

CONTROLLED SUBSTANCES - FAILURE TO MANIFEST - 19 U.S.C. 1584

I. FAILURE TO MANIFEST ILLEGAL DRUGS - STATUTORY LIABILITY UNDER 19 U.S.C. 1584(a)(2)

- A. Pursuant to 19 U.S.C. 1584(a)(2), as amended, as implemented by 19 C.F.R. 162.65(b), the master, person in charge, or owner of a vessel, vehicle, or aircraft, any person directly or indirectly responsible for the failure to manifest *heroin, morphine, cocaine, isonipecaine, or opiate* is liable for a penalty of \$1,000 per ounce. Such party is also liable for a penalty of \$500 per ounce for unmanifested *smoking opium, opium prepared for smoking, or marijuana*, and \$200 per ounce for *crude opium*.
- B. 19 U.S.C. 1584 has been in effect since 1930. However, pursuant to The Anti-Drug Abuse Act of 1986, Congress amended subsection (a)(2) by increasing the drug manifesting penalties 2000% (penalties increased from \$25 to \$500 per ounce of marijuana and \$50 to \$1,000 per ounce of cocaine). For example:
1. Customs seizes 100 pounds of cocaine that carrier failed to manifest. Assess penalty for \$1,600,000 (100 pounds x 16 ounces for each pound x \$1,000 per each ounce of cocaine).
 2. Customs seizes 100 pounds of marijuana that carrier failed to manifest. Assess penalty for \$800,000 (100 pounds x 16 ounces for each pound x \$500 per each ounce of marijuana).
- C. Customs is not required to issue a prepenalty notice. (See, 19 C.F.R. 162.65(c); ARCA Airlines, LTDA v. United States, et al., 726 F. Supp. 827 (S.D. Fla. 1989); aff'd., 945 F.2d 413 (11th Cir. 1991). See also, 19 U.S.C. 1584(b)(1).
- D. A written penalty notice and demand for payment of the penalty for a 19 U.S.C. 1584(a)(2) violation is issued to one of the following parties: the master of the vessel, commander of the aircraft, person in charge of the vehicle; the owner of the vessel, aircraft, or vehicle; or any person directly or indirectly responsible. In the case of a vessel, if an international carrier's bond has been given, also send the notice to the surety. 19 C.F.R. 162.65(c).
- E. If the vessel, vehicle, or aircraft was being operated as a *common carrier*, there is a violation if there was either *knowledge* that narcotic drugs were on board or a *failure to exercise the highest degree of care and diligence* in preventing drugs from being placed on board.

1. Knowledge: In order to find knowledge, Customs must have evidence the master, person in charge, owner, or any person directly or indirectly responsible *knew* that narcotic drugs were on board. For example:
 - a. Customs finds 1,755 pounds of cocaine on a vessel by discovering a manhole cover underneath a freshly painted, false plaster floor. The manhole cover leads to a water tank containing the cocaine. Customs investigative records show that the owner had participated in concealing and loading the cocaine onto the vessel. Thus, the knowledge requirement is met and a violation has occurred. Customs should issue a penalty in the amount of \$28,080,000.
 - b. Customs discovers 500 pounds of marijuana inside an unmanifested box in the cargo belly of an aircraft. Although the owner of the aircraft didn't participate in the drug smuggling incident himself, Customs has sufficient evidence that the owner knew that crewmembers were involved and failed to intervene. Again, the knowledge requirement is met and a violation has occurred. Customs should issue a penalty in the amount of \$4,000,000.
2. Highest Degree of Care and Diligence: if Customs does not find knowledge, then the master, person in charge, owner, or any person directly or indirectly responsible must demonstrate that it could not, by the exercise of the *highest degree of care and diligence*, have known, that narcotic drugs were on board.
 - a. There is no statutory or regulatory definition of *the highest degree of care and diligence*. There is little case law on the subject, other than general guidance such as "[i]f the owner would escape a fine, he must prove that he left *no stone unturned* to prevent the carrying of opium." (*Emphasis added.*) See, Lancashire Shipping Co., Limited, v. United States, 17 F. Supp. 573 (S.D.N.Y. 1936).
 - b. Customs has administratively developed standards on a case-by-case basis. Customs will review the totality of the facts and circumstances of each case, looking for evidence that a carrier took affirmative measures to discover narcotics on board its vessel, vehicle, or aircraft. (See, ARCA Airlines, LTDA v. United States, et al., supra.)
 - c. The Carrier Initiative Program Agreements and the managers of the Carrier Initiative Programs in the Anti-Smuggling Division,

Office of Field Operations at Headquarters provide guidance on the security measures carriers should take. Also review 19 C.F.R. 123.72 for particular guidance regarding land border situations.

3. Example of carrier exercising the highest degree of care and diligence:

- a. An air carrier has followed all mandatory and recommended security measures as set forth in the Air Carrier Initiative Program Agreement. However, a drug smuggler invents a novel and sophisticated approach to container seal tampering. Since the carrier has no prior experience with this new smuggling method, its standard operating procedures do not address it. In this instance, Customs will find that the carrier exercised the highest degree of care and diligence. Customs therefore will not issue a penalty, with the caveat that the carrier should refine its standard operating procedures to address this new threat.

NOTE: If Customs seizes drugs from the same air carrier in a second incident involving the same type of container seal tampering, a penalty should be issued since Customs gave the carrier prior notice that it should reexamine its standard operating procedures in this regard.

4. Examples of a carrier's failure to exercise the highest degree of care and diligence:

- a. Customs examines an unsealed refrigerator container on a sea vessel. The carrier has manifested the container as empty, when in fact, it contains 1,576 pounds of cocaine. The cocaine is packaged in metal boxes of different sizes and concealed beneath the container floor. Access to the narcotics is available through a hole cut into the floor. The hole is clearly visible since no attempt was made to cover it. In this scenario, the carrier clearly did not exercise the highest degree of care and diligence for several reasons: 1) a carrier should inspect the interior of all empty containers prior to being loaded onto a vessel since they are highly susceptible to drug smuggling; 2) the hole in the floor is clearly visible and could have been easily detected by a visual inspection; and 3) there is no container seal. Customs should issue a penalty in the amount of \$25,216,000.
- b. While inspecting baggage on a bus arriving from Mexico, Customs discovers an unclaimed suitcase without a baggage tag affixed to it. The suitcase contains 75 pounds of marijuana. By failing to have in

place adequate baggage handling and tag control procedures, the bus carrier failed to exercise the highest degree of care and diligence. Customs should issue a penalty in the amount of \$600,000.

F. Strict liability and non-common carriers:

If Customs finds unmanifested drugs on board or inside the merchandise of a vessel, vehicle, or aircraft being operated as a *non-common carrier*, then the master, person in charge, owner, or any person directly or indirectly responsible is strictly liable for the violation (i.e., no need to perform the “knowledge/highest degree of care and diligence” analysis – proceed with issuing the penalty.)

G. What is a common carrier?

1. The initial determination of whether a vessel, vehicle, or aircraft is a common carrier depends upon the nature and character of the trade engaged in by the owner.
2. The salient characteristic of a common carrier is that “[h]e must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally....[and] undertakes for all persons indifferently.” *U.S. v. One (1) Liberian Refrigerator Vessel*, 447 F. Supp. 1053 (M.D. Fla. 1977) (*quoting, United States v. Stephen Brothers Line*, 384 F.2d 118 (5th Cir. 1967)).
3. The general rule is, if a vessel, vehicle, or aircraft is being used to transport cargo or passengers for the public at large (e.g., dozens or hundreds of shipments of a wide variety of cargo), it is being operated as a common carrier and the “knowledge/highest degree of care and diligence” analysis described above should be used. However, if the carrier is transporting goods for private carriage only (e.g., time charterer or wet lease), then it is considered a non-common carrier and strict liability applies.
4. The rationale for this distinction is that courts have reasoned it is easier for a carrier engaged in private carriage to control the security of its conveyance and cargo than it is for a carrier engaged in public carriage.
5. The carrier has the burden of proving common carrier status. Customs, however, may confer common carrier status on a carrier based on its own analysis of an individual case.

- H. Examples of non-common carrier and strict liability:
1. Customs discovers 150 pounds of unmanifested cocaine inside plastic trash bags on a sea vessel that arrived at Miami Customs Port. The evidence shows that at the time of arrival, the vessel was being operated under a time-charter agreement, i.e., a private contract between two parties. The vessel master does not provide any evidence that the vessel was arriving in the U.S. to transport cargo for the public at large. Thus, the carrier is strictly liable for the penalty since it was not operating as a common carrier at the time of the incident.
 2. A freight truck arrives in the United States from Mexico. Customs inspectors inspect the truck and find a few boxes that are of a different color and shape than most of the cargo. At this point, the Customs inspectors bring in a narcotic detector dog to examine the cargo. The dog alerts to the different-shaped boxes. Upon further inspection of the different-shaped boxes, the inspectors discover wrapped packages containing a total of 458 pounds of marijuana. Since the truck was being used to haul cargo only for the company that owned the truck, and was not transporting goods for persons generally, it is not a common carrier. Therefore, the carrier is strictly liable for the penalty. Customs should issue a penalty in the amount of \$3,664,000.
- I. Section 584(a)(2) penalties constitute a lien upon a vessel, vehicle, or aircraft which may be enforced by a libel in rem *except* that the master or owner of a vessel, vehicle, or aircraft used by any person as a *common carrier* is not subject to the lien if Customs does not find either knowledge or the failure to exercise the highest degree of care.
- J. Clearance of any vessel, vehicle, or aircraft may be withheld until section 584 drug penalties are paid or until a bond, satisfactory to the Customs Service, is given for the payment thereof. 19 U.S.C. 1584(a)(2); 19 C.F.R. 162.65(e).
- K. The statute of limitations is five years and begins to run on the date of the violation (i.e., date of drug seizure). 19 U.S.C. 1621.

II. FP&F OFFICER'S AUTHORITY

- A. All 19 U.S.C. 1584(a)(2) failure to manifest narcotic drug cases involving claims of \$100,000 or less (except as noted in B. below).
- B. Exception: Refer all 19 U.S.C. 1584(a)(2) petitions involving members of the Air or Sea Super Carrier Programs to the Penalties Branch, Office of

Regulations & Rulings at Headquarters for decision.

NOTE: Refer all *narcotic drug seizures* involving Air or Sea Super Carriers to the appropriate program manager in the Anti-Smuggling Division, Office of Field Operations at Headquarters for approval to issue a penalty. (See, subsection IV., A., *infra*).

III. PETITIONS FOR RELIEF

- A. Follow the usual petitioning procedures as set forth in 19 C.F.R., Part 171.
- B. Exception: Penalty Offset Program (See, subsection VI., *infra*).

IV. SPECIAL PROCEDURES FOR CARRIERS PARTICIPATING IN CUSTOMS INDUSTRY PARTNERSHIP PROGRAMS (IPP)

- A. Cases involving members of the Air Super Carrier Initiative Program (Air SCIP) and the Sea Super Carrier Initiative Program (Sea SCIP), upon referral to the appropriate Program Manager in the Anti-Smuggling Division of the Office of Field Operations (as noted in subsection II. B. above), will be reviewed by the National Accounts Board (NAB; also known as National Accounts Review Board) and then referred to the Executive Oversight Committee (EOC).

NOTE: Cases involving Air and Sea carriers that are not formally designated as “Super Carriers” by the Anti-Smuggling Division are not eligible for National Accounts review.

- 1. The EOC and NAB are the established authorities to, among other things, review, determine assessment, and mitigate National Accounts cases.
- 2. The NAB will periodically review National Accounts cases to determine if individual cases involving a Super Carrier should be assessed and make such recommendations to the EOC.
- 3. For those cases that will be assessed with the final approval of the EOC, the following formula will be used:

Total Incidents = Assists + Foreign Intercepts + Culpable Incidents.

The resulting number will constitute the Performance Standard by which the assessment will be determined. Example:

Statutory Liability = \$1,000,000.00
Performance Standard = 75.5%
Penalty assessment will = 24.5%
Actual penalty amount = \$245,000.00

- B. Penalties involving members of Air CIP and Sea CIP that are *not* members of the SCIP, and penalties involving members of the LBCIP or Rail CIP will be either assessed or mitigated as follows:
1. Penalties that represent the first culpable incident of 19 U.S.C. 1584(a)(2) within a two-year period for a member of either the Air CIP or Sea CIP will be assessed at no more than 50% of the statutory amount in accordance with the Air Carrier Initiative Agreement and Sea Carrier Initiative Agreement, respectively.
 2. Penalties that represent the second or more culpable incident of 19 U.S.C. 1584(a)(2) within a two-year period for a member of either the Air CIP and Sea CIP will be assessed at the full statutory amount in accordance with the Air Carrier Initiative Agreement and Sea Carrier Initiative Agreement, respectively.
 3. Penalties that represent the first culpable incident of 19 U.S.C. 1584(a)(2) within a two-year period for a member of the LBCIP and Rail CIP will be preliminarily mitigated (before a Penalty Notice is issued) to no more than 50% of the statutory amount in accordance with the Land Border Carrier Initiative Agreement and Rail Carrier Initiative Agreement, respectively.
 4. Penalties that represent the second or more culpable incident of 19 U.S.C. 1584(a)(2) within a two-year period for a member of the LBCIP and Rail CIP will be assessed at the full statutory amount in accordance with the Land Border Carrier Initiative Agreement and Rail Carrier Initiative Agreement, respectively.
 5. If at least two years have elapsed since the last culpable incident for either an Air CIP, Sea CIP, LBCIP, or Rail CIP member, the next culpable incident will be considered the first for the purposes of determining penalty assessment under this subsection.
- C. Mitigation of 19 U.S.C. 1584(a)(2) penalties is to be done in accordance with the guidelines as delineated in the subsection entitled, "PENALTY MITIGATION."

V. PENALTY MITIGATION

- A. If there is sufficient evidence that any carrier had *knowledge* of the narcotics being smuggled onboard the conveyance or inside the cargo, then no mitigation is allowed.
- B. If a common carrier lacked knowledge of the smuggled narcotics, *but failed to exercise the highest degree of care and diligence*, or a non-common carrier is found strictly liable, then the following mitigation guidelines apply:
1. Negligence: mitigate to 10-25% of assessed penalty;
 2. Gross Negligence: mitigate to 25-50% of assessed penalty.
- C. The actual mitigation amount within the above ranges depends upon the presence of mitigating and aggravating factors. Please note that the following are not exhaustive lists; other factors may be considered.
1. Mitigating Factors: 1st violation within a two-year period; immediately undertakes a thorough post-seizure analysis and implements remedial measures; active member in one of the Industry Partnership Programs; proven record of security practices and procedures; history of extraordinary cooperation with Customs.
 2. Aggravating Factors: numerous violations; delayed or incomplete post-seizure analysis and fails to implement remedial measures; non-member or inactive member in one of the Industry Partnership Programs; lacks basic security practices and procedures; history of non-cooperation with Customs.
- D. **NOTE:** if a common carrier lacks knowledge and exercised the highest degree of care and diligence, then there is no penalty liability (see subsection I., E., 2. and 3., *supra*).

VI. PENALTY OFFSETS

- A. Subsequent to an initial petition penalty decision letter issued by either the port or Headquarters, any carrier (including both members and non-members of the Industry Partnership Programs) is eligible to participate in Customs "Penalty Offset Program." In effect, a carrier may receive monetary credit towards its penalty liability or recoup some or all of the penalty already paid to Customs when it purchases and installs what Customs believes to be "extraordinary security equipment."

- B. The amount of the penalty offset (or refund) is equal to the cost of the security equipment (“dollar-for-dollar” match), plus 10% of that cost for administrative overhead.
- C. Examples of “extraordinary security equipment” include: remote cameras, X-ray equipment, closed-circuit television (CCTV), etc.
- D. The policy behind the penalty offset program is that Customs prefers to *prevent* drug smuggling instead of making seizures and issuing penalties.
- E. Advise carrier to submit a “Request for Penalty Offsets.” Forward the request to the appropriate program manager in the Anti-Smuggling Division, Office of Field Operations at Headquarters for decision.
- F. The appropriate program manager will issue a penalty offset decision, either approving or denying (in whole or in part) the offset request. The program manager will then send a copy of the decision to the originating FP&F Officer, who in turn should forward a copy to the carrier.
- G. Refer to “Industry Partnership Handbook” to be published by the Anti-Smuggling Division, Office of Field Operations, for further details of the penalty offset program.