

U.S. Department
of Transportation

United States
Coast Guard



COMMANDANT
U. S. Coast Guard

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16616

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

May 25, 2001

RE: MV99002702
[REDACTED],
[REDACTED]
\$25,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia has forwarded the file in Civil Penalty Case MV99002702, which includes your appeal on behalf of [REDACTED], Engineering and Housing ([REDACTED] or [REDACTED]) as shipper of ten containers of hazardous material that were shipped from [REDACTED] to the Port of Salem, New Jersey. The appeal is from the action of the Hearing Officer in assessing a \$58,100.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
49 CFR 172.202	Failure to properly describe hazardous materials on shipping papers	\$ 8,000.00
49 CFR 172.203	Failure to provide additional description information required on shipping papers	Warning
49 CFR 172.204	Failure to provide shipper's certification	\$ 5,000.00
49 CFR 172.201	Failure to properly provide required information for hazardous materials on shipping papers	\$ 5,000.00
49 CFR 172.303	Use of prohibited marking	\$ 3,500.00

49 CFR 172.604	Failure to provide emergency response telephone number on shipping papers	\$ 1,000.00
49 CFR 172.504	Failure to comply with general placarding requirements	\$ 2,100.00
49 CFR 173.24	Failure to comply with the general requirements for packagings and packages	\$ 9,000.00
49 CFR 176.76	Failure to properly secure packages in freight container to prevent any movement during transportation	\$18,000.00
49 CFR 176.83	Failure to comply with segregation requirements	\$ 5,000.00
49 CFR 176.27	Failure to container packing certificate	\$ 1,500.00

The violations were observed on June 9 - 10, 1999, during a container inspection conducted by Coast Guard personnel from Marine Safety Office Philadelphia at the Mid-Atlantic Shipping facility in Port of Salem, New Jersey.

On appeal, you acknowledge that the [REDACTED] does not contest the discrepancies alleged on the Coast Guard Charge Sheet. However, you contend the penalty “is excessive in light of all the relevant facts and circumstances.” You further contend that “important mitigating factors were not appropriately taken into account in the Coast Guard’s decision.” Accordingly, you assert “the charges should be dismissed or, at the least, the penalty should be substantially reduced.” Your appeal is denied, in part, and granted, in part, for the reasons described below.

You assert that “[REDACTED] ([REDACTED] or [REDACTED]) was responsible for the packaging, manifesting, and shipping of” the hazardous waste materials from [REDACTED] to the United States. You further assert that the shipping documents and contents of the containers were identified, containerized, and prepared by [REDACTED]. “The [REDACTED] played no direct role whatsoever with regard to the actual packaging and shipment of the containers” in accordance with the terms of the contract dated April 1, 1998, by and between the [REDACTED] and [REDACTED]. You contend that it was [REDACTED] that, in fact, exercised complete responsibility for the shipment. Therefore, they are the appropriate party responsible for the violations. “[I]t is not appropriate for the Coast Guard to assess a substantial penalty against the [REDACTED] for [REDACTED]’s compliance failures.” I have reviewed the April 1, 1998, contract between the [REDACTED] and [REDACTED] and it appears that

based on the terms of the contract, [REDACTED] contracted with [REDACTED] to package and prepare the [REDACTED]'s hazardous waste material for shipment from [REDACTED] to the United States. [REDACTED] also prepared the shipping papers and the shipper's certification for the containers. Therefore, [REDACTED], as the [REDACTED]'s contractor, acted on behalf of the [REDACTED] to prepare the hazardous material for shipment to the United States. Nevertheless, under 49 CFR 171.2, no person may offer 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 by subchapter C of Title 49 of the Code of Federal Regulations (49 CFR Subchapter C – Hazardous Materials Regulations). Therefore, the [REDACTED], as shipper of the material, remains the appropriate party responsible for ensuring that the hazardous material was properly prepared for shipment in accordance with all the regulations under 49 CFR Subchapter C. As the Hearing Officer explained, the contractual relationship between the [REDACTED] and [REDACTED] does not change the fact that the materials were offered for shipment by the [REDACTED]. However, based on the information and documentation you have provided, I will accept your assertions that “[REDACTED] has made good faith efforts to ensure future compliance.” It has terminated its relationship with [REDACTED] and is in the process of entering into a new waste disposal/recycling contract with another company. Also, it “has retained U.S. legal counsel to review its contract to verify that all necessary measure will be taken to comply with U.S. shipping requirements.” Additionally, as the Hearing Officer determined, I, too, find no merit in the statement that [REDACTED], [REDACTED]'s on site manager, failed to cooperate with the Coast Guard. Instead, I accept your contention that [REDACTED] was “following [REDACTED] protocol, i.e., to inform his superior of the incident before giving any information over the telephone to anyone requesting it, especially when the information pertained to a private Government contract.”

You further assert that the “charges should be treated as ‘first time’ violations.” The September 23, 1999, letter from Chief, Waterways and Waterfront Facilities Branch, MSO Group Philadelphia indicates that a prior case – MV97004481 “was processed against the wrong involved party; however, the case did involve the same shipper.” The record shows that the prior case was against [REDACTED], as the responsible party, and that the Hearing Officer dismissed it because he believed [REDACTED] was not the proper party to be assessed the penalties. Instead, he believed that the [REDACTED], as shipper, was the appropriate party. I will accept your contention that the [REDACTED] had no knowledge of the specifics of the 1997 violation. However, I note that you acknowledge the [REDACTED] was aware the Coast Guard required [REDACTED] to repack a container previously shipped by the [REDACTED]. It is possible that had the [REDACTED] investigated this previous incident more thoroughly, the incident before me now could have been avoided. Nevertheless, I note that the record indicates the [REDACTED] has no history of prior proven violations. Additionally, the rebuttal comments from MST2 [REDACTED], on behalf of the Coast Guard MSO Philadelphia, indicate that the penalty recommended by the MSO was in accordance with the Commandant Instruction 16200.3A for a first offense.

As for your contention that “[t]he cumulation of penalties for the same or similar discrepancies represents an unduly harsh application of the Coast Guard Guidelines,” I disagree. The record shows that ten containers of hazardous material that were shipped had the same or similar deficiencies in each container and on the shipping papers for each container. As noted

previously, under the hazardous materials regulations found in 49 CFR Subchapter C, the hazardous material in **each container** is to be properly classed, described, packaged, marked, labeled, and in condition for shipment in accordance with the applicable requirements issued under this subchapter. Moreover, shipping papers must be properly prepared for **each container** being shipped. Thus, each container being shipped is essentially a separate shipment or “occurrence”. In addition, 49 USC 5123(a)(2) provides that a separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues. In light of the foregoing, your contention that the penalty ranges should apply to a single **occurrence** is correct, but misconstrued. In accordance with the Coast Guard guidelines, the multiple discrepancies could have resulted in far greater penalties than that which were assessed. In fact, I find the repetitive nature of the deficiencies shows a complete disregard for numerous U.S. HAZMAT regulations.

Finally, you contend that in the instant case “[c]onsiderations of comity warrant dismissal of the charges.” I agree that there are many instances in which it is best to resolve issues between nations diplomatically. However, I do not agree with your suggestion that by assessing the instant civil penalty, the Coast Guard is creating an adversarial or distrustful atmosphere between the two countries. Any shipment of HAZMAT to the United States must comply with all applicable U.S. federal regulations. In this case, the [REDACTED] failed to comply with the most basic of hazardous material regulations. Therefore, a civil penalty is warranted.

As to the violations themselves, I have reviewed the copies of the shipping papers contained in the record and do not find them so unreadable to consider them in violation of § 172.201(a)(2). Therefore, the violation and \$5,000.00 penalty for failure to comply with § 172.201(a)(2) are hereby dismissed. Similarly, while I find the use of marine pollutant marking when the commodities were not marine pollutants was a violation of § 172.303, I find the violation less egregious than others and hereby mitigate the penalty to the minimum permitted by statute for a proven violation. Therefore, I have assessed a penalty of \$1,750.00 for the seven violations of § 172.303. With regard to the violation of § 172.203, I note that the Hearing Officer incorrectly assessed a Warning for this violation. Under 49 USC 5123, the minimum penalty that can be assessed for a proven violation is \$250.00. As the record shows the shipping papers failed to provide the additional description requirements, e.g. incorrect reportable quantity information listed in the table at § 172.101, and did not describe the mercury contained in the cargo as a marine pollutant, I must assess at least the minimum penalty permitted by statute for this violation and hereby assess the \$250.00 mandated.

Accordingly, with the exceptions described above, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violations occurred and that the [REDACTED] is the responsible party. As for the penalty assessed by the Hearing Officer for the remaining penalties, I believe further mitigation is warranted in light of the following factors: (1) the [REDACTED] promptly corrected the deficiencies once advised of them; (2) the [REDACTED] has undertaken steps to ensure similar problems do not arise with future shipments; (3) the [REDACTED] relied in good faith on its contractor, [REDACTED], to prepare all the containers of HAZMAT for shipment; and (4) the violations fortunately caused no environmental harm. Based on the information you provided, I also am persuaded the

[REDACTED] is committed to ensuring future compliance with regulations governing the shipment of HAZMAT to the U.S. and hereby mitigate the penalty to \$25,000.00.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$25,000.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 5 % accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

//S//

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, U.S. Coast Guard Hearing Office
Commander, Finance Center
Commanding Officer, MSO/GRU Philadelphia