

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

In the Matter of: National Power Corporation

FAA Order No. 2016-3

FDMS No. FAA-0620¹

Served: September 30, 2016

DECISION AND ORDER²

This matter arises from an enforcement action brought by Complainant, the Federal Aviation Administration (“FAA” or “Complainant”) against the Respondent, National Power Corporation (“Respondent” or “NPC”). Complainant alleged that Respondent made multiple shipments of lithium ion batteries in violation of hazardous materials regulations. Both Complainant and Respondent have appealed the initial decision (“Initial Decision”) of Administrative Law Judge Richard C. Goodwin (the “ALJ”), dated July 24, 2015.³ NPC contends that the ALJ erred in (i) finding that it violated each of six regulations for each of eleven shipments of batteries between January 8 and March 25, 2010 (collectively, the “Battery Shipments”), and (ii) assessing an excessive penalty.⁴ The FAA contends that the ALJ erred in (i) determining that it failed to make a prima facie case that NPC violated a seventh regulation with respect to the Battery Shipments, and (ii) reducing the civil penalty proposed by the

¹ Generally, materials filed in the FAA Hearing Docket are available for viewing at <http://www.regulations.gov>. 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: https://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, and the decisions are available through LEXIS (TRAN library) and Westlaw (FTRAN-FAA database).

³ A copy of the ALJ’s Initial Decision is attached as Appendix I.

⁴ See Respondent’s Appeal from Initial Decision at 1, 4 (Sept. 2, 2015) [*hereinafter* “Respondent’s Appeal”]. Respondent’s Appeal challenges the ALJ’s decision as to “49 C.F.R. § 172.02(a)” and “49 C.F.R. § 172.604(a)(10),” neither of which exist. As a point of clarification, (i) the original Complaint, dated August 8, 2013, mistakenly referenced 49 C.F.R. § 172.604(a)(1) as “49 C.F.R. § 172.604(a)(10)”;

(ii) the Initial Decision uses this mistaken reference with a “(sic)” notation; but (iii) the Amended Complaint, dated September 11, 2013, provided the correct reference as 49 C.F.R. § 172.604(a)(1). These are clerical errors and the challenge will be presumed to be against the ALJ’s decision as to 49 C.F.R. §§ 172.702(a) and 172.604(a)(1).

Agency.⁵ For the reasons set forth herein, NPC's appeal is rejected as to five and granted as to one of the six regulatory violations, and Complainant's appeal is granted in its entirety.

I. Burden of Proof and Standard of Review

The FAA has the burden of proof in civil penalty cases, except with regard to affirmative defenses, 14 C.F.R. § 13.224(a) and (c), and the burden to prove the appropriateness of a civil penalty. *Schuman Aviation Company Ltd.*, FAA Order No. 2016-2 (August 24, 2016); *Wallaesa*, FAA Order No. 2013-2 at n.30 (May 14, 2013); *Seven's Paint & Wallpaper*, FAA Order No. 2001-6 at 4-5 (May 16, 2001). The FAA may meet its burden regarding the civil penalty by, among other things, introducing the Agency's Sanction Guidance⁶ and the testimony of an FAA Inspector. *Northwest Airlines*, FAA Order No. 1990-37 at 6-9 (November 7, 1990). A respondent must prove any affirmative defenses relating to the sanction, such as financial hardship or corrective action. *Seven's Paint & Wallpaper*, *supra*; *Atlas Frontiers, LLC*, FAA Order No. 2010-10 at 11 (June 16, 2010).

In an appeal of an initial decision, the FAA decisionmaker considers whether: (1) each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) the administrative law judge committed any prejudicial errors.⁷

II. Knowing Violation of Hazardous Materials Regulations ("HMR")

NPC contends that the ALJ erroneously found it violated the following six regulatory compliance obligations - 49 C.F.R. §§ 171.2(e),⁸ 171.22(b)(1),⁹ 171.22(g)(2),¹⁰ 172.203(f),¹¹

⁵ See Complaint's Appeal Brief (Oct. 19, 2015) [*hereinafter* "Complainant's Appeal"].

⁶ FAA Order 2150.3B (Change 1, Effective Oct. 23, 2009) [*hereinafter*, "Order 2150.3B"].

⁷ 14 C.F.R. § 13.233(b)(1)-(3).

⁸ 49 C.F.R. § 171.2(e) provides: "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

172.604(a)(1)¹² and 172.702(a)¹³ - with regard to the Battery Shipments¹⁴ because the FAA failed to prove that it had an actual, deliberate intent to violate the law.”¹⁵ As support for its contention, NPC inexplicably cites 49 U.S.C. § 5123(a)(1), which provides that:

A person that knowingly violates this chapter or regulation, order, special permit, or approval issued under this chapter is liable to the United States Government for a civil penalty of at least \$250 but not more than \$50,000 for each violation. A person acts knowingly when—

for shipment as required or authorized by applicable requirements of this subchapter or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter.”

⁹ 49 C.F.R. § 171.22(b)(1) provides:

Limitations on the use of international standards and regulations. A hazardous material that is offered for transportation or transported in accordance with the international standards and regulations authorized in paragraph (a) of this section—

(1) Is subject to the requirements of the applicable international standard or regulation and must be offered for transportation or transported in conformance with the applicable standard or regulation

¹⁰ 49 C.F.R. § 171.22(g)(2) provides:

Additional requirements for the use of international standards and regulations. All shipments offered for transportation or transported in the United States in accordance with this subpart must conform to the following requirements of this subchapter, as applicable:...

(2) The training requirements in subpart H of part 172 of this subchapter, including function-specific training in the use of the international transport standards and regulations authorized in paragraph (a) of this section, as applicable...

¹¹ 49 C.F.R. § 172.203(f) provides:

Transportation by air. A statement indicating that the shipment is within the limitations prescribed for either passenger and cargo aircraft or cargo aircraft only must be entered on the shipping paper.

¹² 49 C.F.R. § 172.604(a)(1). Section 172.604(a)(1) has been revised subsequent to the date of the Battery Shipments in 2010. The version effective on those dates is found in 74 FR 53413 (Oct. 19, 2009) and provides:

A person who offers a hazardous material for transportation must provide an emergency response telephone number, including the area code, for use in an emergency involving the hazardous material. For telephone numbers outside the United States, the international access code or the “+” (plus) sign, country code, and city code, as appropriate, must be included. The telephone number must be—

(1) Monitored at all times the hazardous material is in transportation, including storage incidental to transportation....

¹³ 49 C.F.R. § 172.702(a) provides:

(a) A hazmat employer shall ensure that each of its hazmat employees is trained in accordance with the requirements prescribed in this subpart.

¹⁴ See Respondent’s Appeal at 1.

¹⁵ *Id.* at 3. Additionally, NPC asserts that a civil penalty against it lacks deterrence value if NPC did not intend to violate a regulation

- (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.¹⁶

NPC ascribes an interpretation of “knowing” and “actual knowledge” that is unsupported as well as contrary to well-established law¹⁷ and the plain meaning of the statute. Section 5123(a)(1) provides that a person acts “knowingly” when that person has “actual knowledge of the facts giving rise to the violation,” or when a reasonable person exercising reasonable care under the circumstances would have such knowledge. Hence, mere knowledge of the facts giving rise to the violation is required to establish a “knowing” violation of the law; not an actual, deliberate intent to violate the law.¹⁸ As Agency sanction policy makes clear, an intent to violate the law is an aggravating factor in assessing the civil penalty as opposed to an underlying requirement for finding a violation of law.

Accordingly, I deny NPC’s appeal of the ALJ’s finding that it violated 49 C.F.R. §§ 171.2(e), 171.22(b)(1), 171.22(g)(2), 172.604(a)(1), and 172.702(a) with respect to the Battery Shipments.

¹⁶ 49 U.S.C. § 5123(a)(1) (2010). The statutory language quoted above was applicable at the time of alleged violation, but was subsequently amended to remove the \$250 minimum penalty and increase the maximum penalty to \$75,000 per violation. See 112 P.L. 141, Division C, Title III, § 33010 (Jul. 6, 2012).

¹⁷ The Agency’s precedent recognizes this distinction. *In the Matter of Riverdale Mills Corporation*, FAA Order No. 2003-10, 2003 FAA LEXIS 436 at *7 (Sept. 12, 2003), the Administrator noted that § 5123(a)(1) only requires knowledge of the facts giving rise to the violation and that “knowledge of the law is unnecessary; persons are liable even if they do not know that they are breaking the law.” Similarly, *In the Matter of Scott H. Smalling*, FAA Order No. 94-31, 1994 FAA LEXIS 278 (Oct. 5, 1994), Smalling violated the HMRs by placing fireworks in his checked bag. Smalling admitted to knowledge of the firecrackers in his checked bag, but asserted that “he could not have violated the hazardous materials regulations ‘knowingly,’ within the meaning of the Hazardous Materials Transportation Act, because he did not know that firecrackers were hazardous materials and that what he did was wrong.” *Id.* at *6-7. The Administrator rejected Smalling’s appeal. *Id.* at *6-11.

¹⁸ NPC’s reliance on *In the Matter of Falcon Crest Aviation Supply, Inc.*, FAA Order No. 2007-6 (Aug. 1, 2007), is misplaced. In *Falcon Crest*, the Administrator found that the offender did not know that the shipments would travel by air and that it was not unreasonable for the offender to believe that the shipment would travel by ground. *Id.* at 7-9. Shipment by air was a fact necessary for a violation. *Id.* at 7-9, 12-13. *Falcon Crest* focused upon the offender’s knowledge of the facts leading to the violation rather than turning upon whether there was a conscious desire to violate the law. *Id.*

However, I reverse the ALJ's finding that NPC violated 49 C.F.R. §172.203(f). While the original Complaint did assert that NPC violated § 172.203(f),¹⁹ the Amended Complaint excluded that charge²⁰ and, thus, ultimately the FAA did not charge a violation of §172.203(f).²¹

III. Failure to Obtain Required Approval for Battery Shipments

In the Initial Decision, the ALJ also found the Complainant failed to prove that NPC violated 49 C.F.R. § 173.185(f), noting that it required, and there was neither evidence nor testimony that, the Battery Shipments involved lithium ion cells or batteries that had “been damaged or identified by the manufacturer as being defective for safety reasons.”²² However, that finding is contrary to applicable law. The ALJ incorrectly relied upon a version of § 173.185(f) enacted in 2014 that is inapplicable to the case at hand.²³ NPC's Battery Shipments occurred between January 8 and March 25, 2010, and the applicable version of § 173.185(f) effective on those dates provides: “A lithium cell or battery that does not comply with the provisions of this subchapter may be transported only under conditions approved by the Associate Administrator.”²⁴

While NPC agrees that the ALJ used the incorrect version of § 173.185(f), it nevertheless maintains that a finding of a violation would be erroneous and submits that the matter should be remanded so the ALJ who heard the evidence can judge the credibility of the witnesses.²⁵ However, because the ALJ found all witness testimony to be truthful and credible,²⁶ remand of

¹⁹ Complaint (Aug. 8, 2013) at 4.

²⁰ See Amended Complaint (Sep. 11, 2013) at 3-4.

²¹ See Complainant's Appeal at 11 (asserting that a violation of §172.203(f) was not cited).

²² Initial Decision at 23 (emphasis removed).

²³ See 79 FR 46036 (Aug. 6, 2014). The applicable version of § 173.185(f) cited by the Complainant was recodified by the 2014 final rule to § 173.185(g). NPC (Respondent's Reply Brief at 1 (Nov. 13, 2015)) and Complainant (Complainant's Appeal at 7-8) both agree that the ALJ used the wrong version of § 173.185(f).

²⁴ 72 FR 44930 (Aug. 9, 2007).

²⁵ Respondent's Reply Brief at 1.

²⁶ Initial Decision at 16.

this case is unnecessary and a decision can be made based on the findings in the Initial Decision and application of the correct law.

Section 173.185(f) requires the permission of the Associate Administrator of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) to transport a lithium cell or battery that does not comply with the provisions of the HMRs. Although NPC admitted that the Battery Shipments involved the transport of untested lithium cells or batteries and that NPC did not have a letter of special permission or other documentation from PHMSA approving conditions for their transportation; nonetheless it contends the Battery Shipments were exempt from testing because they were similar enough to other batteries that had been tested.²⁷

The FAA makes two counterarguments. First, it contends NPC violated § 173.185(f) simply by virtue of it having shipped batteries in violation of 49 C.F.R. §§ 171.2(e), 171.22(b)(1), 171.22(g)(2), 172.604(a)(1), and 172.702(a).²⁸ However, 49 C.F.R. §§ 171.2(e), 171.22(b)(1), 171.22(g)(2), 172.604(a)(1), and 172.702(a) relate to the Battery Shipments’ packaging and emergency response information and the training of the personnel who shipped the packages, and not whether the batteries themselves violated the HMRs. In and of themselves, such violations are insufficient in the current case to prove a violation of § 173.185(f). Rather, as § 173.185(a) makes clear, to comply with § 173.185(f) the lithium cell or battery must “[b]e of a type proven to meet the requirements of each test in the UN Manual of Tests and Criteria....”²⁹

Second, in its post-hearing brief, Complainant contends the batteries were not tested to the appropriate United Nations standard required by the HMRs and prior to shipment NPC did not obtain the approval of the Associate Administrator for PHMSA.³⁰ During the September 29,

²⁷ *Id.* at 17; Tr. at 123-26.

²⁸ Complainant’s Appeal Brief at 8.

²⁹ 49 C.F.R. § 173.185(a) (2010). This is the version of § 173.185(a) effective at the time of the violation. *See* 72 FR 44930 (Aug. 9, 2007).

³⁰ Complainant’s Post-Hearing Brief of Closing Argument at 6-8 (Dec. 11, 2014).

2014 hearing on the matter, Mr. Zawarus, the FAA's hazardous materials inspector who inspected NPC's facility,³¹ testified that Section 38.3 of the United Nations ("UN") Manual of Tests and Criteria provides that lithium ion cells and batteries shall be subject to testing prior to the transport of a particular cell or battery type.³² Mr. Zawarus' testimony also referenced an exception to that testing requirement - a person could ship an untested lithium cell battery that is similar to a tested battery without PHMSA's permission as long as the differences between the two were "within the allowances for watt hours and voltage" and the differences were of "a type that would not materially change the test results."³³

NPC's Executive Vice President, Mr. Vrablik, testified all eleven Battery Shipments contained lithium ion batteries that were untested at the time of shipping.³⁴ Two Battery Shipments contained the SM 206 model battery.³⁵ The remaining nine Battery Shipments contained the model 520-libat-2 lithium ion batteries.³⁶

Mr. Vrablik also testified that NPC has a different model SM 201-6 lithium ion battery that was tested to UN 38.3 standards.³⁷ Mr. Vrablik stated that NPC's model SM 201-6 lithium ion battery did not differ by more than 20 percent in the anode, cathode, or electro light in mass from SM 206 and is similar in construction to SM 206.³⁸ As such, Mr. Vrablik believed that the tested SM 201-6 battery was not different from the untested SM 206 battery with respect to the

³¹ Tr. at 17-19.

³² United Nations Manual of Tests and Criteria, Fifth Revised Edition, Section 38.3.2.1.

³³ Tr. at 137-138.

³⁴ Tr. at 123-124 (Mr. Vrablik replied "Yes" when asked if it's fair to say that in every single one of the Battery Shipments, none of the batteries shipped were tested).

³⁵ Tr. at 121; Complainant's Exhibit C-4 and C-5.

³⁶ Tr. at 122; Complainant's Exhibit C-1 through C-3 and C-6 through C-11.

³⁷ Tr. at 105-106. Specifically, UN 38.3 refers to United Nations Manual of Tests and Criteria Section 38.3, Lithium metal and lithium ion batteries.

³⁸ Tr. at 107, 109, and 127.

UN standards, and therefore NPC could take the position that the SM 206 battery did not need testing prior to shipment.³⁹

NPC bears the burden of proving its affirmative defense that its untested batteries contained in the Battery Shipments did not need to be tested under Section 38.3 of the UN Manual of Tests and Criteria.⁴⁰ There are three flaws to NPC's defense. First, other than its Vice President's belief that the SM 206 battery did not need testing, NPC failed to provide any other evidence demonstrating that the untested model SM 206 batteries satisfied the requirements in Section 38.2 such that they were exempted from testing. Mr. Vrablik's subjective belief, without further substantiating evidence supporting it, is insufficient to meet NPC's burden of proof.

Second, Mr. Vrablik failed to testify or provide evidence as to whether there were any differences between the tested model SM 201-6 battery and the untested SM 206 battery that would materially affect test results. As such, NPC also failed to meet its burden of proof as to that part of the exemption.

Third, NPC failed to provide any testimony or evidence that the untested model 520-libat-2 qualified for the exemption. Mr. Vrablik's testimony only addressed the differences between the tested model SM 201-6 and the untested SM 206 battery; it did not address the untested model 520-libat-2 battery.⁴¹

³⁹ *Id.* at 127.

⁴⁰ 14 C.F.R. § 13.224. Complainant met its burden of establishing a prima facie case through NPC's admission that the batteries in the Battery Shipments were untested and that NPC did not have a letter of special permission or other documentation from PHMSA approving conditions for their transportation, thereby shifting the burden of proof to NPC for its affirmative defense that the batteries were excepted from testing. *See In the Matter of Continental Airlines, Inc.*, FAA Order No. 98-6, 1998 FAA LEXIS 403 at *6 (Apr. 7, 1998).

⁴¹ Tr. at 122 (after discussion of the differences between the model SM 201-6 and SM 206 batteries, Mr. Vrablik notes that they haven't talked about the model 520-libat-2 yet).

In sum, even though the ALJ generally found NPC's testimony during the hearing truthful and credible, the evidence and testimony it provided was insufficient as a matter of law to establish that the untested model SM 201-6 batteries included in two of the Battery Shipments, and the untested model 520-libat-2 batteries included in nine of the Battery Shipments, satisfied the requirements for exemption from UN 38.3 testing.

Accordingly, based on all of the above, NPC failed to meet its burden to establish its affirmative defense and the FAA established by the preponderance of reliable, probative, and substantial evidence that NPC violated 49 C.F.R. § 173.185(f) when it shipped untested prototype lithium ion batteries in the eleven Battery Shipments without the required permission of PHMSA.

IV. Civil Penalty Assessment

Both NPC and Complainant appeal the ALJ's finding that \$12,000 was an appropriate sanction. NPC asserts that the assessed civil penalty of \$12,000 is excessive, for two different reasons. First, NPC contends Order 2150.3B, Appendix C ("Appendix C") considers "deterrence" in the assessment of a civil penalty and that there is no deterrence value in a penalty if the violator did not know it was violating the regulation.⁴² However, NPC advocates for an unduly narrow vision of deterrence. Deterrence is not solely limited to preventing a person from taking deliberate action that it knows is wrong; but also encourages reasonable steps be taken to prevent or minimize unintentional violations of the law.⁴³

⁴² Respondent's Appeal at 5.

⁴³ Consideration of the deterrent effect of a penalty is not solely focused upon the person in question, but also on others in similar situations. See, e.g., *In the Matter of Frostad Atelier, Inc.*, FAA Order No. 2013-5, 2013 FAA LEXIS 241 at *30 (Sept. 5, 2013) (noting that the penalty amount will deter future violations by Respondent and others); *In the Matter of Folsom's Air Service, Inc.*, FAA Order No. 2008-11, 2008 FAA LEXIS 395 at *33 (Nov. 6, 2008) (levying a civil penalty substantial enough to deter Respondent and other similarly situated entities from committing similar violations in the future). See also Order 2150.3B at 2-14 ("publicizing the action acts as a deterrent for others similarly situated").

Second, NPC contends FAA Order 2150.3B does not contemplate “compounding” sanctions when a single instance of noncompliance results in multiple violations arising from the same or similar conduct.⁴⁴ Complainant contends that each of the eleven Battery Shipments should be assessed separate civil penalties and that the ALJ’s basis for reducing the sanction from \$66,000 to \$12,000 is arbitrary and inconsistent with applicable law and policy.⁴⁵

In the Initial Decision, the ALJ concluded that he would not assess a fine for each regulatory violation by each of the eleven Battery Shipments, for a total of sixty-six violations. Rather, the ALJ determined he would assess a \$2,000 fine for all eleven violations of each of the six violated regulations, for an aggregate fine of \$12,000. As authority for his decision, the ALJ cited guidance in Chapter 7, of the Agency’s Sanction Guidance Policy of Order 2150.3B (Chapter 7).⁴⁶ However, Chapter 7 does not support the ALJ’s decision. First, Chapter 7 is not directly applicable to this case - Chapter 7 explicitly notes the sanction guidance and policies for hazardous materials are addressed in Appendix C of Order 2150.3B.⁴⁷ Second, the ALJ misapplied the terms of Chapter 7. By its terms, Chapter 7’s guidance is applicable to multiple violations of the HMRs arising from a single instance of non-compliance. Chapter 7 provides:

When a single instance of noncompliance results in multiple violations of general and specific regulations involving the same or similar conduct, the FAA ordinarily does not compound the sanction to reflect the amount of sanction recommended in the table for each regulatory violation.

This case does not involve multiple violations of the HMRs arising from a single instance of non-compliance. Rather, this case involves multiple violations between January 8 and March 25, 2010 and, as such, it is governed by sanction guidance set forth in Appendix C of Order 2150.3B. Appendix C of Order 2150.3B provides:

⁴⁴ Respondent’s Appeal at 6, quoting Order 2150.3B at 7-10 (“When a single instance of noncompliance results in multiple violations of general and specific regulations involving the same or similar conduct, the FAA ordinarily does not compound the sanction to reflect the amount of sanction recommended in the table for each regulatory violation....”).

⁴⁵ Complainant’s Appeal at 9.

⁴⁶ Initial Decision at 30. Initial Decision at 27-30; quoting Order 2150.3B, p. 7-10.

⁴⁷ Order 2150.3B at 7-1.

An investigation will occasionally reveal sufficient evidence of several shipments from the same offeror over a period of several days, all of which involve violations of the HMR... for purposes of determining the appropriate sanction, **each separate shipment** with separate air waybill or shipping papers, separate destination, and/or other evidence establishing it as a separate shipment, **is ordinarily considered as a separate incident for purposes of applying the sanction guidance analysis.** It is suggested that the **separate shipments be treated as individual counts** in the [enforcement investigative report] and the notice of proposed civil penalty, **with each count having its own sanction derived from application of this guidance.**⁴⁸

Additionally, 49 U.S.C. § 5123(a)(4) provides that a “separate violation occurs for each day of the violation, committed by a person that transports or causes to be transported hazardous material, continues.” Between them, the eleven Battery Shipments were shipped on seven different days under eleven different airway bills.⁴⁹ Accordingly, applicable law and Agency Sanction Policy expressly authorize applying a sanction amount for each of the eleven Battery Shipments. While the facts and circumstances of a specific case may warrant some adjustment or departure from this process, no particular facts or circumstances justify the ALJ’s decision to not assess penalties for each Battery Shipment in this case.⁵⁰

Before applying the correct Sanction Policy guidance⁵¹ to this case, it is worth noting the ALJ also incorrectly assumed Complainant contended NPC committed seventy-seven violations of the HMRs in arriving at a \$66,000 civil penalty.⁵² Rather, Complainant only charged six

⁴⁸ *Id.* at Appx. C at C-6 to C-7 (italics removed, bold added). Moreover, Appendix C states that multiple packages in one shipment often represent multiple violations, but is considered an aggravating circumstance rather than a direct multiplier of the sanction for each violation. *Id.* at C-6. Hence, Appendix C provides different guidance for different types of multiple violations.

⁴⁹ Tr. at 24 – 50; Exhibits C-1 through C-11.

⁵⁰ Arguing that the \$12,000 penalty is excessive and should be reduced, NPC also misapplies the same language in Chapter 7 that the ALJ misapplied in the Initial Decision, and for the reasons discussed above, NPC’s contentions are rejected.

⁵¹ In such cases “the Administrator has both the authority and the duty to impose the agency’s sanction guidance on appeal.” *Frostad Atelier, supra*, at *28.

⁵² The ALJ calculated that the “FAA alleged National violated seven (7) provisions of the *CFRs* in eleven (11) flights, for a total of seventy-seven (77) alleged violations. Dividing \$66,000 by the seventy-seven (77) alleged violations results in a figure of \$857 per violation.” Initial Decision at 28.

violations of the HMRS in the Amended Complaint for each of the eleven Battery Shipments.⁵³ Indeed, for penalty calculation purposes, Mr. Zawarus testified that he only considered four separate regulatory violations per shipment,⁵⁴ resulting in forty-four total violations for penalty calculation purposes rather than seventy-seven violations as assumed by the ALJ. This evidence directly contradicts the ALJ's finding that Complainant "failed to produce any testimony and/or evidence of how it calculated the proposed penalty of \$66,000."⁵⁵ Given the ALJ's errors, the FAA decisionmaker "has both the authority and the duty to impose the agency's sanction guidance on appeal."⁵⁶

NPC's violations occurred in January through March of 2010. At that time, the minimum civil penalty for HMR violations was \$250 and the maximum was \$50,000, per violation.⁵⁷ By law, the amount of a sanction is determined on the basis of the following factors:

1. the nature, circumstances, extent, and gravity of the violation;
2. with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and
3. other matters that justice requires.⁵⁸

Appendix C of FAA Order 2150.3B requires Agency personnel to answer certain questions to arrive at a weight of minimum, moderate, or maximum; use the Matrix to find the appropriate sanction amount range; and consider any other pertinent factors.⁵⁹

⁵³ Amended Complaint at 3-4.

⁵⁴ Tr. at 68.

⁵⁵ Initial Decision at 28.

⁵⁶ See, e.g., *In the Matter of Frostad Atelier, Inc.*, FAA Order No. 2013-5, 2013 FAA LEXIS 241 at *30 (Sept. 5, 2013).

⁵⁷ 49 U.S.C. § 5123(a)(1), (3) (2010).

⁵⁸ 49 U.S.C. § 5123(c) (2010). The FAA Administrator is authorized to enforce the statute and the HMR for the transport or shipment of hazardous materials by air. 49 C.F.R. § 1.83(d)(1).

⁵⁹ Specifically, it "provides agency personnel with a systematic way to evaluate a case and arrive at an appropriate penalty, considering all the relevant statutory criteria including mitigating and aggravating circumstances" and the guidance is "designed to promote better consistency so that similar penalties are imposed in similar cases." Order 2150.3B, Appx. C at C-2, C-4 *Id.* at C-4 to C-5.

The appropriateness of Complainant's proposed \$66,000 sanction must be reviewed in light of the applicable penalty ranges in the Matrix, and if the specific facts and circumstances warrant, the determination of the specific sanction amount within the penalty range is not a mathematical computation; but rather a judgment based upon the applicable facts and circumstances.⁶⁰ In the current case, the pertinent considerations include:

1. Weight Analysis – Lithium ion batteries are Category C material and receive a Minimum weighting as a Class 9 hazardous material;⁶¹
2. Degree of Culpability – NPC is a designer and manufacturer of lithium ion battery packs and a Maximum weight should be considered;⁶² and
3. Other Factors – The ALJ found that NPC's violations were not intentional.⁶³

Based upon the above considerations, the final aggregate weighting of the case should be between Minimum and Moderate.⁶⁴ After the overall weight of the case has been determined, the Matrix is reviewed to determine the correct Matrix column and offense category to find the appropriate sanction range for each violation. The relevant portion of the Matrix is provided below.⁶⁵

⁶⁰ Order 2150.3B, Appx. C at C-2 and C-4.

⁶¹ Tr. at 63-64; Order 2150.3B, Appx. C at C-6 and 17.

⁶² Tr. at 100 - 101; Order 2150.3B, Appx. C at C-7. Notably, in the Initial Decision the ALJ found as a mitigating factor that NPC had a violation-free history and therefore had not demonstrated a systemic corporate culture guilty of regulatory disregard. Initial Decision at 29. While Appendix C provides that a history of violations is a consideration for assessing Moderate or Maximum weight, a lack of violations is already factored into the penalty range through a Minimum weight and is not separately mitigating. *See* Order 2150.3B, Appx. C at C-8. *See also In re Toyota Motor Sales, USA, Inc.*, FAA Order No. 94-28, 1994 FAA LEXIS 275 at *13 (stating that a violation-free history is not a mitigating factor).

⁶³ Initial Decision at 29. Significantly, the Matrix contains a separate offense category for intentional or deliberate violations with greater sanctions of up to \$50,000 per violation. Order 2150.3B, Appx. C at C-12, 13 and 15.

⁶⁴ While NPC's status as a designer and manufacturer of the lithium ion battery packs suggests a Maximum weighting, that fact alone does not outweigh the other considerations which support a Minimum to Moderate aggregate weighting.

⁶⁵ Order 2150.3B, Appx. C at C-12 (emphasis added). Only offense category "Declared Shipment" is displayed because the Complainant did not present evidence that would justify using a different offense category with a higher penalty range.

OFFENSE CATEGORIES	A. Individuals*	B. Business Entity	C. Business Entity that uses or handles hazmat in the course of business	D. Business Entity that regularly offers, accepts, or transports hazmat
<u>I. Declared Shipment</u>				
1. Shipping Papers	250-550	250-1,100	500-2,200	1,000-5,500
2. Labels	250-550	250-1,100	500-2,200	1,000-5,500
3. Markings	250-550	250-1,100	500-2,200	1,000-5,500
4. Packaging	250-550	250-1,100	500-2,200	1,000-5,500
5. Training	-----	450-1,100	500-2,200	1,000-5,500
6. Emerg. Response	250-550	250-1,100	500-2,200	1,000-5,500
7. Release into Environ.	250-550	250-1,100	500-2,200	1,000-5,500
8. Other	250-550	250-1,100	500-2,200	1,000-5,500

NPC as a designer and manufacturer of lithium ion battery packs falls under Column D as a business entity that regularly offers, accepts, or transports hazmat.⁶⁶ The violations of the six HMRs fall into four different violation groups: packaging, training, emergency response, and other.⁶⁷ This results in a penalty range of \$1,000 to \$5,500 per violation group per shipment. Dividing the penalty range into thirds equates to approximate ranges of \$1,000 to \$2,500, \$2,501 to \$4,000 and \$4,001 to \$5,500 for Minimum, Moderate, and Maximum weightings, respectively. Because the appropriate weighting of the case is between Minimum and Moderate, the appropriate penalty is between \$1,000 and \$4,000 per regulatory violation per shipment.⁶⁸

Next, the Agency sanction guidance requires consideration of the violator's ability to pay the sanction and other matters such as corrective action. The ALJ found no evidence was presented about NPC's ability to pay the sanction.⁶⁹ As NPC bears the burden of proving inability to pay, there is no justification for reducing the penalty on the basis of inability to pay.

⁶⁶ Tr. at 100 -101, 125-126.

⁶⁷ Tr. at 68. Appendix C provides for a single penalty for each "violation group", meaning that "numerous violations of a particular part or subpart of the HMR" are ordinarily assessed a single penalty unless upward adjustment is justified. Order 2150.3B, Appx. C at C-9. The violation groups were packaging (49 C.F.R § 171.2(e)), training (49 C.F.R §§ 171.22(g)(2) and 172.702(a)), emergency response (49 C.F.R § 172.604(a)(1)), and other (49 C.F.R §§ 173.185(f) and 171.22(b)(1)).

⁶⁸ In the aggregate, penalty amounts range from \$44,000 (= \$1,000 sanction x 4 violation groups x 11 Battery Shipments) to \$176,000 (= \$4,000 sanction x 4 violation groups x 11 Battery Shipments).

⁶⁹ Initial Decision at 29.

As to corrective action, the ALJ found that NPC took swift, comprehensive corrective action, which the ALJ gave significant weight.⁷⁰ However, contrary to applicable law, the ALJ conflated NPC meeting its compliance obligations with evidence of corrective action and failed to consider that corrective action must exceed the minimum legal requirements in order to be a mitigating factor in determining the sanction amount.⁷¹ NPC's corrective action consisted of correcting the emergency response number to a 24-hour number, providing the missing training that was lacking; applying for and receiving the PHMSA authorization that was required; and dedicating a page on its website to hazardous materials regulations.⁷² Based upon the violations charged, all of NPC's actions, other than the webpage, are in the nature of meeting minimum requirements, as opposed to significantly exceeding the minimum, and do not qualify as corrective actions. Accordingly, the appropriate sanction remains between \$1,000 and \$4,000 per violation group per shipment.

In considering the \$66,000 sanction amount sought, Complainant asserts that there were four HMR violation groups during the eleven Battery Shipments, resulting in forty-four violations for sanction purposes. Complainant's proposed \$66,000 sanction divided by forty-four results in an average penalty sought of \$1,500 per violation group.⁷³ Fifteen hundred dollars per violation group is within the reasonable range according to the Agency's sanction guidance.⁷⁴ This penalty per violation group is within the lower half of the sanction range of \$1,000 to \$4,000 commensurate with a Minimum to a Moderate overall violation weighting. As discussed above, the ALJ's rationale for reducing Complainant's proposed sanction from \$66,000 to \$12,000 is both unsupported by and inconsistent with the Agency's sanction guidance and based upon mistaken assumptions. Accordingly, the ALJ's reduction of the sanction amount from \$66,000 to \$12,000 is reversed. A \$66,000 civil penalty is appropriate taking into consideration all facts and circumstances.

⁷⁰ *Id.* at 27.

⁷¹ Order 2150.3B, Appx. C at C-11.

⁷² Initial Decision at 25; Tr. at 57-58.

⁷³ Complainant's Appeal at 19-20.

⁷⁴ This amount is lower than the ALJ's determination that \$2,000 per violation was an appropriate sanction.

V. Conclusion

Based upon the foregoing, I deny NPC's appeal except I reverse the ALJ's finding that NPC violated 49 C.F.R. § 172.203(f). I grant Complainant's appeal and: (1) reverse the ALJ's finding that NPC did not violate 49 C.F.R. § 173.185(f); and (2) reverse the ALJ's reduction of the sanction to \$12,000.

In sum, I find NPC violated 49 C.F.R. §§ 171.2(e), 171.22(b)(1), 171.22(g)(2), 172.604(a)(1), 172.702(a) and 173.185(f) with respect to the eleven Battery Shipments and assess a \$66,000 civil penalty.⁷⁵

[Original signed by Michael P. Huerta]

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

⁷⁵ 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), and 13.235 (year). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases.)