

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

In the Matter of:

Swift Chemical Company, Inc.,

Respondent.

RSPA Ref. No. 03-531-SD-SW
DMS Case No. RSPA-04-18449

DECISION ON APPEAL

I. Background

The Office of Chief Counsel of the Research and Special Programs Administration (RSPA) initiated this proceeding against Swift Chemical Company, Inc. (Respondent) with the Notice of Probable Violation (NOPV), sent by certified mail on December 16, 2003.¹ The NOPV detailed four violations of the Hazardous Materials Regulations (HMR) by Respondent and assessed a civil penalty of \$11,405. According to the United States Postal Service (USPS), Respondent received the NOPV on December 29, 2003. Respondent did not reply to the NOPV within the prescribed 30-day period provided in 49 C.F.R. § 107.313, nor did it request a deadline extension, even though the NOPV specifically advised Respondent of both options. In fact, Respondent's

¹ This case, however, is no longer before RSPA for 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) redelegating the hazardous materials safety functions to the Administrator, PHMSA.

first contact with PHMSA² occurred when it filed this appeal. Thus, the Respondent defaulted in this matter.

On May 28, 2004, the Office of Chief Counsel issued a Default Order stating Respondent's failure to reply to the NOPV within the required period constituted a waiver of the right to appear and contest its allegations. The Default Order found Respondent committed four violations of the HMR and assessed a total penalty of \$11,405. It also detailed PHMSA's appeal process and Respondent's right to appeal the Default Order within 20 days of receipt. According to USPS records, Respondent received the Default Order by certified mail on June 7, 2004.

On June 17, 2004, PHMSA's Chief Counsel received this appeal from Respondent. In its appeal, Respondent requested the monetary fines be reassessed and lowered due to a variety of mitigating factors. These factors include: financial difficulties, difficulty in understanding the HMR, corrective action taken on the assessed violations, internal technology and data management difficulties, and free services provided by Respondent to other small local businesses on how to comply with the HMR. Respondent also requested its HMR violations prior to 1998 be excluded from consideration when calculating the current civil penalties. Respondent offered no evidence or arguments explaining or contesting its default in its appeal request.

Respondent's appeal is denied for the reasons discussed more fully below. However, Respondent's civil penalty will be reduced by \$1,175 because PHMSA increased the civil penalty based on a prior violation outside the scope of review PHMSA established in the NOPV.

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

The Default Order is affirmed in part and modified in part and Respondent is assessed a civil penalty in the amount of \$10,230.

II. Discussion

On appeal, Respondent requests the assessed civil penalties in the Default Order be reduced due to the mitigating factors listed above.

Initially upon receipt of the NOPV, Respondent had 30 days in which to respond to the proposed HMR violations detailed in the document.³ During that time, Respondent could have asserted mitigating circumstances or requested a formal hearing, an informal conference,⁴ or an extension of the 30-day response period.⁵ Respondent did not take any of these actions, nor is there any evidence it attempted to contact PHMSA in any way during this time. The HMR and the NOPV itself clearly states the failure to respond to the NOPV within the 30-days period constitutes a waiver of Respondent's right to contest its findings.⁶ Therefore mitigating factors may only be considered if Respondent can prove it conformed to the requirements of 49 C.F.R. § 107.212 and no default actually occurred.⁷

In its appeal, Respondent makes no such argument and fails to bring forth any evidence on point. Therefore, Respondent has failed to carry its burden of proof and the

³ 49 C.F.R. § 107.313 (2004).

⁴ 49 C.F.R. § 107.313(a)(3) (2004); 49 C.F.R. § 107.317(b) (2004).

⁵ 49 C.F.R. § 107.313(c) (2004).

⁶ See 49 C.F.R. § 107.313(b) (2004) ("Failure of the respondent to file a reply as provided in this section constitutes a waiver of the respondent's right to appear and contest the allegations and authorizes the Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the notice of probable violation and issue an order directing compliance or assess a civil penalty, or, if proposed in the notice, both....").

⁷ See 49 C.F.R. § 107.325(c)(2) (2004) ("An appeal of an order issued under this subpart must...state with particularity the findings in the order that the appealing party challenges, and include all information and arguments pertinent thereto.")

mitigating factors presented will not be considered. Any legal or substantive issues outside of the default determination may not be considered because Respondent, after failing to participate in the initial proceeding, cannot now be heard to make arguments out of time.

In any event, Respondent has failed to produce appropriate evidence to substantiate the truth of the mitigating factors it asserts. The HMR requires the petitioning party on appeal to include all pertinent information and arguments;⁸ yet Respondent does not provide any documentation or evidence to support its claims it is currently suffering financial difficulties, internal technology and data management difficulties, nor has it provided any evidence to substantiate its claims it has been training other local businesses on HMR compliance. It requests PHMSA to again reduce the assessed civil penalty because of corrective action, but does not provide the documentation requested in Addendum A of the NOPV to ensure that actual corrective actions have been taken. Respondent also asserts financial difficulties, but fails to provide financial statements, which may include tax returns, bank statements or other financial documents requested in Addendum A of the NOPV. Respondent's claims without any evidentiary support are inherently unreliable and, therefore, are not appropriate bases for mitigating civil penalties.

Nonetheless, I will reduce Respondent's civil penalty by \$1,175 because PHMSA's charging document (i.e. the NOPV) increased the baseline penalty based on a prior violation outside the timeframe established in the NOPV. PHMSA's regulations authorize an increase in the assessed civil penalty baseline when prior violations of the

⁸ 49 C.F.R. § 107.325(c)(2) (2004).

Federal Hazardous Materials Transportation Law or the HMR have occurred within a specific timeframe. Violations initiated within the six years prior to the calendar year in which the current violation occurred may be considered.⁹ Yet, while the NOPV stated only prior violations “within the last five years” were eligible aggravating factors,¹⁰ the NOPV assessed a higher penalty based upon the 6-year standard. Having established a more favorable standard to the Respondent in the NOPV, PHMSA is estopped from applying a less favorable standard. Therefore, in this case, PHMSA could only consider prior violations by the Respondent initiated within the five years prior to the date the NOPV issued to initiate these proceedings.

Addendum A of the NOPV states PHMSA considered one prior Ticket for Noncompliance (Ticket)¹¹ in determining the proposed civil penalty in this case. The Ticket was cited against the Respondent on May 15, 1998. The NOPV in the current case was issued on December 16, 2004. Therefore, the Ticket was initiated outside the five year reviewable timeframe established in the NOPV and could not be used as a basis for increasing Respondent’s penalty. As a result, the \$1,175 added to Respondent’s administrative penalty because of the Ticket is removed.

For the reasons stated above Respondent’s appeal is denied and the Default Order is affirmed but modified in part, and Respondent is assessed a civil penalty of \$10,230.

III. Findings

There is no justification to grant any of the motions in Respondent’s appeal, but a further reduction of the civil penalties by the Office of the Chief Counsel is necessary due

⁹ See 49 C.F.R. § 107, Subpt. D., App. A(IV)(E)(4).

¹⁰ See NOPV, Addendum A, page 2.

¹¹ RSPA Ref. No. TKT-98-51-SW

to PHMSA's error in calculating the penalty in the original NOPV. PHMSA increased Respondent's penalty based on a prior violation outside the reviewable timeframe PHMSA established in the NOPV. Therefore Respondent's penalty is further reduced by \$1,175 to a final penalty of \$10,230.

The remaining civil penalty of \$10,230 is warranted in light of the seriousness of Respondent's violations, its inability to present mitigating factors in a timely manner, and lack of documentation to support its claims.

V. Final Administrative Action

This Decision on Appeal constitutes the final administrative action in this proceeding.



Brigham A. McCown
Acting Administrator

Date Issued: | 09-19-05 |

Enclosure |

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the *15th* day of *Sept.*, 2005, the undersigned served in the following manner the designated copies of this Decision of Appeal with attached addendums to each party listed below:

Swift Chemical Company, Inc.
P.O. Box 340
Rogers, AR 72757
ATTN: Robert A. Smith, 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

Mr. Kevin Boehne, Chief
Office of Hazardous Materials Enforcement
Central Region Office
2300 East Devon Avenue
Des Plaines, IL 60018


One Copy (without enclosures)
First Class Mail

Tina Mun, Esq.
Pipeline and Hazardous Materials
Safety Administration
Office of the Chief Counsel
400 Seventh Street, S.W., Room 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

for 

Tina Mun

**ADDENDUM A
PAYMENT INFORMATION**

Due Date. Respondent must pay this \$10,230 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 on 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
3716(a)), a debtor has certain procedural rights to
be notified of: (1) the nature and of the d (2) the agency's intention to collect
the debt by offset; (3) the right to and cop