

357497

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

In the Matter of:  
  
Tailored Chemical Products, Inc.  
  
Respondent.

PHMSA Case No. 02-282-SD-SO

PHMSA - 05-22974-1

ORDER

By this Order, I find that Tailored Chemical Products, Inc. (Respondent) committed five violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180:

Violation 1: Offering hazardous materials, (1) Paint and (2) Corrosive liquid, n.e.s. (contains phosphoric acid), for transportation in commerce in unauthorized, non-UN standard packagings, in violation of 49 C.F.R. §§ 171.2(a), 173.22(a)(2), 173.202 and 173.203.

Violation 2: Offering a hazardous material, Paint, for transportation in commerce in a package that was not marked with the proper shipping name and UN identification of the hazardous material, in violation of 49 C.F.R. §§ 171.2(a) and 172.301(a).

Violation 3: Allowing employees to perform functions subject to the HMR when general awareness and function-specific hazardous materials training was not provided, and training records were not maintained, in violation of 49 C.F.R. §§ 172.702(a), 172.704(a)(1), 172.704(a)(2) and 172.704(d).

Violation 4: Offering a hazardous material for transportation in commerce in a quantity requiring placarding, without registering with PHMSA as a shipper of hazardous materials, in violation of 49 C.F.R. §§ 107.601(a)(6), 107.608(a), 107.608(b) and 171.2(a).

Violation 5: Offering a hazardous material for transportation in commerce with a shipping paper not including a shipper's certification statement, the unit of measure for the total quantity of the hazardous material, as well as listing additional information before the shipping description, in violation of 49 C.F.R. §§ 171.2(a), 172.201(a)(4), 172.202(a)(5), 172.204(a) and 172.204(d).

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This matter is before the Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for a determination regarding the Research and Special Programs Administration's (RSPA)<sup>1</sup> Notice of Probable Violation, issued to Respondent on December 10, 2002. The Notice formally initiated this proceeding against Respondent for violations of the HMR. Based on the facts discussed below, I assess Respondent a civil penalty in the amount of \$10,725 in accordance with 49 C.F.R. §§ 107.307 and 107.311.

## **I. Jurisdiction**

As an initial matter, PHMSA<sup>2</sup> must consider whether Respondent's business activities bring it within PHMSA's scope of authority. Respondent, Tailored Chemical Products, Inc. is incorporated and located in Hickory, North Carolina and domiciled in the United States. Respondent manufactures foam products and ships hazardous materials to its customers in the United States. Accordingly, as a function of its business, Respondent is subject to the jurisdiction of the Secretary of Transportation, PHMSA's Associate Administrator for Hazardous Materials Safety and Office of the Chief Counsel.<sup>3</sup>

## **II. Background**

### **A. Inspection**

On August 27, 2002, an inspector from PHMSA's Office of Hazardous Materials Enforcement conducted a compliance inspection at Winston Container Company (Winston) in

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<sup>1</sup> This case, however, is no longer before RSPA for decision. 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) re delegating the hazardous materials safety functions to the Administrator, PHMSA.

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

<sup>3</sup> See 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

Charlotte, North Carolina. During the inspection of Winston's facility, the inspector observed and photographed a non-UN standard, fifty-five gallon steel drum on the receiving dock, which was labeled with a flammable label on its side. After observing Respondent's company identification label on the top of the drum, the inspector determined that the drum had been shipped by Respondent. Mr. John Scarbrough, Winston's Plant Manager, indicated the product inside Respondent's drum was VL-100 BoothCoater and provided the inspector with the accompanying shipping paper, which identified the product as VL-100 Boothcoater, Paint, 3, UN 1263, PGII, Flammable. The inspector then noted that the drum was not properly marked with the proper shipping name and UN identification number. Mr. Scarbrough, upon the inspector's request, provided Respondent's Material Safety Data Sheet for the material.

The drum at Winston's facility was an open-head drum with a center hole for inserting a mixing blade, with an extra rolling ring near the top. The inspector tilted the drum on its side to examine the bottom marks of the drum and noted that the bottom markings, "UN 1A1/X", were rusted and scuffed over, and the rest of the markings were unreadable. Based upon the markings, the inspector determined that the drum had been re-manufactured from its original design as a tight-head drum. Because the drum did not have any new markings to indicate that it had been re-manufactured into an open-head drum, the inspector determined Respondent had used a non-specification drum for the shipping a hazardous material, Paint, 3, UN1263, PGII, in violation of 49 C.F.R. §§ 171.2(a), 173.22(a)(2), 173.202 and 173.203.

On August 28, 2002, the inspector conducted another compliance inspection at Southern Resin, Inc.'s (Southern Resin) facility in Thomasville, North Carolina, where he observed 3 ½ gallon plastic pails containing Corrosive liquid, n.o.s. (contains phosphoric acid), 8, UN1760, PGIII with a product name of "P-500, Foaming Agent." Southern Resin's Shipping Manager,

Mr. Allen Grubb, provided the inspector a bill of lading, number 3689, dated August 1, 2002, which indicated Respondent had shipped the material to Southern Resin. The inspector noted that the bill of lading was short-printed and showed the material as a PG I, when it was actually a PG III material.

On August 30, 2002, the inspector conducted a compliance inspection at Respondent's facility in Hickory, North Carolina. Mr. Jack Temple, III, Respondent's Vice President, accompanied the inspector throughout the facility and provided the inspector with the requested paperwork. During the inspection, the inspector observed and photographed empty pails and pails filled with Corrosive liquid, n.o.s. (contains Phosphoric acid), 8, UN 1760, PGIII, similar to the ones observed at Southern Resin. These plastic pails were on pallets and ready to be shipped out to Respondent's customers.

The inspector also reviewed two bills of lading, provided by Mr. Temple, for proper documentation. The bills of lading, number 3829 (dated August 23, 2002 to Southern Resin) and number 3744 (dated August 9, 2002 to Mincin Insulation Company in Pittsburgh, Pennsylvania) showed Respondent had shipped Corrosive liquid, n.o.s (contains Phosphoric acid), 8, UN1769, PGIII. The inspector noted three problems with the bills of lading in violation of 49 C.F.R. §§ 172.201(a), 172.202(a), 172.204(a) and 172.204(d). First, additional information appeared before the shipping description. Next, the "unit of measure" for the total quantity of hazardous material was not included. Finally, the bills failed to include a signed certification statement with the bill of lading.

Because both shipments in the bills of lading were in quantities that would require placarding of the vehicle during shipment, the inspector then asked for Respondent's 2001 and

2002 hazardous materials shipper's registration with the Associate Administrator for Hazardous Materials Safety. Mr. Temple stated that Respondent had not completed such registration.

Finally, the inspector requested hazardous materials general awareness training records for four of Respondent's employees involved in the shipping and handling of Respondent's hazardous materials. The inspector also requested function specific training records for two of Respondent's employees responsible for documenting its shipping papers. Mr. Temple could not provide either type of training record and stated that Respondent had not conducted hazardous materials training with any of its employees.

At the conclusion of the inspection, the inspector provided Mr. Temple with an exit briefing outlining the probable violations discovered during the inspections. PHMSA's inspector then completed an Inspection/Investigation Report identifying five possible violations of the HMR. The report was then submitted to the Chief of OHME's Southern Region, who reviewed the report for accuracy and sufficiency. Thereafter, the Region Chief referred the matter to the Office of Chief Counsel with a recommendation for a civil enforcement proceeding pursuant to 49 C.F.R. § 107.311.

B. Response to Exit Briefing

In response to the exit briefing, through correspondence dated October 10, 2002, Respondent provided statements concerning its corrective actions. Notably, Respondent did not raise any issues of fact relating to the findings of the inspection.

Respondent indicated that, in response to each violation listed, it was implementing proper UN labeling and drum placarding procedures for its shipment of hazardous materials, including the training of its employees and the purchase of UN standard packagings. It also provided receipts showing that it had registered with the DOT for both 2001-2002 and 2002-

2003. Finally, Respondent stated it was providing general awareness training for all of its hazmat employees, as well as function-specific training when necessary.

C. Notice of Probable Violation

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, PHMSA's Office of the Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent on December 10, 2002, proposing a \$10,725 civil penalty. The civil penalty included a reduction of \$3,575 for corrective actions Respondent had implemented to comply with the HMR after PHMSA's inspection. PHMSA used the Penalty Guidelines set forth at Appendix A to 49 C.F.R. Part 107, subpart D in calculating the proposed civil penalty in the Notice.

D. Informal Response to Notice

Respondent received the Notice through U.S. Postal Service certified mail on December 16, 2002, but failed to reply to the Notice within the statutory 30 day response period. Upon Respondent's request, however, PHMSA granted an extension with a new reply deadline of March 19, 2003. PHMSA received Respondent's Reply on March 24, 2003. In the Reply, Respondent did not deny any of the proposed violations in the Notice, but requested a hearing.

On January 20, 2004, PHMSA's and Respondent's representatives engaged in an informal conference. During the conference, Respondent admitted it violated the HMR as set forth in the Notice, but again offered its corrective actions in an effort to settle the case. Respondent and PHMSA subsequently entered settlement negotiations. Despite both parties' efforts during negotiations, PHMSA and Respondent were unable to reach a compromise.

#### **IV. Findings**

Based on the facts detailed above, I find that there is sufficient evidence to support a finding that Respondent violated the HMR as set forth in the opening to this Order. In reaching this conclusion, I have reviewed the inspector's Inspection/Investigation Report, accompanying exhibits, the exit briefing, Respondent's replies, and all other correspondence in the case file. In addition, I have reviewed and considered all other information that PHMSA provided to Respondent and to which PHMSA afforded an opportunity to reply.

Most notably, my determination rests on the fact that Respondent, in its responses and during settlement negotiations, never denied any of the alleged violations set forth in the Notice. I find Respondent's corrective actions were duly accounted for when PHMSA included a \$3,575 reduction for those actions in the Notice's proposed penalty assessment. I therefore assess Respondent a civil penalty in the amount of \$10,725.

#### **V. Conclusion**

For each violation of the Federal hazardous materials law or the HMR occurring prior to October 1, 2003, Federal law sets a maximum civil penalty of \$27,500 and a minimum civil penalty of \$250 (49 U.S.C. § 5123(a)). For each violation occurring on or after October 1, 2003, Federal law sets a maximum civil penalty of \$32,500 and a minimum civil penalty of \$275 (49 C.F.R. § 107.329).

In 49 C.F.R. Part 107, Subpart D, Appendix A, Section II, PHMSA published "Guidelines for Civil Penalties," it uses when determining a civil penalty. In this appendix, PHMSA also provides factors it considers when aggravating or mitigating a baseline civil penalty.

Based on my review of the record, I have determined that committed five violations of the HMR as detailed in the opening section of this Order. Accordingly, under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.329, I assess a total civil penalty of \$10,725 for the five violations of the HMR, after a total reduction of \$3,575 for Respondent's corrective actions.

The total penalty is allocated as follows:

- Violation No. 1: \$5,250 as proposed in the Notice;
- Violation No. 2: \$2,250 as proposed in the Notice;
- Violation No. 3: \$750 as proposed in the Notice;
- Violation No. 4: \$1,125 as proposed in the Notice; and,
- Violation No. 5: \$1,350 as proposed in the Notice.

In assessing this civil penalty, I have taken into account the following statutory criteria (49 U.S.C. § 5123(c) and 49 C.F.R § 107.331):

1. The nature, circumstances, extent, and gravity of the violations;
2. with respect to the Respondent, its degree of culpability, any history of prior violations, its ability to pay, and any effect on its ability to continue to do business; and
3. other matters as justice may require.

## **VI. Payment and Appeal**

Respondent must either pay the civil penalty in accordance with the attached instructions (Addendum A), or appeal this Order to PHMSA's Administrator. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325(c)(1).<sup>4</sup>

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<sup>4</sup> The requirements of § 107.325(c)(1) include the following: (1) File a written appeal within twenty (20) days of receiving this Order. PHMSA will regard as untimely any appeal that is received after the twenty (20) day period and it will not consider the request; (2) address the appeal to the Administrator, Pipeline and Hazardous Materials Safety Administration, 400 Seventh Street, S.W., Washington, DC 20590-0001; and (3) state with particularity in the appeal (a) the findings in the Order that are challenged; and (b) all arguments for setting aside any of the findings in the Order or reducing the penalty assessed in the Order. The appeal must include all

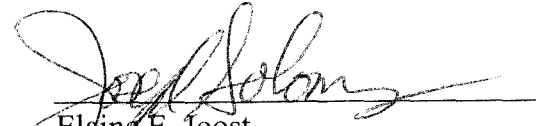


This Order constitutes written notification of these procedural rights.

09-01-05

Date

Enclosure

  
Elaine E. Joost  
Chief Counsel

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

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(a) the findings in the Order that are challenged; and (b) all arguments for setting aside any of the findings in the Order or reducing the penalty assessed in the Order. The appeal must include all relevant information or documentation. See 49 C.F.R. § 107.325(c)(2). PHMSA will not consider any arguments or information not submitted in or with the written appeal.

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## CERTIFICATE OF SERVICE

This is to certify that on the 2ND day of SEPT., 2005, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Tailored Chemical Products, Inc.  
3719 1<sup>st</sup> Avenue S.W.  
Hickory, NC 28602  
ATTN: Jack Temple III, Vice President

Original Order with Enclosures  
Certified Mail Return Receipt

Mr. Doug Smith  
Office of Hazardous Materials Enforcement  
400 Seventh Street, S.W.  
Washington, D.C. 20590-0001

One Copy (without enclosures)  
Personal Delivery

Mr. John P. Heneghan, Chief  
Office of Hazardous Materials Enforcement,  
Southern Region Office  
8701 S. Gessner Road Suite 1110  
Houston, Texas 77074

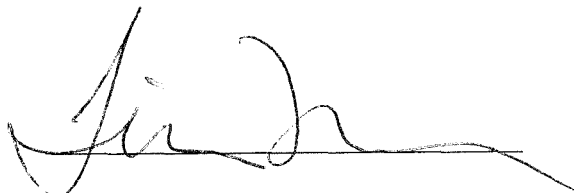
One Copy (without enclosures)  
First Class Mail

Mr. Joseph Solomey  
Office of the Chief Counsel  
Pipeline and Hazardous Materials  
Safety Administration  
400 Seventh Street, S.W., Suite 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



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**ADDENDUM A  
PAYMENT INFORMATION**

Due Date. Respondent must pay this \$10,725 civil penalty within 30 days of the date of this Order.

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 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 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 Order constitutes written notification of these procedural rights.