UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: ATLAS FRONTIERS, LLC
FAA Order No. 2010-10

Docket No. CP07NM0009
FDMS No. FAA-2007-0123[1]

Served: June 16, 2010

DECISION AND ORDER[2]

Respondent Atlas Frontiers, LLC ("Atlas") has appealed the written initial decision of Administrative Law Judge ("ALJ") Richard C. Goodwin[3] assessing Atlas a civil penalty of $12,000 for a number of violations[4] of the Department of Transportation ("DOT") Hazardous Materials Regulations ("HMR") (49 C.F.R. Parts 171-178). This decision denies Atlas's appeal and assesses a $12,000 civil penalty.

I. Facts

Atlas is an equipment broker in Boise, Idaho. (Exh. C-12.) Using mainly eBay, an online auction Web site, Atlas manages the auction of items for companies that do not have time to sell the items themselves. (Tr. 114-16; Exh. C-9.) Atlas's customers

[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://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] A copy of the ALJ's initial decision dated December 17, 2008, is attached.

[4] The violations found by the ALJ are listed in his "Order on Remand," served on August 20, 2009 (attached). The text of the regulations that the ALJ found Atlas violated are included in the Appendix to this decision.

include hospitals, offices, and rental and construction equipment companies. (*Id.*)

Atlas's owner, W. Mason Fuller, testified that Atlas is a very small company, with only a few employees. (Tr. 115.) It makes between 200 and 300 shipments per month. (Exh. C-12.) Atlas's Web site states that it manages all packing. (Exh. C-9; Tr. 72.)

On or about June 1, 2007, an Atlas employee in Boise brought a fiberboard box for ground shipment to DHL, an express courier service. (Tr. 126; Exh. C-8 at 1.) Although the shipment's ultimate destination was Lawton, Michigan (Exh. C-2 at 2), the shipment flew first to Salt Lake City, where DHL employees discovered that it was emitting gasoline fumes and was leaking (Tr. 23, 52).

DHL called USA Environmental, a remediation company, to clean up the environmental hazard. (Tr. 20, 23.) Kirk Stauffer, a partner in USA Environmental, responded. (Tr. 20, 23.) He testified that gas fumes were in the air. (Tr. 24, 33.) He saw that gas, water, and oil were leaking out of the piece of equipment in the box. (Tr. 24, 34, 35-36.) He observed an engine with a pump attached. There were breather holes in the engine's gas cap from which the gasoline was leaking. (Tr. 24, 35.) About 8 ounces of gasoline had spilled out, according to the "Hazardous Materials Incident Report" submitted by DHL to DOT's Research and Special Programs Administration (RSPA). (Exh. C-2 at 2.) Stauffer testified that there were no hazardous materials labels or markings on the box (Tr. 29, 40-41), and no absorbent material used for packaging liquid hazardous materials (Tr. 27). Stauffer put the engine with the attached pump in a 55-gallon drum and sealed it. (Tr. 25.) The box was discarded. (Tr. 97.)

James E. Berk is the FAA hazardous materials specialist who investigated the incident. (Tr. 45, 47.) He went to DHL and observed the engine and pump (Tr. 47-48),

but the box had already been discarded. (Tr. 97.) Berk took photographs of the engine and pump and conducted interviews. (Exh. C-5, C-6; Tr. 48.)

Berk testified that the proper shipping name of the engine was "Engine, internal combustion, flammable liquid powered," and the correct identification number for it was "UN3166." (Tr. 62-63; *see also* 49 C.F.R. § 172.101, Hazardous Materials Table.) It required a CLASS 9 label or placard. (Tr. 63; Section 172.560.)

As for the gasoline, its proper shipping name was "Gasoline." (Section 172.101, Hazardous Materials Table.) Berk testified that its identification number was UN1204, and that it belonged in Packing Group II, Class 3. (Tr. 67.) Berk testified that there was about a quart of gas left in the tank when he observed it. (Tr. 68.) The proper label is a red FLAMMABLE LIQUID label. (Section 172.101, Hazardous Materials Table; Section 172.419.)

Berk testified that the shipment required hazardous materials labels, markings (including orientation markings to prevent tipping on the side and leaking), and shipping papers (including emergency response information). (Tr. 63-66.) He also testified that there is a requirement to purge combustible engine fuel tanks before shipment. (Tr. 69.)

The label indicated that Atlas was the shipper. The label further indicated that it was a ground shipment, although DHL Express's "Terms and Conditions of Service" indicated that DHL may carry its parcels by any means DHL chooses, including air. (Exh. C-4 at 1.) Atlas did not have a contract with DHL, but instead shipped under the account of Fleet Street Couriers (Fleet Street) (Tr. 118), a company owned by the father of Atlas's owner (Tr. 126).

Berk testified, based on a photographic exhibit, that there was a small orange envelope in the bottom right side corner of the box, but that the envelope contained the packing list rather than hazardous materials shipping papers. (Tr. 98; Exh. C-19.) Berk said that if there had been hazardous materials shipping papers, they would have been offered at the Boise, Idaho, station and would have "traveled on a pallet notification." (Tr. 109.) There also would have been a second copy, because one copy stays with the box and one is given to the pilot of the aircraft. (Tr. 109-110.) The shipping papers must be retained by the shipper for 2 years and by the air carrier for 1 year. (Tr. 111.) Berk was unable to obtain from Atlas any indication that there had been a shipper's declaration of hazardous goods (Tr. 111), and DHL had no record of receiving the hazardous materials shipping documents (Tr. 110).

Atlas's owner testified that "[n]ot to my knowledge": (1) did the box have any hazardous materials labels or markings; (2) was the box accompanied by hazardous materials shipping papers, including emergency response information; and (3) did the shipment have the required absorbent materials. (Tr. 121-22.)

Berk testified that he asked Atlas to provide hazardous materials training records for the appropriate individuals at the company, but Atlas did not respond. (Tr. 74.) Fuller stated during the investigation that he had three employees preparing shipments, but none of them were trained in the shipment of hazardous materials. (Exh. C-12.) He testified that he was the only person in the company to receive hazardous materials training, which occurred 9 months after the incident and consisted of watching a hazardous materials slide show on the DOT Web site, which had a "self test." (Tr. 124.) Fuller testified that at the time, Atlas did not have hazardous materials training because

Atlas did not ship hazardous materials. (Tr. 117.) He testified that it was a new venture for Atlas to deal with construction rental equipment, which he implied was more likely to contain hazardous materials than Atlas's other types of shipments. (*Id.*)

II. ALJ's Decision

The ALJ found that Fuller admitted that the shipment lacked the required markings, labeling, and other required information. He further found that Fuller admitted that the engine had not been drained of fuel and that shipping personnel did not have hazardous materials training. Under the circumstances, the ALJ found, each alleged violation was proven.

It made no difference to the ALJ that Atlas had offered the shipment for ground transportation. The ALJ stated that Atlas was, or should have been, aware of the possibility that the package would travel by air because the contract with DHL specified that DHL may transport shipments offered for ground transportation by air.

Regarding the sanction, the ALJ found the following:

- Undeclared shipments of hazardous materials "are particularly worrisome because they constitute a safety threat whose magnitude is unknown." (Initial Decision at 3.)

- The danger was heightened because the gas could have ignited, the gas cap had a hole in it, and there were no orientation markings to decrease the likelihood that the box would be tilted and the gas spilled.

- There was a leak of the hazardous material, which is an aggravating factor.

- Atlas is a business that uses hazardous materials in the course of its business. Nothing suggested that the shipment "was unique or unusual, or inconsistent with Atlas's holding itself out as an equipment broker." (Initial Decision at 4.)

- Even though Atlas did not know about the requirements for hazardous materials transportation, the fact that violations were unintentional does not mitigate an otherwise reasonable sanction.

- Regarding corrective action, Fuller's watching a slide show, produced by DOT, 9 months after the incident, even if true, was not timely and was not rigorous and thorough enough to be mitigating.

- Atlas's status as a first-time violator was not mitigating because a violation-free history is the norm.

- Atlas did not substantiate its claim that the proposed sanction of $12,000 would force it out of business.

For all of these reasons, the ALJ decided to assess a $12,000 civil penalty, the amount proposed by the agency attorney.

III. Atlas's Appeal

A. Regular Course of Business

On appeal, Atlas argues that the sanction is too high because Atlas does not ship hazardous materials in the "regular course of business." Further, it claims, less than 0.1% of its shipments are hazardous. This argument is rejected because, as explained below, the civil penalty proposed by the agency attorney and assessed by the ALJ is appropriate under agency sanction guidance for an entity like Atlas.

The FAA's sanction guidance in hazardous materials cases sets forth sanction ranges for several categories of business entities. (64 Fed. Reg. 19443, 19447 (April 21, 1999); FAA Order No. 2150.3A at 14, Figure 1.) The sanction range, per violation, for a "business entity" is $1,500-7,500, while the sanction range for a "business entity that uses or handles Hazmat in the course of business" is $2,500-10,000. The sanction range for a "business entity that regularly offers, accepts, or transports Hazmat" is $5,000-12,000.

In this case, the agency selected the sanction range for a "business entity" – *i.e.*, $1,500-7,500. The agency then multiplied seven violations (shipping papers, labels, markings, training, packaging, emergency response information, and release into the

environment) – by the bottom of the range, $1,500, yielding $10,500. (Tr. 92.) The agency also multiplied the seven violations by the top of the range, $7,500, yielding $52,500. (*Id.*) After factoring in other required considerations using the sanction guidance, the agency proposed a penalty of $12,000, which was near the low end of the range for these violations by a "business entity." The ALJ imposed the FAA's proposed penalty of $12,000.

In contrast, the low end of the penalty range per violation for "business entity that uses or handles Hazmat in the course of business" is $17,500 (seven violations x $2,500) and the low end of the range for "business entity that regularly offers, accepts, or transports Hazmat" was $35,000 (seven violations x $5,000). The $12,000 assessed by the ALJ was below the range for these two categories of business entities and was within the range for a simple "business entity." Thus, contrary to Atlas's argument, the ALJ did not assess a higher penalty for a business that ships hazardous materials in the "regular course of business."

B. Shipping Papers

Atlas argues that it is unclear whether hazardous materials shipping papers accompanied the shipment, given that the box with its attached pouch was destroyed. Therefore, Atlas contends, the agency attorney did not show that Atlas committed the violations related to shipping papers.[5] Atlas points out that the remediation company's

[5] These include the following:

- Section 171.2, which prohibits persons from offering a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, etc.;
- Section 172.200, which requires a description of the hazardous material on the shipping paper;
- Section 172.202, which details what must be included on the hazardous materials shipping papers; and

personnel and the special agent who investigated the case did not open the envelope attached to the box.

As noted above, when asked at the hearing whether there were hazardous materials shipping papers, Atlas's owner responded, "Not to my knowledge." (Tr. 121-22.) The special agent testified that the envelope attached to the box would have contained only the packing list. As the special agent testified, if there had been hazardous materials shipping papers, there would have been two copies – one attached to the box, and one given to the pilot. (Tr. 109.) Further, both Atlas and DHL were required to keep copies of the hazardous materials shipping papers, but neither was able to produce any. (Tr. 98, 110.) Under the circumstances, the FAA successfully met its burden of proving that there were no shipping papers.

C. Markings

Atlas also argues that it was unclear whether the required markings were present, but when asked at the hearing whether there were any hazardous materials markings, Atlas's owner responded, "Not to my knowledge." (Tr. 121.) Further, the markings, including the orientation arrows, would have been visible on the box and Stauffer, who was first on the scene and who cleaned up the spill, did not observe any markings on the box. (Tr. 41.)

- Section 172.600(c), which requires emergency response information to be on the hazardous materials shipping papers.

D. Carrier Violations

Atlas argues that the ALJ improperly found violations of Section 172.300 and 172.602(c), which, it argues, apply only to carriers, and Atlas is not a carrier.

While paragraph (b) of Section 172.300 applies to carriers, paragraph (a) applies to a "person." Section 172.300(a) provides as follows:

> (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.

Atlas is a "person" as that term is defined in 49 C.F.R. § 171.8 ("person").[6]

As for Section 172.602(c), it applies by its own terms only to carriers and to operators of facilities where a hazardous material is received, stored, or handled during transportation.[7] Atlas does not come within any of these categories. Thus, the ALJ erred in finding a violation of Section 172.602(c), because Atlas is neither a carrier nor a facility operator.[8]

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[6] "Person," under 49 C.F.R. § 171.8, "means an individual, corporation, company, association, firm, partnership, society, joint stock company; or a government, Indian tribe, or authority of a government or tribe offering a hazardous material for transportation in commerce or transporting a hazardous material to support a commercial enterprise."

[7] Section 172.602(c) provides as follows:

> (c) Emergency response information shall be maintained as follows:
> (1) *Carriers*. Each carrier who transports a hazardous material shall maintain the information specified in paragraph (a) of this section and § 172.606 of this part in the same manner as prescribed for shipping papers ….
> (2) *Facility operators*. Each operator of a facility where a hazardous material is received, stored or handled during transportation, shall maintain the information required by paragraph (a) of this section whenever the hazardous material is present. ….

[8] No adjustment in the civil penalty is warranted due to this error because Atlas's violations still fall within the same basic categories of shipping papers, labels, markings, training, packaging, emergency response information, and release into the environment. Although Section 172.602(c) was inapplicable, the agency alleged a violation of Section 172.600(c) pertaining to emergency response information, and Section 172.600(c) applied to Atlas.

The ALJ properly found that Atlas violated Section 172.600(c)(1) by failing to provide emergency response information. Section 172.600(c)(1) requires any person who offers hazardous materials for transportation to provide emergency response information. (*See* 49 C.F.R. § 172.600(b), addressing applicability.)

E. Change in Transportation Mode

Atlas argues that it did not have notice that DHL might change the mode of transportation from ground to air because Atlas was shipping under Fleet Street's contract with DHL.[9] Therefore, it contends, any penalty scales applied to it should be for ground transportation rather than for air transportation.

Assuming, for the sake of argument, that Atlas lacked notice that DHL might change the mode of transportation from ground to air, it would not make a difference. The regulations at issue apply to transportation by ground as well as by air, and the penalty would be no lower if the engine had been shipped by ground.

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") (formerly RSPA), an agency of DOT, has published sanction guidelines for the transportation of hazardous materials by ground. These guidelines applied as of October 1, 2005, and were in effect at the relevant time. (49 C.F.R. Part 107, Subpart D, Appx. A at 43 (2007); Exh. C-15 at 3.) As the agency attorney pointed out, PHMSA's baseline assessment for an undeclared shipment in ground mode is $15,000, $3,000 higher than the penalty assessed in the instant case. (49 C.F.R. Part 107, Subpart D, Appx. A at 43-44; Exh. C-15 at 3-4; Tr. 94.) PHMSA's baseline assessment for the leak

[9] DHL's "Terms and Conditions" for Ground Service define "shipment" to include all parcels that "may be carried *by any means DHL chooses, including air*, road, or any other carrier." (FAA Exh. 4; emphasis added.)

alone, given that the gasoline was in Packing Group II, would be $9,000. (49 C.F.R. Part 107, Subpart D, Appx. A at 45; Exh. C-16 at 5; Tr. 95.) Thus, assessing a sanction based on the guidelines for ground transportation would not yield a lower penalty.

F. History of Violations

Atlas argues that the sanction is too high, in part, because it does not have a history of violations. As stated in previous cases, a violation-free history "is not a mitigating factor, because a violation-free history is considered the norm." Interstate Chemical Co., Inc., FAA Order No. 2002-29 at 17 (December 6, 2002); *see also* TCI Corp., FAA Order No. 1992-77 at 20 (December 22, 1992) (to the same effect). A history of prior violations would be an aggravating factor. Interstate Chemical Co., FAA Order No. 2002-29 at 17. The ALJ correctly rejected Atlas's violation-free history as a mitigating factor.

G. Financial Hardship

Atlas argues that it does not earn enough to pay the penalty. It states that it is a young company and that the penalty would reduce Atlas's owner's income to zero for 2 years and would cause Atlas to cease business operations.

Financial hardship and inability to pay are affirmative defenses that the respondent has the burden of proving by a preponderance of the reliable, probative, and substantial evidence in the record. Giuffrida, FAA Order No. 1992-72 at 2 (December 21, 1992), citing 14 C.F.R. § 13.224(c) ("[a] party who has asserted an affirmative defense has the burden of proving the affirmative defense"); *see also* Scenic Mountain Air, Inc., FAA Order No. 2001-5 at 13-14 (May 16, 2001) (Respondent "bore the burden of proving its claim of financial hardship"). A respondent bears the burden of

proof because its financial records are within its sole control. Seven's Paint & Wallpaper Co., FAA Order No. 2001-6 at 5 (May 16, 2001), quoting Giuffrida, FAA Order No. 1992-72 at 2.

The only evidence in the record of financial hardship and inability to pay is the self-serving testimony of Atlas's owner. Atlas did not provide any supporting documentation such as tax records. Under the circumstances, the ALJ did not err in finding that Atlas failed to bear its burden of proving financial hardship and inability to pay.

H. Corrective Action

Regarding corrective action, Atlas's owner testified that 3 months before the hearing, he took training consisting of a hazardous materials slide show on the DOT Web site. (Tr. 123.) He testified that he was the only one at Atlas doing shipping at the time. (*Id*.) He did not have copies of the training records with him at the hearing. (Tr. 122.)

The ALJ held that if true, the training, which did not take place until 9 months after the incident, [10] was not timely, rigorous, or thorough enough to be mitigating. Atlas argues that the training at issue should be acceptable given that DOT offers the slide show on its Web site. Atlas also argues that Section 172.702, which contains the requirement that hazardous materials employers ensure that each of their hazardous materials employees is trained in accordance with the hazardous materials regulations, does not indicate a "preference for rigor or venue."

[10] The incident occurred in June 2007, and the hearing took place about a year later, in June 2008. Thus, if Atlas's owner was not trained until 3 months before the hearing, he was not trained until approximately 9 months after the incident.

Under certain circumstances, corrective action may be considered in setting the civil penalty amount. Toyota Motor Sales, USA, Inc., FAA Order No. 1994-28 at 9 (September 30, 1994), citing TCI Corp., FAA Order No. 1992-77 at 21 (December 21, 1992). Although the Federal hazardous materials statute [now at 49 U.S.C. § 5123(c)(3)] does not specifically mention corrective action as a factor to consider, it may be considered under the category of "such other matters as justice may require." Seven's Paint & Wallpaper Co., FAA Order No. 2001-6 at 6, citing Phillips Building Supply, FAA Order No. 2000-20 at 9 n.10 (August 11, 2000), *reconsideration denied*, FAA Order No. 2000-27 (December 21, 2000), citing TCI Corp., FAA Order No. 1992-77 at 21.

Swift, comprehensive, and positive corrective action warrants reduction of an otherwise appropriate civil penalty. Whitley, FAA Order No. 2009-4 at 21 (January 14, 2009), citing Detroit-Metropolitan-Wayne County Airport, FAA Order No. 1997-23 at 5 (June 5, 1997). "Positive" means action to prevent future violations. Whitley, FAA Order No. 2009-4 at 22. Training, generally, constitutes a positive action since it is designed to prevent future violations.T[11] But in this case, the training was not swift, and under 49 C.F.R. § 172.702(a), Atlas should have accomplished the training before the shipment. *See* FAA Order No. 2150.3A, Appx. 6 at 11; 64 Fed. Reg. 19443, 19447 (April 21, 1999) ("[c]orrective action that results in mitigation is remedial action that exceeds the minimum legal requirements"). Further, the $12,000 civil penalty is already at the low end of the appropriate range for these violations by a business entity like Atlas.

[11] TCI Corp., FAA Order No. 1992-77 at 21-22 (one example of positive corrective action is sending one's employees to hazardous materials training; if Respondent had done so, it might have been entitled to a reduction in its penalty), cited in Interstate Chemical Corp., Inc., FAA Order No. 2002-29 at 18 (December 6, 2002) (finding that penalty was appropriate, among other things, in light of Respondent's sending its employee for additional training).

In light of the egregiousness of the violation – a hidden shipment of a gasoline engine containing gasoline – the penalty should not be any less than $12,000. In fact, a higher penalty might be assessed if the Administrator were not constrained by the penalty sought by the agency attorney in the complaint. See 14 C.F.R. § 13.16(j) ("[t]he FAA decisionmaker may assess a civil penalty but shall not assess a civil penalty in an amount greater than that sought in the complaint"). [12]

Conclusion

Having found no prejudicial error regarding the violations or the sanction, this decision denies Atlas's appeal and affirms the $12,000 civil penalty assessed by the ALJ.[13]

[Original signed by J.R. Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

[12] Any arguments not discussed have been considered, rejected, and found unworthy of discussion.

[13] This decision shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). *See* 71 Fed. Reg. 70460 (Dec. 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

APPENDIX

Section 171.2(e)[14] 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 provides:

> (a) The shipping description of a hazardous material on the shipping paper must include:
> (1) The identification number …;
> (2) The proper shipping name …;
> (3) The hazard class or division number …;
> (4) The packing group …;
> (5) [T]he total quantity of hazardous materials covered by the description;
> (6) [T]he total net mass per package … and;
> (7) The number and type of packages ….

Section 172.300 provides:

> (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) provides:

> (a) [E]ach person who offers for transportation a hazardous material 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 172.304(a)(1) provides:

> (a) The marking required in this subpart –

[14] All citations are to the 2007 edition of Title 49 of the Code of Federal Regulations.

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

Section 172.400(a) provides:

[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) provides:

General requirements. No person to whom this subpart applies may offer for transportation … a hazardous material unless:

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

Section 172.602(c) provides:

(c) Emergency response information shall be maintained as follows:

(1) *Carriers*. Each carrier who transports a hazardous material shall maintain the information specified in paragraph (a) of this section and § 172.606 of this part in the same manner as prescribed for shipping papers ….

(2) *Facility operators*. Each operator of a facility where a hazardous material is received, stored or handled during transportation, shall maintain the information required by paragraph (a) of this section whenever the hazardous material is present. ….

Section 172.702(a) provides:

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

Section 173.1(b) provides:

(b) A shipment of hazardous materials that is not prepared in accordance with this subchapter may not be offered for transportation by air, highway, rail, or water.

Section 173.22(a) provides:

> (a) [A] person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following:
>
> (1) The person shall class and describe the hazardous material in accordance with parts 172 and 173 of this subchapter ….

Section 173.24(b)(1) provides:

> (b) 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) There will be no identifiable (without the use of instruments) release of hazardous materials to the environment ….

SERVED DECEMBER 17, 2008

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

FEDERAL AVIATION ADMINISTRATION, Complainant, v. ATLAS FRONTIERS, Respondent.	FAA DOCKET NO. CP07NM0009 (Civil Penalty Action) DMS No. FAA-2007-0123

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent is hereby assessed a civil penalty of $12,000.

I. Background

Atlas Frontiers, LLC (hereinafter "Respondent" or "Atlas"), of Boise, ID, is an equipment broker. It sells items for customers, generally by posting the particulars online. It handles all the details of sale, such as preparation for shipment and shipment itself. Atlas is a hazmat employer (Exh. C-9; Tr. 77, 114-16).

According to the Amended Complaint of the Federal Aviation Administration (hereinafter "Complainant," "FAA," or "the agency"), on or about June 1, 2007, at Boise, ID, Atlas knowingly offered in air transportation an undeclared shipment of hazardous materials. "Undeclared" means that the external package, in this case a fiberboard box, was not marked or labeled in a manner that would indicate the hazardous nature of its contents. Complainant identified the hazardous materials inside the box as 1) a gasoline engine (attached to a pump) and 2) approximately one quart of gasoline, which was inside the engine's fuel reservoir.

Thus, according to Complainant, Respondent violated several Hazardous Materials Regulations ("HMRs"), 49 CFR §171 *et seq., viz.*, §§171.2(e), 172.200(a), 172.202, 172.300, 172.301(a), 172.304(a)(1), 172.400(a), 172.600(c), 172.602(c), 173.1(b), 173.22(a), and 173.24(b)(1). These provisions set out marking, labeling, and packing requirements for certain hazardous-

materials shipments, and mandate training for entities involved in such shipments. The agency seeks a civil penalty of $12,000.

Respondent, who appeared *pro se* and was represented by managing member Mr. Mason Fuller (Tr. 4), denied the charges. It had intended the shipment to go by ground transportation.

A hearing was held on June 12, 2008, in Boise, ID. I determined that a written decision was reasonable and appropriate under the circumstances (Tr. 141). The parties made concluding arguments (Tr. 128-41) and the matter now is ready for decision.

I hold that the facts and circumstances of this case warrant findings of violations on all counts and an assessment against Respondent of $12,000.

II. Facts and Circumstances

Atlas Frontiers on June 1, 2007, had shipped the offending package via DHL from Boise, intending it for a customer in Lawton, MI (Exh. C-8; Tr. 70-71). Following a flight which touched down at Salt Lake City, the package was flagged on account of spillage (Exh. C-1). Witness Kurtis Stauffer, a partner in US Environmental, a remediation company which manages environmental hazards such as spills (Tr. 18-20), was called to the scene at the DHL facility in Salt Lake. He discovered a fiberboard box tendered by Respondent apparently leaking from the inside. The "obvious" odor of gas also was present (Tr. 24; *see also* Tr. 66 (testimony of FAA special agent James E. Berk)). Stauffer looked inside and determined that the box contained a ditch pump attached to a small, gas-powered engine (*see* Exh. C-5). Liquid was coming out of the gas cap breather nozzle at the top of the gas can. Upon opening the can, Stauffer found gas in the container. Approximately one and one-half inches of gasoline remained in the tank, or about one quart. Water damage, originating from the pump, also was present. Stauffer cleaned up the spill and removed the offending materials (Tr. 22-29, 33-34; Exh. C-10, pp. 2-5; Exh. C-20).

The shipment ought to have been classified as a hazardous material. The proper shipping name for the engine was "engine, internal combustion, flammable liquid powered." (*See* Hazardous Materials Table immediately following 49 C.F.R. §172.101). It is a Class 9 material. As such, to be shipped by air the HMRs required the display of certain labels and markings (notably, in this matter, orientation markings) and emergency response information. The shipment also was obligated to follow standards of hazmat packaging. None of these conditions were met (Tr. 54-55, 62-64; Exh. C-2). Gasoline also is classified as a hazardous material (Hazardous Materials Table following §172.101), and none of the conditions for its transport by air were present either (Exhs. C-1, C-7; Tr. 66-68). Moreover, the fuel tank of a combustible engine must be purged prior to shipment (Tr. 69) – but this tank was not.

Finally, Atlas employees responsible for tendering the shipment had not had the hazardous-materials training required for such tasks (Tr. 13-14, 74-75).

Mr. Fuller acknowledged the truth of these findings. He admitted that the shipment, tendered by an Atlas employee, lacked the required markings, labeling, and other required information (Tr. 121-22, 125-26). He acknowledged that the engine had not been drained of fuel. He also admitted that shipping personnel did not have hazardous materials training (Tr. 116-17, 123). In these circumstances, I find that each of the violations alleged was proved.

In Respondent's defense, Fuller stressed that Atlas had tendered the shipment for ground transportation (Tr. 118-19; *see also* Tr. 49-50). But this argument does not avail Respondent. Atlas was, or should have been, aware of the possibility that the package would travel by air. The contract it entered into with DHL specifies that, even when a shipment is offered for ground transportation, DHL may transport it by air (Exh. C-4; Tr. 60).

III. Penalty

Complainant seeks a civil penalty of $12,000. 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.

I have decided to assess a civil penalty against Respondent of $12,000.

In determining the amount of the penalty, the decisionmaker must 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)).

Hazardous materials, by their very nature, are dangerous. Air shipment of such goods 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. They are particularly worrisome because they constitute a safety threat whose magnitude is unknown. Undeclared shipments of hazardous materials, the Administrator has emphasized, "increase the likelihood of injury [and] pose a special risk" (*see, e.g., Toyota Motor Sales, USA, Inc.,* FAA Order No. 94-28 (September 30, 1994), p. 13).

In this case circumstances accentuating the danger also were present. The gas remaining inside the engine could have ignited (Tr. 39). Further, the gas cap had a hole in it, inviting additional peril. While necessary for engine performance (Tr. 65), the presence of the hole guaranteed that the gas would spill out if the engine were tipped on its side (Tr. 65-66). Without the required orientation arrows on the box, the risk of a tilt increased unacceptably. Indeed, approximately eight ounces of gasoline had leaked out prior to the shipment's removal from the line (Exh. C-2, p. 5; Tr. 55). A leaked package constitutes an aggravating fact (64 Fed.Reg. 19443, 19445 (April 21, 1999)).

These circumstances warrant a significant fine.

The character of Respondent's business also is important in determining an appropriate penalty. The fine should reflect the degree of Respondent's involvement with hazardous materials. The agency's HMR Penalty Guidelines suggest that the greater the degree of a respondent's involvement in hazardous materials, the higher the sanction amount should be.[1]

The record shows that Respondent is a business entity which uses hazardous materials in the course of its business. Respondent's representative, Mr. Fuller, contended otherwise. But his assertion is belied by the very facts of this case. Nothing in this proceeding suggests that the nature of the materials shipped was unique or unusual, or inconsistent with Atlas' holding itself out as an equipment broker. Respondent's promise to handle all details attendant to shipping is not limited to non-hazardous materials. Promotional materials promise without restriction to "sell off equipment and inventories at great prices." (Exh. C-9)

Respondent's position as a business handling hazardous materials – even if it were doing so only on an occasional basis – compels an awareness of the HMRs and the concomitant obligation to follow them. The Penalty Guidelines emphasize that such a business "is clearly on notice of the hazardous mature of the material and the regulatory requirements to which the Hazmat is subject" (64 Fed.Reg. 19443, 19449). Atlas cannot avoid liability by claiming that it was unprepared or otherwise surprised. The nature of Respondent's business, I find, also compels a significant assessment for the violations at issue.

But Respondent in fact had no knowledge of the requirements attached to its undertaking. No employee had undergone any kind of training in the recognition or appropriate tender of hazardous materials. Respondent was completely unaware of requirements. This circumstance, however, does not

[1] *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 on June 1, 2007. *See* 72 Fed.Reg. 55853 (October 1, 2007).

avail it. Evidence that violations were unintentional does not mitigate an otherwise reasonable sanction. In fact evidence that a violation had been intentional would constitute an aggravating factor, making appropriate an even higher sanction. *American Air Network, Inc.*, FAA Order No. 2006-5 (February 10, 2006), p. 8.

Mr. Fuller eventually underwent a kind of hazardous-materials training. He stated that nine months after the incident, and after the proceeding had been set for hearing, he watched a slide show produced by the Department. The slides were followed by self-testing. Mr. Fuller produced no records of it (Tr. 122-24). He added that he is now aware of the importance of training. Every Atlas employee who ships (only himself at this point) will be trained in the identification and use of hazardous materials, he said (Tr. 119). Atlas' response to the company's lack of training, however, fails to warrant mitigation.

Swift action designed to better ensure future compliance may justify a reduction in sanction. One such measure which has led to a lesser penalty involves sending responsible employees to training programs (*Westair Commuter Airlines, Inc. d/b/a United Express*, FAA Order 93-18 (June 10, 1993), p. 15; *Delta Airlines*, FAA Order No. 91-40 (September 30, 1991)). The action undertaken by Respondent, however, even if taken as true, was not timely, and was of a nature considerably less rigorous and thorough than the kind of actions recognized for mitigation by the Department. It simply does not constitute the type of speedy or systemic change favored by the agency (64 Fed.Reg. 19443, 19447 (April 21, 1999)).

All other arguments proffered by Atlas have been considered and rejected.[2]

In weighing all the totality of the facts and circumstances, I find and conclude that a civil penalty assessment of $12,000 is appropriate. A company, in the business of selling equipment for others, which ships by air a gasoline-powered engine with gasoline sloshing around inside when not oozing out, and which fails to post any kind of warning or to employ appropriate packaging, has acted thoughtlessly and recklessly. It deserves a hefty fine. I conclude that the amount decided will help to achieve the statutory purpose of promoting compliance with the HMRs.[3] It contains sufficient "bite", or deterrent effect (*see*

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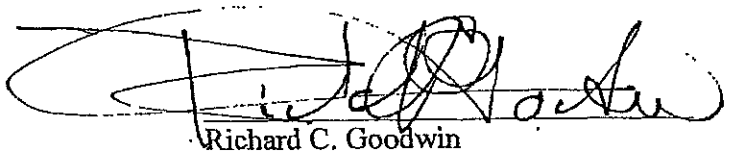
[2] In particular, that Respondent may be a first-time violator (Tr. 120) fails to justify a reduced penalty. A violation-free history is expected to be the norm. *Toyota Motor Sales*, FAA Order No. 94-28 (September 30, 1994); Tr. 87. And while Mr. Fuller stated as an affirmative defense that Atlas could fail as a concern as a result of a fine of such magnitude (Tr. 120), the company failed to support this assertion with any evidence beyond the witness' bare utterance. A self-serving claim without any evidentiary backing is not proof. Atlas, then, failed to demonstrate financial hardship (*see* Tr. 130), and its claim is rejected.

[3] I do not say this without reservations. Respondent's representative Mr. Fuller, in his closing statement, reiterated his intention to henceforth follow the Department's "guidelines" for the shipment of hazardous materials. Tr. 140. Mr. Fuller's characterization of the HMRs is mistaken. The HMRs are not guidelines, but legal requirements.

Toyota Motor Sales, Inc., FAA Order No. 94-28 (September 30, 1994), p. 11). The assessment additionally fairly weighs the post-incident actions Respondent has undertaken. Finally, the civil penalty also appropriately accounts for the factors the statute directs in fixing the assessment.

Atlas Frontiers is hereby assessed a civil penalty of $12,000 for violations of the following HMRs: §§171.2(a), 172.200(a), 172.202(a)(1)-(a)(3), 172.202(a)(5), 172.203(f), 172.204(a) or (c)(1), 172.204(c)(2), 172.204(c)(3), 172.600, 172.602(b)(3), 173.1(b), 172.702(a), 173.27(b)(1), and 173.222.[4]



Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

[4] Any appeal from the Initial Decision to the Administrator must be in accordance with section 13.233 of the Rules of Practice, which requires 1) that a notice of appeal be filed no later than 10 days (plus an additional 5 for mailing) from the date of this order and 2) that the appeal be perfected with a written brief or memorandum not later than 50 days (plus 5 for mailing) from the date of this order. Each is to be sent to the Appellate Docket Clerk, Room 924-A, Federal Aviation Administration, 800 Independence Avenue, Washington, DC 20591, and to agency counsel. Service upon the presiding judge is optional.