

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

In the Matter of:

**Baytec Service Company,
Respondent.**

**PHMSA Case No. 03-517-SCCT-SW
DMS Docket No. PHMSA-2007-27643-2**

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 Baytec Service Company (Respondent) on October 10, 2003. The Notice formally initiated proceedings against Respondent under the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180.

Discussion

Respondent distributes and transports propane, a hazardous material, within 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 July 30, 2003, an inspector from the Office of Hazardous Materials Enforcement observed Respondent's cargo tank motor vehicle, which was marked "propane" and placarded on four sides with the flammable gas placard (UN 1075). Respondent provided a copy of the shipping paper used for deliveries. The shipping paper did not have the proper shipping name and identification number of the material being offered. Respondent's only evidence of hazmat

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

training was a hazmat endorsement on a Texas driver's license. Respondent also had not registered with DOT as an offeror of placarded quantities of hazardous materials.

The cargo tank on Respondent's delivery truck was marked using plastic stickers with an annual inspection test date of "98 08" in association with the letters "V" and "K". Respondent could not find any paperwork for the cargo tank motor vehicle's requalification and inspection tests. In addition, the cargo tank was marked with a five year retest date of "04 08" – or August of the following year. The HMR require the tank to be marked with the date the tank was retested – not the date the next test is due.

Respondent provided evidence of corrective actions with a letter dated August 2, 2003. The evidence demonstrated complete corrective action and compliance with the HMR with regard to each of the probable violations found during the inspection. On October 10, 2003, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, alleging five separate violations of the HMR and proposing a civil penalty in the amount of \$9,000, which reflected a \$3,125 reduction for corrective actions. Respondent replied on October 27, 2003, disputing each of the probable violations.

Discussion

Violation 1: 49 C.F.R. §§ 171.2(a)-(b); and 172.201(e). Although Respondent carried a document in the propane delivery truck which listed the proper shipping name and UN identification number, Respondent's shipping paper did not provide that information as required by the HMR. As corrective action, Respondent provided a copy of a new shipping paper which contains the proper shipping name and UN ID number.

Violation 2: 49 C.F.R. §§ 171.2(b), and 172.704(d)(2). Respondent stated in its response to the Notice that it had the required training records but that the employee interviewed did not

have access to them. Although the owner and manager were interviewed and received the exit briefing at the end of the inspection, they did not provide the records at that time. The owner provided the records on August 18, 2003, following the inspection. There is no reason to pursue this type of violation when the documentation to prove the training occurred is provided prior to issuance of the notice. Therefore, I dismiss this violation.

Violation 3: 49 C.F.R. §§ 171.2(a)-(b), 107.601(a) and 107.608(b). Respondent does not contest that it was not registered with the DOT as an offeror of placarded quantities of hazardous materials at the time of the inspection. Respondent's failure to be aware of the requirement does not excuse Respondent from the requirement. However, Respondent immediately came into compliance upon notification; therefore, I am reducing this penalty to the minimum statutory penalty in effect at the time of the violation.

Violations 4 & 5: 49 C.F.R. §§ 171.2(a)-(b), 173.33(a)(3), 173.315(k)(5), 180.407(c), and 180.415(a)-(b). Respondent does not contest the facts alleged by the inspector that the cargo tank did not have proper markings to transport propane. Respondent also does not contest that the cargo tank inspection markings did not show that the tank had been inspected as required by the HMR. However, Respondent contends that the cargo tank truck photographed by the inspector was not used to transport hazardous materials at that time and did not contain propane.² Nothing in the evidence provided by the inspector goes to show that the cargo tank truck was in use. Although the revised exit briefing, which was produced two weeks later, states that there was propane in the tank, nothing recorded contemporaneous with the inspection indicates the tank was not empty. PHMSA bears the burden to prove the violation. Therefore, I must dismiss Violations 4 and 5 for insufficient evidence.

² Placarding of a vehicle that does not contain a hazardous material is a violation of the HMR; however, that violation was not charged in the Notice.

Findings

On the basis of the foregoing, I find Respondent knowingly committed two violations of the HMR. In reaching this conclusion, I have reviewed the Inspection/Investigation Report and accompanying exhibits, the exit briefing, Respondent's replies, and all other correspondence in the case file.

Civil Penalty

In assessing a civil penalty, I have taken into account the following statutory criteria:

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.³

The total penalty is allocated as follows:

Violation No. 1: \$500, reduced from \$2,250 in the Notice;
Violation No. 2: dismissed;
Violation No. 3: \$250, reduced from \$750 in the Notice;
Violation No. 4: dismissed for insufficient evidence; and
Violation No. 5: dismissed for insufficient evidence.

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 \$750 for the two violations of the HMR. Violations 2, 4 and 5 are dismissed.

Respondent stated the proposed penalty of \$9,000 would affect its ability to continue in business. Respondent did not provide any evidence to show it cannot afford the reduced penalty of \$750.

³ 49 U.S.C. § 5123(c) and 49 C.F.R. § 107.331.

Payment and Appeal

Respondent is ordered to pay a civil penalty in the amount of \$750 for violations of the HMR as set forth in this Order. 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. § 107.325.⁴

This Order constitutes written notification of these procedural rights.

3/17/2007
Date

Sherri Pappas
Sherri Pappas
Acting Chief Counsel

Attachment

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, 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, and will not consider, any appeal that is received after the twenty (20) day period; therefore, PHMSA recommends the use of fax (202.366.7041) or an express delivery service.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of MAR 19 2007 2007, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Baytec Service Company
4761 Highway 146
P.O. Box 838
Bacliff, TX 77518
Attn: Joel Fulcher, Owner

Original Order with Attachment
Certified Mail – Return Receipt

Ryan Posten
Director, OHME
USDOT/PHMSA/OHMS
400 Seventh Street, S.W.
Washington, D.C. 20590

One Copy
Internal E-Mail

Colleen Abbenhaus
Eastern Region Chief
USDOT/PHMSA/OHMS
Eastern Region Office
820 Bear Tavern Road, Suite 306
West Trenton, NJ 08628

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 19 2007



Willard Walker

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, 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. 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-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.