

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of: VILLAMOR TABULA

FAA Order No. 2010-6

Docket No. CP08WP0015
FDMS No. FAA-2008-0883¹

Served: June 15, 2010

DECISION AND ORDER²

Respondent Villamor Tabula (“Tabula”) has appealed from the initial decision written by Administrative Law Judge (“ALJ”) Richard C. Goodwin, holding that Tabula offered an undeclared shipment of hazardous materials for transportation by air to China Airlines in violation of the Department of Transportation’s Hazardous Materials Regulations (“HMR”). Tabula argues on appeal that the \$10,000 civil penalty is “inappropriate,” his financial means are very limited, and he has health problems. He requests that no civil penalty be assessed against him.

This decision holds that the \$10,000 civil penalty assessed by the ALJ is excessive under FAA’s sanction guidance policy pertaining to violations of the HMR. The ALJ was under the mistaken impression that muriatric acid, one of the hazardous materials offered by Tabula, “is considered so dangerous that it is forbidden on passenger

¹ Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at <http://www.regulations.gov>. See 14 C.F.R. § 13.210(e)(1).

² The Administrator’s civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

aircraft in all circumstances.” (Initial Decision at 3.) The HMR, however, permit the shipment of muriatric acid aboard passenger aircraft in limited amounts, and the one gallon of muriatric acid that Tabula offered for shipment did not exceed the limit. Consequently, a significantly lower civil penalty is appropriate. After taking all relevant factors into account, as explained below, a \$3,750 civil penalty is assessed.

I. Background

After conducting an investigation, the FAA filed a complaint, alleging that Tabula violated the HMR (listed in the Appendix of this decision) when he offered a box containing hazardous materials for shipment by air on board a China Airlines flight on May 1, 2007. The FAA proposed a \$17,500 civil penalty for these alleged violations.

In a letter dated October 30, 2008,³ Tabula admitted that he included muriatric acid, paint thinner and wood hardener in his checked baggage and that he failed to comply with the requirements of the HMR. He said that he did not know about some of the requirements regarding shipping papers, packaging, and emergency response information, and that he forgot to label the boxes.

A hearing was held on March 4, 2009. The ALJ permitted the FAA to amend the complaint to allege that the muriatric acid offered by Tabula belonged in Packing Group III, rather than Packing Group II. “Packing Groups I, II and III indicate [that] the degree of danger presented by the material is either great, medium or minor, respectively.”

49 C.F.R. § 172.101(f).

³ Villamor Tabula filed this letter with the FAA Hearing Docket. The ALJ denied Complainant’s “Motion to Deem Allegations Admitted and to Issue Order Assessing Civil Penalty” based upon his finding that Tabula responded in this letter to the allegations contained in the complaint. (Order Denying Motion served on November 19, 2008.)

The ALJ issued his written initial on June 12, 2009, finding that Tabula violated the HMR, as alleged in the complaint, and assessing a \$10,000 civil penalty.⁴

II. The Facts

On May 1, 2007, Tabula was a passenger on China Airlines Flight 001 from Honolulu, Hawaii, to Manila, Philippines, with an intermediate stop in Taipei, Taiwan. His checked baggage included a plain cardboard box containing the following items:

- a 1-gallon plastic bottle containing muriatric acid;
- a 120-fluid-ounce bottle containing paint thinner; and
- a 1-pint spray can filled with wood hardener.

(Tr. 22-23.) He intended to bring those products with him to paint and remodel his family's house in the Philippines. (Letter by Tabula dated October 30, 2008.)

An alarm went off when Tabula's baggage passed through the CTX machine for x-ray screening. The screener opened the box and found the muriatric acid, paint thinner and wood hardener, as well as caulking compounds. (Exhibit A-2; Tr. 19-21.)

The airline informed Tabula that the box could not be shipped. Tabula contacted his son and requested that he pick up the box. Then Tabula boarded the flight and flew to the Philippines. (Tr. 36-37.)

China Airlines notified the FAA about this incident on May 21, 2007, and asked FAA Special Agent Velma Fish, who is a Hazardous Materials Specialist, to examine the package. After conducting her investigation, Special Agent Fish determined that the box contained hazardous materials. (Tr. 20.)

⁴ Specifically, the ALJ held that Tabula violated the following HMR: 49 C.F.R. §§ 171.2(e), 172.200(a), 172.202(a)(1)-(a)(5), 172.204(a), 172.300(a), 172.400(a), 172.600(c), 172.604(a)(3), and 173.22(a)(2). The pertinent parts of these regulations are presented in the Appendix to this decision.

A. Muriatic Acid

Under the HMR, muriatic acid's proper shipping name is hydrochloric acid. It is a corrosive substance and belongs in Hazard Class 8. Special Agent Fish testified that the muriatic acid that Tabula offered for shipment belongs in Packing Group III. A package containing muriatic acid must bear a "CORROSIVE" label. (49 C.F.R. § 172.101; Tr. 7, 22.) Under the HMR, hydrochloric acid is assigned identification number is UN1789.

Special Agent Fish testified that the amount of muriatic acid that Tabula offered for shipment exceeded the limits under the HMR for passenger-carrying aircraft.

(Tr. 23.) However, according to the HMR's Hazardous Materials Table, no more than 5 liters of hydrochloric acid belonging in Packing Group III may be shipped per package on board passenger-carrying aircraft. 49 C.F.R. § 172.101.⁵ One gallon is equivalent to 3.78 liters.⁶ Hence, the 1-gallon container of muriatic acid offered by Tabula for shipment did not exceed the applicable 5-liter limit.

B. Paint Thinner

The paint thinner's proper shipping name, under the HMR, is "paint related material including paint thinning, drying, removing, or reducing compound." It is a flammable liquid and belongs in Hazard Class 3 and Packing Group III. The proper label

⁵ A 1-liter per package limit applies to hydrochloric acid in Packing Group II shipped on board passenger-carrying aircraft. Hence, if, as originally alleged, Tabula had offered 1 gallon of muriatic acid belonging in Packing Group II, it would have exceeded the limit for passenger-carrying aircraft under the HMR.

But, as the FAA alleged in the amended complaint, Tabula offered muriatic acid belonging in Packing Group III, not II. The agency attorney and the special agent apparently did not realize that a 5-liter limit applies to hydrochloric acid belonging in Packing Group III, and consequently, that the amount offered by Tabula for shipment did not exceed the applicable limitation.

⁶ Webster's II, New Riverside University Dictionary (1984) – definition of "gallon."

is “FLAMMABLE LIQUID.” It is assigned identification number UN1263. (49 C.F.R. § 172.101; Tr. 22.) According to the Hazardous Materials Table, it may be shipped on board both passenger and cargo aircraft.⁷

C. Wood Hardener

Like the paint thinner offered by Tabula, the wood hardener has the proper shipping name of “paint related material including paint thinning, drying, removing, or reducing compound,” is assigned identification number UN1263, and belongs in Hazard Class 3. It is also a flammable liquid and it requires a “FLAMMABLE LIQUID” label. However, unlike the paint thinner, wood hardener, according to the Special Agent Fish, belongs in Packing Group II. It may be shipped on board both passenger and cargo aircraft.⁸

As explained by Special Agent Fish, the package constituted a “hidden shipment” because, contrary to the HMR, the box had none of the required labels or markings and it was not accompanied by shipping papers identifying the hazardous materials contents. In addition, contrary to the HMR, Tabula did not provide emergency response information

⁷ The following amounts of paint related material including paint thinning, drying, removing or reducing compound in Packing Group III may be transported aboard aircraft: 60 liters aboard passenger aircraft and 220 liters aboard cargo aircraft. 14 C.F.R. § 172.101 (Table). The FAA did not allege that the amount of paint thinner that Tabula shipped exceeded the applicable limitation.

⁸ The following amounts of paint related material including paint thinning, drying, removing or reducing compound in Packing Group II may be transported aboard aircraft: 5 liters aboard passenger aircraft and 60 liters aboard cargo aircraft. 14 C.F.R. § 172.101 (Table). The FAA did not allege that the amount of wood hardener shipped by Tabula exceeded the applicable limitation.

to the air carrier and did not pack the materials in the specifically prepared box that is required by the regulations. (Tr. 31.)⁹

D. Sanction Guidance

At the time, the FAA set forth its sanction guidance pertaining to violations of the HMR in FAA Order No. 2150.3A, Appendix 6.¹⁰ This guidance was based upon 49 U.S.C. § 5123. The guidance provided that higher civil penalties should be considered for HMR violations involving substances that pose a greater risk than for those involving a less immediate safety threat. Under the guidance, hazardous materials in risk category A pose a greater threat than hazardous materials in risk category B.¹¹ Consequently, the guidance provides that violations involving hazardous materials with risk factor A warrant a maximum range sanction, while materials with risk factor B warrant a moderate range sanction. If a package contains items with different risk

⁹ Liquid hazardous materials must be wrapped in specific types of absorbent material. The complaint did not allege specifically, and the FAA special agent who investigated this case did not testify, that Tabula failed to wrap the flammable liquids in the appropriate materials. (See Tr. 31.) The FAA did not introduce the photographs that Special Agent Fish took during her investigation. As a result, there is no way to know on this record whether the liquid hazardous materials that Tabula offered for shipment were wrapped in absorbent materials.

¹⁰ The ALJ took judicial notice of the sanction guidance contained in Appendix 6 of FAA Order No. 2150.3A. (Tr. 26.)

¹¹ The guidance describes three risk categories – A, B, and C – with A being the highest risk category and C being the lowest.

“Category A materials are materials that when released in the confines of an aircraft can potentially have a catastrophic effect on an aircraft’s ability to continue safe flight, resulting in a crash or emergency landing causing injury or death to passengers and flight crew, as well as persons on the ground.” FAA Order No. 2150.3A, App. 6 at 18. It includes flammable liquids, PG I and II.

“Category B materials “are materials that may not pose an immediate threat to the safety of a flight but can cause death or injury to persons due to unintended releases in aircraft cabin areas, and potential damage to aircraft structures over a longer period of time due to undiscovered releases on aircraft structural components.” FAA Order No. 2150.3A, App. 6 at 18. It includes flammable liquids, PG III.

Category C materials “are materials that present the least amount of risk to the transportation system.” FAA Order No. 2150.3A, App. 6 at 19.

factors, then, under the guidance, the highest risk factor is applicable to the entire package. FAA Order No. 2150.3A, App. 6 at 6.

Special Agent Fish testified about the FAA's sanction guidance in hazardous materials cases that was in effect at the time that this incident occurred.¹² She testified that under the sanction guidance, the wood hardener offered by Tabula for shipment is categorized as having a risk factor of A, because if released in the confines of an aircraft, "it could potentially have a catastrophic effect on the airplane's ability for a safe flight."¹³ (Tr. 24.) In other words, the release of an item with a risk factor of A could result in a crash or cause injuries or deaths. (Tr. 24-25.) The muriatric acid and paint thinner offered by Tabula for shipment, she testified, are categorized as having a risk factor of B. She explained that if items in this risk category are released, they would not pose an immediate threat to the safety of flight, but may cause death or injury or cause damage to the aircraft structure over time.¹⁴ (Tr. 25.)

The agency attorney argued that under the guidance, \$500 to \$5,000 per type of violation was the appropriate sanction range in this case, involving an individual and one substance exceeding the per package limitation. She argued that this case involves five types of violations, *i.e.*, violations of the regulations pertaining to required (1) shipping papers, (2) labels; (3) markings; (4) packaging; and (5) emergency response

¹² Tabula offered the box for shipment before the current sanction guidance, incorporated in FAA Order No. 2150.3B, went into effect on October 1, 2007.

¹³ See n.11, *supra*.

¹⁴ See n.11, *supra*.

information.¹⁵ She concluded by arguing that a \$17,500 civil penalty would be appropriate under the sanction guidance. (Tr. 55-56.)

Tabula testified, in response to the ALJ's questions, that he is retired, receives \$700 a month from Social Security, and owns his home in Honolulu. (Tr. 38-39.) He did not introduce any documentation reflecting his financial circumstances.¹⁶ He argued that he could not afford the civil penalty sought by the FAA. (Tr. 58.)

The ALJ let Tabula's daughter address the court, due to Tabula's difficulty expressing himself in English. His daughter stated that "I know that he didn't intend any harm." (Tr. 58.) She did not testify about her father's finances.

III. The Initial Decision

The ALJ held that the FAA demonstrated that Tabula knowingly committed the alleged violations. (Initial Decision at 2.) Regarding the appropriate civil penalty, the ALJ discussed the hazards associated with undeclared shipments of hazardous materials and wrote that "[t]he substances in this case ... could have proven particularly perilous." (Initial Decision at 3.) He noted that according to the agency's sanction guidance, the wood hardener is categorized as having a risk factor of A, and that the muriatric acid and paint thinner are classified as having a risk factor of B. He explained, mistakenly, that muriatric acid is so dangerous that it is forbidden aboard passenger-carrying aircraft. (Initial Decision at 3.) The ALJ noted further that "[t]akeoffs and landings pose a special

¹⁵ Special Agent Fish testified about required training, and the agency attorney mentioned these requirements in her closing argument. The training requirements, however, do not apply to individuals, and Complainant did not allege that Tabula violated the regulations requiring specialized training for employees of companies that ship hazardous materials.

¹⁶ However, the ALJ had barred Tabula from introducing any evidence at the hearing other than his own testimony because Tabula did not respond to the FAA's discovery request, the FAA's Motion to Compel Discovery Responses, or to the ALJ's Order Granting Motion to Compel and Order to Show Cause. (See Order Sanctioning Respondent, served February 23, 2009.)

risk of mishap” because the possibility of a package shifting during those stages of flight is greater than during a flight’s cruising stage. (Initial Decision at 3.) China Airlines Flight 001 flew from Honolulu, Hawaii, to Taipei, Taiwan, before flying on to Manila, Philippines. (Tr. 43-44.) He aptly wrote:

In sum, a catastrophe could occur when seemingly innocuous household items such as these materials are placed in the stream of commerce without warning to the carrier, its employees, or emergency rescue personnel. Mr. Tabula, as the offeror of these materials, must bear responsibility for this unacceptable level of risk.

(Initial Decision at 3.)

The ALJ noted that Tabula meant no harm and that the hazardous materials did not get on board the aircraft. He explained, however, that these factors “are fortuitous and do not mitigate.” (Initial Decision at 4.) He held that Tabula did not introduce the necessary documentation to prove his claim that he cannot afford the civil penalty proposed by the FAA.

He concluded as follows:

In weighing the totality of the facts and circumstances, I find and conclude that a civil penalty assessment of \$10,000 is appropriate. It adequately reflects the nature of the risk to air transportation safety put in motion by the actions of Mr. Tabula. The assessment also will achieve the statutory purpose of promoting compliance with the HMRs. The fine also contains sufficient “bite,” or deterrent effect. (Citations omitted.) It is a substantial sum for an individual respondent. In sum, I conclude that a civil penalty in the amount of \$10,000 appropriately accounts for the factors the statute directs in fixing the assessment.

(Initial Decision at 4.)

IV. Discussion

The penalty assessed by the ALJ is excessive because it was based, in part, upon the ALJ’s mistaken finding that the shipment included a hazardous material that is prohibited aboard passenger-carrying aircraft. As discussed above, the HMR permit

limited amounts of muriatric acid to be transported aboard passenger-carrying aircraft, and the amount of muriatric acid offered by Tabula was within that limit. As will be explained further, this decision assesses a \$3,750 civil penalty. Tabula did not prove that other circumstances exist that warrant a reduction of a \$3,750 civil penalty.

In determining the amount of a civil penalty in hazardous materials cases, the following statutory factors must be considered: (1) the nature, circumstances, extent, and gravity of the violation(s); (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 requires. 49 U.S.C. § 5123. One purpose of the agency sanction guidance is to “aid in analysis of the facts and circumstances of each case so as to arrive at an appropriate sanction *in light of the statutorily defined penalty considerations.*” FAA Order No. 2150.3A, App. 6, at 1 (emphasis added); see also 2-3.

According to the sanction guidance, a civil penalty in the range of \$250 to \$1,000 should be considered for each type of violation in cases involving an individual who offered a hazardous material in an amount that was permitted on board passenger-carrying aircraft.¹⁷ In this case, contrary to the agency attorney’s argument and the ALJ’s finding, the applicable civil penalty range per violation is \$250 to \$1,000 because the amount of muriatric acid shipped that Tabula shipped was within the permitted limitation for passenger-carrying aircraft.

When a package includes hazardous materials in several risk categories, it is appropriate under the guidance to base the civil penalty upon the highest risk category

¹⁷ In contrast, when an individual offered a hazardous material in an amount exceeding the amount permitted on board passenger-carrying aircraft, the appropriate penalty range per violation is \$500 to \$5,000 per violation, in recognition of the higher risks involved.

item in the package. In this case, Tabula offered wood hardener in risk category A and muriatric acid and paint thinner which belong in risk category B for shipment. As explained in the guidance, packages containing hazardous materials in risk category A warrant a maximum civil penalty, in the absence of other pertinent factors. See FAA Order No. 2150.3A, App. 6 at 6. Applying this guidance, a penalty between \$750 and \$1000 per violation would be appropriate unless other factors justify a lower penalty.

Further, Tabula's violations fall into five categories: shipping papers, markings, labels, packaging, and emergency response information. See FAA Order No. 2150.3A, App. 6, Matrix, Figure 1. Thus, in this case, under the agency's guidance, a civil penalty of \$3,750 to \$5,000 would be appropriate, unless mitigating factors are shown.

Tabula argues that he did not intend to violate the regulations, that he forgot to label the box, and that he was unaware of some of the requirements. He notes further that the materials were not actually shipped. As explained by the ALJ, however, these factors do not warrant lowering an otherwise appropriate civil penalty. He wrote:

But these circumstances are fortuitous and do not mitigate. Whether Respondent intentionally or unintentionally brought the hazmats on board an aircraft, the results could have been equally catastrophic. Had Respondent, by contrast, been aware of the risk of harm he introduced, such a circumstance would have been considered aggravating, and might have warranted a larger fine or even criminal prosecution. *See, e.g., TCI Corporation*, FAA Order No. 92-77 (December 21, 1992).

Tabula offered to "spend my time educating people about the items that can and cannot be brought on the airplane." (Appeal Brief at 1.) As laudable as this offer is, the Administrator does not have the authority in civil penalty actions to order such an alternative sanction. (See Martinez, FAA Order No. 2000-21 at 2 (August 24, 2000), explaining that the FAA governing statute and regulations provide only for monetary

civil penalties in civil penalty cases and do not permit community service as an alternative sanction.)¹⁸

Tabula wrote in his appeal brief that he “thought that it was enough to stand by the scanning machine and wait for the scanner to tell me if the items were ok to fly on the airplane.” (Appeal Brief at 1.) The Administrator finds this explanation to be disturbing. Tabula offered an unmarked, unlabelled box of hazardous materials for shipment by air. He did not do anything to bring the nature of the shipment to the attention of the airline or the screeners. Such a “sit back and wait” attitude can have serious consequences and could have jeopardized the safety of the passengers, crew, aircraft and airline personnel who handled the box.

In light of the above discussion, the applicable sanction guidance calls for a civil penalty between \$3,750 and \$5,000. As helpful as that sanction policy can be, it does not dictate an exact amount to be assessed. In general, as long as the assessed penalty falls into the range that should be used after consideration of all relevant factors, and no factors that would justify an assessment of a civil penalty above or below that range (i.e., inability to pay, willful violation; history of past violations) exist, then the amount assessed is not arbitrary under the guidance and constitutes a reasonable exercise of the Administrator’s discretion to assess a civil penalty.

Tabula argues on appeal that he cannot afford to pay the \$10,000 civil penalty assessed by the ALJ. At the hearing, Tabula testified that he is retired, that he owns a

¹⁸ See also Degenhardt, FAA Order No. 1990-20 (August 16, 1990), in which the Administrator rejected the ALJ’s offer to vacate his decision assessing a civil penalty if the respondent would publish a letter in a local newspaper to raise awareness of the prohibition against bringing a firearm into an airport sterile area. In rejecting the ALJ’s offer to vacate his decision, the Administrator noted, among other things, that the Rules of Practice in Civil Penalty Actions do not permit an ALJ to fashion an entirely different remedy for a violation instead of a civil penalty.

home in Hawaii, and that he receives approximately \$700 per month in Social Security payments. (Tr. 39.) In his appeal brief, he wrote that his monthly income consists of \$600 from Social Security and \$700 from his pension. He listed the amounts that he has in “savings” and in an IRA account. He listed his regular monthly bills -- home mortgage, electricity, telephone, water, cable, and food -- and explained that he has doctor and medication bills. He included copies of documents to substantiate his mortgage, water, sewer, electricity, cable, and telephone bills.

When proven, inability to pay may justify a reduction of an otherwise appropriate civil penalty. However, in this case, Tabula did not prove inability to pay at the hearing stage of the proceedings. The ALJ correctly held that Tabula’s testimony at the hearing was not sufficient to prove inability to pay. A respondent attempting to prove inability to pay must substantiate his or her claims at the hearing with the types of records that a reasonable person would accept as reliable and probative on the issues of incomes and expenses. See Giuffrida, FAA Order No. 1992-72 (December 21, 1992).

On appeal, Tabula attached some of the types of documents that a reasonable person would accept as probative evidence regarding his expenses (although not of his income or assets) to his appeal brief. However, even if these documents sufficed to prove that he cannot afford to pay the \$10,000 civil penalty assessed by the ALJ, it is too late to submit these documents on appeal when their significance cannot be clarified through cross-examination. Further, Tabula’s statement in his appeal brief pertaining to his pension income is an unsworn and unsubstantiated statement that does not suffice to prove his income or his inability to pay.

Tabula's health issues, including his diabetes and history of strokes, do not excuse his violations of the HMR, and they do not justify a reduction of the \$3,750 civil penalty assessed in this decision.

In light of this analysis, it is determined that a \$3,750 civil penalty is appropriate in this matter. While it may be a substantial amount for an individual to pay, it is commensurate with all of the circumstances involved in this case, and hopefully, will suffice to deter Tabula and similarly situated individuals from offering hidden shipments of hazardous materials to air carriers in the future.¹⁹

[Original signed by J.R. Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

¹⁹ This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

APPENDIX

Section 171.2(e)²⁰ provides:

(e) No person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter

Section 172.200(a) provides:

(a) *Description of hazardous materials required.* ... [E]ach person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner required by this subpart.

Sections 172.202(a)(1)-(5) provide:

(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 § 172.201 table;
- (2) The hazard class or division number ... as shown in Column (3) of the § 172.101 Table
- (3) The identification number prescribed for the material as shown in Column 4 of the § 172.201 table;
- (4) The packing group in Roman numerals, as designated for the hazardous material in Column 5 of the § 172.101 Table ...; and
- (5) The total quantity of hazardous materials ...;

Section 172.204(a) provides:

(a) [E]ach person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing ... on the shipping paper ... the certification contained in paragraph (a)(1) of this section or the certification ... 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 the proper shipping name, and are

²⁰ All citations are to the October 1, 2006, edition of Title 49 of the Code of Federal Regulations. The regulations at issue were not revised again until October 1, 2007.

classified, packaged, marked and labelled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations.”

Section 172.300(a) provides:

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

Section 172.400(a) provides:

(a) [E]ach 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

Section 172.600(c) provides:

(c) ... No person to whom this subpart applies may offer for transportation, accept for transportation, transfer, store or otherwise handle during transportation a hazardous material unless:

(1) Emergency response information conforming to this subpart is immediately available for use at all times the hazardous material is present; and

(2) Emergency response information ... is immediately available to any person who, as a representative of a Federal, state or local government agency, responds to an incident involving a hazardous material, or is conducting an investigation which involves a hazardous material.

Section 172.604(a)(3) provides:

(a) A person who offers a hazardous material for transportation must provide an emergency response telephone number, including the area code or international access code, for use in the event of an emergency involving the hazardous material. The telephone number must be –

...

(3) Entered on a shipping paper, as follows:

(i) Immediately following the description of the hazardous material ...; or

(ii)... in a clearly visible location

Section 173.22(a)(2) provides:

(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 only in accordance with the following:

- (1) The person shall class and describe the hazardous material in accordance with parts 172 and 173 of this subchapter, and
- (2) The person shall determine that the packaging or container is an authorized packaging, including part 173 requirements, and that it has been manufactured, assembled, and marked in accordance with:
 - (i) Section 173.7(a) and parts 173, 178 or 179 of this subchapter;
 - (ii) A specification of the Department in effect at the date of manufacture of the packaging or container;
 - (iii) National or international regulations based on the UN Recommendations
 - (iv) An approval issued under this subchapter; or
 - (v) An exemption or special permit issued under subchapter A of this chapter.

SERVED JUNE 9, 2009

DEPT. OF TRANSPORTATION
DOCKETS

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

2009 JUN 10 A-9:54

FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

VILLAMOR TABULA,

Respondent.

FAA DOCKET NO. CP08WP0015

(Civil Penalty Action)

DMS NO. FAA-2008-0883

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: Respondent is hereby assessed a civil penalty of \$10,000.

I. Background

Respondent Villamor Tabula ("Respondent" or "Mr. Tabula"), a resident of Wai'anae, HI., is charged with knowingly offering in air transportation an undeclared shipment of hazardous materials. "Undeclared" means that the shipment contained none of the safeguards that the Hazardous Materials Regulations ("HMRs"), 49 CFR §171 *et seq.*, mandate for the shipment by air of inherently dangerous goods. These safeguards include specifications for labeling and packaging and emergency response information.

On May 1, 2007, Mr. Tabula was about to board a flight from Honolulu, HI. to Manila, Philippines, when a package he tendered as checked baggage was intercepted (Tr. 19-21, 37-38). The package, a cardboard box, contained a one-gallon plastic container of muriatic acid (hydrochloric acid), a bottle containing 120 fluid ounces of paint thinner, and a one-pint spray can of wood hardener. These substances all are classified under the HMRs as hazardous materials.

The package contained none of the marking or labeling notifications necessary for the air transportation of such substances. Nor was it packaged in the required manner. Emergency response information also was lacking. There was no indication that the substances inside the package were classed as hazardous materials (Tr. 21-23, 36-37, 46-48; Compl. Exh. 2).

The Complainant, the Federal Aviation Administration ("Complainant," "FAA," or "the agency"), alleges in its amended Complaint¹ that Mr. Tabula thus violated thirteen HMRs, viz., 49 CFR §§171.2(e), 172.200(a), 172.202(a)(1)-(a)(5), 172.204(a), 172.300(a), 172.400(a), 172.600(c), 172.604(a)(3), and 173.22(a)(2). The agency seeks a civil penalty of \$17,500.

Mr. Tabula admits the facts underlying the charges. He acknowledges that he tendered inside a cardboard box muriatic acid, paint thinner, and a high-performance wood hardener to an air carrier for shipment. Mr. Tabula essentially pleads ignorance. He says that was unaware of the requirements associated with shipping hazardous materials, or had forgotten about them.

A hearing was held on March 4, 2009, in Honolulu, HI.. I determined that a written decision was reasonable and appropriate under the circumstances. The parties made closing arguments (Tr. 52-62)

I hold that the facts and circumstances of this case warrant an assessment against Respondent of \$10,000.

II. Discussion and Penalty

As stated above, the salient facts are uncontested. Respondent in his Answer and in his testimony acknowledged that he brought the named materials for transportation by air lacking any of the HMR requirements for shipment of such materials. Moreover, Complainant, through its witness and documentary materials, proved its case (Tr. 20-26, 36-37, 41-48). As such, I find that Complainant demonstrated that Respondent knowingly committed the violations alleged.² The only issue remaining is that of an appropriate civil penalty amount.

Complainant asks for a levy of \$17,500. It bears the burden of proving the appropriateness of this amount by a preponderance of the evidence. *Phillips Building Supply*, FAA Order No. 2000-20 (August 11, 2000), p. 8.

In setting the amount of the penalty, the decisionmaker must consider "the nature, circumstances, extent, and gravity of the violation," and, 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 "other matters that justice requires" (49 U.S.C. §5123(c)). In other words, the totality of the circumstances involved determines the proper assessment. *Stebbins Aviation*, FAA Order No. 2006-3 (February 7, 2006).

¹ The Complaint was amended, without objection, at the hearing. Tr. 5-9.

² Under the statute, a person acts "knowingly" when he or she has actual knowledge of the facts giving rise to the violation. In this case, it means only that Mr. Tabula knew that he was tendering a package to an air carrier. It does not mean that he was aware that the materials inside were classified as hazardous or that he knew he was violating the law. See 49 U.S.C. §5123(a)(1)(A).

Hazardous materials, by their very nature, are dangerous. Tendering of such goods to aircraft puts the safety of air transportation – the overriding goal of the Department – at significant risk. Because of hazmats' inherent capacity for peril, the HMRs affect a web of protection to minimize risk for persons who could be adversely affected by proximity to such materials, such as handlers, passengers, and crew.

Undeclared shipments of hazardous materials lack that protection. As hidden shipments, they constitute a safety threat whose magnitude is unknown. The FAA considers them particularly worrisome. The Administrator has emphasized that undeclared shipments of hazardous materials, "pose a special risk" (*Envirosolve, Inc.*, FAA Order No. 2006-2 (February 7, 2006), p. 14; *Toyota Motor Sales, USA, Inc.*, FAA Order No. 94-28 (September 30, 1994), p. 13).

The substances involved in this case, additionally, could have proven particularly perilous. Wood hardener, a flammable liquid, is categorized as having a risk factor of "A." Such substances, if released in the confines of an aircraft, carry the potential for a catastrophic effect – possible injury or death – on the safety of aircraft operations (Tr. 24-25). Paint thinner, also a flammable liquid, and muriatic acid, a corrosive, both are classified as a category "B" risk, meaning that unintended release of the items could cause death or injury. On-board flammable substances could be transformed into powerful accelerants by fire. Release of such materials also could raise the risk of long-term danger to aircraft structure. Muriatic acid is considered so dangerous that it is forbidden on passenger aircraft in all circumstances (Tr. 23-26; see FAA Order 2150.3A, Appendix 6).

Complainant also noted that the flight which Mr. Tabula eventually boarded contained a scheduled stop in Taipei, Taiwan, before proceeding to Manila (Tr. 43). Takeoffs and landings pose a special risk of mishap. The chance of a package being disturbed during such events, as, for example, by shifting, is higher than during the cruising phase (Tr. 44).

In sum, a catastrophe could occur when seemingly innocuous household items such as these materials are placed in the stream of commerce without warning to the carrier, its employees, or emergency rescue personnel. Mr. Tabula, as the offeror of these materials, must bear responsibility for this unacceptable level of risk.

I find that the facts and circumstances of this case warrant a substantial fine.

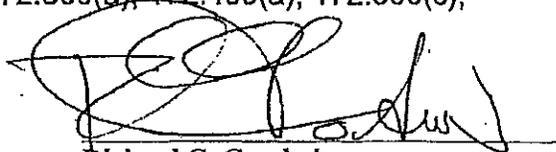
Mr. Tabula's Answer stresses that he meant no harm. I find, based on the testimony and evidence, that Mr. Tabula was not aware of the risk, meant no harm and did not intend to take hazmat on board an aircraft. Mr. Tabula correctly points out that the hazmats never made it on board the aircraft. But these

circumstances are fortuitous and do not mitigate. Whether Respondent intentionally or unintentionally brought the hazmats on board an aircraft, the results could have been equally catastrophic. Had Respondent, by contrast, been aware of the risk of harm he introduced, such a circumstance would have been considered aggravating, and might have warranted a larger fine or even criminal prosecution. See, e.g., *TCI Corporation*, FAA Order No. 92-77 (December 21, 1992).

Mr. Tabula also testified that his income is modest and that he cannot afford the civil penalty proposed by the FAA (Tr. 57-58). But he offered no documentation to back up his statement. Claims unsubstantiated by documentary evidence are insufficient to show inability to pay. *Conquest Airlines*, FAA Order No. 1994-20 (June 22, 1994), p. 3.

In weighing the totality of the facts and circumstances, I find and conclude that a civil penalty assessment of \$10,000 is appropriate. It adequately reflects the nature of the risk to air transportation safety put in motion by the actions of Mr. Tabula. The assessment also will achieve the statutory purpose of promoting compliance with the HMRs. The fine also contains sufficient "bite", or deterrent effect (see *Toyota Motor Sales, Inc.*, FAA Order No. 94-28 (September 30, 1994), p. 11). It is a substantial amount for an individual respondent. In sum, I conclude that a civil penalty in the amount of \$10,000 appropriately accounts for the factors the statute directs in fixing the assessment.

Respondent Villamor Tabula is hereby assessed a civil penalty of \$10,000 for violations of the following HMRs: 49 CFR §§171.2(e), 172.200(a), 172.202(a)(1)-(a)(5), 172.204(a), 172.300(a), 172.400(a), 172.600(c), 172.604(a)(3), and 173.22(a)(2).³



Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

³ This decision may be appealed to the Administrator of the FAA. The notice of appeal must conform to sections 13.210, 13.211(e) and 13.233 of the Rules of Practice, which require that a notice of appeal 1) be filed not later than 10 days (plus an additional five days if mailed) from the service date of this decision, and 2) be perfected with a written brief or memorandum not later than 50 days (plus an additional five, if mailed) from the service date of this decision. The notice of appeal and brief or memorandum must either be a) mailed to the Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, DC 20591, Attn: Hearing Docket Clerk, AGC-430, Wilbur Wright Building—Suite 2W1000, or b) delivered personally or via expedited courier service to the Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, D.C. 20591, Attn: Hearing Docket Clerk, AGC-430. A copy of the notice of appeal and brief or memorandum also must be sent to agency counsel. Service upon the presiding judge is optional.