

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

In the Matter of:

**L. Gray Barrel & Drum
Company, Inc.**

Respondent.

**RSPA Case No. 04-358-DR-EA
DMS Docket No. RSPA-05-20205**

DECISION ON APPEAL

I. Background

On December 15, 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 L. Gray Barrel & Drum Company, Inc. (Respondent), finding 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 \$8,400:

Representing, marking, certifying, selling, and offering tight-head steel drums, marked in part UN1A1/Y1.4/200/USA/2003/1513RL, as meeting the requirements of the Hazardous Materials Regulations, when design qualification testing was not performed as prescribed

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.

by 49 C.F.R. §§ 178.603, 178.604, 178.605, and 178.606, in violation of 49 C.F.R. §§ 171.2(a), 171.2(c), 171.2(e), 171.2(f)(1), 173.28(d) and 178.601(d).

The Order, which is incorporated by reference, assessed the \$8,400 civil penalty originally proposed in the May 14, 2004, Notice of Probable Violation (NOPV). In accordance with PHMSA's² regulations, Respondent had 20 days from the receipt of the Order to appeal to this office (49 CFR §107.325(c)(1)). The U.S. Postal Service's records indicate Respondent received the Order on December 21, 2004. According to the regulations, Respondent's appeal should have been received by PHMSA by January 13, 2005 (which includes 3 additional days for mailing), at the very latest, in order to be considered timely. While Respondent submitted this appeal in a letter dated December 31, 2004, it was not received until January 18, 2005, well after the 20-day filing deadline, as defined in 49 C.F.R. § 107.1. Respondent, however, will be given the benefit of the doubt and this appeal is considered timely.

II. Discussion

Respondent requests the penalty amount be reduced to \$275. Respondent first contends the penalty amount should be lowered because the incorrect marking and labeling was unintentional. Next, Respondent states it has taken corrective action to prevent future violations. Finally, Respondent asserts it is unable to pay the assessed penalty and encloses its financial statements for the year ending December 31, 2003. For the reasons set forth below, Respondent's appeal must be denied.

This enforcement case arose out of a January 12, 2004 compliance inspection at Penn Barrel, Inc. (Penn) in Pittsburgh, Pennsylvania. During the compliance inspection, PHMSA's inspector observed and photographed a reconditioned tight-head steel drum marked, in part

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

UN1A1/Y1.4/200/USA/2003/1513RL. The inspector determined Respondent was the manufacturer of the drums and obtained a copy of invoice number 15273, dated December 17, 2003. This invoice indicated, and Mr. Ron Kaufman, President of Penn, confirmed, Penn had purchased 25 tight-head drums from Respondent.

The inspector then spoke by telephone with Mr. Lomack Gray, President of L. Gray Barrel & Drum Co. (Respondent) on March 2, 2004. During this call, Mr. Gray stated Respondent cleaned, inspected and leak-checked the drums prior to marking them to a UN standard, but had not conducted design qualification testing on the reconditioned drums the inspector had observed. The inspector mailed Respondent an exit briefing detailing the violation; however, Respondent did not return a signed copy to PHMSA.

Respondent does not deny the violations, but contends the penalty amount is excessive and should be lowered to \$275 for the following reasons. First, Respondent argues it unintentionally marked and labeled the drums incorrectly and, as a result, the penalty should be reduced. The purpose of the HMR is to ensure the safety of the public and those persons whose occupations involve the transportation of hazardous materials. Respondent reconditions, remanufactures, and sells drums for use as packaging for hazardous materials; therefore, its 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 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)). By failing to conduct the proper design qualification testing on the drums and then marking and labeling them incorrectly,

Respondent created a potentially dangerous situation, even though it possibly did not intend to do so. Noncompliance with HMR requires the Agency to assess civil penalties. Therefore, Respondent's lack of intent to violate the HMR does not merit a reduction in the assessed penalty amount.

Next, Respondent claims it has taken corrective measures to prevent this type of situation from recurring in the future. For the first time in this matter, Respondent states on appeal it has taken corrective action and its Quality Control Inspectors are now required to perform a final drum inspection with proper label verification prior to loading containers for shipping. While Respondent could have asserted any remedial measures it had taken during the informal response period, it failed to do so and, therefore, waived its right to have any corrective action considered. Stated another way, Respondent may not revise an issue for the first time on appeal.

Finally, Respondent encloses a year-end financial statement for the year ending December 31, 2003 and argues its financial condition justifies a lower penalty amount. While Respondent could have offered any documentation concerning its financial situation during the informal response period, it chose not to do so. In its appeal, Respondent claims its representative made at least four attempts to contact an agency representative to determine which financial records it needed to submit to PHMSA. Respondent further states no one was available to discuss this issue.

The record contains no proof Respondent made these attempts. In the Notice of Probable Violation, however, dated May 14, 2004, Respondent was clearly advised to "submit a copy of its most recent tax return, a current balance sheet (certified if possible) or any other financial information that shows the Respondent's ability to pay the proposed civil penalty." The record also contains a series of correspondence from June 18, 2004 through September 24, 2004,

between Respondent and PHMSA's Special Investigations Chief. During this time, Respondent could have asked the investigator to explain which records should have been submitted to PHMSA but, apparently, did not.

In addition to this correspondence, a Memorandum to the Record prepared by the Special Investigations Chief of the Office of Hazardous Materials Enforcement indicates, on October 8, 2004, he spoke with Respondent's representative by telephone. During that conversation, the investigator instructed Respondent to submit documentation regarding Respondent's financial condition within 30 days. Respondent failed to do so. Based on the foregoing factors, the Chief Counsel's Order of December 15, 2004 took into consideration and made a careful analysis of all facts and statutory requirements before assessing a civil penalty of \$8,400. Even so, in the interests of justice and at my sole discretion, the penalty will be reduced by 20 percent based on the financial information provided by Respondent in its appeal.

III. Findings

Respondent's request for a reduction in the penalty amount to \$275 is denied. However, Respondent's financial condition warrants an additional 20 percent reduction of the civil penalty assessed in the Chief Counsel's Order of December 15, 2004. The civil penalty of \$6,720 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.

IV. Payment

Respondent must pay this \$6,720 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.

A handwritten signature in black ink, appearing to read 'B. McCown', is written over a horizontal line. A vertical line is positioned to the right of the signature.

Brigham A. McCown
Acting Administrator

Date Issued: 08-24-2005

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of August, 2005, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

L. Gray Barrel & Drum Company, Inc. 2800 East 90 th Street Cleveland, OH 44104 ATTN: Mr. Lomack Gray, 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
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

/s/
Tina Mun

ADDENDUM A
PAYMENT INFORMATION

Due Date. Respondent must pay this \$6,720 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.