

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

**PHILLIPS BUILDING
SUPPLY**

FAA Order No. 2000-27

Served: December 21, 2000

Docket No. CP99SO0024

DMS No. FAA-1999-5816¹

ORDER DENYING RECONSIDERATION²

On September 7, 2000, Phillips Building Supply (Phillips) filed a timely petition to reconsider FAA Order No. 2000-20 (August 11, 2000). This order denies Phillips' petition to reconsider.

In its petition to reconsider, Phillips argues that in FAA Order No. 2000-20, the civil penalty imposed by the law judge was erroneously increased from \$9,000 to \$14,000, using a mathematical formula. This argument is rejected. In FAA Order No. 2000-20, the \$14,000 civil penalty was arrived at after careful consideration and balancing of the factors that 49 U.S.C. § 5123(c) requires to be considered – *i.e.*, the nature, circumstances, extent, and gravity of the violation, the violator's degree of culpability, any history of prior violations, the ability to pay, any effect on the ability to

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases. They also can be found in Hawkins's Civil Penalty Cases Digest Service

continue to do business, and other matters that justice requires, including corrective action.³ In FAA Order No. 2000-20, the law judge's determinations regarding the mitigating factors were rejected, and accordingly the civil penalty assessed by the law judge could not be affirmed. (*See* FAA Order No. 2000-20 at pages 9-11, detailing the errors in the law judge's sanction analysis.)

Phillips also argues that FAA Order No. 2000-20 improperly criticized Phillips' corrective action (*i.e.*, the training of its employees) as "cursory" and not immediate enough. Phillips argues that its failure to learn the intricacies of Federal Hazardous Materials Regulations should not be criticized. By no means was there any intent in FAA Order No. 2000-20 to criticize Phillips' efforts to take corrective action. Still, the efforts were not intensive and timely enough to constitute a significant mitigating factor. (*See* FAA Order No. 2000-20 at page 13, stating that while the training "did not justify a large adjustment in the penalty, it [was] a mitigating factor.")

Phillips contends that FAA Order No. 2000-20 should have shifted some responsibility to United Parcel Service (UPS) because Phillips' clerk told the UPS driver that the shipment contained Formica glue. This case, however, does not involve UPS's responsibility – instead, it is an action against Phillips. Further, by simply mentioning to a UPS driver that the shipment contained Formica glue, Phillips' clerk did not do enough to warn UPS that the shipment contained a hazardous material. Accordingly, it cannot be considered a valid mitigating factor. At a minimum, Phillips' clerk should have

and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 65 Fed. Reg. 67,445, 67,462 (November 9, 2000).

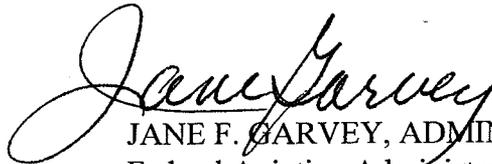
³ FAA Order No. 2000-20 at 11-14.

contacted UPS employees who have expertise in hazardous materials and asked for advice regarding how to package and ship cans of Formica glue.

Phillips' final claim of error in FAA Order No. 2000-20 involves the statement that Phillips regularly handles hazardous materials in the course of its business. Given the nature of Phillips' business – Phillips is a retail company that sells home building supplies – it is reasonable to assume that Phillips regularly handles hazardous materials. Hardware stores commonly stock many items that are regulated under the Hazardous Materials Regulations, such as paint, turpentine, and paint thinner.

Other arguments in Phillips' petition to reconsider are repetitious and will not be considered. (See 14 C.F.R. § 13.234(d), providing that the FAA decisionmaker will not consider repetitious petitions.)

THEREFORE, Phillips' petition to reconsider is denied, and a \$14,000 civil penalty is assessed.


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of December, 2000.