

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

In the Matter of:

MIDTOWN NEON SIGN  
CORPORATION

FAA Order No. 96-26

Served: August 13, 1996

Docket No. CP94EA0057

**DECISION AND ORDER**

Complainant Federal Aviation Administration (FAA) has appealed from Administrative Law Judge Ronnie A. Yoder's initial decision<sup>1</sup> assessing an \$8,000 civil penalty against Respondent Midtown Neon Sign Corporation (Midtown) for violating the Federal hazardous material statute<sup>2</sup> and the Hazardous Materials Regulations (HMR).<sup>3</sup> Complainant argues that the record and the law do not support the law judge's reduction of the proposed \$25,000 sanction. (Appeal Brief at 1.) This decision grants Complainant's appeal and increases the civil penalty from \$8,000 to \$25,000.

The facts of this case are undisputed. Midtown admitted the factual allegations of the complaint, contesting only the amount of the sanction. On October 15, 1992, Midtown, a sign manufacturing company in New York City,

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<sup>1</sup> A copy of the law judge's written initial decision is attached.

<sup>2</sup> Specifically, 49 U.S.C. § 5123 (formerly 49 U.S.C. App. § 1809). The Federal hazardous material statute was formerly known as the Hazardous Materials Transportation Act (HMTA).

<sup>3</sup> 49 C.F.R. Parts 171-177.

offered a shipment to Federal Express containing two one-gallon cans of paint. Paint is a flammable, hazardous material. 49 C.F.R. § 172.101, Hazardous Materials Table. Midtown was attempting to ship the paint by air from New York City to a customer in Fort Worth, Texas.

Midtown failed to comply with any of the applicable HMR.<sup>4</sup> For example, before the incident occurred, Midtown failed to instruct its employees and agents concerning their hazardous materials responsibilities. Midtown's shipment was an "undeclared" shipment, meaning it contained no warning or notice to Federal Express of the hazardous nature of its contents. Midtown did not prepare a Shipper's Declaration of Dangerous Goods to accompany the shipment and did not properly classify, describe, package, mark, and label the shipment.<sup>5</sup>

On November 24, 1992, Federal Express inspection agents found Midtown's shipment leaking at a Federal Express facility in New York City. The agents reported the incident to the FAA, one in a series of events that ultimately led to the law judge's assessment of an \$8,000 civil penalty against Midtown.

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<sup>4</sup> Midtown later claimed that it was unaware that paint was a hazardous material subject to regulation. Nonetheless, as the law judge properly held, Midtown "knowingly" violated the hazardous material statute and regulations because Midtown had knowledge of the facts giving rise to the violations. See 49 U.S.C. § 5123(a), providing that:

- (1) A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least \$ 250 but not more than \$ 25,000 for each violation. A person acts knowingly when--
  - (A) the person has actual knowledge of the facts giving rise to the violation; or
  - (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

<sup>5</sup> The specific regulations at issue are found in an Addendum.

Complainant has appealed the law judge's reduction of its proposed \$25,000 civil penalty.<sup>6</sup> In its appeal brief, Complainant argues that the law judge's sanction analysis contains several critical errors.

For example, Complainant argues that the law judge erred in failing to find violations of the following regulations:

1. 49 C.F.R. 172.200, providing that "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";
2. 49 C.F.R. § 172.300, providing that "each person who offers a hazardous material for transportation shall mark each package . . . containing the hazardous material in the manner required by this subpart"; and
3. 49 C.F.R. § 171.2(a), providing that "[n]o person may offer or accept a hazardous material for transportation in commerce . . .

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<sup>6</sup> Midtown also filed a notice of appeal. On Complainant's motion, the Administrator dismissed Midtown's cross-appeal because Midtown had failed to show good cause for the untimeliness of its notice of appeal. In the Matter of Midtown Neon Sign Corporation, FAA Order No. 96-14 (April 19, 1996). Later, Midtown filed a document captioned "Appeal Brief," arguing that it has been punished enough and that either no sanction or "the least possible" sanction should be imposed. (Midtown's Appeal Brief at 14-15.)

Counsel for Midtown subsequently filed a document captioned, "Affirmation in Opposition to Agency's Motion to Dismiss Appeal Brief." In this document, Midtown's counsel states that he called agency counsel to ask how much time Midtown had to file its brief, because he did not have ready access to the rules of practice. Midtown's counsel asserts that during the ensuing telephone conversation, agency counsel informed him that Midtown's deadline was 35 days from April 19, 1996 (the date Complainant filed its appeal brief). Midtown's counsel further states in his "Affirmation" that he served Midtown's brief within 35 days from April 19, 1996, and that he cannot understand what possible prejudice can result to the agency from having his brief read.

Counsel for Midtown is mistaken about the nature of Complainant's motion. Complainant did not move to dismiss Midtown's *brief*; rather, Complainant moved to dismiss Midtown's *cross-appeal*. Midtown was not entitled to file an *appeal* brief, because its cross-appeal was dismissed for untimeliness. However, Midtown did have the right, under 14 C.F.R. § 13.233(e), to file a *reply* to the agency's appeal brief, and Midtown did file its brief within the time for filing a reply brief. As a result, despite its caption ("Appeal Brief"), Midtown's brief has been considered, but only to the extent that it responds to the arguments raised in Complainant's appeal brief.

Note that by the time counsel for Midtown contacted agency counsel, Midtown's time for filing a notice of appeal and appeal brief had already expired. Note also that the initial decision informed the parties of the deadline for filing a notice of appeal. (Initial Decision at 29 n.34.)

unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter . . . .”

The law judge held that the Double Jeopardy Clause<sup>7</sup> prohibited him from finding violations of these provisions because they were general, introductory sections that a respondent could only violate by means of other HMR sections. The law judge relied on Blockburger v. United States, 284 U.S. 299, 304 (1932), and subsequent decisions, which he said held that:

absent clear congressional intent allowing multiple punishments, the Double Jeopardy Clause of the United States Constitution prohibits finding multiple violations for the same act or transaction absent proof of an additional required fact for each offense.

(Initial Decision at 14.) The law judge found nothing in the statute or the regulations that clearly indicated that Congress intended to punish a respondent multiple times for the same act without proof of an additional fact for each violation. (*Id.* at 14-15.)<sup>8</sup>

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<sup>7</sup> The Double Jeopardy Clause of the United States Constitution provides: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V.

<sup>8</sup> Complainant argues on appeal that Blockburger does not apply because the hazardous material statute is clear on its face that multiple violations can be found and multiple penalties can be assessed for a single act. (Appeal Brief at 12.) To support this argument, Complainant relies on the following portion of the statute:

(a) PENALTY.--(1) A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least \$250 but not more than \$25,000 for each violation.

(2) A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous materials, continues.

49 U.S.C. § 5123(a). It is not necessary to resolve this issue because this decision finds that even if the Double Jeopardy Clause does apply to hazardous materials cases and does preclude findings of violations of the general, introductory HMR sections, nevertheless the law judge erred in reducing the \$25,000 proposed civil penalty.

The law judge based his holding that the Double Jeopardy Clause extends to civil penalty cases arising under the Federal hazardous material statute on United States v. Halper, 490 U.S. 435, 447-49 (1989). In Halper, the U.S. Supreme Court considered "whether and under what circumstances a *civil* penalty constitutes 'punishment' for the purposes of double jeopardy analysis." (*Id.* at 436; emphasis added.) The law judge summarized Halper's holding as follows: where one cannot fairly characterize the sanctions imposed on an individual<sup>9</sup> by the government as remedial, then the Double Jeopardy Clause applies. (Initial Decision at 14.) According to the law judge, nothing in the record suggests that the civil penalty in this case could fairly be characterized as remedial, nor did it bear any rational relationship to the government's damages. (*Id.*) As a result, the law judge concluded, the Double Jeopardy Clause applied and no violation of the general, introductory sections of the HMR could or should be found. (Initial Decision at 15, 17, 20.)

It has not been established that the Double Jeopardy Clause applies in civil penalty proceedings arising under the Federal hazardous material statute.<sup>10</sup> The

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<sup>9</sup> Halper involved an individual defendant. In contrast, the respondent in the instant case is a corporation. There is case law, at least in the criminal context, indicating that the Double Jeopardy Clause applies to corporations as well as to individuals; however, the U.S. Supreme Court has never expressly addressed the question. See U.S. v. Hospital Monteflores, 575 F.2d 332, 333-34 (1st Cir. 1978), for a summary of the case law dealing with whether the Double Jeopardy clause protects corporations.

<sup>10</sup> Contrary to the law judge's holding, it is not clear that Halper applies in the instant case. First, the Supreme Court expressly stated that the rule it announced in Halper applied to situations in which the defendant has already been punished in a separate criminal prosecution:

We therefore hold that under the Double Jeopardy Clause a defendant *who has already been punished in a criminal prosecution* may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Double Jeopardy Clause is "one of the most volatile areas of constitutional criminal law despite repeated efforts at clarification." *The Supreme Court, 1992 Term--Leading Cases*, 107 HARV. L. REV. 129, 144, 149 (1993).<sup>11</sup> Assuming, *arguendo*, that

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490 U.S. at 448-49 (emphasis added). In the instant case, Midtown has not already been punished in a separate criminal prosecution. Thus, the law judge extended the Halper holding beyond the situation to which it strictly applies.

Also, the Halper court limited its holding to situations in which "the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution." (*Id.*; emphasis added.) Arguably, sanctions imposed under the statute may fairly be considered remedial for purposes of double jeopardy analysis. As the legislative history makes clear, the primary purpose of the hazardous material statute is to protect the public against the risks imposed by all forms of hazardous materials transportation. *See, e.g.*, Senate Report No. 101-449, 1990 U.S. Code & Cong. News 4595, 4595. The case law indicates that protecting the public is a remedial purpose. *See Manocchio v. Department of Health and Human Services*, 961 F.2d 1539, 1542 (11th Cir. 1992), stating, in regard to a different statute, that "While the desire to provide a deterrent is a punitive goal, we find that the legislative history, taken as a whole, demonstrates that the primary goal of the legislation is to protect [the public]. Therefore, since the legislative intent . . . is to protect the public, [the sanction] is remedial, not punitive." *See also United States v. WRW Corporation*, 986 F.2d 138, 141-42 (6th Cir. 1993), discussed in *In the Matter of Charter Airlines*, FAA Order No. 95-8 at 27 n.29 (May 9, 1995) (holding that "imposing a civil penalty for health and safety violations which varies in amount based upon the severity of the violation and the operator's attempts to come into immediate compliance may as readily be ascribed to the remedial purpose of promoting mine safety," and declining to find that a \$90,350 penalty was so excessive in relation to the penalty's remedial purpose as to constitute a second impermissible punishment under the Double Jeopardy Clause).

The instant case also differs from Halper in that the \$25,000 penalty proposed by Complainant is not disproportionate to the harm Midtown caused. *See Halper*, stating that "What we announce now is a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a *sanction overwhelmingly disproportionate to the damages he has caused.*" 490 U.S. 435, 449 (emphasis added).

For all the above reasons, it appears that the law judge in the instant case has extended the reach of the Double Jeopardy Clause further than the case law warrants.

<sup>11</sup> As noted in one law review article,

the "Supreme Court now concedes that its [double jeopardy] decisions 'can hardly be characterized as models of consistency and clarity'" (quoting Burks v. United States, 437 U.S. 1, 9 (1978)).

Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 82, *quoted in The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 172 n.250 (Nov. 1994). The law review author provides the following example:

[I]n the last several years, the Supreme Court has twice overruled cases that defined the test to determine what constitutes the "same offense" in a successive prosecution. *See United States v. Dixon*, 113 S. Ct. 2849 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990) (overruling Blockburger v. United States, 284 U.S. 299 (1932))).

the Double Jeopardy Clause applies, nevertheless the law judge erred in holding that the Double Jeopardy Clause prohibited the assessment of the \$25,000 civil penalty in this case. Even if one does not count the general, introductory sections for sanction purposes,<sup>12</sup> the \$25,000 penalty proposed by Complainant is still appropriate. A \$25,000 penalty is not only well within the range contemplated by Congress,<sup>13</sup> but is appropriate given the factors that Congress has required Complainant, the law judge, and the Administrator to consider in setting the penalty.

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*The Supreme Court, 1993 Term: Leading Cases*, 108 HARV. L. REV. 139, 172 n.250 (Nov. 1994). Since Halper was decided, Justice Scalia and others have called into question the very existence of a multiple-punishments component of the Double Jeopardy Clause. Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1955 (1994) (Scalia, J. dissenting, joined by Thomas, J.); Brian L. Summers, Note, *Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition*, 56 OHIO ST. L. J. 1595 (1995) (arguing that the Double Jeopardy Clause prohibits successive prosecutions, but not successive punishments). Justice Scalia has argued that the multiple-punishments component arose only through "the repetition of a dictum." Kurth Ranch, 114 S. Ct. at 1955-56; James J. Curley, Comment, *Expanding Double Jeopardy: Department of Revenue v. Kurth Ranch*, 75 B.U. L. Rev. 505, 517 n.104 (1995).

<sup>12</sup> It is a fiction to say that Midtown did not violate the general, introductory provisions included in the complaint--Midtown *did* violate them, as it conceded when it admitted all of the allegations of the complaint. That is, Midtown *did* offer a hazardous material for transportation without describing the material on the shipping paper, in violation of Section 172.200; Midtown *did* offer a hazardous material for transportation without marking the package, in violation of Section 172.300; and Midtown *did* offer a hazardous material for transportation without classifying, describing, packaging, marking, labeling, and having the package in proper condition for shipment, in violation of Section 171.2(a).

This does not mean that the general, introductory sections should necessarily be counted separately for sanction purposes, and nothing in the record shows that Complainant did so count them. In fact, Complainant has expressly indicated that it did not count them separately. (Appeal Brief at 16.) The law judge stated that he *assumed* that Complainant had counted them separately. (Initial Decision at 27.) The law judge's assumption is unsupported by a preponderance of the reliable, probative, and substantial evidence. Hence, it is unwarranted.

<sup>13</sup> Congress provided that the minimum civil penalty for each violation of the hazardous material statute is \$250, while the maximum civil penalty per violation is \$25,000. 49 U.S.C. § 5123(a). Even if the general, introductory sections are not counted, there were still 9 violations under the law judge's analysis, each with a maximum civil penalty of \$25,000.

The statute mandates a consideration of the following factors in setting the sanction:

1. the nature, circumstances, extent, and gravity of the violation;
2. with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and
3. other matters that justice may require.

49 U.S.C. § 5123(a). *See also* 14 C.F.R. § 13.16(a)(4), which lists the same factors, though it breaks them down further, into seven factors rather than three.<sup>14</sup>

It makes little difference whether technically there were 8, 9, 12, 15, or even 30 violations. The law judge's mathematical, formulaic approach of multiplying the number of violations by a set dollar amount is inappropriate. The law judge's approach is not the one mandated by the statute. Also, a violation of one regulation may be more or less serious than a violation of another regulation. It is not clear that each regulation violated deserves an equal penalty amount.

Furthermore, as Complainant points out, the law judge's sanction analysis contains several additional errors that led him to reduce the penalty improperly. First, the law judge incorrectly stated that there were 8 violations of the HMR (Initial Decision at 22, 27), when he had actually found 9 violations, as follows:

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<sup>14</sup> 14 C.F.R. § 13.16(a)(4) provides, in pertinent part, as follows:

... An order assessing civil penalty for a violation under the Hazardous Materials Transportation Act or a rule, regulation, or order issued thereunder, will be issued only after consideration of--

- (i) The nature and circumstances of the violation;
- (ii) The extent and gravity of the violation;
- (iii) The person's degree of culpability;
- (iv) The person's history of prior violations;
- (v) The person's ability to pay the civil penalty;
- (vi) The effect on the person's ability to continue in business; and
- (vii) Such other matters as justice may require.

<u>Regulation</u>	<u>Page No. of Initial Decision</u>
1. 49 C.F.R. § 172.202(a)(1)	(Initial Decision at 11);
2. 49 C.F.R. § 172.202(a)(2)	( <i>Id.</i> );
3. 49 C.F.R. § 172.202(a)(3)	( <i>Id.</i> );
4. 49 C.F.R. § 172.202(b)	( <i>Id.</i> at 12);
5. 49 C.F.R. § 172.204	( <i>Id.</i> at 16);
6. 49 C.F.R. § 172.301(a)	( <i>Id.</i> at 18);
7. 49 C.F.R. § 172.316(a)	( <i>Id.</i> at 18);
8. 49 C.F.R. § 172.400(a)	( <i>Id.</i> at 19); and
9. 49 C.F.R. § 173.1(b)	( <i>Id.</i> at 20). <sup>15</sup>

This error does not appear to be harmless. The law judge's analysis suggests that, if not for the error, he would have assessed a higher civil penalty, for he expressly stated that the penalty must relate to the number of violations. (*Id.*) Moreover, after erroneously stating that he had found 8 violations, the law judge reduced the civil penalty to \$8,000.

Complainant also contends that the law judge improperly reduced the civil penalty on a pro rata basis. Although the law judge recognized that "neither the FAA nor the Judge is limited [to] a pro rata penalty amount imputed to the FAA complaint" (Initial Decision at 27), he still seems to have reduced the penalty on a pro rata basis. The law judge stated, "to adopt the FAA's proposed \$25,000 penalty would be to ignore that the FAA established less than a third of its original allegations . . . ." (Initial Decision at 27.) Significantly, \$8,000 (the sanction imposed by the law judge) is roughly one third of \$25,000 (the sanction proposed by Complainant).

Assuming, *arguendo*, that Complainant established less than a third of its allegations,<sup>16</sup> pro rata reductions of civil penalties are not always appropriate under

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<sup>15</sup> See the Addendum for the text of these regulations.

<sup>16</sup> Complainant points out that it has never wavered from the factual allegations included in its complaint. (Appeal Brief at 24.) In addition, the complaint alleged that Midtown violated

the Administrator's precedent. In Pony Express, the law judge reduced the \$40,000 penalty sought in the complaint to \$30,000 to reflect his dismissal of alleged violations of 6 general or introductory sections of the HMR. In the Matter of Pony Express Courier Corp., FAA Order No. 94-19 at 2 (June 22, 1994). The law judge reasoned in Pony Express that since the original complaint 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 violated. *Id.* at 3. Rejecting the law judge's analysis, the Administrator stated:

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. . . . [W]here 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 meet the full requested civil penalty.

Likewise, in the instant case, the record amply supports the imposition of the full \$25,000 civil penalty sought in the complaint. Undeclared shipments of hazardous materials are extremely dangerous and can result in loss of life and damage to property. *See In the Matter of Toyota Motor Sales*, FAA Order No. 94-28 at 13 (September 30, 1994), stating that undeclared shipments, which increase the

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15 regulatory provisions, and the law judge found that Midtown violated 9 of those regulatory provisions. Nine is 60%, or nearly two thirds, of 15--significantly more than one third, the fraction of the original violations that the law judge found Complainant had established. The law judge apparently based his conclusion that Complainant had proven only a third of its original allegations on the fact that at one point after the filing of the complaint, Complainant stated that there were 30 violations, which was based on multiplying 2 containers of paint by 15 regulations. Later, however, Complainant corrected its mistake, advising the law judge that because the 2 containers of paint were in one package, multiplication by 2 would be inappropriate.

likelihood of injury, pose a special risk. A \$25,000 civil penalty is commensurate with the danger and harm caused by Midtown's actions in the instant case. As the law judge noted, it was merely fortuitous that no one was hurt. (Initial Decision at 25.)

The other reasons given by the law judge for reducing the sanction also lack merit. The law judge found the isolated nature of the incident to be a mitigating circumstance. (Initial Decision at 23.) As the law judge recognized, however, the Administrator's precedent indicates that "a violation-free history should be the norm and will not be considered as mitigating an otherwise reasonable civil penalty." In the Matter of TCI Corporation, FAA Order No. 92-77 at 20 (December 22, 1992). Moreover, the \$25,000 proposed civil penalty already reflects the isolated nature of the incident.

The law judge further stated that Midtown's "unfamiliarity with the HMR and its ignorance as to the fact that paint is a hazardous material requiring special shipping procedures . . . constitute appropriate mitigating factors." (Initial Decision at 25.) As support for this statement, the law judge cites the following portion of TCI:

A person who offers hazardous materials for the first time and is unfamiliar with the HMR probably deserves more than a minimal sanction for violations of the HMR. However, that person deserves a lesser sanction than the person who regularly offers hazardous materials for transportation and is familiar with the regulations.

FAA Order No. 92-7 at 20. The quoted portion of TCI, however, does *not* state that a first-time offender's unfamiliarity with the regulations will mitigate an otherwise reasonable civil penalty. It indicates only that a *higher* civil penalty is appropriate for the person who regularly offers hazardous materials and is familiar with the

regulations. Although lack of familiarity with the HMR is indeed a factor to consider when determining degree of culpability (*see* TCI, FAA Order No. 92-7 at 18), the \$25,000 proposed civil penalty already reflects Midtown's unfamiliarity with the HMR.

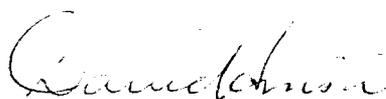
Finally, a penalty of \$25,000, given all the circumstances of this case, is not excessive given previous penalties imposed. For example, in Toyota, which involved an undeclared shipment of two car batteries, the Administrator reinstated the \$50,000 proposed civil penalty (double the amount sought here), which the law judge had reduced to \$10,000. In the Matter of Toyota Motor Sales, FAA Order No. 94-28 at 14 (September 30, 1994) (where the batteries actually made it aboard the aircraft). The maximum civil penalty at the time of Toyota was \$25,000, as in the instant case. *Id.* at 3 n.6.

In Pony Express, involving an undeclared shipment of radioactive iodine, the Administrator reinstated the \$40,000 penalty sought by Complainant. In the Matter of Pony Express Courier Corporation, FAA Order No. 94-19 (June 22, 1994). Notably, the statute in effect at the time permitted a maximum civil penalty of only \$10,000 per violation.

In TCI, after the law judge reduced the \$35,000 civil penalty sought by Complainant to \$5,000, the Administrator raised the penalty to \$15,000. TCI involved one wooden skid of boxes containing bottles of a chemical called photoresist adhesion promoter. The labels and markings of the shipment were obscured, and the shipping papers did not include the proper shipping name or certification. In the Matter of TCI, FAA Order No. 92-77 at 13. TCI is distinguishable from the instant case because, among other reasons, the maximum civil penalty at the time

was only \$10,000, and the contributory negligence of another company constituted a valid mitigating factor.<sup>17</sup>

In summary, the reasons given by the law judge for reducing the proposed civil penalty lack merit. Moreover, a consideration of the required statutory factors, and of past hazardous materials cases decided by the Administrator, supports the \$25,000 proposed civil penalty. Therefore, the law judge's decision is reversed to the extent that it reduced the civil penalty to \$8,000, and a civil penalty of \$25,000 is assessed.<sup>18</sup>



DAVID R. HINSON, ADMINISTRATOR  
Federal Aviation Administration

Issued this 12th day of August, 1996.

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<sup>17</sup> In a few cases involving individuals rather than corporations, the Administrator assessed much smaller penalties, but these cases are distinguishable. The \$750 civil penalty imposed in the Mulhall case is distinguishable, among other reasons, because that case involved an individual with an inability to pay due to financial hardship, which is not the case here. In the Matter of Mulhall, FAA Order No. 95-16 (August 4, 1995). Similarly, the \$1,250 civil penalty assessed in the Smalling case for an undeclared shipment of firecrackers is not relevant for our purposes here, among other reasons, because only the issue of liability, and not the sanction amount, was appealed to the Administrator. In the Matter of Smalling, FAA Order No. 94-31 (October 5, 1994).

<sup>18</sup> Unless Respondent files a petition for review with a United States Court of Appeals within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1994).

## ADDENDUM

49 C.F.R. §§ 171.2(a) (1992) provides as follows:

No person may offer or accept a hazardous material for transportation in commerce unless that person complies with subpart G of part 107 of this chapter, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter (including §§ 171.11, 171.12, and 176.11).

49 C.F.R. § 171.200 (1992) provides as follows:

(a) *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.

(b) This subpart does not apply to any material, other than a hazardous waste or a hazardous substance, that is--

(1) Identified by the letter "A" in Column 1 of the § 172.101 Table, except when the material is offered or intended for transportation by air; or

(2) Identified by the letter "W" in Column 1 of the § 172.101 Table, except when the material is offered or intended for transportation by air; or

(3) an ORM-D, except when the material is offered or intended for transportation by air.

49 C.F.R. § 171.300 (1992), entitled "Applicability," provides as follows:

(a) Each person who offers a hazardous material for transportation shall mark each package, freight container, and transport vehicle containing the hazardous material in the manner required by this subpart.

(b) When assigned the function by this subpart, each carrier that transports a hazardous material shall mark each package, freight container, and transport vehicle containing the hazardous material in the manner required by this subpart.

49 C.F.R. §§ 172.202(a)(1), (2), and (3) (1992) provide as follows:

(a) The shipping description of a hazardous material on the shipping paper must include:

(1) The proper shipping name prescribed for the material in Column 2 of the § 172.101 Table;

(2) The hazard class or division prescribed for the material as shown in Column 3 of the § 172.101 Table (class names or subsidiary hazard class number may be entered following the numerical hazard

class, or following the basic description). The hazard class need not be included for the entry "Combustible liquid, n.o.s.";

(3) The identification number prescribed for the material as shown in Column 4 of the § 172.101 Table; . . .

49 C.F.R. §§ 172.202(b) (1992) provides as follows:

Except as provided in this subpart, the basic description specified in paragraphs (a)(1),(2), (3) and (4) of this section must be shown in sequence with no additional information interspersed. For example: "Gasoline, 3, UN1203, PG II."

49 C.F.R. §§ 172.204 (1992), entitled "Shipper's certification," provides, in pertinent part, as follows:

(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 paper containing the required 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 the 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 [air] according to applicable international and national governmental regulations."

(b) *Exceptions*. (1) Except for a hazardous waste, no certification is required for a hazardous materials offered for transportation by motor vehicle and transported:

(i) In a cargo tank supplied by the carrier, or

(ii) By the shipper as a private carrier except for a hazardous material that is to be reshipped or transferred from one carrier to another.

(2) No certification is required for the return of an empty tank car which previously contained a hazardous material and which has not been cleaned or purged.

(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).

(4) *Radioactive material.* . . .

49 C.F.R. §§ 172.301(a) (1992) provides as follows:

(a) *Proper shipping name and identification number.* (1) Except as provided by this subchapter, each person who offers for transportation a hazardous material in a non-bulk packaging shall mark the package with the proper shipping name and identification number (preceded by "UN" or "NA," as appropriate) for the material as shown in the § 172.101 table.

(2) The proper shipping name for a hazardous waste (as defined in § 171.8 of this subchapter) is not required to include the word "waste" if the package bears the EPA marking prescribed by 40 CFR 262.32.

49 C.F.R. §§ 172.316(a) (1992) provides as follows:

(a) Each non-bulk packaging containing a material classed as ORM-D must be marked on at least one side or end with the ORM-D designation immediately following or below the proper shipping name of the material. The ORM designation must be placed within a rectangle that is approximately 6.3 mm (0.25 inches) larger on each side than the designation. The designation for ORM-D must be:

(1) ORM-D-AIR for an ORM-D that is prepared for air shipment and packaged in accordance with the provisions of § 173.27 of this subchapter.

(2) ORM-D for an ORM-D other than as described in paragraph (a)(1) of this section.

49 C.F.R. §§ 172.400(a) (1992) provides as follows:

(a) Except as specified in § 172.400a, each person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or

containment device with the labels specified for the material in the § 172.101 Table and in this subpart:

- (1) A non-bulk package;
- (2) A bulk packaging, other than a cargo tank, portable tank, or tank car, with a volumetric capacity of less than 18 m<sup>3</sup> (640 cubic feet), unless placarded in accordance with subpart F of this part;
- (3) A portable tank of less than 3755 L (1000 gallons) capacity, unless placarded in accordance with subpart F of this part;
- (4) A DOT Specification 106 or 110 multi-unit tank car tank, unless placarded in accordance with subpart F of this part; and
- (5) An overpack, freight container or unit load device, of less than 18 m<sup>3</sup> (640 cubic feet), which contains a package for which labels are required, unless placarded in accordance with § 172.512 of this part.

49 C.F.R. §§ 173.1(b) (1992) provides as follows:

(b) A shipment of hazardous materials that is not prepared in accordance with this subchapter may not be offered for transportation by air, highway, rail, or water. It is the responsibility of each hazmat employer subject to the requirements of this subchapter to ensure that each hazmat employee is trained in accordance with the requirements prescribed in this subchapter to ensure that each hazmat employee is trained in accordance with the requirements prescribed in this subchapter. 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 shipment as to applicable regulations in this subchapter.