

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

**In the Matter of:**

**RIVERDALE MILLS  
CORPORATION**

FAA Order No. 2000-25

Served: December 21, 2000

Docket No. CP98NE0017  
DMS No. FAA-1998-4931<sup>1</sup>

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

Complainant brought this case against Riverdale Mills Corporation (Riverdale) after a Riverdale employee carried two 16-ounce cans labeled "DANGER, EXTREMELY FLAMMABLE," in checked baggage aboard several flights.<sup>3</sup> Riverdale allegedly failed to comply with safety regulations requiring proper packaging and disclosures of hazardous materials.<sup>4</sup>

When the hearing began, Complainant asked the law judge to amend the complaint to change the alleged proper shipping name and number of the hazardous material from "Methyl Ethyl Ketone, UN 1193" to "Adhesives, UN 1133." The

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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, WestLaw, and other computer databases. They also can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 65 Fed. Reg. 67,445, 67,462 (November 9, 2000).

<sup>3</sup> The complaint alleged that the flights occurred on or about March 16, 1998.

<sup>4</sup> For the specific regulations Complainant alleged Riverdale violated, see the Appendix.

allegation that the substance was in hazard class 3, "FLAMMABLE LIQUID," Packing Group II, was to remain the same. Counsel explained that he had learned from the manufacturer a few days earlier that the proper shipping name and number of the substance was "Adhesives, UN 1133," not "Methyl Ethyl Ketone, UN 1193." The law judge denied Complainant's motion to amend the complaint on the ground that the motion was untimely.

The law judge then went even further, granting Riverdale's motion to dismiss Complainant's case before Complainant had the opportunity to present it. The law judge reasoned that by referring to the wrong shipping name and number, the complaint failed to give Riverdale adequate notice of the charges against it, violating Riverdale's right to due process.

Complainant has filed an appeal from the law judge's order of dismissal.<sup>5</sup> This decision reverses the law judge's order dismissing the complaint and remands the case for a hearing on the merits.

The law judge erred in dismissing the case. In ruling on a motion to dismiss, the court must accept as true all the material allegations of the complaint. *See, e.g., United States v. Gaubert*, 499 U.S. 315, 327 (1991) (stating as follows: "The decision we review was entered on a motion to dismiss. We therefore 'accept all of the factual allegations in [Gaubert's] complaint as true' and ask whether the allegations state a claim sufficient to survive a motion to dismiss."). The law judge failed to accept as true all the material

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<sup>5</sup> A copy of the portion of the hearing transcript containing the law judge's oral initial decision is attached.

allegations of the complaint. Regardless of the proper shipping name, the complaint alleged that the substance in the cans was a hazardous material and that Riverdale violated the Hazardous Materials Regulations by failing to package, mark, and label the boxes properly, and to provide shipping papers and emergency response information. When these allegations are accepted as true, which the law judge should have done, the only logical conclusion is that the complaint stated a valid cause of action.

Even if the allegation in the complaint that the proper shipping name was "Methyl Ethyl Ketone" is ultimately proven incorrect,<sup>6</sup> there was still more than enough in the complaint to give Riverdale adequate notice of the charges against it. The allegation that Riverdale improperly shipped a flammable hazardous material still applies, as do all the same regulations allegedly violated (*see* the Appendix to this decision, which contains the regulations at issue). The issue is not whether Riverdale shipped "Methyl Ethyl Ketone" or "Adhesives," but whether the substance it shipped was a hazardous material and whether Riverdale complied with the regulations requiring proper packaging, marking, labeling, shipping papers, and emergency response information.

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<sup>6</sup> Note that Complainant proffered photographs indicating that Riverdale ordinarily ships the product as a hazardous material, using "Methyl Ethyl Ketone" as the proper shipping name. This constituted an evidentiary admission, on Riverdale's part, that the substance was a hazardous material. (Complainant's Exhibit 1.) Complainant also proffered photographs showing that Riverdale labeled the cans "DANGER, EXTREMELY FLAMMABLE." (*Id.*) This too constituted an evidentiary admission.

Evidentiary admissions are rebuttable. In the Matter of Africa Air Corporation, FAA Order No. 1999-5 at 37 (August 31, 1999) (contrasting evidentiary admissions, which are rebuttable, with judicial admissions, which are not). Thus, it is possible that at a hearing, Riverdale will be able to rebut Complainant's evidence that the substance was a hazardous material. However, Complainant had a right to present its case against Riverdale.

Further, no prejudice to Riverdale has been shown. Riverdale had a duty to know the nature of the substance it was shipping. *See, e.g.*, 49 C.F.R. § 172.301(a),<sup>7</sup> which requires each shipper to mark the package with the proper shipping name. Also, Riverdale's counsel had a box at the hearing labeled "Adhesives," suggesting, perhaps, that Riverdale was well aware prior to the hearing that the manufacturer considered the substance "Adhesives." (Tr. 36.) Thus, not only *should* Riverdale have known the proper shipping name, but it may have had actual knowledge that the manufacturer considered "Adhesives" to be the proper shipping name prior to the hearing. Finally, Riverdale will have the opportunity at the hearing, consistent with due process, to present any evidence showing that the substance was not a hazardous material subject to regulation.

For all of these reasons, the law judge's order of dismissal is reversed, and the case is remanded to the law judge for a hearing consistent with this decision.

  
JANE F. GARVEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 19th day of December, 2000.

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<sup>7</sup> For the text of this regulation, *see* the Appendix.

## APPENDIX

Section 171.2(a)<sup>8</sup> provides:

No person may offer or accept a hazardous material for transportation in commerce unless that person complies with subpart G of part 107 of this chapter, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter ....

Section 172.200(a) provides:

*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.

Sections 172.202(a)(1)-(5) provide:

(a) The shipping description of a hazardous material on the shipping paper must include:

(1) The proper shipping name prescribed for the material in Column 2 of the § 172.101 Table;

(2) The hazard class or division prescribed for the material as shown in Column 3 of the § 172.101 Table (class names or subsidiary hazard class number may be entered following the numerical hazard class, or following the basic description) ....

(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. ....; and

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

Sections 172.202(b) & (c) provide:

(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, UN1203, PGII."

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<sup>8</sup> All citations are to Title 49 of the Code of Federal Regulations.

(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 packagings.

Sections 172.204(a) and (c)(1)-(3) provide:

(a) ... [E]ach 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.

(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."

(2) "I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labeled/placarded, and are in all respects in proper condition for transport according to applicable international and national governmental regulations."

...

(c) *Transportation by air*—

(1) *General*. Certification containing the following language may be used in place of the certification required by paragraph (a) of this section:

I hereby certify that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, 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).

Section 172.300(a) provides:

(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.

Section 172.301(a) provides, in relevant part:

(a) *Proper shipping name and identification number.* ... [E]ach 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. ....

Section 172.304(a)(1) provides:

(a) The marking required in this subpart –  
(1) Must be durable, in English and printed on or affixed to the surface of a package or on a label, tag, or sign.

Section 172.400(a) provides, in relevant part:

(a) ... [E]ach 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 the labels specified for the material in the § 172.101 Table and in this subpart ....

Section 172.600(c)(1) provides, in relevant part:

(c) *General requirements.* 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  
....

Section 173.1(b) provides, in relevant part:

A shipment of hazardous materials that is not prepared in accordance with this subchapter may not be offered for transportation by air ....