

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

In the Matter of:

**I Chih Shivan Enterprise,
Co., Ltd.**

Respondent.

**PHMSA Case No. 05-0412-SC-EA
DMS Docket No. PHMSA-2006-24340**

ORDER OF THE CHIEF COUNSEL

This matter is before the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for a determination regarding the Notice of Probable Violation (Notice) issued to I Chih Shivan Enterprise, Co., Ltd. (Respondent) on October 27, 2005. The Notice formally initiated proceedings against Respondent for violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171–180. The Notice advised Respondent that PHMSA proposed to assess a civil penalty in the amount of \$22,000 for two violations of the HMR. Specifically, the Notice alleged that Respondent:

- 1) Offered a hazardous material by vessel for transportation in commerce without marking or labeling the packaging and without describing the material on a shipping paper to indicate the material was hazardous;¹ and
- 2) Offered a hazardous material for transportation in commerce in packagings that were not authorized for the material.²

¹ Violation 1: 49 C.F.R. §§ 171.2(a), 172.200(a), 172.300(a), and 172.400(a).

² Violation 6: 49 C.F.R. §§ 171.2(a), 172.101, 173.22(a)(2), and 173.302(a).

Background

As an initial matter, PHMSA must consider whether Respondent's business activities bring Respondent within the jurisdiction of this agency. I Chih Shivan Enterprise Co., Ltd. is a company based in Taiwan. Respondent sells compressed gases as propellants for toy guns for distribution within the United States. As a function of its business, Respondent offers hazardous materials for transportation into the United States. Therefore, Respondent is subject to the jurisdiction of the Secretary of Transportation, PHMSA's Associate Administrator for Hazardous Materials Safety, and PHMSA's Office of Chief Counsel.³

A. Inspection

On June 27, 2005, inspectors from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Airsoft Elite (Airsoft) in La Puente, California. Airsoft is a distributor of paintball and airgun equipment, including compressed gases for use with that equipment. Respondent supplied Airsoft with a gas propellant identified as "Green Power Airgun Gas" (Green Gas). Airsoft provided the inspectors with the Material Safety Data Sheet (MSDS) for Difluoromethane, 2.1, UN3252. Airsoft indicated that the MSDS was for the Green Gas product.

The inspector observed and photographed packages of Green Gas as received by Airsoft from Respondent. The product was in non-specification 1,000 mL aluminum cans. The cans were packed in non-specification fiberboard boxes. The outer boxes did not have any markings or labels to identify the product as hazardous. The text on the canisters stated that the canisters contain compressed gas. The text appears to indicate the canister pressure is 70 psi. The warning on the canister states:

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

CAUTION:

Keep out of the reach of children. Contents under pressure. Do not expose to or store in area where temperature may reach or exceed ???°F. Do not freeze gas canister. Do not puncture or incinerate canister. Use in a well ventilated area. Do not directly inhale propellant gas. Keep away from and do not discharge gas near sparks or open flame. ...⁴

Airsoft indicated it did not receive any hazardous materials shipping papers from Respondent. Airsoft provided a copy of the shipping documentation for the shipment of Green Gas it received from Respondent. The bill of lading dated June 10, 2004, identifies the shipment as "TOY GUN AND PARTS." An invoice and a packing list for the same shipment (both dated June 2, 2004) list a variety of items including "1000 ml GAS."

On July 5, 2005, the inspector sent a copy of the exit briefing to Respondent at the email address provided by Airsoft. On July 8, the inspector sent an email to verify Respondent's receipt of the exit briefing. After failing to receive a response, the inspector mailed a copy of the exit briefing to Respondent on July 18, 2005. On August 5, 2005, the inspector contacted Airsoft to request additional contact information for Respondent. The inspector also requested that Airsoft notify Respondent of the importance of responding to the inspector's inquiries. Airsoft provided the inspector with telephone contact information for Respondent.

B. Notice of Probable Violation

On October 27, 2005, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, proposing a civil penalty in the amount of \$22,000 for two violations of the HMR. PHMSA used the Penalty Guidelines set forth at Appendix A to 49 C.F.R. Part 107, subpart D, to calculate the civil penalty proposed in the Notice.

⁴ The temperature is not legible in the photographs.

C. Informal Response

On November 11, 2005, Respondent submitted by email an informal response to the Notice. Respondent indicated in its email that it understood from Airsoft that the problem was resolved. Respondent also indicated it did not understand the Notice.

On November 21, 2005, Respondent sent an email to inquire if there was anything it needed to provide. Respondent indicated it understood the Notice involved a shipment of gas it sent to a customer in the United States. Respondent also stated it understood from its customer that the problem was solved.

On December 2, 2005, Respondent sent an email stating it was “not very clear whats going on now” because Airsoft had told it the case was “solved.” The Office of Chief Counsel responded via email on December 5, 2005,⁵ stating that Airsoft could not resolve the case for Respondent. The Office of Chief Counsel explained that Respondent either needed to provide pictures and documents to show it was properly preparing shipping documents, marking, labeling and packaging its products prior to shipment to the United States or needed to provide information indicating training or other measures Respondent was taking to ensure no hazardous materials were being shipped to the United States. The email also stated that the purpose of PHMSA’s enforcement program was not to discourage trade with the United States but to encourage safe transportation of hazardous materials.

On December 6, 2005, Respondent sent an email stating it understood the December 5, 2005 email from the Office of Chief Counsel. Respondent stated, “We have already stop exporting gas so far.” Respondent inquired as to what its next steps should be.

Later the same day (Dec. 6), the Office of Chief Counsel sent a response via email again stating Respondent need to explain what measures it was taking to ensure no hazardous materials

⁵ The attorney to whom the emails were sent was out of the office at the time Respondent’s emails were sent.

were being shipped to the United States. The email specifically cited as an example of a corrective measure the education of employees to identify hazardous materials.

On December 7, 2005, Respondent sent an email asking what documents it should provide to prove it would not ship a hazardous item. Respondent stated it had stopped production of Green Gas for the month. Respondent also stated it had informed its customer that it would no longer supply it with Green Gas.

Later the same day (Dec. 7), the Office of Chief Counsel sent an email attempting to clarify what corrective actions were required. The email indicated Respondent could provide an email simply stating what specific actions the company was taking to ensure it would not ship hazardous materials to the U.S. In addition, the email suggested Respondent provide a copy of its correspondence with its customer notifying it that Respondent would no longer be supplying Green Gas to the U.S. The email also suggested sending copies of any internal memoranda or written policies or instruction manuals which would support Respondent's statement that it would no longer ship to the U.S. The email stated that ultimately, however, Respondent must identify what documents it had that would address the issue. The Office of Chief Counsel also indicated that it considered Respondent's failure to provide any evidence up to that point to be an indication of Respondent's failure to take the violations seriously.

On December 8, 2005, Respondent's employee requested additional time and stated it would mail or send by facsimile a copy of the document it had sent to its U.S. customer (Airsoft). No further correspondence was exchanged. As of the date of this Order, the Office of Chief Counsel has not received a copy of the document Respondent allegedly sent to its U.S. customer.

Discussion

The first issue in this case is whether the material being shipped was a hazardous material regulated under the HMR.⁶ The only description for the material offered on any of the documents accompanying the shipment was “GAS.” The photos of the aluminum canisters do not show any information identifying the contents. Airsoft provided an MSDS for difluoromethane (also known as R-32 and HFC-32), which it indicated was the material in the canisters. There is no evidence, however, that Respondent provided Airsoft with the MSDS or that Respondent represented the material as being difluoromethane. The photocopy of the MSDS in the file has the words “Green gas” written on it; however there was no such notation on the original. There is no indication in the file as to who wrote “Green gas” on the MSDS photocopy. The evidence is insufficient to determine precisely what chemical was in the cans.

Although there is insufficient evidence to determine that the contents of the canister were difluoromethane, there is sufficient evidence to determine that the contents are appropriately classified in hazard class 2.⁷ The text on the canister clearly indicates that it contained a compressed gas.

The two most fundamental requirements for offering a hazardous material for transportation in commerce are the requirement to communicate to others the nature of the hazard and to ensure the material is packaged such that the material will not escape from its container. The HMR explain exactly how a person offering a material should communicate the hazard. The shipping paper must identify the material as hazardous and must contain

⁶ The inspector’s letters dated July 5, 2005, July 18, 2005, and August 5, 2005 stated the inspector had observed two hazardous materials (R-32 and R-134/R-134a gases) which Respondent had shipped to Airsoft. The inspection report does not mention a second product in the text and does not include any photographs of a second product. In addition, the exit briefing only mentions difluoromethane, and only one MSDS is included in the file.

⁷ If the contents are non-flammable, the appropriate classification is hazard class 2.2, non-flammable gas. If the contents are flammable, the appropriate classification is hazard class 2.1, flammable gas.

information such as the proper shipping name, the UN identification number and the hazard class for the material. The shipping paper must include other information as well (e.g., an emergency contact telephone number). None of the documents Respondent provided to accompany the shipment provided any of the required information.

In addition to shipping papers, hazard information must be included in the form of markings and labels on the package containing the material. Markings provide information such as the proper shipping name and UN identification number. Labels are large, internationally-recognized symbols which can be seen and understood from a distance, which can help ensure an emergency responder is aware of the hazard. These methods of communication are essential to the safe transportation of hazardous materials. The photographs taken by the inspector clearly show the boxes containing the Green Gas did not have any of the required markings or labels. No one would have had any idea there was a flammable material in the box in an emergency.

Proper packaging is the other fundamental requirement for the safe transportation of hazardous materials. The HMR specify a variety of packagings which are safe for the transportation of compressed gases. The photographs taken by the inspector show the cardboard boxes and the aluminum canisters containing the gas. There are no markings to indicate the boxes or the canisters were tested to meet *any* minimum standards of construction.

If a person ships hazardous materials internationally by vessel, the HMR permit that person to ship under the requirements of the International Maritime Dangerous Goods Code (IMDG), subject to some limitations. Like the HMR, the IMDG requires shippers to mark and label packages, to provide information on shipping papers, and to use packagings meeting minimum standards.

As a practical matter, a company who chooses to do business internationally must make efforts to inform itself of the laws and regulations of its own country and the foreign country. In this case, Respondent did not meet the requirements of the HMR or the IMDG. Although it is unfortunate that some foreign companies do not expend the effort to research U.S. regulations prior to shipping into the United States, Respondent's failure to comply with even the international standards for shipments by vessel is indefensible.

Findings

Based on the facts detailed above, I find there is sufficient evidence to support a finding that Respondent knowingly 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 and accompanying exhibits, the exit briefing, Respondent's replies, and all other correspondence in the case file.

Conclusion

Based on my review of the record, I have determined Respondent committed two violations as detailed in the opening section of this Order. The baseline penalty suggested in the Notice was \$22,000. Although Respondent stated it would provide evidence of corrective action, the Office of Chief Counsel has not received any evidence as of the date of this Order.

In determining an appropriate 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.

Accordingly, under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.317 and 107.329, I assess a total civil penalty of \$22,000 for two violations of the HMR.

Payment and Appeal

Respondent must either pay the civil penalty within 30 days 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. § 107.325.⁸

This Order constitutes written notification of these procedural rights.

3/30/06
Date

Joseph Ahern
Joseph Ahern
Acting Chief Counsel

Attachment

REGISTERED MAIL - RETURN RECEIPT REQUESTED

⁸ The requirements of § 107.325 include the following: (1) File a written appeal within twenty (20) days of receiving this Order (filing effective upon receipt by PHMSA); (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 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. PHMSA will regard as untimely any appeal that is received after the twenty (20) day period, and it will not consider the request; therefore, PHMSA recommends the use of fax (202.366.7041) or an overnight service as documents received late will not be accepted.

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of April, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

I Chih Shivan Enterprise Co., Ltd.
1F, No. 90, San Feng Rd., Ho Lishiang
Taichung Hsien
Taiwan
ATTN: President

Original Order
Registered Mail – Return Receipt

Mr. Doug Smith
Office of Hazardous Materials Enforcement
Washington, D.C. 20590

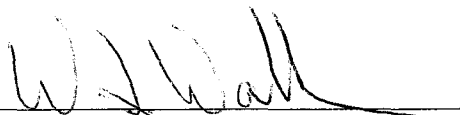
One Copy
Internal E-Mail

Ms. Colleen Abbenhaus
Office of Hazardous Materials Enforcement
Eastern Region Office
Atlanta, GA 30303

One Copy
Internal E-Mail

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


Willard Walker

Payment Method.

Respondent must pay the civil penalty by one of the following: (1) wire transfer, (2) certified check or money order, or (3) credit card via the Internet.

(1) Wire Transfer.

Detailed instructions for sending a wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Order. Please direct questions concerning wire transfers to:

AMZ-300
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125
Telephone (405) 954-8893

(2) Check or Money Order.

Make check or money order payable to "U.S. Department of Transportation" (include the Ref. No. of this case on the check or money order) and send to:

AMZ-300
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125.

(3) Credit Card.

To pay electronically using a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

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 this 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 the Order.

Treasury Department Collection.

FAA's Financial Operations Division may also refer this debt and associated charges to the U.S. Department of 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 prior to an offset. You, as the debtor, have 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.

**INSTRUCTIONS FOR ELECTRONIC FUNDS TRANSFER TO
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION**

1. <u>RECEIVER'S ABA NO.</u> 021030004	2. <u>TYPE SUBTYPE</u> (provided by sending bank)
3. <u>SENDING BANK ARB NO.</u> (provided by sending bank)	4. <u>SENDING BANK REF NO.</u> (provided by sending bank)
5. <u>AMOUNT</u>	6. <u>SENDING BANK NAME</u> (provided by sending bank)
7. <u>RECEIVER NAME:</u> TREAS NYC	8. <u>PRODUCT CODE</u> (Normally CTR, or sending bank)
9. <u>BENEFICIAL (BNF)- AGENCY LOCATION CODE</u> BNF=/ALC-69-14-0001	10. <u>REASONS FOR PAYMENT</u> <i>Example:</i> PHMSA Payment for Case #/Ticket

INSTRUCTIONS: You, as sender of the wire transfer, must provide the sending bank with the information for Block (1), (5), (7), (9), and (10). The information provided in blocks (1), (7), and (9) are constant and remain the same for all wire transfers to the Pipeline and Hazardous Materials Safety Administration, Department of Transportation

Block #1 - RECEIVER ABA NO. - "021030004". Ensure the sending bank enters this nine digit identification number; it represents the routing symbol for the U.S. Treasury at the Federal Reserve Bank in New York.

Block #5 - AMOUNT - You as the sender provide the amount of the transfer. Please be sure the transfer amount is punctuated with commas and a decimal point.

EXAMPLE: \$10,000.00

Block #7 - RECEIVER NAME- "TREAS NYC." Ensure the sending bank enters this abbreviation, it must be used for all wire transfer to the Treasury Department.

Block #9 - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/ALC-69-14-0001" Ensure the sending bank enters this information. This is the Agency Location Code for Pipeline and Hazardous Materials Safety Administration, Department of Transportation.

Block #10 - REASON FOR PAYMENT – "AC-Payment for PHMSA Case#/To ensure your wire transfer is credited properly, enter the case number/ticket number or Pipeline Assessment number."

Note: - A wire transfer must comply with the format and instructions or the Department cannot accept the wire transfer. You, as the sender, can assist this process by notifying, at the time you send the wire transfer, the General Accounting Division at (405) 954-8893.