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

In the Matter of: **Mathers Associates Co.,** **Respondent.**	**RSPA Case No. 01-124-SBD-CE**

DECISION ON APPEAL

I. Background

On August, 20, 2002, the Office of Chief Counsel of the Research and Special Programs Administration (RSPA)[1] issued an Order (Order) to Mathers Associates Co. (Respondent) finding Respondent had knowingly committed the following two violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of $5,400:

> Violation No. 1 – Offering for transportation in commerce a hazardous material, flammable liquid, n.o.s. (acetone, toluene), in an unauthorized non-UN standard packaging, in violation of 49 C.F.R. §§ 171.2(a), 172.101, and 173.202.
>
> Violation No. 2 – Allowing an employee to perform a function subject to the requirements of the HMR, when the employee had not been trained as required

[1] 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) redelegating the hazardous materials safety functions to the Administrator, PHMSA.

and training records were not created and retained, in violation of 49 C.F.R. §§ 172.702(b) and 172.704(d).

The Order, which is incorporated by reference, modified the $7,650 civil penalty originally proposed in the August 1, 2001, Notice of Probable Violation (NOPV). In accordance with PHMSA's[2] regulations, Respondent had 20 days from receipt of the Order to appeal to this office. According to the return receipt provided by the United States Postal Service, Respondent received the Order on August 26, 2002. Thus, in order to be considered timely, Respondent was required to ensure its appeal was filed by September 18, 2002 (which includes the 20-day statutory period plus 3 additional days for mailing). The date stamp on the appeal, however, shows PHMSA did not receive this appeal until September 25, 2002 – well after the 20-day statutory deadline.

Under normal circumstances, this appeal would be considered untimely. However, during the time period when Respondent submitted this appeal, delivery of mail to Federal agencies through the U.S. Postal Service was significantly delayed due to anthrax-related security concerns. The postmark on the envelope accompanying the appeal shows Respondent mailed the appeal on September 11, 2001. Given the unique situation, the appeal will be considered timely submitted.

II. Discussion

Respondent alleges the Chief Counsel's Order of August 20, 2002, was based on flawed inspections and investigations and, therefore, requests that the Order be vacated. For the reasons set forth below, the Order is affirmed in part and reversed in part.

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

Respondent first contends the inspector should not have interviewed Mr. Dahl during the compliance inspection because he is "our only salesperson and is not that familiar with our manufacturing process and training procedures." Respondent employs approximately 8 employees. Mr. Dahl has been employed by Respondent since 1993 and is an officer of the corporation. He is also apparently involved in shipping of hazardous materials, as evidenced by a bill of lading submitted by Respondent. This shipping paper, for the shipment of hazardous materials to Bremen Insulated Wire, is dated May 17, 2001 and certified by Mr. Dahl as meeting the requirements of the HMR.

The record shows Mr. Dahl completed Hazardous Materials training and trained and certified training for other employees in the company in October 2000. Thus, Mr. Dahl should have, at the very least, been familiar with the company's manufacturing process. He signed the "training records," which indicates he was directly involved with and, therefore, knew of Respondent's training and recordkeeping procedures.

Furthermore, Mr. Dahl signed the exit briefing faxed on May 16, 2001. He was also a co-signatory and, therefore, presumably participated in preparing a letter to the inspector, dated May 22, 2001, detailing the corrective actions taken after reviewing the exit briefing, which included both manufacturing and training procedures. In light of these facts, Mr. Dahl's representation of Respondent during the compliance inspection is not a basis for finding the inspection was flawed.

Next, Respondent contends its empty drums, like those observed by the inspector during the compliance inspection, are not reused, but are picked up by its supplier. Respondent explains that only 5 percent of its business consists of shipping drums of blended materials to its customers and 95 percent of its business consists of

manufacturing and shipping 1 gallon cans of ink and thinner/cleaner. In support of this argument, Respondent offers a letter from its supplier EMCO Chemical Distributors, Inc., dated September 9, 2002, stating, "[w]hen picking up empties, our Emco Driver will make a notation on our delivery ticket of the number of containers picked up for return" and "[i]n a physical check of delivery tickets it is estimated that 95% of steel containers are returned as empties." In a letter dated August 1, 2002, Respondent also submitted bills of lading, dated between December 3, 2001 and June 17, 2001, with handwritten notations indicating a request for the pickup of empty drums from its solvent supplier.

As discussed in the Order, Respondent's assertions about the empty drums in its warehouse conflict with Mr. Dahl's statements to the inspector during the May 3, 2001 compliance inspection and the rest of the evidence in this action. In addition, while Respondent claims Mr. Dahl did not understand the manufacturing process, as discussed above, Mr. Dahl is an officer and Sales Manager of the corporation and has certified, at least on one occasion, a shipping paper prepared for the shipment of hazardous materials. He has also represented himself as qualified and knowledgeable enough about the company and its hazardous materials shipping procedures by providing hazardous materials training and certifications for Respondent's employees. Therefore, the evidence indicates that he was, in fact, competent to answer the inspector's questions and his statements must be taken into consideration.

Furthermore, in a letter dated May 22, 2001, Respondent stated it had ordered reconditioned drums "to be used for all future drum orders of hazardous materials." Respondent finds fault with the Chief Counsel's logic in finding this as evidence that Respondent committed a violation of the HMR. Respondent used this purchase of

reconditioned drums as evidence of its corrective actions in order to mitigate its civil penalties and cannot now expect its value to be discounted. The plain language of the May 22, 2001 letter and Respondent's purchase of the drums in its effort to comply with DOT regulations suggests Respondent understood the violations it committed.

Moreover, Respondent has not shown that the empty drums were being picked up by EMCO in a regular manner before the violations were brought to Respondent's attention. Although Respondent has submitted bills of lading with notations for the pickup of empty drums, they are all dated after the NOPV was issued on August 1, 2001. Respondent has not offered any bills of lading with such notations before that time.

The letter from EMCO Chemical Distributors, dated September 9, 2002, is also of limited value. First, it was prepared 16 months after the inspection took place, while Respondent was preparing its appeal. No such letter was offered for the record before the Order was issued on August 20, 2002. Second, and more importantly, the letter itself is very vague. The letter states: "[w]hen picking up empties, our Emco Driver *will* make a notation on our delivery tickets" (emphasis added). Based upon the plain language, it appears EMCO is informing Respondent of what it will do in the future, rather than what it has done in the past. The letter also does not give a timeframe in which EMCO conducted the "physical check of delivery tickets" to determine that 95% of steel containers are returned as empty. As such, it is impossible to determine whether this practice occurred before or after Respondent received its citation for violating the HMR.

Moreover, if EMCO regularly picked up Respondent's empty containers before the NOPV was issued, one or both of the companies should be able to produce bills of

lading completed before that date. Again, none have been submitted. Thus, based on the facts presented, Respondent's second argument on appeal must be denied.

Respondent next argues this action should be dismissed because it was not informed of the inspector's visit to Atlas until it received the NOPV in August 2001. Respondent states it was unable to either personally confirm or dispute the inspector's observations of the drum in question because Atlas had already given the drum to a reclaimer by the time it received the report. Respondent claims the inspector took "copies of at least 20 bills of lading and gave no indication that she was going to visit a customer or examine any drums."

As discussed above, the inspector explained the potential violations to Mr. Dahl before leaving Respondent's facilities on May 3, 2001 and faxed a copy of the exit briefing to Respondent on May 16, 2001. In addition, Mr. Dahl produced the bills of lading for the inspector and knew that she took copies of them with her. Respondent should have been aware the inspector would continue her investigation in this action and that she could use the bills of lading to gather more information.

In any event, the inspector, accompanied by two Atlas employees, photographed the drums in question during the inspection and included those pictures in the inspection report. Neither Respondent nor the Atlas employees who accompanied the inspector have disputed the fact that she viewed Respondent's drum. And, although Respondent did not have the opportunity to view the drums in person, the photographs clearly document the inspector's observations about the missing UN markings on the side of the drum.[3] Therefore, Respondent cannot prevail on this argument.

[3] These photographs accurately reflect the inspector's observations about the drum's top and sides. However, there are no photographs of the bottom of the drum. This issue will be discussed further below.

Respondent also argues that the drum had the proper UN markings before it was shipped and they were likely removed while being used at Atlas' facilities. According to Respondent, the stenciled UN markings on its drums may be removed by wiping them with a rag containing solvent and that it is "sure this is what happened" with the drum observed at Atlas. Respondent further states, "[w]e know usage of a drum like this results in small spills which are always wiped up."

Respondent disputes the Order's definition of "durable" and offers its own definition of "durable" as "a marking that will easily withstand the rigors of shipping and will not be removed by water or moisture." Respondent, however, does not offer a statute, letter of interpretation, or any legal authority upon which it bases its definition. Rather, Respondent merely offers its own opinion or interpretation of the regulations.

The HMR details the required markings on a reconditioned drum in 49 C.F.R. § 178.503(c). Specifically, a reconditioned drum must be marked with, near the original UN markings, the name of the country in which the reconditioning was performed, the name and address or registered symbol of recondition, the letter "R," and, for each packaging successfully passing a leakproofness test, the additional letter "L" (49 C.F.R. § 178.503(c)(1)). The reconditioner must also apply any markings required by 49 C.F.R. §§178.503(a)(1) through (a)(5) that no longer appear on the top head or side of a reconditioned drum "in a durable form" (49 C.F.R. § 178.503(c)(2)). Also, as stated in the Order, dated August 20, 2002:

> "the required reconditioner's marking must be applied in a manner that meets the requirement in 49 C.F.R. § 178.3(a)(3) that the UN "markings must be stamped, embossed, burned, printed or otherwise marked on the packaging to provide adequate accessibility, *permanency*, contrast, and legibility so as to be readily apparent and understood." (Emphasis added.)

As shown above, the regulations clearly require packagings to be marked in a permanent fashion. In its appeal and throughout this action, Respondent has acknowledged the stenciled markings on the drums may be removed with a wiping with a rag containing solvent. Respondent also contends the markings must have been removed by the customer after it was delivered. According to a letter from Atlas, dated September 5, 2002, however, the drum was full at the time of the inspection.

In any event, if a solvent, let alone the solvent inside the drum, could remove the UN markings with a mere "wiping," the markings are not permanent, as required by the HMR. Whether Respondent's customer wiped the markings off with a rag is not the issue at hand, rather it is whether the markings were permanent. As evidenced by the inspector's observations, the photographs of the drum, and Respondent's own admissions, they were not. Therefore, this argument on appeal is rejected.

Next, Respondent challenges the Order's finding regarding the absence of the proper UN markings on the bottom of the drum. Respondent bases its challenge on the fact that the Inspection/Investigation Report (Report), dated June 27, 2001, does not have any pictures of the bottom of the drum. Respondent also offers a letter from Atlas, dated September 5, 2002, stating "the drum was full and made it merely [sic] impossible to view the bottom of it" and, therefore, the employees did not witness the inspector observe or photograph of the bottom of the drum. The inspector, however, took and submitted all other relevant photographs of the drum. Therefore, PHMSA did not meet its burden of proof with respect to the markings on the bottom of the drum.

As a result, a reduction in the penalty for Violation No. 2 is warranted. As discussed above, the missing UN and reconditioning markings on the top and side of the

drum were clear violations of the HMR and could have, standing alone, formed appropriate bases for finding against Respondent with respect to Violation No. 1. However, in the NOPV, dated August 1, 2001 and the Order, dated August 20, 2002, it appears PHMSA gave considerable weight to the alleged missing UN embossment markings on the bottom of the drum and the missing markings on the top and side of the drum. Since PHMSA failed to meet its burden of proof with regards to the alleged missing markings on the bottom of the drum, the assessed penalty is reduced accordingly.

The baseline penalties for the failure to mark packages properly ranges from $4,800 to $9,600. In the NOPV, PHMSA proposed a penalty of $6,300 for Violation No. 1 which was most likely increased in light of the alleged missing UN markings on the bottom of the drum. Given that PHMSA gave equal weight to the bottom and side markings, a one-third (1/3) reduction in the penalties assessed for Violation No. 1 is appropriate. Thus, the penalty is reduced by $1,500.

Finally, Respondent appeals the Order's finding it violated the training requirements in 49 C.F.R. §§ 172.702(b) and 172.704(d). Respondent offers as proof 15 bills of lading, which show several employees shipping various products. Respondent contends the accuracy of these shipping papers prove it trained its employees because the "odds of this happening without proper training are infintesimal [sic]." This statement conflicts with Mr. Dahl's statements to the inspector during the compliance inspection.

During the May 3, 2001 compliance inspection, Mr. Dahl told the inspector Respondent had not provided training to its employees, did not maintain training records, and that he was unaware of the recurrent training requirements in the HMR. Mr. Dahl also subsequently signed training records for the employees, which Respondent

submitted to PHMSA as evidence of its corrective action. The following table details the training records provided by Respondent:

Employee Name	Training Date	Record/Certification Date	Trained and Certified By:
Mel Dahl	5/7/01 – 5/25/01	5/25/01	Williard
Debbie Viveros	10/23/00 - 12/18/00	5/25/01	Williard/Dahl
Corrine DuBois	10/23/00 - 12/18/00	5/25/01	Williard/Dahl
Daniel Aguirre	3/7/01 – 3/23/01	6/8/01	Williard/Dahl
Jim Williard	5/7/01 – 6/8/01	6/8/01	Williard/Dahl

The records indicate Mr. Dahl trained Respondent's employees. Respondent contends they were kept in its dated formula books and submitted photocopies of the books to PHMSA on August 10, 2001, after PHMSA issued the NOPV on August 1, 2001. It is unclear why Mr. Dahl, who allegedly performed training for Respondent's employees less than a year before the May 3, 2001 compliance inspection, did not remember training the employees while speaking with the inspector.

It is clear, however, Respondent's formula books do not qualify as training records, as specified in 49 C.F.R. § 172.704(d), which requires "a description, copy, or the location of the training materials," "the name and address of the person providing the training," and a "[c]ertification that the hazmat employee has been trained and tested." In addition, while they may indicate Respondent's employees have been trained, under the HMR, I do not have the discretion to accept them as evidence of proper training. Therefore, there is insufficient evidence to grant Respondent's appeal and the Chief Counsel's finding is affirmed with respect to Violation No. 2.

For these reasons, Respondent's appeal is granted in part and denied in part with respect to Violation No. 1 and denied with respect to Violation No. 2. Respondent is

assessed the civil penalty of $3,900, which takes into account a reduction in the penalties assessed for Violation No. 1, in the amount of $1,500, as discussed above.

III. Findings

There is justification to grant Respondent's appeal in part and reduce the civil penalties assessed by the Office of the Chief Counsel by $1,500. In addition, there is sufficient evidence to affirm the remainder of the Chief Counsel's Order, dated August 20, 2002. The civil penalty of $3,900 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors. Therefore, the Order of August 20, 2002 is reversed in part and affirmed in part as being substantiated by the record and issued in accordance with the assessment criteria prescribed in 49 C.F.R. § 107.331.

IV. Payment

Due Date. Respondent must pay this $3,900 civil penalty within 30 days of the date of this Action on Appeal. See Addendum A for payment information.

V. Final Administrative Action

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

Brigham A. McCown
Acting Administrator
Date Issued: 08-24-2005

Enclosure
CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of August, 2005, the undersigned served in the following manner the designated copies of this Decision of Appeal with attached addendums to each party listed below:

Mathers Associates Co. 2420 East Oakton, Unit G Arlington Heights, IL 60005 ATTN: Mr. James Williard, 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

/s/
Tina Mun

ADDENDUM A
PAYMENT INFORMATION

Due Date. Respondent must pay this $3,900 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 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 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 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 Action on Appeal constitutes written notification of these procedural rights.