

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

In the Matter of: TEXAS ARMY NATIONAL GUARD

FAA Order No. 2012-3

Docket No. CP09SO0014
FDMS No. FAA-2009-1045¹

Served: May 22, 2012

DECISION AND ORDER²

I. Introduction

Respondent Texas Army National Guard (Respondent)³ has appealed the written initial decision of Administrative Law Judge (ALJ) Richard C. Goodwin.⁴ The ALJ assessed a \$30,000 civil penalty for violations of the Department of Transportation (DOT) Hazardous Materials Regulations (HMR) (49 C.F.R. Parts 171-178).⁵

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at the following Internet address: www.regulations.gov.

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. 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 In the original complaint, Complainant captioned this case, *Federal Aviation Administration v. Executive Office of the State of Texas*. In its answer, Respondent stated that its name is "Texas Army National Guard." Complainant amended its complaint accordingly. The ALJ then changed the caption to *In the Matter of Texas Army National Guard. Order Granting in Part and Denying in Part Motion for Decision* at 1 n.1 (July 8, 2010).

⁴ A copy of the ALJ's written initial decision is attached.

⁵ The Appendix contains the specific regulations at issue.

This decision affirms the ALJ's decision. It holds that Respondent is not a federal agency that would be exempt from the FAA's jurisdiction under the federal hazardous materials transportation law, 49 U.S.C. Chapter 51. Regarding the \$30,000 sanction assessed by the ALJ, this decision finds that it is within the parameters set by the agency's sanction guidance (which factors in all the statutorily required considerations), and that there is no reason to disturb it.

II. Background

On or about July 2, 2008, one of Respondent's employees in Austin, Texas – Staff Sergeant Anthony Jackson, 1836th Transportation Company, Fort Bliss, Texas – offered a fiberboard box containing four 1-gallon cans of a hazardous material (Durant Duraplex 800 Exterior Alkyd Flat paint) for shipment to United Parcel Service (UPS). Jackson addressed the shipment to Staff Sergeant Lynette Patterson, Armory, Killeen, Texas.

The proper shipping name of the material was Paint. It was in Hazard Class 3 (Flammable Liquid), Packing Group III, with an assigned identification number of UN1263. The proper label was "FLAMMABLE LIQUID."

On or about July 3, 2008, UPS flew the shipment to its sort facility in Louisville, Kentucky. UPS ground personnel discovered that about 1 gallon of the paint had leaked into and through the fiberboard container.

Respondent admitted in its Answer that it violated the HMR because the shipment lacked hazardous materials shipping papers, labels, markings, packaging, and emergency response information. Further, Respondent admitted that it failed to train its employees as required by the HMR.

Because Respondent acknowledged liability, the ALJ found that Respondent committed the alleged violations and limited the hearing to the issue of sanction. The ALJ found that the \$30,000 civil penalty sought by Complainant was appropriate. He wrote that undeclared shipments of hazardous materials pose a special risk and that leakage is an aggravating factor. (Initial Decision at 4-5.) He rejected the idea that Respondent's first-time violator status should be mitigating, citing precedent to the effect that a violation-free history should be the norm. (*Id.* at 5.) The ALJ stated that Respondent's actions following the incident were commendable, but were not "systemic or far-reaching," which he said would be necessary to lower an otherwise reasonable assessment. (*Id.*) The paint's failure to ignite, he said, was fortuitous, not mitigating; ignition would have been an aggravating factor. (*Id.*) Finally, he found that *Midtown Neon Sign Corp.*, FAA Order No. 1996-26 (August 13, 1996) suggested that Complainant's proposed sanction of \$30,000 was reasonable. (*Id.*) *Midtown* involved an undeclared, leaking shipment of two 1-gallon cans of paint for which Midtown was fined \$25,000. The ALJ pointed out that the maximum penalty has gone up from a base of \$25,000 in *Midtown* to \$50,000. The ALJ concluded by assessing a \$30,000 civil penalty, which he said reflected all the facts and circumstances of the case, including the risk to air transportation, the need for deterrence, the statutory factors, and agency policy. (*Id.* at 5-6.)

III. Jurisdiction

Complainant brought this case under the federal hazardous materials transportation law, which provides that: "a person that knowingly violates this chapter or

a regulation ... issued under this chapter is liable to the United States Government for a civil penalty” 49 U.S.C. § 5123(a)(1). For purposes of this law, the term person:

includes a government ... or authority of a government ... offering hazardous material for transportation in commerce ... but does not include ... a department, agency, or instrumentality of the [Federal] Government.

49 U.S.C. § 5102(9).

Respondent claims to be a federal agency and argues that Complainant therefore does not have jurisdiction over it. (Appeal Brief at 5-6.) It states that this is so, quoting the U.S. Court of Appeals for the Fifth Circuit, “because of the federal nature of the employees [that it] supervises and the substantive federal law that governs [its] duties.” *Lipscomb v. FLRA*, 333 F.3d 611 (5th Cir. 2003), *reh’g and reh’g en banc denied* (5th Cir. 2003), *cert. denied*, *Cross v. FLRA*, 541 U.S. 935 (2004). It contends that its civilian technician named Cathleen Gruetzner, who is in charge of Respondent’s mailing procedures, is a federal employee under 32 U.S.C. § 709, which governs National Guard technicians (“Technicians: employment, use, status”).

Respondent’s argument that it is a federal agency is not compelling for the following reasons. Gruetzner did not become involved until after the incident, when she attempted to take corrective action on Respondent’s behalf. (Exhibits R-1 and R-2.) Respondent relies on the *Lipscomb* case quoted above for the proposition that state national guards are federal agencies, but the *Lipscomb* court expressly limited its holding to cases involving the Federal Service Labor-Management Relations Act. *Lipscomb*, 333 F.3d at 613. The instant case, however, involves the federal hazardous materials transportation law. According to precedent, a state national guard is not a federal agency for purposes of the federal hazardous materials transportation where the guard has not

been ordered into federal service. *Louisiana Air National Guard, 159th Fighter Wing*, FAA Order No. 2002-23 at 7 (November 22, 2002). Respondent does not claim that it was ordered into federal service.

In conclusion, Respondent is not a federal agency for purposes of the federal hazardous materials transportation law. As a result, the FAA has subject-matter jurisdiction over Respondent in this matter under 49 U.S.C. § 5123.⁶

IV. Sanction

The ALJ assessed a \$30,000 civil penalty. Respondent challenges the sanction amount on appeal.

At the time of the violations in this case, the maximum civil penalty that Complainant could assess under the federal hazardous materials transportation law was \$50,000 per violation, unless the violation caused death, serious illness, severe injury, or substantial destruction of property (not the case here), in which case the maximum was \$100,000 per violation. 49 U.S.C. § 5123(a)(1), (2). The minimum civil penalty was \$250 except in the case of a training violation, in which case the minimum was \$450.⁷ 49 U.S.C. § 5123(a)(1), (3).

The civil penalty guidelines that apply to this case are found in FAA Order No. 2150.3B, entitled “FAA Compliance and Enforcement Program,” Appendix C,

⁶ Complainant argues that Respondent waived personal jurisdiction by not raising it until the appeal. This case involves subject-matter jurisdiction, however, not personal jurisdiction. Subject-matter jurisdiction is governed by legislative authorization (in this case, 49 U.S.C. § 5123). 1 Moore’s Federal Practice § 3.02[a]. The Supreme Court has stated that, “A litigant generally may raise ... subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.” *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

⁷ Congress has also provided for periodic adjustments for inflation. 28 U.S.C. § 2461 (note), as amended by Public Law 104-134 (April 26, 1996). Any applicable adjustments are found in 14 C.F.R. Subpart H.

entitled “Sanction Guidance, Hazardous Materials Enforcement” (October 1, 2007) (Exhibit C-1; Tr. 12-14).⁸ The FAA previously published the guidelines in the Federal Register as “[FAA] Policy on Enforcement of the [HMR]: Penalty Guidelines,” 64 Fed. Reg. 19443 (April 21, 1999).

On appeal, Respondent argues that the ALJ improperly relied on a 15-year old case to support the sanction amount, *Midtown Neon Sign*, FAA Order No. 1996-26, when he should have relied on a more recent case, *Atlas Frontiers, LLC*, FAA Order No. 2010-10 (June 16, 2010). Respondent also argues that its “prompt and extensive” corrective actions (Appeal Brief at 8), including providing hazardous materials training to its employees, justify a reduction in the \$30,000 civil penalty assessed by the ALJ. It states again, as it did before the ALJ, that it has no prior violations.

As previously held, “[a]bsent extraordinary circumstances, reliance on past sanctions will not be grounds for reducing sanctions that fall within the parameters set by the sanction guidance.” *Tate and Partners*, FAA Order No. 2010-7 at 15 (June 15, 2010). Thus, in this case in which extraordinary circumstances do not exist, the question is whether the \$30,000 sanction falls within the parameters set by the sanction guidance.

⁸ Respondent incorrectly states that the applicable civil penalty guidelines are found at 49 C.F.R. Part 107, [Subpart D], Appendix A. (Appeal Brief at 7.) Actually, Appendix A contains the penalty guidelines published by the Pipeline and Hazardous Materials Safety Administration (PHMSA) for the transportation of hazardous materials *by ground*. *Atlas Frontiers*, FAA Order No. 2010-10 at 10 (June 16, 2010).

The PHMSA is the administration within the Department of Transportation (DOT) that promulgates the HMR. The FAA has the delegated authority to enforce the federal hazardous materials transportation law and HMR regarding *air* shipment of hazardous materials. FAA Order No. 2150.3A, Appendix C, ¶ 1.c, citing 49 C.F.R. § 1.47(j).

As noted in the sanction guidance in FAA Order No. 2150.3B, Appendix C, ¶ 2 (Exhibit C-1), the federal hazardous materials transportation law requires the consideration of the following factors in setting the civil penalty:

- (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); 14 C.F.R. § 13.16(c). The agency factored these considerations into the sanction guidance. FAA Order No. 2150.3B, Appendix C, ¶¶ 2, 8.

The sanction 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 (in this case) possible corrective action. *Id.* at ¶ 8.

Weighing this case leads to a final aggregate weight of Moderate. The guidelines state in Figure C-2 that a flammable liquid in packing group III, like the paint in the instant case, is a “Category B” material, which carries a Moderate weight under the guidelines. (Exhibit C-1.) The shipment leaked, which also points to at least a Moderate weight. As the ALJ wrote, while Respondent did not have previous violations, a violation-free history is expected to be the norm. *Atlas Frontiers*, FAA Order No. 2010-10 at 14 n.16 (June 16, 2010).

Turning to the Matrix (Exhibit C-1, Figure C-1), Respondent was not an “Individual” as defined by the Sanction Guidance. Respondent should be regarded as at least a “Business Entity,” which is the category Complainant selected, because it is an

organization. (Reply Brief at 11.) Complainant also selected “Undeclared Shipment Within Hazmat Quantity Limitations.” The following seven violation types are relevant—(1) shipping papers; (2) labels; (3) markings; (4) packaging; (5) training; (6) emergency response information; and (7) release into the environment.

Based on the selections of “Business Entity” and “Undeclared Shipment within Hazmat Quantity Limitations,” the civil penalty range in the Matrix for each violation type, from Minimum to Maximum, is \$1,500-8,200. The Moderate range, according to Complainant, is from approximately \$3,733 to \$5,966, and the median is \$4,850. (Reply Brief at 11.) Complainant multiplied this figure by seven (one for each violation type). (Tr. 47-48.) The result was \$33,950. (Reply Brief at 11.) Complainant performed this calculation, originally proposed an amount of \$33,950, and then lowered its proposed sanction to \$30,000 when it issued its Final Notice of Proposed Civil Penalty. (Tr. 48.)⁹

Regarding other statutory factors, Respondent asks for a reduction based on corrective action. Corrective action is not specifically listed in 49 U.S.C. § 5123(c), but it falls within the catchall category of “other matters that justice requires.” *Atlas Frontiers*, FAA Order No. 2010-10 at 7 (June 16, 2010); *Tate*, FAA Order No. 2010-7 at 14. To result in a reduced civil penalty, the corrective action must exceed minimum legal requirements. FAA Order No. 2150.3B, Appendix C, ¶ 8(g)(2); *Atlas Frontiers*, FAA Order No. 2010-10 at 7. In addition, the corrective action must be *swift, comprehensive, and positive*. *Mole-Master Services Corp.*, FAA Order No. 2010-11 at 11 (June 16,

⁹ Complainant’s calculations resulting in a proposed figure of \$33,950 were useful as a way of finding an approximate Moderate civil penalty. It is true that “[d]etermination of the appropriate penalty does not involve a simple mathematical formula ... but instead requires the exercise of discretion and judgment.” *Dominion Concepts, Inc.*, FAA Order No. 2005-4 at 5 n.15 (March 8, 2005). However, the record shows that Complainant did not stop its analysis after concluding its calculations but that it went on to weigh possible mitigating factors. (Tr. 48-54.)

2010) (emphasis added). “Positive” means action to prevent future violations. *See, e.g., Atlas Frontiers*, FAA Order No. 2010-10 at 7.

Respondent argues that the following corrective action supports a reduction in the civil penalty:

- Respondent’s employee Gruetzner told Jackson about his mistakes with the shipment on July 22, 2008 (20 days after the incident), told him to take a UPS refresher course, and told him to ask UPS how to complete a hazardous materials form.
- By July 28, 2008 (26 days after the incident), Gruetzner and the Deputy Garrison Commander at Camp Mabry decided to take certain actions such as requiring certain personnel to receive training and updating the mail handlers Standard Operating Procedure (SOP).
- After July 2008 (about a year after the incident), Respondent distributed hazardous materials training materials to its personnel and asked them to use the materials and submit a certificate of completion.
- Respondent also did certain other minor things after the incident, such as telling its personnel to use the UPS and United States Postal Service (USPS) Web sites to obtain information on shipping hazardous materials.

(Appeal Brief at 2-4; Exhibits R-1 & R-2.) These measures do not represent *swift, comprehensive action*. Regarding several items, involving Respondent training its personnel, there is no proof of actual action or completion. In any event, training is required by the regulations, and as stated above, simply meeting minimum legal requirements does not constitute corrective action. Gruetzner’s instructions to Jackson, which came 20 days after the incident, represented neither swift nor comprehensive action. Finally, such measures as telling its personnel to use UPS and USPS Web sites to obtain hazardous materials shipping information were far from comprehensive.

This case simply does not present a situation involving the type of swift and comprehensive corrective action that would warrant a reduction in an otherwise reasonable civil penalty. The sanction assessed by the ALJ in the amount of \$30,000 falls within the parameters set by the sanction guidance, and there is no reason to disturb it.

Respondent's appeal is denied. This decision affirms the \$30,000 civil penalty assessed by the ALJ.¹⁰

MICHAEL P. HUERTA
ACTING ADMINISTRATOR
Federal Aviation Administration

¹⁰ 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 (2009). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

APPENDIX

Section 171.2(e)¹¹ 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 for shipment as required or authorized by applicable requirements of this subchapter

Section 172.200(a) provides:

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

Sections 172.202(a)(1)-(4), (6)-(7) provide:

The shipping description of a hazardous material on the shipping paper must include:

- (1) The identification number prescribed for the material ...;
- (2) The proper shipping name prescribed for the material ...;
- (3) The hazard class or division number ...;
- (4) The packing group ...; and
- ...
- (6) ... the total net mass per package ...;
- (7) The number and type of packages

Section 172.204(a) provides:

[E]ach person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing ... on the shipping paper ... the certification contained in paragraph (a)(1) of this section or the certification ... in paragraph (a)(2) of this section.

(1) “This is to certify that the above-named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Department of Transportation.”

(2) “I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labelled/placarded, and are in all respects

¹¹ All citations are to the October 1, 2007, edition of Title 49 of the Code of Federal Regulations (CFR), which was in effect at the time, as the violations occurred in July 2008. The regulations were not revised again until October 1, 2008.

in proper condition for transport according to applicable international and national governmental regulations.”

Section 172.204(c)(2) provided:

Certificate in duplicate. Each person who offers a hazardous material to an aircraft operator for transportation by air shall provide two copies of the certification required in this section.

Section 172.204(c)(3) provided:

Additional certification requirements. ... [E]ach person who offers a hazardous material for transportation by air must add to the certification required in this section ...:

“I declare that all of the applicable air transport requirements have been met.”

Section 172.300(a) provided:

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

Section 172.301(a) provided:

[E]ach person who offers a hazardous material for transportation in a non-bulk packaging must mark the package with the proper shipping name and identification number (preceded by “UN” or “NA,” as appropriate) for the material as shown in the § 172.101 Table....

Section 172.312(a)(2) provided:

... [E]ach non-bulk combination package having inner packagings containing liquid hazardous materials must be ...

(2) Legibly marked with package orientation markingson two opposite vertical sides of the package with the arrows pointing in the correct upright direction. ...

Section 172.400(a) provides:

[E]ach person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or containment device with the labels specified for the material in the § 172.101 table and in this subpart

Section 172.600(c) provided:

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

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

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

Section 172.702(a) provided:

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

Section 173.24(b)(1) provided:

Each package used for the shipment of hazardous materials under this subchapter shall be designed, constructed, maintained, filled, its contents so limited, and closed, so that under conditions normally incident to transportation--

(1) Except as otherwise provided in this subchapter, there will be no identifiable (without the use of instruments) release of hazardous materials to the environment;

Section 173.27(d) provided:

Closures. 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 173.173(a)-(b) provided:

(a) When the Sec. 172.101 table specifies that a hazardous material be packaged under this section, the following requirements apply. Except as otherwise provided in this part, the description "Paint" is the proper shipping name for paint, lacquer, enamel, stain, shellac, varnish, liquid aluminum, liquid bronze, liquid gold, liquid wood filler, and liquid lacquer base. The description "Paint-related material" is the proper shipping name for a paint thinning, drying, reducing or removing compound. However, if a more specific description is listed in the Sec. 172.101 table of this subchapter, that description must be used.

(b) Paint, paint-related material, adhesives, ink and resins must be packaged as follows:

(1) As prescribed in Sec. 173.202 of this part if it is a Packing Group II material or Sec. 173.203 of this part if it is a Packing Group III material;