

U.S. Department
of Transportation

United States
Coast Guard



COMMANDANT
U. S. Coast Guard

2100 Second Street, SW
Washington, DC 20593-0001
Staff Symbol: G-LMI
Phone: (202) 267-1527
FAX: (202) 267-4496

16616
September 24, 2001

[REDACTED]
[REDACTED],
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00000685
[REDACTED].
\$500.00

Dear [REDACTED]:

The Hearing Officer, Coast Guard Pacific Area, Alameda, California, has forwarded the file in Civil Penalty Case MV00000685, which includes your appeal on behalf of [REDACTED]. ([REDACTED]), as shipper of two containers of hazardous material ([REDACTED] and [REDACTED]) from the Peoples Republic of China (PRC). The appeal is from the action of the Hearing Officer in assessing a \$2,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
49 CFR 176.50	Transporting damaged or leaking packages of hazardous materials	\$2,000.00

The violation was observed on January 31, 2000, when Coast Guard personnel from Marine Safety Office, Portland, Oregon inspected containers [REDACTED] and [REDACTED] while they were at Terminal 6 in the Port of Portland, Oregon.

On appeal, you do not dispute that the containers were damaged. However, you assert that [REDACTED] is not the appropriate party responsible for the violation. You contend that "[REDACTED] is not subject to the Hazardous Material Regulations because it neither transported the fireworks at issue nor caused them to be transported in commerce." Instead, you assert that "[REDACTED]'s role was simply that of a logistics agent hired to coordinate the transportation arrangements for the shipment." You further contend that [REDACTED] cannot be subject to civil penalties because they could not "have actually known of any of the facts that are the basis of the alleged violations nor, since it did not employ the actual contractors, did [REDACTED] have any obligation to inspect their work." Your appeal is granted, in part, and denied, in part, for the reasons described below.

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As a preliminary matter, I note that the Hearing Officer incorrectly cited 49 CFR 176.50 rather than § 173.54(c) as the regulatory citation for the violation referenced above. However, as the correct nature of the violation was described throughout the civil penalty proceedings, [REDACTED] has been adequately appraised of the issues and the error was harmless. Furthermore, as you note, the correct cite was written in the Additional Information portion of the Marine Safety Information System description of the case.

You contend that the materials were initially transported by the Chinese feeder service from the manufacturer's premises in Foshan to Hong Kong Harbor, where they were then loaded onto a vessel operated by Hyundai and transported to Portland. [REDACTED] neither caused the fireworks to be transported in commerce, nor did it transport the fireworks because it had no means to do so as it does not operate any types of transportation assets. The Hazardous Materials Transportation Act (Act) defines "transports" or "transportation" as "the movement of property and loading, unloading, or storage incidental to the movement." You contend [REDACTED] did not provide any of these functions nor did it cause them to occur. You further contend "[REDACTED]'s position is supported by the case of NL Industries, Inc. v. Department of Transportation, 901 F.2d 141 (D.C. Circuit, 1990). At 901 F.2d 143, the court concluded

the question of the application of the statute to a particular person is to be approached functionally, based upon the activities in which that person engaged, without regard to whether it is a shipper or a carrier.

Your reliance on this case is misplaced. In NL Industries, the court concluded that it found no merit in NL's objections and dismissed its petition for review. Moreover, NL's role vis-à-vis the hazardous material was not analogous to [REDACTED]'s role in the instant case. In fact, I find the court's determination in the NL case supports the Hearing Officer's finding in MV00000685. NL was a manufacturer of chemical products located in Houston, Texas. Per an order NL received from the national oil company of Bolivia, Yacimientos Petroliferos Fascales Boliviano (YPFB), NL was to ensure proper domestic packaging for shipment via air charter to Bolivia. The material was to be shipped in the drums NL prepared. NL sent part of the order to J.V. Pack and the remainder to Flying Tiger Lines, an air cargo carrier serving Houston to Miami. NL also prepared a Shipper's Declaration for Dangerous Goods certifying that the shipment was "in all respects in proper condition for transport by air according to the applicable International and National Government Regulations." Flying Tiger inspected the cargo delivered to it and rejected it because it did not comply with applicable requirements for hazardous materials. Flying Tiger also notified the FAA, who sent an agent to inspect the drums. The agent found many violations of the marking, labeling, and packaging regulations. NL was ordered to pick up the cargo, re-package it, and then redeliver it to J.V. Pack. NL arranged for an air freight forwarder to properly mark and label the drums. As a result of its investigation, the FAA found NL in violation of 370 violations of the Hazardous Materials Regulations in connection with the shipment. NL conceded that the 79 drums did not comply with the regulations. However, NL argued that the statute applies only to shippers and carriers. NL contends it was neither the shipper nor the carrier of the drums; and therefore, the Hazardous Materials Transportation Act did not apply to it.

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However, in its decision, the court opined that “[t]he statute does not invite so restrictive a reading.” *Id.* at 142. As you noted, the court also stated that the statute defines “‘transports’ or ‘transportation’ broadly as “any movement of property by any mode, and any loading, unloading, or storage incidental thereto,” and “the application of the statute to a particular person is to be approached functionally, based upon the activities in which that person engaged, without regard to whether it is a shipper or a carrier.” The court further clarified its interpretation when, in responding to a dissenting colleague, it stated that “[t]he functional definition of the term ‘transports,’ however, assimilates to the concept of ‘cause’ not only the person that literally transports the chemicals, but also any person that engages in activities ‘ incidental thereto.’” Additionally, the court found that “the statutory definition of ‘transportation’ clearly contemplates that responsibility may rest with more than one person and nothing in the dictionary definition of ‘cause’ suggests that an event may not have more than one cause.” The court determined that 49 CFR 171.2(a) was consistent with this approach. Section 171.2(a) provides that “[n]o person may offer or accept hazardous material for transportation in commerce unless that material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter.” From this, the court opined that the statute “places responsibility with one who transports hazardous materials or causes them to be transported, regardless of whether that person is a shipper or a carrier in either ordinary language or legal discourse relating to common carriers.” However, the court also recognized that “the statute does not impose upon every person with a ‘but for’ causal relationship to the transportation of hazardous materials a continuing obligation to monitor the materials after they have left that person’s control.” A manufacturer of hazardous materials may not always be aware of the mode of transportation by which the material will be shipped, nor will it necessarily be in a position to control the condition of their packaging and labeling. Nonetheless, the court determined that when a party, such as NL, effectively caused the material of hazardous material to be transported, it engaged in conduct within the scope of the statute and regulations. Simply put, NL performed physical acts regulated by the statute.

In the instant case, I am not persuaded that [REDACTED] was merely “a logistics agent hired to coordinate the transportation arrangements for shipment.” On June 29, 2000, Mr. [REDACTED] responded, on behalf of [REDACTED], to the Hearing Officer’s final decision. While Mr. [REDACTED] asserts [REDACTED] is not the party responsible for the violations, he acknowledges that their “Hong Kong office filled in the Dangerous Goods Declaration.” He contends it did so merely “on instructions from the shipper in order to ensure timely presentation to the carrier, Hyundai Merchant Marine.” The Declaration clearly identifies the shipper and consignee as [REDACTED]. Moreover, by signing the Dangerous Goods Declaration, [REDACTED] declared *it was offering* the material for shipment and *certifying* that it was properly packaged, marked, labeled, and in proper condition for transport according to the applicable international and national government regulations. If [REDACTED] did not inspect the containers, or have a surveyor inspect them, or have any role in overseeing the packing of the containers, it should not have signed the Declaration. However, having signed the document, [REDACTED] is responsible for having performed physical acts regulated by the statute and cannot now evade responsibility for their actions. Although [REDACTED] may not have physically prepared the containers for shipment, I believe [REDACTED] was, nevertheless, more than merely the “logistics” coordinator for the shipment. Simply put, having offered the containers for shipment and certifying that the shipment was in compliance with applicable

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regulations, [REDACTED] is the appropriate party responsible for the fact that the containers were not in the condition in which they were certified to be. Finally, you contend that the Chinese Customs officials cut the cartons prior to their inspection and left them unsealed. Our records show, however, that when these containers were inspected in Portland, Oregon the original seal remained intact.

Finally, you contend that [REDACTED] neither knew nor should have known of the facts giving rise to the violation in issue. You contend that the Hazardous Materials Transportation Act “provides that a person is only subject to civil penalties if he has ‘knowingly’ violated the Act or regulations thereunder.” You contend that [REDACTED] did not have “actual knowledge of the facts giving rise to any of the violations alleged, nor would a reasonable person in [REDACTED]’s position exercising reasonable care have that knowledge.” Your analysis of the statute is flawed. 49 USC 5123(a)(1) makes clear that a person acts “knowingly when—(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.” As has been discussed above, [REDACTED] certified, in signing the Dangerous Goods Declaration, that the material was properly packaged, marked, labeled, and in proper condition for transport according to the application of international and governmental regulations. In so doing, [REDACTED] assumed responsibility for the condition of the containers. You contend that Chinese Customs officials are responsible for the damage to the containers and assert that “[n]o reasonable person in the circumstances could have anticipated that the Chinese Customs officials were cutting open packages of hazardous materials and leaving the cuts unrepaired following their inspection of the containers.” You conclude, that “it . . . would be unfair and unreasonable to assess a civil penalty in these circumstances, particularly against [REDACTED], which had absolutely no role in these events.” While I have no reason to doubt your assertion regarding the Chinese officials, I cannot conclude that their actions eliminated [REDACTED]’s responsibility for the goods. Under the facts of this case, [REDACTED] should have either themselves, or through an inspector, ensured that the hazardous materials remained in the condition that they declared them to be in. Their failure to do so constitutes a knowing violation of the Acts dictates vis-à-vis the definition of knowledge contained in 49 USC 5123(a)(1)(B).

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and that [REDACTED] is the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. Under the circumstances of this case, however, I find a penalty of \$500.00 rather than the \$2000.00 assessed by the Hearing Officer to be appropriate.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$500.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 100160
Atlanta, GA 30384

RE: MV000000685

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Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

//S//

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commander, U.S. Coast Guard Pacific Hearing Office
Commander, Finance Center
Commanding Officer, MSO Portland, OR