

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of: SEVEN'S PAINT & WALLPAPER CO.**

FAA Order No. 2001-6

Docket No. CP99GL0037  
DMS No. FAA-1999-6535<sup>1</sup>

Served: May 16, 2001

**DECISION AND ORDER**<sup>2</sup>

Complainant Federal Aviation Administration (FAA) has appealed the oral initial decision of Administrative Law Judge James W. Lawson,<sup>3</sup> which assessed Respondent Seven's Paint & Wallpaper Company (Seven's Paint) a \$7,500 civil penalty after finding that the company violated the regulations governing the transportation of hazardous materials.<sup>4</sup> In its appeal brief, Complainant argues that the civil penalty assessed by the law judge was too low and that \$15,000 is the appropriate amount. This decision increases the civil penalty to \$15,000.

**I. Facts**

The facts are undisputed. On May 29, 1998, Seven's Paint, a retailer and

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<sup>1</sup> 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>.

<sup>2</sup> The Administrator's civil penalty decisions are available on LEXIS and WestLaw. They can also be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 66 Fed. Reg. 7532, 7549 (January 23, 2001).

<sup>3</sup> A copy of the portion of the hearing transcript containing the law judge's decision is attached.

<sup>4</sup> Specifically, 49 C.F.R. §§ 171.2(a), 172.200(a), 172.202, 172.300, 172.301(a), 172.400(a), 172.600(c)(2), 172.702(a), and 173.1(b). For the text of these regulations, see the Appendix to this decision.

wholesaler of paint and paint-related products (Tr. 146), offered a box containing 25 ½-pint cans<sup>5</sup> of “Minwax Woodfinish Stain” to United Parcel Service (UPS) for air transport from Grand Rapids, Michigan to Boyne City, Michigan. (Tr. 36, 39, 86; Complaint § I, ¶¶ 3,4; Answer § I, ¶¶ 3, 4; Complainant's Exhibit 1.) The stain has a flashpoint of 106 degrees and is a flammable liquid in Hazard Class 3 and Packing Group III of the Hazardous Materials Regulations. (Tr. 45.) Seven’s Paint admitted that it had not marked or labeled the box and did not provide UPS with certified shipping papers describing the contents as hazardous materials. (Answer § I, ¶¶ 9, 11, 12, 13.) Seven’s Paint also admitted that it failed to provide emergency response information and to train its employees in the applicable Hazardous Materials Regulations. (Answer § I, ¶¶ 14, 15.)

Before the box was placed on a UPS cargo plane (Tr. 42, 85, 87), a UPS employee heard cans rattling, opened the box, and discovered that it contained a hazardous material. (Complaint § I, ¶7, 8.) UPS reported the undeclared shipment to the FAA (Tr. 35), as required by the Hazardous Materials Regulations (Tr. 86).

Seven’s Paint had received the stain from the manufacturer, Minwax, by ground, in an outer box without any marking, labeling, or shipping papers indicating that the contents were a hazardous material. (Tr. 106, 121.) Minwax, however, committed no violations of the Hazardous Materials Regulations because it sent the cans of stain to Seven’s Paint by ground transport, and the amount did not exceed 1,000 pounds.<sup>6</sup> (Tr. 105, 124-127.)

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<sup>5</sup> The total amount of the Minwax stain was a little over a gallon and a half. (Tr. 36.)

## **II. The Law Judge's Decision**

In an oral initial decision announced at the close of the hearing, the law judge held that Complainant proved the violations alleged in the complaint. (Tr. 191.) The law judge rejected Seven's Paint's argument that it did not "knowingly" commit the violations, pointing out that ignorance of the law is no excuse. (Tr. 191.) The law judge found that Seven's Paint is a business entity that handles hazardous materials in the course of its business and should have taken steps to inform itself of the overall application of the Hazardous Materials Regulations. (*Id.*)

The law judge noted that the company's assistant warehouse manager testified that on a different occasion, he contacted UPS's hazardous materials team to ensure that a shipment of latex complied with the Hazardous Materials Regulations. (Tr. 192.) The law judge said he believed that if the same witness had known about the shipment of Minwax stain, he would have complied with the Hazardous Materials Regulations, but Seven's Paint did not have procedures in place to ensure that result. (Tr. 192.)

According to the law judge, even if the president of Seven's Paint did not himself know the specific Hazardous Materials Regulations, he still must have at least one employee who does. (Tr. 192.) The law judge also noted that there was no indication in the record that the FAA disseminated information about transportation of hazardous materials by air other than at a conference in 1999, which was after Seven's Paint's violations occurred. (*Id.*)

The law judge stated that regardless of whether manufacturers ship by ground or by air, they should label each shipment to alert the general public about the hazardous

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<sup>6</sup> The FAA special agent who investigated the case testified that the product is excepted from a significant portion of the Hazardous Materials Regulations when transported by ground. (Tr. 46.)

nature of their products and about the applicable regulations. (Tr. 192-193.)

The law judge found that Seven's Paint had shipped by air very rarely. (Tr. 193.) As a result, he concluded that Seven's Paint was not an entity that regularly offers, accepts, or transmits hazardous materials. (Tr. 193.)

Although the law judge noted that Seven's Paint had decided to eliminate all air shipments to avoid future liability, he said the decision was made "after the horse [was] out of the barn." (Tr. 193.) On the other hand, the law judge found that Seven's Paint did implement a training program after the violation occurred but before Complainant issued the notice of civil penalty. To the law judge, the training constituted a mitigating factor. (*Id.*) The law judge found another mitigating factor as well: *i.e.*, that Seven's Paint had received the material from the manufacturer in packaging that did not have any hazardous material labeling. (Tr. 194.)

In conclusion, the law judge stated that Seven's Paint is engaged in re-shipping of hazardous materials, and must know the regulations "inside out" whether shipping by motor carrier or by air. (Tr. 194.) While the case involved a very serious violation that required more than a reprimand, the law judge did not believe that it required the \$15,000 civil penalty that Complainant proposed. The law judge chose what he termed "the middle ground" and assessed a \$7,500 civil penalty. (Tr. 195.)

On appeal, Complainant argues that the law judge erred in finding mitigating factors and, as a result, the \$7,500 civil penalty the law judge assessed is too low. Complainant asks the Administrator to raise the civil penalty to \$15,000.

### **III. Analysis**

Under the Rules of Practice, Complainant bears the burden of proving the

appropriateness of the civil penalty. In the Matter of Phillips Building Supply, FAA Order No. 2000-20 at 8 (August 11, 2000); In the Matter of Stout, FAA Order No. 1998-12 at 12 (June 16, 1998); In the Matter of Toyota Motor Sales, USA, FAA Order No. 1994-28 at 6-7 (September 30, 1994). The only exception is for affirmative defenses, such as financial hardship or corrective action, which the respondent bears the burden of proving. See 14 C.F.R. § 13.224(a), which provides: "*Except in the case of an affirmative defense*, the burden of proof is on the agency (emphasis added)." One of the reasons for placing the burden of proof on the respondent in the case of affirmative defenses is that the relevant information is within the respondent's control. See In the Matter of Giuffrida, FAA Order No. 1992-72 at 2 (December 21, 1992), stating that assigning the burden of proving the affirmative defense of financial hardship to the respondent was "reasonable and necessary because the respondent has sole control of his financial information."

The Federal hazardous materials transportation statute requires consideration of the following factors in determining the civil penalty amount:

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 may require.

49 U.S.C. § 5123(a). See also 14 C.F.R. § 13.16(a)(4) (which lists the same factors, although it breaks them down further, into seven factors rather than three).<sup>7</sup>

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<sup>7</sup> 14 C.F.R. § 13.16(a)(4) provides, in pertinent part, as follows:

...An order assessing civil penalty for a violation under the Hazardous Materials Transportation Act or a rule, regulation, or order issued thereunder, will be issued only after consideration of –

While corrective action is not specifically mentioned in the statute as a factor to consider in setting the sanction, corrective action falls within the category of "such other matters as justice may require." In the Matter of Phillips Building Supply, FAA Order No. 2000-20 at 9 n.10 (August 11, 2000), citing In the Matter of TCI, FAA Order No. 1992-77 at 26 (December 22, 1992). However, a civil penalty may only be reduced on the basis of corrective action where there is "sufficient, specific evidence of swift or comprehensive corrective action." In the Matter of Mauna Kea Helicopters, FAA Order No. 1997-16 at 10-11 n.15 (May 23, 1997), citing In the Matter of Delta Air Lines, Inc., FAA Order No. 1992-5 at 7 (January 15, 1992). For example, in the Mauna Kea case, the Administrator held that testimony from a Mauna Kea witness that Mauna Kea sent one of its employees to an engine school did not constitute sufficient, specific evidence of swift or comprehensive corrective action to merit a reduction in the sanction, given that Mauna Kea provided no documentary evidence to corroborate this claim, and the record did not indicate that the action was either swift or comprehensive. Similarly, in the Giuffrida case, FAA Order No. 1992-72 at 5 (December 21, 1992), the Administrator held that an unsworn letter from Giuffrida was insufficient to prove his affirmative defense of financial hardship, given that Giuffrida's assertion of financial hardship was self-serving and more reliable records of Giuffrida's financial situation existed but were not introduced.

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- (i) The nature and circumstances of the violation;
  - (ii) The extent and gravity of the violation;
  - (iii) The person's degree of culpability;
  - (iv) The person's history of prior violations;
  - (v) The person's ability to pay the civil penalty;
  - (vi) The effect on the person's ability to continue in business; and
  - (vii) Such other matters as justice may require.

In the instant appeal, Complainant argues that Seven's Paint failed to present sufficient evidence about the training, and as a result, the law judge erred in finding that training was a mitigating factor. Indeed, there is little evidence in the record about the post-violation training.

The president of Seven's Paint testified that after a conversation with the FAA special agent who investigated the instant case and counsel for Complainant, Seven's Paint acquired training videotapes and test booklets for its employees. (Tr. 140.) The company's assistant warehouse manager also testified that Seven's Paint provided its warehouse employees and drivers with training videotapes, which they watched. (Tr. 92, 97.) Although counsel for Seven's Paint asserted during closing argument that the training occurred quickly, before the agency issued its Notice of Proposed Civil Penalty (Tr. 185), there is no evidence in the record substantiating counsel's assertion.

Seven's Paint failed to introduce any documentary evidence regarding the training. Also, Seven's Paint did not introduce any evidence regarding whether the videotapes met or exceeded the requirements for training contained in 49 C.F.R. § 172.704, or when its personnel watched the videotapes. Because the record does not contain sufficient, specific evidence of swift or comprehensive corrective action, the law judge erred in finding that corrective action was a mitigating factor.

Complainant also contends that the law judge erred in finding another mitigating factor – *i.e.*, the lack of hazardous materials labeling on the packaging Seven's Paint received from the manufacturer. In an earlier case, In the Matter of TCI Corporation, FAA Order No. 1992-77 (December 22, 1992), the Administrator held that a respondent's culpability was diminished where a manufacturer of a hazardous material negligently

failed to comply with the Hazardous Materials Regulations in preparing a shipment for transportation. The instant case is distinguishable from TCI, however. Here the manufacturer, Minwax, was not negligent. It is undisputed that Minwax did not violate any Hazardous Materials Regulations when it shipped the product by ground because the rules in this case were different for air and ground shipments. The instant case is also distinguishable from TCI in that Seven's Paint re-packaged the hazardous material, while TCI did not. An employee of Seven's Paint removed some of the cans from the manufacturer's packaging and put them in a different outer box to ship to the customer. (Tr. 115.) When the employee did so, the labels on the cans indicating that the contents were hazardous would have been visible. Seven's Paint admitted that the labels on the individual cans stated on the front: "Danger! Harmful or fatal if swallowed. Skin Irritant. Combustible. Keep out of reach of children." (Answer § I, ¶ 8.) On the reverse the labels read: "Danger: contains mineral spirits. Harmful or fatal if swallowed. Do not take internally. Skin irritant. Avoid contact with skin or eyes. Wear rubber gloves and safety glasses when handling. Combustible. Do not use or store near heat, sparks, flame or other sources of ignition." (*Id.*) Absent negligence on the part of the manufacturer, it was inappropriate for the law judge to assess a lower civil penalty due to the manufacturer's outer packaging.

The law judge erred in finding that the factors discussed above were mitigating, and as a result, he assessed a civil penalty that was too low. The law judge also erred in finding that Seven's Paint was not an entity that regularly offers, accepts, or transmits hazardous materials. (Tr. 193.) Even if Seven's Paint did not regularly ship hazardous materials by air, it did regularly ship hazardous materials by land. Thus, it should have



been familiar with the Hazardous Materials Regulations, 49 C.F.R. Parts 171 - 180, which govern various means of transportation. *See, e.g.*, 49 C.F.R. § 171.1(a), stating that "[t]his subchapter prescribes requirements of the Department of Transportation governing -- (1) the offering of hazardous materials for transportation ... by rail car, aircraft, motor vehicle, and vessel ...."

Seven's Paint is a business rather than an individual, and this case involves an undeclared shipment of a flammable liquid. When a shipment of hazardous materials is undeclared, the likelihood of injury is increased. As a result, such undeclared shipments are extremely dangerous and can result in loss of life and damage to property. In the Matter of Phillips Building Supply, FAA Order No. 2000-20 at 11 (August 11, 2000). As the FAA special agent testified, air carrier employees need the information required by the Hazardous Materials Regulations to know where and how to stow a hazardous material safely. (Tr. 54.) Air carrier employees also need emergency response information in case of a leak or spill. (*Id.*)

Complainant correctly points out that its proposed \$15,000 civil penalty is conservative in light of In the Matter of Midtown Neon Sign Corporation, FAA Order No. 1996-26 (August 13, 1996). In Midtown, the Administrator assessed a \$25,000 civil penalty for an undeclared shipment of two 1-gallon cans of paint. Midtown's shipment of paint leaked, an aggravating factor not present here.

In another case, In the Matter of Phillips Building Supply, FAA Order No. 2000-20 (August 11, 2000), the Administrator assessed a \$14,000 civil penalty for a shipment of five 1-gallon cans of Formica glue. The Formica glue was not as hazardous as the material at issue here, however. The Formica glue was in Hazard Class 6.1,

Packing Group III, and was not flammable. In contrast, the stain at issue here was in Hazard Class 3, Packing Group III, and was flammable.

Consideration of the statutorily required factors indicates that the \$15,000 civil penalty sought by Complainant in this case is not excessive. Further, a \$15,000 civil penalty is not inconsistent with past cases.<sup>8</sup> Therefore, the law judge's initial decision is modified, and a \$15,000 civil penalty is assessed.<sup>9</sup>

  
JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 15th day of May, 2001.

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<sup>8</sup> After the violations in the instant case occurred, the Administrator released new penalty guidelines for hazardous materials cases. One purpose of the guidelines is to promote a relative consistency in determining penalties. 64 Fed. Reg. 19,443, 19,443 (April 21, 1999). While Complainant indicated that it was not relying on the new guidelines here (Tr. 184), they will be used in cases arising after their effective date, which is April 14, 1999.

<sup>9</sup> Despite ample precedent indicating that a violator's decision to stop shipping hazardous materials is not a valid mitigating factor (*see, e.g., In the Matter of Phillips Building Supply*, FAA Order No. 2000-20 at 10-11 (August 11, 2000)), Seven's Paint argues in its reply brief that the law judge should have reduced the civil penalty due to its decision to stop shipping liquids by air. However, Seven's Paint did not file an appeal and its argument need not be considered.

## Appendix

49 C.F.R. § 171.2(a) provides:

### **§ 171.2 General requirements.**

(a) No person may offer or accept a hazardous material for transportation in commerce unless ... that hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter, or an exemption, approval, or registration issued under this subchapter of subchapter A of this chapter.

49 C.F.R. § 172.200(a) provides:

### **§ 172.200 Applicability.**

(a) *Description of hazardous materials required.* Except as otherwise provided in this subchapter, 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 provides:

### **§ 172.202 Description of hazardous material on shipping papers.**

(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 .... 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"); ...

(5) ... the total quantity..., including the unit of measurement, of the hazardous material covered by the description ....

(b) Except as provided in this subpart, the basic description specified in paragraphs (a)(1), (2), (3), and (4) of this section must be shown in sequence with no additional information interspersed. For example: "Gasoline, 3, UN 1203, PG II."

(c) The total quantity of the material covered by one description must appear before or after, or both before and after, the description required and authorized by this subpart. The type of packaging and destination marks may be entered in any appropriate manner before or after the basic description. Abbreviations may be used to express units of

measurement and types of packaging.

49 C.F.R. § 172.300 provides:

**§ 172.300 Applicability.**

(a) 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.

(b) When assigned the function by this subpart, each carrier that transports a hazardous material 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:

**§ 172.301 General marking requirements for non-bulk packaging.**

(a) *Proper shipping name and identification number.*

(1) Except as otherwise provided by 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 (preceded by "UN" or "NA," as appropriate) for the material as shown in the § 172.101 table. Identification numbers are not required on packages which contain only limited quantities, as defined in § 171.8 of this subchapter, or ORM-D materials.

(2) The proper shipping name for a hazardous waste (as defined in § 171.8 of this subchapter) is not required to include the word "waste" if the package bears the EPA marking prescribed by 40 CFR 262.32.

49 C.F.R. § 172.400(a) provides:

**§ 172.400 General labeling requirements.**

(a) 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:

(1) A non-bulk package; ...

49 C.F.R. § 172.600(c)(2) provides:

**§ 172.600 Applicability and general requirements.**

(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:

...

(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.

49 C.F.R. § 172.702(a) provides:

**§ 172.702 Applicability and responsibility for training and testing.**

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

49 C.F.R. § 173.1(b) provides:

**§ 173.1 Purpose and scope.**

(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.