UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: INTERSTATE CHEMICAL COMPANY, INC.
FAA Order No. 2002-29

Docket No. CP99SO0033
DMS No. FAA-1999-6121[1]

Served: December 6, 2002

DECISION AND ORDER[2]

Complainant has appealed the attached order of Administrative Law Judge Burton S. Kolko, which dismissed the complaint against Interstate Chemical Company, Inc. (ICC). The complaint alleged that Interstate Chemical Company (ICC) violated the hazardous materials regulations by giving United Parcel Service (UPS) an undeclared and improperly packaged shipment of a butanol solution, a flammable liquid.[3]

The ALJ determined that the material was at least 13 years old, and held that Complainant failed to prove that the material was still hazardous. Alternatively, the ALJ held that Complainant failed to prove that the material was "natri-butanol," the trade name identified in the complaint.

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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.

[3] For the regulations allegedly violated, *see* the Appendix.

This decision reverses the ALJ's initial decision, finds that ICC committed the alleged violations, and imposes a civil penalty of $30,000.

I.

ICC is a chemical distributor. (Tr. 77, 133.) At the time of the incident, it employed 100 to 125 individuals. (Tr. 79.) ICC buys large quantities of chemicals and ships them to its customers in containers ranging in size from 55-gallon barrels to tank trucks. (Tr. 77.) It transports most of its chemicals by its own fleet of trucks, but it also uses UPS at times. (Tr. 82.)

On May 21, 1997, a chemist in one of ICC's branch offices in Colorado, called one of ICC's employees, a management trainee, at ICC's headquarters in Pennsylvania. (Tr. 112.) The chemist requested a shipment of a small amount of "kauri-butanol." (*Id.*)

Kauri-butanol is used to determine the strength of solvents. (Tr. 86-87.) Since it is used to test other chemicals, it is termed a "chemical standard." (Tr. 86.)

The chemist needed the kauri-butanol to advise a customer which product the customer needed to buy. (Tr. 113.) He told the employee that he needed him to ship kauri-butanol via UPS's next-day service. (*Id.*)

The headquarters employee went to the ICC laboratory and asked the laboratory supervisor and quality control manager (Tr. 132) to help him find the product (Tr. 113-114). Together they searched and found a 1-quart container whose label read, "Standardized Kauri-Butanol Solution." (Tr. 114-115; Complainant's Exhibit 3.) The can did not have a warning label (Tr. 115-116), as government regulations have required since 1994 (Tr. 148-149).

The employee who shipped the kauri-butanol wrote in a memorandum to his management shortly after the incident that the laboratory told him that the product was roughly 8 years old. (Complainant's Exhibit 5 at 4.) The laboratory supervisor testified, however, that the container had been at the facility since he started work there 13 years before the incident. (Tr. 134.)

The employee testified that before he shipped the can, he shook the can and tried "pretty hard" to open it but could not. (Tr. 117.) He said that the can contained "somewhere between a half and nothing." (*Id.*) He also described the amount as "slightly more than nothing, but definitely less than half." (*Id.*) As for the laboratory supervisor, he testified that the container was not full, but he could not tell exactly how much was in it. (Tr. 136.)

ICC's employee testified that he spent about 15 to 20 minutes consulting the shipping guides and checking the computer before shipping the product. (Tr. 122.) He did not look for a Material Safety Data Sheet (MSDS) on the product. (Tr. 121.) He said he was in a hurry and was trying to meet a deadline. (Tr. 123.) He consulted two commercial hazardous materials shipping guides – the J.J. Keller and the UPS shipping guides, but he found that they contained no listing for kauri-butanol. (Tr. 119-120, 125.) At the time, it did not cross his mind to look under butanol, but he said that if it happened again, he would do so. (Tr. 126.) He looked in ICC's computer database to see if kauri-butanol was a product that ICC had shipped or received before, but could not find it.

He then placed the metal can containing the kauri-butanol solution into a box containing small blocks of Styrofoam (Complainant's Exhibit 1, Photograph 9), sealed it,

and gave it to UPS. The label on the shipment read "UPS Next Day Air – Extremely Urgent." (Complainant's Exhibit 1, Photographs 1 & 2.)

Later the same day, UPS workers found the package leaking at a UPS facility in Kentucky. (Complainant's Exhibit 2.) It is unclear whether UPS transported the package by air from Pennsylvania to Kentucky, on the first leg of its journey to Colorado. Although the complaint alleged that UPS flew the package on a cargo flight, the FAA's Dangerous Goods Coordinator for the Southern Region testified that he did not have any information that the package was actually flown on board an aircraft. (Tr. 67, 72.)

UPS completed a hazardous materials incident report. In the report, UPS identified the proper shipping name of the hazardous material spilled as "Butanols," the hazard class as 3, and the identification number as UN 1120. (Tr. 36; Complainant's Exhibit 2.) UPS estimated the amount of material released from the package as 3 ounces. (Tr. 37-38; Complainant's Exhibit 2.) The report indicated that there were no fatalities or property damage, and the estimated clean-up cost was $100. (Tr. 37.)

UPS contacted the FAA, and a special agent went to the UPS facility to investigate. (Tr. 13.) The special agent found that the shipment was a fiberboard box containing a 1-quart metal can that had leaked. Only friction had secured the cap; there was no tape or plastic seal securing it. (Tr. 25.)

The box had orientation arrows that technically did not meet the requirements of the regulations. (Tr. 15.) While orientation arrows generally reduce the chance of leaks because they help the shippers to stow the box properly, they did not prevent a leak in this case. The box was stained approximately 80% on one side and 90% on the other sides. (Tr. 14-16; Complainant's Exhibit 1, Photographs 3 - 6.) The top of the box was

partly stained, and the bottom was entirely saturated. (Tr. 16-17; Complainant's Exhibit 1, Photographs 1, 7, and 8.)

The can's label was also heavily stained. (Tr. 18.) As a result, the word "KAURI-BUTANOL" had bled so that it looked like "NATRI-BUTANOL." (Complainant's Exhibit 1, Photographs 9 and 11.)

The special agent returned the shipment to a UPS employee when he was finished with it. (Tr. 20.) He testified that the disposition of the shipment was between UPS and the shipper. (*Id.*) He did not conduct a chemical analysis at the scene. (Tr. 20.) He and the FAA's Regional Dangerous Goods Coordinator testified that FAA special agents never conduct an independent chemical analysis of the material during an on-site inspection. (Tr. 26, 56, 61.)

On June 6, 1997, another FAA special agent wrote a letter of investigation to ICC regarding the incident. (Tr. 29.) In the letter, the special agent asked for a copy of the MSDS. (Tr. 29) His letter referred to the material as "natri-butanol." The special agent arrived at this name by reading the smeared label on the can. (Tr. 40.) He was not independently aware of a material called "natri-butanol" (Tr. 40-41), but the "butanol" portion of the name indicated to him that this was a butanol solution, a flammable liquid. (Tr. 42.)

ICC's Vice President of Operations testified that when the FAA contacted ICC about the incident, he immediately called together everyone in the company who was either involved in the incident or who could help resolve it as quickly as possible. (Tr. 156.) He also said that his company immediately contacted the manufacturer to obtain the MSDS for the product. (Tr. 163.)

The ICC employee who shipped the kauri-butanol wrote a memorandum to ICC's Vice President of Operations stating, in part:

> In retrospect I see that I rushed myself to meet the UPS deadline and did not take the proper precautions to make sure that this product was properly marked and packaged for air shipment. I feel that I must mention that this material is not a product that we sell and [I] have never had to ship it before.
>
> In addition I believe that since air shipments are not a normal part of our shipping regiment (sic) and are very rarely done, we should no longer ship products via air, whether hazardous or not.

(Complainant's Exhibit 5, p. 4; Tr. 124.)

Ten days after the FAA sent ICC the letter of investigation, ICC's President sent the FAA a letter stating:

> As requested in your letter of June 6, 1997, please find enclosed a copy of the Material Safety Data Sheet for the product which was offered for air transport to United Parcel Service on May 21, 1997. The MSDS name for this product is Kauri-Gum Solution composed of n-butyl alcohol and Kauri-Gum.

(Complainant's Exhibit 5.)

According to the MSDS, "Kauri-Gum Solution" is composed of 84 percent n-butyl alcohol[4] and 15.4 percent Kauri-Gum. (Tr. 36; Complainant's Exhibit 4.) The MSDS states that the material is a flammable liquid, n.o.s. (not otherwise specified) (butanols) in hazard class 3, with a UN number of 1102 and a flash point of 119 degrees Fahrenheit or 48.33 degrees Centigrade. (Tr. 47; Complainant's Exhibit 4.)

The MSDS indicates that conditions to avoid are high temperatures, incompatible materials, and ignition sources. (Tr. 54.) Under "incompatibilities with other materials," the MSDS includes aluminum, which is a primary component of aircraft, suggesting that

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[4] N-butyl alcohol is simply another term for butanol. (Tr. 89.)

if a sufficient amount of the material was released inside an aircraft, structural damage could result. (Tr. 55.)

ICC indicated in its letter responding to the FAA's letter of investigation that it had taken two corrective actions. First, 4 days after the FAA sent ICC the letter, ICC issued a memorandum to all its employees informing them that there would be no more air shipments of chemicals. Second, ICC scheduled the employee who shipped the kauri-butanol for additional hazardous materials training. (Complainant's Exhibit 5.) Also, ICC's Vice President of Operations testified at the hearing that ICC increased the staff in its Environmental Health and Safety Department. (Tr. 160.)

ICC now requires every product to have an MSDS, whether ICC uses it in-house or sells it, according to ICC's employee. (Tr. 127.) He said that if this happened again, he would review the MSDS, and if ICC did not have one, he would consult with the company's Environmental Health & Safety Department, whose job it is to determine whether a material is hazardous. (*Id.*)

II.

The ALJ determined that the label read kauri-butanol. (Initial Decision at 3.) He further determined that "the agency was entitled to conclude either on the basis of its own reading of the label ('natri-butanol') or on the name furnished by [ICC] ('kauri-butanol') that the product was a butanol solution." (*Id.*) The ALJ rejected ICC's suggestion that because the nature of individual chemicals may change when they are put into a solution with one another, something more was needed to prove that kauri-butanol was a hazardous material. (*Id.*) Instead, he held that butanol is considered a hazardous material

under the regulations, and that "[k]auri-butanol may be considered a hazardous material as well." (*Id.*)

The ALJ pointed out, though, that the kauri-butanol had been on ICC's shelves for "a considerable period of time." (Initial Decision at 4.) He stated that ICC's laboratory supervisor – "credibly stated that it had been there at least 13 years." The ALJ held that this length of time had "decisional significance." (*Id.*) He wrote:

> Testimony suggested that chemicals may break down over time. The nature of material may change. The resulting solution may or may not be hazardous.

(*Id.*) The ALJ noted that neither party had tested the liquid. (*Id.*)

According to the ALJ, Complainant needed to establish the liquid's nature, given its "advanced age." (Initial Decision at 4.) While the can's label and the MSDS both suggested a solution of kauri gum and butyl alcohol, he said they were only ICC's "best guess" and were not enough to prove the material's identity. (*Id.*) As a result, the ALJ held that the complaint must be dismissed because Complainant failed to prove that the material was hazardous.

Alternatively, the ALJ held, the agency did not prove what he called the central or core allegation of the complaint – *i.e.*, that the offending solution was "natri-butanol" -- given that the evidence showed that it was doubtful that a solution called "natri-butanol" even existed. (Initial Decision at 3, 4.) Further, the ALJ stated, the agency was bound by the allegations of its complaint. (*Id.* at 4.)

In the ALJ's view, the agency's initial reading of the label as "natri-butanol" was not unreasonable because the leak caused the label to blur, and the agency could

reasonably assume from the name that it was the commercial name of a product containing butanol. (Initial Decision at 5.) Still, according to the ALJ:

> Complainant's dogged insistence on its interpretation of the label in the face of mounting indicia – beginning as early as agent Bucy's receipt of an Interstate memo in June 1997, more than *two years* prior to the filing of the complaint (Exh. C-5, p.4; Tr. 30, 34-35, 47) – that the label actually said something else, caused its case to fail. It may not now amend the complaint (*see* § 13.214 of the Rules of Practice, 14 C.F.R. § 13.214).

(*Id.*; emphasis in the original.)

By the same token, the ALJ said in a footnote that even ICC admitted that it should know what it is shipping and that it was not diligent enough in determining the can's contents. (Initial Decision at 5 n.4.) The ALJ wrote that ICC's shipping of the can without knowing its contents, "while not legally deficient under all the circumstances, [was] nonetheless inexcusable and irresponsible, if not actually dangerous." (*Id.*) The ALJ dismissed the complaint, and Complainant has appealed.

III.

The Rules of Practice provide that the ALJ "shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record." 14 C.F.R. § 13.223. They also provide that "to prevail, a party with the burden of proof must prove the party's case or defense by a preponderance of reliable, probative, and substantial evidence." *Id.*

The burden of proof in FAA civil penalty cases is ordinarily on Complainant. 14 C.F.R. § 13.224(a). There is an exception, however, for affirmative defenses. An affirmative defense is "[a] defense that introduces new matter, which, even if the . . . allegations are true, constitutes a defense to the complaint. An affirmative defense goes

beyond the mere denial of the . . . allegations." The Plain-Language Law Dictionary (1996). The party who has asserted the affirmative defense has the burden of proving it. 14 C.F.R. § 13.224(c).

ICC admitted both that the shipment contained kauri-butanol, and that kauri-butanol is a hazardous material.[5] (*See, e.g.*, Complainant's Exhibits 4, 5, 6.) Thus, Complainant established its *prima facie* case, and the burden of proof then shifted to ICC to prove the affirmative defense that the liquid inside the can had broken down and lost its hazardous nature.[6]

The ALJ found, however, that Complainant bore the burden of proving that the material remained hazardous. Thus, he placed the burden of proof on the wrong party.

Did ICC prove its affirmative defense by a preponderance of reliable, probative, and substantial evidence? The only evidence supporting the defense, as described by the ALJ, was as follows: "Testimony *suggested* that chemicals may break down over time. The nature of the material *may* change. The resulting solution *may or may not* be

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[5] While UPS indicated in the hazardous materials incident report that the material was not a "hazardous substance" (Tr. 43; Complainant's Exhibit 2), this does not mean that it was not a hazardous material. The terms "hazardous substance" and "hazardous material" are not synonymous in the regulations. "Hazardous substance" refers to a group that is a subset of hazardous materials. *See* the definition of "hazardous material," which provides:

> *The term includes hazardous substances*, hazardous wastes, marine pollutants, elevated temperature materials . . . , materials designated as hazardous under the provision of § 172.101 . . . , and materials that meet the defining criteria for hazard classes and divisions in part 173 . . . .

49 C.F.R. § 171.8 (emphasis added).

[6] Even the ALJ stated that the material ICC shipped, kauri-butanol, was a hazardous material absent proof to the contrary. He correctly stated that "[t]he agency was entitled to conclude . . . that the product was a butanol solution," and that "various types of butanol solutions exist and each may be considered a hazardous material absent proof to the contrary." (Initial Decision at 3-4.)

hazardous." (Initial Decision at 4; emphasis added.) The ALJ cited the following portion of ICC's re-direct examination of its laboratory supervisor:

> Q: . . . Aren't there some situations, because of the length of time which passes, the material actually becomes less dangerous or becomes totally non-dangerous because of the length of time or passage?
>
> A: That can happen . . . .

(Tr. 141.)

Immediately preceding this exchange, however, the same witness had testified during cross-examination that hazardous materials can become *more* dangerous with time:

> Q: Isn't it true that sometimes these materials become more dangerous when they break down?
>
> A: In some cases.

(Tr. 140-141.)

Such testimony -- that over time, some materials become less hazardous while others become more so -- does not say anything about the particular material at issue, kauri-butanol. Assuming, for the sake of argument, that kauri-butanol does become less hazardous over time, the testimony failed to indicate how much time must elapse before kauri-butanol can be considered non-hazardous under the hazardous materials regulations.

ICC knew that it was responsible for knowing what it was shipping. (Tr. 107.) It could have tested the material, or it could have introduced expert testimony that kauri-butanol becomes non-hazardous in less than 13 years. ICC failed, however, to bear its

burden of proving by a preponderance of the probative, reliable, and substantial evidence that the material was no longer hazardous.[7]

IV.

The ALJ found it fatal to Complainant's case that the complaint incorrectly identified the hazardous material as "natri-butanol." He pointed out that ICC had sent the agency the MSDS for "kauri-butanol" more than 2 years before the filing of the complaint.[8]

ICC was entitled to know the allegations against it so that it could properly defend itself. But there was still more than enough in the complaint, even with the incorrect trade name, to give ICC adequate notice. *See* In the Matter of Riverdale Mills, FAA Order No. 2000-25 (December 21, 2000) (ALJ erred in dismissing case on ground that complaint cited incorrect shipping name and number because other allegations gave the respondent adequate notice).

The complaint included the following information: the date on which the shipment occurred, the UPS tracking number, the origination and destination points, and the size of the container. It also included the allegations that the shipment contained a hazardous material, that the proper shipping name of the hazardous material was "Butanols, n.o.s.," that the material was a flammable liquid in hazard class 3, packing group III, and that its UN identification number was 1120.

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[7] Whether this affirmative defense (that a hazardous material can become non-hazardous under these regulations due to its age) would be held valid is an issue that will be saved for another day. Because there was insufficient proof of the defense in this case, there is no need to decide the issue at this time.

[8] ICC sent the agency the MSDS for kauri-butanol on June 16, 1997. The agency filed the complaint on August 27, 1999.

ICC knew that its shipment of kauri-butanol was at issue – this is why it sent the agency the MSDS for kauri-butanol. It also knew that the shipment had leaked, causing the label to smear and look like "natri-butanol," because the agency sent ICC copies of the photographs of the shipment more than a month before the hearing.[9] ICC has not shown that the inclusion of the wrong trade name in the complaint prejudiced its substantial rights. Thus, the ALJ erred in holding this to be an alternative ground for dismissal.

VI.

In its answer to the complaint, ICC denied it knew the material was hazardous when it offered the shipment to UPS. Persons (including corporations[10] like ICC), are only subject to a civil penalty if they "knowingly" violate the hazardous materials regulations. 49 U.S.C. § 5123(a)(1). While the ALJ did not reach the issue of whether ICC had sufficient knowledge to be held responsible under the statute because he resolved the case on other grounds, it is necessary to address the issue now.

To meet the knowledge requirement, a person need not have actual knowledge. Knowledge will be imputed to a person if "a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge." 49 U.S.C. § 5123(a)(1)(B). Thus, this is a statute that "requires inquiry and treats a person as possessing whatever knowledge inquiry would have produced . . . ." Contract Courier Services, Inc. v. Research & Special Programs Administration, United States Department of Transportation, 924 F.2d 112, 114 (7th Cir. 1991).

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[9] Complainant sent ICC copies of its proposed exhibits on August 17, 2000. The hearing took place on September 28, 2000.

[10] 49 U.S.C. § 5102(9) states that "person" includes its meaning under 1 U.S.C. § 1, which in turn provides that "person" includes not only individuals, but also corporations and companies.

ICC did not exercise reasonable care. ICC's employee spent only 15 to 20 minutes attempting to determine if the material was hazardous. He did not look up the term butanol in the hazardous materials shipping guides at his disposal. At the time, ICC did not keep an MSDS on all the chemicals in its facilities, and its employee was unable to find the MSDS for kauri-butanol. Further, the employee did not call the manufacturer to ask if the material was hazardous or to request an MSDS. Finally, ICC's employee did not consult with the company's Environmental Health and Safety Department before shipping the material.

A reasonable person acting in the circumstances and exercising reasonable care would have discovered that kauri-butanol was a hazardous material. Thus, ICC acted "knowingly" within the meaning of the statute, even if it did not have actual knowledge.[11]

VII.

It is unnecessary, and it would be inefficient, to remand this case to the ALJ to determine the appropriate civil penalty. In the Matter of Zoltanski, FAA Order No. 2002-12 at 13 (April 16, 2002); In the Matter of USAir, FAA Order No. 1992-48 at 9 (July 22, 1992); In the Matter of Esau, FAA Order No. 1991-38 at 7 n.7 (September 4, 1991).

The Federal hazardous material transportation law provides that violators are subject to a civil penalty of at least $250 but not more than $25,000 per violation.[12] The

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[11] *Cf.* In the Matter of Midtown Neon Sign Corporation, FAA Order No. 1996-26 at 2 n.4 (August 13, 1996), where a sign manufacturer likewise claimed that it was unaware that the flammable paint it shipped was a hazardous material subject to regulation. In Midtown, the Administrator rejected this claim, holding instead that the ALJ properly determined that Midtown "knowingly" violated the hazardous materials statute and regulations.

[12] 49 U.S.C. § 5123(a).

inflation adjustment law[13] and implementing regulations,[14] however, have increased the maximum civil penalty to $27,500.[15]

In determining the sanction amount, the statute requires consideration of:

(1) the nature, circumstances, extent, and gravity of the violation;

(2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) other matters that justice requires.

49 U.S.C. § 5123(a). *See also* 14 C.F.R. § 13.16(a)(4) (listing the same factors).[16] In determining the appropriate penalty, it is improper to take the mathematical, formulaic approach of multiplying the number of violations by a set dollar amount. In the Matter of Phillips Building Supply, FAA Order No. 2000-20 at 9 (August 11, 2000), quoting Midtown Neon Sign, FAA Order No. 1996-26 at 11.

In the instant case, ICC's shipment lacked shipping papers, labels, markings, proper packaging, and emergency response information. (Complainant's Exhibits 1 and 2.) In addition, the container leaked. (*Id.*) Most of the fiberboard package was saturated

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[13] The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2641 (note), as amended by the Debt Collection Improvement Act of 1996, Public Law 104-134, April 26, 1996.

[14] 14 C.F.R. Part 13, Subpart H.

[15] 14 C.F.R. § 13.305(d).

[16] Section 13.16(a)(4) requires consideration of the following factors:

1) The nature and circumstances of the violation;
2) The extent and gravity of the violation;
3) The person's degree of culpability;
4) The person's history of prior violations;
5) The person's ability to pay the civil penalty;
6) The effect on the person's ability to continue in business; and
7) Such other matters as justice requires.

with the hazardous material, and a small amount (3 ounces) leaked outside the package. (Complainant's Exhibit 4; Tr. 55.)

As an undeclared shipment, it was more hazardous than others, for air carrier employees need the information required by the regulations to know where and how to stow hazardous materials safely. In the Matter of Seven's Paint, FAA Order No. 2001-6 at 9 (May 16, 2001). The Administrator has held repeatedly that undeclared shipments pose a special risk. Phillips Building Supply, FAA Order No. 2000-20 at 11.

The material was a flammable liquid. (Complainant's Exhibits 2, 4, 5; Tr. 55.) As discussed above, it was also incompatible with aluminum, a critical component of aircraft, suggesting that if the material leaked inside an aircraft, structural damage could occur. (Complainant's Exhibit 4; Tr. 55.)

As a chemical distributor that regularly offers, accepts, or transports hazardous materials, ICC is more culpable than other violators. (Tr. 53, 56.) The FAA expects chemical distributors like ICC to have in-depth knowledge of the regulations. (*Id.*) The company did not claim financial hardship or an adverse effect on its ability to continue in business.[17]

On the other hand, this was not a large shipment of hazardous material. The material was in a 1-quart container, and the ALJ found that it was less than half full. (Initial Decision at 1.) According to UPS, only 3 ounces leaked, and UPS reported no fatalities, no property damage, and only $100 in cleanup costs. (Complainant's Exhibit 2.)

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[17] In a letter dated September 11, 2000, from ICC counsel to Complainant's counsel, ICC withdrew its request to produce testimony concerning the effects a penalty would have on the company's finances.

Further, this hazardous material was in packing group 3 (as opposed to packing group 1, the category for the most hazardous materials). (Tr. 55.) The material's flashpoint, 119 degrees Fahrenheit, was relatively high, meaning that the material was less likely to burst into flames than if the flashpoint had been closer to room temperature. (*Id.*)

The container apparently was manufactured before the effective date of government regulations requiring warning labels. (Tr. 136, 148-149.) As a result, it did not bear a warning label that would have alerted ICC's employee that he was shipping a hazardous material. (Tr. 115-116.)

ICC has no history of prior violations. (Tr. 58-60.) While this is not a mitigating factor, because a violation-free history is considered the norm,[18] still the aggravating factor of prior violations is absent.

Complainant did not contest the testimony of ICC witnesses that the International Standards Organization (ISO) has certified ICC, and that this certification is rare among chemical distributors. (Tr. 77, 146.) At least one witness testified that to obtain such certification, a company must complete both internal and external audits and must audit its customers and suppliers to ensure that they are handling hazardous materials properly. (Tr. 161.)

The FAA also did not contest testimony that ICC is a founding and continuing member of the National Association of Chemical Distributors (NACD), an organization that hires outside agencies to audit its member companies for compliance with its "Responsible Distribution Process" (RDP). (Tr. 161.) If a member company does not

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[18] *See, e.g.*, In the Matter of Midtown Neon Sign Corporation, FAA Order No. 1996-26 at 11 (August 13, 1996).

comply, it loses its membership. Both the ISO certification and the NACD membership show a concern on ICC's part with handling hazardous materials responsibly.

ICC provided information to the FAA in a timely manner and attempted to correct the problem even before the FAA initiated this civil penalty action. (Tr. 60-61.) ICC's employee testified that ICC now keeps on hand an MSDS for every product, even if it only uses the product in-house and does not sell it. (Tr. 127.) Complainant did not contest these matters.

While ICC instituted a new policy prohibiting the shipment of hazardous materials by air (Tr. 152-153; Complainant's Exhibit 5 at 8), previous cases have held that stopping shipment of hazardous materials does not constitute the type of positive corrective action that justifies a reduction in the civil penalty. *See, e.g.*, In the Matter of TCI Corporation, FAA Order No. 1992-77 at 22 (December 22, 1992). The rationale that previous cases have given for this holding is that such policies not to ship may not be followed, just as a company's previous policy to follow the hazardous materials regulations was not followed. *Id.* The Administrator stated in the TCI case that one example of positive corrective action is sending one's employees to hazardous materials training, and here ICC did send the employee who shipped the kauri-butanol for additional training. (Complainant's Exhibit 5 at 1, 3.)

A balancing of all the statutory factors indicates that a civil penalty of $30,000 is appropriate. It appropriately reflects the level of hazardousness of the material, the packaging failure and leak, the number of violations, ICC's status as a chemical distributor, and its moderate size. It also reflects the relatively small quantity of the material, the absence of damage to persons or property, the absence of a warning label on

the manufacturer's container, ICC's timely responses to the FAA's inquiry, its positive attempts to correct the problem, and the concern for safety reflected by the company's ISO certification and NACD membership.[19]

For the above reasons, Complainant's appeal is granted, the ALJ's decision dismissing the complaint is reversed, the alleged violations are found, and a civil penalty of $30,000 is assessed.[20]

Marion C. Blakey

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 2nd day of January, 2002

[19] After the violations in the instant case occurred, the agency released new penalty guidelines for hazardous material cases. "Policy on Enforcement of Hazardous Materials Regulations: Penalty Guidelines," FAA Order No. 2150.3A, Change 26, Appendix 6 (April 14, 1999); 64 Fed. Reg. 19,443 (April 21, 1999). Complainant argues, in support of its proposed penalty of $51,000, that even though the new guidelines were not in effect at the time the violations occurred, they still may be used "as guidance." Appeal Brief at 26 n.6. In the interest of fairness, the new guidelines have not been used in this decision to impose a higher sanction than would have otherwise been imposed, given that the new guidelines were not yet in effect at the time of the incident.

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

Appendix

49 C.F.R. § 171.2(a) provides, in relevant part, as follows:

> 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 . . . .

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

> *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)-(5) provide, in relevant part, as follows:

> (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 . . .;
> (3) The identification number prescribed for the material . . .;
> (4) The packing group in Roman numerals . . .; and
> (5) . . . the total quantity . . . of the hazardous material . . . .

49 C.F.R. § 172.204(a) provides, in relevant part, as follows:

> *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 . . . 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.

49 C.F.R. § 172.204(c)(1), (2), & (3) provide, in relevant part, as follows:

> (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.
> (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. . . .

(3) *Passenger and cargo aircraft.* 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).

49 C.F.R. § 172.300(a) provides as follows:

> Each person who offers a hazardous material for transportation shall mark each package, freight container, and transport vehicle containing the hazardous material in the manner required by this subpart.

49 C.F.R. § 172.301(a) provides, in relevant part, as follows:

> *Proper shipping name and identification number.* (1) Except as otherwise provided in this subchapter, each person who offers for transportation a hazardous material in a non-bulk packaging shall mark the package with the proper shipping name and identification number . . . .

49 C.F.R. § 312(a) provides, in relevant part, as follows:

Except as provided in this section, each non-bulk combination package having inner packagings containing liquid hazardous materials must be:

(1) . . .

(2) Legibly marked, with package orientation markings . . . on two opposite vertical sides of the package with the arrows pointing in the correct upright direction. Depicting a rectangular border around the arrows is optional.

49 C.F.R. § 172.400(a) provides, in relevant part, as follows:

> Except as specified in § 172.400a, each person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or containment device with labels specified for the material in the § 172.101 table and in this subpart . . . .

49 C.F.R. § 172.600(c) provides as follows:

> *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