UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: MOLE-MASTER SERVICES CORPORATION
FAA Order No. 2010-11

Docket No. CP08SO0012
FDMS No. FAA-2008-0691[1]

Served: June 16, 2010

DECISION AND ORDER[2]

Respondent Mole-Master Services Corporation ("Mole-Master") has appealed the written initial decision of Administrative Law Judge ("ALJ") Isaac D. Benkin assessing a civil penalty of $25,000 against Mole-Master for a number of violations[3] of the Department of Transportation ("DOT") Hazardous Materials Regulations ("HMR") (49 C.F.R. Parts 171 - 180) resulting from a hidden shipment of a flammable material.[4]

On appeal, Mole-Master argues that the $25,000 civil penalty is excessive, claiming that some mitigation would be appropriate due to corrective action taken by Mole-Master. For the reasons discussed below, the civil penalty assessed by the ALJ was appropriate and will not be disturbed in this decision.

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are 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] The regulations allegedly violated can be found in the Appendix to this decision.

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

I. Background

On June 20, 2008, the FAA filed a complaint alleging that Mole-Master violated the HMR when it offered to UPS a box containing hazardous materials for shipment by air on or about February 13, 2007. The complaint sought a civil penalty of $30,000. The ALJ held a hearing on January 29, 2009, and issued his written initial decision on February 10, 2009, finding that Mole-Master committed the alleged violations, but that the proposed civil penalty of $30,000 was too high. Due to Mole-Master's investment in better hazardous materials training for its headquarters shop, management, and clerical employees, the ALJ assessed a civil penalty of $25,000.

II. Facts

Mole-Master is in the business of cleaning and repairing silos, bins, and other storage facilities. (Initial Decision at 1.) On February 13, 2007, Mole-Master shipped via UPS a cardboard box containing a hazardous material – specifically, nine 11-ounce tubes of a flammable sealant. (Tr. 150; Exhibit C-1.) The shipment originated in Marietta, Ohio, Mole-Master's headquarters, and its destination was Mole-Master's other facility in Moscow Mills, Missouri. (Tr. 41; Exhibit C-1; Exhibit C-3 at 4.) Mole-Master offered the shipment for air transportation ("Next-Day Air"), but it was transported by truck on the first leg of its trip, to a UPS sorting facility in Louisville, Kentucky.

At the UPS sorting facility in Louisville, UPS personnel discovered that the box contained the nine 11-ounce tubes of a sealant in a clear plastic bag. (Tr. 50; Exhibit C-3 at 9.) The manufacturer had labeled each tube with a warning that the sealant and its vapor were flammable. The box lacked the required hazardous materials shipping papers, markings, labels, and emergency response information to identify it as a hazardous

material. (Tr. 42, 44, 58, 80, 109.) Thus, it constituted an undeclared shipment of a hazardous material.

The next day, UPS sent a Hazardous Materials Incident Report[5] and a copy of a Material Safety Data Sheet ("MSDS") concerning the shipment to FAA Special Agent Beverly Farris. Mole-Master later submitted the same MSDS to Special Agent Farris (Tr. 59), who determined from the MSDS that the material at issue was a regulated, hazardous material (Tr. 38).

According to the MSDS, the material is an adhesive (Exhibit C-5 at 4; Tr. 57-58) and is in Hazard Class 3 and Packing Group II. The MSDS indicated that the material's identification number is UN1133; that it is a flammable material; and that shipments of this material require a red caution label. (Exhibit C-5 at 4.) The MSDS further indicated that the material has harmful effects on the throat, lungs, eyes, skin, and gastrointestinal tract. (*Id*.)

Special Agent Farris went to UPS to inspect the box (Tr. 46) and found that it was wet and falling apart (Tr. 49). UPS had opened it to determine if it was leaking or if it had been leaked upon. (Tr. 49, 111.) Special Agent Farris did not know how it got wet, but nothing inside the package had leaked. (Tr. 87.)

If a shipment of hazardous materials is offered for air transportation, it must be prepared for air transportation in accordance with the HMR. (Tr. 43.) This shipment was not properly prepared for transportation by air. Not only was it an undeclared shipment, but Mole-Master had not met the requirement that anyone who prepares a shipment containing hazardous materials be trained according to the regulations. (Tr. 81.) Further,

[5] Carriers are required to notify the FAA of possible violations of the HMR. (Tr. 30-31.)

the box containing the hazardous material did not meet the packaging requirements for an adhesive, Class 3, Packing Group II. (Tr. 82.) Because the shipment was undeclared, UPS did not know to treat it as a hazardous material. (Tr. 62.) If UPS knows that the shipment contains hazardous materials, it will be segregated when loaded. (Tr. 61.)

Mole-Master responded to the FAA's letter of investigation as follows: "We have taken the necessary actions to see that this will not happen again. Please accept our apologies for any inconvenience this may have caused." (Exhibit C-6 at 1.) Mole-Master attached a document regarding its safety training (Exhibit C-6 at 2) to its letter. Special Agent Farris testified that the training described in this document would not meet the regulations for training. (Tr. 71-72.)

Regarding the civil penalty, the FAA introduced through Special Agent Farris a copy of FAA Order No. 2150.3B, Appx. C, which the ALJ admitted. This document is entitled, "Sanction Guidance – Hazardous Materials Enforcement." (Exhibit C-7 at 1.) It contains a Matrix in Figure C-1 for use by agency employees in determining appropriate civil penalties in cases involving the shipment of hazardous materials by air.

Special Agent Farris testified that under this Matrix, the Offense Category was "II" for an "Undeclared Shipment within Hazmat Quantity Limitations." (Tr. 83; Exhibit C-7, Figure C-1, Row 2.) She also testified that she classified Mole-Master as a simple business entity – not a business entity that uses or handles hazardous materials in the course of business and not a business entity that regularly offers, accepts, or transports hazardous materials. (Tr. 82; Exhibit C-7, Figure C-1, Column B.)

Using the Matrix in Figure C-1, she determined that the appropriate civil penalty range per category of violation was $1,500-8,200. She further testified that Mole-Master

violated six categories of violations; *i.e.*, violations of regulations pertaining to (1) shipping papers; (2) labels; (3) markings; (4) packaging; (5) training; and (6) emergency response information. (Tr. 83.) Special Agent Farris testified that Mole-Master was not charged with a release into the environment, because there was no leak. Multiplying the low end of the range, $1,500, by six categories would be $9,000. Multiplying the high end of $8,200 by six categories would be $49,200. When the judge asked her if the proposed $30,000 civil penalty was arrived at by averaging the low end and the high end, she said yes (Tr. 82, 84), although she did not calculate the civil penalty herself (Tr. 97-98).

Mole-Master's General Manager testified as follows. Mole-Master had about 35-40 employees at the time of the incident. (Tr. 124.) It had a fleet of about 12-15 vehicles, and some sales cars and other pieces of equipment. (Tr. 125.) The majority of the items Mole-Master ships are catalogues, brochures, and promotional items such as coffee mugs, T-shirts, and ball caps. (*Id.*)

At the time of the incident, the company's annual sales volume was a little more than $4 million. (Tr. 127.) The profitability of the company was 6 to 8 percent before taxes. (*Id.*)

Mole-Master did not normally ship or use the sealant at issue. (Tr. 128.) Usually it used a non-hazardous sealant. (*Id.*) It had no prior violations. (Tr. 139.) It provided a 2-day hazardous materials training class which was held in September 2008 for everyone in the company. Mole-Master, however, did not introduce certificates of training or a copy of the course curriculum into the record. (Tr. 141, 146.) Mole-Master now has a safety manager. (Tr. 147.) Mole-Master's General Manager testified that Mole-Master

replaced its shipping person with a much higher paid individual who had significant experience in handling hazardous materials. (Tr. 149.)

III. The Initial Decision

After the hearing, the ALJ issued a decision finding that Mole-Master committed the alleged violations. (Initial Decision at 5, 6.) Regarding the penalty, he found that Special Agent Farris accurately applied FAA Order No. 2150.3B, Appx. C, to calculate the appropriate civil penalty.

The ALJ noted that the average of $9,000[6] and $49,200[7] is $29,100. He disapproved the "rounding up" to $30,000 that he said took place after Special Agent Farris completed her report because, in his view, it was baseless. Thus, he stated, the tentative civil penalty should be $29,100. The ALJ recognized that under FAA Order No. 2150.3B, Appx. C, mitigating factors may be relied on to reduce the penalty, but he said that Mole-Master had placed in the record little or no hard evidence that would justify reducing the penalty significantly.

With respect to any alleged negative effect on Mole-Master's ability to remain in business and its inability to pay, the ALJ stated that the burden of coming forward rested upon Mole-Master. He further stated that Mole-Master could not rely upon mere generalizations that formed much of the testimony of Mole-Master's General Manager, but instead, Mole-Master had to "come forward with audited financial statements and other data showing its financial position in detail." Mole-Master, he found, failed to introduce such documentary evidence to prove its financial circumstances. (Initial

[6] $1,500, the low end of the sanction range in FAA Order No. 2150.3B, multiplied by six violation categories.

[7] $8,200, the high end of the sanction range in FAA Order No. 2150.3B, multiplied by six violation categories.

Decision at 7.) Mole-Master's general argument that the civil penalty should be reduced because it was a small business, he found, was insufficient and contrary to FAA Order No. 2150.3B, Appx. C, ¶ 5c, which provides that "[t]he FAA does not reduce or waive the penalty … solely because [the violator] is a small business entity."

The ALJ emphasized that "[m]ajor catastrophes and significant loss of life may occur because seemingly innocuous household items are placed in the stream of air commerce without adequate warning to the carrier, its employees or emergency rescue personnel." (Initial Decision at 7.) According to the ALJ, "[t]he garden-variety adhesive containers … contained a flammable substance that would have been transformed into a powerful accelerant if a fire had broken out in the cargo compartment of the aircraft." (*Id.*)

However, the ALJ reduced the penalty sought by the FAA from $29,100 to $25,000 based on Mole-Master's "investment in better training in hazardous materials transportation for its headquarters shop, management, and clerical personnel." (Initial Decision at 7.) The ALJ did so even though Mole-Master's training did not occur until September 2008, 1 year and 7 months after the violations, and, in his words, the description of the training from Mole-Master's General Manager was "rather sketchy." (*Id.*) Nevertheless, the ALJ stated, Mole-Master did make the effort to remedy the fundamental causes of the violations – ignorance and carelessness.

IV. Discussion

Only Mole-Master has appealed. Mole-Master contests the civil penalty amount, but not the finding of violations.

Preliminarily, the ALJ used the wrong guidance in determining the civil penalty amount. He used FAA Order No. 2150.3B, Appx. C (Exhibit C-7), which became effective on October 1, 2007, and, therefore, did not apply to the violations in this case, which occurred on February 13, 2007. Instead, the sanction guidance in FAA Order No. 2150.3A, Appx. 6,[8] applies to this case.[9]

The applicable sanction range, for business entities that ship undeclared shipments within the hazardous materials quantity limitations, is higher under FAA Order No. 2150.3B, Appx. C, than under FAA Order No. 2150.3A, Appx. 6. The range under FAA Order No. 2150.3B, Appx. C, is $1,500 to *$8,200*, while the range under the applicable order, FAA Order No. 2150.3A, Appx. 6, is $1,500 to *$7,500*. If the FAA took the average of the high and low ends of the range to arrive at a moderate sanction (Tr. 84), as the testimony indicated, then the proposed civil penalty was higher than it should have been.

Not only did the FAA and the ALJ use the wrong guidance in determining the penalty, but the FAA's sole witness, Special Agent Farris, testified that she did not

[8] This sanction guidance was published in the Federal Register; the citation is Federal Aviation Administration Policy on Enforcement of the Hazardous Materials Regulations: Penalty Considerations, 64 Fed. Reg. 19443 (April 21, 1999).

[9] The ALJ's reliance on the wrong guidance is understandable because Special Agent Farris testified regarding FAA Order No. 2150.3B, Appx. C. (Tr. 36.)

herself calculate the civil penalty and did not know how her colleague, who was not at the hearing due to inclement weather, had calculated the amount. (Tr. 97-98.)[10]

Notwithstanding the proceedings before the ALJ, the Administrator can determine the appropriate civil penalty on appeal. *Cf.* Zoltanski, FAA Order No. 2002-12 at 7 (April 26, 2002) (stating that the Administrator need not remand a case for a sanction determination when the Administrator overturns a finding of no violation), citing Esau, FAA Order No. 1991-38 at 7 n. 7 (September 4, 1991) (stating that while it would not be inappropriate to remand the case to the ALJ, it was more efficient for the Administrator to determine the sanction).

The FAA issued the sanction guidance in FAA Order No. 2150.3A, Appx. 6, on April 21, 1999. At that time, the Federal hazardous materials transportation law (now found at 49 U.S.C. § 5123) provided for a minimum civil penalty of $250 and a maximum civil penalty of $25,000. 64 Fed. Reg. 19443, 19443 (April 21, 1999). With the adjustment for inflation found in 14 C.F.R. Part 13, Subpart H, the maximum civil penalty per violation at the time was $27,500. *Id.*

In 2007, when Mole-Master offered the hazardous materials for shipment, the minimum civil penalty for *general* hazardous materials violations under 49 U.S.C. § 5123 was still $250, but the minimum civil penalty for *training* violations had risen to $450. 14 C.F.R. Part 13, Subpart H, Table 3—Table of Minimum and Maximum Civil Monetary Penalty Amounts for Hazardous Materials Violations Occurring on or after August 10, 2005. The maximum penalty per violation had risen to $50,000. *Id.*

[10] She did testify that "we" – apparently meaning special agents – all calculate civil penalties in the same way. (*Id*.)

In determining the amount of a civil penalty in hazardous materials cases, the following statutory factors must be considered: (1) the nature, circumstances, extent, and gravity of the violation(s); (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). The FAA's sanction guidance in FAA Order No. 2150.3A, Appx. 6, takes into account the statutory factors. The guidance states that it "provides agency personnel with a systematic way to evaluate a case and arrive at an appropriate penalty, considering all the relevant statutory criteria including any mitigating and aggravating circumstances." 64 Fed. Reg. 19443, 19444.

The sanction guidance "contains a series of questions designed to assist special agents and attorneys in evaluating a particular case." *Id*. These questions are based on the statutory factors. In response to the question "Is the material(s) offered, transported, or accepted in Category A," the answer is "yes" because the material at issue in this case is a flammable liquid in Hazard Class 3, Packing Group II. FAA Order No. 2150.3A, Appx. 6, Figure 2. The guidance states, "If yes, assign a Maximum weight."[11]

All of the other questions[12] in the hazardous materials sanction guidance in FAA Order No. 2150.3A, Appx. 6, are answered "no" and therefore, under the guidance, do

[11] The ALJ placed the material in Category B although the material, a Class 3, Packing Group II material, is clearly in Category A, according to Figure 2.

[12] (1) Did the package(s) exceed the authorized quantity limitations by a significant amount? (2) Were there multiple packages in the shipment? (3) Did the shipment cause damage or harm to persons or property, or interfere with commerce? (4) Is the violator the manufacturer of the hazardous material? (5) Did someone other than the violator prepare the shipment for transportation? (6) Did the violator reasonably rely on incorrect information from another source? (7) Does the violator have a history of previous HMR violations?

not affect the weighting of the case. As a result, the final, aggregate weight of the case is maximum.

The next step is to use the Matrix in FAA Order No. 2150.3A, Appx. 6. Mole-Master falls into the category of "Business entity." For a "Business entity" that ships an "Undeclared Shipment Within Hazmat Quantity Limitations," the range in the Matrix is $1,500 to $7,500 for each of the six violation categories applicable in this case – *i.e.*, shipping papers, labels, markings, packaging, training, and emergency response information. Note that release into the environment is not one of the violation categories at issue in this case. The evidence was that the hazardous materials offered by Mole-Master for shipment did not leak.

In light of the factors described above, a civil penalty of as much as $45,000 would be appropriate. But the analysis under the sanction guidance is not complete. Regarding "other matters that justice requires [to be considered]," it must be determined whether Mole-Master took corrective action warranting a reduction in the civil penalty. Mole-Master's General Manager testified that Mole-Master conducted a 2-day training course for its employees. In addition, Mole-Master now has a safety manager. (Tr. 147.) Mole-Master's General Manager testified that Mole-Master's shipping person is no longer a basic laborer but is a much higher paid individual with significant experience in handling hazardous materials. (Tr. 149.)

Training and other changes to ensure compliance with the regulations are strongly encouraged. Swift, comprehensive, and positive corrective action may warrant a reduction in an otherwise reasonable civil penalty. *See, e.g.*, Whitley, FAA Order No. 2009-4 at 10 (January 14, 2009). In the instant case, however, Mole-Master's

training was not swift – it did not occur until 1 year and 7 months after the violations. Moreover, the ALJ found that the General Manager's description of the training was "sketchy." (Initial Decision at 7.) Under the circumstances, no more than a minimal adjustment for training is warranted. A minor adjustment for the other corrective action – appointing a safety manager and having a shipping person with significant hazardous materials experience – is also warranted. [13]

The Administrator is constrained by the amount sought in the complaint. Section 13.16(j) of the FAA Rules of Practice, 14 C.F.R. § 13.16(j), provides that "[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*." (Emphasis added.) Here, the FAA sought $30,000, so a civil penalty above that may not be assessed. Further, the FAA did not file a cross-appeal challenging the ALJ's $25,000 civil penalty as too low; therefore, the ALJ's penalty amount will not be disturbed in this decision.

Mole-Master argues that it is likely that the FAA based its proposed penalty largely on the aggravating factor of a leak, which did not exist. Mole-Master points out that the FAA did not move to strike the word "leaking" from the complaint until the hearing. If, however, the FAA had based its proposed civil penalty on a leak, the penalty it sought would have been much higher. Note too that the *proposed* penalty is not at issue any longer. The $25,000 civil penalty assessed in this decision takes into account that there was no leak.

[13] Testimony before the ALJ suggested that the civil penalty sought in the complaint was arrived at by averaging the highest and lowest ends of the civil penalty range for the number of violation categories involved in this case. The Administrator does not encourage the use of a mathematical formula to set a civil penalty. Further, in this decision, the Administrator did not use a mathematical formula to arrive at the civil penalty. Instead, the civil penalty assessed in this decision is based on a consideration of all relevant factors.

Mole-Master also argues that the $25,000 civil penalty assessed by the ALJ is too high compared with that assessed in a previous case, Phillips Building Supply, FAA Order No. 2000-20 (August 11, 2000), *reconsideration denied*, FAA Order No. 2000-27 (December 21, 2000). Phillips, which had no history of violations, shipped five 1-gallon cans of Formica glue, which had the proper shipping name of Halogenated Irritating Liquid, NOS. One of the cans leaked. In Phillips, the Administrator assessed a $14,000 civil penalty. Phillips is inapposite, however. The glue was in Hazard Class 6.1, Packing Group III – indicating a material that was less hazardous than the material offered by Mole-Master for shipment, which was in Hazard Class 3, Packing Group II. The lower the Hazard Class, the more hazardous the material is. Hazard Class 6.1, Packing Group III materials fall within Risk Category C and therefore receive a minimum weight, in contrast to Hazard Class 3, Packing Group II materials, which fall within Risk Category A and warrant a maximum weight. FAA Order No. 2150.3A, Appx. 6, Figure 2. Further, Phillips was decided almost a decade ago, and the shipment in Phillips took place prior to the publication of FAA Order No. 2150.3A, Appx. 6, on April 21, 1999. 64 Fed. Reg. 19443 (April 21, 1999).

Mole-Master argues that its conduct was not egregious because the product at issue is found in any hardware or home improvement store. While Mole-Master's conduct could have been worse, the material was flammable (and was clearly labeled as such), which makes this a very serious matter. Mole-Master also argues that its conduct was not egregious because it had not used the product before. However, the civil penalty would have been higher under the sanction guidance if Mole-Master had used or handled

hazardous materials in the course of business or if Mole-Master regularly offered, accepted, or transported hazardous materials.

Mole-Master argues that there is a "piling on" of violations, that it was a single act of shipping materials, that it did not know the materials were hazardous, and that the other violations were primarily paperwork violations. There was no piling on. Although this may have been a single event, it was not a single violation. Under the sanction guidance, Mole-Master violated six different categories of violations. Had Mole-Master known and intentionally shipped the hazardous material, it would have been subject to criminal penalties under 49 U.S.C. § 5124, which provides for criminal fines under Title 18 of the U.S. Code and imprisonment or both. That Mole-Master argues that some of the violations were "primarily paperwork violations" suggests that it still does not understand the gravity of its offenses. If it is referring to the violations involving shipping papers, labels, markings, or emergency response information, it does not comprehend that compliance with these requirements helps to ensure that hazardous materials are properly handled, so that the risk of an incident is diminished, and so that there is emergency help if an incident does occur.

Conclusion

A civil penalty of $25,000 is not excessive; consequently, for the reasons stated above, this decision affirms the civil penalty assessed by the ALJ.[14]

[Original signed by J.R. Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

[14] 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)[15] provides:

> (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) provides:

> (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.

Sections 172.202(a)(1)-(6) provide:

> (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 …;
> (6) The number and type of packages ….

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

> (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." ….

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[15] 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.

(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)(1) provides:

(c) *Transportation by air* –(1) … Certification containing the following language may be used in place of the certification required by paragraph (a) of this section:

> I hereby certify that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packaged, marked and labeled, and in proper condition for carriage by air according to applicable national governmental regulations. ….

Section 172.204(c)(2) provides:

(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) provides:

(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) 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 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) provides:

> (a) … [E]ach non-bulk combination package having inner packagings containing liquid hazardous materials must be …
>
> (2) Legibly marked with package orientation markings ….on two opposite vertical sides of the package with the arrows pointing in the correct upright direction.

Section 172.400(a) provides:

> (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) provides:

> (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
>
> (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 172.602(b)(3) provides:

> (b) *Form of information*. The information required for a hazardous material … must be …
>
> (3) Presented—
>
> (i) On a shipping paper;
>
> (ii) In a document, other than a shipping paper, that includes both the basic description and technical name of the hazardous material as required by §§ 172.202 and 172.203(k), the ICAO Technical Instructions, the IMDG Code, or the TDG Regulations, as appropriate, and the emergency response information required by this subpart (*e.g.*, a material safety data sheet); or
>
> (iii) Related to the information on a shipping paper, a written notification to pilot-in-command, or a dangerous cargo manifest, in a separate document (*e.g.*, an emergency response guidance document) in a manner that cross-references the description of the hazardous material on the shipping paper with the emergency response information contained in the document. ….

Section 172.604(a)(3) provides:

> (a) A person who offers a hazardous material for transportation must provide an emergency response telephone number, including the area code or international access code, for use in the event of an emergency involving the hazardous material. The telephone number must be –
>
> …
>
> (3) Entered on a shipping paper, as follows:
>
> (i) Immediately following the description of the hazardous material …; or
>
> (ii)… in a clearly visible location ….

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. It is the responsibility of each hazmat employer … to ensure that each hazmat employee is trained in accordance with the requirements prescribed in this subchapter. It is the duty of each person who offers hazardous materials for transportation to instruct each of his officers, agents, and employees having any responsibility for preparing hazardous materials for shipment as to applicable regulations in this subchapter.

Section 173.202 provides:

> (a) When § 172.101 of this subchapter specifies that a liquid hazardous material be packaged under this section, only non-bulk packagings prescribed in this section may be used for its transportation. Each packaging must conform to the general packaging requirements of subpart B of part 173, to the requirements of part 178 of this subchapter at the Packing Group I or II performance level (unless otherwise excepted), and to the particular requirements of the special provisions of column 7 of the § 172.101 table.

SERVED FEBRUARY 10, 2009

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

IN THE MATTER OF

MOLE-MASTER SERVICES CORPORATION
DOCKET NO. CP08SO0012
(Civil Penalty Action)

DMS NO. FAA-2008-0691

INITIAL DECISION ASSESSING CIVIL PENALTY OF $25,000

Mole-Master Services Corporation, the Respondent in this case, is a business headquartered in Marietta, Ohio that performs cleaning and repair services for owners and operators of dry storage facilities such as grain silos. It has been accused by the Complainant, the Federal Aviation Administration (FAA), of violating the Department's Hazardous Materials Regulations (HMR) by tendering to United Parcel Service (UPS) for air transportation a cardboard box containing nine eleven-ounce tubes of Black Lap Sealant, a box that was not labeled, packaged, marked or identified as containing hazardous materials and that was not accompanied by the requisite shipping papers or emergency response information. The FAA's complaint sought a civil penalty of $30,000. In the complaint, the FAA identified 17 separate violations of the HMR that Mole-Master was alleged to have committed.

Mole-Master filed an answer, generally denying that it had committed the violations knowingly and demanded a hearing. In its answer, and at the hearing, Mole-Master never seriously contested the FAA's position that the Black-Lap Sealant had been correctly classified as a hazardous material. A hearing was held before me in Louisville, Kentucky on January 29, 2009. Both parties were represented by counsel, and the testimony of two

witnesses was presented. At the conclusion of the testimony, both parties elected to make an oral presentation in lieu of post-hearing briefs. The Complainant offered for the record seven documentary exhibits (labeled C-1 through C-7), all of which were received in evidence. The Respondent identified a single documentary exhibit but withdrew it and declined to offer it, or any other document, for the record.

The FAA's witness was Special Agent Beverley Farris, a Hazardous Materials Specialist in the agency's Louisville, Kentucky office. On February 14, 2007, she received a Hazardous Materials Incident Report from a UPS employee in the carrier's Louisville sorting facility.[1] The report indicated that a package containing "adhesives" had been opened and found to contain undeclared hazardous materials. See Exh. C-1 AT 1. On February 22, 2007, Ms. Farris went to the UPS facility and was shown the box in question. The cardboard container had been wet, reducing its structural integrity. This prompted the UPS personnel to open it in order to ascertain whether the source of the liquid was inside the box. It was being held in a special room where UPS kept questionable packages. Inside the box were nine 11-ounce tubes of Black Lap sealant inside a clear plastic bag. The tubes had been labeled by their manufacturer with a warning to the effect that the sealant and its vapor were both flammable. The box itself bore a label indicating it had been shipped by the Respondent to a Mole-Master branch office located in Moscow Mills, Missouri with instructions to convey it by "Next-Day Air." Documents furnished by UPS indicated that the box had traveled by ground transportation from the Mole-Master facility in Marietta, Ohio to the UPS sorting station in Louisville.

There were no hazardous materials markings or labels on the package and no shipper's declaration or other hazardous material documentation accompanying the shipment. Emergency response information was also absent. See Exh. C-2. Ms. Farris took photographs of the package and its contents. They are in the record as Exh. C-3. A Material Safety Data Sheet (MSDS) for the Lap Sealant was obtained from UPS. An identical MSDS as later provided by the Respondent and sent to the FAA. The MSDS indicates that the material is hazardous both in contact with human skin or eyes or as inhaled or ingested and because it is extremely flammable. The MSDS also states that the U.S. Department of Transportation has placed the material in

[1] UPS, as an air carrier, is required to make such reports under the Federal Aviation Regulations. See 49 C.F.R.§ 175.31. See also, Cary Ratner, FAA Order No. 2009-2, Docket No. CP06EA0009 at 4 (Jan. 12, 2009).

hazard class 3, packing group II and requires a red caution "flammable" label on shipments of this substance. See Exh. C-5. Special Agent Farris testified -- based on her seven years of experience with UPS prior to her employment with the FAA – that if the shipper had identified the contents as a flammable hazardous material, UPS would have taken special steps, such as loading it in a segregated manner, to ensure it would be safely transported. However, UPS had no idea the contents were hazardous because Mole-Master did not provide that information.

Ms. Farris identified the Respondent's answer to the Letter of Investigation one of her colleagues had sent to the Respondent (Exh. C-10). In that response, the Respondent said that it had "taken the necessary actions to see that this will not happen again. Please accept our apologies for any inconvenience this may have caused." Id. The letter also addressed the safety training that had been provided to Mole-Master employees, training that Agent Farris testified did not meet DOT requirements.

Ms. Farris sponsored a copy of Appendix C to the FAA's Order No. 2150.3B (Exh. C-7). This document provides guidance on how civil penalties should be developed in cases of violations of the HMR. According to Ms. Farris, these violations fell under item II on the matrix (Figure C-1 at p. C-12) as an "Undeclared Shipment Within Hazmat Quantity Limitations." There were, she said, six categories of violations committed by the Respondent: (1) shipping papers; (2) labels; (3) markings; (4) packaging; (5) training; and (6) emergency response information. The violations, she said, fell into the "moderate" range, i.e., a Category B material, prepared by an alleged violator with no history of prior violations. As of the date of Ms. Farris' report to her main office in Atlanta, Mole-Master had not instituted a satisfactory program to train its employees in the proper handling of hazardous materials intended for transportation. Using the Figure C-1 matrix in Order No. 2150.3B, Special Agent Farris categorized Mole-Master as a business entity that did not use or handle hazardous materials in the course of its business (Column B) [2] and thereby derived a penalty range of $1,500 - $8,200 for each of the six categories of violations. According to her testimony, she determined that in light of the "moderate" character of the violations, the applicable penalty should rest in the middle of that range, i.e. $4,850 per violation. For six violations, the total penalty would amount to $29,100, a figure which, it appeared, the FAA "rounded" up to $30,000.

[2] This finding was based on Respondent's reply to the Letter of Investigation.

The sole witness for Mole-Master was David Lang, its General Manager. According to his testimony, the Respondent has 35-40 employees, many of whom are on the road servicing job sites, and it had about the same number when the incident in question took place. Respondent had approximately $4 million in annual sales at that time; its profit margin was in the range of six to eight percent before taxes, Mr. Lang said.

Mr. Lang testified that the Respondent generally does not use the Black Lap Sealant in its work. Instead, when sealant is required, the company uses a silicon-based substance that is not classified as a hazardous material. In this instance, however, the Respondent's field office in Missouri was installing a silo roof opening and needed a weather-proof sealant. A neighboring company in the same building where Mole-Master was headquartered suggested that Black Lap was the product needed and sold the nine tubes of Black Lap to the Respondent. One of the Respondent's employees, a shop technician and machinist named Jamie Francis, placed the tubes of Black Lap into a box of non-hazardous components being sent to the Missouri office. Mr. Lang professed ignorance as to whether the package or its contents ever reached their intended destination. Mr. Francis, said witness Lang, did not know that the adhesive was classified as a hazardous material; it can be purchased at any hardware store, he noted, and hence the violations were not committed "knowingly." The company had never previously been accused of violating a Department of Transportation regulation, Mr. Lang testified, and its trucking fleet had been rated "Satisfactory" by the Department's Federal Motor Carrier Safety Administration.

Mr. Lang testified that in 2008, the Respondent contracted for, and held, a two-day training session, led by an outside consultant, in compliance with the HMR. All headquarters shop and office employees were required to take the training program, which was held in September 2008. Certificates of training were issued, although none was presented for the record. Nor was a copy of the course curriculum offered as an exhibit. According to Mr. Lang, the company has now hired or designated a safety manager. A Mr. Smithburger has been given responsibility for compliance with DOT regulations. A new employee with military experience in handling hazardous materials has been hired.

* * * * *

At the outset, it seems apparent that the Complainant has sustained its burden of proving that the Respondent committed violations of the HMR that render Mole-Master liable for a civil penalty. The fact that Ms. Farris did not personally see the package tendered to UPS or inspect it when it was first opened does not detract from the weight of the uncontested facts as to which she was a competent witness. The package in question bore the Respondent's fingerprints in ample measure. It carried a label indicating that it had been tendered by Mole-Master to UPS, an air carrier, for transportation by "Next-Day Air." There is no evidence that the contents of the package had been tampered with by UPS or anyone else. The Respondent in its response to the LOI did not deny that its employees had placed nine tubes of a hazardous material in the box for transportation by air without marking or labeling the box or its accompanying shipping papers to alert UPS and its employees (including those who were to load and fly the aircraft) to the fact that hazardous materials originating with Mole-Master were to be placed aboard and flown in an aircraft in domestic air commerce. The Respondent is a corporation. Consequently, it can act only through its officers and employees. Their transgressions must, therefore, be attributed to the company. See Westair Commuter Airlines, Inc., FAA Order No. 93-18 at 2 (June 9, 1993); USAir, Inc., FAA Order No. 92-48 (July 22, 1992).

The fact that the shipment traveled by ground to the sorting facility and was never loaded onto an aircraft is irrelevant. The Respondent's act of offering for transportation in commerce is sufficient to require Mole-Master to comply with the HMR. See NL Industries v. Department of Transportation, 901 F.2d 141 (D.C. Cir. 1990); 49 C.F.R. § 171.2(b).

It is well-settled that the *scienter* needed to prove a violation of the HMR consists merely of knowledge of the character of the substance that is being tendered for transportation. See 49 U.S.C. § 5123(a)(1). See also United States v. Int'l Minerals & Chem., 402 U.S. 558, 564-65 (1971). Knowledge of the fact that the substance is classified as a hazardous material need not be established and is, indeed, irrelevant. Aero Continente, S.A., FAA Order No. 2003-8 at 14 n.22 (Sept. 12, 2003); Scott H. Smalling, FAA Order No. 1994-31 at 6-7 (Oct. 5, 1994); TCI Corp., FAA Order No. 1992-77 at 8 (Dec. 22, 1992) (noting that the administrative law judge has "concluded that Respondent knowingly violated the alleged sections of the HMR because Respondent knew that PAP was a flammable liquid). Mr. Francis knew what he was putting into the box for shipment to the

company's field office. So far as the evidence shows, he was not under the illusion that he was shipping something other than Black Lap Sealant.

So I find that the Respondent committed the violations with which it was charged in the FAA's complaint,[3] did so knowingly and is liable for a civil penalty under 49 U.S.C. § 5123(a).

This brings us to the question of the amount of the civil penalty for which the Respondent should be held liable. I find that Special Agent Farris accurately applied the rules in FAA Order No. 2150.3B, Appendix C to calculate the appropriate civil penalty for Mole-Master's violations of the HMR at the time she made her recommendation to the agency's Atlanta office. The upward "rounding" adjustment that apparently took place after her report was rendered is disapproved, however, on the ground that it was baseless so far as this record shows. This leaves us with a tentative figure of $29,100. Order No. 2150.3B does allow adjustment of that amount to take account of specified matters in mitigation. See, e.g., Order No. 2150.3B, para. 3.c at p. B-2 ("Note that the middle of each recommended sanction range would be for a single violation without aggravating or mitigating factors.") Some of these factors have been cited by the Respondent during its counsel's opening and closing arguments. As we have seen, however, the Respondent has placed on the record little or no "hard" evidence to support its position and upon which one could rely to reduce the penalty in any significant way. Arguments of counsel are not evidence. See Delaware Skyways, LLC, FAA Order No. 2005-6 at 6 (Mar. 18, 2005); Watts Agric. Aviation, Inc., FAA Order No. 1991-8 at 13-14 (Apr. 11, 1991), pet. for review denied, 977 F.2d 594 (9th Cir. 1992).

The statute, 49 U.S.C. § 5123(c), provides that the FAA must consider the Respondent's ability to remain in business and, what may amount to the same thing, the Respondent's ability to pay the penalty that otherwise would be merited. But before the Administrator can consider these factors, someone must supply the evidence upon which such consideration would be based. It is well-established that the burden of coming forward with such evidence rests upon the Respondent. See 14 C.F.R. § 13.224(c). It is equally well-established that to be successful the Respondent cannot rest

[3] Except for the allegation that the adhesive leaked while in transit. Counsel for the FAA made an oral motion at the hearing to strike the allegation of leakage from the complaint. I granted the motion. Ms. Farris testified that leakage of the commodity into the environment was not a factor in arriving at the FAA's claim for a $30,000 civil penalty

upon mere generalizations of the type that formed much of Mr. Lang's testimony. Instead, the Respondent must come forward with audited financial statements and other data showing its financial position in detail. Mole-Master did none of this. It contented itself with simply the general argument that it was a small business and, hence, should qualify for special treatment. That is not sufficient. As Order No. 2150.3B plainly states, "[t]he FAA does not reduce or waive the penalty of an alleged violator solely because it is a small business entity." Id. at App. C, para. 5c.

It is also important to bear in mind that violations of the HMR fall into a special category. Major catastrophes and significant loss of life may occur because seemingly innocuous household items are placed in the stream of air commerce without adequate warning to the carrier, its employees or emergency rescue personnel. As the Administrator has said, "hidden shipments pose a special danger." Envirosolve, Inc., FAA Order No. 2006-2 (February 7, 2006) at 14. Undeclared shipments, such as the one under consideration here, are especially dangerous. See Seven's Paint and Wallpaper Co., FAA Order No. 2001-6 at 9 (May 16, 2001); Phillips Building Supply, FAA Order No. 2000-20 at 11 (Aug. 11, 2000); Toyota Motor Sales, USA, Inc., FAA Order No. 1994-28 at 13 (Sept. 30, 1994). The garden-variety adhesive containers, nine of which the Respondent tendered to UPS, contained a flammable substance that would have been transformed into a powerful accelerant if a fire had broken out in the cargo compartment of the aircraft. The FAA's mission is to ensure that such mishaps do not occur and, if by mischance they do, to reduce the threat to life and limb to a minimum.

In this context, only one matter turns in Mole-Master's favor. That is its investment in better training in hazardous materials transportation for its headquarters shop, management and clerical personnel. There is ample precedent for reducing the amount of a civil penalty to reflect the alleged violator's investment in better training for its employees who may need to handle hazardous materials in the course of their duties. See Interstate Chemical Co., FAA Order No. 2002-29 at 18 (Dec. 6, 2002); Toyota Motor Sales, FAA Order No. 1994-28 at 10-11; TCI Corp, FAA Order No. 1992-77 at 21-22.. In his closing argument, the FAA's attorney indicated that, in his view, Mole-Master made its investment in training rather late in the day – in September 2008, a year and seven months after the violations took place. It is also true that Mr. Lang's rather sketchy description of the training effort

left a great deal of doubt about how thorough it was, what subjects were taught and what were the qualifications of those who taught the course.

All of this is relevant, of course, but the fact remains that the Respondent did make the effort to remedy the fundamental cause of the violations: ignorance and carelessness on the part of those employees responsible for shipping materials via an air carrier. Taking this factor into account, I have concluded that a reduction in the penalty from $29,100 to $25,000 is called for.

In consideration of the foregoing, IT IS ORDERED, subject to appeal to the Administrator as provided in section 13.233 of the Rules of Practice and Procedure, 14 C.F.R. § 13.233, that –

1. Respondent Mole-Master Services Corporation is liable to the United States of America as represented by the Federal Aviation Administration for a civil penalty in the amount of twenty-five thousand dollars ($25,000.00); and

2. Respondent Mole-Master Services Corporation shall pay the amount of the civil penalty for which it has been held liable herein to the Federal Aviation Administration forthwith.

Isaac D. Benkin
Administrative Law Judge

Attachment-Service List

[Note: This decision may be appealed to the Administrator of the FAA. The Notice of Appeal must be filed not later than 10 days after service of this decision. The appeal must be perfected with a written brief or memorandum not later than 50 days after service of this decision. The Notice of Appeal and brief or memorandum must either be mailed to the Federal Aviation Administration, Wilbur Wright Building, 800 Independence Avenue, S.W., Washington, D.C. 20591, Attention: Hearing Docket Clerk or delivered personally or via expedited courier service to the Federal Aviation Administration, 600 Independence Ave., S.W. Washington, D.C. 20591, Attention: Hearing Docket Clerk, AGC-430. A copy of the Notice of Appeal

and brief or memorandum should also be sent to counsel for the FAA in this proceeding.]