

APR 8 2011

Mr. Tim Heilig
Vice President of Mechanical Operations
Norfolk Southern Corporation
1200 Peachtree Street NE (Box 184)
Atlanta, GA 30309

Re: CPF No. 2-2010-6004

Dear Mr. Heilig:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation, assesses a civil penalty of \$98,600, and specifies actions that need to be taken by Norfolk Southern Corporation to comply with the pipeline safety regulations. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Wayne T. Lemoi, Director, Southern Region, PHMSA
Mr. A. Gayle Jordan, General Solicitor – Environmental

CERTIFIED MAIL - RETURN RECEIPT REQUESTED [7005 1160 0001 0075 8810]

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

In the Matter of)	
)	
Norfolk Southern Corporation,)	CPF No. 2-2010-6004
)	
Respondent.)	
)	

FINAL ORDER

On September 28-29, and November 30, 2009, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of Norfolk Southern Corporation (Norfolk Southern or Respondent) in Macon, GA. Respondent operates 5.5 miles of diesel fuel pipeline in Georgia.

As a result of the inspection, the Director, Southern Region, OPS (Director), issued to Respondent, by letter dated August 30, 2010, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Norfolk Southern had committed various violations of 49 C.F.R. Part 195 and proposed assessing a civil penalty of \$98,600 for the alleged violations.

Norfolk Southern responded to the Notice by letter dated October 7, 2010 (Response). The company contested some of the allegations, offered additional information in response to the Notice, and requested that the proposed civil penalty be reduced or eliminated. Respondent did not request a hearing and therefore has waived its right to one.

FINDINGS OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 195, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.505(a), which states:

§ 195.505 Qualification program.

Each operator shall have and follow a written qualification program.

The program shall include provisions to:

- (a) Identify covered tasks;

The Notice alleged that Respondent violated 49 C.F.R. § 195.505(a) by failing to maintain a written qualification program that identified individuals' covered tasks properly. Specifically, the Notice alleged that the covered task list in Norfolk Southern's written Operator Qualification Plan (OQ Plan) contained only five tasks, which were broad in nature and missed many of the specific covered tasks that had been performed on Respondent's pipeline system.

In its Response, Norfolk Southern contended that its OQ Plan "met the literal requirements" of § 195.505(a) because it contained a list of covered tasks that are routinely performed on the pipeline.¹ Respondent argued that it was not aware that PHMSA required a more detailed list of covered tasks than the one it provided in its OQ Plan. Therefore, although Respondent now "appreciates that PHMSA expects each main covered task to be broken into its component steps," it maintains that its OQ Plan complied with the stated requirements of § 195.505(a).² Furthermore, Norfolk Southern contended that its list of covered tasks was "appropriate in light of the nature and extent of our Macon pipeline operations."³

Under § 195.501(b), a "covered task" is defined as an activity that: (1) is performed on a pipeline; (2) is an operations or maintenance task; (3) is performed as a requirement of Part 195; or (4) affects the operation or integrity of the pipeline. Generally, operators provide a list of between 50 and 100 covered tasks. Respondent provided a list of five covered tasks. In addition to its numerical deficiency, Norfolk Southern failed to list several items that are defined as covered tasks under § 195.501(b). For example, Norfolk Southern's covered task list did not contain many covered tasks that should be performed on a pipeline, such as (1) pipeline repairs, such as welding, non-destructive testing and evaluation (NDE), tapping the pipeline, and purging the pipeline; (2) repairing pipeline components, such as pipe sleeves or other pipe repairs; and (3) excavation of the pipeline. Norfolk Southern also omitted several tasks that would be considered operations and maintenance tasks and activities that would affect the integrity of the pipeline, such as (1) checking the pipe-to-soil readings; (2) checking bonds; (3) checking electrical isolation from other structures and casings; (4) testing for shorted casings; (5) installation of test leads; (6) repairs to the cathodic protection system; (7) the inspection and repair of the underground pipeline coating; (8) the inspection of exposed pipe; (9) inspecting the surface of removed pipe; (10) inspecting and repairing the coating on aboveground pipeline; and (11) examining the surface of corroded pipe. Indeed, Respondent's inclusion of pipeline right-of-way (ROW) examinations as a covered task is an example of its failure to list all tasks required under Part 195 as covered tasks. More specifically, Norfolk Southern failed to address several requirements relating to ROW examinations that are contained in Part 195. These ROW requirements addressed in Part 195, but not mentioned in Respondent's list of covered tasks, include, but are not limited to: (1) locating the pipeline in response to One Call notifications; and (2) line marking or excavation activities as part of its operations, maintenance, and damage prevention programs.

Under 49 C.F.R. § 195.505(a), the OQ Plan is required to contain all tasks that may be defined as (1) an activity performed on a pipeline; (2) an operations or maintenance task; (3) a requirement of Part 195; or (4) an activity affecting the operation or integrity of the pipeline. Respondent's

¹ Response, at 2.

² *Id.*

³ *Id.*

use of overly broad descriptions of covered tasks led to the omission of a number of specific covered tasks that must be included in its OQ Plan. The items included above provide a non-exhaustive list of the tasks Respondent failed to include. Moreover, the combination of Respondent's numerical deficiency and insufficient specificity in its list of covered tasks highlights its failure to identify covered tasks properly. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.505(a) by failing to maintain a written qualification program that identified covered tasks properly.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.505(b), which states:

§ 195.505 Qualification program.

Each operator shall have and follow a written qualification program.
The program shall include provisions to:
(b) Ensure through evaluation that individuals performing covered tasks are qualified;

The Notice alleged that Respondent violated 49 C.F.R. § 195.505(b) by failing to ensure through evaluation that individuals performing covered tasks were qualified. Under § 195.503, "qualified" is defined as being able to: (a) perform assigned covered tasks; and (b) recognize and react to abnormal operating conditions (AOCs). Specifically, the Notice alleged that Norfolk Southern failed to establish abnormal operating conditions (AOC) for each covered task in its OQ Plan, and thus Respondent could not evaluate an individual's ability to either recognize or react to an AOC.

In its Response, Norfolk Southern contended that the regulations do not require operators to list AOCs along with covered tasks. Further, Respondent stated that PHMSA acknowledged that the OQ Plan contained AOCs, but that PHMSA cited Norfolk Southern for failing to explicitly refer to the listed conditions as AOCs. In sum, Norfolk Southern contends that the regulations never require operators to list all AOCs accompanying the individual's covered tasks.

Upon closely reading Respondent's contentions, it is apparent that Norfolk Southern misinterpreted the NOPV as citing it for merely failing to list all AOCs accompanying covered tasks. Rather, PHMSA alleged that Respondent violated § 195.505(b) by failing to include a provision in its written qualification program that mandates evaluations of individuals' ability to recognize and react to AOCs.

Furthermore, although Respondent conducts "emergency" training for all emergency personnel, emergency training is a separate requirement from the evaluation of individuals' ability to recognize and react to AOCs. While Norfolk Southern did conduct emergency training as required under § 195.403, it did not conduct separate evaluations of individuals performing covered tasks for their ability to recognize and react to AOCs, as required under § 195.505(b). This is problematic because AOCs are different from emergencies. Under 195.503, AOCs are defined as "a condition identified by the operator that may indicate a malfunction of a component or deviation from normal operations that may: (a) indicate a condition exceeding design limits; or (b) result in a hazard(s) to persons, property, or the environment." Emergencies are those unexpected pipeline circumstances or conditions that can cause injury, death, property damage or the environmental harm. It is clear that emergencies are a narrower and sometimes

different set of circumstances than AOCs. Therefore, Norfolk Southern's emergency training does not qualify as a proper evaluation of individuals' ability to recognize and react to AOCs under § 195.505(b).

Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 195.505(b) by failing to ensure through evaluation that individuals performing covered tasks were qualified. More specifically, Respondent failed to determine that individuals performing covered tasks were able to recognize and react to AOCs.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 195.507(a), which states:

§ 195.507 Recordkeeping.

Each operator shall maintain records that demonstrate compliance with this subpart.

(a) Qualification records shall include:

(1) Identification of qualified individual(s);

(2) Identification of the covered tasks the individual is qualified to perform;

(3) Date(s) of current qualification; and

(4) Qualification method(s).

The Notice alleged that Respondent violated 49 C.F.R. § 195.507(a) by failing to maintain qualification records for its employees properly. Specifically, the Notice alleged that Norfolk Southern did not maintain records regarding the qualification methods of individuals, the dates of the individual's qualification, or the identification of the covered tasks for which the individual was qualified. Respondent did not contest this allegation of violation. Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.507(a) by failing to maintain qualification records for its employees properly.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed \$100,000 per violation for each day of the violation, up to a maximum of \$1,000,000 for any related series of violations. In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$98,600 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$38,300 for Respondent's violation of 49 C.F.R. § 195.505(a) for failing to maintain a written qualification program that identified individuals' covered tasks properly. Respondent requested that PHMSA "substantially reduce" the civil penalty. Norfolk Southern's non-compliance was not a contributing factor in a significant spill, accident, or pipeline failure. Accordingly, the low gravity of the violation was taken into account in calculating the penalty. A further reduction in the civil penalty under a good faith or gravity analysis is not warranted. In addition, Respondent's indication that it is willing to and has amended its OQP is post violation compliance that is consistent with and nothing more than what I have ordered herein. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$38,300 for violation of 49 C.F.R. § 195.505(a).

Item 2: The Notice proposed a civil penalty of \$42,000 for Respondent's violation of 49 C.F.R. § 195.505(b), for failing to ensure through evaluation that individuals performing covered tasks were qualified. Respondent has requested the withdrawal of the civil penalty, or alternatively a "substantial reduction." I disagree with its assertion that a withdrawal or substantial reduction is justified. While the nature, circumstances, and gravity of the violation is mild, these factors were accounted for in the original calculation of the penalty. Respondent misinterpreted § 195.503, which defined the term "qualified" under § 195.505(b). Therefore, Norfolk Southern failed to recognize the specific requirement under § 195.505(b), and it is fully culpable for the violation. Respondent expressed its willingness to follow PHMSA's directive to list AOCs in its effort to ensure all required individuals are qualified to recognize and react to AOCs. Similarly, its post-violation efforts toward compliance do not warrant a reduction in the civil penalty under a good faith analysis. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$42,000 for violation of 49 C.F.R. § 195.505(b).

Item 3: The Notice proposed a civil penalty of \$18,300 for Respondent's violation of 49 C.F.R. § 195.507(a), for failing to maintain qualification records for its employees properly. Respondent neither contested the allegation nor presented any evidence or argument justifying a reduction in the proposed penalty. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$18,300 for violation of 49 C.F.R. § 195.507(a).

Failure to pay the \$98,600 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to Items 1, 2, and 3 in the Notice for violations of 49 C.F.R. §§ 195.505(a), 195.505(b), and 195.507(a), respectively. Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids or who

owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Respondent is ordered to take the following actions to ensure compliance with the pipeline safety regulations applicable to its operations:

1. With respect to the violation of § 195.505(a) (**Item 1**), Respondent must review its operations and maintenance (O&M) tasks to be performed on the Norfolk Southern pipeline by using the four-part test included in § 195.505(b) to ensure that any and all covered tasks to be performed on the Norfolk Southern pipeline are included on the covered task list.
2. With respect to the violation of § 195.505(b) (**Item 2**), Respondent must identify abnormal operating conditions (AOCs) for each covered task determined in accordance with Item 1 of this Compliance Order.
3. With respect to the violation of § 195.507(a) (**Item 3**), Respondent must prepare and maintain records to show:
 - a. All OQ covered tasks for the entire Norfolk Southern pipeline and facilities;
 - b. That AOCs have been reviewed for each covered task with each individual performing an OQ covered task on Norfolk Southern's pipeline and that each individual is able to recognize and properly react to an AOC;
 - c. The evaluation methods used to establish the qualifications of each individual performing an OQ covered task;
 - d. That when evaluation methods include observation of on the job performance or a review of performance history, that this was not the sole evaluation method;
 - e. The criteria Norfolk Southern used with the evaluation methods to establish qualifications for individuals performing covered tasks;
 - f. How Norfolk Southern evaluates and approves non-Norfolk Southern OQ and/or other OQ programs to allow individuals under those programs to perform covered tasks on Norfolk Southern pipelines;
 - g. The re-evaluation of all Norfolk Southern employees performing covered tasks;
 - h. The re-evaluation of all contractor individuals qualified under the Norfolk Southern OQ Plan performing covered tasks; and
 - i. The evaluation methods and approval process of third party OQ programs that Norfolk Southern accepts for contractor individuals to perform covered tasks on its pipeline.

4. With respect to the violations of §§ 195.505(a), (b) (**Items 1 & 2**), Respondent must provide written documentation to the Director, Southern Region the Compliance Order Items 1 & 2 have been completed within 30 days following your receipt of the Final Order. This written documentation must include the covered task list.

5. With respect to the violation of § 195.507(a) (**Item 3**), Respondent must make the records required under Item 3 of this Compliance Order available for inspection by PHMSA representatives within 120 days following your receipt of this Final Order.

6. Norfolk Southern is requested to maintain documentation of the safety improvement costs associated with fulfilling this Compliance Order and submit the total to the Director, PHMSA Southern Region. Costs should be reported in two categories: (1) total cost associated with preparation and revision of plans, procedures, studies, and analyses; and (2) total cost associated with replacements, additions, and other changes to pipeline infrastructure.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

Failure to comply with this Order may result in the administrative assessment of civil penalties not to exceed \$100,000 for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

WARNING ITEM

With respect to Item 4, the Notice alleged probable violations of Part 195.509(e) but did not propose a civil penalty or compliance order for these items. Therefore, these are considered to be warning items. The warnings were for:

49 C.F.R. § 195.509(e) (**Item 4**) — Respondent's alleged use of on-the-job performance as the sole method of evaluation for pipeline personnel.

Norfolk Southern presented information in its Response showing that it had taken certain actions to address the cited items. Accordingly, having considered such information, I find, pursuant to 49 C.F.R. § 190.205, that a probable violation of 49 C.F.R. § 195.509(e) (Notice Item 4) occurred and Respondent is hereby advised to correct such conditions. In the event that OPS finds a violation of this provision in a subsequent inspection, Respondent may be subject to future enforcement action.

Under 49 C.F.R. § 190.215, Respondent has a right to submit a Petition for Reconsideration of this Final Order. The petition must be sent to: Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address. PHMSA will accept petitions received no later than 20 days after receipt of service of this Final Order by the Respondent, provided they contain a brief statement of the issue(s) and meet all other

requirements of 49 C.F.R. § 190.215. The filing of a petition automatically stays the payment of any civil penalty assessed. Unless the Associate Administrator, upon request, grants a stay, all other terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued