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Part II

Department of Transportation

Research and Special Programs Administration

Hazardous Materials Transportation Enforcement Cases; Notice of Decisions of Appeal Under the Hazardous Materials Transportation Act

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Appeals in Hazardous Materials Transportation Enforcement Cases

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of decisions on appeal in enforcement cases under the Hazardous Materials Transportation Act.

SUMMARY: This Notice publishes the decisions on appeal issued by the Administrator of the Research and Special Programs Administration (RSPA) in hazardous materials transportation enforcement cases that were initiated between 1983 and the present. These appellate decisions were issued in cases initiated under the Hazardous Materials Transportation Act (HMTA), 49 app. U.S.C. 1801 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180. The purpose of this Notice is to increase public awareness and understanding of hazardous materials transportation enforcement cases.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Assistant Chief Counsel for Hazardous Materials Safety, Office of the Chief Counsel (DCC–10), Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 [Tel. (202) 366–4400].

SUPPLEMENTARY INFORMATION: Section 105 of the HMTA, 49 app. U.S.C. 1804(a), provides that, "The Secretary shall issue regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce. The regulations issued under this section shall govern any aspect of hazardous materials transportation safety which the Secretary deems necessary or appropriate." Under this authority, RSPA has issued the HMR, a comprehensive set of regulations concerning the transportation of hazardous materials.

The HMR govern the shipping and transporting of hazardous materials by aircraft, rail car, vessel and motor vehicle. The HMR also prescribe requirements governing "the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a packaging or container which is represented, marked, certified, or sold for use" in transportation of hazardous materials in commerce.

In addition to the HMR, RSPA has issued other regulations (49 CFR parts 106–7) implementing the HMTA. All of these hazardous materials transportation regulations are enforced by RSPA, the U.S. Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, and the Federal Railroad Administration.

Within RSPA, the Office of Hazardous Materials Enforcement (OHME) and Office of Chief Counsel enforce the HMR and parts 106 and 107. RSPA's enforcement regulations are in subpart D of part 107. When a person violates the HMTA or the regulations, the Office of the Chief Counsel may institute an enforcement action. That office may issue a notice of probable violation (notice), in which a respondent is charged with the probable violation(s) and a civil penalty is proposed. In addition, the notice may contain a proposed compliance order.

Generally, under 49 CFR 107.313(a), a respondent must respond to a notice within 30 days of its receipt. The respondent may respond by admitting the violation(s) and accepting the proposed penalty amount (or the proposed compliance order), or may contest the notice. A notice may be challenged through a written response, a telephonic or in-person conference, or a hearing on the record before an administrative law judge.

If the respondent makes no response within the prescribed period, the Chief Counsel may enter an order finding that the alleged violation(s) were committed and imposing the proposed penalty or compliance order. The same result follows if the respondent admits to the violation(s). When the respondent requests a conference, the Office of the Chief Counsel conducts the conference, following which the Chief Counsel reviews the proceeding and considers all relevant evidence, including all submissions of the respondent. The Chief Counsel then issues an order, which may include a finding of violation and imposition of a civil penalty and a compliance order.

In assessing civil penalties, the Chief Counsel considers the nature and circumstances of the violations, their extent and gravity, the respondent's culpability, the respondent's lack of prior offenses, the respondent's ability to pay, the effect of the civil penalty on the respondent's ability to continue in business and any other relevant factors (especially respondent's corrective actions).

Where a hearing is requested, the Office of the Chief Counsel submits the matter to the Department's Office of Hearings. An administrative law judge is assigned to the case and conducts pre-hearing and hearing procedures. The administrative law judge issues an appropriate order.

Following issuance of an order by either the Chief Counsel or an administrative law judge, a respondent must either comply with the order or file an appeal with the Administrator of RSPA. The appeal must be filed within 20 days of respondent's receipt of the order. The appeal must state, with particularity, the findings in the order that the respondent is challenging, and it must include any and all relevant information and arguments. The filing of an appeal stays enforcement of the order.

In a decision on appeal, the Administrator determines whether to affirm or dismiss violations and whether to affirm or modify civil penalty assessments and compliance orders. The Administrator's decision on appeal is the final step in the administrative process.

A respondent has 30 days from the date of issuance of the decision on appeal in which to comply with its terms. Failure to timely comply results in assessment of interest, penalty and administrative charges where a civil penalty has been affirmed in the decision on appeal.

The following is a chronological index of decisions on appeal issued by the Administrator in hazardous materials transportation enforcement cases between 1983 and the present, followed by the full text of those decisions.

Issued in Washington, DC, on December 12, 1991, under the authority delegated in 49 CFR part 106, appendix A.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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[Ref. No. 83-07-SE]

Grant of Partial Relief

In the Matter of: Air Capital Wholesale Fireworks, Respondent

Background

On September 21, 1984, the Associate Director for Operations and Enforcement (OOE) assessed a $5,000 civil penalty against Air Capital Wholesale Fireworks (Air Capital) for violation of 49 CFR 171.12(a); i.e., failure to "provide the shipper and the forwarding agent at the place of entry into the United States timely and complete information as to the requirements" of subchapter C, 49 CFR parts 177–178. Air Capital submitted an appeal by a one-page letter dated October 2, 1984.

Discussion

In the appeal, Air Capital offered the amount of $1,000 to compromise the civil penalty. Air Capital states in support of mitigation of the penalty amount that it has "never been able to obtain timely and complete information on these regulations." It also claims to have suffered financial loss as a result of the transaction leading to the violation and is "still not financially stable."

Air Capital's concise statement about its lack of knowledge appears to mean that it did not know about the requirements of § 171.12(a). However, once it began its business of importing hazardous materials it had an affirmative duty to acquaint itself with those regulations. There is no evidence in the record to suggest that Air Capital requested information regarding its regulatory responsibilities from the Materials Transportation Bureau or any other Federal entity nor, any indication that "timely" or "complete" information was denied to Air Capital at any time.

With regard to Air Capital's financial condition, there is no new information in the appeal evidencing a deterioration of Air Capital's financial stability since the date of the order assessing the penalty (September 21, 1984). However, the record does reflect a seizure by the U.S. Customs Service of a substantial amount of goods consigned to Air Capital at the time of OOE's investigation. Accordingly, there is some basis for mitigation under 49 CFR 107.331 (e) and (f).

Findings and Order

In consideration of the foregoing, I affirm the finding of the Associate Director for OOE that Air Capital violated 49 CFR 171.12(a). However, sufficient basis exists to mitigate the civil penalty amount from $5,000 to $3,500. Therefore, Air Capital is hereby assessed a civil penalty in the amount of $3,500.

The civil penalty assessed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, room 8420, 400 7th Street, SW., Washington, DC 20590.

Issued May 28, 1985.

L.D. Santman,

Director, Materials Transportation Bureau

Certified mail—Return receipt requested

[Ref No. 84-02-CM]

Grant of Partial Relief

In the Matter of: Worthington Cylinders Corporation, Respondent.

Background

On September 21, 1984, the Associate Director for the Office of Operations and Enforcement (OOE) issued a five-part compliance order to Respondent, Worthington Cylinder Corporation (Worthington). Worthington submitted a timely appeal to challenge only one of the findings contained in the order, namely a violation of 49 CFR 178.51–11(a) for failing to uniformly and properly heat treat its DOT specification cylinders. The Associate Director's order dated September 21, 1984 is incorporated herein by reference.

The basis of Worthington's appeal is as follows:

First, there is no reasonable basis, in the regulations or otherwise, for the Associate Director's finding that Worthington has violated § 178.51–11(a) with respect to heat treatment. Second, the finding and order is inconsistent with past DOT interpretations of § 178.51–11(a) and represents a sudden, arbitrary and unreasonable departure from past DOT interpretations. Third, even if there were any legitimate basis to support the Associate Director's finding and order, if the order were affirmed without modifying the prescribed time for compliance, the order as written, in conjunction with 49 CFR 107.325(b), would require the completion by Worthington of a major change in its

manufacturing processes within twenty days of the decision and would have a devastating competitive and economic impact on Worthington.

Definition of Heat Treatment

No facts are disputed with regard to the contested finding. Worthington acknowledges that its heat treating procedures does not heat the entire cylinder to a temperature in excess of 1100° F. Worthington's primary argument centers on its own interpretation of the intent and purpose of heat treatment i.e., "to remove the stress induced in drawing and to return the material to a more ductile state."

Worthington contends that "uniform mechanical properties" are achieved throughout the cylinder because most of the "work hardening" is done on the sidewalls, concluding that the top and bottom do not need as much heat treatment.

The purpose of heat treatment is not limited to stress relief as described by Worthington. The function of heat treatment is also to obtain desired "properties." Worthington's description addresses itself only to achieving a desired "condition;" i.e., removing stress itself. The American Society for Metals defines heat treatment and stress relieving as follows:

"Heat Treatment. Heating and cooling a solid metal or alloy in such a way as to obtain desired conditions or properties. Heating for the sole purpose of hot working is excluded from the meaning of this definition."

and

"Stress Relieving. Heating to a suitable temperature, holding long enough to reduce residual stresses and then cooling slowly enough to minimize the development of new residual stresses." (*Metals Handbook.* Vol. 1, American Society for Metals (1985)).

While relief of cold work stresses, if present, is accomplished during heat treatment, it is not the exclusive purpose and function of heat treatment. The intent of the regulation is to assure that the entire cylinder is heat treated, not just that portion of the cylinder considered to have stresses induced in drawing. The heating applied by Worthington wherein the sidewalls reach a temperature of 1350° while the top of the heads and the bottoms of each cylinder reached a temperature below 1100°, could in itself induce harmful residual stresses. Therefore, I affirm the decision of the Associate Director that the regulation requires heat treating the entire cylinder.

Previous MTB Interpretations

Worthington contends that the Associated Director's decision and his interpretation of the regulation are inconsistent with a previous "interpretation" made in 1980 by a memorandum from the Office of Hazardous Materials Regulation (OHMR) to OOE. The OHMR memo responded to a memo from OOE. The OOE memo specifically referred to the induction coil heating process which heats "the sidewall of the cylinder and virtually leaves the ends of the cylinder unaffected." While the OHMR memo was accurately cited by Worthington in its appeal (p.6), that memo did not specifically address the "precise question involved in the current proceeding," which is whether the entire cylinder must be heat treated.

The 1980 dialog between OOE and OHMR concerned failed test results involving coupons from the "crowns" of a cylinder. Had the OHMR memo concluded that a cylinder was properly heat treated if coupons from its crown passed the tests, then Worthington's reliance on that memo would be well-founded. It did not.

Additionally, a review of the paragraph in the OHMR memo dealing with Table I of appendix A, part 178, shows that the requirement to "satisfactorily pass all tests prescribed in 178.51" is joined to the requirement to heat treat in conformance with the specific requirements of Table I of appendix A, part 178 by the conjunctive "and", rather than the disjunctive "or". The ultimate logic of Worthington's argument leads to the erroneous conclusion that if the coupons (not cylinders) pass the required tests the cylinder does not have to be heat treated at all. Accordingly, Worthington's interpretation of the OHMR memo is emphatically rejected.

Uniform and Proper Heat Treatment

The interpretational debate between OOE and Worthington throughout this proceeding has focused on the two essential elements of heat treatment: that it be (1) uniform and (2) proper. Worthington is correct in asserting that the meaning given these two words is not consistent among OOE, OHMR and the Compressed Gas Association (CGA) publication cited by Worthington in its appeal, *Basic Considerations of Cylinder Design.* The regulation uses the two words together, "uniformly and properly." However, in each of the references to heat treatment all parties as well as the regulation have used one word in common, "cylinder." None of the authorities relied upon has used the words, "stress relief" or "coupon," or "portion of the cylinder." Both the HMR and plain English usage of the word "cylinder" without using adjectives implies the entire cylinder. The Associate Director in his compliance order did not interpret the words, "uniform" and "proper" as independent adjectives for "heat treatment." Instead, he joined them together and emphasized their application to the entire cylinder. Thus, the Associate Director's conclusion that the entire cylinder must be heat treated is sound and comports with the intent of the HMR.

Worthington relies upon the CGA's reference to heat treatment in its industry publication. However, it is not unusual for Federal regulations to differ with industry codes, by establishing more stringent standards, while simultaneously incorporating by reference much of the pre-existing industry standard. (Note that 49 CFR 178.51–11 does not incorporate by reference an authority outside of the regulation.)

Rulemaking

Because the interpretation described herein is not novel, there is no basis to require a rulemaking initiative on the part of MTB. In our view, the existing rule is a lawfully promulgated and technically sound regulation based upon sound safety concerns. As stated by the Associate Director in his order, the administrative record of this case alone does not justify additional rulemaking.

Findings and Order

Notwithstanding my affirmation of the Associate Director's findings, it is evident to me that Worthington's reliance on its own interpretation of this regulation was made in good faith. Therefore, some mitigation is warranted with respect to the time period within which compliance must be accomplished.

Having reviewed the administrative record in this case, I hereby affirm the finding of the Associate Director that Worthington violated 49 CFR 178.51–11(a). However, the compliance order is amended by deleting Item 1 thereof, and substituting the following:

1. Worthington shall uniformly and properly heat treat its DOT specification cylinders in accordance with 49 CFR 178.51–11(a) so that the entire cylinder is heated to a temperature above 1100° F. Compliance with this requirement shall be accomplished within 120 days of receipt of this order, provided however that the time period for compliance may be extended beyond 120 days by the Associate Director for Operations and Enforcement if Worthington demonstrates to the satisfaction of the Associate Director that compliance cannot be accomplished within the 120 days. Any request for extension of the 120 day period must be written and received by the Associate Director no later than 45 days prior to termination of the 120 day period.

The Order of September 21, 1984, except as modified herein, continues in full force and effect.

Issued: February 11, 1988.

L.D. Santman,

Director, Materials Transportation Bureau.

Certified mail—Return receipt requested

[Ref No. 84-03-CM]

Grant of Partial Relief

In the Matter of: Kargard Industries, Inc., Respondent.

Background

On October 19, 1984, the Associate Director for Operations and Enforcement (OOE) issued a seven part compliance order to Respondent, Kargard Industries, Inc. (Kargard). Kargard submitted a timely appeal to challenge only the first finding contained in the order, i.e., a violation of 49 CFR 178.61-11(a) for failing to uniformly and properly heat treat its DOT specification cylinders. The Associate Director's order dated October 19, 1984 is incorporated herein by reference. In its appeal Kargard submitted additional arguments by written correspondence and documentation dated November 10, 1984 and February 14, 1985.

Discussion

In its appeal Kargard embellished its previous argument with additional technical information regarding the manufacturing of its 4BW cylinders. Kargard continues to argue that its "three-step" process of heat treating the cylinders produces a product which is safe and "meets the letter and spirit of the code." Additionally, Kargard seems to be defending the induction heat treatment method.

The Office of Operations and Enforcement (OOE) does not contend that inductive heat treatment cannot be "proper." The objection to Kargard's head treating method concerns the "three-step" approach proposed as a remedy to the "uniform and proper" standard which is lacking for compliance under 49 CFR 178.61-11(a). As stated in the Associate Director's order, the cylinder must be heat treated "in its entirety" whether by induction method or furnace method. Also, the heat treatment must be performed after all welding and forming operations. Kargard's system performs localized heat treatment after some welding but also prior to some welding.

Kargard's contention that the multiple stage heat treatment satisfies the safety designs of the heat treatment process relies heavily on Kargard's construction that the purpose of heat treatment is to stress relieve. Stress relief achieves a desired "condition," i.e., removing stress itself. However, the function of heat treatment is also to obtain desired "properties." The American Society for Metals defines heat treatment and stress relieving as follows:

"Heat treatment. Heating and cooling a solid metal or alloy in such a way as to obtain desired conditions or properties. Heating for the sole purpose of hot working is excluded from the meaning of this definition."

and

"Stress Relieving. Heating to a suitable temperature holding long enough to reduce residual stresses and then cooling slowly enough to minimize the development of new residual stresses." *Metals Handbook, Vol. 1,* American Society for Metals (1985).

While relief of cold work stresses, if present, is accomplished during heat treatment, it is not the exclusive purpose and function of heat treatment. The intent of the regulation is to assure that the entire cylinder is heat treated not just that portion of the cylinder considered to have stresses induced in drawing. I agree therefore, with the Associate Director's finding that the regulation at issue does not permit Kargard to heat treat the heads before assembly and the sidewalls after assembly.

Findings and Order

Accordingly, I affirm the finding of the Associate Director for OOE that Kargard violated 49 CFR 178.61-11(a) for failing to uniformly and properly heat treat its DOT specification cylinders. However, his order dated October 19, 1984 in item 1 requires immediate compliance. This portion of the order fails to recognize the potential transition problems if Kargard must modify its heat treatment facilities.

While this order does not forbid the use of heat treatment by induction, there is reason to believe that Kargard's current facilities may not permit the use of induction heat treatment to comply with this order. Kargard's analysis as presented in the administrative record implies that some conversion of its physical plant may be necessary, such as conversion to a furnace heat treating method. Because the record reflects Kargard's good faith desire to comply with DOT regulations, some mitigation with respect to a time period for compliance is warranted. Therefore, the compliance order is amended by deleting Item 1 thereof, and substituting the following:

1. Kargard shall uniformly and properly heat treat its DOT specification cylinders in accordance with 49 CFR 178.61-11(a) so that the entire cylinder is heated to a tempertature above 1100°F. Compliance with this requirement shall be accomplished within 120 days of receipt of this order, provided however that the time period for compliance may be extended beyond 120 days by the Associate Director for Operations and Enforcement if Kargard demonstrates to the satisfaction of the Associate Director that compliance cannot be accomplished within the 120 days. Any request for extension of the 120 day period must be written and received by the Associate Director no later than 45 days prior to termination of the 120 day period."

The Order of October 19, 1984 except as modified herein continues in full force and effect.

Issued: May 2, 1985.

L.D. Santman,

Director, Materials Transportation Bureau.

Certified mail—Return receipt requested

[Ref No. 84-11-CD]

Grant of Partial Relief

In the Matter of: Select Drink, Inc., Respondent.

Background

On January 3, 1985, the Associate Director for the Office of Operations and Enforcement (OOE) issued an Order to Select Drink, Inc. (Respondent) assessing a penalty in the amount of $3,500 for violations of 49 CFR 171.2(c), 173.34(e) and 173.301(c). The Associate Director's Order dated January 3, 1985 is incorporated herein by reference.

Discussion

The basis of Respondent's appeal is that the assessed penalty is too high. In support of this it argued that the Department's goal of compliance has been met by the Respondent and they now comply with the regulations, having set up a retest program to ensure that the violations do not occur again. Other than the amount of the penalty, the Respondent has contested no other findings of the Order.

In the Notice of Probable Violation (NOPV), the Respondent was preliminarily assessed a $7,000 civil penalty. Based on Respondent's response to the NOPV and evidence submitted at the informal conference, the Order assessed a civil penalty of $3,500. The Respondent has now requested the civil penalty be abated further. Due to the nature of the violations and the potential risk posed, the assessment of a civil penalty is warranted. However, additional mitigation is granted based on the Respondent's positive actions in response to the NOPV.

Findings

The Order of January 3, 1985, and each finding made therein, is affirmed except that portion of the Order assessing a penalty of $3,500. The appeal of the Respondent has been considered and partial relief is warranted. Accordingly, Select Drink, Inc. is hereby assessed a civil penalty in the amount of $2,000.

This civil penalty must be paid within 20 days of your receipt of this decision. Failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, Room 8420, 400 7th Street, SW., Washington, DC 20590.

Issued: January 31, 1985.

L. D. Santman,

Director, Materials Transportation Bureau.

Certified mail—Return receipt requested

[Ref. No. 85–10–CEM]

Denial of Relief

In the Matter of: Europa, USA, Inc., Respondent.

Background

On December 10, 1985, the Acting Chief Counsel issued an Order to Respondent assessing a penalty in the amount of $12,000 for violations of 49 CFR 171.2(c), 172.200, 172.201(a)(4), 172.202 (a)(2) and (a)(3) and 173.306(c), (c)(4), (c)(5) and (c)(6), of the Hazardous Materials Regulations. Respondent submitted a timely appeal of the Order, challenging the findings of the Order. The Acting Chief Counsel's Order, dated December 10, 1985, is incorporated herein by reference.

Discussion

Respondent's basis for appeal is that the inspector did not understand the filling process Respondent was using to fill the halon blend fire extinguishers at issue in this proceeding. Respondent requested that another inspection be performed with an independent third party inspector, as well as DOT's inspector, to ensure a fair inspection. Respondent's assertion that its procedures were proper and in compliance with the Regulations, is not sufficiently substantiated to contradict the findings made in the Order or the evidence on which they were based.

Findings

The issue raised by Respondent in its appeal has been considered, and in the absence of any evidence to support it, the Order of December 10, 1985, assessing a $12,000 civil penalty is affirmed.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue, if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, Room 8420, 400 7th Street, SW., Washington, DC 20590.

Date Issued: March 24, 1986.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 85–14–SFE]

Denial of Relief

In the Matter of: American Security International, Inc., Respondent

Background

On January 22, 1986, the Acting Chief Counsel issued an Order to Respondent assessing a penalty in the amount of $5,000 for violations of 49 CFR 171.2(a), 172.101, 172.200(a), 172.204(a), 172.300(a), 172.301(a), 172.400(a), 172.400(b)(2), and 173.22a(b). The Respondent filed a timely appeal of the Order, requesting revaluation of the assessed civil penalty.

Discussion

Respondent's basis for appeal is financial hardship in paying the civil penalty. Respondent has expressed concern that if it is required to pay this penalty it may not be able to stay in business. As evidence of this, Respondent submitted a copy of its 1984 tax return, which showed that Respondent paid no income tax in 1984 because of a $15,000 loss. The return was certified as being accurate by Respondent's CPA. Although the tax return does show that Respondent sustained a $15,000 loss it does not support Respondent's position that the penalty would put Respondent out of business.

Findings

The issue raised by Respondent in its appeal has been considered, and in the absence of sufficient evidence to support it, the Order of January 22, 1986 is affirmed, including the $5,000 civil penalty assessed therein. In light of Respondent's financial difficulty Respondent will be allowed to pay the civil penalty in monthly installments of $500 per month for ten months. The first $500 must be paid within 20 days of its receipt of this decision. The remaining installments will be due on the first of each month beginning June 1, 1986.

Failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue, if payment is not made within 110 days of service. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, room 8420, 400 7th Street, SW., Washington, DC 20590.

Issued: April 17, 1986.

M. Cynthia Douglass,

Administrotor, Reseorch and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 85–18–CRR]

Denial of Relief

In the Matter of: Indiana Propane Cylinder Corporation, Respondent.

Background

On February 4, 1986, the Acting Chief Counsel issued an Order to Respondent assessing a penalty in the amount of $14,000 for violations of 49 CFR 171.2(c) and 173.34(i). The Respondent submitted a timely appeal of the Order requesting the civil penalty be reduced to $5,000. The Acting Chief Counsel's Order, dated February 4, 1986, is incorporated herein by reference.

Discussion

Respondent's basis for appeal is financial hardship in paying the civil penalty assessed in the Order. Consequently, Respondent has made an offer in compromise of $5,000. Although claiming that the $5,000 would still pose a financial burden, Respondent states that it can pay that amount and still stay in business. To support its claim of financial hardship, Respondent relies on the income statement and balance sheet, submitted in its response to the Notice of Probable Violation, showing the company's status as of December 31, 1985. These financial statements were not certified by an independent accountant nor signed by the company official responsible for the accuracy of such statements; nor were they supported by independent verifiable documentation. Under these circumstances, and in light of the fact that the claim of financial hardship has already been taken into account in reducing the amount of the civil penalty in the Order, there is no additional evidence in the record to support Respondent's position.

Findings

The offer submitted by Respondent to pay a civil penalty of $5,000 is rejected, and the Order of February 4, 1986, assessing a $14,000 civil penalty is affirmed. Respondent's offer to pay $5,000 is accepted as the first installment payment of the civil penalty, with the remaining $9,000 to be paid in consecutive monthly installments of $500.00 per month for the next eighteen months.

Payment of the $5,000 must be made within 20 days of your receipt of this decision. The installment payments of $500 per month are to begin on May 1, 1986, and continue to be paid on the first day of each month thereafter.

Failure to pay the civil penalty will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in accrual of interest in accordance with the rate establishment pursuant to 31 U.S.C. 3717. That same authority also provides for a penalty charge of six percent (6%) per annum, which will accrue, if payment is not made within 110 days of service. Failure to pay an installment on time will result in acceleration of the remaining balance due as well as assessment of penalty and interest. Payment should be made by certified check or money order, payable to the Department of Transportation, and sent to the Office of the Chief Counsel, Research and Special Programs Administration, Room 8420, 400 7th Street, SW., Washington, DC. 20590.

March 24, 1986.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 86–02–SB]

Denial of Relief

In the Matter of: J.T. Baker Chemical Company, Respondent.

Background

On March 10, 1987, the Chief Counsel, Research and Special Programs Administration, issued an Order to J.T. Baker Chemical Company (Respondent) assessing a penalty in the amount of $1,000 for a violation of 49 CFR 171.2(a), 172.101, and 173.119(a). The Respondent submitted a timely appeal of the Order, challenging it on four bases. The Chief Counsel's Order dated March 10, 1987 is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are: (1) Respondent did not "knowingly" commit any acts which violated the regulations; (2) Respondent did purchase, receive, and ship DOT packages which complied with 49 CFR 178.211–6 in all respects except that the DOT specification marking was missing on some of the packages, and at no time was there any compromise of safety by virtue of a missing manufacturer's DOT marking on an otherwise compliant box; (3) Respondent attempted to purchase DOT specification containers for the shipment; and (4) the charges against Respondent should be dismissed and the matter reviewed on the merits concerning the failure to properly mark a package.

Respondent's first argument is that it did not "knowingly" violate the sections cited in the Notice of Probable Violation. 49 CFR 107.299 states that "knowingly" means:

> that a person who commits an act which is a violation of the Act or of the requirements of this subchapter * * * commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter * * * Knowledge and knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter * * *

Given this definition, the Respondent in this case knowingly offered packages for transportation that were not properly marked. Even if the Respondent was not aware that the boxes were not properly marked, Respondent should have known that they were not. Further, Respondent voluntarily offered the packages for transportation. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Respondent's second argument is that it did purchase, receive, and ship DOT packages which complied with 49 CFR 178.211–6 in all respects except for the absence of the DOT specification marking on some of the packages, and that at no time was there any compromise in safety by virtue of a missing manufacturer's DOT marking on an otherwise compliant box. This recitation of facts does not excuse the violation, but is an admission of it. Further, without the specification marking on the box there was no way for the Respondent to determine whether or not the box had been subjected to the testing required by the regulations and, therefore, was a safe and authorized container in which to ship the material. Thus, safety, in fact, was compromised by Respondent's actions.

Respondent's third argument is that it tried to obtain DOT specification boxes for the shipment. As the Order in this case states, this fact was taken into consideration prior to the issuance of the Order. Respondent had an obligation to check each box for the proper specification marking prior to its use. The fact that Respondent tried to obtain the appropriate boxes does not serve to excuse the violation, but was taken into account as a mitigating factor.

In its fourth argument, Respondent appears to be saying that the manufacturer should have marked the specification on the boxes. However, that argument is irrelevant to the violation at hand. 49 CFR 171.2(a) requires a person who offers or accepts a hazardous material for transportation in commerce to ensure that the package so offered or accepted is marked in accordance with the regulations. Prior to offering the material for transportation, the Respondent was required to make certain that the boxes were properly marked. Respondent did not do so.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly offered packages for transportation that were not properly marked.

(2) The absence of DOT specification markings on some of the packages was a compromise of safety.

(3) The fact that Respondent tried to obtain the required specification boxes does not excuse the violation.

(4) Respondent failed to ensure that the packages were marked with the required specification prior to offering hazardous materials for transportation in those packages, and any separate violation by the package manufacturer is irrelevant.

(5) Consequently, the four issues raised by the Respondent in its appeal are found to be without merit.

(6) The civil penalty was mitigated in the Order by an appropriate amount, and no basis for further mitigation of the penalty exists.

Therefore, the Order of March 10, 1987, assessing a $1,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and set to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: October 19, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 86–09–CR]

Partial Grant of Relief

In the Matter of: Brendle, Inc., Respondent.

Background

On November 24, 1987, the Chief Counsel, Research and Special Programs Administration, issued a Final Order to Respondent, assessing a penalty in the amount of $2,250 for violations of 49 CFR 173.34(e)(3) and 173.34(e)(5). By letter received January 26, 1988, Respondent submitted an appeal of the Order, challenging the occurrence of violations on two bases. The Chief Counsel's Final Order is incorporated by reference.

Discussion

With respect to Violation No. 1, performing retests on DOT specification cylinders using equipment not capable of being read to an accuracy of 1 percent, Respondent contends, as it did before issuance of the Final Order, that the employee who performed the retesting during the inspection was a trainee and generally did not perform retesting without supervision. Furthermore, Respondent asserts that its regular employees were qualified to retest, and such an employee could have correctly retested the cylinder during the inspection.

During the inspection, the inspector observed the testing of a DOT specification 3AA cylinder and inquired which burette was used to measure the total expansion of the cylinder. Respondent's employee indicated a burette that could not be read to an accuracy of 1 percent of the total expansion of this cylinder, and a photograph was taken to establish this fact.

Moreover, to confirm the first employee's response, the inspector asked Idus Brendle, Respondent's employee with six years of retest experience, if the previously indicated burette was used to retest that DOT 3AA cylinder; Mr. Brendle replied that use of the indicated burette was standard procedure. Thus, Respondent's regular retesting employee confirmed that the wrong burette was utilized for retesting the DOT 3AA cylinder. Consequently, Respondent's present contention is without merit in light of the direct evidence that the improper burette was utilized.

With respect to Violation No. 2, failing to maintain records listing the reinspection and retest results of DOT specification cylinders, Respondent contends that, while some of its reinspection and retest records were not dated or signed and failed to contain adequate descriptions of each cylinder retested, this required information was available from other business records generated by the Respondent. In response to the Notice of Probable Violation, Respondent had submitted a series of invoices and pressure charts which it claimed provided the information in question. However, these records did not identify the results of reinspection or the DOT specification of the cylinders and thus did not meet the regulatory records requirements. Furthermore, Respondent failed to submit additional information with this appeal that would rebut the finding on this issue contained in the Order. Consequently, Respondent's contention is not supported by evidence and is without merit.

I have considered the two issues raised by the Respondent in its appeal and find them to be without merit. However, based on the delay in processing this case, partial mitigation of $750 is warranted. Therefore, the Chief Counsel's Order of November 24, 1987 is modified to reduce the civil penalty to $1,500.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC. 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: September 7, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 86–13–CR]

Denial of Relief

In the Matter of: Sentry Fire & Welding Supply, Respondent.

Background

On April 9, 1987 the Chief Counsel, Research and Special Programs Administration, issued a Revised Order to Sentry Fire and Welding Supply (Respondent) assessing a penalty in the amount of $1,500 for violations of 49 CFR 173.34(e) (1)–(5). The Respondent submitted a timely appeal of the Order, challenging it on three bases. The Chief Counsel's Revised Order dated April 9, 1987 is incorporated by reference.

Discussion

The Respondent's bases for appeal are: (1) That the DOT inspection was conducted during an illegal raid upon Respondent's place of business; (2) that

the hydrostatic tests were performed but not immediately recorded; and (3) that regulations pertaining to hydrotesting or recordkeeping are not within 49 CFR part 107. Respondent's assertion that DOT participated in an illegal raid of its plant is without merit. 49 App. U.S.C. 1808 authorizes the Secretary of Transportation to conduct investigations to ensure compliance with the Hazardous Materials Transportation Act and the Hazardous Materials Regulations. The December 2, 1985 inspection by the DOT compliance inspector was conducted pursuant to this authority. Additionally, Respondent was informed that the DOT inspection was independent of the Arizona Department of Public Safety investigation. Consequently, the DOT compliance inspection was fully authorized by law.

Respondent's second basis of appeal is that hydrostatic tests were performed but not recorded. The Respondent proffered this same explanation in response to the May 1, 1986 Notice of Probable Violation. The Chief Counsel determined that Respondent's explanation, in combination with conducting retests and providing records of such retests, warranted the mitigation of the proposed penalty by $1,000. However, Respondent propounding this same justification at this point does not give grounds for further reduction in the assessed penalty.

Respondent's third basis of appeal is that 49 CFR part 107 does not impose hydrostatic testing or recordkeeping requirements. Section 107.299 is RSPA's interpretive regulation of the statutory term "knowingly". This section was cited to establish the basis on which the Chief Counsel based his determination that Respondent had acted with knowledge of the acts which constituted violations. Section 107.331 lists the factors that the Chief Counsel considered when assessing the civil penalty. Consequently, §§ 107.299 and 107.331 do not impose hydrostatic testing and recordkeeping requirements, but provide essential information for establishing Respondent's liability and imposing civil penalties.

Findings

The three issues raised by the Respondent in its appeal have been considered. I find that the inspection was conducted pursuant to valid statutory authority. Furthermore, I find that sufficient evidence has not been presented to warrant additional mitigation of the assessed civil penalty. Consequently, I affirm the civil penalty of $1,500 and the payment schedule outlined in the April 9, 1987 Revised Order.

The first monthly installment of the civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717, as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Issued: September 14, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

[Ref. No. 86–20–CR]

Denial of Relief

In the Matter of: Andre Fire Equipment, Respondent

Background

On March 19, 1987, the Chief Counsel assessed a $2,000 civil penalty against Andre Fire Equipment (Respondent) for violations of 49 CFR 171.2(c) and 171.34 (e)(1) and (e)(2). Respondent submitted an appeal by letter dated April 13, 1987. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had (1) knowingly represented and marked DOT specification cylinders as having been properly retested without performing a visual internal inspection, and (2) knowingly represented and marked DOT specification cylinders as having been properly retested without performing hydrostatic retesting with equipment capable of being read to an accuracy of one percent of the test pressure and one percent of total volumetric expansion or 0.1 cubic centimeter.

Respondent's bases for appeal are that: (1) Sommerfeld Welding Supply Inc. (Sommerfeld), not Respondent, owned the hydrostatic testing equipment and the building where the testing occurred, (2) Respondent's part-time employee, Mr. Zastrow, who did the testing, was trained and supervised by Sommerfeld, and (3) immediately after the inspection, Respondent notified Sommerfeld and closed the operation.

First, Respondent's contention that Sommerfeld owned the testing equipment and the building is irrelevant. Of relevance are the facts that Respondent's employee performed the cylinder retesting, that he did so in an incomplete manner, and that he did so without the required testing equipment. Use of another party's equipment and building does not absolve Respondent of responsibility for ensuring the correctness of the retesting it performs.

Second, Respondent's contention that its employee, Mr. Zastrow, was trained and supervised by Sommerfeld also is irrelevant. Mr. Zastrow performed the retesting of Coca-Cola cylinders at issue here, he was paid for that retesting by Respondent, and Respondent then billed Coca-Cola Co. of Sheyboygan, WI for those retesting services. In addition, Sommerfeld's President denies any involvement with retesting cylinders for Coca-Cola, and Respondent has provided no evidence to the contrary. Even if Mr. Zastrow was trained and supervised by Sommerfeld. Respondent is responsible for his retesting activities, which he carried out as Respondent's employee, for which Respondent billed a third party, and of which Sommerfeld claims no knowledge.

Third, Respondent's closing of its retesting operation after the inspection constitutes no defense to the violations. This action appears to be nothing more than termination of a retesting operation which never had received proper authorization in the first place.

Findings

Based on my review of the record, I find the following:

(1) Another party's ownership of the testing equipment and the building where testing occurred does not relieve Respondent of responsibility for cylinder retesting performed by its employee.

(2) Another party's alleged training and supervision of Respondent's employee/retester does not relieve Respondent of responsibility for cylinder retesting performed by its employee and billed for by Respondent.

(3) Respondent's termination of its retesting operations does not relieve it of responsibility for violations which occurred during such operations.

(4) Consequently, the three issues raised by the Respondent in its appeal are found to be without merit.

(5) The civil penalty was mitigated in the Order by an appropriate amount,

and no basis for further mitigation of the penalty exists.

Therefore, the Order of March 19, 1987, assessing a $2,000 civil penalty is affirmed, as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: November 18, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 86–23–RMS]

Denial of Relief

In the Matter of: Advanced Medical Systems, Inc., Respondent.

Background

On October 30, 1986, the Chief Counsel assessed a $2,000 civil penalty against Advanced Medical Systems, Inc. (Respondent) for violations of 49 CFR 171.2(a), 172.202(a)(3), and 173.476(b) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated October 17, 1986, and supplemented it by letter dated November 18, 1986. The Chief Counsel's Superseding Order (superseding the Order dated October 3, 1986) is incorporated herein by reference.

Discussion

Respondent's bases for appeal are that: (1) Respondent did not "knowingly" commit acts which violated the HMR; and (2) Respondent believes that the civil penalty assessed is unjust and would cause Respondent financial difficulty.

Respondent contends that it did not "knowingly" commit acts which violated 49 CFR 173.476(b) because it did not realize that it was required to obtain an International Atomic Energy Commission (IAEA) Certificate of Competent Authority (CCA) for the special form material itself, in addition to obtaining NRC and DOT approval of the Type B package for export under 49 CFR 173.471. DOT has consistently interpreted the word "knowingly" in the Hazardous Materials Transportation Act (HMTA) and defined it in the HMR (49 CFR 107.299) to mean that a person is chargeable with a violation of the HMTA or regulations if the person (1) actually knew of the facts giving rise to the violation or (2) should have known of such facts. In other words, the Department takes non-criminal enforcement action when it can prove that a person, through that person's negligence, has violated the HMTA or the HMR. The definition further provides that a person is presumed to be aware of the requirements of the HMTA and the HMR. "Knowingly" does not require that a person have an intent to violate the requirements of the HMTA or the HMR. See 49 CFR 107.299. Certainly a shipper of hazardous materials is presumed to be aware of the requirements of the HMTA and HMR, and if any doubt or confusion exists, is expected to inquire further.

Respondent's second basis for appeal is also without merit. Respondent has stated that the amount of the penalty under the circumstances is unjust and would present some financial difficulty. Although Respondent did not explain the circumstances involved, presumably it refers to the fact that Respondent filed for the required CCA on October 4, 1985, the day following the RSPA inspection. That fact already was taken into account in assessing the civil penalty, as stated in the Notice of Probable Violation dated August 5, 1986, and the Superseding Order dated October 30, 1986. Respondent also refers to some financial difficulty which the penalty would cause, without providing any specific information concerning the Respondent's ability to pay or the effect on the Respondent's ability to continue in business. Absent such information, no basis exists to mitigate the penalty.

Findings

Based on my review of the record, I find the following:

1. Respondent knowingly offered a hazardous material for transportation in commerce which was not properly described, in violation of 49 CFR 171.2(a) and 172.202(a)(3), by virtue of the fact that four shipping papers had listed on them incorrect identification numbers for shipments of radioactive material, special form, n.o.s. The assessment of a $150 penalty for each of the four violations (for a total of $600) is reasonable.

2. Respondent knowingly offered a hazardous material for transportation in commerce without obtaining proper authorization, in violation of 49 CFR 171.2(a) and 172.476(b), by virtue of the fact that it offered a special form radioactive material for export shipment on at least 14 occasions between December 1983 and June 1985 without obtaining an IAEA CCA for the specific material prior to the first export shipment. This constitutes a separate violation for each of the 14 shipments, and the assessment of a $100 penalty for each of the 14 violations is reasonable.

3. The two issues raised by the Respondent in its appeal are found to be without merit.

4. The civil penalty was assessed with due consideration of the factors listed in 49 CFR 107.331, and no basis exists for mitigation of the penalty.

Therefore, the Order of October 30, 1986, assessing a $2,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

Date Issued: July 31, 1987.

M. Cynthia Douglass

Administrator, Research and Special Programs Administration.

Certified Mail—Return receipt requested

[Ref. No. 86–24–FBB]

Denial of Relief

In the Matter of: Barkoff Container & Supply Co., Respondent.

Background

On February 12, 1987, the Chief Counsel of the Research and Special Programs Administration (RSPA) issued an Order to Barkoff Container and Supply Co. (Respondent) assessing a civil penalty of $2,500 for a violation of

49 CFR 171.2(c). The Order found that Respondent had sold to CHEMCENTRAL/San Francisco (Chemcentral) 278 DOT Specification 12B boxes which did not have abutting or overlapping inner flaps and which were not accompanied by fill-in pieces or pads to prevent an opening between the inside flaps. The Respondent submitted a timely appeal of the Order by letter dated February 20, 1987. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's bases for appeal are that: (1) The purchaser of the boxes, rather than Respondent, was responsible for the violation and, therefore, Respondent did not "knowingly" violate the Hazardous Materials Regulations; and (2) since the July 25, 1986 warning letter from RSPA to Mercury Container Corporation (Mercury) stated that RSPA would not proceed with any enforcement action unless the violations recurred, and they have not, if any penalty is assessed it should be against Mercury, the manufacturer.

With respect to Respondent's first basis for appeal, Chemcentral's plant manager stated that Chemcentral had specifically requested Respondent to design a specification container in which to package and ship its flammable liquids, and that the boxes that were observed during the inspection of Chemcentral on December 5, 1985, represented the complete boxes received from Respondent. The plant manager stated that Chemcentral had requested by telephone that the boxes be supplied and that the marking DOT 12B30 be printed on them.

Respondent does not contest the fact that it knowingly represented, by sale to Chemcentral, that the fiberboard boxes met the requirements for a DOT Specification 12B box. The boxes supplied to Chemcentral were marked as DOT 12B30 boxes, and Respondent's name and address were printed just above the specification marking on the box. Further, Respondent's Invoice No. 00 0156159, recording the shipment of the boxes to Chemcentral, indicates that the boxes shipped were 12B30 boxes. Chemcentral, as a shipper of hazardous materials, is required to use the appropriate specification packagings to ship its goods, but it is not responsible for the actual manufacture of DOT specification packagings.

It was the responsibility of Respondent as the broker to ensure that the packaging met the Specification 12B fiberboard box specifications of 49 CFR 178.205–.4 before it represented, by sale to Chemcentral, that the fiberboard boxes met DOT specifications. In fact the boxes did not meet DOT specifications, and Respondent's sale of those boxes to Chemcentral as meeting the requirements of 49 CFR 178.205, constitutes a violation of 49 app. U.S.C. § 1804(c) and 49 CFR 171.2(c).

The Respondent's second basis for appeal concerns a July 25, 1986 warning letter which was sent to Mercury, the manufacturer of the boxes. This letter was sent to Mercury and applied only to that corporation, not to Respondent. Enforcement action may be taken against any person who represents, marks, certifies, sells, or offers a packaging or container as meeting the requirements of the HMR if the packaging is not manufactured, fabricated, marked, maintained, reconditioned, repaired or retested in accordance with the HMR. Thus, action may be taken against either the manufacturer or the broker, or both, and the action may be different in each case. The case against Respondent is outlined in the Notice of Probably Violation issued to Respondent on August 11, 1986, which is separate and distinct from the warning letter sent to Mercury.

Findings

Based on my review of the record, I find the following:

1. Respondent knowingly committed an act which violated 49 App. U.S.C. 1804(c) and 49 CFR 171.2(c).

2. The two issues raised by Respondent on appeal are without merit.

3. The civil penalty was assessed with due consideration of the factors listed in 49 app. U.S.C. 1809 and 49 CFR 107.331, and no basis exists for further mitigation of the penalty.

Therefore, the Order of February 12, 1987, assessing a $2,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 App. U.S.C. 1809 and 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: October 9, 1987.

M. Cynthia Douglas,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested.

[Enf. Case No. 86–30–CM]

Partial Grant of Relief

In the Matter of: Kargard Industries, Inc., Respondent.

Background

On October 22, 1987, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Kargard Industries, Inc. (Respondent) assessing a penalty in the amount of $13,000 for violations of 49 CFR 178.51–15(a), 178.51–15(b), 178.61–3, 178.61–14(a), and 178.61–15(b). By letter dated November 13, 1987, Respondent submitted a timely appeal of the Order, challenging it on five bases. The Chief Counsel's Order is incorporated herein by reference. In addition, Respondent has alleged that it has taken four corrective actions which should be considered in determining an appropriate civil penalty.

Discussion

The Respondent's bases for appeal are:

(1) Respondent, instead of cutting two physical test specimens from a DOT 4BA cylinder, cut one specimen because of the cylinder's small size and because 49 CFR 178.61–15(a)(2) (applicable to DOT 4BW cylinders) allows one specimen to be taken from either head on a cylinder when both heads are made of the same material;

(2) The gauge length of physical test specimens for DOT 4 BA cylinders should be based on minimum wall thickness, rather than actual specimen thickness, which would have resulted in a gauge length of at least 24 times thickness;

(3) Respondent has made attempts to locate cylinders covered by Respondent's Inspection Report No. 482 so that a chemical analysis can be performed in the United States;

(4) Respondent's hydrostatic testing equipment did permit readings to an accuracy of 1% of the total expansion.

(5) The gauge length of physical test specimens for DOT 4BW cylinders should be based on minimum wall thickness, rather than actual specimen thickness, which would have resulted in a gauge length of at least 24 times thickness.

First Argument

Respondent's first argument is that, because of the cylinder's small size, it is difficult to obtain two physical test specimens from a single DOT 4BA cylinder. Hence, Respondent applied the test procedure for 4BW cylinders and cut only one specimen from a 4BA cylinder. Respondent states that 4BA cylinders are made of two drawn halves joined by a circumferential weld and that they are so small in size that it is difficult to cut two specimens from a single cylinder. Respondent asserts that, because 4BA cylinders are so small, the specification requirements for 4BW cylinders, allowing one test specimen, should apply. However, the small size of 4BA cylinders fails to justify application of the requirements of a different cylinder specification. In the absence of an exemption issued by the Office of Hazardous Materials Transportation, Respondent was without legal authority to conduct physical tests on a DOT 4BA cylinder using but one specimen.

Second Argument

Respondent's second argument is that, since the regulations do not contain a definition of thickness as it relates to sizing the gauge length for 4BA test specimens, it was justified in using minimum wall thickness rather than actual specimen thickness. Minimum wall thickness is a theoretical value which establishes a minimum material thickness in the cylinder and which is used in calculating wall stress in the worst case or thinnest wall scenario. Wall stress is a calculated value indicating the amount of stress placed on the wall of the cylinder by test pressure. If this stress exceeds the yield strength of the metal in the wall, the cylinder fails. Actual specimen thickness is used to determine the cross-sectional area for the required calculations of yield strength, ultimate tensile strength and reduction in area performed during physical testing. Consequently, the reference to thickness in the physical test requirements refers to actual specimen thickness. Moreover, during a 1984 enforcement conference on prior case against Kargard, gauge length was discussed and RSPA advised Respondent that gauge length must be 24 times the actual specimen thickness.

Third Argument

Respondent's third argument is that it is in the process of obtaining approval from the Office of Hazardous Materials Transportation (OHMT) of a foreign chemical analysis of materials used to manufacture DOT 4BW cylinders. 49 CFR § 178.61–3 requires that chemical analyses be performed in the United States unless otherwise approved by the Director of OHMT. Respondent also stated in its appeal that it is attempting to have a chemical analysis performed in the United States as soon as it locates any cylinder listed on its Inspection Report No. 482. Respondent has been given a sufficient amount of time in which to submit evidence of either approval of foreign chemical analysis or chemical analysis performed in the United States and has failed to do so.

Fourth Argument

Respondent's fourth argument is that a 250 cc burette was used to test DOT 4BW cylinders. However, Respondent's Quality Control Manager, Vincent M. Bahl, stated during the inspection that the 500 cc burette was used to test the cited DOT 4BW cylinders. The evidence concerning this violation was reviewed with Mr. Bahl and Mr. Baumann during the exit interview. Respondent's statement that its quality control people have subsequently reported that a 250 cc burette was used to test these cylinders is not persuasive. Respondent has provided no evidence to support this contention, and it is contradicted by the contemporaneous statement of Mr. Bahl. The incremental accuracy of the 500 cc burette is not adequate to permit reading the total expansion of the cited cylinders to an accuracy of 1 percent, or 0.1 cc's. Further, Respondent contends that their 2000 cc burette can be interpolated to ⅓ or ¼ of the calibration marks. However, Respondent did not use a 2000 cc burette to test the cited DOT 4BW cylinders. In addition, the regulation requires that the expansion gauge permit reading total expansion to an accuracy of 1 percent, or 0.1 cc's. The incremental accuracy of the 2000 cc burette is not adequate to permit reading the total expansion of the cited cylinders to an accuracy of 1 percent, or 0.1 cc's.

Fifth Argument

Respondent's fifth argument is the same, with respect to 4BW cylinders, as its second argument. For the reasons discussed above, I do not find Respondent's argument persuasive.

Summary of Corrective Actions Taken

In its appeal letter, Respondent listed and described four remedial measures it has taken to correct the circumstances leading to the four violations mentioned in the December 17, 1986 Notice of Probable Violation.

Action No. 1 concerns Respondent's failure to take two physical test specimens from a DOT 4BA test cylinder. Respondent claims that while disagreeing with the test requirements, it has changed its test procedure to include taking two specimens from its DOT 4BA test cylinder. Such corrective action warrants mitigation of $250, and the civil penalty assessed for this violation is reduced from $1000 to $750.

In Action No. 2, Respondent states that it has changed the sizing of its tests coupons to a gauge length of 24 times the actual specimen thickness. However, action had been mandated previously by an October 19, 1984 Compliance Order issued to Respondent relating to a prior enforcement action. Therefore, this corrective measure does not warrant mitigation of the civil penalty.

Action No. 3 relates to Respondent's alleged obtaining of chemical analyses of materials used to manufacture DOT 4BW cylinders in Milwaukee, Wisconsin. However, RSPA still has received no evidence from Respondent that it has executed arrangements for having its chemical analyses performed in the United States.

Action No. 4 deals with Respondent's testing of cylinders using a burette that does not permit reading the total expansion of the cylinder to an accuracy of 1 percent or 0.1 cc's. Respondent contends that it has purchased a 1000 cc burette with 5 cc gradations and, therefore, is no longer relying on midpoint interpolations to achieve reading accuracy on its cylinders. Obtaining burettes which would permit accurate expansion readings are corrective measures that warrant mitigation of the assessed civil penalty. Therefore, the civil penalty of $2,500 is reduced by $250 to $2,250.

Actions Nos. 1 and 4 are post-inspection remedial measures that constitute a basis for mitigation of the civil penalties assessed. Actions Nos. 2 and 3, however, provide no basis for mitigation.

Findings

Based on my review of the record, I find the following:

(1) Respondent was required to perform physical tests on two specimens cut from a DOT 4BA cylinder, and failed to do so.

(2) The gauge length of physical test specimens for DOT 4BA and 4BW cylinders is the actual specimen thickness.

(3) There is no evidence of Respondent obtaining a chemical analysis in the United States or approval of a foreign chemical analysis.

(4) There is no evidence that Respondent used a 250 cc burette on hydrostatic testing equipment capable of

being read to an accuracy of 1 percent or 0.1 cubic centimeter.

(5) Mitigation of the proposed civil penalty of $1,000 is granted due to the delay in processing the case. Mitigation of $500 is also granted based on corrective actions taken by Respondent, specifically its taking two test specimens from each DOT 4BA test cylinder and its acquiring burettes which permit expansion readings to an accuracy of 1 percent. There is basis for further mitigation of the penalty.

Therefore, the Order of October 22, 1987, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $13,000 civil penalty assessed therein is hereby mitigated to $11,500.

Failure to pay the civil penalty assessed herein within 120 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 24, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Enf. Case No. 86–38–DM]

Denial of Relief

In the Matter of: JEHL Cooperage, Co., Inc., Respondent.

Background

On September 2, 1987, the Chief Counsel, Research and Special Programs Administration, issued an Order to Jehl Cooperage, Co., Inc. (Respondent), assessing a penalty in the amount of $4,000 for a violation of 49 CFR 178.0–2 and 178.116–12(a). The Respondent submitted a timely appeal of the Order, challenging it on one basis. The Chief Counsel's Order dated September 2, 1987 is incorporated herein by reference.

Discussion

The Respondent's basis for appeal is that it has suffered financial hardship for the past five years, thus making it difficult to pay the assessed civil penalty. In support of its argument, Respondent has submitted financial statements for the years 1985–1987, and a letter from its certified public accountant certifying that Respondent has operated at a loss for the period ending September 30, 1987.

Respondent's financial statements show a positive balance of approximately $300,000 between its current assets and current liabilities. Moreover, Respondent's documents show cash on hand of approximately $50,000. Therefore, the financial information submitted by Respondent indicates that it is financially able to pay the assessed civil penalty.

Findings

Based on my review of the record, I find the following:

(1) Respondent has not submitted any evidence which indicates that it is experiencing financial hardship warranting mitigation of the assessed civil penalty.

(2) Consequently, the argument raised by the Respondent in its appeal is found to be without merit.

(3) There is no basis for mitigation of the civil penalty.

Therefore, the Order of September 2, 1987, assessing a $4,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC. 20590.

Date Issued: June 20, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 86–39–FSE]

Denial of Relief

In the Matter of: Paulista Fireworks Company, Respondent.

Background

On August 14, 1987, the Chief Counsel, Research and Special Programs Administration, issued a Revised Order to Paulista Fireworks Company (Respondent) assessing a penalty in the amount of $8,000 for a violation of 49 CFR 171.2(a), 172.301(a), 173.91(a), and 173.86(b). The Respondent submitted a timely appeal of the Revised Order, challenging it on three bases. The Chief Counsel's Revised Order of August 14, 1987, is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are: (1) Respondent did not "knowingly" commit any acts which violated the regulations; (2) the packaging requirements found in the Hazardous Materials Regulations are new; and (3) DOT required larger shells (6 inch) for testing when Respondent had already been approved for testing of smaller shells (3 inch).

Respondent's first argument is that it did not "knowingly" violate the sections cited in the Notice of Probable Violation. 49 CFR 107.299 states that "knowingly" means:

> That a person who commits an act which is a violation of the Act or of the requirements of this subchapter. . . . commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter . . . Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter.

Given this definition, the Respondent in this case knowingly offered packages for transportation that were not properly marked and packaged. Even if the Respondent was not aware that the boxes were not properly marked, Respondent should have known that they were not. Further, Respondent voluntarily offered the packages for transportation. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Respondent's second argument is that the requirements it violated are new, and that Respondent was not notified of them until after shipping the fireworks

from Brazil to the United States. Respondent contends that it received a copy of the "new procedures" from the American Pyrotechnics Association after it had already shipped the fireworks to Zambelli Internationale Fireworks Manufacturing Company, Inc., of New Castle, Pennsylvania. The American Pyrotechnics Association bulletin to which Respondent refers advised of new administrative procedures of the Bureau of Explosives following a period of uncertainty as to whether the Bureau would remain in operation. The requirement to submit the largest item (in this case, 6-inch shells) and have smaller ones (3-inch shells) approved by analogy is not a new requirement. The only "new" aspect of the process is that the location for submission of test samples was changed from New Jersey to Wisconsin. Hence, there are no new procedures or regulatory requirements, and Respondent is not excepted from compliance with those requirements.

Respondent's third argument is that it could rely upon DOT's earlier approval of its manufacturing 3-inch shells, but that DOT is now unfairly requiring it to obtain a separate approval to manufacture 6-inch shells. Respondent obtained approval to manufacture 3-inch shells under approval numbers EX–8310179 and EX–8310206. Respondent has improperly manufactured and offered for transportation 6-inch shells under these approval numbers. 49 CFR 173.86(b)(1) requires a new explosive to be approved by the Director of OHMT before it may be offered for transportation. Respondent was required to obtain approval prior to manufacturing and shipping of the 6-inch shells. Respondent failed to do so.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly offered packages for transportation that were not properly marked.

(2) DOT specification markings were not affixed to any of the boxes, and the boxes inside the freight container did not qualify as DOT 12B specification boxes.

(3) Respondent offered a new explosive for transportation without obtaining approval from the Director of OHMT.

(4) Consequently, the three arguments raised by the Respondent in its appeal are found to be without merit.

(5) The civil penalty was assessed with due consideration of the factors listed in 49 App. U.S.C. § 1809 and 49 CFR § 107.331, and no basis exists for further mitigation of the penalty.

Therefore, the Revised Order of August 4, 1987, assessing an $8,000 civil penalty is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 app. U.S.C. 1809 and 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

Date Issued: November 18, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–04–SC]

Action on Appeal

In the Matter of: Union Carbide Corporation, Respondent.

On September 3, 1987, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $10,000 civil penalty against Union Carbide Corporation (Respondent) for violations of 49 CFR 171.2(a) of the Hazardous Materials Regulations (HMR). Respondent, through counsel, submitted a timely appeal by letter dated November 23, 1987. The Chief Counsel's Order is incorporated herein by reference.

In its appeal, Respondent made several arguments which I will summarize and discuss. The Chief Counsel determined that Respondent, in four instances, had knowingly offered hazardous materials for transportation in commerce in cylinders which had not been retested in accordance with 49 CFR 173.34(e), in violation of 49 CFR 171.2(a).

The regulations at issue in this case are 49 CFR 173.34 (e)(9) and (e)(10). Subsection (e)(9) provides, in relevant part, that DOT 4BA and 4BW cylinders may be hydrostatically retested every 12 years, instead of every seven years, if used exclusively for the transport of certain hazardous materials.[1] Subsection (e)(10) provides that DOT 4BA and 4BW cylinders which are used exclusively for "fluorinated hydrocarbons and mixtures thereof which are commercially free from corroding components" may, in lieu of the periodic hydrostatic retest, be given a complete external visual inspection at the time the periodic retest becomes due.

The Chief Counsel's Order stated that subsection (e)(9) allows 12-year retesting for cylinders used for a mixture of listed materials with each other, but not a mixture of a listed material with one that is not listed. Consequently, the Chief Counsel found that the mixture contained in Respondent's cylinders, consisting of a listed material, dichlorodifluoromethane, and a nonlisted material, ethylene oxide, was not a mixture falling within the purview of subsection (e)(9).

Respondent argues that the Chief Counsel's interpretation of subsection (e)(9) is too narrow given the language of the subsection and its regulatory history, which indicates that the original intent and application were clearly more expansive than the current interpretation. Respondent contends that the language could logically be construed to allow mixtures of listed materials with non-listed materials. Moreover, Respondent argues that the history of this subsection indicates that its purpose was to provide an alternative method of retesting low pressure cylinders which are not subject to conditions causing corrosion, and that the initial regulation did not limit or restrict its application to any particular non-corrosive gas. Later revisions to the subsection to list specific non-corrosive gases, Respondent contends, were merely to clarify, not restrict, its application.

Respondent argues that the proper interpretation of the words "or mixture thereof" should include mixtures of one or more listed fluorocarbons with any other material, provided the mixture is commercially free from corroding components. Any more restrictive

[1] Subsection (e)(9) provides the 12-year retesting period for cylinders "which are used exclusively for anhydrous dimethylamine; anhydrous monomethylamine; anhydrous trimethylamine; methyl chloride; liquefied petroleum gas; methylacetylene-propadiene stabilized; or dichlorodifluoromethane, difluoroethane, difluoromonochloroethane, monochlorodifluoromethane, monochlorotetrafluoroethane, monochlorotrifluor-ethylene, or mixture thereof, or mixtures of one or more with trichloromonofluoromethane; and which are commercially free from corroding components. . . ." 49 CFR 173.34(e)(9).

interpretation, Respondent contends, would compel the conclusion that the words "commercially free of corroding components" relate to the cylinders themselves, rather than the materials, and allow shipment of gases with corroding components in obvious contradiction of the purpose of the subsection.

Respondent also argues that the history of subsection (e)(10) supports its contentions because, of all the materials listed, only the fluorinated hydrocarbons refer to "and mixtures thereof." Since "liquefied petroleum gas" is a generic category of materials and mixtures of two or more such gases presumably would be allowed, Respondent argues, the use of the "mixture" language with "fluorinated hydrocarbons," also a generic category, must indicate the applicability of subsection (e)(10) to mixtures of fluorinated hydrocarbons with other materials. Respondent also notes that the docket file of the Interstate Commerce Commission (predecessor to DOT) pertaining to the adoption of language which resulted in subsection (e)(10) indicates that the external visual examination "is superior to the presently required hydrostatic test." Respondent asserts that upholding the Order would prohibit the use of a test recognized for over three decades as superior.

Finally, Respondent contends that the regulations are so confusing, and the Chief Counsel's interpretation renders them so vague, that the assessment of a penalty raises substantial questions of equity and due process.

Respondent refers repeatedly to the "Chief Counsel's interpretation" and the "present interpretation" when, in fact, the interpretation of 49 CFR 173.34 (e)(9) and (e)(10) in the Chief Counsel's Order has been the longstanding official agency interpretation of these subsections. Respondent's assertion that the purpose of listing specific non-corrosive gases was merely illustrative is without merit. The regulations, while not a model of good draftsmanship, do not include language suggesting that these gases are merely examples of non-corrosive gases that may be used. The only language which is arguably ambiguous is "mixture(s) thereof," and RSPA has consistently interpreted that language to mean mixtures of the listed materials with each other. Moreover, Respondent's other assertions concerning the meaning of prior ICC dockets, and the lack of notice and comment afforded during the 1969 rulemaking are irrelevant, untimely, or both. Respondent has an obligation to come forward and request an interpretation of the regulations if it believes they are unclear, and may not unilaterally follow its own interpretation. Accordingly, I find that Respondent has not submitted evidence of warrant dismissal of the Order and no mitigation is warranted on this basis.

Respondent asserts that if the Order is not dismissed, substantial mitigation of the penalty is warranted because of the lack of culpability or adverse effect on safety, the understandable confusion with respect to application of the regulations, Respondent's extraordinary record of transportation safety, and the adverse effect of the Order on Respondent's business.

The nature, circumstances, extent, and gravity of the violations, as well as Respondent's history of prior violations, were already taken into account in assessing the civil penalty. Furthermore, Respondent's ability to pay the penalty and its ability to continue in business were also considered. Respondent is clearly able, as it acknowledges, to pay the assessed penalty, and doing so will not adversely affect its ability to continue in business. Therefore, no mitigation is warranted on these bases.

Finally, Respondent argues that the Order represents an immediate and substantial threat to Respondent's ability to continue shipping Oxyfume-12, the hazardous material in question. Respondent asserts that Oxyfume-12 is the only product available for sterilizing certain medical equipment, and that denial of the appeal would result in Respondent having to file an immediate application for an emergency exemption.

Respondent's argument is not persuasive. Respondent is responsible for compliance with the Hazardous Materials Regulations (HMR). Respondent had several options available to it, including seeking an interpretation of the HMR (as stated above), filing a rulemaking petition under § 106.31, testing the cylinders at the appropriate interval, or applying for an exemption. Respondent, however, did none of the above, and no mitigation is warranted because Respondent now claims that compliance with § 173.34(e) may cause it problems.

However, I do find that mitigation of the assessed penalty is warranted due to the extensive delay in processing this case.

Therefore, the Chief Counsel's Order of September 3 1987, finding that Respondent knowingly violated 49 CFR 171.2(a), is modified by reducing the civil penalty from $10,000 to $6,000. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: April 26, 1969.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–08–RMC]

Denial of Relief

In the Matter of: A. J. Metler Hauling & Rigging, Inc., Respondent.

On March 10, 1988, the Chief Counsel issued an order assessing a $3,000 civil penalty against A. J. Metler Hauling & Rigging, Inc. for a violation of 49 CFR 177.825(b), transporting highway route controlled radioactive materials on a nonpreferred route, as alleged in an April 1, 1987 Notice of Probable Violation (Notice). Respondent submitted an appeal in a March 29, 1988 letter. The Chief Counsel's Order and the Notice are incorporated herein by reference.

Discussion

In its appeal, Respondent states that "we checked with the [S]tate of Illinois Department of Transportation on our designated routes of travel. We got a verbal commitment from them on this particular route." Respondent's contention, therefore, is that, when it left the Interstate Highway System, it used a State-designated alternative preferred route.

However, a February 24, 1988 letter from E. T. Crawford, Jr., Chief, Compliance Unit, Illinois Department of Transportation states: "To date, the State of Illinois has not designated any alternative preferred routes for the transportation of highway route controlled quantities of radioactive

materials." The existence of this letter was cited in the Chief Counsel's Order, and Respondent has not presented any specific probative evidence to rebut that statement. There is no statement as to who in the Illinois Department of Transportation allegedly made what statements on what dates to what specific employee of Respondent—let alone any contemporaneous document reflecting the occurrence of such a verbal statement.

Therefore, the preponderance of the evidence indicates that Respondent knowingly violated § 177.825(b) as alleged in the Notice.

Findings

Based on my review of the record, I find the following:

(1) Respondent transported highway route controlled quantities of radioactive materials on a nonpreferred route, in violation of § 177.825(b).

(2) Respondent's appeal is without merit.

(3) The $3,000 civil penalty is appropriate.

Therefore, the Order of March 10, 1988, assessing a $3,000 civil penalty is affirmed, as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 7th Street SW., Washington, DC 20590.

Date Issued: May 10, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–09–CR]

Partial Grant of Relief

In the Matter of Consolidated Fire Control, Inc., Respondent.

Background

On March 14, 1988, the Chief Counsel assessed a $5,500 civil penalty against Consolidated Fire Control, Inc. (Respondent), for violations of 49 CFR 173.34(e) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated May 17, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) performed hydrostatic testing of DOT specification cylinders without including an external visual examination in accordance with Compressed Gas Association Pamphlet C–6, in violation of 49 CFR 173.34(e)(1), (2) retested DOT specification cylinders without holding a current retester's identification number issued by the Research and Special Programs Administration (RSPA), in violation of 49 CFR 173.34(e)(1)(i), and (3) performed hydrostatic testing of DOT specification cylinders using a gauge indicating the total expansion of a cylinder which could not be read with an accuracy of one percent or to a reading of 0.1 cubic centimeter and a pressure gauge which could not be read to within one percent of the test pressure, in violation of 49 CFR 173.34(e)(3).

Respondent does not contest the occurrence of the violations. Respondent's sold basis for appeal is that the civil penalty assessment will work an economic hardship on Respondent. Respondent submitted certain financial information, including copies of its 1985 and 1986 tax returns, and requested a reduction of the penalty amount, or, in the alternative, a suitable payment plan. The Chief Counsel's Order noted that Respondent, despite two requests prior to issuance of that Order, had failed to submit financial information to substantiate its assertion of economic hardship. The Chief Counsel, therefore, determined that mitigation of the civil penalty was not warranted.

After reviewing Respondent's financial information submitted with the appeal, I have determined that partial mitigation is warranted.

Findings

Based on my review of the record, I find the following:

(1) The Chief Counsel correctly determined, based on the information then available to him, that mitigation of the civil penalty was not warranted.

(2) On appeal, Respondent has submitted sufficient evidence to show that payment of the $5,500 penalty will work a financial hardship and could adversely affect the Respondent's ability to continue in business.

Therefore, the Chief Counsel's Order of March 14, 1988, finding that Respondent knowingly violated 49 CFR 173.34(e), is modified by reducing the civil penalty from $5,500 to $4,000, and authorizing payment of the $4,000 civil penalty in 10 consecutive monthly payments of $400 each beginning on August 15, 1988, and due on the 15th day of each month thereafter until a total of $4,000 has been paid. If you default on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Your failure to pay this accelerated amount in full will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default.

Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: July 21, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–13–PM]

Denial of Relief

In the Matter of: Chicago Pail Manufacturing Co., Respondent.

Background

On May 23, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed an $8,000 civil penalty against Chicago Pail Manufacturing Co. (Respondent), for violations of 49 CFR 171.2(c), 178.115–12 (a)(1) and (a)(2), 178.116–6(a), 178.131–11 (a) and (b), and 178.132–11(a) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated June 10, 1988, and supplemented the appeal by letter dated August 11, 1988. The Chief Counsel's

Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Manufactured and marked steel pails as DOT specification 17E pails when they were manufactured with 28 gauge steel instead of the required 24 gauge steel; (2) manufactured and distributed DOT specification 17C steel pails without conducting required hydrostatic tests; (3) manufactured and distributed Dock specification 17C steel pails without conducting required drop tests; (4) manufactured and distributed DOT specification 37A60 steel pails without conducting required drop tests; and (5) manufactured and distributed DOT specification 37B60 steel pails without conducting required drop tests.

Respondent does not contest the occurrence of the violations. Respondent's bases for appeal are that (1) the imposition of any civil penalty would work a severe hardship, and (2) Respondent operates in an enterprise zone in the City of Chicago in which approximately 90% of its work force consists of minorities.

With respect to Respondent's first contention, the Chief Counsel's Order noted that, despite two requests prior to issuance of that Order, Respondent had failed to submit financial information and thus failed to substantiate its assertion of economic hardship. Respondent submitted with its appeal uncertified financial statements for the years 1985, 1986, and 1987 showing income and expenses. By letter of July 29, 1988, Respondent was requested to provide a certified balance sheet or financial statement identifying its current assets and liabilities. By letter dated August 11, 1988, Respondent submitted an uncertified balance sheet (dated January 20, 1988) for the years ended November 30, 1987, 1986 and 1985 prepared by Cohen & Pollack, Certified Public Accountants. The balance sheet includes a statement by the accounting firm that "Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles." With these limitations in mind, I have reviewed the financial information submitted by Respondent. The balance sheet shows losses for the years 1986 and 1987. However, these losses were created by a transfer of funds to Respondent's parent corporation, American Steel Container Company. Furthermore, these transfers reflect only the Respondent's tax position, not its ability to pay. In addition, Respondent's liquidity, as evidenced by the ratio of current assets to current liabilities, is good. The ratios for the three years are 2.8, 2.75, and 2.5 for 1985, 1986, 1987, respectively. Finally, the most current data supplied showed a cash balance of $9,615. The information provided by Respondent thus does not support its contention that payment of a civil penalty would affect its ability to pay or its ability to continue in business.

With respect to Respondent's second contention, Respondent was asked by letter dated July 29, 1988, to explain the relevance of its assertion and provide information to substantiate it. Respondent provided a statement from the Department of Economic Development, City of Chicago, to the effect that Respondent is located in Chicago's Enterprise Zone I. Respondent also stated that:

> "Both the City of Chicago and the State of Illinois have recognized the obstacles Chicago Pail must overcome to continue to operate in an economically depressed, crime-ravaged area while employing those not necessarily otherwise employable. In recognition of these obstacles, the City and State have assisted Chicago Pail's continued viability through the enterprise program.

I am not persuaded as to the relevance of this argument. While it may be laudable that Respondent operates in an economically depressed area and employs persons who might otherwise not be employed, Respondent has failed to show that this assertion alone warrants mitigation of the civil penalty. Moreover, Respondent's statement that it has received assistance, from Chicago and the State of Illinois, suggests that its continued operation in the enterprise zone is economically advantageous.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent are without merit.

(2) The Chief Counsel mitigated the amount of the civil penalty by $1,000.

(3) The civil penalty assessed by the Chief Counsel was appropriate, and no further mitigation is warranted.

Therefore, the Chief Counsel's Order of May 23, 1988, finding that Respondent knowingly violated 49 CFR 171.2(c), 178.115–12 (a)(1) and (a)(2), 178.116–6(a), 178.131–11(a) and (b), and 178.132–11(a), and assessing an $8,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria in 49 CFR 107.331. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service.

Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: October 17, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–14–SPT]

Denial of Relief

In the Matter of: Reliance Universal Inc., Respondent.

Background

On July 14, 1987, the Chief Counsel assessed a $10,000 civil penalty against Reliance Universal Inc. (Respondent) for violations of 49 CFR 173.32(e)(1)(ii), 171.2(a), 173.128(a)(3), 172.326(a)(1), and 172.326(a)(2) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated July 26, 1987. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's bases for appeal are that: (1) The violations were merely recordkeeping in nature, with no accident involved and no injury to persons, property, or the environment; and (2) the recordkeeping problems have been solved with the installation of a computerized retest program.

Respondent contends that the violations were merely recordkeeping in nature. Failure to retest DOT Specification 57 portable tanks in accordance with 49 CFR 173.32(e)(1)(ii) is not a mere recordkeeping violation, but a violation of substantive safety requirements. Similarly, offering a hazardous material, in this case flammable liquid, paint, for transportation in commerce in DOT Specification 57 portable tanks which have not been properly retested is a violation of the substantive requirements of 49 CFR 171.2(a) and 173.128(a)(3).

Finally, offering for transportation in commerce DOT Specification 57 portable tanks containing a hazardous material, which tanks have not been properly marked, is a violation of the substantive marking requirements of 49 CFR 172.326(a)(1) and (a)(2). The fact that there has been no known injury to persons or property was already taken into account in considering the gravity of the violation when the civil penalty was assessed. Despite the fact that Respondent had been warned in 1982 about its lack of retest procedures, Respondent failed to comply with the regulations.

Respondent's second basis for appeal is also without merit. Respondent's corrective actions in retesting all DOT 57 portable tanks and installing a computerized retest program were already considered in the Order, and the proposed assessment accordingly was reduced by $1,000 to the $10,000 assessment in the Order. Substantial mitigation is not appropriate merely because Respondent brought its operation into compliance with the law.

Findings

Based on my review of the record, I find the following:

1. Respondent knowingly committed acts which violated 49 CFR 173.32(e)(1)(ii), 171.2(a), 173.128(a)(3), 172.326(a)(1) and 172.326(a)(2).

2. The two issues raised by the Respondent in its appeal are without merit.

3. The civil penalty was assessed with due consideration of the factors listed in 49 app. U.S.C. 1809 and 49 CFR 107.331, and no basis exists for further mitigation of the penalty.

Therefore, the Order of July 14, 1987, assessing a $10,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 app. U.S.C. 1809 and 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590.

Date Issued: September 1, 1987.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Enf. Case No. 81–17–CM]

Revised Partial Denial of Relief

In the Matter of: General Fire Extinguisher Corp., Respondent.

Background

On November 3, 1987, the Chief Counsel, Research and Special Programs Administration, issued an Order to General Fire Extinguisher Corp. (Respondent) assessing a penalty in the amount of $2,000 for a violation of 49 CFR 171.2(c) and 178.37–14(a). The Respondent submitted a timely appeal of the Order, challenging it on six bases. The Chief Counsel's Order dated November 3, 1987 is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) Respondent did not "knowingly" commit any acts which violated the regulations;

(2) Respondent's representatives did not accompany Inspector Henderson during this June 19, 1986 compliance inspection of their facility, and Inspector Henderson failed to notify anyone in Respondent's employ of his findings;

(3) Respondent, instead of replacing the expansion gauge at issue, installed a new computer on its hydrostatic equipment to increase testing, increase reliability, and decrease maintenance;

(4) Pittsburgh Testing Laboratories (PTL), not Respondent, is responsible for ensuring that Respondent's hydrostatic equipment complies with the Hazardous Materials Regulations;

(5) The electronic expansion gauge on Respondent's hydrostatic equipment can be read by using a midpoint interpolation; and

(6) Respondent is allowed a 10 percent ratio of expansion when testing cylinders.

First Argument

Repondent's first argument is that it did not "knowingly" violate the Sections cited in the Notice of Probable Violation. 49 CFR 107.299 states that "knowingly" means:

> That a person who commits an act which is a violation of the Act or of the requirements of this subchapter . . . commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter . . . Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter. . . .

Given this definition, the Respondent in this case knowingly performed hydrostatic tests on DOT specification 3AA cylinders with equipment having an expansion gauge that could not be read to an accuracy of 1 percent. Even if Respondent did not know that the expansion gauge on its hydrostatic equipment was not capable of being read to an accuracy of 1 percent, Respondent should have known that the gauge could not be read to the required accuracy. Further, Respondent has been a cylinder manufacturer since 1903 and thus is factually as well as legally presumed to be aware of the hydrostatic testing requirements. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Second Argument

Respondent's second argument is that Inspector Henderson was not accompanied by Respondent's representatives during his June 19, 1986 compliance inspection. Respondent further alleges that Inspector Henderson failed to speak to anyone in Respondent's employ. Respondent has submitted three affidavits of company officials stating that they did not accompany Inspector Henderson during his inspection. Respondent Quality Control Manager, Neil MacLean, states in his affidavit that he "guided (Inspectors Henderson and Abis) to the hydrotest area where I left them." Obviously this indicates that Inspector Henderson was accompanied by one of Respondent's representatives during his inspection. Respondent's argument that Inspector Henderson failed to speak with anyone in Respondent's employ is not true since, during the inspection, Mr. MacLean provided Inspector Henderson with copies of pertinent inspection reports. Also, Donald Schneckloth, in his affidavit, stated that he talked briefly with Inspectors Henderson and Abis, and delivered various cylinder reports from Respondent's files for their examination. In her affidavit, Beverly Burden states that she met with both DOT inspectors in her office. Hence, Inspector Henderson did speak to individuals in Respondent's employ and was accompanied on his inspection by at least one of Respondent's representatives. Furthermore, the

relevance of this argument is questionable at best since Respondent's officials were aware of the inspectors' presence and free to accompany them throughout the entire inspection, but chose not to do so.

Third Argument

Respondent's third argument is that instead of merely replacing the expansion gauge, it installed a new computer on its hydrostatic equipment to increase testing, increase reliability, and decrease maintenance. The Chief Counsel mitigated the proposed civil penalty, in part, because of Respondent's installation of new equipment. Further mitigation on that basis is not justified.

Fourth Argument

In its fourth argument, Respondent claims that PTL, as an independent inspector, is solely responsible for ensuring that Respondent's hydrostatic equipment complies with the Hazardous Materials Regulations. Both Respondent and PTL had a dual responsibility to ensure compliance with the regulations. While separate enforcement action has been taken against PTL regarding inadequate testing at Respondent's facility, Respondent also was responsible for ensuring that its cylinders were tested in accordance with the Hazardous Materials Regulations. Respondent failed to do so. In addition, the Chief Counsel's partial mitigation of the proposed civil penalty took into account the dual responsibility of PTL and Respondent. Further mitigation on that basis is not justified.

Fifth Argument

Respondent, in its fifth argument, claims that the electronic expansion gauge on its hydrostatic equipment can be read by using a midpoint interpolation. RSPA's engineering staff has studied this contention, and found it to be valid. However, as noted in the Notice of Probable Violation dated July 9, 1987, five attempts at calibration were made with calibrated cylinder S/N 26768Y. The calibrated expansion at 3000 psi is 31.0 cc's. 49 CFR 178.37–14(a) allows a total expansion rate of 1 percent or 0.1 cubic centimeters. The acceptance range is ±0.31 cc's or 30.69 to 31.31 cc's. The five successive attempts at calibration yielded results of 31.5 to 32.5 cc's. The calibration attempt at precisely 3000 psi yielded a total expansion of 31.5 cc's. During the subsequent attempt, the test pressure only reached 2980 psi. However, the total expansion recorded was still 31.5 cc's, which is not within 1 percent or 0.1 cubic centimeters of the required total expansion rate. Therefore, even though Respondent's hydrostatic equipment can be read by using a midpoint interpolation, the preponderance of the evidence nevertheless indicates that Respondent failed to perform hydrostatic tests on cylinders with equipment having an expansion gauge permitting a reading of total expansion to an accuracy of either one percent or 0.1 cubic centimeters.

Sixth Argument

Finally, Respondent argues that it is allowed a 10 percent ratio of expansion when testing cylinders. However, this argument is irrelevant to the alleged violation of failing to produce a reading of total expansion to an accuracy of 1 percent. The section of the regulations to which Respondent refers in its argument is 49 CFR §178.37–14(c). Respondent, however, is being cited for an alleged violation of 49 CFR 178.37–14(a), which mentions nothing about an allowable 10 percent expansion ratio when testing cylinders. Therefore, Respondent's last argument is irrelevant to the alleged violation.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly performed hydrostatic tests on DOT specification cylinders with equipment having an expansion gauge that could not be read to an accuracy of 1 percent.

(2) Inspector Henderson spoke with and was accompanied by representatives of Respondent during his June 19, 1986 compliance inspection of Respondent's facility.

(3) The Chief Counsel mitigated the proposed civil penalty, in part, because of Respondent's installation of a new computer on its hydrostatic equipment.

(4) Respondent was responsible for ensuring that its hydrostatic equipment complied with the Hazardous Materials Regulations and already has benefitted from partial mitigation because of the dual responsibilities of Respondent and PTL.

(5) The electronic gauge on Respondent's hydrostatic equipment can be read by using a midpoint interpolation. However, this does not explain Respondent's observed failure to calibrate its equipment to 1 percent.

(6) Respondent is not allowed a 10 percent ratio of expansion when testing cylinders. The 10 percent ratio is not applicable to the violation at issue here.

(7) Consequently, five of the six arguments raised by the Respondent in its appeal are found to be without merit.

(8) The proposed civil penalty was mitigated in the Order by an appropriate amount. Further mitigation of $500 is granted due to the delay in processing the case, specifically the time period between the date of inspection and the date of the NOPV. No basis for further mitigation of the penalty exists.

Therefore, the Order of November 3, 1987, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $2,000 civil penalty assessed therein is hereby mitigated to $1,500.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also, failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. § 3717 as well as a penalty charge of six percent (6) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: March 5, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–25–CR]

Denial of Relief

In the Matter of: All Fire Equipment, Inc. Respondent

Background

On November 16, 1987, the Chief Counsel assessed a $5,000 civil penalty against All Fire Equipment, Inc. (Respondent) for violations of 49 CFR 173.34(e), 173.34(e)(1)(i), 173.34(e)(3), and 173.34(e)(5) of the Hazardous Materials Regulations. Respondent submitted an appeal by letter dated January 13, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) failed to retest Department of Transportation (DOT) 3AA cylinders at a minimum retest pressure of 5/3 times service pressure, in violation of 49 CFR

173.34(e); (2) represented to be performing retests on DOT specification cylinders by test date stamping them without holding a retester's identification number issued by the Research and Special Programs Administration (RSPA) in violation of 49 CFR 173.34(e)(1)(i); (3) performed hydrostatic testing on DOT specification cylinders using equipment which did not have a gauge indicating the total expansion of the cylinder such that the total expansion could be read with an accuracy of 1% or to a reading of 0.1 cc, and did not have a pressure gauge that could be read to an accuracy of within 1% of the test pressure, in violation of 49 CFR 173.34(e)(3); and (4) failed to keep records showing the results of reinspection and retest of cylinders, in violation of 49 CFR 173.34(e)(5).

Respondent asserts two bases for its appeal. First, Respondent asserts that it has made subtantial efforts to ensure compliance with the DOT regulations, as evidenced by (a) its initiation of contact with the Department for the purpose of meeting any and all standards for hydrostatic testing, (b) its consultation, at the Department's suggestion, with the Robert Hunt Company, an independent inspection agency, to learn how to properly perform hydrostatic testing, and (c) the Hunt Company's issuance to Respondent of a five-year approval rating and statement that Respondent is in strict conformance with the Department's regulations. Second, Respondent contends that, because of its corrective efforts, the $5,500 proposed civil penalty should have been mitigated by more than $500, and that the $5,000 assessed penalty is excessive and will effect a substantial and undue hardship on Respondent.

With respect to Respondent's first contention, in June 1986 Respondent requested and received from the Department an application for registration of its cylinder requalification facility, with instructions for contacting an independent inspection agency. However, it was not until October 8, 1986, the day after the Department's inspection of Respondent's facility, that Respondent authorized the Hunt Company to conduct a survey of its facility. Furthermore, contrary to Respondent's statement, RSPA's Office of Hazardous Materials Transportation, not the Hunt Company, issued Respondent a registration number valid for a five-year period, and the Hunt Company's recommendation did not contain a statement that Respondent was "in strict conformance" with Department regulations. Only the Department can determine whether a facility is in compliance with the Department's regulations. An inspection agency can only recommend that a facility be approved by the Department.

With respect to Respondent's second contention, the Chief Counsel reduced the civil penalty by only $500 from the proposed assessment because Respondent initiated efforts to obtain a survey by the inspection agency and a retester's identification number only after the Department's inspection. The record does not contain any evidence, nor did Respondent submit any information to support its contention that the penalty would impose an undue financial burden.

Findings

Based on my review of the record, I find the following:

(1) Respondent's efforts to ensure compliance were taken after RSPA's inspection, and were, in any event, no more than the minimum necessary to be in compliance.

(2) There is no evidence that the Respondent is unable to pay the penalty or that the penalty assessment will adversely affect the Respondent's ability to continue in business.

(3) Consequently, the issues raised by Respondent on appeal are without merit.

(4) The civil penalty was mitigated in the Order by an appropriate amount, and no basis exists for further mitigation of the penalty.

Therefore, the Chief Counsel's Order of November 16, 1987, finding that Respondent knowingly violated 49 CFR 173.34(e), 173.34(e)(1)(i), 173.34(e)(3), and 173.34(e)(5), and assessing a $5,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transporation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

Date Issued: March 14, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87-26-CR]

Denial of Relief

In the Matter of: Aurora Beverage Distributors, Inc., Respondent

Background

On March 16, 1988, the Chief Counsel assessed a $2,000 civil penalty against Aurora Beverage Distributors, Inc. (Respondent), for violations of 49 CFR 173.34(e)(1)(i) and 173.34(e)(3) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated April 5, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) represented to have retested DOT specification cylinders by marking them with a test date without holding a current retester's identification number issued by the Research and Special Programs Administration (RSPA) in violation of 49 CFR 173.34(e)(1)(i), and (2) used a gauge indicating the total expansion of a cylinder which could not be read with an accuracy of one percent or to a reading of 0.1 cc, to perform hydrostatic testing of DOT specification cylinders, in violation of 49 CFR 173.34(e)(3).

Respondent asserts two bases for its appeal. First, Respondent asserts that the penalty imposed "was not commensurate with the minor infraction alleged." In support of this contention, Respondent stated that its machine, while old, was functioning correctly, has since been checked and certified to be accurate, and no testing has been performed since the Notice of Probable Violation was received. Respondent also contends that it was licensed by the Bureau of Explosives and when that function was transferred to the Department of Transportation, no notice was provided to Respondent. Second, Respondent asserts that the financial information it submitted clearly shows an inability to pay the penalty. In support of its assertion, Respondent noted that its tax returns for 1985 and 1986 show a net operating loss, while its most recent financial statement (June 1987) shows a net profit of $2,783.

With respect to Respondent's first contention, the RSPA inspector observed and the Chief Counsel determined that Respondent's retest operator tested DOT specification

cylinders using a burrette incapable of being read to the required accuracy. The violation was not for malfunctioning equipment, but for testing procedures not in compliance with the regulations. The fact that Respondent once held a license from the Bureau of Explosives does not excuse Respondent's failure to obtain a current retester's identification number from RSPA. Respondent has a legal responsibility to comply with the Hazardous Materials Transportation Act and the HMR and is presumed to be aware of the requirements. Further, Respondent was informed during the informal conference that notice was published in the **Federal Register** in 1978 stating that all undated registrations expired on December 31, 1979. Finally, the Chief Counsel took into consideration Respondent's statement that it no longer retests cylinders and mitigated the amount of penalty.

With respect to Respondent's second contention, the Chief Counsel reduced the amount of the penalty initially assessed after considering the financial information submitted by Respondent. Respondent's financial statement shows a bank balance of $1,944 and a current asset/current liabilities ratio of approximately 1.1. There is no justification at this point for any further reduction of the assessed penalty.

Findings

Based on my review of the record, I find the following:

(1) Respondent has not submitted sufficient evidence to show that it is unable to pay the penalty or that the penalty assessment will adversely affect the Respondent's ability to continue in business.

(2) The civil penalty was mitigated in the Order by an appropriate amount, and no basis exists for further mitigation of the penalty.

(3) Consequently, the issues raised by Respondent on appeal are without merit.

Therefore, the Chief Counsel's Order of March 16, 1988, finding that Respondent knowingly violated 49 CFR §§ 173.34(e)(1)(i) and 173.34(e)(3), and assessing a $2,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

In view of Respondent's assertions concerning its financial status, I hereby authorize payment of the $2,000 civil penalty in 10 consecutive monthly payments of $200 each beginning on June 15, 1988, and due on the 15th day of each month thereafter until a total of $2,000 has been paid. If you default on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Your failure to pay this accelerated amount in full also will result in referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: May 31, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–34–CM]

Denial of Relief

In the Matter of: Catalina Cylinders Corporation, Respondent.

Background

On March 31, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $2,500 civil penalty against Catalina Cylinders Corporation (Respondent), for violations of 49 CFR 178.46–11(a) and 178.46–12(e) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated April 19, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) performed hydrostatic tests on DOT specification 3AL cylinders on equipment which had a pressure gauge which could not be read to an accuracy of one percent, and an expansion gauge indicating the total expansion of cylinder which could not be read with an accuracy of one percent or to a reading of 0.1 cc, in violation of 49 CFR 178.46–11(a), and (2) performed the alternate bend test on specimens cut from DOT 3AL cylinders without have them bent inward around a mandrel until the interior edges were at a distance apart not greater than the diameter of the mandrel, in violation of 49 CFR 178.46–12(e).

Respondent asserts two bases for its appeal. With respect to the first violation, Respondent asserts that its hydrostatic testing equipment was performing at the required accuracy level at the start of the testing shift as verified by calibration at the start of the test day. However, this assertion is contradicted by the evidence discussed in the Chief Counsel's Order. The RSPA inspector observed DOT specification 3AL cylinders being tested on Respondent's equipment, and witnessed eight unsuccessful attempts by Respondent to calibrate this equipment.

With respect to the second violation, Respondent asserts that the finding of violation was based on an erroneous interpretation of the ASTM (American Society for Testing and Materials) bend test procedure. The requirement that a flattening test be performed on DOT 3AL cylinders authorizes an alternate bend test in accordance with ASTM E 290–77. However, 49 CFR 178.46–12(e) further requires that "when the alternate bend test is used, the test specimens shall remain uncracked when bent inward around a mandrel in the direction of curvature of the cylinder wall until the interior edges are at a distance apart not greater than the diameter of the mandrel." The RSPA inspector observed, and the Chief Counsel determined, that Respondent failed to perform the bend test so that the inside edges of the DOT cylinder were bent to a separation distance of 3½" (the diameter of the mandrel used in the test).

In addition, Respondent stated that Steigerwalt Associates, its independent inspector, had provided a detailed explanation of both these violations in its own response to Notice of Probable Violation No. 87–38–IIA, and requested a meeting with the Administrator and Steigerwalt Associates after review of the appeal. Respondent has already been afforded the opportunity for an informal conference or for a formal administrative hearing before an Administrative Law Judge. Respondent did not avail itself of either opportunity and accordingly has waived its right to a hearing. The non-hearing appeal proceeding which Respondent elected by filing a written appeal does not include any further opportunity for a conference or meeting.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent on appeal are without merit.

(2) The civil penalty assessed in the Order was appropriate, and no basis exists for mitigation of the penalty.

Therefore, the Chief Counsel's Order of March 31, 1988, finding that Respondent knowingly violated 49 CFR 174.46–11(a) and 178.46–12(e) and assessing a $2,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: May 31, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–38–HA]

Denial of Relief

In the Matter of: Steigerwalt Associates, Respondent.

Background

On May 4, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $6,000 civil penalty against Steigerwalt Associates (Respondent), for violations of 49 CFR 178.46–4(d), 178.46–4(d)(11) and 178.46–4(d)(12) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated May 27, 1988, and supplemented that appeal by letters dated June 16 and 29, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order dismissed Violation No 1 and determined that Respondent had knowingly (1) failed to witness and ensure that hydrostatic testing on Department of Transportation (DOT) specification 3AL cylinders was conducted with equipment that could be calibrated to one percent accuracy, in violation of 49 CFR 178.46–4(d) (Violation No. 2), (2) failed to witness and ensure that bend tests of DOT 3AL cylinders were properly conducted, in violation of 49 CFR 178.46–4(d) (Violation No. 3), (3) failed to ensure that DOT 3AL cylinders are marked in compliance with the specifications, in violation of 49 CFR 178.46–4(d)(11) (Violation No. 4), and (4) failed to provide complete test records to the manufacturer of DOT 3AL cylinders, in violation of 49 CFR 178.46–4(d)(12) (Violation No. 5).

With respect to Violation No. 2, Respondent asserts that the test equipment was properly calibrated before the DOT inspector arrived at the plant, was worked on during the day by a third party, and would not calibrate at the end of the day. Respondent further asserts that no testing was performed that day because the DOT inspector and Respondent's inspector were away from the plant witnessing other tests. Respondent's assertion that the equipment was properly calibrated before the DOT inspector arrived is contradicted by its own inspector's contemporaneous statement, made to the DOT inspectors, that the equipment had not been calibrated on the day of the inspection, and that it was only checked once a week. Respondent's assertion that no testing was performed that day is contradicted by the observations of the DOT inspectors, who actually witnessed hydrostatic testing and made copies of computer printouts showing the test results. Moreover, Respondent's assertion that no testing was conducted is contradicted by its own earlier statement (in response to the Notice of Probable Violation) that "the test data from earlier that day was accurate and properly obtained." Respondent cannot now be heard to claim that no testing was conducted.

With respect to Violation No. 3, Respondent contends that the bend test was performed properly and that the violation is a result of an incorrect interpretation by the DOT inspector. The requirement that a flattening test be performed on DOT 3AL cylinders authorizes an alternate bend test. However, 49 CFR 178.46–12(e) further requires that "when the alternate bend test is used, the test specimens shall remain uncracked when bent inward around a mandrel in the direction of curvature of the cylinder wall until the interior edges are at a distance apart not greater than the diameter of the mandrel." The RSPA inspector observed, and the Chief Counsel determined, that Respondent failed to perform the bend test so that the inside edges of the DOT cylinder were bent to a separation distance of 3.5 inches (the diameter of the mandrel used in the test). The DOT inspector observed an alternate bend test in which the specimen was bent around a 3.5 inch diameter mandrel until the inside edges were approximately 4 inches apart. Mr. Robert Lyddon, Division Manager of Advanced Testing Services, confirmed that this was the standard testing procedure. Respondent's inspector, Mr. Kayser, was present and did not correct or contradict this statement in any way.

With respect to Violation No. 4, Respondent asserts that the DOT inspector must have observed the markings on a cylinder prior to final inspection, whereas Respondent inspects markings on finished, painted cylinders. Respondent also contends that it has never seen any of DOT's evidence and thus is unable to determine what the photographs show. The photographs taken by the DOT inspector are of a DOT 3AL cylinder, painted yellow, serial number A5306, stamped as having been inspected in 8/86 with Respondent's partially legible identification number IA11. Furthermore, Respondent was given specific notice of all of DOT's evidence and could have reviewed any or all of DOT's evidence by requesting an informal conference or a formal hearing, or by simply requesting copies of the evidence referred to in the Notice of Probable Violation.

With respect to Violation No. 5, Respondent asserts that the HMR do not specify a time limit within which test records are to be prepared and provided to the container manufacturer, and contends that a six-month limit is an arbitrary interpretation of the regulations. Respondent claims that it had the records available in its Pennsylvania home office and could have provided them to the California facility had it been requested to do so. The Chief Counsel determined that while 49 CFR 178.46–4(d)(12) does not specify a tme limit, Respondent must prepare and furnish records within a reasonable time period.

The Chief Counsel further determined that a six-month period without test records was not reasonable. Respondent's operations are subject to inspection at any time and the DOT inspectors must have sufficient current information available to conduct such

inspections. Respondent's contention that it could have provided the required reports had it been requested to do so is irrelevant. Resondent is required by 49 CFR 178.46–4(d)(12) to furnish complete test records to the cylinder manufacturer. Neither the cylinder manufacturer nor Mr. Kayser, Respondent's plant inspector, had copies of any test records for the entire period during which the cylinders had been manufactured.

In its June 16, 1988 letter, Respondent stated that the asessed civil penalty would severely impact on its ability to continue in buisness. Respondent was requested to provide a certified financial statement or other information to substantiate this claim. By letter dated June 29, 1988, Respondent submitted copies of Schedule C (Form 1040) for tax years 1985, 1986, and 1987 showing Mr. Ernest E. Steigerwalt's profit from operation of Steigerwalt Associates, a sole proprietorship. On June 14, 1988, Respondent was again asked to provide a certified balance sheet showing its current assets and liabilities, rather than the individual tax returns of Mr. Steigerwalt. Respondent did not choose to provide such information, and therefore I have relied on the information Respondent provided with its June 29 letter. By his failure to respond to requests for pertinent financial information. Mr. Steigerwalt effectively failed to substantiate his assertion that the assessed civil penalty would, in fact, severely impact the ability of Steigerwalt Associates to continue in business. The tax returns provided show that Mr. Steigerwalt had a net profit from operation of Steigerwalt Associates of $7,431 for 1985, $15,999 for 1986, and $13,628 for 1987, after deductions for payment of wages to an unidentified recipient of $15,000 for 1985, $14,600 for 1986, and $12,900 for 1987. This information not only does not support Respondent's claim that payment of a $6,000 penalty would severely impact its ability to continue in business, but on the contrary, reflects that Respondent is able to pay the penalty and still show a profit.

Finally, Respondent requested a meeting with the Administrator after review of the appeal. Respondent has already been afforded the opportunity for an informal conference or for a formal administrative hearing before an Administrative Law Judge. Respondent did not avail itself of either opportunity and accordingly has waived its right to a conference or a hearing. This appeal proceeding does not include any further opportunity for a conference or meeting.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent on appeal are without merit.

(2) The civil penalty assessed in the Order was appropriate, and no basis exists for mitigation of the penalty.

Therefore, the Chief Counsel's Order of May 4, 1988, finding that Respondent knowingly violated 49 CFR 178.46–4(d), 178.46–4(d)(11), and 178.46–4(d)(12), and assessing a $6,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717.

Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 24, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 87–43–SC]

Denial of Relief

In the Matter of: G.C. Industries, Inc., Respondent.

Background

On December 4, 1987, the Chief Counsel issued an order assessing a $2,000 civil penalty against G.C. Industries, Inc. (Respondent) for violations of 49 CFR 171.2(a) and 173.304(a) of the Hazardous Materials Regulations, as alleged in the Notice of Probable Violation of August 3, 1987. Respondent submitted an appeal by letters of December 16, 1987, and February 3, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's bases for appeal are: (1) The permeation devices shipped by Respondent are entirely different from gas cylinders, and thus the gas cylinder regulations cannot be applied to them; (2) Respondent's competitors ignore the regulations and ship similar products by regular mail; (3) on November 16, 1987, Respondent applied for an exemption from the Department's packaging requirements; and (4) during the year ended December 31, 1986, Respondent lost $72,000, with an accumulated loss of $218,000.

I will discuss each of those issues in the order indicated above. First, a party shipping hazardous materials has a legal responsibility to ensure that those shipments comply either with the Hazardous Materials Regulations (49 CFR parts 171–179) or with an exemption from those regulations; the alleged inapplicability of the gas cylinder regulations to Respondent's shipments is irrelevant. Because Respondent elected to ship hazardous materials not in accordance with the regulations, it had no alternative but to obtain an exemption prior to shipping those materials.

Second, the alleged practices of Respondent's competitors are irrelevant to Respondent's legal responsibility to comply with the regulations. Any specific allegations of violations on the part of other parties would be investigated by the Office of Hazardous Materials Transportation.

Third, the fact that Respondent belatedly has applied for an exemption from the Hazardous Materials Regulations does not merit mitigation of the civil penalty for Respondent's violation.

Fourth, the financial information submitted by Respondent reflects cash on hand of over $38,000 and a current assets/current liabilities ratio of about 2.5 ($182,000/$74,000). That information indicates neither an inability to pay a $2,000 civil penalty nor any adverse effect of such a penalty on Respondent's ability to remain in business.

Findings

Based on my review of the record, I find the following:

(1) Respondent offered a hazardous material, hydrogen sulfide, for transportation in commerce in a non-specification packaging, in violation of 49 CFR §§ 171.2(a) and 173.304(a)(2).

(2) The issues raised on appeal by Respondent are without merit.

(3) There is no basis for mitigation of the civil penalty set forth in the Order.

Therefore, the Order of December 4, 1987, assessing a $2,000 civil penalty is affirmed, as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in referral of this matter to the U.S. Attorney for collection of the civil penalty in the appropriate United States District Court. Also failure to pay this civil penalty within 20 days of service will result in the accrual of interest in accordance with the rate established pursuant to 31 U.S.C. 3717 as well as a penalty charge of six percent (6%) per annum. Payment should be made by certified check or money order payable to the Department of Transportation, and sent to the Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

Date Issued: May 10, 1988.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Enf. Case No. 87–50–CR]

Denial of Relief

In the Matter of: Bennett Welding Supply Corp., Respondent.

Background

On January 21, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Bennett Welding Supply Corp. (Respondent) assessing a penalty in the amount of $3,000 for violations of 49 CFR 171.2(c), 173.34(e)(1) and 173.34(e)(3). By letter dated February 26, 1988, the Respondent submitted a timely appeal of the Order, challenging it on two bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) Respondent contends that the results of the hydrostatic testing performed during the January 8, 1987 inspection are identical to the results shown in Respondent's records;

(2) Although Respondent's employee did not know which burette to use for retesting when questioned by the RSPA inspector, this is not a violation of 49 CFR 173.34(e)(3).

First Argument

Respondent's first argument is that the results of hydrostatic testing performed for the RSPA inspector on January 8, 1987, matches the results shown in Respondent's hydrostatic test records, and, therefore, there is no violation. However, Violation No. 1 is based on Respondent's failure to conduct an internal visual examination of the cylinder under § 173.34(e)(1), not the adequacy of its hydrostatic testing.

During the inspection, the RSPA inspector examined the inside of the cylinder and observed an excessive amount of iron oxide deposits caused by internal corrosion. Such an excessive buildup of iron oxide deposits creates a rebuttable presumption that Respondent failed to perform an internal visual examination of the cylinder. Respondent has failed to rebut this presumption. Moreover, Respondent's Vice President of Operations, Thomas J. Bennett, examined photographs of the cylinder during the December 9, 1987 informal conference and agreed that such a buildup would indicate that an internal visual examination was not performed.

Second Argument

Respondent's second argument is that it should not be cited for using hydrostatic equipment that could not be read to an accuracy of 1 percent simply because its employee, David Flight, selected an incorrect burette for retesting. Respondent argues that this evidence shows only that Mr. Flight misunderstood the RSPA inspector's question concerning which burette was to be used for retesting. However, there is sufficient evidence to show that Respondent violated § 173.34(e)(3). First, Mr. Flight stated that he has been retesting cylinders for Respondent for two years. When asked by the RSPA inspector which burette was used to test a cylinder (ICC 3AA 1800, Serial No. 36450) located near the retest equipment, Mr. Flight replied that the middle burette with 0.5 cc increments was used to test the cylinder. The retest record provided by Respondent indicated that this cylinder had been retested by Mr. Flight on January 7, 1987, the day before the inspection. The test report showed a total expansion of 9 cc's. Performing retesting on a cylinder of this size using a burette with 0.5 cc increments will not result in an expansion reading of within 1 percent or 0.1 cc as required by the regulations.

Findings

Based on my review of the record, I find the following:

(1) Respondent failed to conduct an internal examination on a cylinder that had been marked as properly inspected.

(2) Respondent, by marking a DOT specification cylinder, represented it as having been tested on hydrostatic equipment which had an expansion gauge that could not be read to an accuracy of 1 percent of total expansion or 0.1 cc.

Therefore, the Order of January 21, 1988, assessing a $3,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M.86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 9, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–60–DM]

Denial of Relief

In the Matter of: Myers Container Corporation; Respondent.

Background

On April 5, 1988, the Chief Counsel assessed a $7,600 civil penalty against Myers Container Corporation (Respndent), for violations of 49 CFR 178.116–12(a)(1), 178.116–12(a)(2), and 178.131–11(a) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated April 20, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly (1) failed to conduct periodic drop tests and retain drop test samples on 20 gauge, 30-gallon DOT specification 17E drums, (2) failed to conduct periodic drop tests and retain drop test samples on [illegible] gauge,

55-gallon DOT specification 17E drums, (3) failed to conduct hydrostatic pressure tests and retain hydrostatic test samples on 18/16 gauge, 55-gallon DOT specification 17E drums, and (4) failed to successfully pass a periodic drop test on 22 gauge, 55-gallon DOT specification 37A480 steel drums.

Respondent asserts three bases for appeal. First, Respondent states with respect to violation 1 that what "the original inspection report" [i.e., the Notice of Probable Violation] failed to state was that the drop test sample was located in the DOT retain area, was full of water, and was marked with the date dropped, the DOT specification, and "4 Foot Drop Test".

Respondent contends that the drum was intended to be dropped but that the operator was probably interrupted and failed to get back to it. The fact that Respondent's failure to conduct the required drop test may have been inadvertent does not excuse the occurrence of the violation. Furthermore, Respondent has already admitted, in an August 10, 1987 letter, that due to an oversight the retain sample had not been dropped, and stated that corrective action had been taken. The Chief Counsel mitigated the amount of the proposed penalty for this violation by $300 to reflect the corrective action, and no further mitigation is warranted.

Second, Respondent states, with respect to violations 2 and 3, that it conducted drop and hydrostatic tests for 20/18 gauge and 18 gauge 55-gallon DOT 17E drums. Respondent asserts that these drums are the same type and size as 18/16 gauge 55-gallon DOT 17E drums, and therefore it was not in violation of 49 CFR 178.116–12 which requires that each packaging design type must successfully pass the tests. Contrary to Respondent's contention, 49 CFR 178.116–12(a) provides that a "packaging design type" is defined by the design, size, material, thickness, and manner of construction. "Thickness" means gauge. Moreover, a different thickness would also require a change in the manner of construction because the seamer would have to be adjusted to accommodate a different gauge. Respondent's 18/16 gauge 55-gallon DOT 17E drums are separate packaging design types requiring testing as specified in 49 CFR § 178.116–12.

Finally, Respondent contends that the Chief Counsel's Order erred in stating that prior enforcement actions have been taken against Respondent. Respondent asserts that it is a new corporation formed in 1984, and that it is not a successor in interest to Myers Drum Company, but acquired "only certain assets" of Myers Drum Company, not the corporation itself. The Chief Counsel was responding to Respondent's argument that "other manufacturing" facilities of the same company have recently experienced the same investigation without any noted violations." The Chief Counsel countered this argument by noting that prior enforcement actions had been taken for violations at Respondent's Portland, Oregon and Oakland, California plants, and that a warning letter had been issued to Respondent's San Pablo, California plant.

In considering Respondent's contention concerning its relationship to Myers Drum Company, I observe the following:

(1) A January 4, 1985 letter from John W. Cutt, President of IMACC Corporation (of which Respondent is a division) stating that IMACC had "recently acquired the assets of Myers Drum Company's three steel drum manufacturing plants located in Portland, Oregon; Richmond, and Los Angeles, California."

(2) Respondent's corporate officers responsible for operation and compliance performed similar functions for Myers Drum Company, e.g., John W. Cutt, President of IMACC, was president of Myers Drum Company, and Roger C. Stavig, IMACC's Vice President-Manufacturing, was the manager of Myers Drum Company's Portland, Oregon plant.

(3) Respondent, Myers Container Corp., has continued to manufacture steel drums at the same plants and in the same locations as did Myers Drum Company.

Therefore, I conclude that while Respondent may have acquired only certain assets of Myers Drum, the two entities are so closely aligned that for enforcement purposes Myers Container Corporation may be considered the successor in interest to Myers Drum Company.

Findings

Based on my review of the record, I find the following:

(1) The issues raised by Respondent on appeal are without merit.

(2) The civil penalty was mitigated in the Order by an appropriate amount, and no basis exists for further mitigation of the penalty.

Therefore, the Chief Counsel's Order of April 5, 1988, finding that Respondent knowingly violated 49 CFR 178.116–12(a)(1), 178.116–12(a)(2), and 178.131–11(a), and assessing a $7,600 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 1, 1988.

M. Cynthia Douglass,

Administratar, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Enf. Case No. 87–63–RNC]

Denial of Relief

In the Matter of: Contract Courier Services, Inc., Respondent.

Background

On February 8, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Contract Courier Services, Inc. (Respondent), assessing a penalty in the amount of $18,000 for violations of 49 CFR 171.2(b) and 177.942(b). By letter dated March 2, 1988, Respondent submitted a timely appeal of the Order, challenging in on four bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent asserts four bases for its appeal:

(1) Respondent did not "knowingly" commit any acts which violated the regulations;

(2) Respondent's method of stowing radioactive materials does not violate 49 CFR 177.842(b);

(3) The February 8, 1988 Order failed to give appropriate weight to the unusual circumstances which led to the storage violation;

(4) The proposed civil penalties are excessive in view of the level of fines established in the Sentencing Guidelines for United States Courts for criminal

violations of the Hazardous Materials Regulations (regulations) under 49 U.S.C. 1809(b).

First Argument

Respondent's first argument is that the standard for a knowing violation within the meaning of 49 U.S.C. 1809(a)(1) does not permit imposition of a penalty on persons who "should have known" facts giving rise to the violation. Respondent argues that although 49 CFR 107.299 provides that a violation is committed when a person should have known of facts giving rise to a violation, the legislative history of 49 U.S.C. 1809(a)(1) suggests that civil penalties may be imposed only in the event that a defendant knowingly commits an act which is a violation. RSPA considered the legislative history of 49 U.S.C. 1809(a)(1) in lawfully promulgating 49 CFR 107.299 which states that "knowingly" means:

> that a person who commits an act which is a violation of the Act or of the requirements of this subchapter . . . commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter. . . . Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter. . . .

Under this definition, Respondent knowingly placed packages of radioactive material closer than the allowable distances in an area occupied by employees. Even if Respondent did not know that the packages in question were closer than the allowable distance, Respondent should have known this. Therefore, the argument that the Respondent did not knowingly violate the regulations is without merit.

Second Argument

Respondent's second argument is that its method of stowing radioactive materials does not constitute a violation of the regulations. Respondent contends that its normal stowage method involves placement of radioactive packages at least 20 feet apart from each other. Respondent's contention does not address the crux of the storage violation. Respondent is being cited for a storage violation on the date of the inspection, not for its "normal stowage method." During his inspection, Inspector Shuler photographed radioactive packages at Respondent's facility that were closer than a distance of 20 feet apart.

Respondent also contends that it physically painted and marked the storage areas. Inspector Shuler's photographs refute this claim. Moreover, Respondent, in its appeal, admits to the storage violation by stating that incoming materials may have remained together for a short time as part of the vehicle unloading process. Respondent further admitted that a group of radioactive packages were stored together on the date of the inspection in question. Based on these two admissions found in Respondent's appeal and the photographs taken by Inspector Shuler of Respondent's facility, Respondent did violate the regulations by storing radioactive packages at its facility at a distance of closer than 20 feet.

Third Argument

In its third argument, Respondent claims that the February 8, 1988 Order failed to give appropriate weight to the unusual circumstances and desire to avoid exposure to the public which led to the storage violation. Respondent describes the unusual circumstances as a "significant possibility" that a dissatisfied former employee of Respondent who knew of the inspection in question may have removed a padlock from one of the storage bins in order to disrupt Respondent's storage process. Respondent has not produced any evidence of a former employee having notice of Inspector Shuler's inspection leading to removal of the padlock. Respondent further contends that the storage of radioactive packages in one location was a direct result of the missing padlock and was intended to reduce public safety risks by returning the radioactive packages to the bin with the remaining padlock. Respondent has not produced any evidence of a former disgruntled employee's intentional removal of a padlock from one of the storage bins. Even if this were true, this does not excuse Respondent from the storage violation. Similarly, Respondent's professed intent to avoid public exposure does not excuse the violation. The Chief Counsel mitigated the amount of penalty by $1,000 for corrective actions taken and no further mitigation is warranted.

Fourth Argument

Respondent, in its fourth argument, claims that the penalties assessed in the February 8, 1988 Order are excessive in view of the Sentencing Guidelines established for United States Courts for criminal violations of the Hazardous Materials Regulations. First, the Sentencing Guidelines to which Respondent refers apply solely to Federal courts, not Federal agencies. Further, the guidelines apply to criminal cases, not civil ones. The case in question is neither in Federal court, nor is it a criminal proceeding. This is a civil enforcement action brought by a Federal agency which has assessed a civil penalty against Respondent for violations of the Hazardous Materials Regulations. Therefore, the Sentencing Guidelines are not applicable to this case. Moreover, the Chief Counsel mitigated the proposed civil penalties for each of the three violations in the February 8, 1988 Order based on corrective actions taken by Respondent. No basis for further mitigation exists.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly committed acts which violated 49 CFR 171.2(b) and 177.842(b).

(2) Respondent violated 49 CFR 177.842(b) by storing packages of radioactive materials at a distance of less than 20 feet apart.

(3) The February 8, 1988 Order gave appropriate weight to the factors involved in Respondent's case involving the storage violation.

(4) The proposed civil penalties are not excessive, and the Sentencing Guidelines for United States Courts do not apply to this case because it is not a criminal proceeding.

(5) The civil penalty was mitigated in the Order by an appropriate amount, and no basis for further mitigation of the penalty exists.

Therefore, the Chief Counsel's Order of February 8, 1988, finding that Respondent knowingly violated 49 CFR 171.2(b) and 178.842(b) and assessing an $18,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations

Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 9, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 87–67–EXR]

Denial of Relief

In the Matter of: Seradyn, Inc., Respondent.

Background

On December 21, 1987, the Chief Counsel, Research and Special Programs Administration (RSPA), issued a Final Order to Respondent, assessing a penalty in the amount of $4,000 for violations of 49 CFR 171.2(a), 173.242(a) and 173.286(c). By letter dated January 6, 1988, the Respondent submitted a timely appeal of the Order, challenging the amount of the penalty assessment on four bases. The Chief Counsel's Final Order is incorporated by reference.

Discussion

The Respondent's bases for appeal are: (1) Respondent did not "intentionally" commit acts that violated the Hazardous Materials Regulations (49 CFR Parts 171–179) (HMR); (2) Respondent's Exemption DOT–E 6702 would have been routinely renewed if the renewal application had been filed in a timely manner; (3) Respondent, to the best of its knowledge, had not committed any prior hazardous materials violations; and (4) the amount of the assessed civil penalty was excessive.

Respondent's first assertion, that it did not "intentionally" commit violations of the HMR, is irrelevant. Under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Consequently, Respondent's contention that it did not "intentionally" violate the regulations is without merit.

Respondent's second basis for appeal is that, based on its operating experience under DOT–E 6702, the exemption renewal would have been routinely granted. The probability of exemption DOT–E 6702 being renewed does not alter the fact that Respondent was transporting a large volume of hazardous materials under an expired exemption. Respondent admits that it transported 45,500 hazardous materials packages between January 1986 and August 1987 after expiration of the exemption authorizing such transportation. The probability of exemption renewal does not obviate the necessity for timely application for renewal or authorize continued transportation after the exemption expires.

Respondent's third basis for appeal is that it has not been cited for any previous hazardous materials violations. Respondent's compliance record was taken into account in establishing the proposed penalty in this case, and no further mitigation is warranted.

Finally, Respondent has asserted that imposition of a $4,000 civil penalty would have an adverse effect upon its financial viability. However, Respondent failed to submit any financial information or documents supporting this contention. Without such information or documents substantiating Respondent's contention of economic hardship, inability to pay the penalty being imposed, or adverse effect of such a penalty on its ability to continue in business, there is no basis on which to provide mitigation.

Findings

The four issues raised by the Respondent in its appeal have been considered. I find that sufficient evidence has not been presented to warrant mitigation of the assessed civil penalty. Therefore, the Chief Counsel's Order of December 21, 1987, finding that Respondent knowingly violated 49 CFR 171.2(a), 173.242(a) and 173.286(c), and assessing a $4,000 civil penalty is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 10, 1988.

M. Cynthia Douglass,

Administrator Research and Special Programs Administration.

Certified mail—Return receipt requested

[Enf. Case No. 87–71–SD]

Denial of Relief

In the Matter of: Twin Terminal Services, Inc., Respondent.

Background

On February 16, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Twin Terminal Services, Inc. (Respondent) assessing a penalty in the amount of $8,000 for violations of 49 CFR 171.2(a), 172.202(a)(1), 172.202(a)(3), 172.202(a)(4), 172.204(a), 173.30, and 176.83(d)(1). By letter dated March 17, 1988, Respondent submitted a timely appeal of the Order, challenging it on two bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) Respondent has had no history of prior violations in the 20 years it has been in operation. Respondent admits that it made mistakes which led to the alleged violations and that corrective action has been taken; and

(2) Respondent is financially unable to pay the proposed civil penalty.

First Argument

Respondent's first argument is that it has been in business for 20 years and has no history of prior violations. During this period, Respondent states that it has always handled its cargo with utmost care and has never experienced problems. However, it is clear that Respondent has failed to appreciate the potential level of danger involved in the incorrect intermodal transportation of hazardous materials. Respondent placed into a single freight container for ocean transportation two corrosive materials, one flammable liquid, a flammable solid, and an oxidizer totalling 10,671 pounds. As all of these classes of materials are required to be segregated and not loaded into the same freight container as required by 49 CFR 173.30, 176.83(b), and 176.83(d)(1), Respondent can hardly assert that it is exercising a high degree of care in its day-to-day operations.

Respondent further asserts that it was relying on Marine Cargo Management to

identify the hazardous material contents of the containers in question. Respondent is unjustified in relying on Marine Cargo Management to inform it of the contents of the container. Respondent physically loaded and offered this incompatible freight container for ocean transportation, and it was Respondent's responsibility to ensure that the materials were in proper condition for transportation. Respondent also failed to provide shipping papers with hazardous materials shipping descriptions and shipper's certifications. Moreover, Respondent admitted that it made mistakes which led to the violations and takes full responsibility for their occurrences.

Second argument

Respondent's second argument is that it is financially unable to pay the proposed civil penalty. Respondent submitted copies of its financial statements for the years 1985 through 1987, and bank statements for the period October 1987 through February 1988. However, the bank statements show an average balance on hand of over $24,000. This indicates that Respondent is able to pay the assessed civil penalty. Respondent's financial statements show a total depreciation of $909,000. This does not affect Respondent's current ability to pay because depreciation has no effect on cash flow. Therefore, I find that the financial data provided by Respondent indicates its ability to pay the proposed penalty, and its assertion of financial difficulty is without merit.

Findings

Based on my review of the record, I find the following:

(1) Respondent offered for transportation in commerce hazardous materials without placing the proper shipping names, identification numbers, and quantities on the shipping papers.

(2) Respondent offered for transportation in commerce hazardous materials without placing a shipper's certification on the shipping papers.

(3) Respondent loaded in a single freight container hazardous materials which are required to be segregated, and offered it for ocean transportation.

(4) The proposed civil penalty was mitigated in the Order by an appropriate amount, and no basis for further mitigation of the penalty exists.

Therefore, the Order of February 16, 1988, assessing an $8,000 civil penalty is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation," and sent to the Chief, Accounting Branch Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: July 21, 1988.

M. Cynthia Douglass.

Administrator.

Certified mail—Return receipt requested

[Enf. Case No. 87–76–SD]

Partial Grant of Relief

In the Matter of: Nuodex, Inc., Respondent.

Background

On February 12, 1988, the Chief Counsel, Research and Special Programs Administration, issued an Order to Nuodex, Inc., (Respondent) assessing a penalty in the amount of $5,000 for violations of 49 CFR §§ 171.2(a), 172.301(a) and 173.346(a). By letter dated March 28, 1988, Respondent submitted a timely appeal of the Order, challenging it on two bases. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Respondent's bases for appeal are:

(1) The drums used by Respondent to transport hazardous materials met or exceeded DOT packaging standards; and

(2) Respondent marked the drums with the proper international and domestic shipping name.

First Argument

Respondent's first argument is that the drums in which it transported hazardous materials met or exceeded DOT standards. Respondent also maintains that the marking "GDH" is on file with DOT and therefore verifies compliance insofar as materials used. GDH is a DOT registered symbol which serves only to identify the container manufacturer. Marking a drum in such a manner does not qualify it as a DOT specification drum. In order to make it a DOT specification drum, the DOT specification marking must be placed on the container.

That marking acts as the manufacturer's certification to the user that the container complies with the specification requirements. Therefore, Respondent's drums are not DOT specification packages even though they were marked with the GDH marking. Finally, Respondent contends that the packaging is superior and posed no greater safety hazard than if the drums had been marked in accordance with DOT standards. This argument is irrelevant to Respondent's obligation to mark the drums with the DOT specification marking.

Second Argument

In its second argument, Respondent contends that it marked its drums with the proper international and domestic shipping name. Respondent also claims that toxicological and other precautionary information were included on the label. Respondent submitted a copy of a product label representative of the type used on the drums in question. Although the international description is incorrect (Class B poison, UN 2290), the DOT shipping description is correct (Poison B liquid, n.o.s. UN 2810). Since the product labels submitted by Respondent were marked with the proper DOT shipping name and since there is insufficient evidence that the drums observed during the July 28, 1987 inspection were not properly marked, Violation No. 2 is dismissed and the civil penalty of $2,000 for this violation is eliminated. Respondent is advised, however, that it must discontinue its practice of labeling its drums containing Class B poison as "Isophorine Diisocyanate" and label them under 49 CFR 172.102 as "Isophorone Diisocyanate."

Findings

Based on my review of the record, I find the following:

(1) Respondent offered for transportation hazardous materials in packaging not authorized under the regulations.

(2) There is insufficient evidence to support a finding that Respondent improperly marked its drums. Therefore, elimination of the $2,000 civil penalty for this violation is granted.

Therefore, the Chief Counsel's Order of February 12, 1988, is modified by dismissing Violation No. 2 and reducing the assessed civil penalty to $3,000.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: August 9, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

Certified mail—Return receipt requested

[Ref. No. 88–01–CR]

Denial of Relief

In the Matter of: Atlantic Fire Systems, Inc., Respondent.

Background

On July 28, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $4,500 civil penalty against H & M Fire Company, predecessor to Atlantic Fire Systems, Inc. (Respondent) for violations of 49 CFR 173.34(e)(1), 173.34(e)(l)(i), and 173.34(e)(3) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated August 26, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Represented that it had retested DOT specification cylinders by marking them with a retester's identification number (RIN) that had not been issued by RSPA to the Respondent; (2) performed periodic retests on DOT specification cylinders with equipment that had a pressure gauge which could not be read to 1 percent of test pressure and an expansion gauge that could not be read to 1 percent of total expansion; and (3) performed periodic retests on DOT specification cylinders without properly conducting external visual inspections in accordance with CGA Pamphlet C–6.

With respect to Violation No. 1, Respondent stated that it had purchased Sun Jan Fire Equipment on December 31, 1986, and understood from representations by the seller that the seller could assign the RIN to Respondent, to be used until Respondent obtained its own RIN. Respondent stated that it had continued to use the same personnel as had performed services for the seller, and contended that 49 CFR 173.34(e)(1)(i) allows assignment of a RIN to remain valid with the use of the same personnel and equipment. Finally, Respondent stated that after acquiring Sun Jan Fire Equipment it had undertaken to obtain its own RIN, and in fact was inspected for that purpose by an independent inspection agency shortly after the RSPA inspection.

Despite what Respondent may have understood from the seller, the Hazardous Materials Regulations at 49 CFR 173.34(e)(1)(i) provide that no person may represent that he has retested a DOT specification cylinder unless that person holds a current RIN issued by RSPA. There is no provision in the regulations authorizing the transfer or assignment of a RIN from one person to another. Respondent's contention that assignment of a RIN is allowed provided the same personnel and equipment are used is incorrect. The regulation to which Respondent apparently refers is 49 CFR 173.34(e)(l)(v), which provides that the "authority to perform retesting under this section, as reflected by assignment of a current retester identification number, remains valid as long as the level of personnel qualifications, and equipment used, is maintained at least equivalent to the level observed at the time of inspection by the independent inspection agency." This regulation does not authorize assignment of a RIN from one person to another, but, in fact, circumscribes RSPA's assignment of a RIN. Therefore, whether Respondent continued to use the same personnel and equipment is irrelevant; Respondent had not been issued a RIN by RSPA and accordingly lacked authority to retest DOT specification cylinders.

Respondent, however, did undertake to obtain its own RIN, as evidenced by an application filed with RSPA on June 24, 1987. Although the application was not made until after the June 2, 1987 RSPA inspection, Respondent had made the necessary arrangements with an independent inspection agency prior to that date. In view of Respondent's efforts to obtain a RIN, I find that mitigation of $500 for Violation No. 1 is appropriate.

With respect to Violation No. 2, Respondent contends that within a few days after the RSPA inspection, the pressure gauge was inspected by the independent inspection agency and certified to be accurate, and, therefore, "any problem with the gauge is inexplicable to the Respondent."

The report of the independent inspection agency includes on page 7, "Note: For this inspection Calibrated cylinder from fayettville [sic] was used." In addition, on page 6 of the report, the primary test gauge is identified as having increments of 20 pounds per square inch (psi). The gauge examined and photographed by the RSPA inspector had 25 psi increments. Based on this evidence, it appears that a different calibrated cylinder and gauge were used for the June 8, 1987 inspection by the independent inspection agency. Respondent has not presented any information to contradict the evidence in the record that the gauge inspected and photographed by RSPA on June 2, 1987, could not be read with the required accuracy and that Respondent did not have any method of calibrating its hydrostatic testing equipment.

With respect to Violation No. 3, Respondent denied that it had failed to conduct external visual inspections, and stated that the duct tape on the side of the cylinder was there "merely to record the owner of the tank and was no more than a decal placed on a CO2 fire extinguisher by the manufacturer."

The cylinder in question was photographed by the RSPA inspector. The tape on the cylinder's lower sidewall was neither duct tape nor a manufacturer's label, but an abrasive tape used to keep the cylinder (a dive tank) from moving around in a backpack. Respondent's shop foreman, Mr. Donald Bradshaw, stated that the black tape was not removed when the cylinder was retested. Regardless of the purpose of the tape, anything which prevents the inspector from examining the entire external surface of the cylinder, including manufacturer's labels and tape, must be removed prior to inspection.

Respondent also disputed the statement atrributed to Mr. Bradshaw that he failed to remove metal bands from DOT specification cylinders prior to retest and reinspection. Respondent stated that it had observed Mr. Bradshaw's retesting on numerous occasions and the bands were always removed. Respondent also suggested that Mr. Bradshaw "was a friend of the Seller and any such statement if made

by him must have been made with malicious intent." Respondent asserted as a general matter that a dispute had arisen between Respondent and the seller, that the seller had threatened to wreck Respondent's business, and that Respondent believes that RSPA inspection was initiated by the seller.

Mr. Bradshaw told the RSPA inspector during the June 2, 1987 inspection, in response to a direct question, that he did not remove the bands to check for corrosion. Mr. Bradshaw's contemporaneous statement has not since been contradicted by an affidavit or other evidence. Moreover, I am not persuaded by Respondent's statements concerning an alleged dispute with the seller that Mr. Bradshaw had any reason to make a false statement. At the time the statement was made, Mr. Bradshaw was in Respondent's employ and would have had no incentive to jeopardize his position with Respondent. Furthermore, the RSPA inspection was not initiated based on a complaint by the seller. The decision to inspect Respondent was not made by the RSPA inspector until June 1, 1987, when he heard that Respondent was retesting but Respondent did not appear on his list of registered retesters.

Finally, Respondent requested an informal telephone conference. Respondent was already afforded the opportunity to request an informal conference or a formal hearing before an Administrative Law Judge. Respondent failed to avail itself of either opportunity and accordingly has waived its rights to a conference or hearing. This administrative review proceeding does not include any further opportunity for a conference or hearing of any kind.

Findings

Based on my review of the record, I find the following:

(1) Respondent has provided information sufficient to warrant mitigation of $500 for Violation No. 1.

(2) Respondent did not provide any information to warrant mitigation of the civil penalties assessed for Violation Nos. 2 and 3.

Therefore, the Chief Counsel's Order of July 28, 1988, finding that Respondent knowingly violated 49 CFR 173.34(e)(1), 173.34(e)(1)(i), and 173.34(e)(3) is modified by reducing the civil penalty from $4,500 to $4,000. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: November 18, 1988.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Enf. Case. No. 88–05–CM]

Action on Appeal

In the Matter of: General Processing Corp., Respondent.

Background

On December 14, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to General Processing Corporation (Respondent) assessing a penalty in the amount of $15,000 for violations of 49 CFR 171.2(c), 178.51–4(d), 178.51–14(a), 178.51–19(c)(1), 178.61–4(d), 178.61–14(a), 178.61–14(d)(2), 178.61–15(a) and 178.61–15(b). By letter dated January 16, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent contends that, with respect to Violation No. 5, it took steps to ensure that none of the 205 involved cylinders were used until the required testing had been completed. Its March 16, 1989 letter clarified and reaffirmed this pont. This remedial action to correct the absence of prior physical testing of the cylinders merits mitigation of the $3,000 civil penalty for Violation No. 5 to $2,000.

With respect to Violation No. 7, Respondent argues that the civil penalty is unfair because it had been misled by a 1982 OHMT inspection and OHMT's failure to respond to its 1983 letter explaining its stamping procedures. Respondent made this same argument in response to the original Notice, and, in recognition thereof, the Chief Counsel's Order reduced the $1,000 proposed penalty to $500. No new information has been presented, and no additional mitigation is warranted.

Findings

Based on my review of the record, I find the following:

(1) Mitigation of $1,000 is warranted for remedial action taken by Respondent with respect to Violation No. 5.

(2) No additional mitigation is appropriate with respect to Violation No. 7 or any other violations.

Therefore, the Order of December 14, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $15,000 civil penalty assessed therein is hereby mitigated to $14,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) in accordance with 31 U.S.C. § 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 24, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–10–CR]

Denial of Relief

In the Matter of: Fire Foe Corporation, Respondent.

Background

On October 12, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $3,000 civil penalty against Fire Foe Corporation (Respondent) for violations of 49 CFR 173.34(e)(1) and 173.34(e)(3) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated November 7, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Performed periodic retests on DOT specification cylinders without properly conducting internal visual inspections in accordance with the Compressed Gas Association (CGA) Pamphlet C–6 by failing to use an inspection light of sufficient intensity to clearly illuminate the interior walls of the cylinder; and (2) performed periodic retests on DOT specification cylinders with equipment that had a pressure gauge which could not be read to one percent (1%) of test pressure and an expansion gauge that could not be read to one percent (1%) of total expansion or 0.1 cubic centimeter (cc).

In its November 7 appeal, Respondent stated that it had not been provided with certain information it had requested earlier to enable it to respond to the Notice of Probable Violation issued on April 22, 1988. Respondent also asserted that the RSPA attorney then assigned to the case had acted unethically. By letter dated December 7, 1988, Respondent was provided with a complete copy of the enforcement file and the other information it had requested, and was given 45 days from receipt to submit any additional information it desired the Administrator to consider. Respondent was also advised that in order for the Administrator to consider the allegation concerning unethical conduct, Respondent would need to provide specific, factual information to support it. Respondent did not reply to RSPA's December 7, 1988 letter, although Respondent received it on December 13, 1988, as evidenced by return of the certified mail receipt. Accordingly, I find that Respondent's allegations concerning a lack of information necessary to its defense and the conduct of the RSPA attorney are without merit.

With respect to Violation No. 1, Respondent stated that it has four different types of inspection lights available, including two "mini" lights, which the hydrotest stand operators can choose to use based on their belief as to which will best illuminate the interior of a cylinder. Respondent stated that the RSPA inspectors were advised that the "overall hydrotest supervisor" was not available that day, but that the RSPA inspectors refused to delay the inspection until the next day when the supervisor would be available. Respondent alleged that the RSPA inspectors waited more than two hours after observing the inspection of cylinders before requesting that Respondent show them the available inspection lights. Respondent asserted that the test stand operator had already left for the day and the remaining office personnel were unable to locate the small lights which presumably would have illuminated the interior of the cylinders. Respondent also alleged that the light used by the test stand operator provides "the same or greater field of view inside the cylinder as the mini light."

The evidence in the record includes a statement from Mr. Daniel Marino, Respondent's retest operator, to the effect that when he could not see the interior walls of a cylinder he relied on the hydrostatic test to reveal any weakened areas. The RSPA inspectors asked Mr. Marino at the time of the inspection to show them the light he used to inspect five-pound cylinders of that type. Mr. Marino showed the inspectors the inspection light, which they photographed and which did not fit inside the cylinder or clearly illuminate the interior walls as required for a proper visual inspection. Respondent's assertion that other inspection lights were available is irrelevant. The violation which occurred in this instance occurred because Mr. Marino chose to conduct a visual inspection using an inadequate inspection light. Respondent's other assertions are erroneous, irrelevant or both.

With respect to Violation No. 2, Respondent stated that it closed its hydrotest operations for nine days, from September 11, 1987, through September 20, 1987, while its principal operator was on vacation. Respondent stated that on September 21, 1987, when it resumed operations, it placed a new gauge on the machine, conducted a calibration test which was observed by three people, and then, at lunch time, began to have difficulties with leaks. Respondent stated that it had stopped operations to determine the problem and had decided to bring a second test stand into operation when the RSPA inspectors arrived. Respondent alleged that, despite its request that the RSPA inspectors return in the morning, the inspectors stated that they were pressed for time and requested that Respondent hydrotest cylinders so that they could observe Respondent's operation.

Respondent stated that after it had tested a number of cylinders, the RSPA inspectors requested a calibration test. Respondent alleged that each time it raised the pressure in order to locate the leaks it had discovered in the morning, the RSPA inspectors called it an attempt at calibration, which Respondent asserts it was not. Respondent stated that it discovered a screw on the back of the pressure gauge was not seated properly and that the following day it corrected this problem by removing the gauge and reseating the screw. Respondent contends that the gauge was accurate with the screw in the correct position and that the RSPA inspectors' "lack of time to properly inspect our facility resulted in allegations that are without merit."

The inspection report, with which Respondent was provided a copy, states that Mr. Kenneth Foerster, Respondent's Operations Manager, was unable to provide any explanation of why the equipment could not be calibrated. At no time during the inspection did the RSPA inspectors observe, nor did Respondent mention, that a second hydrotest stand existed or was being brought into operation. It is standard practice for RSPA inspectors to inspect each and every hydrotest stand. Respondent did not tell the RSPA inspectors at the time of the inspection that the leaks had recently developed. In fact, the RSPA inspectors observed that testing was being conducted on the test stand in question when they arrived. Several DOT specification cylinders had already been stamped as having been successfully retested on the test stand in question despite the fact that Respondent was unable to calibrate the equipment. Furthermore, even when all the leaks had been located and all pressure released from the system, the pressure gauge still indicated 100 psi. The fact that Respondent may have corrected the problem the following day does not excuse retesting DOT specification cylinders on equipment which could not be read to the required accuracy. The information provided by Respondent in its appeal is insufficient to overcome the preponderance of the evidence obtained at the time of the inspection which indicates that Respondent was in violation of 49 CFR 173.34(e)(3).

Finally, Respondent alleged that throughout the RSPA inspection "there was a constant state of confusion," and that it "looked like a teacher-student situation," with one inspector appearing "to be constantly distracted by questions from the other inspector." The RSPA inspectors informed Mr. Foerster at the beginning of the inspection that Inspector Henderson would be instructing Inspector LaMagdelaine and that all questions should be directed to Inspector Henderson. The RSPA inspectors noted that Mr.. Neil Crowley, who appealed on behalf of Respondent, did not appear until more than half the RSPA inspection had been completed. Furthermore, the RSPA inspectors

advised both Mr. Foerster and Mr. Crowley at the exit interview of the probable violations they had observed and the possible enforcement actions which might be taken. Neither Mr. Foerster nor Mr. Crowley made any contemporaneous statements to attempt to explain, excuse, or deny the probable violations. Respondent's version of events, as presented in its appeal, is simply not persuasive when measured against the evidence in the record.

Findings

Based on my review of the record, I find the following:

(1) Respondent's assertions are without merit.

(2) Respondent did not provide any information to warrant mitigation of the civil penalties assessed for the violations cited in the Order.

Therefore, the Chief Counsel's Order of October 12, 1988, finding that Respondent knowingly violated 49 CFR 173.34(e)(1) and 173.34(e)(3), and assessing a civil penalty of $3,000, is affirmed as being substantiated on the record and in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operation Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: February 17, 1988.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–22–PTM]

Action on Appeal

In the Matter of: Rotational Molding Inc., Respondent.

Background

On February 7, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Rotational Molding Inc. (Respondent), assessing a civil penalty for violations with respect to its DOT–E 9503 exemption to manufacture 300-gallon polyethylene portable tanks. Respondent was found to have knowingly: (1) manufactured, marked, and sold these tanks without conducting the periodic hydrostatic pressure, cold drop, and ambient drop tests; (2) manufactured and marked these tanks with a minimum wall thickness less than 0.224 inches; (3) manufactured and marked these tanks without a pressure relief device that would not open at less than 10 psig or more than 15 psig; (4) manufactured and sold these tanks without embossing the serial number on the tanks; and (5) manufactured, marked, and sold these tanks without including the month that the tanks were manufactured, in violation of 49 CFR 171.2(c) and 178.19–7, and DOT–E 9503, paragraphs 7.a.ii., 7.a.iv., 7.a.v., 7.b.(ii) and 7.c. In the Order, the Acting Chief Counsel waived the civil penalty proposed for violation 5 and assessed a civil penalty of $12,500, reduced from the $20,000 civil penalty originally proposed in the July 22, 1988 Notice of Probable Violation (Notice). The Acting Chief Counsel's Order is incorporated by reference. By letter dated February 21, 1990, Respondent submitted a timely appeal of the Order.

Discussion

In its appeal, Respondent accepts the civil penalties assessed for violations 1 and 3, totalling $6,000. Respondent requests that the civil penalties for violations 2 and 4, totalling $6,500, be dismissed.

Concerning violation 2, Respondent argues that it had established the minimum wall thickness of .224 inches for its exemption, DOT–E 9503, using its own testing methods and equipment. Even though it admits that the ultrasonic tester revealed "spot" inconsistencies in thickness, Respondent avers that it is "highly unlikely that these reflect actual wall thickness." Its basis for this declaration is that if any of the specified number of conditions had been present during testing, the ultrasonic device would have presented a false reading. Not only does Respondent fail to state, let alone demonstrate, that any of those conditions was present, it neglects to mention that the wall thickness measurements of less than .224 inches obtained during the inspection had been taken by Respondent using its own ultrasonic testing device. Moreover, the appeal implies that Respondent had used the same device in its testing when it established the minimum wall thickness of .224 inches.

Respondent also asserts that its violation was not "knowingly" and refers to an argument it had made in response to the Notice, i.e., that it had mistakenly specified minimum wall thickness instead of average wall thickness in its original application for exemption. The Acting Chief Counsel's Order stated that "[i]f Respondent determined that the Exemption issued to it did not read as it intended, Respondent's remedy was to request a correction to the Exemption." The Order then admonished Respondent that "[i]t was not to disregard the plain language of the Exemption." In its appeal, Respondent claims that it did not disregard that language; it implies that it did not realize what the exemption required until after the November 3, 1987 inspection. Respondent knew that it had an exemption and that it was responsible for complying with it. Respondent's failure to read the exemption does not excuse Respondent from complying with its terms. A knowing violation occurs when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually know of, or intend to violate the legal requirements. Respondent's conduct thus met the definition of a "knowing" violation.

Respondent's final argument regarding violation 2 is that wall thickness is determined by charging a specific amount of resin to cover a specific number of square inches. Respondent contends that because the charge weights were correct, the tanks weighed the correct amounts, and the mold size had not changed, it could not selectively alter or control wall thickness. Respondent appears to be saying that, given this manufacturing process, it is not possible to obtain wide variations in wall thickness. Nevertheless, the inspection revealed wall thickness readings as low as .187 inches and as high as .261 inches. It is simply not a credible argument to state that something that did occur—wide variations in wall thickness readings—could not have occurred.

Violation 4 cited Respondent for failing to emboss the serial number on its exemption tanks. Following its receipt of the Notice, Respondent had argued that it engraved the serial number into each tank, thereby

satisfying the embossing requirement. The Acting Chief Counsel's Order stated that embossing required raising the surfaces of the tanks, rather than cutting into them. In its appeal, Respondent agrees with the Acting Chief Counsel. Respondent claims, however, that its original interpretation of the definition of "emboss" is understandable and that it, therefore, did not commit a "knowing" violation. Respondent also maintains that engraving serial numbers is a common practice in the industry for marking tanks, further indication that it did not commit a knowing violation.

The requirement to emboss is not vague, and Respondent's misinterpretation does not excuse the violation. The Acting Chief Counsel did not consider the requirement "ambiguous in any way." In light of Respondent's own admission of its error, I concur with the Acting Chief Counsel. Moreover, even if Respondent had presented any specific evidence that its method of engraving the serial number into the tank is a pervasive industry method, this would not excuse Respondent from complying with the requirements of its exemption. Respondent engraved serial numbers into its tanks and thus had knowledge of the facts giving rise to the violation.

The Acting Chief Counsel, in noting that Respondent had been found in violation of minimum wall thickness requirements, stated that "Respondent's procedure of engraving serial numbers into the tanks is all the more serious, since it further reduces wall thickness." In its appeal, Respondent protests that the places in which it engraved the serial numbers were of sufficient thickness to not be adversely affected by the procedure. This argument is not persuasive. The integrity of a polyethylene tank is compromised whenever a cut is made in it, irrespective of wall thickness.

Finally, Respondent counters the Acting Chief Counsel's contention that, in assessing the civil penalty, she had considered Respondent's ability to pay. Respondent maintains that the total number of tanks that it sells is evidence that it is a very small producer. Respondent's argument is misleading. The record shows that Respondent's manufacturing of 55 exemption portable polyethylene tanks each month represents only about one-tenth of one percent of its production. In fact, a Dun & Bradstreet, Inc. report, indicates that Respondent's controller projected annual sales to be $10,000,000 as of April 19, 1989.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $12,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 7, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The $12,500 civil penalty is due and payable upon receipt of this Action on Appeal. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: September 5, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–23–CR]

Action on Appeal

In the Matter of: Buddy's Fire Protection Service, Inc., Respondent.

Background

On March 13, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Buddy's Fire Protection Service, Inc. (Respondent), assessing a civil penalty in the amount of $3,000 for having knowingly retested DOT specification cylinders on improper equipment, failed to maintain proper DOT specification cylinder reinspection and retest records, and failed to mark retested cylinders with its DOT retester ID number, in violation of 49 CFR 173.34(e)(3), (5) and (6) and DOT Exemption DOT–E 7235. The Order assessed a $3,000 civil penalty, reflecting mitigation of the $4,000 civil penalty originally proposed in the August 23, 1988 Notice of Probable Violation. By an undated letter received March 31, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's major contention is that it was misled by a DOT-approved independent inspector, Professional Services Industries, Inc. (PSI), which allegedly had approved all of Respondent's practices at issue in this case. As to Violation No. 1, improper testing, DOT's inspectors observed that the expansion gauge on Respondent's hydrostatic test equipment was not being adjusted to compensate for the change in the column weight of water. To determine whether PSI observed and approved that improper procedure, a DOT inspector asked Respondent's President, Charles Stevens, whether he was present during the PSI inspection. He said that he was not present and that his sons, Victor and Cory Stevens, were the operators during that inspection. Both of them have provided written statements indicating that during that inspection they properly adjusted the testing equipment to compensate for the weight of the water column. Therefore, PSI observed proper procedures and cannot be held accountable for Respondent's later use of improper procedures. Thus, no mitigation is appropriate for Violation No. 1 because of alleged reliance on the independent inspector.

Respondent also contends that it relied upon PSI with respect to Violation No. 2, improper recordkeeping, and Violation No. 3, improper marking. Because Respondent itself is responsible for compliance with the Federal regulations, alleged reliance on an independent inspector is not an

appropriate basis for dismissal of a violation but instead may be considered as a matter in mitigation. The Chief Counsel's Order already mitigated the proposed penalty for Violation No. 3 due, in part, to Respondent's reliance on PSI; thus, further mitigation of that penalty is inappropriate. However, mitigation of $250 is appropriate for Respondent's alleged reliance on PSI with respect to Violation No. 2, an issue not previously raised by Respondent.

Respondent further states that the State Fire Marshal had inspected its facility without finding any violations. Inspections by officials responsible for enforcing other statutes and regulations are irrelevant to enforcement actions under the Hazardous Materials Transportation Act.

In addition, Respondent alleges that other companies follow incorrect procedures similar to those of Respondent. If so, those other companies may be subject to similar enforcement actions. However, their alleged practices are irrelevant to a proper disposition concerning Respondent's violations.

Respondent's final argument is that its violations were unintentional and not done with any intent to violate the law. Respondent itself recognized that the lack of intent is not a valid defense: "You will probably say Ignorance is no excuse but you learn from mistakes." Respondent has been found to have committed a civil violation under a "knowing" standard, not a criminal violation under a "willful" standard. As Respondent was advised in the August 23, 1988 Notice, 49 CFR 107.299 provides that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts, and that there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Respondent met this standard, and its violations thus were "knowing."

In its summation, Respondent stated that civil penalties of $500 for each violation would be reasonable and that it would take legal action against PSI to recover the amount of any civil penalties. Any potential private litigation is irrelevant to an appropriate decision in this proceeding. Respondent has provided no information justifying reduction of the civil penalties of $500 for each violation.

A Dun & Bradstreet report on Respondent indicates that as of March 31, 1987, Respondent had $4,348 cash on hand, current assets of $19,580 and current liabilities of 17,054.

Findings

Respondent has presented sufficient evidence to justify mitigation of the civil penalty assessment for Violation No. 2 from $1,500 to $1,250. It has not justified mitigation of the $1,000 penalty for Violation No. 1 or the $500 penalty for Violation No. 3. Respondent's other arguments are without merit.

I find that a total civil penalty mitigated to $2,750 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability (reduced by some reliance on the independent inspector), the absence of prior offenses, Respondent's ability to pay, the effect of civil penalty on Respondent's ability to continue in business, and all other relevant circumstances.

Therefore, the Order of March 13, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $3,000 civil penalty assessed therein is hereby mitigated to $2,750.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR Part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 6, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–45–EXR]

Denial of Relief

In the Matter of: Pointer, Inc., Respondent.

Background

On May 25, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA) U.S. Department of Transportation, issued a Final Order to Respondent, assessing a penalty in the amount of $1,500 for offering lithium batteries for transportation in commerce not violations of 49 CFR §§ 171.2(a) and 173.206 of the Hazardous Materials Regulations (HMR). By letter dated July 10, 1988, Respondent submitted a timely appeal of the Order, challenging the amount of the civil penalty assessment on two bases. The Chief Counsel's Order is incorporated by reference.

Discussion

The Chief Counsel's Order found that Respondent knowingly offerered lithium batteries for transportation in commerce not packaged in accordance with 49 CFR 173.206 after expiration of an exemption from compliance therewith. The Order assessed the $1,500 civil penalty originally proposed in the April 13, 1988 Notice of Probable Violation.

Respondents makes two arguments, each of which I will summarize and discuss.

The Respondent states that it inadvertently received a copy of the 17th Revision of DOT–E 7052, and such copy listed the individuals granted party status to the exemption and the dates their renewal applications were received by RSPA. Respondent contends its renewal application was received by RSPA at the same time as the other applications but that RSPA failed to process Respondent's application in a timely manner.

Respondent is mistaken concerning the time when RSPA received Respondent's exemption renewal application. Of the individuals granted party status to the 17th Revision of DOT–E 7052, the latest renewal application was received by RSPA on September 2, 1987—over 100 days prior to the expiration of DOT–E 7052. However, Respondent's renewal application was received on February 4, 1988—approximately 50 days after its party status to DOT–E 7052 expired. Consequently, Respondent's contention that RSPA failed to timely process its renewal application is without merit.

In addition, Respondent explains it is a small company that provides maintenance and replacement parts for an emergency transmitter it manufactured and installed on a majority of the U.S. Air Force's transport fleet. Accordingly, Respondent asserts that its shipments subsequent to the expiration of DOT–E 7052 were

necessary to maintain these aircraft in "Mission Ready" status. While Respondent's commitment to ensure the U.S. Air Force fleet is in operable condition is commendable, it does not excuse its non-compliance with the requirements of the HMR. The national defense nature of a shipment does not excuse non-compliance with the HMR. Respondent could have applied for an emergency exemption to continue its shipments in accordance with the law. Consequently, Respondent's contention is without merit.

Findings

The two issues raised by the Respondent in its appeal have been considered. I find that sufficient evidence has not been presented to warrant mitigation of the assessed civil penalty. Therefore, the Chief Counsel's Order of May 25, 1988, finding that Respondent knowingly violated 49 CFR 171.2(a) and 173.206, and assessing a $1,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (7%) per annum will accrue if payment is not made within 110 days of service. Filing an appeal within 20 days stays the effectiveness of this order, the accrual of interest, and administrative and penalty charges.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: March 6, 1989.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88-45-EXR]

Addendum to Amended Denial of Relief

In the Matter of: Pointer, Inc., Respondent.

On March 27, 1989, the Administrator of the Research and Special Programs Administration (RSPA) issued an Amended Denial of Relief (incorporated herein by reference) to Pointer, Inc. affirming the May 25, 1988 Order of the Chief Counsel assessing a $1,500 civil penalty for knowing violation of 49 CFR 171.2(a) and 173.206. The Amended Denial of Relief provided that the penalty must be paid within 20 days of receipt by Respondent.

By letter dated April 21, 1989, Respondent submitted a check in the amount of $250 in partial payment of the assessed penalty. The Department of Transportation hereby accepts this partial payment and authorizes the remaining $1,250 to be paid in four consecutive monthly installments. The first payment of $300 shall be due on or before June 15, 1989; the second payment of $300 shall be due on or before July 15, 1989; the third payment of $300 shall be due on or before August 15, 1989; and the fourth and final payment of $350 shall be due on or before September 15, 1989.

If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable. Respondent's failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default. Each payment must be made by certified check or money order (Containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of each check or money order to the Office of Chief Counsel (DCC-1), RSPA, room 8405, at the same street address.

Date Issued: May 3, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Enf. Case No. 88-49-NVO]

Denial of Relief

In the Matter of: Gulf Carrier Corporation, Respondent.

Background

On November 3, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Gulf Carrier Corporation (Respondent) assessing a penalty in the amount of $13,000 for violations of 49 171.2(a), 172.201(a), 172.201(c), 172.204(a) and 176.83(d)(1). By letter dated November 25, 1988, Respondent submitted a timely appeal of the Order. The Chief Councel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Offered for transportation by vessel in commerce, in a single freight container, hazardous materials of different hazard classes not authorized to be loaded together in the same freight container; (2) offered hazardous materials for transportation in commerce without properly describing them on a shipping paper; and (3) offered hazardous materials for transportation in commerce without certifying the compliance of the shipment on the shipping paper.

Respondent's bases for appeal are:

(1) Respondent was improperly refused a hearing to develop a proper record in the proceeding.

(2) Respondent was improperly denied an independent and neutral decisionmaker.

(3) There was no violation of 49 CFR 176.83(d)(1) because Respondent's container was not a "freight container."

(4) The finding of a violation of 49 CFR 176.83(d)(1) was based upon an improper assumption of critical facts.

(5) 49 CFR § 176.83(d)(1) conflicts with 49 CFR 172.504(b) and, therefore, is unenforceable.

I will address each of those arguments in the order described above.

Respondent's first argument is that it was improperly denied a hearing. Respondent states that on June 20, 1988, it filed correspondence offering a settlement; that the settlement was rejected by RSPA in a July 6, 1988 letter; that on July 25, 1988, Respondent submitted a request for a hearing; and that its request for a hearing was denied in a July 29, 1988 letter, which concluded that Respondent had waived its right to a hearing by not having requested a hearing within the timeframe provided in 49 CFR 107.313(b). Respondent contests this determination and cites the Administrative Procedure Act and three court cases in support of its contention that charging time expended in "settlement" negotiations against Respondent's deadline for requesting a hearing violates Respondent's right to due process.

The fallacy in Respondent's argument is that it had waived its right to a hearing before it initiated any

compromise or settlement negotiations. The Notice of Probable Violation (Notice) in this case was issued on May 4, 1988, and received by Respondent (via certified mail return receipt requested) on May 6, 1988. Because 49 CFR 107.313 provides that requests for a hearing must be made within 30 days of receipt of the Notice or otherwise are waived, Respondent had until June 6, 1988, to request a hearing. As evidenced by its June 1, 1988 letter, Respondent requested and received an extension to June 20, 1988, to respond to the Notice, thereby extending to June 20, 1988, Respondent's right to request a hearing. However, by its letter of June 20, 1988, which was received by RSPA on June 22, 1988, Respondent did not request a hearing; instead it made a compromise offer. It was not until July 25, 1988, 19 days after its compromise offer had been rejected, that Respondent finally requested a hearing. By failing to request a hearing on or before June 20, 1988, Respondent waived its right to request such a hearing.

Respondent's second argument is that it was denied its right to an independent and neutral decisionmaker. It argues that the Administrative Procedure Act (APA) applies and requires a separation between prosecutor and fact-finder. It contends that the RSPA procedures violated this principle because the "involved claims were brought by, and in the first instance, have been determined by the Office of General [*sic*] Counsel."

The facts are as follows. The alleged violations were investigated by the Enforcement Division Office of Hazardous Materials Transportation and referred by that Division to the RSPA Chief Counsel's Office. The Notice was issued by Mary M. Crouter, a senior attorney in the Office of Chief Counsel of RSPA. The Order in this case was issued by George W. Tenley, Jr., Chief Counsel of RSPA. This appeal is being decided by the undersigned Administrator of RSPA. Initial legal advice on this appeal has been provided by Edward H. Bonekemper, III, a senior attorney in the Office of the Chief Counsel of RSPA. All of Respondent's arguments have been given exhaustive consideration.

Respondent cites no specific APA provison and no caselaw in support of its proposition that it has been denied due process under the APA by these procedures. The APA provision which comes closest to being relevant is 5 U.S.C. § 554(d), which addresses the separation of investigative/prosecuting and decisionmaking functions in "adjudications." However, § 554 applies only "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." (Emphasis added.) With respect to this proceeding, Section 110 of the HMTA (49 App. U.S.C. § 1890) provides only for civil penalty violation determinations "after notice and an opportunity for a hearing."

Therefore, in accordance with a March 8, 1976 opinion of the General Counsel of the Department of Transportation (DOT), it has been DOT's official position that the APA's requirement for a formal adjudicatory hearing is inapplicable to HMTA civil penalty cases because of the absence of an explicit statutory requirement that decisions in those cases be made on the record. That approach is supported by *United States* v. *Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979), where the APA was held not to apply to a Coast Guard proceeding assessing a civil penalty under the Federal Water Pollution Control Act Amendments of 1972. In this case, therefore, Respondent was not entitled to rights enumerated under the APA, but only those provided in the HMTA, i.e., notice and an opportunity for a hearing. It received that notice, as well as an opportunity for a hearing; however, despite receiving an extension of time to exercise its rights, Respondent failed to make a timely request for a hearing. In summary, Respondent has not been deprived of any procedural rights to which it is entitled.

Respondent's third argument is that there was no violation of 49 CFR § 176.83(d)(1) because that section applies only to "freight containers," not to Respondent's "container," which was affixed to a trailer chassis. Respondent asserts that the Chief Counsel's Order incorrectly assumed that Respondent's equipment was detached from its chassis; it states that this did not occur because its equipment simply was driven on and off a "roll-on/roll-off" (RO/RO) vessel and is never detached from its chassis. In addition, Respondent cites Interstate Commerce Commission (ICC) cases stating that transportation of the type of equipment shipped by Respondent is a movement "in trailers," not a movement "in containers." In essence, Respondent contends that its consolidation and offering for transportation of an oxidizer, a corrosive, and a poison B in a single container did not violate § 176.83(d)(1) because that container is never removed from its chassis and is regarded by the ICC as a "trailer."

Respondent's contention is invalid. The Chief Counsel's Order neither stated nor assumed that Respondent's container was detached from its chassis. The applicable definition of "freight container" is in 49 CFR § 171.8: "a reusable container having a volume of 64 cubic feet or more, designed and constructed to permit being lifted with its contents intact and intended primarily for containment of packages (in unit form) during transportation." Respondent has neither argued nor shown that this definition is inapplicable to the container involved here. In fact, Respondent's appeal itself states that the "involved equipment, trailer GULF 603367, was comprised of a container and the container was affixed to a trailer chassis." The facts that Respondent's container is a RO/RO container and is never detached from it chassis do not render it something other than a freight container. In addition, ICC container classifications for purposes of ICC economic regulation are irrelevant to the construction of the term "freight container" under a safety statute such as the HMTA. Safety statutes are broadly construed in order to carry out their remedial purposes. Therefore, I find that § 176.83(d)(1) applied to Respondent's container and prohibited incompatible stowage therein.

Fourth, Respondent contends that the Chief Counsel's finding of a violation of § 176.83(d)(1) was based on "improper" assumptions of critical facts. It alleges that the Chief Counsel erroneously concluded that Phenylhydrazine is a prohibited Poison B under § 172.101. It also alleges that the Chief Counsel erroneously assumed that the involved oxidizer, Zinc Nitrate, was shipped in a quantity greater than the authorized limited quantity of 25 pounds; it contends that only 17 pounds of Zinc Nitrate were consolidated and shipped. Respondent also contends that there was an unjustified assumption that the involved corrosive exceeded the legally permissible limited quantity amounts. It concluded by asserting that RSPA, therefore, has failed to meet its burden of proof on all the elements of the failure-to-segregate violation.

In fact, none of the alleged "improper" assumptions exists. Although Phenylhydrazine indeed is not a Poison B, the Notice and Order did not assert that it was, and the evidence shows that Respondent consolidated and shipped two Poison B materials, Potassium Cyanide (UN1680) and Mercuric Chloride (UN1624), in the freight container in question. With respect to both of its contentions regarding the possibility of the oxidizer and the corrosive having been shipped in limited quantities, Respondent overlooked the

regulatory requirement that shipments must be packaged in specific packaging configurations (49 CFR §§ 173.153(b)(1) (oxidizers) and 173.244(a) (corrosives)) and be identified on shipping papers as limited quantity shipments in order to qualify for the limited quantity exceptions. 49 CFR § 172.203(b). There is no evidence of compliance with the specific packaging requirements for the limited quantity exceptions. Also, neither the shipping papers for the shipments from Fisher Scientific (which Respondent then consolidated and shipped) nor those for Respondent's shipment identified any of the relevant hazardous materials as limited quantity shipments. Finally, in a March 15, 1988 telephone conversation with RSPA, Mr. Brady of Fisher Scientific stated that, since that Company's shipping papers did not state "LTD QTY," the shipments were not of limited quantities. Therefore, the 49 CFR § 176.80 limited quantity exception from the segregation requirements does not apply.

Respondent's fifth and final argument is that § 176.83(d)(1) conflicts with § 172.504 and, therefore, is unenforceable. Respondent describes § 172.504 as a "threshold" requirement and asserts that it permits the consolidation of two or more classes of materials in one container. However, § 172.504 is compatible with, and does not undermine the enforceability of § 176.83(d)(1). The former section merely specifies required placarding when two or more classes of hazardous materials are placed in a transport vehicle or freight vehicle. It does not authorize stowage deemed incompatible under other regulations. Additionally, the placarding exception for less than 1,000 pounds of hazardous materials contained in § 172.504(c) expressly does not apply to transportation by water (which transportation was involved in this case).

Findings

Based on my review of the record, I find the following:

(1) Respondent waived its rights to a hearing by failing to file a timely request for such a hearing.

(2) Respondent is not entitled, in these proceedings, to any rights under the Administrative Procedure Act.

(3) Respondent violated 49 CFR 173.83(d)(1) by consolidating and offering for transportation by vessel incompatible hazardous materials in a "freight container," as defined in 49 CFR 171.8.

(4) Respondent improperly offered for transportation two Poison B hazardous materials which were incompatible with other hazardous materials with which they were stowed.

(5) Respondent did not comply with the requirements for availing itself of the limited quantity exceptions under the Hazardous Materials Regulations and did not offer limited quantities for transportation.

(6) There is not conflict between the placarding requirements of 49 CFR 172.504(b) and the water transportation stowage requirements of 49 CFR 176.83(d)(1).

(7) there is no basis for mitigation of the proposed civil penalty.

Therefore, the Order of November 3, 1988, including the assessment of a $13,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of seven percent (7%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision of appeal constitutes the final administrative action in this proceeding.

Date Issued: February 28, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–52–HMI]

Partial Grant of Relief

In the Matter of: Boncosky Transportation, Inc., Respondent.

Background

On November 15, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA), issued an Order to Boncosky Transportation, Inc. (Respondent) assessing a penalty in the amount of $1,500 for violation of 49 CFR 171.16. By letter dated November 30, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent, a carrier transporting a hazardous material, failed to report on DOT Form 5800.1, within 15 days of its discovery, an unintentional release of Acid, Liquid N.O.S. , which occurred on May 20, 1987, in violation of 49 CFR 171.16.

In its appeal, Respondent argues that it did not "knowingly" violated the regulation. Respondent contends that it hired Ecology & Environment, Inc. (E&E) to provide emergency response, site clean-up, and hazard risk assessment. Respondent states that it verbally authorized E&E to make state and Federal governmental notifications and that it relied upon the following language in its agreement with E&E:

> E&E also has represented that it can provide appropriate documentation and testimony with regard to services which it furnishes, in administrative or court proceedings, as may be requested by the company.

In addition, Respondent quotes a definition from Black's Law Dictionary to the effect that "knowingly" requires actual, not merely constructive, knowledge.

There are many legal definitions of "knowing" and "knowingly." Respondent's reference to Black's Law Dictionary is unpersuasive and irrelevant. As Respondent was advised in the June 22, 1988 Notice of Probable Violation in this case, 49 CFR § 107.299 provides that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Thus, Respondent was legally required to be aware of the reporting requirement. It could not contract away its responsibility to file the report. In any event, its quoted contract language with E&E did not to this. If Respondent did verbally "delegate" this task to E&E, Respondent should have required a copy of the required report from E&E in order to ensure itself that E&E had performed Respondent's legal reporting obligation.

Finally, Respondent argues that it has submitted evidence warranting mitigation and that the civil penalty is excessive. It states that this is its first offense, it acted responsibly and adverted a possible crisis, its contractor provided immediate telephonic notification to the Missouri Department of Natural Resources and the National

Response Center, and Respondent—even if chargeable with constructive knowledge—neither knew nor should have known under these circumstances that the report was not timely field.

All of the cited factors previously were raised by Respondent and already considered in these proceedings. However, even though Respondent was legally responsible to ensure that the required written report was timely filed, its erroneous reliance on E&E is understandable. Therefore, I am mitigating the civil penalty by $250.

Findings

Based on my review of the record, I find the following:

(1) Respondent knowingly committed the violation, as alleged.

(2) Mitigation of the proposed civil penalty by $250 is granted due to the good faith, although erroneous, reliance by Respondent upon its contractor for performance of the report-filing requirement. There is no basis for further mitigation of the penalty.

Therefore, the Order of November 15, 1988, is affirmed as being substantiated on the record and in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,250.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: February 10, 1989,

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–57–CR]

Action on Appeal

In the Matter of: B & C Fire Safety, Inc., Respondent.

Background

On December 13, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to B & C Fire Safety, Inc. (Respondent) assessing a penalty in the amount of $4,500 for having knowingly committed the following acts in violation of 49 CFR 171.2(c), 173.34(e)(3), 173.34(e)(4), and 173.23(c): (1) representing DOT specification cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) when hydrostatic retesting was performed using equipment that was not capable of being read to an accuracy of one percent; (2) representing DOT specification cylinders as meeting the requirements of the HMR while failing to condemn a cylinder the permanent expansion of which exceeded 10 percent of the total expansion; and (3) representing a DOT specification cylinder as meeting the requirements of the HMR while failing to remark a cylinder manufactured in conformance with DOT Exemption E 6498 with the specification "3AL" at the time of retesting. By letter dated January 11, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Notice of Probable Violation (Notice), dated July 26, 1988, had originally proposed a total civil penalty of $7,500 for the three probable violations as follows: $1,500 for the first, $5,000 for the second, and $1,000 for the third.

Based upon corrective action taken by Respondent, the Chief Counsel reduced the penalty proposed in the Notice for the first violation from $1,500 to $1,000. In its appeal, Respondent states that further mitigation is warranted but presents no information or arguments not already considered by the Chief Counsel. After reviewing the record in this case, I have determined that the assessment of $1,000 for Violation No. 1 is appropriate.

In its appeal of the second violation, Respondent argues that the cylinder in question is no longer in service. However, the cylinder was not removed from service until after the inspector informed Respondent that the cylinder was required to be condemned because its permanent expansion exceeded 10 percent of total expansion. Even if there were an error in the test results and the cylinder's permanent expansion were actually less than 10 percent of total expansion, as Respondent claims, Respondent's records at the time of the inspection indicated that the cylinder should have been either condemned or retested in accordance with HMR. Respondent did neither. Moreover, the Chief Counsel already considered Respondent's argument about an error in the test results when he reduced the penalty proposed in the Notice for this violation from $5,000 to $2,500. After reviewing the record in this case, I have determined that the assessment of $2,500 for Violation No. 2 is appropriate.

In its appeal of the third violation, Respondent admits the violation but states that the corrective remarking of the "3AL" on the cylinder was done before the cylinder was placed back in use. Respondent also emphasizes that corrective steps have been taken to ensure that none of its personnel will make this mistake again. After reviewing the record in this case, I have determined that corrective action taken by Respondent warrants a partial mitigation of the civil penalty for Violation No. 3 from $1,000 to $500.

Respondent also argues that because it is a small business, it cannot afford to pay the administrative penalty that has been assessed. However, a January 25, 1989 Dun & Bradstreet report concerning Respondent as of December 31, 1987, states: "Current ratio is good. Cash and accounts receivable are sufficient to retire current debts. Condition regarded as good." Moreover, with its September 27, 1988 letter responding to the Notice, Respondent attached its own financial statement for the six months ended June 30, 1988. The statement shows Respondent's annual gross profit to be over $111,000, and its annual net income to be nearly $18,000. After reviewing the Dun and Bradstreet report and Respondent's own financial statement, I have determined that Respondent has the ability to pay the civil penalty, and payment will not adversely affect its ability to continue in business.

Findings

Therefore, the Order of December 13, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $4,500 civil penalty assessed in the Order is hereby mitigated to $4,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven

percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 24, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–62–PPM]

Denial of Relief

In the Matter of: Bennett Industries, Respondent.

Background

On October 19, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) issued an Order to Bennett Industries (Respondent) assessing a penalty in the amount of $10,000 for violations of 49 CFR 171.2(c), 178.16–13(a)(1), 178.16–16(a), 178.19–7(a)(1), 178.19–7(a)(3), and 178.19–7(d). By letter dated November 9, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent discusses certain procedural matters and urges that the $10,000 civil penalty be significantly reduced.

Respondent states that, during the September 15, 1988 telephonic informal conference, it advised RSPA that it would be submitting a compromise offer and that it was not aware that an order would be issued prior to RSPA's receipt and evaluation of such a compromise offer. Respondent's October 19 compromise offer and the Chief Counsel's October 19 Order crossed in the mail, and that offer was received on October 21.

During the conference, Respondent admitted the violations and was advised that, therefore, an Order would be issued. Respondent's Counsel stated that he would make a compromise offer and was advised to do so within a week or ten days. Having received no compromise offer by early October, RSPA's Counsel called Respondent's Counsel, Guy V. Croteau, and was told that he no longer was with the law firm and that there was no information concerning who was handling his cases. Although Respondent's compromise offer and appeal letters allege that another attorney, Richard Sanders, also participated in the September 15 telephonic conference, Mr. Sanders did not introduce himself during the conference, and RSPA personnel were unaware of his presence during that conference because Mr. Croteau acted as the sole attorney spokesman for Respondent. Under these circumstances, I find that it was appropriate for the Chief Counsel to issue an Order on October 19 without waiting any longer for a compromise offer.

In its appeal, Respondent asserts that the $10,000 civil penalty should be eliminated or significantly reduced because of Respondent's "good faith" decision to cease production of DOT–E 7802 polyethylene containers resulting in an alleged annual loss of approximately $2 million in annual sales and because of other factors described in the compromise offer letter. Those other factors were Respondent's past record of compliance, its standing policy to comply with regulatory requirements, its belief that RSPA's hydrostatic test pressure requirements are more stringent than necessary, and the good record in transportation of Respondent's containers.

Respondent has admitted seven violations involving failures to test properly, failures to test at all, and failures to maintain test records—all with respect to DOT exemption or specification containers. Respondent's compromise offer stated that it was ceasing production of DOT–E 7802 containers "until corrective action, by way of design change, exemption or rule change can be achieved." In summary, Respondent applied for a DOT Exemption, then knowingly failed to comply with the requirements of that Exemption, had its knowing non-compliance discovered by a RSPA inspector, and then made a business decision to cease production of those exemption containers instead of manufacturing in compliance with the Exemption. If Respondent could not or would not comply with the terms of the Exemption, it was its legal responsibility to stop production of those exemption containers, and I do not view that stoppage of production as a mitigating factor.

Respondent's belief that RSPA's hydrostatic test pressure requirements are too stringent likewise is not a mitigating factor. The implication is that Respondent was free to ignore RSPA's requirements rather than comply with them or seek to have them changed. All of the other mitigating factors raised by Respondent were considered and addressed in the Chief Counsel's Order and do not merit additional mitigation.

Findings

Based on my review of the record, I find the following:

(1) The Chief Counsel's Order in this matter was properly issued on October 19, 1988.

(2) Respondent has presented no valid basis for any further mitigation.

Therefore, the Order of October 19, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: January 3, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Enf. Case No. 88–66–EXR]

Denial of Relief

In the Matter of: Birko Corporation, Respondent.

Background

On September 6, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Birko Corporation (Respondent) assessing a penalty in the amount of $2,500 for violations of 49 CFR 171.2(b)

and 177.834(1)(2)(i). By letter dated September 23, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent admits that it transported flammable liquids in motor vehicles equipped with combustion heaters not meeting regulatory requirements for about 1½ years after expiration of an exemption allowing such transportation. It contends, however, that the $2,500 civil penalty assessed against it should be reduced significantly because, it says, the violation was *de minimis,* Respondent has caused no injuries to health or the environment during its 30-year existence, Respondent had no prior offenses during that time, and Respondent is a small business upon which this $2,500 civil penalty would impose a hardship.

Notwithstanding Respondent's contentions, I find that no mitigation is warranted because, when measured against the $10,000 maximum penalty provided by the Hazardous Materials Transportation Act, the $2,500 civil penalty already reflects the nature of the violations and Respondent's compliance history. Furthermore, Respondent submitted no evidence to support its contention that the $2,500 would impose a hardship on it. In fact, Dun & Bradstreet reports indicate that Respondent has $6,000,000 in annual sales, a 1.9:1 ratio of current assets to current liabilities, and assets constituting 70.6 percent of sales (indicating assets of over $4,200,000).

Findings

Based on my review of the record, I find the following:

(1) Respondent has admitted the allegation described in the Chief Counsel's September 6, 1988 Order.

(2) Respondent's past record of compliance already is reflected in the $2,500 civil penalty in the Chief Counsel's Order.

(3) There is no evidence indicating that Respondent is unable to pay a $2,500 civil penalty or that such a penalty would adversely affect Respondent's ability to continue in business.

(4) There is no basis for mitigation of the $2,500 civil penalty.

Therefore, the Order of September 6, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: January 3, 1989.

M. Cynthia Douglass,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–67–IMP]

Denial of Relief

In the Matter of: GLNIC Corporation of America, Respondent.

Background

By Order dated November 17, 1988, the Chief Counsel of the Research and Special Programs Administration (RSPA) assessed a $9,000 civil penalty against GLNIC Corporation of America (Respondent) for violations of 49 CFR 171.12(a) of the Hazardous Materials Regulations (HMR) (49 CFR parts 171–179). The Chief Counsel's Order is incorporated herein by reference. Respondent, through counsel, filed an appeal by letter dated December 23, 1988.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly imported a hazardous material into the United States and failed to provide either the shipper or the forwarding agent at the place of entry into the United States with timely and complete information as to the requirements of the HMR that would apply to the shipment in the United States. In its appeal, Respondent does not contest the occurrence of the violation, only the amount of the civil penalty. The $10,000 civil penalty proposed in the Notice of Probable Violation (Notice) was mitigated to $9,000 by the Chief Counsel's Order.

Respondent argues that the assessment proposed in the Notice should have been in the $6,000 to $8,500 range because of Respondent's lack of experience in importing hazardous materials, its lack of knowledge of the HMR, its attempt to comply with regulations that were made known to it, and the fact that it has no history of HMR violations.

However, Respondent did not make these arguments until after the Notice was issued. When Respondent earlier was apprised that it was under investigation by OHMT to determine its compliance with 49 CFR 171.12(a), its March 9, 1988 response contained none of the arguments that it now claims should have been considered in issuing the Notice. Moreover, the Chief Counsel did consider these arguments when, on November 17, 1988, he concluded in his Order that partial mitigation of the civil penalty was warranted: "In view of the fact that Respondent has no prior history of violations and that it made some effort, albeit limited, to ascertain its responsibilities, I believe mitigation of $1,000 is warranted in this case." (Order, at 3.)

In its appeal, Respondent also states that it reviewed Office of Hazardous Materials Transportation (OHMT) files for other cases concerning violations of 49 CFR 171.12(a). It submitted copies of four cases, which it believes to be a representative sample of RSPA's administration of the HMR. It admits, however, that the violations in those cases were "not identical" to that in this case. It further admits that "[Respondent's] case differs from the four cases [it had] cited in that the merchandise involved was a Class A explosive. . . ." Since none of the other cases involved the shipment of an unclassified, forbidden, class A explosive, a comparison with those cases to determine a civil penalty would be inappropriate.

Nevertheless, Respondent argues that its case closely parallels one of the four "representative sample" cases that it had reviewed in OHMT files, and that, therefore, the mitigation should be similar. The case to which Respondent refers, Fire Art Corporation (83–08–SE), was a 1983–84 case concerning the violation of 49 CFR 171.12(a) with respect to the shipment of Class B and Class C explosives. Respondent cites RSPA's mitigation of a $5,000 proposed civil penalty to $2,500 in that case and contends that, since the mitigating factors in the two cases are similar, its own civil penalty should be reduced by 50 percent.

While there are some similarities between the two cases, the mitigating factors are not the same. One of the

mitigating factors in Fire Art was that the shipment of fireworks upon which the violation was based was the first shipment Fire Art had ordered directly from a Chinese manufacturer. Respondent contends that it too is a first-time importer of hazardous materials but, unlike Fire Art, had not previously purchased hazardous materials from domestic sources and so had no knowledge of the HMR, "despite its best efforts to learn of, and comply with, any applicable Federal regulations." However, the proposed civil penalty of $10,000 in this case already has been mitigated by $1,000 because Respondent made some effort to ascertain its responsibilities and because it had no prior history of violations (the latter being a necessary result of its not having previously purchased hazardous materials).

Another mitigating factor contained in Fire Art was that it had suffered severe financial loss as a result of its shipment's seizure by U.S. Customs officials. Respondent admits that it did not suffer a severe financial loss, but argues that there were "closely parallel" circumstances because it did not profit from the shipment in this case. Fire Art suffered a severe financial loss because it could not meet contracted holiday commitments since the seized shipment of fireworks was not returned to it until long after the Fourth of July. To attempt to draw a close parallel between Fire Art's circumstances and those of Respondent—where Respondent not only did not suffer a severe loss, but was paid for the merchandise before the shipment was detained—strains credibility.

Respondent next argues that, like Fire Art, it incurred legal fees as a result of the violation. Respondent ignores the fact that while both it and Fire Art hired lawyers, they did so for very different reasons. Fire Art hired legal counsel to seek release of the seized fireworks from Customs; the hiring was part of an unsuccessful effort to avert its severe financial loss, Respondent, on the other hand, hired legal counsel solely to request mitigation of the civil penalty. Respondent's hiring of counsel in an effort to mitigate the civil penalty cannot be considered as a reason for mitigation.

Furthermore, Fire Art had taken affirmative action to get all unapproved fireworks examined by the Bureau of Explosives and approved by the Department. Yet, Respondent admits that it did not take action to have the explosive in this shipment examined.

In a final effort to compare its case with that of Fire Art, Respondent notes that in mitigating Fire Art's civil penalty, RSPA had considered that Fire Art had provided labels, placards, and information on applicable hazardous materials regulations to the Chinese shipper for future imports. Although Respondent has not done this, it attempts to "parallel" the cases by stating that it has chosen not to import other hazardous materials; it argues that it has thereby demonstrated its desire to comply with the regulations. Curiously, Respondent states that it will not import hazardous materials "until it has found a way to comply with [the applicable regulations]." Fire Art, of course, demonstrated that it had found a way to comply. Unlike Respondent, it developed procedures and implemented them.

Of all the cumulative factors that were considered in mitigating Fire Art's civil penalty, the only comparable one in Respondent's case is the factor relating to the first importation of hazardous materials. That factor has already been considered by the Chief Counsel in mitigating the proposed civil penalty. Moreover, even if the factors in both cases were closely parallel, which they are not, the resolution of an enforcement case in 1984 would not constitute a binding precedent for resolving a similar case in 1989.

Respondent also tries to blame RSPA's "regulatory arrangement" for "many needless violations * * * in the case of inexperienced importers [who] cannot reasonably be expected to be *expert in transportation requirements* unless advised of them by their carriers, shipping agents, freight forwarders, customhouse brokers, or the Government." (Emphasis supplied.) Although Respondent acknowledges that there were "transportation requirements" to be discovered, it never sought information from the one source that could supply the expertise: the U.S. Department of Transportation!

As the Chief Counsel stated in his November 17 Order, "Respondent is responsible for compliance with the Hazardous Materials Regulations and should have known when it undertook to import explosives that a careful inquiry should be made to determine all Federal laws and regulations applicable to Respondent's business." (Order, at 2.) This does not imply, as Respondent claims, that inexperienced importers "should be engaging the services of attorneys *specializing in transportation* or customs law to advise them on such matters." (Emphasis supplied.) A careful inquiry by Respondent, knowing that it needed advice on transportation matters, would certainly have led it to the Department of Transportation.

Respondent argues that if the Customs Service and other Federal Agencies referenced RSPA's requirements in brochures and letters, or in connection with other regulations that Customs enforces, this HMR violation could have been avoided. Respondent cites regulations of the U.S. Customs Service and has submitted pamphlets issued by that Agency purportedly to demonstrate that since other agency regulations are referenced therein and RSPA's are not, the Government has not met its responsibility to inform the importing community of all requirements. Yet, of the six pamphlets Respondent submitted, five have nothing to do with importing requirements for businesses. Instead, they discuss personal importations, such as pets, cars, food, and gifts. The sixth, while including import requirements for businesses, lists other agencies only if Customs enforces their requirements. This same information is found in the regulations of the Customs Service, 19 CFR Part 161. Since Customs does not enforce RSPA's regulations, it is not reasonable for Respondent to have expected to discover in a pamphlet issued by the Customs Service or in Customs' regulations any reference to the transportation of hazardous materials. Moreover, even if such a reference were contained in the Customs pamphlet, Respondent would not have known about the reference since it did not contact Customs before the importation involved in this case. In its August 1, 1988 letter to the Office of Chief Counsel responding to the Notice, Respondent contended that since it had relied on the advice of its agents, it did not need to "independently contact a plethora of Federal and State agencies (including, *inter alia, * * * U.S. Customs Service). . . .*" *Finally, it was not the responsibility of BATF, which issued a permit to import ammunition, to inform Respondent of the existence of the HMR. The responsibility to inquire was Respondent's.*

Concerning its ability to pay the civil penalty, Respondent maintains that "[o]ther than [its] primary records, the [unaudited statement dated December 31, 1987] is currently the best evidence of [its] financial position. * * *" Yet, Respondent has not submitted its primary records, which it admits are the best evidence of its financial position. Counsel merely stated that he would be happy to *attempt* to obtain them for RSPA *if* RSPA requests. Again, Respondent attempts to put the onus on the Government. Respondent had the responsibility to either submit its primary records or an audited financial

statement. It chose to do neither. Thus, RSPA is unable to determine Respondent's true ability to pay the penalty or the effect of the penalty on its ability to continue in business. Finally, Respondent requests that, if RSPA does not further mitigate the penalty, arrangements be made to sign a note for its payment since a large majority of Respondent's assets are not liquid.

Findings

Based on my review of the record, I find the following:

(1) Respondent did not provide any information to warrant mitigation of the $9,000 civil penalty assessed for having knowingly violated 49 CFR 171.12(a) of the HMR.

Therefore, the civil penalty assessed by the Chief Counsel's Order of November 17, 1988, is not modified. However, I am persuaded that Respondent's request to make arrangements for payment was made in good faith. Therefore, I authorize payment of the penalty in nine monthly installments of $1,000 each. The first installment shall be due on April 17, 1989, and each succeeding payment shall be due on the seventeenth day of each month thereafter until a total of $9,000 has been paid. Respondent must pay each installment of the civil penalty by sending a certified check or money order payable to "Department of Transportation" to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. If Respondent defaults on any payment of the authorized payment schedule, the entire remaining amount of the civil penalty shall, without further notice, immediately become due and payable. Respondent's failure to pay any amount due will result in the initiation of collection activities by the Chief of the General Accounting Operations Branch, the assessment of administrative charges, and the accrual of interest at the current annual rate of seven percent (7%) in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 90 days of default.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: April 14, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–68–FSE]

Denial of Relief

In the Matter of: China North Industries Corporation, Respondent.

Background

On October 4, 1988, the Chief Counsel assessed a $14,000 civil penalty against China North Industries Corporation (Respondent) for violations of 49 CFR 171.2(a), 171.12(b), 172.400(a), 173.51(b), 173.64(d) and 173.86(b) of the Hazardous Materials Regulations (HMR). Respondent submitted an appeal by letter dated October 22, 1988. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent had knowingly: (1) Offered for transportation in commerce a new explosive which had not been examined, classed, and approved by the Research and Special Programs Administration (RSPA); (2) offered for transportation in commerce propellant explosives, Class A explosives, in packages not labeled in accordance with the HMR; and (3) offered for transportation in commerce propellant explosives, Class A explosives, in packages not properly marked as required by the regulations.

In its appeal, Respondent raises two issues. First, it continues to assert that its violation of the HMR was unintentional because it was unaware of the regulations at the time of shipment (November 1987). Second, it asserts that the party (GLNIC International Corporation of America) to whom Respondent shipped hazardous materials is responsible for the violations because that party (GLNIC) had obtained U.S. Government approval for the shipment.

The first issue, Respondent's alleged ignorance of the HMR, is both irrelevant and unsupported by the evidence. It is irrelevant because, as explained in the August 3, 1988 Notice of Probable Violation issued to Respondent, 49 CFR 107.299 specifically states that there is no requirement that the alleged violator actually knew of, or intended to violate, the legal requirements of the HMR.

In any event, the evidence does not support Respondent's contention that it had no prior knowledge concerning the HMR. The Chief Counsel's October 4, 1988 Order indicated that Respondent's statement that the violations were unintentional because it was unaware of the HMR is contradicted by a May 6, 1985 letter to Respondent from the Materials Transportation Bureau (MTB) (predecessor agency to RSPA) approving a new explosive for shipment based on documentation submitted by Respondent. That Order also stated that Respondent not only was aware of the HMR, but had on a previous occasion undertaken to obtain approval for shipment of a new explosive, pursuant to the same requirement that Respondent violated in this case. In its appeal, Respondent denies that it ever applied directly to MTB or RSPA for an approval and suggests that RSPA recheck its files. RSPA's files have been rechecked, and the following documents were found:

(1) April 23, 1985, letter from China North Industries Corporation (NORINCO) to the Office of Hazardous Materials (OHMT), U.S. Department of Transportation, requesting an official classification and Ex-number for certain NORINCO TNT.

(2) April 9, 1985 letter and laboratory report (both enclosed with (1) above) from the Bureau of Explosives of the Association of American Railroads to China North Industries Corp. (NORINCO) referring to a March 15, 1985 NORINCO request for examination and classification of certain TNT, recommending that the TNT be described as a High Explosive and classified as a Class A Explosive, Type 3, specifying applicable HMR packaging, marking and labelling requirements, and stating: "Section 173.86 requires that, except for shipments of sample quantities, the shipper has to submit the test report to the Department of Transportation to apply for approval before any new explosive device is offered for shipment."

(3) May 6, 1985 OHMT letter to China North Industries Corporation approving new explosive products (TNT) for shipment (EX–8505024).

(4) May 20, 1985 OHMT letter to China North Industries Corporation approving new explosive products (TNT) for shipment (EX–8505106).

These letters are attached to, and incorporated in, this Denial of Relief. They clearly demonstrate Respondent's knowledge of the HMR (which knowledge, as indicated above, is not a required element of the violation).

The second issue raised by Respondent is that GLNIC, not Respondent, is responsible for the violations. OHMT has taken enforcement action against GLNIC for its failure to comply with the HMR in this matter. However, any violations by GLNIC do not absolve Respondent of its responsiblility to comply with the HMR when shipping hazardous materials to the United States.

Findings

Based on my review of the record, I find the following:

(1) Respondent had knowledge of the HMR.

(2) Respondent's knowledge of the HMR is not an element of the violations.

(3) Any violations by GLNIC did not relieve Respondent its responsibility to comply with the HMR.

(4) Consequently, the issues raised on appeal by the Respondent are without merit.

Therefore, the Chief Counsel's Order of October 4, 1988, finding that Respondent knowingly violated 49 CFR 171.2(a), 171.12(b), 172.400(a), 173.51(b), 173.64(d) and 173.86(b), and assessing a $14,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty affirmed herein must be paid within 20 days of your receipt of this decision. Your failure to pay the civil penalty will result in (1) referral of this matter to the Attorney General for collection of the civil penalty in the appropriate United States District Court, and (2) accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717. Pursuant to this same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M.86.2), Accounting Operations Division, Office of the Secretary, room 2228, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: January 3, 1989.

M. Cynthia Douglass.

Registered mail—Return receipt requested

[Ref. No. 88-71-HMI]

Action on Appeal

In the Matter of: Donald Holland Trucking, Inc., Respondent.

Background

On March 2, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Donald Holland Trucking, Inc. (Respondent) assessing a penalty in the amount of $1,500 for having knowingly failed to file a written hazardous materials incident report, DOT Form 5800.1, within 15 days after discovering an incident involving its unintentional release of a hazardous material during transportation in commerce, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the June 30, 1988 Notice of Probable Violation. By letter dated March 29, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent appeals the Chief Counsel's Order on several grounds, each of which is discussed herein.

First, Respondent contends that the $1,500 civil penalty is excessive because Respondent cooperated with state and Federal officials in cleanup of the hazardous materials spill and was commended by EPA authorities for its promptness in doing so and because: "Any report to the DOT would have been strictly statistic and is not consistent with the spirit of any statute passed for the protection of the public." Respondent overlooks the fact that it was required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to clean up its spill and would have been subject to a separate Federal enforcement action had it failed to so so. In addition, Respondent fails to recognize the purpose of RSPA's requirement for a written hazardous materials incident report: the ongoing compilation of a comprehensive data base concerning such incidents so that corrective actions (e.g., regulatory changes) can be taken to reduce their future occurrence and thereby enhance the safety of hazardous materials transportation. Therefore, Respondent's arguments are without merit.

Second, Respondent contends that the $1,500 penalty is excessive and a financial hardship for a small trucking company. It submitted no financial information. However, a Dun & Bradstreet report on Respondent indicates that on December 31, 1987, it had cash assets of $68,254, working capital of $48,572, and retained earnings of $259,395, and that during 1987 it had sales of $2,737,680 and a net income of $81,222. Therefore, Respondent's financial hardship argument is without merit.

Third, Respondent contents that there was no violation because there has been inadequate dissemination of the HMR. As a transporter of hazardous materials, Respondent should regularly obtain copies of the relevant volumes of the Code of Federal Regulations to ensure its compliance with those regulations. Publication of RSPA's regulations in the **Federal Register** and the Code of Federal Regulations constitutes legal notice to the world of their existence and, therefore, compliance with them is mandatory. As provided in 49 CFR 107.299, actual knowledge of the legal requirements is not a prerequisite to a finding of violation of the Hazardous Materials Regulations for purposes of imposition of a civil penalty.

Findings

(1) Respondent's arguments on appeal have no merit.

(2) In light of the nature and circumstances of the violation, the extent and gravity of the violation, the degree of Respondent's culpability, the absence of any prior offenses by Respondent, and such other matters as justice may require, I find the civil penalty of $1,500 to be appropriate.

(3) I also find that Respondent has the ability to pay such a civil penalty and that such a penalty will have no adverse effect on Repondent's ability to continue in business.

Therefore, the Order of March 2, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or many order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC-1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: May 31, 1989.

Travis P. Duncan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–72–FF]

Action on Appeal

In the Matter of: Martin Brokerage Co., Respondent.

Background

On March 2, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Martin Brokerage Co. (Respondent) assessing a penalty in the amount of $7,500 for having knowingly offered hydrofluoric acid for transportation in commerce in unauthorized packages and offered hydrofluoric acid for transportation in commerce without listing the proper shipping name or identification number on the shipping paper, in violation of 49 CFR 171.2(a), 172.202(a)(1), 172.202(a)(3), and 173.264(a)(18). The Order assessed the $7,500 civil penalty originally proposed in the November 17, 1988 Notice of Probable Violation. By letter dated March 17, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's first contention is that it had no way of knowing what was in the sealed containers because it relies on instructions from the Mexican shipper. Respondent stated that it prepares U.S. Customs documentation and bills of lading days in advance of importation based on information received from the Mexican shipper by telephone. Respondent stated that the Mexican shipper had previously made three shipments of ammonium bifluoride and there was no reason for Respondent to question the telephonic instructions in this particular instance. Respondent stated that it had no way of knowing what was in the containers because they are sealed before they enter the United States.

Respondent's argument is without merit. On April 17, 1989, Inspector William Wilkening of the Office of Hazardous Materials Transportation interviewed Respondent's Customs Broker and Traffic Manager, Mr. George Garcia. Mr. Garcia stated that in this case, as in all cases involving the Mexican shipper, one of Respondent's employees met the shipment at the border in El Paso to satisfy U.S. Customs regulations requiring a U.S. company to assume control of the goods while they are in bond and transit through the U.S. The Mexican truck driver normally has three copies of the shipping paper prepared by the Mexican shipper. One copy is provided to U.S. Customs, one copy is given to Respondent, and one copy continues with the truck to the rail yard. That procedure was followed on December 8, 1987, for the shipment in question. Respondent's employee, after completing U.S. Customs paperwork and securing a copy of the shipping paper, returned to the office. The shipping paper provided to Respondent by the Mexican shipper, identifies the shipment as hydrofluoric acid of 70 percent strength, contained in DOT 34–8 specification drums. Therefore, as of December 8, 1987, Respondent had actual knowledge that the shipment in question was hydrofluoric acid, not ammonium bifluoride, and that the hydrofluoric acid of 70 percent strength was packaged in DOT 34–8 drums, which are not authorized for that material. Nevertheless, Respondent offered this material to the Atchison, Topeka and Santa Fe Railway Company for transportation to Galveston and subsequent shipment to Holland via the Lykes Bros. Steamship Co., accompanied by shipping papers which incorrectly identified the material as ammonium bifluoride.

Respondent's second contention is that it did not knowingly violate the regulations and had no intent to violate any legal requirements. Respondent was advised in the Notice of Probable Violation that, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person knew of, or intended to violate, the legal requirements. Respondent's conduct met the definition of "knowingly", and thus its contention is without merit.

Findings

I have determined that there is insufficient evidence to justify mitigation of the civil penalty assessment. I find that a civil penalty of $7,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, the absence of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant circumstances. Therefore, the Order of March 2, 1989, assessing a $7,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 26, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 88–78–MSC]

Action on Appeal

In the Matter of: Falcon Safety Products, Inc., Respondent.

Background

On May 5, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Falcon Safety Products, Inc. (Respondent) assessing a civil penalty in the amount of $5,000 for having knowingly committed acts which violated 49 CFR 171.2(a), 171.2(c), 172.202(a)(2), 172.202(b), 173.25(a)(4), 173.304(e)(1), 178.65–4(c)(5), 178.65–14(b)(8) and 178.65–15(b) of the Hazardous Materials Regulations (HMR), as alleged in the Notice.

The Order assessed a $5,000 civil penalty, which reflected mitigation in the amount of $1,000 of the originally proposed $6,000 penalty set out in the December 15, 1988 Notice of Probable Violation. By letter dated June 1, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its June 1, 1989 Appeal, Respondent stated that it accepted the decisions in the Order as to Violations 1, 2 and 4 and was requesting reconsideration only as to Violations 3 and 5.

Violation 3 involved a finding that Respondent knowingly offered for transportation in commerce dichlorodifluoromethane, a nonflammable gas, accompanied by shipping papers with an incorrect hazard class and an identification number that was out of sequence, in violation of 49 CFR 171.2(c), 172.202(a)(2) and 172.202(b). Because Respondent had made an effort to come into compliance with the HMR, the Order mitigated the proposed $1,000 penalty and assessed a $750 penalty.

Respondent's appeal of Violation 3 is based upon its assertion that it acted in a timely manner to correct the errors in its bill of lading, and that the mistakes which it made were ". . . not of any magnitude . . . since our errors were in interpretation of the rules and every attempt was made to meet the standard."

The $750 penalty assessed for Violation 3 approximately reflects the magnitude of the violation. Respondent's unsuccessful efforts to comply with the HMR do not excuse its violation. As indicated in the Notice, 49 CFR 107.299 specifies that an intent to violate the HMR is not a prerequisite to a finding of violation. Further, although Respondent has updated its bill of lading, the revised document still contains an erroneous hazard class; it references "nonflammable *compressed* gas" (emphasis added) in lieu of the correct classification of "nonflammable gas."

In its appeal of Violation 5, Respondent appears to admit that it was not in compliance, but appeals *its* interpretation of the Chief's Counsel's order. It construes the Order as saying that Respondent took almost one year *following issuance of the NOPV* to achieve compliance with the regulation. In fact, the Order states that Respondent came into compliance ". . . almost one year *following the inspection* by the Office of Hazardous Materials Transportation." (Emphasis added.) Respondent did come into compliance four months after receipt of the NOPV; however, it is required to be in compliance at all times, not merely within a certain time period following receipt of an NOPV. Here, in fact, it was more than 11 months from the time of the inspection to the time of Respondent's achieving compliance. In any event, there was no penalty imposed for Violation 5, and thus the issue of penalty mitigation is moot.

Findings

With respect to the appeal of Violation 3, I have determined that there is no evidence presented in this appeal to warrant further mitigation of the penalty assessed for that violation. Because Respondent has presented no evidence denying Violation 5 and no penalty was assessed therefore, the Chief Counsel's Order as to that violation is affirmed.

Therefore, the order of May 5, 1989, which includes assessment of a civil penalty in the amount of $5,000, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing reference number of this case) payable to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: November 6, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–80–EXR]

Denial of Relief

In the Matter of: Copps Industries, Inc., Respondent.

Background

On October 31, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), issued an Order to Copps Industries, Inc. (Respondent) assessing a penalty in the amount of $2,000 for violations of 49 CFR 171.2(a), 173.245 and 173.249. By letter dated November 23, 1988, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order found that Respondent had knowingly: (1) offered for transportation in commerce alkaline corrosive liquid, n.o.s., in a DOT specification 37C80 steel drum not authorized by 49 CFR § 173.245 or 173.249, after expiration of an exemption from compliance therewith; and (2) offered for transportation in commerce alkaline corrosive liquid, n.o.s., in other packages not meeting the requirements of 49 CFR § 173.245 or 173.249, after expiration of an exemption from compliance therewith. That Order mitigated the $3,000 civil penalty originally proposed in the August 1, 1988 Notice of Probable Violation.

Respondent makes several arguments, each of which I will summarize and discuss.

First, Respondent asserts that it has not admitted the alleged violations. However, in a May 3, 1988 letter, Respondent's Vice President of Operations, Richard W. Burgess, stated: "From the time the exemption expired on January 31, 1988 until it was discovered in our office that renewal was not processed and shipments under the exemption (DOT–E 8747) stopped, 407 items were shipped in 14 different shipments." In a separate May 3, 1988 letter concerning the other exemption (DOT–E 8885), Mr. Burgess wrote: "From the time the exemption expired on February 29, 1988 until it was discovered in our office that a renewal was not processed and shipments under this exemption stopped, 100 items were shipped in one shipment." These admissions directly refute Respondent's assertion.

Second, Respondent disputes a statement in the Chief Counsel's Order that "Projected after-tax profits for 1988 would be $33,000." It states that its after-tax profits through October 31, 1988, are only $12,500. This assertion, unaccompanied by any supporting financial data or reports, presents an interesting contrast with the detailed financial statements submitted by Respondent on September 15, 1988, showing 1988 after-tax profits of $22,040.01 through August 31, 1988. In any event, neither profit amount justifies reduction of the $1,000 assessments for each of the two violations on the basis of Respondent's ability to pay or effect on Respondent's ability to remain in business.

Third, Respondent disagrees with a statement in the Chief Counsel's Order that it characterizes as stating "that whether the exemption packagings are safer than the required packagings is not relevant." The complete statements in the Order were:

> Respondent's contention that the exemption packagings are safer is not relevant to the issue of Respondent's continued operation under the terms of an expired exemption. Respondent offered hazardous materials for transportation in violation of the Hazardous Materials Regulations.

Respondent has not demonstrated that its use of unauthorized packagings for 15 shipments of 507 hazardous materials items were safer than authorized by the applicable regulations. In any event, Respondent misses the point that, in the absence of an effective exemption, those shipments were unauthorized and that the regulations, not shippers, determine packaging requirements.

Fourth, Respondent contends that the relevant exemptions never expired because they subsequently were renewed without any lapse. This argument is flawed. Respondent applied for, and received, emergency extensions of both exemptions on June 6, 1988. In addition, the letter forwarding those two extensions to Respondent contained the following language:

> Possible extension of the expiration dates of *DOT-E 3885 and E 8747* beyond the *August 1, 1988* date referenced herein will be considered separately upon the completion of proceedings by the Office of the Chief Counsel, Research and Special Programs Administration. Those proceedings will focus upon the operations identified in your *May 3, 1988* letters, which occurred after the respective *February 29, 1988 and January 31, 1988,* expiration dates. The reason for deferring final action on your request for renewal is that those proceedings are relevant to your company's compliance disposition, which is a key factor in making a final decision.

The language precludes any argument by Respondent that RSPA somehow was waiving Respondent's admitted violations through RSPA's granting of Respondent's requests for emergency extensions of its expired exemptions. Those extensions were effective when issued and had no retroactive legal effect. Therefore, when Respondent made its 15 shipments of 507 hazardous materials items, there were no exemptions in place authorizing such shipments.

Fifth, Respondent contends that it did not "knowingly" violate the regulations because it made no shipments after its discovery that the necessary exemptions had expired. However, as stated in the August 1, 1988 Notice issued to Respondent, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. Respondent should have been aware that its exemptions had expired and that it, therefore, had no legal authority thereafter to make the hazardous materials shipments it did.

Sixth, Respondent contends that RSPA did not comply with its written request for a conference. In its August 15, 1988 letter, Respondent conditionally requested an informal conference. Subsequently, on August 29, 1988, Respondent's Mr. Burgess had an extended telephone conversation concerning this case with RSPA Senior Attorney Mary M. Crouter and agreed at the end of that conversation that no conference was necessary because all relevant information had been or would be provided by Respondent. Subsequent letters of September 15 and 16, 1988, between those two persons impliedly confirm Mr. Burgess' August 29 verbal withdrawal of the request for a conference.

Seventh, Respondent alleges that some of the 49 CFR § 107.331 penalty assessment criteria either were not considered or were misapplied. Respondent's arguments concerning application of those criteria are either redundant with earlier arguments or incorrect.

Findings

Based on my review of the record, I find the following:

(1) Respondent has admitted the two violations involving a total of 15 shipments of 507 hazardous materials items without authority after the expiration of two separate exemptions.

(2) Assessments of $1,000 for each of two violations adequately take into account Respondent's ability to pay and the effect thereof on Respondent's ability to remain in business.

(3) Respondent's repeated use of unauthorized packages for hazardous materials violated the Hazardous Materials Regulations regardless of Respondent's contention that its packagings were safer than the legally required packagings.

(4) The two exemptions at issue both expired before Respondent's unauthorized shipments, and the later emergency extensions of those exemptions had no retroactive effect.

(5) Respondent knowingly violated the regulations, as alleged in the Notice and as determined in the Chief Counsel's Order.

(6) Respondent withdrew its request for an informal conference.

(7) All of the required statutory and regulatory penalty assessment criteria have been properly applied, and there is no basis for further mitigation of the civil penalties for Respondent's two violations.

Therefore, the Order of October 31, 1988, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717. Pursuant to that same authority, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment should be made by certified check or money order payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 2228, Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590.

This decision on appeal constitutes the final administrative action in this proceeding.

Issued: February 16, 1989.

M. Cynthia Douglass.

Certified mail—Return receipt requested

[Ref. No. 88–86–CR]

Addendum To Denial of Relief

In the Matter of: Nardo Fire Equipment Company, Respondent.

On February 16, 1989, the Administrator of the Research and Special Programs Administration (RSPA) issued a Denial of Relief (incorporated herein by reference) to Nardo Fire Equipment Company (Respondent) affirming the September 8, 1988 Order of the Chief Counsel assessing a $3,000 civil penalty for knowing violation of 49 CFR 171.2(c), 173.34(e)(1)(i), and 173.34(e)(5). The Denial of Relief provided that the penalty must be paid within 20 days of receipt by Respondent.

By letter dated August 3, 1989, Respondent offered to pay $2,000 in four monthly installments in compromise of the penalty assessment because of its

WTG also requests that the Commission waive the applicable regulations in order to authorize under the proposed blanket certificate certain existing facilities. It is asserted that these facilities constitute an interconnection between WTG's 22-inch pipeline and the facilities of Westar Pipeline Company (Westar) for the purpose of purchasing system supply gas from Westar. It is stated that these facilities were installed between April and July, 1991, in order to take advantage of WTG's 1991 peak operating season.

Comment date: January 31, 1992, in accordance with Standard Paragraph F at the end of this notice.

11. Florida Gas Transmission Co.

[Docket No. CP92-275-000]

January 10, 1992.

Take notice that on December 31, 1991, Florida Gas Transmission Company (FGT), 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188, filed in Docket No. CP92-275-000 a request pursuant to §§ 157.205 and 157.216 of the Commission's Regulations under the National Gas Act (18 CFR 157.205, 157.216) for authorization to abandon and transfer by sale to Florida Public Utilities Company (FPU) minor pipeline facilities located in Palm Beach County, Florida, under FGT's blanket certificate issued in Docket No. CP82-553-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

FGT proposes to abandon and transfer by sale to FPU approximately 1.7 miles of the 6.2 mile Lake Worth 4-inch lateral located in Palm Beach County, Florida. FGT states that FPU would use this segment of pipeline as part of its existing distribution system. FGT also states that it would not terminate any services nor take any other facilities out of service as a result of this proposal. Additionally, FGT states that the existing Lake Worth 8-inch looping facilities has sufficient capacity to meet FGT's contractual obligations to FPU. Further, FGT states that FPU's certificated entitlements would not be affected by this request.

Comment date: February 24, 1992, in accordance with Standard Paragraph G at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1390 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02504T Texas-15 Addition 4]

State of Texas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 13, 1992.

Take notice that on December 23, 1991, as supplemented on Janauary 9, 1992, the Railroad Commission of Texas (Texas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that portions of the Lower Vicksburg Formation underlying portions of Hidalgo and Starr Counties qualify as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The designated area includes approximately 20,000 acres in Hidalgo and Starr Counties, Texas and consists of the acreage listed in the attached appendix.

The notice of determination also contains Texas' findings that the referenced portion of the Lower Vicksburg Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

Appendix

Lower Vicksburg Formation in Hidalgo and Starr Counties, Texas Railroad Commission District 4.

1. "Los Guajes" Segundo Flores Survey #27, A-83 and A-697
2. Hidalgo County School Land Survey #553, A-227, league 1, sections 3 and 4, league 2, w/2 section 1 and sections 2-8 and league 3, sections 5 and 6
3. J.M. Vela Survey #200, A-640
4. Tex. Mex. R.R. Survey #201, A-123
5. E.B. Pue Survey #202, A-152
6. E.B. Pue Survey #204, A-636
7. Tex. Mex. R.R. Survey #205, A-125
8. E.B. Pue Survey #208, A-638
9. Tex. Mex. R.R. Survey #209, A-127
10. Tex. Mex. R.R. Survey #198, A-122
11. "Santa Anita" Manuel Gomez Survey, A-63, Valley Farms Subdivision, w/2 lots 90 and 91

[FR Doc. 92-1339 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02507T Texas-9 Addition 10]

State of Texas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 13, 1992.

Take notice that on December 23, 1991, as supplemented on January 9, 1992, the Railroad Commission of Texas (Texas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that the Travis Peak Formation underlying portions of Robertson County qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The designated area includes approximately 17,000 acres in Robertson County, Texas and consists of the acreage listed in the attached appendix.

The notice of determination also contains Texas' findings that the referenced portion of the Travis Peak Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

Appendix

Travis Peak Formation in Robertson County, Texas.

1. James Farris, A-147
2. Owen Maynard, A-260
3. James Patterson, A-300
4. Wm. J. Kyle, A-206
5. Jackson Hensley, A-174
6. O'Connor Denson, A-126
7. Wm. Owens, A-279
8. Ezra Corry, A-102
9. Joel Bogguss, A-64
10. Wm. B. Ball, A-76
11. John Copeland, A-92
12. John McNeese, A-231
13. N. McCuistion, A-264
14. Maria DeLa Concepcion Marques, A-25
15. Robert M. Williamson, A-362
16. Clinton A. Rice, A-316
17. G.W. McGrew, A-232

[FR Doc. 92-1340 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02503T Texas-10 Addition 12]

State of Texas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 14, 1992.

Take notice that on December 23, 1991, as supplemented on January 13, 1992, the Railroad Commission of Texas (Texas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that the Edwards Limestone Formation in portions of Webb County, Texas, qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The designated area includes approximately 72,290 acres in Webb County, Texas and consists of the acreage listed in the attached appendix.

The notice of determination also contains Texas' findings that the referenced portion of the Edwards Limestone Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

Appendix

Edwards Limestone Formation in Webb County, Texas Railroad Commission District 4.

Survey	Section No.	Approximate acreage
Full Section Within Application Area:		
L.M. McClendon A-851	1839	1156
Hugh P. Sutton A-582	1837	1280
C. Vergara A-2677	31	317.3
C. Vergara A-2949	12	544
W.H. Thaxton A-2675	11	640
L.T. & B. A-2336	10	640
L.T. & B. A-2335	9	640
Z. Villareal A-2805	44	640
Z. Villareal A-2804	43	640
P. Cisneros A-2708	41	640
C. Ortiz A-3145	111	1280
F. Ortiz A-3148	112	1047.5
M. Grandapo A-3146	107	1275.5
M. Grandapo A-3147	109	640
E. Ramos A-3149	106	632.25
Will H. Hearne A-3143	108	1210
C.C. Tribble A-3306	876	378.1
W. Brown A-3157	110	94.5
B.S. & F. A-3155	875	378.1
L. Vergara A-2951	39	640
R.W. Roberson A-2865	38	642
R.W. Roberson A-2784	35	642
M.G. DeGarza A-2731	36	640
M.G. DeGarza A-2730	34	642
B.S. & F. A-29	977	640
Portion of Section Within Application Area:		
Joaquin Galan A-65 Webb Co.	2182	32,362
Joaquin Galan A-3226	2292	20,844
L. Vergara A-2952	40	374
M. Martinez A-794	2289	133
Mrs. M.M. Nichols A-557	1900	659
Total acreage		72,290

[FR Doc. 92-1387 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. JD92-02812T West Virginia-10]

State of West Virginia; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

January 14, 1992.

Take notice that on January 6, 1992, the West Virginia Department of Commerce, Labor and Environmental Resources (West Virginia) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that the Maxton/Maxon Sandstone of the Appalachian Plateau of Southern West Virginia qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978 (NGPA). The notice covers approximately 66 square miles in the Davy, Pineville and Welch Quads in McDowell and Wyoming Counties, West Virginia.

The notice of determination also contains West Virginia's findings that the referenced portion of the Maxton/Maxon Sandstone meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NW., Washington, DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1388 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. PR92-6-000]

Delhi Gas Pipeline Corp.; Petition for Rate Approval

January 14, 1992.

Take notice that on December 30, 1991, Delhi Gas Pipeline Corporation (Delhi) filed pursuant to § 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve as fair and equitable a maximum rate of 30.54 cents per MMBtu for transportation of natural gas under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA).

Delhi states that it is an intrastate pipeline within the meaning of section 2(16) of the NGPA and currently operates intrastate facilities in several states. The subject of this petition is its intrastate system in North Louisiana. Delhi states in its petition that it intends to seek an opinion letter from the Officer of General Counsel that its facilities in North Louisiana qualify as non-jurisdictional gathering and it requests that this petition be made subject to that filing. Delhi's previous maximum interruptible transportation rate of 21 cents MMBtu for section 311(a)(2) service was approved by a Commission order issued June 21, 1990 in Docket No. ST84-773-000 *et al.*

Pursuant to § 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments.

Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before January 30, 1992. The petition for rate approval is on file with the Commission and is available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1385 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP91-2448-000, and RP91-187-000]

Florida Gas Transmission Co.; Notice Reconvening Informal Settlement Conference and Notice Canceling Separate Informal Settlement Conference

January 13, 1992.

Take notice that the informal settlement conference previously scheduled to be convened on January 14-15, 1992, has been rescheduled to be held on February 11-12, 1992, at 10 a.m., on each day, at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC, for the purpose of exploring the possible settlement of the issues in this proceeding.

Any party, as defined by 18 CFR 385.102(c), or any participant, as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214) (1991).

Take notice that the separate informal settlement conference previously scheduled to be convened on February 18-19, 1992, has been canceled and will be rescheduled at a later date.

For further information, please contact Warren C. Wood at (202) 208-2091 or Donald Williams at (202) 208-0743.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1341 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-143-010]

Great Lakes Gas Transmission Limited Partnership; Proposed Changes in FERC Gas Tariff

January 14, 1992.

Take notice that Great Lakes Gas Transmission Limited Partnership ("Great Lakes"), on January 10, 1992, tendered to the Federal Energy Regulatory Commission (Commission) for filing as part of its FERC Gas Tariff, First Revised Volume No. 1 and Original Volumes Nos. 2 and 3, the following tariff sheets, proposed to be effective as of November 1, 1991:

First Revised Volume No. 1

Fourth Substitute Twenty-Fourth Revised Sheet No. 4
Fourth Substitute Fortieth Revised Sheet No. 57(i)

Original Volume No. 2

Sixth Revised Sheet No. 3-A
Fourth Substitute Twenty-Sixth Revised Sheet No. 53
Substitute Sixth Revised Sheet No. 53-G
Fourth Substitute Eighteenth Revised Sheet No. 77
Substitute Fourth Revised Sheet No. 78
Fourth Substitute Fourteenth Revised Sheet No. 151
Fourth Substitute Eleventh Revised Sheet Nos. 223 and 245
Fourth Substitute Fifth Revised Sheet No. 269
Fourth Substitute Eleventh Revised Sheet No. 294
Fourth Substitute Sixth Revised Sheet No. 603
Second Substitute Third Revised Sheet No. 604
Fourth Substitute Fourth Revised Sheet Nos. 865 and 866
Fourth Substitute Third Revised Sheet No. 905
Fourth Substitute Fourth Revised Sheet No. 906
Second Substitute First Revised Sheet No. 1008

Original Volume No. 3

Fifth Substitute Fourth Revised Sheet No. 2
Substitute Original Sheet No. 2-A
Fourth Substitute Fourth Revised Sheet No. 3

Great Lakes states that the purpose of the instant filing is to comply with Ordering Paragraph (B) of the "Order On Compliance Filing" issued by the Federal Energy Regulatory Commission ("Commission") on December 20, 1991, in Docket Nos. RP91-143-006, *et al.* (Order). In this regard, the Order directed Great Lakes to file revised tariff sheets to reflect the elimination of costs, in the design of its interruptible and overrun rates, associated with its incrementally-priced, expansion facilities. In addition, Great Lakes is to reflect, in the design of its rates for non-incremental customers, a credit for anticipated revenue from the projected levels of interruptible and overrun services.

Great Lakes further states that its filing includes workpapers setting forth the calculation of projected fuel usage.

Great Lakes states that its filing is being submitted under protest and without prejudice to Great Lakes' request for rehearing filed in response to Opinion Nos. 367 and 368 or the request for rehearing which Great Lakes will file concerning the Commission's December 20, 1991 order herein.

Great Lakes states that copies of this filing were posted and served on all of its customers, upon the Public Service Commissions of the States of Minnesota, Michigan, and Wisconsin, and upon all parties listed on the service list maintained by the Commission's Secretary in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance

with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before January 22, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1382 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. PR92-7-000]

Louisiana Intrastate Gas Corporation; Petition for Rate Approval

January 14, 1992.

Take notice that on January 6, 1992, Louisiana Intrastate Gas Corporation (LIG) filed pursuant to § 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve as fair and equitable a maximum rate of 21 cents per MMBtu for transportation of natural gas under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA) through its Eloi Bay Facility.

LIG states that it is an intrastate pipeline within the meaning of section 2(16) of the NGPA and currently operates intrastate facilities in Louisiana. The subject of this petition is its Eloi Bay Facility. LIG states that the Eloi Bay Facility was the subject of prior orders of the Commission in Docket Nos. ST89-1708-000, *et al.* which determined an incremental rate of 3.37 cents per MMBtu for section 311(a)(2) transportation through this facility. These orders are pending review in *Louisiana Intrastate Gas Corp.* v. *FERC*, DC Cir. Nos. 89-1479, 90-1050 and 90-1476. LIG states that it is filing this petition to have its general system-wide rate of 21 cents currently pending in Docket No. PR91-12-000 apply to section 311(a)(2) transportation using the Eloi Bay Facility.

Pursuant to § 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments.

Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before January 30, 1992. The petition for rate approval is on file with the Commission and is available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1386 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP92-88-000]

Pacific Gas Transmission Co.; Change in FERC Gas Tariff

January 14, 1992.

Take notice that on January 10, 1992, Pacific Gas Transmission Company (PGT) tendered for filing and acceptance the following tariff sheets:

Second Revised Volume No. 1

First Revised Sheet No. 12

Original Volume No. 1-A

Sixth Revised Sheet No. 4
Second Revised Sheet Nos. 5 and 14
Second Revised Sheet Nos. 72 and 73
Second Revised Sheet Nos. 74 and 75
Second Revised Sheet Nos. 78, 82, 83 and 84

The purpose of this filing is to revise the billing demand under Rate Schedule PL-1 of Second Revised Volume No. 1 coincident with a partial conversion from sales service under Rate Schedule PL-1 to transportation service under Rate Schedule FTS-1 for Pacific Gas and Electric Company (PG&E), and to make certain minor changes to Rate Schedule FTS-1, the form of service agreements for Rate Schedules FTS-1 and ITS-1, and to the format of the Statement of Rates of PGT's FERC Gas Tariff, Original Volume No. 1-A.

PGT has requested an effective date of January 10, 1992 for First Revised Sheet No. 12 of Second Revised Volume No. 1 and February 9, 1992 for all other tariff revisions. A copy of this filing is being served on PGT's jurisdictional customers and affected state regulatory commissions.

Any person desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Comission's Rules of Practice and Procedure. All such motions or protests should be filed on or before January 22, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1383 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP91-212-003]

Stingray Pipeline Co.; Supplemental Compliance Filing

January 14, 1992.

Take notice that Stingray Pipeline Company (Stingray), on January 10, 1992, filed certain revised tariff sheets in its FERC Gas Tariff, First Revised Volume No. 1, to correct an earlier compliance filing that it made on October 15, 1991 pursuant to an order of the Federal Energy Regulatory Commission (Commission) issued on September 10, 1991 in Docket No. RP91-212-000, 56 FERC ¶ 61,462 (1991). The proposed tariff sheets, which pertain to § 6.3(d) of Stingray's FTS and ITS Rate Schedules, are as follows:

Revised Second Substitute Original Sheet No. 59
Revised Second Substitute Original Sheet No. 60
Original Sheet No. 60A
Revised Second Substitute Original Sheet No. 97
Original Sheet No. 97A

Stingray requests that the tendered tariff sheets be accepted in lieu of those filed in the October 15 compliance filing to be effective October 1, 1991.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before January 22, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-1384 Filed 1-17-92; 8:45 am]

BILLING CODE 6717-01-M

Final Rule changed 49 CFR 107.311(c) to its current form (except for changes in office names following a subsequent reorganization). 48 FR 2652–3; January 20, 1983. The "Supplementary Information" section explained that the change was made based on the following recommendation of a commenter: "[A]mendments to notices should be allowed only where the new information relates directly to allegations in the original notice. In all other cases, [the agency] should have to issue a new notice based on new allegations." 48 FR 2647; January 20, 1983. Thus, the Office of the Chief Counsel would be required to issue a new notice of probable violation only if it determines that any additional information that it may seek to make a part of this proceeding does not relate directly to allegations in the original notice. Because the information does relate directly to those allegations, amending the notice of probable violation is the proper procedure for the Office of the Chief to follow.

If that is the course taken, the Respondent is not entitled to change the form of its reply that it chose under 49 CFR 107.313. It is noteworthy that that portion of the NPRM that would have permitted respondents to treat amended notices as initial notices for purposes of response options was removed from the final rule. I therefore agree with Respondent's assertion in its appeal that the "informal hearing" [49 CFR 107.317(b) refers to this response as an "informal conference"] should have been reopened and that Respondent should have been given notice and opportunity to examine and refute the additional evidence.

Findings

I find that the Chief Counsel's Order was based, in part, upon information outside of this proceeding. Accordingly, that Order is vacated, and this case remanded to the Office of the Chief Counsel to either:

1. Issue an Amended Notice of Probable Violation in accordance with this Action; or

2. Issue a new Order that is not supported by information outside of this proceeding.

If the Office of the Chief Counsel issues an Amended Notice, it must inform Respondent that it will have an opportunity to respond to the amendments by requesting that the informal conference be reconvened. I also direct the Office of the Chief Counsel to make arrangements for Respondent's expert to review any new exhibits that that office seeks to make a part of the record.

Date Issued: February 22, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–113–CR]

Action on Appeal

In the Matter of: Consolidated Fire Protection Services, Inc., Respondent.

Background

On December 27, 1988, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Consolidated Fire Protection Services, Inc. (Respondent) assessing a penalty in the amount of $2,000 for having knowingly committed acts in violation of 49 CFR 171.2(b), 173.34(e)(3), and 173.34(e)(5). (The Order inadvertently cited § 171.2(b) instead of § 171.2(c). The Notice of Probable Violation contained the correct reference.)

The Order assessed a civil penalty of $2,000, reduced from the $2,500 civil penalty originally proposed in the November 9, 1988 Notice of Probable Violation. By letter dated January 20, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order found two violations of the Hazardous Material Regulations. Respondent does not challenge the civil penalty for the second violation, which the Chief Counsel's Order had mitigated from $1,000 to $500. Respondent's appeal concerns only the first violation: that Respondent knowingly represented that it had performed hydrostatic retesting of DOT specification cylinders even though Respondent had not determined that its retesting equipment met the accuracy requirements of 49 CFR § 173.34(e)(3). In its appeal, Respondent argues that the $1,500 penalty for that violation was excessive because Pittsburgh Testing Laboratory, the independent inspection agency, had the responsibility to not certify Respondent's hydro-tester if the calibrated cylinder did not have a recent calibration certificate. Respondent maintains that, had it known of the requirements, it would not have continued its retesting of DOT specification cylinders until it had received a calibration certificate. Respondent further notes that following the inspection of its facility by Office of Hazardous Materials Transportation (OHMT) inspectors, it had stopped retesting the cylinders until it had received the certificate.

The fact that, subsequent to the OHMT inspection, Respondent had obtained an independent calibration of, and a certificate of calibration for, its hydro-tester was known to the Chief Counsel before the Notice issued. Regarding this effort by Respondent, the Notice stated: "this mitigating factor has been considered in determining an appropriate proposed civil penalty assessment." Moreover, during the December 16, 1988 informal telephone conference, an attorney from the Chief Counsel's Office explained to Respondent's President and Vice President that the shared responsibility of the independent inspection agency had also been considered in determining the proposed penalty. However, Respondent cannot escape its obligation to be familiar with, and abide by, the Hazardous Materials Regulations. Finally, Respondent had not been able to determine the accuracy of the calibration of its equipment for a week before the OHMT inspection because, during that time, it did not have the ¾-inch fitting necessary to connect the calibrated cylinder to the high pressure line. Despite the fact that its retest equipment had not been checked for accuracy for about one week, Respondent had continued to test DOT specification cylinders, thereby violating 49 CFR 173.34(e)(3).

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability reduced by some reliance on the independent inspector, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of December 27, 1988, assessing a $2,000 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a

penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: September 18, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 88–114–HMI]

Action on Appeal

In the Matter of: Chemcentral Corporation, Respondent.

Background

On March 3, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Chemcentral (Respondent) assessing a penalty in the amount of $1,500 for having knowingly failed to file DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the November 30, 1988 Notice of Probable Violation. Although Respondent had waived its right to respond to the Notice, by letter dated March 21, 1989, it submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The incident involving the unintentional release occurred March 3, 1988. Respondent admits that it did not mail the required DOT Form F 5800.1 until November 30, 1988, even though each of its drivers had received a handbook containing the reporting requirements. Moreover, the eventual filing on November 30, 1988, occurred more than 30 days after a Transportation Enforcement Specialist, U.S. Department of Transportation, informed Respondent's General Manager in a telephone interview that the filing was required. Respondent also took more than 30 days following that interview to bring to the attention of its supervisory personnel the necessity of making timely reports.

Respondent requests that the assessed civil penalty be reduced from $1,500 to $250, "because of the relatively insignificant nature of the real or potential harm caused by the release of the hazardous material in this instance." Respondent also reasons that it immediately made repairs to the trailer involved in the incident. Respondent's arguments are not convincing. The significance of the harm caused by the release or the repairs made to the trailer do not determine the amount of the civil penalty assessed for not reporting the release. If the reporting requirements in the regulations are violated consistently, the Department's statistics concerning the unintentional release of hazardous materials will be unreliable. In addition, the amount of the penalty assessed by the Chief Counsel, which Respondent says it has the ability to pay and will not in any way affect its ability to continue in business, is far below the maximum permitted. Pursuant to 49 CFR 107.329, when, as here, the violation is a continuing one, each day of the violation constitutes a separate offense. Thus, Respondent could have been assessed a civil penalty of up to $10,000 per day for each day Respondent was in violation of 49 CFR 171.16. Nevertheless, because Respondent did make the required filing on November 30, 1988, before receiving the Notice issued on that date, mitigation of $100 is justified.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. Respondent argues that it has a "relatively-free record of alleged violations of 49 CFR regulations." Nevertheless, I find that a civil penalty of $1,400 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of March 3, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,400.

Failure to pay the $1,400 civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR Part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 21, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–01–SIT]

Action on Appeal

In the Matter of: FMC Corporation, Respondent.

Background

On March 22, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to FMC Corporation (Respondent) assessing a penalty in the amount of $7,000 for having knowingly committed three violations. The Order assessed the $7,000 civil penalty originally proposed in the January 18, 1989 Notice of Probable Violation.

By letter dated June 9, 1989, after obtaining an extension of time to appeal, Respondent, through counsel, submitted a timely appeal of the Order insofar as it found a violation and imposed a $3,000 civil penalty for Violation No. 3. Violation No. 3 involved the knowing offering of a hydrogen peroxide solution for transportation in commerce in a concentration (70.8%) higher than authorized for an intermodal (IM) portable tank, in violation of 49 CFR 171.2(a) and 173.266(a)(3). (Respondent previously had submitted a $4,000 check in full payment of the civil penalties imposed for Violation Nos. 1 and 2.) The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent stated that the maximum 70% figure in the IM Tank Table and 49 CFR 173.266 originated with an exemption issued to an international tank manufacturer whose customer intended to ship standard 70% hydrogen peroxide. Respondent contended that the 70% figure was apparently chosen because that is what the exemption application requested, and that nothing in the available records indicates that RSPA "drew a line at 70% and would have considered 71% unsatisfactory, if the petition had asked for 71%." Respondent also suggested that the 70% figure was incorporated in the IM Tank Table without formal notice and comment under the Administrative Procedure Act. Respondent reiterated the arguments it made in response to the Notice, suggesting that hydrogen peroxide must be shipped in concentrations higher than 70% in order to have 70% at destination because the material slowly loses concentration over time, and that the industry practice is to describe the material by the standard commercial percentage that a company is contractually obligated to deliver (e.g., 70%), not the actual percentage shipped.

Respondent also contended that although RSPA stated that one of the purposes of adopting the portable tank rules was to facilitate international transport of hazardous materials and harmonize with the United Nations (UN) standards, the UN standards do not apply an upper limit of 70%. Furthermore, Respondent noted that a number of organic peroxides and oxidizers listed in the Hazardous Materials Table have concentrations of 52% or 72%, presumably to accommodate standard 50% or 70% material and anticipating product loss, while other materials have more even figures which correlate with uneven percentages in the UN standards. Respondent suggests that these apparent inconsistencies are not explained by any scientific rationale, but rather correlate with what was requested by a variety of petitioners over the years, some of whom accounted for decreasing concentration and some of whom merely identified the material by its commercial standard description.

Finally, Respondent contends that this situation is inappropriate for resolution through the enforcement process because all the commercial parties outside the Department understood the rule to mean one thing, while the agency understood it to mean something else. Respondent stated that it was now shipping hydrogen peroxide below 70% pending resolution of this matter, although doing so puts it at a competitive disadvantage with other companies in the industry.

The meaning of the regulatory requirement has been undisputed since its inception. In January 1981, RSPA published a final rule, after notice and comment, authorizing the use of two new specification intermodal portable tanks to transport certain hazardous materials to be identified by name in the IM Tank Table (46 FR 9880). The rule amended each of the specific packaging requirements in 49 CFR part 173 for the materials authorized. The packaging requirements in 49 CFR 173.266(a)(3) for hydrogen peroxide solution in water authorized shipment of this material, containing 70 percent or less hydrogen peroxide by weight, in specification IM 101 portable tanks, under the conditions specified in the IM Tank Table. The 70 percent figure was corrected to 60 percent by a final rule correction issued April 30, 1981 (46 FR 24184).

The January 1981 final rule stated that the IM Tank Table would be published separately, and provided procedures, in 49 CFR 173.32d, for addition, modification, and removal of entries in the IM Tank Table. The Tank Table was intended to provide flexibility by allowing addition or modification of entries through an approval process based upon a technical analysis of available data concerning the material. Absent that approval process, the Tank Table would be a static document, unable to accommodate the legitimate needs of commerce. In April 1981, the Materials Transportation Bureau (predecessor to the Office of Hazardous Materials Transportation (OHMT)) issued an interim approval, in accordance with 49 CFR 173.32d, to L'air Liquide. The interim approval, which was effective May 1, 1981, authorizes transportation in IM 101 tanks of hydrogen peroxide solution "Over 60 percent but not greater than 70 percent by weight in water" under the conditions specified in the interim approval, and requires that a copy of the interim approval accompany each shipment. The interim approval also states that hydrogen peroxide solution over 70 percent by weight in water is "*Not Authorized for transportation in IM 101 or IM 102 tanks*" (emphasis added). Respondent has been on notice since that time that hydrogen peroxide solution over 70 percent cannot be shipped in IM portable tanks, and that hydrogen peroxide solution over 60 percent but not greater than 70 percent may be shipped only under the authority, and in accordance with the terms, of the interim approval granted by OHMT. If Respondent had any doubt about the 70 percent maximum, it could have requested clarification or sought an amendment to the IM Tank Table, as provided in 49 CFR 173.32d.

The Chief Counsel considered and rejected Respondent's arguments concerning the prevailing industry practice of shipping hydrogen peroxide in concentrations greater than the 70% allowed by the regulations. I concur with the Chief Counsel's conclusion that industry practice is irrelevant as to the legality of Respondent's practice.

Respondent's contention concerning different percentages for other named materials is not directly relevant to this case because those materials are not allowed to be shipped in IM portable tanks. Respondent's contention concerning the different percentages authorized for various materials is valid to the extent that it highlights that exemptions, subsequently incorporated into the regulations, are based upon applications from industry representing what it plans to do. A company is perfectly capable of specifying what concentration it plans to ship, including an allowance for loss of concentration, and apparently many companies did so. It is not for RSPA to conjecture that a given percentage should be understood to mean approximately that percentage. The exemptions that were granted, and subsequently converted to regulation, were issued on the basis of a demonstration that a company's proposed action would result in a level of safety equivalent to the regulations. The fact that a company might have been able to make that demonstration with a higher concentration is irrelevant. The fact that the UN standards do not set a maximum percentage is likewise irrelevant. Although the portable tank rules were adopted, in part, to align with UN standards, the preamble clearly states that the rules are not identical. The Hazardous Materials Regulations, not the UN standards, regulate the packaging of hazardous materials for domestic transportation.

Findings

Accordingly, I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of March 22, 1989, assessing a $3,000 civil penalty for Violation No. 3, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 4, 1989.

Travis P. Dungan,

Administrator.

cc: Robert H. Malott
Chief Executive Officer
FMC Corporation
200 E. Randolph Drive
Chicago, IL 60601.

FMC Corporation
2000 Market Street
Philadelphia, PA 19103
Attn: David D. Eckert, Branch Manager.

Certified mail—Return receipt requested

[Ref. No. 89–11–SPT]

Action on Appeal

In the Matter of: Chemcentral Corporation, Respondent.

Background

On August 14, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation (DOT), issued an Order to Chemcentral Corporation (Respondent) assessing a penalty in the amount of $2,500 for having knowingly used for transportation of hazardous materials five DOT specification 57 portable tanks that had not been retested at least once every two years, in violation of 49 CFR 173.32(e)(1)(i). The Order assessed a civil penalty which was $500 less than the $3,000 assessment originally proposed in the January 30, 1989 Notice of Probable Violation. By letter dated September 12, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Notice of Probable Violation (NOPV) originally issued in this matter proposed a penalty of $3,000 against Respondent for its knowing use for the transportation of hazardous materials five DOT specification 57 portable tanks which had not been retested as required by the Hazardous Materials Regulations. In February 20 and March 3, 1989 reply letters, Respondent requested mitigation of the penalty and stated that of the five tanks that should have been retested, two tanks subsequently had been retested and passed and the remaining three tanks had been retired from service. The Chief Counsel, RSPA, determined that Respondent's prompt corrective action warranted partial mitigation and, therefore, reduced Respondent's proposed civil penalty by $500.

In its appeal letter, Respondent requests further reduction of the penalty amount. Respondent contends that of the seven criteria listed in 49 CFR 107.331, the only two criteria addressed were Respondent's ability to pay and the effect on Respondent's ability to continue in business. Respondent argues that no harm from the violation was noted, the nature and circumstances of the violation and its extent and gravity seemed to be minor, the degree of culpability is difficult to assess, and there was no history of prior offenses.

The Chief Counsel already has mitigated the penalty by $500 in light of the corrective action taken by Respondent. The Chief Counsel considered all the civil penalty criteria in 49 CFR 107.331, including the nature and circumstances of the violation, its extent and gravity, the degree of Respondent's culpability, the absence of prior offenses by Respondent, Respondent's ability to pay, the effect of the penalty on Respondent's ability to remain in business, and such other matters as justice may require, including Respondent's remedial action. Five instances of knowing use of out-of-test portable tanks for hazardous materials transportation constitute serious offenses. Although they were charged as a single offense, Congress has provided for a possible maximum penalty of $10,000 for that offense. None of the five portable tanks had ever been retested, and there is no indication that Respondent has not presented any new information or argument to warrant further mitigation or to indicate that the Chief Counsel did not properly consider the penalty assessment factors. In light of all the foregoing, I find that the $2,500 penalty (constituting a $500 penalty for each of the out-of-test tanks) is appropriate.

Respondent also requests an informal conference and, if that proves unsatisfactory, a formal hearing to be held in Chicago, Illinois. The time for requesting either option has expired. Respondent's options, pursuant to 49 CFR 107.313, were listed in Addendum B to the Notice of Probable Violation (Notice). Within 30 days of its receipt of the Notice, Respondent could have included in its informal response a request for an informal conference. However, in its February 20 and March 3, 1989 replies to the Notice, Respondent did not request a conference. Also, within this same 30-day period, Respondent could have made a request for a formal hearing before an administrative law judge. Respondent's failure to request either an informal conference or a formal hearing within 30 days of its receipt of the Notice constituted a waiver of Respondent's right to such a conference or hearing. Therefore, I deny Respondent's request for an informal conference and its request for a formal hearing.

Findings

I have determined that there is insufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of the violation, its extent and gravity, Respondent's culpability, the absence of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant circumstances. Therefore, the Order of August 14, 1989, assessing a $2,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed in this matter within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89.

Pursuant to those same authorities, a penalty charge of 6 percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: October 12, 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 89–12–SP]

Action on Appeal

In the Matter of: Chemco Manufacturing Co., Inc. Respondent.

Background

On February 23, 1990, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Chemco Manufacturing Company, Inc. (Respondent) assessing a penalty in the amount of $2,000 for having knowingly offered for transportation in commerce a hazardous material, a flammable liquid with a flash point of 5 degrees Fahrenheit (#791 Strippable Booth Coating, product name: Liquid Envelope, #791–35), in 5-gallon, open-head DOT-37C pails authorized only for materials having a flash point above 20 degrees Fahrenheit, in violation of 49 CFR 171.2(a) and 173.128(a)(4). The Order assessed a civil penalty of $2,000, reduced from the $5,000 civil penalty originally proposed in the April 20, 1989, Notice of Probable Violation. By letter dated March 9, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent admitted that the civil penalty was for violations occurring prior to the date of the DOT inspection. Respondent's sole basis for appeal is that Mr. O'Neil, the inspector from the Office of Hazardous Materials Transportation (OHMT), "acknowledged to our General Manager in front of other employees that if we immediately complied with the HMR regulations, of which we had no knowledge, that we were assured no penalties for prior non-compliance would be involved [sic]." Respondent stated that it had disposed of all non-complying containers, at considerable cost, and had complied with the HMR since the date of the OHMT inspection.

It is standard procedure for OHMT inspectors to conduct an exit interview following a compliance inspection. The OHMT inspector discusses the probable violations observed during the inspection, and the range of enforcement sanctions available. The Notice of Probable Violation (Addendum A, Page 1) states that "[b]efore leaving Respondent's facility, Inspector O'Neil showed Mr. Schweizer 49 CFR 173.128(a)(4), and explained to him the probable violation concerning Respondent's shipment of its paint related material #791 packaged in DOT 37C80 5-gallon pails." Inspector O'Neil's inspection report states that the exit interview was conducted with Mrs. J.J. Pape and Mr. Schweizer. Inspector O'Neil's report also states that he discussed the probable violation, showed Mr. Schweizer the relevant section of the Hazardous Materials Regulations, and discussed "all of the enforcement possibilities." OHMT inspectors do not have the authority to waive the imposition of civil penalties, and it is standard practice for them to state during an exit interview that any enforcement decision will be made by the Chief of the Enforcement Division in consultation with the Office of Chief Counsel. Respondent never raised this allegation until it appealed the Chief Counsel's Order, and it provided no corroboration whatsoever to support its contention. I therefore find that there is on credible evidence that Inspector O'Neil made the alleged statement. Even if the inspector mistakenly or improperly had made such an unauthorized statement, the Office of Chief Counsel would not thereby have been precluded from bringing an enforcement action. Respondent has a responsibility to comply with the Hazardous Materials Regulations and is subject to appropriate sanctions for its failure to do so.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 23, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual, of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 30, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–20–CR]

Action on Appeal

In the Matter of: New York Fire and Safety Corporation, Respondent.

Background

On November 14, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to New York Fire and Safety Corporation (Respondent) assessing a penalty in the amount of $10,000 for knowingly representing, marking, certifying, and offering 15 DOT specification cylinders as successfully retested in accordance with the Hazardous Materials Regulations (HMR) when they should have been condemned because their permanent expansion exceeded ten percent of total expansion. Respondent's failure to condemn the cylinders was

determined to be in violation of 49 CFR 171.2(c) and 173.34(e)(4).

The Order assessed the maximum penalty of $10,000 allowed under the authority of 49 App. U.S.C. 1809(a)(1) and 49 CFR § 107.329, citing Respondent's failure to respond to the Notice of Probable Violation (Notice) issued August 21, 1989, and, therefore, its failure to contest the probable violation as set forth in the Notice and to present any information which would warrant mitigation of the proposed civil penalty amount. The Chief Counsel's Order is incorporated herein by reference.

Respondent submitted a timely appeal of the Order, and in the alternative, requested that the Chief Counsel vacate the Order "in the interests of justice and with a view to compromising a settlement." Respondent proposed to pay a $2,000 penalty, citing its financial difficulties and inability to pay the assessed penalty. A December 13, 1989 letter from the Acting Chief Counsel, RSPA, was sent to Respondent informing it that the proper procedure for contesting an Order of the Chief Counsel was through an appeal to the Administrator, RSPA, and that its letter was being so considered. As Respondent had not presented any documentary evidence of its financial condition prior to issuance of the Order, the letter also invited the submission of additional evidence. (Respondent had supplied certain financial statements to the staff attorney of record in the matter after its 30-day response period had run (49 CFR 107.313).) This action on appeal is based upon a *de novo* review of the administrative record in this case, as supplemented by Respondent following issuance of the Order.

Discussion

In its appeal, Respondent does not contest that it violated the HMR as stated in the Chief Counsel's Order. The sole ground for appeal is the appropriateness of imposing the maximum penalty authorized by law in light of Respondent's financial circumstances. Respondent also explains that its failure to respond to the Notice and to raise this issue in a timely manner was due to an inadvertent oversight by office personnel. (Respondent was unaware of the action pending against it until an informal conference held on October 26, 1989 with regard to a Notice of Probable Violation issued to its parent corporation, Radec Corporation.)

In order to complete the administrative record, a January 5, 1990 letter from the Office of Chief Counsel again invited the submission of any material which Respondent wished to have considered on appeal. It also presented Respondent with copies of memoranda from the Office of Hazardous Materials Transportation (OHMT) inspector and the RSPA attorney who were present at the informal conference, noting their best recollection of Respondent's statements and other evidence presented at the conference concerning the financial condition of Respondent. This was done to provide Respondent with an opportunity to respond or supplement the record as it saw fit. Respondent's first submission, dated January 22, 1990, included income statements (unverified) and a certified financial statement for its parent corporation. According to those income statements, Respondent was operating at a net loss of about $96,500 as of November 1989. Respondent's January 22, 1990 letter also noted that despite its financial difficulties, Respondent had taken corrective action to ensure its employees were properly trained in hydrostatic testing and inspection of cylinders.

In a February 26, 1990 letter, Respondent advised the Office of Chief Counsel, RSPA, that on February 23, 1990, Radec Corporation had sold all of Respondent's assets, and had realized a net loss of $60,000 on the sale. In response to the Office of Chief Counsel's request for additional information concerning the sale, Respondents supplied a copy of the Asset Purchase Agreement and related documents. Respondent noted that the terms of the sale left Respondent with a substantial amount of accounts payable for which Respondent remains liable. According to the Schedule of Assets Sold and Attachment provided, the company was sold for $280,771.67, for assets having a book value of $238,799.09. This transaction would yield a net of $41,972.58, except that Respondent still had outstanding obligations to discharge. Respondent received only $120,000 at the time of closing. Of these proceeds, $10,000 was placed in escrow for sales tax and $110,000 was used to pay off various of Respondent's obligations, leaving Respondent with another $60–65,000 of accounts payable for which it remains responsible. The balance of the sales price will be paid over five years in equal monthly installments, and $35,000 will not be paid until at least one year from the closing. According to Respondent's calculations, this sale actually resulted in a net loss to Respondent of approximately $92,000.

Respondent's March 28, 1990 letter also stated that it has agreed with the purchaser that the purchaser is in no way responsible for any liability arising out of the instant action.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $5,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, and all other relevant factors. The effect of a civil penalty on Respondent's ability to continue in business is, of course, not in issue, as the assets of the business have been sold.

Therefore, the Order of November 14, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CRF 107.331, except that the $10,000 civil penalty assessed therein is hereby mitigated to $5,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1) RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 21, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–25–SPT]

Action on Appeal

In the Matter of: GRO–MOR, Inc. and USA Fertilizer, Inc., Respondents.

Background

On September 6, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Gro-Mor, Inc. and USA Fertilizer, Inc. (Respondents) assessing, jointly and severally, a penalty in the amount of $8,500 for having knowingly offered for transportation and transported sulfuric acid (1) in concentration of 51 percent or less in packaging not authorized, (2) in concentration of greater than 95% to not over 100.5% in packaging not authorized, and (3) in a motor vehicle not placarded on each end and each side with CORROSIVE placards, in violation of 49 CFR 171.2(a) and (b), 173.272(a), (c), and (g), 172.504(a), 172.506(a)(1), and 177.823. The Order assessed the $8,500 civil penalty originally proposed in the February 24, 1989 Notice of Probable Violation, but authorized payment in four monthly installments. By letter dated September 29, 1989, Respondent, through counsel, submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In their appeal, Respondents contend that the Hearing Officer (the Chief Counsel) failed to: properly consider the assessment criteria; understand the "corrosion study" submitted by Respondents; or give due credibility to the financial statements submitted by Respondents. Respondents also challenge the findings that the violations in fact occurred and the amount of the penalty. The appeal, however, does not include any arguments or additional information in support of Respondent's contentions. Accordingly, I have carefully reviewed all the information in the record and find Respondents' contentions meritless.

Respondents did not deny, and in fact acknowledged in their March 21 letter and at the informal conference, that Violation Nos. 2 and 3 occurred. Respondents even conceded in their March 21 letter, with respect to Violation No. 1, that although the material that spilled was intended to be a non-corrosive fertilizer vine-kill mix, "it is possible the plant operation could have made a mistake." In fact, the report from the Idaho Department of Health and Welfare included a laboratory analysis of the material that spilled showing it to be 50.5% sulfuric acid. The "Corrosion Study" is for a material Respondents refer to as "26–0–0–6," but there is no evidence to suggest that this material was being transported at the time of Violation No. 1, and there is ample evidence, in the form of the laboratory analysis, to conclude that it was not the material being transported.

With respect to Respondents' contention concerning the consideration given to the financial information they submitted, the information in the financial statement is sketchy, unsubstantiated, and pertained to a natural person affiliated with both corporations, rather than to the corporations themselves. Under these circumstances, the Chief Counsel was more than generous in according the financial statement even limited credibility.

Finally, although they are not required to do so, Respondents have not submitted any information concerning corrective actions taken to prevent the occurrence of such violations in the future. Transporting high concentrations of sulfuric acid in non-specification packagings is a serious violation, and there is no evidence in the record to warrant mitigation of the civil penalty assessed.

In view of the foregoing, the Chief Counsel properly considered each of the assessment criteria and decided that there was no justification for mitigating the penalty amount.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $8,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondents' culpability, Respondents lack of prior offenses, Respondents' ability to pay, the effect of a civil penalty on Respondents' ability to continue in business, and all other relevant factors.

Therefore, the Order of September 6, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty of $8,500 shall be payable in four equal monthly installments of $2,125 each, beginning on January 22, 1990, and due on the 22nd day of each of the three succeeding months. If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable.

Respondent's failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment of the accelerated amount is not made within 90 days of default.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondents must send a photocopy of each check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 21, 1989.

Travis P. Dungan.

cc: Mr. Arthur H. Nielson, Jr., President
Gro-Mor, Inc. and USA Fertilizer, Inc.
120 North 12th Avenue
Pocatello, Idaho 83201
Certified mail—Return receipt requested

[Ref. No. 89–27–HMI]

Action on Appeal

In the Matter of: Peoples Cartage, Inc., Respondent.

Background

On April 13, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Peoples Cartage, Inc. (Respondent) assessing a penalty in the amount of $1,000 for having knowingly failed to file DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR § 171.16. The Order assessed a civil penalty of $1,000, reduced from the $1,500 civil penalty originally proposed in the February 3, 1989 Notice of Probable Violation. By letter dated April 19, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's sole basis for appeal is that the amount of the civil penalty is not warranted or reasonable given certain substantial mitigating factors. Respondent contends that the unintentional violation involved a single written reporting requirement that did not endanger persons or property; the

violation resulted from a good faith misinterpretation of the regulations, not a willful or intentional violation; Respondent has provided its personnel with training; Respondent has no history of prior offenses; Respondent should not be penalized because it is financially able to pay; and Respondent voluntarily undertook remedial action to educate its employees.

The Chief Counsel already has mitigated the $1,500 proposed penalty by $500 in light of Respondent's good faith misinterpretation and its remedial actions. Moreover, the Chief Counsel considered all the civil penalty criteria in 49 CFR 107.331, including Respondent's lack of prior offenses, its degree of culpability, the gravity of the violation, and Respondent's ability to pay and continue in business. Respondent is not being penalized because of its ability to pay. Ability to pay is considered in assessing a civil penalty only to the extent that a person is unable to pay or doing so would adversely affect the ability to continue in business. Otherwise, ability to pay is given minimal weight. Respondent has not presented any new information or argument to warrant mitigation or to indicate that the Chief Counsel did not properly consider the penalty assessment factors.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,000 is appropriate in light of the nature and circumstances of the violation, its extent and gravity, Respondent's culpability, Respondent's lack or prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of April 13, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331.

Failure to pay the $1,000 civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: July 20. 1989.

Travis P. Dungan,

Administrator.

Certified mail—Return receipt requested

[Ref. No. 89–32–CRR]

Action on Appeal

In the Matter of: Robert Gas Cylinder Co., Inc., Respondent.

Background

On July 5, 1989, the Chief Counsel, Research and Special programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Robert Gas Cylinder Co., Inc. (Respondent), assessing a penalty in the amount of $6,000 for having knowingly represented DOT–4 series specification cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) by rebuilding them when it was not authorized to do so, in violation of 49 CFR 171.2(c) and 173.34(1). The Order assessed the $6,000.00 civil penalty originally proposed in the March 27, 1989 Notice of Probable Violation (Notice). By letter dated July 24, 1989, Respondent submitted a timely appeal of the Order (the "Appeal"). The Chief Counsel's Order is incorporated herein by reference.

Discussion

In assessing the $6,000 penalty in issue, the Chief Counsel, RSPA, relied on the fact that Respondent had known, for more than four years, that the necessary RSPA approval for rebuilding of DOT cylinders had not been granted to Respondent. Specifically, an inspection performed on the Robert Cylinder Manufacture, Inc. (RCM) on February 12, 1985, revealed the same violation as that which is currently in issue; this violation was discussed with Mr. Roberto Santiago, President of RCM, who did not contest it. Mr. Santiago subsequently attended a meeting on March 24, 1988, at the Puerto Rico Public Service Commission, at which time the need to obtain RSPA approval was discussed and planned enforcement action was reviewed with him.

In the Appeal, Respondent introduced several items which contradict the evidence relied upon to assess the $6,000 penalty. First, Respondent provided a contract for the sale of the business and equipment of RCM to it on February 17, 1987. Additionally, Respondent's counsel, Mr. Fernandez Mejias, stated that, at the time of purchase of the business, Mr. Santiago warranted to Respondent that all Federal licenses and permits necessary to repair, rebuild or manufacture compressed gas cylinders had been issued to RCM, that these licenses and permits were in full force and effect, and that they could be transferred to Respondent upon consummation of the sale (see Appeal, page 2). Respondent's Counsel also stated that "After the March 24, 1988 meeting held at the Puerto Rico Public Service Commission headquarters in which RSPA officials discussed the need for facilities engaged in the rebuilding and repair of compressed gas cylinders to obtain RSPA approval, Respondent acquired constructive knowledge that such approval was needed." (see Appeal, page 3.)

Respondent's Counsel has also provided the sworn statement of Mr. Antonio Navarro, Respondent's administrative office clerk, stating that he was mistaken in this prior oral statement to RSPA inspectors that Mr. Santiago was Respondent's Vice-President; further, Respondent provided the sworn statement of Mr. Hector Barreto, its Secretary, that Mr. Santiago never occupied any office or position with Respondent.

The new evidence contradicts Mr. Navarro's prior oral statement that Mr. Santiago was Respondent's Vice-President, which was relied upon to establish the $6,000 civil penalty in the Notice and the Order. Thus, accepting this evidence as true, Respondent *did not* have knowledge of the violations in issue until sometime after Mach 24, 1988. The Order was issued on the basis of the then-uncontradicted evidence that Respondent had knowledge of the violation since 1985. Respondent's evidence shows that: (1) It did not acquire this facility until 1987, (2) it is a separate corporate entity from RCM, to which the 1985 advisory letter was issued; and (3) far from bringing knowledge of the violation to Respondent, Mr. Santiago dealt at arm's length with Respondent, merely as a predecessor-in-interest, and actually misrepresented to Respondent that it was legally free to continue the cylinder

rebuilding operation. While lack of actual knowledge is not exculpatory, the extent of actual knowledge is relevant in assessment of a penalty. The $6,000 penalty was based on the belief that Respondent knew of the requirements for four years; because Respondent had had actual knowledge of the requirements for only six months prior to the inspection in which the violation was discovered, significant mitigation of the $6,000 penalty is appropriate.

Mitigation of the penalty by $3,000 reflects my evaluation of the nature and circumstances of the violation, its extent and gravity, the degree of Respondent's culpability, and such other matters as justice may require.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of July 5, 1989 is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $6,000 civil penalty assessed therein is hereby mitigated to $3,000.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: January 3, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–33–CRR]

Action on Appeal

In the Matter of: Caribe Cylinders, Inc., Respondent.

Background

On February 23, 1990, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Caribe Cylinders, Inc. (Respondent) assessing a penalty in the amount of $3,000 for having knowingly represented DOT–4 series cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180, by rebuilding them when Respondent was not authorized to rebuild DOT–4 series cylinders, in violation of 49 CFR 171.2(c) and 173.34(1).

The Order assessed a civil penalty of $3,000, reduced from the $6,000 civil penalty originally proposed in the March 27, 1989 Notice of Probable Violation. The Order also provided that the civil penalty was payable in six monthly installments of $500 each. By a March 19, 1990 letter from its President, Ruben D. Milan, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's appeal is based on two arguments. First, Respondent asserts that it relied upon certification by the Puerto Rico Public Service Commission as authority for its operations. Second, it alleges that, in light of numerous existing debts, the proposed civil penalty would lead to bankruptcy.

With regard to Respondent's alleged reliance on a Public Service Commission certification, it is entirely possible that Respondent could have relied in good faith upon such certification, in lieu of U.S. Department of Transportation (DOT) approval, until early 1985. However, on February 14, 1985, Respondent's President, Mr. Milan, was visited by Inspector James Henderson of the Office of Hazardous Materials Transportation (OHMT) of DOT. Mr. Henderson explained to Mr. Milan the necessity to obtain OHMT approval prior to rebuilding any more DOT specification cylinders. Subsequently, OHMT sent letters to Respondent on March 26, 1985, and September 18, 1987, reiterating the OHMT approval requirement contained in the HMR. In addition, Mr. Milan attended a March 24, 1988 meeting at the Public Service Commission Headquarters at which both OHMT and Public Service Commission representatives informed him of the requirement for OHMT approval. In light of all these notifications, Respondent had no justification for reliance upon its Public Service Commission certificate when it was discovered in November 1988 to be rebuilding DOT specification cylinders without OHMT approval.

With respect to the financial assertions made in Respondent's appeal, most of them are irrelevant because they relate to the personal financial situation of Respondent's President and his family and to the financial situation of another family business. Although Respondent alleges that both it and the other company have combined debts of over $154,000, no separate information is provided for Respondent itself. The appeal also states that Respondent is closed and non-productive and that its assets are "under threat of IRS (Social Security Taxes) embargo." This financial information concerning Respondent does not justify any further reduction of the $3,000 civil penalty imposed in the Chief Counsel's Order.

Findings

I have determined that there is not sufficient information to warrant any mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 payable in six monthly installments of $500 each is appropriate in light of the serious nature and all of the circumstances concerning this violation, its extent and gravity, Respondent's culpability (aggravated by the numerous "warnings" given to Respondent about such a violation), Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 23, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the first $500 monthly installment of the $3,000 civil penalty assessed herein within 20 days of receipt of this decision and each subsequent $500 monthly installment during each of the five subsequent months will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations

Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. § 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 15, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–38–CRR]

Action on Appeal

In the Matter of: Carli Cylinder Repair Co., Respondent

Background

On October 27, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Carli Cylinder Repair Co. (Respondent) assessing a penalty in the amount of $1,500 for having knowingly represented DOT–4 series specification cylinders as meeting the requirements of the Hazardous Materials Regulations by rebuilding them when Respondent was not authorized to rebuild DOT–4 series cylinders, in violation of 49 CFR 171.2(c) and 173.34(l). The Order assessed a civil penalty of $1,500, reduced from the $3,000 civil penalty originally proposed in the March 27, 1989 Notice of Probable Violation. By letter dated February 2, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent does not contest the violation or the amount of the civil penalty. However, it indicates that Hurricane Hugo collapsed and destroyed its working facilities and that its owner is unemployed and penniless. On that basis, Respondent requests that the civil penalty be suspended or that its monthly payments be reduced.

Respondent's allegations concerning its facilities have been confirmed by the Public Service Commission of Puerto Rico. In light of that calamity and Respondent's greatly reduced ability to pay, mitigation of the civil penalty by an additional $750 and a proportional reduction of the monthly payments are appropriate.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $750 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 27, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $750, payable in six consecutive equal monthly installments of $125 each. The first payment shall be due on July 12, 1990, and each succeeding payment shall be due on the 12th day of each month thereafter until a total of $750 has been paid. Failure to pay the first installment or any succeeding monthly installment on time will result in the entire remaining amount of the civil penalty, without notice, becoming immediately due and payable on July 12, 1990.

Failure to pay the first $125 installment payment of the $750 civil penalty assessed herein by July 12, 1990, will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 15, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 80–40–CR]

Action on Appeal

In the Matter of: Eagle Industries, Inc., Respondents.

Background

On July 10, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Eagle Industries, Inc. (Respondent) assessing a penalty in the amount of $2,500 for having knowingly represented and marked cylinders as meeting the requirements of the Hazardous Materials Regulations when hydrostatic testing was conducting using equipment having an expansion gauge which could not be read to an accuracy of one percent or 0.1 cubic centimeter (cc) (Violation No. 1), and when records showing the results of reinspection and retest were not kept (Violation No. 2), in violation of 49 CFR 171.2(c), 173.34(e)(3), and 173.34(e)(5). (The Chief Counsel's Order inadvertently omitted citation of 49 CFR 173.34(e)(5), although the Order clearly found a violation of that requirement.) The Order assessed the $2,500 civil penalty originally proposed in the March 22, 1989 Notice of Probable Violation, as amended on June 5, 1989. By letter dated August 1, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

With respect to Violation No. 1, Respondent contends that it offered the inspector from the Office of Hazardous Materials Transportation (OHMT) the opportunity to return the day following the inspection to meet with the shop foreman (who had been absent during the inspection), but that the OHMT inspector declined to do so. Respondent further stated that burettes must be stored carefully as they are easily broken and expensive to replace.

The OHMT inspector informed Respondent that he was investigating an accident on the day after his inspection of Respondent's operation, and could not return. Respondent is essentially reiterating the argument that it raised

before the Chief Counsel that its shop foreman is responsible for testing cylinders and uses the correct size burettes. During the inspection, however, Mr. Bill Salmon stated that the only burette used to test cylinders was the one marked in increments of 1.0 cc, and that he had never used the other burettes, which were still in the package. The OHMT inspector asked Bill Salmon specifically if there were any cylinders in the shop that had been tested with the burette in question, and Mr. Salmon identified a cylinder (Serial #HO 24528) as one so tested. In addition, the OHMT inspector photographed retest records for a cylinder (Serial No. 706691C) which Bill Salmon signed as having tested. The fact that Respondent may have had other employees who tested cylinders correctly does not alter the fact that Bill Salmon, identified by Respondent as a designated hydrostatic test operator, admitted that he did not test cylinders as required. Moreover, as noted in the Order, this violation was reviewed with Bill Salmon at the time of the inspection and he did not contest the violation. Therefore, I find there is sufficient evidence in the record to sustain a finding of violation.

With respect to Violation No. 2, Respondent appears to contend that, since it used a proof pressure test rather than a water jacket test for certain cylinders, no expansion results were necessary. Proof pressure tests are permissible only for low pressure cylinders, not for cylinders with 1800 psi service pressure and 3000 psi test pressure. In addition, during the OHMT inspection, Bill Salmon stated that Respondent tests all cylinders by the water jacket method. The Notice alleged and the Order found that Respondent's hydrostatic retest records omitted total, elastic, and permanent expansion information for several cylinders for which a proof pressure test is not allowed. Therefore, Respondent's argument concerning proof pressure testing for low pressure cylinders is irrelevant to this violation.

Finally, Respondent reiterated its argument that it is a small family-owned business and the penalty would cause it a financial hardship. Respondent contends that its total liabilities are greater than $60,000, and that a recent move cost more than $10,000. Respondent provided no financial statement supporting its contention or contradicting the information provided in the Dun & Bradstreet report which the Chief Counsel used in assessing the penalty. In addition, the Dun & Bradstreet report indicates that Respondent had cash on hand of $36,704 as of December 31, 1988. I find that the Chief Counsel correctly determined that Respondent is able to pay the civil penalty and doing so would not adversely affect its ability to continue in business.

Findings

In summary, I find Respondent's arguments on appeal to be without merit. I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Repondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of July 10, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accurual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date issued: November 28, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–46–HMI]

Action on Appeal

In the Matter of: Walters-Dimmick Petroleum, Inc., Respondent.

Background

On May 4, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Walters-Dimmick Petroleum, Inc. (Respondent) assessing a penalty in the amount of $1,000 for having knowingly failed to file a DOT Form F 5800.1 report within fifteen (15) days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16.

The Order assessed a civil penalty of $1,000, which was $500 less than the $1,500 assessment originally proposed in the March 13, 1989 Notice of Probable Violation. By letter dated May 15, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Notice of Probable Violation (Notice) originally issued in this matter assessed a penalty of $1,500 against Respondent for failing to timely comply with the 15-day deadline for filing a written report on DOT Form F 5800.1, as mandated by 49 CFR 171.16. Respondent requested mitigation of the penalty, based on its lack of bad faith and on the fact that, upon being informed that it had committed a violation, it did file the Form F 5800.1; this filing, however, occurred subsequent to expiration of the 15-day deadline. The Chief Counsel, RSPA, reduced Respondent's civil penalty, by one-third of the proposed assessment, to $1,000.

Respondent has alleged that it was not guilty of "knowingly" failing to file the Form F 5800.1 within the requisite 15-day period. Respondent, as a carrier of hazardous materials, is expected to be aware of the hazardous materials transportation regulations. Furthermore, as explained in the Notice, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. The fact that Congress has permitted the Chief Counsel to assess a penalty as high as $10,000 per violation further supports the reasonableness of the reduced penalty of $1,000 for this violation.

Findings

I have determined that there is not sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,000 is appropriate in

light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of May 4, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address. This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: July 5, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–52–HMI]

Action on Appeal

In the Matter of: Westar Corporation, Respondent.

Background

On May 31, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Westar Corporation (Respondent) assessing a penalty in the amount of $1,500 for a knowing failure to file a written Hazardous Materials Incident Report, DOT Form F. 5800.1, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the March 13, 1989 Notice of Probable Violation. By letter dated June 20, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order determined that Respondent, a carrier transporting a hazardous material, failed to report on DOT Form F 5800.1, within 15 days of its discovery, an unintentional release of approximately 200 pounds of sodium cyanide, which occurred on June 14, 1988, in violation of 49 CFR 171.16.

Respondent primarily bases its appeal on the double jeopardy clause of the Fifth Amendment to the United States Constitution. Respondent alleges that the State of Arizona earlier fined it for the spilling of sodium cyanide on an Interstate Highway. This argument is invalid for several reasons. First, the Double Jeopardy Clause is applicable only in criminal, not civil penalty cases. Since this case involves a civil penalty action, the principle of double jeopardy is inapplicable. Second, the Double Jeopardy Clause does not even preclude separate criminal prosecutions for the same act by two different sovereigns—the Federal Government and a State Government. Third, although the State and Federal actions against the Respondent related to the same incident, two different sets of regulatory requirements are involved. That is, there are two different violations—one for the spill and one for a failure to report the spill. In the State action, Respondent was fined for the hazardous materials release which occurred on an Interstate Highway. This Federal case involves Respondent's failure to file a written report of the incident within 15 days of its discovery as required by 49 CFR 171.16. Fourth, Mr. Robert Bartlett, a motor carrier investigator for the Arizona Department of Public Safety's Hazardous Materials Division, has stated to RSPA that no action has been taken concerning this spill by either his Department or the Arizona Department of Environmental Quality. In summary, any State assessment of a fine against Respondent related to the spill does not excuse Respondent's failure to file the required written report.

Respondent also contends that a civil penalty cannot be levied against it because on October 25, 1988, it filed a Chapter 11 petition with the U.S. Bankruptcy Court for the District of Nevada. Although 11 U.S.C. 362(a) of the Bankruptcy Code grants Respondent an automatic stay while it is under the protection of the Bankruptcy Court, it does not preclude RSPA from issuing this Final Order. Pursuant to 11 U.S.C. 362(b)(4) of the Bankruptcy Code, an automatic stay is not applicable to the commencement or continuation of an action by a governmental unit to enforce its regulatory power. This Order should not be construed as a demand and is issued to administratively conclude this case and to establish the fact of Respondent's liability for a civil penalty. Thus, this Order is not an effort to collect a debt, and, therefore, is unimpeded by Respondent's protection under the Bankruptcy Court.

Findings

I have considered the issues raised by Respondent in its appeal and find them to be without merit. Furthermore, I find that sufficient evidence has not been presented to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. Therefore, the Order of May 31, 1989, assessing a $1,500 civil penalty, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

If this penalty is not voluntarily paid, RSPA will seek collection through the Bankruptcy Court while the Respondent's Chapter 11 proceeding is pending. In the event that Respondent elects to pay the civil penalty, a certified check or money order (containing the Ref. No. of this case) should be made payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. In that event, Respondent also should send a photocopy of that check or money order to the Office of Chief Counsel (DCC-1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: August 21, 1989.

Travis P. Dungan.

Certified Mail—Return receipt requested

[Ref. No. 89–55–HMI]

Action on Appeal

In the Matter of: Slay Transportation Co., Inc., Respondent.

Background

On May 15, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Slay Transportation Co., Inc. (Respondent) assessing a civil penalty in the amount of $1,500 for having knowingly failed to file a DOT Form F 5800.1 report within fifteen (15) days of

discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16.

The Order assessed the $1,500 civil penalty originally proposed in the March 13, 1989 Notice of Probable Violation. By letter dated May 31, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

With its appeal, Respondent submitted a Motor Carrier Accident Report (MCS 50–T), which it had filed with the Federal Highway Administration (FHWA) in October 1988, concerning the incident in question. Respondent also states that it did file the required DOT Form F 5800.1 after being advised in February 1989 of the necessity to do so and having been provided with the blank form. It has provided a copy of the completed 5800.1.

Filing of the MCS 50–T did not obviate the need to file the 5800.1 since each form provides important information to a separate government agency, which information is utilized by each agency to compile a data base used for its own regulatory purposes. However, Respondent's filing of the 5800.1 after being advised of the need to do so and prior to its receipt of the Notice of Probable Violation merits partial mitigation of $100.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,400 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of May 15, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,400.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: July 25, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–60–SP]

Action on Appeal

In the Matter of: Tennant Company, Respondent.

Background

On September 20, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), United States Department of Transportation (Department), issued an Order to Tennant Company (Respondent) assessing a penalty in the amount of $3,000 for having knowingly offered for transportation in commerce a flammable liquid, resin solution, and a corrosive liquid, n.o.s., not in compliance with the packaging requirements, in violation of 49 CFR 171.2(a), and 173.119, and 173.245(a), respectively. (Although the Order inadvertently cited 49 CFR 171.16, the Notice of Probable Violation (Notice), issued May 2, 1989, cited the correct sections of the regulations, and the facts in the Order were correct.)

The Order assessed a civil penalty of $3,000, reduced from the $3,500 civil penalty originally proposed in the Notice. By letter dated October 9, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

The Chief Counsel's Order found two violations of the Hazardous Materials Regulations. Respondent does not challenge the civil penalty for the second violation: That Respondent knowingly offered for transportation in commerce corrosive liquid, n.o.s., in one-gallon containers that were not authorized by 49 CFR 173.245(a). Respondent's appeal concerns only the first violation: that Respondent knowingly offered for transportation in commerce a flammable liquid, resin solution, in 37A open-head steel pails that were not authorized by 49 CFR 173.119. In its appeal, Respondent argues that the $2,000 assessment for this violation is too harsh, and requests a further reduction of the penalty amount by approximately 50 percent. Respondent states that it provided for nonspecification containers of resin solution to the transporter for shipment and inquired whether the containers were acceptable. Respondent contends that the transporting company assured it that the containers met the Department's regulatory requirements, and that it in good faith left the containers with the carrier for transportation. Respondent also raises the issue that the Department's regulations are confusing. Finally, Respondent contends that it did not knowingly violate any of the Department's laws and should not be held to that level of intent.

The Chief Counsel already mitigated the penalty by $500 in light of Respondent's good faith mistake in interpreting the regulations, its reliance on advice from its carrier that it was in compliance with the regulations, and its corrective action to avoid a recurrence of these violations. Moreover, Respondent's contention that it did not knowingly violate any of the Department's regulations is not persuasive. As indicated in the Notice, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually know of, or intend to violate, the legal requirements. As an offeror of hazardous materials, Respondent is required to be knowledgeable concerning all of the hazardous materials regulations. I therefore find the violations were "knowing." Respondent has not presented any new information or argument to warrant further mitigation or to indicate that the Chief Counsel did not properly consider the penalty assessment factors.

Findings

I have determined that there is not sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability,

Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of September 20, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 15, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–63–HMI]

Action on Appeal

In the Matter of: John's Oil Company, Respondent.

Background

On May 26, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to John's Oil Company (Respondent) assessing a penalty of $1,500 for having knowingly failed to file a written report on DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16.

The Order assessed the $1,500 civil penalty originally proposed in the March 20, 1989 Notice of Probable Violation. By letter dated June 20, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated into this appeal by reference.

Discussion

Respondent has requested reconsideration of the penalty because it attempted to notify all local, state and Federal agencies. Respondent states that its failure to file a written hazardous materials incident report occurred while it was concentrating its efforts on consoling the family of its deceased driver, assisting in the cleanup of the gasoline spill and trying to find other means to make deliveries to its customers. Respondent also states that it has not been reimbursed for the loss of its truck and other accident-related expenses.

I recognize that the death of Respondent's driver was a sad and difficult time for Respondent and that clean-up efforts consumed much of Respondent's time. However, reporting incidents of this nature is critical to the development of a complete hazardous materials transportation data base and to the prevention of similar incidents in the future. Partial mitigation of the penalty by $100 is appropriate in recognition of the remedial action Respondent took by filing DOT Form 5800.1 on June 29, 1989.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,400 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of may 26, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed in that Order is mitigated to $1,400.

Failure to pay the civil penalty assessed in this matter within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current rate of seven percent (7%) per annum in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: October 17, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–69–CR]

Action on Appeal

In the Matter of: Jim Hollis' Scuba World, Respondent.

Background

On August 28, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Jim Hollis Scuba World (Respondent) assessing a civil penalty in the amount of $3,250 for having knowingly (1) represented to be retesting DOT specification cylinders in accordance with the Hazardous Materials Regulations (HMR) when Respondent's equipment had a pressure gauge which could not be read to within one percent of test pressure and an expansion gauge which could not be read to within one percent of total expansion or 0.1 centimeter; (2) represented a DOT specification cylinder as meeting the requirements of the HMR when the cylinder had not been marked with the specification identification "3AL" at the time of retest; and (3) represented DOT specification cylinders as meeting the requirements of the HMR when records showing the results of reinspection and retest had not been maintained as required, in violation of 49 CFR 171.2(c), 173.23(c), 173.34(e)(3), and 173.34(e)(5). The Order assessed a civil penalty of $3250, reduced from the $4000 civil penalty originally proposed in the April 19, 1989 Notice of Probable Violation (Notice). By letter dated October 16, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent maintains that a $500 civil penalty would be more appropriate for the first violation than the "proposed" penalty of $1500. Respondent admits that it may have committed a "knowing" violation, but argues that there is no evidence that it was intentional. Respondent further admits that the calibration of the hydrotesting equipment was incorrect and acknowledges that it has a responsibility to be aware of its legal obligations as a retester of scuba tanks. Respondent argues, however, that its immediate response to correct the problem should be taken into consideration by the Department when determining the assessment amount. Respondent also points out that this is its first violation and that it relied on the past manager's instruction regarding calibration.

Respondent raised, and the Chief Counsel considered, each of these arguments following the issuance of the Notice, which had proposed a civil penalty of $2,000 for this violation. The Chief Counsel's Order pointed out that the Notice had "advised Respondent that a 'knowing' violation does not require any intention to violate the legal requirements." Furthermore, the Order specifically referred to Respondent's "lack of prior offenses" as well as Respondent's "reliance on its prior manager, and the immediate corrective action it took" as reasons for "reducing the proposed penalty amount for this violation by $500, to $1,500." Thus, the $1,500 was the amount assessed, not, as Respondent mistakenly believes, the amount proposed. In addition, the Chief Counsel may have been too generous in reducing the proposed amount in part because of Respondent's reliance on its prior manager. A Dun & Bradstreet report dated April 11, 1989, which is part of the record of this case, indicates that Respondent's Chief Executive Officer and 100% owner of its stock, Mr. James E. Hollis, started the business in 1969. Therefore, although Respondent's current business manager may not have received correct information concerning retesting requirements from the previous business manager, Respondent's CEO and owner should have know the requirements.

In its appeal, Respondent raises for the first time the argument that it "is a *small* business that tests scuba tanks making a minimum return on its investment * * *. A fine in the magnitude of $1500 to a business the size of (Respondent) would be financially devastating to his business." Respondent provides no information concerning the size of its business, the amount of its investment, or the size of its profit. Merely concluding that financial devastation will occur, without supporting documentation, is unconvincing. Moreover, the Chief Counsel's Order considered Respondent's "ability to pay" as well as "the effect of a civil penalty on Respondent's ability to continue in business" in determining the amount of the civil penalty. The Dun & Bradstreet report rates the company's worth at $200,000.

It also states that, as of March 3, 1988, projected annual sales were $600,000, and sales and profit for the 12 months ended December 31, 1987, were up compared with the same period the previous year. Finally, the report indicates that, at least until March 3, 1988, Respondent did more than test scuba tanks. Fifty percent of its business consisted of retailing scuba diving equipment, while the remainder consisted of teaching scuba diving.

Respondent contends that the second violation cited in the Chief Counsel's Order did not occur. Respondent's position is that it was not required to mark the cylinder with the specification identification "3AL" because the test had not been completed. Respondent claims that the cylinder was still in the testing zone and would not be completely tested until the final stamping and VIP stickers [1] are attached and the cylinder is moved to the service area. A form of the same argument was made by Respondent in its May 11 response to the Notice. That argument was considered and rejected by the Chief Counsel; he stated in the Order that "(t)he cylinder in question was stamped as having been retested by Respondent in October 1988, but was not marked as required at that time. Moreover, the inspection took place January 27, 1989, and the cylinder had still not been marked at that time." It is simply not a credible argument that a cylinder, stamped as having been retested in October, was still in testing merely because it had not been marked as required and may not have reached the "service area."

Regarding the third violation, Respondent admits that there were some errors on the retest data sheets, denies that they were numerous, and categorizes them merely as "technical" and "minor." Respondent again states that it "has corrected the situation and, for the most part kept good records." Respondent proposes a $100 penalty for this violation. I disagree. The evidence in the Notice demonstrates that the errors were numerous and were neither technical nor minor. Respondent was assessed a civil penalty for this violation because it represented DOT specification cylinders as meeting the requirements of the HMR when they did not. The Notice had proposed a civil penalty of $1,500 although the maximum possible assessment for this violation is $10,000. The Chief Counsel reduced the assessment to $1,250 "(i)n view of Respondent's reliance on the former manager and its corrective action[.]" Respondent has not made a convincing case for further reduction.

Findings

I have determined that there is not sufficient information to warrant any mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,250 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability reduced by some reliance on the instructions of the former manager, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors. Therefore, the Order of August 28, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the current annual rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the reference number of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

[1] Visual inspection stickers are not required by the HMR and, therefore, are irrelevant.

Dated Issued: March 5, 1990.

Travis P. Dungan.

cc: Jim Hollis' Scuba World
5107 E. Colonial Avenue
Orlando, FL 32807

Certified mail—Return receipt requested

[Ref. No. 89–75–HMI]

Action on Appeal

In the Matter of: Central Grain Corporation, Respondent.

Background

On November 7, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Central Grain Corporation (Respondent) assessing a penalty in the amount of $1,500 for having knowingly failed to file a written report, on DOT Form F 5800.1, within 15 days of discovering a December 19, 1988 incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16. The Order assessed the $1,500 civil penalty originally proposed in the April 7, 1989 Notice of Probable Violation. By letter dated December 20, 1989, Respondent (through counsel) submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent stated that it has taken steps to ensure that there will not be any future violation by instructing its drivers about the incident reporting requirements and instituting new written procedures, which it included with its appeal. Respondent's remedial action warrants mitigation of the civil penalty in the amount of $200.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,300 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of November 7, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,500 civil penalty assessed therein is hereby mitigated to $1,300.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: March 1, 1990.

Travis P. Dungan

cc: Mr. W.R. Harrell, President
Central Grain Corporation
Route 3, Box 459
Elizabeth City, NC 27090

Certified mail—Return receipt requested

[Ref. No. 89–81–SE]

Action on Appeal

In the Matter of: Aztec International Limited, Respondent.

Background

On December 13, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Aztec International Limited (Respondent) assessing a penalty in the amount of $12,000 for having knowingly offered for transportation in commerce a new explosive device that had not been classed and approved in accordance with the Hazardous Materials Regulations (HMR), and which was not in compliance with the packaging and shipping requirements of the HMR, in violation of 49 CFR 171.2(a), 172.101(c)(13)(ii), 172.200(a), 172.202(a), 172.301(a), 172.400(a), 173.3(a), 173.51(b), and 173.86(b).

The Order assessed a civil penalty of $12,000, payable in six monthly installments of $2,000 each, reduced from the $13,500 civil penalty originally proposed in the December 13, 1989 Notice of Probable Violation (Notice). By letter dated January 19, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent does not deny that it was in violation of the HMR, as determined in the Order. Respondent maintains that the violations were not done knowingly because it relied upon information obtained from the Bureau of Alcohol, Tobacco, and Firearms (BATF). Respondent also raises the issue of its financial ability to pay the civil penalty assessed. The remainder of Respondent's arguments are a reiteration of the arguments presented below to the Office of Chief Counsel.

Respondent's argument that it did not "knowingly" violate the HMR because it contacted BATF in a good faith effort to comply with Federal regulations was considered by the Chief Counsel and found uncompelling. As stated in the Notice, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts. There is no requirement that a person actually know of, or intend to violate, the HMR. As an offeror of hazardous materials, Respondent is responsible for having knowledge of and complying with all applicable regulations. Respondent's reliance on the representations of another Federal agency which does not have authority to enforce the Hazardous Materials Transportation Act does not excuse its violation of the HMR.

Furthermore, the administrative record in this case indicates that at least one company official had actual knowledge of the regulations. The record reflects that in 1982, Respondent's managing director, Mr. Sandy Brygider, corresponded with the Office of Hazardous Materials Transportation (OHMT) in his capacity as president of Bingham, Ltd., Norcross, Georgia. The correspondence arose out of RSPA's inquiry into a possible violation of the HMR by Bingham, Ltd., specifically, offering for transportation in commerce certain small arms ammunition without that material having been examined, classed, and approved as required by the regulations. I therefore find that the record supports the Chief Counsel's determination that the violations were committed knowingly.

Respondent's second basis for appeal is its financial condition. Respondent argues that the February 1988 Dun & Bradstreet Report reflected in the Notice was inaccurate and did not reflect the company's actual cash value. Respondent also challenges the penalty

amount because it does not know how the Dun & Bradstreet Report figures were used in arriving at the penalty amount proposed in the Notice.

Respondent's financial condition is relevant to two of the assessment criteria listed in the HMR at 49 CFR 107.331: the Respondent's ability to pay and the effect of the penalty on the Respondent's ability to continue in business. The Dun & Bradstreet Report is a tool used in evaluating the financial aspects of the assessment criteria. The nature and circumstances of the violation, the extent and gravity of the violation, the degree of culpability, prior offenses, and such other matters as justice may require were also considered. Accordingly, on the basis of all of the foregoing criteria, the Chief Counsel determined that partial mitigation of the penalty in light of Respondent's corrective action and implementation of an employee training program was warranted.

Respondent's financial condition was duly considered by the Chief Counsel. The Order provides for a payment schedule whereby Respondent could pay the penalty amount in six monthly installments of $2,000, in order to avoid cash flow problems. On appeal, Respondent has provided unverified figures which it states were prepared by its accountant for income tax purposes. These figures show a net loss for 1989 of $12,361.42. This unverified financial information does not warrant reduction of the penalty. Respondent's submission reflects a health current ratio and retained earnings. Furthermore, according to Respondent's representations at an informal conference conducted on October 20, 1989, it has annual sales of $250,000–$300,000. The record does not support further reduction of the penalty amount of the basis of Respondent's financial condition.

Findings

I have determined that there is not sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $12,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of December 13, 1989, including the payment schedule, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty of $12,000 shall be payable in six monthly installments of $2,000 each, with the first payment due within 20 days of receipt of this decision. The five remaining payments shall be due on the same date of the succeeding five months until the entire amount is paid. If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable.

Respondent's failure to pay this accelerated amount in full will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue on the entire penalty amount if payment is not made within 90 days of default.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: April 30, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–83–EXR]

Action on Appeal

In the Matter of: Central Vermont Railway Inc., Respondent.

Background

On December 5, 1989, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Central Vermont Railway, Inc. (Respondent) assessing a penalty in the amount of $1,750 for having knowingly transported in commerce railway track torpedoes, Class B explosives, and railway fusees, flammable solid material, in non-DOT specification packaging, in violation of 49 CFR 171.2(b), 173.91(f), and 173.154a. The Order assessed a civil penalty of $1,750, reduced from the $2,000 civil penalty originally proposed in the June 8, 1989 Notice of Probable Violation. By letter dated January 24, 1990, Respondent (through counsel) submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent contends that the penalty assessment should be reduced to a total of $250 because one of the factors applied in originally proposing the penalty is incorrect, and that "this is a significant variation in the factors used." Respondent contends that the evidence cited in the Notice of Probable Violation included a statement that Respondent had retained earnings of $18.9 million at the end of 1988, when in fact Respondent had accumulated losses of $18.9 million at that time. Respondent attached a copy of "consolidating balance sheets for 1987 and 1988."

The balance sheet Respondent submitted shows only liabilities, not assets, making an accurate evaluation difficult. The balance sheet shows Respondent's parent corporation, Grand Trunk Railroad, as having retained earnings in excess of $38 million in 1988. It is noteworthy that Respondent did not dispute the other financial evidence in the Notice of Probable Violation, which included $10,000 in cash on hand, current assets of $8.36 million, and current liabilities of $8.3 million. The financial information cited in the Notice of Probable Violation is not used to increase the proposed penalty amount. It is only used to reduce the proposed penalty amount if the information indicates the Respondent would have difficulty paying the proposed assessment, or doing so would adversely affect its ability to continue in business. Accordingly, I find that the evidence in the record does not support Respondent's contention that the penalty should be further mitigated.

Respondent also contended that its "paper violation" did not result in injury to anyone, and that it has successfully monitored the three-month extensions to its exemption which were granted throughout 1989 and timely applied for further extensions.

The nature and gravity of the violation were already considered in proposing and assessing the civil penalty. Respondent's efforts to monitor its exemption subsequent to the violation, while laudable, do not warrant mitigation. The Chief Counsel already mitigated the penalty by $250 based on Respondent's remedial action

in establishing a computer warning system to apprise it of exemption expiration dates.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $1,750 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of December 5, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Dated Issued: March 16, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–91–SB]

Action on Appeal

In the Matter of: Lumenyte International Corp. Respondent.

Background

On June 7, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Lumenyte International Corporation (Respondent) assessing a penalty in the amount of $6,750 for having knowingly offered an organic peroxide for transportation by vessel in nonspecification, unauthorized packages; without properly blocking and bracing those packages inside a freight container; in packages not marked with the proper shipping name or identification number of the hazardous material; and accompanied by shipping papers which contained additional information about the hazardous material in front of and within the proper hazardous material shipping description, listed the hazardous material description in the improper sequence, and failed to contain a shipper's certification indicating compliance with the regulations, in violation of 49 CFR 171.2(a), 173.218(a)(1), 176.76(a)(2), 176.76(a)(6), 172.301(a), 172.201(a)(4), 172.202(b) and 172.204(a). The Order assessed a civil penalty of $6,750, reduced from the $7,750 civil penalty originally proposed in the July 12, 1989 Notice of Probable Violation. By letter dated June 27, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its letter of appeal, Respondent raises several issues. Each issue is summarized and discussed in the following paragraphs.

First, Respondent contends that the "should have known" test has not been met with respect to any of the violations because it relied upon the advice of an "expert" company in offering the organic peroxide for transportation and did not know what the regulations require. With two exceptions, discussed below, Respondent asserts that it knew of the facts constituting the violations but did not know that there was a violation. Respondent's contentions concerning the "should have known" test are without merit. As indicated in both the Notice and the Order, 49 CFR 107.299 provides that there is no requirement that a person actually knew of, or intended to violate, the regulatory requirements. Because Respondent either knew or should have known the facts constituting its six violations, the requisite "knowledge" test of the statute and the regulations has been met.

Second, Respondent contends that greater weight should be given to its reliance upon a third party with respect to its use of unauthorized packages. The evidence indicates that Respondent loaded organic peroxides in fiberboard boxes marked for transportation of frozen vegetables and containing no UN or DOT specification markings. Offering hazardous materials for transportation cannot be excused by alleged reliance upon a third party; sufficient weight already has been given to that reliance.

Third, Respondent alleges that it did provide blocking, bracing and dunnage, and points to the fact that the packages completed their voyage intact and in place as evidence of that fact. The evidence indicates otherwise. Photographs taken by Office of Hazardous Materials Transportation (OHMT) Inspector Gary P. McGinnis show that there was no blocking, bracing or dunnage around the pallet containing the organic peroxide packages when the freight container was opened for inspection. Thereafter, on November 19, 1988, when Respondent corrected the specification packaging problem, its employee, Mr. Scott Dill, and OHMT inspectors McGinnis and Douglas S. Smith corrected the blocking and bracing. Because this action was taken prior to the water voyage of the hazardous materials, their eventual safe arrival does not constitute evidence that Respondent had properly blocked and braced the hazardous materials when it offered them for transportation.

Fourth, Respondent states that the packages in question were properly marked except for the absence of a DOT number. To the contrary, the photographs taken by Inspector McGinnis show that the packages were not marked with either the proper shipping name or the identification number required by 49 CFR 172.301. Instead the boxes were preprinted with information about broccoli and were not marked with the required hazardous materials information.

Fifth, Respondent contends that there was no evidence concerning information improperly preceding the "hazardous material" information on the shipping papers. However, the shipping paper for the hazardous materials in question describes the shipment as "Chemical **, ceramic Jars, fiberboard containers, and dry ice. **CHEMICAL IS ORGANIC PEROXIDE—PRODUCED BY PPG INDUSTRIES. * * *" All of the quoted verbiage improperly preceded the required information which must appear first on the shipping paper: the proper shipping name, hazard class and identification number.

Sixth, Respondent asserts that it prepared and delivered to the "shipper" (apparently it means the carrier) a shipper's certificate to accompany the shipment and that the "shipper" apparently "failed to include it." Neither of the documents relating to this

shipment and provided to the OHMT inspectors (the invoice/shipping paper and the export declaration) contained the required certification that the shipment complied with the Hazardous Materials Regulations. Respondent has not asserted at any earlier time in this proceeding that it ever made or prepared such a certification. Furthermore, Respondent has not provided a copy of a certification. The evidence in the record, therefore, supports a finding that Respondent offered a hazardous material for transportation accompanied by a shipping paper not containing the required shipper's certification.

Seventh, Respondent contends that the civil penalty should be further mitigated because it acted in good faith, the Acting Chief Counsel's Order did not adequately reduce the penalty to reflect Respondent's actual annual sales, it was a one-time shipper of hazardous materials, and its financial condition continues to worsen. The Acting Chief Counsel's Order sufficiently reduced the civil penalty to reflect all of the issues raised by Respondent— in light of all the statutory assessment criteria—and also adequately took into account Respondent's financial condition by authorizing a reasonable payment plan. No additional mitigation is justified.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $6,750 is appropriate in light of the assessment criteria prescribed in 49 CFR 107.331: nature and circumstances of these violations, their extent and gravity, Respondent's culpability (reduced by some reliance on a third party), Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of June 7, 1990, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The civil penalty of $6,750 shall be payable in six monthly installments of $1,000 each and a final installment of $750, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $1,000 installment is due.

If Respondent fails to pay this $6,750 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 22, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–122–HMI]

Action on Appeal

In the Matter of: Warrenton Oil Company, Respondent.

Background

On September 14, 1989, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Warrenton Oil Company (Respondent) assessing a penalty in the amount of $900 for having knowingly failed to file a written report on DOT Form F 5800.1 within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR 171.16. The Order assessed a civil penalty of $900, reduced from the $1,500 civil penalty originally proposed in the July 20, 1989 Notice of Probable Violation. By letter dated September 29, 1989, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent requested that a new attorney review its original reply and stated that the grounds for appeal are based on that original reply. Respondent contends that mitigation of the civil penalty to $900 from the original $1,500 is not appropriate, considering the nature and gravity of the violation.

It is RSPA's standard procedure to assign a different attorney to review an appeal. Respondent did not present any new information in its appeal and accordingly, I have reviewed its original response to the Notice and the notes of the informal telephone conference, in addition to the other evidence in the record. Respondent, as a carrier of hazardous materials, has a responsibility to be aware of the regulations applicable to its operations. The fact that it was not aware of the regulations and relied on the representations of Federal officials was adequately considered by the Chief Counsel. Respondent's reliance does not excuse the occurrence of the violation. Further, Respondent did not file a written report until more than a month after it was advised of the need to do so. The Chief Counsel provided sufficient mitigation of the proposed penalty amount.

Findings

Accordingly, I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $900 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of September 14, 1989, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

Failure to pay the civil penalty assessed herein within 20 days of receipt of this decision will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same

authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: December 21, 1989.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–138–CR]

In the Matter of: A-Advanced Fire & Safety, Inc. Respondent.

Action on Appeal

Background

On February 14, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to A-Advanced Fire & Safety, Inc. (Respondent) assessing a penalty in the amount of $3,300, payable in six equal monthly installments of $550 each, for having knowingly: (1) Represented cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) when performing cylinder retests with equipment having a pressure gauge that could not be read to an accuracy of 1 percent of test pressure; (2) failed to keep accurate records showing the results of reinspections and retests of DOT specification cylinders; (3) failed to mark each DOT specification cylinder passing retest with the retester's identification number (RIN); and (4) failed to mark a DOT–E 6498 cylinder with the specification identification "3AL" at the time of its retest, in violation of 49 CFR 171.2(c), 173.34(e)(3), 173.34(e)(5), 173.34(e)(6), and 173.23(c) of the HMR. The Order assessed a civil penalty of $3,300, reduced from the $4,250 civil penalty originally proposed in the October 4, 1989 Notice of Probable Violation (Notice). By letter dated March 8, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent acknowledges that the gauge was not working properly at low test pressures, but maintains that the gauge still gave accurate test readings on the cylinders between 1,000 and 5,000 pounds of pressure. Respondent's argument ignores the fact that 49 CFR 173.34(e)(3) requires that a pressure gauge be capable of being read to within 1 percent of test pressure. Moreover, it cannot state with certainty that its improperly calibrated equipment gave accurate test readings. Pursuant to 49 CFR 173.34(e)(4), a cylinder must be condemned when the permanent expansion exceeds 10 percent of the total expansion. The use of inaccurate equipment to conduct hydrostatic testing increases the risk that a cylinder will fail after being placed back in service when it should have been condemned.

Respondent also admits the second and fourth violations. (Respondent did not address the third violation, for which no civil penalty was assessed.) Regarding the former, Respondent acknowledges that its paperwork was sloppy and that the employees who fill out the retest inspection sheets had been interrupted with other duties. With respect to the fourth violation, Respondent contends that it had ignored the DOT letter advising it of the requirement to mark the DOT–E 6498 cylinder with the specification identification "3AL" at the time of retest because the letter had not been sent by certified mail. This does not warrant a further reduction of the civil penalty.

Respondent refers to the changes in its operation to prevent these violations from occurring again. This is not new information. In the February 14 Order, the Acting Chief Counsel took these changes into consideration when she reduced the civil penalty to $3,300 from the proposed amount of $4,250. Finally, Respondent argues that the civil penalty should be reduced because the violations were not intentional, and occurred only because of Respondent's sloppiness. The fact that the violations were not intentional does not excuse them. The Notice had advised Respondent that a "knowing" violation does not require any intention to violate the legal requirements.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $3,300, payable in six equal monthly installments of $550 each, is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of February 14, 1990, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331. The civil penalty of $3,300 shall be payable in six monthly installments of $550 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal, and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $550 installment is due.

If Respondent fails to pay this $3,300 in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590–0001. Respondent must send a photocopy of each check or money order to the Office of Chief Counsel (DCC–1), RSPA, Room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 21, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–152–CR]

Action on Appeal

In the Matter of: J's Cylinder Requalification and Maintenance Co., Inc. Respondent.

Background

On March 9, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to J's Cylinder Requalification and Maintenance Co., Inc. (Respondent) assessing a civil penalty in the amount of $3,250 for having knowingly represented cylinders as meeting the requirements of the Hazardous Materials Regulations (HMR) (49 CFR parts 171–180) when the following violations were found: (1) retesting was not performed using equipment having an expansion gauge which could be read with an accuracy of one percent of total expansion or 0.1 cubic centimeters (cc); (2) the cylinders were marked with a test date when the hydrostatic retest had not yet been performed; (3) proper records showing the results of reinspection and retest were not maintained; and (4) a cylinder manufactured for use as a DOT–E 6498 exemption cylinder had not been marked with the specification "3AL" before or at the time of retesting. The Order found that Respondent had violated 49 CFR 171.2(c), 173.23(c), 173.34(e)(1)(ii), 173.34(e)(3), and 173.34(e)(5) of the HMR.

The penalties assessed in the Order reflect partial mitigation of the penalty amounts proposed in the Notice of Probable Violation (Notice) issued December 26, 1989, based upon Respondent's corrective action. No additional mitigation was deemed warranted based upon Respondent's financial circumstances or the effect of the penalty amount on Respondent's ability to continue in business. The Order of the Acting Chief Counsel is incorporated herein by reference.

Respondent submitted a timely appeal of the Order, and, on the basis of the arguments set forth in its appeal, proposed a settlement of $500.00 for its failure to conduct retesting with an expansion gauge which could be read with an accuracy of one percent of total expansion or 0.1 cubic centimeters. Respondent proposed that a compliance order be issued for the other violations.

Discussion

In its appeal, Respondent does not contest the findings of the Acting Chief Counsel with respect to Violation No. 1, as set forth in the Order. With respect to Violations Nos. 2 and 3, Respondent disputes whether the acts which form the bases of the violations were in violation of the HMR. Respondent argues that the regulations are subject to interpretation and can be read in a manner which supports a finding of no violation. With respect to Violation No. 4, Respondent argues that its actions were neither in violation of the regulations nor done knowingly or intentionally. Respondent's arguments with respect to Violations Nos. 2–4 are discussed in greater detail below.

Violation No. 2

In the Order, Respondent was assessed a penalty of $750 for marking the cylinders with a test date before hydrostatic testing had been performed. In its appeal, Respondent states that the cylinders were marked and then tested by one individual, in assembly line fashion, within a one hour period. Any cylinder which failed had its stamp or marking "removed" by that same individual. Thus, Respondent argues, there was little chance that a failed cylinder would retain its mark and be returned for service or be placed where someone other than the retest operator would be misled by the mark. Respondent argues that the regulatory directive that cylinders shall not be marked as meeting the requirements of the regulations unless retested should be construed broadly to encompass the entire requalification and maintenance procedure.

The HMR unequivocally state that a packaging or container *shall not be marked unless* it has been retested or has undergone any other required manufacturing or maintenance procedure required by the HMR. (emphasis supplied) This is to avoid any opportunity for error. Respondent has taken corrective action and discontinued its practice of marking cylinders before retesting. For this reason, the proposed penalty was mitigated by $250 in the Order. I find that further mitigation of the penalty amount by an additional $250 is appropriate on the basis of Respondent's argument that there is a negligible chance of error in a one-person retesting operation where the retest operator does not relinquish control of the cylinders being tested until all testing has been completed. Under these circumstances, I agree there is less likelihood of a safety risk.

Violation No. 3

Respondent was assessed a penalty of $750 for its failure to maintain proper records showing the results of reinspection and retest. Partial mitigation of the proposed penalty was found appropriate in the Order because of procedures Respondent has adopted to assure the proper recording of the results of visual inspection on its retest rocords. In its appeal, Respondent argues that its records did comply with the regulations because it noted the cause of any cylinder failing visual inspection on its retest report. Therefore, the absence of any notation indicated that the cylinder had passed inspection. Respondent further asserts that what constitutes proper record keeping is a subjective determination, and that under Respondent's proposed interpretation of the regulations, its "negative reporting system" was proper.

Section 173.34(e)(5) of the HMR is explicit. It states that "[r]ecords *showing the result of reinspection* and retest must be kept * * *." (emphasis supplied) No provision is made for negative implications in recording those results. I do not find that additional mitigation of the penalty amount is warranted for this violation. Furthermore, Respondent did not submit any evidence of records showing failures noted or any written procedures or directions to employees to support its position that visual inspections are actually done.

Violation No. 4

Respondent has been assessed a penalty of $500 for its failure to mark a DOT–E 6498 Exemption cylinder "3AL" before, or at the time of, its next retest, as required under 49 CFR 173.23(c). Respondent denies that its failure to so mark the cylinder was done knowingly, or that it was a violation of the regulations. In support of its argument, Respondent notes that § 173.23(c) provides that a DOT–E 6498 Exemption cylinder may be continued in "USE" if marked 3AL before or "AT THE TIME OF NEXT RETEST." (emphasis supplied by Respondent) Since the cylinder was not in use, Respondent argues there was no violation. In addition, Respondent argues that the provision referring to the time of retest could be interpreted to include the entire time the cylinder is in the uninterrupted possession of the retester for purposes of reinspection and retesting. Under Respondent's interpretation of § 173.23(c), the violation would not occur until the cylinder left the retester's premises, and perhaps not until it was actually filled and used.

Respondent's interpretation of this regulatory requirement is too broad. In 1982, Exemption DOT–E 6498 was eliminated, and its provisions became the manufacturing and testing requirements for specification 3AL

cylinders contained in 49 CFR 178.346 and 178.46–1 *et seq.* (See 46 FR 62452, published December 24, 1981, and corrections published April 1, 1982 and May 13, 1982, at 47 FR 13816 and 47 FR 20591, respectively.) Following notice and comment rulemaking, the HMR were amended to require that a DOT–E 6498 Exemption cylinder be marked 3AL to signify that it is a specification cylinder, and that, accordingly, provisions pertaining to its use and manufacture are contained in the HMR. (See 46 FR 62452, published December 24, 1981). The regulations provide that markings on the cylinder be changed before or at the time of the next retest in order to prevent the cylinder from being released from retesting before it has been marked. If a cylinder were released without receiving the necessary markings, it could be another five years before another opportunity to mark it arises. (Under 49 CFR 173.34(e), most cylinders, including DOT–3AL cylinders, must be retested at five year intervals.) Nevertheless, I find that Respondent's failure to mark the cylinder at the time of retesting did not impact upon the safe use of the cylinder. Accordingly, I find that additional mitigation of the assessed penalty in the amount of $250 is warranted.

Financial Assessment Criteria

Respondent has again placed its financial circumstances and ability to pay the assessed penalty in issue on appeal. Respondent asserts that it was unaware that the purpose of the Dun & Bradstreet inquiry into its finances was for purposes of an investigation by the U.S. Department of Transportation when its Director, Mr. Eddins, provided the information. Respondent states that had it known the purpose of the Dun & Bradstreet inquiry, it would have made certain that the appropriate, knowledgeable person provided the information to ensure that it was reliable and accurate. Respondent, and its Director, knew or should have known that the financial information reported to Dun & Bradstreet would be relied upon by third persons, and should have ensured that its response was accurate. Respondent's argument that the Dun & Bradstreet report was misleading was presented by Respondent in response to the Notice and further mitigation on this basis was not found warranted. In its appeal, Respondent has submitted additional information indicating that it is experiencing reduced demand for its services and has had to reduce its workforce in order to cut costs.

Findings

I have determined that there is sufficient information to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order, for the reasons set forth above. I find that a civil penalty of $2,750 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors. Respondent's offer of compromise is hereby rejected.

Therefore, the Order of March 9, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR § 107.331, except that the $3,250 civil penalty assessed therein is hereby mitigated to $2,750. Due to Respondent's financial circumstances, however, the civil penalty of $2,750 shall be payable in three monthly installments of $950, $900, and $900 each, with the first payment due within 20 days of receipt of this decision. The remaining two payments shall be due on the same date of the succeeding two months until the entire amount is paid. If Respondent defaults on any payment of the authorized payment schedule, the entire amount of the remaining civil penalty shall, without notice, immediately become due and payable.

Respondent's failure to pay this accelerated amount will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue on the entire penalty amount if payment is not made within 90 days of default.

Each payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 1, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89–154–HMI]

Action on Appeal

In the Matter of: Regional Enterprises, Inc. Respondent.

Background

On January 17, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Regional Enterprises, Inc. (Respondent) assessing a civil penalty for having knowingly failed to file a DOT Form F 5800.1 report within 15 days of discovering an incident involving the unintentional release of a hazardous material during transportation, in violation of 49 CFR § 171.16. The Order assessed a civil penalty of $1,100, reduced from the $1,400 civil penalty originally proposed in the November 3, 1989 Notice of Probable Violation (Notice). The Acting Chief Counsel's Order is incorporated herein by reference. By letter dated March 8, 1990, Respondent submitted a timely appeal of the Order.

Discussion

In its appeal, Respondent contends that the Notice was inaccurate because it stated that the "incident * * * involved the unintentional release of between 10,000 and 12,000 pounds of sodium hydroxide solution *from a tank truck operated by Regional Enterprise[s], Inc. (Respondent)* * * *" (Emphasis added.) Respondent maintains that the material was released from the equipment of its customer, Champion International Corporation, not through its own equipment. Respondent further argues that because the release occurred after the unloading of the sodium hydroxide solution from its equipment to that of its customer had been completed, it was not required to file Form F 5800.1.

Respondent had argued these same points in a November 14, 1989 written response to the Notice. In the January 17, 1990 Order, the Acting Chief Counsel did not address Respondent's contention that the unintentional release of the hazardous material had occurred through the customer's equipment. As alleged in the Notice, the Order stated, without discussion, that the sodium hydroxide solution was unintentionally released from Respondent's tank truck. The Order also found "that Respondent knowingly committed acts that violated 49 CFR 171.16 of the Hazardous Materials Regulations, *as alleged in the*

Notice." (Emphasis supplied.) There is nothing in the record, however, to refute Respondent's contention that the leak occurred from its customer's equipment, not Respondent's tank truck. The Acting Chief Counsel's finding with respect to this issue, therefore, was not supported by evidence in the record.

The second issue presented in this case is whether Respondent had completed the unloading of the hazardous material from its equipment to that of its customer at the time of the unintentional release. If unloading had not been completed, Respondent, as the carrier, would be the party responsible for filing the form. Section 171.16(a) [as in effect at the time of the incident] required each carrier that transported hazardous materials to have filed Form F 5800.1 within 15 days of having discovered that, during the course of transportation (including loading, unloading, or temporary storage), there had been an unintentional release of hazardous materials from a package. Had unloading been completed, however, the release would not have occurred during the course of transportation, and Respondent would not have been required to file Form F 5800.1.

The Acting Chief Counsel's Order addressed this issue only indirectly. It stated: "During the informal conference, Respondent was informed that a written report must be filed for any hazardous materials incident that includes loading and unloading operations. Respondent now realizes that whenever a hazardous materials release occurs during unloading operations a written report should be filed." There is no evidence in the Order, however, to prove that this release of a hazardous material occurred during unloading operations. In fact, Respondent argued both in its response to the Notice and its appeal that the release occurred after unloading had been completed.

Respondent's December 11, 1989 document, labeled Appendix K, entitled, "IMPORTANT NOTICE TO ALL DRIVERS AND TERMINAL PERSONNEL:" does not prove that this incident occurred during unloading operations. It indicates that, following the informal conference, Respondent believed that its interpretation of the hazardous material incident reporting regulations must be expanded. Part of this expansion included a statement that a reportable incident can occur at any time during transportation, including loading, unloading, or temporary storage. Nevertheless, this revised interpretation is not evidence that this was a reportable incident.

The record, therefore, provides no evidence to prove that the release of the hazardous material occurred during the course of transportation. Without that evidence, the Acting Chief Counsel's Order cannot be upheld.

Findings

I have determined that there is not sufficient evidence presented to find a violation of 49 CFR 171.16. Accordingly, this case is dismissed. This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 10, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 89-162-EXR]

Action on Appeal

In the Matter of: Thermex Energy Corp., Respondent.

Background

On April 11, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Thermex Energy Corporation (Respondent) assessing a penalty in the amount of $1,400 for having knowingly offered for transportation in commerce a hazardous material, blasting agent, n.o.s., in bulk packagings, in violation of 49 CFR 171.2(a) and 173.114a(i). The Order assessed a civil penalty of $1,400, the same penalty amount originally proposed in the November 2, 1989 Notice of Probable Violation (Notice), and authorized payment in seven monthly installments of $200 each. By letter dated May 9, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent's Appeal did not dispute the Order's finding of violation but protested the assessment of the $1,400 civil penalty. The Respondent stated that it did not have the financial ability to pay the penalty and that attempting to do so would adversely affect its ability to remain in business. In support of this assertion, Respondent stated that it owed back taxes, was currently a defendant in approximately 28 legal actions, and had 20 judgments against it. Respondent further stated that it was appealing a judgment of eviction obtained by its landlord and, insofar as it was financially unable to post a bond in the appeal, had been required to post a sworn pauper's affidavit. A copy of the affidavit was attached as an exhibit to Respondent's appeal.

Finally, Respondent attached a March 14, 1990 financial statement which it had prepared in an effort to compromise some of its indebtedness.

The $1,400 penalty proposed in the Notice and assessed in the Order was based upon information contained in an August 29, 1989 Dun and Bradstreet Report on Respondent. Prior to the Appeal, this was the most timely financial information covering Respondent which was available to RSPA. Review of the additional information supplied by the Respondent in the April 2, 1990 Affidavit of Inability to Pay and the March 14, 1990 Balance Sheet indicates that partial mitigation of the penalty, coupled with continued authorization of a payment plan, is appropriate. Imposition of a $1,000 penalty will take into account the serious nature of Respondent's violation, but will also give adequate consideration to Respondent's ability to pay and the effect of the penalty on Respondent's ability to remain in business.

Findings

I have determined that there is sufficient information to warrant partial mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $1,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

In addition, I have determined that the Respondent may pay this $1,000 civil penalty in five consecutive monthly installments of $200 each.

Therefore, the Order of April 11, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the $1,400 civil penalty assessed therein is mitigated to $1,000, to be paid in accordance with the following payment plan. The $1,000 civil penalty shall be payable in five monthly installments of $200 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal, and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $200 installment was due.

If Respondent fails to pay the $1,000 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13 and 49 CFR 89.23. Pursuant to those same authorities, a late payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the reference number of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of the check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: March 5, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–21–CR]

Action on Appeal

In the Matter of: Hoopes Fire Equipment Corp., Respondent.

Background

On May 9, 1990, the Chief Counsel, Research and Special Progams Administration (RSPA), U.S. Department of Transportation, issued an Order to Hoopes Fire Equipment Corp. (Respondent) assessing a penalty in the amount of $2,750 for having knowingly: (1) represented to be retesting DOT specification cyclinders with inadequate equipment, (2) failed to maintain records showing the results of such retesting, and (3) representing inadequately marked DOT specification cyclinders as meeting the requirements of the Hazardous Materials Regulations, in violation of 49 CFR 171.2(c), 173.23(c), 173.34(e)(3) and 173.34(e)(5).

The Order assessed a civil penalty of $2,750, reduced from the $4,000 civil penalty originally proposed in the January 9, 1990 Notice of Probable Violation. By letter dated May 25, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent addressed each of the three violations. With respect to Violation 1, it enclosed a $130.65 invoice showing prompt corrective action and contended that it was unaware of the violation prior to the RSPA inspection and thus could not have "knowingly" committed the violation. As explained in the original Notice in this case, 49 CFR 107.299 provides that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts and that there is no requirement that the person actually knew or intended to violate the legal requirements. The Chief Counsel's $750 reduction of the proposed penalty for this violation, partically due to Respondent's corrective action, has resulted in an appropriate assessment and obviated the need for any further reduction.

With respect to Violation 2, Respondent stated that it ordinarily kept proper records and that its violation was an aberration. The fact is that Respondent did not keep accurate records and that it was necessary for the Chief Counsel to point out in her Order that Respondent's corrective actions in this regard required additional changes to avoid a recurrence of this type of violation. The Chief Counsel's $250 mitigation of the proposed penalty for this violation is sufficient.

Concerning Violation 3, Respondent contended that the penalty assessment is excessive because it took immediate corrective action and no one was harmed. Again, the Chief Counsel's $250 mitigation of the proposed penalty for this violation resulted in an equitable assessment.

Finally, Respondent stated that its $9,324 cash balance on December 31, 1989, was misleading because much of that money was a reserve for payment of a mortgage and various taxes. In light of Respondent's allegations relating to its ability to pay a civil penalty and the effect of a civil penalty on Respondent's ability to remain in business, I am extending the time for Respondent to pay the civil penalty in this case from three to five months.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $2,750 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

However, I find that it is appropriate to modify the terms of the payment schedule authorized for the payment of this civil penalty by allowing and requiring Respondent to pay the $2,750 civil penalty in five equal consecutive monthly payments of $550 each instead of the three larger monthly payments set forth in the Chief Counsel's Order.

Therefore, the Order of May 9, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the civil penalty payment schedule authorized therein is hereby modified to authorize and require the payment of the $2,750 civil penalty imposed herein in five equal consecutive monthly payments of $550 each, with the first payment being due and payable on July 16, 1990, and each subsequent payment being due on the 16th day of each of the succeeding four months.

Respondent's failure to pay the first installment of the civil penalty assessed herein by July 16, 1990, or to make any of the subsequent payments when required will result in the entire amount of the remaining civil penalty, without notice, becoming immediately due and payable July 16, 1990. Failure to pay the first $550 of the $2,750 civil penalty assessed herein by July 16, 1990, or to make any of the subsequent monthly payments when required will result in the initiation of collection activities by the Chief of the General Accounting Branch of the Department's Accounting Operations Division, the assessment of administrative charges, and the accrual of interest at the applicable rate in accordance with 31 U.S.C. 3717 and 49 CFR part 89. Pursuant to those same authorities, a penalty charge of six percent (6%) per annum will accrue if payment is not made within 110 days of service. Payments must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of those checks or money orders to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: June 15, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90-22-PDM]

Action on Appeal

In the Matter of: Delta Drum, Inc. Respondent.

Background

On July 30, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Delta Drum, Inc. (Respondent) assessing a penalty in the amount of $11,500 for having knowingly represented, marked, certified and offered DOT 34 specification containers as meeting the requirements of 49 CFR 178.19 and 178.19–1 *et seq.* without having conducted required cold drop and hydrostatic tests and without having properly marked the containers with letters and figures at least ½ inch in size. The Order found that these actions violated 49 CFR 171.2(c), 178.0–2, 178.19–7(b), 178.19–7(a)(3) and 178.19–6. The Order assessed a civil penalty of $11,500, the same amount as had been proposed in the March 13, 1990 Notice of Probable Violation (Notice), to which Respondent had not replied.

By letter dated August 17, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent raises three issues: (1) Its failure to respond to the Notice was due to the abrupt departure of its on-site operating officer, (2) its failure to comply with the Hazardous Materials Regulations (49 CFR 171–180; HMR) was caused by confusion and was ameliorate by similar testing, and (3) the financial information concerning Respondent was outdated and inaccurate.

First, Respondent explains the confusion surrounding the unexpected resignation of the corporate official who normally would have responded to the Notice. Respondent now has availed itself of the additional opportunity to respond to the allegations set forth in the Notice, and full consideration is being given in this action to Respondent's allegations.

Second, Respondent asserts that it attempted to comply with the HMR and had believed that it complied with, and exceeded, the HMR testing requirements. Respondent alleges that its employees mistakenly overlooked the fact that § 178.19–7(b) requires frequent periodic testing in addition to the four-month testing requirements § 178.19–7(a). Respondent states that it exceeds the HMR test requirements by conducting 20-foot drop tests, it now has brought its testing program into full compliance with the HMR, no drum has failed the required tests, it was not advised during an earlier inspection of any testing deficiencies, and its quality assurance supervisor believed that the July 13, 1989 inspection (which resulted in the Notice in this case) would not result in any civil penalities.

Section 178.19–7(b) of the HMR clearly states that tests must be performed on three randomly selected containers out of each lot produced of up to 1,000 containers. Furthermore, at the time of an April 23, 1987 inspection, Respondent's employees had been aware of the proper testing procedures. This explains why no corrective advice was given at that time and makes the 1989 improper practices difficult to understand. In addition, Respondent's 20-foot ambient drop tests do not adequately compensate for its failure to conduct cold drop and hydrostatic tests which are designed to reveal deficiencies which would not be detected by ambient drop testing at any height.

Furthermore, the RSPA Inspector who conducted the 1989 inspection at issue here followed standard RSPA procedures and, at the exit conference, advised Mr. James Schultz, Respondent's Quality Assurance Supervisor, and Mr. and Mrs. Evans, Respondent's Vice Presidents for Administration and Marketing, of the several types of sanctions which might result from the discovery of probable violations (letter of warning, civil penalty proceeding, criminal proceeding). At the request of Mr. Schultz, who inquired what Respondent could do to "get back on track," RSPA's Inspector reviewed all of the applicable testing requirements and photocopied the relevant pages of the HMR.

However, the corrective actions Respondent took following the inspection, and before its receipt of the Notice, justify mitigation of the proposed civil penalties.

Third, Respondent states that the financial information relied upon in the Notice is outdated and no longer accurate. It has provided, on a confidential basis, detailed financial information which is relevant to its ability to pay a civil penalty and to its ability to continue in business. That information justifies additional mitigation of the proposed civil penalties and authorization of a payment plan.

In light of all the relevant evidence, I believe that an $8,000 civil penalty is appropriate for the serious violations in this case, but that Respondent should be permitted to pay that penalty in eight consecutive monthly installments of $1,000 each. This will ensure that adequate consideration is given to Respondent's ability to pay and to the effect of this penalty on Respondent's ability to continue in business.

Findings

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $8,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors (including Respondent's corrective actions).

In addition, I have determined that the Respondent may pay this $8,000 civil penalty in eight consecutive monthly installments of $1,000 each.

Therefore, the Order of July 30, 1990, is affirmed as being substantiated on the record except that, in accordance with the assessment criteria prescribed in 49 CFR 107.331, the civil penalty assessed therein in reduced to $8,000 and is authorized to be paid in accordance with the following payment plan. The civil penalty of $8,000 shall be payable in eight monthly installments of $1,000 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall without further notice, become immediately due and payable as of the date that the first $1,000 installment is due.

If Respondent fails to pay this $8,000 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR

102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of 6 percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary room 9112, Department of Transportation, 400 Seventh Street SW., Washginton, DC 20590–0001. Respondent must send a photocopy of each or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: April 10, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–25–CR]

Action on Appeal

In the Matter of: Quincy Heating Co., Respondent.

Background

On May 31, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Quincy Heating Company (Respondent) assessing a penalty in the amount of $3,000 for having knowingly represented to be retesting DOT specification cylinders without holding a current retester's identification number issued by the RSPA, in violation of 49 CFR 173.34(e)(1)(i); and having knowingly represented DOT specification cylinders as meeting the requirements of the HMR when records showing the results of reinspection and retest had not been maintained as required, in violation of 49 CFR 171.2(c) and 173.34(e)(5). The Order assessed a civil penalty of $3,000, reduced from the $3,500 civil penalty originally proposed in the January 26, 1990 Notice of Probable Violation (Notice).

By letter dated June 25, 1990, Repsondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent strongly objects to the finding that it "knowingly" violated the two cited regulations. Respondent states that in 1985 it bought a business which had been retesting DOT specification cylinders for many years without the requisite RSPA approval and without maintaining the required records. Respondent states that it was unaware of the regulatory requirements.

As indicated in the original Notice to Respondent, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements.

Therefore, Respondent's lack of knowledge about the regualtory requirements does not excuse its operating without a RSPA retester's identification number or its failure to maintain records of that testing.

Respondent also requests that additional consideration be given to its ability to pay the $3,000 civil penalty and to the effect of such a penalty on its ability to remain in business. It states that it is unable to pay its accountant for services rendered or to afford the cost of obtaining the RSPA approval necessary for it to resume testing of DOT specificaion cylinders.

In response to financial information submitted by Respondent, the Acting Chief Counsel's Order reduced the proposed penalty by $500 and authorized payment of the $3,000 penalty in five monthly installments of $600 each. In light of Respondent's renewed plea of financial hardship, I have indenpendently reviewed all the financial information Respondent has submitted. I particularly note that Respondent is making $500 semi-monthly payments to the Internal Revenue Service to pay off a $65,000 tax liability.

In light of all the relevant evidence, I believe that the $3,000 civil penalty is appropriate for the serious violations in this case, but that Respondent should be permitted to pay that penalty in 12 consecutive monthly installments of $250 each. This will ensure that adequate consideration is given to Respondent's ability to pay and to the effect of this penalty on Respondent's ability to continue in business.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability (reduced by some reliance on its predecessor), Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

In addition, I have determined that the Respondent may pay this $3,000 civil penalty in 12 consecutive monthly installments of $250 each.

Therefore, the Order of May 31, 1990, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the civil penalty assessed therein is authorized to be paid in accordance with the following payment plan. The civil penalty of $3,000 shall be payable in 12 monthly installments of $250 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first $250 installment is due.

If Respondent fails to pay this $3,000 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will asssess interest and administrative charges and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: September 14, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90-35-PBM]

Action on Appeal

In the Matter of: Consolidated Plastechs, Inc. (d/b/a Contech), Respondent.

Background

On July 2, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Consolidated Plastechs, Inc. (d/b/a CONTECH) (Respondent) assessing a penalty in the amount of $7,000 for having knowingly represented, marked, certified, sold, and offered polyethylene bottles marked with DOT specification 2E as meeting the requirements of the Hazardous Materials Regulation when the required samples representing those bottles had not been subjected to the required periodic cold-drop test (Violation No. 1), and when the bottles had not been marked by embossment with the name and address or symbol of the person making the mark, or with the current year of manufacture (Violation Nos. 2 and 3), in violation of 49 CFR 171.2(c), 178.24a–5(c), 178.24a–6(a), and 178.24a–6. The Order assessed the $7,000 civil penalty originally proposed in the April 11, 1990 Notice of Probable Violation. By letter dated July 25, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent contends that the $7,000 civil penalty is excessive "for the three minor infractions we were cited for." With respect to Violation No. 1, Respondent contends that it performed the required monthly cold-drop tests, but failed to log the results of the tests. Respondent's contention represents the third explanation offered by Respondent to this violation. At the time of the inspection, Mr. Cumings, Respondent's General Manager, stated that Respondent had not conducted cold-drop tests since 1988. In response to the Notice of Probable Violation, Respondent stated that it had conducted cold-drop tests "randomly" since 1984. Now Respondent asserts that it conducted cold-drop test "monthly." Respondent's latest assertion is no more persuasive than its earlier statements. As the Acting Chief Counsel found, the totality of the evidence indicates Respondent did not perform the required cold-drop testing. Failure to conduct required testing of a DOT specification container is not a "minor infraction." Testing is an essential part of the representation by the manufacturer that the container meets the DOT specifications, and is the opportunity to demonstrate the integrity of the container or discover deficiencies that may require adjustments to the manufacturing process. The gravity of the violation, its extent (from 1986 to the date of the DOT inspection), and all other relevant circumstances were considered in determining the penalty assessment for this violation. I find that a $5,000 penalty for failure to conduct required cold-drop testing is appropriate in light of all the factors required to be considered.

With respect to Violation Nos. 2 and 3, Respondent reiterated its attempts in 1988 to obtain registration numbers from DOT, and noted that it had corrected both these violations immediately following the DOT inspection. As the Acting Chief Counsel observed, it was Respondent's responsibility to obtain a manufacturer's registration number and emboss both the number and the year of manufacture on the DOT 2E bottles it manufactures—steps it easily took following the DOT inspection. Respondent was assessed penalties of $1,250 and $750 respectively for these two violations, primarily because of their lesser degree of gravity. I do not find any basis in the record for mitigating the amount of the penalty for these violations.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $7,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of July 2, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $7,000 civil penalty is due and payable upon receipt of this Action on Appeal. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: October 9, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90-37-SD]

Action on Appeal

In the Matter of: Acid Products Co. Inc., Respondent

Background

On May 25, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Acid Products Co. Inc. (Respondent) assessing a penalty in the amount of $2,000 for having knowingly offered for transportation and transporting in commerce a hazardous material, acetone, a flammable liquid, in unauthorized packaging, in violation of 49 CFR 171.2(a), 171.2(b), and 173.119(a)(3). The Order assessed a civil penalty of $2,000, reduced from the $2,500 civil penalty originally proposed in the March 19, 1990 Notice of Probable Violation. By letter dated June 22, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent stated that it purchased the company in 1988 from previous owners and was not aware of any problems until the RSPA inspection. Respondent stated that it immediately corrected any discrepancies that were

identified. Respondent stated that it is located in an established enterprise zone, with the goal of employing local residents, and that its partners have diverted capital to replacing old equipment and improving the building rather than taking any salary. Respondent requested that the penalty assessment be waived so that it may fulfill its goals and policies.

Respondent presented identical information in response to the Notice of Probable Violation, and the Acting Chief Counsel mitigated the amount of the proposed penalty by $500. Respondent has not presented any additional information that would justify further mitigation.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $2,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of May 25, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $2,000 civil penalty is due and payable upon receipt of this Action on Appeal. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, Room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: August 28, 1990.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–73–SP]

Action on Appeal

In the Matter of: Kimson Chemical Inc., Respondent.

Background

On November 6, 1990, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Kimson Chemical Inc. (Respondent) assessing a penalty in the amount of $2,750 for having knowingly offered for transportation in commerce an oxidizer, potassium permanganate, in unauthorized packaging and in packagings that were not marked with a UN identification number, in violation of 49 CFR 171.2(a), 172.301(a), 173.1(b), 173.3(a), 173.154(a) and 173.194(a).

The Order assessed a $2,750 civil penalty, reduced from the $3,000 penalty originally proposed in the July 12, 1990 Notice of Probable Violation (Notice). By letter dated November 5, 1990, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its Appeal, Respondent contends that the Order did not consider the responses it made in its July 18, 1990 letter since it was clear that any violation was without Respondent's knowledge, consent or instigation. Respondent also argues that significant mitigation is warranted taking into account the assessment criteria set forth in 49 CFR 107.331. In reaching a decision on this Appeal, I have reviewed Respondent's July 18 response to the Notice and the notes from the August 14, 1990 informal conference, in addition to the other evidence in the record.

For Respondent to have knowingly committed the violations, there is no requirement that Respondent actually knew of, or intended to violate, the legal requirements. A violation is knowing when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts. The Chief Counsel's Order noted that Respondent stated in its July 18 letter that it thought the containers of potassium permanganate satisfied the requirements of the Hazardous Materials Regulations, even though the containers did not have DOT specification markings. Additionally, Respondent said that it had instructed its agent warehouse to mark the containers with a UN identification number and believed that its instructions were being followed. Thus, the record shows that Respondent had knowledge of the facts, or was in a position to know the facts, that gave rise to the violations described. Therefore, Respondent knowingly committed the violations.

Respondent had a responsibility to be aware of the regulations applicable to its operations and that responsibility cannot be excused by reliance upon another party. Reliance, however, is relevant to Respondent's culpability. The Chief Counsel considered Respondent's reliance upon its overseas exporters in assuming that the potassium permanganate was packaged correctly, but found no basis in Respondent's argument for reducing the proposed penalty for this violation. The record shows that the Chief Counsel adequately considered Respondent's argument and I agree with the penalty amount assessed for the violation.

With respect to the labelling violation, in its informal responses, Respondent stated that it had instructed its agent warehouse that the packagings should be marked with the UN identification number. Since the UN identification number appeared on the bill of lading the warehouse prepared, Respondent believed that the packagings were labelled in accordance with its instructions. The Chief Counsel found that Respondent's reliance upon the warehouse did not warrant a reduction in the proposed penalty amount. A $250 reduction was given, however, for the corrective measures Respondent instituted to ensure that packagings would be correctly labelled in the future. I find that the record presents a basis for further mitigation of $250, due to Respondent's reliance on its agent.

In the July 18 letter and in the informal conference, Respondent stated that the proposed penalty would pose a financial hardship, due to the size of its operations, and requested a payment plan. Respondent did not follow up with any financial information to document its claim of financial difficulty. In its Appeal, Respondent maintains that the penalty will adversely affect its three-person operation, even if it will be able to continue in business. The Order did not reduce the penalty or authorize a

payment plan because Respondent did not submit any information to support its claim of financial hardship. Because Respondent has still not provided any financial information, no further mitigation is warranted on this basis. However, based on Respondent's assertion concerning the penalty's adverse effect on its three-person business, authorization of a payment plan is appropriate.

The Chief Counsel's Order assessed the penalty to reflect all of the issues raised by Respondent, in light of all the statutory assessment criteria. Thus, in addition to the factors already described, the nature and circumstances, extent and gravity of the violations and Respondent's lack of prior offenses were considered in determining an appropriate penalty amount.

Findings

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. Additionally, a payment plan of three monthly installments is authorized. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 17, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the penalty is reduced to $2,500, and payment is authorized in installments.

The civil penalty of $2,500 shall be payable in three monthly installments of $1,000 each for the first two months and a final installment of $500, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date the first $1,000 installment is due.

If Respondent fails to pay this $2,500 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M-86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: March 20, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–74–SP]

Action on Appeal

In the Matter of: Eastern Warehouses Inc., Respondent.

Background

On October 17, 1990, the Acting Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Eastern Warehouses Inc. (Respondent) assessing a penalty in the amount of $2,500 for having knowingly offered for transportation in commerce an oxidizer, potassium permanganate, in unauthorized packaging and in packagings that were not marked with a UN identification number, in violation of 49 CFR 171.2(a), 172.301(a), 173.1(b), 173.3(a), 173.154(a) and 173.194(a).

The Order assessed a $2,500 civil penalty, reduced from the $3,000 penalty originally proposed in the April 11, 1990 Notice of Probable Violation (Notice). By letter dated November 26, 1990, Respondent submitted a timely appeal of the Order. The Acting Chief Counsel's Order is incorporated herein by reference.

Discussion

In its Appeal, Respondent contends that with respect to Violation No. 1 which concerned Respondent's offering of potassium permanganate in unauthorized packaging, the Order did not properly address the ownership of the material. Due to its reliance upon the owner of the material, Kimson Chemical Corporation (Kimson), Respondent argues that it cannot be held responsible for knowingly offering the material since Respondent was not aware of any possible violation of Department of Transportation (DOT) rules.

Respondent maintains that it had no choice but to rely on Kimson since it is part of Respondent's agreement for accepting customers that all materials accepted for storage and transportation meet all applicable government regulations. Respondent states that it merely acted as Kimson's agent and prepared the bill of lading only at the instruction of Kimson, and in good faith. Short of conducting independent examination and testing of the packaging, Respondent contends that it had no way of knowing there was a violation.

Respondent did more than prepare the bill of lading. Respondent held the material in its warehouse and then offered the potassium permanganate back into transportation by arranging for its shipment to the purchaser. Respondent was in the best position to determine if violations existed since it physically handled the packages. Furthermore, Respondent signed the certification on the bill of lading stating that the potassium permanganate was properly classified, described, packaged, marked and labeled in accordance with the applicable DOT regulations. Even if this were done under Kimson's instructions, reliance upon another does not relieve Respondent of its responsibility to be aware of the regulations applicable to its operations. By preparing the shipping documentation and offering the potassium permanganate into transportation, Respondent was responsible for ensuring compliance with the requirements of the Hazardous Materials Regulations applicable to its operations.

Contrary to Respondent's assertion, in the Order the Acting Chief Counsel considered the ownership and responsibility arguments, and as noted in the Order, reduced the proposed penalty by $250 because of Respondent's reliance upon Kimson. I do not find any basis in the record for further mitigating the amount of the penalty for this violation.

With respect to Violation No. 2 concerning the lack of a UN identification number on the pails containing the potassium permanganate, Respondent contends that it affixed a safety sticker incorporating the UN

identification number to each pail before shipment. Respondent states that there is no proof to the contrary that the labels were not affixed before leaving Respondent's warehouse and that due to the delay in bringing this action, the actual pails cannot be examined. Respondent also suggests that the recipient of the pails has a motive for removing the labels since they also reveal the supplier's identity.

Proof to the contrary is found in the observation report Inspector O'Neil made and the photographs he took during his inspection at American Industrial Chemical Company, which had purchased the potassium permanganate from Kimson. The Inspector's observation report shows that he observed 36 pails of potassium permanganate, none of which were marked with a UN identification number. The photographs show, as Respondent argues they should, the clear plastic wrap Respondent puts around the pails to hold them in position. Respondent maintains that the labels are placed on the top of the pails. However, the photographs clearly show the tops of the upper row of pails and no label can be seen on any of the tops, nor anywhere else. The photographs and the observation report are sufficient evidence to conclude that the labels were not affixed to the pails at the time they left Respondent's warehouse. Furthermore, Respondent does not present any evidence to substantiate its suggestion that the labels were later removed.

The Acting Chief Counsel mitigated the proposed penalty by $250 for the delay between the inspection and the issuance of the Notice. There is no basis in the record for further mitigation.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Acting Chief Counsel's Order. I find that a civil penalty of $2,500 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 17, 1990, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $2,500 civil penalty is now due and payable. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23.

Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more the 90 days past due. This penalty will accure from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Divisions, Office of the Secretary, room 9112, Department of Transportation 400 Seventh Street, SW, Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA room 8405, at the same street address.

This decision of appeal constitutes the final administrative action in this proceeding.

Date Issued: March 20, 1991.

Travis P. Dungan.

Certified Mail—Return Receipt Requested

[Ref. No. 90–84–SB]

Action on Appeal

In the Matter of: Whitaker Oil Co., Respondent

Background

On October 29, 1990, the Acting Chief, Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Whitaker Oil Company (Respondent) assessing a penalty in the amount of $3,000 for having knowingly offered for transportation in commerce corrosive liquid, n.o.s., in non-DOT specification packaging (Violation No. 1) and without marking the proper shipping name and hazard class on the shipping paper (Violation No. 2), in violation of 49 CFR 171.2(a), 172.202(a)(1), 172.202(a)(2), and 173.245(a). The Order assessed a $3,000 civil penalty, reduced from the $4,000 civil penalty originally proposed in the June 15, 1990 Notice of Probable Violation. By letter dated November 27, 1990, Respondent submitted an appeal of the Order. RSPA received the appeal letter on December 5, 1990, more than a week after the November 26 deadline for appeal. Although the appeal was filed after the deadline, I am waiving the 20-day appeal period requirement in this case. The Chief Counsel's Order is incorporated herein by reference.

Discussion

Respondent contends that the $3,000 civil penalty is excessive for the two violations, and states that there was no intent to "specifically circumvent the regulations." Respondent contends that consideration of the "nature, circumstances, extent and gravity of these allegations, would dictate a much lower penalty if at all."

Respondent was advised in the Notice that a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts. There is no requirement that the person intend to violate or circumvent the regulations. The Acting Chief Counsel specifically considered the nature, circumstances, extent, and gravity of the violations when assessing the civil penalty, in addition to the other factors required to be considered. The Acting Chief Counsel substantially reduced the amount of the civil penalty after considering corrective action taken by the Respondent. I do not find any basis in the record for further mitigating the amount of the penalty for these violations.

Findings

I have determined that there is not sufficient information to warrant mitigation of the civil penalty assessed in the Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

Therefore, the Order of October 29, 1990, is affirmed as being substantiated or the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $3,000 civil penalty is now due and payable. If the civil penalty is paid within 30 days of the date of issuance of this Action on Appeal, no interest will be charged. If, however, the civil penalty is not paid by that date, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges, and initiate collection activities on the debt and those charges. Interest on the debt will accrue from the date of issuance of this

Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from the date this Action on Appeal is received.

Payment must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Respondent must send a photocopy of that check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: January 28, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 90–165–SP]

Action on Appeal

In the Matter of: United Laboratories, Inc. Respondent.

Background

On February 6, 1991, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to United Laboratories, Inc. (Respondent) assessing a penalty in the amount of $4,750 for having knowingly offered for transportation in commerce a hazardous material, oxidizer, corrosive solid, n.o.s., in non-DOT specification packaging, in violation of 49 CFR 171.2(a) and 173.154. The Order reduced the civil penalty originally proposed in the November 13, 1990 Notice of Probable Violation from $5,500 to $4,750. By letter dated February 14, 1991, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Knowingly

The first issue raised by the Respondent concerns whether the violation was committed "knowingly" as required by the Hazardous Materials Regulations (HMR). Respondent stated: "The record is clear that the supplier, on a one time basis, breached that contract, and shipped United non-conforming containers. There is no proof that United had actual recognition and knowledge of the breach."

A violation is committed "knowingly" if a person has actual knowledge of the facts that gave rise to the violation or "should have known" the facts that gave rise to the violation. 49 CFR 107.299.

A party offering hazardous materials for transportation is presumed to be aware of the regulations' requirements. Therefore, the issue on appeal is whether the Respondent should have known the facts that gave rise to the violation.

The Respondent was found to have violated the HMR by offering for shipment, and actually shipping, a corrosive oxidizer in non-DOT specification polyethylene packages. Although, as noted in the Respondent's August 28, 1990 letter, these non-DOT specification packages were manufactured and filled by third parties; these packages were stored in the Respondent's facilities, handled by the Respondent's employees and distributed by the Respondent to its Sparks, Nevada facility, Hence, the Respondent's employees had the ability and the opportunity to discover that these containers were in fact non-DOT specification packaging. Thus, the general rule that notice to a corporation's employee is notice to the corporation applies, since the Respondent's employees exercised functional responsibilities over the area where the violation occurred and therefore, could be reasonably expected to perceive the violation. As a result, I find that a reasonable party acting under circumstances similar to those which confronted the Respondent and exercising reasonable caution would have known the facts which gave rise to the Respondent's violation. Thus, I conclude that for the purposes of the HMR the Respondent should have known those facts that gave rise to its violation.

The Respondent also argues that it was the unfortunate victim of a third party supplier who "slipped in nonconforming containers." However, a Respondent may not escape its HMR responsibilities by shifting those responsibilities to a third party. As the Respondent recognized so aptly in its appeal: "It is a simple case of inadvertence: all the steps for compliance were taken by United; a third party breached and *United's shipping department failed to recognize the breach.* (emphasis added). The fact that the Respondent may have received nonconforming containers from a third party supplier may support mitigating the penalty, but on its own merits, it would not justify reducing the Respondent's civil penalty to zero.

Assessment Criteria

With regard to imposing a civil penalty, the Respondent argues that the assessment criteria do not justify imposing a fine. In addition, the Respondent claims that such a penalty would impose a financial hardship and adversely affect its ability to stay in business. The gravity of offering hazardous materials for transportation in non-DOT specification packages involves the issue of package integrity.

There is no built-in assurance that non-DOT specification packaging can withstand the stress associated with the transportation process. One goal of the HMR is to reduce the risk of such failures by requiring that all hazardous materials, which are in transportation, be packaged in containers which satisfy certain DOT specifications.

Addressing the financial considerations, an August 31, 1990 Dun & Bradstreet report indicates that as of July 31, 1989, the Respondent has a current ratio of 1.62, on current assets of $5.9 million, including $82,000 in cash, and current liabilities of $3.6 million. The Respondent's retained earnings were listed as $3.9 million. These figures must be weighted against the Respondent's claims of "shrinking" sales and profits. The Respondent submitted "Exhibit A" which indicates that it is in violation of its loan covenants with the Northern Trust Bank. This exhibit and the Respondent's written comments support the claim that the Respondent is experiencing "shrinking" sales and profits. I have considered this information in determining the amount of the civil penalty.

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. The Respondent's appeal emphasized that it had recently invested in numerous capital expenditures to improve its facility. The Respondent claims it demonstrated good faith by taking immediate corrective action. Based on the evidence submitted by the Respondent, I find that a reduction in the civil penalty is appropriate.

In light of the violation's nature and circumstances, the violation's extent and gravity, Respondent's culpability, Respondent's single prior offense, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors, I am reducing the assessed civil penalty from $4,750 to $3,900. In addition, the Respondent is permitted to pay the penalty in 12 consecutive monthly installments of

$325 each. These measures are taken in light of the Respondent's financial condition.

Amount of Relief

Therefore, the Order of February 6, 1991, is modified to reduce the assessed penalty to $3,900 and to include a payment plan. The remainder of the Order is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331.

The $3,900 civil penalty shall be payable in 12 monthly installments of $325 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and with each succeeding payment due every thirty days thereafter until the entire amount is paid.

Should the Respondent default on any payment in this schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date the first $325 was due.

If the Respondent fails to pay this $3,900 civil penalty in accordance with the terms of this Action on Appeal, the Chief of the General Accounting Branch of the Department's Accounting Operations Division will assess interest and administrative charges and initiate collection activities on the debt and those charges.

Interest on the debt will accrue from the date of issuance of this Action on Appeal at the applicable rate in accordance with 31 U.S.C. 3717, 4 CFR 102.13, and 49 CFR 89.23. Pursuant to those same authorities, a late-payment penalty of six percent (6%) per year will be charged on any portion of the debt that is more than 90 days past due. This penalty will accrue from receipt of this Action on Appeal.

Payments must be made by certified check or money order (containing the Ref. No. of this case) payable to the "Department of Transportation" and sent to the Chief, General Accounting Branch (M–86.2), Accounting Operations Division, Office of the Secretary, room 9112, Department of Transportation, 400 Seventh Street , SW., Washington, DC 20590–0001. Respondent must send a photocopy of each check or money order to the Office of the Chief Counsel (DCC–1), RSPA, room 8405, at the same street address.

This decision on appeal constitutes the final administrative action in this proceeding.

Date Issued: May 20, 1991.

Travis P. Dungan.

Certified mail—Return receipt requested

[Ref. No. 91–02–EXR]

Action on Appeal

In the Matter of: Abacana Industries, Respondent

Background

On February 27, 1991, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Abcana Industries (Respondent) assessing a penalty in the amount of $5,000 for having knowingly offered for transportation in commerce corrosive materials in non-DOT specification plastic bottles inside a high-density polyethylene box, in violation of 49 CFR 171.2(a) and 173.277(a)(6). The Order assessed a civil penalty of $5,000, reduced from the $5,500 civil penalty originally proposed in the January 11, 1991 Notice of Probable Violation (Notice). The Order also authorized a payment plan of eight monthly installments of $625 each.

By letter dated March 4, 1991, Respondent submitted a timely appeal of the Order. The Chief Counsel's Order is incorporated herein by reference.

Discussion

In its appeal, Respondent denied that it "knowingly" committed the violation. Respondent stated that it thought it only had to apply for the exemption once.

As indicated in the original Notice to Respondent, under 49 CFR 107.299, a violation is "knowing" when a person has actual knowledge of the facts giving rise to the violation or should have known of those facts; there is no requirement that the person actually knew of, or intended to violate, the legal requirements. As stated in the Order, the two-paragraph document making Respondent a party to the exemption contained a clear statement: "The expiration date of the exemption is September 1, 1985 for the party(s) listed below." Respondent was one of four parties on that list.

Therefore, Respondent's failure to read the exemption document does not excuse its offering hazardous materials in packaging not authorized by the regulations.

Respondent also stated that it was under the impression that it would have a telephone conference. An informal conference must be requested in writing. Respondent's January 18, 1991 response to the Notice stated that it would like to make an informal response *or* ask for a conference. Respondent's January 18 letter was considered the informal response, and Respondent did not renew its request for a conference.

Respondent also requested that additional consideration be given to its ability to pay the $5,000 civil penalty. Respondent submitted an additional financial statement with its appeal.

In response to financial information submitted by Respondent, the Chief Counsel's Order reduced the proposed penalty by $500 and authorized payment of the $5,000 penalty in eight monthly installments of $825 each. In light of Respondent's renewed plea of financial hardship and its most recent financial statement, I have independently reviewed all the financial information Respondent has submitted. I note that although Respondent has cash on hand of approximately $42,000, its ratio of current assets ($399,800) to current liabilities ($722,800) is an unfavorable 0.55.

In light of all the relevant evidence, I believe that a $3,000 civil penalty is appropriate for the violation in this case, and that Respondent should be permitted to pay that penalty in eight consecutive monthly installments of $375 each. This will ensure that adequate consideration is given to Respondent's ability to pay and to the effect of this penalty on Respondent's ability to continue in business.

Findings

I have determined that there is sufficient information to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $3,000 is appropriate in light of the nature and circumstances of this violation, its extent and gravity, Respondent's culpability. Respondent's lack of prior offenses, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors.

In addition, I have determined that the Respondent may pay this $3,000 civil penalty in eight consecutive monthly installments of $375 each.

Therefore, the Order of February 27, 1991, including the authorization of a payment plan, is affirmed as being substantiated on the record and as being in accordance with the assessment criteria prescribed in 49 CFR 107.331, except that the civil penalty assessed therein is reduced to $3,000, and authorized to be paid in accordance with the following payment plan. The civil penalty of $3,000 shall be payable in eight monthly installments of $375 each, with the first payment due within 30 days of the date of issuance of this Action on Appeal and each succeeding payment due every 30 days thereafter until the entire amount is paid. If