

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

**In the Matter of:**  
  
**Matson Navigation Company**  
  
**Respondent.**

**PHMSA Case No. 02-132-FE-CE  
DMS Docket No. PHMSA-2006-24425 -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)<sup>1</sup> Notice of Probable Violation (Notice), issued to Matson Navigation Company (Respondent) on August 19, 2002. 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<sup>2</sup> proposed to assess a civil penalty in the amount of \$17,500 for the following violation of the HMR:

Accepting and offering in commerce for transportation by vessel, a mixed load of hazardous materials without maintaining the required general segregation of incompatible hazardous materials, in violation of 49 C.F.R. §§ 171.2(a), 176.83(b)-(c).<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> For clarity and ease of reading, when an action occurred at RSPA this order will refer to PHMSA.

<sup>3</sup> The citation to the HMR for this violation should have been 49 C.F.R. §§ 171.2(a), 176.83(b), (d). Subsection (c) pertains to segregation requirements for breakbulk cargo. Subsection (d) prohibits stowing hazardous materials for which segregation is required in the same cargo transport unit.

I find Respondent knowingly accepted and offered a shipment that was not properly segregated for carriage by vessel; however, because Respondent was only responsible for reviewing the shipping documents and was not in a position to directly correct the segregation violation, I am reducing the penalty to an amount appropriate for a shipping paper violation.

### **Background**

As an initial matter, PHMSA must consider whether Respondent's business activities bring Respondent within the jurisdiction of this agency. Respondent offers ship cargo services, acting as a carrier between the western coast of the United States to Guam and the Hawaiian Islands. As a function of its business, Respondent arranges for transportation and transports hazardous materials by ocean vessel in the United States and 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.<sup>4</sup>

#### **A. Inspection**

On April 16, 2002, a container shipment being transported by highway by DHX Ocean/Air Freight was inspected by enforcement personnel from the Los Angeles County Sheriff's Office and the U.S. Coast Guard. Review of the shipping papers revealed that the load was in violation of requirements to segregate incompatible hazardous materials for carriage by vessel. The container was escorted back to the original shipper, Unitor, in Long Beach, California. The U.S. Coast Guard placed the shipment on hold.

An inspector from PHMSA's Office of Hazardous Materials Enforcement (OHME) examined the shipping papers for the shipment. The shipping papers were prepared for transportation through to Guam. The shipping papers detailed thirteen (13) different hazardous materials in the hazard classes 2.1, 2.2, 5.1, 6.1, 8 and 9 – all within the container APW993738.

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<sup>4</sup> See 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

On the basis of the probable violation of segregation requirements, the container was then sealed until it could be unloaded in the presence of inspectors.

Subsequent investigation revealed that the shipment was loaded at Unitor. DHX accepted the load for transportation at Unitor's facilities. DHX covered the trucking company logo and faxed the shipping papers to Respondent. Respondent placed a fax coversheet at the front of the shipping papers and faxed the papers to APL.

On May 9, 2002, Respondent received an exit briefing by telephone and fax. Respondent signed and returned the Exit Briefing the same day.

B. Notice of Probable Violation

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, on August 19, 2002, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, proposing a civil penalty in the amount of \$17,500 for one violation of the HMR.

C. Informal Response

On September 20, 2002, Respondent submitted an informal response to the Notice. Respondent indicated that it did not believe it committed a violation. Respondent stated that it did not accept or offer a shipment for transportation. Respondent stated that it was the ocean carrier for transportation and that APL/Eagle was Respondent's terminal services provider. The shipment was booked on an APL-owned ship *President Grant* for carriage. Respondent stated it has a specified number of container spaces on APL ships for carrying Respondent's customers' cargo. Respondent argued its forwarding of the shipping papers to APL did not constitute an offer of hazardous materials for transportation.

## **Discussion**

The HMR state that no person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is in condition for shipment as required or authorized by the HMR.<sup>5</sup> In many cases, a freight forwarder or broker never has physical contact with the materials being shipped; however, freight forwarders and brokers have responsibilities under the HMR to ensure the safe transportation of hazardous materials. Because these entities do not handle the hazardous materials, their responsibilities consist largely of the preparation and review of shipping papers.

In this case, Respondent received shipping papers from DHX. DHX hired Respondent to transport the container of hazardous materials to Guam. Respondent admits it was an intermediate carrier of the container. When it received the shipping papers, Respondent had a responsibility to review those papers in order to determine whether the container was “in condition for shipment as required” for transport by sea. Respondent agreed to arrange transportation by vessel for the container. Furthermore, Respondent’s acceptance of the container was not contingent upon review of the shipping papers by APL.

Respondent then faxed the shipping papers to APL – offering the shipment to another carrier for actual carriage by vessel. The shipping papers indicated that a booking with APL had been made for the freight container APW993738. Respondent forwarded the shipping papers without any indication that the load required segregation. The shipping papers clearly showed that the materials within the container were not in condition for shipment by vessel, so Respondent cannot claim it was unaware of the segregation problem because it did not physically see the freight. By faxing the shipping papers to APL, Respondent offered the shipment to APL for carriage as the vessel operator.

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<sup>5</sup> 49 C.F.R. § 171.2(a).

Respondent claims it did not offer or accept the shipment because of its contract with APL to provide terminal services. Respondent admits it was responsible for the freight and that APL was providing space on the ship in accordance with their prior agreement. Therefore, Respondent did accept the shipment. Respondent could have held the shipment for transportation on its own ship; instead, Respondent offered the shipment for transportation on APL's ship. APL was responsible for reviewing the shipping paper as the person responsible for the ship. Respondent was responsible for reviewing the shipping paper as the person offering the freight for transportation on APL's ship. Each had responsibility for different aspects of the transportation, but both had an obligation to ensure the safe transportation of the hazardous materials in the container.<sup>6</sup> Respondent cannot pass along the documents and wash its hands of all responsibility for hazards created by the freight at the same time that it claims to be the carrier.

Respondent's final argument is that there was no violation because the freight never made it on board the ship. Respondent claims that there was no obligation to segregate the hazardous materials prior to being on board the ship. Respondent correctly cites to 49 C.F.R. § 176.83(a)(1); however, Respondent omitted a few key words. The section states: "The requirements of this section apply to all cargo spaces on deck or under deck of all types of vessels, *and to all cargo transport units.*"<sup>7</sup> A cargo transport unit includes freight containers.<sup>8</sup> The shipping papers indicated this container was destined for transportation by vessel with no indication that the contents of the container would require additional segregation. The segregation rules apply to freight containers destined for transportation by vessel prior to those

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<sup>6</sup> APL refused the shipment based on the shipping papers.

<sup>7</sup> 49 C.F.R. § 176.83(a)(1) (emphasis added).

<sup>8</sup> 49 C.F.R. § 176.2 (Oct. 1, 2001) (definition for "transport unit"). The definition for "transport unit" became "cargo transport unit" in 2004 as part of a rulemaking designed to harmonize the HMR with, *inter alia*, the IMDG. 69 Fed. Reg. 76143, 76179 (Dec. 20, 2004).

containers being physically loaded on board the ship. Even under Respondent's interpretation, this container could not have been loaded onto the ship. Clearly the segregation must occur before the container is on board.

The hazardous materials in this case required segregation "away from" and "separated from" each other. The failure to properly segregate materials creates an extremely hazardous situation. Respondent must take responsibility for the safety of a shipment of hazardous materials when it accepts those materials for carriage. Furthermore, today's environment makes Respondent's obligation to review shipping papers even more important as Respondent can provide an additional layer against potential security risks.

A booking for container APW993738 had been arranged, and the shipping papers for container APW993738 were marked as being the shipping papers for that booking when Respondent forwarded them to APL. Therefore, Respondent accepted and offered hazardous materials for transportation in commerce when the materials were not in condition for shipment as required by vessel segregation. Respondent was obligated to review the shipping papers and not merely forward them on.

### **Findings**

Based on the facts detailed above, I find that Respondent knowingly violated the HMR by failing to review and/or adequately prepare shipping papers before accepting and offering the shipment for carriage by vessel. 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.

In applying the Guidelines for Civil Penalties (49 C.F.R. Part 107, Subpart D, Appendix A), I find the penalty applied to the violation in the Notice is inappropriate. Respondent had no

role in physically segregating the materials and did not initially prepare the shipping papers. Therefore, Respondent's culpability is limited to its failure to adequately review and/or revise shipping papers.<sup>9</sup> The Guidelines for Civil Penalties do not suggest a baseline for this violation; however, after reviewing the various types of shipping paper violations, I find the appropriate penalty in this case is \$1,200.

### **Conclusion**

For each violation of the Federal hazardous materials law or the HMR occurring prior to October 1, 2003, Federal law sets a maximum penalty of \$27,500 and a minimum civil penalty of \$250 (49 U.S.C. § 5123(a)). Based on my review of the record, I find that Respondent committed one violation as set forth in the opening to this Order. Accordingly, under the authority of 49 U.S.C. § 5123 and 49 C.F.R. § 107.329, I assess a total civil penalty of \$1,200 for one violation of the HMR. 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.

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<sup>9</sup> PHMSA assessed penalties over two years ago in the related enforcement cases against the other parties involved in this shipment, Unitor Ships Service, Inc. and DHX, Inc.

**Payment and Appeal**

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.<sup>10</sup>

This Order constitutes written notification of these procedural rights.

4/10/06  
Date

Joseph Ahern  
Joseph Ahern  
Acting Chief Counsel

Attachment

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

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<sup>10</sup> 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**

APR 10 2006

This is to certify that on the 10<sup>th</sup> day of APRIL, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Matson Navigation Company  
4605 E Elwood #500  
Phoenix, AZ 85040  
Attn: Mr. James S. Andrasick

Original Order  
Certified Mail – Return Receipt

Mr. Doug Smith  
Office of Hazardous Materials Enforcement  
Washington, D.C. 20590

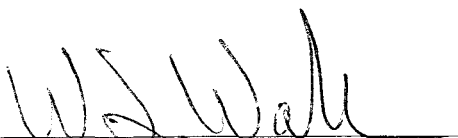
One Copy  
Internal E-Mail

Mr. Kevin Boehne, Chief  
Office of Hazardous Materials Enforcement  
Central Region Office  
Des Plaines, IL 60018

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=/ALC-69-14-0001	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=/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/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.