

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Penalty Assessment)	DOCKET TE-070767
Against)	
)	ORDER 01
MERIDIAN TRANSPORTATION)	
RESOURCES, LLC, d/b/a MTR)	
WESTERN,)	INITIAL ORDER MITIGATING
)	PENALTY TO \$200
in the amount of \$500)	
)	
.....)	

- 1 **Penalty.** On April 24, 2007, the Washington Utilities and Transportation Commission (Commission) assessed a penalty in the amount of \$500 against Meridian Transportation Resources, LLC (MTR Western), for one or more violations of WAC 480-30-221, which requires a passenger transportation company to comply with parts of Title 49, Code of Federal Regulation (CFR), including 49 CFR Part 382, which governs controlled substance and alcohol use testing.

- 2 **Hearing Request and Jurisdiction.** RCW 80.04.405 allows the Commission to consider remission or mitigation of penalties “upon written application therefore, received within fifteen days.” On May 4, 2007, MTR Western responded and timely requested a hearing on the matter.

- 3 **Commission Staff Response and Additional Pre-Hearing Filing.** On June 7, 2007, Commission Staff submitted its Response to MTR Western’s request for hearing. On Friday, June 18, 2007, MTR Western filed a Motion to Void Violation and Dismiss Penalty. On July 6, 2007, Commission Staff filed its Response to this Motion. On July 9, 2007, MTR Western submitted a Rebuttal of Staff’s Response.

- 4 **Brief Adjudicative Proceeding.** The Commission scheduled and, upon proper notice to the parties, commenced a brief adjudicative proceeding (BAP) on July 9, 2007, in Olympia, Washington. MTR Western and Commission Staff appeared, presented witness testimony and evidence, and were afforded the opportunity to present oral statements supporting their positions on the penalty assessment.

- 5 Commission Staff made a motion to strike portions of MTR Western's written Rebuttal as well as portions of MTR Western's opening statement. The presiding officer denied this motion, finding the nature of the rebuttal and statement and antagonistic but not necessary to strike.
- 6 The Commission's penalty assessment was issued following a terminal safety inspection at MTR Western's facilities on March 29 and 30, 2007. Leon Macomber, Special Investigator for the Commission's Motor Carrier Safety Section, inspected records pertaining to 31 different drivers and identified a set of driver logs indicating that one newly hired driver was permitted to operate a vehicle prior to MTR Western receiving a negative controlled substance test result. Mr. Macomber noted this as a violation of 49 CFR 382.301(a); however, he did not find any other defects during his inspection. Mr. Macomber proposed an overall safety rating of "satisfactory."
- 7 MTR Western stipulated that its newly hired driver, Dustin Larsh, operated one of the company's commercial motor vehicles on January 2, 2007, and on January 3, 2007. MTR Western noted that the first of these days was only within the company's premises but acknowledged that the second day included driving on the highways of the state of Washington. MTR Western further stipulated that it did not receive the results of a drug test (negative) until the morning of January 4, 2007.
- 8 49 CFR 382.107 defines a "safety-sensitive function" as, among other things, "all time spent at the driving controls of a commercial motor vehicle in operation." No distinction is drawn as to the location of the operation of the motor vehicle.
- 9 49 CFR 382.301(a) prohibits employers from allowing "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."
- 10 On January 2, 2007, and January 3, 2007, MTR Western had not received any documentation from Mr. Larsh's previous employer regarding his participation in a

controlled substances testing program. Therefore, none of the exceptions described in 49 CFR 382.301(b) apply in this case.¹

11 **Applicability of 49 CFR 382.301 to Intrastate Commerce.** MTR Western argued that 49 CFR Part 382 could not be applied to this matter or to any case involving drivers operating commercial motor vehicles only within the state of Washington because 49 CFR 382.107 defines “commerce” as “(1) 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,” creating applicability only to interstate commerce. MTR Western asserted that the Commission’s adoption of 49 CFR Part 382 in its entirety, without simultaneous redefining “commerce” to apply to intrastate commerce, makes the federal regulation inapposite and unenforceable in Washington except as applicable to interstate commercial transportation. In the alternative, MTR Western argued that the driving undertaken by Mr. Larsh prior to receipt of his negative urinalysis screen was not operating “in commerce” and thus exempt.² MTR Western also offered additional arguments in its briefing and at hearing that are not addressed here.

12 These arguments are without merit. First, MTR Western overlooks the second definition of “commerce” contained in 49 CFR 382.107 which further defines the term as “(2) trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.” Thus, an argument might be made that wholly intrastate commerce in the state of Washington could affect other interstate commerce elsewhere in North America. As noted below, this approach is unnecessary here.

13 Second, and perhaps most obvious, WAC 480-30-221 which adopts and requires companies to comply with parts of Title 49 CFR notes that the adoption of the entirety of Part 382 “applies to Washington *intrastate* operations” (emphasis added).

¹ In its original response to Mr. Macomber’s compliance review, MTR Western had asserted that no negative test was required for Mr. Larsh because of his prior employment for another commercial carrier. See MTR Western letter of April 12, 2007 (submitted with its request for hearing). At hearing, however, the company did not reiterate or otherwise emphasize this line of argument.

² In making this argument, MTR Western relied upon 49 CFR 382.103, *Applicability*, which states “This Part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State.”

This regulation adopts all or portions of nine other parts of Title 49 CFR and each time relies on the same phrase to apply the federal regulations to “Washington intrastate operations.” Adoption of a separate definition of “commerce” is simply unnecessary. MTR Western’s interpretation of this WAC provision and the strident arguments made to prevent its effect in this case are mere chicanery and not well taken.

- 14 Following the stipulated facts in this case and a full and complete review of the applicable regulations, the presiding officer concludes that MTR Western violated WAC 480-30-221, and its adoption of 49 CFR 382.301(a). These rules require a company to actually receive a negative pre-employment controlled substance test result prior to allowing a driver to perform safety-sensitive functions. The presiding officer further concludes that MTR Western’s training of the driver remained a safety-sensitive function and was done with the purpose of furthering commercial operations. Thus, any driving permitted prior to receipt of the negative test result was in violation of these rules.
- 15 **Mitigating Circumstances.** MTR Western began operations in 2003. Its first safety inspection resulted in a “conditional” rating in October 2003 and a follow-up inspection upgraded the company to a “satisfactory” rating in November 2003. The company again received a “satisfactory” rating in December 2005. The most recent inspection, from which this case arises, also resulted in a “satisfactory” rating in March 2007. The Commission’s inspector, Leon Macomber, acknowledged that MTR Western’s safety program is “excellent,” that the company’s equipment is “some of the best I’ve seen,” and that the company’s records are well-maintained.
- 16 MTR Western’s compliance record is admirable and it is clearly conscientious and serious about safety. Although RCW 81.04.530 allows a penalty of “up to \$500,” a first violation of this nature merits some relief.
- 17 **Commission Decision.** It is undisputed that MTR Western’s driver, Dustin Larsh, drove a company vehicle prior to MTR Western’s receipt of a negative drug test. Therefore, the company violated WAC 480-30-221 and its adoption of 49 CFR 382.301(a).

18 MTR Western contested the penalty of \$500, zealously seeking a full dismissal of the matter. The Commission considers MTR Western to be represented *pro se* by its owner and CEO, despite having indicated its general counsel was appearing on its behalf.³ Although the Commission rejects MTR Western's legal arguments for mitigation, there are facts supporting mitigation in this case.

19 Under RCW 81.04.530, the Commission is authorized to assess a penalty of up to \$500. However, had the penalty been assessed under RCW 81.04.405, the authorized penalty would have been up to \$100 per occurrence. In this case, Mr. Larsh drove on two separate days prior to MTR Western receiving his negative drug test results. Therefore, the presiding officer concludes that a penalty of \$200 is more appropriate here than the maximum \$500 penalty originally imposed.

ORDER

20 The Commission mitigates the \$500 penalty issued in the original Penalty Assessment. Staff will revise its records to show the amount due from Meridian Transportation Resources, LLC, is \$200 upon service of this Order.

DATED at Olympia, Washington, and effective July 23, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

³ At hearing, MTR Western's representative and "general counsel," F. Darren Berg, clarified for the presiding officer that he had earned a Juris Doctor degree but was not a member of the Washington State Bar Association or of any other state bar association.

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-610(7) provides that any party to this proceeding has twenty-one (21) days after service of this Initial Order to file a *Petition for Review*. What must be included in any *Petition* and other requirements for a *Petition* are stated in WAC 480-07-610(7)(b). WAC 480-07-610(7)(c) states that any party may file a *Response* to a *Petition for Review* within seven (7) days after service of the *Petition*.

RCW 80.01.060(3) and WAC 480-07-610(9) provide that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any *Petition* or *Response* filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and six (6) copies of any *Petition* or *Response* must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250