

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

DOCKET NO. TE-070767

COMMISSION STAFF'S RESPONSE
TO MTR WESTERN'S MOTION TO
VOID VIOLATION OF
WAC 480-30-221 AND
DISMISS PENALTY

1 Pursuant to WAC 480-07-380, Staff of the Utilities and Transportation Commission
("Commission Staff" or "Staff") submits this Response to the Motion to Void Violation of
WAC 480-30-221 and to Dismiss Penalty in the Amount of \$500 ("Motion to Dismiss")
filed June 18, 2007, by Meridian Transportation Resources, LLC d/b/a MTR Western
("MTR Western").

I. INTRODUCTION

2 On April 24, 2007, the Washington Utilities and Transportation Commission
(Commission) assessed a penalty of \$500 against MTR Western for violating WAC 480-30-
221. This rule requires passenger transportation companies to comply with 49 C.F.R. 382,
which governs controlled substance testing. Specifically, the Commission alleged that MTR
Western allowed a newly hired driver to drive before the company received a negative drug
test result for the driver, an act prohibited by 49 C.F.R. 382.301(a).

3 MTR Western filed a request for hearing and a statement in support of its contention
that a violation did not occur. Staff filed a response on June 7, 2007. Then MTR Western
filed the motion that is the subject of this Response. MTR Western's motion seeks to rebut
facts and reply to arguments set forth in Staff's Response to MTR Western's Request for
Hearing filed with the Commission. This Response to MTR Western's motion clearly sets

forth the known facts as well as the factual gaps relating to MTR Western's factual arguments and addresses the legal arguments the company raises.

II. STATEMENT OF FACTS

4 On March 29 and 30, 2007, Leon Macomber, a special investigator in the Commission's Motor Carrier Safety Section, conducted a terminal safety inspection of MTR Western.¹ MTR Western had hired a new driver, Dustin Larsh, who started work on January 2, 2007.² Mr. Larsh's driver's daily logs indicate that he drove on January 2, January 3, and January 4, 2007.³

5 According to Mr. Larsh's driver log dated January 2, 2007, Mr. Larsh engaged in "Pre Trip" activity between 9:00 a.m. and 9:45 a.m. Then, between 9:45 a.m. and 10:45 a.m., Mr. Larsh drove in Kent, Washington. From 10:45 a.m. to 11:00 a.m., Mr. Larsh engaged in "Post Trip" activity. MTR Western operates a terminal in Kent.⁴ MTR Western asserts that on this day Mr. Larsh drove only in the MTR Western yard in Kent.⁵ At 1:30 p.m., Mr. Larsh submitted a sample for the pre-employment controlled substance test.⁶

6 According to Mr. Larsh's driver log dated January 3, 2007, Mr. Larsh came on duty at 1:00 p.m. in Kent and engaged in Pre Trip activity until 1:15 p.m. Then he drove until 2:30 p.m., at which time he was in Redmond. At 2:45 p.m., he began driving again. At 4:15 p.m., he was in Kent, where he engaged in Post Trip activity until 4:30 p.m. MTR Western characterized this driving as "briefly leav[ing] the MTR Western yard to perform an

¹ Copy of the Declaration of Leon Macomber, June 6, 2007, filed originally on June 7, 2007, in this docket with Staff's Response to MTR Western's Request for Hearing, at ¶ 5.

² *Id.* at ¶ 6.

³ Declaration of Leon Macomber, Appendix A at Exhibit A (driver's logs).

⁴ See Declaration of Leon Macomber, Appendix A, Compliance Review report at Part C, page 1.

⁵ MTR Western's *Motion to Void Violation of WAC 480-30-221 and to Dismiss Penalty in the Amount of \$500*, section I at ¶ 4.

⁶ Declaration of Leon Macomber, Appendix A at Exhibit A (Controlled Substance Test Report); MTR Western's Motion, section I at ¶ 5.

‘assessment’ drive.”⁷

7 According to Mr. Larsh’s driver log dated January 4, 2007, Mr. Larsh engaged in Pre Trip activity between 8:00 and 8:15 a.m. in Kent. Between 8:15 and 10:30 a.m., he drove, and then in Redmond he went off duty until 11:30 a.m. At 11:30 a.m. he began driving again in Redmond and at 12:30 p.m. he ceased driving in Kent. He remained in Kent on duty but not driving for several hours. At 3:30 p.m., he commenced driving, in Kent, and drove until 4:30 p.m. From 4:30 until 4:45 p.m., he engaged in Post Trip activity.

8 On this same day, January 4th, MTR Western received the controlled substance test report for Mr. Larsh indicating a negative result.⁸ The faxed report shows a time of “06:46:27” at the top. This display does not clarify, however, (1) whether the time refers to the morning or the evening, (2) when MTR Western actually knew of the report’s receipt, or (2) if the fax machine even was set to the correct time.

III. ARGUMENT

9 The following argument demonstrates that when Mr. Larsh started his duties with MTR Western before the company had received a negative pre-employment drug test, MTR Western violated WAC 480-30-221, which adopts the federal rules on controlled substance and alcohol testing. The Commission rule, as discussed below, is valid, and MTR Western’s selective interpretation of the federal drug test rules does not render WAC 480-30-221 ambiguous. Finally, the argument below explains that the penalty is appropriate.

A. MR. LARSH’S ACTIVITIES ON AT LEAST TWO OF THE THREE DAYS AT ISSUE CONSTITUTED VIOLATIONS OF APPLICABLE LAW AND REGULATION.

10 The applicable law and regulations are as follows. Motor carriers subject to

⁷ MTR Western’s Motion, section I at ¶ 6.

⁸ Declaration of Leon Macomber, Appendix A at Exhibit A (Controlled Substance Test Report).

Commission jurisdiction must comply with the federal motor carrier safety regulations contained in Title 49 of the Code of Federal Regulations, Part 382. RCW 81.04.530. Part 382 of the federal regulations governs controlled substance and alcohol use and testing. The Commission's rules applicable to passenger transportation companies under its jurisdiction specifically incorporate Part 382.⁹ Pursuant to the federal regulations of Part 382, "[p]rior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances." 49 C.F.R. 382.301(a). In addition, "[n]o employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the employer has received a controlled substances test result...indicating a verified negative test result for that driver." *Id.*

11 The definition of "safety-sensitive function" is "all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work." 49 C.F.R. 382.107. This includes all time at an employer's terminal while the driver is in duty status and waiting to be dispatched. This also includes all time the driver spends inspecting, servicing, or conditioning a commercial motor vehicle. *Id.* In addition, this includes all time spent at the driving controls of a commercial motor vehicle in operation as well as all time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth.

⁹ WAC 480-30-221, which states in part as follows:

Vehicle and driver safety requirements.

(1) Companies must comply with all state and local laws and rules governing licensing, vehicle safety, and driver safety. Companies must also comply with the parts of Title 49, Code of Federal Regulations (49 CFR), adopted by reference, that are shown in the following chart. Information about 49 CFR, including the version adopted by the commission and where to obtain copies is set out in WAC 480-30-999.

[...]

Part 382 -

Controlled Substance and Alcohol Use and Testing

Entire Part 382, including definition of commercial motor vehicle, is adopted and applies to Washington intrastate operations.

Id. A driver is considered to be “performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any safety-sensitive functions.” *Id.*

1. MTR Western Allowed Mr. Larsh to Perform Safety-Sensitive Functions Before Undergoing Testing for Controlled Substances.

12 At 9:15 a.m., when Mr. Larsh started work on January 2nd, he was performing a safety-sensitive function. When he came on duty he became available to perform a safety-sensitive function and he was in readiness to work, circumstances that each fall within the definition of safety-sensitive functions. Whether Mr. Larsh was on the grounds of MTR Western’s terminal or on the public street is immaterial to performing a safety sensitive function. All of the time spent at the controls of the motor vehicle before he undertook the drug test at 1:30 p.m. was time spent performing a safety-sensitive function.

2. MTR Western Allowed Mr. Larsh to Perform Safety-Sensitive Functions Before MTR Western Received a Negative Controlled Substances Test Result.

13 As MTR Western admits, Mr. Larsh drove both on January 3rd and January 4th, and the company did not receive the controlled substances test results until January 4th. It is not clear when on January 4th MTR Western received the controlled substances test results. Consequently, MTR Western failed to comply at the very least on January 3rd and, possibly, also on January 4th, with the requirement that an employer receive a negative pre-employment controlled substances test prior to allowing a driver to perform safety-sensitive functions.

14 MTR Western is incorrect when it asserts that MTR Western can undertake local, intrastate training of a newly hired driver prior to the receipt of test result verification.¹⁰

¹⁰ MTR Western’s Motion, section II.A. at ¶ 7.

MTR Western reasons that because the federal rules apply to employers who operate a commercial motor vehicle “in commerce,” which for purposes of Part 382 refers to interstate, and not to intrastate, trade, traffic, or transportation, Part 382 does not apply so long as a driver does not cross a state line. The broad definition of safety-sensitive functions reveals the fallacy of MTR’s assumptions. In fact, a driver need not actually drive anywhere in order to be performing safety-sensitive functions. Safety-sensitive functions can include simply being in or upon a commercial motor vehicle. An employer’s obligation to comply with Part 382 does not wax and wane depending on the orbit of its drivers. MTR Western is subject to Commission jurisdiction and, therefore, is subject under WAC 480-30-221 to Part 382 of the federal regulations.

15 Under MTR Western’s logic, MTR Western could selectively comply with Part 382 depending on whether the company directed a driver to cross a state line. MTR Western conflates an essentially jurisdictional provision of the federal rules with the rules’ substantive requirements.

B. THE COMMISSION’S RULE, WAC 480-30-221, IS VALID AND UNAMBIGUOUS.

16 MTR Western attacks the validity and interpretability WAC 480-30-221. The law, however, does not support MTR Western’s arguments.

1. The Commission’s Rule, WAC 480-30-221, Is Valid.

17 Under the Administrative Procedure Act at RCW 34.05.570(2)(c), an agency rule will be declared invalid only if the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious. MTR Western, however, has not made any argument on these grounds. Consequently the validity of WAC 480-30-221 is

unchallenged.

18 Furthermore, the portion of the rule at issue here echoes a provision of state law. Under RCW 81.04.530, an “employer operating as a motor carrier shall comply with the requirements of the United States department of transportation federal motor carrier safety regulations contained in Title 49 C.F.R. Part 382, controlled substances and alcohol use and testing.” Because the language at issue in WAC 480-30-221 is identical to the requirement that the Legislature enacted in RCW 81.04.530, the validity of the rule (except perhaps on grounds of procedural problems with the rulemaking) is unassailable.

2. The Commission’s Rule, WAC 480-30-221, Is Not Ambiguous.

19 MTR Western contends that WAC 480-30-221 is confusing at best, and, at worst, uninterpretable and therefore unenforceable.¹¹ A court will apply principles of statutory construction to determine the meaning of statutory language, but only if the language is ambiguous. *State v. Chapman*, 140 Wn.2d 436 (2000). If an administrative rule or regulation is ambiguous, the principles of statutory construction apply to interpreting its meaning. *State v. Cannon*, 147 Wn.2d 41, 57 (2002). A statute is not ambiguous, however, “merely because different interpretations are conceivable.” *State v. Tili*, 139 Wn.2d 107, 115 (1999).

20 WAC 480-30-221 is enforceable and unambiguous. MTR Western complains that WAC 480-30-221 “reads as nothing more than the adoption and incorporation of Code of Federal Regulations Title 49, Part 382.” Actually, WAC 480-30-221 states clearly that companies must “**comply** with the parts of Title 49, Code of Federal Regulations (49 CFR), adopted by reference, that are shown in the following chart” (emphasis added). This requirement constitutes a substantive component, violation of which supports a penalty.

¹¹ See MTR Western’s Motion, section II.A. at ¶ 3.

21 In addition, MTR Western asserts that the Commission’s wholesale adoption of Part 382 creates a conflict with language in the federal rule that limits application of Part 382 to interstate commerce.¹² No such conflict exists. The applicability provision of Part 382 of the federal rules is jurisdictional in nature. The Commission’s adoption of Part 382 in WAC 480-30-221 authorizes the Commission to enforce Part 382 to the extent of the Commission’s jurisdiction, which can be coextensive with federal jurisdiction if a passenger carrier holds both interstate and intrastate authority. Contrary to MTR Western’s assertions, therefore, WAC 480-30-221 is interpretable and enforceable.

22 MTR Western seeks to manufacture ambiguity that does not exist. Simply because MTR Western decides to ignore the Commission’s rule and interpret federal regulations to exempt MTR Western drivers from Part 382 of the federal regulations for driving performed exclusively within Washington State does not render WAC 480-30-221 confusing. It is a well-known principle that ignorance is not an excuse for violating the law. Part 382 defines safety-sensitive functions. According to the definition, Mr. Larsh’s activities on all three days at issue constituted performance of safety-sensitive functions. MTR Western’s logic that Part 382 did not apply to Mr. Larsh’s activities on those days as Mr. Larsh did not drive over any state lines is, at best, strained.

23 Even if WAC 480-30-221 were ambiguous, a court will avoid constructions that render the statutory language absurd. *See Kilian v. Atkinson*, 147 Wn.2d 16, 21 (2002). Furthermore, a court may depart from the literal construction of a statute “when such a construction would produce an absurd and unjust result.” *State v. McDougal*, 120 Wn.2d 334, 351 (1992) (*quoting* 2A N. Singer, *Statutory Construction* § 45.12 (4th ed. 1984)). Such an absurd interpretation, however, is exactly the result that MTR Western apparently seeks.

¹² *See id.*, section II.A. at ¶¶ 1-6.

C. ASSESSMENT OF THE \$500 PENALTY WAS APPROPRIATE.

24 Pursuant to RCW 80.04.530, motor carriers must comply with Part 382 of the federal regulations. If a motor carrier's controlled substance and alcohol testing program is out of compliance with Part 382, the Commission may assess the carrier a penalty of up to \$1,500 and for each driver not in compliance additional penalties of up to \$500 per driver. RCW 81.04.530.

25 MTR Western concludes puzzlingly that because the Commission assessed "the maximum allowable fine, WUTC asserts that all perceived violations of WAC 480-30-221 are equal."¹³ The company proceeds to provide two hypotheticals, one in which a newly hired driver drives a motorcoach full of school-aged children all night and one in which a driver drives a motorcoach that is empty except for a safety and training manager. MTR Western argues that it is bad public policy to penalize the latter case the same as the first. The public policy of this statute, however, includes protecting all of the public, not just particular passengers of particular motorcoaches.¹⁴ To continue with MTR Western's hypothetical, a driver driving an empty motorcoach could just as well cause an accident that involved a school class crossing the street or another vehicle full of school-aged children. In short, assessment of the \$500 penalty supports the purpose of the Commission's safety regulation, which is to keep the public safe, and demonstrates an intolerance, consistent with this purpose, of violations involving drug and alcohol testing.

IV. CONCLUSION

26 Mr. Larsh performed safety-sensitive functions for at least two days before MTR Western received a negative pre-employment controlled substance test result for this new

¹³ MTR Western's Motion, section II.B. at ¶ 1.

¹⁴ RCW 81.04.530 was enacted as part of a traffic safety law and is the only provision of this law that the Commission enforces. *See* Laws of 1999, ch. 351, § 6.

driver. Consequently, MTR Western violated WAC 480-30-221, which adopts the controlled substances testing regulations of the federal rules. Consistent with the goal of keeping the public safe, the \$500 penalty assessed for this violation is appropriate. MTR Western's selective interpretation of the federal rules does not affect the validity or undermine the interpretability of WAC 480-30-221. The arguments that MTR Western advances constitute insufficient grounds under the Administrative Procedure Act to declare the Commission's rule invalid. Accordingly, the violation occurred, and the penalty should stand.

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DATED this 6th day of July, 2007.

Respectfully submitted,

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