UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: HUSKY CORPORATION
FAA Order No. 2010-8

Docket No. CP07SO0017
FDMS No. FAA-2007-0120[1]

Served: June 16, 2010

DECISION AND ORDER[2]

On October 31, 2008, Administrative Law Judge (ALJ) Richard C. Goodwin issued a decision assessing an $8,000 civil penalty against Husky Corporation ("Husky") based upon his finding that Husky had violated numerous sections of the Department of Transportation's Hazardous Materials Regulations (HMR) (see Appendix). The ALJ held that an agent for Husky tendered two boxes containing gasoline and diesel pump nozzles to FedEx, without identifying the shipment as containing hazardous materials. Husky filed an appeal from the ALJ's decision, arguing primarily that Dan Hatfield, the sales representative who offered the boxes for shipment to FedEx, was employed by another company and was not Husky's agent. As a result, Husky argues, the ALJ's finding of liability should be reversed.

This decision holds that the ALJ's determination that Hatfield was Husky's agent,

[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. For additional information, see http://dms.dot.gov.

[2] The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. See 14 C.F.R. § 13.210(e)(2). 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.

was erroneous, and, therefore, is reversed. As Husky argues, the ALJ erred in finding that an agency relationship existed because the FAA failed to prove that Husky had the requisite degree of control over Hatfield's actions. Consequently, Husky's appeal is granted. No penalty is assessed.

I. Background

On November 28, 2007, the FAA filed the complaint seeking a $15,000 civil penalty for violations of the HMR arising from an offer of two boxes containing 17 gasoline pump nozzles to Federal Express for shipment by air. One box ("Box # 1") contained three nozzles wrapped in bubble wrap and cushioned with Styrofoam peanuts. The other box ("Box # 2") contained 14 nozzles packed in individual boxes.

The FAA alleged that there was a residual stain of gasoline on one of the 14 individual boxes packed in Box # 2, and that Husky did not clean the gasoline nozzle in that individual box sufficiently or purge it of vapors to remove any potential hazard. (Complaint § II, ¶ 11.) The FAA alleged that:

- the shipment was not marked or labeled to indicate that it contained regulated hazardous material;
- the shipment was not accompanied by shipping papers describing the hazardous materials, or certifying that they were prepared for shipment in accordance with the HMR;
- emergency response information was not included;
- the shipment was not packaged properly; and
- Husky's employees and agents were not trained regarding the HMR.

The FAA alleged that Husky offered hazardous material for transportation in commerce in violation of the following regulations: 49 C.F.R. §§ 171.2(a), 172.200(a), 172.202(a)(1), 172.202(a)(2), 172.202(a)(3), 172.202(a)(5), 172.203(f), 172.204(a) or

(c)(1), 172.204(c)(2), 172.204(c)(3), 172.600, 172.602(b)(3), 173.1(b), 172.702(a), 173.27(b)(1), and 173.222.[3] Husky denied the alleged violations in its answer.

A hearing was held on May 28, 2008, at which one witness testified on behalf of the FAA and five witnesses testified on Husky's behalf. At the conclusion of the hearing, the ALJ gave the parties an opportunity to file written closing arguments, but counsel for both parties later waived closing argument.

The ALJ issued the initial decision on October 31, 2008. Husky filed a notice of appeal, and perfected that appeal by filing an appeal brief on January 28, 2009. Husky requested oral argument. (Appeal Brief at 15.) The FAA did not file a reply brief.[4]

II. The Facts

Husky manufactures and sells products used in the petroleum industry, including fuel pump nozzles. (Tr. 142-143.) While Husky manufactures all of its products in Pacific, Missouri, it tests its products at locations throughout the United States. (Tr. 143.)

On June 8, 2006, three Husky employees (John Myers, Joseph Laschke, and Richard Benscoter) tested Husky gasoline and diesel fuel nozzles at a Circle K service station in North Augusta, South Carolina. They were assisted by two Circle K employees and by Hatfield. Hatfield was employed by Jack Pittman and Associates, ("Pittman") which distributed products manufactured by Husky, as well as by other companies. (Tr. 74.) Husky pays Pittman on a commission basis.

At the end of the test, the Husky employees removed the nozzles from the pumps and installed new ones. Husky employees and Hatfield drained the residual fuel

[3] The regulations are reproduced in the Appendix attached to this decision.

[4] The FAA was granted two extensions of time within which to file its reply brief. The second extension of time granted the FAA until April 1, 2009, in which to file its reply brief, but the FAA neither filed a reply brief nor requested a third extension of time.

remaining in the old nozzles. (Tr. 76-78.) Draining the used nozzles was necessary because parts of the nozzle hold fuel after the nozzle is disconnected. (Tr. 100.) Richard Benscoter, Husky's engineering manager, explained that the area between the poppet and the check valve could hold approximately 1.35 ounces of fuel. (Tr. 107.)

John Myers, Husky's national account sales manager, testified that he is always very careful to drain and purge all of the fuel he can get out of a used nozzle because ultimately someone has to transport the nozzles. He testified that he tries to minimize the odor coming from used nozzles by draining and purging every bit of fuel that he can. (Tr. 88.) He explained that on June 8, he drained the residual fuel from the used nozzles into a bucket by jamming the poppet open with a screwdriver. (Tr. 88.)

Myers explained further that if he were going to ship used nozzles, he would let them sit out in the sun until they were sufficiently dried out and the odors were gone. Then he would package them and ship them by ground freight. (Tr. 95.) However, he testified, in this instance, he did not place the nozzles in the sun to dry before putting them in the boxes. (Tr. 93.) Also, he did not flush the nozzles out. (Tr. 93.) Instead, after the nozzles were drained, they were put down for no more than a few minutes before they were boxed and placed in Hatfield's car. (Tr. 78.)

Later that day, Hatfield tendered two fiberboard boxes containing a total of 17 nozzles to FedEx in West Columbia, South Carolina, for shipment by air to Husky headquarters in Pacific, Missouri.[5] (Complainant's Exhibits 1 and 3.) Hatfield used his home address in Lexington, South Carolina, as the point of origin. Hatfield did not prepare shipping papers, or mark or label the two outer boxes to disclose that they

[5] FedEx indicated in the incident report that ""Dan Hartfield [sic] Husky" was the shipper/offeror of these boxes. (Complainant's Exhibit 1.)

contained hazardous materials.

Hatfield used Husky's FedEx account number to pay for the shipment. Brad Baker, Husky's Executive Vice President, testified that Husky permits its customers and outside salespeople to use its FedEx number to ship documents and paperwork back to the company. As a result, Baker testified, he assumed that Hatfield or his assistant had the Husky FedEx number before the boxes were tendered for shipment by air on June 8, 2006. (Tr. 191-192.)

In response to the FAA's letter of investigation, Baker and Mark Pittman, Pittman's President, wrote in a letter dated July 20, 2006:

> On the days preceding the shipment, three Husky employees (John Myers, Richard Benscoter, and Joe Laschke) were working with Dan Hatfield at a test location. Following the conclusion of the tests, *Dan was asked to make arrangements to return the products to Husky. While employees of Husky asked Dan to make the shipment arrangements, Dan actually shipped the product*.

(Complainant's Exhibit 3 at 1-2.) (Emphasis added.)

However, at the hearing, the Husky employees did not testify as clearly regarding how Hatfield became responsible for shipping the used nozzles. Baker testified that he had never been told by any Husky employee that that employee had instructed Hatfield regarding shipping the nozzles, (Tr. 149), and that it was his understanding that Husky employees did not ask Hatfield to ship the nozzles. (Tr. 183.) Myers, Benscoter and Laschke testified at the hearing that they did not give Hatfield any instructions about how or when to ship the nozzles to Husky headquarters in Missouri and denied having heard anyone else give any shipping instructions to Hatfield. (Tr. 89-90, 113, 130, 135.) Myers and Laschke testified that they were aware of no reason for Hatfield to ship the nozzles to Husky by overnight delivery. (Tr. 89, 131.) Myers testified that he understood that the nozzles would be returned to Missouri, and that he did not expect

Hatfield to drive the nozzles there. (Tr. 94-95.) Laschke, in contrast, testified that he did not expect that the nozzles would be returned to Husky's headquarters in Missouri and that Hatfield could have thrown the nozzles away, although none of the Husky employees told Hatfield that he could discard the nozzles. (Tr. 137-138.)

As FedEx explained in the Hazardous Materials Incident Report that it completed, there was "vapor (gas) dispersion" coming from the shipment. (Complainant's Exhibit 1.) Consequently, FedEx did not transport the boxes.

FedEx contacted the FAA about this incident, and Staci Baldwin, an FAA Hazmat Specialist, was assigned to investigate this incident. She went to the FedEx sort facility on July 10, 2006, and saw two big boxes, neither of which had any hazardous materials markings or labels. (Tr. 19, 27.) Box # 1 contained Styrofoam peanuts and three nozzles with black handles wrapped in bubble wrap. (Tr. 19; Complainant's Exhibit 2, photographs 1-8.) Box # 2 contained 14 nozzles, each packed in an individual box with Husky's name printed on it. (Tr. 19; Complainant's Exhibit 2, photographs 9-17.) She did not receive any shipping papers for these boxes. (Tr. 15, 27.) Baldwin wrote in her statement that "the contents of this package were discovered due to the heavy vapors coming from the box." (Respondent's Exhibit 5 at 3.)

She testified that she smelled gasoline from Box # 2. (Tr. 18, 21, 39.) Box # 2 contained one individual box that had a "gassy" stain. (Tr. 22; Complainant's Exhibit 2, pictures 15-17.) Baldwin opined that residual gasoline contained in the gasoline fuel nozzle packed in that individual box caused the stain. She based this opinion upon her observation that the nozzle's discharge end pointed to the stain. Actually, that particular nozzle had a green handle, and as she testified, diesel fuel nozzles generally have green

handles while gasoline nozzles have black handles. (Tr. 34.) No tests were done to ascertain whether the stain was caused by diesel fuel or gasoline, and Baldwin did not know whether that particular nozzle had been used for diesel fuel or gasoline.

Jack Peters testified as an expert in the field of hazardous materials regulations on behalf of Husky. Peters testified based on his examination of photograph 17 that "it would be a diesel stain based especially on the handle that was there and the fact that it was there several days after whatever made the stain caused it." (Tr. 221.)

Inspector Baldwin testified that whether the nozzles contained diesel fuel or gasoline, they were properly categorized as "dangerous goods in apparatus." (Tr. 53.) She stated that diesel fuel, like gasoline, is a hazardous material. (Tr. 42.)

After the FAA notified Husky about its investigation, Husky arranged for hazardous materials transportation training for five of its employees. FedEx provided one training course, and Jack Peters and Associates ran the other course attended by Husky employees. (Tr. 170.) The Husky employees completed their training in August 2006. (Tr. 171-172, 174.) Husky introduced copies of the certificates received by its employees after they completed the training, as well as other documentation pertaining to the training. (Tr. 171-172; Respondent's Exhibit 3.)

III. The Initial Decision

The ALJ held that Hatfield served as an agent for Husky. He wrote:

> The critical fact in determining liability is that Hatfield acted at the behest of Husky employees who were acting, or apparently acting, on Husky's behalf. Nozzles in the field routinely were returned to headquarters (Tr. 94). Husky employees designated Hatfield to perform that task. These circumstances created an agency relationship. *See, e.g., Holley v. Crank*, 386 F.3d 1248, 1252 (9 Cir. 2004).

(Initial Decision at 3.) The ALJ rejected Husky's arguments that an agency relationship

did not exist because its employees had not directed the manner of shipment or packaging of the nozzles. According to the ALJ, these details did not change the nature of the relationship between Husky and Hatfield.

Regarding the shipment, the ALJ concluded that the evidence showed that diesel fuel had leaked from a diesel fuel nozzle inside one of the individual boxes in Box # 2. (Initial Decision at 4.) The ALJ wrote that his determination that diesel fuel leaked from a diesel fuel nozzle – rather than gasoline from a gasoline fuel nozzle as alleged in the complaint – did not affect his legal findings and conclusions because the HMR regulate both diesel fuel and gasoline. He decided to "permit the Complaint to conform to the proof."[6] (Initial Decision at 4-5.)

The ALJ rejected Husky's other arguments that compliance with the HMR was not required based upon exceptions in the regulations. (Initial Decision at 5-6.) He concluded that Husky violated all of the alleged regulations.

After weighing the totality of the facts and circumstances, the ALJ concluded that an $8,000 civil penalty was appropriate. On the one hand, he found that a significant penalty was appropriate because of the risks posed by a hidden shipment and because Husky used hazardous materials in the course of its business. On the other hand, he found that Husky's witnesses credibly testified that they attempted to drain the nozzles thoroughly and that the "the residual amount of fuel in each of the nozzles would have

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[6] In determining to conform the complaint to the proof, the ALJ relied in part upon the following reasoning:

> Respondent has not suggested that it was surprised or otherwise prejudiced by the difference between the allegations of the Complaint and the evidence adduced at the hearing. No compelling reason exists to hold Complainant strictly to the Complaint's literal words.

(Initial Decision at 6.)

been measured 'in drips rather than ounces or liters.'" (Initial Decision at 8.) He also found that the Husky's response to this incident – sending its employees for hazardous materials training – was a mitigating factor. (Initial Decision at 8.)

IV. Resolution of the Issues on Appeal

Husky argues on appeal that it was error for the ALJ to find that Hatfield was an agent for Husky. Hatfield, Husky notes, was employed by Pittman, a manufacturer's representative. Pittman sold Husky products, as well as the products of other manufacturers of petroleum products, on a commission basis. The evidence indicated, Husky argues, that Husky did not give Hatfield any direction regarding how to ship the nozzles, and that Hatfield probably had Husky's FedEx account number before the day of the shipment. The ALJ, Husky notes, made no findings showing that Husky had the right to control Hatfield's behavior and conduct, regardless of whether its employees asked Hatfield to ship the nozzles to Missouri. Husky argues that it was error for the ALJ to conclude that the Hatfield acted as Husky's agent if Husky did not have the right to control Hatfield's behavior and conduct.

Husky is correct. To establish an agency relationship between Hatfield and Husky, it is not enough to show that Hatfield shipped the nozzles at Husky's request. According to the Restatement (Third) of Agency § 1.01 (2006):

> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

As explained in Comment c to Restatement (Third) of Agency § 1.01:

> A principal's right to control the agent is a constant across relationships of agency, but the content of specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of

> the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal.

However, if a person has the right to control only "the result of the work [by another person], and not the means by which it is accomplished, … an independent contractor relationship exists." Aero Continente, S.A., FAA Order No. 2003-8 at16 (September 12, 2003), *quoting* In re Coupon Clearing Service, Inc., 113 F.3d 1091, 1099 (9th Cir. 1997).

In this case, the FAA presented no evidence concerning the relationship between Hatfield and Husky beyond the equivocal testimony regarding how the nozzles came to be shipped back to Husky. There was no evidence describing any contractual arrangement between Hatfield and Husky or between Husky and Pittman, nor was there any evidence that Husky either controlled or had the right to control Pittman's employees when they acted as sales representatives for Husky. Consequently, whether Hatfield agreed to serve as an agent subject to Husky's control for the discrete function involved in this case – the shipment of the used nozzles – cannot be determined on this record.[7]

V. Conclusion

In light of the foregoing, Husky's appeal is granted, the ALJ's initial decision is reversed, and Husky is not liable for the payment of a civil penalty.

[Original signed by J.R. Babbit]

J. RANDOLPH BABBITT,
ADMINISTRATOR
Federal Aviation Administration

[7] The FAA did not address the issue of agency in its opening argument and did present a closing argument or file a reply brief. Consequently, the record does not reflect the agency's view regarding whether there is any basis for holding Husky liable for Hatfield's failure to prepare the package properly for shipment. Therefore, whether there is any other basis for a finding of liability under the HMR other than agency in a case such as this one in which hazardous materials are given by one party to another for tendering to a carrier for transportation is not decided.

APPENDIX

[The regulations quoted in this Appendix
were printed in the 2005 Volume 49
of the Code of Federal Regulations,
which was current between
October 1, 2005, and September 30, 2006.]

49 C.F.R. § 171.2(a) (2005) provides:

> (a) Each person who performs a function covered by this subchapter must perform that function in accordance with this subchapter.

49 C.F.R. § 172.200(a) (2005) provides:

> (a) *Description of hazardous materials required*. Except as otherwise provided in this subpart, each person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner required by this subpart.

49 C.F.R. § 172.202(a)(1) – (3) and (5) (2006) 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 § 172.101 table;
>
> (2) The hazard class or division number prescribed for the material, 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 § 172.101 table;
>
> * * *
>
> (5) The total quantity of hazardous materials covered by the description must be indicated (by mass or volume, or by activity for Class 7 materials) and must include an indication of the applicable unit of measure. For example, "200 kgs." or "50 L." * * *

49 C.F.R. § 172.203(f) (2005) provides:

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

49 C.F.R. § 172.204(a) (2005) provides:

> (a) *General.* Except as provided in paragraphs (b) and (c) of this section, each person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing (manually or mechanically) on the shipping paper containing the required shipping description the certification contained in paragraph (a)(1) of this section of the certification (declaration) containing the language contained 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."
>
> NOTE: In line one of the certification the words "herein-named" may be substituted for the words "above-named".
>
> (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 labeled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations."

49 C.F.R. § 172.204(c)(1) – (c)(3)(2005) provides:

> (c) *Transportation by air* – (1) *General.* 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 government standards.
>
> NOTE TO PARAGRAPH (c)(1): In the certification, the word "packaged' may be used instead of the word "packaged" until October 1, 2010.
>
> (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. (See § 175.30 of this subchapter.)
>
> (3) *Additional certification requirements*. Effective October 1, 2006, each person who offers a hazardous material for transportation by air must add to the certification required in this section the following statement:

"I declare that all of the applicable air transport requirements have been met." * * *

49 C.F.R. § 172.600 (2005) provides:

(a) *Scope*. Except as provided in paragraph (d) of this section, this subpart prescribes requirements for providing and maintaining emergency response information during transportation and at facilities where hazardous materials are loaded for transportation, stored incidental to transportation or otherwise handled during any phase of transportation.

(b) *Applicability*. This subpart applies to persons who offer for transportation, accept for transportation, transfer or otherwise handle hazardous materials during transportation.

(c) *General requirements*. 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 including the emergency response telephone number, required by this subpart 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.

(d) *Exceptions*. The requirements of this subpart do not apply to hazardous material which is excepted from the shipping paper requirements of this subchapter or a material properly classified as an ORM-D.

49 C.F.R. § 172.602(b)(3) (2005) provides:

* * *

(b) *Form of information*. The information required for a hazardous amterial by paragraph (a) of this section 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 Instruction, 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. * * *

* * *

49 C.F.R. § 172.702(a) (2005):

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

49 C.F.R. § 173.1(b) (2005):

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

49 C.F.R. § 173.27(b)(1) (2005):

(b) Packages authorized on board aircraft. (1) When column 9a of the § 172.101 table indicates that a material is "Forbidden", that material may not be offered for transportation or transported aboard aircraft.

49 C.F.R. § 173.222 (2005):

Hazardous materials in machinery or apparatus are excepted from the specification packaging requirements of this subchapter when packaged according to this section. Hazardous materials in machinery or apparatus must be packaged in strong outer packagings, unless the receptacles containing the hazardous are afforded adequate protection for the construction of the machinery or apparatus. Each package must conform to the packaging requirements of subpart B of this part, except for the requirements in 173.24(a)(1) and 173.27(e) and the following requirements:

* * *

(b) The nature of the containment must be as follows –

(1) Damage to the receptacles containing the hazardous materials during transport is unlikely. However, in the event of damage to the receptacles containing the hazardous materials, no leakage of the hazardous materials from the equipment, machinery or apparatus is possible. A leakproof liner may be used to satisfy this requirement.

(2) Receptacles containing hazardous materials must be secured and cushioned so as to prevent their breakage or leakage and so as to control their movement within the equipment, machinery or apparatus during normal conditions of transportation. * * *

* * *

(c) The total net quantity of hazardous materials contained in one item of equipment, machinery or apparatus must not exceed the following:

* * *

(2) 0.5 L (0.1 gallons) in the case of liquids; * * *

* * *

SERVED OCTOBER, 31, 2008

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

FEDERAL AVIATION ADMINISTRATION, Complainant, v. HUSKY CORPORATION, Respondent.	FAA DOCKET NO. CP07SO0017 (Civil Penalty Action) DMS NO. FAA-2007-0120

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent is hereby assessed a civil penalty of $8,000.

I. Background

Husky Corporation (hereinafter "Respondent" or "Husky"), of Pacific, MO, manufactures and sells equipment for the petroleum industry (Tr. 142-43). On June 8, 2006, according to the Complaint of the Federal Aviation Administration (hereinafter "Complainant," "FAA," or "the agency"), Husky offered in air transportation an "undeclared" shipment of hazardous materials (Exh. R-6). "Undeclared" means that the shipment contained no warning or notice of the hazardous nature of its contents (Tr. 17). Complainant identified the hazardous materials as gasoline and gasoline pump nozzles.

By this act, Complainant says, Respondent violated sixteen Hazardous Materials Regulations ("HMRs"), 49 CFR §171 *et seq., viz.*, §§171.2(a), 172.200(a), 172.202(a)(1)-(a)(3), 172.202(a)(5), 172.203(f), 172.204(a) or (c)(1), 172.204(c)(2), 172.204(c)(3), 172.600, 172.602(b)(3), 173.1(b), 172.702(a), 173.27(b)(1), and 173.222 (Exh. R-6). These provisions generally set out marking and similar informational requirements for certain hazardous-materials shipments as well as training obligations for entities involved in such shipments. The agency seeks a civil penalty of $15,000 (Exh. R-6; Tr. 6).

Respondent denies the charges. It argues that it was not the shipper, and so cannot be held liable. The shipment in any event contained no hazardous

materials, it says further. Husky also asserts that the shipment is properly characterized as falling outside HMR requirements (Tr. 7-8, 216). Finally, it argues that, as an entity not regularly offering hazardous materials, it had no obligation to offer training; nonetheless, it instituted an employee training program after the incident.

A hearing was held on May 28, 2008, in St. Louis, MO. I determined that a written decision was reasonable and appropriate under the circumstances (Tr. 276-78).

I hold that the facts and circumstances of this case, including factors in mitigation, warrant an assessment against Respondent of $8,000.

II. Liability

The question of responsibility for placing the shipment into the stream of commerce must be considered first. For if Respondent, as it asserts, was not, in fact or in law, the shipper, then it is not liable for any violation stemming from the shipment.

The facts show that Respondent was the shipper. As such, it must answer for any violations.

On June 8, 2006, several Husky officials were in South Carolina testing nozzles for a possible customer. Respondent had 20 nozzles at the site. Sixteen were gasoline nozzles, and four were diesel (Tr. 71-73). After the demonstration, employees of Husky asked an individual, Dan Hatfield ("Hatfield"), to arrange to ship the nozzles to Husky's headquarters in Missouri (Exh. C-2, pp. 1-2). After the nozzles were drained and packaged, they were placed in Hatfield's car (Tr. 77-78, 83-88). Hatfield was not instructed on how or when to effect the shipment (Tr. 88-89, 113).

Hatfield was not a Husky employee. He was a salesman for Jack Pittman and Associates ("Pittman"), a manufacturer's representative. Pittman sells products to distributors and end users on behalf of Husky and other manufacturers. Husky pays Pittman on a commission basis (Tr. 72-74, 92, 144-45, 147; Exh. R-2, p. 1).

Later that same day, June 8, Hatfield carried out the task that Husky employees had asked him to perform. Using his home address as the point of origin, he tendered to Federal Express Corporation ("FedEx") at West Columbia, SC, two fiberboard boxes for shipping to Husky headquarters. One of the boxes contained three gasoline pump nozzles. The other contained fourteen nozzles, each individually packaged in its own fiberboard box (Tr. 19-21, 28-29; Exhs. C-1 and C-2, picture 15; Exhs. R-4 and R-5, p. 3). Hatfield used Husky's FedEx account number (Tr. 183).

The critical fact in determining liability is that Hatfield acted at the behest of Husky employees who were acting, or apparently acting, on Husky's behalf. Nozzles in the field routinely were returned to headquarters (Tr. 94). Husky employees designated Hatfield to perform that task. These circumstances created an agency relationship. *See, e.g., Holley v. Crank,* 386 F.3d 1248, 1252 (9 Cir. 2004). Husky, in asserting that Hatfield's actions should not be imputed to it, points out that the manner in which the nozzles were packed and the type of transportation used were details left to the judgment solely of Hatfield. But these were, of course, details. They did not change the nature of the relationship. Of central and overriding significance is that Hatfield, in arranging to ship the nozzles, acted at the direction of Husky employees. He used Husky's FedEx account number to do so. Hatfield in this transaction acted as Husky's agent, I conclude. Hatfield's actions therefore are imputed to Husky.[1]

III. Findings and Conclusions

The salient facts are straightforward. Respondent tendered for shipment aboard aircraft hazardous materials lacking the safeguards the HMRs require for such shipments. By doing so, Respondent violated the HMRs set out in Complainant's Complaint. An appropriate civil penalty will be set.

The FAA learned of the shipment the day after Respondent's tender, when it was notified by the carrier hired to transport the packages, Federal Express Corporation (Tr. 14; Exh. R-5, p. 3). FedEx subsequently sent to the agency a report required by carriers involved in a hazmat incident. In its Hazardous Materials Incident Report, FedEx stated that it had uncovered an undeclared shipment of gasoline. Its employees, it said, were alerted by gas or vapor emitting from the shipment (Exh. C-1; Exh. R-5, p. 3; Tr. 14-18). One of the individual boxes was stained. The stain, according to the report, was gasoline residue.[2]

FAA special agent and hazardous-materials specialist Staci Baldwin investigated the incident. She pointed out that gasoline pump nozzles are a regulated hazardous material known as Dangerous Goods in Apparatus (*see* Hazardous Materials Table immediately following §172.101; Tr. 25-27, 32). The source of the apparent leakage which had led to the stain, she said, was gasoline

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[1] *See generally Westair Commuter Airlines, Inc. d/b/a United Express,* FAA Order No. 93-18 (June 10, 1993). That Hatfield may have performed the task either in a manner different from Husky procedures, in an unauthorized manner, or even in a manner contrary to law does not change the nature of the relationship. *Westair,* pp. 5-7; W. Page Prosser *et al.*, Prosser and Keeton on the Law of Torts, § 70, at 502-503 (5th ed. 1984). The claim of Husky safety official John Myers that he would not have shipped the nozzles unless they were "sufficiently" dried out (Tr. 95), then, does not alter the agency relationship Husky had established with Hatfield.

[2] Exh. C-2, pictures 15, 16, and 17; Exh. R-5, p. 3. Although the report states that the shipper/offeror's surname is "Hartfield," the record establishes that the report was referring to Dan Hatfield. *See, e.g.,* Exh. C-3, p. 1.

(Tr. 33, 56; *see* Exh. C-2, picture 15). Gasoline also is named in the HMRs as a hazardous material and subject to the regulations' requirements and restrictions.[3]

Agent Baldwin supported the allegations of the Complaint. She stated that the shipment at issue failed to observe any HMR requirements triggered by its nature. She concluded that Respondent violated each of the HMRs set out in the Complaint (Tr. 27).

The preponderance of the evidence showed that the materials in the shipment included diesel pump nozzles as well as gasoline pump nozzles. The evidence also showed that a substance did cause the stain on one inner package, but that it was diesel fuel, not gasoline. The diesel fuel, I further conclude, had leaked from inside the package.

Testimony from witnesses for both parties sufficiently supported these determinations. Agent Baldwin testified that she had removed from the stained box the nozzle inside it before she took a photograph. She placed the nozzle on top of the offending box. Her photograph shows a nozzle with a green handle. Pump nozzles with green handles customarily are used for diesel fuel; gasoline normally is pumped through nozzles with handles that are black (Tr. 35-36, 48-49; Exh. C-2, picture 17). Jack Peters, a consultant on hazardous-materials regulation and a witness for Respondent, concluded that the nozzle photographed by agent Baldwin is a diesel nozzle and that the stain in the picture is a diesel stain (Tr. 220-22; *see* Exh. C-2, picture 17). In support, he testified not only that green is the color customarily used for diesel handles; he added that while gasoline will evaporate after staining, diesel fuel will not (Tr. 220). Further, while it is true that any residue remaining in the nozzle in question was not tested (Tr. 33, 50), no evidence tended to show that Husky broke with industry convention by using a nozzle with a green handle for gasoline rather than for diesel. The evidence showing that the stain was the product of diesel fuel, not gasoline, and that diesel pump nozzles were part of the shipment, was persuasive.

These determinations do not affect the legal findings and conclusions herein. Diesel fuel, like gasoline, is named in the HMRs as a hazardous material. Diesel pump nozzles, like gasoline pump nozzles, also are hazardous materials categorized as Dangerous Goods in Apparatus (Hazardous Materials Table immediately following §172.101; Tr. 53, 222). Although the Complaint asserts HMR violations stemming solely from the undeclared tender of gasoline and gasoline pump nozzles (Exh. R-6), Respondent has not suggested that it was surprised or otherwise prejudiced by the difference between the allegations of the Complaint and the evidence adduced at the hearing. No compelling reason

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[3] Hazardous Materials Table of §172.101. Respondent attempted to cast doubt on Complainant's conclusion that the package leaked from the inside, or that it leaked at all. *See, e.g.*, Tr. 47-49. Whether the package leaked is not directly relevant to the violations at issue. Tr. 54.

exists to hold Complainant strictly to the Complaint's literal words. Therefore, I will permit the Complaint to conform to the proof.[4]

Respondent's attempts to show that the materials involved fall within exceptions to HMR requirements miss the mark. Its contention that the diesel fuel it carried qualifies for the small-quantity exception of §173.4 (Tr. 234) is wrong. Section 173.4 may indeed be invoked when eleven numbered prerequisites are met (§173.4; Tr. 255). But Respondent failed to meet at least two of them. First, packing material must be capable of absorbing liquid in an inner receptacle (§173.4(a)(4)). The leak of the diesel fuel shows that the packing material failed in that task. Further, no evidence, other than a hearsay statement of insufficient credibility, demonstrated that Respondent met the "drop-test" prerequisite (§173.4(a)(6); Tr. 257-58). Respondent in fact acknowledged that it failed to meet the requirements necessary to benefit from the §173.4 exception (Tr. 259).

Nor does the HMRs' Special Provision ("SP") 136 suggest an exemption from the labeling rules otherwise applicable to the shipment (*see* "Code/Special Provisions" *following* §172.102*)*. SP 136 exempts hazardous materials from labeling requirements under certain conditions, but only when they are offered for transportation by a method *other than* aircraft. Apparatus such as the nozzles may be excepted from HMR requirements by the Associate Administrator respecting any form of travel, including transportation by air; however, the Associate Administrator granted no exception in this case (Tr. 249-50). Therefore, SP 136 does not apply either.[5] Neither do the exceptions from labeling requirements for "limited quantities" classed as flammable or combustible liquids pertain, because these exceptions are not applicable for carriage by aircraft (§173.150; Tr. 243).

Respondent also asserted that the diesel fuel at issue could not have been a hazardous material because its flash point was too high to be considered as such. Husky's consultant-witness, Jack Peters, contended that "there is a good possibility" (Tr. 224) or "a possibility" (Tr. 244) that the flash point of the fuel had been over 140° F. – and thus too high to be regulated, he said – because it was recovered in early June, near the beginning of summer, in warm-weather South Carolina (Tr. 223-24). But the witness' conclusion is merely conjecture. Peters did not know the actual flash point of the diesel fuel in the nozzle (Tr. 246). Speculation is not probative testimony.

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[4] My power to do so derives from the Administrative Procedure Act, 5 USC §556(c), and the FAA's rules, 14 CFR §13.205(a)(5) and (a)(6), each of which permit administrative law judges to "receive relevant evidence" and "regulate the course of the hearing." The Federal Rules of Civil Procedure also allow such an action. Rule 15(b) states that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." It further states that failure to amend the pleadings to conform them to the evidence "does not affect the result of the trial of these issues."

[5] Respondent acknowledges that if these exceptions do not apply and "Husky was the shipper," then HMR labeling and packaging requirements do apply. Tr. 236-37; *see also* Tr. 251-52.

Respondent's assumption that fuel with a flash point above 140° F. would remove it from the regulatory scheme is, moreover, incorrect. A flash point above 140° F. and less than 200° F. would, as Respondent correctly points out, enable a substance classed as a flammable liquid to be reclassed as a combustible liquid.[6] But Peters' claim that combustible liquids are completely nonregulated (Tr. 268-69) is not correct.

Peters bases his conclusion on §173.150(f)(2), which states that (other than exceptions inapplicable here) "the requirements in this subchapter do not apply to a material classed as a combustible liquid in a non-bulk packaging." But the previous subparagraph, (f)(1), makes clear that subparagraph (f)(2) does not apply to transportation by aircraft or vessel. Peters counters that subparagraph (f)(2) stands alone; it should be read without reference to (f)(1), he stated (Tr. 271-72). The witness' reading is incorrect. It is an elementary rule of statutory construction that, in construing one provision or section, provisions of a legislative enactment must be read together. *A & E Supply Co., Inc. v. Nationwide Mutual Fire Insurance Co.*, 798 F.2d 669, 675 (4 Cir. 1986). All parts, provisions, and sections of the HMRs must be read together in order to best ascertain and give effect to their meaning. *Meloy v. Conoco, Inc.*, 817 F.2d 275 (5 Cir. 1987). It is concluded that combustible liquids generally must conform to HMR requirements.

I have considered all other objections raised by Respondent and reject them without additional comment.[7]

IV. Penalty

I have decided to assess a civil penalty against Respondent of $8,000.

Complainant asks for a civil penalty of $15,000. 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)).

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[6] §173.120(b). A flammable liquid with a flash point of just 100° F. or above may be reclassed as a combustible liquid, but only if means of transportation other than aircraft or vessel are "impracticable." §173.120(b)(2); Tr. 245. No such showing was made here.

[7] One further matter must be addressed. The Order Sealing Portions of the Docket served June 9, 2008, protected from public disclosure certain exhibits of a proprietary nature. It also directed the parties to notify the undersigned within 30 days of receipt of the transcript whether any testimony needed to be redacted and withheld from public filing. No such notification was received. Therefore, the transcript will be filed in full with the Docket Management System (DMS) in due course.

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

Undeclared shipments of hazardous materials lack that protection. Such shipments, by constituting a safety threat whose magnitude is unknown, are particularly worrisome. The Administrator has emphasized that undeclared shipments of hazardous materials, "which increase the likelihood of injury, pose a special risk" (*see, e.g., Toyota Motor Sales, USA, Inc.*, FAA Order No. 94-28 (September 30, 1994), p. 13). These circumstances warrant a substantial fine.

The character of Respondent's business also is important in determining an appropriate penalty. The fine should reflect the degree of Husky's involvement with hazardous materials. The agency's HMR Penalty Guidelines suggest that the greater the degree of a respondent's involvement in hazardous materials, the higher the sanction amount should be.[8] The record shows that the company uses hazardous materials in the course of its business (Tr. 24). Husky VP Brad Baker acknowledged that the company utilizes and accepts hazardous materials as part of its manufacturing process (Tr. 150-51, 183-84, 193). Husky also transports hazmats in the sense of moving them within the plant and in storing them (Tr. 185-86). Respondent, however, emphasized that it does not (at least as a rule) ship hazmats (Tr. 150).

Respondent's position as a business using and handling hazardous materials – even if not utilizing such materials on a regular basis -- compels an awareness of the HMRs and the concomitant obligation to follow them. The Penalty Guidelines emphasize that such a business "is clearly on notice of the hazardous mature of the material and the regulatory requirements to which the Hazmat is subject" (64 Fed.Reg. 19443, 19449). But Respondent showed very little such knowledge. No employee had undergone any kind of training in the recognition or appropriate use of hazardous materials (Tr. 25). No company procedure existed for the purging of pump nozzles (Tr. 187). The nozzles in the shipment were not flushed (Tr. 92-93). These circumstances also compel a significant assessment for the violations at issue.

Additional relevant factors, however, warrant mitigation of the penalty amount. Respondent officials credibly testified that they attempted to drain thoroughly the nozzles that later were tendered for shipment (Tr. 88, 116-17).

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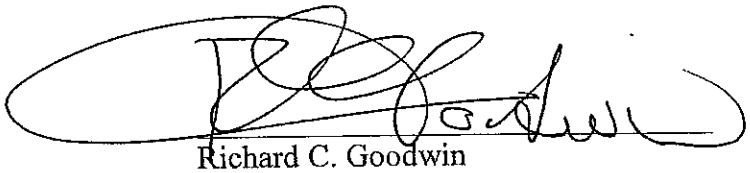
[8] *See* Federal Aviation Administration Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines, 64 Fed.Reg. 19443 *et seq.* (April 21, 1999), FAA Order 2150.3A, Chg. 26, Appendix 6, dated April 14, 1999. By Order 2150.3B, the agency issued new sanction guidelines superseding the old. The new guidelines are inapplicable here, however, because they apply to violations occurring on or after October 1, 2007, and the incident in this matter took place on June 8, 2006. *See* 72 Fed.Reg. 55853 (October 1, 2007).

Little fuel was left in them by the time they were placed in Hatfield's car. I agree with the evidence suggesting that the residual amount of fuel in each of the nozzles would have been measured "in drips rather than ounces or liters" (Exh. R-2, p. 2).

Another factor suggesting mitigation is that soon after the incident Husky officials underwent hazardous-materials training. Swift action designed to better ensure future compliance may warrant a significant reduction in civil penalty. One such measure which has led to a lesser penalty involved sending responsible employees to training programs (*Westair Commuter Airlines, Inc. d/b/a United Express,* FAA Order 93-18 (June 10, 1993)). Husky VP Brad Baker testified that, within a few weeks of the incident, responsible officials attended a Federal Express-sponsored seminar on dangerous goods in air transportation. Jack Peters, Respondent's witness-consultant, also provided training (Tr. 169-174, 238-39). These actions justify a measure of mitigation.

In weighing all the totality of the facts and circumstances, I find and conclude that a civil penalty assessment of $8,000 is appropriate. I conclude that this amount will achieve the statutory purpose of promoting compliance with the HMRs. It also contains sufficient "bite", or deterrent effect (*see Toyota Motor Sales, Inc.,* FAA Order No. 94-28 (September 30, 1994), p. 11). The assessment additionally fairly weighs the post-incident actions Respondent has undertaken. Finally, the civil penalty also appropriately accounts for the factors the statute directs in fixing the assessment.

Husky Corporation is hereby assessed a civil penalty of $8,000 for violations of the following HMRs: §§171.2(a), 172.200(a), 172.202(a)(1)-(a)(3), 172.202(a)(5), 172.203(f), 172.204(a) or (c)(1), 172.204(c)(2), 172.204(c)(3), 172.600, 172.602(b)(3), 173.1(b), 172.702(a), 173.27(b)(1), and 173.222.[9]



Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

[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.