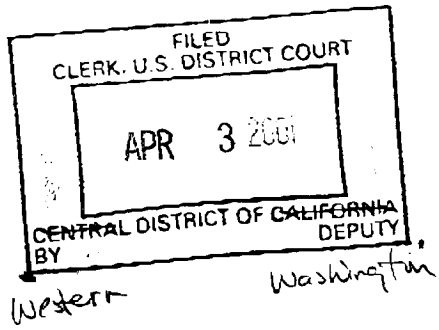
CHIEF JUDGE JOHN C. COUGHENOUR



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, vs. AHMED RESSAM, Defendant.	NO. CR 99-666 C MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT 7

NOW COMES the defendant, Ahmed Ressam, by undersigned counsel, and asks this Court to consider the following memorandum of law in support of his motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(a).

FACTS

Count 7 of the Second Superseding Indictment alleges:

(Transportation of Explosives)

On or about December 14, 1999, at Port Angeles, in the Western District of Washington, AHMED RESSAM and ABDELMAJID DAHOUMANE, not being licensees or permittees under the provisions of Chapter 40 of Title 18 of the United States Code, knowingly transported and shipped, and caused to be transported and shipped, in interstate and foreign commerce, from Canada into the United States, explosive materials, that is, hexamethylene triperoxide diamine, cyclotrimethylene trinitramine, and a nitroglycerine equivalent identified as ethylene glycol dinitrate.

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All in violation of Title 18, United States Code, Sections 842(a)(3)(A); 844(a); and 2.

ARGUMENT

The defendant's Motion for Judgement of Acquittal on Count 7 must be granted because Mr. Ressam's conduct fits within 18 U.S.C. § 845, a statutory exception to the charged offense. In United States v. Petrykievicz, 809 F. Supp. 794 (W.D. Wash. 1992),[1] the Court, relying on United States v. Illingworth, 489 F.2d 264 (10th Cir. 1973), held that the 18 U.S. C. § 845 exception to 18 U.S.C. §§ 842(a)(3)(A) and 844(a) is applicable when the Department of Transportation regulates explosive materials. 809 F. Supp. at 799. The Department of Transportation regulates the three explosive materials carried by Mr. Ressam on the ferry vessel. Accordingly, the government cannot convict Mr. Ressam of 18 U.S.C. §§ 842(a)(3)(A) and 844(a) and Mr. Ressam must be acquitted of the violations alleged in Count 7.

Chapter 40 of Title 18 of the United States Code contains statutes regulating the importation, manufacture, distribution, and storage of explosive materials. Chapter 40 consists of sections 841 through 848 of Title 18. Sections 842(a)(3)(A) and 844(a) of Title 18, the violations alleged in Count 7 of the indictment, proscribe the transportation of explosives in interstate or foreign commerce. Congress, however, also created an exception to the application of those sections of Chapter 40. Title 18 U.S.C., § 845, entitled "Exceptions; relief from disabilities," provides, in pertinent part:

> (a) Except in the case of subsections (*l*), (m), (n), or (*o*) of § 842 and subsections (d), (e), (f), (g),(h), (i), of section 844 of this title, this chapter [i.e., Chapter 40] shall not apply to:
>
> (1) any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety;

18 U.S.C. § 845(a)(1) (emphasis added). In enacting this exception, Congress intended that certain provisions of Chapter 40, including §§ 842(a)(3)(A), and 844(a), would not be applicable

[1] For the Court's convenience, a copy of United States v. Petrykievicz, 809 F. Supp. 794 (W.D. Wash. 1992), is appended hereto as Attachment A.

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to aspects of the transportation of explosive materials regulated by the Department of Transportation. H. Rep. No. 91-1549, 91st Cong., 2d Sess. 2 (1970), reprinted in 1970 U.S. Code Cong. and Admin. News 4047.

Thus, under § 845(a)(1), a person cannot be convicted of a violation of Chapter 40 for conduct which is regulated by the Department of Transportation, unless the charge falls within the enumerated sub-sections for which prosecution is still permitted. The conduct which forms the basis of the charge and evidence in Count 7 of the indictment against Mr. Ressam, the transportation of the listed chemicals, is regulated by the Department of Transportation. See, e.g., 49 C.F.R. § 172.101 (1999).[2] The Department of Transportation regulates many aspects of the transportation in interstate and foreign commerce of the explosives allegedly transported by Mr. Ressam.[3] Therefore, his conduct falls within the exception to Chapter 40 violations created

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[2] A copy of the relevant pages of the table in 49 C.F.R. § 172.101 (1999) that reflect the Department of Transportation's regulation of these materials is annexed hereto as Attachment B.

[3] Among the many regulations promulgated by the Department of Transportation that would apply to Mr. Ressam's conduct are the following:

> 49 C.F.R. §172.1 lists and classifies those materials which the Department of Transportation has designated as hazardous materials for purposes of transportation and prescribes the requirements for shipping papers, package marking, labeling, and transport vehicle placarding. See, Attachment C.
>
> 49 C.F.R.§172.101 is the Hazardous Materials Table (Table) that lists Hexamethylene Triperoxide Diamine, Ethylene Glycol Dinitrate, and Cyclotrimethylene Trinitramine as regulated materials. See, Attachment B.
>
> 49 C.F.R. §176.1 prescribes additional requirements with respect to the transportation of hazardous materials by vessel. See, Attachment D.
>
> 49 C.F.R. §176.3(b) states that a carrier may not transport by vessel any explosive or explosive composition described as forbidden for transportation by the Department of Transportation. See, Attachment E.
>
> 49 C.F.R. §176.88 states that regulations apply to vehicles containing hazardous materials being transported on board ferry vessels. See, Attachment F.

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by Congress in § 845(a)(1), and Count 7 of the indictment must be dismissed.

In United States v. Petrykievicz, Judge Zilly granted the defendant's motion for judgment of acquittal of a count charging the identical offense charged in Count 7 of the indictment against Mr. Ressam, i.e., §§ 842(a)(3)(A), and 844(a), based on precisely the same argument raised herein. To that point, the only circuit court that had analyzed this issue was United States v. Illingworth, 489 F.2d 264 (10th Cir. 1973),[4] which had reached the same result.

Like Mr. Ressam, the defendant in Petrykeivicz was charged with knowingly transporting and shipping and causing to be transported and shipped in foreign commerce an explosive material. On a commercial flight from London, England to Seattle, Washington, Mr. Petrykeivicz carried a safety fuse and approximately one pound of explosive materials, pentaerythritol tetranitrate (PETN), in his luggage. 809 F.Supp. at 795. Applying §845's exception, Judge Zilly dismissed the counts against Mr. Petrykievicz alleging criminal violations under U.S.C. §§ 842(a)(3)(A) and 844(a). The Court stated that "[i]t is undisputed that the Department of Transportation regulates some aspects of the transportation of explosive materials, including PETN and safety fuses." Id. at 796. The Court reasoned that because some aspects of the transportation of explosives are regulated by the Department of Transportation, the exception of §845 applies to all aspects of the transportation of explosive materials. Id. Although the Court concluded that §845 is ambiguous, the Court applied the rule of lenity in the construction of the statute and concluded that the Department of Transportation's regulation of the explosive materials made the exception applicable. Id. at 799.

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49 C.F.R §176.90 prohibits a private automobile which is carrying any Class 1 (explosive) material from being transported on a passenger-carrying ferry vessel unless the Class 1 (explosive) material is in compliance with the Department of Transportation's packaging, labeling, marking, and certification requirements. See, Attachment G.

[4] For the Court's convenience, a copy of United States v. Illingworth, 489 F.2d 264 (10th Cir. 1973), is appended hereto as Attachment H.

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In Illingworth, the Tenth Circuit applied §845's exception to a prosecution commenced under the same statute involved here, 18 U.S.C. §842 (a)(3). The defendant in Illingworth was charged with transporting dynamite in interstate commerce. The Tenth Circuit held that §845's exception prohibited the defendant's conviction under §842(a)(3)(A) because the transportation of dynamite – like the transportation of ethylene glycol dinitrate, hexamethylene triperoxide diamine, and cyclotrimethylene trinitramine – is regulated by the Department of Transportation. Illingworth, 489 F.2d at 265-66. In reaching its decision the Illingworth Court tracked the various statutory and regulatory provisions providing the Department of Transportation with the authority to regulate the transportation of certain explosives. Thus, the Court concluded that:

> [t]here is no ambiguity in the statutory exception; nor is there any question of the existence of alternative statutes open to the prosecution in this case by reason of the explicit exception in 18 U.S.C. §845(a)(1) to Section 842's application. Congress has provided this exception to permit regulation by appropriate authorities and they have done so.

Illingworth, 489 F.2d at 266. Because § 845's "exception refers to materials which are regulated by the Department, Illingworth, 489 F.2d at 265 (emphasis in original), Mr. Illingworth could not be convicted under § 842(a)(3). Just as the dynamite that Mr. Illingworth carried on an airplane fell within § 845's exception, so too does the ethylene glycol dinitrate, hexamethylene triperoxide diamine, and cyclotrimethylene trinitramine allegedly carried by Mr. Ressam.

Subsequently, the Ninth Circuit has implicitly approved the reasoning of Illingworth and Petrykievicz, although declining to apply the exception to the facts before it. United States v. Fiorillo, 186 F.3d 1136, 1153 (9th Cir. 1999). In Fiorillo, the defendant was receiving explosives without a license. The § 845(a)(1) exception did not apply because that exception "by its own terms only applies to the transportation of explosives, not the receipt of explosives." Id. On this basis, the Ninth Circuit distinguished Illingworth and Petrykievicz, which did relate to transportation, id. at 1153 n. 29; this same distinction applies to Mr. Ressam. Whereas the defendant in Fiorillo "interpret[ed] the exception too broadly," id. at 1153, Mr. Ressam comes squarely within its terms, as construed by the Ninth Circuit.

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The Secretary of Transportation has been specifically empowered to designate materials as hazardous and to prescribe rules and regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce. 49 U.S.C. §5103. In accordance with this power, the Secretary of Transportation has designated a number of "hazardous materials," including explosives, which are regulated or forbidden from transportation on vessels. 49 C.F.R §172.101; 49 C.F.R. §176.3(b). The Code of Federal Regulations includes a table designating these regulated materials. 49 C.F.R §172.101. Hexamethylene triperoxide diamine, cyclotrimethylene trinitramine, and ethylene glycol dinitrate are among the list of hazardous materials regulated by the Department of Transportation. Id.

The regulations provide that hexamethylene triperoxide diamine and ethylene glycol dinitrate are absolutely forbidden from transportation on vessels. 49 C.F.R. §176.3(b). The regulations classify cyclotrimthylene trinitramine as a Division 1.1 explosive with a mass explosion hazard. §172.101; see generally Illingworth, 489 F.2d at 265 (noting that §845's exception applies to aspects of the transportation of explosives that "are regulated by the Department,"and not just to the explosives that are prohibited.) As the Court in Illingworth explained, Congress enacted § 845's exception to permit regulation of the transportation of explosives by the appropriate authorities; namely, the Department of Transportation. As in Illingworth, the Department has done what Congress envisioned by regulating the transportation of the explosives carried by Mr. Ressam.

On the facts of this case, the government can and did charge criminal violations for the illegal carrying, using and possessing of explosives. Count 2 of the Second Superseding Indictment charges Mr. Ressam with placing an explosive in close proximity to a terminal. Count 6 of the Indictment charges Mr. Ressam with smuggling explosives into the United States. Count 8 of the Indictment charges Mr. Ressam with possession of an unregistered destructive device. Moreover, Congress has provided criminal penalties for bringing explosives or dangerous weapons aboard vessels, but the government has chosen not to file under that specific

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statute. See Title 18 U.S.C. §2277 (making it a crime for a person to bring, carry, or possess an explosive article or compound on board any vessel registered under the laws of the United States).[5] The offense alleged in Count 7 of the indictment is one specifically excepted from application in this case by §845(a)(1).

Though alternative statutes existed for the prosecution in this case, Count 7 must be dismissed because Mr. Ressam's conduct falls within the § 845 exception to the offense charged. The transportation of these materials is an aspect of transportation regulated by the Department of Transportation. Accordingly, Mr. Ressam may not be convicted of violating § 842(a)(3)(A). The Court is therefore requested to enter a judgment of acquittal as to Count 7 of the Second Superseding Indictment.

DATED this 3rd day of April, 2001.

Respectfully submitted,

Thomas W. Hillier, II
Federal Public Defender
Attorney for Ahmed Ressam

Michael Filipovic
Assistant Federal Public Defender
Attorney for Ahmed Ressam

Jo Ann Oliver
Assistant Federal Public Defender
Attorney for Ahmed Ressam

[5] The § 845 exception also did not prohibit government from prosecuting under 18 U.S.C. § 844(d), which makes it a crime to transport explosives under circumstances similar to those alleged in Count 1, but without the requirement that the conduct transcend national boundaries.

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United States District Court,
W.D. Washington,
at Seattle.

UNITED STATES of America, Plaintiff,
v.
Oliver Stefan PETRYKIEVICZ, Defendant.

No. CR92-290Z.

Dec. 14, 1992.

Defendant charged with knowingly transporting and shipping an explosive material in foreign commerce, importing that explosive material into the United States, and making false statement to customs inspectors moved for judgment of acquittal on the first two counts. The District Court, Zilly, J., held that defendant's case fell within statutory exception for aspects of transportation of explosive materials via air that were regulated by United States Department of Transportation (DOT).

Motion granted.

West Headnotes

[1] Statutes ⚷212.7
361k212.7
(Formerly 361k212)

There is strong presumption that Congress expresses its intent through the language it uses in statute.

[2] Statutes ⚷217.4
361k217.4

When statutory language is clear, courts should consider legislative history only to determine whether there is clearly expressed legislative history to the contrary.

[3] Explosives ⚷4
164k4

Defendant found in possession of safety fuse and approximately one pound of explosive materials containing pentaerythritol tetranitrate (PETN) after having arrived in United States from England could not be charged with knowingly transporting and shipping explosive material in foreign commerce and importing that explosive material into the United States; defendant's conduct fell within statutory exception for aspects of transportation of explosive materials via air that were regulated by the United States Department of Transportation (DOT). 18 U.S.C.A. §§ 545, 842(a)(3)(A), 845(a)(1); Federal Aviation Act of 1958, § 101(23), 49 App.U.S.C.A. § 1301(23); Transportation Safety Act of 1974, § 103(2), 49 App.U.S.C.A. § 1802(2).

[4] Statutes ⚷241(1)
361k241(1)

"Rule of lenity" requires that where there is ambiguity in criminal statute, doubts are to be resolved in favor of defendant.

*795 Susan B. Dohrmann, Asst. U.S. Atty., Seattle, WA, for plaintiff.

Robert Steven Mahler, Federal Public Defender, Seattle, WA, for defendant.

ORDER

ZILLY, District Judge.

I.
INTRODUCTION

THIS MATTER comes before the Court on the defendant's motion for judgment of acquittal of Counts I and II of the Superseding Indictment pursuant to Fed.R.Crim.P. 29. Count I charged that the defendant, not being a licensee or permittee under the provisions of Chapter 40 of Title 18, knowingly transported and shipped and caused to be transported and shipped in foreign commerce an explosive material (approximately one pound of PETN) in violation of 18 U.S.C. §§ 841(c) and (d), 842(a)(3)(A), and 844(a). Defendant was charged in Count II with importing this same explosive material into the United States contrary to law, in violation of 18 U.S.C. Section 545. The defendant was also charged in Count III with making a false statement to a customs inspector. At trial, the defendant moved to have the Indictment dismissed pursuant to Rule 29. The Court denied the motion as to Count III and deferred a ruling on the motion for judgment of acquittal on Counts I and II until the parties could fully brief the issues presented. After trial, the jury found the defendant guilty of Counts I and II and not guilty of Count III. On November 24, 1992, the Court heard oral argument on defendant's motion for judgment of acquittal. The Court then took the motion under advisement. For the reasons stated in this order, the Court GRANTS the defendant's motion and DISMISSES Counts I and II of the Superseding Indictment.

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II.
ANALYSIS

The defendant was arrested on May 26, 1992 at the Seattle-Tacoma International Airport, having arrived on United Airlines Flight # 933 from London, England. At the time of his arrest, the defendant had in his possession a safety fuse and approximately one (1) pound of explosive materials containing pentaerythritol tetranitrate, commonly referred to as PETN.

Title 18, United States Code, Chapter 40, contains statutes relating to the importation, manufacture, distribution, and storage of explosive materials. 18 U.S.C. §§ 841-848. Defendant was charged in Count I with a violation of 18 U.S.C. § 842(a)(3)(A) which provides in pertinent part that:

(a) It shall be unlawful for any person--
(3) other than a licensee or permittee knowingly--
(A) to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials....

Administration of Chapter 40 is vested in the Secretary of the Treasury or his delegate. 18 U.S.C. § 841(k). The defendant was charged in Count II with importing and bringing a safety fuse and explosive materials into the United States "contrary to law" in violation of 18 U.S.C. § 545. The Government's Superseding Indictment relies upon §§ 18 U.S.C. § 841(c) and (d), 842(a)(3)(A), and 844(a) to satisfy the "contrary to law" portion of the charge in Count II. As a result, the defendant's arguments relating to the application of Section 845 will be critical as to both counts.

*796 The defendant contends that he must be acquitted of the charges in Counts I and II because his conduct falls within the exception to Chapter 40 violations contained in 18 U.S.C. § 845(a)(1). Entitled "Exceptions; relief from disabilities," § 845(a)(1) provides as follows:

(a) Except in the case of subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, this chapter shall not apply to:
(1) any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof;

It is undisputed that the Department of Transportation regulates some aspects of the transportation of explosive materials, including PETN and safety fuses. *See, e.g.*, 49 U.S.C.App. § 1472(h)(2) (makes unlawful the willful delivery to an air carrier for transportation baggage which contains a hazardous material in violation of any rule or regulation promulgated by the Department of Transportation); 49 C.F.R. § 171.3(a) (prohibits the offer for transportation of hazardous materials unless properly described, packaged, marked, labeled, and in condition for shipment as required by regulations); 49 C.F.R. § 173.27(b) (prohibits the transportation by passenger-carrying aircraft of certain hazardous materials, including PETN, identified in the section 172.101 Table as "forbidden"); 49 C.F.R. § 173.27(c) (describes requirements for transportation of hazardous materials, including safety fuses, that are not forbidden from air transportation).

Although the Department of Transportation regulates many aspects of the transportation of explosive materials, it does not regulate licensing requirements relating to explosive materials. License applications and requirements to "import, manufacture, or deal in explosive materials" are governed by 18 U.S.C. § 841 *et seq.* and the regulations promulgated by the Secretary of the Treasury. *United States v. Guess*, 629 F.2d 573, 575 (9th Cir.1980); 18 U.S.C. § 843; 27 C.F.R. Part 55, Commerce in Explosives.

Defendant's motion to dismiss is based on the exception contained in 18 U.S.C. § 845. Defendant contends that because some aspects of the transportation of explosive materials are regulated by the Department of Transportation, that the exception applies to all aspects of the transportation of explosive materials. Brief of Defendant in Support of Motion for Judgment of Acquittal on Counts I and II, at 16. In effect, the defendant reads § 845(a)(1) as a preemption clause.

The defendant relies on *United States v. Illingworth*, 489 F.2d 264 (10th Cir.1973), the only Circuit Court opinion to analyze the statutory exception involved here. In *Illingworth*, the defendant took an airplane flight from Pocatello, Idaho to Salt Lake City, Utah and from Salt Lake City to Denver, Colorado while carrying a handbag containing dynamite. Like Petrykievicz, Illingworth was charged under 18 U.S.C. § 842(a)(3) with transporting explosive materials via air, without a license. *See* Illingworth's Indictment, Exhibit B to Defendant's Brief, docket no. 86. The issue presented in *Illingworth* was whether the defendant could be prosecuted under § 842 in the face of the exception contained in § 845. The court stated that "the exception refers to materials which are *regulated* by the Department" of Transportation. (Emphasis by Court.) *Id.* at 265. Because explosives were regulated by the Department of Transportation,

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the Tenth Circuit concluded that Illingworth could not be prosecuted under Chapter 40 by reason of the "clearly provided exception to its application." *Id.* at 266. The *Illingworth* court, finding no ambiguity in the statutory exception contained in § 845, reasoned that

> ... it is clear that the dynamite which Illingworth carried with him on the planes was not only regulated, but also excluded from the range of "acceptable" explosives that, in certain circumstances, could be carried on board passenger-carrying aircraft, by 14 C.F.R. § 103.7 (1973).

Id. at 265.

The *Illingworth* court therefore dismissed the indictment against that the defendant *797 based on the exception contained in § 845. The facts in *Illingworth* are almost identical to the facts in the present case. The decision by the Tenth Circuit is, however, not binding on this Court.

The Government argues the *Illingworth* court "failed to understand the essence of the charge" and in any event was wrongly decided. The Government argues, citing *United States v. Scharstein,* 531 F.Supp. 460, 466 (E.D.Ky.1982), that because licensing is not an aspect of transportation which is regulated by the Department of Transportation, the exception in § 845(a)(1) does not apply. In *Scharstein,* the defendant was convicted of illegally manufacturing, storing and transporting illegal explosives in violation of 18 U.S.C. § 841 *et seq.* Scharstein contended that because these activities were regulated by the Department of Transportation, they were not subject to criminal prosecution under 18 U.S.C. § 841 *et seq.* The *Scharstein* court found that "the key word in constructing the meaning of § 845 was the word 'aspect.' " *Id.* at 466. The *Scharstein* court held that the aspect of licensing the transportation of explosive materials was covered by the Department of Treasury and the aspect of labeling, packaging, mode of transportation, placarding and shipping papers was regulated by the Department of Transportation regulations. The *Scharstein* court then concluded that the defendant had been charged with conduct involving the transportation of explosives without a license which was governed by 18 U.S.C. § 841 *et seq.*, reasoning that

> The aspects regulated by the Department of Transportation pertain to the physical requirements or manner in which hazardous materials must be transported by one who has a license. Hence, the "aspect" governed by the Secretary of Treasury under 18 U.S.C. § 841 *et seq.* is *who* may transport, manufacture, etc. The aspect regulated by the Department of Transportation is *how* items may be transported once the transporter obtains a license. In the present case, therefore, the 18 U.S.C. § 845 exclusion does not apply since the defendants were not charged with any offense concerning any aspect regulated by the Department of Transportation.

Id, at 466-67. The *Scharstein* decision is contrary to the holding in *Illingworth.*

[1][2] The defendant contends § 845 is clear, unambiguous and that it should be given its plain meaning. There is a strong presumption that Congress expresses its intent through the language it uses. *INS v. Cardoza- Fonseca,* 480 U.S. 421, 432, 107 S.Ct. 1207, 1213, 94 L.Ed.2d 434 (1987). When the language is clear, courts should consider legislative history only to determine whether there is "clearly expressed legislative history to the contrary." *U.S. v. Geyler,* 932 F.2d 1330 (9th Cir.1991). The only legislative history relating to § 845 suggests a different intent but falls short of a clearly expressed legislative intent necessary to override plain language in the statute.

In contrast to the defendant's position that the statute is not ambiguous, the Government's attorney conceded at oral argument that there is "perhaps an ambiguity" in § 845 and argued that the exception should be read as if the statute used the word "is" rather than the word "are" in 18 U.S.C. § 845(a)(1). So read, the statute would exempt "any aspect of the transportation of explosive materials ... which [*is*] regulated by the ... Department of Transportation." The Government relies on the legislative history which provides that

> This chapter is not meant to affect aspects of the transportation of explosive materials regulated by the Department of Transportation.

Attachment 1 to Government's brief in response, docket no. 82. This legislative history refers to "aspects" of the transportation of explosive materials and lends support to the Government's position However, even the legislative history is not a model of logic or clarity. Further, the legislative history appears contrary to the plain language of the statute. A proper grammatical reading of the exception results in an interpretation that provides that if the explosive materials transported via air "are" regulated, the exception applies. In contrast, a complete reading of 18 *798(Cite as: 809 F.Supp. 794, *798) U.S.C. § 841

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et seq. and 49 U.S.C.App. § 1472 *et seq.* and the regulations promulgated under these statutes, strongly suggests that Congress intended to except only aspects of the transportation of explosive materials which were regulated by the Department of Transportation. Although this Court questions whether § 845(a)(1) " *clearly* provide[s]" for anything, the Court finds that a careful grammatical analysis of the exception does support the defendant's position. Inartfully drafted, § 845(a)(1) states that Chapter 40 shall not apply to "any aspect of the transportation of explosive materials ... which *are* regulated by the United States Department of Transportation and agencies thereof...." 18 U.S.C. § 845(a)(1) (emphasis added).

[3] The Court must interpret the meaning of the words used by Congress. Clearly, many aspects of transporting explosive materials are regulated by the United States Department of Transportation. The Department of Transportation regulations expressly prohibit the transporting of PETN by commercial aircraft. 49 C.F.R. 172.101. The Government, however, properly directs the Court to the charge against this defendant which prohibits the transportation of explosive materials without a license or permit. The Government argues that "there is no question" that the conduct set forth in Count I is regulated by the Department of Treasury as it is the "status" of the defendant as a person without a license or a permit to transport explosive materials by air in foreign commerce which is the gravamen of the offense. Government's Brief at pp. 9-10. Although the Government is correct as to the nature of the charge, it is incorrect with respect to the gravamen of the defendant's conduct. Mr. Petrykievicz carried one (1) pound of PETN in his luggage from London, England to Seattle, Washington on a commercial aircraft. The clear gravamen of the conduct is the transportation of these explosive materials rather than whether or not he had a license from the Department of Treasury. Even if the defendant had obtained such a license, the defendant was prohibited from transporting the materials on the aircraft by the Department of Transportation regulations. Ultimately, the focus must be on the language of the statute rather than the gravamen of the offense. In the absence of the exception provided in § 845 of Title 18, the defendant could have been charged and convicted under either 18 U.S.C. § 842 or 49 U.S.C.App. § 1472. *United States v. Batchelder,* 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *Scharstein,* 531 F.Supp. at 465

To reach the result urged by the Government, one would have to read the exception in § 845(a)(1) as if it stated that Chapter 40 shall not apply to "any aspect ... which *is* regulated by the United States Department of Transportation...." However, § 845(a)(1) uses the plural "are" instead of the singular "is" in the phrase "which *are* regulated." The phrase can therefore modify only the plural "explosives" and not the singular "aspect." If Congress meant to exempt from Chapter 40 "any aspect of the transportation of explosive materials ... which *is* regulated by the United States Department of Transportation" it could have done so. Instead, Congress stated that Chapter 40 shall not apply to "any aspect of the transportation of explosive materials ... which *are* regulated by the Department of Transportation." PETN and safety fuses are explosive materials which are regulated by the Department of Transportation.

The Government argues that such a reading of the exception would make meaningless the licensing regulations contained in 18 U.S.C. § 841 *et seq.* and the regulations of the Department of the Treasury. Thus, the Government, relying upon *Scharstein,* wants to focus on the word "aspect."

This Court concludes that the exception contained in 18 U.S.C. § 845 is ambiguous. Although a focus on the words "any aspect" or "aspect" would support the Government's position if the statute had used the word "are," a focus on the entire exception, giving effect to the words used, more strongly supports the defendant's position. The Court concludes that it must apply the words used by Congress in their entirety.

***799** [4] In order to rule in favor of the Government, the Court would also have to ignore a cardinal rule of statutory construction. The rule of lenity requires that "where there is ambiguity in a criminal statute, doubts are to be resolved in favor of the defendant." *Geyler,* 932 F.2d at 1336 (citing *United States v. Bass,* 404 U.S. 336, 348, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971)). Applying the rule of lenity to this case, the Court must construe § 845 in favor of the defendant and conclude that the transportation of *these* explosive materials is regulated by the Department of Transportation, thereby making the exception applicable.

The Government makes one final argument in support of its position. It argues that the defendant has been charged with transportation of explosive materials in foreign commerce, that the defendant moved the materials before he boarded the aircraft in England and after he exited the plane in Seattle, and that these activities do not constitute foreign commerce and are

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not regulated by the Department of Transportation. The Government is mistaken. The Department of Transportation regulations relate to "foreign air commerce" which is defined as including commerce which moves wholly by aircraft or partly by aircraft and partly by other forms of transportation from any place outside the United States to a place in the United States. 49 U.S.C.App. § 1301(23); 49 U.S.C.App. § 1802(2).

III.
CONCLUSION

In conclusion, the Department of Transportation regulates many aspects of the transportation of explosive materials. Section 845 of Title 18 excludes the application of Chapter 40 of Title 18 if the explosive materials being transported are regulated by the Department of Transportation. Applying the exception in this case requires the Court to grant the defendant's motion to dismiss Count I. For the same reasons, Count II must also be dismissed. The criminal violations alleged in Count I of the Indictment underlie the importation count in Count II. *See United States v. Patel,* 762 F.2d 784, 790 (9th Cir.1985) (outlining four elements of crime of smuggling contrary to law, as set out in 18 U.S.C. § 545); *Current v. United States,* 287 F.2d 268, 269 (9th Cir.1961) (holding that the Government must allege which law the defendant's action was contrary to). The Government charges in Count II that the defendant's actions were contrary to §§ 841(c) and (d), 842(a)(3)(A) and 844(a). The exception contained in § 845(a)(1) applies with equal force to Count II which must also be dismissed.

IT IS SO ORDERED.

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§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or Division	Identification Numbers	PG	Label Codes	Special provisions	(8) Packaging (§173.***) Exceptions	Non-bulk	Bulk	(9) Quantity limitations Passenger aircraft/rail	Cargo aircraft only	(10) Vessel stowage Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	Cyclonite and HMX mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*	.....			.....		.....	.....	.....	.....	.....		
	Cyclonite and octogen mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*	.....			.....		.....	.....	.....	.....	.....		
	Cyclonite, *see* Cyclotrimethylenetrinitramine, *etc.*	.....			.....		.....	.....	.....	.....	.....		
	Cyclooctadiene phosphines, *see* 9-Phosphabicyclononanes.	.....			.....		.....	.....	.....	.....	.....		
	Cyclooctadienes	3	UN2520	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Cyclooctatetraene	3	UN2358	II	3	T8	150	202	242	5 L	60 L	B	
	Cyclopentane	3	UN1146	II	3	B101, T14	150	202	242	5 L	60 L	E	
	Cyclopentane, methyl, see Methylcyclopentane.	.....			.....		.....	.....	.....	.....	.....		
	Cyclopentanol	3	UN2244	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Cyclopentanone	3	UN2245	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Cyclopentene	3	UN2246	II	3	B101, T13	150	202	242	5 L	60 L	E	
	Cyclopropane	2.1	UN1027		2.1		306	304	314, 315.	Forbidden	150 kg	E	40
	Cyclotetramethylene tetranitramine (dry or unphlegmatized) (HMX).	Forbidden			.....		.....	.....	.....	.....	.....		
	Cyclotetramethylenetetranitramine, desensitized or Octogen, desensitized or HMX, desensitized.	1.1D	UN0484	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Cyclotetramethylenetetranitramine, wetted or HMX, wetted or Octogen, wetted *with not less than 15 percent water, by mass.*	1.1D	UN0226	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Cyclotrimethylenenitramine and octogen, mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*	.....			.....		.....	.....	.....	.....	.....		
	Cyclotrimethylenetrinitramine and cyclotetramethylenetetranitramine mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*	.....			.....		.....	.....	.....	.....	.....		
	Cyclotrimethylenetrinitramine and HMX mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*	.....			.....		.....	.....	.....	.....	.....		
	Cyclotrimethylenetrinitramine, desensitized or Cyclonite, desensitized or Hexogen, desensitized or RDX, desensitized.	1.1D	UN0483	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Cyclotrimethylenetrinitramine, wetted or Cyclonite, wetted or Hexogen, wetted or RDX, wetted *with not less than 15 percent water by mass.*	1.1D	UN0072	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Cymenes	3	UN2046	III	3	B1, T1	150	203	242	60 L	220 L	A	
D	Dangerous Goods in Machinery or Dangerous Goods in Apparatus.	.....	NA8001	.....	.....	136	None	222	None	No limit	No limit	A	
	Decaborane	4.1	UN1868	II	4.1, 6.1	A19, A20	None	212	None	Forbidden	50 kg	A	
	Decahydronaphthalene	3	UN1147	III	3	B1, T1	150	203	242	60 L	220 L	A	
	n-Decane	3	UN2247	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Deflagrating metal salts of aromatic nitroderivatives, n.o.s.	1.3C	UN0132	II	1.3C		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Delay electric igniter, see Igniters.	.....			.....		.....	.....	.....	.....	.....		
D	Denatured alcohol	3	NA1986	I	3, 6.1	T8, T31	None	201	243	Forbidden	30 L	E	40
	.....	.....		II	3, 6.1	T8, T31	None	202	243	1 L	60 L	E	40
	.....	.....		III	3, 6.1	B1, T8, T31	150	203	242	60 L	220 L	E	40
D	Denatured alcohol	3	NA1987	II	3	T8, T31	150	202	242	5 L	60 L	B	
	.....	.....		III	3	B1, T7, T30	150	203	242	60 L	220 L	A	
	Depth charges, see Charges, depth.	.....			.....		.....	.....	.....	.....	.....		
	Detonating relays, see Detonators, *etc.*												
	Detonator assemblies, non-electric *for blasting.*	1.1B	UN0360	II	1.1B	.....	None	62	None	Forbidden	Forbidden	B	2E, 6E
	Detonator assemblies, non-electric, *for blasting.*	1.4B	UN0361	II	1.4B	103	63(f), 63(g).	62	None	Forbidden	75 kg	A	24E

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or Division	Identification Numbers	PG	Label Codes	Special provisions	(8) Packaging (§173.***) Exceptions	Non-bulk	Bulk	(9) Quantity limitations Passenger aircraft/rail	Cargo aircraft only	(10) Vessel stowage Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	Ethylene chlorohydrin	6.1	UN1135	I	6.1, 3	2, B9, B14, B32, B74, T38, T43, T45	None	227	244	Forbidden	Forbidden	D	40
	Ethylene, compressed	2.1	UN1962		2.1		306	304	302	Forbidden	150 kg	E	40
	Ethylene diamine diperchlorate	Forbidden											
	Ethylene dibromide	6.1	UN1605	I	6.1	2, B9, B14, B32, B74, B77, T38, T43, T45	None	227	244	Forbidden	Forbidden	D	40
	Ethylene dibromide and methyl bromide liquid mixtures, see Methyl bromide and ethylene dibromide, liquid mixtures.												
	Ethylene dichloride	3	UN1184	II	3, 6.1	T14	None	202	243	1 L	60 L	B	40
	Ethylene glycol diethyl ether	3	UN1153	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Ethylene glycol dinitrate	Forbidden											
	Ethylene glycol monoethyl ether	3	UN1171	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Ethylene glycol monoethyl ether acetate.	3	UN1172	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Ethylene glycol monomethyl ether.	3	UN1188	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Ethylene glycol monomethyl ether acetate.	3	UN1189	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Ethylene oxide and carbon dioxide mixture *with more than 87 percent ethylene oxide.*	2.3	UN3300		2.3, 2.1	4	None	304	314, 315.	Forbidden	Forbidden	D	40
	Ethylene oxide and carbon dioxide mixtures *with more than 9 percent but not more than 87 percent ethylene oxide.*	2.1	UN1041		2.1		306	304	314, 315.	Forbidden	25 kg	B	40
	Ethylene oxide and carbon dioxide mixtures *with not more than 9 percent ethylene oxide.*	2.2	UN1952		2.2		306	304	314, 315.	75 kg	150 kg	A	
	Ethylene oxide and chlorotetrafluoroethane mixture *with not more than 8.8 percent ethylene oxide.*	2.2	UN3297		2.2		306	304	314, 315.	75 kg	150 kg	A	

	Ethylene oxide and dichlorodifluoromethane mixture, *with not more than 12.5 percent ethylene oxide.*	2.2	UN3070		2.2		306	304	314, 315.	75 kg	150 kg	A	
	Ethylene oxide and pentafluoroethane mixture *with not more than 7.9 percent ethylene oxide.*	2.2	UN3298		2.2		306	304	314, 315.	75 kg	150 kg	A	
	Ethylene oxide and propylene oxide mixtures, *with not more than 30 percent ethylene oxide.*	3	UN2983	I	3, 6.1	5, A11, N4, N34, T24, T28	None	201	243	Forbidden	30 L	E	40
	Ethylene oxide and tetrafluoroethane mixture *with not more than 5.6 percent ethylene oxide.*	2.2	UN3299		2.2		306	304	314, 315.	75 kg	150 kg	A	
	Ethylene oxide or Ethylene oxide with nitrogen *up to a total pressure of 1MPa (10 bar) at 50 degrees C.*	2.3	UN1040		2.3, 2.1	4	None	323	323	Forbidden	25 kg	D	40
	Ethylene, refrigerated liquid *(cryogenic liquid).*	2.1	UN1038		2.1		None	316	318, 319	Forbidden	Forbidden	D	40
	Ethylenediamine	8	UN1604	II	8, 3	T14	154	202	243	1 L	30 L	A	40
	Ethyleneimine, inhibited	6.1	UN1185	I	6.1, 3	1, B9, B14, B30, B72, B77, N25, N32, T38, T43, T44	None	226	244	Forbidden	Forbidden	D	40
	Ethylhexaldehyde, see Octyl aldehydes *etc.*												
	2-Ethylhexyl chloroformate	6.1	UN2748	II	6.1, 8	T12	None	202	243	1 L	30 L	A	12, 13, 21, 25, 40, 100
	2-Ethylhexylamine	3	UN2276	III	3, 8	B1, T2	150	203	242	5 L	60 L	A	40
	Ethylphenyldichlorosilane	8	UN2435	II	8	A7, B2, N34, T8, T26	None	202	242	Forbidden	30 L	C	
	1-Ethylpiperidine	3	UN2386	II	3, 8	T8	None	202	243	1 L	5 L	B	
	N-Ethyltoluidines	6.1	UN2754	II	6.1	T14	None	202	243	5 L	60 L	A	
	Ethyltrichlorosilane	3	UN1196	II	3, 8	A7, B100, N34, T15, T26	None	202	243	1 L	5 L	B	40
	Etiologic agent, see Infectious substances, *etc.*												
	Explosive articles, see Articles, explosive, n.o.s. *etc.*												
	Explosive, blasting, type A	1.1D	UN0081	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E, 21E
	Explosive, blasting, type B	1.1D	UN0082	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Explosive, blasting, type B *or* Agent blasting, Type B.	1.5D	UN0331	II	1.5D	105, 106	None	62	None	Forbidden	Forbidden	B	1E, 5E
	Explosive, blasting, type C	1.1D	UN0083	II	1.1D	123	None	62	None	Forbidden	Forbidden	B	1E, 5E
	Explosive, blasting, type D	1.1D	UN0084	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E

Symbols (1)	Hazardous materials descriptions and proper shipping names (2)	Hazard class or Division (3)	Identification Numbers (4)	PG (5)	Label Codes (6)	Special provisions (7)	(8) Packaging (§173.**) Exceptions (8A)	Non-bulk (8B)	Bulk (8C)	(9) Quantity limitations Passenger aircraft/rail (9A)	Cargo aircraft only (9B)	(10) Vessel stowage Location (10A)	Other (10B)
	Hexafluoroacetone	2.3	UN2420		2.3, 8	2, B9, B14	None	304	314, 315.	Forbidden	Forbidden	D	40
	Hexafluoroacetone hydrate	6.1	UN2552	II	6.1	T14	None	202	243	5 L	60 L	B	40
	Hexafluoroethane, compressed or Refrigerant gas R 116.	2.2	UN2193		2.2		306	304	314, 315.	75 kg	150 kg	A	
	Hexafluorophosphoric acid	8	UN1782	II	8	A6, A7, B2, N3, N34, T9, T27	None	202	242	1 L	30 L	A	
	Hexafluoropropylene compressed or Refrigerant gas R 1216.	2.2	UN1858		2.2		306	304	314, 315.	75 kg	150 kg	A	
	Hexaldehyde	3	UN1207	III	3	B1, T1	150	203	242	60 L	220 L	A	
	Hexamethylene diisocyanate	6.1	UN2281	II	6.1	B101, T14	None	202	243	5 L	60 L	C	13, 40
	Hexamethylene triperoxide diamine (dry).	Forbidden											
	Hexamethylenediamine, solid	8	UN2280	III	8		154	213	240	25 kg	100 kg	A	12
	Hexamethylenediamine solution	8	UN1783	II	8	T8	None	202	242	1 L	30 L	A	
				III	8	T7	154	203	241	5 L	60 L	A	
	Hexamethyleneimine	3	UN2493	II	3, 8	B101, T8	None	202	243	1 L	5 L	B	40
	Hexamethylenetetramine	4.1	UN1328	III	4.1	A1	151	213	240	25 kg	100 kg	A	
	Hexamethylol benzene hexanitrate.	Forbidden											
	Hexanes	3	UN1208	II	3	B101, T8	150	202	242	5 L	60 L	E	
	2,2',4,4',6,6'- Hexanitro-3,3'-dihydroxyazobenzene (dry).	Forbidden											
	Hexanitroazoxy benzene	Forbidden											
	N,N'-(hexanitrodiphenyl) ethylene dinitramine (dry).	Forbidden											
	Hexanitrodiphenyl urea	Forbidden											
	2,2',3,4,4',6- Hexanitrodiphenylamine.	Forbidden											
	Hexanitrodiphenylamine or Dipicrylamine or Hexyl.	1.1D	UN0079	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	2,3',4,4',6,6'- Hexanitrodiphenylether.	Forbidden											
	Hexanitrobiphenyl	Forbidden											
	Hexanitrooxanilide	Forbidden											
	Hexanitrostilbene	1.1D	UN0392	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Hexanoic acid, see Corrosive liquids, n.o.s.												
	Hexanols	3	UN2282	III	3	B1, T1	150	203	242	60 L	220 L	A	
	1-Hexene	3	UN2370	II	3	B101, T8	150	202	242	5 L	60 L	E	
	Hexogen and cyclotetramethylenetetranitramine mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*												
	Hexogen and HMX mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*												
	Hexogen and octogen mixtures, wetted or desensitized *see* RDX and HMX mixtures, wetted or desensitized *etc.*												
	Hexogen, *see* Cyclotrimethylenetrinitramine, *etc.*												
	Hexolite, or Hexotol *dry or wetted with less than 15 percent water, by mass.*	1.1D	UN0118	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Hexotonal	1.1D	UN0393	II	1.1D		None	62	None	Forbidden	Forbidden	B	1E, 5E
	Hexyl, *see* Hexanitrodiphenylamine.												
	Hexyltrichlorosilane	8	UN1784	II	8	A7, B2, B6, N34, T8, T26	None	202	242	Forbidden	30 L	C	40
	High explosives, see individual explosives' entries.												
	HMX, *see* Cyclotetramethylenetetranitramine, *etc.*												
	Hydrazine, anhydrous or Hydrazine aqueous solutions *with more than 64 percent hydrazine, by mass.*	8	UN2029	I	8, 3, 6.1	A3, A6, A7, A10, B7, B16, B53, T25	None	201	243	Forbidden	2.5 L	D	21, 40, 42, 100
	Hydrazine, aqueous solution *with not more than 37 percent hydrazine, by mass.*	6.1	UN3293	III	6.1	T7	153	203	241	60 L	220 L	A	
	Hydrazine azide	Forbidden											
	Hydrazine chlorate	Forbidden											
	Hydrazine dicarbonic acid diazide.	Forbidden											
	Hydrazine hydrate or Hydrazine aqueous solutions, *with not less than 37 percent but not more than 64 percent hydrazine, by mass.*	8	UN2030	II	8, 6.1	B16, B53, B110, T15	None	202	243	Forbidden	30 L	D	40, 42, 82

Subpart F—Placarding

172.500 Applicability of placarding requirements.
172.502 Prohibited and permissive placarding.
172.503 Identification number display on placards.
172.504 General placarding requirements.
172.505 Placarding for subsidiary hazards.
172.506 Providing and affixing placards: Highway.
172.507 Special placarding provisions: Highway.
172.508 Placarding and affixing placarding: Rail.
172.510 Special placarding provisions: Rail.
172.512 Freight containers and aircraft unit load devices.
172.514 Bulk packagings.
172.516 Visibility and display of placards.
172.519 General specifications for placards.
172.521 DANGEROUS placard.
172.522 EXPLOSIVES 1.1, EXPLOSIVES 1.2 and EXPLOSIVES 1.3 placards.
172.523 EXPLOSIVES 1.4 placard.
172.524 EXPLOSIVES 1.5 placard.
172.525 EXPLOSIVES 1.6 placard.
172.526 [Reserved]
172.527 Background requirements for certain placards.
172.528 NON-FLAMMABLE GAS placard.
172.530 OXYGEN placard.
172.532 FLAMMABLE GAS placard.
172.536 [Reserved]
172.540 POISON GAS placard.
172.542 FLAMMABLE placard.
172.544 COMBUSTIBLE placard.
172.546 FLAMMABLE SOLID placard.
172.547 SPONTANEOUSLY COMBUSTIBLE placard.
172.548 DANGEROUS WHEN WET placard.
172.550 OXIDIZER placard.
172.552 ORGANIC PEROXIDE placard.
172.553 [Reserved]
172.554 POISON placard.
172.555 POISON INHALATION HAZARD placard.
172.556 RADIOACTIVE placard.
172.558 CORROSIVE placard.
172.560 CLASS 9 placard.

Subpart G—Emergency Response Information

172.600 Applicability and general requirements.
172.602 Emergency response information.
172.604 Emergency response telephone number.
172.606 Carrier information contact.

Subpart H—Training

172.700 Purpose and scope.
172.701 Federal-State relationship.
172.702 Applicability and responsibility for training and testing.
172.704 Training requirements.
APPENDIX A TO PART 172—OFFICE OF HAZARDOUS MATERIALS TRANSPORTATION. COLOR TOLERANCE CHARTS AND TABLES
APPENDIX B TO PART 172—TREFOIL SYMBOL
APPENDIX C TO PART 172—DIMENSIONAL SPECIFICATIONS FOR RECOMMENDED PLACARD HOLDER

AUTHORITY: 49 U.S.C. 5101–5127; 49 CFR 1.53.

SOURCE: Amdt. 172–29, 41 FR 15996, Apr. 15, 1976, unless otherwise noted.

Subpart A—General

§ 172.1 Purpose and scope.

This part lists and classifies those materials which the Department of Transportation has designated as hazardous materials for purposes of transportation and prescribes the requirements for shipping papers, package marking, labeling, and transport vehicle placarding applicable to the shipment and transportation of those hazardous materials.

[Amdt. 172–29, 41 FR 15997, Apr. 15, 1976]

§ 172.3 Applicability.

(a) This part applies to—

(1) Each person who offers a hazardous material for transportation, and

(2) Each carrier by air, highway, rail, or water who transports a hazardous material.

(b) When a person, other than one of those provided for in paragraph (a) of this section, performs a packaging labeling or marking function required by this part, that person shall perform the function in accordance with this part.

[Amdt. 172–29, 41 FR 15996, Apr. 15, 1976, as amended by Amdt. 172–32, 41 FR 38179, Sept. 9, 1976]

Subpart B—Table of Hazardous Materials and Special Provisions

§ 172.101 Purpose and use of hazardous materials table.

(a) The Hazardous Materials Table (Table) in this section designates the materials listed therein as hazardous materials for the purpose of transportation of those materials. For each listed material, the Table identifies the hazard class or specifies that the material is forbidden in transportation, and

gives the proper shipp
rects the user to the
shipping name. In add
specifies or references
this subchapter pertai
packaging, quantity li
craft and stowage of
rials aboard vessels.

(b) *Column 1: Symbols.* Table contains six syn "D", "G", "I" and "W"

(1) The plus (+) fixes ping name, hazard cl group for that entry w whether the material tion of that class or meets any other haz tion. An appropriate shipping name and haz authorized by the As trator for Hazardous

(2) The letter "A" re cation of requiremer chapter to material tended for transporta unless the material is stance or a hazardous

(3) The letter "D" shipping names whic for describing mater transportation but priate for internatior under the provisions regulations (e.g., IMO nate proper shipping lected when either d national transportati

(4) The letter "G" shipping names for w technical names of t terial must be enter in association with tion. (See § 172.203(k).

(5) The letter "I" shipping names whi for describing ma national transporta proper shipping nan when only domestic involved

(6) The letter "W" cation of requiren chapter to materi tended for transport less the material i stance or a hazardo

(c) *Column 2: Has scriptions and proj* Column 2 lists the

176.405 Stowage of charcoal.
176.410 Division 1.5 (blasting agents) materials, ammonium nitrate and ammonium nitrate mixtures.
176.415 Permit requirements for Division 1.5 (blasting agents), ammonium nitrates, and certain ammonium nitrate fertilizers.

Subpart K [Reserved]

Subpart L—Detailed Requirements for Division 2.3 (Poisonous Gas) and Division 6.1 (Poisonous) Materials

176.600 General stowage requirements.
176.605 Care following leakage or sifting of Division 2.3 (poisonous gas) and Division 6.1 (poisonous) materials.

Subpart M—Detailed Requirements for Radioactive Materials

176.700 General stowage requirements.
176.704 Requirements relating to transport indexes.
176.708 Segregation distance table.
176.710 Care following leakage or sifting of radioactive materials.
176.715 Contamination control.

Subpart N—Detailed Requirements for Class 8 (Corrosive Materials) Materials

176.800 General stowage requirements.
176.805 On deck stowage.

Subpart O—Detailed Requirements for Cotton and Vegetable Fibers, Motor Vehicles, and Asbestos

176.900 Packaging and stowage of cotton and vegetable fibers; general.
176.901 Stowage of cotton or vegetable fibers with rosin or pitch.
176.903 Stowage of cotton or vegetable fibers with coal.
176.905 Motor vehicles or mechanical equipment powered by internal combustion engines.

AUTHORITY: 49 U.S.C. 5101–5127; 49 CFR 1.53.

Subpart A—General

§ 176.1 Purpose and scope.

This part prescribes requirements in addition to those contained in parts 171, 172, and 173 of this subchapter to be observed with respect to the transportation of hazardous materials by vessel.

§ 176.2 Definitions.

As used in this part—

Cantline means the v-shaped groove between two abutting, parallel horizontal cylinders.

Cargo net means a net made of fiber or wire used to provide convenience in handling loose or packaged cargo to and from a vessel.

Clear of living quarters means that the hazardous material must be located so that in the event of release of the material, leakage or vapors will not penetrate accommodations, machinery spaces or other work areas by means of entrances or other openings in bulkheads or ventilation ducts.

Closed freight container means a freight container which totally encloses its contents by permanent structures. A freight container formed partly by a tarpaulin, plastic sheet, or similar material is not a closed freight container.

Commandant (G–MTH) means the Chief, Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security and Environmental Protection, United States Coast Guard, Washington, DC 20593–0001.

Compartment means any space on a vessel that is enclosed by the vessel's decks and its sides or permanent steel bulkheads.

CSC safety approval plate means the safety approval plate specified in Annex I of the International Convention for Safe Containers (1972) and conforming to the specifications in 49 CFR 451.23 and 451.25. The plate is evidence that a freight container was designed, constructed, and tested under international rules incorporated into U.S. regulations in 49 CFR parts 450 through 453. The plate is found in the door area of the container.

Deck structure means a structure of substantial weight and size located on the weather deck of a vessel and integral with the deck. This term includes superstructures, deck houses, mast houses, and bridge structures.

Draft means a load or combination of loads capable of being hoisted into or out of a vessel in a single lift.

Dunnage means lumber of not less than 25 mm (0.98 inch) commercial thickness or equivalent material laid over or against structures such as tank tops, decks, bulkheads, frames, plating,

Responsible person means a person empowered by the master of the vessel to make all decisions relating to his or her specific task, and having the necessary knowledge and experience for that purpose.

Safe working load means the maximum gross weight that cargo handling equipment is approved to lift.

Skilled person means a person having the knowledge and experience to perform a certain duty.

Skipboard means a square or rectangular pallet without sideboards, usually used in conjunction with a cargo net to handle loose cargo on board a vessel.

Splice as used in § 176.172 of this part, means any repair of a freight container main structural member which replaces material, other than complete replacement of the member.

Transport unit means a transport vehicle or a freight container. A *closed transport unit* means a transport unit in which the contents are totally enclosed by permanent structures. An *open transport unit* means a transport unit which is not a closed transport unit. Transport units with fabric sides or tops are not closed transport units for the purposes of this part.

Tray means a type of pallet constructed to specific dimensions for handling a particular load.

[Amdt. 176–30, 55 FR 52687, Dec. 21, 1990]

§ 176.3 Unacceptable hazardous materials shipments.

(a) A carrier may not transport by vessel any shipment of a hazardous material that is not prepared for transportation in accordance with parts 172 and 173 of this subchapter.

(b) A carrier may not transport by vessel any explosive or explosive composition described in § 173.54 of this subchapter.

[Amdt. 176–1, 41 FR 16110, Apr. 15, 1976, as amended by Amdt. 176–30, 55 FR 52688, Dec. 21, 1990]

§ 176.4 Port security and safety regulations.

(a) Each carrier, master, agent, and charterer of a vessel and all other persons engaged in handling hazardous materials on board vessels shall comply with the applicable provisions of 33 CFR parts 6, 109, 110, 125, 126, and 160.

(b) Division 1.1 and 1.2 (Class A and B explosive) materials may only be loaded on and unloaded from a vessel at—

(1) A facility of particular hazard as defined in 33 CFR 126.05(b);

(2) An explosives anchorage listed in 33 CFR part 110; or

(3) A facility operated or controlled by the Department of Defense.

(c) With the concurrence of the COTP, Division 1.1 and 1.2 (Class A and B explosive) materials may be loaded on or unloaded from a vessel in any location acceptable to the COTP.

[Amdt. 176–30, 55 FR 52688, Dec. 21, 1990]

§ 176.5 Application to vessels.

(a) Except as provided in paragraph (b) of this section, this subchapter applies to each domestic or foreign vessel when in the navigable waters of the United States, regardless of its character, tonnage, size, or service, and whether self-propelled or not, whether arriving or departing, underway, moored, anchored, aground, or while in dry dock.

(b) This subchapter does not apply to:

(1) A public vessel not engaged in commercial service;

(2) A vessel constructed or converted for the principal purpose of carrying flammable or combustible liquid cargo in bulk in its own tanks, when only carrying these liquid cargoes;

(3) A vessel of 15 gross tons or smaller when not engaged in carrying passengers for hire;

(4) A vessel used exclusively for pleasure;

(5) A vessel of 500 gross tons or smaller when engaged in fisheries;

(6) A tug or towing vessel, except when towing another vessel having Class 1 (explosive) materials, Class 3 (flammable liquids), or Division 2.1 (flammable gas) materials, in which case the owner/operator of the tug or towing vessel shall make such provisions to guard against and extinguish fire as the Coast Guard may prescribe;

(7) A cable vessel, dredge, elevator vessel, fireboat, icebreaker, pile driver, pilot boat, welding vessel, salvage vessel, or wrecking vessel; or

(8) A foreign vessel transiting the territorial sea of the United States

Note	Provision
1E	Cargo vessel, on deck, in containers or the like.
2E	Cargo vessel, on deck, in portable magazines.
3E	Cargo vessel, on deck, secured to the vessel's structure.
4E	Cargo vessel, under deck, Magazine, Type A.
5E	Cargo vessel, under deck, Magazine, Type B.
6E	Cargo vessel, under deck, Magazine, Type C.
7E	Cargo vessel, under deck, Ordinary Stowage.
8E	Cargo vessel, under deck, Special Stowage.
9E	Passenger vessel, stowage as for cargo vessel.
10E	Magazine, Type B, if in effectively sealed dust-tight packages; otherwise, Magazine, Type A.
11E	On-deck portable magazine must be steel.
12E	Stowage as specified by Competent Authority.
13E	On deck, in containers not exceeding 2.5 metric ton gross per container or group. There may not be more than 2 such containers or groups; they must be separated from each other, and from any other explosive substance or article by at least 9 m (30 feet). Containers or groups must be at least 9 m (30 feet) from the bridge or accommodation.
14E	On deck, in steel portable magazines or steel freight containers.
15E	On-deck, containers must be leakproof.
16E	On deck, in containers or sheeted stacks. The gross weight of each stack or group of containers may not exceed 2.5 metric ton. There may not be more than 2 stacks or groups of containers; they must be separated from each other, and from any other explosive substances or articles by at least 9 m (30 feet). Stacks or containers must be at least 9 m (30 feet) from the bridge or accommodation.
17E	On deck stowage is recommended.
18E	For international shipments, stow in the same manner as is required for "cartridges for weapons' inert projectile" UN 0012, Division 1.4S.
19E	Substances which contain ammonium nitrate or other ammonium salts must be stowed "away from" Explosives, Blasting, Type C, UN 0083.
20E	Stow in accordance with § 176.84(c)(3) of this subchapter.
21E	Cargo space ventilation must be carefully controlled to avoid excessive condensation.
22E	May not be stowed together with explosive substances containing ammonium nitrate or other ammonium salts.
23E	Segregate from other Class 1 (explosive) materials in the same manner as is required for flammable liquids.
24E	Passenger vessels, on deck or under deck, in portable magazines only.
25E	Passenger vessels, in containers or the like, on deck only.
26E	Cargo vessel, on deck, in containers or the like (non-metallic lining is necessary if not in sealed dust tight packages).
27E	Cargo vessel, on deck, in containers or the like (non-metallic lining is necessary).
28E	Cargo vessel, when items are transported as projectiles or cartridges for guns, cannons, or mortars, notes 1E and 7E are applicable. All other times, notes 14E, 15E, and 8E are applicable.

(3) Explosive articles designated by special provision "20E" in column 10B of the 172.101 table must be stowed as follows:

(i) Projectiles for guns, cannon, or mortars:

(A) *On deck:* in containers or the like.

(B) *Under deck:* ordinary stowage.

(ii) All other types:

(A) *On deck:* in steel portable magazines or steel freight containers which are capable of preventing leakage of their contents.

(B) *Under deck:* Special stowage.

[Amdt. 176-30, 55 FR 52693, Dec. 21, 1990, as amended at 56 FR 66282, Dec. 20, 1991; Amdt. 176-43, 62 FR 24742, May 6, 1997]

Subpart E—Special Requirements for Transport Vehicles Loaded With Hazardous Materials and Transported on Board Ferry Vessels

§ 176.88 Application.

The requirements in this subpart are applicable to transport vehicles containing hazardous materials being transported on board ferry vessels and are in addition to any prescribed elsewhere in this subchapter. Vessels in a service similar to a ferry service, but not over a designated ferry route, may be treated as a ferry vessel for the purpose of this subpart if approved in writing by the District Commander.

[Amdt. 176-1, 41 FR 16110, Apr. 15, 1976, as amended by Amdt. 176-1A, 41 FR 40690, Sept. 20, 1976]

§ 176.89 Control of transport vehicles.

(a) A transport vehicle containing hazardous materials may be transported on board a ferry vessel, subject to the following conditions:

(1) The operator or person in charge of the vehicle shall deliver to the vessel's representative a copy of the shipping papers and certificate required by §§ 176.24 and 176.27;

(2) The vehicle shall be placed at the location indicated by the vessel's representative;

(3) The parking brakes of the vehicle shall be set securely to prevent movement;

(4) The motor of a highway vehicle shall be shut off and not restarted until the vessel has completed its voyage and docked;

(5) All vehicle lights shall be cut off and not relighted until the vessel has completed its voyage and docked;

(6) The operator of a highway vehicle shall remain with the vehicle;

(7) No repairs or adjustments must be made to the vehicle while it is on the vessel;

(8) No hazardous materials are to be released from the vehicle; and

(9) Any instructions given by the vessel's representative during the voyage, and during "roll on" and "roll off" operations must be observed.

(b) Smoking by any person in or around a vehicle is prohibited.

§ 176.90 Private automobiles.

A private automobile which is carrying any Class 1 (explosive) material (except permitted fireworks or small arms ammunition) may not be transported on a passenger-carrying ferry vessel unless the Class 1 (explosive) material is in compliance with packaging, labeling, marking, and certification requirements of this subchapter. Permitted fireworks and small arms ammunition may be carried without the required packaging, labeling, marking, or certification if they are in tight containers.

[Amdt. 176–1, 41 FR 16110, Apr. 15, 1976, as amended by Amdt. 176–30, 55 FR 52695, Dec. 21, 1990]

§ 176.91 Motorboats.

A motorboat may be transported on board a ferry vessel with gasoline in the tank and two other containers not exceeding 23 L (six gallons) capacity each if they are in the motorboat, closed, and in good condition.

[Amdt. 176–1, 41 FR 16110, Apr. 15, 1976, as amended by Amdt. 176–30, 55 FR 52695, Dec. 21, 1990]

§ 176.92 Cylinders laden in vehicles.

Any cylinder of Class 2 (compressed gas) material which is required to have a valve protection cap fitted in place may be transported on board a ferry vessel without having the valve protection cap in place when it is laden in a transport vehicle and is not removed from the vehicle while on the vessel.

[Amdt. 176–1, 41 FR 16110, Apr. 15, 1976, as amended by Amdt. 176–30, 55 FR 52695, Dec. 21, 1990]

§ 176.93 Vehicles having refrigerating or heating equipment.

(a) A transport vehicle fitted with refrigerating or heating equipment using a flammable liquid or Division 2.1 (flammable gas) material, or diesel oil as fuel, may be transported on a ferry vessel. However, the refrigerating or heating equipment may not be operated while the vehicle is on the vessel, unless the equipment complies with the following requirements:

(1) The installation is rigidly mounted and free of any movement other than normal vibration in operation;

(2) An easily accessible shutoff control is fitted to the fuel and electrical supply of the refrigerating or heating equipment; and

(3) The fuel storage tank, the fuel lines, the carburetor and any other fuel devices are tight and show no signs of leakage.

(b) If the vehicle operator desires to operate the refrigerating or heating equipment while on the vessel and the equipment is not fitted with automatic starting and stopping devices, it must be started before the vehicle is taken on board. It may continue in operation while the vehicle is on the vessel, but if the motor stops it may not be restarted.

(c) In the case of a ferry vessel on a voyage exceeding 30 minutes' duration, stowage must be provided for transport vehicles having refrigerating or heating equipment operated by internal combustion engines which will permit ready diffusion of exhaust gases to the open air. Passenger vehicles may not be stowed in a position adjacent to vehicles operating internal combustion motors which expose the occupants of the passenger vehicles to excessive

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Appellee,
v.
Ronald Lee ILLINGWORTH, Appellant.

No. 73-1207.

Argued and Submitted Aug. 15, 1973.
Decided Dec. 14, 1973.

Defendant was convicted before the United States District Court for the District of Colorado, Alfred A. Arraj, Chief Judge, of transporting explosives across state lines without permit, and he appealed. The Court of Appeals held that defendant could not be prosecuted for such offense in view of clearly provided exception to application of statute under which he was charged.

Judgment vacated and case remanded with directions.

West Headnotes

Explosives ⚷4
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Accused, who carried dynamite on airplane flights, could not be prosecuted under statute proscribing transportation of explosives across state lines without a permit, in view of provision rendering such statute inapplicable to "any aspect of the transportation of explosive materials via * * * air which are regulated by the United States Department of Transportation and agencies thereof" and fact that Federal Aviation Administration had promulgated regulation which excluded dynamite from range of explosives that could be carried on passenger-carrying aircraft. 18 U.S.C.A. §§ 842, 842(a)(3), 845, 845(a)(1); Federal Aviation Act of 1958, §§ 601(a)(6), 902(h)(1), 49 U.S.C.A. §§ 1421(a)(6), 1472(h)(1); Department of Transportation Act, § 2(e)(1), 49 U.S.C.A. § 1652(e)(1).

***264** Philip M. Jones, Lewis, Jones & Ellwood, Denver, Colo., for appellant.

***265** Stephen M. Duncan, Sp. Asst. U.S. Atty. (James L. Treece, U.S. Atty., with him on the brief), for appellee.

Before HILL, BARNES [FN1] and SETH, Circuit Judges.

FN1. Senior Circuit Judge, of the Ninth Circuit, sitting by designation

PER CURIAM.

Ronald Lee Illingworth appeals from a jury verdict finding him guilty of having violated the provisions of 18 U.S.C. § 842(a)(3), by unlawfully transporting explosives across state lines without a permit required by law. Illingworth appears to have taken an airplane flight from Pocatello, Idaho, to Salt Lake City, Utah, and then taken another flight from Salt Lake City to Denver, Colorado, while carrying a handbag containing dynamite. His expressed reason for this enterprise was to help his father blow up some tree stumps at the latter's farm in Iowa. He disclosed the contents of the bag to ticket agents at the Denver airport.

18 U.S.C. § 842 under which the prosecution was commenced is part of Chapter 40 of that title of the United States Code; so, too, is section 845 of Title 18, which provides that:

'(a) Except in the case of subsections . . . of section 844 of this title, this chapter shall not apply to:

'(1) any aspect of the transportation of explosive materials via . . . air which are regulated by the United States Department of Transportation and agencies thereof; . . .'

Thus the question arises whether appellant could be prosecuted under section 842 in the face of the above exception to its application. The exception refers to materials which are regulated by the Department, and not necessarily prohibited.

The Federal Aviation Administration is an agency of the Department of Transportation (49 U.S.C. § 1652(e)(1)), and under 49 U.S.C. § 1421(a)(6), the Administrator of the Federal Aviation Administration is empowered and required to prescribe 'such reasonable rules and regulations . . . governing other practices, methods and procedure, as (he) may find necessary to provide adequately for national security and safety in air commerce.' This he has done. These regulations pertain to the carrying or transporting of explosives by civil aircraft in the United States. See 14 C.F.R. § 103.7 (1973); Underwriters at Lloyd's of London v. Cordova Airlines, Inc., 283 F.2d 659 (9th Cir.). These regulations relate to persons carrying certain dangerous articles on board passenger-carrying aircraft; these dangerous articles, in turn, are defined to include explosives of the type carried by Illingworth. While the applicable regulations are 'not a paragon of logical organization of graphic lucidity,' 283 F.2d at 661, it is clear that the dynamite which Illingworth

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carried with him on the planes was not only regulated, but also excluded from the range of 'acceptable' explosives that, in certain circumstances, could be carried on board passenger-carrying aircraft, by 14 C.F.R. § 103.7 (1973). See 49 C.F.R. §§ 173.50, 173.51, 173.52, 173.53 (1973).

Additionally, Congress has specifically provided a penalty for violations of such regulations by enacting 49 U.S.C. § 1472, subsection (h)(1) of which, in relevant part, provides:

'Any person who knowingly . . . causes the transportation in air commerce, of, any shipment, baggage, or property, the transportation of which would be prohibited by any rule, regulation, or requirement prescribed by the Administrator under subchapter VI of this chapter, relating to the transportation . . . of explosives or other dangerous articles shall, upon conviction thereof for each such offense, be subject to a fine of not more than $1,000, or to imprisonment not exceeding one year, or to *266 both such fine and imprisonment; . . .'

Again the reference is to 'explosives.'

Thus, the appellant could not be prosecuted under 18 U.S.C. § 842(a)(3) by reason of the clearly provided exception to its application. Explosives are regulated by the Administrator of the Federal Aviation Administration, an agency of the Department of Transportation, in regard to their transportation by air. There is no ambiguity in the statutory exception; nor is there any question of the existence of alternative statutes open to the prosecution in this case by reason of the explicit exception in 18 U.S.C. 845(a)(1) to section 842's application. Congress has provided this exception to permit regulation by appropriate authorities and they have done so. Congress has also provided for penalties for violation of these regulations.

The judgment is vacated, and the case is remanded with directions to dismiss the indictment. This action constitutes no bar to a proper indictment.

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