

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

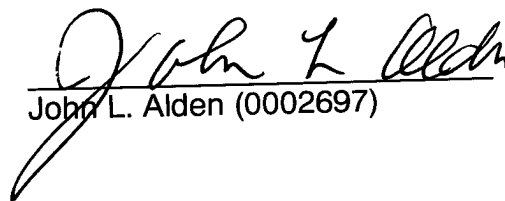
**APPLICATION FOR REHEARING**

Respondent LMD Integrated Logistic Services, Inc. ("LMD"), by counsel and pursuant to ORC Section 4903.10, hereby respectfully submits its Application for Rehearing from the Opinion and Order entered by the Public Utilities Commission of Ohio ("PUCO") on January 28, 2015 ("Order") on the following grounds, the basis of which are more fully explained in the accompanying Memorandum in Support:

1. The PUCO Order is unreasonable in that it failed to consider all of the applicable law.
2. The PUCO Order is unreasonable in that, with respect to the applicable law that it did consider, it incorrectly applied that law to the facts of this case.

Wherefore, LMD respectfully requests that the PUCO grant its Application for Rehearing and, upon further consideration, vacate its Order and dismiss the underlying citation and companion assessment in this civil forfeiture proceeding.

Respectfully submitted,

  
John L. Alden (0002697)

**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 ) (OH3233003840C  
Violation and Intent to Assess Forfeiture.)**

**MEMORANDUM IN SUPPORT**

LMD incorporates by reference as if fully restated herein all pleadings, exhibits, filings, and other entries on the PUCO case docket for this proceeding.

A synopsis of the facts and legal issues in this case is as follows. On January 8, 2014, one of LMD's drivers, Jose Guerra, underwent an inspection of his vehicle at an Ohio weigh station, en route to St. Louis, Missouri, carrying an IMO sealed container HazMat shipment received with shipping papers from offeror Panalpina Inc. at a marine terminal in Elizabeth, New Jersey. Pursuant to the inspection, Mr. Guerra was cited with two violations, one of which was subsequently dismissed as having been erroneously issued; and the remaining violation was contested by LMD in this proceeding, specifically, the alleged failure to comply with 49 CFR §177.817(a). On September 22, 2014, the matter was heard before the PUCO, and the parties entered their respective post-hearing briefs and reply briefs.

LMD put forth the following legal arguments: (1) LMD as a carrier did not violate Section 177.817(a), which is a provision of the HazMat Rules ("HMR") that is expressly dependent upon compliance with 49 CFR Part 172; (2) 49 CFR §172.200(a) imposes **strict** liability on the **offeror** of hazardous materials for transportation; (3) 49 CFR § 171.2(f) allows a **carrier to rely upon** the offeror's

compliance with the HMR, with only one exception; (4) in order for that sole exception to apply to a carrier, proof must be offered of either (i) actual knowledge or (ii) reason to know, in which case a reasonableness test must be used; (5) the Staff put forth no factual evidence that the carrier's conduct fell within the parameters of that exception (i.e., no evidence that the carrier **knew or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge** that the information provided by the offeror was incorrect); (6) the Staff applied both the wrong standard of liability (i.e., offeror liability) and the wrong test (i.e., expert person test) to the carrier; and (7) LMD put forth ample evidence, applying the proper test, that the carrier acted reasonably under the circumstances.

**1. The PUCO failed to consider all of the applicable law.**

The Order presented the following as the "single issue" in this case: "Is it LMD's responsibility to make sure the shipping papers are correct?" [Order p. 2]. The PUCO erred in its rationale, findings, and conclusion in several respects and on several levels.

First, the PUCO found 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)" [Order p. 5]. This conclusion has no basis in applicable law. The PUCO considered the law relating to offerors as equally applicable to carriers, in essence applying strict liability and forming a *res ipsa* case against LMD for a violation by the offeror Panalpina. Having trouble even bringing itself to conclude that the shipping paper was prepared by the

offeror Panalpina,<sup>1</sup> the PUCO nevertheless concluded that LMD bore responsibility for ensuring that Panalpina's shipping paper was correct. The following Staff line of questioning, and Officer Michael's testimony, regarding the shipping paper is particularly revealing:

Q. Inspector Michael, you were asked some questions about Staff Exhibits 5 and 6 by the examiner and also by Mr. Alden, counsel for LMD. **Regardless of who prepared the shipping paper, would you agree that the information needs to be correct, regardless of who is doing the preparing?**

A. **Yes**; because they [LMD] could not have produced this document [Exhibit 6] unless they had this document [Exhibit 5], and **they both match; so therefore, they [LMD] assumed they were both correct.** This one could not have been produced without this one.

Q. Are either of those correct?

A. No, sir.

Q. Why?

A. It's missing the poison by inhalation.<sup>2</sup>

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<sup>1</sup> "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.)" (Order p. 3).

<sup>2</sup> TR at p. 110.

From this, the PUCO in its Order surmised, “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.)” [Order p. 3]. On this basis, the PUCO found that, “because [the shipping papers] were not [properly labeled], LMD violated 49 C.F.R. 177.817(A)” (Order p. 5). This is not the law as applied to carriers.

The Staff’s above question to Officer Michaels was in complete contravention of applicable law. Applicable law **does not** dictate that, regardless of who prepared the shipping paper, a carrier is liable for an incorrect shipping paper violation. Furthermore, contrary to what Officer Michaels’ supposedly damning statement above would suggest, applicable law **does** permit the carrier **to assume** that the shipping paper is correct unless he knows, or **a readily apparent discrepancy** alerts him, otherwise. **The fact that neither document in this proceeding had the poisonous inhalation warning proves LMD’s case, not the Staff’s case.** Were there a discrepancy between the two documents, LMD’s driver would have been on notice that something was wrong.

Second, the Order stated, “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.... **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” [Order pp.5-6]. The PUCO in effect re-wrote the law and formulated its conclusion based on **its** own risks/burdens analysis. The PUCO exceeded the bounds of its authority in so doing. The Order itself acknowledged that the PUCO adopted the federal motor carrier safety regulations as are applicable to transportation or offering for transportation of hazardous materials by motor vehicle (Order p. 2). The PUCO must follow federal law, as written and interpreted by federal authorities, because the PUCO adopted the federal law as its own.<sup>3</sup>

Third, the PUCO found that “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” [Order p. 5]. In so finding, the PUCO misquoted the express provisions of the applicable law. The express language of Section 171.2(f) is not “if” – the word “if” changes the whole tenor and implication of the law. “If” means a condition must be met in order for a carrier to rely. Reliance is not conditional upon some pre-condition; rather, the opposite is true. The express language of Section 171.2(f) is “unless” – that is, a carrier’s reliance is established unless refuted by proof that the carrier has contrary knowledge or a reasonable person, acting in the circumstances and exercising reasonable care, would have contrary knowledge.

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<sup>3</sup> See OAC 4901:2-5-03; 4901:2-5-02.

Fourth, the PUCO incorrectly interpreted, and in fact arguably ignored, ample case law and administrative interpretations of, Section 171.2(f). LMD cited numerous judicial and regulatory authorities in its hearing testimony, post-hearing brief, and reply brief, which provided clear guidance on how to interpret and apply Section 171.2(f), none of which was cited, referenced, or even acknowledged by the PUCO in reaching its conclusion.<sup>4</sup>

## **2. The PUCO incorrectly applied the applicable law to the facts.**

The PUCO in its Order completely ignored legal argument, documentary evidence in the form of Administrator Jim Feddern's remarks,<sup>5</sup> and expert testimony put forth that the wrong test was used to determine whether a reasonable person acting in the circumstances would have been able to make the determination that the shipping paper was not correct. In addition, the highly qualified, specific, on-point, extensively documented expert witness testimony presented by LMD to justify the reasonableness of the driver's reliance on the correctness of the shipping paper was largely ignored by the PUCO in arriving at its conclusion.

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<sup>4</sup> See Federal Register Vol. 70 Issue 144 (July 28, 2005) pp. 43638-43644; Federal Register Vol. 63, Issue 107, 63 Fed. Reg. 30411 (Dep't of Transp. June 4, 1998), pp. 53-54; PHMSA Interpretive Letter No. 10-0192 (October 5, 2010); PHMSA Interpretive Letter No.13-0195 (December 23, 2013); PHMSA Interpretive Letter No. 08-0301R (December 11, 2009); U.S. DOT Interpretive Letter No. 06-0085 (September 11, 2007); U.S. DOT Interpretive Letter No. 08-0137 (February 6, 2009); *Borger v. CSX Transportation, Inc.*, 571 F.3d 559, 2009 US App. LEXIS 14944 (July 8, 2009). See also *Ramos Oil Recyclers, Inc. v. AWIM, Inc.*, 2007 U.S. Dist. LEXIS 62608 (upholding plaintiff's argument that Section 171.2(f) allows a carrier to rely on the offeror's representations instead of bearing the burden of testing the contents of products transported, and finding that the court must determine whether plaintiff had reason to believe the information given by defendant was inaccurate); *In re Empire Airlines, Inc.*, FAA No. 2012-10 (October 11, 2012) (holding that Section 171.2(f) pertains to a carrier's reliance on information, such as that in shipping papers; under the facts of that case, the carrier's pilot was presented with and signed *conflicting* documents and took no action to reconcile the *discrepancy*).

<sup>5</sup> "If our inspector could determine it was wrong the carrier should have been able too"(Exh. K to LMD Exh. 2).

On the contrary, the PUCO considered only certain portions of the testimony and evidence presented at the hearing in order to reach its conclusion. The Order noted no less than four times and thus gave great weight to the inspecting officers' testimony that it did not take long<sup>6</sup> to make a determination, even though that testimony was controverted by the record. For example the inspection report itself indicated that the examination took over an hour<sup>7</sup>; testimony was presented that outside consultations took place<sup>8</sup>; and testimony also was presented, and the Order itself reiterated,<sup>9</sup> that the determination was the result of a multi-step process. In fact, testimony on that process encompasses no less than eight (8) pages of the Hearing Transcript<sup>10</sup> prior to, and in ironic contrast to, Officer Gatesman's statement that he "saw right away it was supposed to say 'poison inhalation hazard,' probably less than five minutes."<sup>11</sup>

The PUCO found noteworthy Officer Michaels' testimony based on his experience as a truck driver.<sup>12</sup> What is more noteworthy is what Officer Michaels

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<sup>6</sup> "The inspector stated that he was able to deduce that the papers were insufficient in under five minutes" (Order p. 3); "Mr. Gatesman was so readily able to conclude...." (Order p. 3) "...it did not take Inspector Gatesman long...." (Order p. 4); "...less than five minutes...." (Order p. 6).

<sup>7</sup> TR at 60-61; Staff Exh. 2.

<sup>8</sup> TR at 93-94.

<sup>9</sup> "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)" (Order p.3).

<sup>10</sup> See TR pp. 22-29.

<sup>11</sup> TR at p. 30.

<sup>12</sup> "Mr. Michael ... 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....**[I]f he**



did not say. He did not say that there was any readily apparent incorrect information on the shipping paper. He did not say that there was any readily apparent discrepancy between the Panalpina paper and the LMD paper. He did not even say that there was any readily apparent *missing* information on the shipping paper. Even if LMD were to concede that Officer Michaels' testimony was properly introduced (which LMD does not, given the fact that he had not been qualified as an expert witness to offer an opinion on the application of a reasonable person standard), that testimony merely consisted of the repetitious statements, "**I would inquire ...to inquire is this correct ....would make me inquire more ....**"<sup>13</sup> A duty to inquire appears nowhere in the text of 49 CFR 171.2(f), nor in any judicial or administrative interpretations of that Section.

### **CONCLUSION**

The Order stated that the PUCO found that "Staff met its burden showing that the alleged violation of 49 C.F.R. 177.817(A) occurred." LMD concedes that the Staff may have met its burden with respect to Panalpina, the offeror, but otherwise utterly failed to make a case as against LMD. While it may take law enforcement some additional time to double-check which party is responsible for a shipping paper violation, it is very reasonable to expect them to do their due diligence and ensure that the law is justly and properly enforced.

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*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.)" (Order p. 3).

<sup>13</sup> The remainder of Transcript pages 84-86 consists of a line of leading questions by the Staff.

Wherefore, the Respondent LMD respectfully requests that the PUCO grant its Application for Rehearing and, upon further consideration, reverse and vacate the Order and enter a decision that the underlying citation and companion assessment in this civil forfeiture proceeding be dismissed and deleted from the Respondent's CSA/SMS data.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John L. Alden", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> day of February, 2015, copies of the foregoing Application for Rehearing were served upon the following parties of record in this proceeding, by electronic mail.

  
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Summary: App for Rehearing electronically filed by Mrs. Erin L Henson on behalf of Alden, John L. Mr. and AldenLaw