

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)

ENTRY ON REHEARING

The Commission finds:

- (1) On January 28, 2015, the Commission issued an Opinion and Order in this case finding that LMD Integrated Logistic Services, Inc. (LMD) did not have the proper poison inhalation hazard warning on the shipping papers, in violation of 49 C.F.R. 177.81(A), and directing LMD to pay a civil forfeiture of \$1,680 within 30 days of the date of the Order.
- (2) Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (3) On February 25, 2015, LMD filed an application for rehearing. In its application, LMD asserts that the Commission's Opinion and Order is unreasonable on two accounts, because it failed to consider all of the applicable law, and incorrectly applied the law to the facts of the case.
- (4) On March 3, 2015, Staff filed a notice in this case indicating that the Commission's fiscal department received a check from LMD for the forfeiture amount of \$1,680. Thus, Staff recommends the case be closed in accordance with Ohio Adm.Code 4901:2-7-22(B), stating that payment terminates all further proceedings. On March 10, 2015, LMD filed a reply to Staff's notice. The Commission notes that, according to Ohio Adm.Code 4901-1-35, the only permissible filing in response to a rehearing application is a memorandum contra; however, the rule does not provide for the filing of a notice by Staff or a reply by LMD. Therefore, the Commission finds that neither Staff's March 3, 2015 filing nor LMD's reply to Staff's filing should be considered, and the Commission will solely consider the application for rehearing.

- (5) On March 18, 2015, the Commission issued an Entry granting rehearing for the limited purpose of affording the Commission additional time to consider the issues in the case.
- (6) LMD's first assignment of error in its application for rehearing asserts the Commission failed to consider all of the applicable law and is based on four rationales.
  - (a) Under the first rationale, LMD claims that the Commission misapplied the law in finding that LMD had a responsibility to ensure the papers were properly labeled. LMD says the insufficient shipping papers were created by the offeror and the Commission's application of the law makes LMD responsible for another party's mistake. LMD asserts that, based on 49 C.F.R. 217(f), it would only be responsible if the error was "readily apparent." LMD believes the Commission's Order creates strict liability on the carrier to make sure the papers are correct.

As to this rationale, the Commission finds no merit. In its argument, LMD is misstating the regulation, as 49 C.F.R. 171.2(f) reads that a carrier may rely on the information it receives "unless the carrier knows or, a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information \* \* \* is incorrect." In the Order, the Commission made a determination about what constitutes reasonable care, stating "it is very reasonable to expect (carriers) to do their due diligence and ensure all proper warnings are in place." The Order rightfully considered what the carrier knew or should have known, had it exercised reasonable care. This does not impose strict liability on the carrier, but rather an expectation to take reasonable safety precautions before embarking on the transport of hazardous materials in commerce.

- (b) Regarding its second argument, LMD states the Commission's Order went outside the scope of the federal regulations by requiring carriers to ensure their loads are labeled correctly. LMD claims that the Commission is formulating law based on its own analysis of risks and burdens.

For this argument, the Commission also finds no merit. The Order did not rewrite the law or exceed the scope of the law, but rather it clarified what is expected of a "reasonable person \* \* \* exercising reasonable care," as the law describes. The regulations are designed to ensure the safe transport of hazardous materials. Further, as noted, the law imparts carriers to use "reasonable care." The Commission does not believe it is unreasonable to expect carriers to exhibit a minimal amount of review in order to ensure the proper safety measures are being made in the transportation of hazardous materials.

- (c) LMD's next basis for error is that the Commission misstated the law by saying "if" instead of "unless" when it summarized 49 C.F.R. 171.2(f) in its conclusion. LMD argues this change alters whether its reliance on the shipping papers was assumed or conditional.

The Commission further finds LMD's semantical "if" argument to be without merit. By analyzing the carrier's responsibility related to its reliance on the information in shipping papers it receives, the Commission noted that LMD had a responsibility to ensure that the shipping papers had the proper descriptions. Because they were not, LMD was found to have violated 49 C.F.R. 77.817(A). The Order found that, had the carrier exercised reasonable care, then it should have known the papers were faulty. While the Order did use the word "if" in analyzing the responsibilities of the carrier, it is a far cry from changing the clear understanding and responsibility of LMD to ensure that shipping

papers include all appropriate warnings for the hazardous materials. The Order did not change the meaning of the law (explicitly or implicitly), under either of LMD's interpretations, and the evidence demonstrated that LMD did not exhibit reasonable care in failing to ensure the proper description of the hazardous materials was on the shipping papers.

- (d) LMD's fourth rationale is that the Order incorrectly interpreted or ignored case law and administrative interpretations presented by LMD regarding 49 C.F.R. 171.2(f).

Towards LMD's fourth argument, the Commission finds no merit. All of the relevant evidence in this case was considered by the Commission in reaching its conclusion. The argument that the Order did not refer to LMD's "numerous judicial and regulatory authorities in its hearing testimony, post-hearing brief, and reply brief," does not mean that the Commission did not consider such materials in reaching its conclusion. As LMD is well aware, briefs are not evidence, but are legal arguments to be considered. The Commission further points out that the cases and interpretations cited by LMD were not analogous to the unique set of facts presented in this case, and, therefore, the weight given to such materials was not as great as the evidence in the record, such as the testimonies of Inspector Michael and Inspector Gatesman.

Therefore, the Commission finds that LMD's first assignment of error, under any of the grounds argued, has no merit.

- (7) In its second assignment of error, LMD argues that the Commission did not consider all of the evidence in the case and that it incorrectly applied the law to the facts of the case. LMD believes the Commission ignored evidence and testimony that it presented and instead relied on challenged testimony from the inspectors. LMD further states that the Order misapplied

the law to the evidence that it did rely on, particularly the testimony of Inspector Michaels.

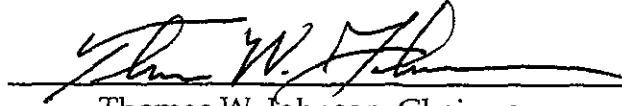
The Commission finds LMD's second assignment of error to be without merit. In regards to the evidence, the Commission points out that the conclusion of the Order states that all evidence was considered and specifically discusses the testimonies of LMD's and Staff's witnesses. While all the evidence was considered, the Commission had to determine what weight to assign to that evidence. The Commission notes that much of the testimony given by LMD witnesses was simply an analysis of the regulations given by representatives of the carrier. However, as set forth in the Order, the Commission was not persuaded by this testimony and does not agree with the analysis of the regulations provided in the testimony. As to Inspector Michaels' testimony, the key portions of his testimony go towards what is considered reasonable care. From his testimony, the Order notes that there was very little time needed to make the determination that the hazardous materials listed on the shipping paper did not include the inhalation hazard, as well as the importance of having the proper descriptions on the shipping papers, particularly for first responders. As discussed above, the carrier is not just responsible for errors that are readily apparent, but errors that are apparent after taking reasonable care.


It is, therefore,

ORDERED, That the application for rehearing filed by LMD be denied. It is, further,

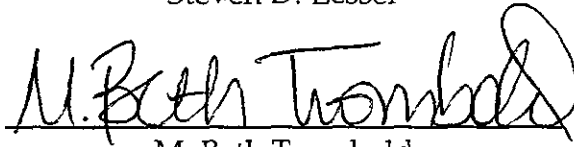
ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Thomas W. Johnson, Chairman

  
Steven D. Lesser

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Lynn Slaby


  
M. Beth Trombold

  
Asim Z. Haque

NW/vrm

Entered in the Journal

**APR 08 2015**

  
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Barcy F. McNeal

Barcy F. McNeal  
Secretary