

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

In the Matter of:

**BCI,
Respondent**

**PHMSA Case No. 05-0428-SBG-SW
Docket No. PHMSA-2005-23469-2**

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 Baker Chemicals, Inc., on February 8, 2006. The Notice formally initiated proceedings for 5 violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180.

In its response to the Notice, BCI (hereinafter "Respondent") indicates that the Notice incorrectly identifies the company as Baker Chemicals, Inc., rather than the correct name of "BCI." Respondent also argues that the Notice was issued to the wrong address and names the wrong individual. Respondent states that "BCI" is a franchise of Baker Chemicals, Inc., and as such, is wholly responsible for its actions and that Baker Chemicals assumes no responsibility for BCI's actions. Respondent then argues that BCI is not a motor carrier or transporter of hazardous materials and is not an offeror.

Respondent raised two procedural issues in its response to the Notice: Did Respondent receive proper notice of the probable violations charged against it? Is Respondent subject to the HMR?

Did Respondent receive adequate notice?

The preponderance of the evidence in the record supports the conclusion that the named party in the Notice should have been BCI instead of Baker Chemicals, Inc. The captioning of this Order reflects this correction. Despite the use of an incorrect name, Respondent admits it received the Notice. Therefore, the issue is whether service was proper when the Notice was mailed to, and was captioned with, the franchisor's business name rather than the franchisee's business name.

In determining whether service is sufficient to give a party notice of a claim made against it, courts examine the similarity between the names (named party and intended party), other information in the pleading by which a party could identify itself, and the address where the pleading was served.¹ In this case, the Notice listed the parent company name. "As a general rule the misnomer of a corporation in a notice, summons ... or other step in a judicial proceeding is immaterial if it appears that [the corporation] could not have been, or was not, misled."² A copy of the Notice was served on BCI's Tyler facility. Respondent does not claim it was unaware it was the intended recipient. Respondent received the Notice and responded accordingly. The intended party filed the response to the Notice. Furthermore, Respondent produced some evidence of corrective actions taken following the inspection. The evidence shows Respondent did, in fact, realize it was the intended recipient of the Notice.

¹ See generally *Morrel v. Nationwide Mutual Fire Insurance Company*, 188 F.3d 218(4th Cir. 1999); *Datskow v. Teledyne, Inc., Continental Products Div.*, 899 F.2d 1298 (2d Cir. 1990); *Thompson v. Liberty Mutual Insurance Co. of Boston, Mass.*, 390 F.2d 24 (10th Cir. 1968); *F. T. C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980). See also *Schiavone v. Fortune*, 477 U.S. 21 (1986) (noting in dicta that, while "not a model of accuracy," the revised pleading identifying the party as "Fortune, also known as Time, Incorporated" "does focus on Time and sufficiently describes Time as the targeted defendant.")

² *Morrel* at 224 (quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)). See also *Datskow v. Teledyne, Inc., Continental Products Div.*, 899 F.2d 1298 (2d Cir. 1990) (holding service was proper where proper party had actual notice, the address was correct, and the named party was a subsidiary of the proper party); *Thompson v. Liberty Mutual Insurance Co. of Boston, Mass.*, 390 F.2d 24 (10th Cir. 1968) (stating "[t]he general rule of law is that a misnomer in service of process is immaterial if service is duly made).

If the Notice names the party “in such terms that every intelligent person understands who is meant ... it has fulfilled its purpose.”³ Respondent cannot evade the civil penalties on the basis of a misnomer. Respondent received actual notice of the claim made against it by PHMSA. The Notice was sufficient to meet the requirements of the Administrative Procedure Act and due process.

Is Respondent subject to the HMR?

Respondent states it is not a motor carrier, a transporter, an offeror or a freight forwarder. Although Respondent identifies the shipments as “customer pick-up” and states that it does not arrange the transportation, Respondent does perform some of the functions subject to the HMR. An offeror of hazardous materials includes a company that performs certain pre-transportation functions, including selecting and offering placards and preparing shipping papers. 49 C.F.R. § 171.1(b). As our regulations state in section 171.2, each offeror is responsible for complying with the HMR with respect to any pretransportation function that it performs or is required to perform. The evidence in the record clearly demonstrates that Respondent selected and offered placards and prepared shipping papers; therefore, it is an offeror subject to the HMR.

Because Respondent offers hazardous materials for transportation within the United States, 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.⁴

Background

On July 12, 2005, an inspector from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Respondent’s facility in Tyler, Texas. During the course

³ *Morrel* at 224 (quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)).

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

of the inspection, the inspector observed shipping papers denoting shipments of 3,000 pounds and 1,500 pounds of Sodium Hydroxide, solid, 8, UN1823, PG II, which Respondent had offered for transportation in commerce. Upon examination of the shipping papers, the inspector determined the shipping papers did not include the required shipper's certification that the material was offered for transportation in accordance with the HMR. The inspector also contacted the emergency response company identified on Respondent's shipping paper. The emergency response company indicated that Respondent was not authorized to use the company's emergency response telephone number.

The inspector requested training records for Respondent's hazmat employees. Respondent indicated it did not have hazmat training records. Respondent also indicated to the inspector that it did not have a security plan and was not registered with the DOT as a hazmat shipper.

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, on February 8, 2006, the Office of Chief Counsel issued the Notice to Respondent, proposing a civil penalty in the amount of \$11,500. The Notice advised Respondent that PHMSA proposed to assess a civil penalty in the amount of \$11,500 for offering for transportation in commerce a placarded quantity of a hazard class 8 (corrosive), PG II material: (1) without developing a security plan, in violation of 49 C.F.R. §§ 171.2(a), 172.800, and 172.802; (2) without providing training to its hazmat employees, in violation of 49 C.F.R. §§ 171.2(b), 172.702(a), 172.704(a), and 172.704(c)(1); (3) accompanied by a shipping paper that contained an unauthorized emergency response number, in violation of 49 C.F.R. §§ 171.2(b) & (e), 172.600(c), 172.201(d) and 172.604(b); (4) without signing the required shipper's certification on the shipper paper, in violation of 49 C.F.R.

§§ 171.2(a), (b) & (e), and 172.204(a) & (d); and (5) without registering as an offeror of hazardous materials, in violation of 49 C.F.R. §§ 171.2(d), 107.601(a)(6), and 107.608(a)-(b).

Respondent argues that it rarely shipped in a quantity requiring placarding and that it has now instituted a policy against offering shipments in a quantity requiring placarding.

Respondent states that the Tyler facility is a warehouse and not a manufacturing facility, as indicated in the inspection report. Respondent argues that sodium hydroxide in *solid* form is not hazardous and that the packaging used by the manufacturer prevents any possibility of the material becoming a hazardous “or even a nuisance.” Respondent argues that it has a perfect safety record and that it should be given special financial consideration because it is a very small company with a small profit margin.

The case now comes before the Chief Counsel for decision.

Discussion

Offerors of certain hazardous materials must take additional precautions due to the nature of the materials they are shipping. In this case, Respondent was offering over 1,000 pounds of regulated hazardous materials for transportation in commerce. As a result, the shipment was required to be placarded. In addition, Respondent was required to register with the DOT as an offeror of hazardous materials and to develop a security plan. Respondent failed to do so.

Respondent admitted it did not have a security plan and was not registered at the time of the placarded shipments. In correspondence, Respondent indicated it is no longer offering hazardous materials for transportation in commerce in placarded quantities. As a result, it is no longer required to register as an offeror of hazardous materials and is not required to develop a security plan.

Respondent was not authorized to use the emergency response telephone number it had listed on its shipping papers. Respondent also admitted it had no training records for its hazmat employees. Respondent has not addressed its failure to certify that the shipments were made in accordance with the HMR. Respondent has not provided corrective action with regard to these violations.

Is Sodium Hydroxide, Solid, hazardous?

Respondent states that Sodium Hydroxide, Solid, is the “least hazardous material of all products, as it is designated a mere ‘Class 8’ (Table II).” Respondent also asserts that Sodium Hydroxide is not hazardous because it is not identified as a hazardous substance in the HMR. Respondent’s assertions demonstrate its failure to understand the fundamental principles of the HMR, such as hazard classes, packing groups, and the purpose of the Hazardous Materials Table (HMT).

The hazard class of a material indicates the type of hazard posed. Hazard class 8 indicates a corrosive hazard. The numeral 8 does not indicate any more or less hazard than a numeral 1 (explosive), 2 (gas), 3 (flammable liquid), etc. Furthermore, Sodium Hydroxide, Solid, is in Packing Group II, which indicates a moderate hazard. Packing Group III materials are the least hazardous materials within a hazard class.

In addition to the hazard classes and packing groups, the HMR require precautions such as placarding under certain circumstances. Respondent is correct that Table II materials are considered to be less hazardous than Table I materials, in that, even very small quantities of Table I materials must be placarded; however, Table II materials shipped in large quantities require the same placarding precautions as Table I materials.

PHMSA creates the HMT, which lists regulated hazardous materials and specifies their hazard classes, packing groups and relevant portions of the HMR, such as packaging provisions. Sodium Hydroxide, Solid, 8, UN1823, PG II, is identified in the HMT as a hazardous material and is regulated as a corrosive hazard by PHMSA when transported in commerce.

Hazardous substances are identified by the U.S. Environmental Protection Agency and are regulated by PHMSA when transported in commerce. The hazardous substance designation indicates that the material is hazardous to the environment. Some materials are designated as hazardous substances by the EPA and as hazardous materials by PHMSA, other materials are only hazardous substances, and still others are only hazardous materials. EPA's determination not to identify Sodium Hydroxide, Solid, as a hazardous substance has no relevance to the corrosive hazard identified by PHMSA.

Findings

The Notice advised Respondent of a probable violation of the HMR regarding Respondent's failure to develop a written security plan, in violation of 49 C.F.R. §§ 171.2(a)-(b) and 172.800(b). Respondent claims it is no longer offering placarded quantities of hazardous materials and is, therefore, not required to develop a security plan. Respondent is hereby warned with regard to this probable violation in accordance with the provisions of 49 C.F.R. § 107.309. Violation of the HMR or the Federal hazardous material transportation law (49 U.S.C. §§ 5101 et seq.) may subject Respondent to future enforcement action.

I find Respondent knowingly committed four violations of the HMR, in that Respondent failed to provide training to its hazmat employees, provided an unauthorized emergency response telephone number on its shipping papers, failed to certify on its shipping papers that it had complied with the HMR, and failed to register with DOT as an offeror of placarded quantities of

hazardous materials. In reaching this conclusion, I have reviewed the inspector's Inspection/Investigation Report and accompanying exhibits, the exit briefing, the Notice, and Respondent's replies.

Conclusion

Respondent did not submit any information warranting a reduction from the civil penalty proposed in the Notice. Although Respondent currently is not required to register if it is not offering placarded quantities of hazmat for transportation in commerce, Respondent failed to pay the registration fees for the years it was making placarded quantity shipments. In its correspondence, Respondent has not provided any evidence of having provided the training required by the HMR or addressed the shipping paper violations.

Based on my review of the record, I have determined that Respondent committed four violations of the HMR. 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 \$7,000 for four violations of the HMR, after reducing the total penalty to reflect the security plan warning.

The total penalty is allocated as follows:

- Violation No. 1: Warning;
- Violation No. 2: \$1,600, as proposed in the Notice;
- Violation No. 3: \$3,400, as proposed in the Notice;
- Violation No. 4: \$1,000, as proposed in the Notice; and
- Violation No. 5: \$1,000, as proposed in the Notice.

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;

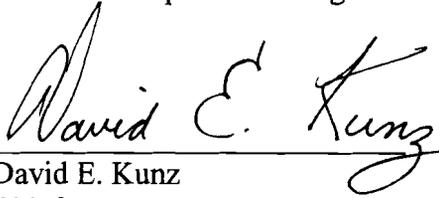
2. with respect to the Respondent, its degree of culpability, any history of prior violations, its ability to pay, and any effect on its ability to continue to do business; and
3. other matters as justice may require.

Payment and Appeal

Respondent must either pay the civil penalty in accordance with the attached instructions (Addendum A) within 30 days of this Order, or appeal this Order to PHMSA's Administrator. In consideration of Respondent's status as a small business and possible financial hardship resulting from a lump sum payment, Respondent may request a payment plan, not to exceed six months, from the Office of Chief Counsel; however, the first payment must be made within 30 days of this Order. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325.⁵

This Order constitutes written notification of these procedural rights.

12/10/07
Date



David E. Kunz
Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

⁵ 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 – PHC, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Ave., SE, 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 DEC 13, 2007, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

BCI
918 East Oakwood
Tyler, Texas 75702
Attn: Roy Walls

Original Order with Enclosures
Certified Mail Return Receipt

Ryan Posten
Director, OHME
PHH-40, East Building, 2nd Floor
1200 New Jersey Ave., SE
Washington, D.C. 20590

One Copy
Internal E-Mail

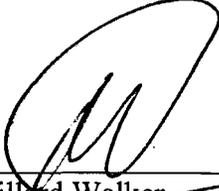
Billy Hines, Chief
Office of Hazardous Materials Enforcement
Southwestern Region Office
8701 S. Gessner Rd., Ste. 1110
Houston, TX 77074

One Copy
Internal Email

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

DEC 13 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, 1200 New Jersey Ave., SE, Washington, DC 20590; 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-341
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-341
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 or ticket 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.