

BEFORE THE WAHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Penalty)	DOCKET NO. TE-070767
Assessment against MERIDIAN)	
TRANSPORTATION RESOURCES,)	Administrative Law Judge
LLC, (doing business as MTR WESTERN))	Adam E. Torem
n the Amount of \$500)	
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**REBUTTAL OF STAFF'S RESPONSE TO MTR WESTERN'S
MOTION TO VOID VIOLATION OF WAC 480-30-221 AND TO
DISMISS PENALTY IN THE AMOUNT OF \$500**

A.

*The Commission mistakes MTR Western's argument when it states
"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."*

1. MTR Western does not assert that there is a "conflict" between WAC 480-30-221 and 49 C.F.R. Part 382 owing to the Commission's wholesale adoption of same. On this matter, MTR Western will freely stipulate to the Commission's assertion that 49 C.F.R. Part 382 and WAC 480-30-221 can be coextensive if a passenger carrier holds both interstate and intrastate operating authority, as MTR Western does.

2. The issue MTR Western identifies arises from the Commission's copying of 49 C.F.R. Part 382. In developing WAC 480-30-221, the Commission copied "Entire Part 382"¹ *including the applicability provision that appears at 382.103 and the*

¹ See WAC 480-31-221

definition of commerce that appears at 382.107, without making a single modification, amendment, correction, or interlineation to the text. Consequently, the adopted language contained in WAC 480-30-221 is identical – word for word – to the language of 49 C.F.R. Part 382. So how does one reconcile, MTR Western asks, the fact that 49 C.F.R. Part 382 was written with express intent to regulate interstate activity only, 49 C.F.R. Part 382 being crafted with express intent to exclude the regulation of intrastate activity? In fact, the written word of WAC 480-30-221 (by virtue of the fact that it was copied word for word from 49 C.F.R. Part 382) reads as follows:

*“Sec. 382.103 Applicability. This Part applies to every person and to all employers of such persons who operate a commercial motor vehicle **in commerce** in any State (emphasis added).”*

*“Sec. 382.107 Definitions. Commerce means any trade, traffic, or transportation within the jurisdiction of the United States between a place in a State and a place **outside of such State**, including a place outside of the United States (emphasis added).”*

B.

The Commission errors when it asserts WAC 480-30-221 is unambiguous and enforceable as written.

1. Incredibly, in spite of the conflicted language evidenced above (language that renders WAC 480-30-221 enforceable only in those instances where a driver crosses a state line), the Commission argues that WAC 480-30-221 is valid, unambiguous, and enforceable for intrastate purposes as written without the need or necessity for

interpretation or construction.² Yet, in the making of its argument, the Commission fails to address let alone explain why it believes it is reasonable for it to expect motorcarriers to know that the wording of WAC 480-30-221 means something other than what it says. More importantly, presuming it would be reasonable for a motorcarrier to know that the wording of WAC 480-30-221 means something other than what it says, the Commission fails to articulate specifically how a motorcarrier who knows WAC 480-30-221 means something other than what it says is to determine what WAC 480-30-221 means to say. Evidently, the Commission believes it is reasonable public policy for it to leave motorcarriers to guess at what it means and to subsequently cite and fine those motorcarriers who guess wrong. See State of Washington v. Keller, 143 Wn. 2d 267 (2001) “When applying a statute, a court presumes that the legislature means exactly what it says. Plain words do not require judicial construction; the meaning of a plain and unambiguous statute is derived from the language of the statute itself.” Further, see Whatcom County v. City of Bellingham, 128 Wn. 2d 537 (1996) “Courts construe ambiguous statutes, but enforce clear statutes according to their terms.”

2. It seems the Commission desires to have it both ways: it simultaneously argues that WAC 480-30-221 is unambiguous while at the same time arguing that the plain words contained therein mean something other than what they say. In fact, it must be one or the other – it cannot be both. The statute is either ambiguous and, thus, subject to construction or it is unambiguous and is to be enforced according to its terms. To the extent the Commission argues WAC 480-30-221 is unambiguous, it argues that WAC 480-30-221 does not apply until such time as a driver of a commercial motor vehicle

² See Paragraphs 17, 18 and 19 of Commission Staff’s Response to MTR Western’s Motion

crosses a state line³. To the extent the Commission argues that the definition of commerce contained in 49 C.F.R. Part 382.107, adopted word for word into WAC 430-221, says something other than what the Commission means for it to say, the Commission argues that the definition of commerce is subsequently left undefined in WAC 480-30-221. *See City of Seattle v. State of Washington*, 136 Wn.2d 693 (1998) “a statute is ambiguous if it contains a term undefined by the statute and the meaning of the term is not plain.” *See also Hoberg v. City of Bellevue*, 76 Wn. App. 357, 359-60, 884 P. 2d 1339 (1994) “Although a court will give considerable deference to the construction of an ambiguous statutory provision by the agency charged with its enforcement, it is ultimately for the court to decide the purpose and meaning of the provision.” For these reasons, we argue WAC 480-30-221 is ambiguous and in need of construction by this Court.

4. Thus, the issue before this Court is whether or not MTR Western made a good faith attempt to interpret a flawed and conflicted WAC 480-30-221 and, to the extent the interpretation MTR Western made is deemed to be at odds with the Commission’s interpretation, whether or not it is equitable to cite and fine MTR Western for attempting to reconcile a flawed and conflicted WAC 480-30-221 in good faith absent any intent to violate WAC 480-30-221. On this matter, we assert the citation and fine is inappropriate. *See Friends of the Law v. King County*, 123 Wn. 2d 518 (1994) “In the absence of an ordinance specifying the requirements of a “fully completed” preliminary plat

³ See 49 C.F.R. Parts 382.103 and 382.107, the exact same language being incorporated word for word into WAC 480-30-221.

application, a developer's good faith attempt to comply with the ambiguous terms of existing ordinances may be sufficient to vest the application."

C.

The Commission errors when it asserts that the definition of "Safety Sensitive Functions" contained in 49 C.F.R. Part 382.103 renders 49 C.F.R. applicable to the intrastate training activities of a commercial motor vehicle driver.

1. As background to our assertion that MTR Western attempted to resolve a flawed and conflicted WAC 480-30-221 in good faith, MTR Western asserted in its Motion to Void Violation of WAC 480-30-221 that 49 C.F.R., the federal law after which WAC 480-30-221 is styled, is written such that a motorcarrier can undertake the local, intrastate training of a newly-hired driver prior to the receipt of a test result verification. Further, even though MTR Western's original motion did not articulate such, we additionally assert that the manner in which 49 C.F.R. is written allows MTR Western to interview, screen, orient, and test drive new job applicants prior to hiring absent receipt of a negative drug test result verification. So long as the newly-hired driver (or job applicant) in question does not cross a state line, and until such time as a driver crosses a state line for the first time while under MTR Western's employ, the intrastate activities of a job applicant or a newly-hired driver do not fit within the driving activities articulated in the applicability provision of 49 C.F.R. Part 382.103 and, as such, the terms and conditions of 49 C.F.R. do not apply. This is a critical distinction: *given the manner in which 49 C.F.R. is crafted, a motorcarrier such as MTR Western is afforded a brief initial opportunity to interview, test drive and train new job applicants and recently hired*

drivers prior to the receipt of a negative drug test result verification. This brief initial opportunity is a critical and necessary element to the practical hiring and training operations of a well managed motorcarrier enterprise and it is relied upon by motorcarriers industry-wide.

2. In its response to our Motion to Void Violation of WAC 480-30-221, the Commission wrote *“MTR Western is incorrect when it asserts that it can undertake local, intrastate training of a newly hired driver prior to the receipt of test result verification.”*⁴ On this matter, the Commission seeks to prove its argument that MTR Western is in error by asserting that the broad definition of “safety-sensitive functions” contained in 49 C.F.R. Part 382.107 traps MTR and *“reveals the fallacy of MTR’s assumptions,”* said definition of safety-sensitive functions being *“all time from the time a driver begins 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.”*⁵

3. Strangely, the Commission’s response points to one (and only one) of the definitions contained in 49 C.F.R. Part 382.107 as being supportive of its position that 49 C.F.R. does not limit itself solely and exclusively to interstate driving. By its argument, the Commission contends that the definition of “safety-sensitive functions” contained in 49 C.F.R. Part 382.107 somehow renders 49 C.F.R. applicable to the local, intrastate training of a newly highly driver. But the Commission’s response fails to speak to significant conflicts that appear elsewhere in 49 C.F.R. and render its argument moot. Most notably:

⁴ Paragraph 14 of Commission Staff’s Response to MTR Western’s Motion to Void Violatin

⁵ See 49 CFR Part 382.107, Definitions

*“Sec. 382.103 Applicability. This Part applies to every person and to all employers of such persons who operate a commercial motor vehicle **in commerce** in any State (emphasis added).”*

*“Sec. 382.107 Definitions. Commerce means any trade, traffic, or transportation within the jurisdiction of the United States between a place in a State and a place **outside of such State**, including a place outside of the United States (emphasis added).”*

4. Our argument is based on the intrastate training of a newly-hired driver not falling under the driving activities articulated in the applicability provision of 49 C.F.R., said applicability provision appearing in Sec. 382.103. We contend the applicability provision of a rule, regulation, or statute is the starting point from which disputes are rightfully resolved. The definition of “Safety-Sensitive Functions” serves at the pleasure of the applicability provision that precedes it. Resolving the question as to whether or not the Act itself is applicable to a certain activity is a necessary precursor to determining whether or not language contained elsewhere in the body of the Act is relevant. Such is the very purpose of an applicability provision. Incredibly, the Commission argues that the definition of “safety-sensitive function” contained in 49 C.F.R. Part 382.107 somehow trumps and supercedes the applicability provision that appears earlier. No explanation is given for how or why credence should rightfully be given to a definition contained in the body of an Act that, per its own applicability provision, is deemed inapplicable to the activity in question. Accordingly, we respectfully disagree with the Commission’s conclusion. The intrastate testing and training of a newly hired driver

clearly does not fall under the guise of the activities outlined in the “applicability” provision contained in 49 C.F.R. Part 382.103. As such, 49 C.F.R. is deemed inapplicable to the matter and the definitions contained downstream are irrelevant. Furthermore, given WAC 480-30-221 reads as nothing more than the wholesale adoption of 49 C.F.R. absent the modifications, amendments, deletions, and interlineations that would be necessary for it to successfully and unambiguously redirect it to address intrastate activity, the plain wording of WAC 480-30-221 produces the same result .

D.

***The Commission errors when it asserts that MTR Western
“ignores the Commissions rule.”***

1. With all due deference to the Commission and its counsel, the Commission’s suggestion that MTR Western “ignores” the Commissions rule, or that MTR Western would ignore any regulation rightfully governing its operation, is not well taken. MTR Western is well established in the motorcoach industry as having an unimpeachable safety record and as having an unfaltering commitment to operating at the highest levels. As such, MTR Western submits that such inflammatory language has no place in this proceeding and that such has been inserted solely to pollute the record with groundless accusations in an attempt to distract the focus of this matter away from where it rightfully belongs, namely with the Commission’s adoption of a flawed Act and the reasonableness of the Commission’s enforcement of that Act against an upstanding motorcarrier who attempted to interpret and comply with its writings in good faith.

E.

The Commission errors when it asserts that MTR Western seeks an “absurd interpretation” of WAC 480-30-221. In fact, MTR Western’s interpretation is reasonable. Upon examination, the Commission’s interpretation is the absurd one.

1. In addition to the Commission’s contention that a motorcarrier must be in receipt of a negative controlled substance test result prior to allowing a newly-hired driver to begin safety and training courses, the Commission further asserts that “*a driver need not actually drive anywhere in order to be performing safety-sensitive functions*”⁶ and that “*a safety-sensitive function can include simply being in or upon a commercial motor vehicle.*”⁷ Continuing further, the Commission additionally asserts that “*no 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*” (emphasis added).⁸ By way of this interpretation, the Commission interprets WAC 480-30-221 as requiring that a motorcarrier must add every prospective new job applicant to its company drug testing pool and must drug test job applicants prior to allowing them to be “in or upon” one of the motorcarrier’s commercial motor vehicles – regardless as to whether or not he or she is driving. This interpretation raises breathtaking privacy concerns, raising the requirement of pre-employment drug testing to one of pre-application drug testing. Although we will leave the matter of the legality of a pre-application drug test for another

⁶ See Paragraph 14 of Commission Staff’s Response to MTR Western’s Motion

⁷ See Paragraph 14 of Commission Staff’s Response to MTR Western’s Motion

⁸ See Paragraph 10 of Commission Staff’s Response to MTR Western’s Motion

day, we nevertheless question the constitutional validity of an employer requiring individuals to undergo drug testing as a condition of applying for a position rather than as a condition of employment. See *Robinson v. City of Seattle*, 102 Wn. App. 795 (2000) “Pre-employment urinalysis drug testing constitutes a warrantless search under Const, art. I, § 7,” and “Under Const, art I, § 7, a warrantless search is per se unreasonable and invalid unless the search falls within a recognized judicial exception to the warrant requirement,” and “Neither the fact of widespread societal drug abuse nor the need to detect drug abusers diminishes an individual’s legitimate expectation of privacy of one’s body and bodily functions under Const, art I, § 7 or the degree of intrusion represented by urinalysis drug testing,” and “A warrantless search is not justified merely by an individual’s submission of an application for employment.”

2. In the case of MTR Western, MTR Western hires less than 10% of the drivers who apply for employment. Given this percentage, the Commission’s interpretation of WAC 480-30-221 would result in the requirement that 9 out of every 10 job applicants drug tested by the company would have been required to submit to a urinalysis drug test simply so as to apply for a position for which they were not hired. Once again, we will leave this issue for another court to decide on another day, but suffice to say this issue of a pre-application drug test alone renders MTR Western’s interpretation of WAC 480-30-221, whereby there is a brief opportunity to interview, test drive and train a prospective or newly-hired driver prior to requiring him or her to submit to a drug test, reasonable. Lest we forget, the entire matter before this Court occurred over a period spanning less than 48 hours.

3. We suspect the Commission will attempt to rebut our concerns with drug testing job applicants prior to making the decision to hire and train them by claiming that a driver should not be allowed to be at the wheel of a commercial motor vehicle at any time – *for even a moment* – prior to the motorcarrier receiving a negative controlled substance test result. But such an argument ignores the seriousness Washington courts have previously placed on an individual’s right to privacy of one’s body and bodily functions, a right the Commission has failed to consider, let alone square and reconcile, against its own mission of driver safety.

4. Further, an argument of *not even for a moment* ignores the reality of the drug testing protocol under which commercial motorcarriers operate. In making such an argument, the Commission would attempt to lead this Court to believe that commercial motor vehicle drivers operate under an “airtight” drug testing protocol from the day they apply for employment if they are immediately enrolled in a drug testing consortium. Accordingly, the Commission would attempt to persuade this Court that the likelihood a commercial motor vehicle driver could escape drug use detection is nil. Unfortunately, such is not the reality. The federal drug testing program succeeds largely due to its deterrent capabilities, not its testing capabilities. Drivers are enrolled in a random drug testing pool and know that they could be randomly selected for a drug test at any time. *But the average MTR Western driver is called for a test less than once a year.* As such, commercial motor vehicle drivers operate after being hired for long, extended periods of time absent being tested. Thus, it would be disingenuous for the Commission to assert that it would be an unreasonable jeopardy to public safety for a prospective or newly

hired MTR Western driver to operate in advance of a negative controlled substance test result for a couple of days, particularly in light of the fact the deterrent capabilities of the drug testing protocol are still very much in place given the newly hired driver knows he or she must immediately submit for a urinalysis drug test and, further, given said prospective or newly-hired driver is operating under the direct and constant supervision of an MTR Western safety and training supervisor.

4. Further on this matter, the issue of illicit drug use among charter motorcoach drivers is rare. In fact, MTR Western has never in its operating history received a positive drug test result and knows of no charter motorcoach company that has. As such, given the problem is far from prolific, we reason an interpretation requiring the broad testing of job applicants prior to the making of a decision of employment would be looked upon negatively by the courts and would subject a charter motorcoach company such as MTR Western to civil lawsuits that would be difficult to defend against. Particularly in light of the fact MTR Western would be subjecting large numbers of individuals (approximately 9 people for every 1 hired) to urinalysis drug testing without hiring them. Accordingly, we submit the Commission's interpretation of WAC 480-30-221 is the unreasonable one.

E.

***The Proper Course of Action Would be to Void the Violation and to
Instruct the Commission to Clarify its Ambiguous Rule***

WAC 480-30-221 is ambiguous, and this matter arises out of MTR Western's good faith attempts to make sense of a law that contradicts itself and makes no sense on

its own. There is no evidence to support the Commission's assertion that MTR Western "ignores" the authority of the Commission or that MTR Western intended to violate any of its rules. As such, the proper course of action in this matter would be to void the violation and to instruct the Commission to clarify its ambiguous rule in a manner such that motorcarriers are not subjected to unreasonable liability from civil lawsuits for violating the rights to privacy of job applicants and newly-hired drivers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "F. Darren Berg", is written over a horizontal line.

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