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

In the Matter of: **Mainland Investment Group** **d/b/a Tech Air** **Respondent.**	**PHMSA Case No. 05-0052-SC-SO** **DMS Docket No. PHMSA-2005-21856**

DECISION ON APPEAL

I. Procedural History

On July 6, 2005, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued a Default Order[1] to Mainland Investment Group d/b/a Tech Air finding the company had knowingly committed four violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. The Default Order, which is incorporated by reference, assessed the $7,775 civil penalty proposed in the Notice of Probable Violation (Notice), dated February 15, 2005. In a letter received August 2, 2005, Tech Air of South Florida (Respondent) timely filed an appeal of the Default Order. In its appeal, Respondent stated the Notice and Default Order were addressed to its predecessor company, Mainland Investment Group. Respondent also provided evidence of corrective actions.

[1] DMS Docket Number PHMSA-2005-21856-1 *at* http://dms.dot.gov.

II. Summary

Respondent appeals the Default Order, claiming the Notice of Probable Violation and the Default Order listed the wrong company name. The Notice and Default Order listed "Tech Air" as Respondent's official company name versus its d/b/a, as is commonly the practice in Florida. Respondent signed for the Notice, accepting delivery under the listed name, and submitted an appeal to the Default Order. Because Respondent received actual notice of the probable violations and failed to respond, Respondent's appeal is denied.

III. Background

This case arises from a December 3, 2004 compliance inspection performed at Respondent's facilities in Miami, Florida. At the time of the inspection, Respondent's trucks were marked with the company name Tech Air. Respondent identified the company as Tech Air and provided the inspector with a previous business name of Mainland Investment Group. Jose Abreu, Manager, represented the company during the inspection.

The Notice and the Default Order named "Mainland Investment Group d/b/a Tech Air" as the party against whom PHMSA sought to take action. Respondent signed for the Notice on February 22, 2005, and mailed the return receipt. Based on U.S. Postal Service records, Respondent also accepted delivery of the Default Order on July 11, 2005. The Notice and Default Order were sent to the attention of Jose Abreu, Manager. Mr. Abreu wrote the letter appealing the Default Order.

The Notice clearly states: "By failing to respond to this notice, or by responding after 30-days of receipt of this Notice without obtaining an extension, <u>you waive your right to contest the allegations</u> made in Addendum A to this Notice." (emphasis in original).

In its appeal, Respondent claimed it did not start doing business under the name Tech Air until January 2005. In December 2004, however, Respondent registered with the DOT as Tech Air, identified itself as Tech Air to the inspector, and was operating vehicles marked with a Tech Air logo.

IV. Discussion

Respondent's appeal raises several questions. Did Respondent receive proper notice of the probable violations charged against it? If so, did Respondent default and waive its opportunity to respond to the allegations in the Notice? If Respondent did not default, then the case must be remanded to the Office of Chief Counsel and Respondent must be afforded an opportunity to respond to the Notice. Respondent submitted evidence of corrective action in its appeal; however, the merits of the case are not before me on an appeal from a Default Order.

Did Respondent receive adequate notice?

The preponderance of the evidence in the record supports the conclusion that the named party in the Notice and Default Order should have been Tech Air instead of listing Tech Air as Respondent's public name under which it does business ("d/b/a name"). Despite the use of an incorrect name as the primary company name, the addressee on the Notice and Default Order included Respondent's company name (Tech Air), and Respondent admits it received the Notice. Therefore, the issue is whether service was proper when the Notice was mailed to, and was captioned with, Respondent's former business name with its current business name listed as a "d/b/a name."

In determining whether service is sufficient to give a party notice of a claim made against it, courts examine the similarity between the names (named party and intended party), other information in the pleading by which a party could identify itself, and the address where the

pleading was served.[2] In this case, the Notice listed the correct name, albeit as a "d/b/a name." The Notice was sent to the attention of Jose Abreu, an employee of Respondent. Respondent was aware it had been inspected by PHMSA in December, only two months prior to receiving the Notice, and the violations cited in the Notice were the same as those presented in the inspection exit briefing. Finally, the Notice was served at Respondent's address.

"As a general rule the misnomer of a corporation in a notice, summons ... or other step in a judicial proceeding is immaterial if it appears that [the corporation] could not have been, or was not, misled."[3] Respondent does not claim it was unaware it was the intended recipient. Respondent accepted the certified mail addressed to "Mainland Investment Group d/b/a Tech Air" and responded to the Default Order. The certified mail was addressed to the attention of the same person who ultimately responded to the Default Order. Furthermore, Respondent produced evidence of corrective actions taken following the inspection. The evidence shows Respondent did, in fact, realize it was the intended recipient of the Notice.

If the Notice names the party "in such terms that every intelligent person understands who is meant ... it has fulfilled its purpose."[4] Respondent cannot, at this late date, try to evade the civil penalties on the basis of a simple misnomer. Respondent received actual notice of the claim made against it by PHMSA. The Notice was sufficient to meet the requirements of the Administrative Procedure Act and due process.

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[2] *See generally Morrel v. Nationwide Mutual Fire Insurance Company*, 188 F.3d 218(4th Cir. 1999); *Datskow v. Teledyne, Inc., Continental Products Div.*, 899 F.2d 1298 (2d Cir. 1990); *Thompson v. Liberty Mutual Insurance Co. of Boston, Mass.*, 390 F.2d 24 (10th Cir. 1968); F. T. C. v. *Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980). *See also Schiavone v. Fortune*, 477 U.S. 21 (1986) (noting in dicta that, while "not a model of accuracy," the revised pleading identifying the party as "Fortune, also known as Time, Incorporated" "does focus on Time and sufficiently describes Time as the targeted defendant.")

[3] *Morrel* at 224 (quoting United States v. A.H. Fischer Lumber Co., 162 F.2d 872, 873 (4th Cir. 1947)). *See also* Datskow v. Teledyne, Inc., Continental Products Div., 899 F.2d 1298 (2d Cir. 1990) (holding service was proper where proper party had actual notice, the address was correct, and the named party was a subsidiary of the proper party); *Thompson v. Liberty Mutual Insurance Co. of Boston, Mass.*, 390 F.2d 24 (10th Cir. 1968) (stating "[t]he general rule of law is that a misnomer in service of process is immaterial if service is duly made).

Did Respondent default and waive its opportunity to respond?

Respondent bears the burden of proof when challenging a Default Order. A default is a failure to participate in a proceeding when required to do so after receiving proper service and thus, Respondent must demonstrate it was not in default when it failed to respond to the Notice. As noted above, Respondent admits it received the Notice, which specifically stated Respondent waived its right to contest the allegations in the Notice if it failed to respond within thirty (30) days. Respondent offers no explanation for its failure to respond. Respondent does not claim it did not respond because it did not know it was the intended recipient of the Notice. Respondent did not make any attempt to clarify the error or to respond in any other way upon receipt of the Notice. A default judgment against a party may stand where the respondent had actual notice and chose not to participate in the proceeding.[5] Because Respondent failed to participate within the required time limit, it is now too late for Respondent to be heard.

V. Findings

Respondent knew it was the party named in the Notice and did not avail itself of its opportunity to respond. Therefore, Respondent received the notice required by the Administrative Procedure Act and due process. As such, the time to raise any affirmative defenses, such as the one raised in its response to the default, has past and may not now be heard. Because Respondent received notice, Respondent was obligated to respond to the Notice within thirty (30) days in order to exercise its right to respond. Respondent did not respond. On appeal from a default order, Respondent bears the burden to show it was not in default. Respondent failed to show it was not in default. Therefore, Respondent is in default and Respondent's appeal

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[4] *Morrel* at 224 (quoting United States v. A.H. Fischer Lumber Co., 162 F.2d 872, 873 (4th Cir. 1947)).
[5] *See, e.g.*, In re Swift Chemical Company, Inc., DMS Docket No. RSPA-04-18449-2 (Sept. 19, 2005).

of the Default Order is denied.

Before dispensing completely with this matter however, an analysis, although not required to decide the matter, was nonetheless conducted into the merits of Respondent's argument.

In researching the Florida Department of State, Division of Corporations' records, Tech Air of South Florida registered with the State of Florida as a domestic for-profit corporation on April 22, 2004. Mr. Jose Abrreu is in fact listed as an officer of the corporation, *see* attached.

The State's records also reveal that "Mainland Investment Group, Inc." filed for inactive status on October 10, 2004. Thus at all times material hereto, Tech Air was the correct business named in the enforcement action and the arguments raised, even if considered, are without merit.

VI. Payment

Respondent is ORDERED to pay the civil penalty of $7,775, as assessed in the Default Order within 30 days of the date of this Decision on Appeal. 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: APR 24 2006

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

ARTICLE OF INCORPORATION

OF

TECH AIR OF SOUTH FLORIDA INC.

The undersigned incorporator(s), for the purpose of forming a corporation under the Florida General Corporation Act, hereby adopt(s) the following Articles of Incorporation.

ARTICLE I NAME

The name of the corporation shall be: TECH AIR OF SOUTH FLORIDA INC.

The principal place of business of this corporation shall be:

4506 SW. 74 TH.AVE.
MIAMI,FL.33155

ARTICLE II NATURE OF BUSINESS

This corporation may engage in or transact any or all lawful activities or business permitted under the laws of the United State,the State of Florida, or any other state, country, territory or nation.

ARTICLE III CAPITAL STOCK

The aggregate number of shares of stock and its par value that this corporation is authorized to have outstanding at any one time is:

100 X $ 10.00 = $1,000.00

ARTICLE IV TERM OF EXISTENCE

This corporation is to exist perpetually.

FILED
04 APR 22 AM 8:48
SECRETARY OF STATE
TALLAHASSEE, FLORIDA

ARTICLE V OFFICERS DIRECTORS

The name(s) and street address(es) of the initial officer(s) if any, who shall hold office the first year of the corporation's existence or until their successor(s) is (are) elected, is(are):

JOSE ABREU DIRECTOR
14204 SW. 117 ST.
MIAMI,FL.33186

JOHN ABREU DIRECTOR
7010 SW. 164 TH.CT.
MIAMI,FL.33193

ALICIA ABREU DIRECTOR
14203 SW. 117 ST.
MIAMI,Fl.33186

CARLOS ABREU DIRECTOR
14203 SW. 117 ST.
MIAMI,FL.33186

ARTICLE VI INCORPORATOR(S)

The name(s) and street address(es) of the Incorporator(s) to these Article of Incorporation is (are):

JOSE ABREU (PRESIDENT)
14204 SW. 117 ST (25 shares)
MIAMI,FL.33186

JOHN ABREU (VICE-PRESIDENT)
7010 SW. 164 TH. CT. (25 shares)
MIAMI,FL.33193

ALICIA ABREU (SECRETARY)
14203 SW. 117 ST. (25 shares)
MIAMI,FL.33186

CARLOS ABREU (TREASURER)
14203 SW. 117 ST. (25 shares)
MIAMI,FL.33186

The undersigned has(have) executed these Article of Incorpora-tion this 22 th. day of April, 2004.

Signature/Title

X
Signature/Title

X
Signature/Title

X

CERTIFICATE OF DESIGNATION
REGISTERED AGENT/REGISTERED OFFICE

Pursuant to the provisions of sections 607.0501 or 617.0501, Florida Statutes, the undersigned corporation, organized under the laws of the State of Florida, submits the following statement in designating the registered office/registered agent, in the State of Florida.

1. The name of the corporation is: TECH AIR OF SOUTH FLORIDA INC.

2. The name and address of the registered agent and office is ALICIA ABREU (Name)

14203 SW. 117 ST. (P. O. BOX NOT ACCEPTABLE)

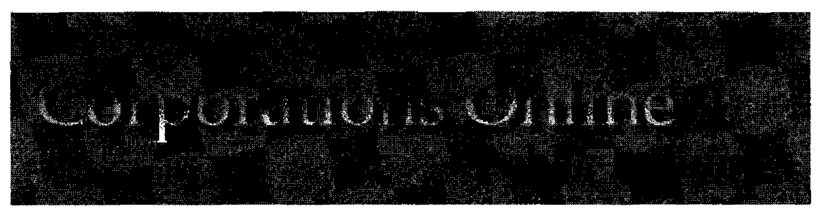
MIAMI, FLORIDA 33186 (CITY/STATE/ZIP)

HAVING BEEN NAMED AS REGISTERED AGENT AND TO ACCEPT SERVICE OF PROCESS FOR THE ABOVE STATED CORPORATION AT THE PLACE DESI AS REGISTERED AGENT AND AGREE TO ACT IN THIS CAPACITY. I FUR THER AGREE TO COMPLY WITH THE PROVISIONS OF ALL STATUTES RELATING TO THE PROPER AND COMPLETE PERFORMACE OF MY DUTIES AND I AM FAMILIAR WITH AND ACCEPT THE OBLIGATIONS OF MY POSITION AS MY POSITION AS REGISTERED AGENT.

SIGNATURE [signature]

DATE 4-22-04

FILED
04 APR 22 AM 8:48
SECRETARY OF STATE
TALLAHASSEE, FLORIDA



Florida Profit

MAINLAND INVESTMENT GROUP, INC.

PRINCIPAL ADDRESS
4500 S.W. 74TH AVENUE
MIAMI FL 33155 US
Changed 05/20/2002

MAILING ADDRESS
4500 S.W. 74TH AVENUE
MIAMI FL 33155 US
Changed 05/20/2002

Document Number	FEI Number	Date Filed
J31091	592776037	08/29/1986
State	**Status**	**Effective Date**
FL	INACTIVE	NONE
Last Event	**Event Date Filed**	**Event Effective Date**
ADMIN DISSOLUTION FOR ANNUAL REPORT	10/01/2004	NONE

Registered Agent

Name & Address
ABREU, ALICIA M 4500 S.W. 74 AVNUE MIAMI FL 33186
Name Changed: 07/13/2001
Address Changed: 02/11/2000

Officer/Director Detail

Name & Address	Title
GONZALEZ, JOSE E. 4500 S.W. 74 AVENUE MIAMI FL 33155	D
GONZALEZ, JORGE R.	