UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: December 22, 1992

FAA Order No. 92-77

In the Matter of: TCI CORPORATION	Docket No. 88-25(HM)

DECISION AND ORDER

A hearing was held in this matter before Chief Administrative Law Judge John J. Mathias on March 5-7, 1991, in Boston, Massachusetts. The law judge issued a written initial decision on October 9, 1991,[1/] finding that Respondent TCI Corporation had violated all of the regulations alleged in the amended complaint. Nevertheless, the law judge reduced the civil penalty from $35,000 to $5000.[2/] Complainant has appealed from the written initial decision. For the reasons set forth below, Complainant's appeal is granted in part, and the law judge's decision is modified to assess a $15,000 civil penalty against Respondent.

1/ A copy of the written initial decision is attached.

2/ It was alleged that Respondent had violated 49 C.F.R. §§ 171.2(a), 172.200(a), 172.202, 172.202(a)(1)-(4), 172.202(b), 172.204, 172.204(c)(2), 172.204(a) or (c)(1), 172.304(a)(3), 172.406(f), 173.27(a), 173.1(b). These regulations are set forth in the Addendum to this decision.

In February, 1987, Respondent, an export-import company, ordered 36 quarts of Fineline Photoresist Adhesion Promoter (PAP) from American Hoechst Corporation. Respondent intended to ship the PAP by air to China to fulfill its contract with China International Trust and Investment Corporation.

Under the Hazardous Materials Regulations (HMR), PAP[3/] is a hazardous material.[4/] PAP, which has a flash point of 55° Fahrenheit, is a flammable liquid.[5/] Its proper shipping name[6/] is flammable liquid, corrosive,[7/] n.o.s.,[8/] and its identification number is UN 2924.[9/]

3/ The chemical name for PAP is hexamethyldisilazane.

4/ Hazardous material is defined in the HMR as "a substance or material ... which has been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and which has been so designated." 49 C.F.R. § 171.8.

5/ A flammable liquid under the HMR is a liquid having a flash point below 100° Fahrenheit. 49 C.F.R. § 173.115(a).

6/ PAP is not listed specifically in the Hazardous Materials Table set forth in Section 172.101, 49 C.F.R. § 172.101. Section 172.101(9)(ii) provides that if a hazardous substance does not appear in the table, then an appropriate generic shipping name must be selected corresponding to the hazard class of the material ...." 49 C.F.R. § 172.101(9)(ii).

7/ A corrosive material is defined as "a liquid or solid that causes visible destruction or irreversible alterations in human skin tissue at the site of contact." 49 C.F.R. § 173.240.

8/ N.O.S. means "not otherwise specified." 49 C.F.R. § 171.8.

9/ UN 2924 is the identification number listed for a flammable liquid, corrosive, n.o.s., in the Hazardous Materials Table, at Section 172.101, 49 C.F.R. § 172.101.

As the law judge summarized, the HMR place the following restrictions and impose the following requirements regarding the shipment of a flammable and corrosive liquid, such as PAP:

> [U]nder the HMRs, transporting PAP by air requires that not more than one quart of PAP be contained in each package, 49 C.F.R. §§ 172.101 and 173.27(a); that the required hazardous materials markings and labels on each package of PAP be unobscured by labels or attachments, 49 C.F.R. §§ 172.304(a)(3) and 406(f); that the shipping papers accompanying the PAP contain hazardous materials descriptions of the PAP, 49 C.F.R. §§ 172.200, 202(a)(1)-(4) and 202(b); that the shipping papers also contain a hazardous materials shipper's certification, 49 C.F.R. §§ 172.204(a) or (c)(1) and 204(c)(2); and that the offeror of the PAP for air transportation instruct its officers, agents, and employees responsible for preparing the PAP for shipment in the requirements of the HMRs, 49 C.F.R. § 173.1(b).

(See Addendum to this order and decision.)

Prior to ordering the PAP, Respondent's vice president, Dr. Franklin Hwang, reviewed a technical bulletin for this product, which was provided to him by American Hoechst. Although it was not mentioned specifically in the technical bulletin that PAP is a hazardous material, the technical bulletin did specify that PAP was a flammable liquid with a flashpoint of 55° Fahenreit. Handling precautions were also included in this bulletin.

Since Respondent did not have its own warehouse, it directed that American Hoechst ship the PAP to Respondent's freight forwarder, Morrison Express, in Chelsea, Massachusetts. American Hoechst shipped the PAP by truck from its facility in Illinois to the Morrison Express warehouse, where it arrived on or about March 12, 1987.

To fulfill its contract with China International Trust and Investment Corporation, Respondent had purchased products from 13 different vendors. Each vendor shipped its goods directly to Morrison Express. The PAP was the last part of the total shipment to arrive. Claudia Randall, Respondent's Contract Administrator, went to Morrison Express and worked with Morrison Express employee Carlos Reverendo to identify each box to be included in the shipment to China.

There were six boxes of PAP connected to a wooden skid by metal bands. Three boxes were on the skid, and three boxes were piled on top of those boxes. The boxes were covered with cardboard and shrink wrap. Each box contained six 1-quart bottles of PAP. According to Ms. Randall, the warehouse was so crowded with cargo that she had to climb over things to mark[10/] the boxes included in TCI's shipment, and she was unable to view the boxes of PAP from all directions. Ms. Randall did not see any hazardous materials markings on the boxes.

TCI provided Morrison Express with a commerical invoice and a packing list. On both of these documents the PAP was referred to as "Photoresist Adhesion Promoter," with no mention of this chemical's proper shipping name, or any other

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10/ Ms. Randall marked each box with a shipping mark, and Mr. Reverendo placed a Flying Tigers label on each carton. Neither placed any hazardous materials labels or markings on the boxes of PAP.

reference to the fact that it was a hazardous material. Carlos Reverendo relied upon these documents when he prepared the Total Link International Inc.[11/] Air Waybill (with a commercial invoice signed by Claudia Randall attached) and the Flying Tigers Air Waybill. Mr. Reverendo did not realize that photoresist adhesion promoter was a flammable liquid.

These shipping papers, prepared by Morrison Express to accompany the shipment of PAP, made no mention of the hazardous nature of the contents of the six boxes. A Morrison Express employee signed the shipper certification on the Flying Tigers Air Waybill to the effect that "insofar as any part of the consignment contains dangerous goods, such part is properly described by name and is in proper condition for carriage by air according to the applicable Dangerous Goods Regulations." Complainant's Exhibit 9. The shipment from TCI was referred to on the Flying Tigers shipping papers prepared by Morrison Express as "Electronic Laboratory Equip. & Spectrum Analyzer & Display." Complainant's Exhibit 9 at 2.

The District Manager for Morrison Express, Robert Wang, testified that no one at Morrison Express knew that the six

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11/ Total Link International is a United States corporation related to Morrison Express, which is a Taiwanese corporation. When a customer wants to ship goods to mainland China, Total Link provides the forwarding services, rather than Morrison Express.

boxes on the pallet contained a hazardous material. If a Morrison Express employee had known about the hazardous material, he said, Morrison Express would have requested that TCI prepare a shipper's certification. (See 49 C.F.R. § 172.204). Morrison Express also would have requested that the boxes be labeled properly. (See 49 C.F.R. § 172.400 et seq.)

On or about March 18, 1987, the shipment was transported by truck to Flying Tigers. During the loading process, the boxes shifted somewhat on the skid. A forklift operator at Flying Tigers noticed part of a flammable liquid label on a box while loading the skid. The label was on the side of a box that had been facing another box and apparently became visible after the boxes shifted. Flying Tigers then removed some of the shrink wrapping to determine whether the labels were hazardous materials labels, which they were. Flying Tigers reported this incident to the FAA.

The next day, FAA Security Inspector Stephen Luongo inspected the shipment at the Flying Tigers facility. Mr. Luongo testified that he was unable to determine from looking at the boxes whether each box had the required flammable liquid and corrosive labels because of the shrink wrapping and cardboard surrounding the shipment. Because he did not take the shipment apart, he could not tell how many boxes had flammable liquid or corrosive labels that were

obscured because they were facing other boxes on the pallet.[12/]

After Respondent was notified about Flying Tigers' discovery, Respondent opened a sealed envelope sent to Respondent c/o Morrison Express by American Hoechst and found the Material Safety Data Sheet. Ms. Randall had received this envelope from Morrison Express on March 17th. The proper shipping name, hazard class, and identification number for the PAP were listed under the heading "TRANSPORTATION AND OTHER REGULATORY REQUIREMENTS" on the last page of the Material Safety Data Sheet. Complainant's Exhibit 7 at 4.

The law judge held that each of the boxes was improperly packaged because each box contained 6 quarts of PAP. Sections 172.101 and 173.27(a) prohibit more than 1 quart of flammable liquid, corrosive, n.o.s., per package. He also held that the shipping papers did not meet the requirements of the HMR

12/ The law judge concluded based upon his review of the entire record, including the photographs, that:

> [t]hree of the six boxes of PAP had DOT hazardous materials markings and labels on them, including diamond shaped labels with the words 'Flammable Liquid' and 'Corrosive' written in them. However, the markings and labels on two of these three boxes were either completely or partially obscured by the cardboard and/or the shrink-wrapping covering the group of six boxes, and the markings and labels on the third box were on the side of the box turned inward in the group of six boxes. If there were such markings and labels on the other three boxes of PAP, they would have also been turned inward in the group of six boxes and, consequently, would have been totally obscured unless the group of boxes had been taken completely apart.

Initial Decision at 11.

because the PAP was not identified as a hazardous material and a shipper's certification was not included.

Regarding the HMR requirements pertaining to markings and labeling, the law judge held:

> Finally, while the record is inexact in showing what the PAP shipment looked like when it was received by Flying Tigers on March 18, 1987, the record does show that although some, and even more probably all, of the six boxes of PAP had the required HMR markings and labels on them, the markings and labels were obscured, either partially or completely, because the six boxes of PAP were partially covered by pieces of cardboard, shrink-wrapped together, and as to at least some of the boxes, they were positioned in the group of six boxes in such a way that their hazardous materials markings and labels were facing inward in the group of boxes. The HMRs expressly require not only that the required hazardous materials markings and labels be on packages containing PAP but also that the markings "[m]ust be unobscured by labels or attachments ....," 49 C.F.R. § 172.304(a)(3), and the labels "must not be obscured by markings or attachments," 49 C.F.R. § 172.406(f).

Initial Decision at 18-19.

The law judge held that, regarding the issue of liability, it was immaterial that Respondent had been unaware of the Hazardous Materials Transportation Act (HMTA) and the implementing regulations (HMR). He concluded that Respondent knowingly violated the alleged sections of the HMR because Respondent knew that PAP was a flammable liquid. Hence, a fine could be imposed under 49 U.S.C. App. § 1809(a)(1).[13/]

13/ Section 110(a)(1) of the HMTA, 49 U.S.C. App. § 1809(a)(1) provides in part: "Any person ... who is determined by the Secretary, ... to have knowingly committed

(Footnote 13 continued on next page.)

Initial Decision at 22. He concluded that despite its knowledge of the hazardous properties of the PAP, "Respondent proceeded through the China Int'l transaction with an amazing lack of interest in how the product was being prepared for shipment to China." Initial Decision at 23. The law judge also rejected Respondent's argument that Morrison Express should be held accountable for not ensuring that the PAP shipment was prepared properly for shipment. Although

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(Footnote 13 continued from previous page.)

an act which is a violation of a provision of this title or of a regulation issued under this title, shall be liable to the United States for a civil penalty." (Emphasis added.)

In making this determination, the law judge relied upon United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). Initial Decision at 22. In International Minerals, the Supreme Court interpreted a statute providing that whoever "knowingly" violates ICC regulations pertaining to the transportation of corrosive liquids is subject to penalties. In the majority opinion it was explained that "where ... dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of a regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." Id. at 565.

It is evident from the HMTA's legislative history that Congress authorized the Secretary to assess civil penalties against a person who knew about the act that constituted a violation, but may have been unaware of the law. It was written in the conference report accompanying H.R. 15223, which was later enacted, that the conference substitute provided:

> (4) ... that 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) ....

S. Conf. Rep. No. 1347, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7669, 7686.

Morrison Express's employees had received hazardous materials training, they were not responsible for shipping the improperly prepared PAP because Respondent did not apprise them of the hazardous nature of the PAP. Finally, the law judge held that even though this was Respondent's first involvement with hazardous materials, Respondent should still be held accountable for failing to train its employees about the requirements of the HMR. Initial Decision at 29.

Despite the finding that Respondent had violated all of the alleged regulations, the law judge reduced the $35,000 civil penalty sought by Complainant to $5000 based upon several factors. The law judge was influenced by the fact that none of the PAP was released, and that Respondent arranged for the shipment to be prepared properly after becoming aware of the problem. In reducing the sanction, the law judge also took into account that Respondent had no history of violations of the HMR, and that Respondent did not intend to violate the HMR.

The law judge found that American Hoecht's lack of diligence constituted a mitigating factor. He also concluded that Respondent was misled by American Hoechst, which failed to notify Respondent "in a direct and specific way" that PAP is a hazardous material and subject to the HMR when transported in commerce. The law judge noted that American Hoechst packaged the PAP so that the hazardous materials warnings were obscured, and that American Hoechst should have provided the Material Safety Data Sheet to Respondent directly.

In the law judge's view, Morrison Express did not serve Respondent particularly well either. Morrison Express knew from the trucking bill that the boxes contained "chemicals liquid in bottles." Respondent's Exhibit 2. The law judge found that in light of Morrison Express's expertise regarding hazardous materials, Morrison Express should have inquired about the properties of those chemicals. He questioned whether Morrison Express employees paid so little attention to the shrink-wrapped boxes that they overlooked hazardous materials labels that were only partially obscured. The law judge regarded Morrison Express's lack of diligence to be a mitigating factor in determining the appropriate penalty.

The law judge regarded Respondent's refusal to handle requests for the purchase of chemicals as a reasonable way of ensuring that such a violation will not occur again. He considered this action to be a mitigating factor as well.

The only issue on appeal is whether the reduction of the civil penalty in this matter was appropriate.[14/] As explained below, the law judge's reduction of the civil penalty to $5000 is reversed because it is far too low relative to the seriousness of Respondent's numerous

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14/ Respondent did not appeal from the initial decision but did file a reply brief. Most of Respondent's reply brief, however, is devoted to Respondent's argument that no violation should have been found, and to other issues that also are not on appeal.

violations.[15/] At the same time, the goals of the HMTA do not require that the $35,000 civil penalty sought by Complainant be reinstated. A $15,000 civil penalty is assessed.

Section 110(a) of the Hazardous Materials Transportation Act, 49 U.S.C. App. § 1809(a), provided for a civil penalty up to $10,000[16/] for each violation of the HMR. Section 110(a) provided that in determining the appropriate penalty, the following factors should be considered:

> the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to

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15/ Respondent violated 14 regulations. Complainant asserts in its appeal brief that there were 30 separate HMR violations as follows: four shipping paper violations, one certification violation, 12 obscured marking violations (failure to mark shipping name and identification number), six obscured labeling violations, six quantity limitation violations, and one training violation. Complainant's Appeal Brief at 32, n. 5. As Complainant asserts, Respondent violated the marking, labeling and quantity limitation regulations with regard to each of the six boxes.

16/ Since the events giving rise to this case occurred, the agency's civil penalty authority in hazardous materials cases was increased. In 1990, the Hazardous Materials Transportation Uniform Safety Act was enacted, increasing the penalty for each civil violation of the HMTA from $10,000 to $25,000, and establishing a $250 minimum penalty for each violation. Hazardous Materials Transportation Uniform Safety Act, Pub. L. No. 101-615, § 12, 104 Stat. 3244, 3259 (1990). Congress indicated that these increases were designed "to further deter violations, in recognition of the fact that the maximum civil penalties have not been increased since the adoption of the HMTA in 1975." S. Rep. No. 449, 101st Cong., 2d Sess. 18-19, reprinted in 1990 U.S. Code Cong. & Ad. News 4595, 4612-4613.

> pay, effect on ability to continue to do business, and such other matters as justice may require.

49 U.S.C. App. § 1809(a).

Regarding the nature, extent, and gravity of the violation, the law judge was correct in finding that Respondent's omissions created a "real and serious potential for harm." Initial Decision at 30. If Flying Tigers had accepted the shipment and if the shipment had been damaged so that PAP was released, the consequences might have been very serious due to PAP's hazardous properties. Because the labels and markings were obscured and the shipping papers did not include the proper shipping name or certification, Flying Tigers had no idea about the hazardous nature of this shipment. Without this information, Flying Tigers was not on notice to take those precautions that are necessary and prudent when transporting flammable and corrosive liquids.[17/] Not only were there deficiencies regarding

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17/ When a shipment of a hazardous material is properly prepared, the captain receives documentation about where this material is loaded on board the aircraft. Consequently, if a need arises during the flight to remove that hazardous material from other freight or other hazardous materials, the captain knows where the hazardous cargo is located.

Also, if the hazardous material is not identified as such, it may be loaded in the middle of the aircraft. If the hazardous material is inaccessible during flight, then in the event of a spill or leak, it would be very difficult to contain or clean up the material. If an unidentified hazardous material was released accidentally, the carrier's

(Footnote 17 continued on next page.)

the shipping papers, markings and labeling, but each of the six packages contained six times more flammable liquid, corrosive, n.o.s., than permissible under the HMR.

The law judge regarded the fact that no PAP was actually released as a mitigating factor. However, this was inappropriate because it is simply fortuitous that the hazardous nature of the shipment was realized, that the shipment was rejected, and that no injuries or damage resulted.

Regarding Respondent's degree of culpability, the law judge correctly found that Respondent's actions were "inexplicably casual and insensitive to the welfare of [the] persons who would necessarily come in contact with a shipment of 36 quarts of chemical known by Respondent to be combustible and corrosive for human contact."[18/] Initial Decision at 30. Respondent knew that this was a flammable liquid, with

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(Footnote 17 continued from previous page.)

personnel would not know what precautions to take in cleaning up the spill, thereby possibly endangering the health and safety of those workers, as well as the safety of the flight itself. The carrier's employees also might not know what steps to take to clean up the released hazardous material.

18/ Respondent's vice president, Dr. Hwang, who had a Ph.D. in chemical physics, had reviewed the technical bulletin for the PAP before it arrived at Morrison Express. The technical bulletin warned that PAP should be kept away from heat, sparks, and flames, and that individuals coming in contact with it should avoid breathing mists and should wear chemical

(Footnote 18 continued on next page.)

a flash point of only 55° Fahrenheit. American Hoechst had informed Respondent that it only packs its products for domestic delivery, which is usually by truck. Nonetheless, Respondent failed to ask American Hoechst or Morrison Express whether anything had to be done to prepare this shipment for air transportation. Respondent made no arrangements to ensure that this shipment was prepared properly for air transportation, and neglected to even mention to Morrison Express that American Hoechst had declined to prepare the PAP for overseas air transportation.

Respondent's degree of culpability is diminished somewhat, however, by the negligence of American Hoechst, which introduced the PAP into the transportation network. American Hoechst, as the law judge noted, is in the business of manufacturing and selling chemicals, and it knew that PAP was a hazardous material subject to the HMR. Although American Hoechst had refused to prepare the PAP for air transportation, it did prepare the PAP for shipment by truck. The HMR pertaining to shipment by aircraft and by truck are

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(Footnote 18 continued from previous page.)

goggles, rubber gloves, and protective clothing. Complainant's Exhibit 8 at 3. It also included first aid measures in case of eye or skin contact or inhalation. Id. Dr. Hwang testified that he was not concerned with the safety of freight forwarder employees because they handle the containers of PAP. He was oblivious to the risks to which these workers would have been exposed if the PAP had been released during shipment.

substantially identical.[19/] Had American Hoechst packaged the PAP so that the labels and markings were visible, as required, a Morrison Express employee might have noticed the labels and markings and recognized the hazardous nature of the materials to be shipped. Then Morrison Express might have insisted that the PAP be prepared properly for shipment. The key point here is that despite its expertise, American Hoechst appears to have introduced the PAP into transportation packaged contrary to the HMR. While American Hoechst's negligence does not exonerate Respondent,[20/] it does diminish Respondent's degree of culpability, which is a factor to consider under 49 U.S.C. App. § 1809(a).

19/ In this regard, the law judge wrote, "I think that the question should have been raised and considered by the appropriate U.S. Department of Transportation officials as to whether American Hoechst violated its obligations in transporting the PAP in commerce by highway in this condition." Initial Decision at 31.

20/ American Hoechst's failures do not exonerate Respondent because Respondent was the offeror of the PAP for transportation by air. See Initial Decision at 19-21. The HMR prohibit the offering of hazardous materials for transportation in commerce unless those materials are properly classed, described, packaged, marked, and labeled. 49 C.F.R. § 171.2(a). Respondent cannot shift its responsibility under the HMR to the company from which it purchased the hazardous material. Cf. NL Industries v. DOT, 901 F.2d 141, 143-145 (D.C. Cir. 1990)(in which the court noted that the responsibility for transportation may rest with more than one person; the court also held that the manufacturer of hazardous materials was not relieved of its independent responsibilities under the HMR by the purchaser's contract with a freight forwarder to accept responsibility for forwarding the material by air.) Also, since Respondent knew that American Hoechst would not package the PAP for overseas shipment by air,

(Footnote 20 continued on next page.)

Complainant argues that it is inconsistent to find that American Hoechst's negligence does not exonerate Respondent but does serve as a mitigating factor. Complainant insists that the penalty should be assessed based upon Respondent's degree of responsibility alone. This argument is rejected. Quite simply, but for American Hoechst's failure to prepare the boxes for shipment properly despite its obvious knowledge of the existence of the HMR, many, if not all, of these violations would not have occurred. It would be illogical not to consider this when evaluating Respondent's degree of culpability. The $35,000 civil penalty sought by Complainant will be lowered by $15,000 to reflect the contribution of American Hoechst.

When American Hoechst shipped the PAP to Morrison Express's warehouse, the shipment of PAP was accompanied by a trucking bill describing the PAP as "chemicals liquids in bottles." It is unfortunate that no Morrison Express employee asked whether the chemical was a hazardous material based upon that description. Although Morrison Express might have been more diligent in this case, its failure to question whether the chemicals were hazardous materials does not reduce Respondent's degree of culpability. Unlike American Hoechst,

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(Footnote 20 continued from previous page.)

Respondent was obligated to investigate whether the PAP was properly packaged. Had Respondent done such an investigation, these violations may not have occurred.

Morrison Express itself did not introduce the PAP into the system without complying with the HMR, and the evidence suggesting that those six boxes contained a hazardous material was not especially strong.

Respondent's unfamiliarity with the HMR is also a factor to consider when determining Respondent's degree of culpability. The law judge appears to have taken Respondent's unfamiliarity with the HMR into account when he found that Respondent did not intend for this violation to occur.

Complainant argues that it was error for the law judge to find that Respondent's lack of intent was a mitigating factor. Complainant argues that had Respondent intentionally committed acts in violation of the HMR, then Respondent would have been subject to criminal penalties.

Section 110(b) of the HMTA, 49 U.S.C. App. § 1809(b), provides for criminal penalties for willful violations of the HMR.[21/] As explained in United States v. Allied Chemical,

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21/ At the time of this incident, Section 110(b) of the Hazardous Materials Transportation Act (HMTA) provided:

> Criminal. -- A person is guilty of an offense if he willfully violates a provision of this title or a regulation issued under this title. Upon conviction, such person shall be subject, for each offense, to a fine of not more than $25,000, imprisonment for a term not to exceed 5 years, or both.

49 U.S.C. App. § 1809(b).

"in applying the standard of intent under section 1809(b), it may be necessary to show a voluntary, intentional violation of a known legal duty." United States v. Allied Chemical, 431 F. Supp. 361, 369 (W.D.N.Y. 1977). In support of this conclusion, the court in Allied Chemical cited United States v. Bishop, 412 U.S. 346 (1973), in which the Supreme Court interpreted the word "willful" as used in a tax crime statute, 26 U.S.C. § 7206, pertaining to fraud and false statements. The Supreme Court in the latter case wrote that its "consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." Id. at 361. "Willful" was interpreted as including an element of bad purpose or evil motive. Id. at 360-361.

Thus, criminal penalties would be appropriate where a person was familiar with the HMR, realized that the act would be contrary to the HMR's requirements but decided to do that act anyway. In contrast, a person would be subject to a civil penalty if that person was unfamiliar with, or had a good faith misunderstanding of the HMR, because that person did not willfully violate the HMR. A person who is familiar with the HMR might negligently fail to follow the requirements of the HMR when shipping a hazardous material and then would be subject to a civil, rather than criminal penalty.

Accordingly, it was not improper for the law judge to consider Respondent's lack of familiarity with the HMR when determining what civil penalty to assess. Based upon Respondent's lack of familiarity with the HMR, the $35,000 civil penalty sought by Complainant will be reduced by an additional $5,000.

Complainant also challenges the law judge's finding that Respondent's history of no prior violations and inexperience with hazardous materials should be considered as a mitigating factor. Complainant argues that "[w]hile a person who regularly offers hazardous materials for transportation may be subject to an aggravated sanction for repeated failures to comply with the HMR, a first time offeror of hazardous materials should not benefit from a reduced sanction simply because of a lack of experience with hazardous materials." Complainant's Appeal Brief at 24. A person who offers hazardous materials for the first time and is unfamiliar with the HMR probably deserves more than a minimal sanction for violations of the HMR. However, that person deserves a lesser sanction than the person who regularly offers hazardous materials for transportation and is familiar with the regulations. Generally speaking, a violation-free history should be the norm and will not be considered as mitigating an otherwise reasonable civil penalty. Cf. In the Matter of Delta Air Lines, FAA Order No. 92-5 (January 15, 1992). While Respondent should be fined more than the token $5000 imposed

by the law judge, the $35,000 civil penalty sought by Complainant is perhaps too high in light of Respondent's degree of culpability, as previously discussed.

The law judge was persuaded that Respondent had taken reasonable action to ensure that in the future it would not be responsible for causing the transportation of hazardous materials by air. Respondent now has a policy not to handle contracts for the delivery or purchase of hazardous materials. It has revised the purchase order addendum to require vendors to indicate whether the item to be purchased is a hazardous material. Believing that it is the responsibility of the vendor to tell it whether the goods to be purchased are hazardous materials, Respondent has not sent any of its employees for hazardous materials training.

Although corrective actions are not specifically mentioned as a factor to consider in 49 U.S.C. § 1809(a), corrective action may be considered under appropriate circumstances under the category of "such other matters as justice may require." See NL Industries v. DOT, 901 F.2d at 145. Nonetheless, the law judge should not have reduced the civil penalty sought by Complainant based upon the actions taken by Respondent after the incident.

The type of corrective action that warrants a significant reduction in civil penalty is action to ensure that hazardous materials will be handled by this respondent in compliance with the HMR in the future. For example, if Respondent had

sent its employees to hazardous materials training, or had instituted a program to ensure proper shipping of hazardous materials, then Respondent might have been entitled to a reduction of its civil penalty.

A decision not to handle hazardous materials in the future does not represent the type of positive corrective action that would warrant consideration in determining the penalty. Such a company policy may be changed at any time. If a civil penalty is reduced for this reason, then the penalty may not deter that respondent and others from committing similar violations in the future.

Also, it may be wondered whether this new policy will accomplish its purpose. It is not clear from the record what Respondent does when a vendor informs Respondent that Respondent is purchasing a hazardous material. As an export-importer, Respondent purchases goods for third parties and ships those goods to those third parties. If a vendor informs Respondent that the items to be purchased are hazardous materials, would Respondent cancel its contract with the third-party? If not, then Respondent would have to arrange for proper preparation of the hazardous materials, and Respondent probably would still be responsible under the HMR for that shipment.

Finally, Respondent's repackaging of the boxes of PAP in accordance with the HMR after the shipment was rejected by Flying Tigers does not justify a reduction of sanction. Once

the shipment was rejected by Flying Tigers, Respondent had no choice but to find a way to comply with the HMR. Otherwise, Respondent would have defaulted on its contract with China International Trust and Investment Corporation.

Therefore, Complainant's appeal is granted in part, and denied in part. A $15,000 civil penalty is imposed. A $15,000 civil penalty reflects the seriousness of Respondent's violations of the HMR, as well as Respondent's unfamiliarity with the HMR and the negligence of American Hoechst. It is not appropriate to impose a penalty that is lower than $15,000 in light of Respondent's failure to investigate whether this hazardous material required special packaging. It is simply fortuitous that Flying Tigers discovered the hazardous nature of the contents of the boxes offered to it for shipment. A penalty that is any lower would not suffice to deter Respondent and others from acting with as little concern for the safe transportation of known hazardous materials as Respondent exhibited in this incident.[22/]

THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of December , 1992.

22/ 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).