UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: TATE AND PARTNERS
FAA Order No. 2010-7

Docket No. CP04SO0014
FDMS No. FAA-2004-17784[1]

Served: June 15, 2010

DECISION AND ORDER[2]

Administrative Law Judge (ALJ) Richard C. Goodwin issued a written initial decision[3] on December 12, 2005, holding that Respondent Tate and Partners (Tate)[4] violated the regulations alleged in the complaint when it shipped hazardous materials without shipping papers, labels, markings, proper packaging, employee training, and emergency response information.[5] The ALJ assessed a civil penalty of $25,000.

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *http://www.regulations.gov*.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, 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 order is attached.

[4] Originally, the complaint also named Tate employee Lilit Karapetian as a respondent, but the FAA later amended the complaint to make Tate the only respondent.

[5] Specifically, the FAA alleged that Tate violated: 49 C.F.R. § 171.2(a) (offering hazardous material for transportation when not properly classed, described, packaged, marked, labeled, and in condition for shipment); § 172.200(a) and § 172.202(a)(1)-(5) (offering hazardous material for transportation and failing to describe hazardous material on shipping papers); § 172.204(a) or (c)(1) (offering hazardous material for transportation and failing to certify that material was offered for transportation in accordance with regulations by printing a certification on the shipping paper); § 172.204(c)(2) (offering hazardous material to aircraft operator for transportation by air and failing to provide two copies of certification); § 172.204(c)(3) (offering

Tate has appealed, arguing, among other things, that the civil penalty is "grossly excessive" in light of past cases. As explained herein, this decision assesses a $20,000 civil penalty.

I. Facts

Tate, located in Santa Monica, California, is a four-person company that produces television commercials. (Tr. 90, 93, 122.) Tate hired a director to film a Molson beer commercial in Toronto, Canada. (Tr. 96-97.) In turn, the director hired a prop master, Damon Cardwell. (Tr. 97.) Cardwell asked Tate to ship three boxes of materials to Toronto for his use at the shoot.

Tate's production manager, Hugh Bacher, testified that the boxes were sealed when Cardwell brought him the boxes. (Tr. 102.) Bacher testified that he asked

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for air transportation hazardous material and failing to add to certification a statement that shipment was within limitations prescribed for passenger or cargo-only aircraft – whichever was applicable); §172.300(a) and § 172.312(a)(2) (offering for transportation non-bulk packaging having inner packagings containing liquid hazardous material and failing legibly to mark outer package with orientation markings); § 172.301(a) (offering hazardous material for transportation in non-bulk packaging and failing to mark package with proper shipping name and identification number); § 172.400 and § 172.404(a) (offering package containing hazardous material for transportation when package contains hazardous materials having different hazard classes packed within same packaging, outside container, or overpack and failing to label packaging, outside container, or overpack as required for each class of hazardous material contained inside); § 172.400(a) (offering hazardous material for transportation in a permitted package or containment device and failing to label package or containment device with labels specified for material); § 172.600(c) (offering hazardous material for transportation and failing to make emergency response information immediately available for use at all times hazardous material was present and failing to make such information, including emergency response telephone number, immediately available to any government agency responding to incident involving hazardous material or conducting investigation that involves hazardous material); § 172.702(a) (offering hazardous material for transportation and failing to ensure that each hazmat employee was trained); § 173.1(b) (offering hazardous material for transportation that was not prepared in accordance with hazardous materials regulations, and failing to instruct each of its officers, agents, and employees having any responsibility for preparing hazardous materials for shipment as to applicable hazardous materials regulations); and § 173.201 (offering for transportation package containing liquid hazardous material in Packing Group I and failing to use non-bulk packaging and otherwise to conform to the packaging regulations for this material).

Cardwell whether the shipment contained any hazardous materials,[6] and Cardwell replied that he had removed the hazardous materials from the boxes. (Tr. 110.)

However, the boxes did contain numerous hazardous materials – roughly 40 or 50 different products[7] (Tr. 64) – most of which were labeled "flammable" or "extremely flammable."[8] (Tr. 27.) Many aerosol cans were packed in the boxes, and one box contained a butane lighter as well as other hazardous materials. (Tr. 61.) According to

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[6] The director's line producer had warned Tate employees on the day of the shipment that the prop master would need his kits at the shoot and that the hazardous contents should be removed before Tate shipped them. (Tr. 98, 109-110.)

[7] The complaint alleged that the three boxes contained: two 11-ounce aerosol containers of Krylon Crystal Clear Acrylic Coating" labeled "Extremely Flammable" and "Contents Under Pressure"; one 16 ½ ounce aerosol container of 3M "Super 77 Spray Adhesive" labeled "Extremely Flammable" and "Contents under Pressure"; five 5-ounce aerosol containers of "Le Brumisateur Evian Eau Mineral" labeled "Pressurized Container"; two 16-ounce containers of "Reagent Alcohol" affixed with flammable liquid label; one 25-ounce plastic container of "Last Rinse Sanitizer" labeled "Corrosive to Eyes"; one 16-ounce glass container of "Aqua Gel" labeled to have a pH of 2; one 11-ounce aerosol container of "Krylon Matte Finish Spray Coating 1311" labeled "Extremely Flammable" and "Can Pressurized"; two 8-ounce aerosol containers of "Streaks 'N Tips" labeled "Flammable" and "Contents under Pressure"; one 7-ounce aerosol container of "Super 77 Spray Adhesive" labeled "Extremely Flammable and "Contents under Pressure"; two 38-gram metal cylinders of "CO_2 Power Clean" labeled "Carbon Dioxide Gas/Non-Flammable Gas/UN1013/ORM-D"; two "Magnum 44 Permanent Markers" labeled "Combustible"; two "Marks-A-Lot Permanent Markers" labeled "Flammable"; one 4 ½-ounce container of "Goof-Off" labeled "Flammable"; one 2-ounce plastic container of "Zip Kicker Accelerator for Super Glue" labeled "Flammable"; one 3-ounce glass container of "Weldwood Contact Cement" labeled "Extremely Flammable"; one 100-milliliter aerosol container of "WD-40" labeled "Flammable" and "Pressurized Container"; one 4-ounce metal tube of "Liquid Nails" labeled "Extremely Flammable"; one butane lighter labeled "Butane Gas Under Pressure" and "Extremely Flammable"; four 12-ounce aerosol containers of "Krylon Interior/Exterior Paint" labeled "Extremely Flammable" and "Contents Under Pressure"; one 12-ounce aerosol container of "Krylon Sandable Primer" labeled "Extremely Flammable" and "Contents Under Pressure"; one 9-ounce aerosol container of "Studio Hair Color" labeled "Extremely Flammable"; one 16-ounce metal container of "Bestine Solvent and Thinner" labeled "Extremely Flammable"; one 16-ounce container of "Denatured Alcohol" labeled "Flammable" and "Poison"; one 8-ounce plastic container of "Goo Gone" labeled "Combustible"; and one 9 ¾-ounce aerosol container of "Spray Mount Artist's Adhesive labeled "Extremely Flammable" and "Contents Under Pressure."

[8] Extremely flammable hazardous materials have a lower flash point than flammable hazardous materials. (Tr. 29.)

former FAA Special Agent Daniel Wahl,[9] who investigated this matter and testified at the hearing, if a butane lighter is not packaged properly, it is a forbidden item.[10] (*Id*.)

On the day that Cardwell brought the boxes to Tate, he gave Bacher three lists; each list described the contents of one of the three boxes. (Tr. 98-99.) Bacher read the lists before he shipped the boxes, but he did not research the nature of any of the listed items (Tr. 111) and did not open the boxes. (Tr. 102.) Bacher prepared a UPS invoice for each box. Attached to each invoice was Cardwell's list of the contents of that particular box. (FAA Exhibit 6.)

The prop master's lists did not include many of the hazardous materials. For example, Cardwell failed to list "WD-40," "Liquid Nails," "fuel lighter," "Streaks "N Tips," denatured alcohol, and spray mount. (Compare FAA Exhibit 5 and FAA Exhibit 6; Tr. 37-38.) While incomplete, the prop master's lists did include "Super Glue" which is a flammable material, and other items – *i.e*., "glue," "glue sticks," "glycerine," and "butyl" – that could have indicated that the boxes contained hazardous materials. (Tr. 34-36.) As Wahl explained, certain glue, glue sticks, glycerine, and butyl products are hazardous materials, but others are not.[11] (Tr. 34-36.) For example, Elmer's Glue is not a hazardous material. (Tr. 36.) "Butyl," he explained, is "a cousin of alcohol," and the

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[9] At the time of the hearing, Wahl worked at the Department of Homeland Security. (Tr. 22.)

[10] Under 49 C.F.R. § 173.21, "Forbidden materials and packages," the offering or transportation of packages containing a cigarette lighter or other similar device, with an ignition element and containing fuel, is prohibited.

[11] "Butyl" is defined in Webster's II, New Riverside University Dictionary as "[a] hydrocarbon radical, C_4H_9, with a structure of butane and valence 1." (Tr. 43.) "Glycerin" or "glycerol" is defined in that dictionary as "a syrupy sweet, colorless or yellowish liquid, $C_3H_8O_3$, derived from fats and oils as a by-product of the manufacture of soaps and fatty acids and used as a solvent, antifreeze and antifrost fluid, plasticizer and sweetener and in the production of dynamite, cosmetics, liquid soaps, inks, and lubricants."

Hazardous Materials Table (set forth at 49 C.F.R. § 172.101), according to the special agent, lists many butyl products. (Tr. 41.) He explained that while the listed term "butyl" might have been meant to describe butyl alcohol, a hazardous material, it might also have been meant to indicate that the box contained butyl rubber, a nonhazardous material. (Tr. 35.) Hence, he stated, the prop manager's list did not provide sufficient identifying information about the nature of the packed items described as "glue," "glue sticks," "glycercine" and "butyl," and he would need to look at those items to determine whether they were hazardous materials. (Tr. 24.)

Tate's production manager shipped the boxes via UPS to Radke Films in Toronto, Canada, on or about August 7, 2000. This was an undeclared, or "hidden," shipment because the boxes did not indicate in any way that they contained hazardous materials. (Tr. 20.) UPS flew the boxes to a UPS facility in Louisville, Kentucky, a stopping off point on the way to Canada, where it discovered that the shipment contained hazardous materials.[12] (Tr. 33.) After opening the boxes, UPS prepared a three-page list of the shipment's contents, which it provided to the FAA after contacting the FAA. (Tr. 21-22; FAA Exhibit 5.) The list compiled by UPS for the contents of each box included many more items than the prop master's lists.

II. Case History

The FAA filed a complaint seeking a $30,000 civil penalty for Tate's alleged violations of the hazardous materials regulations. In a letter to the ALJ, Tate, which was not represented by counsel at the time, stated that it did not deny that it had shipped the hazardous materials, but it argued that the proposed penalty was excessive.

[12] The FAA special agent testified that the hazardous materials were discovered during "the course of a document search." (Tr. 20.)

The FAA moved to deem the allegations admitted and to have a hearing on the sanction only. The ALJ denied the FAA's motion, stating that he did not want to "summarily preclude a *pro se* respondent not familiar with the Rules from presenting evidence." Tate hired counsel, and the ALJ presided over a hearing.

In his written decision, the ALJ found that the FAA showed by a preponderance of the evidence that Tate "knowingly" offered the shipment for air transport. (Initial Decision at 4.) To commit a violation under the Federal hazardous materials statute, 49 U.S.C. § 5123(a), a person must act "knowingly." A person acts "knowingly" under Section 5123(a)(1) not just when he or she has actual knowledge of the facts giving rise to the violation, but also when a reasonable person in the circumstances using reasonable care would have that knowledge.[13]

According to the ALJ, Tate's production manager "was aware of the possibility that hazardous materials could be, and may have been, a part of this shipment." (Initial Decision at 3.) As the ALJ noted, the line producer on the shoot told Bacher that she had reminded the prop master not to include hazardous materials in the shipment and the prop master told Bacher that he had not included hazardous materials in the boxes. (Initial Decision at 3.) The ALJ found that Tate's production manager had reviewed the prop master's lists containing entries that should have prompted further inquiry, according to the testimony – "glue sticks," "butyl," "glues, "Super Glue," and "glycerine" (FAA Exh.

[13] 49 U.S.C. § 5123(a)(1) provides as follows:

(a) PENALTY.—(1) A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least $250 but not more than $25,000 for each violation. A person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

6 at 2, 4, 6; Tr. 24, 34-36) – and yet he failed to look inside the boxes. He held that Tate's production manager would have found the hazardous materials in the proper exercise of his duty. The ALJ, therefore, held that the production manager had knowledge of the hazardous materials under 49 U.S.C. § 5123(a)(1), and found that Tate was liable through him because he was an employee acting within the scope of his employment. Thus, the ALJ concluded that Tate knowingly offered the shipment of hazardous materials to UPS because a reasonable person in the circumstances and exercising reasonable care would have known the contents of the shipment. (Initial Decision at 4.)

The ALJ assessed a civil penalty of $25,000.[14] He did not assess the FAA's proposed civil penalty of $30,000 because he found that the FAA failed to consider adequately that Tate did not normally ship hazardous materials and was unfamiliar with the regulations. (Initial Decision at 5.)

III. Discussion

Tate argues on appeal that the civil penalty of $25,000 is "grossly disproportionate" to the penalties in previous hazardous materials cases and is "manifestly excessive" given that "the violation occurred as a direct result of an affirmative misrepresentation by an independent contractor whom Tate had no reason to disbelieve." (Appeal Brief at 2.)

A. Federal Hazardous Materials Statute

The starting point in this analysis is the Federal hazardous materials statute. The statute provides that in determining the sanction, the relevant factors are: the nature,

[14] For a list of the regulations, *see* footnote 5.

circumstances, extent and gravity of the violation; the degree of culpability of the violator; any history of past violations; the ability to pay; any effect on the ability to continue to do business; and other matters as justice requires. 49 U.S.C. § 5123(c).

B. FAA Sanction Guidelines

To implement the statute, the FAA issued penalty guidelines entitled, "Federal Aviation Administration Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines." 64 Fed. Reg. 19,443 (April 21, 1999). The guidelines in effect at the time of the violations were set forth in FAA Order No. 2150.3A ("Compliance and Enforcement Program"), Change 26, Appendix 6.[15] The purpose of the guidelines is to provide agency personnel with "a systematic way to evaluate a case and arrive at an appropriate penalty, considering all the relevant statutory criteria, including any mitigating and aggravating circumstances," as well as to promote consistency so that "similar penalties are imposed in similar cases." FAA Order No. 2150.3A, App. 6, p. 3.

C. Weighting Questions

The FAA's penalty guidelines contain a series of questions to help evaluate a particular case. FAA Order No. 2150.3A, App. 6, p. 5. The questions review the statutory criteria, which, as discussed above, include the nature, circumstances, extent, and gravity of the violation, the violator's degree of culpability, any history of prior violations, the ability to pay, any effect on the ability to do business, and any other matters that justice may require. FAA Order No. 2150.3A, App. 6, p. 2. The weight assigned a particular case depends on these statutory factors, as reflected in the penalty

[15] FAA Order No. 2150.3A, Change 26, Appendix 6, may be found at: http://www.airweb.faa.gov. Once at this Web site, click on "Orders/Notices." Enter "2150.3A." Click on "2150.3A Compliance and Enforcement Program [Incorporated Changes 1 thru 28]." Finally, select "Order2150.3aPart12.pdf." Appendix 6 starts on p. 121 of this 140-page PDF file.

guidelines, with higher weights justifying higher penalties. The guidelines provide recommended penalty ranges corresponding to the various weights in a penalty matrix that also considers several other relevant factors. Below is a discussion of the questions pertinent to this case.

1. *What material is at issue?* This question is pertinent because the more hazardous the shipped material is, the higher the civil penalty should be. The guidelines divide hazardous materials into various risk categories. Category A is the highest risk group, and is defined as "materials that, when released in the confines of an aircraft, can potentially have a catastrophic effect on an aircraft's ability to continue safe flight, resulting in a crash or emergency landing causing injury or death to passengers and flightcrew, as well as persons on the ground." FAA Order No. 2150.3A, App. 6, page 18. Violations involving Category A materials warrant maximum weight, under the guidelines. *Id.*

The guidelines state: "If there is more than one type of haz mat involved in the shipment, answer this question using the haz mat in the highest risk category." FAA Order No. 2150.3A, App. 6, p. 6. The guidelines further provide that "a shipment of a single package containing several different hazardous materials [as in the instant case] may present an aggravating factor." FAA Order No. 2150.3A, App. 6, p. 9.

There were many types of hazardous materials shipped in this case including some items that belonged in Category A.

2. *Were there multiple packages in the shipment?* The guidance indicates that a moderate or maximum weight should be considered if the answer is yes, depending on the number of packages and total amount of hazardous material. Three boxes were

shipped.

3. *Did someone other than the violator prepare the shipment for transportation?* According to the guidance, when someone other than the violator prepared the shipment, a minimum to moderate weight is considered. The prop master packed the boxes.

4. *Did the violator reasonably rely on incorrect information from another source?* As explained in the guidance, "detrimental or reasonable reliance on another party may be a mitigating factor when considering the violator's degree of culpability." The prop master assured Bachman that the hazardous materials had been removed. Whether it was reasonable for Bachman to rely upon this representation is discussed in section D, entitled "Final Aggregate Weight," of this analysis.

D. Final Aggregate Weight

The guidelines require one to weigh the answers to the questions discussed above and then to determine the final aggregate weight of the case, whether minimum, moderate, or maximum. According to the guidelines:

> Generally, if the answer to a particular question demonstrates the factor at issue represents a more significant aspect of a case, greater consideration should be given to that answer. For example, violations involving an extremely dangerous substance, even in minute quantities, might warrant a penalty at the maximum end of the range or even a penalty exceeding the matrix range…. It is possible that a single weighting factor may outweigh all others.

FAA Order No. 2150.3A, App. 6, p. 9.

Tate offered three boxes to UPS for shipment, and these three boxes contained many hazardous materials, mostly flammable and extremely flammable items, as well as a butane lighter. Consideration of these factors, in isolation, would result in the imposition of a maximum weight civil penalty.

However, Caldwell – not a Tate employee -- packed the boxes, and Caldwell prepared the incomplete lists containing inadequate descriptions of the contents. The lists did not include the most hazardous items. Some of the descriptions of items on the lists were ambiguous. For example, "glues" and "butyl" could have described prohibited hazardous items or could have described nonhazardous items that are permitted on board aircraft. Further, the evidence indicated that Bacher did ask whether the hazardous materials had been removed and was told by the prop master that they had been. Hence, while, as the ALJ found, Tate is liable for knowingly violating the regulations, Tate is not as culpable as it would have been if one of its employees had packed the many different hazardous items, including the lighter and the many products that had warning labels on them. Thus, rather than assigning a maximum final aggregate weight for sanction purposes to these violations, a moderate aggregate weight would be more appropriate.

E. Matrix

The next step is to use the matrix in the guidelines. FAA Order No. 2150.3A, App. 6, p. 9. The matrix contains sanction ranges for different types of violations by (a) an individual; (b) a business entity; (c) a business entity that uses or handles hazardous materials in the course of business; and (d) a business entity that regularly offers, accepts, or transports hazardous materials. Tate falls within the category of "Business Entity." The sanction ranges for a "business entity" are lower than the ranges for the other two business categories.

The matrix indicates that $1,500 - $7,500 is the appropriate civil penalty range for

each category of offense[16] by a business entity involving undeclared shipments within the quantity limitations.[17] FAA Order No. 2150.3A, App. 6, p. 14. One can deduce that the moderate portion of the range would be $3,300 - $5,500 for each offense category.

Tate's offenses involved the lack of: (1) shipping papers; (2) labels; (3) markings; (4) proper packaging; (5) employee training; and (6) emergency response information. Applying a moderate final aggregate weight, an appropriate civil penalty for the six violations under the matrix guidance would be between $19,800 and $33,000. In light of the fact that Tate did not pack the boxes, that the packing lists were incomplete and the ambiguity of the descriptions of the listed items that the inspector said could have been hazardous, a sanction at the lower end of the moderate range is appropriate. A $20,000 civil penalty is sufficient in light of all of the factors involved in this case.[18]

Tate argues that its lack of hazardous materials experience should result in a lower penalty.[19] The $20,000 civil penalty adequately takes Tate's lack of experience

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[16] The guidance sets forth eight offense categories: (1) "Shipping Papers;" (2) "Labels;" (3) "Markings;" (4) "Packaging;" (5) "Training;" (6) "Emerg. Response"; (7) "Release into Environ.;" and (8) "Other."

[17] The FAA believed that because there was a forbidden material (the butane lighter) in the shipment, the offenses fell in the category of "Undeclared shipments forbidden on or exceeding quantity limitations for all aircraft." But the FAA has stated that for purposes of determining the civil penalty to propose in this case, it decided to use the comparatively less serious category of "Undeclared shipment within quantity limitations," which carries lower penalties, because of the small size of Tate's company. (Reply Brief at 14.) The Administrator will not second-guess this exercise of prosecutorial discretion in the respondent's favor.

[18] The cases relied on by Tate are not sufficiently analogous so as to provide persuasive guidance on the amount of the penalty in this case. It is very difficult to compare one case to another for the purpose of determining whether the assessed penalty is impermissibly disproportionate. Not only are such comparisons difficult because of factual differences, a certain amount of disparity is the inevitable result of the exercise of prosecutorial discretion. *See infra* at p. 14.

[19] Also, the ALJ took this factor Tate's lack of experience with hazardous materials into account in arriving at the $25,000 civil penalty. He rejected the $30,000 civil penalty sought by the FAA and assessed a $25,000 civil penalty instead because, in his view, the FAA did not consider

into account because it is based upon the matrix sanction ranges appropriate for a business entity, rather than the higher sanction ranges for violations by a business that uses or handles hazardous materials in the course of business[20] or a business that regularly offers, accepts or transports hazardous materials.[21]

Tate argues that the civil penalty should be lowered due to its history of no violations. As many past cases have stated, "[a] violation-free history is considered the norm and does not lead to a reduction in an otherwise appropriate civil penalty." *See, e.g.*, TCI, FAA Order No. 1992-77 at 20 (December 22, 1992). If Tate had committed violations previously, the civil penalty would have been higher.

Tate argues that it has taken "aggressive" steps to revise its policies and educate its workforce. While swift corrective action can be a mitigating factor, depending on the circumstances, Tate's office manager testified that the company's hazardous materials policy after the incident (Tate Exhibit 8) was essentially the same as before the incident. (Tr. 118.) Tate's office manager further testified that although she has no hazardous materials training, she wrote the policy guidelines. Further, she testified, Tate simply gave the guidelines to its employees and freelance producers, but did not require them to sign anything to indicate that they had read and understood the guidelines. (Tr. 122-23.) These steps are not "aggressive," and FAA Special Agent Hanson testified that they

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adequately that Tate normally did not ship hazardous materials and was unfamiliar with the hazardous materials regulations.

[20] Under the matrix, the sanction range for each offense category involving an undeclared shipment within the HMR's quantity limitations by a *business entity that uses or handles hazardous materials in the course of business* is $2,500 to 10,000.

[21] Under the matrix, the sanction range for each offense category involving an undeclared shipment within the HMR's quantity limitations by a *business entity that regularly offers, accepts, or transports hazardous materials* is $10,000 to 27,500.

would not prevent a similar incident in the future. (Tr. 125.) Tate has pointed to nothing in the record that would cast doubt on the ALJ's finding that Tate's new policy guidelines have little value because they do not mandate training and lack an enforcement mechanism. For these reasons, the ALJ did not err in finding that Tate's revised guidelines were not a mitigating factor.

F. Precedent

Tate argues that the sanction is grossly excessive when compared with past hazardous materials cases. Past cases have stated that "it is often difficult to compare sanctions across cases because there are so many variables involved in each case." Alika Aviation, Inc., FAA Order No. 1999-14 at 12 n.20 (December 22, 1999), quoting Pacific Aviation International, FAA Order No. 1997-8 at 7 (February 20, 1997).

As time has passed, however, it has become apparent that comparing sanctions across cases is not just difficult, but it is unworkable. There are simply too many variables in each case. No two cases are alike when it comes to all the relevant statutory factors to consider, which include:

> the nature, circumstances, extent, and gravity of the violation; the violator's degree of culpability; any history of prior violations; the ability to pay; any effect on the ability to do business; and any other matters that justice may require.[22]

There is a catchall phrase at the end of the cited passage which is: "and any other matters that justice may require." It includes corrective action under the sanction guidance and case law. Also falling within the catchall is the maximum sanction amount in effect at the time. Congress sometimes raises the maximum civil penalty for certain violations. Thus, the maximum civil penalty in one case may be $10,000, and the one under

[22] *See supra* at p. 7.

consideration may be $25,000.

For these reasons, absent extraordinary circumstances, reliance on past sanctions will not be grounds for reducing sanctions that fall within the parameters set by the sanction guidance. Thus, Tate's argument based on past cases that the sanction is too high, in this case in which Tate was assessed a sanction below that in the sanction guidance, fails.

IV. Conclusion

Tate's appeal is granted in part. A $20,000 civil penalty is assessed.[23]

[Original signed by J.R. Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

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

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

FEDERAL AVIATION ADMINISTRATION, Complainant, v. TATE AND PARTNERS,[1] Respondent.	FAA DOCKET NO. CP04SO0014 (Civil Penalty Action) DMS NO. FAA-2004-17784 -34

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent violated the sections of 49 C.F.R. listed in the paragraph below; and
2) Respondent is liable to and is hereby assessed a civil penalty of $25,000.

I. Background

Tate and Partners (hereinafter "Tate" or "Respondent") has stipulated that on August 7, 2000, it offered an undeclared shipment of three boxes of hazardous materials to United Parcel Service ("UPS") for transportation by air.[2] In this action the Federal Aviation Administration (hereinafter "Complainant," "FAA," or "the agency") charges that Tate "knowingly" offered the shipment to UPS in violation of the following twenty-one sections or subsections of the Hazardous Materials Regulations ("HMRs"), 49 CFR §§171 *et seq.*: 171.2(a), 172.200(a), 172.202(a)(1-5), 172.204(a), 172.204(c)(1-3), 172.300(a), 172.301(a), 172.312(a)(2), 172.400, 172.400(a), 172.404(a), 172.600(c), 172.702(a), 173.1(b), and 173.201. The provisions involve mainly labeling, packaging, and training requirements.[3]

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[1] The matter was originally captioned "Lilit Karapetian Tate and Partners," but Respondent's first amended complaint, dated January 18, 2005, removed "Lilit Karapetian" and I adopted the current caption.

[2] Respondent's Trial Brief, filed May 13, 2005 (hereinafter "Trial Brief"), pp. 2-4; Tr. 6, 10-11, 50. "Undeclared" means that the shipment contained no warning or notice of the hazardous nature of its contents. *Midtown Neon Sign Corporation*, FAA Order No. 96-26 (August 13, 1996), p. 2.

[3] The parties stipulated specifically that the shipment contained hazardous materials and/or dangerous goods and (a) was not accompanied by a Shipper's Certification or Declaration of Dangerous Goods or any other shipping papers required by law or regulation for the shipment of dangerous goods; (b) did not possess the outer container markings and labeling required by law or regulation for the shipment of dangerous goods; (c) was not contained in authorized combination packaging required by law or regulation for the shipment of dangerous goods; and (d) was not accompanied by that emergency response information required by law or regulation for the shipment of dangerous goods. Trial Brief, pp. 3-4; Tr. 11.

Tate denies legal responsibility for the shipment. Even if the violations occurred, it states, they were committed "unknowingly" (Trial Brief, p. 2). Thus the issue is joined.

FAA seeks a civil penalty under 49 U.S.C. §5123(a) and 49 CFR §107.329 of $30,000. Respondent counters that even if it is found liable, the proposed fine is disproportionate to the transgression (Tr. 78).

A hearing was held on May 16, 2005, in Gardena, CA. I determined that a written decision was reasonable and most appropriate under the circumstances (Tr. 16). The parties submitted briefs and the case is now ready for decision.

We hold Tate in violation of the cited HMRs and set a civil penalty of $25,000.

II. Facts and Conclusions

Tate, a corporation based in Santa Monica, CA, is a four-person commercial production company; that is, it makes television commercials for advertising agencies (Tr. 93-94, 114). Sometime prior to August 7, 2000, it was hired to shoot a Molson beer commercial in Toronto (Tr. 96). Tate did not have a director on staff, so it hired one for the shoot – a practice common in the industry. The director, in turn, hired a prop manager, Damon Cardwell (Tr. 96-97). A prop manager, or propmaster, supplies props for a set (Tr. 95).

Cardwell, like Tate, is based in the Los Angeles area (Tr. 117). He asked Tate to ship to Toronto three boxes of materials he needed for the shoot. Cardwell assured Tate production manager Hugh Bacher, who processed the shipment, that any hazardous materials had been removed from the shipment and that none of the boxes contained anything unsuitable for transportation by air (Tr. 98, 110, 120-21; RX-7). Cardwell's statement proved incorrect.

On or about August 7, 2000, Bacher tendered the boxes to UPS.[4] None contained any indication that hazardous materials were inside. But UPS employees at its sort facility in Louisville, KY learned of the contents (Tr. 33). They found hazardous materials in each box, uncovering dozens of hazardous items altogether.[5] The carrier notified FAA special agent Daniel Wahl (Tr. 20). UPS unpacked the boxes and provided a handwritten list of the dangerous goods to agent Wahl (Tr. 20-22, 33, 40; GX-5).

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[4] Tr. 99-100. Bacher signed the name of Lilit Karapetian to each box as the offeror. Tr. 99-100; *see* GX-6, pp. 1, 3, and 5. Karapetian (now Lilit Shaghoian) was the Tate employee who normally shipped items on the company's behalf and was programmed as Respondent's default contact. Tr. 83, 85, 87-89, 91, 100. Ms. Karapetian herself was unavailable at the time, being out of the country. Tr. 80-83.

[5] The list of the shipment's hazardous materials, set out in Paragraph 6 of the agency's Complaint, is reproduced in the Appendix to this Initial Decision (hereinafter "I.D.").

Liability attaches under the penalty statute, 49 U.S.C. §5123(a)(1), to a person (including a partnership or corporation) who "knowingly violates" an HMR. A person acts knowingly when:

> (A) the person has actual knowledge of the facts giving rise to the violation; or
>
> (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

The circumstances demonstrate, I find, that Tate should have known that the boxes contained hazardous materials. Thus Respondent is liable under §5123(a)(1)(B).

When the propmaster, Cardwell, tendered the three boxes for shipping to Tate production manager Bacher, he gave Bacher three handwritten lists representing the items purportedly inside each of the boxes (Tr. 99, 100, 111; GX-6, pp. 2, 4, and 6). Most of the items on each list were innocuous. But some should have raised suspicion about their nature and suitability for shipping. The names or descriptions of these items should have alerted a person exercising reasonable care to their possibly hazardous character. Among the latter were "glue sticks" (GX-6, p. 2; Tr. 24, 34), "butyl," "glues," "Super Glue" (GX-6, p. 4; Tr. 24, 35), and "glycerine" (GX-6, p. 6; Tr. 24, 36). Super Glue, a brand of glue, is in fact considered a hazardous material (Tr. 24, 36). The other descriptions are general categories under which certain items constitute hazardous materials and others do not (*see* Tr. 34-36). Some types of butyl, for example, are listed as hazardous substances in the HMRs (Tr. 24, 41). The salient point is that the lists should have put a reasonable person on notice of the possibility of the presence of hazardous materials.

Bacher reviewed the lists.[6] He did not know what could or could not be shipped or whether any of the items constituted hazardous materials (Tr. 98, 102). He had had no training in hazardous materials shipping (Tr. 110-11). Bacher failed to look inside any of the boxes. Although they were sealed, the evidence shows that he made no request or effort to open them (Tr. 100-02, 111). Yet he was aware of the possibility that hazardous materials could be, and may have been, a part of this shipment. The line producer on the shoot told Bacher that she had reminded Cardwell, the propmaster, to remove hazardous materials prior to tendering the boxes to Bacher (Tr. 98, 109-110). The topic of hazmats also came up in conversation between Bacher and Cardwell, as we have noted (I.D., p. 2). Against this background, the five items noted on the lists should have prompted a reasonable individual to make further inquiry (Tr. 24, 34-35). The law charges Bacher in this situation with the duty of reasonable inquiry and, further, with the knowledge that reasonable inquiry would have produced.

[6] Tr. 101. These lists are different and less comprehensive than the dangerous-goods lists prepared by UPS and turned over to agent Wahl. Tr. 36-38, 40.

We hold that Bacher, in the proper exercise of his duty, would have learned of the existence of the hazardous materials later found in the shipment. Thus he is charged with that knowledge. And Tate is liable through Bacher. Bacher, of course, was a Tate employee. There is no question that he was acting within the scope of his employment (Tr. 94). Employers are responsible for hazardous-materials violations committed by their employees. *Riverdale Mills Corporation,* FAA Order No. 2003-10 (September 12, 2003).

I find and conclude that Complainant showed by a preponderance of the evidence that Tate "knowingly offered" the shipment in question because in the exercise of reasonable care it would have known of the contents of the shipment. *See Interstate Chemical Company, Inc.,* FAA Order No. 2002-29 (December 6, 2002), p. 14. Constructive knowledge of the acts constituting violations is all that is required for liability under the Hazardous Materials Uniform Safety Act. *Scott H. Smalling,* FAA Order No. 94-31 (October 5, 1994), p. 7, n. 8. Tate thus is liable for the violations set out in the Complaint.[7]

III. Penalty

I will assess a civil penalty against Tate and Partners of $25,000.

Complainant asks for a civil penalty of $30,000. 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.

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)).

Special Agent Donald Hanson testified that the FAA's recommendation was grounded on the number of products uncovered and their compatibility with each other and with other products (Tr. 65). As the Appendix shows, the shipment contained a long list of undeclared items. Shipping any undeclared dangerous good unacceptably compromises the safety of flight. The Administrator has emphasized that "undeclared shipments of hazardous materials pose a special risk" (*see, e.g., Interstate Chemical Company, Inc.,* FAA Order No. 2002-29 (December 6, 2002), p. 16). Safety issues for all those who may be affected by such items – handlers, passengers, and crew – are particularly acute since hazardous materials by their very nature carry significant risks of danger. Some of the materials in this shipment were labeled flammable, and even "extremely flammable" (Tr. 28, 29; *see, e.g.,* Exh. GX-7,

[7] Complainant also argued that Tate is liable on the ground that Cardwell was functionally its employee or agent in connection with the shoot. Post-Hearing Brief of Closing Argument, pp. 7-8. Respondent countered that Cardwell was an independent contractor. Tr. 76; Respondent's Post-Hearing Closing Argument and Brief, p. 2. In view of my decision, I do not reach this issue.

I have considered all other arguments and reject them as without merit.

pp. 18, 19). Agent Hanson added that unmarked, unlabeled boxes such as these are generally loaded next to other passenger and cargo items. A fire or explosion in the midst of several different types of shipments increases the likelihood of catastrophe (Tr. 55). These circumstances warrant a substantial fine.

Mitigation, however, is suggested by the fact that Tate neither is in the business of handling hazardous materials nor does it normally ship them incident to its business. Tate indeed ships – but items in furtherance of its commercial production activities, such as tapes, video, and related documents (Tr. 104, 116; RX-7). It had never shipped a kit like this before (Tr. 105, 116). Indeed, it never intended to ship these items (Tr. 126). Goods tendered in furtherance of a shoot, moreover, normally are shipped by the client or are obtained in hand at the production locale (which in this case was Toronto) (RX-7; Tr. 117, 120). Unfamiliarity with the HMRs which is reasonable under the circumstances may be considered in determining a civil penalty assessment. *TCI Corporation,* FAA Order No. 92-77 (December 22, 1992), pp. 18, 20. The factors described lead me to conclude that Tate's unfamiliarity with the HMRs was reasonable. Complainant in its penalty suggestion, I find, failed to give this factor due consideration. I also find that no other mitigating factors are present.[8]

In weighing all relevant issues I find and conclude that a civil penalty assessment of $25,000 is warranted. It fairly accounts for the totality of the circumstances of the case in the context of the statutory factors (*see* I.D., p. 4). The fine has appropriate "bite" as well; I conclude that it will suitably promote the agency's policies of compliance and deterrence.

Tate and Partners is hereby assessed a civil penalty of $25,000 for violations of the following HMRs: §§171.2(a), 172.200(a), 172.202(a)(1-5), 172.204(a), 172.204(c)(1-3), 172.300(a), 172.301(a), 172.312(a)(2), 172.400, 172.400(a), 172.404(a), 172.600(c), 172.702(a), 173.1(b), and 173.201.[9]

Richard C. Goodwin
Administrative Law Judge

Attachments – Appendix
Service List

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[8] Tate proffered written shipping guidelines it has generated for freelancers and its own employees. Tr. 118, 122-23; RX-8. I agree with special agent Hanson, however, that the guidelines, which do not mandate training and have no enforcement mechanism, are weak and carry little value. *See* Tr. 125-27. Therefore I do not consider the guidelines a mitigating factor.

[9] 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.

Appendix

Paragraph 6 of Section II of the Complaint lists the following hazardous materials and/or dangerous goods found in the three boxes of the shipment under review:

- One (1) eleven-ounce aerosol container of "Krylon Crystal Clear Acrylic Coating 1303" labeled "Extremely Flammable" and "Contents Under Pressure."

- One (1) 16 ½-ounce aerosol container of 3M "Super 77 Spray Adhesive" labeled "Extremely Flammable" and "Contents Under Pressure."

- Four (4) five-ounce aerosol containers of "Le Brumisateur Evian Eau Mineral" labeled "Pressurized Container."

- One (1) sixteen-ounce plastic container of "Reagent Alcohol" affixed with a flammable liquid label.

- One (1) twenty-five-ounce plastic container of "Last Rinse Sanitizer" labeled "Corrosive to Eyes."

- One (1) sixteen-ounce glass container of "Aqua Gel" labeled to have a Ph of 2.

- One (1) eleven-ounce aerosol container of "Krylon Matte Finish Spray Coating 1311" labeled "Extremely Flammable" and "Can Pressurized."

- One (1) eight-ounce aerosol containers of "Streaks 'N Tips" labeled "Flammable" and Contents Under Pressure."

- One (1) seven-ounce aerosol container of "Super 77 Spray Adhesive" labeled "Extremely Flammable" and "Contents Under Pressure."

- One (1) five-ounce aerosol container of "Le Brumisateur Evian Eau Mineral" labeled "Pressurized Container."

- Two (2) thirty-eight-gram metal cylinders of "CO2 Power Clean" labeled "Carbon Dioxide Gas / Non-Flammable Gas / UN 1013 / ORM-D." One of the containers was attached to a spray nozzle and the other was packaged in a single fold fiberboard container.

- Two (2) "Magnum 44 Permanent Markers" labeled "Combustible."

- Two (2) "Marks-A-Lot Permanent Markers" labeled "Flammable."

- One (1) 4 ½-ounce metal container of "Goof Off labeled "Flammable."

- One (1) two-ounce plastic container of "Zip Kicker Accelerator for Super Glue" labeled "Flammable."

- One (1) three-ounce glass container of "Weldwood Contact Cement" labeled "Extremely Flammable".

- One (1) 100-millilliter aerosol container of "WD-40" labeled "Flammable" and "Pressurized Container".

- One (1) four-ounce metal tube of "Liquid Nails" labeled "Extremely Flammable".

- One (1) butane lighter labeled "Butane Gas Under Pressure" and "Extremely Flammable".

- Four (4) twelve-ounce aerosol containers of "Krylon Interior/Exterior Paint" labeled "Extremely Flammable" and Contents Under Pressure."

- One (1) twelve-ounce aerosol container of "Krylon Sandable Primer" labeled "Extremely Flammable" and "Contents Under Pressure."

- One (1) eleven-ounce aerosol container of "Krylon Crystal Clear Acrylic Coating" labeled "Extremely Flammable" and "Contents Under Pressure."

- One (1) nine-ounce aerosol container of "Studio Hair Color" labeled "Extremely Flammable."

- One (1) eight-ounce aerosol container of "Streaks 'N Tips" labeled "Flammable" and "Contents Under Pressure."

- One (1) sixteen-ounce metal container of "Bestine Solvent and Thinner" labeled "Extremely Flammable."

- One (1) sixteen-ounce metal container of "Denatured Alcohol" labeled "Flammable" and "Poison."

- One (1) eight-ounce plastic container of "Goo Gone" labeled "Combustible."

- One (1) sixteen-ounce plastic container of "Reagent Alcohol" affixed with a flammable liquid label.

- One (1) 9 ¾-ounce aerosol container of "Spray Mount Artist's Adhesive" labeled "Extremely Flammable" and Contents Under Pressure."