

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

In the Matter of:

Acetylene Oxygen Company

Respondent.

**PHMSA Case No. 03-222-CR-SW
DMS Docket No. RSPA-05-20271**

DECISION ON APPEAL

I. Procedural History

On December 30, 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 Acetylene Oxygen Company (Respondent) finding Respondent had knowingly committed the following four violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a civil penalty in the amount of \$18,900:

Violation Number 1. Representing, marking, and certifying cylinders as having been successfully requalified in accordance with the HMR, instead of condemning the cylinders when the hydrostatic testing results demonstrated that the permanent expansion exceeded ten percent of the total expansion, and failing to condemn exemption cylinders that exhibited a permanent expansion in excess of five percent of the total expansion, in violation of 49 C.F.R. §§ 171.2(c), 180.205(i)(1)(iv) and (vii), and DOT-E 7277.

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 (RSPA) to the Administrator, PHMSA.

Violation Number 2. Representing, marking, and certifying DOT-specification cylinders as having been successfully requalified in accordance with the HMR, when failing to demonstrate the accuracy of the testing equipment within plus or minus one percent of prescribed test pressure, in violation of 49 C.F.R. §§ 171.2(c) and 180.205(g)(3)(i).

Violation Number 3. Representing, marking, and certifying DOT-E 11194 exemption cylinders as meeting the requirements of an exemption, when the cylinders had not been retested in accordance with the exemption, in violation of 49 C.F.R. §§ 171.2(c) and DOT-E 11194.

Violation Number 4. Representing, marking, and certifying DOT-specification and exemption cylinders as having been successfully retested in accordance with the HMR, while failing to maintain complete retest and reinspection records, in violation of 49 C.F.R. §§ 171.2(c) and 180.215(b).

The Order, which is incorporated by reference, assessed the \$18,900 civil penalty originally proposed in the Notice of Probable Violation (Notice), dated April 21, 2003, which included a \$2,250 reduction for Respondent's corrective actions and a \$4,000 increase for Respondent's prior violations. In accordance with PHMSA's² regulations, Respondent had twenty (20) days from the receipt of the Order to file an appeal with this office. Respondent received the Order on January 5, 2005. In a letter dated January 20 and received January 28, 2005, Respondent timely filed an appeal of the Order.³

II. Summary

In this appeal, Acetylene Oxygen Company (Respondent) requests that PHMSA reduce the penalty to "a more reasonable amount." The Chief Counsel applied the Guidelines for Civil Penalties appropriately after correctly determining that Respondent knowingly committed four violations of the Hazardous Materials Regulations. As discussed below, Respondent's appeal is denied.

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

³ The filing date for an appeal is the date received by PHMSA. The Federal Rules of Civil Procedure provide that three days be added to the prescribed period if a paper is served by mail. Fed. R. Civ. Proc. 6(e). Twenty days after the date of receipt was January 25, 2005; therefore, January 28, 2005, was the last day for timely filing of an appeal in this case.

III. Background

This enforcement case arose out of a compliance inspection performed January 30, 2003, at Respondent's Harlingen, Texas, facility. The inspector determined Respondent routinely did not condemn⁴ cylinders that failed an initial hydrostatic pressure test. Instead, Respondent subjected the cylinders to a second test. Respondent noted in its test records that the cylinders passed the second hydrostatic pressure test. As recorded in the Cylinder Retest Facility Inspection Report, Respondent indicated that condemned cylinders are recorded on test records with the code "D" and remarks. Respondent also indicated that all of the cylinders listed as "Passed" on the hydrostatic test records are marked with the test date and the facility's requalification identification number (RIN).

The inspector also determined that Respondent only used one calibrated cylinder to verify the accuracy of the test equipment, regardless of the pressures being tested. Respondent's retest records did not contain the required information and showed that Respondent had not applied the correct criteria for testing different types of cylinders. At the end of the inspection, the inspector provided Respondent with an exit briefing outlining four probable violations.

Respondent's replies to the exit briefing and the Notice, and Respondent's other correspondence, including this appeal, have continued to raise the same arguments regarding corrective action. Respondent states it retrained its testers with regard to the requirements for testing, record-keeping, and calibration. The Vice-President of Operations reviews the testing records and conducts spot audits, including verbally quizzing the testers regarding proper procedures.

⁴ The HMR requires Respondent to indicate in its records the disposition of a cylinder with the reason for any repeated test, rejection or condemnation. 49 C.F.R. § 180.215(b)(2). In addition, the HMR requires the requalifier to "stamp a series of X's over the DOT specification number and the marked pressure or stamp "CONDEMNED"

IV. Discussion

Respondent appeals Violations 1, 2, and 4,⁵ and requests that PHMSA reduce the penalty to “a more reasonable amount.” Respondent claims the amount should be reduced because (1) the failures to condemn cylinders, as described in Violation 1, were isolated incidents and (2) Respondent has taken corrective actions regarding Violations 2 and 4.

Respondent states its failures to condemn six cylinders were isolated incidents. This claim is in direct conflict with the bulk of the information gathered during PHMSA’s investigation. For example, Respondent stated in an email dated September 11, 2003, “I never would have initiated a recall of these cylinders if I had known how we conducted business with Mexico concerning condemned cylinders.” Respondent made a direct admission in its November 17, 2003 email that Respondent had a policy of not marking cylinders as condemned if they had an order from Mexico: “the only time [the retester] would not stamp X’s on the cylinders is whenever we have order for condemned cylinders from our customer(s) in Mexico.”⁶ Respondent cannot claim on appeal that these were isolated incidents when Respondent is already on record as saying this is its standard business practice.

In its appeal, Respondent states it verbally reprimanded the testers involved with each of the violations and provided additional training to all of its employees involved in cylinder retesting. Whatever actions Respondent may have taken toward correcting the problems, PHMSA’s February 25, 2004 inspections demonstrated that Respondent had not corrected the problems throughout its facilities. At those inspections, inspectors discovered similar

on the shoulder, top head, or neck using a steel stamp. Alternatively, at the direction of the owner, the qualifier may render the cylinder incapable of holding pressure.” 49 C.F.R § 180.205(i)(2).

⁵ Respondent did not make any arguments in appeal of Violation 3.

⁶ Respondent’s statement is internally inconsistent. If the customers ordered condemned cylinders then Respondent would have no reason not to stamp X’s as required in the HMR. PHMSA obtained evidence from one of Respondent’s Mexican customers that Respondent sold the cylinders in Mexico as requalified cylinders.

violations.⁷ For example, at the Corpus Christi (Texas) and Rosenberg (Texas) locations, inspectors determined that Respondent had not calibrated the retest apparatus at a point within 500 psig of the actual test pressure to ensure the pressure indicating device was accurate within + or – 1.0% (same as Violation 2). At the Rosenberg location, the inspectors determined that Respondent had not condemned and marked cylinders as required (same as Violation 1) and that Respondent had failed to maintain complete retest and reinspection records for requalified cylinders as required by the HMR (same as Violation 4).

Respondent's actions and correspondence illustrate Respondent's failure to comprehend the severity of these violations. Although a subsequent inspection was not performed at the Harlingen, Texas, facility, Respondent's failure to correct the same types of violations at all of its locations indicates a lack of regard for the safety risks created by these violations. Respondent offers no explanation for its assertion that it "should not fully be held responsible."

As Respondent indicates, PHMSA had all of this information when the Chief Counsel issued the Order. She took this information into account and granted a reduction of \$2,250 based on Respondent's claims of corrective actions. As indicated in the Guidelines for Civil Penalties, Respondent's prior violation resulted in a twenty-five percent (25%) increase over the pre-mitigation recommended penalty. Respondent submitted no new evidence to support its claims that it has corrected the problems, and its prior corrective actions have already proven to be insufficient to prevent additional violations.

V. Findings

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

⁷ The Office of the Chief Counsel did not initiate enforcement cases for these violations. Instead, the Chief Counsel decided to use the evidence in this case as support against any further reduction of the penalties.

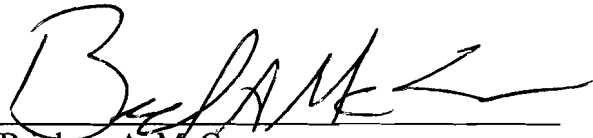
took into consideration and carefully applied the statutory requirements before assessing a civil penalty of \$18,900, which included the penalty reduction for corrective action and the penalty increase for previous violations as proposed in the Notice.

VI. Payment

Respondent must pay the \$18,900 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