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

In the Matter of: Novelty Inc., Respondent.	RPSA Case No. 02-354-SB-EA DMS Case No. RSPA-2004-19826

DECISION ON APPEAL

I. Background

On November 29, 2004, the Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA),[1] U.S. Department of Transportation (DOT), issued an Order (Order) to Novelty Inc. (Respondent), finding that Respondent had committed the following six violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of $22,140:

> Violation No. 1. Offering hazardous materials – Lighters, containing flammable gas, 2.1, UN 1057 – for transportation in commerce when the lighter and its packagings had not been examined by an agency authorized to examine such devices, and when the devices had not been specifically approved by the

[1] Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline 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) redelegating the hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to the Administrator, PHMSA.

Associate Administrator for Hazardous Materials, in violation of 49 C.F.R. §§ 171.2(a) and (b); 173.21(i); and 177.801.

Violation No. 2. Offering hazardous materials - Lighters, containing flammable gas, 2.1, UN 1057 – for transportation in commerce while failing to package the hazardous materials in authorized packages, in violation of 49 C.F.R. §§171.2(a) and (b); 171.12(b)(4); 172.101(h); 172.102(c)(5) special provision N10; 173.21(i); 173.22(a)(2); 173.24(a)(1); 173.24(c)(1); 177.801; and 178.503(a)(4)(ii).

Violation No. 3. Offering hazardous materials – Lighters, containing flammable gas, 2.1, UN 1057 – for transportation in commerce when the packages were not marked or labeled, in violation of 49 C.F.R. §§ 171.2(a) and (e); 171.12(b)(4); 172.301(a); 172.400(a)(1); 172.407(c)(1); 173.22(a)(2); and 177.801.

Violation No. 4: Offering hazardous materials – Lighters, containing flammable gas, 2.1, UN 1057 – for transportation in commerce while failing to prepare shipping papers, including valid emergency response telephone numbers, in violation of 49 C.F.R. §§ 171.2(a) and (b); 171.12(b), 172.201(a) and (d); 172.202(a)(1), (a)(2), and (a)(3); 172.600(a), (b), (c)(1) and (c)(2); 172.602(a), (b), and (c); 172.604; 177.801; and 177.817(a).

Violation No. 5: Offering a non-hazardous material for transportation in commerce while representing the material as being a hazardous material by its packagings marked with the proper shipping name, identification number, T-approval number and hazardous class warning label, in violation of 49 C.F.R. §§ 171.2(a) and (b); 172.303(a)(1); 172.401(a)(1); and T-approval number T-0449.

Violation No. 6: Offering hazardous materials – Lighters, containing flammable gas, 2.1, UN 1057 – for transportation in commerce while failing to provide general awareness, function specific, and safety training to hazmat employees, in violation of 49 C.F.R. §§ 171.2(a) and (b); 172.702(b); 172.704(a); 173.308; and 177.801.

The Order, which is incorporated by reference, assessed the $22,140 civil penalty originally proposed in the Notice of Probable Violation (NOPV), dated July 12, 2002, which included a $7,360 reduction for corrective actions. In accordance with PHMSA's[2] regulations, Respondent had 20 days from the receipt of the Order to appeal to this office. The U.S. Postal Service's records show that Respondent received the Order, via certified

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

mail, on December 3, 2005. According to the regulations, Respondent was required to ensure PHMSA received its appeal 20 days after receipt (49 C.F.R. §107.325(c)(1)). Thus, in order to be considered timely, the appeal should have been received by PHMSA by December 27, 2004,[3] which includes an additional 3 days for mailing (Fed. R. Evid. 6(e)). PHMSA, however, did not receive Respondent's appeal, dated and postmarked December 20, 2004, until December 28, 2004.

Nevertheless, in the interests of justice and at my sole discretion, this appeal is considered timely for several reasons. First, and most importantly, the postmark on Respondent's appeal is dated December 20, 2004, *before* the December 27, 2004 filing deadline. In addition, the charging documents, i.e. the Notice and the Order, do not ma the procedural filing requirements sufficiently clear. Finally, it appears there is a significant delay in the delivery of mail to Federal agencies via the U.S. Postal Service.

However, in the spirit of assisting respondents in complying with the HMR in th future, the Chief Counsel's office is herein ordered to modify the language in the charging documents to: (1) give respondents adequate warning of the default potential in instances where respondents fail to file their appeals in a timely manner and (2) recommend respondents use alternate delivery methods, such as facsimile or overnight delivery, to ensure timely filing.

Although Respondent's appeal is considered timely, it must be denied, for reasons more fully discussed below and Respondent is assessed a civil penalty of $22,140.

[3] The 20th day after Respondent received the Order was December 26, 2004. However, since December 26, 2004 fell on a weekend day, the 20-day statutory deadline was extended to the end of the next business day, December 27, 2004.

II. Discussion

Respondent requests the Order of November 29, 2004 be vacated. Respondent's contention with the Chief Counsel's findings and penalty assessment in the amount of $22,140 rests on the following bases: (1) Respondent asserts the penalties should be withdrawn because it immediately took corrective actions; (2) Respondent argues the duty to properly package hazardous materials lies only with the importer and manufacturer; and, (3) Respondent alleges the fines are unreasonably duplicative, excessive, and arbitrary. Respondent has not disputed any of the facts articulated in the Order; thus, the facts in the Order of November 29, 2004 are incorporated herein.

First, Respondent argues the Chief Counsel's Order should be vacated because it took immediate corrective action in response to being notified of Violation Nos. 1, 2, 3, 4, 5, and 6. In order to achieve its purpose, a regulatory scheme must include a robust enforcement program to ensure voluntary compliance. Thus, the enforcement program must have a deterrent effect. The assessment of civil penalties ensures the HMR have "teeth" (see, e.g., Toyota Motor Sales, USA, Inc., FAA Order No. 94-28 (September 30, 1004)).

However, Federal law requires the Office of Chief Counsel to consider certain factors when assessing penalties (49 C.F.R. § 107.331) for violations of the HMR. Under 49 C.F.R. § 107.331(g), the Chief Counsel may reduce penalties based on "other matters as justice may require," which include documented evidence of corrective action. The record shows the Chief Counsel, in the NOPV dated July 12, 2002, considered Respondent's corrective actions and, as a result, reduced the proposed penalty amount by a total of $7,360. Upon a review of the record, the Chief Counsel appropriately

accounted for the corrective actions when assessing the penalties. While Respondent is commended for taking immediate action to come into compliance with the HMR, these actions do not form a proper basis to dismiss the penalties altogether. Thus, Respondent's first argument on appeal is denied.

Next, Respondent argues the Order of November 29, 2004 should be vacated because, as a distributor of lighters, it is not responsible for ensuring they are properly packaged. Respondent further claims the duty to ensure proper packaging lies only with the manufacturers and importers. Finally, Respondent claims it "does not re-package the lighters, but merely puts that same package on a route truck that delivers the item directly to the stores for consumer purchases."

Respondent's argument is flawed for the following reasons. First, as a distributor of lighters, Respondent is engaged in the transportation of hazardous materials. The HMR applies to *any* person "who transports a hazardous material to further a commercial enterprise or offers a hazardous material for transportation in commerce" (49 C.F.R. §§ 107.1, 172.3). Respondent distributes various novelty and convenience items, including hazardous materials, and in the course of its business, its salesmen transport those hazardous materials. Thus, Respondent is clearly subject to the HMR's requirements, including those related to the marking, labeling, and packaging of hazardous materials.

In addition, contrary to Respondent's claims it does not re-package the lighters, the record shows Respondent's salesmen actually did so before and during the inspection. As detailed in the Inspection/Investigation Report dated May 31, 2002, Respondent's salesmen picked up lighters from self-storage units and replenished retail store displays. The salesmen then transported any remaining lighters in the original packagings without

closing them in accordance with the manufacturer's instructions. The record also shows, in at least one instance, a salesman packaged hazardous materials by combining different types of lighters and other non-hazardous materials in an unauthorized manner to return to Respondent's warehouse or supplier, or both.

Respondent's actions, as described above, constitute the re-packaging of hazardous materials. The purpose of the HMR is to ensure the safety of the public and those persons whose occupations involve the transportation of hazardous materials. As a result, the HMR prescribes certain packaging requirements to minimize the inherent risk involved in transporting hazardous materials. Insofar as Respondent's re-packaging methods did not comply with HMR, Respondent's actions posed an even greater risk to its employees and the public. Thus, Respondent's second argument on appeal is not a sufficient basis for a further reduction in the assessed penalties.

Finally, Respondent contends the penalties are unreasonably duplicative, excessive, and arbitrary. With respect to Violations Nos. 1, 2, and 3, Respondent cites only the text in the Order of November 29, 2004 finding Novelty "...transported lighters in unauthorized packages...." However, Respondent fails to recognize the distinction in the Chief Counsel's findings for each violation.

Each of the regulations for approvals, marking, labeling, and shipping papers are distinct and separate requirements a person involved in hazardous materials transportation must follow. As a result, a number of violations may arise from the same packaging or one set of facts. A closer reading of each violation in the Order places each finding in context and makes apparent each violation consists of a separate area of the packaging specifications in the HMR. Furthermore, contrary to Respondent's assertions,

the findings state and apply different regulations for each violation committed. Thus, the Chief Counsel's findings are not duplicative.

Federal law authorizes PHMSA to assess a penalty between $275 and $32,500 for each violation of the HMR (49 C.F.R. § 171.1(c)). Furthermore, in 49 C.F.R., Part 107, Subpart D, Appendix A, the regulations provide a penalty guideline for frequently cited violations. As mentioned above, PHMSA may increase or decrease the baseline penalties based on the factors listed in 49 C.F.R. § 107.331.

In this instance, the Chief Counsel took into consideration each of the recommended baseline penalties for Violation Nos. 2, 3, 4, 5, and 6 ($7,000, $5,000, $1,125, $1,600, and $2,400, respectively) and, employing its discretion, reduced every penalty amount for Respondent's corrective actions. The exception is Violation No. 1, which is not listed in the baseline penalty table. However, the Chief Counsel considered the circumstances of the violation and used a comparable violation's baseline penalty to determine the appropriate penalty amount, which included a reduction for corrective actions. The Chief Counsel, therefore, acted appropriately and Respondent's third argument on appeal is denied.

Based on the foregoing factors, the Chief Counsel's Order of November 29, 2004 took into consideration and made a careful analysis of all facts and statutory requirements before assessing a civil penalty of $22,140.

III. Findings

There is no justification to grant Respondent's appeal and withdraw the civil penalties assessed by the Office of the Chief Counsel. The civil penalty of $22,140 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, Respondent's prior violations and all other relevant factors. Therefore, the Order of November 29, 2004 is affirmed as being substantiated by the record and issued in accordance with the assessment criteria prescribed in 49 C.F.R. § 107.331.

IV. Payment

Respondent must pay this $22,140 civil penalty within 30 days of the date of this Action on Appeal. See Addendum A for payment information.

V. Final Administrative Action

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

Brigham A. McCown
Acting Administrator

Date Issued: 09-19-05

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 19TH day of SEPT, 2005, the undersigned served in the following manner the designated copies of this Decision of Appeal with attached addendums to each party listed below

Novelty Inc.
351 W. Muskegon Drive
Greenfield, Indiana 46140
ATTN: Jeanne M. Hamilton, General Counsel

Original Order with Enclosures
Certified Mail Return Receipt

Mr. Doug Smith, Enforcement Officer
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
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
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
820 Bear Tavern Road, Suite 306
West Trenton, New Jersey 08628

One Copy (without enclosures)
First Class Mail

Tina Mun, Esq.
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Office of the Chief Counsel
400 Seventh Street, S.W., Room 8417
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

for Tina Mun

ADDENDUM A
PAYMENT INFORMATION

Due Date. Respondent must pay this $22,140 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.