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TIMOTHY W. WISEMAN twiseman@scopelitis.com

12-1156-TR-CVF

August 9, 2012August 8, 2012

#### SENT VIA FEDERAL EXPRESS

Ohio Public Utilities Commission Att: Docketing Division 180 East Broad Street, 11th Floor Columbus, Ohio 43215-3793

Re:

Neier, Inc.

Case No.: 0191006873C

Dear Sir/Madam:

I enclose Petitioner's Post-Hearing Brief for filing in the above-referenced matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Timothy W. Wiseman

TWW/kkc Enclosure

cc:

Werner L. Margard, III

Richard Neier

This is to certify that the images appearing are an accurate and complete reproduction of a case file 

Indianapolis • Chicago • Washington, D.C. • Los Angeles • Chattanooga • Detroit • Spokane • Dallas/Fort Worth

### **BEFORE**

#### THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Neier, Inc., Notice of ) Case No. 12-1156-TR-CVF Apparent Violation and Intent to Assess ) (0191006873C) Forfeiture.

#### POST-HEARING BRIEF OF PETITIONER

Petitioner, Neier, Inc. ("Neier"), hereby submits its Post-Hearing Brief for consideration by the Hearing Officer of the Public Utilities Commission of Ohio (the "Commission").

### I. STATEMENT OF CASE

This case arises from a roadside vehicle inspection conducted by Trooper Kevin Fleming ("Trooper Fleming") of the Ohio State Highway Patrol, Motor Carrier Enforcement Division, on December 28, 2011 in Lorain, Ohio (the "Roadside Inspection"). After the Roadside Inspection, Trooper Fleming issued Neier's driver, Kasey Kadinger ("Kadinger"), a Driver/Vehicle Examination Report (see Staff Exhibit 1) listing two violations, including a speeding violation by Kadinger and a violation of 49 C.F.R. § 172.502(a)(1) for including a Class 3 Flammable Placard on Neier's 53' box van trailer despite the lack of any Class 3 materials on the vehicle.

Subsequent to the Roadside Inspection, the Commission, on January 5, 2012, issued Neier a Notice of Apparent Violation and Intent to Assess

Forfeiture (the "Notice"), which assessed a civil monetary penalty of \$900.00 for the alleged violation of 49 C.F.R. § 172.502(a)(1). (See Staff Exhibit 4).

Neier timely appealed the Commission's Notice, and a hearing was held on July 10, 2012. At the hearing, Trooper Fleming, Kadinger, and Jonathan Frye, Chief of the Commission's Compliance Division, testified before the Hearing Officer.

### II. STATEMENT OF ISSUE

The single issue in dispute in this case is whether Neier and its driver, Kadinger, violated 49 C.F.R. § 172.502(a)(1) on December 28, 2011. § 172.502(a)(1) states as follows:

**Prohibited Placarding**. Except as provided in Paragraph (b) of this section, no person may affix or display on a packaging, freight container, unit load device, motor vehicle or rail car (1) any placard described in this subpart unless (i) the material being offered or transported is a hazardous material; (ii) the placard represents a hazard of the hazardous material being offered or transported; and (iii) any placarding conforms to the requirements of this subpart.

### III. NEIER'S ARGUMENT ON APPEAL

This case is very simple from Neier's standpoint. If the 53' foot box van trailer being transported by Kadinger and Neier on December 28, 2011 contained a Class 3 flammable material, then no violation of § 172.502(a)(1) occurred. While the Commission may see this as a very minor infraction with a minimal monetary penalty, it is a very important issue to Neier since any hazardous material violation has a significant negative impact on Neier's Safety Measurement System ("SMS") scores with the U.S. Department of

Transportation, Federal Motor Carrier Safety Administration ("FMCSA"). High SMS scores can subject an interstate motor carrier such as Neier to increased enforcement by the FMCSA, loss of business as many shippers do not want to contract with carriers that have high SMS scores, and increased liability insurance costs. Because Neier does not transport a significant amount of hazardous material, even a single hazardous material violation has a significant negative impact on its SMS score with the FMCSA.

The overwhelming weight of evidence presented at last month's hearing establishes that Neier's trailer did contain one pallet of Class 3 flammable paint thinner at the time of the Roadside Inspection on December 28, 2011. The undisputed evidence supportive of Neier includes:

- 1. One of the multiple bills of lading/shipping documents provided to Kadinger by the shipper, Safety-Kleen Systems, Inc., (BOL #846238) clearly showed that the shipment contained thirty-two pails of Class 3 paint-related materials with a total weight of 1,152 pounds. (See attached Bills of Lading as Exhibit 1). Kadinger testified that he had this particular bill of lading in his possession at the time of the Roadside Inspection, but neither him nor Trooper Fleming recognized it since it looked substantially different than the other bills for the other product contained on Neier's trailer.
- 2. Bill of Lading #846238 was signed by Angela French of Safety-Kleen's facility in Kent, Ohio on December 28, 2011, where she acknowledged receipt of all the materials contained in Neier's trailer, including the pallet of Class 3 flammable materials.

- 3. Both Kadinger and Trooper Fleming testified that they were not able to inspect the entire contents of Neier's 53' trailer during the Roadside Inspection because it was packed full of Safety-Kleen product.
- 4. Within two hours after the Roadside Inspection, Kadinger testified that he delivered the full trailer load to Safety-Kleen's facility in Kent, Ohio. At that time, Tom Mathers, the Safety-Kleen's facility manager, unloaded the trailer and showed Kadinger the pallet of Class 3 flammable paint thinner that had been towards the front of the trailer. Mr. Mathers also showed Kadinger Bill of Lading #846238 that had been in Kadinger's possession listing the Class 3 materials in Neier's trailer.
- 5. Kadinger testified that he picked up all of the products on his trailer at Safety-Kleen's facility in Dalton, Illinois on December 27, 2011 and did not add any additional products to his trailers between this loading time, the Roadside Inspection and the delivery of the product to Safety-Kleen's facility in Kent, Ohio on December 28, 2011. Thus, Kadinger testified that the Class 3 flammable product was in his trailer at all times in transit.

It is important to point out the consistency between the testimony of both Trooper Fleming and Kadinger at last month's hearing. Both agreed that they could not locate a bill of lading showing the Class 3 material during the Roadside Inspection, nor could they identify the Class 3 product within the trailer. However, both also testified that the only way they could inspect all of the pallets on the trailers was to empty the trailer, which is impossible on the side of the road. Based upon the information available to Trooper Fleming at

the time of the Roadside Inspection, it was entirely proper for him to site a violation of § 172.502(a)(1) against Neier. However, subsequent to the Roadside Inspection, additional evidence not available to Trooper Fleming at the time, confirmed that the Class 3 material was contained in the inspected trailer. As such, no violation of § 172.502(a)(1) existed at the time of the Roadside Inspection and therefore the Notice should be dismissed in its entirety.

It is also important to point out that the monetary assessment made by the Commission in connection with the Roadside Inspection was clearly incorrect based upon the testimony of Mr. Frye. In his testimony, Mr. Frye indicated that the \$900.00 monetary assessment was based upon the Commission's Civil Forfeiture Violations Chart. According to his testimony, Mr. Frye calculated the fine, not based upon Neier's improper use of a Class 3 flammable placard on the trailer, but for Neier's failure to include a Class 4.1 placard on the trailer. Subsequent to Mr. Frye's testimony, however, both Kadinger and Trooper Fleming confirmed that Neier's trailer did properly include both Class 3 and Class 4.1 hazardous material placards as required by the federal regulations. As such, it was clear from the testimony of Mr. Frye that the Commission incorrectly calculated the monetary penalty in this case based on a violation that did not occur (e.g. failing to display a Class 4.1 placard). Nevertheless, it is Neier's position, which is well documented by the undisputed evidence, that its trailer was properly placarded at the time of the Roadside Inspection and thus no violation of the hazardous material regulations occurred.

# IV. SUMMARY

In sum, based upon the evidence available to the Commission at last month's hearing, Neier, by its counsel, respectfully requests that the Notice and subsequent monetary assessment be dismissed in its entirety and that the Ohio State Highway Patrol amend its records with the FMCSA to remove this particular violation from Neier's SMS Report.

Respectfully submitted,

Timothy W. Wiseman, Attorney for

Petitioner, Neier, Inc.

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served, via U.S. First Class Mail, postage prepaid, to the following counsel of record, this 9<sup>th</sup> day of August, 2012.

Werner L. Margard, III Assistant Attorney General Public Utilities 180 East Broad Street Columbus, Ohio 43215

Timothy W. Wiseman

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY 10 West Market Street, Suite 1500 Indianapolis, Indiana 46204 (317) 637-1777
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*	3. Shipper's Natine and Mailing Address NORTHE PO BOX POTINI MANKTO	RM LABS 850 KURT BOOMEY	WI 542	ž 21			
	4. Shipper's Phone (Some Carlotte Source Sou	6	US EPA IO Number	A. Transporter's F	hone		
	7. TRANSCORP 2 CONDENS NAME BY STEMS, SOFFIN FICON SUSTEMS	isinc itxp	00050130	B. Transporters	581	50	
	SAFETY-KLEEN SYSTEMS.	7408 <sup>10.</sup> INC.	US EPA ID Number	C. Facility's Phone	3		
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	Ņ	BILL OF LADING/MANIFEST  1. Shipper's US EPA ID No. (If Applicable)  7. Page 1  Of	
		3. Shippers Name and Malling Address MILLER ELECTRIC MFG COMPANY 1635 W Spencer St Appleton WI 54914-4911	
, i		4. Shipper's Phone ( 928+735-4538) 5. Transporter 1 Company Name 6. US EPA ID Number A. Transporter's Phone	
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	L	11. Shipping Name and Description 12. Container  HM No. Ty	Total Unit
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Ā	3.	Shippe	n's Name and Mailing Address 13-72	ADWIND TOW	ERS		<del>-1-1.</del>				
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			r's Phone ( 920)-694-55 orier 1 Company Name	31	8. US EPA ID	Number	A. Transp	orter's Pr	iónē		·········
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	8.	Y A Topological Control of the Contr	ated Pacifity Name and Site Address	7408	10. US EPAID	Number	C. Facility	/s Phone		avo	
		370	ETY-KLEEN SYSTEM NO LASRANGE ROAD ITHFIELD KY	s, INC. 40068	KYD#53348	11010		500.	_B∆≈	i-2453	
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*	3	B. Shipper's Name and Mailing Address C. B. RICHARD EL 95 W. ALGONQUIN	LIS	ଦେବର				
	4	ARLINGTON HEID Shipper's Phone ( 847-1871-3883	Atti L.	BANNO.				
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	9.	Designated Facility Name and Site Address 7408 SAFETY-KLEEN SYSTEMS, INC.	10. US EPA ID Number		C. Facility's Phone			
		3700 LAGRANGE ROAD SMITHFIELD KY 40068	KYD053348108	. <u>.</u>			-2453	
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	16	b. NON-REGULATED SHIPPER'S CERTIFICATION:   certify the meter	loss of US DOT regulated (in described above on this form are not safe)	<b>bje</b> ct lyjfode	ral moutations for Tra	aportation	or Disposal.	L.
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11	5. Generator's Name and Mails	ng Address		Ge	ierator's Site Address	(if different in	en mailing addre	es)			<u>~ —</u>	
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		y systems. Inc	,		÷				TXRO	00509	30	
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Replenishment Dlv,	4	501069816	DC	Dolton SP	1 of	1	12/22/2011
SAFETY-KLEEN CORP 1169 INDUSTRIAL PKWY B/u 0885 Sap Plant 7040 Brunswick OH 44212					DC Dolt 13925 C Dolton II	on SP Center Aver L 60419	nue
ORDER AUTHORIZATION:		12	DATE -2711	WEIGHT 128		KIDS	
SHIP DATE			VEH NUM	<del></del>			
RECEIVED BY:	DATE	1	DELIVERY DA	TE			
SPECIAL INSTRUCTIONS:	<u> </u>		J				***************************************
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5825 THINNER, HVY D	TY LAQ 5 GL		32	ea (	1,280	LB	
		*;	Totals		1,280	LB	

Shipping conditions standard

<sup>1)</sup> IMMEDIATELY UPON RECEIPT OF MATERIALS, A GOODS RECEIPT MUST BE PROCESSED 2) ANY EXCEPTIONS TO THIS TRANSFER MUST BE ACKNOWLEDGED BY PHONE IMMEDIATELY