



U.S. Department
of Transportation
**Pipeline and Hazardous Materials
Safety Administration**

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Office of
Chief Counsel

*Hazardous Materials Safety Law
Division*

NOTICE OF PROBABLE VIOLATION

PHMSA Case No. 13-0097-SC-EA Date Issued: **MAR 19 2014**

Respondent: Brandon Farner Fire Extinguishers
 1299 Route 18
 Burgeststown, PA 15021
 Attn: Brandon Farner, President

No. of Alleged Violations: 3

Total Proposed Assessment: \$3,825

The Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) alleges that you have violated certain provisions of the Federal hazardous materials transportation law, 49 U.S.C. § 5101 *et seq.*, and/or the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. PHMSA sets forth the specific allegations in Addendum A to this Notice.

What are the maximum and minimum civil penalties that PHMSA can assess? For probable

violations occurring after December 31, 2009, Federal law sets a civil penalty of not more than \$55,000 and a civil penalty of not less than \$250 for each violation of the Federal Hazardous Materials Transportation Law or the (49 U.S.C. § 5123(a)(1)). Furthermore, if a person's violation of the HMR "results in death, serious illness, or severe injury . . . or substantial destruction of property" the maximum civil penalty is \$110,000 (49 U.S.C. § 5123(a)(2)); and if the violation concerns training the minimum civil penalty is \$495 (49 U.S.C. § 5123(a)(3)). Each day of a continuing violation constitutes a separate violation for which the maximum penalty may be imposed (49 U.S.C. § 5123(a)(4)).

What factors does PHMSA consider when proposing and assessing a civil penalty? Federal law requires PHMSA to consider certain factors when proposing and assessing a civil penalty for a violation of Federal hazardous materials transportation law or the HMR. Please refer to Addendum B to this Notice for more information concerning these factors, which include corrective actions you take to attain and ensure compliance with the HMR.

How do I respond? You may respond to this Notice in any of three ways:

- (1) pay the proposed assessment;
- (2) send an informal response, which can include a request for an informal conference;
or
- (3) request a formal hearing.

Details on these three options are provided in Addendum B to this Notice and also on the home page of PHMSA's Office of Hazardous Materials Safety (go to <http://www.phmsa.dot.gov/hazmat/enforcement>). PHMSA explains its procedures for assessing civil penalties and imposing compliance orders in 49 C.F.R. § 107.307 through 107.331.

When is my response due? You must respond within thirty (30) days from the date that you receive the Notice (49 C.F.R. § 107.313(a)). You are encouraged to submit your response by e-mail or fax when possible. I may extend the 30-day period for your response if you ask for an extension, and show good cause, within the original 30-day period (49 C.F.R. §107.313(c)).

What happens if I fail to respond? You waive your right to contest the allegations made in Addendum A to this Notice if you fail to respond within thirty (30) days of receiving it (or by the end of any extension). In that event, the Chief Counsel may find that you committed the violation(s) alleged in this Notice and assess an appropriate civil penalty.

PHMSA Case No. 13-0097-SC-EA (Brandon Farner Fire Extinguishers)



Amelia Samaras, Attorney

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Enclosures: Addendum A

Addendum B

Addendum C

Case Exhibits

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Addendum A

Background

On April 10, 2013, PHMSA Investigators Snyder and Michalski conducted a compliance investigation as the result of a complaint at Brandon Farner Fire Extinguishers (Respondent) in Burgetts, Pennsylvania. Respondent distributes, fills, ships, and requalifies DOT-specification cylinders.

SPECIFIC ALLEGATIONS

Probable Violation No. 1

Respondent filed with hazardous materials and offered for transportation, DOT-specification cylinders that were unauthorized packages because they had not been requalified and marked as required in 49 C.F.R. §§180.209(j) and 180.213, in violation of 49 C.F.R. §§171.2(a), (e), and (g); 173.301(a)(6), and 173.302(a).

Factual Allegation/ Avertisments

1. PHMSA investigators received information about DOT-specification cylinders that arrived at Respondent's customer's residence and appeared to be past due for requalification. See Exhibits 2 and 3. UPS shipping documents and labels and language appearing from Respondent's Ebay store indicate that the cylinders were shipped from Respondent. See Exhibits 2 and 3. In Respondent's April 10, 2013 email to the PHMSA investigator, Respondent admits sending cylinders to complainant's residence. Exhibit 7. Photographs of the cylinders at issue show that the adhesive labels and red "maintenance" tags both display Respondent's name and address.
2. The cylinders displayed the following information
 - a. Cylinder 1: Serial # GD8575 (Exhibit 3, pg. 8); DOT-Specification DOT-4B195, (Exhibit 3, pg. 10); and requalification test date mark, 4/92 (Exhibit 3, pg. 17).
 - b. Cylinder 2: Serial # KB8636 (Exhibit 5, pg. 10); DOT-Specification DOT-4B195, and requalification test date mark, 1/91 (Exhibit 3, pg. 15).
3. Cylinder 1 displayed evidence of dents, scratches, and missing paint, which can expedite corrosion. See Exhibit 3, pgs. 19, 21; and Exhibit 4, pg. 4,
4. 49 C.F.R. § 180.205(d) requires, "Without regard to any other periodic requalification requirements, a cylinder must be tested and inspected in accordance with this section prior to further use if --(1) The cylinder shows evidence of dents, corrosion, cracked or

abraded areas, leakage, thermal damage, or any other condition that might render it unsafe for use in transportation;”

5. 49 CFR §180.209(j) requires that cylinders used as fire extinguishers must undergo requalification either by pressure test or water jacket test every 12 years. Because the tanks were marked as last requalified in 1991 and 1992, the tanks were out of test. Respondent’s adhesive labels that allowed for marking of hydrostatic test date were not punched; only “6 Year Maintenance” was punched, which is not relevant to DOT requirements. The PHMSA investigators also requested test records for the cylinders, but Respondent could not provide.
6. Respondent violated the HMR when it offered for shipment DOT-specification cylinders filled with hazardous materials that displayed conditions that might render it unsafe for transportation and because the test markings on the cylinders indicated that the cylinders were at least nine years past due for requalification.

Probable Violation No. 2

Respondent offered DOT specification cylinders, filled with UN 1044, Nitrogen, compressed, fire extinguisher, 2.2 without shipping papers while failing to mark packages as a limited quantity, in violation of 49 C.F.R. § 171.2 (a), (b), (e), and (j); 173.309(d)(2); and 172.315(a).

Factual Allegation/ Averments

1. The PHMSA investigators observed the boxes in which Respondent shipped the fire extinguishers described in Probable Violation 1. See Exhibit 3, pages 3-7. The box was not marked with any hazardous materials markings, including limited quantities markings.
2. The PHMSA investigators asked Respondent for the shipping papers that accompanied the shipment, but Respondent could not provide. Respondent stated that he believed shipping papers were not required.
3. 49 C.F.R. 173.309(d) allows for the shipment of limited quantities of compressed gases without shipping papers as long as the package is marked in accordance with 49 C.F.R. §172.315.
4. Respondent violated the HMR when it offered DOT-specification cylinders filled with hazardous materials without either marking the package as a limited quantity in accordance with 49 C.F.R. 173.309(d) or accompanying the shipment with hazardous materials shipping papers.

Probable Violation No. 3

Respondent filled DOT-specification cylinders with hazardous materials and offered them for transportation, while failing to provide general awareness and security awareness hazmat training, in violation of 49 C.F.R. §§171.2(a), (e), and (g); 172.702(a); and 172.704(a)(1) and (4), (c)(1), and (d).

Factual Allegation/ Avertisments

1. During the investigation, the PHMSA investigators asked Respondent to provide copies of hazardous materials trainings records to determine whether Respondent's hazardous materials employees received hazardous materials training within the last three years, as required by 49 C.F.R. Part 172, subpart H.
2. Respondent provided training records showing he had received NFPA training on fire extinguishers. This training covers function-specific training and safety training. However, this NFPA training did not cover general awareness/familiarization or security awareness training.
3. 49 C.F.R. §172.704(a) states, "Hazmat employee training must include the following:
(1) *General awareness/familiarization training.* Each hazmat employee shall be provided general awareness/familiarization training designed to provide familiarity with the requirements of this subchapter, and to enable the employee to recognize and identify hazardous materials consistent with the hazard communication standards of this subchapter. (2) *Function-specific training.* (i) Each hazmat employee must be provided function-specific training concerning requirements of this subchapter, or exemptions or special permits issued under subchapter A of this chapter, that are specifically applicable to the functions the employee performs. (ii) As an alternative to function-specific training on the requirements of this subchapter, training relating to the requirements of the ICAO Technical Instructions and the IMDG Code may be provided to the extent such training addresses functions authorized by subpart C of part 171 of this subchapter. (3) *Safety training.* Each hazmat employee shall receive safety training concerning-- (i) Emergency response information required by subpart G of part 172; (ii) Measures to protect the employee from the hazards associated with hazardous materials to which they may be exposed in the work place, including specific measures the hazmat employer has implemented to protect employees from exposure; and (iii) Methods and procedures for avoiding accidents, such as the proper procedures for handling packages containing

hazardous materials. (4) *Security awareness training*. No later than the date of the first scheduled recurrent training after March 25, 2003, and in no case later than March 24, 2006, each hazmat employee must receive training that provides an awareness of security risks associated with hazardous materials transportation and methods designed to enhance transportation security. This training must also include a component covering how to recognize and respond to possible security threats. After March 25, 2003, new hazmat employees must receive the security awareness training required by this paragraph within 90 days after employment.”

4. Respondent violated the HMR when it failed to provide required hazmat employee training to employees that perform functions subject to the HMR and failed to maintain hazmat training records for its hazmat employees.

FACTS ALREADY CONSIDERED (UNDER 49 C.F.R. § 107.331) IN SETTING PROPOSED PENALTIES

Prior Violations of the Hazardous Materials Regulations:

PHMSA increases proposed penalties when Respondent has committed a prior violation of the Federal Hazardous Materials Transportation Law or the HMR within the last six years, as determined through a civil penalty case, criminal case, or ticketing process (49 C.F.R. § 107.331(d)). More specifically, “the general standards for increasing a baseline proposed penalty on the basis of prior violations are . . . (1) for each prior civil or criminal enforcement case –25% increase over pre-mitigation recommended penalty, and (2) for each prior ticket–10% increase over pre-mitigation recommended penalty” (49 C.F.R. Part 107, Subpart D, Appendix A, Section IV, E).

PHMSA is not aware of prior violations of the HMR by Respondent.

Corrective Action:

An important purpose of PHMSA’s enforcement program is to bring the regulated community into compliance with the Hazardous Materials Regulations, and to promote ongoing efforts by that community to maintain compliance. In determining the final penalty assessment, PHMSA considers documented evidence of actions taken by a Respondent to correct violations and ensure that they do not recur (49 C.F.R. § 107.331 (g)).

Probable Violation 1

In a letter dated April 10, 2013, Respondent stated that it will continue to have its cylinders

tested by an outside tester. For additional corrective action credit, provide records of cylinder testing/requalification performed by a RIN holder.

Probable Violation 2

Respondent stated that it will now use limited quantity markings, but Respondent did not provide photos of any documentation of the markings. This is a warning item.

Probable Violation 3

Respondent provided training records certifying that he received hazmat training in accordance with the HMR.

Financial Status

Under 49 C.F.R. §107.331 (e) and (f), the proposed penalty may be reduced if Respondent demonstrates an inability to pay the penalty, or if payment of the proposed penalty would affect Respondent's ability to continue in business. Respondent's poor financial condition may be a basis for reducing the proposed penalty; a healthy financial condition is *not* a basis for increasing the penalty.

PHMSA has no information that indicates that Respondent is unable to pay the proposed penalty. If Respondent believes it lacks the ability to pay the proposed penalty and that the proposed penalty will jeopardize Respondent's ability to continue in business, Respondent should submit copies of its three most recent federal tax returns or current balance sheet, certified by a C.P.A.

TOTAL CIVIL PENALTY PROPOSED

Probable Violation	Baseline Penalty	Corrective Action Credit	Proposed Penalty
1	\$3,500	\$350	\$3,150
2	Warning Item	Warning Item	Warning Item
3	\$900	\$225	\$675
Total	\$4,400	\$575	<u>\$3,825</u>