UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: EMPIRE AIRLINES, INC.
FAA Order No. 2012-10

Docket No. CP09NM0009
FDMS No. FAA-2009-0586[1]

Served: October 11, 2012

DECISION AND ORDER[2]

Complainant Federal Aviation Administration and Respondent Empire Airlines have filed cross-appeals from the written initial decision of Administrative Law Judge ("ALJ") Richard C. Goodwin.[3] After a hearing,[4] the ALJ held that Respondent violated: (1) 49 C.F.R. §§ 175.30(a)(2) and 175.30(a)(3), prohibiting any person from accepting a hazardous material for air transportation unless the aircraft operator ensures that the hazardous material is properly described and certified on a shipping paper and properly marked and labeled, and (2) 49 C.F.R. § 175.3, prohibiting any person from accepting for transportation or transporting by aircraft a hazardous material that is not prepared properly for shipment. The ALJ also held that Respondent did not violate 49 C.F.R.

[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*. 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.

[3] The ALJ's written initial decision is attached.

[4] The hearing took place on October 26 and 27, 2010, in Portland, Oregon.

§ 175.33(c)(3), which requires an aircraft operator to have certain information, including the location of any hazardous cargo aboard an aircraft, readily available at the destination airport for the duration of the flight leg.[5] The ALJ rejected the $20,000 civil penalty sought by Complainant for the alleged violations of these four regulations, and instead assessed a $12,000 civil penalty for the violations of Sections 175.30(a)(2), 175.30(a)(3) and 175.3.

As will be explained further in this decision, Respondent's appeal of the finding by the ALJ that it violated Sections 175.3, 175.30(a)(2) and 175.30(a)(3) is denied. Further, Complainant's appeal regarding the ALJ's holding that Respondent did not violate Section 175.33(c) and that the $12,000 civil penalty is inappropriate under agency guidance is granted. A $20,000 civil penalty is assessed.

I. Background

A. The Relationship between Empire and FedEx

Empire is a regional cargo carrier that is certificated under 14 C.F.R. Part 119 and operates under 14 C.F.R. Parts 121 and 135. It has a contract with FedEx to serve as a supplemental or feeder airline for FedEx d/b/a FedEx Express. (Tr. 46, 133, 168.) Empire has sole operational control of its aircraft, which are owned by FedEx but are listed on Empire's operations specifications.[6]

To track hazardous cargo on its flights, Empire relies on FedEx's electronic

[5] These regulations and others relevant to this case are set forth in the Appendix.
The alleged violations in this case took place on August 22, 2007. The applicable edition of the *Code of Federal Regulations*, unless otherwise indicated, is the October 1, 2006, edition, because the regulations were not revised again until October 1, 2007.

[6] The aircraft display the FedEx logo but are also required by 14 C.F.R. § 119.9(b) to display Empire's name as the operator of the aircraft.

automated manifesting system, referred to as AutoDG. Only FedEx and FedEx Express personnel may enter or update information in AutoDG (Tr. 146) because Empire employees do not have access to the FedEx computer mainframe. (Tr. 149, 175.) Empire relies upon FedEx to make information about hazardous materials cargo on Empire flights available at destination airports through AutoDG. If there is an emergency on an Empire flight, a FedEx Express employee at the destination airport can provide information regarding hazardous cargo to emergency responders by accessing the AutoDG system. (Tr. 146.)

B. The FAA Inspection at Medford, Oregon

On August 22, 2007, two FAA inspectors conducted a random inspection of Respondent's inbound flights at Medford, Oregon. (Tr. 17.) They observed the arrival and unloading of Flights 8678-22 and 8677-22. (Tr. 26, 27, 47.) Both flights were aboard Cessna 208 aircraft. The inspectors obtained documents pertaining to these flights from FedEx Express station personnel in Medford. (Tr. 19, 79.) Information about these flights is presented in the chart below.

Flight numbers	Aircraft numbers	Referred to by the ALJ in the decision as:	Hazardous material cargo	Number of boxes	Hazard Class, Packing Group, and Identification Number
Flight 8678-22	N778FE	"first flight"	Potassium Hydroxide Solution	5	Class 8, Corrosive Material, Packing Group II, UN 1814[7]
Flight 8677-22	N940FE	"second flight"	Nexium HCP Anti-Bacterial Hand Sanitizing Gel	2	Class 3, Flammable Liquid, Packing Group III, UN 1170[8]

[7] (Complainant's Exhibit 3 at 4.)

[8] (Tr. 56.)

II. Flight 8678-22

A. Facts

Respondent transported five boxes containing potassium hydroxide solution, a Class 8 Corrosive Material, from Portland, Oregon, to Medford, Oregon, aboard Flight 8678-22. FAA inspectors asked FedEx Express personnel in Medford to generate an Inbound DG Alert using the AutoDG electronic manifest system. The Alert indicated that the boxes containing hazardous materials were on the aircraft's main deck (also referred to as "position 1"), and that there were no hazardous materials in the pods. (Complainant's Exhibit 2; Tr. 23-25, 27.) The Alert was consistent with the AutoDG paperwork that both Empire's pilot and FedEx Express's DG specialist signed, which showed that all of the dangerous goods (hazardous materials) were located at "POS 1," the main cabin of the aircraft. The inspectors, however, saw FedEx Express personnel unload the boxes containing hazardous materials from one of the pods. (Complainant's Exhibit 4; Tr. 27.)

Although Respondent's pilot signed the AutoDG paperwork indicating that the dangerous goods were all in the main cabin, prior to departure, he asked FedEx Express's DG specialist to move the boxes to Pod C. (Tr. 163.) The specialist complied, and both the specialist and the pilot signed the Feeder Aircraft Load Control Sheet, with handwritten entries showing that the boxes of corrosives were loaded into Pod C. However, the specialist did not make any handwritten corrections to the AutoDG paperwork and did not update the AutoDG system to reflect the change. (Tr. 163, 178, 179, 192; Complainant's Exhibit 11 at 2.)

During the flight, Respondent's pilot carried a copy of the Feeder Aircraft Load Control Sheet in which he certified that he would also carry a copy of the aircraft manifest. Neither the Feeder Aircraft Load Control sheet nor a corrected AutoDG Alert were available at the destination airport during the flight. Thus, no one at the destination airport had the information that the boxes of corrosive materials were loaded into Pod C.

Respondent's General Operations Manual ("GOM") provided at the time as follows:

> If there is AutoDG paperwork and a last minute DG package shows up that is not listed it can be added to the Load Control Sheet with a pen entry. If the load position of the DG package changes from what is listed on the paperwork, the DG Specialist can correct and initial the change with a pen.

(Complainant's Exhibit 11 at 42.)

B. The ALJ's Initial Decision

Complainant alleged that Respondent violated Section 175.33(c)(3), which provided that the aircraft operator must have certain required information readily accessible at the intended airport of arrival. The ALJ, however, wrote that Respondent was entitled to rely on information provided by another entity when reasonable. The ALJ relied on Section 171.2(f), which provided in pertinent part as follows:

> Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows, or a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect.

The ALJ wrote that it was reasonable for Respondent to assume that FedEx Express personnel had updated the AutoDG system to reflect the location change. (Initial Decision at 4.)

C. Appeal and Analysis Regarding Violations

On appeal, Complainant argues that the ALJ erred in finding that Respondent did not violate Section 175.33(c)(3). Complainant argues that Respondent is responsible for complying with Section 175.33(c)(3), independently of FedEx Express. Complainant also argues that the ALJ misapplied Section 171.2(f) in finding that Respondent did not violate Section 175.33(c)(3).

Section 175.33(c)(3) places the onus on the aircraft operator to have the required information readily accessible at the intended airport of arrival. The regulation states that it is *the aircraft operator* that *must* do so.

Section 171.2(f) does not apply because it pertains only to an air carrier's reliance on *information*, such as that in the shipping papers. In this case, Respondent did not rely upon information provided by FedEx, but instead, relied upon FedEx Express's expected completion of an *action – i.e.*, updating the AutoDG system.

Under the Federal hazardous materials transportation law, only a person who "knowingly" violates the Hazardous Materials Regulations ("HMR")[9] is subject to a civil penalty. 49 U.S.C. § 5123(a)(1). This law provides that:

> 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.

Although Respondent did not have actual knowledge that the AutoDG system had not been updated to show that the boxes had been moved to Pod C, a reasonable person acting in the circumstances and exercising reasonable care would have realized that there

[9]Subchapter C of Title 49 of the Code of Federal Regulations, entitled "Hazardous Materials Regulations," includes 49 C.F.R. Parts 171-180 (2006).

was a problem. Respondent's pilot was presented with and signed conflicting documents – the Feeder Aircraft Load Control sheet, which indicated that the corrosives were in Pod C (Complainant's Exhibit 3-1), and the Aircraft DG Position Summary and Aircraft DG Manifest (Complainant's Exhibit 3 at 2-5), which indicated that the corrosives were on the aircraft's main deck (also referred to as "position 1" – Tr. 23). Respondent's GOM required that if the load position of the hazardous materials changes, then the DG Specialist is to correct and initial the change with a pen, but no such corrections were made on the Aircraft DG Manifest.[10] (Complainant's Exhibit 11 at 42.) Respondent failed to follow the procedures in its own FAA-approved GOM. Even though the information in the documents conflicted, Respondent took no action to reconcile the discrepancy regarding the load location. Hence, Respondent failed to exercise reasonable care.

Consequently, the ALJ's determination that Respondent was not liable for a violation of Section 175.33(c)(3) arising from the unavailability at the destination airport of accurate information regarding the location of five boxes of a Class 8 Corrosive material on Flight 8678-22 is reversed.

[10] Respondent's Director of Quality Assurance, Richard Mills, testified at the hearing that he consulted with the Director of Operations, who was the immediate supervisor of the pilots and who interviewed the pilots of Flight 8678-22 after this incident. Mills testified that the Director of Operations and he believed that the DG specialist had made an appropriate "pen and paper change of the Auto-DG," which was an acceptable practice under the GOM at the time. (Tr. 179.) He testified that "the expectation" was that the AutoDG specialist would enter the information regarding the actual location of the corrosives in the system. (Tr. 179.) However, the AutoDG printout in the record which the pilot had with him during the flight (Complainant's Exhibit 3), was signed by the pilot and the DG specialist, but does not contain any handwritten corrections.

III. Flight 8677-22

A. Facts

On August 21, 2007, AstraZeneca offered two fiberboard boxes to FedEx Express in Baltimore, Maryland. FedEx Express transported the boxes by air to Memphis, Tennessee, and then to Portland, Oregon. On August 22, 2007, FedEx Express ramp agents removed the boxes from the FedEx Express aircraft and loaded them on board Flight 8677-22. (Complainant's Exhibit 7.) Respondent's pilot supervised the loading, which was performed by FedEx Express personnel. Flight 8677-22 flew to Medford, Oregon, where FAA inspectors observed the unloading of the aircraft.

The inspectors had a copy of the DG Alert generated by AutoDG for Flight 8677-22. This Alert indicated that there were no hazardous materials on board Flight 8677-22. (Tr. 41-42; Complainant's Exhibit 5.) When the boxes shipped by AstraZeneca were unloaded, however, the FAA inspectors noticed that the boxes were marked "Consumer Commodity ORM-D" [Other Regulated Material – Domestic],[11] indicating that the boxes contained a consumer commodity of hazardous material presenting a limited hazard in transportation. A photograph of the conveyor belt shows that the sides of the boxes with the ORM-D markings were visible during unloading. (Complainant's Exhibit 8 at 2.) There were ORM-D markings on two sides of the boxes. On one side of the boxes, the markings were next to the shipping labels. (Tr. 84.)

The FedEx Express manager opened the boxes and found in each box twenty-four 354-ml plastic bottles containing Nexium HCP Anti-Bacterial Hand Sanitizing Gel. (Complainant's Exhibit 8, photographs 2 - 4; Complainant's Exhibit 9 at 1; Tr. 83.) The

[11] Respondent's General Operations Manual ("GOM") indicates that "ORM-D" is a label (Complainant's Exhibit 11 at 11), but it is actually a marking. (Tr. 63-64.)

gel has a flash point of 74 degrees Fahrenheit, which indicates that it is a flammable liquid. (Tr. 58.)

The fiberboard boxes containing the hazardous materials should have been accompanied by shipping papers but were not. (Tr. 50.) In addition, the boxes were not marked properly. ORM-D is not a valid marking for hazardous materials shipped by air. (Tr. 151.) Under Section 172.316(a)(1), the proper marking would have been ORM-D-AIR, if the shipment had been properly prepared for air transportation in accordance with Section 173.27. (Tr. 55.) These packages did not qualify as ORM-D-AIR because the screw-type bottle caps on each bottle were not secured in accordance with Section 173.27(d). Hence, as packaged, the boxes could not be transported as ORM-D-AIR or ORM-D, and should have been handled as a Class 3 Flammable Liquid.

Respondent's GOM states that FedEx Express ramp personnel will load and unload hazardous materials and will separate hazardous materials from other freight "so [Respondent's] crewmember may accomplish the pre-load inspection." (Complainant's Exhibit 11 at 41.) The manual also provides that "[a] crewmember must supervise the loading of DG." (*Id*.)

Respondent asserted that its pilot did not notice the ORM-D markings on the boxes while he was overseeing the loading process in Portland, even though the markings were clearly visible in the photograph of the unloading of these boxes in Medford. (Complainant's Exhibit 8 at 2.) According to Respondent:

> The ORM imprint on either end of each box was apparently the only indication that they might contain hazardous materials. When interviewed, our pilot said that he supervised the loading as required but did not see the ORM imprint. He explained that during the loading process, the long dimension of the boxes would run the same direction as the belt loader and the imprint on the box ends would be obscured from

> his view. He said that if he had seen the imprint, he would have pulled the boxes from the loader and investigated prior to loading them.

(Complainant's Exhibit 11 at 2.)

B. The ALJ's Initial Decision

Respondent argued that it should not be held liable for the alleged violations of Sections 175.3, 175.30(a)(2), and 175.30(a)(3) because FedEx personnel controlled acceptance and loading. The ALJ rejected this argument, finding that Respondent "has a full and independent obligation to comply with the HMRs … [due to] its status as an aircraft operator and as the carrier of such materials." (Initial Decision at 6-7.) The ALJ stated that the HMR require aircraft operators to ensure that hazardous materials are authorized for transportation by air and are described and marked properly. He noted that Respondent's GOM:

- sets forth Respondent's responsibility for compliance with the HMR;
- directs Respondent's personnel to verify that the outside of packages are marked properly;
- warns that packages may not be loaded if the shipment does not meet acceptance and packaging requirements; and
- states that noncompliant packages must be rejected.

The ALJ held that Respondent cannot delegate its responsibilities regarding hazardous materials. (Initial Decision at 7.)

The ALJ found further that the FedEx Express personnel who loaded the flight were Respondent's agents because Respondent's GOM provides that Respondent's crewmember must supervise the loading of hazardous materials. The ALJ wrote:

> That the boxes were loaded at an angle which made it difficult to observe the entire outside of the boxes, and that the existing documentation failed to alert the pilot to the hazardous materials, made the pilot's duty of scrutiny trickier, to be sure; but these circumstances do not absolve Empire of liability for the resulting violations.

(Initial Decision at 7.) The ALJ held that Complainant proved that Respondent had violated Sections 175.3, 175.30(a)(2) and 175.30(a)(3).

Regarding the civil penalty, the ALJ assessed $12,000, which was $3,000 for each of the four violations he found (shipping paper and marking violations involving two packages). The ALJ regarded lack of shipping papers and Respondent's reliance on incorrect information as mitigating factors.

C. Appeal and Analysis Regarding Violations

On appeal**,** Respondent argues that the ALJ erred in finding that it violated Sections 175.3, 175.30(a)(2), and 175.30(a)(3). Respondent argues that FedEx Express was its independent contractor, not its agent, because Respondent did not exercise day-to-day control over FedEx Express's operations.[12] Respondent contends that it should not be held liable for an independent contractor's actions. Further, Respondent argues, there was no paperwork indicating the presence of hazardous materials, and the absence of proper shipping papers constituted an implicit representation by FedEx Express that there was no hazardous material on the flight. Respondent argues that it reasonably relied upon this implicit representation.

[12] According to the Restatement (Third) of Agency § 1.01 (2006):

> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

If a person has the right to control only "the result of the work [by another person], and not the means by which it is accomplished, an independent contractor relationship exists." *Aero Continente, S.A.*, FAA Order No. 2003-8 at 16 (September 12, 2003), quoting *In re Coupon Clearing Service, Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997).

In response, Complainant argues that Respondent may not delegate its responsibility under Sections 175.30(a)(2) and (3) to ensure that shipments of hazardous materials are described properly on a shipping paper and marked in accordance with the HMR. Complainant argues that "the arrangement between [Respondent] and FedEx regarding the loading of hazardous materials aboard Respondent's aircraft resembled an agency relationship" because Respondent could not contract away its duty to ensure compliance with the HMR. (Reply Brief at 25-26.) Complainant argues further that the flammable materials were not a hidden shipment. Therefore, Complainant urges, the Administrator should reject Respondent's argument that it committed no violations regarding this flight.

It is undisputed that FedEx Express accepted the non-conforming packages on Respondent's behalf and loaded them on board Flight 8677-22. At common law, a principal generally is not responsible for the acts or omissions of its independent contractors. *Federal Express Corporation*, FAA Order No. 2002-20 at 6 (August 5, 2002). But the common law is not controlling here. The regulations at issue do not differentiate between agents and independent contractors.

Section 175.3 prohibits the transportation aboard an aircraft of any hazardous material that is not prepared properly under the HMR. There is no question that Respondent transported these boxes and that these boxes were not properly prepared for shipment under the HMR because: (1) the boxes were unaccompanied by shipping papers; (2) the boxes were not marked properly; and (3) the bottle caps on the bottles in each box were not secured.

Sections 175.30(a)(2) and (3) stated:

> (a) No person may accept a hazardous material for transportation aboard an aircraft unless the aircraft operator *ensures* the hazardous material is:
>
> (2) Described and certified on a shipping paper … in accordance with part 172 of this subchapter …;
>
> (3) Marked and labeled in accordance with subparts D and E of part 172 ….

(Emphasis added.) The word "ensure" in Section 175.30(a) indicates that the aircraft operator may not delegate its responsibility to comply with this regulation.

Although Section 175.30(a) states that no hazardous materials may be accepted unless the aircraft operator *ensures* compliance with the HMR, the aircraft operator's responsibility is not absolute. Under the Federal hazardous materials transportation law, a person is subject to a civil penalty for "knowingly" violating a provision of the HMR. As stated above, the statute provides that "[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). Also as stated above, Section 171.2(f) provided as follows:

> Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect.

As explained in the preamble to the amendments to Section 175.30 in 2006, "[t]o ignore readily apparent facts indicating … [that] a shipment actually contains a hazardous material governed by the HMR despite the fact it may not be properly marked, labeled, placarded, or described on a shipping paper as containing a hazardous material, would

not represent reasonable care." 71 Fed. Reg. 14586, 14592 (March 22, 2006). Respondent was responsible for the actions of FedEx Express because the boxes had hazardous materials markings that should have put Respondent on notice that the shipment was not prepared in accordance with the HMR.

Respondent argues that this case is like *Federal Express Corporation*, FAA Order No. 2002-20 (August 5, 2002), in which the Administrator held that Federal Express was not responsible for its independent contractor's actions. In that case, Federal Express's independent contractor, Scharff International Courier and Cargo, S.A., ("Scharff") provided ground courier services in Peru. Scharff picked up a box of infectious bacteria from an individual shipper, put the box and its shipping papers in a courier bag, and delivered the bag to American Airlines for air transportation to Miami. The package inside the courier bag constituted a hidden shipment during the American Airlines flight.[13] When the courier bag was opened in Miami, the package of infectious bacteria was discovered. The ALJ held that Federal Express could not delegate its responsibilities to Scharff because air carriers must perform their services with the highest degree of safety in the public interest under 49 U.S.C. §§ 44701(d) and 44702(d). On review, the Administrator held that Federal Express had not served as an air carrier and, therefore, this statutory duty placed on air carriers did not apply to Federal Express. The Administrator also held that Federal Express was not responsible for Scharff's improper offer or acceptance of hazardous materials in air transportation because Scharff was Federal Express's independent contractor. The key difference between the *Federal Express* case and the case at bar is that Empire, as the aircraft operator, transported the

[13] The FAA alleged that Federal Express violated Sections 171.2(a), 172.200(a), 172.202(a), 172.204(a), 172.204(c)(1), 172.204(c)(3), 172.406(f), 172.600(c), 172.604(a), 173.1(b), and 175.30(a)(2) (1997) as a result of Scharff's actions.

boxes of hand gel from Portland to Medford aboard an Empire flight and failed to ensure that the boxes were marked and shipping papers were prepared in accordance with the HMR. In other words, Empire's violations of Sections 175.30(a)(2) and (3) and 175.3 arose from its own actions, not the actions of its independent contractor, Federal Express.

Under the statute and the regulations, Respondent has a non-delegable duty to bar the transportation by air of goods that it knows or should reasonably know do not conform to the HMR. How Respondent chooses to meet that obligation is up to Respondent, regardless of whether the obligation is met by Respondent's employees, its contractor's employees, an agent's employees, or some combination thereof.

For the foregoing reasons, this decision affirms the ALJ's findings that Empire violated Sections 175.3, 175.30(a)(2), and 175.30(a)(3) concerning the two boxes of hand sanitizing gel marked Consumer Commodity ORM-D aboard Flight 8677-22.

IV. Sanction

On appeal, Complainant argues that the $12,000 civil penalty assessed by the ALJ is too low and that the appropriate amount is $20,000, as it sought in the complaint. Respondent argues in response that the ALJ's decision to assess a $12,000 civil penalty is supported by substantial evidence and is consistent with applicable law, precedent and policy.

Complainant bears the burden of proving, by a preponderance of the evidence, the appropriateness of the amount of the civil penalty it seeks. *Phillips Building Supply*, FAA Order No. 2000-20 at 4 (August 11, 2000), citing 14 C.F.R. § 13.224(a) (stating that "[e]xcept in the case of an affirmative defense, the burden of proof is on the agency"). In determining the amount of a civil penalty, the Federal hazardous materials transportation

law requires consideration of:

> (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.

49 U.S.C. § 5123(c). These considerations are factored into the FAA's penalty guidelines for hazardous materials cases, which are located in Compliance and Enforcement Program, FAA Order No. 2150.3A, Change 26, Appendix 6 at 2 (Policy on Enforcement of Hazardous Materials Regulations: Penalty Guidelines) (April 14, 1999).[14] The purpose of the penalty guidelines is to "provide agency personnel with a systematic way to evaluate a case and arrive at an appropriate penalty, considering all the relevant statutory criteria including any mitigating and aggravating circumstances." (FAA Order No. 2150.3A, Change 26, Appendix 6 at 3, Complainant's Exhibit 12 at 2, 64 Fed. Reg. at 19444.)

The penalty guidelines "provide guidance to agency personnel in the exercise of the FAA's prosecutorial discretion in enforcement cases concerning transportation of hazardous material by air." (FAA Order No. 2150.3A, Change 26, Appendix 6 at 3, Complainant's Exhibit 12 at 2, 64 Fed. Reg. at 19444.) Although the ALJs are not agency personnel, "if an ALJ assesses a civil penalty that is not consistent with agency sanction policy, the Administrator on appeal may reverse the ALJ." *Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 14 (November 6, 2008); *Northwest Airlines,*

[14] The FAA published these guidelines in the *Federal Register* as "Federal Aviation Administration Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines." (Complainant's Exhibit 12 at 1; 64 Fed. Reg. 19443 (April 21, 1999).) The FAA has since canceled FAA Order No. 2150.3A, replacing it with FAA Order No. 2150.3B, but FAA Order No. 2150.3A applies in this case because it was in effect at the time of the violations.

Inc., FAA Order No. 1990-37 at 8-9 (November 7, 1990); FAA Order No. 2150.3B, Appendix C, ¶¶ 2, 8.

The penalty guidance requires: (1) weighing the case by answering a list of questions to arrive at a weight of Minimum, Moderate, or Maximum; (2) using the Matrix to find the appropriate sanction amount range; and (3) considering any other statutory factors, such as corrective action or financial hardship. *Id.* at ¶ 8.

It is important to note that the penalty guidelines state that "determination of where the sanction lies within the Matrix is not the result of a mathematical computation," but instead "[e]valuation of the case is based on the totality of the facts and circumstances." (FAA Order No. 2150.3A, Change 26, Appendix 6 at 3; Complainant's Exhibit 12 at 2; 64 Fed. Reg. at 19444.) *See also Stebbins Aviation¸ Inc.*, FAA Order No. 2006-3 at 5 (February 7, 2006) (stating that "it is inappropriate to take a mathematical, formulaic approach of simply multiplying the number of violations by a set dollar amount").

Regarding Flight 8678-22, Respondent transported five boxes containing potassium hydroxide solution, a Class 8 Corrosive Material in Packing Group II. (Complainant's Exhibit 3 at 4.) The penalty guidelines state that Class 8 Corrosive Materials in Packing Group II fall within Risk Category B, which suggests a Moderate weight. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 6, 18 Figure 2 "Risk Categories"; Complainant's Exhibit 12 at 7-8, Figure 2 "Risk Categories"; 64 Fed. Reg. at 19445, 19449-19450, Figure 2 "Risk Categories.") 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, Change 26, Appendix 6 at 18; Complainant's Exhibit 12 at 7, Figure 2 "Risk Categories"; 64 Fed. Reg. at 19449, Figure 2 "Risk Categories".)

The penalty guidelines also state that where there are multiple packages in a shipment – and here there were five – a Moderate or Maximum weight should be considered. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 6-7; Complainant's Exhibit 12 at 3; 64 Fed. Reg. at 19445.) The guidelines state that if someone other than Respondent prepared the shipment for transportation, which was the case here, consider a Minimum to Moderate weight. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 8; Complainant's Exhibit 12 at 3; 64 Fed. Reg. at 19445.)[15] The guidelines also allow for consideration of aggravating and mitigating circumstances that are not routinely seen, recognizing that some cases present unique scenarios. (FAA Order No. 2150.3A, Appendix 6 at 9.)

The assignment of a Minimum final aggregate weight is appropriate for the Flight 8678-22 violation due to FedEx Express's role. Although Respondent is responsible for the violation of Section 175.33(c)(3), Respondent's degree of responsibility was reduced by FedEx Express's failure to follow the usual procedures and to enter information about the change in location of the boxes of potassium hydroxide into the AutoDG system.

[15]The guidelines also ask whether the packages exceeded the authorized quantity limitation by a significant amount, whether the shipment caused damage to persons or property or interfered with commerce, whether the violator was the manufacturer of the hazardous materials, and whether the violator has a history of previous HMR violations. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 6-8; Complainant's Exhibit 12 at 3-4; 64 Fed. Reg. at 19445-19446.) In this case, all of these questions are answered in the negative. The guidelines indicate that questions receiving a negative response do not affect the weighting of the case – that is, these matters are not mitigating. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 5; Complainant's Exhibit 12 at 3; 64 Fed. Reg. at 19445.)

This factor outweighs the other factors previously discussed that would indicate a Moderate or even a Maximum final aggregate weight in this case.

The Matrix recommends a range of $5,000 to $15,000 civil penalty for "Other Part 175 violations" committed by a Group II air carrier like Respondent.[16] Given that the final aggregate weight of the violation of Section 175.33 is Minimum, a civil penalty of $6,000 would be appropriate.

As for Flight 8677-22, the boxes marked ORM-D did not meet all the requirements in Section 173.27 to be designated as Consumer Commodity ORM-D-AIR. (Tr. 55.) The boxes did not meet the requirement in Section 173.27(d) that the screw-type bottle caps inside be secured to prevent the closure from loosening due to vibration or substantial change in temperature. Because the contents of the boxes could not be reclassified as Consumer Commodity ORM-D, they were Class 3 Flammable Liquids and were in Packing Group III. (Tr. 56.) Class 3 Flammable Liquids in Packing Group III fall within Risk Category B (Moderate weight). (Tr. 71; FAA Order No. 2150.3A, Change 26, Appendix 6 at 18 "Risk Categories"; Complainant's Exhibit 12 at 7-8, Figure 2 "Risk Categories"; 64 Fed. Reg. at 19445, 19449-19450, Figure 2 "Risk Categories.")

The penalty guidelines also state that where there are multiple packages in a shipment – here there were two – a Moderate or Maximum weight should be considered. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 6-7; Complainant's Exhibit 12 at 3; 64 Fed. Reg. at 19445.) If someone other than the respondent prepared the shipment for transportation, which was the case here, a Minimum to Moderate weight should be

[16] Group II aircraft operators consist of "air carriers and other aircraft operators that hold Part 121 certificates or have 50 or more pilots or operate 25 or more aircraft, with annual operating revenue of less than $100,000,000." (FAA Order No. 2150.3A, Change 26, Appendix 6 at 15; Complainant's Exhibit 12 at 6; 64 Fed. Reg. at 19448.)

considered under the guidelines. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 8; Complainant's Exhibit 12 at 3; 64 Fed. Reg. at 19445.)[17]

Other factors affect the weighting of the case. First, Respondent relied on the DG Alert generated by AutoDG for Flight 8677-22, which indicated that there were no hazardous materials on board. Further, there were no shipping papers advising of the presence of hazardous materials. And finally, the penalty guidelines state that a reshipper of hazardous materials (like Respondent) "is generally considered to have a lesser degree of culpability [than the original shipper] for compliance of the package received." (FAA Order No. 2150.3A, Change 26, Appendix 6 at 8.) While these factors do not relieve Respondent of liability altogether, particularly because there were ORM-D markings on the boxes that should have alerted Respondent to the hazardous nature of the boxes' content, these factors are properly considered in determining the sanction amount.

In light of these factors, the final aggregate weight for the two Flight 8677-22 violations (absence of shipping papers and failure to mark properly) is Minimum. The next step is to use the Matrix, which sets forth specific penalty ranges. The range under the guidelines for violations of Sections 175.30(a)(2) and (3) is $5,000 to $27,500 per violation for Class 3 Flammable Liquids. (Tr. 74; FAA Order No. 2150.3A, Change 26, Appendix 6 at 15; Complainant's Exhibit 12 at 6, Figure 1; 64 Fed. Reg. at 19448.) A a

[17] As discussed above, the guidelines also ask whether the packages exceeded the authorized quantity limitation by a significant amount, whether the shipment caused damage to persons or property or interfered with commerce, whether the violator was the manufacturer of the hazardous materials, and whether the violator has a history of previous HMR violations. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 6-8; Complainant's Exhibit 12 at 3-4; 64 Fed. Reg. at 19445-19446.) All of these questions are answered in the negative regarding Flight 8677-22. As stated above, the guidelines indicate that questions receiving a negative response do not affect the weighting of the case. (FAA Order No. 2150.3A, Change 26, Appendix 6 at 5; Complainant's Exhibit 12 at 3; 64 Fed. Reg. at 19445.) Respondent has not argued that the mitigating factors of corrective action or financial hardship apply.

civil penalty of $7,500 for each of the two violations (absence of shipping papers and failure to mark properly) would be appropriate.

To summarize, for Flight 8678-22, a civil penalty of $6,000 is appropriate. For Flight 8677-22, a civil penalty of $7,500 for each of the two violations is appropriate. The total is $21,000. However, the civil penalty cannot be higher than the $20,000 sought in the complaint. *Mole-Master Services Corp*., FAA Order No. 2010-11 at 12 (June 16, 2010) (citing 14 C.F.R. § 13.16(j), which provides that "the FAA decisionmaker … shall not assess a civil penalty in an amount greater than that sought in the complaint"). Therefore, a civil penalty of $20,000 is assessed. Based on the guidance and the totality of the circumstances, a $20,000 civil penalty is appropriate.[18]

[Original signed by Michael P. Huerta]

MICHAEL P. HUERTA
ACTING ADMINISTRATOR
Federal Aviation Administration

[18] 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 Respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2012). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

APPENDIX

Section 171.2(f) [19] provided:

> No person may transport a hazardous material in commerce unless the hazardous material is transported in accordance with applicable requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or subchapter A of this chapter. Each carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material or a prior carrier, unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror or prior carrier is incorrect.

Section 172.316(a)(1) provided:

> The designation for ORM-D must be: (1) ORM-D-AIR for an ORM-D that is prepared for air shipment and packaged in accordance with the provisions of § 173.27 of this subchapter.

Section 173.27(d) provided:

> Stoppers, corks or other such friction-type closures must be held securely, tightly and effectively in place by positive means. Each screw-type closure on any packaging must be secured to prevent closure from loosening due to vibration or substantial change in temperature.

Section 173.144 provided:

> "ORM-D material" means a material such as a consumer commodity, which although otherwise subject to the regulations of this subchapter, presents a limited hazard during transportation due to its form, quantity, and packaging. It must be a material for which exceptions are provided in the § 172.101 table. Each ORM-D material and category of ORM-D material is listed in the § 172.101 table.

Section 175.1(b)(1) provided:

> This part applies to the offering, acceptance, and transportation of hazardous materials in commerce by aircraft to, from, or within the United States, and to any aircraft of United States registry anywhere in air commerce. This subchapter applies to any person who performs, attempts to perform, or is required to perform any function subject to this

[19] 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.

subchapter, including--

(1) Air carriers, indirect air carriers, and freight forwarders and their flight and non-flight employees, agents, subsidiary and contract personnel (including cargo, passenger and baggage acceptance, handling, loading and unloading personnel); ….

Section 175.3 provided:

A hazardous material that is not prepared for shipment in accordance with this subchapter may not be … accepted for transportation or transported aboard an aircraft.

Section 175.30(a)(2) provided:

No person may accept a hazardous material for transportation aboard an aircraft unless the aircraft operator ensures the hazardous material is … (2) [d]escribed and certified on a shipping paper … in accordance with part 172 of this subchapter ….

Section 175.30(a)(3) provided:

No person may accept a hazardous material for transportation aboard an aircraft unless the aircraft operator ensures the hazardous material is … (3) [m]arked and labeled in accordance with subparts D and E of part 172[.]

Section 175.33(c)(3) provided:

(c) The aircraft operator must –
(3) Have the information required to be retained under this paragraph readily accessible at the airport of departure and the intended airport of arrival for the duration of the flight leg.

SERVED MARCH 28, 2011

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

FEDERAL AVIATION ADMINISTRATION,	)	
Complainant,	)	FAA DOCKET No. CP09NM0009
v.	)	(Civil Penalty Action)
EMPIRE AIRLINES, INC.,	)	
Respondent.	)	DMS No. FAA-2009-0586

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent violated 49 C.F.R. §§175.3, §175.30(a)(2), and 175.30(a)(3) as charged;
2) Complainant failed to prove a violation of §175.33(c)(3);
3) The charge of violating 49 C.F.R. §175.33(c)(3) is dismissed; and
4) Respondent is hereby assessed a civil penalty of $12,000.

I. Background

Respondent, Empire Airlines, Inc., ("Respondent" or "Empire"), of Hayden, ID, is an air carrier authorized to carry cargo under Parts 121 and 135. Complainant, Federal Aviation Administration, ("Complainant," "FAA," or "the agency") has charged the carrier with several violations of the Department's Hazardous Materials Regulations ("HMRs"), 49 CFR §§171-178. The allegations pertain to two flights. One charge involves the first flight. In the first flight the FAA avers that the location of hazardous materials on board had not been properly documented (*see* Exh. C-10; Tr. 166-68). The remaining charges apply to the second flight. In the second flight, the FAA alleges that agents of Empire accepted and shipped two boxes of a certain sanitizing gel, a hazardous material ("hazmat"). The boxes allegedly 1) contained improper markings and 2) lacked mandatory shipping papers.

In the Complaint, as amended at the hearing (Tr. 6-7), the agency charged Empire with violating 49 C.F.R. §§175.33(c)(3), 175.3, 175.30(a)(2), and 175.30(a)(3). It is the §175.33(c)(3) allegation that pertains to the first flight. Empire failed in its obligation to retain a copy of a shipping paper describing the hazmats on board and specifying their location, the charge asserts. The shipping paper must be "readily accessible" at both the airport of departure and the intended airport of arrival. The remaining allegations relate to the second flight. Section 175.3 prohibits a hazardous material that has not been properly prepared for shipment to be offered, accepted, or transported in air transportation. Section 175.30(a)(2) does not allow a hazardous material to be accepted for air transportation unless the aircraft operator ensures that it is described on a shipping paper in accordance with HMR requirements. Finally, §175.30(a)(3) prohibits the acceptance of hazmats in air transportation unless the aircraft operator ensures that such materials have been marked and labeled as required. Pursuant to 49 U.S.C. §5123(a)(1), the agency asks for a total civil penalty of $20,000.

Respondent denied the charges, and asserts that no civil penalty is justified (Exh. C-11; Resp. Br., pp. 12-13; Tr. 12).

A hearing was held on October 26, 2010, in Portland, OR. I determined that a written decision was reasonable and appropriate under the circumstances. The parties have each filed opening briefs, and Complainant, which has the burden of proof, has also filed a rebuttal brief.[1]

I find and conclude that Complainant failed to prove the alleged §175.33(c)(3) violation (the charge relating to the first flight). I also find and conclude that Complainant proved the remaining allegations. I hold that the facts and circumstances of this case warrant an assessment against Respondent of $12,000.

II. Discussion and Findings

A. The First Flight

1. The Evidence

FAA special agent Donald Stiger, who I found credible, testified that on August 22, 2007, he and his supervisor, special agent Thomas Kenny, had undertaken a routine ramp inspection of Empire at the Medford, OR. airport. They were observing off-loading operations when a Cessna 208 flight that had originated in Portland, OR. became their focus.

The flight was part of Empire's feeder service for Federal Express ("FedEx"). Empire operates on behalf of FedEx in more rural areas whose traffic does not justify

[1] Complainant's Brief will be noted as "Compl. Br."; Respondent's as "Resp. Br."; and Complainant's Rebuttal Brief as "Compl. Rebut."

a FedEx trunk aircraft. The aircraft was adorned with FedEx colors and logo, but it was operated by Empire and used an Empire crew (Tr. 46, 67-69, 134, 168-69, 186; Exhs. C-11 and C-15).

The agents determined that the records provided them failed to state the correct location of dangerous goods[2] on the flight. These records, known as an Inbound Dangerous Goods Alert and an Auto DG Manifest, stated that all the flight's hazmats had been loaded onto the main deck (Exh. C-2; Tr. 23-25). However, the inspectors observed the dangerous goods – five packages of Class 8 hazardous materials labeled as corrosives – being unloaded from Pod C. Pod C is the aft center pod below the main deck (Exhs. C-1 and C-4, p. 4).

The agents learned that the hazmats originally had been loaded onto the main deck, as the papers given them had stated. But the pilot had decided prior to takeoff from Portland to move them to Pod C. (Pilots have the authority to make such changes (Tr. 30, 162, 191-92)).

Empire uses a computer system known as Auto DG to enter hazmat data. Auto DG is a product of Federal Express (Tr. 80-81). Only FedEx employees have access to the system, and only FedEx personnel trained in the system can update it. Conversely, a discrepancy could not be corrected by a non-FedEx employee (Tr. 146-49, 175; Exh. C-11, p. 41).

A FedEx dangerous-goods specialist in Portland made a paper entry reflecting the change. The new location was noted on a document known as a Feeder Aircraft Load Control Sheet ("Load Control Sheet"). The pilot signed off on the change and was given a copy of the Load Control Sheet. But no computer entry reflecting the change was put into the Auto DG system. As a result the updated data was not sent downline. That is why the records the agents obtained at the airport of arrival, Medford, reflected the hazmats' old location (Exhs. C-1, C-2, C-3, C-4, p. 4 and C-11; Tr. 17-40, 81, 162-63, 179-80, 190-92).

2. Arguments of the Parties

Empire argues that, under the circumstances described, it is not responsible for the violation. The failure of the downline station to show the hazmats' changed location simply is not its fault, it states. The responsibility lay with Federal Express and only with Federal Express.

Empire pilots – and the pilot operating this flight was employed by Empire – must ensure that their paperwork reflects accurately the nature, amount, and location of hazmats on board their ship. Pilots take charge of this process. But Empire's responsibilities, Respondent contends, do not extend to ensuring that any

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[2] The term "dangerous goods," as used in the International Civil Aviation Organization (ICAO) Technical Instructions, is interchangeable with the term "hazardous material" as defined in 49 C.F.R. §171.8. *See also* Empire's General Operations Manual, Exh. C-11, p. 8, ¶D ("The terms Dangerous Goods and Hazardous Materials are synonymous and may be used interchangeably.").

changes made are reflected in a computer system owned, controlled, and managed by another entity (Tr. 52, 80, 169-74; Exh. C-11, p. 2). Respondent argues that it was FedEx' sole responsibility to enter the change, and that Empire was justified in its expectation that FedEx personnel would so perform (Resp. Br., p. 10). Since only FedEx personnel had the authority and training to enter the new data, Empire cannot under these circumstances be held liable for non-performance, the carrier contends. To ascribe responsibility to Empire, Respondent argues, would amount to imposing a duty on its pilot to "follow the DG specialist back to the office to ensure the manual entries were transcribed" (Exh. C-11, p. 2). Respondent contends that its obligations cannot fairly be stretched that far.[3]

Complainant countered that Empire should be held liable. Respondent has an independent duty to abide by the HMRs, it stated. The fact that Empire relied on another carrier's tracking system was "a business decision" which did not relieve the carrier of its discrete responsibility for the ready availability of an accurate document, the FAA contends (Compl. Br., pp. 5-6 and n. 26).

3. Decision

I will dismiss this charge. I agree with Respondent that, in these circumstances, it may not be held legally responsible for the fact that a change in the hazmats' location failed to be reflected in the downline record.

The operative regulation, §175.33(c)(3), obligates the aircraft operator to ensure that data showing the location of hazmats on board is "readily accessible" at the operator's destination. But the operator, Respondent, cannot be held liable for every failure of performance.

Empire, as Complainant stresses, is responsible as the operator for compliance with the HMRs. The carrier's own General Operations Manual ("GOM" or "Manual") as well as the HMRs compels it (Exh. C-11, p. 8; *see* Compl. Br., pp. 6, 9). Indeed, this responsibility is so critical – stemming an air carrier's duty to exercise the highest possible degree of care – that it may not be delegated. *See, e.g., Alaska Airlines, Inc.*, FAA Order No. 2004-8, 2004 WL 3198210 (October 4, 1984), p. 6. Yet the regulations also ensure that Empire may rely on information provided by another entity when it is reasonable to do so. 49 C.F.R. §171.2(f). This is such a situation. Empire obtained a paper copy reflecting the locational change. I hold that it was reasonable to assume that the necessary computer entry also would be made in due course by the FedEx official responsible. It was a purely ministerial step, taken routinely. The risk of non-compliance was small, and the inconvenience to Empire comparatively great. The HMRs in these circumstances do not charge the operator with a duty to investigate and the concomitant knowledge of what an investigation would have revealed.

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[3] Respondent also stated that in the future it would ask FedEx for a copy of the carrier's Auto DG entry reflecting hazmat placement. Tr. 180.

The fact, moreover, that Empire has since implemented a method of ensuring that this situation is not repeated should not suggest that the carrier was duty-bound to employ the method in the first place. Hindsight is 20-20. Respondent was not obligated to take steps to forestall this possibility.

For all these reasons, I decline to find a violation of §175.33(c)(3). I will dismiss this charge.[4]

B. The Second Flight

1. **The Evidence**

The FAA agents also claimed violations pertaining to a second Portland-Medford flight Empire had operated on August 22, 2007. The agents determined that Empire had tendered and shipped two fiberboard boxes marked on both sides "CONSUMER COMMODITY ORM-D." (Caps in original). A FedEx official at the Medford airport opened the boxes. Each contained one case (24 bottles) of 354-milliliter plastic bottles of Nexium Hand Sanitizing Gel ("Gel"), a hazardous material (Exhs. C-1 and C-8; Tr. 49-54). Because of the presence of hazmats, the agents concluded that the markings were improper. Nor were the packages accompanied by hazardous materials shipping papers.

The Gel had begun its journey in Baltimore the day before, on August 21, 2007. It had traveled to Memphis on Federal Express and then was put on a flight to Portland, OR before the FAA agents observed the packages at the final air destination, Medford, OR, the following day. The packages were to be delivered to a customer of AstraZeneca Pharmaceuticals LP ("AstraZeneca"), the original shipper, in Jacksonville, OR (Exhs. C-1, C-7).

The Gel product is described generically as an antibacterial hand gel. It is classified as a hazardous material on account of its alcohol content. The product's Material Safety Data Sheet ("MSDS") indicates that it contains as much as 62% ethyl alcohol by volume. The Gel's flashpoint is 74° Fahrenheit (23° Celsius). Agent Stiger testified that this item is properly classed as a Class 3 flammable liquid. It is formally categorized in the Hazardous Materials Table ("Table") as a Flammable Material in Packing Group III. Its UN identification number is UN 1170 (Exh. C-9; Tr. 54-59, 71).

2. **Arguments of the Parties**

Agent Stiger testified that an "ORM-D" marking on a box means that the material inside is hazardous (Tr. 53). ("ORM-D" is an authorized marking standing

[4] The pilot, as seen, had the correct information on board. But it was not "readily accessible" as the regulation requires -- particularly in a situation in which it would be needed most, an actual emergency. Pilots in emergency situations are trained to leave the aircraft as quickly as possible. The risk of leaving documents behind in that event clearly would be too great to suggest that the paper record in the pilot's possession satisfied regulatory requirements. *See* Tr. 33-35.

for "other regulated material." 49 C.F.R. §173.144). As so marked, such goods are permitted to move by ground or rail. But the ORM-D marking is not authorized for air transportation (Tr. 50, 151; Exh. C-9; *see* Table following §172.101). Such goods as a general matter are properly marked ORM-D-Air. Another deficiency agent Stiger noted is that a hazardous material package labeled ORM-D that is offered or intended for transportation by air must be accompanied by a shipping paper (49 C.F.R. §§172.200(a) and (b)). But there were no such papers. The flight's Inbound Dangerous Goods Alert and the aircraft DG manifest had indicated that no hazmats were on board (Exhs. C-5, C-6; Tr. 41-44, 50). Finally, the bottles, which had screw-type caps, were not securely held with a positive means of control as §173.27 of the HMRs requires. This is significant because these goods then could not have been reclassified as ORM-D Air. In such circumstances they revert to the base classification – in this case, a Class 3 flammable ethanol.[5] Complainant concluded that the shipment had not been described and marked as required by the cited HMRs.

Empire countered that no violations could be ascribed to it. The acceptance and loading processes, it pointed out, are controlled and overseen by Federal Express. FedEx personnel also do the actual loading. FedEx properly bears responsibility for the violations, it asserts. Empire does not. Respondent "simply flies the plane carrying the FedEx Express shipments from one point to another" (Exh. C-11, p. 41; Tr. 60-61, 176, 188; Resp. Br., pp. 4-6).

Empire concedes that (in conformance with Manual requirements) its pilot had supervised the loading process. But the pilot had not seen the ORM imprint because the dimensional manner in which the boxes were placed on the belt loader prevented him from seeing the area to which the imprints were affixed (Exh. C-11, p. 2; Tr. 52, 181, 189-90; *see* Exh. C-8, pp. 1, 2; Resp. Br., p. 7). And he had no reason to suspect hazmats, Respondent contends, because there was no paperwork for these boxes (Tr. 53, 182; Resp. Br., pp. 7, 8, and 9, and p. 8 n. 2). No visual cues alerting the pilot to such a situation were present. The captain's duties, Empire says, do not extend to examining every package placed on board (Tr. 180-82). During loading he or she is concerned primarily with weight-and-balance limitations (Tr. 182). Moreover, the package handler at that point would not have been "doing any type of inspection for acceptance" (Tr. 158).

3. Decision

I find the violations.

Respondent's arguments cannot be sustained. I agree with Complainant that Empire has a full and independent obligation to comply with the HMRs. This duty is a necessary element of its status as an aircraft operator and as the carrier of such

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[5] Tr. 54-56, 86; Exh. C-8. 49 C.F.R. §173.27(d) states that "Stoppers, corks or other such friction-type closures must be held securely, tightly and effectively in place by positive means. Each screw-type closure on any packaging must be secured to prevent closure from loosening due to vibration or substantial change in temperature."

materials. 49 C.F.R. §171.1. The obligation, moreover also is required by the carrier's GOM (Exh. C-11, pps. 6-44; Tr. 62, 98). Empire simply is responsible for identifying HMRs aboard aircraft it operates (Tr. 99-100).

More specifically, the HMRs require aircraft operators to ensure that hazmats are authorized for transportation by air and are properly described and marked. 49 C.F.R. §175.30. The GOM directs Empire personnel to verify that the outside of packages tendered to it are properly marked. It cautions that packages may not be loaded "unless the shipment has met acceptance and packaging requirements."[6] Non-compliant hazmats must be rejected. These responsibilities are fully Empire's; they are not delegable or transferable.

The GOM does note that FedEx personnel perform the loading. But the Manual underscores that is the responsibility of Empire crewmembers to oversee the process: "A crewmember must supervise the loading of DG," the Manual states (Exh. C-11, p. 41, ¶A.2; Tr. 65-66, 100, 188). Empire's pilots perform this supervision (Tr. 100). In these circumstances, the actual loaders, no matter by whom employed, act as Empire's agents. Empire is responsible for the result. That the boxes were loaded at an angle which made it difficult to observe the entire outside of the boxes, and that the existing documentation failed to alert the pilot to the hazmats, made the pilot's duty of scrutiny trickier, to be sure; but these circumstances do not absolve Empire of liability for the resulting violations.

For the reasons stated, I find and conclude that Empire violated HMRs §§175.3, 175.30(a)(2), and 175.30(a)(3).

III. Penalty

We now turn to the issue of civil penalty.

A. Factors

Determination of an appropriate civil penalty involves a number of factors. The decisionmaker must weigh "the nature, circumstances, extent, and gravity of the violation[s]," and, with respect to the violator, "the degree of culpability, any history of prior violations, [and] the ability to pay" as well as "other matters that justice requires" (49 U.S.C. §5123(c); *see* Tr. 62). The principal elements in this analysis are the nature of the respondent's conduct and the totality of the circumstances. *Envirosolve, LLC,* FAA Order No. 2006-2 (February 7, 2006), p. 13.

The Administrator has provided policy guidance for agency employees to follow when recommending an appropriate civil penalty in hazardous-materials cases. It has published penalty guidelines. The guidelines, contained in FAA Order 2150.3A, assess all relevant statutory criteria, including mitigating and aggravating

[6] Exh. C-11, pp. 11, 12, 13; Tr. 62-65, 99. While "ORM-D" properly is considered a marking and not a label, the GOM categorized it as a label. Exh. C-11, p. 11; Tr. 63-64.

circumstances. The guidelines further aid Complainant's penalty determination through a Sanction Guidance Matrix. The Matrix sets out specific penalty ranges for each input, cross-referencing such factors as the nature of the respondent (for example, whether it is a business which "regularly" offers hazmats) and the relative risk of harm posed by the goods offered. Complainant's sanction determination nonetheless does not reflect merely a fixed mathematical computation. The sanction guidance table is intended to indicate the Administrator's "general views" about the civil penalty ranges appropriate for different types of violations. *Folsom's Air Service, Inc.,* FAA Order No. 2008-11 (November 6, 2008), 2008 WL 4948488, p. 13. Nor are the guidelines binding. Each situation, being dependent on so many variables, is unique. "Evaluation of the case," the FAA has emphasized, "is based on the totality of the facts and circumstances."[7]

An administrative law judge ("ALJ") is not required to follow the Policy. The Policy is intended for the guidance of agency personnel, and ALJs are not agency personnel. *Folsom's, supra,* p. 14. ALJs make decisions independently, and the ALJ determines (subject to agency review) whether a civil penalty is to be assessed, and if so, in what amount. The Guidelines nonetheless must be respected as an expression of agency sanction policy. They represent an effort to produce consistent results in similar cases. The Administrator has asserted the power to impose the agency's sanction policy on appeal if an ALJ assesses a civil penalty that is not consistent with the Guidelines. *Warbelow's Air Ventures, Inc.,* FAA Order No. 2000-3 (February 3, 2000), p. 20; *Northwest Airlines,* FAA Order No. 1990-37 (November 7, 1990), pp. 8-10.

Additional factors inform the determination of an appropriate civil penalty. Air carriers are held to a high duty of care. Indeed, they are obligated to perform their services with "the highest possible standard of care." *See, e.g., Folsom's, supra*, p. 16. This degree of care devolves from carriers' responsibility to assure, to the maximum extent possible, the safety and well-being of their passengers, crew, and others involved in transportation by air.

Hazardous materials require particular attention. They are dangerous by their very nature. The risk of harm must be kept to an absolute minimum in view of the possible grave consequences of error. Carriers of dangerous goods such as Empire are expected to conform to the highest standards of care and, concomitantly, must answer in appropriate measure if they fall short.

On account of hazmats' inherent capacity for peril, the HMRs provide a web of protection to minimize the risk for persons who could be adversely affected by such materials. Flammable materials, to cite one type of problem, could cause a fire

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[7] FAA Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines, 64 Fed.Reg. 19443, 19444, 1999 WL 226610 (F.R.) (April 21, 1999) ("the Policy" or "the Guidelines"), also published on April 14, 1999, as Change 26, Appendix 6, to FAA Order 2150.3A. FAA Order 2150.3A may be found at www.airweb.faa.gov and was submitted in pertinent part in this proceeding as Exhibit C-12.

By Order 2150.3B, effective October 1, 2007, the agency issued new sanction guidelines superseding the old. Since the actions involved in this matter occurred prior to the effective date, Order 2150.3A remains applicable. *See* 72 Fed.Reg. 55853 (October 1, 2007).

if they come in contact with a heat source. Such circumstances could threaten the integrity of the flight itself.

B. Complainant's Position

Complainant has asked for a levy of $20,000 on all charges. 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.

The penalty guidelines place the type of flammable liquid involved in this case in packing group III in the medium-risk category of the matrix, known as Category "B." 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, . . . " They are given moderate weight for assessment purposes (64 Fed.Reg. 19443, 19449 (April 21, 1999); Exh. C-12, p. 7; Tr. 71, 86-87). Respondent's marking and notification violations created a serious risk of danger, the agency says. The rules' prohibition of air carriage represents a determination that the product, as shipped, was too dangerous for air travel. There were two violations, or one per shipment, stemming from the lack of shipping papers, and two violations for improper markings (Tr. 71-72).

The agency also determined for assessment purposes that Empire was a "Group 2" carrier, as measured by the number of its pilots and the number of aircraft it operates (Tr. 73-74; Exh. C-12, p. 8).

Finally, Complainant accounted for a mitigating factor: an entity other than the violator prepared the shipment. Respondent relied on incorrect information from another source. This factor suggests a minimum weight (Tr. 72-73).

Respondent's violation history also was considered. It had none, but that circumstance is not considered mitigating (Tr. 73, 107). A violation-free history is expected to be the norm. *Toyota Motor Sales, USA, Inc.,* FAA Order No. 94-28 (September 30, 1994).

For the second flight – the only flight in which violations are found -- the guidelines suggest a sanction in the range of $5,000 to $27,500 for each of the four found violations (Tr. 74). So the sanction range is $20,000 to $110,000. Yet even if each shipment on the second flight is considered as one violation, for a total of two, the sanction range becomes $10,000 to $55,000 (Tr. 76).

In taking all factors in consideration, including corrective action undertaken by Respondent, the agency concludes that its proposed assessment of $20,000 (which, of course, includes the allegation which was not proven) appropriately reflects all the salient circumstances, is "eminently reasonable," and even is low (Tr. 75-77; Compl. Br., p. 16).

C. Respondent's Position

Empire noted that neither of the boxes leaked. The packaging remained intact. Neither box caused any damage or harm (Tr. 82-83).

Additionally, the carrier had no prior violation history. As stated, Empire also emphasized the difficulties in spotting the faulty markings (I.D., p. 6). It asserts that it fails to understand why it received a proposed civil penalty under all the circumstances (Resp. Br., p. 14).

D. Decision

I have decided to assess a total civil penalty of $12,000. I find and conclude that this amount appropriately reflects the totality of the circumstances surrounding the offending shipments.

Any package containing hazardous materials which fails to completely conform to the HMRs introduces an unacceptable, and possibly perilous, element into the stream of air commerce. Flammable items, by their very nature, could ignite. The violations presented a significant threat to the safety of air transportation. These facts and circumstances warrant a commensurate fine.

I give no weight to Respondent's argument that no leak or other potentially troublesome result flowed from its failure to properly mark the packages. These are fortuitous circumstances which do not justify mitigation. Indeed, harm resulting from any of the shipments would have constituted an aggravating factor (Exh. C-10, p. 3 (64 Fed.Reg. 19443, 19445 (April 21, 1999)). Additionally, the fact that Federal Express was involved in inspecting and transporting the offending packages, and may also have been at fault, simply is not relevant to the determination in the instant matter. Empire as the operator was independently and fully responsible for permitting these packages to enter the stream of air transportation. The lack of shipping papers, however, must be considered a mitigating factor. Lacking a warning that hazmats were on board, it is natural -- though not excusable – to relax one's guard and fail to look for problems with the same vigilance one might perform otherwise. The fact itself that Empire relied on incorrect information also mitigates to an extent.

Finally, civil penalties levied in other cases may be a relevant consideration. Yet as the Administrator has said, "it is often difficult to compare sanctions across cases because there are so many variables involved in each case." *Alika Aviation, Inc.,* FAA Order No. 1999-14 (December 22, 1999), p. 12, n. 20 *quoted in Folsom's Air Service, Inc.,* FAA Order No. 2008-11 (November 6, 2008), p. 21. Additionally, base penalty amounts have been raised periodically over the years, and have been adjusted upward from time to time to account for inflation. The maximum civil penalty for a single violation of 49 U.S.C. §5123(a), the penalty statute under which Complainant brought this case, was raised from $25,000 to $30,000 in 2002, and then to $50,000 for violations occurring after August 10, 2005. *See* 14 C.F.R. §13.305 (showing changes in minimum and maximum penalty amounts). It is useful

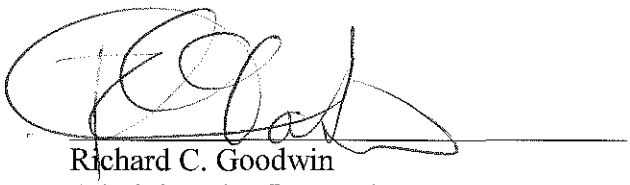
to note, nonetheless, the decision in the noted cases, which, like the present matter, involved two nonconforming units. The Respondent in *Toyota Motor Sales, USA, Inc.,* was fined $50,000 for an undeclared shipment of two "wet" automobile batteries. FAA Order No. 94-28 (September 30, 1994). The respondent in *Midtown Neon Sign Corporation,* FAA Order No. 1996-26 (August 13, 1996) was fined $25,000 for an undeclared (and leaking) shipment of two 1-gallon cans of paint.

I have considered all other arguments advanced by both parties. Those not discussed are rejected as without merit.

In weighing the all the facts and circumstances, I find and conclude that a civil penalty assessment of $12,000 is warranted. This amount appropriately reflects the nature and extent of the risk to air transportation safety created by Empire, while giving appropriate weight to other salient factors. The risk of harm that Respondent brought to air transportation was significant. It allowed into the stream of air commerce flammable liquids considered so perilous that they were prohibited from traveling by air. On the other hand, mitigating circumstances, as discussed above, also were present. I believe a civil penalty of $3,000 for each of the four found violations (two per package), or $12,000 in total, is appropriate.

The civil penalty levied will, I find, achieve the statutory purpose of promoting compliance with the HMRs. It also will achieve deterrence for Respondent and entities in a similar position. In sum, it appropriately accounts for the factors the statute and agency policy directs in fixing the assessment.

Respondent Empire Airlines, Inc. is hereby assessed a civil penalty of $12,000 for violations of the HMRs 49 C.F.R. §§175.3, 175.30(a)(2) and 175.30(a)(3) as stated in this Initial Decision. The Complaint is in all other respects dismissed.[8]



Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

[8] 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.