UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: CANUCK INDUSTRIES, INC.
FAA Order No. 2002-14

Docket No. CP00SO0021
DMS No. FAA-2000-7726[1]

Served: May 10, 2002

DECISION AND ORDER[2]

The agency attorney served a Final Notice of Proposed Civil Penalty on Respondent Canuck Industries, Inc. (Canuck), alleging that Canuck failed to train its employees under the hazardous materials regulations. When the agency attorney did not receive a request for hearing from Canuck by the deadline, she issued an order assessing a $12,000 civil penalty. Canuck filed a request for hearing and a motion to dismiss Complainant's order. Acting Chief Administrative Law Judge Ronnie A. Yoder then dismissed Canuck's request for hearing as late-filed and denied Canuck's motion to dismiss by order dated November 22, 2000 (attached). Canuck has appealed. This decision denies Canuck's appeal and affirms the ALJ's order assessing a $12,000 civil penalty.

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: 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: http://www.faa.gov/agc/cpwebsite. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, *see* the website.

I. Allegations

The allegations in this case are as follows. On September 18, 1997, a special agent of the Federal Aviation Administration (FAA) saw two persons wearing Airborne Express uniforms handling air freight at an Airborne Express facility in Nashville, Tennessee. The two, who were employees of Canuck, told the FAA special agent that they had not received any training in the identification and handling of hazardous materials. Canuck had agreed in a written contract to pick up, transport, and deliver shipments for Airborne Express. Canuck had represented in its contract with Airborne Express that Canuck employees had received hazardous materials training.

II. Case History

On January 28, 1999, an agency attorney sent Canuck's president a Notice of Proposed Civil Penalty (Notice). The Notice alleged that Canuck failed to train its employees as required by the hazardous materials regulations[3] and that $20,000 was an appropriate civil penalty.

On February 26, 1999, an attorney with a private law firm called the agency attorney to advise her that he was representing Canuck and was requesting an informal conference. On the same day, Canuck's attorney also sent the agency attorney a facsimile confirming his representation of Canuck and his request for an informal conference.

On April 13, 1999, the same attorney represented Canuck at the informal conference. On July 23, 1999, he sent the agency attorney confidential information regarding Canuck's financial situation, and the two attorneys engaged in settlement negotiations.

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[3] Specifically, 49 C.F.R. §§ 172.702(b), 172.702(d), 172.704(a)(1), 172.704(a)(2), 172.704(c)(1), and 172.704(d). For the text of these regulations, *see* the Appendix.

When the settlement negotiations produced no agreement, the agency attorney signed Complainant's Final Notice of Proposed Civil Penalty (Final Notice) and mailed it to Canuck's attorney on December 14, 1999. The return receipt indicated that Canuck's counsel received the Final Notice on December 20, 1999.

The Rules of Practice required Canuck either to pay the civil penalty or request a hearing within 15 days of receipt of the Final Notice.[4] Assuming that the Final Notice was served properly, the request for hearing was due on or before January 4, 2000.

On January 7, 2000, the two attorneys spoke on the telephone, and the agency attorney made a settlement offer. Canuck's attorney argued that service of the Final Notice was defective because Canuck had not designated its counsel in writing to receive the Final Notice for Canuck. The agency attorney disagreed.

On February 1, 2000, the agency attorney, having received no response to her settlement offer of January 7, issued an order assessing a $12,000 civil penalty (Order Assessing Civil Penalty). The order contained a statement that the penalty was reduced from the amount originally proposed due to Canuck's corrective action and financial situation. The agency attorney mailed the order to both Canuck and its attorney.

On March 4, 2000, Canuck's attorney sent a request for hearing to the hearing docket. Although the cover letter indicated that a copy was sent to the agency attorney,

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[4] 14 C.F.R. § 13.16(e)(2) provides, in relevant part, as follows:

> (2) Not later than 15 days after receipt of the final notice of proposed civil penalty, the person charged with a violation shall do one of the following:
> (i) Submit the amount of the proposed civil penalty or an agreed-upon amount . . . ; or
> (ii) Request a hearing in which case a complaint shall be filed with the hearing docket clerk.

she maintains that she did not receive a copy. Canuck argued in its request for hearing that: (1) under 14 C.F.R. § 13.16(e),[5] the agency attorney should have served the Final Notice on Canuck's President rather than on its counsel; (2) even if the agency attorney properly served the Final Notice on Canuck's attorney, Canuck's reliance on the letter of 14 C.F.R. § 13.16(e) constituted excusable neglect; (3) the FAA lacked jurisdiction because Canuck does not operate or load aircraft; (4) the Final Notice and the Order Assessing Civil Penalty were defective because they were signed only by an attorney in the Enforcement Division, who was not included in the delegation of authority in 14 C.F.R. § 13.16(c); and (5) the $12,000 civil penalty was excessive.

On July 21, 2000, the agency attorney received a copy of a letter dated July 12, 2000, from Canuck's attorney to the Secretary of Transportation. The letter mentioned Canuck's request for hearing, alerting the agency attorney for what appears to be the first time that Canuck had filed a request for hearing.

On August 7, 2000, the agency attorney moved to dismiss Canuck's request for hearing, arguing that the request was late and that Canuck had failed to show good cause for the lateness. Under 14 C.F.R. § 13.208(a), an agency attorney must file a motion to dismiss a request for hearing within 20 days of receiving the request.[6] The agency

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[5] 14 C.F.R. § 13.16(e) provides, in relevant part, as follows:

> A final notice of proposed civil penalty will be sent to the individual charged with a violation, to the president of the corporation or company charged with a violation, or a person previously designated in writing by the individual, corporation or company to receive documents in that civil penalty action. If not previously done in response to a notice of proposed civil penalty, a corporation or company may designate in writing another person to receive documents in that civil penalty action. . . .

[6] 14 C.F.R. § 13.208(a) provides, in relevant part, as follows:

attorney filed her motion to dismiss within 20 days of July 21, 2000, the day she received a copy of Canuck's letter to the Secretary of Transportation mentioning Canuck's request for hearing.

On September 7, 2000, Canuck's attorney filed a motion with the ALJ requesting dismissal of the Final Notice and the Order Assessing Civil Penalty. At the same time, he filed a memorandum supporting Canuck's request for hearing. Canuck's attorney again argued that: (1) the FAA lacked jurisdiction because Canuck does not provide transportation by air; (2) the Final Notice was defective because it was signed by an agency attorney who lacked authority to issue a Final Notice; and (3) service of the Final Notice was defective because the agency attorney sent it to Canuck's attorney rather than to its president.

On November 22, 2000, the ALJ granted the agency attorney's motion to dismiss the request for hearing. The ALJ concluded that Canuck's attorney was designated in writing to receive the Final Notice and that the agency attorney properly served the Final Notice on Canuck's attorney under 14 C.F.R. § 13.16(e). The ALJ stated that after the agency attorney received notice that counsel represented Canuck, substantive communication between the agency attorney and Canuck's president, the client, would have violated rules of professional responsibility. The ALJ further found that Canuck's request for hearing was untimely and that good cause did not exist to excuse the lateness of the request. On December 6, 2000, Canuck's attorney filed a notice of appeal from the ALJ's decision dismissing the request for hearing.

(a) *Filing*. The agency attorney shall file the original and one copy of the complaint with the hearing docket clerk, or may file a written motion pursuant to § 13.218(f)(2)(i) of this subpart instead of filing a complaint, not later than 20 days after receipt by the agency attorney of a request for hearing. . . .

III. Jurisdiction

On appeal, Canuck challenges the ALJ's finding that the FAA has jurisdiction. Canuck asserts that it transports hazardous materials only by highway, and that its employees neither load nor operate aircraft. According to Canuck, the only agency that could possibly have had jurisdiction over it for the alleged violations would be the Federal Highway Administration (FHWA).

A person, the definition of which includes a corporation like Canuck,[7] can violate the Federal hazardous materials transportation law, 49 U.S.C. § 5123,[8] and the hazardous materials regulations, 49 C.F.R. Parts 171-179, even if the person neither loads nor operates the vehicle that transports the hazardous materials. A violation occurs if the person merely *offers* or *accepts* the hazardous material for transportation. *See* 49 C.F.R. § 171.2(a), which provides that "no person may *offer* or *accept* a hazardous material for transportation in commerce unless . . . the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter . . . ." (Emphasis added.)

The Secretary of Transportation has delegated to the Administrator of the FAA the authority to "carry out the functions vested in the Secretary by 49 App. U.S.C. 1809 [now 49 U.S.C. § 5123] . . . so far as they apply to the transportation or shipment of

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[7] 49 U.S.C. § 5102(9) states that the word "person" in the Federal hazardous materials law includes its meaning under 1 U.S.C. § 1; 1 U.S.C. § 1 states that the word "person" in the U.S. Code includes corporations and companies as well as individuals.

[8] 49 U.S.C. § 5123 provides, in relevant part, as follows:

> (a)(1) A person that knowingly violates this chapter [beginning at 49 U.S.C. § 5101, and entitled "Transportation of Hazardous Materials"] or a regulation

hazardous materials by *air* . . . ." 49 C.F.R. § 1.47(k) (October 1, 1996) (emphasis added). This delegation necessarily includes *all* of the Secretary's authority to prosecute hazardous materials violations relating to air transportation – not just those violations involving actual transportation, but also those violations involving the *offer* or *acceptance* of hazardous materials for transportation in *air* commerce. The FAA has exercised its jurisdiction over other companies where the companies *offered* the hazardous materials for transportation in air commerce even though there was no allegation that the companies actually loaded or operated an aircraft. *See, e.g.*, In the Matter of Seven's Paint & Wallpaper, FAA Order No. 2001-6 (May 16, 2001); In the Matter of Phillips Building Supply, FAA Order No. 2000-20 (August 11, 2000); In the Matter of Midtown Neon Sign Corporation, FAA Order No. 1996-26 (August 13, 1996); In the Matter of Toyota Motor Sales, USA, FAA Order No. 1994-28 (September 30, 1994), *clarified*, FAA Order No. 1995-12 (May 10, 1995), *petition for review voluntarily dismissed*, Toyota Motor Sales, USA v. FAA, No. 95-1341 (D.C. Cir. June 5, 1996).

The agency attorney has alleged that Canuck had an agreement with Airborne Express to pick up and deliver hazardous materials on Airborne Express's behalf – *i.e.*, to accept [from Airborne Express customers] and offer [to Airborne Express] hazardous materials for transportation in air commerce. The agency attorney has alleged further that Canuck drivers wore Airborne Express uniforms, handled air cargo, and acted as agents for Airborne Express. There has been no claim from Canuck that the packages it picked up for and delivered to Airborne Express were *not* transported aboard Airborne Express's

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prescribed or order issued under this chapter is liable to the U.S. Government for a civil penalty . . . for each violation.

aircraft. For these reasons, the ALJ did not err in finding facts sufficient to invoke FAA jurisdiction under the Federal hazardous materials transportation law.

The Administrator of the Federal Highway Administration (FHWA) may also have jurisdiction over Canuck, although there is nothing in the record indicating any exercise of FHWA jurisdiction. The Secretary of Transportation delegated authority to the Administrator of the FHWA to "carry out the functions vested in the Secretary by 49 App. U.S.C. . . . 1809 [now 49 U.S.C. § 5123] so far as they apply to the transportation or shipment of hazardous materials by *highway* . . . ." 49 C.F.R. § 1.48(u)(1) (October 1, 1996) (emphasis added).[9] Canuck admits that its drivers transport hazardous materials by highway. Canuck, however, has cited no provision that makes the jurisdiction of the FAA and FHWA mutually exclusive. Administrative agencies sometimes have dual, or concurrent, jurisdiction. *See, e.g.*, United States v. Price Brothers Co., 721 F. Supp. 869 (E.D. Mich. 1989) (discussing the dual jurisdiction of the Federal Trade Commission and the Department of Justice over the antitrust laws).

IV. Delegation of Authority

Canuck argues that the Final Notice of Proposed Civil Penalty was defective because it was signed by an attorney in the Enforcement Division of the FAA's Office of the Chief Counsel who lacked authority to sign and issue the Final Notice. This argument is rejected.

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[9] The Secretary of Transportation revised the delegations of authority to the administrators of the various agencies within the Department of Transportation. 65 Fed. Reg. 49,763 (August 15, 2000). The revision occurred after the alleged violations in the instant case. In the revised delegations, it is the Administrator of the Federal Motor Carrier Safety Administration to whom the Secretary has delegated the authority "to carry out the functions vested in the Secretary by 49 U.S.C. . . . 5123 . . . with particular emphasis on the transportation or shipment of hazardous materials by *highway* . . . ." 49 C.F.R. § 1.73(d)(1) (emphasis added).

The Administrator has delegated her authority to initiate and assess civil penalties for hazardous materials violations as follows:

> The authority of the Administrator, under . . . section 110 of the Hazardous Materials Transportation Act [codified as 49 U.S.C. § 5123], to initiate and assess civil penalties for a violation of [that Act], or a rule, regulation, or order issued thereunder, is delegated to . . . the Assistant Chief Counsel, Enforcement . . . .

14 C.F.R. § 13.16(c).

The agency attorney in this case signed her name under the typewritten name of the Assistant Chief Counsel for Enforcement. Hence, she issued the Final Notice in the name and under the authority of the Assistant Chief Counsel for Enforcement. *See* In the Matter of Langton, FAA Order No. 1993-12 at 3 n.5 (March 25, 1993) (Notice and Final Notice of Proposed Civil Penalty, signed by an agency attorney in the name and under the authority of an Assistant Chief Counsel, were properly issued).

In addition, by memorandum dated November 9, 2000, the Assistant Chief Counsel for Enforcement redelegated his authority to initiate and assess civil penalties under 49 U.S.C. § 5123 to attorneys in his division, including the agency attorney in this case.[10] The Assistant Chief Counsel for Enforcement wrote further in the November 9, 2000, memorandum that due to an oversight, he had failed in previous delegations of authority to redelegate his authority under 49 U.S.C. § 5123 to the attorneys in his division. He wrote, however, that he was ratifying the prior exercise of his authority under 49 U.S.C. § 5123 by attorneys working in his division since May 11, 1994, including the agency attorney handling this case. Hence, the Assistant Chief Counsel for Enforcement ratified the action of the agency attorney in this case.

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[10] Section 13.16(c) does not preclude the Assistant Chief Counsel for Enforcement from redelegating the authority to initiate and assess civil penalties.

V. Service on Counsel

Canuck argues that service of the Final Notice was defective because the agency attorney served the Final Notice on Canuck's attorney, rather than on its president. In so doing, according to Canuck, the agency attorney failed to comply with 14 C.F.R. § 13.16(e), which provides:

> A final notice of proposed civil penalty will be sent to the individual charged with the violation, to the president of the corporation or company charged with a violation or a person previously designated in writing by the individual, corporation or company to receive documents in a civil penalty action.

Canuck further argues that even if notice to counsel is sufficient to trigger the time for filing a request for hearing, a hearing should be allowed because Canuck's reliance on the letter of the agency's regulations should be considered excusable neglect.

In Belton v. United States, 6 F.3d 756, 761 (Fed. Cir. 1993), the court determined that the Department of Commerce violated its own regulation providing for written notice to the appellees.[11] The court held, however, that because the appellees' counsel received actual notice, there was no prejudice and the error was harmless. The court also relied on the general principle that "[n]otice to the attorney is notice to the client unless the applicable notice provision *expressly requires otherwise.*" (*Id.*; emphasis added.) Attempting to use this statement in support of its argument here, Canuck argues that the regulation at issue, 14 C.F.R. § 13.16(e), expressly requires otherwise. Section 13.16(e), however, like the regulation in Belton, does not expressly state that "notice to counsel is insufficient," as the Belton court anticipated would be necessary to invoke its exception

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[11] The regulation provided, in relevant part: "[T]he Secretary will serve written notice of the intent to revoke or terminate on each interested party listed on the Department's service list and on any other person which the Secretary has reason to believe is a producer or seller in the United States of the product." 19 C.F.R. § 355.25(d) (1990).

to the usual rule. 6 F.3d at 761. Although the regulation does anticipate that a respondent may designate in writing alternative means of service, nothing in this provision undermines the settled principle, routinely followed in a variety of litigation contexts and generally required by the rules of professional conduct, that service on a party is effectively accomplished by service on identified counsel. As the Supreme Court stated in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 93 (1990) (citing Decker v. Anheuser-Busch, 632 F.2d 1221, 1224 (5th Cir. 1980)), "If Congress [or in this case, the FAA] intends to depart from the common and established practice of providing notification through counsel, it must do so expressly." Section 13.16(e) does not provide for such a departure. Given that notice to counsel is notice to the client, service on Canuck's identified attorney satisfied the requirements of Section 13.16(e).

Section 13.16(e)'s intent, at least in part, is to protect against false representations that a person has the authority to receive documents on a respondent's behalf. In this case, Canuck's president participated in a telephonic informal conference at which counsel represented Canuck. Thus, Complainant had verification from Canuck's president that counsel was representing Canuck. In any event, Canuck has not claimed that its counsel lacked the authority to represent it.

Having received notice from Complainant, Canuck's attorney had a professional obligation to inform Canuck of the receipt of the Final Notice. Canuck's attorney (or Canuck itself) took an ill-advised gamble. Even though he received a copy of the Final Notice and thus had actual notice, he failed to respond in any way, risking default by his client. No excusable neglect justifying remand for a hearing is present here.

For the above reasons, Canuck's appeal is denied.[12]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 7th day of May, 2002

[12] Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).

Appendix

49 C.F.R. § 172.702(b) provides, in relevant part, as follows:

> [A] hazmat employee who performs any function subject to the requirements of this subchapter [the hazardous materials regulations] may not perform that function unless instructed in the requirements of this subchapter that apply to that function. It is the duty of each hazmat employer to comply with the applicable requirements of this subchapter and to thoroughly instruct each hazmat employee in relation thereto.

49 C.F.R. § 172.702(d) provides as follows:

> A hazmat employer shall ensure that each of its hazmat employees is tested by appropriate means on the training subjects covered in § 172.704.

49 C.F.R. § 172.704(a)(1) provides as follows:

> *General awareness/familiarization training.* Each hazmat employee shall be provided general awareness/familiarization training designed to provide familiarity with the requirements of this subchapter, and to enable the employee to recognize and identify hazardous materials consistent with the hazard communication standards of this subchapter.

49 C.F.R. § 172.704(a)(2) provides, in relevant part, as follows:

> *Function-specific training.* (i) Each hazmat employee shall be provided function-specific training concerning requirement of this subchapter, or exemptions issued under subchapter A of this subchapter, or exemptions issued under subchapter A of this chapter, which are specifically applicable to the functions the employee performs. . . .

49 C.F.R. § 172.704(c)(1) provides as follows:

> *Initial and recurrent training* -- (1) Initial training. A new hazmat employee, or a hazmat employee who changes job functions may perform those functions prior to the completion of training provided -- (i) the employee performs those functions under the direct supervision of a properly trained and knowledgeable hazmat employee; and (ii) the training is completed within 90 days after employment or change in job function. (2) Recurrent training. A new hazmat employee shall receive the training required by this subpart at least once every three years.

49 C.F.R. § 172.704(d) provides, in part, as follows:

> *Recordkeeping.* A record of current training, inclusive of the preceding

three years, in accordance with this section shall be created and retained by each hazmat employer for as long as that employee is employed by that employer as a hazmat employee and for 90 days thereafter. . . .