).

APPENDIX

Section 171.2(a) of the Hazardous Materials Regulations (HMR), 49 C.F.R. § 171.2(a) (1990), provided:

No person may offer or accept a hazardous material for transportation in commerce unless that material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter

Section 171.2(b) of the HMR, 49 C.F.R. § 171.2(a) (1990), provided:

No person may transport a hazardous material in commerce unless that material is handled and transported in accordance with this subchapter, or an exemption issued under subchapter B of this chapter.

Section 172.200(a) of the HMR, 49 C.F.R. § 172.200(a) (1990), provided:

Description of hazardous materials required. Except as otherwise provided in this subpart, each person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner required by this subpart.

Section 172.202(a) of the HMR, 49 C.F.R. § 172.202(a) (1990), provided:

- (a) The shipping description of a hazardous material on the shipping paper must include:
- (1) The proper shipping name prescribed for the material in § 172.101 or § 172.102 (when authorized) ...
 - (2) The hazard class prescribed for the material ...
 - (3) The identification number (preceded by "UN" or "NA" as appropriate) prescribed for the material

Section 172.202(a)(4) of the HMR, 49 C.F.R. § 172.202(a)(4) (1990), provided:

- (a) The shipping description of a hazardous material on the shipping paper must include:
- ...
- (4) Except for empty packagings, cylinders for compressed gases, and packagings of greater than 110 gallons capacity, the total quantity by weight ... or volume

Section 172.202(b) of the HMR, 49 C.F.R. § 172.202(b) (1990), provided:

Except as provided in this subpart, the basic description specified in paragraphs (a) (1), (2) and (3) of this section must be shown in sequence. ...

Section 172.203(f) of the HMR, 49 C.F.R. § 172.203(f) (1990), provided:

Transportation by air. When a package containing a hazardous material is offered for transportation by air and this subchapter prohibits its transportation aboard passenger-carrying aircraft, the words "Cargo aircraft only" must be entered after the basic description.

Section 172.204(a) of the HMR, 49 C.F.R. § 172.204 (1990), provided:

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, each person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing (manually or mechanically) on the shipping description the certification contained in paragraph (a)(1) of this section or the certification (declaration) containing the language contained in paragraph (a)(2) of this section.

(1) "This is to certify that the above named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to applicable regulations of the department of Transportation."

(2) "I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked and labeled, and are in all respects in proper condition for transport by [*] according to applicable international and national governmental regulations."

Section 172.204(c)(1)-(3) of the HMR, 49 C.F.R. § 172.204(c)(1)-(3) (1990), provided:

(c) *Transportation by air--(1) General.* Certification containing the following language may be used in place of the certification required by paragraph (a) of this section:

I hereby certify that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked and labeled, and in proper condition for carriage by air according to applicable national governmental regulations.

(2) *Certificate in duplicate.* Each person who offers a hazardous material to an aircraft operator for transportation by air shall provide two copies of the certification required in this section. (See § 175.30 of this subchapter.)

(3) *Passenger and cargo aircraft.* Each person who offers for transportation by air a hazardous material authorized for air

transportation shall add to the certification required in this section the following statement:

This shipment is within the limitations prescribed for passenger aircraft/cargo aircraft only (delete nonapplicable).

Section 172.400(a) of the HMR, 49 C.F.R. § 172.400(a) (1990), provided:

(a) Except as otherwise provided in this subchapter, each person who offers a package, overpack, or freight container containing a hazardous material for transportation shall label it, when required, with labels prescribed for the material

as specified in for the material as specified in § 172.101 or § 172.102 (when authorized) and in accordance with this subpart.

Section 172.402(b) of the HMR, 49 C.F.R. §172.402(b) (1990), provided:

CARGO AIRCRAFT ONLY label. Each person who offers for transportation by air a package containing a hazardous material authorized only on cargo aircraft shall affix to the package a CARGO AIRCRAFT ONLY label which is described in § 172.448.

Section 173.1(b) of the HMR, 49 C.F.R. § 173.1(b) (1990), provided:

A shipment that is not prepared for shipment in accordance with this subchapter may not be offered for transportation by air, highway, rail, or water. It is the duty of each person who offers hazardous materials for transportation to instruct each of his officers, agents, and employees having any responsibility for preparing hazardous materials for shipment as to applicable regulations in this subchapter.

Section 173.3(a) of the HMR, 49 C.F.R. § 173.3(a) (1990), provided:

(a) The packaging of hazardous materials for transportation by air, highway, rail, or water must be as specified in this part. Methods of manufacture, packing, and storage of hazardous materials, that affect safety in transportation, must be open to inspection by a duly authorized representative of the initial carrier or of the Department. Methods of manufacture and related functions necessary for completion of a DOT specification packaging must be open to inspection by a representative of the Department.

Section 173.22(a) of the HMR, 49 C.F.R. § 173.22(a) (1990), provided:

(a) Except as otherwise provided in this part, a person may offer a hazardous material for transportation in a packaging or container required by this part

Section 173.266(c)(8) of the HMR, 49 C.F.R. § 173.266(c)(8) (1990), provided:

(c) Hydrogen peroxide solution in water containing over 8 percent hydrogen peroxide by weight and not exceeding 37 percent must be packaged as prescribed in paragraph (a), (b), or (f) of this section or as follows (vented packaging are not permitted aboard aircraft):

...

(8) Spec. 12B (§ 178.205 of this subchapter). Fiberboard boxes with inside polyethylene bottles not over 1 gallon capacity each with vented closures; such bottles over 32 ounces capacity each must be completely contained in a securely closed polyethylene bag or tube constructed of material having minimum film thickness of 0.003 inch. Alkaline solutions containing sodium hydroxide or other alkaline materials packed in glass or polyethylene bottles not over 1 gallon capacity each and with peroxide solution contained in polyethylene bottles not over 1 gallon capacity each, when shipped as a wood bleach preparation, may be packed together in inside chipboard or corrugated fiberboard boxes or separated by corrugated fiberboard partitions; not more than six inside chipboard or corrugated fiberboard boxes having inside bottles not over 32 ounces each, or more than 4 one gallon bottles separated by corrugated fiberboard partitions may be packed in one outside box; completed package with mixed contents must be capable of withstanding a drop from a height of four feet onto solid concrete without failure of any inside container.

Section 173.6(b)(1) of the HMR, 49 C.F.R. § 173.6(b)(1) (1991), provided:

(b) *General packaging requirements.*

(1) In addition to the requirements of this part and Parts 175 and 178 of this subchapter, for air shipments each packaging must be designed and constructed to prevent leakage that may be caused by changes in altitude and temperature during air transportation.

Section 173.6(b)(4) of the HMR, 49 C.F.R. § 173.6(b)(4) (1991), provided:

(b) *General packaging requirements.*

...

(4) Stoppers, corks, or other such friction-type closures must be held securely, tightly, and effectively in place with wire, tape or other positive means. Each screw-type closure on any inside plastic packaging must be secured to prevent the closure from loosening due to vibration or substantial changes in temperature.

Section 173.24(a)(1) of the HMR, 49 C.F.R. §173.24(a)(1) (1990), provided:

(a) Each package used for shipping hazardous materials under this subchapter shall be so designed and constructed, and its contents so limited, that under conditions normally incident to transportation:

(1) There will be no significant release of the hazardous materials to the environment.

Section 173.25(a)(3) of the HMR, 49 C.F.R. § 173.25(a)(3) (1990), provided:

(a) Except as provided in paragraph (b) of this section, authorized packages containing hazardous materials may be offered for transportation when tightly packed in a strong overpack, if all of the following conditions are met:

...
(3) Each package subject to the orientation marking requirements of § 172.312 of this subchapter is packed in the overpack with its filling holes up and the overpack is marked "THIS END UP" or "THIS SIDE UP" (as appropriate) to indicate the upward position of closures.

Section 173.243 of the HMR, 49 C.F.R. § 173.243 (1990) provided:

(a) All containers must be tightly and securely closed. Inside containers must be cushioned as prescribed or in any case when necessary to prevent breakage or leakage.

Section 173.260(a)(1) of the HMR, 49 C.F.R. § 173.260(a)(1) (1990), provided:

(a) Electric storage batteries, containing electrolyte acid or alkaline corrosive battery fluid, must be completely protected so that short circuits will be prevented; they must not be packed with other articles except as provided in §§ 173.250 and 173.258, portable searchlights properly cushioned, battery parts, or hydrometers, securely packed in a separate container. The batteries either with or without other articles must be packed in specification containers as follows:

(1) Spec. 15D or 16B (§ 178.186 of this subchapter). Wooden or wirebound wooden boxes except as provided in paragraphs (b) and (c) of this section.