Appendix

APPENDIX

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-14140

METAL CONVERSION TECHNOLOGIES, LLC,

Petitioner,

versus

U.S. DEPARTMENT OF TRANSPORTATION,
Pipeline and Hazardous Material Safety
Administration (PHMSA),

Respondent.

Petition for Review of a Decision of the
U.S. Department of Transportation
Agency No. 18-0086-HMI-SW

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before BRANCH, LUCK, and ABUDU, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-14140

Non-Argument Calendar

METAL CONVERSION TECHNOLOGIES, LLC,

Petitioner,

versus

U.S. DEPARTMENT OF TRANSPORTATION,
Pipeline and Hazardous Material Safety
Administration (PHMSA),

Respondent.

Petition for Review of a Decision of the
U.S. Department of Transportation
Agency No. 18-0086-HMI-SW

Before BRANCH, LUCK, and ABUDU, Circuit Judges.

PER CURIAM:

This petition for review is DISMISSED as untimely. Metal Conversion Technologies, LLC ("MCT") contends that it did not receive notice of the Pipeline and Hazardous Material Safety Administration's ("PHMSA") July 25, 2022, decision assessing a civil penalty against it until October 18, 2022. However, PHMSA sent a copy of the decision by certified mail to Deitra Crawley, MCT's legal counsel at the time the decision was issued, on August 2, 2022. According to the regulations governing PHMSA proceedings, MCT received notice of the decision on that date. *See* 49 C.F.R. § 105.35(a). Therefore, PHMSA's decision became final on August 2, 2022, and MCT's petition for review was due by October 3, 2022. *See* Fed. R. App. P. 26(a)(1)(C); 49 U.S.C. §§ 5123(b), 5127(a). Thus, MCT's petition for review, filed on December 15, 2022, was untimely.

While MCT argues that the 60-day filing deadline contained in 49 U.S.C. § 5127(a) is not jurisdictional and, thus, subject to equitable tolling, even claims-processing rules are not subject to equitable tolling if the text of the rule precludes flexibility. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714-15 (2019)

(discussing how the time limitation in Federal Rule of Civil Procedure 23(f) is not subject to equitable tolling based on the language in Federal Rule of Appellate Procedure 26(b)(1)). Moreover, an extension of the 60-day deadline that applies here is not "specifically authorized by law." *See* Fed. R. App. P. 26(b)(2).

BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

In the Matter of:

Metal Conversion Technologies, LLC,
Appellant.

PHMSA Case No. 18-0086-HMI-SW
Docket No. PHMSA-2021-0088

DECISION ON APPEAL

On October 7, 2021, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued an Order to Metal Conversion Technologies, LLC. (MCT or Appellant) assessing a civil penalty in the amount of $131,456 for four violations and six warning items of the Hazardous Materials Regulations (HMR), 49 C.F.R. parts 171-180. The Order was issued after MCT and PHMSA were unable to come to an agreement following the issuance of the February 5, 2020 Notice of Probable Violation (Notice). MCT filed a timely Appeal of the Order on December 14, 2021.

In the Order, which is incorporated by reference, the Chief Counsel found that Appellant committed four violations of the HMR, when:

1. Appellant offered for transportation in commerce a shipment on April 20, 2017 containing hazardous material (UN3480 Lithium ion batteries, 9), without shipping papers, markings, or labels, in violation of 49 C.F.R. §§ 171.2(a), (b), (e), and (i); 172.200(a); 172.300(a); 172.400, and 173.22; and when

2. Appellant offered for transportation in commerce a shipment on April 4, 2017 containing hazardous material (UN3480 Lithium ion batteries, 9), without shipping papers, markings, or labels, in violation of 49 C.F.R. §§ 171.2(a), (b), (e), and (i); 172.200(a); 172.300(a); 172.400, and 173.22; and when

3. Appellant offered for transportation in commerce a shipment on March 28, 2017 containing hazardous material (UN3480 Lithium ion batteries, 9), without shipping papers, markings, or labels, in violation of 49 C.F.R. §§ 171.2(a), (b), (e), and (i); 172.200(a); 172.300(a); 172.400, and 173.22; and when

4. Appellant offered for transportation in commerce a shipment on January 26, 2017 containing hazardous material (UN3480 Lithium ion batteries, 9), without shipping papers, markings, or labels, in violation of 49 C.F.R. §§ 171.2(a), (b), (e), and (i); 172.200(a); 172.300(a); 172.400, and 173.22.

5. Lastly, Appellant received warnings for similar shipments that Appellant offered on other dates in 2015 and 2016.

On April 25, 2017, investigators from PHMSA Southwest Regional Office of Hazardous Materials Safety Field Operations initiated a compliance inspection following an April 23, 2017 fire and explosion that occurred on a rail shipment that was being transported through Houston, Texas on the way to its final destination in Chino, California. The Notice alleged eleven violations of the HMR and proposed a civil penalty of $278,376 for failure to provide proper shipping papers, marks, and labels for the shipment that caused the fire and explosion and various other prior documented shipments. MCT provided a timely Response to the Notice (Response) on April 27, 2020. The Order provided a reduction for corrective action and reduced the Proposed Violations 5-9 and 11 to warning items without civil penalty. Lastly, the Order dismissed Proposed Violation 10. The Order assessed total civil penalties of $131,456, allotted accordingly for each Finding of Violation:

Violation No. 1: $78,376;
Violation No. 2: $18,270
Violation No. 3: $18,270; and
Violation No. 4: $18,270.

Appeal

On December 14, 2021, MCT and Battery Recycling Made Easy, LLC (BRME) jointly submitted a timely appeal (Appeal) of the Order, even though the Order was directed solely to MCT. The Appeal does not contest the factual and legal findings that support the Findings of Violation in the Order. Appellant's primary argument is that BRME is the proper respondent, not MCT. However, Appellant also raises various arguments about the penalty amount. Finally, Appellant argues that it did not make "knowing" violations.

Proper Respondent

Appellant argues throughout its Appeal that PHMSA improperly named MCT as the Respondent.[1] The Appeal argues that BRME is the proper Respondent because BRME employed the employee that MCT claims is responsible for the violations. The Appeal claims that BRME "took responsibility" for the violations by firing the responsible employee on April 23, 2021 and pursuing legal action against him. MCT further argues that "MCT has never shipped lithium-ion batteries and that it is "a non-actor" in this case.[2]

The Order stated that MCT and BRME are affiliated and that BRME assumed MCT's customer relationships and inventory of batteries for sale to customers. In order to determine whether MCT was properly named as the Respondent in the Notice and Order, it is necessary to examine (i) the

[1] Appeal at 1 and 3.
[2] Appeal at 1.

relevant definitions set out in the HMR, (ii) the evidence in the Inspection Report, and (iii) the evidence in the materials that MCT submitted to PHMSA.

First, the requirements of the HMR apply to a "*person who offers or offeror*," of hazardous materials, also known as a "shipper."[3]

> "*Person who offers or offeror.*
>
> *1) Any person who does either or both of the following:*
>
> *(i) Performs, or is responsible for performing, any pre-transportation function required under this subchapter for transportation of the hazardous material in commerce.*
>
> *(ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.*

Next, an examination of "*pre-transportation function*" is necessary because it is included within the definition of "*offeror*".

> *Pre-transportation function means a function specified in the HMR that is required to assure the safe transportation of a hazardous material in commerce, including -*
>
> *(1) Determining the hazard class of a hazardous material.*
>
> *(2) Selecting a hazardous materials packaging.*
>
> *(3) Filling a hazardous materials packaging, including a bulk packaging.*
>
> *(4) Securing a closure on a filled or partially filled hazardous materials package or container or on a package or container containing a residue of a hazardous material.*
>
> *(5) Marking a package to indicate that it contains a hazardous material.*
>
> *(6) Labeling a package to indicate that it contains a hazardous material.*
>
> *(7) Preparing a shipping paper.*
>
> *(8) Providing and maintaining emergency response information.*
>
> *(9) Reviewing a shipping paper to verify compliance with the HMR or international equivalents.*

[3] "Each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of this subchapter, or an exemption or special permit, approval, or registration issued under this subchapter or under subchapter A of this chapter." 49 CFR § 171.2(b).

(10) For each person importing a hazardous material into the United States, providing the shipper with timely and complete information as to the HMR requirements that will apply to the transportation of the material within the United States.

(11) Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR.

(12) Loading, blocking, and bracing a hazardous materials package in a freight container or transport vehicle.

(13) Segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo.

(14) Selecting, providing, or affixing placards for a freight container or transport vehicle to indicate that it contains a hazardous material.

As recounted in the Order, the Inspection Report shows that the four 2017 shipments that underlie the Findings of Violation occurred on January 26, March 28, April 4, and April 20 of 2017. Each of these shipments was accompanied by a Bill of Lading (BOL) that identifies "Metal Conversion" as "Shipper."[4] Each BOL contains the following certification, "The Shipper certifies that the above-named materials are properly classified, described, marked, labeled and packaged, and are in proper condition for transportation, according to the applicable regulations of the Department of Transportation." The "Shipper Signature" block on each of the four BOLs contains a unique, handwritten signature signed on behalf of MCT by either Jennifer Wilson or Lee Shipman.[5] Each BOL is also hand dated with the same dates as the shipments, which are listed above. In each BOL, the "HM" column in the "Basic Description" portion of the BOL is unchecked or left blank, certifying that the shipment contains no hazardous materials. Each BOL describes the contents as "Recycled electronics."

By identifying itself as "Shipper," certifying, and signing the BOL, MCT performed pre-transportation functions 1, 7, 9, and 11, as enumerated in the HMR definition of "pre-transportation function." Thus, MCT meets the definition of "offeror" because it performed pre-transportation functions.

Additionally, the Inspection Report contains an Oral Interview Form for Steve Pledger.[6] The Interview Form is dated April 25, 2017, which was when PHMSA was on-scene at MCT investigating the April 23, 2017 fire and explosion. The form identifies the Respondent as "Metal

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[4] Inspection Report 17298005, Exhibit 9, page 21: BOL 79030847, documenting the January 26, 2017 shipment; Exhibit 9, page 15: BOL 80298047, documenting March 28, 2017 shipment; Exhibit 9, page 6 BOL # 80419988, documenting April 4, 2017 shipment; and Exhibit 6, pages 1 and 2: BOL 80728175, documenting April 20, 2017 shipment.

[5] *Id.*, Exhibit 14, page 6. This document shows the printed names and signatures of Jennifer Wilson and Lee Shipman on a hazmat training sign in sheet dated, February 24, 2017.

[6] *Id.* Exhibit 14, pages 12-13. The Interview Form also notes the time of day: 9:15 – 10:30 p.m.

Conversion" and Steve Pledger's title as "VP" of "Metal Conversion." The interview was recorded with handwritten text, presumably by the PHMSA Investigator. Mr. Pledger of MCT answered questions and described where MCT lithium, lithium ion, lead, nickel, and alkaline batteries are shipped and how MCT prepares hazardous materials packagings for shipment. The interview form records various other answers that demonstrate Steve Pledger, who identified himself as VP of MCT, has extensive knowledge about the past and current shipping and hazmat compliance practices of MCT.

The Inspection Report also contains a certified statement, dated May 31, 2017, entitled "Packaging and preparing lithium batteries to ship," signed by Jennifer Wilson. Jennifer Wilson also signed three out of the four MCT BOLs associated with the Findings of Violations in the Order.[7] In the certified statement, Jennifer describes how hazardous materials are prepared for shipment, i.e. which hazmat markings and labels are applied, how hazardous materials are packaged, closed, stacked, and loaded into trucks. As signer of MCT BOLs, she is an appropriate person to provide information about MCT practices for preparing and offering hazmat materials for transportation in commerce. Furthermore, the certified statement indicates that all but one of the eleven declarations in the statement apply to the time period both before and up to the April 20, 2017 shipment that caused the April 23, 2017 fire and explosion.

The interview of Steve Pledger and the "certified statement" of Jennifer Wilson both describe MCT packaging and shipping practices. These hazmat packaging and shipping practices are included within pre-transportation functions 2, 4, 5, 6, 12, 13, and 14, as enumerated in the definition of "pre-transportation function." The file contains conflicting information about whether these individuals were actually employees of MCT or BRME, but the actual employer is of little import. Both individuals acted on behalf of MCT, the "Shipper" identified on the BOLs, to prepare hazmat shipments and certify shipping papers. Given these facts, I find that MCT is an offeror for the shipments at issue in the Order because it carried out pre-transportation functions listed in paragraph (i) of the definition for "offeror."

Additionally, MCT provided information to PHMSA that demonstrates that it additionally meets the paragraph (ii) definition of "offeror" because MCT "makes the hazardous material available to a carrier for transportation in commerce." Frieghtquote.com sent "steve@metalconversion.com" an email dated April 18, 2017 with the subject "Your shipment #80728175." This number is identical to the BOL # for the April 20, 2017 shipment. The email confirms shipment details including date, time, and location with steve@metalconversion.com. This correspondence indicates that MCT arranged the shipment with the carrier. Thus, while MCT was already established as an offeror above, MCT's actions arranging for transportation of the hazardous materials by the carrier demonstrate that MCT meets the criteria for "offeror" in paragraph (ii) of the definition.

MCT argues that BRME should have been named as the Respondent because BRME employed an employee it claims was responsible for the violations, but this argument is not persuasive. MCT's 2020 Response to the NOPV states in a footnote, "In December 2016, BRME assumed MCT's customer relationships and inventory of batteries for sale to customers." Following this footnote, the Response mainly refers to BRME shipping practices. This indicates that that MCT

[7] *Id.* Exhibit 14, page 14

hired or contracted with BRME to perform packaging and other HMR compliance duties for the offeror, MCT. While an offeror is free to hire or contract with a "person" (i.e. an individual or an entity) to perform compliance duties on its behalf, the offeror is nonetheless responsible for compliance with the HMR. It also is noteworthy that MCT has not claimed that BRME identified MCT as "Shipper" without MCT's knowledge or consent. MCT provided no explanation in its Response or Appeal as to why MCT is listed as "Shipper" in the relevant BOLs if it was a "non-actor" as it claims.[8] Furthermore, the Response, which was submitted when Steve Pledger was still employed with BRME/MCT provided no mention or correction for the fact that Steve Pledger is described as the VP of MCT in the Interview Form or that he used an MCT email address and was corresponding on behalf of MCT with the carrier. Thus MCT consented on various occasions to this individual acting on its behalf or as its agent.

Even if BRME also performed per-transportation functions, PHMSA may use its discretion to pursue an enforcement action against the entity it believes is in the best position to ensure future compliance and safety. Furthermore, while various persons or entities can perform pre-transportation functions, the entity who completes the shipper's certification is responsible for assuring that all applicable regulatory requirements are met."[9] Therefore, the identification of MCT as "shipper," completion of the certification, and MCT's apparent hiring of BRME to perform hazmat functions establishes MCT's ultimate responsibility for HMR compliance.

Finally, MCT claims that Mr. Pledger was solely responsible for the violations, and the Appeal referenced an ongoing civil claim against this individual. However, the evidence presented in the Inspection Report establishes that various employees and principals were involved in the actions that establish the Findings of Violation. In any event, MCT presented no evidence that Mr. Pledger was not acting within scope of his employment when he arranged for the shipment of the undeclared hazmat or during the PHMSA investigation that followed. The fact that he allegedly had a side business years later is irrelevant to this enforcement case.[10] It is the offeror's responsibility to ensure its employees or contractors receive proper training and oversight to ensure compliance with the HRM. Thus, I affirm the finding in the Order that MCT was an offeror for the shipments at issue, and I find no error in naming it as Respondent.

Penalty Considerations

In the remainder of the Appeal, Appellant argues that PHMSA should have awarded greater corrective action reduction to the civil penalties because BRME "[took] extreme corrective action measures when it terminated the employment agreement with Mr. Pledger."[11] Next, Appellant argues that PHMSA failed to consider BRME's inability to pay.[12] MCT then argues that PHMSA violated the Small Business Regulatory Enforcement Fairness Act (SBREFA) because PHMSA failed to consider that Appellant is a small business in assessing the civil penalty. Finally, the

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[8] Appeal at 3.
[9] Applicability of the Hazardous Materials Regulations to "Persons Who Offer" Hazardous Materials for Transportation in Commerce, Final Rule, 69 FR 57245, 57247 (September 24, 2004)
[10] Appeal at 2. The Appellant's civil suit against Mr. Pledger appears to stem from a contract dispute it had to settle with a client wherein Mr. Pledger allegedly acted improperly. The facts there bear no relation to the instant case.
[11] Appeal at 3.
[12] *Id.* at 4.

Appeal argues that PHMSA misapplied the "knowingly" standard in making the Findings of Violation.[13]

Corrective Action Reduction

First, I address the claim that PHMSA failed to award appropriate corrective action credit. Appellant claims that its firing of Mr. Pledger was "the most significant action taken by management" and merits a 50% reduction for corrective action credit. Earlier in the Appeal, Appellant stated that Mr. Pledger was terminated on April 23, 2021 after Appellant had reason to believe he was improperly re-selling materials intended for recycling or disposal, in violation of a contract with a client.[14] Thus, more than four years passed between the incident and shipments at issue and the employee's termination. In any event, the termination appears to be the result of alleged misconduct related to the resale of batteries intended from recycling, which resulted in a costly settlement for BRME. While termination of an employee is an uncommon corrective action for a violation of the HRM, in this case it does not appear to be factually connected to the instant case. Thus, it is not relevant to the calculation of corrective action credit.

Appellant also argued that the Order improperly provided only a 5% reduction for its other corrective actions of hiring a hazmat consultant, providing updated standard operating procedures, and providing refresher training.

In order to consider the proper reduction for corrective action, it is necessary to consider how PHMSA awards corrective action credit. First, the Exit Briefing that Appellant signed stated the following in bolded text, "Documentation of corrective action submitted in writing to the Investigator within 30 days of the Inspection may be considered for mitigation should the sanction imposed result in the issuance of a notice proposing a civil penalty."[15] Furthermore, Appendix A to Subpart D of Part 107 - Guidelines for Civil Penalties states,

> *If a respondent has given full documentation of timely corrective action and PHMSA does not believe that anything else can be done to correct the violation or improve overall company practices, we will generally reduce the civil penalty by no more than 25 percent. As noted above, a 25 percent reduction is not automatic. We will reduce the penalty up to 20 percent when a respondent promptly and completely corrected the cited violation and has taken substantial steps toward comprehensive improvements. PHMSA will generally apply a reduction up to 15 percent when a respondent has made substantial and timely progress toward correcting the specific violation as well as overall company practices, but additional actions are needed. A reduction up to 10 percent is appropriate when a respondent has taken significant steps toward addressing the violation, but minimal or no steps toward correcting broader company policies to prevent future violations. PHMSA may reduce a penalty up to 5 percent when a respondent made untimely or minimal efforts toward correcting the violation.*

[13] *Id.* at 5.
[14] *Id.* at 2.
[15] Inspection Report 17298005, Exhibit 1, page 2.

Five months following the fire and explosion incident, Appellant submitted updated standard operating procedures, and stated the following to PHMSA investigators in a 9/25/2017 email,[16]

> *[P]er the onsite visit with DOT Consultants, Curry Associates, it is MCT & BRME's position that no "corrective action" is needed. Instead the consultant did advise that MCT & BRME have over complied (gone above and beyond what is required) with DOT Shipping Regulations. . . In summation, as explained to MCT & BRME by consultant, the shipment received by GVT, via C.H. Robinson, on behalf of FreightQuote.com, did comply with packaging requirements according to and as stated in Guide 3.*

A review of Guide 3 reveals no statement that MCT's packaging or shipping paper practices nor the April 20 BOL that was utilized for shipment comply with the HMR. In fact, the shipping paper requirements that the consultant provides bear no resemblance to the BOLs signed by Appellant. The PHMSA investigator's reply email stated the following:[17]

> *When your company submits Corrective Action it should tell us what measures your company has put in place to ensure that the violations noted on the Exit Briefing won't happen again. Typically, when we receive SOPs they are listed as one of the components of the Corrective Action and not as the Corrective Action as a whole. Other documents that we typically get in addition to what you provided are Bills of Lading or examples of Bills of Landing, Photos of new packaging with the labeling and marking or proof of purchase/ invoices for new packaging, training records for you employees to show that they have been trained on the new SOPS and have a good understand information provided.*

MCT then replied and the investigators question was confusing and asked how the SOP is "being used/implied in relation to the documents we gave you?" The PHMSA investigator then replied and asked "Are the SOPs that you submitted being used as your company's document Corrective submission?"[18] I understand this to mean that the Investigator was asking if there are any other documents MCT would like to include in its corrective action submission. MCT's reply merely references the previously provided SOPs.[19]

In analyzing the exchange between MCT and the PHMSA investigator, MCT insisted corrective action was not needed and that it was in compliance, despite that it had offered various shipments of hazardous materials into transportation undeclared, one of which caused a serious fire and explosion incident that could have resulted in injuries or deaths. When the PHMSA investigator sought specific documentation about the actions MCT was taking rather than guides a consultant had prepared, MCT did not provide any further documentation of its actions. For these reasons, I find that corrective action reductions beyond the 5% provided in the Order would not be appropriate.

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[16] *Id.* Exhibit 13, page 1.
[17] *Id.* Exhibit 13, page 2.
[18] *Id.* Exhibit 13, page 3.
[19] *Id.* Exhibit 13, page 4.

Ability to Pay

Next, I address Appellant's argument that the Order failed to consider ability to pay. Appellant contends that BRME has submitted various financial documents showing that the civil penalty would affect its ability to continue in business. However, the financial condition of BRME is not relevant to this case. Despite the fact that the Order makes Findings of Violation and assesses a civil penalty specifically against MCT, MCT declined to provide financial documents for PHMSA's consideration. Thus, I affirm the finding in the Order that mitigation based on the company's financial status is not warranted.

Small Business Regulatory Enforcement Fairness Act (SBREFA) Compliance

Now I turn to MCT's argument that PHMSA violated the Small Business Regulatory Enforcement Fairness Act (SBREFA) because PHMSA failed to consider that Appellant is a small business in assessing the civil penalty. MCT states that SBREFA requires that agencies consider company size, whether the small business corrected its violations in a reasonable time, prior violations, violations involving willful conduct, violations that pose serious threats to health, safety or the environment or whether the small business made a good faith effort to comply.

As explained in the Notice, PHMSA's hazardous materials enforcement program has been designed to consider small businesses, and the penalties that PHMSA proposes and assesses are generally considered appropriate for small business. However, the Notice stated that special consideration may not be given if the violations were not corrected in a reasonable time, the violations involve willful conduct, the violations pose serious risks to health, safety or the environment or the small business has not made a good faith effort to comply with the law.[20] MCT argues that the Order failed to consider MCT's "good faith effort to comply especially in light of how quickly it terminated the bad actor who blatantly ignored established Company policies and procedures."[21]

Despite the pattern that the Inspection Report indicated of shipping hazardous materials (UN3480, Lithium batteries, 9) as undeclared, the Order did not make a finding as to whether MCT's violations were willful or intentional.[22] However, as discussed above, MCT did not provide full corrective action documentation within 30 days, as recommended in the Exit Briefing. Furthermore, MCT declined to follow the PHMSA's investigators suggestion that it provide documentation of specific actions MCT took to demonstrate compliance.[23] Furthermore, MCT's violations posed serious threats to the health, safety, and environment. The railroad employee and any surrounding residents could have been injured or worse from the lithium battery fire and explosion that came from MCT's shipping container.[24]

PHMSA has policies and procedures in place to accommodate small businesses, but these accommodations do not excuse violators from liability. PHMSA has the discretion to mitigate a

[20] Notice at Addendum B, page 5.
[21] Appeal at 5.
[22] Order at 15; Inspection Report 17298005, Exhibits 3,4,5, and 9.
[23] Inspection Report 17298005, Exhibit 13.
[24] Supplemental Exhibits to the Notice, Exhibits 3 and 5.

proposed penalty amount based on corrective action. Furthermore, PHMSA's guidelines provide flexibility to reduce proposed penalties, or enter into payment plans, where payment of a civil penalty would (1) exceed the amount the company is able to pay or (2) have an adverse impact on the company's ability to continue in business. The Order reduced the proposed penalty according to its existing policies, the information provided in the Inspection Report, and the documentation that MCT provided.

Knowing Standard

Lastly, the Appeal argued that "PHMSA misapplied the knowingly standard for" finding a violation. MCT cites that PHMSA must find either that (1) one had actual knowledge of the facts giving rise to the violation, or (2) one had imputed knowledge of the facts giving rise to the violation in that a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge. MCT claims that it did not have actual knowledge of the facts giving rise to the violation or imputed knowledge. MCT further argues that "the Administrator must review the matter through the lens of a company that was oblivious to the breach, violations, and bad acts that occurred."[25]

These arguments are unavailing because MCT identified itself as "Shipper" in the various BOLs that displayed signed and dated hazmat shipper certifications. Because MCT certified the BOL and made the hazardous materials available to the carrier for transportation in commerce as an offeror, MCT had knowledge of the facts that gave rise to the violation, i.e. the contents described in the shipping paper and its certification that there were no hazardous materials. The fact that the owner of the company may not have been specifically aware of these facts is irrelevant. Given the risks posed by the transportation of hazardous materials in commerce, especially lithium and lithium ion batteries, it is the responsibility of an offeror, including a battery recycler, to ensure compliance by providing sufficient training and oversight. When a hazmat employee performs a function subject to the HMR on behalf of a "person," including an individual, corporation, company, etc. that offers a hazardous material for transportation in commerce, the "person," must ensure that the employee's actions are compliant with the HMR.[26]

Findings

I affirm the Findings of Violation in the Order because I find that MCT was an offeror of the hazmat shipments at issue. Furthermore, I find MCT's arguments for a reduction in addition to the reductions provided in the Order are unavailing. However, I find that a twelve-month payment plan is appropriate in this case.

MCT must pay the civil penalty of **$131,454**.[27] MCT may pay the amount in one lump sum within 30 days of the date of the Decision or over the course of a twelve months, paying $10,954.50 each month, beginning within 30 days of the date of the Decision until, the entire civil penalty is paid in full.

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[25] Appeal at 5.
[26] 49 C.F.R. §§ 171.2 and 171.8.
[27] The minor reduction from the civil penalty imposed by the Order is simply to facilitate a 12-month payment plan without a repeating decimal.

Final Administrative Action

This Decision on Appeal constitutes the final administrative action in this proceeding.

25 Jul 2022
Date

Howard W. McMillan
Chief Safety Officer

U.S. Department of Transportation

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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

In the Matter of: **Metal Conversion Technologies, LLC,** **Respondent.**	**PHMSA Case No. 18-0086-HMI-SW** **Docket No. PHMSA-2021-0088**

ORDER OF THE CHIEF COUNSEL

By a Notice of Probable Violation (Notice) issued on February 5, 2020, the Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration (PHMSA), proposed to assess Metal Conversion Technologies, LLC[1] (Respondent) a civil penalty under the provisions of 49 C.F.R. §§ 107.307 and 107.311. In the Notice, PHMSA alleged that Respondent had committed eleven violation of the Hazardous Materials Regulations (HMR), 49 C.F.R. parts 171-180, and proposed a total civil penalty of $278,376.

On April 27, 2020, Respondent submitted its reply to the Notice and requested an informal conference. On October 9, 2020, the parties participated in an informal conference. Because PHMSA and Respondent have not been able to resolve this matter, this case is before me for a determination.

Background and Jurisdiction

On April 23, 2017, a rail shipment caught fire and exploded while being transported through Houston, Texas on its way to its final destination in Chino, California. (*In/In Report at page 2; Exhibit 2*).[2] The bills of lading for the shipment identified Respondent as the shipper and indicated that the multi-modal shipment of "Recycled Electronics" originated from Respondent's Cartersville, Georgia facility on April 20, 2017. (*In/In Report at page 3; Exhibits 3 – 6*). PHMSA initiated an investigation of the incident and visited the scene to gather information.

On April 25, 2017, investigators from PHMSA's Southwest Regional Office of Hazardous Materials Safety Field Operations initiated a compliance inspection at Respondent's

[1] Respondent is affiliated with Battery Recycling Made Easy, LLC through common principals, management, and/or ownership. According to Respondent, in December 2017, Battery Recycling Made Easy, LLC assumed Respondent's customer relationships and inventory of batteries for sale to customers.
[2] References to "Exhibits" are to the Exhibits to PHMSA's Inspection/Investigation Report No. 17298005 (In/In Report), a copy of which was provided to Respondent with the Notice.

Cartersville, Georgia facility in accordance with 49 U.S.C. § 5121 and 49 C.F.R. § 107.305. [3] Respondent offers battery recycling services and produces recycled alloys for industrial applications. During the course of the inspection, Respondent was represented by Mr. John Patterson, Owner, and Mr. Steven Pledger, Vice President of Sales and Marketing. (*In/In Report at page 1*).

On February 5, 2020, PHMSA initiated this proceeding against Respondent and its affiliate, Battery Recycling Made Easy, LLC (BRME), alleging that Respondent intentionally made shipments of lithium ion cells and batteries without shipping papers, markings or labels, i.e., shipping undeclared hazardous materials. In the Notice, PHMSA relied on evidence related to the April 20, 2017 shipment, as well as ten prior shipments by Respondent that occurred between November 2015 and April 2017.

Based on this information, I find that Respondent is an offeror of hazardous materials for transportation, in commerce. Therefore, Respondent is subject to the requirements of the HMR issued by PHMSA under authority delegated by the Secretary of Transportation acting pursuant to Federal hazardous material transportation law. 49 U.S.C. § 5103(b); 49 C.F.R. §§ 1.97(b), 107.301.

Discussion

Incident Investigation

At the scene of the incident, the investigators obtained the bills of landing for the shipment from the rail carrier transporting the shipment at the time of the incident. (*In/In Report at page 3; Exhibit 3*). Because this was a multi-modal shipment arranged by a freight forwarder, there were multiple carriers and associated bills of lading generated for the shipment. (*In/In Report at page 3; Exhibits 3 – 6*). The investigators' review of the bills of lading revealed that each bill of lading described the shipment as containing "Recycled Electronics,"[4] and none of the bills of landing had any information or otherwise indicated the shipment contained a hazardous material. (*Exhibits 3 – 6*).

The investigators observed and photographed several drums that were damaged and without lids at the incident scene. (*In/In Report at page 3; Exhibit 2*). Upon closer inspection, the investigators determined that the drums contained lithium cells and batteries, and some electronic equipment, e.g., keyboards or other laptop components. (*Exhibit 2; Supplemental Exhibit 5*).[5] The investigators noted that the drums did not have any hazardous material markings or labels. (*In/In Report at page 3; Exhibit 2; Supplemental Exhibit 5*).

During the course of the investigation, the investigators interviewed the motor carrier's driver and shipping personnel.[6] (*In/In Report at pages 3 and 4*). The driver stated he was not aware the load contained hazardous materials and that he did not see any hazardous material markings or labels on the packages as they were being loaded by Respondent's personnel. (*In/In*

[3] PHMSA investigators made multiple visits to Respondent's facility during the course of the agency's investigation.
[4] The rail carriers' bills of lading contained a general "freight" description for the commodity.
[5] References to "Supplemental Exhibits" are to the Supplemental Exhibits to the Notice.
[6] The shipment was initially transported via motor carrier to the rail carrier.

Report at page 4; Exhibit 8). According to the investigators, the driver also stated that if he had known the load contained hazardous materials, he would not have transported it because he is not qualified to do so. (*Id.*).

The shipping personnel provided the investigators with shipping papers for prior shipments between the carrier and Respondent. (*In/In Report at page 4; Exhibit 9*). The investigators' review of these shipping papers revealed that none of the prior shipments were declared as hazardous materials shipments. (*Id.*).

Compliance Inspection

During the course of the compliance inspection at Respondent's facility, the investigators toured Respondent's facility and observed and photographed Respondent's procedures for receiving, sorting, and preparing lithium cells and batteries for recycling or disposal. (*In/In Report at page 4*). The investigators interviewed Respondent's representatives and its employees about Respondent's shipping operations. The investigators collected shipping papers from prior shipments with Respondent's customer, Golden Valley Trading, Inc. (GVT) and bills of lading and training materials Respondent provided to its customers. (*In/In Report at page 4; Exhibits 10 - 12*). According to Respondent's representatives, the company is familiar with the HMR requirements for shipping hazardous materials and they provided the investigators with another version of the bill of lading for the April 20th shipment showing that Respondent shipped the materials as fully regulated lithium cells and batteries. (*In/In Report at page 4; Exhibit 10*). The investigators interviewed Respondent's representatives about the types of packagings Respondent used to ship batteries. Respondent's representative, Mr. Pledger, stated that batteries are placed into buckets and boxes for shipment. But he also admitted that Respondent had previously used 55-gallon drums to ship batteries. (*Exhibit 14*).

The investigators' review of the bills of ladings from prior shipments revealed that Respondent and the carrier, Genesis Intermodal Delivery (Genesis), had an ongoing business relationship for at least three years prior to the incident. (*In/In Report at page 4*). Genesis provided the investigators with shipping papers for the last ten shipments the carrier transported for Respondent. (*Exhibit 9*). The investigators observed that although the dates on the bills of lading provided by Respondent seemed to match the dates on the bills of landing provided by the carrier, Respondent's bills of landing showed the materials declared as fully regulated lithium cells and batteries. (*In/In Report at page 4*). However, Respondent's representatives admitted that these bills of lading—including the one for the April 20th shipment— were not provided to the carrier or freight forwarder, and they did not accompany the shipments during transportation. (*Id.*).

After the inspection, the investigators noted one probable violation—failure to declare a shipment of hazardous materials—and conducted an exit briefing with Respondent's representatives. (*In/In Report at page 4; Exhibit 1*). The investigators, during the exit briefing, encouraged Respondent to submit corrective action for the probable violation noted during the inspection. (*Id.*). Initially, Respondent submitted its "Shipping SOPs" but did not address the probable violation discussed during the exit briefing. (*In/In Report at page 6; Exhibit 13*). In a follow up letter, Respondent's representative, Mr. Patterson, asserted that Respondent did not need to submit any corrective action because the April 20th shipment was transported in accordance with the HMR exceptions for lithium cells and batteries. (*Id.*).

During the course of the investigation of the incident, the investigators issued two subpoenas to Respondent for the production of documentary and other tangible evidence related to Respondent's lithium cell and battery recycling and shipping operations. On April 27, 2017, the investigators issued Respondent a subpoena for documents related to the April 20th shipment. (*Notice at page 5; Exhibit 17*). Respondent, in response to the subpoena, provided a bill of lading and load list for the April 20th shipment. (*Id.*).

On May 11, 2017, the investigators issued Respondent another subpoena requesting shipping papers for specific dates which corresponded to the dates of the last ten shipments that Genesis transported for Respondent. (*Notice at page 11; Exhibit 18*). The investigators did not request shipping papers for two shipment dates: March 28, 2017 and December 11, 2015.[7] (*Id.*). Respondent, in response to the subpoena, provided shipping papers for eight prior shipments on the dates specified in the subpoena. (*Notice at page 11; Exhibit 23*).

HMR Requirements for Lithium Cells and Batteries

The HMR contain specific requirements governing the transportation of lithium cells and batteries. 49 C.F.R. § 173.185. A package containing smaller lithium cells and batteries shipped for disposal or recycling that meet certain size, packaging, and hazard communication conditions are excepted from the HMR requirements for shipping papers, marking, labeling, placarding, emergency response, and training. *See* 49 C.F.R. §§ 173.185(c)(1) – (3); 173.185(d).

For transportation by highway or rail only, "the lithium content of the cell or battery may be increased to 5 g for a lithium metal cell or 25 g for a lithium metal battery and 60 Wh for a lithium ion cell or 300 Wh for a lithium ion battery provided the outer package is marked: 'LITHIUM BATTERIES—FORBIDDEN FOR TRANSPORT ABORD AIRCRAFT AND VESSEL.'" 49 C.F.R. § 173.185(c)(1)(iv).

"Except when lithium cells or batteries are packed with, or contained in, equipment, each package must not exceed 30 kg (66 pounds) gross weight." 49 C.F.R. § 173.185(c)(1)(vi).

Except when lithium cells or batteries are contained in equipment, each package, or the completed package when packed with equipment, "must be capable of withstanding a 1.2 meter drop test, in any orientation, without damage to the cells or batteries contained in the package, without shifting of the contents that would allow battery-to-battery (or cell-to-cell) contact, and without release of the contents of the package." 49 C.F.R. § 173.185(c)(2).

For transportation by highway, rail and vessel, the outer package must be marked with hazard communication information or the handling mark, as described in the HMR. *See* 49 C.F.R. §§ 173.185(c)(3)(i); (c)(3)(i)(A) – (D).

The Violations and the Evidence

The HMR provide, generally, that (1) "[e]ach person who performs a function covered by [the HMR] must perform that function in accordance with [the HMR]"; (2) "[e]ach person

[7] Due to an apparent administrative oversight, the subpoena requested shipping records for March 2, 2017 and November 20, 2015, instead of the intended shipping records for March 28, 2017 and December 11, 2015.

who offers a hazardous material for transportation in commerce must comply with all applicable requirements of [the HMR], or an exemption or special permit, approval, or registration issued under [the HMR] . . ."; (3) "[n]o person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of [the HMR] . . ."; and (4) "[n]o person may certify that a hazardous material is offered for transportation in commerce in accordance with the requirements of [the HMR] unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of [the HMR] . . . .". 49 C.F.R. §§ 171.2(a), (b), (e), and (i).

In the Notice, PHMSA alleged that Respondent violated these and other provisions in PHMSA's regulations when offered for transportation, and transported, in commerce, a hazardous material, and it failed to:

- Provide a proper shipping paper, properly mark and label the packages (Violation Nos. 1 – 11).

The evidence relied upon by PHMSA to support the violations is related to the April 20th shipment and ten prior shipments between Respondent and Genesis. The evidence includes the contents of the shipping container after the incident, the bills of lading for the shipments, and evidence and witness statements obtained during the incident investigation and compliance inspection.

Following is a summarization of the evidence, Respondent's reply to the Notice, and an overall assessment of the evidence.

Contents of the Shipping Container

During the investigation of the incident, the investigators visited the incident site and observed and photographed the remains of the shipping container. (*In/In Report at page 3; Exhibit 2; Supplemental Exhibit 5*). The investigators also visited the rail yard where the remains of the container and its contents were stored after the incident cleanup. (*Exhibit 2; Supplemental Exhibit 5*). During these visits, the investigators observed and photographed lithium ion cells and batteries and pieces of fiberboard boxes and other packaging materials. The investigators noted that many of the cells and batteries were without the equipment they are intended to power. The investigators also observed a few pieces of equipment and other components such as keyboards and chargers among the debris. (*Id.*).

The investigators found 55-gallon drums without lids among the remains. Upon closer inspection of the drums, the investigators observed that the drums were filled with melted lithium ion cells and batteries and noted that some of the batteries or their plastic inner wrappings had melted and stuck to the inside of the drums. The investigators weighed two of these drums and recorded weights of 349 pounds and 304 pounds. The investigators noted that the drums did not have any hazardous materials markings or labels, or lithium battery handling marking labels. (*Id.*).

Bills of Lading

April 20, 2017 Shipment. The shipment was a multi-modal shipment that was transported by motor carrier and rail. (*In/In Report at page 3*). At the time of the incident, Union Pacific Railroad was in possession of the shipment, which it received via an interchange with CSX Railroad. (*In/In Report at page 3; Exhibit 3*). The shipment was arranged by Respondent's customer, GVT, through a freight forwarder. (*In/In Report at page 3*). The shipment originated from Respondent's Cartersville, Georgia facility and was initially transported to CSX via the motor carrier, Genesis. (*Id.*). Consequently, there were several bills of landing and other shipping papers generated for this shipment. (*In/In Report at page 3; Exhibits 3 – 6*). The investigators obtained shipping papers from both rail carriers, the motor carrier, and the freight forwarder (collectively the carriers), and Respondent. (*Exhibits 3 – 6*). The investigators reviewed the bills of lading and discovered that the carrier's bills of lading were consistent:

- None of the bills of lading listed or described the shipment as containing a hazardous material;
- The shipment is described as 40 pallets of "Recycled Electronics," weighing 40,000 pounds;
- Respondent is the designated shipper; and
- Respondent signed the "Shipper's Certification."

(*Exhibits 3 – 6*).

In the Notice, PHMSA noted that Respondent's bill of lading did not travel with the shipment nor was it provided to the freight forwarder. Several discrepancies between Respondent's bill of landing and the bills of lading from the carriers were evident:

- Respondent's bill of lading is unsigned – the carriers' bills of lading are signed and dated by the shipper and the driver;
- Respondent's bill of lading does not have unique BOL Number – the carriers' bills of lading have BOL Number 80728175; and
- Respondent's bill of lading declares the shipment as containing a hazardous material (UN3480, Lithium ion battery, 9, PG II) – the carriers' bills of lading do not declare the shipment as containing a hazardous material and describes the shipment as "Recycled Electronics."

(*Exhibits 3, 4, 5, 6, 7, 14*).

Prior Shipments. During the course of the investigation and inspection, the investigators obtained shipping papers for ten prior shipments between Respondent and GVT and transported by Genesis: April 4, 2017; March 28, 2017; January 26, 2017; June 30, 2016; April 26, 2016; April 6, 2016; March 2, 2016; February 8, 2016; December 11, 2015; and November 23, 2015. (*Exhibit 9*).

In the Notice, PHMSA noted that the bills of lading for these prior shipments were consistent with the Genesis bill of lading for the April 20th shipment:

- None of the bills of lading listed or described the shipment as containing a hazardous material;
- The shipment is described as 40 pallets of "Recycled Electronics," weighing 40,000 pounds;
- Respondent is the designated shipper; and
- Respondent signed the "Shipper's Certification."

(*Notice at pages 10 – 11; Exhibit 9*).

Respondent provided four bills of lading for shipments of lithium ion batteries on dates which correspond to the dates of the Genesis bills of lading for shipments of recycled electronics: April 4, 2017; April 20, 2017; March 27, 2017; and January 24, 2017. (*Notice at pages 12 – 13; Exhibit 10*).

In the Notice, PHMSA noted the same discrepancies between Respondent's bills of landing for these shipments and the Genesis bills of lading:

- Respondent's bills of lading are unsigned – the Genesis bills of lading are signed and dated by the shipper and the driver;
- Respondent's bills of lading do not have unique BOL Number – the Genesis bills of lading have unique BOL Numbers; and
- Respondent's bills of lading declares the shipment as containing a hazardous material (UN3480, Lithium ion battery, 9, PG II) – the Genesis bills of lading do not declare the shipment as containing a hazardous material and describes the shipment as "Recycled Electronics."

(*Id.*).

Witness Statements

The Genesis driver, Mr. Simmons, provided the investigators with a voluntary written statement regarding the April 20th shipment. Mr. Simmons stated he did not see any hazardous materials labeling or markings on the packagings being loaded onto the truck at Respondent's facility and that Respondent did not provide him with an updated bill of lading for the shipment. (*In/In Report at page 4; Exhibit 8*). The investigators, during the course of the investigation, obtained the statement that Mr. Simmons provided to Genesis' insurance carrier regarding the April 20th shipment. (*Notice at page 7*). Mr. Simmons, in his statement to the insurance company, indicated he had remained in the cab of the vehicle during the loading process and that he observed "black barrels on pallets" being loaded into the vehicle's trailer. (*Notice at page 7; Supplemental Exhibit 7*).

During the course of the inspection at Respondent's facility, the investigators interviewed Respondent's employees about the company's lithium cell and battery recycling and shipping operations. (*In/In Report at page 4*). According to the investigators, Respondent's representative, Mr. Pledger, described a shipping procedure that included placing lithium cells and batteries into buckets and boxes which are loaded onto skids, i.e., pallets, and overwrapped. (*In/In Report at pages 3 – 4; Exhibit 14*). Furthermore, Mr. Pledger indicated Respondent does

not currently use 55-gallon drums for these shipments but admitted Respondent had used 55-gallon drums for prior shipments. (*Exhibit 14*). Regarding Respondent's bill of lading procedure, Mr. Pledger stated that Respondent creates a bill of lading indicating the proper shipping commodity and identification and delivers the bill of landing to Respondent's warehouse. He noted that Respondent retains a copy of the "signed" bill of lading. (*Id.*).

Respondent's employee, Ms. Jennifer Wilson, described Respondent's shipping and bill of lading procedures for lithium cells and batteries that were generally consistent with Mr. Pledger's description of Respondent's procedures. (*Id.*). Ms. Wilson admitted that Respondent's practice of taking pictures of each load that leaves Respondent's facility was not implemented until May 2017. (*Id.*).

Respondent's Reply to the Notice

Respondent, in its reply to the Notice, maintained its position that the April 20th shipment complied with the HMR exception for small lithium cells and batteries for recycling. Notwithstanding its position that the subject shipment was fully compliant, Respondent stated that it had retained a hazmat consultant and updated its standard operating procedures for shipping lithium cells and batteries for recycling. It also stated that it continues to provide its employees with annual and refresher hazmat training, as required. And that it had implemented a firm policy requiring that only its bill of landing shall be used for future shipments.

Respondent claims the April 20th shipment consisted of 25 skids of small lithium ion batteries that were packed in corrugated boxes with compliant lithium ion battery markings and labels. Respondent, in support of this assertion, submitted a shipment load list for 25 skids, weighing 40,875 pounds, and dated "4.20.17;" and photographs showing packages of fiberboard boxes overpacked onto pallets loaded in a container and bearing handling marking labels. It is Respondent's contention that PHMSA's evidence does not support the agency's conclusion that a shipping paper with the applicable UN description was required because the HMR exception for small lithium cells and batteries did not apply to the April 20th shipment. Furthermore, Respondent asserted there is simply no nexus between any alleged non-compliance issues with the April 20th shipment and any of the other ten shipments charged in the Notice.

Respondent, in support of its position, noted the driver's statements about the April 20th shipment (that he saw drums on pallets but didn't see any hazmat markings or labels on the packages, and he wasn't given an updated bill of lading) were inconsistent with its own photographs of the shipment and the fact he admitted to staying in the truck's cab during the loading process.

Respondent also challenged the agency's conclusion that Respondent intentionally committed the alleged violations (which the agency said was an aggravating circumstance that resulted in a higher penalty assessment). As noted above, it is Respondent's position that the agency's evidence does not support this conclusion for the April 20th shipment, or the previous ten shipments alleged as additional violations in the Notice. Instead, the company claims the evidence shows that the company has long adhered to, and communicated to its customers, the regulatory requirements for recycling lithium cells and batteries, and that it properly trained its employees.

Additionally, Respondent asserted its customary practice is to draft a bill of lading in compliance with the HMR for battery shipments. But it also acknowledged that the bill of lading it allegedly prepared for the April 20th shipment did not travel with the shipment. According to Respondent, its failure to ensure its bill of lading traveled with the shipment was merely an "inadvertent" departure from its normal procedures. Nonetheless, Respondent contends that the photographs and load list it provided with its reply are further proof of its compliance.

Regarding corrective action, Respondent pointed out the actions it has undertaken since the April 2017 incident to ensure its battery shipments are HMR compliant. According to Respondent, these actions include retaining a hazmat consultant to review and update its standard operating procedures; its willingness to reengage the consultant as necessary; and providing its employees with annual and refresher training.

Finally, Respondent indicated it would appreciate the opportunity to discuss with PHMSA the company's financial status and ability to pay any assessed penalty.

Assessment of the Evidence

Respondent, in its reply to the Notice, maintained that the April 20th shipment complied with the HMR exception for small lithium cells and batteries for recycling. Respondent claims the shipment consisted of 25 skids of small lithium ion batteries that were packed in corrugated boxes with compliant lithium ion battery markings and labels. Respondent submitted photographs and a load list as proof of the shipment.

Respondent's photographs. I have reviewed Respondent's reply and I have considered the photographs and load list against the alleged facts and evidence presented in the Notice and I do not find Respondent's evidence credible for the following reasons.

First, the photographs are purported to show the April 20th shipment of lithium cells and batteries in sealed fiberboard boxes loaded on pallets and bearing a handling mark. However, the photographs are undated with no visible time or date stamp, which makes authentication difficult. And it is noteworthy that Respondent admitted that its practice of taking pictures of each load that leaves its facility was not implemented until May 2017.

Second, there are no 55-gallon drums in Respondent's photographs. Yet, the photographs taken by the investigators at the incident site clearly show there were unlabeled and unmarked 55-gallon drums filled with lithium cells, batteries, and equipment. Respondent, in its reply to the Notice, failed to sufficiently account for why these drums were not in its photographs of the shipment. Moreover, in the photographs from the incident site that show corrugated box debris, there is no indication that the markings or labels that Respondent alleges were on the boxes were present.

Next, the motor carrier driver who picked up the shipment from Respondent's facility made consistent statements to the PHMSA investigators and the carrier's insurance company that he observed black metal barrels on pallets being loaded into the container and that he did not see any hazardous material marking or labeling on the barrels or packages.

Last, Respondent claims the load list confirms the batteries shipped did not exceed the HMR size limitation. In its reply, Respondent asserted that the photographs taken at the incident site don't show any batteries with a Watt-hour (Wh) rating that exceeds the HMR size limitation.

Load list. Respondent's load list indicates the shipment contained lithium ion cells, batteries, and equipment. But it does not specify the Wh rating for determining whether the cells, batteries and equipment in the load do not exceed the exception's size limitation. Furthermore, although a review of the photographs taken by the investigators of the contents of the shipment at the incident site appear to show individual cells and batteries that meet the size limitation, the photographs also show that at least some of the packages, e.g., the 55-gallon drums, were likely packed full with lithium cells and batteries and were severely over the exception's 66 pound weight limitation for a package.

For these reasons, I do not believe the materials submitted by Respondent accurately represent the shipment that was loaded on April 20, 2017 at Respondent's facility.

As I noted at the start of this discussion, PHMSA primarily relied on photographs taken of the contents of the shipping container after the incident, the bills of lading and related shipping papers for the April 20th shipment and ten prior shipments, and evidence and witness statements obtained during the incident investigation and compliance inspection at Respondent's facility.

Remains of the Shipping Container. The photographs taken by the investigators at the incident site and rail yard are compelling. The photographs show the remains of the shipping container and its contents. Lithium ion cells and batteries and pieces of fiberboard boxes and other packaging materials are evident. Most of the cells and batteries appear to be without the equipment they are intended to power.

Also, the photographs show 55-gallon drums without lids among the remains. The drums do not have any hazardous materials markings or labels, or lithium battery handling marking labels. The drums are filled with melted lithium ion cells and batteries with some of the batteries or their plastic inner wrappings melted and stuck to the inside of the drums. The investigators weighed two of these drums and the photographs show recorded weights of 349 pounds and 304 pounds.

Witness Statement. The driver's statements regarding the loading of the shipment corroborate many of the details shown in the photographs. For example, the driver indicated that he observed "black barrels on pallets" being loading into the vehicle's trailer. He also stated he did not see any hazardous materials labeling or markings on the packagings being loaded onto the truck.

Bills of Lading. The April 20th shipment was a multi-modal shipment that was transported by motor carrier and rail. Consequently, there were several bills of landing and other shipping papers generated for the shipment. The carrier's bills of lading were consistent in that none of the bills of lading listed or described the lithium ion cells and batteries as hazardous materials. Furthermore, Respondent is identified as the shipper, and the bills of lading are signed by the carrier and Respondent.

Respondent provided another version of the bill of lading for the April 20th shipment and three prior shipments (April 4, 2017, March 27, 2017, and January 24, 2017). As noted above, there were several issues identified with these bills of lading. For example, the bills appear to be incomplete, they were not signed by Respondent or the carrier, and they did not travel with the shipments.

According to Respondent, it prepared the bills of lading in compliance with the HMR for these shipments. Specifically, the bills of lading declare the shipments as containing a hazardous material (UN3480, Lithium ion battery, 9, PG II). Respondent claims these bills of lading prove that it intended to comply with the HMR and that its failure to ensure its bills of lading traveled with the shipments was merely an "inadvertent" departure from its normal procedures.

Notwithstanding these other versions of the bills of lading and Respondent's explanations, the evidence here clearly establishes that the carrier's bills of lading for these shipments—identifying Respondent as the shipper and executed by both parties—are the applicable shipping papers under the HMR.

Non-compliance with HMR Exception for Lithium Cells and Batteries

Alternatively, Respondent claims the April 20th shipment complied with the HMR exception for small lithium cells and batteries for recycling. As outlined above, the HMR contain specific requirements governing the transportation of lithium cells and batteries. A package containing smaller lithium cells and batteries shipped for disposal or recycling that meet certain size, packaging, and hazard communication conditions are excepted from the HMR requirements for shipping papers, marking, labeling, placarding, emergency response, and training. Therefore, if the packages met the conditions in the exception—as suggested by Respondent—the lithium ion cells and batteries contained in the shipment did not have to be declared as hazardous materials on the shipping paper. However, the evidence here is sufficient to support a finding that the shipment failed to satisfy the size, packaging, and hazard communication conditions of the HMR exception for small lithium cells and batteries.

Size limits. Although the photographs taken by the investigators of the contents of the shipment at the incident site appear to show individual cells and batteries that meet the size limitation, the photographs also show that at least some of the packages, e.g., the 55-gallon drums, were likely packed full with lithium cells and batteries and were severely over the exception's 30 kg (66 pounds) weight limitation for a package. Notwithstanding the fact that these packages were severely overweight, the exception requires that the outer packages must be marked: "LITHIUM BATTERIES—FORBIDDEN FOR TRANSPORT ABORD AIRCRAFT AND VESSEL." There is no evidence the packages were marked in accordance with this requirement.

Packaging. Each package must be capable of withstanding a 1.2 meter drop test, in any orientation, without damage to the cells or batteries contained in the package, without shifting of the contents that would allow battery-to-battery (or cell-to-cell) contact, and without release of the contents of the package. Here, there is limited evidence of the condition of the packages before the incident due to the packages' exposure to the fire and explosion. However, the condition of the 55-gallon drums observed among the debris of the incident (damaged without tops, overfilled with lithium ion cells and batteries, and no evidence of packing material to

prevent damage, shifting, or release) indicates at least some of the packages did not meet this requirement.

Hazard communication. Under the exception, for transportation by highway, rail and vessel, the outer package must be marked with hazard communication information or the handling mark, which includes an indication that the package contains lithium ion cells or batteries; that the package is to be handled with care and a flammable hazard exists if the package is damaged; that special procedures must be followed for damaged packages; and a telephone number for additional information. There is no evidence the packages were marked with the required hazard communications information.

PHMSA, in the Notice, alleged that Respondent offered the April 20th shipment of lithium cells and batteries for transportation as an undeclared shipment of hazardous material. In addition, PHMSA charged Respondent with ten additional counts of offering an undeclared hazardous material for Respondent's prior shipments of lithium cells and batteries.

The violations are discussed next.

Violation No. 1

Alleged Violation No. 1 – Undeclared Hazmat. The HMR require a person offering a hazardous material for transportation to "class and describe the hazardous material in accordance with [the HMR]." 49 C.F.R. § 173.22(a)(1). The HMR defines an undeclared hazardous material as a hazardous material that is:

> (1) Subject to any of the hazard communication requirements in subparts C (Shipping Papers), D (Marking), E (Labeling), and F (Placarding) of Part 172 of [the HMR] . . . and
> (2) offered for transportation in commerce without any visible indication to the person accepting the hazardous material for transportation that a hazardous material is present, on either an accompanying shipping document, or the outside of a transport vehicle, freight container, or package.

49 C.F.R. § 171.8.

Generally, under the HMR hazard communication requirements, each person who offers a hazardous material for transportation shall "describe the hazardous material on the shipping paper in the manner required by [the HMR];" "mark each package, freight container, and transport vehicle containing the hazardous material in the manner required by [the HMR];" "label [a non-bulk packaging] with labels specified for the material in [the HMR];" and "comply with the applicable placarding requirements." 49 C.F.R. §§ 172.200(a), 172.300(a), 172.400(a), and 172.500(a).

Based on all of the facts and evidence discussed above, it is apparent the April 20th shipment did not meet the HMR requirements for the exception for packages containing smaller

lithium ion cells and batteries shipped for disposal or recycling. For example, there is sufficient evidence that some of the packages exceeded the gross weight size limitation, did not bear the required handling mark, and were not marked with the required hazard communications information. Therefore, the shipment's packages were not excepted from the HMR requirements for shipping papers, marking, labeling, placarding, emergency response, and training.

The April 20th shipment was a multi-modal shipment that was transported by motor carrier and rail. Consequently, there were several bills of landing and other shipping papers generated for the shipment. The carrier's bills of lading were consistent in that none of the bills of lading listed or described the lithium ion cells and batteries as hazardous materials. Furthermore, Respondent is identified as the shipper, and the bills of lading are signed by the carrier and Respondent. As such, under the HMR, Respondent is the offeror for the shipment, and it assumed overall responsibility for ensuring that the shipment complied with the applicable HMR requirements when it signed the shipper's certification on the bills of lading. Because the shipment failed to meet the conditions of the lithium cells and batteries exception, Respondent was required to comply with the HMR requirements for shipping papers, marking and labels for the shipment.

For the reasons stated above, the evidence for this violation is sufficient to find that Respondent offered for transportation, in commerce, a hazardous material (UN3480, Lithium ion batteries, 9), without shipping papers, markings, or labels (Violation No. 1), in violation of 49 C.F.R. §§ 171.2(a), (b), (e), (i), 172.200(a), 172.300(a), 172.400, and 173.22.

Violation Nos. 2, 3, and 4

In the Notice, PHMSA alleged that the evidence in the case (the interviews, statements, and documents provided by Respondent's employees, the driver's statements, the 55-gallon drums found in the incident debris, the discrepancies between the carrier's bills of lading, and the shipping papers provided by Respondent) establishes a pattern of behavior by Respondent showing that it is more likely than not the hazardous materials in the remaining ten shipments were not properly marked or labeled. These shipments and the April 20th shipment were offered for transportation within three months of each other. The dates of these shipments are:

- Violation No. 2 – April 4, 2017;
- Violation No. 3 – March 28, 2017; and
- Violation No. 4 – January 26, 2017.

PHMSA noted that for these shipments, Respondent provided other versions of the bills of lading. As noted above, there were several issues identified with these bills of lading. For example, the bills of lading appear to be incomplete; they were not signed by Respondent or the carrier; and they did not travel with the shipments. As such, the evidence clearly establishes that the carrier's bills of lading for these shipments—identifying Respondent as the shipper and executed by both parties—are the applicable shipping papers under the HMR and not Respondent's other versions of the bills of lading.

Furthermore, these shipments and the April 20th shipment were offered for transportation within three months of each other. As such, these facts and the existence of Respondent's other

versions of the bills of lading for these particular shipments and the April 20th shipment supports the agency's conclusion that these shipments were part of a pattern of shipments whereby Respondent shipped undeclared hazardous materials, i.e., lithium ion cells and batteries as "recycled electronics."

For these reasons, the evidence for these violations is sufficient to find that Respondent offered for transportation, in commerce, a hazardous material (UN3480, Lithium ion batteries, 9), without shipping papers, markings, or labels (Violation Nos. 2, 3, and 4), in violation of 49 C.F.R. §§ 171.2(a), (b), (e), (i), 172.200(a), 172.300(a), 172.400, and 173.22.

Violation Nos. 5, 6, 7, 8, 9, and 11

In the Notice, PHMSA alleged that the evidence in the case (the interviews, statements, and documents provided by Respondent's employees, the driver's statements, the 55-gallon drums found in the incident debris, the discrepancies between the carrier's bills of lading, and the shipping papers provided by Respondent) establishes a pattern of behavior by Respondent showing that it is more likely than not the hazardous materials in the remaining shipments were not properly marked or labeled. The dates of these shipments are:

- Violation No. 5 – June 30, 2016;
- Violation No. 6 – April 26, 2016;
- Violation No. 7 – April 6, 2016;
- Violation No. 8 – March 2, 2016;
- Violation No. 9 – February 8, 2016; and
- Violation No. 11 – November 23, 2015.

Here, there are certain facts that differ from the alleged pattern of behavior relied on by the agency. First, these shipments did not occur within the same general timeframe as the April 20th shipment and the other 2017 shipments. For example, there is a ten-month to seventeen-month gap between the April 20th shipment and these shipments.

In the Notice, PHMSA relied largely on the photographs of the debris of the April 20th shipment to show that Respondent likely didn't comply with the HMR packaging and hazard communication requirements for these shipments. But I find the amount of time since these shipments in 2016 and 2015 and the April 20th shipment and the other 2017 shipments is too great to make that connection.

Last, the shipping papers for these shipments are not consistent with April 20th shipment or the other 2017 shipments. For instance, these older shipments lack a load list and more importantly, Respondent did not generate other versions of the bills of lading for these shipments.

Taken together, these facts do not support a finding that Respondent followed the same pattern of behavior that PHMSA established for the April 20th shipment and the other 2017 shipments. For example, the fact that Respondent did not create load lists or other versions of the bills of lading does not conform to the alleged pattern. Furthermore, the agency's conclusion

that the photographs of the debris of the April 20, 2017 shipment show that the packages in these 2016 and 2015 shipments were similarly prepared, is not convincing.

Nevertheless, there are known hazards and risks associated with improperly shipping and transporting lithium cells and batteries. As such, it is incumbent upon the regulated community to comply with the applicable regulatory requirements when shipping lithium cells and batteries. And, as noted above in the discussions for the April 20th shipment and the other 2017 shipments, the totality of the evidence in this case demonstrates a pattern of Respondent's non-compliance with the HMR for its shipments of lithium cells and batteries.

In light of the above, I am reducing each of these violations to a warning.

Violation No. 10

In the Notice, PHMSA alleged that Respondent offered an undeclared hazardous material on December 11, 2015. Here, the agency relied on shipping papers the investigators obtained from the motor carrier, Genesis. However, my review of the administrative record revealed that Respondent was not provided an adequate opportunity to raise a defense for this particular shipment because as discussed above, the agency failed to ask Respondent to provide shipping papers for the December 11, 2015 shipment. Therefore, in interests of fairness and due process, I am dismissing this violation.

Discussion of Penalties

In the Notice, PHMSA proposed a total civil penalty of $278,376. The agency used the Penalty Guidelines set forth at Appendix A to 49 C.F.R. part 107, subpart D, to calculate the civil penalty proposed in the Notice. PHMSA increased the penalty for the April 20th shipment to the statutory maximum (Violation No. 1) and charged each of the ten prior shipments as individual violations (Violation Nos. 2 – 11) because of aggravating circumstances. Specifically, PHMSA said the violations were intentional because Respondent is a sophisticated shipper that was aware of the regulatory requirements and safety risks involved in the transportation of lithium ion cells and batteries. Furthermore, its shipping practices of concealing the contents of its shipments of lithium ion cells and batteries repeatedly exposed people across the southern United States to the risks of a lithium battery fire.

According to PHMSA, because each undeclared shipment described in the Notice required a separate and distinct act by Respondent, each undeclared shipment was an individual violation. Moreover, the agency stated that Respondent's practice of shipping lithium ion batteries undeclared ultimately resulted in an incident in which a fire in a rail car led to an explosion. As such, the agency determined that the property damage, danger to the public, and danger to first responders caused by the fire and explosion are aggravating factors that justify an increased penalty to the statutory maximum for that shipment.

Respondent, in its reply to the Notice, rejected the agency's conclusion that it intentionally committed the alleged violations and asked the agency to "reconsider its finding that [Respondent] made any intentional violations" in this matter. However, whether Respondent's violations were intentional or not does not diminish the gravity of the aggravating

factors considered here, i.e., the increased safety risks of separate and distinct shipments of undeclare hazardous materials. Therefore, the penalty assessment is justified.

On October 17, 2017, Respondent submitted correspondence to the investigators before the Notice was issued that included its standard operating procedures but failed to address the violation for an undeclared shipment of hazardous material. As such, no reductions of the proposed penalties for the violations were given in the Notice. Respondent, in its reply to the Notice, reminded the agency that it had retained a hazmat consultant to review and update its standard operating procedures, which Respondent stated it had provided to PHMSA during the investigation. Furthermore, Respondent submitted recent refresher training records for its hazmat employees. In light of this information, I am reducing Violation Nos. 1, 2, 3, and 4 by 5%.

Regarding financial considerations, although Respondent, in its reply to the Notice, indicated its willingness to discuss its current financial circumstances, PHMSA has no information that Respondent is unable to pay the proposed penalty or that payment of the proposed penalty will affect Respondent's ability to continue in business. Therefore, mitigation based on the company's financial status is not warranted.

Findings

Based on all the facts discussed above, I find that Respondent offered for transportation, in commerce, a hazardous material (UN3480, Lithium ion batteries, 9), without shipping papers, markings, or labels (Violation Nos. 1, 2, 3, and 4), in violation of 49 C.F.R. §§ 171.2(a), (b), (e), (i), 172.200(a), 172.300(a), 172.400, and 173.22.

In reaching this conclusion, I have reviewed the Inspection/Investigation Report and accompanying exhibits, including the exit briefing, Notice and accompanying supplemental exhibits, Respondent's written responses to the Notice and further correspondence, and I find that sufficient evidence supports these findings.

Conclusion

Under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.317 and 107.329, I hereby assess Respondent a total civil penalty of $131,456, for four violations of the HMR, as follows:

- Violation No. 1 – $76,646, reduced from $78,376 proposed in the Notice;
- Violation No. 2 – $18,270, reduced from $20,000 proposed in the Notice;
- Violation No. 3 – $18,270, reduced from $20,000 proposed in the Notice;
- Violation No. 4 – $18,270, reduced from $20,000 proposed in the Notice;
- Violation No. 5 – reduced to a WARNING;
- Violation No. 6 – reduced to a WARNING;
- Violation No. 7 – reduced to a WARNING;
- Violation No. 8 – reduced to a WARNING;
- Violation No. 9 – reduced to a WARNING;
- Violation No. 10 – DISMISSED; and
- Violation No. 11 – reduced to a WARNING.

In assessing this civil penalty, I have taken into account the following statutory and regulatory 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) Respondent's degree of culpability;
(3) Respondent's prior violations;
(4) Respondent's ability to pay a penalty and the effect of a penalty on its ability to continue to do business; and
(5) Other matters as justice may require.

Payment and Appeal

Respondent must either (1) pay the civil penalty within thirty (30) days of the date of this Order or (2) appeal this Order to PHMSA's Administrator within twenty (20) days of the date that the Order is received by Respondent. Instructions for payment or appeal are set forth in Addendum A to this Order.

Vasiliki Tsaganos

October 7th, 2021
Date

Vasiliki Tsaganos
Acting Chief Counsel

CERTIFIED MAIL