

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of LMD Integrated Logistic)
Services, Inc., Notice of Apparent Violation) Case No. 14-685-TR-CVF
and Intent to Assess Forfeiture.) (OH3233003840C)
)

OPINION AND ORDER

The Commission, considering the applicable law and evidence of the record, and being otherwise fully advised, hereby issues its Opinion and Order in this matter.

APPEARANCES:

Mike DeWine, Ohio Attorney General, by Ryan O'Rourke, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Public Utilities Commission of Ohio.

John Alden, One East Livingston Avenue, Columbus, Ohio 43215, on behalf of LMD Integrated Logistic Services, Inc.

OPINION:

I. Nature of the Proceeding and Background

On January 8, 2014, Inspector Timothy Gatesman with the Ohio State Highway Patrol, Motor Carrier Enforcement (Highway Patrol) inspected a vehicle operated by LMD Intergrated Logistic Services Inc. (LMD, or Respondent), and driven by Jose Guerra, in the state of Ohio. The Highway Patrol found two violations of Title 49 of the Code of Federal Regulations (C.F.R.):

C.F.R. Section	Violation
177.817(A)	Poison inhalation hazard not listed on shipping papers.
177.823(A)	Missing required poison inhalation hazard placards.

Respondent was timely served with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-12. In the NPD, Respondent was notified that Staff intended to assess civil monetary forfeitures totaling \$3,360, or \$1,680 for each violation. A prehearing conference was conducted in this case on May 19, 2014; however,

the parties failed to reach a settlement agreement during the conference. Thereafter, a hearing was held on September 22, 2014. Inspectors Timothy Gatesman and Thomas Michael appeared as witnesses for Staff. Louis Diblosi, Jeffrey Davis, and Lawrence Dannemiller appeared as witnesses on behalf of LMD. At the hearing, Staff indicated that it is no longer pursuing the placard violation. Further, LMD stated that it is not contesting the calculation of the forfeiture amount, which, if found to be a violation, would be \$1,680.

II. Law

Under Ohio Adm.Code 4901:2-5-02(A), the Commission adopted certain provisions of the federal motor carrier safety regulations to govern the transportation of person or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-02(C) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

III. Issue

This case presents a single issue: Is it LMD's responsibility to make sure the shipping papers are correct?

Staff alleges that, when Inspector Gatesman examined the LMD vehicle at a weigh station, it was found to be carrying ethylene chlorohydrin. Staff asserts that, pursuant to 49 C.F.R. 177.817, in conjunction with 49 C.F.R. 172.203(m), a vehicle carrying this chemical is required to have shipping papers noting that the product is a "poison-inhalation hazard" and that the documents LMD provided failed to have this warning.

LMD states that it received the papers in question when it picked up the shipment and reasonably believed that they were properly created by the previous carrier, Panalpina. Because it reasonably relied on the paperwork, pursuant to 49 C.F.R. 171.2(f), LMD believes it is not liable for the alleged violation.

IV. Discussion and Conclusion

Staff's Position

Inspector Timothy Gatesman testified that, on January 8, 2014, he conducted an inspection of a vehicle operated by LMD and driven by Jose Guerra at the weigh station on mile marker 5 of U.S. Route 76 (Tr. at 15). Mr. Gatesman noted that the vehicle contained a sealed shipment and that, because he felt pressure on the doors of the shipping container, he did not physically inspect the actual load (Tr. at 43-45). Mr. Gatesman stated that, as

part of the inspection, he requested the shipping papers from Mr. Guerra. According to Mr. Gatesman, the driver handed him several documents: one document created by LMD, one created by Panalpina, and a material safety data sheet. (Tr. at 20-22.) Mr. Gatesman said that, based on the documents, the shipment originated in the Netherlands, then went to Elizabeth, New Jersey, where it was picked up by LMD (Tr. at 34).

From the shipping documents, per Mr. Gatesman, he was able to ascertain that the vehicle was transporting ethylene chlorohydrin (Tr. at 22-23; Staff Exs. 3D and 3E). Also from those documents, Mr. Gatesman noted he was able to determine that the chemical is in Packing Group 1 and a Class 6.1(3). After consulting the Hazardous Material Regulations book, Mr. Gatesman testified that, based on the chemical's class, he was able to determine that the vehicle's load was an inhalation hazard and that a notification of such a hazard should appear on a carrier's shipping papers. (Tr. at 22-29.) He averred that a "poison inhalation hazard" warning did not appear on any of the documents the driver gave to him (Tr. at 29; Staff Exs. 3D and 3E). The inspector stated that he was able to deduce that the papers were insufficient in under five minutes (Tr. at 29-30). Because Mr. Gatesman was so readily able to conclude that the papers should have such a warning, Staff asserts that it is reasonable that a driver of a commercial motor vehicle should be able to readily ascertain that the documents provided with this shipment required a warning indicating the materials constituted a poison inhalation hazard (Staff Br. at 12).

Inspector Thomas Michael stated that he was training Mr. Gatesman during the inspection and supervised him the entire time (Tr. at 80). Mr. Michael testified that he would consider both the Panalpina document and the LMD document to be the shipping papers, as they both contained descriptions of the load (Tr. at 83-84). However, on cross-examination, he indicated that, if he had to choose which document between the two would more likely be considered a shipping paper, he would choose the document created by Panalpina. He noted that the document created by LMD was based off information on the Panalpina document. Mr. Michael testified that, notwithstanding which document would be considered a shipping document, neither document had the proper poison inhalation warning. (Tr. at 106-110.)

Mr. Michael also noted that, prior to becoming an inspector, he was a carrier for 27 years and often transported hazardous materials. He stated that, as a driver, he received a copy of the hazardous materials regulations as part of his employment, and had the ability to check if his load was a poisonous inhalation hazard. Further, Mr. Michael stated that, if he looked up the load, saw it was a hazard and the shipping papers were incorrect, he would not leave the shipping facility. The inspector opined that, in this particular case, knowing that the shipment was a Packing Level 1 would have caused him to inquire into the load more, and that there was enough information on the LMD and Panalpina papers to allow him to determine, along with the regulatory materials, that the load was a poison inhalation hazard. (Tr. at 84-86.)

Staff averred that it is irrelevant which document was the actual shipping paper, because neither one had the proper warning. Staff contended that, because no one testified from LMD that actually handled any of the shipping documents, it is unknown what review of the papers, if any, took place. The inspectors were the only witnesses who actually reviewed the document and, according to Staff, they demonstrated that a reasonable person, let alone a professional driver, should know that the documents were in violation of the Commission's transportation rules by failing to include the poison inhalation warning. Staff noted that it did not take Inspector Gatesman long to determine that the load was a poison inhalation hazard. Staff believed it is reasonable to expect carriers to make sure the shipping papers are correct. (Staff Br. at 10-13.) The purpose of the notifications, according to both Inspector Gatesman and Inspector Michael, is to give instructions to officers and first responders so they can make all the necessary safety precautions in case of an emergency (Tr. at 18, 44, 87). Here, Staff stated that the driver had the proper information and tools to make that determination, and that it would not have taken him long to check the shipment contents against the appropriate manual, to ensure that the shipment was properly identified with all appropriate warnings. Therefore, because none of the documents had the "poison inhalation hazard" warning, Staff believed that LMD violated the law. (Staff Br. at 13.)

LMD's Position

Louis Diblosi, chief executive officer of LMD, testified that he considers the Panalpina document to be the shipping papers. He also stated that Panalpina is a large global company and is part of a hazardous care program that must meet certain safety requirements. Because of its size and reputation, Mr. Diblosi said his company typically relies on Panalpina's documents. He noted that, on the documents in question, he did not notice anything out of the ordinary. (Tr. at 124-126.) In regards to the LMD document, Mr. Diblosi asserted that it was an internal billing invoice, and not a shipping paper (Tr. at 130). Based on Mr. Diblosi's testimony, as well as Inspector Michael's testimony, LMD believed the shipping papers were created by Panalpina (LMD Br. at 4). Further, LMD contended that the driver reasonably believed those papers were created properly (LMD Br. at 16-17).

LMD maintained that nothing would have indicated to the driver that he was carrying a poison inhalation hazard (LMD Br. at 14). On the safety data sheet, according to Mr. Diblosi, there are several sections, including hazard identification, ingredient composition, first aid measures, fire-fighting measures, handling and storage, and transportation. Mr. Diblosi stated that the only part of the document that a driver would be concerned with is the "transportation" section. (Tr. at 128-130.) Mr. Diblosi testified that LMD's driver acted reasonably. He averred that the driver is responsible for ensuring that the shipping papers match the material safety data sheet and the container. If

everything matches, then he believed the driver acted responsibly and that it is Panalpina's duty to create the paperwork with the proper hazard warnings. (Tr. at 151-152.) LMD noted that the carrier "duly reviewed" the shipping paper (LMD Br. at 18).

Jeffrey Davis, chief safety officer of Fleet Safety Services and a certified director of safety, testified for LMD that he did not believe a reasonable driver would know that ethylene chlorohydrin is a poison inhalation hazard nor know that the shipping papers were unsatisfactory (LMD Ex. 3 at 7). Mr. Davis noted that the shipment had four previous carriers prior to LMD, which would require at least six separate reviews of the paperwork, and, therefore, it is reasonable for LMD's driver to believe that the documents were accurate (LMD Ex. 3 at 4-5). Lawrence Dannemiller, president of Dannemiller Associates, Inc., a trucking safety consulting company, also testifying on behalf of LMD, likewise stated that he did not think a reasonable driver would know that the ethylene chlorohydrin shipment needed a poison inhalation warning on the shipping papers (Tr. at 182). He asserted that a typical driver does not have sufficient training to know the dangers of such loads (Tr. at 201-202). Further, he opined that it would take considerable and burdensome time for the driver, at a busy port, to establish whether the shipping papers were in compliance (Tr. at 208).

LMD opined that the shipping papers were created by Panalpina and that the driver reasonably believed that they were created properly. Because it did not create the shipping papers, and because it was not readily apparent that the shipment was a poison inhalation hazard, LMD believed it did not commit a violation. (LMD Br. at 18.)

Conclusion

The Commission finds, after analyzing the evidence presented at the hearing and reviewing the briefs, that Respondent LMD had a responsibility to ensure that the shipping papers were properly labeled and, because they were not, LMD violated 49 C.F.R. 177.817(A). It is not disputed that the documents provided by LMD at the inspection did not contain the warning of a "poison inhalation hazard" that 49 C.F.R. 177.817(A) necessitates. Based on 49 C.F.R. 171.2(f), though, a carrier may rely on the information in the shipping papers it receives, if that carrier reasonably has no reason to believe that the documents are faulty. Staff contended that it is reasonable to expect a carrier to examine the regulations to determine if the shipping papers and placards are in compliance. LMD believed a carrier should be able to rely on the shipping papers it receives and that it would be too burdensome to expect carriers to verify the loads at every transfer.

In reaching its conclusion, the Commission considered and balanced the associated risks to the community at large that could result from improperly labeled shipments of hazardous materials against the burden placed on the carriers to take the time to check

shipment contents for appropriate warnings. In the end, the risks outweigh the burdens. Here, Inspector Gatesman indicated and demonstrated that it took him less than five minutes to look at the regulations and realize that the shipping papers should have a "poison inhalation hazard" notification. The Commission is cognizant that it may not always be as simple to double check a load's hazards as it was on this case, and that some shipments may have more than one hazardous material. The Commission is also aware that it takes time for a carrier to do this verification, as noted by Mr. Diblosi, Mr. Dannemiller, and Mr. Davis, and, further, that it may be somewhat time consuming, particularly at a busy port. However, both inspectors established that locating a chemical on a list and crosschecking it with a chart in the hazardous materials regulations to confirm whether the labeling is appropriate is not a complicated procedure. Further, it is important for the Commission to consider the purpose of these regulations. As Inspector Michael stated, when arriving at a scene, it is imperative for first responders to know all of the potential dangers of a particular load, especially when appearing on the scene of a hazardous material accident, where time is of the essence. This allows them to protect themselves, others involved, and the surrounding community. In responding to an emergency, responders are not afforded the time to investigate a particular chemical and must react in an expeditious manner. While it may take carriers some additional time to double-check their loads, it is very reasonable to expect them to do their due diligence and ensure all proper warnings are in place. As the maxim goes, it is better to be safe than sorry.

Accordingly, the Commission finds that Staff has met its burden showing that the alleged violation of 49 C.F.R. 177.817(A) occurred. LMD is directed to make payment of the \$1,680 civil forfeiture by check or money order payable to the "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case No. 14-685-TR-CVF and inspection number OH3233003840C should be written on the face of the check or money order. Payment must be made within 30 days of this Opinion and Order. LMD should not be assessed the \$1,680 forfeiture for the alleged violation of 49 C.F.R. 177.823(A), which Staff is not pursuing. That alleged violation should be deleted from the Respondent's Safety-Net record and history of violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On January 8, 2014, the Highway Patrol stopped and inspected a motor vehicle driven and operated by LMD in the state of Ohio. The Highway Patrol found the following C.F.R. violations:

C.F.R. Section	Violation
177.817(A)	Poison inhalation hazard not listed on shipping papers.
177.823(A)	Missing required poison inhalation hazard placards.

- (2) Respondent was timely served with an NPD. In the NPD, Respondent was notified that Staff intended to assess civil monetary forfeitures totaling \$3,360 or \$1,680 for each violation. Staff later decided not to pursue the violation of 49 C.F.R. 177.823(A).
- (3) A prehearing conference was conducted in this case on May 19, 2014; however, the parties failed to reach a settlement agreement during the conference.
- (4) A hearing was held on September 22, 2014.
- (5) Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.
- (6) Based upon the record in this proceeding, sufficient evidence has been presented to conclude that LMD did not have the proper "poison inhalation hazard" warning on the shipping papers. Therefore, Staff has shown, by a preponderance of the evidence, that a violation of 49 C.F.R. 177.817(A) occurred.
- (7) LMD should be assessed the \$1,680 forfeiture for the alleged violation of 48 C.F.R. 177.817(A), but not the \$1,680 forfeiture for the alleged violation of 49 C.F.R. 177.823(A), which Staff is not pursuing. The latter violation should be deleted from the Respondent's Safety-Net record and history of violations.

ORDER:

It is, therefore,

ORDERED, That LMD be assessed a civil forfeiture of \$1,680 for a violation of 49 C.F.R. 177.817(A). It is, further,


ORDERED, That LMD pay the assessed civil forfeiture by check or money order payable to the "Treasurer, State of Ohio" and mail or deliver it to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case No. 14-685-TR-CVF and inspection number OH3233003840C should be written on the face of the check or money order. Payment must be made within 30 days of this Opinion and Order. It is, further,

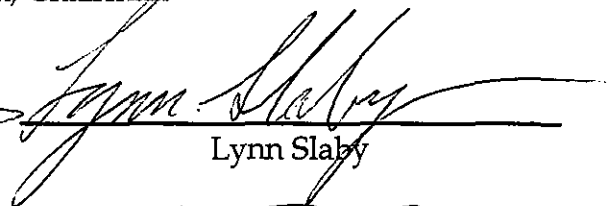
ORDERED, That the alleged violation of 49 C.F.R. 177.823(A) be removed from LMD's Safety-Net record and history of violations. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser


Lynn Slaby


M. Beth Trombold


Asim Z. Haque

NW/vrm

Entered in the Journal

JAN 28 2015



Barcy F. McNeal
Secretary