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In the Matter of )

DYNAMIC PROPELLENT TECHNOLOGIES, LLC, )  
U.S. ROCKETS, LLC, and )  
MR. JERRY IRVINE, )

Respondents, jointly and severally. )

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RSPA Ref. No. 02-002-SE-HQ

ACTION ON APPEAL

Background

On July 25, 2002, the Chief Counsel, Research and Special Programs Administration (RSPA), U.S. Department of Transportation, issued an Order to Dynamic Propellant Technologies, LLC, U.S. Rockets, LLC, and Mr. Jerry Irvine (Respondents), jointly and severally, assessing a penalty in the amount of \$57,500 for the following violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180:

Violation No. 1 - Knowingly offering for transportation in commerce hazardous materials, rocket motors and propellant, solid, that had not been examined, classed, and approved in accordance with 49 C.F.R. § 173.56 and, therefore, were unapproved explosives and unauthorized for transportation in commerce, in violation of 49 C.F.R. §§ 171.2(a), 173.51(a), 173.54(a), and 173.56.

Violation No. 2 - Knowingly offering for transportation in commerce hazardous materials, rocket motors and propellant, solid, accompanied by a shipping paper that did not indicate that the materials are hazardous and that contained an improper description of the materials, in violation of §§ 171.2(a), 172.200(a), 172.202, and 173.22(a)(1).

Violation No. 3 - Knowingly offering for transportation in commerce hazardous materials, rocket motors and propellant, solid, in a quantity that required placarding, without registering with RSPA as a hazardous materials shipper, in violation of 49 C.F.R.

§ 107.601(a)(6), 107.608, and 171.2(a).

In the Order, which is incorporated herein by reference, RSPA's Chief Counsel assessed the \$57,500 civil penalty originally proposed in the January 30, 2002 Notice of Probable Violation (Notice). In an August 14, 2002 letter, Mr. Jerry Irvine submitted an appeal of the Order on behalf of himself and the other two Respondents.

### Discussion

This enforcement case arises out of a January 2001 shipment by Dynamic Propellant Technologies LLC (Dynamic) of three different types of model rocket motors and five different solid propellant reloading kits for model rockets. On the Yellow Freight Lines bill of lading, the shipment was described as "Model Aircraft Parts" with a total weight of 210 pounds. There was no "X" in the "Haz Mat" column or any other indication that the shipment contained hazardous materials. The bill of lading was signed by Mr. Irvine as the "shipper."

Respondents' August 14, 2002 appeal is their first and only submission in this case, because they failed to reply to the Notice as provided by 49 C.F.R. § 107.313, and RSPA's inspector never received an answer to the earlier October 3, 2001 "exit briefing" letters he addressed to Mr. Irvine as Dynamic's manager. During a subsequent telephone conference on September 26, 2002, Mr. Irvine stated that he would submit the rocket motors and solid propellant for examination, classification, and approval. However, there is no indication that any further examination has been conducted. Neither Mr. Irvine nor an attorney who participated in this conference with Mr. Irvine has responded to RSPA's follow-up letters of June 19, 2003, and November 25, 2003.

In the appeal letter, Mr. Irvine acknowledges that he is the "manager" of Dynamic, "an active California LLC," which has "under 2 employees" and less than \$10,000 net income per year. Mr. Irvine asks to be "stricken" from this case on the ground that he "was acting as an agent or employee of Dynamic" and not "in his individual or personal capacity." He also states that U.S. Rockets does not exist "now [and] has never existed."

Mr. Irvine denies each of the violations in this case and asserts that:

1. These materials were actually examined, classified, and approved in July 1986. He contends that, "[t]he material was recommended for a hazard class ONLY IF larger than a particular solid cylinder 3.30 inches in diameter AND 36 inches long" and "[n]o material at issue meets the 3.3"d x 36"h test."
2. These materials are not hazardous because they do not "meet the standards for treatment as either Class 1 or Class 4 and . . . thus is an UNREGULATED PLASTIC." He states that the "nature of the material is a stable unregulated plastic which cannot spill, explode, harm by contact with humans or other goods, or spontaneously catch fire. In short, it is objectively safe to ship."

3. The exceptions for a “consumer commodity” apply to this shipment, under the definition in 49 C.F.R. § 171.8: “a material that is packaged or distributed in a form intended or suitable for sale through retail sales agencies or instrumentalities for consumption by individuals for purposes of personal care or household use. The term also includes drugs and medicines.”

According to the appeal letter, this “was a single shipment of all remaining ‘excess’ produced materials and samples sent to a dealer at his specific request . . . after [Mr. Irvine] had contacted DOT, and did not receive any response that rules had changed since the July 1986 letter issued by your office regarding being listed as a hazmat shipper (for items above 3.3"d x 36"h), and being listed as a party to exemption DOT-E-10996 for purposes of any materials, and other matters.” Mr. Irvine also states that this “single shipment by a small shipper [had] no consequences, and no threatened consequences.” As exhibits to the appeal letter, he provided copies of the following documents (listed in chronological order):

–a July 14, 1986 Bureau of Explosives’ (BOE) Chemical Laboratory Report of its examination of AP/A1/HTPB Propellant submitted by ACS-Reaction Labs, in which BOE recommended that “the material represented by this sample is described as a Propellant Explosive, Solid and classed as a Class B Explosive when the material is shipped in cast form with the minimum dimensions of 36.00"h x 3.30"d.”

–a November 18, 1986 letter from RSPA’s Approvals Branch to ACS-Reaction Labs approving two “new explosive products” for shipment: (1) Rocket motor, 3486-A, Class B explosive, EX-8611103, and (2) Propellant explosive, solid AP/A1/HTPB Propellant Class B explosive, EX-8611104.

–a November 28, 1986 Competent Authority Approval CA-861124 issued by RSPA for “Rocket Motor (P/N 3486-A, EX-8611103)” classifying this item as a division 1.3C explosive article.

–a May 2, 1998 letter from ACS-Reaction Labs to RSPA stating that Mr. Jerry Irvine of Dynamic Propellant Technologies LLC had “purchased all assets, properties, files . . . and all other assets pertaining to the former ACS-Reaction Labs,” and that Mr. Irvine “wishes to change the former CA number [CA-861124] over to his operation.”

–a June 8, 1998 letter from RSPA’s inspector to Mr. Irvine stating that “[t]he recent acquisition of all assets and properties belonging to ACS-Reaction Labs by Dynamic Propellant Technologies does not relieve you from the requirement to apply for the formal transfer of Competent Authority Approval CA-861124, from ACS-Reaction Labs to Dynamic Propellant Technologies, LLC.”

–a June 15, 1998 letter from Mr. Irvine to RSPA stating that “the competent authority # CA-8611124 [sic] has been transferred to Dynamic Propellant Technologies LLC” and asking for “a new CA document” to be issued for “two EX numbers as follows:” EX-

8611103 for the Rocket Motor P/N 3486-A in “UN Class: 1.3c” and EX-8611104 for the Solid Propellant P/N AP/A1/HTPB in “UN Class 1.4s?” Mr. Irvine asked that Dynamic “be made party to exemptions 7887 and 10996 with regard to rocket motors,” and he also stated that

This material is also used in smaller quantities as model rocket motors, 1.4s, Rocket motor reload kits 1.4c and rocket motors 1.4g. I need to know the procedure to obtain competent authority documents with these hazard classes and UN numbers.

–a May 10, 2001 letter from Mr. Irvine to RSPA with “the documents requested for a reassignment of DOT EX numbers resulting from a business ownership change,” and again asking for “a new CA document [to be] issued for” the rocket motors and solid propellant approved under EX-8611103 and EX-8611104, respectively asking “to be made party to exemptions DOT-EX-7887 and DOT-EX-10996 with regard to rocket motors and propellents.”

–a June 26, 2001 letter from Mr. W.E. Wallace of the Maryland Delaware Rocketry Association to RSPA “regarding EX-8611103 and EX-8611104 and their owner assignment transfer to Mr. Jerry Irvine,” raising questions whether “Mr. Irvine has complied with the instructions provided him, with no response from your office unless he has taken liberties with the truth, there are problems he has failed to disclose, resulting in a delay in a response from you or your office, and or both.”

In 49 C.F. R. § 173.54(a), the HMR prohibit the shipment of an “explosive that has not been approved in accordance with § 173.56.” The latter section provides that (a) a “new explosive must be examined and assigned a recommended shipping description, division and compatibility group . . . [and] approved in writing and assigned an EX number,” and (b) a “new explosive means an explosive produced by a person who– (1) Has not previously produced that explosive, or (2) Has previously produced that explosive but has made a change in the formulation, design or process so as to alter any of the properties of the explosive.” Even if it is assumed that Dynamic made no “change in the formulation, design, or process [that] alter[ed] any of the properties” of the rocket motors and solid propellant manufactured by ACS-Reaction Labs, these items were “new explosives” that must be examined, classified, and approved because they had not been previously produced by Dynamic.

As indicated in the June 8, 1998 letter to Mr. Irvine from RSPA’s inspector, under certain circumstances, RSPA will “transfer” an approval to a new producer of an explosive based on representations that there has not been any change in the formulation, design or process in manufacturing the explosive. Mr. Irvine’s own June 1998 and May 2001 letters, in addition to the May 1998 letter from ACS-Reaction Labs and the June 9, 1998 letter from RSPA’s inspector, show that Mr. Irvine clearly understood he needed to have that approval “transferred” to Dynamic in order for Dynamic to ship these rocket motors and solid propellant in accordance with the HMR. However, the November 18, 1986 approvals issued to ACS-Reaction Labs were

never transferred to any of the Respondents.

RSPA has not been able to locate in its files the originals of the May 1998 letter from ACS-Reaction Labs or the June 1998 and May 2001 letters from Mr. Irvine regarding a “transfer” of the approvals to Dynamic. If these letters were actually received by RSPA (prior to the copies of these letters that were attached to Mr. Wallace’s June 26, 2001 letter), RSPA’s failure to respond promptly would constitute a basis for some reduction of the penalty assessed for violation No. 1. At this date, it is not possible to state with certainty whether RSPA would have transferred these approvals to Dynamic without requiring further examination, or whether Dynamic would have submitted the rocket motors and solid propellant for further examination if requested. The possibility that RSPA was responsible for a delay in issuing or transferring an approval (prior to the January 2001 shipment involved in this case) makes it appropriate to reduce – but not eliminate – the penalty for violation No. 1. However, these circumstances cannot justify the shipment of a “new explosive” that had not been approved.

In any event, the November 18, 1986 approvals issued to ACS-Reaction Labs were no longer valid after October 1, 1993, the effective date of the new classification system for explosives adopted in RSPA’s final rule in docket No. HM-181, 55 Fed. Reg. 52402 (Dec. 21, 1990), 56 Fed. Reg. 66125 (Dec. 20, 1991). As RSPA explained in the preamble to the December 20, 1991 final rule, at p. 66141, “for an explosive that had been approved under the old HMR [*i.e.*, as a Class A, B, or C explosive], to be transported after October 1, 1993, it would have to be reclassified under the new regulations,” in Divisions 1.1 through 1.6. See 49 C.F.R. § 173.52. RSPA also stated that it would provide such reclassification upon request, 56 Fed. Reg. at 66141, but no reclassification of these rocket motors and solid propellant was ever made. For this additional reason, these rocket motors and solid propellant were unapproved and forbidden to be transported in commerce.

The exhibits to the appeal letter are also inconsistent with the argument that these rocket motors and solid propellant could properly be shipped as items that are not subject to the HMR. The July 14, 1986 BOE report of examination specified the dimensions of the samples of solid propellant submitted to BOE, but that report cannot be read to indicate that a smaller quantity of this material is not an explosive. The primary component of the solid propellant is ammonium perchlorate (77%), which is listed in the Hazardous Materials Table as either a Division 1.1D (explosive) or 5.2 (organic peroxide) material, depending on “the particulate size and packaging . . . [and the] appropriate classifications should be verified following the test procedures [for explosives] in §§ 173.57 and 173.58” of the HMR. 49 C.F.R. § 172.102(c)(1) (Special Provision 107). RSPA’s Office of Hazardous Materials Technology has confirmed that, based on the composition of the solid propellant described in BOE’s July 14, 1986 report of examination, any quantity of this material would be expected to be properly classified as an explosive. Even if testing indicated otherwise, the propellant would have to be classified in Division 5.2 and shipped in accordance with the requirements in the HMR. While a Division 5.2 material (but not an explosive) may be reclassified as an ORM-D “consumer commodity,” in that event, the outer packagings must be marked “ORM-D.” 49 C.F.R. § 172.316(a). They were not, so that the consumer commodity exception was not applicable to Dynamic’s January 2001 shipment of

rocket motors and solid propellant. Moreover, it is clear that Mr. Irvine always considered that the rocket motors and solid propellant were explosives, as initially approved in November 1986, which is consistent with the opinion of RSPA's Office of Hazardous Materials Technology.

There is no basis to dismiss Mr. Irvine from this case. As the manager and virtually the only employee of Dynamic, he is the company. He signed the bill of lading and was responsible for the shipment of rocket motors and solid propellant disguised as "Model Airplane Parts." It is well settled that both a company and its individual agent or employee who acts for the company may be held responsible for violations that the employee commits.

At the same time, it appears proper to dismiss U.S. Rockets from this case. U.S. Rockets presently has an internet web site (<http://www.usrockets.com>) at which customers may place orders for rocket motors and propellants (many of which actually exceed the 36" x 3.3" dimensions in the BOE test report). RSPA understands that these orders are passed to Dynamic which fills and ships these orders to the customer. (The internet address for Dynamic, <http://www.v-serv.com>, provides a direct connection to the U.S. Rockets web site.) There is no evidence that U.S. Rockets had any actual participation in this shipment. However, the range of rocket motors and propellant available for purchase from the U.S. Rockets' web site casts doubt on Mr. Irvine's statement that the shipment in this case was "a single shipment of all remaining 'excess' produced materials." The items available for purchase on the U.S. Rockets web site seem to confirm that Dynamic is continuing to ship rocket motors and propellant without holding an approval for these explosive materials.

Dynamic's small size justifies some reduction of the penalty assessed in the Order. At the same time, there is insufficient information to find that Dynamic and Mr. Irvine are unable to pay a substantial civil penalty for these serious violations or that such a penalty will have an adverse effect on their ability to continue in business. The text of Mr. Irvine's appeal letter indicted he was including "income statements for all respondents," but no such financial statements were provided (or listed in the Exhibit List at the end of his letter).

### Findings

I have determined that there is sufficient information to dismiss this case against U.S. Rockets and to warrant mitigation of the civil penalty assessed in the Chief Counsel's Order against Dynamic and Mr. Irvine. I find that a civil penalty of \$40,000 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, the culpability of Dynamic and Mr. Irvine, their lack of prior offenses, the size of their business, their ability to pay, the effect of a civil penalty on their ability to continue in business, and all other relevant factors. The total penalty is allocated to the three violations as follows:

- Violation No. 1 - \$16,000, reduced from \$27,500 in the Order,
- Violation No. 2 - \$22,000, reduced from \$27,500 in the Order,
- Violation No. 3 - \$2,000, reduced from \$2,500 in the Order

Therefore, as modified herein, the Chief Counsel's July 25, 2002 Order 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.

### Payment

Due Date. Respondents Dynamic and Mr. Irvine must pay this \$40,000 civil penalty within 30 days of the date of this Action on Appeal.

Payment Method. Respondents Dynamic and Mr. Irvine must pay the civil penalty by wire transfer. Detailed instructions for sending a wire transfer through the Federal Reserve Communication System (Fedwire) are contained in the enclosure to this Acton on Appeal. Please direct questions concerning wire transfers to:

Financial Operations Division (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 these Respondents pay the civil penalty by the due date, no interest will be charged. If these Respondents do 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 this 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 Respondents. 31 C.F.R. § 901.3. Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights prior 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.

### Final Administrative Action

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

/s/ Samuel G. Bonasso  
Deputy Administrator

Date Issued: April 1, 2004

Enclosure

REGULAR U.S. MAIL AND CERTIFIED MAIL - RETURN RECEIPT REQUESTED