

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

In the Matter of:

Balloon Innovations, Inc.

Respondent.

**PHMSA Case No. 04-264-SC-SO
DMS Docket No. PHMSA-2007-27632-2**

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 Balloon Industries, Inc., (Respondent) on May 10, 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 \$13,950 for the following five violations of the HMR:

Violation 1: Filling and offering for transportation in commerce hazardous materials packagings (cylinders) after subjecting those packagings, or causing those packagings to be subjected, to conditions of abrasion, physical abuse, and possible overheating that may have rendered the packagings unsafe for use in the transportation of hazardous materials, in violation of 49 C.F.R. §§ 171.2(a); 173.301(a)(2), (e); and 180.205(d)(1), (3).

Violation 2: Offering and transporting a hazardous material in commerce when it executed a shipping paper that contained an emergency response number of a company or organization that did not accept responsibility for providing detailed information as is required by the HMR, in violation of 49 C.F.R. §§ 171.2(a)-(b), 172.210(d), and 172.604(a)-(b).

Violation 3: Transporting a quantity of a hazardous material requiring placarding when not registered as a shipper of hazardous materials, in violation of 49 C.F.R. §§ 107.601(a)(6), 107.608(a)-(b), and 171.2(b).

Violation 4: Allowing employees to perform functions subject to the HMR when the employees had not received general awareness, function-specific, or safety training and testing, in violation of 49 C.F.R. §§ 172.702(a)-(b) and 172.704(a)(1)-(3).

Violation 5: Offering for transportation and transporting a hazardous material in commerce and failing to maintain copies of the shipping papers for at least 375 days, in violation of 49 C.F.R. §§ 171.2(a)-(b), and 172.201(e).

Background

Balloon Innovations, Inc., wholesales balloons and related supplies, including compressed helium gas (a hazardous material). As a function of its business, Respondent offers and transports hazardous materials in DOT specification cylinders 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.¹

On or about April 21, 2003, the Southern Region Office of Hazardous Materials Enforcement received a complaint that Respondent was stealing and altering DOT specification cylinders, resulting in an unsafe condition. A criminal investigation was launched by the Atlanta Police Department resulting in the seizure of 44 cylinders.

On December 31, 2003, an inspector from the Office of Hazardous Materials Enforcement interviewed the owner of an Atlanta automobile body shop who reported that he had removed the markings on the cylinder shoulders and neck rings, filled in the indentations, and repainted the cylinders to cover the alteration. The owner stated that Respondent hired him to make the alterations and provided invoices for the work dated from September 1998 through January 2003.

The inspector also visited Airgas South, located in Marietta, Georgia, where the seized cylinders were stored. The inspector photographed the seized cylinders which showed evidence

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

of grinding and filling of indentations. BI or BII was stamped onto some of the neck rings. Some cylinders were painted with "BALLOON INNOVATIONS INC. 404 696-9548" on the side.

On January 23, 2004, the inspector conducted a compliance inspection at Balloon Innovations, Inc., in Atlanta, Georgia. During the inspection, Mr. Neil Schwartz, President, represented the company and provided requested documents. Mr. Schwartz admitted having hired another company to grind off the DOT specification markings on cylinder shoulders and neck rings. He also provided one shipping paper for the transportation of 24 cylinders of Helium, compressed, 2.2, UN1046, on January 22, 2004. The shipping paper identified the weight of the shipment to be at least 2400 pounds. The shipping paper listed Chemtrec's telephone number as the emergency response telephone number. Mr. Schwartz could not provide any additional shipping papers as bills of lading were not retained after transportation was complete.

The inspector also photographed Respondent's delivery truck, properly placarded, loaded with approximately 20 cylinders awaiting delivery. Mr. Schwartz admitted Respondent was not registered as an offeror of hazardous materials at the time of the shipment and inspection. The inspector verified in DOT records that Respondent was not registered. Mr. Schwartz also indicated that Respondent had not provided any hazardous materials training to its hazmat employees.

The inspector provided Mr. Schwartz with an exit briefing, outlining the probable violations. Prior to the issuance of the Notice, Respondent provided evidence of corrective action, showing that Respondent had registered with DOT as an offeror of hazardous materials, had modified its procedures to provide an authorized emergency response number on its shipping

papers, had provided general awareness and some function-specific training to its hazmat employees, had returned cylinders to their owners and was retaining its shipping papers. Through counsel, Respondent provided additional evidence of corrective action and financial information in correspondence following the issuance of the Notice.

Discussion

Violation 1: 49 C.F.R. §§ 171.2(a), 173.301(a)(2), 173.301(e), and 180.205(d)(1) & (3). The outside of a cylinder must be visually inspected before each filling. If there is evidence of physical abuse, the cylinder may not be filled until it has been repaired and requalified. In addition, a cylinder may only be offered for transportation if it was filled by its owner or with its owner's consent. Respondent had the surface of the cylinders ground down, refilled with a hard plastic and repainted. Respondent then refilled the cylinders and offered them for transportation in commerce.

Respondent could not have performed a visual inspection before filling because it had the surface of the cylinders artificially smoothed and painted. Respondent knew the cylinders had been subjected to physical abuse in the form of grinding the metal to eliminate the markings; therefore, the cylinders could not be refilled with a hazardous material without requalifying them. Finally, Respondent admitted it was not the rightful owner of the cylinders. Therefore, Respondent did not have the authority to fill and offer the cylinders for transportation in commerce.

Violation 2: 49 C.F.R. §§ 171.2(a), 172.201(d), and 172.604(a)-(b). Hazardous materials shipping papers must provide an authorized emergency response telephone number. The number must be monitored by someone who can, and has agreed to, provide emergency information about the material being shipped. Respondent had not contracted with Chemtrec to provide

emergency response services; therefore, Respondent's shipping paper did not contain an authorized emergency response telephone number.

Violation 3: 49 C.F.R. §§ 171.2(a), 107.601(a)(6), and 107.608(a)-(b). Offerors of placarded quantities of hazardous materials are required to register with DOT. Respondent provided a shipping paper for a placarded quantity of hazardous materials and had another placarded quantity of hazardous materials ready for transportation. Respondent admitted it was not registered with DOT at the time of the shipments.

Violation 4: 49 C.F.R. §§ 171.2(a), 172.702(a) and 172.704(a). The HMR require all employees who directly affect hazardous materials transportation safety to receive hazardous materials training in the areas of general awareness/familiarization with the HMR, function-specific training, and safety training.² Respondent did not provide any hazardous materials training to its hazmat employees prior to allowing those employees to perform functions subject to the HMR.

Violation 5: 49 C.F.R. § 171.2(a) and 172.201(e). The HMR require an offeror and transporter of hazardous materials to retain shipping papers for 375 days. Respondent did not have shipping papers for prior shipments of hazardous materials.

Findings

Based on the facts detailed above, I find that 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 Respondent's replies. In particular, I note that Respondent admitted each violation.

² All hazmat employees must receive security awareness training no later than March 24, 2006.

The civil penalty proposed in the Notice was adjusted to reflect corrective actions taken prior to the issuance of the Notice. Since the issuance of the Notice, Respondent has provided safety training and additional function-specific training. Respondent has also taken steps to ensure all cylinders it had refilled were properly requalified.

The primary purpose of a civil penalty is to encourage compliance. Respondent took immediate steps to correct each violation and has been forthcoming and cooperative throughout the investigative process. Therefore, I find an additional 25% mitigation of the civil penalty is appropriate.

Conclusion

Based on my review of the record, I have determined that Respondent committed five violations of the HMR as detailed in the opening section of this Order. The baseline penalty for the five violations is \$16,200. After mitigation for corrective action, the penalty is allocated as follows:

Violation No. 1: \$5,850, reduced from \$9,360 in the Notice;
Violation No. 2: \$1,460, reduced from \$1,950 in the Notice;
Violation No. 3: \$560, reduced from \$750 in the Notice;
Violation No. 4: \$675, reduced from \$1,140 in the Notice; and
Violation No. 5: \$560, as proposed in the Notice.

Respondent is a small business and has provided evidence that the proposed penalty may affect its ability to continue to do business. Therefore, an additional reduction of 20% is warranted to help mitigate the hardship the civil penalty will cause. However, the extent and gravity of these violations outweighs any further hardship caused by the civil penalty.

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 \$7,284.00 for five 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. § 107.325.³

This Order constitutes written notification of these procedural rights.

3/16/2007
Date

Sherri Pappas
Sherri Pappas
Acting Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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, 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 _____ day of MAR 16 2007, 2007, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Sol Spielberg, P.C.
1443 Merriman Lane, N.E.
Atlanta, GA 30324-3226
ATTN: Sol Spielberg, Esquire

Original Order with Enclosures
Certified Mail – Return Receipt

Ryan Posten
Office of Hazardous Materials Enforcement
Washington, D.C. 20590

One Copy
Internal E-Mail

John Heneghan
Office of Hazardous Materials Enforcement
Southern 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

MAR 16 2007



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-69-14-0001	10. <u>REASONS FOR PAYMENT</u> <i>Example: Payment for PHMSA Case No. (or Ticket No.)</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-69-14-0001 Ensure the sending bank enters this information. This is the Agency Location Code for the Pipeline and Hazardous Materials Safety Administration, Department of Transportation

Block #10 - REASON FOR PAYMENT - "AC-Payment for PHMSA Case No." 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.