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

In the Matter of:
Carbonator Rental Service, Inc.
Respondent.

PHMSA Case No. 04-084-CR-EA
DMS Docket No. PHMSA-2005-23676

DECISION ON APPEAL

I. Procedural History

On January 18, 2006, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued an Order[1] to Carbonator Rental Service, Inc. (Respondent) finding Respondent had knowingly committed six violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a civil penalty in the amount of $19,210.

The Chief Counsel found Respondent – an approved cylinder requalifier – represented, marked and certified cylinders as having been successfully requalified when Respondent: (1) did not test the cylinders, (2) did not verify the accuracy of the testing equipment, (3) failed to maintain current copies of the HMR and applicable CGA pamphlets and failed to notify PHMSA when Respondent changed its testing equipment, (4) failed to maintain its retest records, (5) offered hazardous materials for transportation in commerce accompanied by shipping papers

[1] Order of the Chief Counsel, DMS Docket No. PHMSA-2005-23676-1 (Jan. 18, 2006).

listing an unauthorized emergency response telephone number and (6) failed to register as an offeror of hazardous materials as required by the HMR.

The Order, which is incorporated by reference, reduced the civil penalty originally proposed in the February 17, 2004 Notice of Probable Violation (Notice) based on evidence Respondent contracted with an emergency response telephone service provider. In accordance with PHMSA's[2] regulations, Respondent had twenty (20) days from the receipt of the Order to file an appeal with this office. Respondent submitted three replies to the Order.[3]

II. Summary

In this appeal, Carbonator Rental Service, Inc. (Respondent) requests an informal hearing, a formal hearing, and a reduction of the penalty. Respondent waived its opportunity for an informal conference regarding the penalty when it failed to provide necessary information to the Office of Chief Counsel. Respondent's response to the Notice did not meet the requirements to obtain a formal hearing. The Chief Counsel applied the Guidelines for Civil Penalties appropriately after correctly determining that Respondent knowingly committed six violations of the Hazardous Materials Regulations and failed to conduct a cylinder recall. As discussed below, Respondent's appeal is denied.

III. Background

This enforcement case arose out of a compliance inspection performed November 11, 2003, at Respondent's facility in Philadelphia, Pennsylvania. Respondent stated its retester was not present and the test equipment was not functional. The inspector returned on November 24, 2003, at which time a consultant represented Respondent.

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[2] For ease of reading and clarity, when an action occurred at Research and Special Programs Administration, PHMSA's predecessor agency, this order will refer to PHMSA.

[3] Two of the letters were timely. Although PHMSA regulations require a Respondent to provide all relevant information in its appeal, I will consider the third, untimely letter as a supplement to the timely appeal.

Respondent's retest records demonstrated a complete disregard for the cylinder requalification standards. The inspector found cylinders marked as requalified for which Respondent had no record of testing.[4] According to records taken from November 2001, April 2002, September 2002, and January 2001, only one of the cylinders tested exhibited *any* permanent expansion; the permanent expansion values were recorded as "0".[5] Records for some dates show Respondent did not perform any calibration testing. Records for other dates (e.g., March – no year) indicate Respondent requalified cylinders using incorrectly calibrated equipment.[6] In addition, Respondent failed to notify PHMSA of its testing equipment change and did not have current copies of the HMR or required CGA pamphlets.

After Respondent's consultant failed to respond to written and telephone inquiries, the Office of Chief Counsel began correspondence directly with Respondent. Respondent and the Office of Chief Counsel exchanged multiple letters and telephone calls discussing the evidence needed to mitigate the penalty proposed in the Notice. After Respondent repeatedly failed to provide evidence of having performed the requested recall, the Chief Counsel issued the Order, taking into consideration the single piece of evidence of corrective action.

In response to the Order, Respondent submitted several new pieces of evidence and renewed some of the same arguments it had made previously. Respondent provided a copy of a letter to the Office of Chief Counsel, dated April 22, 2005, which was not in the case file. The letter states Respondent is addressing the need for a security plan and provides financial

[4] Respondent's retesters denied having tested the marked cylinders.
[5] Respondent's retester stated he wrote "0" if the expansion was not "significant" and stated he did not remember how to calculate the percent permanent expansion. Inspection/Investigation Report, Exhibit 3.
[6] Respondent's retester stated he did not remember how to perform the calculations to determine whether the equipment was within tolerances.

information for 2004.[7] The letter does not address corrective action for any of the cited violations.

Respondent submitted test records from another DOT-approved cylinder requalifier, to demonstrate another company has tested cylinders owned by Carbonator. Two of the cylinders specified for recall are listed on the third party retest records. The remaining three cylinders, however, are not listed in the retest records Respondent provided.

Respondent states it does not know if its consultant registered it with DOT, although the Order clearly states: "PHMSA records show Respondent is not currently, and has never been, registered with PHMSA as an offeror of hazardous materials."[8] PHMSA records show Respondent still has not registered with the DOT as an offeror of hazardous materials. As corrective action, Respondent provided an original permit application for the Federal Motor Carrier Safety Administration (FMCSA);[9] however, registering with FMCSA as a carrier does not fulfill Respondent's obligation to register as an offeror of hazardous materials.[10]

Respondent provided another copy of its registration with Chem-Trec for emergency response telephone services. Respondent has not provided any evidence it has recalled the cylinders specified in the Notice. Respondent states it does not need to obtain current copies of the HMR or CGA pamphlets because it is no longer testing cylinders.

IV. Discussion

On appeal, Respondent raises several issues. First, Respondent requests a formal hearing. Second, Respondent questions whether it waived its right to an informal conference. Finally,

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[7] The financial information for 2004 indicates Respondent was in slightly better financial condition than in 2003.
[8] Order of the Chief Counsel at p. 13 note 11, DMS Docket No. PHMSA-2005-23676-1 (Jan. 18, 2006).
[9] According to FMCSA records, Respondent did not file the permit application which was provided as evidence of corrective action.
[10] FMCSA has different statutory authority than PHMSA and issues separate regulations. Permits required by 49 C.F.R. §§ 385.401-423 are for a select subset of motor carriers transporting hazardous materials. The requirement of PHMSA to register applies to *all* offerors and transporters of hazardous materials.

Respondent seeks a reduction in the penalty amount.

PHMSA's regulations provide a limited right to a formal hearing. In order to exercise the right, a respondent must: "State generally the issues to be raised by the respondent at the hearing."[11] This statement of issues must be made in the response to the notice of probable violation.[12] The consultant (J.B. Ruck & Associates, Ltd.) filed a response to the Notice on behalf of Respondent. Respondent admitted four violations and did not contest the other two violations. Respondent stated it had initiated corrective actions. The response raised no issues for an administrative law judge to resolve. Therefore, Respondent did not retain its limited right to a formal hearing.

In the response to the Notice, Respondent requested an informal conference. The Office of Chief Counsel made multiple attempts to schedule an informal conference with Respondent's agent. Because Respondent's agent failed to respond to inquiries, the Office of Chief Counsel contacted Respondent directly. Respondent inquired about an informal conference to discuss the penalty. The Office of Chief Counsel provided a detailed list of information needed to demonstrate corrective action, without which the Office could not negotiate regarding the penalty. Respondent and the Office of Chief Counsel exchanged letters, faxes and phone calls. The Office of Chief Counsel repeatedly requested specific evidence of corrective action, which Respondent never provided.

The purpose of an informal conference is to permit a respondent an opportunity to provide any additional information it believes is relevant to the case. Often, this information is evidence of corrective action, which becomes the basis for a reduction in the penalty as described in the Guidelines for Civil Penalties (49 C.F.R. Part 107 Subpart D, Appendix A). The

[11] 49 C.F.R. § 107.319(b)(3).
[12] 49 C.F.R. § 107.319(a). *See also* 49 C.F.R. § 107.319(c).

information can also be evidence of financial hardship. Respondent failed to cooperate with the repeated requests of the Office of Chief Counsel through over six months of active correspondence. Respondent cannot now complain it did not have an opportunity to discuss the penalty when it refused to provide the information needed for a productive meeting. As a result, Respondent waived its opportunity for an informal conference to discuss the penalty amounts.[13]

Finally, Respondent argues the penalty is too high. The Office of Chief Counsel proposed a penalty based on the Guidelines for Civil Penalties.[14] In assessing the penalty, the Chief Counsel considered the statutory criteria, including Respondent's financial situation, to determine an appropriate penalty. A respondent's financial condition is an important factor, but it must be weighed against the safety hazard presented by a respondent's (in)action. Corrective action taken by a respondent mitigates the safety hazard and mitigates the assessed penalty.

Respondent received notice of the proposed penalty and received specific instructions as to what actions to take to mitigate the penalty. Respondent had the ability to reduce the penalty but failed to take the requisite action – despite the severity of the penalty. When Respondent had the opportunity to demonstrate corrective action, Respondent did not do so. Although, on appeal, Respondent provided evidence of having had two cylinders retested, Respondent has not provided any evidence the remaining three cylinders have been recalled or retested. Therefore, I find the civil penalty assessed in the Order is appropriate.

V. Findings

I find that the Chief Counsel correctly determined that Respondent committed six violations of the HMR. Based on the foregoing information, it is clear that the Chief Counsel

[13] Where there are no disputed facts, as is the case here, constitutional due process requires only that a respondent have notice and an opportunity to respond. See generally, Mathews v. Eldridge, 424 U.S. 319 (1976) and subsequent cases.
[14] 49 C.F.R. Part 107, Subpart D, Appendix A.

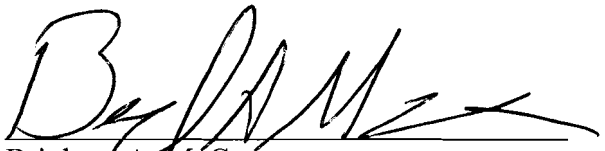
took into consideration and carefully applied the statutory requirements before assessing a civil penalty of $19,210, which included a penalty reduction for corrective action. After reviewing the additional financial information Respondent submitted with its appeal, and in consideration of the seriousness of the violations – particularly with regard to Respondent's failure to recall cylinders – I find no reduction on the basis of financial hardship is appropriate. Furthermore, I direct the Associate Administrator for Hazardous Materials Safety to initiate a proceeding to terminate Respondent's RIN.[15]

VI. Payment

Respondent must pay the $19,210 civil penalty 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

[15] Respondent's current RIN is valid until October 24, 2006.