UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: APOLLO A & HS COMPANY

FAA Order No. 2011-4

Docket No. CP08AL0001
FDMS No. FAA-2008-0783[1]

Served: January 14, 2011

DECISION AND ORDER[2]

Complainant Federal Aviation Administration (FAA) has appealed from the written initial decision of Administrative Law Judge (ALJ) Richard C. Goodwin[3] finding that Respondent Apollo A & HS Company (Apollo) violated the Hazardous Materials Regulations (HMR).[4] The ALJ assessed a $9,000 civil penalty for the violations.[5]

History

On July 10, 2008, Apollo filed its request for hearing. In response, on July 15, 2008, the FAA filed a complaint alleging that on or about August 16, 2007, Apollo shipped hazardous materials, consisting of 19,200 matches, from Hong Kong to New

[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *http://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: *http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, Thompson/West 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 written initial decision was issued on November 9, 2009.

[4] The HMR generally can be found in 49 C.F.R. Parts 171-180. The specific regulations allegedly violated in this case can be found in the Appendix to this decision.

[5] A copy of the ALJ's order is attached.

York City. The complaint further alleged that the shipment failed to meet requirements for marking, labeling, shipping papers, emergency response information,[6] and employee training set forth in the HMR. The FAA wrote in the complaint that it was seeking a civil penalty of $22,500.

On July 23, 2009, the FAA filed a motion for decision under 14 C.F.R. § 13.218(f)(5).[7] The FAA noted that Apollo had averred in its answer[8] that the shipment contained demonstration items that had the shape and color of matches, but were not actually matches. However, the FAA argued, Apollo had admitted previously, both in its response to the Notice of Proposed Civil Penalty (NPCP) and in its response to the Letter of Investigation (LOI), that it had shipped real matches. The FAA attached copies of the response to the NPCP and to the LOI to its motion, as well as an affidavit of FAA Special Agent Gary Meaders. Meaders stated in his affidavit that he had examined the items closely and determined that they were real matches, not match sticks painted to resemble matches. Regarding the sanction, the FAA argued in the motion for decision that the amount it sought, $22,500, was well within the range specified in the agency's sanction

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[6] Because of the alleged failure to mark, label, provide shipping papers and emergency response information, the shipment was allegedly a "hidden shipment."

[7] Section 13.218(f)(5) provides:

> A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, matters that the administrative has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

[8] The FAA had construed a pre-complaint letter from Apollo, a letter dated August 10, 2008 (Tr. 8), as its answer.

guidance table found in Appendix 6 of FAA Order No. 2150.3A (entitled "FAA Compliance and Enforcement Program").[9]

The ALJ scheduled the hearing for August 21, 2009, in Anchorage, Alaska. On that day, the ALJ and the FAA attorney appeared at the hearing site, but no one appeared for Apollo. The FAA attorney requested that the ALJ rule favorably on the motion for decision.

The ALJ issued an oral initial decision finding that Apollo had constructively withdrawn its request for hearing. (Tr. 6, 10.) He stated at the hearing that based on the motion for decision, he would find that Apollo was deemed to have admitted all of the allegations in the complaint and that he would find for the agency. (*Id.*) He stated further that he would find that the evidence supported the FAA's request for a civil penalty in the amount of $22,500. (Tr. 10.)

On November 4, 2009, the ALJ issued a written initial decision. The ALJ wrote that he had already found at the hearing that by its failure to appear, Apollo had constructively withdrawn its request for a hearing and had constructively admitted all of the allegations of the complaint. The ALJ concluded that the agency proved its case on the merits. He cited the affidavit of Special Agent Meaders (FAA Motion for Decision, Ex. 2.), in which Meaders averred that the shipment contained matches, which are a hazardous material under the HMR. The ALJ also noted that Meaders averred that the shipment contained none of the marking, labeling, and other information required by the regulations.

[9] Since the time of the alleged violations in this case (August 16, 2007), FAA Order No. 2150.3A has been updated and is now FAA Order No. 2150.3B (October 1, 2007).

Regarding the sanction, the FAA asked for a $22,500 civil penalty for five categories of HMR violations regarding (1) marking; (2) labeling; (3) shipping papers; (4) emergency response information; and (5) training. The ALJ, however, found that for sanction purposes, there were only two violations: (1) absence of information on the package, and (2) lack of training. He concluded that a $9,000 penalty was appropriate for these two violations under the FAA's sanction guidance at the time.

On November 12, 2009, the FAA filed its notice of appeal, and subsequently perfected that appeal by filing an appeal brief. The FAA argued on appeal that the $9,000 civil penalty imposed by the ALJ was too low. According to the FAA, the ALJ's decision to find only two types of violations for sanction purposes was contrary to precedent and FAA sanction guidance. The FAA argued that the Administrator should assess a $22,500 civil penalty.

Analysis

Although the FAA's appeal involves only the sanction amount, it is necessary to examine the underlying proceedings. As the ALJ found, Apollo's failure to appear at the hearing and to pursue its request for hearing without good cause constituted a constructive withdrawal of its request for hearing. Once a respondent withdraws a request for hearing, then there is no basis for the complaint and the case reverts back to the *status quo ante*, before the request for a hearing. Hence, in other words, by failing to appear at the hearing, Apollo constructively withdrew its request for hearing, and the case reverted to the Final Notice of Proposed Civil Penalty (FNPCP) stage. Apollo's time for

filing a request for hearing from the FNPCP expired long ago.[10] In the absence of a request for hearing and a valid complaint, the ALJ had no authority to make any findings regarding violations or an appropriate civil penalty amount.[11] Given that the case reverted to the FNPCP stage and that the time for requesting a hearing has expired, the FAA is now free to issue an Order Assessing Civil Penalty.

THEREFORE, IT IS ORDERED THAT: These proceedings are dismissed.

[Original signed by J. Randolph Babbitt]

J. RANDOLPH BABBITT, ADMINISTRATOR
Federal Aviation Administration

[10] If persons receiving a FNPCP wish to have a hearing, they must request a hearing within 15 days of receipt of the FNPCP. 14 C.F.R. § 13.16(g)(2)(ii). In this case, the FAA served the FNPCP on June 30, 2008.

[11] In light of this disposition of the case, it is unnecessary to consider any other issues.

APPENDIX

Section 171.2(e)[12] provided:

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

Section 172.200(a) provided:

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

Section 172.201(d) provided:

> Emergency response telephone number. ... [A] shipping paper must contain an emergency response telephone number ....

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

> (a) The shipping description of a hazardous material on the shipping paper must include:
> (1) The proper shipping name prescribed for the material in Column 2 of the § 172.201 table;
> (2) The hazard class or division number ... as shown in Column (3) of the § 172.101 Table ....
> (3) The identification number prescribed for the material as shown in Column 4 of the § 172.201 table;
> (4) The packing group in Roman numerals, as designated for the hazardous material in Column 5 of the § 172.101 Table ...; and
> (5) The total quantity of hazardous materials ...;

Section 172.203(f) provided:

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

Section 172.204(a)(1)-(2) provided:

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[12] 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.

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

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

(2) "I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labelled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations."

Section 172.204(c)(2) provided:

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

Section 172.204(c)(3) provided:

(3) *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:

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

Section 172.301(a) provided:

(a) [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 172.400(a) provided:

(a) [E]ach person who offers for transportation or transports a hazardous material in any of the following packages or containment

devices, shall label the package or containment device with the labels specified for the material in the § 172.101 table and in this subpart ....

Section 172.600(c) provided:

> (c) ... No person to whom this subpart applies may offer for transportation, accept for transportation, transfer, store or otherwise handle during transportation a hazardous material unless:
>
> (1) Emergency response information conforming to this subpart is immediately available for use at all times the hazardous material is present; and
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> (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) A hazmat employer shall ensure that each of its hazmat employees is trained in accordance with the requirements prescribed in this subpart.

SERVED NOVEMBER 4, 2009

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

FEDERAL AVIATION ADMINISTRATION, Complainant, v. APOLLO A & HS Company, Respondent.	FAA DOCKET No. CP08AL0001 (Civil Penalty Action) DMS No. FAA-2008-0783

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent violated 49 C.F.R. §§171.2(e), 172.200(a), 172.201(d), 172.202(a)(1)-(a)(5), 172.203(f), 172.204(a), 172.204(c)(2), 172.204(c)(3), 172.300(a), 172.301(a), 172.400(a), 172.600(c), and 172.702(a) as charged in the complaint; and
2) Respondent is hereby assessed a civil penalty of $9,000.

I. The Complaint

On or about August 16, 2007, Apollo A & HS Company (hereinafter "Apollo" or "Respondent"), through an employee, offered to Federal Express a fiberboard box containing hazardous materials – 19,200 safety matches -- for transportation by air between Hong Kong, People's Republic of China, and New York, NY. The safety matches were packaged in paperboard boxes. They had been marked as "wooden sticks."

The shipment had been undeclared. That is, the package had not met marking and labeling requirements for the air transportation of hazardous materials. Nor was it packaged in the required manner. Emergency response information also was lacking. There was no indication that the substances inside the package were classed as hazardous materials. It was

also determined that the employee who tendered the shipment did not have the requisite training to ship these types of goods.

This incident led the Federal Aviation Administration (hereinafter "Complainant," "FAA," or "agency") to prefer the charges at issue. The agency's Complaint alleges that Respondent violated seventeen provisions of the United States Department of Transportation Hazardous Materials Regulations ("HMRs"): 49 CFR §§171.2(e), 172.200(a), 172.201(d), 172.202(a)(1)-(a)(5), 172.203(f), 172.204(a), 172.204(c)(2), 172.204(c)(3), 172.300(a), 172.301(a), 172.400(a), 172.600(c), and 172.702(a). The agency seeks a total civil penalty of $22,500.

Respondent denied the charges.

I held a hearing on August 21, 2009, in Anchorage, AK. Respondent failed to appear.

II. Discussion and Penalty

I found that, by its failure to appear, Respondent had constructively withdrawn its Request for Hearing. I also found that by its failure to appear, Respondent is deemed to have admitted all the allegations of the Complaint (Tr. 10).

I conclude, moreover, that the agency proved its case on the merits. FAA special agent Gary Meaders submitted an affidavit accepted into evidence (Exh. 2) which states his conclusion that, following examination of the suspect shipment, the shipment "obviously" contained safety matches. Safety matches are classified as a hazardous material (*see* Hazardous Materials Table immediately following 49 CFR §172.101). Agent Meaders' affidavit, which contains attachments, also asserted that the shipment contained none of the marking, labeling, and other information that the HMRs require (Exh. 2, pp. 1-2; *see also* Exh. 2, Attachment A, containing nine photographs of the outer and inner packages and their contents).

Respondent, moreover, acknowledged in writing the truth of the allegations. Apollo's response of October 3, 2007, to agent Meaders' Letter of Investigation admitted that it had in fact shipped matches (Exh. 2, Attachment C). The company's response to the agency's Notice of Proposed Civil Penalty, dated January 29, 2008, also admitted the same

(Exh. 1). Against this background, I reiterate my conclusion that Respondent knowingly committed the violations alleged.[1]

The amount of an appropriate civil penalty became the only remaining issue.

Complainant asks for a civil penalty of $22,500. It bears the burden of proving the appropriateness of this amount by a preponderance of the evidence. *Phillips Building Supply,* FAA Order No. 2000-20 (August 11, 2000), p. 8.

In setting the amount of the penalty, the statute requires that the decisionmaker consider "the nature, circumstances, extent, and gravity of the violation," and, with respect to the violator, "the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business," and "other matters that justice requires" (49 U.S.C. §5123(c)). In other words, the totality of the circumstances involved determines the proper assessment. *Stebbins Aviation,* FAA Order No. 2006-3 (February 7, 2006).

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

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

The substances involved in this case could have proven particularly perilous. The agency's penalty guidelines ("the guidelines") place matches in a risk category warranting a maximum fine because matches are considered

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

to have the potential to have a catastrophic effect on an air carrier's ability to continue safe flight.[2]

The agency also concluded that Apollo properly is categorized under the guidelines simply as a business entity (Category B in the "Offense Categories" under the guidelines; *see* Exh. 2, Attachment D, p. 14). This is a risk category that put Respondent in the low-to-medium penalty group -- although the company arguably could be considered an entity handling hazmats in the course of business (Category C), a categorization which would warrant a medium-to-high penalty.

The midpoint of the suggested range of fines in the sanction matrix identified is $4,500, and multiplying that figure by the five categories of violations (shipping papers, marking, labeling, training, and emergency response information) led to Complainant's suggestion that Respondent's actions justified a civil penalty of $4,500 × 5, or $22,500 (Exh. 2, p. 2, ¶5).

In weighing the totality of the facts and circumstances, I find and conclude that a civil penalty assessment of $9,000 is appropriate. For sanction purposes I have concluded that there are two violations – one involving the absence of information on the package, and the other concerning the lack of training – and, in conformance with Complainant's suggestion, each was multiplied by the guidelines' midrange penalty of $4,500 to obtain the assessment. In non-egregious cases, assessing multiple penalties for what is essentially one type of violation – tendering a shipment lacking the requisite information – should be avoided, particularly when the respondent, as in this matter, is not in the business of shipping such goods in air transportation, and when it has readily admitted to the act comprising the violations. *See Paul H. Carr,* FAA Order No. 98-2 (March 12, 1998), pp. 13-14.

The civil penalty assessment also adequately reflects the nature of the risk to air transportation safety put in motion by the actions of Respondent. I conclude further that the assessment will achieve the statutory purpose of promoting compliance with the HMRs. The fine contains sufficient "bite", or deterrent effect (*see Toyota Motor Sales, Inc.,* FAA Order No. 94-28 (September 30, 1994), p. 11)). It is not an insignificant amount. In sum, I

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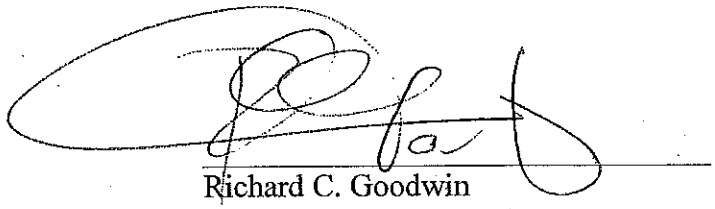
[2] Exh. 2, p. 2; Exh. 2, Attachment D, p. 18. *See* Federal Aviation Administration Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines, 64 Fed.Reg. 19443 *et seq.* (April 21, 1999), FAA Order 2150.3A, Chg. 26, Appendix 6, dated April 14, 1999. By Order 2150.3B, the agency issued new sanction guidelines superseding the old. The new guidelines are inapplicable here, however, because they apply to violations occurring on or after October 1, 2007, and the incident in this matter took place earlier, on August 16, 2007. *See* 72 Fed.Reg. 55853 (October 1, 2007).

conclude that a civil penalty in the amount of $9,000 appropriately accounts for the factors the statute directs in fixing the assessment.[3]

Respondent Apollo A & HS Company is hereby assessed a civil penalty of $9,000 for violations of the following HMRs: 49 CFR §§171.2(e), 172.200(a), 172.201(d), 172.202(a)(1)-(a)(5), 172.203(f), 172.204(a), 172.204(c)(2), 172.204(c)(3), 172.300(a), 172.301(a), 172.400(a), 172.600(c), and 172.702(a).[4]



Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

[3] Complainant's Motion for Decision, dated July 23, 2009, is denied.

[4] 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.