

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

In the Matter of:

Top Cat Chemicals, Inc.

(Respondent)

**PHMSA Case No. 05-0396-SD-SO
Docket No. PHMSA-2005-23078-2**

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 Top Cat Chemicals, Inc. (Respondent) on November 28, 2005. The Notice formally initiated proceedings against Respondent for two 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 \$14,110 for: (1) offering for transportation in commerce hazard class 8 (corrosive), PG II hazardous materials without proper shipping papers, and without marking the packagings with a proper hazard level, proper shipping name, or UN identification number in violation of 49 C.F.R. §§ 172.200, 172.300(a), 172.400(a), and 173.22(a); and (2) permitting employee(s) to perform functions subject to the HMR when the employee(s) had not received training and testing in General Awareness/Familiarization, Function-Specific, Safety, and Security Awareness areas, in violation of 49 C.F.R. §§ 172.702 and 172.704.

Background

Because Respondent offers hazardous materials for transportation within the United States, 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.¹

On April 21, 2005, an inspector from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Respondent's facility in Selma, NC. During the course of inspection, the inspector learned that on April 14, 2005, Respondent offered and transported in commerce one 55-gallon drum, weighing approximately 500 pounds, of "TC X-10 Liquid Steam." The inspector also learned that on April 19, 2005, Respondent offered and transported one 55-gallon drum, weighing approximately 490 pounds, of "TC A-747 Aluminum Cleaner." Subsequent test results from samples of these two products indicated that both of the materials were corrosive, PG-II hazardous materials. Neither shipment was accompanied by a proper shipping paper. Also, neither shipment was contained in packaging marked with a proper hazard class label, proper shipping name, or UN identification number.

During the course of inspection, the inspector asked to review Respondent's hazmat training records. Respondent stated that it had not provided hazmat training and was not aware of the requirement. The inspector informed Respondent that the HMR requires that employees who perform functions subject to the HMR must receive training and testing in the areas of (1) General Awareness/Familiarization, (2) Function-Specific, (3) Safety, and (4) Security Awareness.

¹ See 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

On June 1, 2005, the inspector mailed an exit briefing to Respondent, describing the probable violations. The exit briefing explained Respondent's opportunity to respond to the facts alleged in the exit briefing and to submit evidence of corrective action.

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, on November 16, 2005, the Office of Chief Counsel issued the Notice to Respondent, proposing a civil penalty in the amount of \$14,110 for two violations of the HMR. Respondent received the Notice on November 28, 2005.

On December 5, 2005, Respondent requested a 30-day extension to reply to the Notice. On December 14, 2005, the Office of Chief Counsel granted the extension, making Respondent's reply due by January 27, 2006. On December 29, 2005, Respondent sent a written reply that explained current hardships and included documentation of corrective actions taken by Respondent. On January 5, 2006, Respondent faxed a copy of its balance sheet. The case now comes before the Chief Counsel for decision.

Discussion

Offering and transporting undeclared hazardous materials without shipping papers, proper package labeling, and without proper shipping name or UN identification numbers is a serious violation of the HMR. In response to the Notice, Respondent engaged in several corrective actions: (1) Respondent corrected its invoices to show the correct shipping description and submitted a sample shipping invoice to check for compliance with the HMR; (2) Respondent contracted with Chemtrec to provide emergency response information; (3) Respondent now applies proper markings and hazard class labels to all hazmat packages; (4) Respondent established a training program for any future employees; and (5) Respondent

purchased and had employee(s) complete the Hazmat Transportation Modules from the PHMSA website.

The submitted balance sheet indicates that Respondent is a small company and suffers significant financial hardship.

Findings

Based on the above facts, I find that there is sufficient evidence to support a finding that Respondent knowingly committed both violations. 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.

The proposed penalties in the Notice reflected only a fifteen percent (15%) reduction. Respondent submitted evidence of corrective action warranting a twenty-five percent (25%) reduction in the civil penalty for the undeclared hazmat violation.² Respondent also submitted evidence of corrective action warranting a twenty-five percent (25%) reduction in the civil penalty for the failure to train and test employees who perform functions subject to the HMR. I am adjusting the civil penalty accordingly.

Conclusion

Based on my review of the record, I have determined that Respondent committed two violations of the HMR. A reduction on the basis of financial hardship is not always warranted – particularly in a case of the shipment of undeclared hazmat; however, upon examining the submitted balance sheet, I believe that an additional reduction on the basis of financial hardship is justified in this case. Respondent immediately took comprehensive, thorough action to come into compliance following the inspection. The corrective action Respondent submitted indicates

² A twenty-five percent (25%) reduction is the maximum reduction recommended in the Guidelines for Civil Penalties (49 C.F.R. Part 107, Appendix A to Subpart D).

that Respondent is now shipping in compliance with the HMR. Accordingly, I am reducing the civil penalty by thirty percent (30%). Respondent may request up to a 6-month payment plan from the Office of Chief Counsel if needed.

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 \$8,715 for the two violations of the C.F.R. The total penalty is allocated as follows:

Violation No. 1: \$7,875, reduced from \$12,750 in the Notice; and
Violation No. 2: \$840, reduced from \$1,360 in the Notice.

In assessing this 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.

Payment and Appeal

Respondent must either pay the civil penalty in accordance with the attached instructions (Addendum A), or appeal this Order to PHMSA's Administrator. Respondent may request a payment plan extending up to six months by contacting the Office of Chief Counsel; however, the first payment must be made within 30 days of this Order. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325.³

³ 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, c/o Office of Chief Counsel – PHC, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Ave., SE, 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

This Order constitutes written notification of these procedural rights.

12/13/07
Date

David E. Kunz
David E. Kunz
Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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 _____ day of DEC 13, 2007, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Top Cat Chemicals, Inc.
805 W. Railroad Street
Selma, NC 27576
Attn: Phyllis Summerlin

Original Order with Enclosures
Certified Mail – Return Receipt

Ryan Posten
Director, OHME
PHH-40, East Building, 2nd Floor
1200 New Jersey Ave., SE
Washington, D.C. 20590

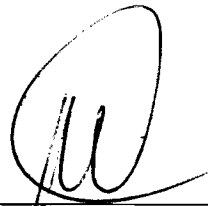
One Copy
Internal E-Mail

John Heneghan, Chief
Office of Hazardous Materials Enforcement
Southern Region Office
233 Peachtree Street, NE, Suite 602
Atlanta, GA 30303

One Copy
Internal Email

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

DEC 13 2007

Appeal Information

If Respondent chooses to appeal, Respondent must:

- (1) File a written appeal within twenty (20) days of receiving this Order; a submission will be considered "filed" with PHMSA on the date it is received by PHMSA;
- (2) Address the appeal to the Administrator, c/o Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Ave., SE, Washington, DC 20590; 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. PHMSA will not consider any arguments or information not submitted in or with the written appeal.

PHMSA will regard as untimely, and will not consider, any appeal that is received after the twenty (20) day period. PHMSA recommends the use of fax (202.366.7041) or an overnight service. An appeal received by PHMSA more than twenty (20) days after receipt of the Order by Respondent will not be considered and will not toll the deadline for payment of the civil penalty assessed in the Order.

Payment of Civil Penalty

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-341
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-341
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 or ticket 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.