

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

In the Matter of: RIVERDALE MILLS CORPORATION

FAA Order No. 2003-10

Docket No. CP98NE0017  
DMS No. FAA-1998-4931<sup>1</sup>

Served: September 12, 2003

DECISION AND ORDER<sup>2</sup>

Respondent Riverdale Mills Corporation (Riverdale) has appealed the Administrative Law Judge's (ALJ's) decision<sup>3</sup> assessing Riverdale a \$20,000 civil penalty for hazardous materials violations committed by a Riverdale employee.<sup>4</sup> Riverdale argues on appeal that it is not responsible for the acts of its employee. This decision denies Riverdale's appeal and affirms the ALJ's decision.

**I. Facts**

The facts are undisputed. On March 16, 1998, a Riverdale employee flew on a Business Express flight from Bangor, Maine to Boston, Massachusetts with two 16-ounce cans of a hazardous material called "Aquament" inside his checked baggage. According

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<sup>1</sup> 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>.

<sup>2</sup> 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.

<sup>3</sup> A copy of the decision is attached.

<sup>4</sup> For the regulations at issue in this case, *see* the Appendix.

to his affidavit, he was traveling to British Columbia on Riverdale's behalf to promote "Aquamend," a vinyl repair product, and other Riverdale products. (Complainant's Exhibit 21 at 1; Complainant's Exhibit 9 at 1.) Riverdale has admitted that he was acting within the scope of his employment at the time.<sup>5</sup>

The label on one can read, "RIVERDALE MILLS, AQUAMEND, LIQUID VINYL REPAIR MATERIAL" and "DANGER, EXTREMELY FLAMMABLE." The hazardous materials regulations classify the material as a flammable liquid in hazard class 3, packing group II.

The material was not packaged, marked, or labeled as the regulations require. The cans also were not accompanied by the required shipping papers and emergency response information.

## II. Case History

The ALJ dismissed the complaint because it included the wrong shipping name and number,<sup>6</sup> but the Administrator reversed and remanded the case for a hearing, explaining, among other things, that: (1) the regulations required Riverdale to know what it was shipping; (2) there was still more than enough in the complaint to give Riverdale notice; and (3) Riverdale had not shown any prejudice. In the Matter of Riverdale Mills, FAA Order No. 2000-25 at 3-4 (December 21, 2000).

On remand, Riverdale stipulated that its employee committed the acts alleged in the complaint. Complainant then moved for a decision under 14 C.F.R. § 13.218(f)(5),

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<sup>5</sup> Appeal Brief at 2.

<sup>6</sup> Complainant had moved at the hearing to amend the complaint to change the shipping name and number from "Methyl Ethyl Ketone, UN 1193" to "Adhesives, UN 1133." The ALJ denied the motion because it was untimely.

arguing that there was no longer any genuine issue of material fact and that Complainant was entitled to a decision as a matter of law.<sup>7</sup>

The ALJ granted Complainant's motion for decision. The ALJ found no material issue of fact as to seventeen of the eighteen regulations allegedly violated, and he held as a matter of law that the employee's actions are imputed to Riverdale. (Initial Decision at 9.) The ALJ did find a material issue of fact concerning one regulation,<sup>8</sup> however, and at Complainant's request, he dismissed the allegation involving it. (*Id.* at 10.)

As for the civil penalty, the ALJ noted that Riverdale had not contested Complainant's request for a \$20,000 civil penalty. After considering the required statutory and regulatory factors,<sup>9</sup> he assessed a \$20,000 civil penalty. (*Id.* at 10-11.)

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<sup>7</sup> 14 C.F.R. § 13.218(f)(5) provides in part:

The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law.

<sup>8</sup> 49 C.F.R. § 173.1, which requires hazardous materials training for employees.

<sup>9</sup> The hazardous materials statute and regulations required the ALJ to consider the following factors in assessing a civil penalty:

1. The nature, circumstances, extent, and gravity of the violation;
2. The violator's degree of culpability, history of violations, 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(c) and 14 C.F.R. § 13.16(a)(4).

### III. Riverdale's Appeal

#### A. Vicarious Liability

On appeal, Riverdale argues that it is not responsible because it did not know that its employee was going to transport the hazardous material. The hazardous materials statute does not address whether employers are responsible for violations committed by their employees. Congress, however, legislates against a background of common-law principles, and when it wishes to nullify a common-law principle, it does so expressly. Meyer v. Holley, 123 S.Ct. 824, 829 (2003) (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) and United States v. Texas, 507 U.S. 529 (1993)).

At common law, an employer is vicariously liable for an employee's acts that are within the scope of employment, even if the employer did not know about or authorize the acts. Meyer, 123 S.Ct. 829; In the Matter of TWA, FAA Order No. 1998-11 at 26 (June 16, 1998). There is no language in the hazardous materials statute that abrogates this common-law principle, and under Meyer one can infer from the statute's silence that the principle still applies. Here, Riverdale has admitted that its employee acted within the scope of his employment. (Appeal Brief at 2.) Thus, it is vicariously liable for his acts.

#### B. Knowledge

Riverdale nevertheless argues that it is not responsible for the violations. According to Riverdale, even though its employee should have known the material was hazardous, he did not know it was, and employers are only responsible for their employees' actual knowledge, not their constructive knowledge. To support this argument, Riverdale relies on the following portion of the RESTATEMENT OF AGENCY:

The principal is not affected by [*i.e.*, responsible for] the knowledge which an agent should have acquired in the performance of the agent's duties to the principal or to others, except where the principal or master has a duty to others that care shall be exercised in obtaining information.

RESTATEMENT (SECOND) OF AGENCY § 277 (1958).

Knowledge is indeed an element of a violation of the hazardous materials statute and regulations. Both provide that a person<sup>10</sup> that *knowingly* commits a violation is liable for a civil penalty. 49 U.S.C. § 5123(a)(1); 49 C.F.R. § 171.1(c). Knowledge may be either actual or constructive.<sup>11</sup>

As for the type of knowledge required, the statute provides that the alleged violator must have known the "facts giving rise to the violation." 49 U.S.C. § 5123(a)(1). In contrast, knowledge of the law is unnecessary; persons are liable even if they do not know that they are breaking the law. Thus, in the Smalling case, FAA Order No. 1994-31 at 7 n.9 (October 5, 1994), then-Administrator Hinson rejected Smalling's argument that he did not violate the regulations "knowingly" because he did not know that the firecrackers in his checked baggage were hazardous materials. The Administrator pointed out that Smalling "readily admitted that he had actual knowledge of the facts giving rise to the violation – *i.e.*, that he placed fireworks in his suitcase, and that he checked the bag with the airline." *Id.*

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<sup>10</sup> The definition of person includes corporations. 49 U.S.C. § 5102(9); 1 U.S.C. § 1.

<sup>11</sup> The statute provides:

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).

As in Smalling, Riverdale's employee knew the facts giving rise to the violations – *i.e.*, that he packed "Aquamend" in his luggage and checked it with the airline.<sup>12</sup> It is difficult to believe that he did not know that the "Aquamend" was a hazardous material, given that the label read, "DANGER, EXTREMELY FLAMMABLE." It is irrelevant, however, whether he knew it was a hazardous material, because the product's status as a hazardous material is not a question of fact. Rather, a determination that an item falls within a legally defined category is a question of law. *See In Re Johnson*, 113 B.R. 44, 45 (W.D. Okl. 1989) (holding that the bankruptcy court's determination that a truck fell within a statutory exemption for "tools of the trade" was a finding of law). "Aquamend" is a "hazardous material" by operation of the regulations, which define the term "hazardous material" as follows:

[A] substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under section 5103 of Federal hazardous materials transportation law (49 U.S.C. 5103). The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (see 49 CR 172.101), and materials that meet the defining criteria for hazard classes and divisions in part 173 of subchapter C of this chapter.

49 C.F.R. § 171.8. As Riverdale stipulated, the hazardous materials regulations classify "Aquamend" as a hazardous material – specifically, a flammable liquid in hazard class 3 and packing group II. (Joint Stipulations ¶¶ 5, 6; *see also* the Hazardous Materials Table in 49 C.F.R. § 172.101.)

<sup>12</sup> As one court has said, "[q]uestions of fact essentially require the establishment of 'a recital of external events and the credibility of their narrators.'" United States v. Lang, 149 F.3d 1044 (9<sup>th</sup> Cir. 1998) (quoting United States v. McConney, 728 F.2d 1195, 1200 (9<sup>th</sup> Cir. 1984) (en banc)).

For these reasons, Riverdale's reliance on Section 277 of the RESTATEMENT (SECOND) OF AGENCY to avoid liability is misplaced. While Section 277 provides that an employer is not responsible for an employee's constructive knowledge, Riverdale's employee had actual knowledge of the facts giving rise to the violations, which is all that is required under 49 U.S.C. § 5123(a)(1). Therefore, Section 277 does not apply.

In any event, the last clause of Section 277 expressly excludes cases in which the employer "has a duty to others that care shall be exercised in obtaining information." *Id.* The hazardous materials regulations imposed such a duty on Riverdale that its employees would use care in obtaining information about the proper means of shipping company products. For this reason also, Section 277 does not apply.

#### IV. Conclusion

For the foregoing reasons, Riverdale's appeal is denied, the ALJ's decision is affirmed, and a civil penalty of \$20,000 is assessed.<sup>13</sup>



MARION C. BLAKEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 10<sup>th</sup> day of September, 2003.

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<sup>13</sup> Unless Respondent files a petition for review under 5 U.S.C. § 704 and 28 U.S.C. § 1331 with an appropriate District Court of the United States, this decision shall be considered an order assessing civil penalty.

## APPENDIX

Section 171.2(a)<sup>14</sup> provides:

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 . . . .

Section 172.200(a) provides:

*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.

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 § 172.101 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) . . . .

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

(4) The packing group, in Roman numerals, prescribed for the material in column 5 of the § 172.101 table, if any. . . . ; and

(5) . . . [T]he total quantity . . . , including the unit of measurement, of the hazardous material covered by the description . . . .

Sections 172.202(b) & (c) provide:

(b) 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, PGII."

(c) The total quantity of the material covered by one description must appear before or after, or both before and after, the description required and authorized by this subpart. The type of packaging and

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<sup>14</sup> All citations are to Title 49 of the Code of Federal Regulations.

destination marks may be entered in any appropriate manner before or after the basic description. Abbreviations may be used to express units of measurement and types of packagings.

Sections 172.204(a) and (c)(1)-(3) provide:

(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 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 the proper shipping name, and are classified, packaged, marked and labeled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations."

...

(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. . . .

(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).

Section 172.300(a) provides:

(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.

Section 172.301(a) provides, in relevant part:

(a) *Proper shipping name and identification number.* . . . [E]ach 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. . . .

Section 172.304(a)(1) provides:

(a) The marking required in this subpart –  
(1) Must be durable, in English and printed on or affixed to the surface of a package or on a label, tag, or sign.

Section 172.400(a) provides, in relevant part:

(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)(1) provides, in relevant part:

(c) *General requirements.* No person to whom this subpart applies may offer for 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

. . . .

Section 173.1(b) provides, in relevant part:

A shipment of hazardous materials that is not prepared in accordance with this subchapter may not be offered for transportation by air . . . .