BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF THE ADMINISTRATOR
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

In the Matter of:
3N International, Inc.
Respondent.

PHMSA Case No. 03-394-SIBC-EA
DMS Docket No. RSPA-04-19287

REVISED DECISION ON APPEAL

I. Background

On October 1, 2004, the Office of the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA),[1] U.S. Department of Transportation (DOT), issued an Order (Order) to 3N International, Inc. (Respondent), finding that Respondent had committed the following violation of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of $1,000:

> Allowing an employee to perform a function subject to the provisions of the HMR when Respondent did not provide the employee general awareness/familiarization, function-specific and safety training, in violation of 49 C.F.R. §§ 172.702(a) and 172.704(a).

[1] Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline transportation and hazardous materials transportation. See, section 108 of the Norman Y. Mineta Research and Special Programs Improvement Act (Public Law 108-426, 118 Stat. 2423-2429 (November 30, 2004)). See also, 70 Fed. Reg. 8299 (February 18, 2005) re-delegating the hazardous materials safety functions from the Research and Special Programs Administration to the Administrator, PHMSA.

The Order, which is incorporated by reference, modified the $1,350 civil penalty originally proposed in the October 27, 2003, Notice of Probable Violation (NOPV). In accordance with PHMSA's[2] regulations, Respondent had 20 days from the receipt of the Order to appeal to this office (49 CFR §107.325(c)(1)). In a letter dated October 23, 2000,[3] Respondent timely submitted an appeal of the Order.

II. Discussion

In this appeal, Respondent requests that the Chief Counsel's finding that Respondent had violated the HMR be vacated. As discussed below, Respondent's appeal must be denied.

This enforcement case arose out of a May 12, 2003 compliance inspection at Marine Packing Company, Inc., dba, Shipside Marine Warehouse (Shipside Marine) in Baltimore, Maryland. During the compliance inspection, PHMSA's inspector observed filled 1000 kg flexible intermediate bulk containers (FIBC's) containing antimony trioxide, awaiting shipment for Respondent. The FIBC's were not marked as UN-standard packagings, however, Shipside Marine, at Respondent's direction, had affixed paper tags to the FIBC's. These tags displayed a Class 9 label with "3077" and stated:

> Antimony Oxide
> 3N Brand HT Grade
> Net Weight – 2000 lbs.
> Lot #200022217
> PG III, UN3077
> Made in China

The inspector then interviewed Mr. Donald Heim, President of Shipside Marine. After speaking with Mr. Heim, the inspector concluded from his statements that Shipside Marine had

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[2] For ease of reading and clarity, when an action occurred at RSPA, this order will refer to PHMSA.

[3] This date appears to be a typographical error. The letter was time/date-stamped by PHMSA upon receipt on November 3, 2005. I will, therefore, assume that Respondent prepared the letter on October 23, 2004.

either received intermediate bulk container (IBC) quantities of antimony trioxide or had repackaged non-bulk bags of antimony trioxide into FIBC's for reshipment in the past. Mr. Heim also provided the Material Safety Data Sheet (MSDS) that had been supplied by Respondent, which indicated the basic description for the materials in quantities of 1000 pounds or more per package (RQ, environmentally hazardous substance, n.o.s. (antimony trioxide, arsenic trioxide), 9, UN3077, III). During this inspection, the inspector also spoke by telephone with Ms. Cindy Chen, President of 3N International (Respondent), who confirmed that Respondent imports IBC quantities of antimony trioxide.

Ms. Chen provided, in a letter dated May 15, 2003, the instructions that Respondent had sent to Shipside Marine regarding the repackaging of antimony trioxide from 25 kg bags to 1,000 lbs. FIBC's with the proper shipping name, hazard class, UN identification number and packing group. Respondent also included its MSDS with these instructions. On May 19, 2003, Mr. Heim provided, at the inspector's request, records of Shipside Marine's past shipments. These records indicated that prior shipments for Respondent had been made in non-regulated, non-bulk quantities. In his report, the inspector noted that the FIBC's observed during this inspection had not been offered for transportation in commerce and were the first of such shipments. Thus, Respondent was not cited with a probable violation at that time.

The inspector interviewed Ms. Chen by telephone again on May 19, 2003. During this interview, Ms. Chen indicated that Respondent was aware of the HMR's requirements with respect to shipments of antimony trioxide when the quantity per package exceeded 1000 pounds and that it had notified its suppliers of those requirements. When asked whether Respondent could provide documentation or any written correspondence to substantiate its compliance, Ms.

Chen was unable to provide any documentation, but stated that they had notified their suppliers of the marking requirements.

During this interview, the inspector also requested that Ms. Chen produce records of Respondent's employees' hazardous materials training, testing and certification to perform hazardous material transportation related functions. Ms. Chen indicated that, as the only employees of 3N International, she and her husband, Mr. David Li, handled all aspects of importation and shipment, but that neither had received training. Ms. Chen also confirmed that Respondent had directed all shipments related to this case. The inspector provided Ms. Chen with an exit briefing at the conclusion of this conversation.

Subsequently, the inspector spoke with Ms. Luanne Ciaccio, an import agent at Pride International, Inc. (Pride International), who confirmed that Shipside Marine had not received antimony trioxide in regulated quantities and, instead, had only received 25 kg bags of antimony trioxide for Respondent. She later provided import documentation, including the ocean bill of lading, which did not identify the material as hazardous. She then informed the inspector that the entire shipment had been delivered to Apollo Warehouse, Inc. (Apollo Warehouse) in Baltimore, Maryland.

On June 13, 2003, the inspector conducted a compliance inspection at Apollo Warehouse. In his report, the inspector noted that 84 FIBC's of antimony trioxide were marked with Respondent's name, the proper shipping name and identification number for antimony trioxide. The inspector obtained the MSDS's and shipping papers of two recent shipments made on behalf of Respondent. In his report, the inspector stated that, in both instances, Apollo Warehouse failed to properly identify antimony trioxide in the basic description. The inspector then provided Respondent with an amended exit briefing on June 12, 2003 and corresponded with

Respondent several times over the following two months. After further review, PHMSA's Office of Hazardous Materials Enforcement reduced the violation regarding the shipping papers to a quality control item.

After completing this investigation, the inspector concluded that Respondent had committed two violations of the HMR. First, the inspector alleged that Respondent imported into the United States and failed to provide complete information regarding shipment of an environmentally hazardous substance, n.o.s. (antimony trioxide), 9, UN3077, III, in violation of 49 C.F.R. §§ 171.2 and 171.12(a). Second, the inspector alleged that Respondent failed to provide function-specific and safety training for an employee who performed a function subject to the HMR, in violation of 49 C.F.R. §§ 172.702(a) and 172.704(a).

A. Violation Number 1

With respect to the first alleged violation, the Chief Counsel, it its October 1, 2004 Order, held that there was insufficient evidence to support a finding that Respondent failed to provide timely and complete shipping information for its shipments of antimony trioxide and dismissed the first alleged violation from this action. Insofar as Respondent's appeal addresses this violation, I need not discuss the merits of any issue raised because this violation is not now before me for review.

B. Violation Number 2

In the October 1, 2004 Order, the Chief Counsel found that Respondent violated 49 C.F.R. §§ 172.702(a) and 172.704(a) by allowing an employee to perform a function subject to the provisions of the HMR when Respondent did not provide the employee general awareness/familiarization, function-specific and safety training. In the October 1, 2004 Order, the Chief Counsel assessed a civil penalty of $1,000, which was reduced from the proposed

amount of $1,350 in the NOPV, dated October 27, 2003. The Chief Counsel, in reducing the penalty, took into account Respondent's corrective actions, small size, and financial condition. Specifically, the Order cited to the fact that Respondent employs less than 10 people and is, therefore, considered a small business entity. The Order also considered Respondent's corrective actions when it provided of hazardous materials training for one of its employees, as well as Respondent's apparent "familiarity with the basic tenets of the HMR."

In its appeal, Respondent first argues that this finding should be reversed because the alleged training violation was not discussed during informal conferences[4] held with Mr. Kenneth Williams, an attorney in PHMSA's Office of Chief Counsel and Mr. Anthony Lima, an inspector with PHMSA's Office of Hazardous Materials Enforcement, on July 30, 2004 and August 6, 2004. Respondent further asserts that one of its employees, Mr. David Li, and Mr. Williams had a telephone conversation after the conference in which Mr. Li asked Mr. Williams if the topic of training had not been discussed because Mr. Williams had been satisfied with Respondent's previous responses regarding training (i.e., training of one employee, experience, and knowledge of the HMR).

Respondent alleges that in those conversations, Mr. Williams agreed that 1) Respondent's employees had demonstrated their knowledge on the subject and could be qualified to provide training to others and 2) they had more knowledge on the specific regulations regarding antimony than Mr. Lima. As evidence, Respondent offers a letter dated and faxed on July 30, 2004, from Mr. Li to Mr. Williams, in which Mr. Li recounts the details of the conversation that allegedly occurred. Aside from this letter, nothing in the record indicates that Mr. Li's

[4] In its appeal, Respondent refers to these informal conferences as "informal hearings" on several occasions. As a point of clarification, Respondent failed to request a hearing as required in 49 C.F.R. § 107.313(a) and, therefore, waived its right to a hearing, pursuant to §107.313(b). Thus, this decision cannot take into consideration any rights that might have been afforded to Respondent if it had requested a hearing.

understanding (as memorialized in the July 30, 2004 letter) is accurate. In fact, the absence of a recommendation by Mr. Williams to the Chief Counsel to dismiss this violation seems to indicate that either one or both parties misunderstood the substance of those conversations or that Mr. Williams found that Respondent had indeed committed the second alleged violation after completing his review of the record. In any event, it was reasonable for the Chief Counsel not to solely rely on Respondent's letter without any evidence of Mr. Williams' concurrence of that understanding in the record. Therefore, I find that this argument does not justify vacating the Chief Counsel's finding.

Respondent also bases its appeal on the fact that the Order dated October 1, 2004 cites to the exit briefing notes presented by Mr. Lima and signed by Ms. Chen. Respondent quotes language from the Order, alleging that it demonstrates that the Chief Counsel used the exit briefing notes as evidence of Respondent's admission of guilt. Respondent further explains that Ms. Chen only signed it because she was instructed to do so as a mere acknowledgement that she received the briefing. Respondent also argues that it has disputed the accuracy of the exit briefing notes in both oral and written correspondence with Mr. Lima and Mr. Williams. Finally, Respondent alleges that it has proven that the inspector's notes and reports are inaccurate and are, therefore, "neither accurate nor sufficient."

Even if Respondent's allegations about the accuracy of the investigation reports and exit briefing notes are true, they do not relate to the actual substance of the violation Respondent has committed. Simply stated, it is clear that Respondent failed to provide training to its employees as required by the regulations. I find it particularly troubling that, since it was placed on notice of this violation, Respondent continues to violate the HMR, as it still has not provided training to one of its two employees (or has failed to provide proof of that training to PHMSA).

I believe that Respondent fully understood the nature of the violation, which was demonstrated by the corrective action it took when it provided training to one of its employees, Mr. David Li, and presented proof of that training to PHMSA. In short, although Respondent's signing of the exit briefing notes was not an admission of guilt, Respondent has not presented evidence showing that they did not violate the HMR's training requirement. In light of these facts, I cannot dismiss this violation based on Respondent's second argument on appeal.

Finally, Respondent cites to 49 C.F.R. § 107.702(c), which states that "[t]raining may be provided by the hazmat employer or other public or private sources," and argues that it "recognizes that training is not the goal but is a means to achieve the goal of obtaining knowledge of the subject and that it can be provided by anyone with the appropriate knowledge." In essence, Respondent argues that its employees have been engaged in self-training since 2001 by spending an estimated 120 hours conducting studies and research necessary to compile and update the Material Safety Data Sheet (MSDS) for antimony trioxide. Respondent claims that the "fruits" of its employees' self training are 1) its past compliance with the HMR with respect to antimony oxide and 2) the alleged conversation in which Ms. Chen corrected Mr. Lima's misunderstanding of the HMR with respect to RQ requirement of antimony trioxide.

The requirements for training hazmat employees are clearly prescribed in the 49 C.F.R. §§172.700 – 172.704. Respondent offers one isolated section (§172.702(c)) of Subpart H to show that it has complied with the HMR's training requirements by allowing its employees to engage in "self-training." However, a hazmat employer is required to comply with Subpart H in its entirety and a discussion placing section 172.702(c) in context is, therefore, necessary.

Section 172.700(b) defines "training" as:

> "a *systematic program* that ensures a hazmat employee has familiarity with the general provisions of this subchapter, is able to recognize and identify hazardous materials, has

> knowledge of specific requirements of this subchapter applicable to functions performed by the employee, and has knowledge of emergency response information, self-protection measures and accident prevention methods and procedures." (Emphasis added).

In sections 172.704(a) and (b), the regulations specify what must, at a minimum, be included in this training. According to these regulations, employees must receive security awareness training, in-depth security training, and OSHA, EPA and other training, in addition to general awareness/familiarization training, function-specific training, and safety training.

While I am pleased that Respondent's employees have apparently invested significant time and energy in the preparation of the MSDS, Respondent has not shown that it provided all of the required training specified in the regulations (as described above). Moreover, "training" is defined by the regulations as a "systematic program." Though Respondents' employees may have acquired a great deal of knowledge and expertise through their own research, the regulations clearly require their participation in a systematic program, which includes training in a number of important issues surrounding the transportation of hazardous materials that may lie outside their area of expertise.

In addition, while Respondent, as an employer, may provide training for its employees, it must still comply with all of the requirements that have been discussed. Respondent has failed to show that its employees have been trained in a systematic program that covers all of the topics required in the regulations. Moreover, Respondent has not demonstrated that it has provided Ms. Chen with the requisite training. As long as Ms. Chen performs any functions subject to the provisions of the HMR, Respondent remains in violation of 49 C.F.R. §§702(a) and 704(a).

Therefore, I have no basis to dismiss the violation on these facts and affirm the Chief Counsel's findings in the October 1, 2004 Order.[5]

Based on the foregoing factors, it is clear that the Chief Counsel, in its Order of October 1, 2004, took into consideration and made a careful analysis of all facts and statutory requirements before assessing a civil penalty of $1,000, which included a reduction in the penalty amount proposed in the NOPV for Respondent's corrective action, status as a small business entity and financial condition. Therefore, Respondent's appeal is denied.

III. Findings

I have determined that there is no basis to grant Respondent's appeal and withdraw the civil penalties assessed by the Office of the Chief Counsel. 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 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 1, 2004 is affirmed as being substantiated in the record and as being in accordance with the assessment criteria prescribed in 49 C.F.R. § 107.331.

IV. Payment

Respondent must pay this $1,000 civil penalty within 30 days of the date of this Action on Appeal. See Addendum A for payment information.

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[5] It is worth noting that Respondent, in its appeal and other correspondence with PHMSA, has alleged that the inspector engaged in misconduct throughout the investigation by incorrectly characterizing Respondent's words and actions during and after the investigation. Respondent also alleges that PHMSA's inspector did not have the proper knowledge of the HMR's requirements with respect to the shipping of antimony trioxide. While they do not affect my finding that Respondent has violated the HMR's employee training requirements, I have not taken these allegations lightly. After a review of the record, however, I find no basis to agree that our inspector engaged in any improper conduct in this matter. In any event, the evidence in this case alone determined the outcome of my decision today.

V. Final Administrative Action

This Decision on Appeal constitutes the final administrative action in this proceeding.

Stacey Gerard
Acting Assistant Administrator

Date Issued: 06-14-05

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of June, 2005, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

3N International, Inc. 41-40 Union Street, Suite 3P Flushing, NY 11355 ATTN: Ms. Cindy Chen, President	Original Order with Enclosures Certified Mail Return Receipt
Mr. Doug Smith, Enforcement Officer Office of Hazardous Materials Enforcement 400 Seventh Street, S.W. Washington, D.C. 20590-0001	One Copy (without enclosures) Personal Delivery
Ms. Colleen Abbenhaus, Chief Office of Hazardous Materials Enforcement, Eastern Region Office 820 Bear Tavern Rd., Ste. 306 West Trenton, NJ 08628	One Copy (without enclosures) First Class Mail
Tina Mun, Attorney Pipeline and Hazardous Materials Safety Administration 400 Seventh Street, S.W. Washington, D.C. 20590-0001	One Copy Personal Delivery
U.S. DOT Dockets U.S. Department of Transportation 400 Seventh Street, S.W., RM PL-401 Washington D.C. 20590	One Copy Personal Delivery

Tina Mun

ADDENDUM A
PAYMENT INFORMATION

Due Date. Respondent must pay this $1,000 civil penalty within 30 days of the date of this Action on Appeal.

Payment Method. Respondent must pay the civil penalty by wire transfer. Detailed instructions or sending a wire transfer through the Federal Reserve Communication System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Action on Appeal. Please direct questions concerning wire transfers to:

Financial Operations Divisions (AMZ-120)
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125
Telephone No.: (405) 954-8893

Interest and Administrative Charges. If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late payment penalty, and administrative charges under 31 U.S.C. § 3717, 31 C.F.R § 901.9, and 49 C.F.R. 89.23.

The rate of interest is determined under the above authorities. Interest accrues from the date of Action on Appeal. A late-payment penalty of six percent (6%) per year applies to any portion of the debt that is more than 90 days past due. The late-payment penalty is calculated from the date Respondent receives this Action on Appeal.

Treasury Department Collection. FAA's Financial Operations Division may also refer this debt and associated charges to the Department of the Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Respondent. 31

C.F.R. § 901.3. Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights to an offset. The debtor has the right to be notified of: (1) the nature and amount of the debt; (2) the agency's intention to collect the debt by offset; (3) the right to inspect and copy the agency records pertaining to the debt; (4) the right to request a review within the agency of the indebtedness; and (5) the right to enter into a written agreement with the agency to repay the debt. This Action on Appeal constitutes written notification of these procedural rights.