

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

In the Matter of:

**American Chemical Systems,
Respondent**

**PHMSA Case No. 05-0212-DS-SW
DMS Docket No. PHMSA-2007-29206-2**

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 American Chemical Systems (Respondent) on July 26, 2005. The Notice formally initiated proceedings against Respondent for 5 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 \$10,445 for offering for transportation in commerce a placarded quantity of a hazard class 8 (corrosive), PG II material: (1) without developing a security plan, in violation of 49 C.F.R. §§ 171.2(a), 172.800, and 172.802; (2) without registering as an offeror of hazardous materials, in violation of 49 C.F.R. §§ 171.2(a), 107.601(a)(6), and 107.608(a)-(b); (3) accompanied by a shipping paper that contained an unauthorized emergency response number, in violation of 49 C.F.R. §§ 171.2(a) and 172.604(b); and without retaining a copy of the hazardous materials shipping papers, in violation of 49 C.F.R. § 171.2(a) and 172.201(e). Respondent also allowed employees to perform functions subject to the HMR when the employees were not trained and records of

training were not created or retained, in violation of 49 C.F.R. §§ 171.2(a), 172.702(b), 172.704(a)(1)-(4), and 172.704(d).

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 March 2, 2005, an inspector from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Respondent's facility in Kansas City, KS. During the course of the inspection, the inspector determined that Respondent offered for transportation in commerce pallets of 5-gallon drums bearing a UN standard marking of 1H2, a class 8 hazard warning label, the proper shipping name Corrosive Liquid, Basic, Inorganic, N.O.S. (Contains Potassium Hydroxide, Sodium Hypochlorite) and the UN identification number 3266. Respondent did not have a copy of the shipping paper provided to the carrier. The inspector requested training records for Respondent's hazmat employees. Respondent indicated it had not provided hazmat training to its employees and, therefore, had no records. Respondent also indicated to the inspector that it did not have a security plan.

Subsequently, the inspector obtained a copy of a shipping paper from the recipient of one of Respondent's shipments. Upon examination of the shipping paper, the inspector determined Respondent had offered 5,394 pounds of hazardous materials for transportation in commerce on February 25, 2005. At that time, Respondent was not registered as an offeror of hazardous materials.

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

The inspector also contacted the emergency response company identified on Respondent's shipping paper to verify that Respondent was authorized to use the number. The emergency response company indicated that it did not provide emergency response information for Respondent.

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, on July 26, 2005, the Office of Chief Counsel issued the Notice to Respondent, proposing a civil penalty in the amount of \$10,445, which reflected a \$1,055 reduction for corrective action taken prior to the issuance of the Notice.

Despite multiple attempts, the Office of Chief Counsel has been unable to obtain any additional evidence of corrective action. Correspondence from Respondent indicates a continuing failure to understand that hazardous materials are regulated when transported in commerce, even if they are not transported in placarded quantities.

The case now comes before the Chief Counsel for decision.

Discussion

Respondent admitted it did not have a security plan and was not registered at the time of the February 25, 2005 shipment. Respondent also admitted it did not retain copies of its shipping papers at that facility. Respondent did indicate, however, that copies of its shipping papers were available from "the home office." Despite this availability, Respondent was not able to provide a copy of a shipping paper to the inspector during the inspection, and the inspector had to obtain the copy of the shipping paper from the recipient of the shipment.

The HMR require persons who ship hazardous materials in commerce to provide an authorized emergency response telephone number. The number must be the number of the

person offering the material for transportation or the number of an agency or organization capable of, and accepting responsibility for, providing the detailed information concerning the specific material being shipped. Respondent admitted that it listed on its shipping papers the phone number for an emergency response service who had not accepted responsibility for providing services to Respondent.

Because of the dangers inherent in the transportation of hazardous materials, offerors of those materials must provide their employees with training. By providing this training, many common mistakes which can result in loss of life or property may be averted. In this case, Respondent stated it had provided some training to its hazmat employees many years earlier. As a result, Respondent was unfamiliar with the requirement to retain copies of hazmat shipping papers and to provide an authorized emergency response telephone number. The HMR require hazmat employers to ensure its hazmat employees receive initial training and recurrent training at least once every three years and to keep records of the required training. Respondent had no training records and admitted its employees had not received training in the previous three years.

Offerors of certain hazardous materials must take additional precautions due to the nature of the materials they are shipping. In this case, Respondent was offering over 5,000 pounds of regulated hazardous materials for transportation in commerce. As a result, the shipment was required to be placarded. In addition, Respondent was required to register with the DOT as an offeror of hazardous materials and to develop a security plan. Respondent failed to do so.

In correspondence, Respondent indicated it is no longer offering hazardous materials for transportation in commerce in placarded quantities. As a result, it is no longer required to register as an offeror of hazardous materials and is not required to develop a security plan. Respondent's correspondence does not clearly indicate that it has stopped offering *all* quantities

of regulated hazardous materials for transportation in commerce. Accordingly, Respondent has not provided corrective action with regard to the remaining violations. The Notice included mitigation for corrective action taken prior to issuance of the Notice.

Findings

Because Respondent claims it is no longer offering placarded quantities of hazardous materials, I am not making a finding of compliance or of violation of the HMR with regard to the security plan violation. Respondent is hereby warned in accordance with the provisions of 49 C.F.R. § 107.309. Respondent should continue taking appropriate action to ensure compliance with the HMR. Violation of the HMR or the Federal hazardous material transportation law (49 U.S.C. §§ 5101 et seq.) may subject Respondent to future enforcement action.

Based on the above facts, I find that there is sufficient evidence to support a finding that Respondent knowingly committed four violations of the HMR. In reaching this conclusion, I have reviewed the inspector's Inspection/Investigation Report and accompanying exhibits, the exit briefing, and Respondent's replies.

Conclusion

Respondent did not submit any information warranting a reduction from the civil penalty proposed in the Notice. Respondent did not pay the registration fees for the years it was making placarded quantity shipments. Respondent has not provided the training required by the HMR. Furthermore, subsequent correspondence indicates that Respondent may not have made some of

the changes it had indicated previously; however, I am barred from increasing a penalty above the amount proposed in the Notice.

Based on my review of the record, I have determined that Respondent committed four violations of the C.F.R. 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 \$6,170 for the five violations of the HMR, after reducing the penalty to reflect the security plan warning.

The total penalty is allocated as follows:

- Violation No. 1: Warning;
- Violation No. 2: \$1,000, as proposed in the Notice;
- Violation No. 3: \$2,720, as proposed in the Notice;
- Violation No. 4: \$1,600, as proposed in the Notice; and
- Violation No. 5: \$850, as proposed 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):

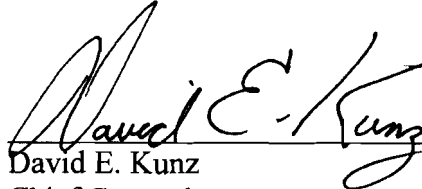
1. The nature, circumstances, extent, and gravity of the violations;
2. with respect to the Respondent, its degree of culpability, any history of prior violations, its ability to pay, and any effect on its ability to continue to do business; and
3. other matters as justice may require.

Payment and Appeal

Respondent must either pay the civil penalty in accordance with the attached instructions (Addendum A) within 30 days of this Order, 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. § 107.325.²

This Order constitutes written notification of these procedural rights.

9/12/07
Date


David E. Kunz
Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

² 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 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 12th day of Sept., 2007, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

American Chemical Systems
3023 Power Drive
Kansas City, KS 66106
Attn: Brad Wickham, President

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

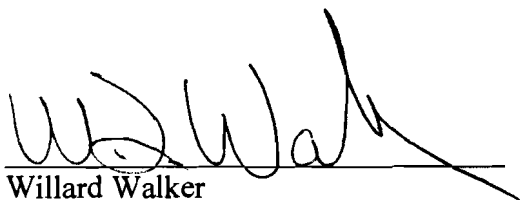
One Copy
Internal E-Mail

Billy Hines, Chief
Office of Hazardous Materials Enforcement
Southwestern Region Office
8701 S. Gessner Rd., Ste. 1110
Houston, TX 77074

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