

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Penalty Assessment Against
MERIDIAN TRANSPORTATION
RESOURCES, LLC d/b/a MTR WESTERN
in the Amount of \$500

DOCKET NO. TE-070767

DECLARATION OF
LEON MACOMBER

I, LEON MACOMBER, under penalty of perjury under the laws of the state of Washington, declare as follows:

1. I am over 18 years of age, a citizen of the United States, a resident of the state of Washington, and competent to be a witness.
2. I am employed by the Washington Utilities and Transportation Commission (Commission) as a Special Investigator in the Motor Carrier Safety Section. I have been employed at the Commission for over 30 years, holding various positions. As a Special Investigator, my responsibilities include conducting investigations regarding the motor carrier safety practices of regulated transportation companies. As part of those duties, I conduct in-depth and complex audits, perform carrier reviews of terminal safety records and equipment, including driver and vehicle safety requirements, and issue safety ratings.
3. On May 23, 2007, Meridian Transportation Resources, LLC d/b/a MTR Western (MTR Western) filed with the Commission a Request for a Hearing (Hearing Request) in Docket No. TE-070767. I have read the Hearing Request.
4. This Hearing Request arises from a Notice of Penalties Incurred and Due for Violations of Laws and Rules issued by the Commission on April 24, 2007, in Docket No. TE-070767. In that Notice, the Commission issued a penalty under RCW 81.04.530 of \$500 for violating WAC 480-30-221, which adopts by reference Title 49, Code of Federal Regulations, Part 382.301(a), using a driver before receiving a negative pre-employment controlled substance test result. RCW 81.04.530 allows penalties of \$500 for every such violation.
5. Before recommending the Commission issue penalties, I, Leon Macomber, as part of my job, conducted a carrier review on March 29 and 30, 2007, of MTR Western's terminal safety records and equipment. See Appendix A for a true and correct copy of the Compliance Review report.
6. During the carrier review, I found the following driver had operated a vehicle, although the company had not received a negative controlled substance test result before allowing him to drive:

Dustin M. Larsh

He was hired on January 2, 2007. Trip dates noted on daily logs indicate that he drove on January 2, 3, and 4, 2007. The date of his negative pre-employment controlled substance test result verification is January 4, 2007.

7. MTR Western admits that Mr. Larsh drove on January 2nd, 3rd, and 4th and that the negative results of his test were not verified until January 4th. In addition, the company admits that it has not received any response to its request for verification from Mr. Larsh's previous employer to document an exception to the pre-employment testing requirement.

Specific Issues Addressed by Meridian Transportation Resources, LLC in its Hearing Request:

- A. When the driver in question drove on January 2, 3, and 4, these trips were all conducted as part of this training and orientation with a company Safety and Training Manager present.**
8. Any type of driving, whether supervised or unsupervised, is a safety-sensitive function. Code of Federal Regulations Title 49, Part 382.301(a), requires that, prior to performing a safety-sensitive function for the first time, a driver must undergo testing for controlled substances. The presence of a safety and training manager does not invalidate or excuse the violation.
- B. It is our belief that the company was not in violation of Part 382.301(a) due to the driver's previous employment as a commercial vehicle operator at Gray Line of Seattle.**
9. Code of Federal Regulations Title 49, Part 382.103(a), states that Part 382 applies to every person and to all employers of such persons who operate commercial motor vehicles in commerce in any state. In addition, 49 C.F.R. § 382.301(a) states that prior to the first time a driver performs safety sensitive functions for an employer, the driver shall undergo testing for controlled substances. The company allowed Mr. Larsh to drive for at least two days before receiving test result verification.
- C. His application clearly indicates that he was subject to FMCSRs and was employed in a designated safety sensitive position up to his last day of work prior to starting at Meridian Transportation Resources, LLC. This designation should have excluded the requirement as listed above, in accordance with Part 382.301(b) (inclusive).**
10. Code of Federal Regulations Title 49, Part 382.301(c)(1), states that an employer who exercises the exception in paragraph (b) must contact the controlled substance testing program in which the driver participated and obtain and retain the following information:

- (i) Name and address of the program.
 - (ii) Verification that the driver participated in the program.
 - (iii) Verification that the program conforms to part 40 of this title.
 - (iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.
 - (v) The date the driver was last tested for controlled substances.
 - (vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.
11. MTR Western failed to meet these requirements before allowing Mr. Larsh to drive. Therefore, the company is not eligible for the exception in Part 382.301(b).
- D. Meridian Transportation Resources, LLC had submitted a request for verification of previous employment and qualification to the driver's previous employer in accordance with Part 382.301(c).**
12. At the time of the carrier review, I found no evidence of the return of the requested information.
13. An employer must produce the required documents at the time of the compliance review for the exception to apply.

Staff Recommendation:

14. The evidence establishes that the violation of 49 C.F.R. § 382.301(a) occurred and that MTR Western does not meet the requirements of the exception to the rule.
15. Staff recommends that the Commission reject MTR Western's arguments and deny any mitigation of the penalty.

DATED this 6th day of June, 2007, at Olympia, Washington.

LEON MACOMBER