

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

METAL CONVERSION
TECHNOLOGIES, LLC,

Petitioner,

v.

U.S. DEPARTMENT OF
TRANSPORTATION, PIPELINE
AND HAZARDOUS MATERIAL
SAFETY ADMINISTRATION,

Respondent.

CASE NO: _____

PETITION FOR REVIEW

Pursuant to 49 U.S.C. § 5127 and Federal Rule of Appellate Procedure 15, Petitioner Metal Conversion Technologies, LLC, hereby petitions the Court for review of the Decision on Appeal in *In the Matter of: Metal Conversion Technologies, LLC*, PHMSA Case No. 18-0086-HMI-SW, dated July 25, 2022 (“Decision”), issued by the Department of Transportation, Pipeline and Hazardous Materials Safety Administration. A copy of the Decision is attached to this petition as Exhibit A.

Respectfully Submitted,

December 15, 2022

/s/ Sheng Li

SHENG LI

KARA ROLLINS

Litigation Counsel

New Civil Liberties Alliance

1225 19th St. NW, Suite 450

Washington, DC 20036

Phone: (202) 869-5210

Sheng.Li@ncla.legal

Attorneys for Petitioner

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

METAL CONVERSION
TECHNOLOGIES, LLC

Petitioner,

v.

U.S. DEPARTMENT OF
TRANSPORTATION, PIPELINE
AND HAZARDOUS MATERIALS
SAFETY ADMINISTRATION

Respondent.

Case No. _____

Petition for Review

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Petitioner Metal Conversion Technologies, LLC, discloses under Federal Rule of Appellate Procedure 26.1 that it has no parent corporation and no publicly held company owns more than 10% of its stock. Petitioner further certifies that the following is a complete list of interested persons as required by Eleventh Circuit Rule 26.1:

1. Metal Conversion Technologies, LLC, *Petitioner.*
2. John Patterson, *President of Metal Conversion Technologies, LLC*
3. Sheng Li, *Counsel for Metal Conversion Technologies, LLC*
4. Kara Rollins, *Counsel for Metal Conversion Technologies, LLC*

5. Deitra Crawly, *Counsel Metal Conversion Technologies, LLC, in the administrative proceeding before Department of Transportations*
6. U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *Respondent*
7. Peter Buttigieg, *Secretary of the U.S. Department of Transportation*
8. Tristan Brown, *Acting Administrator and Deputy Administrator of the Pipeline and Hazardous Materials Safety Administration*
9. Osasu Dorsey, *Chief Counsel of the Pipeline and Hazardous Materials Safety Administration*
10. Vasiliki Tasagnov, *Deputy Chief Counsel of the Pipeline and Hazardous Materials Safety Administration*
11. Howard McMillan, *Chief Safety Officer of the Pipeline and Hazardous Materials Safety Administration*

No publicly traded company or corporation has an interest in the outcome of this petition.

Dated: December 15, 2022

/s/ Sheng Li

SHENG LI

KARA ROLLINS

Litigation Counsel

New Civil Liberties Alliance

1225 19th St. NW, Suite 450

Washington, DC 20036

Phone: (202) 869-5210

Sheng.Li@ncla.legal

Attorneys for Petitioner

CERTIFICATE OF NOTICE

I hereby inform the Clerk of the Court that the Respondent may be served through:

Peter Buttigieg
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Tristan Brown
Acting Administrator and Deputy Administrator
U.S. Department of Transportation
Pipeline and Hazardous Materials Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

and

Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

On information and belief there are no other known parties who would be required to participate at this time.

/s/ Sheng Li

Exhibit A

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

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.” Freightquote.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

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 Lading, 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.

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.

²⁵ Appeal at 5.

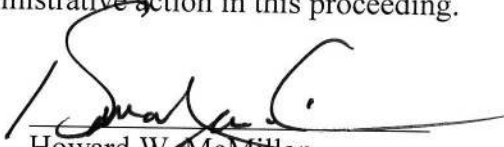
²⁶ 49 C.F.R. §§ 171.2 and 171.8.

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