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

In the Matter of: **China National Chemical Construction Shenzhen Company (CNCCC-Shenzhen)**	**PHMSA Case No. 02-609-FSBG-EA** **DMS Docket No. RSPA-04-19781**

DECISION ON APPEAL

I. Background

On October 28, 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 China National Chemical Construction Shenzhen Company (CNCCC-Shenzhen) (Respondent), finding that Respondent had committed the following one violation of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of $18,050:

> Offering for transportation in commerce a hazardous material, ammonium hydrogendiflouride, solid, 8, UN1727, PGII, when the material was not declared as a hazardous material on the shipping document and the packages were not marked or

[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) redelegating the hazardous materials safety functions from the Research and Special Programs Administration to the Administrator, PHMSA.

labeled as containing a hazardous materials, thereby creating an undeclared shipment in violation of 49 C.F.R. §§ 171.2(s), 172.200(a), 172.201, 172.301(a), 172.400(a), 172.600, and 172.602 and IMDG Code 5.4.1.1, 5.2.1.1, 5.2.2.1.1, and 5.3.2.1.1.

The Order, which is incorporated by reference, modified the $19,125 civil penalty originally proposed in the October 28, 2002, 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 an electronic mail message dated December 3, 2004 (well after the 20 day appeals deadline), Respondent submitted its appeal; however, the United States Postal Service cannot confirm the date of delivery of the Order, and I will consider this appeal as being timely submitted.

II. Discussion

In this appeal, Respondent requests that that the penalty amount be reduced to $250. Respondent first contends that it is a "small company with limited ability to pay" and that it is an independently incorporated branch of its parent corporation, China National Chemical Construction Company (CNCCC). Next, Respondent highlights, in support of a penalty amount reduction, the fact that it had no prior violations, that it took remedial action immediately and that its violation of the HMR did not result in environmental, bodily or property damage. Respondent further argues that the penalty amount should be reduced because the NOPV proposed a total assessment of $19,125, not $21,250, as indicated on page 7 of the October 28, 2004 Order. Finally, Respondent asserts that its warranties of future compliance with the HMR justify a further reduction of the penalty amount. As discussed below, Respondent's appeal must be denied.

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

This enforcement case arose out of a July 17, 2002 compliance inspection at Mann Chemical, LLC (Mann) in Warwick, RI. During the compliance inspection, PHMSA's inspector observed several pallets packaged in UN5M2 paper bags. The inspector noted that the product label indicated *that the bags* contained ammonium biflouride and included the number, UN 1727, and, in smaller print, the name ammonium hydrogen di-flouride. The bags, however, had no hazardous material labels and the product label failed to display the full proper shipping description, "Ammonium hydrogendiflouride, solid, 8, UN 1727, PGII" , as it is listed in § 172.101 Hazardous Materials Table.

The inspector then interviewed Mr. George Mauk, Vice President of Mann Chemical, who explained that the commodities in question had been imported from CNCCC-Shenzhen on Mann's behalf by Tannin Corp., Peabody, MA (Tannin). Mr. Mauk confirmed that the packages arrived in the same condition as the inspector had observed them, and that the freight container in which the packages had arrived was not placarded. The inspector then reviewed documents, including the bill of lading, dated May 28, 2002 and provided *by Mr.* Mauk, which did not identify the shipping records produced by Tannin.

Subsequently, the inspector determined that Respondent had committed one violation of the HMR by shipping its product to the US without declaring it as a hazardous material, failing to describe the product properly in the shipping papers, failing to label the packaging as prescribed, *and* failing to placard the freight container with the proper corrosive placards. Furthermore, the inspector found that the only markings actually identifying the material as hazardous were not visible until the material was off-loaded at the final destination.

Respondent does not deny that it violated the HMR, but contends that the penalty amount should be lowered to $250 for the following reasons. First, Respondent cites its status as a

"small company with limited ability to pay" and discounts its affiliation with its national parent corporation, CNCCC. To date, Respondent has not offered any evidence to the agency to substantiate its claims regarding its inability to pay. Nor has Respondent proffered any evidence showing the exact financial relationship, or lack thereof, between it and its parent corporation, In fact, in a letter dated November 28, 2002, Respondent asserted that it is a "sub-company of CNCCC" and asked the agency to rely on its "very good reputation" and annual $500 million output as mitigating factors when assessing the penalty.

Respondent cannot slice the financial issues both ways. In essence, Respondent is guing: (1) we are a small business and cannot pay the assessed penalty, but (2) please rely upon our parent company's very good reputation and $500 million annual output to be assured that we will comply in the future. What is clear to me is that Respondent violated the HMR and that the only reliable measure of future compliance is its actual compliance. Notwithstanding its annual $500 million output and its assertions about the parent company's "very good reputation," time can only judge whether Respondent will comply with the HMR in the future. Moreover, I believe that the penalties issued today will go a long way toward assuring Respondent's future compliance with the HMR. In any event, Respondent has had multiple opportunities to present evidence showing that it would suffer undue hardship as a result of the penalty that has been assessed, but has failed to do so. I, therefore, have no basis to reduce the assessed penalty on these facts.

Respondent also bases its appeal for a reduced penalty on the fact that it had no prior violations, that it took remedial action immediately, and that its violation of the HMR did not result in environmental, bodily or property damage. Respondent's corrective actions and the

absence of prior violations warrant a reduction in the penalty amount, and the Order accurately reflects those factors.

The fact that Respondent's violation of the HMR did not ultimately cause seriously environmental, bodily or property damage, however, is not a mitigating factor in this instance. 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 shipper of hazardous materials, Respondent's actions are governed by these regulations, which serve an important public service and must be enforced vigorously. In order to achieve its purpose, a regulatory scheme must have "bite," or a deterrent effect. The assessment of civil penalties ensures that the HMR have "teeth" (See, e.g., Toyota Motor Sales, USA, Inc., FAA Order No. 94-28 (September 30, 1004). Respondent created a potentially dangerous situation by failing to comply with the HMR's safety precautions, which, as demonstrated above, require the Agency to assess civil penalties to deter future non-compliance by Respondent, as well as others in the industry.

Respondent further argues that the penalty amount should be reduced because the NOPV proposed a total assessment of $19,125 and the October 28, 2004 Order's base penalty amount before reduction for corrective actions was $21,250. While it is true that page 7 of the Order referenced the proposed penalty amount before reduction for corrective action ($21,250) in the NOPV, the amount after reduction for corrective action ($19,125) was referenced on page 4 of the Order; that typographical error did not prejudice the Respondent. In any event, I find that Respondent has suffered no detriment, since the final penalty amount assessed by the Chief Counsel is lower than the proposed penalty assessment in the NOPV. Therefore, Respondent cannot prevail on this argument.

Finally, Respondent asserts that its warranties of future compliance with the HMR justify a further reduction of the penalty amount. Warranties of future compliance are not among the factors enumerated in 49 C.F.R. § 107, Subpart D, Appendix A, Section III to be considered in the mitigation of penalties. In fact, the surest way to guarantee that Respondent will be more vigorous in complying with the HMR in the future is to assess the appropriate penalties as governed by clear statutory criteria. That said, I am pleased that Respondent is taking seriously its responsibility for future compliance.

Based on the foregoing factors, it is clear that the Chief Counsel, in its Order of October 28, 2004, took into consideration and made a careful analysis of all facts and statutory requirements before assessing a civil penalty of $18,050, which included a reduction in the penalty amount proposed in the NOPV. It is also clear that Respondent has failed to produce the relevant evidence to substantiate its bases for appeal. [3] Therefore, Respondent's appeal must be denied.

Hi. Findings

I have determined that there is no basis for further mitigation of the civil penalty assessed in the Chief Counsel's Order. I find that a civil penalty of $18,050 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 28, 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.

In its appeal, Respondent additionally argues that the penalty amount should be reduced, at the very least, to the amount proffered by the Chief Counsel during settlement negotiations. However, consideration of settlement negotiations is inappropriate and, therefore, irrelevant at this and any future stage in this matter. See Fed. R. Evidence 408.

IV. Payment

Respondent must pay this $18,050 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.

Stacey Gerard
Acting Assistant Administrator

Date Issued: JUN - 2 2005

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 2ND 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:

China National Chemical Construction Shenzhen Co. 5/F, International Trading Center, 3002 Shenzhen, 518014 China ATTN: Mr. Hongbo Liao	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
Collen 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 $18,050 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.