



incorporated and attached to this Order. All of the terms and conditions of the Agreement shall be given the full force and effect of an Order issued pursuant to the Federal hazardous materials transportation law, 49 U.S.C. § 5101, et seq., or the Hazardous Materials Regulations, 49 C.F.R. Parts 171 – 180.

It is so Ordered,

  
for David E. Kunz  
Chief Counsel  
Pipeline and Hazardous Materials Safety Administration

Date: 12/3/08

Attachments

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

**In the Matter of:**

**Brainerd Chemical Company, Inc.,**

**Respondent.**

**PHMSA Case No. 08-0036-SDIBC-SW**

**COMPROMISE AGREEMENT**

**I. Parties**

The Parties to this Compromise Agreement (Agreement) are:

**Brainerd Chemical Company, Inc.** (Respondent), located at 1200 North Peoria, Tulsa, OK 74106 (mailing address: P.O. Box 470010, Tulsa, OK 74147-0010),

and

**Pipeline and Hazardous Materials Safety Administration (PHMSA)**, an operating administration of the United States Department of Transportation.

**II. Authority/Jurisdiction**

A. The Parties enter into this Agreement under the authority of 49 U.S.C. § 5123(e) and 49 C.F.R. § 107.327(a)(1).

B. Respondent acknowledges:

(1) As a company which offers hazardous materials for transportation in commerce, it is a regulated entity subject to Federal hazardous material transportation law, 49 U.S.C. § 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and to the authority of (a) the Secretary of Transportation, (b) PHMSA's Associate Administrator for Hazardous Materials Safety, and (c) PHMSA's Office of the Chief Counsel (49 U.S.C. § 5103(b) and 49 C.F.R. § 107.301);

- (2) PHMSA has sufficient proof to show by a preponderance of the evidence that Respondent violated the Federal regulations listed in Section V below; and
- (3) It received proper notice of PHMSA's action in this proceeding.

### **III. Background**

A. On November 13, 15, and 27-28, 2007, investigators from PHMSA's Office of Hazardous Materials Enforcement (OHME) conducted routine compliance inspections at Respondent's facility pursuant to 49 U.S.C. § 5121 and 49 C.F.R. § 107.305. Based on these inspections and further observations at Smith Metal Products, Lindstrom, Minnesota on November 26, 2007, and at a facility of Airgas, Inc. in Tulsa, Oklahoma on November 28, 2007, PHMSA's investigators concluded that Respondent:

--Had shipped nitric acid in 30-gallon composite steel drums with a Teflon liner inside a polyethylene overpack which were not authorized for this material and which had not been leakproofness tested before reuse.

--Had filled an intermediate bulk container (IBC) with sulfuric acid and shipped the filled IBC when the IBC had not been visually inspected and leakproofness tested within the past 2½ years.

--Was refusing to allow PHMSA's investigator to review relevant portions of its security plan.

--Had shipped nitric acid in stainless steel drums which were not marked with the type of steel, metal thickness, and original tare weight as required.

--Had failed to record all required information in its records of periodic reinspection and retest of IBCs.

--Had made shipments of hazardous materials under the authority of DOT special permits when it had not instructed its hazmat employees in the requirements and conditions of the special permits.

On December 3, 2007, PHMSA's investigator sent Respondent a revised "exit briefing" noting the probable violations observed and inviting Respondent to submit information and evidence of corrective actions.

B. Following receipt of Respondent's February 29 and March 7, 2008 letters indicating that it had taken corrective actions, PHMSA's investigator submitted a report to the Chief of OHME's Southwestern Region, who reviewed the report for accuracy and sufficiency. Based on that review, the Region Chief referred the matter to PHMSA's Office of the Chief Counsel with a recommendation that it initiate a civil penalty action against Respondent pursuant to 49 C.F.R. § 107.311.

C. Based on the apparent nature, circumstances, extent, and gravity of these probable violations, on April 29, 2008, the Office of the Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent with a proposed civil penalty in the amount of \$21,915 for five violations of the HMR and a warning (with no penalty) for the violation relating to Respondent's failure to allow PHMSA's investigator to review relevant portions of Respondent's security plan. That amount reflected a reduction of \$2,435 from the amount that would have been proposed in the absence of any corrective actions. PHMSA 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.

#### IV. Basis of Agreement

A. Corrective Action. In its June 23, 2008 written response to the Notice, Respondent submitted additional evidence of actions it has taken to correct the violations alleged in the Notice and to prevent future violations of the HMR. The following is a summary of Respondent's corrective actions.

| Violation Number | Respondent's Corrective Actions  |
|------------------|--|
| 1                | Respondent applied for and has been issued DOT Special Permit 14635 authorizing the shipment of nitric acid other than red fuming with more than 70% nitric acid in 30-gallon drums certified to the UN6HA1 performance standard in the HMR, overpacked inside a steel drum certified to the UN1A2 performance standard. An emergency special permit was issued on February 14, 2008, and Respondent's grantee status was renewed on June 4, 2008, with an expiration date of April 30, 2012. Respondent also stated it would retrain and certify its operating personnel in requirements for leakproofness testing of used stainless steel drums when not refilled and transported under the conditions in 49 C.F.R. § 173.28(b)(7). It provided a copy of its "Safety Meeting Sign Up Sheet" dated January 10, 2008, indicating that five of its employees had "reviewed DOT regulations for reuse of SS drums for nitric acid." |
| 2 & 5            | Respondent stated it would retrain and certify its operating personnel in requirements for periodic retesting of intermediate bulk containers, and it provided sample "IBC Inspection and Retest Records" containing all required information.   |
| 3                | Respondent stated it could have made available to PHMSA's investigator those parts of its Quality Control/Assurance Manual on site security and risk management "which cover Personnel Security, Unauthorized Access and Risk Assessment . . . at the time of [PHMSA's inspection] if we could have better understood your needs." In the Notice, Respondent was reminded that it is required to make "records, property, reports, and information available" to PHMSA's investigators upon request. 49 U.S.C. § 5121(b)(2).   |
| 4                | Respondent stated it would retrain and certify its operating personnel in requirements for marking the type of steel, metal thickness, and original tare weight on stainless steel drums, and it will assure that all stainless steel drums  |

|   |   |
|---|---|
|   | will be examined and marked as required. It provided copies of (a) its "Safety Meeting Sign-Up Sheet" dated January 10, 2008, indicating that five of its employees had been trained in "required markings on SS drums to be refilled," and (b) its one-page guide on "DOT requirements for our Nitric containers."   |
| 6 | Respondent stated it was retraining its operating personnel in requirements in DOT special permits under which Respondent offers and transports hazardous materials and that it had addressed special permit requirements in a safety meeting held on December 28, 2007. It provided copies of its "Safety Meeting Sign Up Sheets" dated (a) December 28, 2007, indicating that it covered "initial DOT SP review," "DOT audit from 11-27-07," and "policy, procedures, and teamwork" with employees, and (b) February 23, 2008, indicating that, during late December, it had covered several subjects including the current versions of DOT-SP 10878, 12412, and 12970. |

B. Small Business Size and Financial Condition. Evidence in the record also substantiates that Respondent is a small business. Respondent did not submit evidence of its financial condition.

#### V. Compromise Penalty Amounts

Based on all the evidence in this case, the parties now agree to the compromise penalty amounts listed below:

| Violation Number | HMR Violation   | NOPV Penalty Amount | Compromise Penalty Amount |
|------------------|---|---------------------|---------------------------|
| 1                | Offering for transportation in commerce a hazardous material, nitric acid, a corrosive and oxidizer, in 30-gallon composite drums marked as meeting the "UN6AH1/X1.8/250" performance standard in the HMR, inside a polyethylene overpack marked as meeting the "UN1H2/X200" performance standard in the HMR, which were not authorized for this material and which had not been leakproofness tested before reuse, in violation of 49 C.F.R. §§ 171.2(e), 173.28(b)(2), and 173.158. | \$12,150            | \$10,530                  |
| 2                | Filling an intermediate bulk container (IBC) with a hazardous material, sulfuric acid, a corrosive, and offering the filled IBC for transportation in commerce when the IBC was not authorized for this material because the IBC had not been visually inspected and leakproofness tested within the past 2½ years, in violation of 49 C.F.R. §§ 171.2(e), 173.35(a), and 180.352(b)(1)-(3).  | \$4,725             | \$4,200                   |

|              |  |                  |                  |
|--------------|--|------------------|------------------|
| 3            | Offering for transportation in commerce a quantity of hazardous materials, corrosive and poisonous materials, that required placarding under the provisions of subpart F of 49 C.F.R. part 172, when it was required to develop and adhere to a hazardous materials transportation security plan, but refusing to allow PHMSA's investigator to review relevant portions of its security plan, in violation of 49 U.S.C. § 5121(b)(2). | \$0<br>(warning) | \$0<br>(warning) |
| 4            | Offering for transportation in commerce a hazardous material, nitric acid, a corrosive, in stainless steel drums that were not marked with the type of steel, metal thickness, and original tare weight, in violation of 49 C.F.R. §§ 171.2(e) and 173.158(b)(vi).   | \$2,700          | \$2,400          |
| 5            | Representing and certifying that intermediate bulk containers (IBCs) had been successfully reinspected and retested in accordance with the HMR, when its records of periodic reinspection and retest failed to include all required information, in violation of 49 C.F.R. §§ 171.2(g) & (j) and 180.352(g).   | \$1,800          | \$1,600          |
| 6            | Allowing an employee to perform a function subject to requirements in a special permit, when the employee had not received training on the requirements and conditions of the special permit, in violation of 49 C.F.R. §§ 172.702(b), 172.704(a)(2), and DOT Special Permits 12412 & 10878.   | \$540            | \$470            |
| <b>TOTAL</b> |  | <b>\$21,915</b>  | <b>\$19,200</b>  |

#### VI. Factors Considered in Determining the Civil Penalty

In determining the amount of a civil penalty, PHMSA considered the following statutory criteria (49 U.S.C. § 5123(c)):

- (1) The nature, circumstances, extent, and gravity of the violations;
- (2) Respondent's degree of culpability and lack of prior violations;
- (3) Respondent's size;
- (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.

Respondent's documented corrective actions for these violations, its small size, and its financial condition justify assessing a civil penalty of \$19,200, payable in six monthly installments of \$3,200 each.

## **VII. Terms and Conditions**

A. Respondent agrees to pay the sum of \$19,200, as full satisfaction of the civil penalty proposed in the Notice, in six monthly payments of \$3,200 each.

(1) Respondent must pay the first \$3,200 installment within thirty days of the date of a Compromise Order adopting the terms of this Agreement.

(2) Respondent must pay an additional \$3,200 installment each thirty days after that until the entire amount is paid.

B. By entering into this Agreement, Respondent waives its rights to:

(1) Present further written or oral explanations, information, and arguments in this matter;

(2) Submit an administrative appeal of an Order issued pursuant to this Agreement; and

(3) Seek judicial review or otherwise contest or challenge the validity of the Notice, this Agreement, or an Order issued pursuant to this Agreement.

C. This Agreement resolves only the violations referenced in Section V of this agreement. These violations constitute a prior violation under 49 U.S.C. § 5123 if Respondent commits any future violations of the Federal hazardous material transportation law, 49 U.S.C. § 5101 *et seq.*, or the HMR.

D. After Respondent returns this signed Agreement, PHMSA's representative will present the Agreement to the Chief Counsel and request the Chief Counsel to adopt the terms of this Agreement by issuing a Compromise Order (49 C.F.R. § 107.327(a)(1)). The terms of this Agreement constitute an offer of compromise until accepted by the Chief Counsel.

E. After issuance of the Compromise Order, Respondent must pay the civil penalty in accordance with the terms of this Agreement. Upon receipt of Respondent's final payment, the Chief Counsel will close this case with prejudice to the Respondent (49 C.F.R. § 107.327(a)(1)(ii)).

## **VIII. Miscellaneous Provisions**

A. By signing this Agreement, Respondent or its representative warrants to have read the Agreement and understood its terms and conditions.

B. The individuals signing on behalf of the Respondent and PHMSA represent that they are authorized to sign and have authority to enter into this Agreement.

C. Respondent's failure to sign and return this Agreement within thirty (30) days from its receipt will result in the withdrawal of this Agreement and the Chief Counsel

will issue an Order pursuant to 49 C.F.R. §§ 107.317(d) based on all the information in the record of this case.

D. Respondent must return the signed Agreement to:

Frazer C. Hilder  
Office of the Chief Counsel  
Pipeline and Hazardous Materials Safety Administration  
United States Department of Transportation  
1200 New Jersey Avenue, S.E.  
East Building, 2<sup>nd</sup> Floor (PHC-10)  
Washington, D.C. 20590-0001

**Respondent**

Federal Tax ID #: 73-1441533\*

By: [Signature] Date: 10-30-08  
Name  
President  
Capacity or position

**Pipeline and Hazardous Materials Safety Administration**

By: Frazer C. Hilder Date: DEC 3 2008  
Attorney

\* The Taxpayer Identifying Number is required by 31 U.S.C. § 7701(c)(3). PHMSA will use this number for purposes of collecting and reporting on any delinquent amounts arising out of this agreement.

## ***Payment Information***

### **Due date.**

Respondent must pay a total civil penalty of \$19,200. Respondent may pay this civil penalty in six payments of \$3,200 each.

PHMSA acknowledges Respondent's payment of the first \$3,200 installment of the civil penalty installment plan by Respondent's check No. 27164, dated November 19, 2008.

Respondent must pay a further \$3,200 installment within 30 days of the date of this Order and each 30 days thereafter until the total civil penalty has been paid. If Respondent defaults on any payment of this payment schedule, the entire amount of the remaining civil penalty shall, without further notice, become immediately due and payable as of the date that the first installment is due.

### **Payment Method.**

Respondent must pay each installment of the civil penalty by one of the following:  
(1) wire transfer, (2) certified check or money order, or (3) credit card via the Internet.

(1) **Wire Transfer.**

Detailed instructions for sending a wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury are contained in the attachment. Please direct questions concerning wire transfers to:

Financial Operations Division (AMZ-341)  
Federal Aviation Administration  
Mike Monroney Aeronautical Center  
P.O. Box 25082  
Oklahoma City, OK 73125  
Telephone (405) 954-8893

(2) **Check or Money Order.**

Make check or money order payable to "U.S. Department of Transportation"  
(include the Ref. No. of this case on the check or money order) and send to:

Financial Operations Division (AMZ-341)  
Federal Aviation Administration  
Mike Monroney Aeronautical Center  
P.O. Box 25082  
Oklahoma City, OK 73125.

(3) Credit Card.

To pay electronically using a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

Interest and Administrative Charges.

If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late-payment penalty, and administrative charges under 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 49 C.F.R. § 89.23.

The rate of interest is determined under the above authorities. Interest accrues from the date of this Order. A late-payment penalty of six percent (6%) per year applies to any portion of the debt that is more than 90 days past due. The late-payment penalty is calculated from the date Respondent receives the Order.

Treasury Department Collection.

FAA's Financial Operations Division may also refer this debt and associated charges to the U.S. Department of Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Respondent. 31 C.F.R. § 901.3.

Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights prior to an offset. You, as the debtor, have the right to be notified of: (1) the nature and amount of the debt; (2) the agency's intention to collect the debt by offset; (3) the right to inspect and copy the agency records pertaining to the debt; (4) the right to request a review within the agency of the indebtedness and (5) the right to enter into a written agreement with the agency to repay the debt. This Order constitutes written notification of these procedural rights.

**INSTRUCTIONS FOR ELECTRONIC FUNDS TRANSFER TO  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,  
U.S. DEPARTMENT OF TRANSPORTATION**

|  |  |
|--|--|
| 1. <u>RECEIVER'S ABA NO.</u><br>021030004                                  | 2. <u>TYPE SUBTYPE</u><br>(provided by sending bank)   |
| 3. <u>SENDING BANK ARB NO.</u><br>(provided by sending bank)               | 4. <u>SENDING BANK REF NO.</u><br>(provided by sending bank)                                     |
| 5. <u>AMOUNT</u>   | 6. <u>SENDING BANK NAME</u><br>(provided by sending bank)  |
| 7. <u>RECEIVER NAME:</u><br>TREAS NYC                                      | 8. <u>PRODUCT CODE</u> (Normally CTR, or<br>sending bank)  |
| 9. <u>BENEFICIAL (BNF)- AGENCY<br/>LOCATION CODE</u><br>BNF=/AC-69-14-0001 | 10. <u>REASONS FOR PAYMENT</u><br><i>Example: Payment for PHMSA Case No.<br/>(or Ticket No.)</i> |

**INSTRUCTIONS:** You, as sender of the wire transfer, must provide the sending bank with the information for Block (1), (5), (7), (9), and (10). The information provided in blocks (1), (7), and (9) are constant and remain the same for all wire transfers to the Pipeline and Hazardous Materials Safety Administration, Department of Transportation

**Block #1** - RECEIVER ABA NO. - "021030004". Ensure the sending bank enters this nine digit identification number; it represents the routing symbol for the U.S. Treasury at the Federal Reserve Bank in New York.

**Block #5** - AMOUNT - You as the sender provide the amount of the transfer. Please be sure the transfer amount is punctuated with commas and a decimal point.

**EXAMPLE: \$10,000.00**

**Block #7** - RECEIVER NAME- "TREAS NYC." Ensure the sending bank enters this abbreviation, it must be used for all wire transfer to the Treasury Department.

**Block #9** - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/AC-69-14-0001 Ensure the sending bank enters this information. This is the Agency Location Code for the Pipeline and Hazardous Materials Safety Administration, Department of Transportation

**Block #10** - REASON FOR PAYMENT - "AC-Payment for PHMSA Case No." To ensure your wire transfer is credited properly, enter the case number/ticket number or Pipeline Assessment number.

**Note:** - A wire transfer must comply with the format and instructions or the Department cannot accept the wire transfer. You, as the sender, can assist this process by notifying, at the time you send the wire transfer, the General Accounting Division at (405) 954-8893.

## CERTIFICATE OF SERVICE

This is to certify that on DEC - 3 2010 the undersigned served in the following manner the designated copies of this Order with attached addenda to each party listed below:

|  |  |
|--|--|
| Mr. Matthew A. Brainerd<br>President<br>Brainerd Chemical Company, Inc.<br>P.O. Box 470010<br>Tulsa, OK 74147-0010                                   | Original Order<br>Certified Mail                 |
| Mr. Ryan Posten, Director<br>Office of Hazardous Materials Enforcement<br>1200 New Jersey Avenue, S.E.<br>Washington, D.C. 02590-0001                | One Copy<br>Personal Delivery                    |
| Mr. Billy Hines, Chief<br>Hazardous Materials Enforcement Office<br>Southwest Region, PHH-45<br>8701 S. Gessner Road Suite 1110<br>Houston, TX 77074 | One Copy<br>Regular Mail                         |
| Mr. Ted Willke, Associate Administrator<br>for Hazardous Materials Safety<br>1200 New Jersey Avenue, SE<br>Washington, DC 20590                      | One Copy (without enclosures)<br>Electronic Mail |
| Mr. Bob Richard, Deputy Associate<br>Administrator for Hazardous Materials Safety<br>1200 New Jersey Avenue, SE<br>Washington, DC 20590              | One Copy (without enclosures)<br>Electronic Mail |
| Ms. Tonya Schreiber, Executive Director<br>for Hazardous Materials Safety<br>1200 New Jersey Avenue, SE<br>Washington, DC 20590                      | One Copy (without enclosures)<br>Electronic Mail |
| Frazer C. Hilder, Attorney<br>Pipeline and Hazardous Materials<br>Safety Administration<br>1200 New Jersey Avenue, S.E.<br>Washington, DC 20590-0001 | One Copy<br>Personal Delivery                    |



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Willard Walker