

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of LMD Integrated Logistic : Case No. 14-685-TR-CVF
Services, Inc., Notice of Apparent :
Violation and Intent to Assess Forfeiture :

**POST-HEARING REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**On behalf of the Staff of
The Public Utilities Commission of Ohio**

October 31, 2014

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INTRODUCTION

The Staff's initial brief explained that under the hazardous materials regulations (HMRs), a carrier cannot transport a shipment of ethylene chlorohydrin unless the shipping paper expressly declares that the substance is a "Poison-Inhalation Hazard." LMD Integrated Logistic Services, Inc. (LMD) did not have a shipping paper containing this declaration. LMD's initial brief does not contend otherwise.

What LMD's brief does do, however, is offer a series of unconvincing justifications for why it should be absolved of responsibility for violating a provision of the HMRs that is intended to communicate the risks of harm inherent in the handling of ethylene chlorohydrin. The Commission should reject LMD's position because it is wrong both as a matter of law and policy. LMD's argument mangles the meaning of 49 C.F.R. 171.2(f) and, in so doing, threatens to make first responders and drivers less safe. If a carrier can absolve itself of responsibility simply by pointing the finger at others in the

supply chain, it reduces the incentive for the carrier to make sure that the documents it carries adequately communicate the risks of harm to those that come in contact with hazardous materials.

For the reasons given in Staff's initial brief, and as more thoroughly discussed below, the Commission should uphold the shipping-paper violation.

ARGUMENT

A. LMD violated 49 C.F.R. 177.817(a).

LMD's first argument is perhaps its weakest. It claims it did not violate 49 C.F.R. 177.817(a), which provides that "a person may not accept a hazardous material for transportation or transport a hazardous material by highway unless that person has received a shipping paper prepared in accordance with Part 172 * * * ." As Staff explained in its initial brief, LMD violated this provision because the shipping paper it was carrying did not declare that the shipment of ethylene chlorohydrin it accepted for transport was a "Poison-Inhalation Hazard."

This declaration is required by two provisions from Part 172. First, 49 C.F.R. 172.203(m) requires that when a shipment contains a material that is poisonous by inhalation, the phrase "Poison-Inhalation Hazard" shall be shown on the shipping paper. Second, the hazardous materials table in part 172, along with 49 C.F.R. 172.102(c)(1)(2.), instruct that ethylene chlorohydrin is poisonous by inhalation. Taken together, these pro-

visions from Part 172, coupled together with 49 C.F.R. 177.817(a), unambiguously provide that a person cannot transport a shipment of ethylene chlorohydrin unless the shipping paper expressly states that the substance is a “Poison-Inhalation Hazard.”

LMD’s defense to this is that it did not did prepare the shipping paper; it claims instead that Panalpina prepared the shipping paper. LMD misses the point. Under 49 C.F.R. 177.817(a), the person that prepared the shipping paper is irrelevant. The focal point of 49 C.F.R. 177.817(a) is whether the shipping paper complied with Part 172, not who prepared it. Regardless of which document the Commission ultimately decides to credit as the “real” shipping paper—the LMD-created document, the Panalpina-created document, or both—the undisputed fact is that LMD did not have a shipping paper declaring that the shipment contained a “Poison-Inhalation Hazard.” This constitutes a violation 49 C.F.R. 177.817(a).

B. LMD’s digression into the requirements applicable to offerors does not help the Commission decide this case.

Perhaps in an effort to deflect attention away from its own failure to live up to the requirements imposed by the HMRs, LMD drifts off into a discussion about the requirements that apply to offerors. This unnecessary detour does not help the Commission decide this case. LMD is not an offeror and there is no dispute about this. Thus, whether or not offerors have strict liability under the HMRs is not germane to this controversy. The central questions are whether LMD, acting as a carrier, violated 49 C.F.R.

177.817(a) and whether LMD can invoke 49 C.F.R. 171.2(f) as a defense to this violation. The answer to the first question is “yes” (as explained above) and the answer to the second question is “no” (more on this below).

C. The interpretive letters cited by LMD do not answer the interpretive dispute over what “reasonable” means in the context of 49 C.F.R. 171.2(f).

In the appropriate circumstances, interpretive letters from federal agencies with regulatory oversight over the HMRs can offer the Commission relevant guidance on how to resolve disputes about the meaning of unclear regulatory language. Here, except for one key term (*i.e.*, “reasonable”), the parties largely agree on the meaning of 49 C.F.R. 171.2(f): it permits a carrier to rely on information provided by the offeror if a reasonable person, exercising reasonable care under the circumstances, would have actual or constructive knowledge that the information given by the offeror is incorrect. This provision is, in so many words, couched in the language of a negligence standard.¹

But in spite of the many interpretive letters cited by LMD, none attempt to clarify what the term “reasonable” means in the context of 49 C.F.R. 171.2(f) under this set of

¹ See *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, ¶ 45 (defining negligence as the “failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.”) (quoting *Black’s Law Dictionary* (9th Ed. 2009)).

facts. Undoubtedly, this provision is not a get-out-of-jail-free card for carriers, otherwise there would have been no reason to insert the word “reasonable” into the regulation.²

The question thus turns on what “reasonable” means in the context of 49 C.F.R. 171.2(f). The Commission has been given competing interpretations about what this answer should be. Staff’s approach asks the Commission to take account of the totality of the circumstances, whereas LMD’s blinkered approach erects a virtual shield to carrier liability except in the most egregious of fact patterns. Ultimately, the Commission will have to decide.³ The salient point here is simply that, in contrast to what LMD thinks, the interpretive letters do not supply an answer to the question that lies at the heart of this dispute.

D. Staff proved its case by a preponderance of the evidence.

It takes some cheek to accuse Staff of failing to meet its burden of proof when it was the only party to present testimony from witnesses that actually witnessed the stop of LMD’s vehicle, but LMD has proven itself up to the task.

² See *WCI, Inc. v. Ohio Liquor Control Comm.*, 116 Ohio St.3d 547, 2008-Ohio-88, ¶ 28 (“when language is inserted in a statute it is inserted to accomplish some definite purpose.”).

³ See *Northwestern Ohio Bldg. & Constr. Trade Council v. Bureau of Workers Comp.*, 92 Ohio St.3d 282, 287-289, 750 N.E.2d 130 (2001) (agency’s authority to adopt a regulation necessarily entails the authority to interpret that regulation).

1. Staff proved that LMD violated 49 C.F.R. 177.817(a) by a preponderance of the evidence.

Consider the evidentiary ledger with respect to the charged violation of 49 C.F.R. 177.817(a). On Staff's side is the testimony given by Inspectors Gatesman and Michael. They were the only individuals present during the stop of LMD's vehicle that testified. Their testimony unambiguously shows that LMD could not produce a shipping paper declaring that the shipment of ethylene chlorohydrin was a "Poison-Inhalation Hazard." This constitutes a violation of 49 C.F.R. 177.817(a).

On the other side of the ledger with respect to the charged violation of 49 C.F.R. 177.817(a) is LMD's testimony. LMD's driver did not testify. LMD's shipping clerks did not testify. No one from Panalpina testified nor did anyone else from the supply chain. LMD's CEO testified, but he was not present when the stop occurred. Simply put, Staff comfortably met its burden of showing that LMD violated 49 C.F.R. 177.817(a).

2. LMD has not substantiated its reliance on 49 C.F.R. 171.2(f) with probative evidence.

Staff's affirmative evidentiary burden in this case applies to the shipping-paper violation associated with 49 C.F.R. 177.817(a). Staff met its burden by a preponderance of the evidence. In response to this violation, LMD has raised 49 C.F.R. 171.2(f) as a defense. This bears repeating—LMD has raised this defense, not Staff. Thus, contrary to LMD's errant notion, it is not the Staff's burden to establish a prima facie case with

respect to this defense. Because LMD has raised the defense, LMD needs to supply probative evidence to substantiate the defense.⁴ As is customary in litigation, if a party fails to substantiate its defense, the defense must fail. If the party raising the defense establishes a prima-facie case, it falls to the other party to rebut that defense. Here, LMD has failed to establish a prima-facie case to support its defense. But even if that was not true, Staff has rebutted LMD's prima-facie case.

LMD's prima-facie case would appear to rest almost solely on the testimony of its CEO.⁵ His claim that LMD acted reasonably under the circumstances, however, rests on sheer guesswork. The CEO based this assertion almost exclusively on the actions of others in the supply chain (*i.e.*, Panalpina, Maersk, BASF). But the CEO has no idea what types of internal policies and procedures these companies follow in the course of preparing a shipment of hazardous materials for commercial carriage. And while the CEO may have an idea as to what internal policies and procedures his own employees are supposed to follow, he does not know whether these protocols were in-fact followed because he was not there to observe the shipping clerks' or the driver's actions.

⁴ See 42 Ohio Jurisprudence 3d Evidence and Witnesses, Section 87 (2014) ("As a general rule, the burden of proof in any cause is upon the party asserting the affirmative of an issue as determined by the pleadings or by the nature of the case.").

⁵ Tellingly, the opinions of LMD's so-called "expert" witnesses are barely featured in LMD's initial brief. And for good reason. As established on cross-examination, these witnesses did not have the requisite credentials to educate the Commission about how to decide the issues in this case. Neither witness devotes the primary part of his consulting work to educating the regulated community about how to comply with the HMRs. Tr. at 157-158, 183. Moreover, neither witness is a current member of any organization whose primary purpose is to further the understanding of the HMRs. *Id.*

Against LMD's empty prima-facie case is the testimony of Gatesman and Michael. Coupled together, their testimony shows that a reasonable person under the circumstances would have had actual or constructive knowledge that the shipping paper was incorrect. Gatesman knew virtually "right away" that the shipping paper was incorrect.⁶ As a former driver of hazardous materials shipments, Michael explained that the packing group 1 designation appearing on both the Panalpina-created and LMD-created documents would have placed him on inquiry notice to confirm whether in-fact the shipping paper complied with the HMRs.⁷ Gatesman's and Michael's testimony adequately rebuts LMD's reliance on 49 C.F.R. 171.2(f) as a defense to the shipping-paper violation.

E. LMD's interpretation of 49 C.F.R. 171.2(f) should be rejected.

If accepted, LMD's expansive interpretation of 49 C.F.R. 171.2(f) would dramatically broaden the protective reach of that regulation, reward carriers for maintaining sloppy paperwork, and thwart Staff's ability to pursue shipping-paper violations against those that run afoul of the HMRs. All of this to the detriment of first responders and drivers that rely on shipping papers to apprise themselves of the risks of harm inherent in hazardous-materials shipments.

LMD claims it acted reasonably under the circumstances chiefly by relying on the reputations of others in the supply chain. Because the companies in the supply chain are

⁶ Tr. at 29.

⁷ Tr. at 84.

large, so the argument goes, LMD should be absolved of the shipping-paper violation. This is a poor way to do regulation—the size of a company should not dictate the outcome. Companies of all shapes and sizes make errors—from big ones to small ones.

The language of 49 C.F.R. 171.2(f) does not grant extra protection to carriers doing business with large companies. Surely, small to medium-sized companies would resent the notion that they are somehow less trustworthy than companies with a larger market share. To dispel this false notion pressed by LMD that large companies are all but infallible, one need only hark back to the recent BP oil spill or the Target security breach. These were massive companies, and they made massive mistakes.

LMD also claims it should be excused because its driver was carrying a shipment through what is alleged to be a busy sealand terminal. Accepting this theory would all but grant blanket immunity to carriers for shipping-paper violations. Staff is not unmindful that carriers operate under busy circumstances. Time is money to carriers, and the less time spent during the loading phase means that the shipment will arrive more quickly to the recipient's proverbial doorstep. But the fact that carriers are busy does not excuse a departure from the HMRs. If this defense was an adequate justification to an alleged shipping-paper violation, the carrier would prevail every time.

The better approach to interpreting 49 C.F.R. 171.2(f), an approach that is more faithful to the regulation and the one that is advocated by Staff, is to take account of the totality of the circumstances and ask whether a reasonable person would have had actual or constructive knowledge that the shipping paper is incorrect. Actual knowledge is not required, the lesser showing of constructive knowledge will defeat a defense based on 49

C.F.R. 171.2(f).⁸ Constructive knowledge is defined as “[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person <the court held that the partners had constructive knowledge of the partnership agreement even though none of them had read it>.”⁹ Applying this doctrine here, the Commission can impute constructive knowledge to LMD’s driver (which bears derivatively on LMD’s own liability) of the shipping-paper deficiency. After exercising reasonable diligence, and accounting for the totality of the circumstances, the driver should have known that the phrase “Poison-Inhalation Hazard” was required to be shown on the shipping paper.

The following factors amply support this conclusion:

- The Panalpina-created and LMD-created documents correctly described the chemical as ethylene chlorohydrin and provided the correct UN number. This information alone is enough to enable a reasonably intelligent member of the regulated community to determine that the chemical is poisonous by inhalation. Indeed, LMD concedes that the driver had been trained in the HMRs, so the driver should have been readily able to make this determination.
- The Panalpina-created and LMD-created documents correctly identified ethylene chlorohydrin as a packing group 1 chemical. A reasonably intelligent

⁸ See LMD’s Initial Brief at 11 (citing to federal-agency interpretations that construe “knowledge” as embracing actual and constructive knowledge).

⁹ *Black’s Law Dictionary* (9th Ed. 2009).

- member of the regulated community should know that this classification means that the chemical poses the most serious risks of harm. Inspector Michael, a former hazmat driver, testified that he would never transport a packing group 1 chemical unless he was absolutely sure that the documentation was correct.
- LMD's driver had in his possession the material safety data sheet (MSDS) for ethylene chlorohydrin. Although not a shipping paper, the MSDS identifies ethylene chlorohydrin as a substance that is harmful if inhaled and cautions that inhalation of dusts/mists/vapours should be avoided. It instructs that an affected person should be removed to fresh air, kept calm, and given assisted breathing if necessary. It also recommends that an affected person should seek immediate medical attention. Breathing protection is mandatory in the event of an accidental release. Certainly, at a minimum, this documentation would raise a question in the mind of a reasonable person trained in the HMRs regarding the potentially dangerous nature of the chemical being transported.
 - Inspector Gatesman testified that he knew virtually "right away" that the shipping paper did not comply with the HMRs.

This is not a case where, due to a shipper's misrepresentations, a carrier thought that it was carrying chemical X but it was really carrying chemical Y. In a case like that, it would be fair to permit a carrier to raise a 49 C.F.R. 171.2(f) defense. In that example, chemical X could correctly be described on the face of the shipping paper as a chemical that is regulated under the HMRs, but not subject to the required "Poison-Inhalation Haz-

ard” declaration. If an inspection later determined that the carrier was actually transporting chemical Y rather than chemical X, and chemical Y was required to be described as a “Poison-Inhalation Hazard,” a defense based on 49 C.F.R. 171.2(f) would be justified because no further inquiry based on the information shown on the shipping paper would have told the driver that he was carrying a chemical that was poisonous by inhalation.

But the example just described is not what we have here. The offeror did not misrepresent the state of affairs to LMD. The chemical name was correct, the UN number was correct, and the packing group number was correct. Everything shown on the Panalpina-created and LMD-created documents permitted a reasonably intelligent member of the regulated community to determine that ethylene chlorohydrin was poisonous by inhalation. A quick glance through the HMRs is all it would have taken to figure this out. Couple that with the numerous warnings provided by the MSDS along with Gatesman’s testimony, and it should be evident that LMD’s defense based on 49 C.F.R. 171.2(f) is untenable.

In stretching 49 C.F.R. 171.2(f) beyond its limits, LMD’s argument has the effect of rewarding carriers for maintaining sloppy paperwork. This, in turn, threatens the safety of first responders and drivers because they rely on shipping papers to apprise themselves of the risks of harm inherent in hazardous-materials shipments. This clashes with the purpose of the HMRs, which “is to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate,

interstate, and foreign commerce.”¹⁰ First responders should be able to tell right away what they are dealing with when they show up to contain and remediate the release of a hazardous material. Likewise, a driver should be able to tell right away what risks of harm are posed by a hazardous material in the event of its release during transport.

In short, the Commission should not countenance the approach advocated by LMD, it is bad law as well as bad policy.

CONCLUSION

For the foregoing reasons, the Commission should uphold the shipping-paper violation.

Respectfully submitted,

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49 U.S.C. 5101.

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by email, this 31st day of October, 2014.

/s/ Ryan P. O'Rourke

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