

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: AERO CONTINENTE, S.A.

FAA Order No. 2003-8

Docket No. CP99CE0008
DMS No. FAA-2000-6753¹

Served: September 12, 2003

DECISION AND ORDER²

This case arises from the shipment of a portable breathing equipment device (PBE) on board a Federal Express flight from Miami, Florida, to Lenexa, Kansas. Although a PBE is a hazardous material, the shipment did not comply with the Hazardous Materials Regulations (HMR). At the hearing, the only issue was whether Aero Contiente, S.A.,³ was responsible for the "hidden" shipment⁴ of the PBE in violation of the HMR. In a written decision, Administrative Law Judge Burton S. Kolko held Aero

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing 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, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

³ "S.A." is a corporate designation in South America. (Tr. 190.) In the remainder of this decision, Aero Contiente, S.A., will be referred to simply as "Aero Contiente."

⁴ The package was not properly marked or labeled, and was not accompanied by shipping papers containing the information required under the HMR. The respondent admitted that the shipment was not prepared properly, but denied that it was responsible for these violations.

Continente responsible for the violations⁵ because its agent, International Pacific Trading, Inc. (IPT), offered the PBE to Federal Express for shipment. The ALJ imposed a \$20,000 civil penalty rather than the \$85,000 civil penalty sought by Complainant. Both parties have appealed from the initial decision.

After consideration of the record and the appellate briefs in this matter, the ALJ's decision is reversed. No civil penalty is assessed.⁶

The Facts.

Aero Continente and IPT.

Aero Continente is a Peruvian air carrier, based in Lima, Peru. (Tr. 190-192.) It had no offices or employees in the United States in February 1998, when IPT shipped the PBE to Puritan-Bennett. (Tr. 131, 191.) Aero Continente did not begin flying to the United States until December 1999. (Tr. 137, 191.)

IPT was a Florida corporation located at 2858 79th Avenue, Miami, Florida.⁷ IPT leased several aircraft to and procured aircraft parts for Aero Continente. IPT leased aircraft only to Aero Continente, but it also acted as a broker locating aircraft for three or four other companies. (Tr. 141.)⁸ IPT provided Aero Continente with parts for all of its aircraft, not just the aircraft that it leased from IPT. (Tr. 194.)

⁵ Specifically, the ALJ held that Aero Continente violated the following regulations: 14 C.F.R. §§ 172.202(a)(1), 172.202(a)(2), 172.202(a)(3), 172.204(a)(4), 172.301(a), 172.400(a)(1), 172.102(c)(1), 172.102(c)(2), and 172.702(a).

⁶ In light of this ruling, there is no need to address Complainant's argument on appeal that the ALJ should have assessed a higher civil penalty.

⁷ IPT is no longer in business.

⁸ Aero Continente leased aircraft from IPT as well as from other companies. (Tr. 194.)

According to Aero Continente's engineering manager, Victor Sanchez, Aero Continente had delegated authority to IPT, its "broker," to obtain aircraft parts that Aero Continente needed. (Tr. 198.) Aero Continente had authorized IPT to locate used aircraft parts from a disassembled Boeing 727 that IPT had once leased to Aero Continente and subsequently returned to IPT in Miami.⁹ When necessary, IPT could send parts from that disassembled aircraft for repairs. (Tr. 174.) Aero Continente provided IPT with blank work order forms and green repair tags that IPT could use when IPT needed to get parts repaired. (Tr. 149, 174-175, 201.)

The contract between Aero Continente and IPT originally provided that Aero Continente would set aside maintenance reserve funds for the aircraft that it leased from IPT. Under that arrangement, IPT would bill Aero Continente for all expenses. Aero Continente, however, could not meet the obligation to maintain that reserve fund. As a result, in 1996, the parties agreed that Aero Continente would pay directly for parts and expenses related to procuring aircraft parts for it by IPT. (Tr. 129-130.) As part of this arrangement, the parties agreed that IPT could open certain accounts, such as a Federal Express account, for Aero Continente using IPT's address. (Tr. 142.) IPT used Aero Continente accounts, including its Federal Express account, when procuring parts for the air carrier. (Tr. 130.)

Portable Breathing Equipment (PBE).

A PBE is used by aircraft crewmembers as an emergency breathing device. It has two oxygen generators. When a PBE is listed on an aircraft's Minimum Equipment List (MEL), the aircraft will be equipped with a PBE. As such, a PBE is not a hazardous material, requiring special markings and labels, as well as shipping papers in compliance

⁹ See n. 11, *infra*.

with the HMR. In contrast, when an air carrier transports a package containing a PBE as cargo on board an aircraft, that PBE is a hazardous material. As such, the shipment must be properly marked and labeled, and accompanied by appropriate shipping papers disclosing among other information, the nature of the hazard in accordance with the HMR.

The Shipment.

In January 1998, Aero Continente sent IPT a facsimile, requesting that IPT get a PBE for one of Aero Continente's aircraft. (Tr. 171-172.) IPT's purchasing department manager, Luis Fernandez, sent Daniel Yacher,¹⁰ a purchasing agent in training, to IPT's warehouse to determine whether they had a PBE from a disassembled aircraft.¹¹ (Tr. 171-172, 184.) Yacher found an expired PBE and, following Fernandez's instruction, asked Puritan-Bennett, the manufacturer, whether the PBE could be put back into service. (Tr. 171-172, 185.) Puritan-Bennett informed Yacher that he could send the PBE to them via Federal Express. (Tr. 172, 185.)

Yacher filled out the Federal Express airway bill dated February 26, 1998. (Tr. 184.) He wrote on the airway bill that he was the shipper and gave IPT's Miami address. (Tr. 40; Complainant's Exhibit 2). He wrote that Aero Continente was the shipper because the shipment was made on Aero Continente's Federal Express account. (Tr. 173,

¹⁰ Yacher and Fernandez were employed by IPT, not by Aero Continente. (Tr. 134-136, 151, 169-170, 182-184.)

¹¹ Aero Continente had leased a Boeing 727 from IPT. Once the lease expired, Aero Continente returned the aircraft to IPT in Miami. (Tr. 131-132.) IPT disassembled the aircraft, intending to sell the parts. (Tr. 131-132.) When Aero Continente needed parts, IPT could supply them with salvaged parts from that aircraft.

185.)¹² He testified that he put his name and telephone number on the form to enable Federal Express to contact him in case there were any questions. (Tr. 185.)

Yacher filled out a repair order (Complainant's Exhibit 3) to send to Puritan-Bennett. (Tr. 184.) "Aero Continente, Inc." was printed at the top of the repair order.¹³ Aero Continente, Inc.'s address, as printed on this form, was 2858 Northwest 79th Avenue, Miami, Florida, 33122. Yacher wrote on the work order that the following work was required: "Evaluation, replace chemicals, reseal." (Tr. 42.) The contact person listed on the bottom of the form was Daniel Yacher, and the authorizing official's initials were "L.F." (Luis Fernandez). The package sent via Federal Express contained the PBE, the repair order, and a green repair tag with the name "Aero Continente" printed on it. Yacher did not comply with the HMR when he prepared the package and the shipping papers, resulting in a hidden shipment of a hazardous material.

After receiving the package containing the PBE from Federal Express, Puritan-Bennett contacted FAA Special Agent John Nipper and reported that the shipment did not comply with the HMR. Nipper conducted an investigation, leading to this action. After reviewing the paperwork that accompanied the package containing the PBE, Nipper concluded that Aero Continente was the shipper and that it had an office at 2858 79th Avenue, Miami, Florida. (Tr. 67, 73.)

¹² Sandra Sanchez, IPT's former general manager, testified that "if it was Aero Continente's account, Aero Continente should have paid for it." (Tr. 144.)

¹³ Aero Continente, Inc., according to its accountant, was "an inactive corporation." (Tr. 157.) He described it as "not more than a shell." (Tr. 165.) Aero Continente, Inc. had no income or employees in 1998. Sandra Sanchez testified that Aero Continente, Inc. was formed when IPT and Aero Continente separated their books. (Tr. 145.)

The ALJ's Initial Decision.

The ALJ held Aero Continente legally responsible for the shipment of the PBE and, as a result, for the HMR violations, based on his finding that when IPT shipped the PBE, IPT acted as the agent of Aero Continente. The ALJ wrote, "IPT had located the PBE, prepared it for shipment and shipped it, and the facts show, it did so as the agent of Aero Continente, S.A." (Initial Decision at 5.) According to the ALJ, IPT was the agent of Aero Continente because Aero Continente had requested that IPT procure a PBE. The ALJ found further that IPT was acting within its scope of authority when it sent the PBE to Puritan-Bennett. (Initial Decision at 5-6.) Consequently, "Aero Continente, S.A., as the principal, must answer for the violations." (Initial Decision at 5.) The ALJ rejected Aero Continente's argument that IPT acted independently and therefore had not served as an agent for Aero Continente. (Initial Decision at 5.)

The ALJ also cited public policy reasons for holding Aero Continente responsible for the violations of the HMR. The ALJ explained that "[i]t is a principle of more than 50 years' standing that air carriers, by the very nature of their business, must be held to a high standard of care." (Initial Decision at 6.) He referred to the cases in which the Administrator has held that an air carrier's responsibilities are too critical to safety to allow it to delegate them to another company. (Initial Decision at 6.)

Regarding penalty, the ALJ held that the \$85,000 civil penalty sought by Complainant in this matter was excessive. He assessed a \$20,000 civil penalty instead. (Initial Decision at 7-9.)

Aero Continente's Appeal

1. Jurisdiction.

Aero Continente argues that the ALJ erred by denying its motion to dismiss for lack of jurisdiction. It contends that under the Federal aviation statute,¹⁴ the Administrator may not assess civil penalties exceeding \$50,000 for violations of the HMR. This argument is rejected.

The HMR implement the Federal hazardous materials transportation statute, 49 U.S.C. § 5101 *et seq.*¹⁵ Under 49 U.S.C. § 5123(a), a person who knowingly violates the HMR is subject to a civil penalty of no less than \$250 and no more than \$25,000 per violation. The Secretary of Transportation may, under the Federal hazardous materials transportation statute, assess a civil penalty for violations of the HMR “only after notice and an opportunity for a hearing.” 49 U.S.C. § 5123(b). The Secretary of Transportation delegated this assessment authority to the FAA Administrator in 49 C.F.R. § 1.47(k) regarding violations involving air transportation.

While Section 5123 limits the minimum and maximum penalty *per individual violation*¹⁶ that may be assessed, it does not otherwise limit the *total* civil penalty that may be assessed through administrative adjudication (after notice and opportunity for a

¹⁴ The Federal aviation statute is found at 49 U.S.C. Subtitle VII, entitled “Aviation Programs.” 49 U.S.C. § 40101 *et seq.*

¹⁵ The Hazardous Materials Transportation Act of 1974 gave the Secretary of Transportation the authority to impose civil penalties after notice and an opportunity for a hearing. This statute was later codified at 49 U.S.C. Subtitle III, Chapter 51, entitled “Transportation of Hazardous Material,” 49 U.S.C. § 5101 *et seq.* Chapter 51 is referred to in this decision as the “Federal hazardous materials transportation statute.”

¹⁶ “A person that knowingly violates this chapter [Chapter 51] or a regulation prescribed under this chapter [*i.e.*, the HMR] is liable to the United States Government for a civil penalty of at least \$250 but not more than \$25,000 for each violation.” 49 U.S.C. § 5123(a)(1).

hearing) in any particular hazardous materials case. Complainant brought this civil penalty action seeking an \$85,000 civil penalty against Aero Continente for multiple HMR violations under 49 U.S.C. § 5123 and 49 C.F.R. § 1.47(k). It is undisputed that the \$85,000 civil penalty sought by Complainant was within Section 5123's penalty range.

Aero Continente bases its argument on 49 U.S.C. § 46301(d)(4)(A), a provision of the Federal aviation statute, which states: "Notwithstanding paragraph (2) of this subsection [subsection (d)], the district courts of the United States have exclusive jurisdiction of a civil action involving a penalty the Administrator initiates if (A) the amount in controversy is more than \$50,000." Paragraph (4), subparagraph (A) must be read in its context in subsection (d) [section 46301(d)]. Subsection (d) provides for the administrative assessment of civil penalties by the Administrator. 49 U.S.C. § 46301(d). In 1998, when the events leading to this case occurred, the Administrator's assessment authority under subsection (d) extended to violations of safety and security provisions of the Federal aviation statute. 49 U.S.C. § 46301(d)(2). The authority to regulate the transportation of hazardous materials by air and to assess a civil penalty for violations of the HMR is not included in subsection (d). *See* 49 U.S.C. § 46301(d)(2). Hence, Section 46301(d)(4)(A)'s grant of exclusive jurisdiction to the United States district courts of actions involving civil penalties greater than \$50,000 does not apply to violations arising from the transportation of hazardous materials by air.

Section 46301(d)(4)(A)'s grant of exclusive jurisdiction in the United States district courts for cases involving civil penalties over \$50,000 dovetails with Section 46301(d)(8)'s \$50,000 "cap" on administrative imposition of civil penalties. The latter

section provides: "The maximum civil penalty the Administrator ... may impose *under this subsection [subsection (d)]* is \$50,000. 49 U.S.C. § 46301(d)(8) (emphasis added.) Subsection (d), as discussed above, does not apply to chapter 51, the statutory authority for the HMR and this particular civil penalty action.

In contrast to subsection (d), subsection (a) of Section 46301 does mention penalties for violations related to the transportation of hazardous material. Section 46301(a)(3)(A) provides basically that a civil penalty may be imposed for violations related to the transportation of hazardous material. This provision is no more than a general statement of an individual's potential liability. There is no mention in subsection (a) of who may prosecute such an action and whether such an action would be brought before a United States district court or an administrative forum. The Federal aviation statute's Section 46301(c)(1)(D)¹⁷ and the Federal hazardous materials transportation statute's Section 5123 provide for administrative adjudication of such civil penalty actions related to the transportation of hazardous materials but the adjudication authority in both statutory provisions is unlimited.

Aero Continente argues further that 14 C.F.R. § 13.201 of the FAA's Rules of Practice in Civil Penalty Actions supports its position that the ALJ lacked jurisdiction over this case because Complainant sought a penalty greater than \$50,000. As explained below, Section 13.201's language is problematic, but it cannot give the United States district courts jurisdiction over hazardous materials cases seeking civil penalties above \$50,000.

The Administrator issued the FAA's Rules of Practice in Civil Penalty Actions to implement the civil penalty assessment authority granted under P.L. 100-233, the Airport

¹⁷ See n. 18, *infra*.

and Airway Safety and Capacity Expansion Act of 1987, which was signed by the president on December 30, 1987. Under P.L. 100-233, Congress and the President authorized the Administrator for the first time to assess civil penalties through administrative adjudication actions to enforce the FAA's safety and security regulations.¹⁸

Section 13.201(a), provides as follows:

(a) This subpart applies to the following actions:

¹⁸ See 53 Fed. Reg. 34646 (September 7, 1988) and 55 Fed. Reg. 27548 (July 3, 1990).

Prior to the enactment of P.L. 100-223, the FAA lacked the authority to assess civil penalties against violators of the Federal Aviation Regulations (FAR) relating to aviation safety and security. Under Section 901(a)(1) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1471(a)(1) [now codified at 49 U.S.C. § 46301(a)(1)], an individual who violated a provision of the Act or the FAR relating to safety or security was subject to a civil penalty no greater than \$1,000 per violation. The Administrator, however, did not have the authority to assess that penalty. When a civil penalty for violations of the safety or security provisions of the FAR was appropriate, the Administrator could attempt to reach a compromise civil penalty with the violator. If such an agreement could not be reached, however, the Administrator's only remaining option was to refer the case to the U.S. Attorney for prosecution in an appropriate Federal district court. This system for assessing civil penalties, however, did not work well as a deterrent because the overburdened U.S. Attorney's offices regarded these as low priority matters.

Even before the enactment of P.L. 100-223, in contrast, the Secretary of Transportation had the authority under the Federal Aviation Act of 1958, as amended, to assess civil penalties against violators in hazardous materials cases "upon written notice upon a finding of violation by the Secretary after notice and an opportunity for a hearing." 49 U.S.C. § 1471(a) [now codified at 49 U.S.C. § 46301(c)(1)(D)]. Similar authority was found in the Hazardous Materials Transportation Act of 1974 [now codified at 49 U.S.C. § 5123]. The Secretary delegated the authority to impose a civil penalty after notice and an opportunity for a hearing to the Administrator. 49 C.F.R. § 1.47(k).

With the passage of P.L. 100-233, Congress recognized the necessity of developing a better system to punish and deter violators of the FAA's safety regulations. To fix the situation, Congress enacted P.L. 100-233 which created a 2-year demonstration program (made permanent with some modifications in 1992) in which the Administrator had the authority to prosecute civil penalty actions and assess civil penalties after a hearing in safety cases. Thus, P.L. 100-233 gave the Administrator authority to prosecute cases and assess civil penalties after a hearing in safety cases similar to the authority that the Secretary had already delegated to the Administrator in hazardous materials cases.

One significant difference was that Congress only granted the Administrator the authority to prosecute and assess civil penalties for violations of the safety regulations in cases in which the Administrator sought a civil penalty not exceeding \$50,000. The Hazardous Materials Transportation Act did not limit the Administrator's authority in hazardous materials cases to prosecute and to assess a civil penalty.

(1) A civil penalty action in which a complaint has been issued for an amount not exceeding \$50,000 for a violation arising under the Federal Aviation Act of 1958, as amended [now codified at 49 U.S.C. § 40101 *et seq.*] ... or a rule, regulation, or order issued thereunder.

(2) A civil penalty action in which a complaint has been issued for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471 [now codified at 49 U.S.C. 46301], *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801 [now codified at 49 U.S.C. 5123] *et seq.*), or a rule, regulation, or order issued thereunder.

14 C.F.R. § 13.201(a)(1) and (2).¹⁹

Section 13.201(a) makes the Rules of Practice in Part 13, Subpart G,²⁰ applicable to aviation safety and security cases seeking civil penalties \$50,000 or below, and to cases involving the transportation by air of hazardous materials of any amount. It is consistent with the statutory scheme, as discussed above.

Section 13.201(c), however, is not consistent with Section 13.201(a). Section 13.201(c) provides: "Notwithstanding the provisions of paragraph (a) of this section, the United States district courts shall have exclusive jurisdiction of any civil penalty initiated by the Administrator: (1) which involves an amount in controversy in excess of \$50,000." 14 C.F.R. § 13.201(c). This section states, in other words, that the

¹⁹ The FAA explained in the preamble to the final Rules of Practice issued in 1988 that

[T]he authority contained in the 1987 amendment [P.L. 100-233] is similar to the authority granted to the agency in the Hazardous Materials Transportation Act with one exception. The statutory authority to prosecute civil penalty actions brought under the Federal Aviation Act is limited to civil penalties that do not exceed \$50,000; the authority to bring civil penalty actions under the Hazardous Materials Transportation Act is not so limited.

The FAA believes that one set of procedures, before and during the hearing, for hazardous materials cases and cases brought pursuant to the Federal Aviation Act would eliminate confusion and duplication in civil penalty proceedings.

53 Fed. Reg. 34646, 34647 (September 7, 1988).

²⁰ 14 C.F.R. Part 13, Subpart G.

Administrator may *not* bring before the DOT ALJs cases involving the transportation of hazardous materials by air seeking a civil penalty above \$50,000.

It is apparent from the regulatory history that the FAA did not intend to issue a rule that limited the Administrator's assessment authority in hazardous materials cases. As explained in the preamble summary to the 1990 final rule, the FAA intended for the regulations to apply to "FAA civil penalty actions (1) not exceeding \$50,000 for a violation of the Federal Aviation Act of 1958, or any rule, regulation, or order issued thereunder, and (2) regardless of amount, for a violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder." 55 Fed. Reg. 27548 (July 3, 1990). Further in the preamble to the 1990 rule, the agency explained that "[i]n the final rule issued in August 1988,²¹ the FAA made the rules of practice applicable to civil penalty actions, regardless of amount, for a violation of the Hazardous Materials Transportation Act, or any rule, regulation or order issued thereunder." Later, it was stated in the preamble:

... it must be understood that the rules of practice subject to this rulemaking apply only to (1) civil penalty actions not exceeding \$50,000 for alleged violations of the safety and security relations (sic); ... (3) civil penalty actions *regardless of amount* for alleged violations of the of the Hazardous Materials Transportation Act.

55 Fed. Reg. at 27553 (emphasis added). There is simply no evidence in the preamble to the 1990 rule that the FAA intended to put a cap on the applicability of the Part 13,

²¹ The FAA first issued procedural rules implementing its authority under P.L. 100-233 in a final rulemaking document published in the Federal Register on September 7, 1988, without notice and prior comment. Subsequently, the U.S. Court of Appeals for the D.C. Circuit held that the FAA should have provided notice and an opportunity for prior comment before issuing the final procedural rules. *Air Transport Association (ATA) v. DOT*, 900 F.2d 369 (D.C. Cir. 1990), *cert. granted sub nom.*, *DOT v. ATA*, 111 S. Ct. 669 (1991), *vacated and remanded*, 111 S. Ct. 944 (1991), *vacated sub nom.*, *ATA v. DOT*, 933 F.2d 1043 (D.C. Cir. 1991) (on the issue of mootness).

Subpart G procedural rules to hazardous materials cases. Moreover, regardless of the agency's intent in drafting Section 13.201(c), where Congress specified that the Secretary of Transportation had the authority to prosecute and adjudicate civil penalty actions under the Federal hazardous materials statute, the Administrator could not create jurisdiction in the United States district courts.

It can only be concluded that Section 13.201(c) apparently reflects either a typographical error or a drafting mistake. In any event, it does not reflect accurately either Congress's or the agency's intent regarding the prosecution and adjudication of hazardous materials cases.

In light of the above, Aero Continente's argument that the ALJ lacked jurisdiction over this case is rejected.

2. Liability for the Actions of IPT.

Aero Continente argues that the ALJ erred in assessing a civil penalty against it because 1) it did not knowingly violate the HMR and 2) it was not in any way involved in the packing, labeling or shipping of the PBE. As a result, Aero Continente argues, it was error for the ALJ to assess a civil penalty against it under 49 U.S.C. § 5123.

Section 5123(a)(1) provides:

(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. 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.

49 U.S.C. § 5123(a)(1).

There is no evidence indicating that Aero Continente itself had actual knowledge of the hidden PBE shipment, and the ALJ found that Aero Continente had no such knowledge. The question is, however, whether Aero Continente should be held responsible for the actions taken by IPT in light of the fact that Aero Continente had delegated authority to secure aircraft parts, including this particular device, to IPT. IPT certainly had knowledge of the underlying fact that it was shipping a PBE by air.²² If IPT was acting as Aero Continente's agent, as the ALJ found, then its knowledge of the underlying facts can be imputed to Aero Continente. However, if IPT was acting as an independent contractor, then Aero Continente should not be held liable for IPT's failure to comply with the HMR when it shipped the PBE. See In the Matter of Federal Express, FAA Order No. 2002-20 (August 5, 2002), *reconsideration denied*, FAA Order No. 2003-2 (May 6, 2003).

The ALJ held that Aero Continente was the offeror of the shipment because IPT was acting as Aero Continente's agent. (Initial Decision at 5-6.) He based this determination upon these facts: 1) Aero Continente requested that IPT procure a PBE; 2) IPT shipped the PBE to the manufacturer on Aero Continente's behalf; 3) IPT

²² Under Section 5123, it was not necessary for IPT to know that the PBE was a hazardous material. In the Matter of Smalling, FAA Order No. 94-31 at 6-7 (October 5, 1994); In the Matter of TCI Corporation, FAA Order No. 92-77 (December 22, 1992). As written in the TCI decision:

It is evident from the HMTA's [Hazardous Materials Transportation Act's] legislative history that Congress authorized the Secretary to assess civil penalties against a person who knew about the act that constituted a violation, but may have been unaware of the law. It was written in the conference report accompanying H.R. 15223, which was later enacted, that the conference substitute provided:

(4) ... that a civil penalty may be imposed only upon proof that the defendant knowingly committed the act which constitutes the violation (it is not necessary to show that he knew the act constituted a violation)....

In the Matter of TCI Corporation, FAA Order No. 92-77 at 9, n. 13 (December 22, 1992)(quoting S. Conf. Rep. No. 1347, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7669, 7686).

regularly searched for, procured, and repaired aircraft parts for Aero Continente; 4) Aero Continente supplied blank work order forms and tags to IPT; 5) repair orders were pre-printed with the initials of Luis Fernandez, an IPT supervisor; 6) IPT did not purchase parts for any company but Aero Continente; and 7) Aero Continente was obligated to pay IPT for its services regarding this PBE. The ALJ furthermore rejected Aero Continente's contention that IPT, as the ALJ put it, "was essentially an independent actor" because IPT received no directions about the shipment of the PBE. (Initial Decision at 5.) The ALJ wrote:

Determining responsibility for the violations turns on the nature of the relationship between IPT and Aero Continente, S.A. The evidence showed that IPT's actions were occasioned by a request from Aero Continente, S.A. The carrier wanted a PBE, and it asked IPT to find one. IPT set out to do just that; it carried out Aero Continente, S.A.'s request. As such, the relationship between the entities was that of principal and agent. IPT acted as Respondent's agent. And in furtherance of Respondent's request for a viable PBE – and thus within the scope of its agency – IPT shipped the PBE to Puritan-Bennett. The manner or method by which IPT carried out Aero Continente, S.A.'s request is irrelevant. Aero Continente, S.A. was the principal; as such, it is liable for the HMR violations associated with the shipment.

(Initial Decision at 6.)

"Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and by the other to so act." Restatement (Second) of Agency § 1(1), *quoted in B & G Enterprises, Ltd. v. U.S.*, 220 F.3d 1318, 1323 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001). It is not enough that the person act on another's behalf. "It is a fundamental principle of hornbook agency law that an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.'" Restatement (Second) of Agency § 14 (1958)." International

Longshorement's Ass'n, AFL-CIO v. NLRB, 56 F.3d 205 (D.C. Cir. 1995), *cert. denied sub. nom., Canaveral Port Authority, v. International Longshoremen's Assn.*, 516 U.S. 1158 (1996). It has been held that the right to control, rather than the actual exercise of control, is sufficient to establish this aspect of the test for an agency relationship. In re Coupon Clearing Service, Inc., 113 F.3d 1091, 1099 (9th Cir. 1997). If a person has the right to control only "the result of the work [by another person], and not the means by which it is accomplished, ... an independent contractor relationship exists." *Id.* As the Administrator pointed out in a previous hazardous materials case, what is critical to the finding of an agency relationship is that the principal has the authority to control the detailed performance or day-to-day operations of the entity acting on its behalf. If no such control exists, then the entity is an independent contractor, not an agent. In the Matter of Federal Express Corporation, FAA Order No. 2002-20 at 7.²³

In this case, as the ALJ found, there was ample evidence that IPT was acting on Aero Continente's behalf and with Aero Continente's consent. Whether Aero Continente had the right to control IPT's operations is a separate issue, but nonetheless, a prerequisite to a finding of an agency relationship under case law.

At the time of the PBE shipment, Aero Continente had no offices in the United States and did not fly into this country. The individuals involved with the shipment -- Luis Fernandez and Daniel Yacher -- were IPT employees. IPT paid their salaries. There is no evidence that Aero Continente paid the salaries of any IPT employees, or that Aero Continente had the right to hire or fire IPT employees. The evidence indicates that Aero Continente did not know about the shipment to Puritan-Bennett. After receiving the

²³ Referring to United States v. Orleans, 425 U.S. 807, 814 (1976) quoting Logue v. United States, 412 U.S. 521, 528 (1973).

faxed request for a PBE, Luis Fernandez, IPT's purchasing manager, had no conversations with Aero Continente about this matter. (Tr. 173.) It was Fernandez's responsibility to approve of any work that Puritan-Bennett would perform to put the PBE back into service. (Tr. 188.) These facts tend to indicate that IPT was acting as an independent contractor.

Aero Continente paid for the repairs that IPT arranged for, and any incidental costs, such as shipping. As seen in this case, for example, IPT shipped the PBE on Aero Continente's Federal Express account. Aero Continente, also, was supposed to pay for the cost of the PBE's repair. (Tr. 173.) IPT used Aero Continente materials, including green tags and work order forms "to make their work easier." (Tr. 174-175.) These arrangements, however, appear to have been made for convenience and for accounting and payment purposes (Tr. 129-130),²⁴ rather than to give Aero Continente control over the manner in which IPT completed its work.

Thus, the evidence overall indicates that IPT was serving as an independent contractor, not an agent. Aero Continente, as a result, should not have been held responsible for IPT's offering of the hidden PBE shipment based upon its relationship with IPT. A principal generally is not held responsible for the acts or omissions of its independent contractor. In the Matter of Federal Express, FAA Order No. 2002-20 at 6.

The ALJ cited public policy reasons as an additional basis for finding Aero Continente liable for IPT's actions. The ALJ explained that "air carriers, by the very nature of their business, must be held to a high standard of care." (Initial Decision at 6.) The ALJ also referred to the cases in which the Administrator held that an air carrier's

²⁴ As noted earlier, Aero Continente could not afford to maintain an adequate maintenance reserve fund. (Tr. 129.)

responsibilities are too critical to permit it to delegate them to others. (Initial Decision at 6.) In finding that Aero Continente should be held responsible for IPT's actions, the ALJ wrote: "Permitting air carriers to transfer away their critical safety responsibilities, then, would be contrary to the public interest – particularly when hazardous materials are involved." (Initial Decision at 6.)

These principles and those cases, however, are not applicable here because while Aero Continente is an air carrier, it was not involved in this case in transporting this PBE. In other words, it was not acting as an air carrier in this matter. The standard of care applied to air carriers, as well as cases stating that an air carrier's duty of care may not be delegated to an independent contractor, therefore, are inapplicable. In the Matter of Federal Express, FAA Order No. 2002-20 at 5.

Conclusion.

In light of the above, the ALJ's finding that Aero Continente should be held responsible for the hazardous materials violations arising from IPT's shipment of the PBE because IPT was Aero Continente's agent is reversed. No penalty is assessed.


MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of September, 2003.