UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 98-2
PAUL A. CARR	Served: March 12, 1998
	Docket No. CP96NM0106

DECISION AND ORDER

This matter arises from Respondent Paul Carr's shipment of fireworks, a hazardous material, on board Horizon Air Freight. Mr. Carr failed to provide appropriate and required information and certification pertaining to the fireworks on the shipping papers. He also failed to label and mark the boxes containing the fireworks, and he failed to properly package the fireworks. At the conclusion of a hearing held on May 15, 1997, Administrative Law Judge Burton S. Kolko rendered an oral initial decision in which he held that Mr. Carr violated numerous Hazardous Materials Regulations.[1] In light of these findings, the law judge assessed a $3,000 civil penalty.[2] Mr. Carr has appealed from this initial decision, seeking the dismissal of this case on procedural grounds, or a reduction of the sanction. His appeal on procedural grounds is denied, and his appeal based on sanction is granted. A $2,000 civil penalty is assessed.

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[1] The complete text of the Hazardous Materials Regulations that the law judge found that Mr. Carr violated is set forth in Appendix A to this decision.

[2] An excerpt of the transcript containing the law judge's initial decision is attached.

On June 21, 1995, Mr. Carr offered two packages to Horizon Air Freight ("Horizon") agent Dorothy DeMond for shipment from Bellingham, Washington, to Anchorage, Alaska. The boxes contained fireworks packaged in their original boxes, as well as a bottle of wine, a jar of pickles and a jar of mustard, all of which Mr. Carr intended to send to a friend in Anchorage. (Tr. 47, 53.)[3] There were no markings on the packages indicating that the boxes contained hazardous materials. (*See* Complainant's Exhibits 4 and 5; Tr. 19, 24.) Ms. DeMond testified that she asked Mr. Carr if the packages contained any dangerous goods, and that he replied that the packages contained personal goods. (Complainant's Exhibit 1; Tr. 13.)

Mr. Carr signed the shipping papers and made an "x" in the box next to this statement: "This shipment does not contain dangerous goods." (Emphasis in the original) (Complainant's Exhibit 2; Tr. 13, 51.) Ms. DeMond testified that she usually asks the shipper what is being shipped and then fills out the box under the heading "nature and quantity of goods." However, in this instance, she failed to do so. (Complainant's Exhibits 1 and 2; Tr. 12-13.) She testified that she also failed to open the packages and check the contents contrary to company policy. (Tr. 14.)[4]

Horizon transported the packages to Seattle where the packages were to be transferred to Alaska Airlines. (Tr. 24.) When Horizon brought the packages to Alaska Airlines, the packages were opened because the shipping paper did not contain information regarding the nature and quantity of goods. (Complainant's Exhibit 3; Tr. 24.) At this point, the fireworks were discovered.

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[3] Mr. Carr packed these items in used Lands End cardboard boxes. *See* photographs marked as Complainant's Exhibits 4 and 5.

[4] Rick Christenson, supervisor at Horizon's Seattle cargo hub, testified that Horizon accepts a limited variety of hazardous materials and does not accept fireworks. (Tr. 23.)

As can be seen in the photographs of the open packages, the individual boxes in which the fireworks were sold had conspicuous warning labels. (*See* Complainant's Exhibits 6, 7 and 8; Tr. 25-26.) However, the overpacks containing the fireworks and other items had no markings or labeling to indicate that hazardous items were inside. (Tr. 24.)

Fireworks are a hazardous material under the Hazardous Materials Regulations (HMR). 49 C.F.R. Parts 171 *et seq*. The proper shipping name for these fireworks is "fireworks," and the hazard class is 1.4S Explosive.[5] (49 C.F.R. § 172.101; Tr. 33, 36.) The identification number for these fireworks is UN0337. (49 C.F.R. § 172.101; Tr. 36.)

David C. King, the FAA Lead Special Agent for Dangerous Goods and Cargo Security at the Seattle Civil Aviation Security Field Office, testified that fireworks in the Division 1.4 explosive hazard class represent a fairly minor explosive hazard relative to other types of explosives. (Tr. 33.) He explained that Division 1.4 explosives are not self-initiating and would not result in mass detonation. (*Id.*) However, Division 1.4 explosives present a potential hazard in air transportation because the components of fireworks would fuel an on-going fire, thereby exacerbating a fire in an aircraft. (*Id.*) He testified that if the powdered metals and explosive powder in the fireworks ignite, the resultant fire would be hot enough to melt plastic luggage components, thin-walled metallic materials, metal aircraft frames and aluminum aircraft skin. (Tr. 34.)

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[5] According to the chart appearing at 49 C.F.R. § 173.2a, an explosive in the 1.4 explosive hazard class presents no significant blast hazard.

Under the Hazardous Materials Regulations, the following information must be included on the shipping papers accompanying fireworks: 1) the proper shipping description, "fireworks;" 2) the hazard class or division, Explosive 1.4; 3) the identification number, N0337; 4) a certification that the fireworks are fully and accurately described by proper shipping name, and are classified, packed, marked and labeled and in proper condition for carriage by air. (Tr. 35.) 49 C.F.R. §§ 172.101 (fireworks), 172.200, 172.202, 172.204. Furthermore, each package must be marked with the proper shipping name and identification number. (Tr. 36.) 49 C.F.R. §§ 172.300 and 172.301(a)(1). Each person offering fireworks such as those involved in this case for air transportation must affix an Explosive 1.4 label to the package. 49 C.F.R. § 172.400(a), (b). Special Agent King testified that these fireworks must be packaged in a United Nations specification 4G fiberboard box. (Tr. 38.)[6]

As Special Agent King explained, the marking and labeling requirements are designed to identify hazardous material to the personnel who handle this material in air transportation. If the airline personnel have information about the nature of hazardous materials being shipped, they can load the hazardous material in the aircraft properly and separate this material from other dangerous goods which might interact with it. Also, in case of a spill, the clean up personnel would be alerted to the nature of the hazardous materials with which they were dealing. (Tr. 37.)

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[6] Under Section 173.62, the following types of outer packaging are permitted for an explosive with identification number UN0337: Fiberboard (4G); Plywood (4D); Reconstituted wood (4F); Wood, ordinary (4C1); Steel (4A); or Aluminum. 49 C.F.R. § 173.62.

Mr. Carr testified that Ms. DeMond asked him if he was shipping any flammable liquids, not whether he was shipping any dangerous goods. (Tr. 47.) He testified that when, as he recalls, Ms. DeMond asked him whether he was shipping a flammable liquid, he did not think of the fireworks, but only wondered whether he had packed the wine properly. (Tr. 47, 52.) Mr. Carr testified that he was unaware of the requirements pertaining to the shipment of fireworks, and that had he known he "certainly would have changed course." (Tr. 47.) He said that he did not recall seeing any warning signs regarding the shipment of hazardous materials. (Tr. 48.)

Mr. Carr acknowledged on cross-examination that he knew that he had purchased fireworks, that he had packed them, and that he had had an opportunity to observe the warning labels on the boxes. He acknowledged further that he knew that fireworks are flammable and hazardous. (Tr. 51-52.) He said that he did not recall actually reading the statement on the shipping papers regarding whether he was shipping dangerous goods, but he acknowledged that he had signed his name by the statement that he was not shipping dangerous goods. (Tr. 51.)

The law judge held that Complainant proved that Mr. Carr violated the Hazardous Materials Regulations as alleged. (Tr. 60.) Judge Kolko accepted both Ms. DeMond's testimony that signs pertaining to the shipment of hazardous materials were posted and Mr. Carr's testimony that he did not see those warning signs. (Tr. 61-62.)

The law judge was influenced by the evidence that Mr. Carr had indicated on the airway bill that he was <u>not</u> shipping dangerous goods. The law judge stated:

> Nevertheless, you were handed an airway bill to sign and there were one of two boxes, so at some point you had to focus, however, briefly, on whether to check off a box that said the shipment does not contain dangerous goods or the shipment does contain dangerous goods, and you indicated the shipment does not contain dangerous goods. That is what the carrier has to

> rely on, and sadly, we have learned in recent times that even though the carrier may rely, it does so to its detriment, because there are things in there that ought not to be in there and very serious mischief can ensue.

(Tr. 62.) The law judge explained that although the minimum civil penalty for nine violations of the Hazardous Materials regulations is $2,750,[7] he was assessing a $3,000 civil penalty,[8] as sought by Complainant, "essentially for the reason ... summed up in the signature box of the airway bill ...." (Tr. 61.)

On appeal, Mr. Carr seeks the dismissal of this case based upon several "errors" made in the hearing process and untimely or unresponsive actions by Complainant. None of the reasons, as detailed below, warrant the dismissal of this case or a reversal of the law judge's order regarding the finding of violations.

Mr. Carr notes that Mr. McCurdy, Complainant's counsel, sent various correspondence to Mr. Carr at Mr. Carr's former address, stating that the witness list was being amended and that there had been a change in counsel representing Complainant. The use by Mr. McCurdy's office of Mr. Carr's former address, even though Mr. Carr had provided his new address, was at most an oversight which did not deprive Mr. Carr of any of his rights.

Also Mr. Carr acknowledged at the hearing that Mr. McCurdy had called him prior to the hearing and informed him that FAA Special Agent Laners[9] would not be testifying at the hearing. (Tr. 4-5.) Mr. Carr did not state at the hearing

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[7] In rendering his oral initial decision, the law judge made an arithmetical error. Since the minimum civil penalty per violation involving the transportation of a hazardous material is $250, the law judge should have concluded that the minimum penalty for nine violations is $2,250. *See* 49 U.S.C. § 5123(a).

[8] The law judge gave Mr. Carr the option to pay the penalty in six installments of $500 each. (Tr. 63.) The law judge did not specify the time intervals for payments.

[9] FAA Special Agent Laners investigated this incident.

that he wanted or needed to question Special Agent Laners, and he at no time requested a subpoena to issue to her. It was Mr. Carr's responsibility to ensure that the witnesses whom he felt that he needed attended the hearing. In the Matter of Parks, FAA Order No. 92-3, 1992 LEXIS 288 at *11 (January 9, 1992.)

According to Mr. Carr, he needed Special Agent Laners' testimony regarding the packaging and the weight of the shipment. However, at the hearing, Mr. Carr did not dispute the allegation that the fireworks were packaged improperly. Furthermore, it is not enough for a respondent to state on appeal that he had wanted to question a witness who did not appear at the hearing. The respondent, at a minimum, must show that he had reason to believe that this individual would have testified to a particular fact(s) and/or opinion(s) that could have affected the outcome of the law judge's decision. Mr. Carr did not make any such proffer at the hearing or in his appeal brief. Also, Mr. Carr packaged the goods himself, there were photographs of the packages introduced into evidence, and Mr. Christenson, Ms. DeMond and Special Agent King were available for additional questioning regarding the packaging and weight of the shipment. Moreover, additional testimony regarding the weight of the fireworks would have been unnecessary because it was established at the hearing that the *total* shipment, including the wine, the mustard, etc., weighed about 17 pounds. (Tr. 53.) The law judge's decision was not based upon a mistaken impression that Mr. Carr had shipped 17 pounds of fireworks.

Mr. Carr argues that the case should be dismissed because two letters listed on Complainant's exhibit list were not introduced at the hearing. This argument is

unpersuasive. The letters in question were in Mr. Carr's possession,[10] and he could have introduced them at the hearing himself if he needed them to prove any aspect of his case. Also, Mr. Carr argues that these letters might have influenced the law judge's decision because they revealed Mr. Carr's degree of cooperation upon learning of the investigation. However, the law judge did recognize in his initial decision that Mr. Carr had been cooperative with FAA personnel during the investigation. (*See* Tr. 63.)[11]

Mr. Carr argues that the case should be dismissed because in his estimation Complainant was "less than fully represented" by Mr. McCurdy. Mr. Carr bases this upon what must have been an off-the-record discussion about settlement. Whether Mr. McCurdy was authorized by his office to discuss settlement after the case went to hearing is irrelevant and of no concern on appeal. Regardless of Mr. McCurdy's position on settlement, the law judge could have imposed a lower civil penalty if he had found that Mr. Carr had not violated all of the regulations as alleged and that the circumstances did not warrant a $3,000 civil penalty or that mitigating factors existed.

Mr. Carr complains that Complainant's original counsel, Dwight Williams, failed to provide him with a copy of the relevant pages of a sanction guidance table, contrary to the law judge's order. However, as Mr. Williams explained in a letter

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[10] The document listed on the Complainant's exhibit list as Complainant's Exhibit 9 was a letter written by Special Agent Laners to Mr. Carr. The document listed on Complainant's exhibit list as Complainant's Exhibit 10 was a letter written by Mr. Carr to Special Agent Laners. Mr. Carr attached both of these letters to his appeal brief.

[11] Mr. Carr also argues that he was unaware of a letter listed on Complainant's exhibit list as Complainant's Exhibit 11. This letter was not introduced. Mr. Carr suffered no prejudice from the listing of a letter that was not introduced.

dated August 9, 1996, the Enforcement Sanction Table, Appendix 4 to FAA Order No. 2150.3A, does not contain sanction guidance pertaining to violations of the Hazardous Materials Regulations. The FAA has not adopted a sanction table to provide civil penalty guidance in hazardous materials cases. Thus, no sanction guidance table relevant to the violations involved in this case existed, and consequently, it was impossible for Complainant's counsel to supply such a table to Mr. Carr.

Mr. Carr argues that Complainant was late in providing the witness and exhibit lists. While this may be true, Complainant did provide the witness and exhibit lists to Mr. Carr long before the hearing. Mr. Carr also argues that no one consulted him regarding his availability for the hearing. However, Mr. Carr did attend the hearing. Consequently, no prejudice resulted from any failure to consult him regarding a hearing date.

Mr. Carr argues on appeal that Horizon bears some responsibility for this shipment but that no action was taken against Horizon. When ruling on an appeal, it is not the Administrator's role to review the discretionary decisions made by Complainant with regard to whether to bring a civil penalty action against an individual other than the respondent in that action. Moreover, Mr. Carr has not established that Horizon violated any regulations. As Special Agent King testified: "The carrier need only provide the opportunity ... for the shipper to properly declare the hazardous [material], and there is no requirement for the air carrier to specifically ask a shipper if this shipment contains dangerous goods." (Tr. 63.) Regardless of whether Ms. DeMond asked him if he was shipping a flammable

liquid or dangerous goods, when he completed the shipping papers, he checked the box next to the statement that he was not shipping any dangerous goods.

Mr. Carr presents several arguments attacking the $3,000 civil penalty assessed by the law judge. He argues that there was only one violation -- "the 'initial failure to label or declare the contents of the package as fireworks'"[12] -- rather than multiple violations. The other violations found by the law judge, he argues were "piling on" and would normally apply only to incorrect labeling after the initial labeling procedure." (Appeal Brief at 4.) He argues that the penalty was too high because the violation was a result of unintentional mistakes by both Horizon and himself and that he shipped only a small quantity of Class 1 fireworks in their original wrappers.

Regarding the number of violations, Complainant contends that the law judge mistakenly concluded that there were nine violations. Complainant asserts that the law judge mistakenly counted the factual allegation paragraphs (Section II, paragraphs 7 - 15) in the complaint to determine the number of violations, rather than the regulatory violation paragraphs (Section III, paragraph 1a through 1m.)

A person who violates the Hazardous Materials Regulations is subject to a penalty of no less than $250 but not more than $25,000 per violation. 49 U.S.C. § 5123(a). The Administrator must consider the following factors when determining the appropriate civil penalty for violations of the Hazardous Materials Regulations:

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

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[12] Appeal Brief at 4.

(3) other matters that justice requires.

49 U.S.C. § 5123(c).

On review of the civil penalty, one question to ask is: how many violations were there?[13] The answer to that question is necessary to ensure that the minimum penalty is assessed and that the maximum penalty is not exceeded. Also the factors set forth in 49 U.S.C. § 5123(c) must be considered.

It was shown that Mr. Carr violated all of the alleged regulatory sections. However, there is no reason to count each of these paragraphs in Section III of the complaint alleging violations of specific Hazardous Materials Regulations as separate violations for sanction purposes, because some are duplicative of others.[14] (*See* Appendix B setting forth Section III of the complaint.) As stated previously, violation of general, introductory sections of the Hazardous Materials Regulations should not necessarily count as separate violations for sanction purposes when violations of more specific regulatory requirements are proven. In the Matter of Midtown Neon Sign, FAA Order No. 96-26 at 7, n.12, 1996 FAA LEXIS 2060 at *9 (August 13, 1996); In the Matter of Mulhall, FAA Order No. 95-16 at 2, n.3, 1995 FAA LEXIS 344 at *2 (August 4, 1995). Due to the statutory minimum civil penalty provision, the consideration of duplicative regulatory violations as separate violations for sanction purposes in non-egregious cases against individuals not in

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[13] Although there were two separate boxes containing fireworks, Complainant has not alleged that each box represents a separate set of violations. This issue, therefore, is neither addressed nor resolved in this decision.

[14] It would be a fiction to say that Mr. Carr did not violate each and every regulation as alleged in the complaint. However, since several are duplicative of others, there is no reason to count each separately for sanction purposes in this non-egregious case against an individual not in the business of shipping hazardous materials.

the business of shipping hazardous materials may undermine the credibility of the enforcement program and result in excessive penalties under 49 U.S.C. § 5123(c).

It is held in this case that contrary to Complainant's assertion,[15] there were *not* 13 separate violations for sanction purposes. The violation of Section 171.2(a), 49 C.F.R. § 171.2(a),[16] should not be counted as a separate violation for sanction purposes. Section 171.2(a) is a general introductory section, and its prohibition against offering a hazardous material for shipment unless it is properly classed, described, packaged, marked, and labeled is contained in the other regulations that were alleged separately by Complainant in the complaint.[17] Likewise, there is no reason to consider Section 172.200(a) as a separate violation for sanction purposes.[18] Section 172.200(a) contains a general requirement that each person who offers a hazardous material for shipment shall properly describe the hazardous material on the shipping papers. This should not be considered as a separate violation for sanction purposes when the particular elements of a proper description for shipping papers set forth in Sections 172.202(a)(1), 172.202(a)(2), 172. 202(a)(5),[19] 172.202(c), 172.204(a) or (c)(1), and 172.204(c)(2) are alleged in the complaint individually.[20]

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[15] *See* Reply Brief at 16.

[16] Complaint, Section III, paragraph 1a. (*See* Appendix B.)

[17] Complainant has taken the position in previous cases that Section 171.2(a) does not count as a separate violation for sanction purposes. *See e.g.*, In the Matter of Midtown Neon Sign, FAA Order No. 96-26 at 7, n.12, 1996 FAA LEXIS 2060 at *9 (August 13, 1996); In the Matter of Mulhall, FAA Order No. 95-16, at 2, n.3, 1995 FAA LEXIS 344 *2 (August 4, 1995).

[18] Complaint, Section III, paragraph 1b. (*See* Appendix B.)

[19] Complainant alleged that Mr. Carr violated Section 172.202(a)(4) but then mischaracterized that regulation in its complaint. Complainant stated in the complaint that Mr. Carr violated Section 172.202(a)(4) by not including on the shipping papers the total quantity of the hazardous material covered. *See* Complaint part III, paragraph 1e. (*See* Appendix B.) The requirement to include the total quantity of the hazardous material is actually in 49 C.F.R. § 172.202(a)(5), as well as in 172.202(c). A similar mistake was pointed

There also does not appear to be any need to count a violation of Section 172.202(a)(5)[21] and a violation of Section 172.202(c) as separate violations for sanction purposes because both require that the total quantity of the hazardous material be included on the shipping papers. Section 172.202(c) also requires that the total quantity be recorded before or after (or both before and after) the description of the hazardous material on the shipping paper. However, in this case, neither a description of the hazardous material nor the total quantity was included on the shipping paper.

In one paragraph of the complaint, Complainant alleged that Mr. Carr violated both Sections 172.300 and 172.301(a), 49 C.F.R. § 172.300 and 172.301(a).[22] These sections, taken together, require that the package be marked with the proper shipping name and identification number of the hazardous material contained therein. This allegation should be considered as one violation. Having established that Mr. Carr failed to mark the packages with the proper shipping name and identification number, it may be wondered whether there was any need for Complainant also to allege *separately* that Mr. Carr violated Section 172.304 because the required marking was not durable, in English and printed on or affixed to the surface of a package or on a label, tag, or sign. This case does not involve a

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out in In the Matter of Mulhall, FAA Order No. 95-16 at 2, FAA LEXIS 344 at *2 (August 4, 1995), and probably resulted from an error in the boilerplate language used by agency counsel in preparing complaints in hazardous materials cases. If so, Complainant should see to it that the boilerplate used in all offices initiating hazardous materials civil penalty cases is corrected expeditiously.

[20] Complaint, Section III, paragraph 1c - 1h. (*See* Appendix B.)

[21] *See* n.19.

[22] Complaint, Section III, paragraph 1i. (*See* Appendix B.)

question of a marking that was made improperly. Hence, it does seem that the separate allegation of Section 172.304 is "piling on." Such "piling on" should be avoided in non-egregious cases in light of the minimum penalty provision in the statute particularly in cases in which the shipper is an individual and not in the business of shipping goods in air transportation.

Regarding the failure to package the fireworks correctly, Complainant alleged simply in the factual portion of the complaint as follows: "Paul A. Carr offered a package containing 'fireworks' for transportation by air when the material was not packaged in DOT specification packages as required by Section 173.62 of the Hazardous Materials Regulations (49 C.F.R. § 173.62)." Complaint, Section II, paragraph 15. In Section III of the complaint, Complainant included two paragraphs alleging regulatory violations arising from Mr. Carr's failure to package the fireworks in accordance with the Hazardous Materials Regulations. In one of these paragraphs, Complainant alleged that Mr. Carr violated the general, introductory regulation, 49 C.F.R. § 173.1(b).[23] In the other paragraph, Complainant alleged that Mr. Carr violated 49 C.F.R. §§ 173.3(a), 173.22(a), and 173.62.[24] Section 173.3(a) is another general section regarding the necessity to package hazardous materials properly. Section 173.22(a) makes it the *shipper's* responsibility to ensure that the packaging complies with the regulations. Section 173.62(b) contains the specific standards for packaging different types of explosives. Although four regulations were alleged to have been violated in two separate

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[23] Complaint, Section III, paragraph 1l. (*See* Appendix B.)

[24] Complaint, Section III, paragraph 1m. (*See* Appendix B.)

paragraphs, there was only one failure by Mr. Carr to package the fireworks in compliance with Section 173.62's requirements.

Hence, for sanction purposes, there were no more than eight separate violations.[25] The *minimum* civil penalty for these violations would be $2,000. A $2,000 civil penalty is a significant penalty for an individual, and it is sufficient and appropriate under the circumstances of this case. Mr. Carr knew that the fireworks that he had recently purchased and packed were hazardous, and yet he indicated on the shipping papers that he was not shipping any dangerous goods. The law judge was right on point when he referred to this as a critical factor. Moreover, although this type of fireworks is not self-igniting, it can fuel a fire on board an aircraft, and the fire could become so hot that it could melt aircraft skin.[26] Mr. Carr's negligence led to the potential endangerment of the Horizon's aircraft and personnel, and had Alaska Airlines accepted the packages, another aircraft and team of airline employees would have been placed at risk. It is simply fortuitous that this powerful

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[25] The violations for sanction purposes are as follows:

1. Sections 172.200(a), 172.202(a)(1), and 171.2(a)
2. Sections 172.200(a), 172.202(a)(2), and 171.2(a)
3. Sections 172.200(a), 172.202(a)(5), 172.202(c), and 171.2(a)
4. Sections 172.200(a), 172.204(a) or (c)(1) and 171.2(a)
5. Sections 172.200(a), 172.204(c)(2) and 171.2(a)
6. Sections 172.300, 172.301(a), 172.304, and 171.2(a)
7. Section 172.400 and 171.2(a)
8. Sections 173.1(b), 173.3(a), 173.22(a), 173.62, and 171.2(a).

It should be noted further that this decision does not represent a major shift in enforcement policy in hazardous materials cases. As previously mentioned, Complainant has in other cases stated that it did not consider the general introductory paragraphs as separate violations.

[26] In In the Matter of Smalling, FAA Order No. 94-31, 1994 FAA LEXIS 278 (October 5, 1994), Complainant sought a $1,500 civil penalty against Mr. Smalling for shipping various fireworks in his checked luggage. At the hearing, the law judge reduced the civil penalty to $1,250. Complainant did not appeal in that case, and neither the sanction nor the number of penalties was an issue on appeal.

"fuel" was not ignited while it was on board the aircraft or during the loading and unloading process.

For the foregoing reasons, Mr. Carr's appeal is denied in part and granted in part. A $2,000 civil penalty, to be paid over the course of a year in quarterly installments, is assessed.[27]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of March, 1998.

[27] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. § § 13.16(b)(4) and 13.233(j)(2) (1997).

Appendix A

49 C.F.R. § 171.2(a) (1995) reads as follows:

> 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 (including §§ 171.11, 171.12, and 176.11.)

49 C.F.R. § 172.200(a) (1995) reads as follows:

> (a) *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 (1995) reads, in pertinent part, as follows:

> (a) The shipping description of a hazardous material on the shipping paper must include:
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> > (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). ....
> >
> > (5) Except for empty packaging (see § 173.29 of this subchapter), cylinders for Class 2 (compressed gases) materials, and bulk packagings, the total quantity (by net or gross mass, capacity, or as otherwise appropriate, including the unit of measurement, of the hazardus material covered by the description ....
>
> (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.

49 C.F.R. § 172.204 (1995) reads in pertinent part:

> (a) *General.* Except as provided in paragrpahs (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 the the contents of this consignment are fully and accurately described above by the proper shipping name, and are classified, packaged, marked and labelled/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 langauge 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. (See § 175.30 of this subchapter.)

49 C.F.R. § 172.300(a) (1995) reads as follows:

> (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.

49 C.F.R. § 172.301(a)(1) (1995) reads as follows:

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

49 C.F.R. § 172.304(a)(1) (1995) reads as follows:

> (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.

49 C.F.R. § 172.400(a) (1995) reads as follows:

> (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;
> >
> > (2) A bulk packaging, other than a cargo tank, portable tank, or tank car, ... unless placarded in accordance with subpart F of this part;
> >
> > (3) A portable tank of less than 3785 L (1000 gallons) capacity, unless placarded in accordance with subpart F of this part;
> >
> > (4) A DOT specification 106 or 110 multi-unit tank car tank, unless placarded in accordance with subpart F of this part; and
> >
> > (5) An overpack, freight container or unit load device, of less than ... (640 cubic feet), which contains a package for which labels are required, unless placarded or marked in accordance with § 172.512 of this part.

49 C.F.R. § 173.1(b) (1995) reads as follows:

> (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.

49 C.F.R. § 173.3(a) (1995) reads as follows:

(a) The packaging of hazardous materials for transportation by air, highway, rail, or water must be as specified in this part. Methods of manufacture, packing, and storage of hazardous materials, that affect safety in transportation, must be open to inspection by a duly authorized representative of the initial carrier or of the Department. Methods of manufacture and related functions necessary for completion of a DOT specification or U.N. standard packaging must be open to inspection by a representative of the Department.

49 C.F.R. § 173.22(a) (1995) reads as follows:

(a) Except as otherwise provided in this part, a person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following:

(1) The person shall class and describe the hazardous material in accordance with parts 172 and 173 of this subchapter, and

(2) The person shall determine that the packaging or container is an authorized packaging, including part 173 requirements, and that it has been manufactured, assembled, and marked in accordance with:

(i) Section 173.7(a) and parts 173, 178, or 179 of this subchapter;

(ii) A specification of the Department in effect at the date of manufacture of the packaging or container;

(iii) National or international regulations based on the UN Recommendations on the Transport of Dangerous Goods, as authorized in § 173.24(d)(2);

(iv) An approval issued under this subchapter; or

(v) An exemption issued under subchapter A of this chapter.

(3) In making the determination under paragraph (a)(2) of this section, the person may accept:

(i) Except for the marking on the bottom of a metal or plastic drum with a capacity over 100 liters which has been reconditioned, remanufactured or otherwise converted, the manufacturer's certification, specification, approval, or exemption marking (see §§ 178.2 and 179.1 of this subchapter);

(ii) With respect to cargo tanks provided by a carrier, the manufacturer's identification plate or a written certification of specification or exemption provided by the carrier.

(4) For a DOT specification of UN standard packaging subject to the requirements of part 178 of this subchapter, a person shall perform all functions necessary to bring that package into compliance with part 178 of this subchapter, as identified by the packaging manufacturer or subsequent distributor, in accordance with § 178.2 of this subchapter.

49 C.F.R. § 173.62 (1995) reads in pertinent part as follows:

(1) Except as provided in paragraph (e) of this section, when the § 172.101 Table specifies that an explosive must be packaged in accordance with this section, only non-bulk packagings which conform to the provisions of paragraphs (b), (c), and (d) of this section, and the applicable requirements in §§ 173.60 and 173.61 may be used, unless otherwise approved by the Associate Administrator for Hazardous Materials Safety.I11(b) Explosives Table. The Explosives Table specifies, by a two-step process, which packing methods must be utilized for a particular explosive. Explosives are identified in the first column of the Explosives Table by their identification number, which is listed in Column 4 of the § 172.101 Table, of this subchapter. However, the packing method authorized under E-103 may be used in place of the packing method listed in the Explosives Table. The second column of the Explosives Table specifies the packing method or methods (e.g., E-2) which must be used to pack a particular explosive. The table of packing methods in paragraph (c) of this section defines the packing methods. The packing methods are prefixed either by the letter "E" (E-2) or "US" (US001). The packing methods prefixed by the letter "E" are those based on the UN Recommendations. The packing methods prefixed by the letters "US" are those that are particular to the United States and are not found in any applicable International Regulations. The packing methods are listed in appropriate alpha-numerical sequence.

(For the full text of the Explosives Table, the reader must refer to the appropriate volume of 49 C.F.R. The Explosives Table does provide that explosives with the identification number UN0337 must be packaged in accordance with the E-146(a) packing methods.)

(c) Table of packing methods: Packing methods must be utilized in accordance with the following table.

(1) The first column lists, in alpha-numeric sequence, the packing methods presecribed for explosives in the Explosive table of paragraph (b) of this section. If more than one set of packagings is authorized for a packing method, it is noted with a designation (a), (b), (i), (ii), etc.

(2) The second column specifies the inner packagings that are required. If inner packagings are not required, a notation of "Not necessary" or "Optional" appears in the column. The terms "Optional" and "Not necessary" mean that a suitable inner packaging may be used but is not required. If intermediate packagings are required, it is so noted in this column. In addition, any special requirements regarding the inner packagings are specified with a "Note."

(3) The third column specifies the outer packagings which are required. If inner packagings and/or intermediate packagings are specified in the second column, then the packaging specified in the third column must be used as the outer packaging of a combination packaging; otherwise it may be used as a single packaging. Any special requirements regarding the outer packagings are specified with a "Note."

(4) The fourth column specifies, by a numerical and alpha-numerical (ex: D1) sequence, applicable particular packaging requirements or exceptions. The exception or requirements associated with a particular number is explained in paragraph (d) of this section. Those particular packaging requirements or exceptions that are not found in international regulations are noted with a "D".

(For the full text of the Packing Table, the reader must refer to the appropriate volume of 49 C.F.R. The Packing Table does provide that for explosives that must be packaged in accordance with packing method E-146(a), inner packaging is not necessary, and that any of the following outer packaging (boxes) is appropriate: Fiberboard (4G); Plywood (4D); Reconstituted wood (4F); Wood, ordinary (4C1); Steel (4A); Aluminum (4B)).