

DEPT. OF TRANSPORTATION
DOCKETS

2005-23123-2 P 4:14

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

In the Matter of:

**Chemicon S.A. Indústrias
Químicas**

Appellant.

**RSPA Case No. 02-504-FSD-SW
DMS Docket No. PHMSA-2005-23123 - 3**

DECISION ON APPEAL

I. Procedural History

On November 22, 2005, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued an Order¹ to Chemicon S.A. Indústrias Químicas (Appellant) finding Appellant had knowingly committed two violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a civil penalty in the amount of \$7,500. Specifically, the Order found Appellant had offered an environmentally hazardous substance for transportation in commerce in a reportable quantity without preparing a proper hazardous material shipping paper and without properly marking the package. In a letter dated December 16, 2005, PHMSA received a timely appeal of the Order.

II. Summary

In this appeal, Appellant, located in Sao Paulo, Brazil, seeks reconsideration of the civil penalty assessed in the Order. Appellant argues it did not commit a knowing violation.

¹ DMS Docket Number PHMSA-2005-23177-1 at <http://dms.dot.gov>.

Appellant also seeks mitigation for financial hardship. The Chief Counsel correctly determined Appellant committed two knowing violations of the Hazardous Materials Regulations; however, mitigation for Respondent's degree of culpability and financial situation is appropriate. As discussed below, the appeal is granted in part.

III. Background

This enforcement case arose out of an inspection performed in Overland Park, Kansas, which revealed a reportable quantity of an environmentally hazardous substance shipped without proper markings and unaccompanied by proper hazardous materials shipping papers. After investigation, the Office of Hazardous Materials Enforcement determined Appellant was the original shipper of the hazardous substance. In a separate enforcement action, the Office of Chief Counsel determined the domestic importer did not provide Appellant with timely and complete information as to the requirements of the HMR.

IV. Discussion

Appellant seeks reconsideration of the civil penalty assessed in the Order. Appellant states the penalty is in excess of one month of its payroll. Appellant argues it did not know the substance at issue was regulated for transportation in the United States because the substance is not regulated under Brazilian regulations or under the IMDG. In addition, Appellant refers to the Material Safety Data Sheets for two U.S. manufacturers, which state the substance is not regulated in transportation. As a result, Appellant argues it is virtually impossible for it to know of the regulation unless informed by the importer.

Appellant states it has been unable to provide any evidence of corrective action because its U.S. customer is no longer purchasing the substance from Appellant; as a result, Appellant is no longer shipping the regulated substance into the United States. Finally, Appellant states it has

obtained information from the Office of Chief Counsel and from the internet which it believes will ensure no violations of this nature will occur in the future.

Appellant has maintained from the beginning it did not know the transportation of the substance was regulated in the United States. In a separate action, the Office of Hazardous Materials Enforcement issued a ticket to the importer for failure to provide the required information to Appellant. There is no evidence to suggest Appellant had actual knowledge the substance was regulated.

The “knowingly” standard does not require actual knowledge, however. Even if Appellant did not actually know about the requirements, Appellant is responsible for violations if “it should have known”. About the requirement and if “a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.”² A foreign shipper must ensure it has complete information prior to shipping materials into the United States. Although the substance is not regulated under the IMDG, the United States regulates many substances which are not regulated elsewhere. A reasonable person acting in these circumstances and exercising reasonable care should have checked for information regarding U.S. regulations prior to shipping the substance into the United States. Although the HMR impose a duty on an importer to provide information to a foreign shipper, the importer’s duty does not completely insulate the foreign shipper from its own responsibility to investigate the regulations of the country in which it has elected to do business.

Appellant has taken some actions to ensure similar violations do not occur in the future and is no longer shipping into the United States the hazardous material at issue. The Order provided no mitigation from the baseline recommended in the Guidelines for Civil Penalties.

² 49 U.S.C. § 5123(a)(1)(B).

V. Findings

Based on the foregoing factors, I find Appellant committed two knowing violations of the HMR. In consideration of mitigating factors, I find a reduction to the civil penalty assessed in the Order is appropriate. After considering the nature and circumstances of these violations, their extent and gravity, Appellant's culpability, Appellant's ability to pay, the effect of a civil penalty on Appellant's ability to continue in business, and all other relevant factors, I assess a civil penalty of \$3,000, a reduction of \$4,500 from \$7,500 in the 2005 order. The appeal is granted with regard to the amount of the civil penalty in consideration of evidence presented.

VI. Payment

Appellant must pay this \$3,000 civil penalty within 30 days of the date of this Decision on Appeal. Alternatively, Appellant may pay the \$3,000 penalty in four monthly installments of \$750. See Addendum A for payment information.

VII. Final Administrative Action

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



Brigham A. McCown
Acting Administrator

Date Issued: MAY 31 2006

REGISTERED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of June, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Chemicon S.A. Indústrias Químicas
Rau Candido Fontoura 90
Sao Paul, Brazil
Attn: Mr. J.L.Buejo

Original Decision on Appeal
Registered Mail – Return Receipt

Krista L. Edwards, Esquire
Chief Counsel
USDOT/PHMSA
400 Seventh Street, S.W.
Washington, D.C. 20590

One Copy
Internal E-Mail

Ray LaMagdelaine
Acting Director, OHME
USDOT/PHMSA/OHMS
400 Seventh Street, S.W.
Washington, D.C. 20590

One Copy
Internal E-Mail

Billy Hines, Jr.
Southwestern Region Office Chief
USDOT/PHMSA/OHMS
Southwest Region Office
8701 S. Gessner Road, Ste 1110
Houston, TX 77074

One Copy
Internal E-Mail

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

JUN - 2 2006



Willard Walker

Payment Method.

Appellant must pay the civil penalty by one of the following: (1) wire transfer, (2) certified check or money order, or (3) credit card via the Internet.

(1) Wire Transfer.

Detailed instructions for sending a wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Order. Please direct questions concerning wire transfers to:

AMZ-300
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125
Telephone (405) 954-8893

(2) Check or Money Order.

Make check or money order payable to "U.S. Department of Transportation" (include the Ref. No. of this case on the check or money order) and send to:

AMZ-300
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125.

(3) Credit Card.

To pay electronically using a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

Interest and Administrative Charges.

If Appellant pays the civil penalty by the due date, no interest will be charged. If Appellant 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 this Order. 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 Appellant receives the Order.

Treasury Department Collection.

FAA's Financial Operations Division may also refer this debt and associated charges to the U.S. Department of Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Appellant. 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. You, as the debtor, have 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 Order constitutes written notification of these procedural rights.

**INSTRUCTIONS FOR ELECTRONIC FUNDS TRANSFER TO
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION**

1. <u>RECEIVER'S ABA NO.</u> 021030004	2. <u>TYPE SUBTYPE</u> (provided by sending bank)
3. <u>SENDING BANK ARB NO.</u> (provided by sending bank)	4. <u>SENDING BANK REF NO.</u> (provided by sending bank)
5. <u>AMOUNT</u>	6. <u>SENDING BANK NAME</u> (provided by sending bank)
7. <u>RECEIVER NAME:</u> TREAS NYC	8. <u>PRODUCT CODE</u> (Normally CTR, or sending bank)
9. <u>BENEFICIAL (BNF)- AGENCY LOCATION CODE</u> BNF=/ALC-69-14-0001	10. <u>REASONS FOR PAYMENT</u> <i>Example: PHMSA Payment for Case #/Ticket</i>

INSTRUCTIONS: You, as sender of the wire transfer, must provide the sending bank with the information for Block (1), (5), (7), (9), and (10). The information provided in blocks (1), (7), and (9) are constant and remain the same for all wire transfers to the Pipeline and Hazardous Materials Safety Administration, Department of Transportation

Block #1 - RECEIVER ABA NO. - "021030004". Ensure the sending bank enters this nine digit identification number; it represents the routing symbol for the U.S. Treasury at the Federal Reserve Bank in New York.

Block #5 - AMOUNT - You as the sender provide the amount of the transfer. Please be sure the transfer amount is punctuated with commas and a decimal point.

EXAMPLE: \$10,000.00

Block #7 - RECEIVER NAME- "TREAS NYC." Ensure the sending bank enters this abbreviation, it must be used for all wire transfer to the Treasury Department.

Block #9 - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/ALC-69-14-0001" Ensure the sending bank enters this information. This is the Agency Location Code for Pipeline and Hazardous Materials Safety Administration, Department of Transportation.

Block #10 - REASON FOR PAYMENT – "AC-Payment for PHMSA Case#/To ensure your wire transfer is credited properly, enter the case number/ticket number or Pipeline Assessment number."

Note: - A wire transfer must comply with the format and instructions or the Department cannot accept the wire transfer. You, as the sender, can assist this process by notifying, at the time you send the wire transfer, the General Accounting Division at (405) 954-8893.