

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

**PONY EXPRESS COURIER
CORPORATION**

FAA Order No. 94-19

Served: June 22, 1994

Docket No. 89-4 (HM)

DECISION AND ORDER

Complainant has appealed from the written initial decision issued by Administrative Law Judge Ronnie A. Yoder.¹ The law judge found that Respondent Pony Express Courier Corporation knowingly offered a package containing radioactive medical supplies for transportation by air without proper markings, labels, and shipping papers in violation of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. App. § 1809 (a)(1). The law judge assessed a civil penalty of \$30,000.

The only issue to be decided in this appeal concerns the amount of the civil penalty. Complainant argues on appeal that the law judge erred in assessing a civil penalty lower than the \$40,000 civil penalty sought in the complaint. Respondent did not appeal the law judge's decision or file a reply brief.

The law judge found that on June 9, 1988, Respondent accepted a properly marked and labeled box containing I-131, a radioactive iodine, from the University of New Mexico Radiopharmacy Department for delivery to a hospital. (Initial

¹ A copy of the law judge's written initial decision is attached.

Decision 3,4.)² Radioactive iodine is a hazardous material under the HMTA. (ID 3, 21.) Respondent, knowing that the box contained hazardous materials, sealed it inside an unmarked, unlabeled, plastic courier bag, obscuring the box's labels, markings and shipping papers. (ID 4 n.7.) Respondent offered the box to Mesa Airlines for air transport without disclosing that it contained hazardous materials. (ID 4.) The airline, which previously advised Respondent that it did not accept hazardous materials for transport, unknowingly shipped the box on a passenger-carrying aircraft. (ID 4.) Upon unloading, an airline employee noticed the radioactive labels pressed against the side of the courier bag, and alerted the FAA.

The law judge found that a substantial civil penalty was warranted in this case because Respondent displayed a lack of concern for aviation safety and a poor compliance attitude. The law judge wrote in his decision:

The Respondent displayed a singular lack of concern for those who would come in contact with the package. Although it knew the package contained radioactive materials, it concealed the package's "warning" labels and markings, it unilaterally diverted the package for air transport, and it offered the package to a passenger-carrying airline after notice that the airline did not transport hazardous material. ... Moreover, the radioactive iodine was in liquid not pill form, and if spilled could damage the thyroid of those inhaling the vapors. The Respondent also displayed a poor compliance attitude by not cooperating with the FAA investigation. Even after the incident ... Respondent continued to offer hazardous materials for air transport to Mesa Airlines ... and made no effort to train its employees in the recognition and handling of hazardous material.

(ID 20-22.) The law judge ruled that Respondent did not establish any mitigating factors that would warrant a reduction in the civil penalty. Nevertheless, the law judge reduced the \$40,000 civil penalty sought in the complaint to \$30,000 to reflect his dismissal, *sua sponte*, of five complaint allegations alleging violations of six Hazardous Materials Regulations (HMR). The law judge ruled that the dismissed allegations were based on general or introductory sections of the regulations that

² The law judge found that the University had completed the shipping papers and marked and labeled the box in compliance with the HMTA for ground transportation, intending it to be delivered by ground transportation, but Respondent shipped it by air transportation. (ID 3.)

could not support separate penalties because they only could be violated in conjunction with other regulations.³ The law judge reasoned that since the original complaint⁴ alleged violations of 24 regulations and sought a \$40,000 civil penalty, or approximately \$1,667 per regulation, a civil penalty of \$30,000 was appropriate for the 17 regulations that he found had been violated.

Complainant argues on appeal that the law judge erred in allotting a *pro rata* civil penalty for each violation because the \$40,000 civil penalty was sought for the *entire* complaint, *i.e.*, for the June 9, 1988, shipment of hazardous materials. The \$40,000 civil penalty was arrived at, according to Complainant, after considering the factors governing the assessment of civil penalties in Section 110 of the HMTA, 49 U.S.C. App. § 110, and Section 13.16(a)(4) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 13.16(a)(4).⁵ Complainant argues that the dismissed allegations of HMR violations were not intended as separate violations but were pleaded in conjunction with the other 17 HMR violations. Complainant argues further that it was error to reduce the civil penalty where no mitigating factors were established.

The law judge acknowledged in his decision that he could have assessed the \$40,000 civil penalty because the maximum civil penalty that Complainant could

³ The dismissed complaint allegations alleged violations of the following Hazardous Materials Regulations: 49 C.F.R. §§ 171.2(a), 172.200(a), 172.202, 172.204, 172.300, and 172.310(a)(2). The law judge found Section 172.310(a)(2) inapplicable to Respondent's case. That finding need not be addressed because of the decision in this appeal.

⁴ Complainant subsequently filed an amended complaint excluding one allegation which is not at issue in this case.

⁵ Section 110 of the HMTA, 49 U.S.C. App. § 110, provides in relevant part: "in determining the amount of such penalty, the Secretary shall 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." Section 13.16(a)(4) of the FAR, 14 C.F.R. § 13.16(a)(4), requires that the FAA consider the same factors listed in Section 110 of the HMTA, before issuing an order assessing a civil penalty for a violation of the HMTA."

have sought under the HMTA for the 17 violations was \$170,000.⁶ The law judge noted that: "We are not compelled to negotiate down from a requested penalty that is significantly below the the maximum penalty simply because of a finding of fewer violations than the number alleged in the complaint." (ID 24.) He stated further that "neither the FAA or the Judge is limited to a per violation *pro rata* penalty." (ID 26.) Nevertheless, the law judge assessed the reduced civil penalty of \$30,000 on a *pro rata* basis because: "... the FAA must be assumed to assert a penalty in relation to the number of violations alleged, ... and the FAA cannot escape the consequences of its pleadings."

Complainant and the law judge agree that Complainant established 17 violations of the regulations with respect to the June 9, 1988, shipment of hazardous materials by Respondent. The maximum civil penalty for those 17 violations was \$170,000. The law judge made numerous findings reflecting the seriousness of Respondent's actions and omissions, including that Respondent, a courier service, knowingly offered hazardous materials for air transport without disclosing their hazardous nature, and made no effort after the incident, to remedy this dangerous practice. No mitigating factors were established that would operate to reduce the sanction. The record of this case amply supports the imposition of the full \$40,000 civil penalty sought in the complaint. It is the egregiousness of Respondent's conduct and not the number of regulations violated that justifies the assessment of the requested \$40,000 civil penalty. The law judge correctly noted in his decision that where the requested penalty is significantly below the maximum penalty, no reduction is necessary even though all the violations alleged are not established. Moreover, no reduction in civil penalty is appropriate where, as here, the violations established are sufficiently serious to merit the full requested civil

⁶ At the time, the maximum civil penalty for a single hazardous materials violation was \$10,000. It was subsequently raised to \$25,000 per violation. See 49 U.S.C. § 1809(a)(1).

penalty.⁷ Accordingly, the law judge's decision is modified to assess a civil penalty of \$40,000.⁸


DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of June 1994.

⁷ See Administrator v. Polynesian Airways, 5 NTSB 2375, 2377 (1987) (failure to prove all factual allegations does not automatically justify a reduction in sanction without a determination of the seriousness of the allegations that were established). See also Administrator v. Hrobak, NTSB Order No. EA-3212, at 5 (November 13, 1990) (where not all factual complaint allegations are established the requested sanction may be reduced after weighing the seriousness of the allegation that was proven).

⁸ 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. § 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).