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

In the Matter of:

**Yates Fire Protection Service,
Inc.**

Respondent.

**PHMSA Case No. 04-624-CR-EA
DMS Docket No. PHMSA-2006-24212-1**

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 Research and Special Programs Administration's (RSPA)¹ Notice of Probable Violation (Notice), issued to Yates Fire Protection Service, Inc., (Respondent) on December 2, 2004. 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 \$5,810, which included an increase of \$1,160 for a prior violation, for the following two violations of the HMR:

Violation 1: Representing, marking and certifying that hazardous materials packagings (cylinders) were tested in accordance with the HMR when Respondent failed to verify its test equipment to be accurate within one percent (1%) of its calibrated cylinder's known values, in violation of 49 C.F.R. §§ 171.2(c), 180.3(a), and 180.205(g)(4).

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

Violation 2: Failing to include the reason for a second test in Respondent's hydrostatic testing records, in violation of 49 C.F.R. §§ 171.2(c), 180.3(a), and 180.215(b)(2).

Background

As an initial matter, PHMSA must consider whether Respondent's business activities bring Respondent within the jurisdiction of this agency. Yates Fire Protection Services, Inc., is a U.S. DOT approved cylinder requalifying facility (RIN C520). As a function of its business, Respondent requalifies cylinders as approved packagings for the transportation of hazardous materials in 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.²

A. Inspection

On August 18 and 19, 2004, an inspector from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Yates Fire Protection Services, Inc., in Hampton, Virginia. Mr. Wyn McPherson, Shop Foreman, accompanied the inspector and provided information regarding Respondent's procedures for visual examination and hydrostatic testing of DOT specification cylinders.

The inspector reviewed Respondent's cylinder testing records, finding one probable violation. Respondent's calibrated cylinder has a certified expansion of 54.1 cc at 3,000 psi and 72.1 cc at 4,000 psi. Permitted expansion of up to one percent would range from 53.6 to 54.6 cc at 3,000 psi and from 71.4 to 72.8 cc at 4,000 psi. Respondent's calibration test records indicated:

- April 8, 2004 calibration record – calibrated cylinder exhibited total expansion of 55.0 cc at 3,016 psi and 73.5 cc at 4,013 psi.

² See 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

- April 9, 2004 calibration record – calibrated cylinder exhibited total expansion of 55.5 cc at 3,027 psi and 73.5 cc at 4,015 psi.
- April 12, 2004 calibration record – calibrated cylinder exhibited total expansion of 55.5 cc at 3,017 psi and 74.0 cc at 4,008 psi.

At the end of the inspection, the inspector conducted an exit briefing with Respondent and explained the probable violations.

During the supervisory review of the test records, an additional probable violation was found. Respondent subjected several cylinders to pressure multiple times; however, Respondent's records do not state the reason for the multiple tests. For example, on April 12, 2004, Respondent's test records show that cylinder S/N ALT285253700 was tested at 1,065 psi and 1,741 psi. On a third test, the cylinder was marked to have failed the hydrostatic test. Respondent's records provide no reason for the retesting or the failure. Also on April 12, 2004, Respondent's test records show that cylinder S/N ALT285261953 was tested at 2,783 psi and 3,704 psi. The records do not indicate the reason for the second test.

C. Notice of Probable Violation

On December 2, 2004, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, proposing a civil penalty in the amount of \$5,810 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, in calculating the civil penalty proposed in the Notice. The proposed penalty included a \$1,160 increase for a prior violation.

D. Informal Response

On January 4, 2005, Respondent submitted an informal response to the Notice, acknowledging both violations and specifying the corrective actions the company had taken to address the problems. Respondent made an offer of settlement due to its "current financial situation." To address the calibration violation, Respondent stated it has a "sheet of acceptable

calibration factors” which is checked at the start of each day. Respondent also stated it keeps explanations of retests on a separate piece of paper attached to the test report if there is insufficient room on the test report to record the reason for the retest.

On January 27, 2004, the Office of Chief Counsel requested documentation of Respondent’s financial condition to determine whether Respondent qualified for additional mitigation of the proposed penalty on the basis of financial hardship. On February 8, 2005, Respondent submitted a copy of its December financial statement. On May 9, 2005, the Office of Chief Counsel requested a copy of Respondent’s tax return to obtain a better assessment of Respondent’s financial condition. After several telephone conversations, the Office of Chief Counsel received Respondent’s tax return on September 16, 2005.

In a letter dated December 15, 2005, the Office of Chief Counsel informed Respondent it did not qualify for mitigation of the civil penalty on the basis of financial hardship. Respondent did not reply to the December 15 letter.

Discussion

The HMR requires a cylinder requalifier to verify the accuracy of the test equipment within one percent of the calibrated cylinder’s pressure and corresponding expansion values prior to performing testing and certifying a packaging as an authorized packaging. Respondent’s calibration test records show that, although Respondent performed daily calibration tests, Respondent proceeded to perform requalification testing when the test equipment was not within one percent of the calibrated cylinder’s pressure and corresponding expansion values. On three days, Respondent performed testing and passed cylinders when the test equipment was shown to be inaccurate beyond an acceptable range. Respondent did not contest the violation.

The HMR requires a cylinder requalifier to document the reason for any retesting on the hydrostatic test records. Respondent's test records showed multiple retests performed but did not provide any explanation regarding the reason for the retesting of those cylinders. Respondent did not contest the violation.

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, and all correspondence in the case file. In particular, I note that Respondent did not challenge any of the factual allegations underlying the violations.

Corrective Action

The civil penalty proposed in the Notice did not reflect any corrective action. Since that time, Respondent has submitted evidence of corrective action.³ Respondent stated it now has reference material readily available to ensure that the employee performing retesting can recognize whether the total expansion of the calibration cylinder is within one percent of the expected value. In addition, Respondent stated it records the reason for a retest on a separate paper accompanying the retest record if there is not room on the retest record. However, Respondent did not provide any physical evidence to support its statements. Therefore, the penalty for each violation is reduced by twenty percent (20%).

Conclusion

Based on my review of the record, I have determined that Respondent committed two violations of the HMR as detailed in the opening section of this Order. The baseline penalty for

³ Reductions for corrective action are based on the original baseline penalty, not the amount proposed in the Notice which reflected an increase based on a prior violation.

the violations is \$4,650. After mitigation for corrective action and an increase for a prior violation, the penalty is allocated as follows:

Violation No. 1: \$3,830, reduced from \$4,560 in the Notice; and
Violation No. 2: \$1,050, reduced from \$1,250 in the Notice.

Respondent's does not qualify for mitigation on the basis of financial hardship. Although Respondent is a small business, Respondent has chosen to engage in the highly regulated business of requalifying and certifying cylinders as being safe for the transportation of hazardous materials. Therefore, Respondent's status as a small business does not warrant additional mitigation.

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.

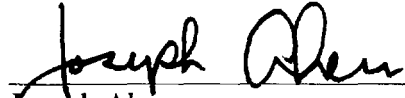
Accordingly, under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.317 and 107.329, I assess a total civil penalty of \$4,880 for the two violations of the HMR.

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. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325.⁴

This Order constitutes written notification of these procedural rights.

3/15/06
Date



Joseph Ahern
Acting Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

⁴ 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 16th day of March, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Yates Fire Protection Services, Inc.
P.O. Box 9206
Hampton, VA 23670-0206
ATTN: Mr. H. James Yates, President

Original Order
Certified 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

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=/AC-69001105	10. <u>REASONS FOR PAYMENT</u> <i>Example: PHMSA Payment for Case #/Ticket</i>

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=/AC-69001105" 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.