UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: FEDERAL EXPRESS CORPORATION
FAA Order No. 2002-20

Docket No. CP97SO40271
DMS No. FAA-2000-6732[1]

Served: August 5, 2002

DECISION AND ORDER[2]

This case arises from a hidden shipment of hazardous materials. The ALJ found Federal Express Corporation (Federal Express) responsible for the shipment and assessed a $45,000 civil penalty.[3] Federal Express has appealed, asking the Administrator to reverse the ALJ's finding of violations.

I.

Federal Express does not fly aircraft into Peru. (Tr. 63.) Scharff International Courier and Cargo, S.A. (Scharff), one of Federal Express's "Global Service Participants," provides Federal Express with courier services in Peru. (Respondent's Exhibit C.)

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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 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.

[3] The ALJ's initial decision is attached. For the specific regulations at issue, *see* the Appendix.

Federal Express's contract with Scharff prohibits the acceptance of dangerous goods. (Tr. 62-63; Respondent's Exhibit D at 1.)[4] Nevertheless, in April 1997, Scharff personnel accepted a box containing infectious bacteria[5] from an individual shipper in Lima, Peru. (Complainant's Exhibit 1.) Scharff personnel placed the box, which had a label stating "infectious substances" (Complainant's Exhibit 2), inside a large courier bag and delivered it to American Airlines for transportation aboard a passenger-carrying flight to Miami (Tr. 17). Because the box was hidden inside the bag, American Airlines personnel could not see the dangerous goods label or the orientation arrows on the box.

After the flight landed in Miami on April 23, 1997, a Federal Express employee picked up the bag and took it to customs for clearance. (Tr. 15-16.) When an inspector asked to see the cargo from Peru, the Federal Express employee emptied the bag and noticed the dangerous goods label on the box containing the bacteria. (Tr. 16.) Fortuitously, the box was undamaged, and no one was infected.

The Federal Express airway bill indicated that the box's destination was "Oficina Panamericana Sanitaria Laboratorio" in Washington, D.C. (Complainant's Exhibit 1), although the shipper's declaration for dangerous goods indicated that the destination was the National Laboratory for Enteric Pathogens in Ottawa, Canada (Complainant's Exhibit 3). The box had Federal Express tracking information on it, and a label

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[4] "Dangerous goods" is the international term for items referred to in Department of Transportation regulations as "hazardous materials." 49 U.S.C. §§ 171-180.

[5] Included in the box were shigella, salmonella, vibrio, and e. coli. (Tr. 28; Complainant's Exhibit 2, photograph number 5.)

indicating that it was a "Federal Express Corporation International Multiple Piece Shipment."[6] (Tr. 25; Complainant's Exhibit 2.)

The shipment violated the hazardous materials regulations in a number of ways. It was a "hidden shipment," given that the required labeling, marking, and shipping papers were hidden inside the courier bag. (Tr. 17.) Also, the Federal Express label on the box partially obscured the dangerous goods label. (Tr. 28.) Finally, the shipper's declaration for dangerous goods was unsigned and failed to indicate whether the shipment was radioactive or whether the shipment needed to be carried aboard cargo aircraft only. (Tr. 32.)

II.

In his written initial decision dated August 2, 2000, the ALJ held Federal Express responsible for the acts and omissions of Scharff. He noted that the Administrator has repeatedly emphasized that air carriers such as Federal Express must perform their services with the highest possible degree of care, and may not delegate away their duty of care to other entities. (Initial Decision at 4-5.)

The following factors led the ALJ to conclude that Scharff was acting on Federal Express's behalf and that Federal Express must be held accountable for Scharff's actions:

- Federal Express obtained business in Peru through Scharff.
- Scharff was limited to offering its delivery services to Federal Express.
- Scharff held itself out as Federal Express.
- Scharff employees wore Federal Express uniforms and placed Federal Express decals on its delivery vehicles.

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[6] The shipment consisted of the box of bacteria and a Federal Express envelope containing documents, including the shipper's declaration for dangerous goods. (Complainant's Exhibit 2; Tr. 25, 95.)

- Scharff employees placed packages in Federal Express envelopes with Federal Express airway bills.

(Initial Decision at 5.)

The ALJ noted that the contract between Scharff and Federal Express prohibited Scharff from accepting dangerous goods. (Initial Decision at 5.) He nevertheless held that Federal Express was liable because Scharff's actions were within the scope of its duties for Federal Express. (*Id.*) Federal Express has appealed.

III.

On appeal, Federal Express argues that it was not operating as an air carrier and that the ALJ therefore erred in imposing on it "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest."[7] 49 U.S.C. §§ 44701(d) and 44702. (Appeal Brief at 6-7.) Federal Express notes that American Airlines rather than Federal Express or Scharff operated the flight carrying the bacteria. (Appeal Brief at 6.)

Complainant asserts, however, that Federal Express was acting as an air carrier because the shipment was an "interline shipment" between two air carriers, *i.e.*, Federal Express and American Airlines. This argument was raised for the first time on appeal, and Complainant presented no testimony or other evidence at the hearing that an interline agreement existed. It is inappropriate to consider an issue that has not been raised below except where proper resolution of the issue is beyond doubt and injustice would otherwise result. Procter & Gamble v. Haugen, 222 F.3d 1262, 1270-1271 (10th Cir. 2000). Because proper resolution of this newly raised issue is not beyond doubt, it is

[7] No comparable language appears in the Federal hazardous materials statute, 49 U.S.C. §§ 5101-5127.

inappropriate to consider it.

The record therefore does not support a finding that Federal Express was acting as an air carrier at the time the hidden shipment was offered in air transportation. The standard of care applied to air carriers, as well as cases stating that an air carrier's duty of care may not be delegated to an independent contractor, are accordingly inapplicable.[8]

IV.

Federal Express's key argument on appeal is that the ALJ erred by holding it responsible for the actions of Scharff, because Scharff was Federal Express's independent contractor, not its agent. (Appeal Brief at 12-13.)

With the exception of 49 C.F.R. § 173.1, which is addressed *infra*, the regulations Federal Express allegedly violated apply to persons who have *offered* or *accepted* hazardous materials for transportation in commerce without complying with the hazardous materials regulations.[9] Thus, the key question in this case is whether Federal Express *offered* or *accepted* hazardous materials. Put another way, the question is whether Federal Express is responsible for *Scharff's* improper offer or acceptance of hazardous materials in air transportation.

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[8] Specifically, the ALJ cited In the Matter of Empire Airlines, FAA Order No. 2000-13 at 15 n.24 (June 8, 2000) (stating that "allowing an air carrier to delegate its primary responsibility for the safety of its aircraft would not serve the public interest"); and In the Matter of USAir, FAA Order No. 1992-70 at 3 (December 21, 1992) (holding that USAir was responsible for violations committed by its agent-servant pushback operator, but stating that even if the pushback operator were an independent contractor, USAir would still be responsible, in that air carriers have a statutory duty to perform their services with the highest possible degree of safety).

[9] *See, e.g.*, 49 C.F.R. § 171.2(a) (providing that "[n]o 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 . . . .").

A. The Independent Contractor Rule and Exceptions

At common law, a principal generally is not responsible for an independent contractor's acts or omissions. *See, e.g.*, Ek v. Herrington, 939 F.2d 839, 841 (9th Cir. 1991); Mini Mart v. Direct Sales Tire Co., 889 F.2d 182, 184 (8th Cir. 1989); Wilson v. Good Humor, 757 F.2d 1293, 1301 (D.C. Cir. 1985). The general rule, however, has many exceptions. Indeed, it has been said that the exceptions to the general rule are so numerous that the general rule may not be general any longer. Mini Mart, 889 F.2d at 182.

According to the D.C. Circuit,

> Both the rule and its exceptions are derived from the same underlying policies. The general rule encompasses the notion that employers should not be held responsible for activities they do not control and, in many instances, lack the knowledge and resources to direct. *See, e.g.*, RESTATEMENT 2D [TORTS] § 409 comment b. The exceptions, in the main, reflect special situations where the employer is in the best position to identify, minimize, and administer the risks involved in the contractor's activities. *See, e.g.*, PROSSER AND KEETON § 409 at 509-10 (collecting cases); Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494, 498-500 (1935).

Wilson, 757 F.2d at 1301. Federal Express argues that this case falls within the general rule of non-liability for acts or omissions of independent contractors.[10]

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[10] Federal Express explains that "[i]n a related context, the Federal Tort Claims Act [FTCA] exempts the United States Government from any liability for the wrongful acts committed by an independent contractor," citing Logue v. United States, 412 U.S. 521 (1973) and Cannon v. United States, 645 F.2d 1128 (1981). (Appeal Brief at 15 n.5.) FTCA cases, however, are distinguishable from this case in that FTCA's exemption from liability for acts of independent contractors may not be abrogated even where "there is a good reason for so doing." Hines v. United States, 60 F.3d 1442, 1447 (9th Cir. 1995). This is because the FTCA is a limited statutory waiver of sovereign immunity. As the Supreme Court noted in U.S. Department of Energy v. Ohio, "waivers [of sovereign immunity] must be 'construed strictly in favor of the sovereign' and must not be 'enlarged beyond what the statute requires.'" 503 U.S. 607, 615 (1992), quoting McMahon v. United States, 342 U.S. 25, 27 (1951). In contrast, Hines makes clear that in non-FTCA cases, courts may find exceptions to the general rule of non-liability. 60 F.3d 1447.

B. Scharff's Status

The ALJ found that Scharff was Federal Express's independent contractor,[11] despite Complainant's argument to the contrary at the hearing.[12] Based on the evidence in the record, the ALJ did not err in so finding.

If an employer does not supervise an entity's day-to-day operations – *i.e.*, control the "detailed physical performance" of the operation – then courts generally find that the entity is an independent contractor. *See, e.g.*, United States v. Orleans, 425 U.S. 807, 814 (1976) (quoting Logue v. United States, 412 U.S. 521, 528 (1973) and stating that "a critical element" in determining whether an entity is an independent contractor is the principal's power to control the entity's "detailed physical performance").

Although the record contains evidence suggesting that Scharff is not an independent contractor, there is also evidence that Federal Express has no employees in Peru (Tr. 56) and does not oversee Scharff's day-to-day operations (Tr. 64). In addition, Scharff does its own hiring and firing (Tr. 56), chooses its own routes, and provides its own delivery vehicles (Tr. 57) and place of work. Federal Express pays Scharff by the package; it does not provide Scharff personnel with compensation or benefits. (Tr. 57.)[13] Given these factors – particularly the crucial fact that Federal Express does not control

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[11] Initial Decision at 5, stating that "Federal Express is legally responsible for the actions of *its independent contractor Scharff*." (Emphasis added.)

[12] Tr. 100-101.

[13] *See* the RESTATEMENT (SECOND) OF TORTS § 220(2) (1965) (listing factors to consider in determining whether a person acting for another is a servant or an independent contractor).

Scharff's day-to-day operations or oversee its detailed physical performance – the ALJ did not err in concluding that Scharff was an independent contractor.[14]

C. Apparent Agency

In his initial decision holding Federal Express responsible for Scharff's acts and omissions, the ALJ wrote:

> Additionally, while not itself determinative of Respondent's liability, it is significant that Scharff held itself out as Federal Express. Its employees wore Federal Express uniforms and placed Federal Express decals on its delivery vehicles. It placed packages in Federal Express envelopes with Federal Express airway bills.

(Initial Decision at 5.) This language suggests that the ALJ was relying in part on a theory of "apparent agency" to hold Federal Express responsible. Under this theory, courts may find an employer vicariously liable for the negligence of its independent contractor if the employer has held out the independent contractor as an agent of the employer. Wilson, 757 F.2d at 1302, citing RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

Complainant also relies on the concept of "apparent authority." For example, Complainant argues that "Scharff acted with . . . apparent authority in accepting packages and reoffering them on behalf of Federal Express." (Reply Brief at 8.) Complainant asserts that "[t]o the public in Peru and in the United States, Scharff was indistinguishable from Federal Express." (*Id.* at 10.) Complainant states that "the public and conceivably

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[14] Complainant argues that: "Determining the exact nature of the relationship between parties that characterize themselves as independent contractors is not only difficult but involves discovery of many detailed facts that often are not the subject of the investigation of an administrative violation. Thus, many FAA decisions focus on the nature of the regulatory responsibility and what has been delegated, rather than the relative positions of the parties." (Reply Brief at 15 n.2.) Complainant fails, however, to provide examples to support this assertion.

even American Airlines were not aware that they were dealing with anyone other than Federal Express." (*Id.*)

Under the "apparent agency" theory, courts generally require a showing of "reasonable reliance on the business reputation or good name of the employer in doing business with the independent contractor." For example, in Wilson, 757 F.2d at 1302-1303, a child was killed when crossing a street to buy ice cream from a Good Humor truck operated by an independent contractor. In this wrongful death action, the court rejected the plaintiffs' apparent authority claim on the grounds that the plaintiffs did not present any evidence that the adults responsible for the child had relied on Good Humor's general business reputation. *Id.* Here, similarly, Complainant did not present any evidence that American Airlines' personnel relied on the business reputation or good name of Federal Express in accepting the courier bag from Scharff personnel.

Finally, Complainant has not argued that any other exception to the general rule of non-liability for independent contractors applies. Accordingly, the ALJ erred in holding Federal Express responsible for the actions of its independent contractor.[15]

V.

Federal Express's final argument[16] is that the ALJ erred in finding that it violated 49 C.F.R. § 173.1(b), which provides:

> It is the duty of each person who offers hazardous materials for transportation to instruct each of his *officers, agents, and employees*

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[15] The holding in this case does not preclude the possibility that in another hazardous materials case, Complainant might raise and prove an argument that an exception to the general rule of non-liability for acts or omissions of independent contractors applies.

[16] Any other arguments not specifically discussed in this decision have been considered and found unworthy of discussion.

> having any responsibility for preparing hazardous materials for shipment as to applicable regulations in this subchapter.

(Emphasis added.) According to Federal Express, it did not violate this regulation because Scharff is not its officer, agent, or employee.

Complainant counters with the argument that Scharff was Federal Express's agent. (Reply Brief at 22.) Quoting the RESTATEMENT (SECOND) OF AGENCY § 1(1), which states that "[i]t is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries," Complainant argues: "It is . . . clear that Scharff was subject to the control of Federal Express." (Reply Brief at 19.)

Complainant argues that Scharff was an "agent" within the meaning of Section 173.1(b) because Scharff was continuously subjected to Federal Express's will, but as noted *supra*, Federal Express did not supervise Scharff's day-to-day operations, did not take part in hiring and firing, did not supply the vehicles, and did not control Scharff's routes. Thus, there was no continuous subjection to Federal Express's will.

Complainant also has not shown that the training of independent contractors is within the purview of the Federal hazardous materials transportation law and the hazardous materials regulations. In the Federal hazardous materials law -- specifically, 49 U.S.C. § 5107 -- Congress required the Secretary of Transportation to issue, by regulation, requirements for training to be given by all "hazmat employers" to their "hazmat employees." Congress made no mention of training of "independent contractors" in Section 5107. The regulation at issue, likewise, specifies instruction of "officers, agents, and employees," but does not mention independent contractors. 49 C.F.R. § 173.1(b). It is inappropriate to read into the statute or regulation a requirement for training of independent contractors that is not specified in either place.

Federal Express's appeal is granted, the ALJ's decision assessing a $45,000 civil penalty is reversed, and the case is dismissed.[17]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 1st day of August, 2002

[17] Unless Respondent files a petition for review with an appropriate District Court of the United States under 5 U.S.C. § 704 and 28 U.S.C. § 1331, this decision shall be considered an order assessing civil penalty.

Appendix

The Hazardous Materials Regulations (49 C.F.R. §§ 171-180) at issue provide, in pertinent part, as follows:

§ 171.2(a): 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 [Subchapter C] . . . .

§ 172.200(a): [E]ach person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner required by this subpart.

§ 172.202(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 prescribed for the material as shown in Column 3 of the § 172.101 Table (class names or subsidiary hazard class or division number may be entered following the numerical hazard class, or following the basic description). The hazard class need not be included for the entry "Combustible liquid, n.o.s.";
> (3) The identification number prescribed for the material as shown in Column 4 of the § 172.101 Table;
> (4) The packing group, in Roman numerals, prescribed for the material in column 5 of the § 172.101 Table, if any. The packing group may be preceded by the letters "PG" (*e.g.*, PG II); and
> (5) . . . the total quantity (by net or gross mass, capacity, or as otherwise appropriate), including the unit of measurement, of the hazardous material covered by the description (*e.g.*, "800 lbs", "55 gal.", 3629 kg", or 280 L"). For cylinders for Class 2 (compressed gases) materials and bulk packagings, some indication of total quantity must be shown (*e.g.*, "10 cylinders" or "1 cargo tank").

§ 172.204(a): 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 or 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 the 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."

§ 172.204(c)(1): Certification containing the following language may be used in place of the certification required by paragraph (a) of this section:

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

§ 172.204(c)(3): Each person who offers for transportation by air a hazardous material authorized for air transportation shall add to the certification required in this section the following statement:

"This shipment is within the limitations prescribed for passenger aircraft/cargo aircraft only (delete nonapplicable)."

§ 172.406(f): A label must be clearly visible and may not be obscured by markings or attachments.

§ 172.600(c): No person to whom this subpart applies may offer for transportation . . . a hazardous material unless:

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

§ 172.604(a): A person who offers a hazardous material for transportation must provide a 24-hour emergency response telephone number (including the area code or international access code) for use in the event of an emergency involving the hazardous material . . . .

§ 173.1(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 requirements prescribed in this subchapter. It is the duty of each person who offers hazardous materials for transportation to instruct each of his officers, agents, and employees having any responsibility for preparing hazardous materials for shipment as to applicable regulations in this subchapter.

§ 173.25(a): Authorized packages containing hazardous materials may be offered for transportation in an overpack as defined in § 171.8 of this subchapter, if all of the following conditions are met:

> . . .
> (2) The overpack is marked with the proper shipping name and identification number, and labeled as required by this subchapter for each hazardous material contained therein unless markings and labels representative of each hazardous material in the overpack are visible.

§ 175.30(a): No person may accept a hazardous material for transportation aboard an aircraft unless the hazardous material is:

> . . .
> (2) Described and certified on a shipping paper prepared in duplicate in accordance with subpart C of part 172 . . . . The originating aircraft operator must retain one copy of each shipping paper for 90 days.