

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Robin's Interstate Carriers,)
 Inc., Notice of Apparent Violation and) Case No. 08-251-TR-CVF
 Intent to Assess Forfeiture.) (CR08C029)

OPINION AND ORDER

The Commission, considering the public hearing held on June 3, 2008, issues its opinion and order in this matter.

APPEARANCES:

Frank W. Robinson, 1879 Federal Parkway, P.O. Box 72176, Columbus, Ohio 43207, on behalf of Robin's Interstate Carriers, Inc.

Thomas Winters, First Assistant Attorney General of Ohio, by Duane W. Luckey, Section Chief, and Werner L. Margard III and Sarah Parrot, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission.

NATURE OF THE PROCEEDING:

On November 1, 2007, the staff of the Public Utilities Commission of Ohio conducted a compliance review¹ of Robin's Interstate Carriers, Inc. (Robin's Interstate Carriers, respondent, company) at the company's facility in Columbus, Ohio. As a result of the review, staff found the following violations² of the Code of Federal Regulations (C.F.R.):

¹ A compliance review is a regulatory review at the fixed facility of a motor carrier. In a review, staff investigates a motor carrier for record keeping requirements and hazardous materials requirements under the Federal Motor Carrier Safety Regulations and Hazardous Materials Regulations.

² 49 C.F.R. §382.301(a) provides, in pertinent part, that:
 Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used. 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 from the MRO or C/TPA indicating a verified negative test result for that driver.

49 C.F.R. §382.305(b)(1) provides, in pertinent part, that:
 ...the minimum annual percentage rate for random alcohol testing shall be 10 percent of the average number of driver positions.

49 C.F.R. §382.305(b)(2) provides, in pertinent part, that:

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Violation (1), 49 C.F.R. §382.301(a) - Failing to have driver undergo pre-employment controlled substance test (One violation discovered).

Violation (2), 49 C.F.R. §382.305(b)(1) - Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions (One violation discovered).

Violation (3), 49 C.F.R. §382.305(b)(2) - Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions (Two violations discovered).

Violation (4), 49 C.F.R. §382.305(i)(2) - Failing to ensure that each driver selected for random alcohol and controlled substance testing has an equal chance of being selected each time selections are made (Three violations discovered).

Violation (5), 49 C.F.R. §391.51(c) - Failing to keep driver qualification file for at least three years after termination of driver's employment (One violation discovered).

...minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

49 C.F.R. §382.305(i)(2) provides that:

Each driver selected for random alcohol and controlled substances testing under the selection process used, shall have an equal chance of being tested each time selections are made.

49 C.F.R. §391.51(c) provides, in pertinent part, that:

...each driver's qualification file shall be retained for as long as a driver is employed by that motor carrier and for three years thereafter.

49 C.F.R. §396.3(b)(1) provides that:

For vehicles controlled for 30 consecutive days or more, except for a private motor carrier of passengers (non-business), the motor carriers shall maintain, or cause to be maintained, the following record for each vehicle:

An identification of the vehicle including company number, if so marked, make, serial number, year, and tire size. In addition, if the motor vehicle is not owned by the motor carrier, the record shall identify the name of the person furnishing the vehicle.

Violation (6), 49 C.F.R. §396.3(b)(1) - Failing to keep a maintenance record which identifies the vehicle, including make, serial number, year, and tire size (Four violations discovered).

(Staff Exhibit 2)

Respondent was served timely Notices of Apparent Violation and Intent to Assess Forfeiture and Preliminary Determination in accordance with Rules 4901:2-7-07 and 4901:2-7-12, Ohio Administrative Code (O.A.C.), respectively. In these notices, respondent was notified that staff intended to assess a civil monetary forfeiture totaling \$1,300.00 for violation (1), 49 C.F.R. §382.301(a) [§382.301(a)] (\$400.00); violation (2), 49 C.F.R. §382.305(b)(1) [§382.305(b)(1)] (\$400.00); and violation (3), 49 C.F.R. §382.305(b)(2) [§382.305(b)(2)] (\$500.00). No forfeitures were assessed for the remaining three violations, violation (4), 49 C.F.R. §382.305(i)(2) [§382.305(i)(2)]; violation (5), 49 C.F.R. §391.51(c) [§391.51(c)]; and violation (6), 49 C.F.R. §396.3(b)(1) [§396.3(b)(1)]. A prehearing teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, a hearing was convened on June 3, 2008.

ISSUES IN THE CASE:

Staff maintained that respondent committed the violations in this case by failing to have on file at its facility required documents verifying the following: driver pre-employment drug tests, driver alcohol and drug random tests, equal chance of driver selection for testing, and driver qualification and vehicle maintenance records. Frank Robinson, the company's owner and president, testified variously that his company did not get involved in a drug testing program, that he only has full-time, not temporary, drivers tested for drugs, that he did not know if the required random testing had been done, and that drivers' names had not been sent to his testing consortium (Tr. 73, 101, 103, 109, 111, 119-122). Mr. Robinson offered testimony pertaining to violation (1) - failing to have driver undergo pre-employment controlled substance test, §382.301(a); violation (2) - failing to conduct random alcohol testing at the required annual rate, §382.305(b)(1); violation (3) - failing to conduct random controlled substances testing at the required annual rate, §382.305(b)(2); and violation (4) - failing to ensure that each driver is properly selected for random alcohol and controlled substances testing, §382.305(i)(2). He later submitted a post-hearing statement concerning violations (1), (2), and (3). Mr. Robinson did not address or present any evidence relating to the remaining violations, violation (5) - failing to keep driver qualification file for at least three years after termination of driver's employment, §391.51(c); and violation (6) - failing to keep a required vehicle maintenance record, §396.3(b)(1). Therefore, because Mr. Robinson's testimony at hearing and his post-hearing statement related to the first four violations, those violations will be discussed in a subsequent section of this opinion and order. Regarding violations (5), and (6), however,

the Commission believes that, lacking any rebuttal evidence from Mr. Robinson, the compliance review report and the testimony of staff's investigating officer as to the occurrence of those violations are sufficient at this point to establish that respondent committed the violations as charged.

DISCUSSION:

With regard to violation (1) - failing to have driver undergo pre-employment controlled substance test, §382.301(a), Investigator Lancaster testified that for all of a company's drivers, whether employees of the company, temporary drivers from a leasing agency, or owner-operators, the company must have received a negative pre-employment controlled substances test result (Tr. 33-34). Investigator Lancaster stated that she did find pre-employment drug tests in the respondent's records, but not for each driver (Tr. 35). Specifically, she noted that she found no pre-employment drug test for respondent's driver, Roshawn Bryant, and was able to confirm that Mr. Bryant drove for the respondent during the audit period in 2006 (Tr. 38-39, 40-41, 55-56, Staff Exhibit 4).

With regard to violations (2), (3), and (4) - failing to conduct both random alcohol and random controlled substances testing, and failing to ensure that each driver is properly selected for such testing, §382.305(b)(1), §382.305(b)(2), and §382.305(i)(2), respectively, Investigator Lancaster testified that respondent did not accomplish the required random alcohol and drug testing during 2006 (Tr. 43-46). She noted her determination that respondent did have three drivers during the audit period and thus needed to do the required testing (Tr. 55-57).

Inspector Lancaster testified that respondent was enrolled in a consortium that conducted alcohol and drug tests during 2006, but that respondent, who had an obligation to respond, failed to reply to any notices from the consortium that year and update the list of drivers eligible to be tested (Tr. 43- 49, 54, 56, 59). As a result, when drivers were either employed by the respondent, or used through the temporary recruiting agency patronized by the respondent, or left respondent's service, the consortium was never notified. Further, the consortium eliminated the company from its national testing pool for failing to state the number of drivers eligible for testing (Tr. 68, 83-84).

Jonathan Frye, chief of the Commission's Compliance Division, testified that the proposed forfeiture amount of \$1,300.00 is in conformity with the Commission's standard method of calculating forfeitures. Further, Mr. Frye testified that the forfeiture is reasonable (Tr. 93-96).

Mr. Robinson stated that the only people he has tested for drugs are people he is going to hire full-time. He stated that if he hires temporary drivers, utilizing an employment service, he does not need to do, and does not do, a pre-employment test (Tr.

73). Mr. Robinson stated that his company was not in the drug testing program in 2006, because he had only one permanent driver. He noted that as soon as he got two more drivers, he put them in the program in March 2007, and they were in the program when he was inspected by Commission staff in November 2007. He further noted that he was not told that his company was being excluded from the drug testing program, even though he was notified that he had not sent the necessary driver reports to the program (Tr. 101, 103-104).

Mr. Robinson testified that Roshawn Bryant was a temporary driver with the company and that he was never an employee of the company with regard to drug testing. Mr. Robinson stated that the company should not be fined for someone who was never an employee (Tr. 104, 105, 107). Further, Roshawn Bryant drove as a temporary driver through Success Employment (Success), an employment service that maintains a pool of temporary drivers. Mr. Robinson stated that Roshawn Bryant's drug test could not be found during the compliance review, that it was overlooked or accidentally destroyed, and that he obtained a copy of Roshawn Bryant's 2006 drug test from Success about a month after the compliance review. He stated that he requests copies of driver's drug tests and does not hire any driver without the driver's Bureau of Motor Vehicles (BMV) report, drug test, driver's license, medical card, and a second driver's report through his insurance company (Tr. 107-109, Respondent's Exhibit 1).

Mr. Robinson explained that the reason his company did not get involved in a drug testing program was because he used only temporary drivers from Success. Mr. Robinson indicated that if he were to send in a drug testing form for a temporary driver one day, he might have a different driver the next day (Tr. 109-110). He indicated that he would almost have had to send in forms for temporary drivers everyday, so he did not do that and did not keep up with the drug program (Tr. 111). Mr. Robinson testified that he requested test results and BMV records from his temporary service for all his temporary drivers, that he cannot remember using a driver whose records were not sent, and that he tries to keep drivers' records. However, he did not know why Investigator Lancaster was unable to find those records (Tr. 117-118). Lastly, Mr. Robinson testified that he did not know if any of the drivers he used in 2006 received random tests and that, after receiving notices from his testing consortium, he never sent anything back to the consortium in 2006. Mr. Robinson also testified that he did not notify his testing consortium in 2006 that driver Thomas Williams was no longer working for him (119-122).

The Commission notes that 49 C.F.R. §382.107 provides that a driver "includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors." In other words, the temporary drivers used by Mr. Robinson to drive for Robin's Interstate Carriers are defined as drivers under the federal safety rules pertaining to alcohol and drug testing, the same as drivers that are permanently employed. Mr. Robinson thus was expected to

obtain from Success pre-employment test results before using his drivers, temporary or permanent (violation (1)), to do random alcohol and drug testing at the required rates (violations (2) and (3)), and to ensure that all the drivers he used had an equal chance of being selected for alcohol and drug testing (violation (4)).

Mr. Robinson's arguments at hearing and his post-hearing statement tended to confirm violations (1) thru (4) in this case. Specifically, concerning violation (1), failing to have pre-employment testing done, Mr. Robinson argued that, while he did not have a pre-employment test for one of his drivers, Roshawn Bryant, at his facility, that test was obtained from his testing consortium and forwarded to him after the compliance review (Tr. 106, 114, Respondent's Exhibit 1). Yet, §382.301(a) provides 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" (emphasis added). Investigator Lancaster testified that driving is a safety-sensitive function (Tr. 33); and there is no evidence of record that the particular pre-employment test referred to by Mr. Robinson for driver Roshawn Bryant was ever received by Mr. Robinson before Mr. Bryant began driving for Robin's Interstate Carriers.

Furthermore, concerning violations (2), (3) and (4), Mr. Robinson stated that he did not know if any of his drivers were randomly tested for alcohol or drugs in 2006 and that, although he received notices for driver testing from his testing consortium, he did not send any driver's name back to the consortium, nor did he inform the consortium when a driver was no longer working for him (Tr. 118-122). However, §382.305(b)(1), §382.305(b)(2), and §382.305(i)(2) provide that drivers must be tested randomly for alcohol and drugs and must have an equal chance of being selected for those random tests. As with the previously discussed pre-employment testing, there is no evidence of record that Mr. Robinson, through his consortium, did any required random alcohol and drug tests during the 2006 compliance review period. Also because Mr. Robinson did not respond to notices from his testing consortium and state the number of drivers eligible for alcohol or drug testing, his company was excluded from the consortium, and there was no chance that any of his drivers would be selected for testing. Accordingly, in light of the evidence of record that the violations did occur, and Mr. Robinson's testimony and post-hearing statement, the Commission finds that Robin's Interstate Carriers violated §382.301(a), §382.305(b)(1), §382.305(b)(2), and §382.305(i)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On November 1, 2007, the staff of the Public Utilities Commission of Ohio conducted a compliance review of Robin's Interstate Carriers, Inc. at the company's facility in Columbus, Ohio. As a result of the review, staff found the following violations of the Code of Federal Regulations (C.F.R.):

Violation (1), 49 C.F.R. §382.301(a) - Failing to have driver undergo pre-employment controlled substance test (One violation discovered).

Violation (2), 49 C.F.R. §382.305(b)(1) - Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions (One violation discovered).

Violation (3), 49 C.F.R. §382.305(b)(2) - Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions (Two violations discovered).

Violation (4), 49 C.F.R. §382.305(i)(2) - Failing to ensure that each driver selected for random alcohol and controlled substances testing has an equal chance of being selected each time selections are made (Three violations discovered).

Violation (5), 49 C.F.R. §391.51(c) - Failing to keep driver qualification file for at least three years after termination of driver's employment (One violation discovered).

Violation (6), 49 C.F.R. §396.3(b)(1) - Failing to keep a maintenance record which identifies the vehicle, including make, serial number, year, and tire size (Four violations discovered).

- (2) Robin's Interstate Carriers was served timely with a Notices of Apparent Violation and Intent to Assess Forfeiture and a Notice of Preliminary Determination that set forth a civil forfeiture of \$1,300.00 for violations (1), (2), and (3) [49 C.F.R. §382.301(a), 49 C.F.R. §382.305(b)(1), and 49 C.F.R. §382.305(b)(2), respectively]. No forfeiture was assessed for the remaining three violations, (4), (5), and (6) [49 C.F.R. §382.305(i)(2), 49 C.F.R. §391.51(c), and 49 C.F.R. §396.3(b)(1), respectively], that were discovered during the compliance review.
- (3) A hearing in this matter was convened on June 3, 2008.

- (4) Respondent committed the violations in this case by failing to have on file at its facility required documents verifying the following: driver pre-employment alcohol and drug tests, driver alcohol and drug random tests, the equal chance of driver selection for testing, and driver qualification and vehicle maintenance records.
- (5) Pre-employment drug tests were found in the respondent's records, but not for each driver. No pre-employment drug test was found in the respondent's records for driver Roshawn Bryant, who drove for the respondent during the audit period in 2006.
- (6) Respondent did not accomplish the required random alcohol and drug testing during 2006. Respondent did have three drivers during the audit period and thus needed to do the required testing.
- (7) Respondent was enrolled in a consortium that conducted alcohol and drug tests during 2006, but respondent, who had an obligation to respond, failed to reply to any notices from the consortium that year and update the list of drivers eligible to be tested. As a result, the consortium was never notified for testing. Further, the consortium excluded the company from its national testing pool for failing to state the number of drivers eligible for testing.
- (8) The only people Frank Robinson, the company's owner and president, had tested for drugs were people he was going to hire full time. If he hired temporary drivers, utilizing an employment service, he did not do a pre-employment test.

The reason Mr. Robinson's company did not get involved in a drug testing program was because he used only temporary drivers. With temporary drivers, Mr. Robinson would have almost had to send in forms for the drivers everyday, so he did not do that and did not keep up with the drug program.

Mr. Robinson did not know if any of the drivers he used in 2006 received random tests. Lastly, after receiving notices from his testing consortium, he never sent anything back to the consortium in 2006, and he did not notify his testing consortium in 2006 that driver Thomas Williams was no longer working for him.

- (9) Staff presented sufficient evidence to enable the Commission to establish by a preponderance of the evidence that the violations in this case occurred. Moreover, the civil forfeiture is in conformity with the Commission's standard method of calculating forfeitures and is reasonable.
- (10) Mr. Robinson's arguments at hearing and in his post-hearing statement were not sufficient to demonstrate that Robin's Interstate Carriers, Inc. should not be held liable for violating 49 C.F.R. §382.301(a), 49 C.F.R. §382.305(b)(1), 49 C.F.R. §382.305(b)(2), 49 C.F.R. §382.305(i)(2), 49 C.F.R. §391.51(c), and 49 C.F.R. §396.3(b)(1).
- (11) Pursuant to Section 4905.83, Revised Code, Robin's Interstate Carriers, Inc. must pay the State of Ohio the civil forfeiture assessed in this matter. Robin's Interstate Carriers, Inc. shall have 30 days from the date of this order to pay the assessed forfeiture of \$1,300.00.
- (12) Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793.

ORDER:

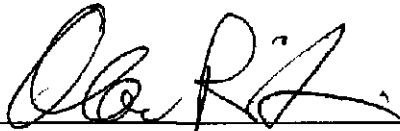
It is, therefore,

ORDERED, That Robin's Interstate Carriers, Inc. pay the civil forfeiture assessed in this matter to the State of Ohio within 30 days, as set forth in Findings of Fact and Conclusions of Law (11) and (12). In order to assure proper credit, Robin's Interstate Carriers, Inc. is directed to write the case number (CR08C029) on the face of the check or money order. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

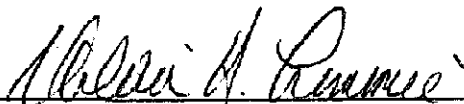


Alan R. Schriber, Chairman

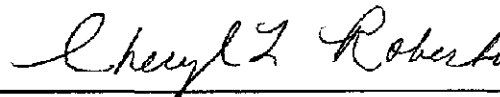


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Renee J. Jenkins
Secretary