UNITED STATES DEPARTMENT OF TRANSPORTATION
# FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

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| In the Matter of: | FAA Order No. 94-31 |
| **SCOTT H. SMALLING** | Served: October 5, 1994 |
| | Docket No. CP93NM0260 |

## ORDER AND DECISION

Respondent Scott H. Smalling appeals from Administrative Law Judge Burton S. Kolko's order assessing a civil penalty of $1,250 against him for violations of the Hazardous Materials Transportation Act, 49 U.S.C. App. §§ 1809(a), and the Hazardous Materials Regulations contained in 49 C.F.R. Parts 171-173.[1] For the reasons discussed below, the law judge's initial decision is affirmed.

The facts of this case are not in dispute. In 1992, Respondent decided to take a trip to California from his home near Seattle, Washington to visit a friend for the Fourth of July weekend. The night before the trip, Respondent testified, his friend called and asked him to bring a bag of fireworks they had bought together previously. Tr. 51. When Respondent packed his bag that night for the trip, he "threw [the fireworks] in the bag." *Id.*

The next day, on July 2, 1992, Respondent went to the Seattle-Tacoma International Airport to catch his flight to California. Respondent checked his bag, which contained the fireworks, at the ticket counter, and then boarded his flight for San Jose.

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[1] A copy of the law judge's written initial decision is attached.

When Respondent's bag reached the baggage facility, airline employees noticed that it was missing its destination tag. Tr. 18. Following the airline's normal procedures for locating lost luggage, the employees opened the bag to enter an inventory of its contents into the computer. When they did so, they discovered the following fireworks inside a brown sack in the bag:

- 1 battery (25 shots) of "Saturn Missiles";
- 7 "M-100 Salute" firecrackers;
- 3 "Crackling Balls";
- 8 "Roman Candles";
- 8 "Dixie Whistler Rockets";
- 6 "Ground Bloom Flowers"; and
- 1 package containing 100 "Mighty Mite" firecrackers.

Complainant's Exhibit 3.

Fireworks are listed in the Hazardous Materials Regulations as a hazardous material. 49 C.F.R. § 172.101; Tr. at 33. However, Respondent's bag had none of the required shipping papers, labels, or markings indicating that it contained hazardous materials. The airline employees reported the matter to the FAA, which began an investigation and ultimately brought this civil penalty action against Respondent.

In the original complaint, Complainant alleged that Respondent violated 17 sections of the Hazardous Materials Regulations (49 C.F.R. §§ 171.2(a), 172.200(a), 172.202, 172.202(a)(1), 172.202(a)(2), 172.202(a)(4), 172.202(c), 172.202(a) or (c)(1), 172.204(c)(2), 172.300(a), 172.301(a), 172.304(a)(1), 172.400(a), 173.1(b), 173.3(a), 173.22(a), and 173.266(c)(8)).[2] When the hearing began, the FAA

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[2]For the text of these regulations, with the exception of Section 173.266(c)(8), see the Appendix to this decision.

As for Section 173.266(c)(8), the regulations in effect at the time did not include any

[Footnote continues on next page.]

moved to amend its complaint to reduce the number of violations alleged. Complainant pointed out that under the Hazardous Materials Transportation Act, 49 U.S.C. App. § 1809(a)(1), the minimum penalty for each violation is $250. Since 17 regulations were alleged to have been violated in the original complaint, the sanction should have been at least $4,250 ($250 multiplied by 17 equals $4,250).[3] However, in the original complaint, Complainant sought a civil penalty of only $1,500, and the Rules of Practice provide that a civil penalty may not be greater than that sought in the complaint.[4]

As a result, Complainant moved to amend the complaint to reduce the number of violations charged to six--49 C.F.R. §§ 172.200(a), 172.202, 172.204, 172.300, 172.400(a), and 173.1(b). Tr. 7. In this way, the penalty sought in the complaint would not be below the statutory minimum for the number of violations alleged. Respondent had no objection to the proposed amendment, and the law judge granted Complainant's motion to amend the complaint.

At the hearing, Respondent admitted that he knew that he had firecrackers in the bag when he checked it, as he had placed them there himself. He argued, however, that evidence obtained during the search of his bag violated his Fourth Amendment rights and was therefore inadmissible. He further argued that at the

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such section. Although earlier, superseded regulations did include a Section 173.266(c)(8), this regulation involved hydrogen peroxide solution in water rather than fireworks. *See* 49 C.F.R. § 173.266(c)(8) (1990). Thus, Complainant's inclusion of Section 173.266(c)(8) in the initial complaint must have been an error. In any event, the law judge granted Complainant's motion at the hearing to delete from the complaint the allegation involving Section 173.266(c)(8), along with several other allegations. Tr. 8.

[3] Complainant's position is that the statutory requirement of a minimum of $250 per violation means $250 per regulation. Tr. at 4.

[4] *See* 14 C.F.R. § 13.16(h), which provides that the Decisionmaker shall not assess a civil penalty in an amount greater than that sought in the complaint. In the original complaint, Complainant sought $1,500.

time, he did not know that firecrackers were a hazardous material. According to Respondent, the sign at the ticket counter warning passengers about the carriage of hazardous materials was not prominently displayed, as required by the regulations. Respondent also presented character evidence to show that he is responsible and would not have violated the regulations intentionally. For all of these reasons, Respondent argued that he should not be found to have violated the regulations.

Shortly after the hearing, the law judge issued a written initial decision in which he rejected Respondent's arguments and found five violations of the regulations rather than six. The law judge found that Respondent knowingly offered a package containing hazardous materials for air transport without properly:

(1) completing shipping papers (49 C.F.R. §§ 172.202(a)(1)-(4) and 172.202(c);

(2) certifying the shipping papers (49 C.F.R. §§ 172.204(a)(c)(1)-(2));

(3) marking the package with its proper shipping name and identification number (49 C.F.R. §§ 172.300(a) and 172.301(a));

(4) labeling the package (49 C.F.R. § 172.400(a)); and

(5) preparing the package for shipment (49 C.F.R. § 173.1(b)).

Initial Decision at 11. The law judge declined, however, to find violations of 49 C.F.R. §§ 172.200(a) and 172.202. In his view, these sections were general, introductory sections that could not support a violation independently. Id. at 7-8.

The law judge imposed a civil penalty of $1,250, the minimum permissible under the Hazardous Materials Transportation Act given the number of violations found. The law judge noted that even if the Hazardous Materials Transportation Act did not mandate a minimum penalty of $250 for each violation, he would still have found a $1,250 penalty appropriate due to the seriousness of hazardous

materials violations and the harm that could have resulted from Respondent's actions. Initial Decision at 10-11.

Respondent has appealed from the law judge's decision. In his appeal brief, he does not renew the argument he made before the law judge that the search of his bag violated the Fourth Amendment and required exclusion of the evidence obtained in that search.[5] Neither does he challenge the number of violations the law judge found, nor the amount of the sanction he imposed. Rather, Respondent has appealed on one issue and one issue only--whether he had the requisite knowledge to commit the violations alleged. Respondent argues that he could not have violated the hazardous materials regulations "knowingly," within the meaning of the Hazardous Materials Transportation Act, because he did not know that firecrackers were hazardous materials[6] and that what he did was wrong.

Respondent marshals the following arguments to support his claim that he did not know that his actions constituted a violation of the regulations:

- his ticket jacket did not contain a warning against the carriage of hazardous materials, including firecrackers;
- the sign in the baggage well (where passengers place their checked baggage) at the airline ticket counter, warning against the carriage of hazardous materials, was not "prominently displayed," as required by 49 C.F.R. § 175.25;[7] and

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[5] The law judge properly ruled that because the initial search of Respondent's bag was conducted by private parties in an effort to ascertain the bag's owner, rather than pursuant to Federal regulations, the protections of the Fourth Amendment, and hence the exclusionary rule, did not apply. Initial Decision at 9.

[6] Indeed, at the hearing, Respondent testified that "to me, fireworks are sparkly things that go off." Tr. 60.

[7] Respondent claims that the sign in the baggage well in which one places one's checked luggage at the ticket counter was not prominently displaced because it was at about knee level and faced at a 90-degree angle to a person standing at the counter.

Section 175.25(a), 49 C.F.R. § 175.25(a), provides that:

> each aircraft operator who engages for hire transportation of passengers shall display notices to passengers concerning the requirements and

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- he is of good character and therefore, would not have violated the regulations intentionally.

Respondent also calls to the Administrator's attention the acquittal of H. Ross Perot, Jr. in a criminal case involving the charge of carrying a concealed weapon. Mr. Perot testified at his trial that he forgot that he had a pistol in his carry-on bag when he went through the security checkpoint at the Seattle-Tacoma International Airport. The judge instructed the jury that not knowing that one has a weapon is a complete defense, and the jury, believing Mr. Perot's plea of forgetfulness, acquitted him. Respondent argues that he, like Mr. Perot, did not realize that he was violating the law or any rules and regulations, and therefore, the case against him should be dismissed.

Section 110(a)(1) of the Hazardous Materials Transportation Act, 49 U.S.C. App. § 1809(a)(1), provides in pertinent part that:

> Any person who is determined ... to have *knowingly* committed an act which is a violation of a provision of this title, an order, or regulation issued under this title, shall be liable to the United States for a civil penalty.

(Emphasis added.) The statute defines "acting knowingly" as follows:

> (3) ACTING KNOWINGLY.--For purposes of this section, a person shall be considered to have acted knowingly if--
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> (A) such person has actual knowledge of the facts giving rise to the violation, or
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> (B) a reasonable person acting in the circumstances and exercising due care would have such knowledge.

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> penalties associated with the carriage of hazardous materials aboard aircraft. Such a notice shall be PROMINENTLY displayed in each location at an airport where the aircraft operator issues tickets, checks baggage, and maintains aircraft boarding areas.

Note, however, that FAA inspectors testified at the hearing that the sign at the ticket counter at which Respondent presented his bag met FAA requirements. Tr. 46-48.

49 U.S.C. App. § 1809(a)(3)(A) & (B). In this case, Respondent readily admitted that he had actual knowledge of the facts giving rise to the violation--*i.e.*, that he placed fireworks in his suitcase, and that he checked his bag with the airline. Thus, the law judge did not err in finding that Respondent had the requisite knowledge to be found in violation of 49 U.S.C. App. § 1809(a)(3)(A) and the hazardous materials regulations. Congress intended to prevent individuals from relying on ignorance of the law as an excuse in civil hazardous materials cases.[8]

The Perot[9] case is distinguishable because it was a criminal case, one in which specific intent was an element of the crime.[10] If Respondent had been charged with the *criminal* rather than the *civil* provisions of the Hazardous Materials Transportation Act, his lack of knowledge of the law would have been a valid defense for him too.[11] However, in this context--a civil case in which specific

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[8] The legislative history of the Hazardous Materials Transportation Act indicates that Congress intended civil penalties to be imposed on persons who knew about the act that constituted a violation, but were unaware of the law. In the Matter of TCI Corporation, FAA Order No. 92-77 at 8-9, n.13 (December 22, 1992) (quoting the following language in the conference substitute: "a civil penalty may be imposed only upon proof that the defendant knowingly committed the act which constitutes the violation *(it is not necessary to show that he knew the act constituted a violation)* .... (emphasis added)" S. Conf. Rep. No. 1347, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7669, 7686).

[9] In its reply brief, Complainant "strongly objects to the attempted introduction of such 'evidence',"--referring to Respondent's attachment to Respondent's brief of a newspaper article concerning the Perot case. Reply Brief at 6. This objection is overruled. Respondent is relying on Perot's case in much the same way that attorneys regularly and appropriately rely on case law. In the absence of any claim from Complainant that the newspaper article concerning Mr. Perot's case contains inaccuracies, Respondent's legal argument based on the result in the Perot case will be considered.

[10] Note that the FAA brought a civil penalty action against Mr. Perot based on the same incident in Seattle, alleging that Mr. Perot violated 14 C.F.R. § 107.21(a)(1) by having a deadly or dangerous weapon on or about his accessible property during the security inspection before he boarded his flight. The "forgetfulness" defense that applied in the criminal case was unavailable to Mr. Perot in the civil penalty action, and he paid the penalty. *See* Attachment A to Complainant's Reply Brief.

[11] Respondent's character is not in question in this proceeding. In fact, Complainant stipulated at the hearing that there was no belief on the part of the government that this was a willful violation or that Respondent was aware that he should not have carried these
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intent to violate the regulations need not be shown--lack of knowledge of the law is irrelevant.

Based on the foregoing, the law judge's decision assessing a $1,250 civil penalty is affirmed.[12]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 30th day of September, 1994.

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materials on the aircraft. Tr. 63. Had Respondent's violation been willful, Complainant would have brought its action under the criminal provisions of the Hazardous Materials Act, which provide not just for fines, but also for imprisonment. 49 U.S.C. App. § 1809(b).

[12] 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. App. § 1486), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).

## APPENDIX

Section 171.2(a) of the Hazardous Materials Regulations (HMR), 49 C.F.R. § 171.2(a) (1991), provided:

> No person may offer or accept a hazardous material for transportation unless that material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter ...

Section 172.200(a) of the HMR, 49 C.F.R. § 172.200(a) (1992), provided:

> *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.

Section 172.202(a)(1)-(2), (4) of the HMR, 49 C.F.R. § 172.202(a)(1) (1992), provided:

> (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;
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> (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) ....
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> ...
>
> (4) The packing group, in Roman numerals, prescribed for the material in Column 5 of the § 172.101 Table, if any. The packaging group may be preceded by the letters "PG" (e.g., "PG II") ....

Section 172.202(c) of the HMR, 49 C.F.R. § 172.202(c) (1992), provided, in relevant part:

> 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 ....

Section 172.204(a) of the HMR, 49 C.F.R. § 172.204(a) (1992), provided:

> Except as provided in paragraphs (b) and (c) of this section, each person who offers a hazardous material for transportation shall certify that the material is offered for transportation in accordance with this subchapter by printing (manually or mechanically) on the shipping paper containing the required shipping description the

certification contained in paragraph (a)(1) of this section or the certification (declaration) 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 proper shipping name and are classified, packed, marked and labeled, and are in all respects in proper condition for transport by [*] according to applicable international and national governmental regulations."

*Additional language indicating the modes of transportation to be used may be inserted at this point in the certification. All modes of transportation may be indicated provided that any mode not applicable to a specific shipment is deleted (lined out).

Section 172.204(c)(1) of the HMR, 49 C.F.R. § 172.204(c)(1) (1992), provided:

(c) *Transportation by air*--(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.

Section 172.204(c)(2) of the HMR, 49 C.F.R. § 172.204(c)(2) (1992), provided:

*(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.)

Section 172.300(a) of the HMR, 49 C.F.R. § 172.300(a) (1992), provided:

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) of the HMR, 49 C.F.R. § 172.301(a) (1992), provided, in relevant part:

(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.

...

Section 172.304(a)(1) of the HMR, 49 C.F.R. § 172.304(a)(1) (1992), provided:

(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) of the HMR, 49 C.F.R. § 172.400(a) (1992), provided:

(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, with a volumetric capacity of less than 18 $m^3$ (640 cubic feet), 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 18 $m^3$ (640 cubic feet), which contains a package for which labels are required, unless placarded or marked in accordance with § 172.512 of this part.

Section 173.1(b) of the HMR, 49 C.F.R. § 173.1(b) (1992), provided:

A shipment that is not prepared for shipment in accordance with this subchapter may not be offered for transportation by air, highway, rail, or water. 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.

Section 173.3(a) of the HMR, 49 C.F.R. § 173.3(a) (1992), provided:

(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.

Section 173.22(a) of the HMR, 49 C.F.R. § 173.22(a) (1992), provided, in relevant part:

> (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
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> (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;
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> (ii) A specification of the Department in effect at the date of manufacture of the packaging or container;
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> (iii) An approval issued under this subchapter; or
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> (iv) An exemption issued under subchapter B of this chapter.
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> ....