

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of DL Winner :  
Livestock Express, Inc. : Case No.  
Notice of Apparent Violation : 17-780-TR-CVF  
and Intent to Assess :  
Forfeiture. :

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PROCEEDINGS

Before Kerry Sheets, Attorney Examiner, held at  
the Public Utilities Commission of Ohio, 180  
East Broad Street, Hearing Room 11-C, Columbus,  
Ohio, on Thursday, August 24, 2017, at 10:00  
A.M.

- - -

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1 APPEARANCES:

2 Mr. John Jones  
3 Assistant Attorney General  
4 30 East Broad Street, 16th Floor  
5 Columbus, Ohio 43215

6 On behalf of the Staff of the  
7 Public Utilities Commission  
8 of Ohio.

9 Mr. Daniel L. Winner  
10 6141 State Route 705  
11 New Weston, Ohio 45348

12 Appearing Pro se.

13 ALSO PRESENT:

14 Mr. Steve Plummer  
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1 Thursday Morning,  
2 August 24, 2017.

3 - - -

4 ATTORNEY EXAMINER: The Public  
5 Utilities Commission of Ohio has set for hearing  
6 at this time and place Case No. 17-780-TR-CVF  
7 being in the Matter of DL Winner Livestock  
8 Express, Inc.

9 My name is Kerry Sheets, I am  
10 Attorney Examiner for the Commission and I have  
11 been assigned to hear this case.

12 I will now have the appearances of  
13 the parties, please, starting with Staff.

14 MR. JONES: Good morning, Your  
15 Honor. On behalf of the Commission's Staff,  
16 Ohio Attorney General Mike DeWine, Assistant  
17 Attorney General John Jones, 30 East Broad  
18 Street, Columbus, Ohio 43215.

19 ATTORNEY EXAMINER: And now  
20 the Respondent. Give your name and address.

21 MR. WINNER: Dan Winner, 6080 State  
22 Route 705, New Weston, Ohio 45348.

23 ATTORNEY EXAMINER: Very good. Are  
24 there any preliminary matters to take care of  
25 this morning?

1 MR. JONES: Yes, Your Honor. I have  
2 been informed by the Respondent that not all the  
3 charges or violations that were cited by the  
4 Staff are being contested in this case, and it's  
5 only a portion of those charges are being  
6 contested here today.

7 And what has been identified, we can  
8 put that on the record as to identifying what  
9 the scope of the hearing is as to what's being  
10 contested. So we just wanted to clarify the  
11 record for that purpose, your Honor.

12 Otherwise the remaining charges,  
13 those are not being contested by the Respondent  
14 is my understanding from communicating with  
15 the Respondent this morning. So, I guess we  
16 could do that now, or --

17 ATTORNEY EXAMINER: Go ahead.

18 MR. JONES: Okay. Thank you, Your  
19 Honor. And I believe that the Respondent also  
20 has a statement that he would like to read to  
21 help identify that scope as well, and then I  
22 will respond after him if that's okay with your  
23 Honor.

24 ATTORNEY EXAMINER: Okay. We need  
25 it on the record. Go ahead.

1                   MR. JONES: Okay. I will let you  
2 follow me then.

3                   MR. PLUMMER: Okay.

4                   MR. JONES: Your Honor, what the  
5 scope of the hearing as to the portions of the  
6 Code of Federal Regulations that are being  
7 challenged here today as was presented in the  
8 compliance review that was conducted on DL  
9 Winner Livestock Express, Inc. would be Code of  
10 Federal regulations 382.305 (B) (1).

11                   And the second one would be Code of  
12 Federal Regulations 382.30 (B) (2). Let me say  
13 that correctly. 382.305 (B) (2).

14                   The third one would be Code of  
15 Federal Regulations 382.303 (a).

16                   And the 4th one would be Code of  
17 Federal Regulations 382.303 (b).

18                   And now the remaining citations are  
19 not being contested here today. Those would be  
20 CFR 382.303 (d) (1). 382.303 (d) (2). CFR  
21 382.305 (i) (2). 395.8 (e) of the CFR.

22 And 395.8 (f). And I believe that I would  
23 repeat that. That's 385.8. There are two  
24 charges for that I believe.

25                   And so those are the remaining

1 charges, Your Honor, that are not being  
2 contested here today.

3 I am sorry, I believe there was one  
4 other one. 395 --

5 ATTORNEY EXAMINER: Those are the  
6 ones they were fined?

7 MR. JONES: The last that I read  
8 into the record are the ones that are not being  
9 contested here today. And I did want to clarify  
10 when I cited the CFR 395.8 (E) there is two  
11 violations for that code section.

12 And I will let the other side, I  
13 believe they want to respond to help clarify  
14 that scope.

15 ATTORNEY EXAMINER: Okay. I will  
16 ask the Respondent, is that correct what he  
17 said? You agree with what he said about the --

18 MR. PLUMMER: Yes.

19 ATTORNEY EXAMINER: Okay. We will  
20 proceed.

21 MR. PLUMMER: I have kind of  
22 listed --

23 ATTORNEY EXAMINER: I am sorry.  
24 You are going to have to speak up.

25 MR. PLUMMER: I have a list here of



1     what we are contesting kind of like an opening  
2     statement from our side.

3             ATTORNEY EXAMINER:   We will cover  
4     that in your testimony.  You can hold off on  
5     that.

6             MR. PLUMMER:   Okay.

7             ATTORNEY EXAMINER:   Okay.  Do you  
8     have a witness to present?

9             MR. JONES:   Yes, Your Honor.  Staff  
10    would call Bob Barrett to the stand.

11            (WITNESS SWORN)

12                           - - -

13                   ROBERT BARRETT  
14    called as a witness, being first duly sworn,  
15    testified as follows:

16            ATTORNEY EXAMINER:   Be seated.

17                   DIRECT EXAMINATION

18    By Mr. Jones:

19            Q.    Would you please state your name for  
20    the record, please?

21            A.    My name is Robert J.  Barrett.    I  
22    go by Bob.

23            Q.    And where are you employed?

24            A.    I am employed with the Public  
25    Utilities Commission of Ohio, Transportation

1 Enforcement Division. And I work out of the  
2 western Ohio field office stationed in  
3 Wapakoneta, Ohio.

4 Q. How long have you been so employed?

5 A. December will be 17 years.

6 Q. And what are your job duties and  
7 responsibilities?

8 A. I am a hazmat specialist with the  
9 Transportation Enforcement Division, and I  
10 conduct roadside inspections, I conduct new  
11 entrants safety audits, compliance reviews,  
12 respond to hazmat incidents, and spills, and we  
13 do public outreach presentations.

14 Q. Okay. And what is your  
15 jurisdiction?

16 A. The State of Ohio. I really don't  
17 have any assigned territory or county within the  
18 State of Ohio.

19 Q. And what is your training, your  
20 qualifications for your position?

21 A. I have maintained all of the  
22 required training and certification to conduct  
23 the compliance reviews, conduct new entrants  
24 safety audits, to conduct driver vehicle  
25 inspections. And there are various levels of

1 driver vehicle inspections. But I have  
2 maintained all of those since my initial  
3 employment through the current date.

4 Q. So did you attend any academies or  
5 anything to --

6 A. My compliance review training was  
7 two weeks in Austin, Texas provided through the  
8 of FMCSA and the Texas Department of Public  
9 Safety. I attended hazmat training in  
10 Massachusetts with the Massachusetts State  
11 Police, Level 6 radioactive training in Illinois  
12 with the Illinois State Police.

13 And then we have had, like I said,  
14 some recurrent training that has been conducted  
15 here locally at the state level.

16 Q. And what equipment is provided to  
17 you to help you do your job?

18 A. I have a marked State of Ohio  
19 vehicle with a light bar and state markings on  
20 it. Issued electronic equipped laptop, camera,  
21 scanner, printer, uniform to identify us as who  
22 we work for.

23 Q. And did you have occasion then to do  
24 a compliance review of the company named DL  
25 Winner Livestock Express, Inc?

1 A. Yes.

2 Q. And I have what's before you there  
3 as Staff Exhibit 1. Could you identify that?  
4 Is there any records there?

5 A. No.

6 MR. JONES: Excuse me, your Honor.  
7 May I approach the witness?

8 ATTORNEY EXAMINER: Yes, you may.

9 Q. Now, I have handed you what's been  
10 marked as Staff Exhibit 1. Could you please  
11 identify that document, please, for the record?

12 A. It is a printout of the compliance  
13 review Part A, Part B violations, and  
14 recommendations as imputed into the Federal  
15 software Capri that we use for compliance  
16 reviews.

17 Q. Okay. And so any time you conduct  
18 a compliance review this documentation has to be  
19 provided or generated from your review?

20 A. Yes. It's generated, yes, sir.

21 Q. And whose form is this? Is this a  
22 form coming from a peculiar agency?

23 A. Well, it's from our laptop, state  
24 issued laptop, but the software is actually  
25 federal software provided by the FMCSA.

1           Q.    Okay.  So the information that is  
2   provided in Part A or on the front page here,  
3   what's it identify?

4           A.    Basically logistical description of  
5   the carrier's name, address, phone number, DOT  
6   number, contact, personal contact number,  
7   e-mail, freight, number of drivers, number of  
8   trucks.  Just basically an overall description  
9   logistically of the carrier.

10          Q.    Okay.  And what's the scope of the  
11   records that were reviewed for the purpose of  
12   your review, the time frame?

13          A.    Compliance review goes back 12  
14   months from the date that we open at the  
15   carrier, and with the exception of drug and  
16   alcohol, which goes back two years.

17          Q.    So, then at the time -- what was  
18   the date then that you arrived to begin your  
19   review at DL Winner Livestock Express?

20          A.    I opened on July 18th of 2016.  And  
21   my scope would have been 12 months to the rear,  
22   and then so it would have been the first seven,  
23   basically almost eight months of 2016 and all of  
24   2015 for drug and alcohol.

25          Q.    And how did you set that review up

1 with the company? How did you make those  
2 arrangements?

3 A. We typically will schedule a review  
4 with the carrier, although that has changed.  
5 Now it's preferred that we don't announce, but I  
6 had called the carrier by phone and made  
7 arrangements. I called I believe on the 15th,  
8 which was a Friday, and I told the carrier that  
9 I intended to be there, show up there, Monday  
10 morning. And the carrier didn't really want me  
11 coming at that time, they weren't available or  
12 couldn't make themselves available. They were  
13 dealing with something with the IRS apparently  
14 at that time. But, anyway, it was mutually  
15 agreed that I could come around noon and the  
16 carrier could be there, Mr. Winner, could be  
17 there and I think Mr. Plummer wanted to be there  
18 also.

19 Q. And did you identify the purpose of  
20 your visit to the company; what your intention  
21 was?

22 A. Yes. That was discussed over the  
23 phone that they were in alert in a couple of  
24 different categories or basics according to  
25 their on road performance, crash, hours of

1 service and drug and alcohol.

2 Q. And so then were you taken to a part  
3 of the facility where these records were  
4 maintained?

5 A. When I arrived there, they have an  
6 office located adjacent to or connected to their  
7 garage or shop. And in that area I met Mr.  
8 Plummer and Mr. Winner there. And that is where  
9 I set up my computer and my laptop and began  
10 the review. And documents were provided at that  
11 location.

12 Q. You identified a Mr. Plummer and Mr.  
13 Winner. Who are these people?

14 A. Dan Winner is the owner or the  
15 carrier representative. And Steve Plummer  
16 seated to his right across from you is part of  
17 Transportation Consultants, Tri-State  
18 Transportation Consultants.

19 Q. And Mr. Winner is an officer of the  
20 company?

21 A. Yes. I believe he may be the only  
22 officer. I don't recall.

23 Q. And are those two people here today?

24 A. Yes.

25 Q. And why this review? What prompted

1 the review?

2 A. Well, there are seven basics that  
3 the FMCSA utilizes based on roadside  
4 performance, inspections, crashes. And there  
5 are thresholds set in those basics or those  
6 categories. And when a carrier breaches those  
7 thresholds -- they are basically on the radar  
8 and subject to an intervention.

9 And in this particular case  
10 the carrier was in alert in three of those  
11 areas. And Chris May, my supervisor here at the  
12 office, assigned the carrier to be reviewed as a  
13 focus review, meaning we weren't looking at the  
14 entire scope of the regulations, but just the  
15 areas that they were proven to be deficient or  
16 in alert.

17 MR. JONES: Your Honor, may I  
18 approach again?

19 ATTORNEY EXAMINER: You may.

20 MR. JONES: Thank you.

21 Q. Officer Barrett, I have handed you  
22 what is marked as Staff Exhibit 1A. Could you  
23 identify that document for the record, please?

24 A. Yes. Part 1A is Part C of  
25 the review. Basically it's a Word document.



1 It's a summary of the review from the time it  
2 was opened until it was completed.

3 Q. So it's really an extension of Staff  
4 Exhibit 1?

5 A. Yes.

6 ATTORNEY EXAMINER: This is Exhibit  
7 2, you said?

8 MR. JONES: That was Staff Exhibit  
9 1A, your Honor.

10 ATTORNEY EXAMINER: Okay.

11 MR. JONES: An extension of Staff  
12 Exhibit 1, yes.

13 Q. As so Staff Exhibit 1A, that is a  
14 complete log of information as to from the  
15 beginning of the investigation to the  
16 investigation was closed as to your involvement  
17 with the review?

18 A. Yes. The FMCSA has a template for  
19 uniformity, and we simply plug in from carrier  
20 to carrier the appropriate information into the  
21 template.

22 Q. And so you prepared the information  
23 both in Staff Exhibit 1 and Staff Exhibit 1A;  
24 is that correct?

25 A. Yes.

1 Q. And you generated this information  
2 from your compliance review of the company?

3 A. That's correct.

4 Q. Okay. And also have then Staff  
5 Exhibit 2. Could you identify what Staff  
6 Exhibit 2 is, please, for the record?

7 (EXHIBIT MARKED FOR THE PURPOSE OF  
8 IDENTIFICATION)

9 A. Staff Exhibit 2 is records that I  
10 had scanned in that were provided by the carrier  
11 and by Mr. Plummer to use to support my  
12 violations or part of the drug and alcohol  
13 violations in Part B of Staff Exhibit 1.

14 Q. And let's see. Staff Exhibit 3.  
15 Could you please identify what those records  
16 are, please?

17 (EXHIBIT MARKED FOR THE PURPOSE OF  
18 IDENTIFICATION)

19 A. Staff Exhibit 3 includes a couple  
20 of logs to support violations that are not being  
21 contested, but it also includes a driver's list  
22 that was prepared by and provided to me by the  
23 carrier. And there are two pages on that  
24 driver's list.

25 The first one was provided to me by

1 the carrier that showed the drivers currently  
2 employed as of 7-15 of 2016. And the page  
3 underneath of that was really a duplicate.

4 But at the bottom of the second page  
5 there were drivers identified on the profile as  
6 having been employed by the carrier, but were  
7 excluded from the initial drivers list. Those  
8 drivers were no longer employed, but they  
9 weren't on record on list No. 1 or the copy of  
10 No. 1.

11 Q. So for purposes of identification  
12 the pool of employees subject to the random  
13 document testing that is required, that pool  
14 would consist of who would be on the driver's  
15 list; is that correct?

16 A. It would consist of all drivers  
17 employed during January through July of '16 and  
18 all of '15.

19 Q. And so I see then you referenced the  
20 last two pages of Staff Exhibit 3 being two  
21 pages of the drivers list. I see that the  
22 second to the last page is a drivers list that  
23 contains nine names. And then I see the last  
24 page of that Staff Exhibit 3 has it looks like a  
25 photocopy of that, but there is information

1 added at the bottom of that page; is that  
2 correct?

3 A. Yes.

4 Q. And then the information that was  
5 added at the bottom starting at Line 10 on down  
6 to the rest of the page, who provided that  
7 information?

8 A. Like I said those were drivers that  
9 I was aware were on record as having operated a  
10 commercial vehicle for the carrier, for Mr.  
11 Winner, but they weren't included on the profile  
12 or on the drivers list. And I needed to  
13 determine when they were hired and when they  
14 were terminated to determine if they fell within  
15 the scope of this review.

16 And so to my best recollection I  
17 identified verbally these individuals and  
18 the dates were provided verbally. And I wrote  
19 the information. Line 11 down through  
20 the bottom, that's my writing. I wrote that at  
21 the bottom.

22 Q. I see. Okay. And again those are  
23 records that were recovered from DL Winner  
24 Livestock Express during your compliance review;  
25 that is correct?

1           A.    Yes.

2                   (EXHIBIT MARKED FOR THE PURPOSE OF  
3 IDENTIFICATION)

4           Q.    And Staff Exhibit 4, could you  
5 please identify the records making up Staff  
6 Exhibit 4?

7           A.    Staff Exhibit 4, the first page is a  
8 copy of the crash portion of the carrier's  
9 profile which indicates the four drivers or four  
10 crashes within the previous 24 months. And then  
11 underneath of that is the Indiana crash report  
12 and charges filed against the carrier that was  
13 involved in the one crash that occurred within  
14 the 12 months within the scope of my compliance  
15 review.

16          Q.    So, let's try to understand the  
17 first page that has a list of crashes for the 24  
18 months you identified, and then how that relates  
19 to the pages that follow after the first page.

20          A.    As I previously said, the carrier  
21 was in alert in the crash basic or category, I  
22 guess we call it basic, but you could refer to  
23 it as category. That encompasses any accidents  
24 that they have been involved in in 24 months.

25                   So, that is why those are drawn out

1 on that profile, realizing within 12 months of  
2 when I initiated the review there was only one  
3 crash that occurred in that scope.

4 So the three, one that occurred 1-29  
5 of '15, 12-29 of '14, 12-12 of '14 were included  
6 in the basic which caused it to be elevated, but  
7 not included during this review. They weren't  
8 examined during this review.

9 Q. So we are only concerned then with  
10 the first crash that's listed on Page 1 listed  
11 there for the date of April 22, 2016; is that  
12 correct?

13 A. Yes, that's correct.

14 Q. So all the records that follow  
15 the first page involve the records that you  
16 obtained in relation to that crash?

17 A. That's correct.

18 Q. Okay. Because that is the only one  
19 that is relevant to your 12-month review?

20 A. Correct.

21 Q. And how did you obtain those records  
22 that follow the first page?

23 A. I ended up contacting the Indiana  
24 State Police to get a copy of the crash report  
25 and corresponding documents.

1           Q.    Is this something you would  
2           ordinarily do as part of your investigation and  
3           review?

4           A.    The crash report, the typical  
5           standard crash report, is typically on file at  
6           the carrier, not always, more often not.   And I  
7           don't honestly recall if this one was obtained  
8           from the carrier or I got it.   But everything  
9           else underneath of there, yes, I obtained from  
10          Indiana.

11                   The last review I was at we had to  
12          contact South Carolina.   So that is pretty  
13          common.   In order to fully investigate the crash  
14          we have to have all the information.   And if the  
15          carrier doesn't have it then we have to seek out  
16          the investigating agency to try to fill in the  
17          gaps.

18           Q.    All right.   Well, let's go back to  
19          Staff Exhibit 1, and go to Page 3.   Actually it  
20          would be Page 3 of Staff Exhibit 1.

21                   ATTORNEY EXAMINER:   What exhibit are  
22          you on?

23                   MR. JONES:   Staff Exhibit 1.

24                   ATTORNEY EXAMINER:   Exhibit 1.

25           Q.    Page 3 that's entitled Part B,

1 violations. Do you see that?

2 A. Yes. We are at the bottom is it  
3 Page 1 of 3? Is that what you are referring to?

4 Q. Yes. I know it's a little  
5 confusing. But, yes.

6 A. I wanted to make sure.

7 Q. So, let's start there with the first  
8 violation that is noted. And this would be the  
9 Code of Federal Regulations 382.305 (B)(1).  
10 This is one of the charges being contested here  
11 today.

12 Could you please for the record give  
13 the description of this violation?

14 A. Yes. As I previously said, we were  
15 looking at drug and alcohol testing for January  
16 through the current date in July when I was  
17 there. And then the previous 12 months which  
18 would be calendar year 2015.

19 This particular violation that you  
20 are referring to occurred during calendar year  
21 2015. It was determined that the carrier failed  
22 to conduct random alcohol testing at the annual  
23 rate of 10 percent the average number of drivers  
24 as required.

25 Q. Okay.



1           A.    They should have done two -- I am  
2   sorry, they should have done two alcohol tests  
3   which is under discover there.  Shows 2, checked  
4   2.  There was no record of any alcohol tests  
5   that had been conducted.

6           Q.    And here I want you to reference  
7   Staff Exhibit 2 as a tie in to support.  And  
8   let's talk about not only the alcohol testing  
9   but the drug tests as well.  So we are going to  
10  talk about, from Staff Exhibit 1, we are going  
11  to talk about the first and second violations  
12  there.

13                   The first one dealing with alcohol  
14  under 382.305 (B) (1) and the second one being  
15  382.305 (B) (2).  The first one is alcohol, the  
16  second one is substance abuse.

17                   And could you then walk us through  
18  Staff Exhibit 2 as to talking about the pool and  
19  how that wasn't properly done?

20           A.    Well, it was determined that the  
21  carrier was utilizing Tri-State Transportation  
22  Consulting as their consortium or third party to  
23  administer their random drug and alcohol testing  
24  program, which meant the carrier played no part  
25  in the selection of drivers.  It was done by

1 Tri-State Transportation.

2 If a carrier is enrolled in a  
3 consortium we are only looking to determine were  
4 all drivers employed by the carrier in the pool  
5 during each selection period, so they had an  
6 equal chance of being picked.

7 Did the selected drivers or were  
8 the selected drivers tested as required and  
9 within the time frame.

10 And did the consortium test at the  
11 appropriate percentages for that calendar year  
12 in both the alcohol and the controlled  
13 substances.

14 And the first page in Staff Exhibit  
15 2, what you were referring to, is a copy of the  
16 2015 summary of the third party administrator's  
17 program for calendar year 2015. When I look at  
18 that it indicates that the average number of  
19 drivers in that testing pool not employed by  
20 the carrier, but by multiple employers within  
21 that pool, the average number of drivers was 555  
22 for the calendar year, January 1 through  
23 December 31, of '15.

24 And they conducted, according to the  
25 summary, the consortium completed 277 random

1 controlled substance tests and 55 random alcohol  
2 tests.

3 During 2015 the average or the  
4 testing percentages was 50 percent of the  
5 average number of drivers for controlled  
6 substances and 10 percent for alcohol.

7 So by utilizing the summary that was  
8 provided the testing pool only -- they missed  
9 their number by one. They should have done 278  
10 random controlled substance tests and they  
11 should have done 56 random alcohol tests.

12 Because if you divided, we have half  
13 of a driver, 277.5, we have to round up because  
14 you can't test half of a driver. The summary  
15 doesn't meet the requirements.

16 So the pool itself failed to meet  
17 the requirements. So we can't use this to  
18 verify the carrier's compliance with random drug  
19 testing. And we don't regulate the PUCO, we  
20 don't regulate third party administrators, or  
21 drug and alcohol testing consortiums. The  
22 Federal government, the FMCSA, does.

23 So, our guidance from the FMCSA is  
24 if the consortium fails to meet the minimum  
25 testing percentages we are required to look at

1 the carrier itself as an individual pool. If  
2 they conducted all their own drug and alcohol  
3 testing, did they test enough drivers.

4 And the carrier in combination with  
5 Mr. Winner provided a summary for the carrier  
6 specific to DL Winner Livestock for the same  
7 period, January 1 through December 31 of '15.  
8 And they indicate that there were eight drivers,  
9 average number of drivers for the calendar year  
10 of eight.

11 Q. What are you referring to now?

12 A. I am on the second page of Staff  
13 Exhibit 2. And that same page also says that  
14 the carrier conducted eight random controlled  
15 substance tests for 2015 and two random alcohol  
16 tests for 2015.

17 Q. Okay. So now when you see that  
18 there was eight for the pool here both for the  
19 alcohol and drug testing, how did you find an  
20 error with that number, number eight?

21 A. Well, utilizing the carrier's  
22 drivers list and the roster that the consortium  
23 provided by quarters -- flip to a different page  
24 here. Excuse me

25 Q. So let me ask you, you are referring

1 now to the last page of Staff Exhibit 3, the  
2 driver list?

3 A. Sorry. I have to get my exhibits  
4 right here. Yes, that's correct.

5 Q. Okay. So I am sorry, I didn't mean  
6 to interrupt

7 A. That is okay.

8 Q. I just want to give a reference  
9 here.

10 A. I determined that the carrier  
11 actually during the four quarters of 2015 and  
12 the first quarter had 13 drivers. The second  
13 quarter they had 12. The third quarter they had  
14 10, and the fourth quarter they employed 11.

15 So I added those up, I got 46 and I  
16 divided it by four quarters to get an average  
17 number of drivers of 11.5, which we would round  
18 up to 12. In order to meet the testing  
19 percentages for calendar year 2015 they had to  
20 test 50 percent of the 12 so they had to have  
21 done at least six for controlled substances, and  
22 at least two for alcohol.

23 Q. So let me slow you down here just  
24 for a second. You are referring to Staff  
25 Exhibit 2, and I believe it's, the pages aren't

1 marked, but I believe it's Page 10, if you were  
2 to walk back through these pages from the front.  
3 I see there is a calculation in the margin here  
4 where you just testified to numbers for each  
5 quarter; is that correct?

6 A. Yes. Page 10, you are correct.

7 Q. So you show your calculation in the  
8 margin here for each quarter and how then you  
9 get the total number for all those quarters, and  
10 then you divided by four is how you came up then  
11 with -- I am sorry, I will let you speak to your  
12 calculation there. I believe that is what you  
13 testified to; correct?

14 A. Yes. It was 11.5 which required  
15 round up to the next whole driver which was 12.

16 Q. And so then based on your  
17 calculations there it should be 12 instead of 8  
18 for the pool, then the percentages that would be  
19 required for the drug testing being 50 percent  
20 then the number 6; is that correct?

21 A. Yes.

22 Q. And then for the alcohol testing the  
23 10 percent that is required of that pool, that  
24 would be the No. 2; is that correct?

25 A. Yes.

1           Q.    So referring back then to the second  
2 page of Staff Exhibit 2, if you look at the  
3 Roman Numeral II on that page there is a box to  
4 the right-hand side of the page that has 8 in  
5 it; is that correct?

6           A.    Yes.

7           Q.    What number should be reflected  
8 there?

9           A.    It should be at least 6. I realize  
10 that 8 is more than 6, but the carrier only  
11 conducted two.

12          Q.    When you came up with it should be  
13 12 employees in the pool, where should that be  
14 reflected on Page 2 of Staff Exhibit 2?

15          A.    The 12 should be under Roman Numeral  
16 II, Letter C.

17          Q.    Okay.

18          A.    Employee category from FMCSA would  
19 be 12.

20          Q.    12. Okay. All right. And now why  
21 don't you refer then to each quarter. I noticed  
22 in this exhibit, Staff Exhibit 2, there are  
23 records that support what was provided for each  
24 quarter. Could you walk us through those  
25 records for each quarter?

1           A.    Yes.  As we previously determined  
2   the annual summary on Page No. 2 shows that the  
3   career conducted eight random controlled  
4   substance tests for 2015, and they conducted two  
5   alcohol tests.

6                   Page 3 in that same exhibit is a  
7   selection notification for the first quarter of  
8   2015 which would encompass January, February and  
9   March.  You will notice in the box in the middle  
10  of that page there was one driver selected for a  
11  controlled substance test.

12                   I would also just like to note that  
13  test selection actually according to the  
14  documentation was made prior to the beginning of  
15  calendar year 2015.  This is dated 12-29 of '14.

16                   Realizing that the carrier or  
17  consortium probably just got a little anxious to  
18  get started, I gave that -- I didn't give that  
19  any further consideration.  I gave the credit  
20  for that testing period.

21                   But the next page, Page 3, you will  
22  notice it's a MRO drug and alcohol or a  
23  controlled substance test result which would  
24  coincide with the selected driver on Page 3.  
25  So that test was in fact completed as it was



1 required. So that is one controlled substance  
2 test for 2015.

3 Q. That's on Page 4, the drug test  
4 result is on Page 4 relating back to Page 3?

5 A. Correct.

6 Q. Okay.

7 A. Page 5 is the second quarter  
8 selection, April, May, June. Again we have one  
9 driver selected.

10 The subsequent page is again the MRO  
11 report that shows there was a sample collected,  
12 it was analyzed. So that is the second test  
13 completed during calendar year 2015.

14 Q. Okay.

15 A. The subsequent page to that is the  
16 third quarter selection, July, August,  
17 September. You will notice there were no  
18 drivers selected. If no driver was selected  
19 there was no test done.

20 In the following page to that is the  
21 fourth quarter. Again no drivers selected  
22 during that testing or that selection period.  
23 So that wraps up calendar year 2015. We only  
24 had two drivers selected. We needed to test at  
25 least six. They said they tested 8, plus two

1 alcohol tests. We got two drug tests. That  
2 doesn't meet the requirements.

3 Q. So you asked for all the records in  
4 these categories and this is all the records you  
5 received from the company, and this is what  
6 those records show; is that correct?

7 A. Right. The selection notification  
8 is generated by the Tri-State Consulting which  
9 is then sent to the carrier for the carrier to  
10 notify the driver and the selection process  
11 begins. And if no driver is selected during two  
12 quarters and only two drivers were selected in  
13 the first two quarters, I am not sure how the  
14 eight were tested.

15 And there were no documents to  
16 indicate any other tests were done. No  
17 selection forms, no results, MRO reports.

18 Q. Okay.

19 A. That is how violation one and two  
20 were determined.

21 Q. So referring back then to Staff  
22 Exhibit 1, Page 3, those first two violations  
23 noted under Part B under violations, the first  
24 one being the alcohol testing violation and  
25 the second one being the controlled drug

1 testing, No. 2, the records you just went  
2 through with us in Staff Exhibit 2 support your  
3 violations, is that correct, for those two?

4 A. That's correct. No record. And  
5 violation 1 they should have done two alcohol  
6 tests. We have no record of any alcohol tests.

7 Violation No. 2 they should have  
8 done six random drug tests or urine, controlled  
9 substance tests. We had two done. So we are  
10 still missing four to meet the minimum testing  
11 requirements.

12 Q. And that is what your numbers  
13 reflect in those boxes, is that what you are  
14 describing?

15 A. Right. Checked is how many should  
16 have been there. Discover is how many weren't.

17 Q. I see. So then your third box then  
18 on Page 3 of Staff Exhibit 1 under Part B  
19 violations, what does this indicate then for  
20 that third box?

21 A. The violation No. 3?

22 Q. No. For the first two violations  
23 you have a box that is entitled drivers/vehicles  
24 and violation checked. Is that just the summary  
25 then?

1           A.    Well, you may have -- you have two  
2   drivers in violation. We only had two that  
3   should have been tested, so we only have two  
4   that would have been in violation.

5                   On violation No. 2 you, and you got  
6   the same drivers actually picked twice within a  
7   year, so sometimes those numbers are not 4 and 6  
8   and 4 and 6. In this case because we didn't  
9   have anything they simply carried over from  
10   discover to checked to violations and checked.

11           Q.    Okay. Got you. Let's move on then  
12   to the third violation here for the Code of  
13   Federal Regulations 382.303 (A). And can you  
14   describe that violation, please?

15           A.    That violation, carrier failed to  
16   conduct post-accident alcohol test on a driver  
17   following a reportable crash.

18                   There was one crash that the driver  
19   was required to be tested and wasn't. So that's  
20   the one checked and one discovered.

21           Q.    Now, sorry, let me back up one  
22   second before we move on to the third violation.  
23   I just want to make sure for the record, for  
24   the first two violations, you talked about  
25   requirements of 10 percent and 50 percent of

1 what needed to be tested for a pool of the  
2 employees, random employees. Where do those  
3 requirements, where do they come from?

4 A. They come from the CFR, the Federal  
5 Motor Career Safety regulations, Part 382.

6 Q. So that is spelled out in the Code  
7 of Federal Regulations, those percentages need  
8 to be tested of the pool of employees?

9 A. During that year that is what was in  
10 place. They have since changed in calendar year  
11 '16 and currently in '17.

12 Q. But that was what was required for  
13 2015?

14 A. Yes.

15 Q. Those percentages?

16 A. Right.

17 Q. Okay.

18 A. Yes.

19 Q. Let's move back then to the third  
20 violation here for the post-accident testing  
21 here. And, I am sorry, to interrupt you.  
22 What's going on there for the third violation,  
23 and what you have to support that?

24 A. I am not sure --

25 Q. The third violation had to deal with

1 the post-accident. Where did you get that  
2 information from?

3 A. Well, I knew on the profile  
4 the carrier had one crash that we already  
5 referred to on the profile, the first one 4-22  
6 of '16 which occurred in the State of Indiana.  
7 That involved injury, or excuse me, it involved  
8 at least tow away which meet the definition of a  
9 reportable crash if one or more vehicles is  
10 towed due to disabling damage. No one is  
11 killed, nobody is injured it meets the  
12 definition of a reportable crash.

13 Then if the driver is at fault, in  
14 this case the carrier's driver, Keith Delzeith,  
15 I don't know how you say that, was charged as a  
16 result of the crash, he is required at that  
17 point to be post-accident tested for alcohol and  
18 controlled substances.

19 Q. And you got this information from  
20 Staff Exhibit 4; is that correct?

21 A. Started, yes. That's where it  
22 began.

23 Q. Okay. And so then all the records  
24 that are part of Staff Exhibit 4 relate to a  
25 description of that crash?

1           A.    Yes.  It's not uncommon that we find  
2   crash on the profile that may not belong there,  
3   but when we look at the crash information we can  
4   rule it out that it did not meet the required  
5   criteria to be a reportable crash.

6                   Sometimes we find one that is not on  
7   there that should be.  And in this case the  
8   profile indicated that there was a tow away, no  
9   one was killed and no one was injured.  So right  
10   away I need to go there to determine if that was  
11   in fact a reportable crash.  And we start with  
12   the police report.

13           Q.   And from your review of the police  
14   report you determined that it was a reportable  
15   crash for purposes of meeting the requirements  
16   for then to see if the testing was done; is that  
17   correct?

18           A.   That's correct.

19           Q.   So what information did you collect  
20   as to whether a test was done?

21           A.   Through a lot of phone tag back and  
22   forth with Indiana and various officers who  
23   worked different shifts I was able to determine  
24   that the driver was charged for a traffic  
25   infraction; that he was custodially arrested at

1 the time of the crash for being impaired; that  
2 the law enforcement administered a breathe  
3 alcohol test which tested zero indicating no  
4 alcohol was present.

5 And then he was -- the driver  
6 provided a blood sample to be tested for  
7 controlled substances at the direction or  
8 request of the Indiana State Police.

9 Q. And so here the obligation is on the  
10 company to secure a test of their driver who is  
11 involved in a reportable crash within a certain  
12 time limitation; is that correct?

13 A. Yes. Post-accident alcohol test is  
14 required to be given within two hours of the  
15 crash, no later than 8. So you actually have  
16 two time frames there. If it's administered  
17 within eight hours obviously everything is fine.

18 The urinalysis for controlled  
19 substances is immediately after the crash, no  
20 later than 32 hours after the crash.

21 Q. Okay. And is there anything here  
22 that would substitute for the company, DL  
23 Winner, from actually performing the test? Is  
24 there any other test that would satisfy this  
25 requirement?



1           A.    According to the Federal Motor  
2   Carrier Safety regulations a test administered  
3   at the direction or discretion of law  
4   enforcement is able to be used to meet this  
5   requirement for the carrier.

6           Q.    Okay.  And so did DL Winner have  
7   records showing that they either conducted the  
8   test of this driver or obtained the test results  
9   from another county or state agency as to a test  
10  being done on their driver within those time  
11  frames?

12          A.    No records were provided.

13          Q.    Did you request those records?

14          A.    Yes.

15          Q.    And that request was not just for  
16  alcohol but for drug as well?

17          A.    You know, I don't recall.  I know  
18  the alcohol test, we already know that it was  
19  zero.  It's included in the Indiana State Police  
20  report.  So I would think we are only talking,  
21  my best recollection, is only the urinalysis for  
22  the controlled substances.

23          Q.    So for your report here, the Part B  
24  violation, and particularly these two violations  
25  that were noted by you for No. 3 and No. 4, that

1 page, for alcohol and drug testing  
 2 post-accident, you provided the example of Mr.  
 3 Delzeith as being the driver here that was  
 4 involved in a reportable crash and testing  
 5 should have been done in the time frames you  
 6 described; is that correct?

7 A. Yes. He was the driver employed by  
 8 the motor carrier at the time of the crash.

9 Q. And again you marked your boxes  
 10 going to the right of the page for those  
 11 violations 3 and 4. Again would you describe  
 12 what you are doing there marking numbers in  
 13 those boxes?

14 A. Well, there was one crash subject to  
 15 review, one crash in which testing was required,  
 16 which was the one checked. One test under each  
 17 violation. Violation 3 and 4 was not conducted.

18 So, again, it's one of one, and one  
 19 of one. We are only referring to one crash and  
 20 one driver.

21 Q. Okay. And again this is a crash  
 22 that occurred on April 22, 2016; correct?

23 A. Yes, that's correct.

24 Q. And this involves a compliance  
 25 review that you conducted in July of 2016,

1 beginning in July of 2016; correct?

2 A. Yes.

3 MR. JONES: Your Honor, can I just  
4 have a second, please?

5 ATTORNEY EXAMINER: You may.

6 MR. JONES: Your Honor, based on  
7 the scope of what we are here, what's being  
8 contested, Staff would have no further questions  
9 of Officer Barrett. Staff has covered the first  
10 four violations of Staff Exhibit 1. And so I  
11 have no further questions

12 ATTORNEY EXAMINER: Nothing further  
13 for this witness?

14 MR. JONES: That's correct, your  
15 Honor.

16 ATTORNEY EXAMINER: You are excused.  
17 Go ahead. Do you have any other witnesses?

18 MR. JONES: Yes. I have Rod Moser,  
19 please.

20 (WITNESS SWORN)

21 - - -

22 ROD MOSER

23 called as a witness, being first duly sworn,  
24 testified as follows:

25 ATTORNEY EXAMINER: Be seated.

1 DIRECT EXAMINATION

2 By Mr. Jones:

3 Q. Could you please state your name  
4 for the record, please?

5 A. My name is Rod Moser.

6 Q. And where are you employed?

7 A. I am employed with the Public  
8 Utilities Commission of Ohio, 180 East Broad  
9 Street, Columbus, Ohio.

10 Q. And what is your job title and  
11 duties?

12 A. I am the Chief of Compliance in the  
13 Transportation section of the Public Utilities  
14 Commission. My duties include supervising  
15 compliance officers who conduct conferences over  
16 inspections and compliance reviews. And then  
17 also managing the administrative hearing process  
18 for our section.

19 MR. JONES: Your Honor, may I  
20 approach, please?

21 ATTORNEY EXAMINER: You may.

22 MR. JONES: Thank you.

23 (EXHIBIT MARKED FOR THE PURPOSE OF  
24 IDENTIFICATION)

25 Q. Mr. Moser, I am going to hand

1 you what has been marked as Staff Exhibit 5.

2 Could you please identify that document for  
3 the record, please?

4 A. Sure. This is a Notice of  
5 Preliminary Determination.

6 Q. And what does it refer to?

7 A. It's referring to the compliance  
8 review of DL Winner Livestock Express.

9 Q. Okay. And how is it then that your  
10 department received the documentation from what  
11 was conducted by Officer Barrett from his  
12 compliance review of DL Winner?

13 A. That information was uploaded  
14 through the federal system, and once it's  
15 approved it comes to Chris May, the supervisor  
16 for Mr. Barrett's section. Once they have  
17 reviewed it it gets uploaded into Safety Net.

18 Provided there are violations it  
19 then goes on and gets assigned to a compliance  
20 officer.

21 Q. And the Notice of Preliminary  
22 Determination, which is Staff Exhibit 5, it  
23 provides notice then of information related to  
24 the violations that were noted from the  
25 compliance review; is that correct?

1           A.    Yes, sir.  It details the  
2   violations.

3           Q.    And in addition to that then there  
4   is also a forfeiture that looks like it was  
5   applied for each one of those violations; is  
6   that correct?

7           A.    Yes, sir.

8           Q.    And was that done by your  
9   department?

10          A.    It was done by in this case  
11   compliance officer Mark Banks in my department,  
12   yes.

13          Q.    And how was that done?  How is that  
14   determined?

15          A.    He looks at the individual  
16   violations, and the fine amounts are set  
17   according to what kind of violation it is.  
18   These are all considered critical violations  
19   which are not the most severe.

20                For a single violation sometimes  
21   there is no fine.  In other cases the minimum  
22   fine would be \$400 per violation per the initial  
23   violation, and then \$100 additional for each  
24   subsequent of the same violation.

25          Q.    Okay.  And what distinguishes a

1 critical violation?

2 A. There is acute and critical. Acute  
3 are things which are deemed to be so serious it  
4 needs to have corrective action right now.

5 Critical violations are more of a  
6 management issue, something that is a control  
7 issue for management.

8 Q. All right. And as far as what is  
9 being contested here today, you see the charge  
10 under Code of Federal Regulations 382.305 (b),  
11 and I see a forfeiture there of \$500; is that  
12 correct?

13 A. That's correct. There were two  
14 violations of that CFR, the first being 400 and  
15 the second is 100 for a total of \$500.

16 Q. Okay. And that calculation is made  
17 consistent with the standards that would apply  
18 to any carrier or driver in similar  
19 circumstances having the same violations?

20 A. Yes, sir.

21 Q. And those guidelines that you were  
22 going off of, are they provided by the state or  
23 by the federal government or who?

24 A. They are provided -- the PUCO has  
25 the authority to set them, but we generally set

1       them according to guidelines of the Commercial  
2       Vehicle Safety Alliance.

3               Q.     Okay.  So this calculation here is  
4       consistent with the Commercial Vehicle Safety  
5       Alliance?

6               A.     Yes, sir, it is.

7               Q.     And likewise then for the violation  
8       382.305 (b) (2) the calculation being \$700.

9               A.     Yes.  In that case there were four  
10      violations, the first being 400 then each  
11      subsequent violation an additional \$100 for the  
12      total of \$700.

13              Q.     Okay.  And then for the third  
14      violation being under Code of Federal  
15      Regulations 382.303 (a) it looks like there is a  
16      forfeiture calculation \$400?

17              A.     Yes, sir.  One violation.

18              Q.     And again that is consistent with  
19      the Commercial Motor Vehicle Safety Alliance?

20              A.     Yes, sir.

21              Q.     And then finally the fourth  
22      violation of 382.303 (b).  And that being a  
23      forfeiture of \$400.

24              A.     Yes, sir.

25              Q.     How was that --



1           A.    Again, just one violation.

2           Q.    Just one violation.  And again that  
3 is consistent with the Commercial Vehicle Safety  
4 Alliance?

5           A.    Yes, sir.

6           Q.    And are these then, the forfeitures  
7 that are -- the Staff is recommending to the  
8 Commission to impose in this case?

9           A.    Yes, sir, we are.

10          Q.    In addition to the other noted  
11 forfeitures for the other violations that are  
12 not being contested?

13          A.    There are, yes, the forfeiture  
14 amounts, those are zero, but we still recommend  
15 conviction on those as well.

16          Q.    Okay.  So, for Staff Exhibit 5 then,  
17 this is a Notice of Preliminary Determination  
18 that was sent to who?

19          A.    It was sent to the carrier, DL  
20 Winner Express, I think in care of their  
21 consultant, Mr. Plummer.

22          Q.    And again this is a follow-up then  
23 based on the compliance review that was done by  
24 Officer Barrett, and this again provides those  
25 violations and the forfeitures then that

1 the Staff of the Commission would be  
2 recommending in conjunction with those  
3 violations?

4 A. Yes, sir.

5 Q. And all these records that you have,  
6 you know, as to all these different parts of the  
7 compliance review, being Staff Exhibit 1, Staff  
8 Exhibit 1 A, Staff Exhibit 5, all these records  
9 are records that were kept by your department as  
10 a business record?

11 A. Yes, sir.

12 MR. JONES: Your Honor, I have no  
13 further questions.

14 ATTORNEY EXAMINER: You are excused.

15 MR. JONES: Your Honor, with that,  
16 the Staff would rest its side of the case. I  
17 would like to move for the admission of  
18 the Staff exhibits at this time.

19 ATTORNEY EXAMINER: All Staff  
20 Exhibit are admitted into evidence at this  
21 time.

22 (EXHIBITS HEREBY ADMITTED INTO  
23 EVIDENCE)

24 ATTORNEY EXAMINER: And Staff has  
25 nothing further. We will go to the Respondent's

1 side of the case.

2 MR. JONES: Your Honor, just for  
3 clarification, Staff Exhibit 1, Staff Exhibit  
4 1A, 2, 3 4 and 5 are all admitted into evidence?

5 ATTORNEY EXAMINER: Yes. All of  
6 them.

7 MR. JONES: Thank you, your Honor.

8 ATTORNEY EXAMINER: Now you can  
9 present your testimony.

10 MR. PLUMMER: Thank you, your Honor.

11 ATTORNEY EXAMINER: Please come up  
12 and take a seat

13 (WITNESS SWORN)

14 - - -

15 STEVE PLUMMER

16 called as a witness, being first duly sworn,  
17 testified as follows:

18 ATTORNEY EXAMINER: Be seated. Give  
19 your name, address for the reporter.

20 MR. PLUMMER: Steve Plummer.

21 ATTORNEY EXAMINER: Go ahead, speak  
22 up for the reporter.

23 MR. PLUMMER: Steve Plummer, 12236  
24 Road 82, Paulding, Ohio.

25 ATTORNEY EXAMINER: Be seated. Now,

1 I want you to go ahead and present your  
2 testimony in a narrative style. I guess you are  
3 going to read from that document you have; is  
4 that correct?

5 MR. PLUMMER: I am going to read  
6 from this first, and then I have some factual  
7 information to present.

8 ATTORNEY EXAMINER: Go ahead.

9 MR. PLUMMER: Excuse me.

10 ATTORNEY EXAMINER: Do you want them  
11 marked as an exhibit?

12 MR. PLUMMER: No. This is just more  
13 like an opening statement.

14 ATTORNEY EXAMINER: Proceed.

15 MR. PLUMMER: Okay. I respectfully  
16 address this matter to the Public Utilities  
17 Commission of Ohio. We have taken this case  
18 through all of the steps and are now here at  
19 this hearing for a final ruling on this matter.

20 We thank you for taking this into  
21 consideration and would like to start out with  
22 this statement.

23 We understand that it is our  
24 responsibility to present evidence in support of  
25 our contentions regarding the allegation

1 violations in this matter. We also understand  
2 that since we are not using an attorney at law  
3 we can only answer questions of facts only, we  
4 cannot examine witnesses, make motions or file  
5 legal briefs.

6 With that said, we are ready and  
7 willing to address the questions at hand and to  
8 answer them with facts.

9 As we have stated in our request for  
10 conference and our request for hearing there are  
11 four major issues we would like to address.

12 No. 1, 382.305 (b) (1). Failure to  
13 conduct random alcohol tests at the annual rate  
14 of not less than the applicable annual rate of  
15 the average number of driver positions.

16 No. 2, 382.303 (b), failure to  
17 conduct post-accident testing on drivers for  
18 controlled substances.

19 382.303(a), failure to conduct  
20 post-accident alcohol testing on drivers  
21 following a reportable accident.

22 And No. 4, 382.305 (b) (2), failure  
23 to conduct random controlled substance testing  
24 at an annual rate of not less than the  
25 applicable annual rate of the average number of

1 driver positions.

2 We are ready to enter factual data  
3 to prove that each of these four categories we  
4 have met the FMCSA requirements, and, therefore,  
5 do not feel we are in violation at the time of  
6 the audit, nor are we in violation now.

7 If this review board would please  
8 allow us to present the evidence that we have at  
9 hand I think we can clear this matter up quite  
10 quickly.

11 Thank you again for your time in  
12 considering this matter.

13 And, so, I would like to present the  
14 evidence on the post-accident drug and alcohol,  
15 382.303 (a) and (b).

16 ATTORNEY EXAMINER: Do you have  
17 exhibits you want to present?

18 MR. PLUMMER: Yes.

19 ATTORNEY EXAMINER: Let's show your  
20 exhibit to counsel.

21 MR. JONES: Does he have a copy?

22 MR. PLUMMER: I do not, but you have  
23 the very same one in your exhibit --

24 MR. JONES: Exhibit 2, maybe?

25 MR. PLUMMER: It's the police report

1 from the accident.

2 MR. JONES: Exhibit 4?

3 MR. PLUMMER: Yes, Exhibit 4.

4 MR. JONES: Okay.

5 MR. PLUMMER: If you would go to  
6 Page 2 of your Exhibit 4.

7 ATTORNEY EXAMINER: Staff Exhibit 4,  
8 Page 2.

9 MR. PLUMMER: Yes. You will find  
10 that the officer --

11 ATTORNEY EXAMINER: What document do  
12 you have there, sir?

13 MR. PLUMMER: This is the same one.

14 MR. JONES: Can we just use the  
15 Staff exhibit then?

16 MR. PLUMMER: Yes.

17 MR. JONES: We might as well use our  
18 exhibit because it's the same information.

19 MR. PLUMMER: Staff Exhibit 2, Page  
20 2 of the police report.

21 ATTORNEY EXAMINER: Is that what you  
22 are reading from?

23 MR. PLUMMER: Yes.

24 ATTORNEY EXAMINER: Go ahead.

25 MR. PLUMMER: And it says here

1 driver 1 was arrested by Sergeant Nathalang for  
2 possession of methamphetamine and transported  
3 from the accident site, transported to the  
4 DeKalb County jail for further investigation on  
5 possibly operating vehicle while intoxicated  
6 charges.

7 Down in the last sentence of that it  
8 said it is the opinion of the investigating  
9 officer that the primary cause of this crash was  
10 following too close and illegal drug use on  
11 the part of driver 1, which was this driver of  
12 Dan Winner's truck.

13 The point is that he was taken  
14 immediately from the scene to jail and we had no  
15 opportunity to perform drug or alcohol test on  
16 him. And they would not give us their test  
17 results. They said they were part of the Court,  
18 were part of the evidence in the Court  
19 proceedings against him.

20 So, in the 7-hour window or the  
21 32-hour window we did not have a chance. We  
22 followed the rules and wrote out a statement  
23 that the post-accident drug and alcohol tests  
24 were not done due to the fact that he was  
25 incarcerated and that it was impossible for us



1 to get a post-accident drug or alcohol test.

2 So, that is our basis that we could  
3 not do a drug and alcohol test on the driver.  
4 He was in jail, they would not allow us to do  
5 that. And they would not give us a copy because  
6 we couldn't get it until after he was tried.  
7 And then he went to jail right from there.  
8 So, that is the evidence in that.

9 The other two are in regards to DL  
10 Winner's not meeting the 10 percent or 50  
11 percent drug and alcohol testing requirements.  
12 And the basis that Mr. Barrett used was that the  
13 drug and alcohol consortium did not meet the  
14 numbers. Had the consortium met its numbers  
15 then the fact that DL Winner only did two  
16 randoms would have still made him legal by being  
17 inside the consortium.

18 My contention is this: And I have  
19 the facts that the consortium in fact did meet  
20 the numbers. And if it is anyone's fault it is  
21 the consortium's due to the fact that I had an  
22 employee that sent out the wrong annual reports  
23 and we corrected the reports and have all of  
24 the test numbers listed as an example of all the  
25 tests run that prove the consortium was indeed

1 in compliance, which by that being done makes  
2 Mr. Winner in compliance.

3 What I had was a disgruntled  
4 employee that I terminated, and he did not make  
5 new drug test reports for 2015. He just copied  
6 2014, and I terminated him.

7 And I have all of the drug test  
8 results from Quest Diagnostics to back up the  
9 numbers that we did indeed do a total of 751  
10 drug tests. 740 negative, 10 verified positive,  
11 1 positive for cocaine.

12 And alcohol we did 64. 56 of them  
13 were random, and 8 were post-accident.

14 ATTORNEY EXAMINER: What are you  
15 reading from, sir?

16 MR. PLUMMER: This is the report  
17 that Quest Diagnostics -- that is the MRO.

18 ATTORNEY EXAMINER: Is that your  
19 exhibit or Staff?

20 MR. PLUMMER: That is my exhibit.

21 ATTORNEY EXAMINER: You want that  
22 marked as an exhibit?

23 MR. PLUMMER: Yes. I do.

24 ATTORNEY EXAMINER: Let's let Staff  
25 take a look at this.

1 MR. JONES: Thank you.

2 MR. PLUMMER: And that has the  
3 backup to it behind it.

4 MR. JONES: Can we go off the record  
5 just for a second, your Honor?

6 ATTORNEY EXAMINER: Yes.

7 (DISCUSSION OFF THE RECORD)

8 (RECESS TAKEN)

9 ATTORNEY EXAMINER: We are ready to  
10 go back on the record.

11 MR. JONES: Yes, your Honor.

12 ATTORNEY EXAMINER: You made copies  
13 of what?

14 MR. JONES: Yes, your Honor, we have  
15 a copy too.

16 ATTORNEY EXAMINER: Come on back up  
17 here, Mr. Plummer. You were in the middle of  
18 your testimony about this. You want it marked  
19 as an exhibit; correct?

20 MR. PLUMMER: Yes.

21 ATTORNEY EXAMINER: Respondent's  
22 Exhibit 1. Does Staff have any comment?

23 MR. JONES: I am not sure he is done  
24 yet with his presentation.

25 MR. PLUMMER: No.

1 (EXHIBIT HEREBY MARKED FOR  
2 IDENTIFICATION PURPOSES)

3 MR. PLUMMER: This copy was --

4 ATTORNEY EXAMINER: What I have  
5 marked Respondent's Exhibit 1?

6 MR. PLUMMER: Yes.

7 ATTORNEY EXAMINER: Go ahead.

8 MR. PLUMMER: Was given to Mr.  
9 Barrett as soon as we found the discrepancy.  
10 So, he had it the second day of the audit. So,  
11 he knew that there was a correction made before  
12 the audit was over, and that we had corrected  
13 the error in the report before the audit was  
14 over.

15 The other thing that I wanted to  
16 mention on -- this I have as Exhibit 3, and I  
17 have a copy.

18 ATTORNEY EXAMINER: Staff Exhibit  
19 3?

20 MR. PLUMMER: This is Staff Exhibit  
21 4, and this is Respondent's Exhibit 3. Same  
22 thing. May I approach?

23 ATTORNEY EXAMINER: I am sorry.  
24 Now, you have --

25 MR. PLUMMER: This is the same page.

1                   ATTORNEY EXAMINER:   Staff Exhibit 1.  
2   Staff Exhibit 4.

3                   MR. PLUMMER:   Yes.

4                   ATTORNEY EXAMINER:   And this is  
5   Staff Exhibit 1; correct?

6                   MR. PLUMMER:   This is Staff Exhibit  
7   4.   There is our Exhibit 3.

8                   (EXHIBIT MARKED FOR THE PURPOSE OF  
9   IDENTIFICATION)

10                  ATTORNEY EXAMINER:   Your Exhibit 3  
11   which is the same as Staff Exhibit 1?

12                  MR. PLUMMER:   4.   This page.

13                  ATTORNEY EXAMINER:   Excuse me.  
14   Staff Exhibit 1 is the Driver/Vehicle  
15   Examination Report?

16                  MR. JONES:   Staff Exhibit 1, your  
17   Honor, is the compliance review itself, Parts A  
18   and B.

19                  ATTORNEY EXAMINER:   This is from  
20   the Indiana State Police.

21                  MR. PLUMMER:   Right.

22                  MR. JONES:   I think he is referring  
23   to a document that is in Staff Exhibit 4, I  
24   thought.

25                  ATTORNEY EXAMINER:   A page from

1 Staff Exhibit 4 which is the same as  
2 Respondent's Exhibit 3. Do you want --

3 MR. JONES: Did that come out of  
4 Staff Exhibit 4?

5 MR. PLUMMER: There is no need to  
6 mark it separately, I mean, unless you want to.  
7 The only thing I want to show here is this one  
8 is unsigned, this one is signed. And then it  
9 says not available because he was jailed, which  
10 gives credence to my thing that I was unable to  
11 give him a drug and alcohol test.

12 MR. JONES: Your Honor, he needs to  
13 mark that as his own exhibit if that is  
14 different than what's in Staff's exhibit.

15 MR. PLUMMER: That is what I did.

16 ATTORNEY EXAMINER: He says it's a  
17 little bit different because it has a signature.

18 MR. JONES: But there is yet another  
19 exhibit that came out of Staff -- that was the  
20 exact same exhibit. So, I guess right now we  
21 have marked as Staff Exhibit 1 the document I  
22 went and copied, right, that is the document I  
23 copied.

24 MR. PLUMMER: I have got it marked as  
25 3.

1 MR. JONES: Wouldn't that be 2?

2 MR. PLUMMER: I got another one that  
3 is 2.

4 ATTORNEY EXAMINER: He has another  
5 exhibit he has marked 2.

6 (EXHIBIT MARKED FOR THE PURPOSE OF  
7 IDENTIFICATION)

8 MR. PLUMMER: And this is the  
9 letter in his file stating why we could not --

10 ATTORNEY EXAMINER: Do you want to  
11 see that?

12 MR. JONES: I haven't seen this.

13 MR. PLUMMER: I have got copies of  
14 both of them, so those are yours. But  
15 the bottom of that shows --

16 MR. JONES: Do you want copies, your  
17 Honor?

18 ATTORNEY EXAMINER: Yes. I don't  
19 see why that needs -- it's different -- his  
20 Exhibit 3 is different from the page in Staff  
21 Exhibit 4. And this is a letter from --

22 MR. JONES: Who is the letter from?

23 MR. PLUMMER: From Dan. That is  
24 what we put in his file. It's a letter from Dan  
25 why we could not do the drug and alcohol tests,

1     which is what the FMCSA says we have to do if we  
2     are unable to perform it.

3             ATTORNEY EXAMINER:  Let's go off the  
4     record.

5             (DISCUSSION OFF THE RECORD)

6             (RECESS TAKEN)

7             ATTORNEY EXAMINER:  Let's go back  
8     on the record.  I think you explained a bit  
9     about Respondent's Exhibit 1.  Now I would like  
10    you to talk a little bit more about Exhibit 2.  
11    Explain what that is for the record.

12            MR. PLUMMER:  According to FMCSA it  
13    says if you are unable to do a drug or alcohol  
14    test you are to write out the reason why and to  
15    put that in the file in place of the actual drug  
16    or alcohol tests.  And that is what we did here  
17    was that he was incarcerated and we are not  
18    allowed to get a drug or alcohol test.

19            ATTORNEY EXAMINER:  This is a letter  
20    from who to who?

21            MR. PLUMMER:  Just --

22            ATTORNEY EXAMINER:  Did you write  
23    this?

24            MR. PLUMMER:  Dan Winner wrote it.  
25    Dan wrote this to put in the file.



1                   ATTORNEY EXAMINER: That was your  
2 employee wrote this?

3                   MR. PLUMMER: Dan, the owner of the  
4 company.

5                   ATTORNEY EXAMINER: He is an  
6 employee of the company?

7                   MR. PLUMMER: He is the owner of the  
8 company.

9                   ATTORNEY EXAMINER: Okay.

10                  MR. PLUMMER: And he wrote it and  
11 put in it in the file because he was unable to  
12 get a drug or alcohol --

13                  ATTORNEY EXAMINER: So this is from  
14 your file, the company's files?

15                  MR. PLUMMER: Yes.

16                  ATTORNEY EXAMINER: Okay. Now, go  
17 to Respondent's Exhibit 3. Explain what that  
18 is.

19                  MR. PLUMMER: No. 3, I noticed when  
20 looking through Staff Exhibit 4 that their  
21 police report was unsigned and ours is signed.  
22 And at the bottom where Keith would have signed  
23 it says NA jail.

24                  So, he wasn't even allowed to sign  
25 the examination report which just shows that he

1     went directly to jail which gave us no chance to  
2     do a drug or alcohol post-accident testing on  
3     him.

4             ATTORNEY EXAMINER:   Okay.   So this  
5     is from your files, the company's files?

6             MR. PLUMMER:   Yes.   This is the  
7     police report that we were given, and was signed  
8     by the police officer and in places where Keith  
9     would have signed they put NA jailed.

10            ATTORNEY EXAMINER:   So that is  
11    Respondent's Exhibit 3.

12            MR. PLUMMER:   Right, which is not in  
13    Staff Exhibit 4.

14            ATTORNEY EXAMINER:   Okay.

15            MR. PLUMMER:   So that is what those  
16    were.

17            ATTORNEY EXAMINER:   Does that  
18    conclude your testimony?

19            MR. PLUMMER:   Yes, your Honor.

20            ATTORNEY EXAMINER:   Okay.   Do you  
21    have any questions for this witness?

22            MR. JONES:   Yes, your Honor.   Thank  
23    you.

24                            CROSS-EXAMINATION

25    By Mr. Jones:

1           Q.    Mr. Plummer, as it pertains to  
2   Respondent's Exhibit 1, this is a different  
3   report than what was provided in Staff Exhibit 2  
4   that Officer Barrett collected at the time of  
5   the compliance review; is that correct?

6           A.    It is different than the first one  
7   he was given.

8           Q.    Yes.  So, are you the one that gave  
9   Officer Barrett the records for the compliance  
10  review?

11          A.    Dan pulled this, the first report,  
12  out of his compliance box and gave it to Bob.  
13  Bob said this doesn't add up.  I looked at it,  
14  said this can't be right.

15                Went back to the office, spent half  
16  of the night figuring out what was wrong, found  
17  it, brought back this one the next morning with  
18  the supporting documentation.

19          Q.    But isn't it true, Mr. Plummer, that  
20  this discovery that was made between you and Mr.  
21  Winner was much later than when Officer Barrett  
22  was on the scene doing the investigation?

23          A.    No.  We made it right then.  I found  
24  out what happened right away because I knew we  
25  were in compliance.  And I just couldn't figure

1 it out without doing a check of all these  
2 records. And that is what we did.

3 Q. Well, let's look at Respondent's  
4 Exhibit 1. There is no date there for the date  
5 being certified. Do you see that on the first  
6 page?

7 A. Yes, I do.

8 Q. Whereas the one that is provided in  
9 Staff Exhibit 2 is in fact certified as February  
10 2nd, 2016. Do you see that? Do you recognize  
11 that?

12 A. Yes. Certified by Joe Higgins.

13 Q. Yes. Okay.

14 A. He is the employee that I  
15 terminated.

16 Q. And then Respondent's Exhibit 2, do  
17 you know when this entry was made, what date?

18 A. I do not know what date this letter  
19 was written. I know that we did not -- this was  
20 not in his drug and alcohol file, it was in his  
21 confidential file when Bob was there. It was in  
22 his confidential file instead of his drug and  
23 alcohol file.

24 Q. Let me understand. So this  
25 confidential file, is this a file that Officer

1 Barrett had access to for his compliance review?

2 A. We run a 3-file system. Driver  
3 qualification file, a driver confidential file  
4 which would be like his long form, his physical,  
5 his writeups and stuff like that. And then a  
6 drug and alcohol file.

7 They are all right there together,  
8 and he has access to any of them. The  
9 confidential would have his background checks,  
10 stuff like that in it, because the driver  
11 qualification file only has 11 pieces of paper  
12 in it.

13 And so that is how they are filed,  
14 and then everything with the drug and alcohol is  
15 kept in a separate file.

16 Q. When did Mr. Winner bring this to  
17 your attention, this Respondent's Exhibit 2?

18 A. We found it when we started going  
19 through everything trying to figure out where it  
20 was because he knew that he had written it down  
21 and just swore up and down he had it. So we  
22 started going through the files and that is when  
23 we found it after the audit.

24 Q. After the audit?

25 A. It was after, yes. It was only a

1 two-day audit

2 Q. Is after the time that Mr. Winner  
3 was noticed with the violations from the  
4 Commission Staff?

5 A. No. This was like the same week of  
6 the audit, because I wanted to find out what  
7 happened because it makes me look very bad that  
8 we would have missed doing it properly because I  
9 am on top of the accidents myself and I am  
10 usually talking to the clients and making sure  
11 that either we get the tests done or they write  
12 letters or what is needed.

13 Q. Mr. Plummer, do you recall being  
14 involved in a closing interview with Officer  
15 Barrett with the compliance review after the  
16 audit is completed and they have a final  
17 interview that's conducted, that was conducted  
18 with you?

19 A. I am sure I was, yes.

20 Q. Okay. And at that time at no time  
21 was there any discussion about any discrepancies  
22 with either the consortium information pool or  
23 this letter, the claim was in the file, this was  
24 not produced at that final interview; where the  
25 final interview was where Officer Barrett had

1 disclosed or noticed the company as to what  
2 violations he found from his compliance review;  
3 isn't that correct?

4 A. That is correct. And we did not --  
5 we did not have that.

6 Q. Those records you have today you  
7 didn't have?

8 A. And we did not find it in the other  
9 file until after Bob had left. But we did  
10 strongly object to, in that interview, the  
11 violation of both of these because we had  
12 produced the corrected numbers for the --  
13 showing that the consortium was in compliance  
14 which made Mr. Winner's company in compliance.

15 But, Mr. Barrett went with the first  
16 paper he was shown and stuck with that. And so  
17 in these two points we have strongly protested  
18 from that closing argument to today as a matter  
19 of principle, I guess, that we are trying to do  
20 things right, we were trying to be in  
21 compliance, and we just feel that we are being  
22 wrongfully penalized for situations that are out  
23 of DL Winner's Livestock control.

24 Q. Just for clarification, so you are  
25 saying that Respondent's Exhibit 2 was not

1 produced at that time, at the time of the  
2 closing interview?

3 A. We did not have it. And I would not  
4 sit here and lie and say that we did. Bob and I  
5 are too good of friends to do that.

6 Q. But you are saying that Respondent  
7 Exhibit 1 had been produced to Officer Barrett  
8 by that time?

9 A. I brought it in the next morning.

10 Q. You physically gave it to him?

11 A. I brought it in and produced it that  
12 day.

13 Q. That day of the closing interview?

14 A. Yes.

15 Q. Okay. You are qualified to conduct  
16 a urine test; are you not?

17 A. I am a certified collector,  
18 certified as a trainer, certified as a alcohol  
19 tester and trainer.

20 Q. And let me see, you were, at  
21 the time of April 22, 2016, you were the safety  
22 consultant for the company?

23 A. Yes.

24 Q. Did you receive a call from Mr.  
25 Winner in regards to the accident by his



1 employee on that date?

2 A. What was the date again?

3 Q. April 22, 2016, the accident that's  
4 described in Staff Exhibit 4 of the employee  
5 Keith Delzeith.

6 A. What was --

7 Q. Did you receive a call regarding  
8 that accident from Mr. Winner?

9 A. What was the location?

10 Q. That was in Indiana, Interstate 69.

11 A. Yes. Yes, I did.

12 Q. And DeKalb County?

13 A. Yes. Just south of Fort Wayne.

14 Q. Were you asked to respond to the  
15 scene of that accident to conduct a test of that  
16 employee?

17 A. No. He explained it to me and told  
18 me the guy was incarcerated already.

19 Q. So based on that information you  
20 made no attempt to try to go to the incarcerated  
21 facility to see if you could get access to your  
22 employee to have that test or obtain a test that  
23 was done by the authorities?

24 A. I did not. I have done that many  
25 times, and I know their response is always the

1 same.

2 Q. But you made no attempt?

3 A. No, I did not that day. I called  
4 the following day if he had made bond and they  
5 said no.

6 Q. He was shortly released on bond; was  
7 he not?

8 A. I did not check any further. So,  
9 after that, after the 32 hours were up I did not  
10 do any follow-up.

11 Q. Is it your testimony, Mr. Plummer,  
12 that Mr. Delzeith was incarcerated for 32 hours?

13 A. Yes. That is my understanding.

14 Q. Do you know that as a matter of  
15 fact?

16 A. I do not know exactly what time in  
17 the morning they put him in, or processed him.  
18 But it was more than a day later that I called,  
19 so that -- if it had happened in the morning it  
20 would have exceeded the 32 hours.

21 And the other thing is that  
22 according to our drug and alcohol policy he was  
23 already terminated from DL Winner immediately  
24 for testing positive and being arrested for drug  
25 possession, not that that made any difference on

1 the fact that he still needed a post-accident  
2 test.

3 But our policy is zero tolerance.  
4 If he gets a DUI or a drug arrest you are  
5 terminated immediately. We don't wait for a  
6 trial.

7 Q. When did Mr. Winner express to you  
8 that this employee was terminated?

9 A. When he called me about the  
10 accident, and he told me what had happened and  
11 that, you know, neither one of us could believe  
12 it. This was a good driver, and one of the few  
13 I would not have expected anything like this  
14 from, and that he still had the crack pipe  
15 sitting on the passenger seat when the cop came  
16 up to the door.

17 Q. Mr. Plummer, you are familiar with  
18 the Federal Motor Carrier Safety Regulations;  
19 right?

20 A. Yes, sir.

21 Q. And in particular you are familiar  
22 with the regulations concerning a company using  
23 a third party provider such as Tri-State for  
24 conducting these tests, alcohol and drug tests;  
25 correct?

1           A.    Third party consortium?

2           Q.    Yes.

3           A.    Yes.

4           Q.    Yes, that's correct.  Are you  
5 familiar with Section 40.15 that talks about the  
6 responsibilities and compliance of that  
7 relationship?

8           A.    Not verbatim.  I couldn't quote it  
9 for you.  But, I know pretty much what it says.  
10 The carrier is still ultimately responsible for  
11 what the consortium does.  It always falls back  
12 to the carrier to be in compliance.

13          Q.    In fact, Mr. Plummer, it says as an  
14 employer and the carrier it says you are  
15 responsible for ensuring that the service agents  
16 you use meet the qualifications set forth in  
17 this part.  You don't dispute that; right?

18          A.    No, I do not.  That is the way I  
19 understand it also.

20          Q.    And as pertains to, and that was  
21 40.15, Part B, there is also a Part C that talks  
22 about you remain responsible for compliance.

23                And that part reads "Your good faith  
24 use of a service agent is not a defense in an  
25 enforcement action initiated by a DOT agency in

1     which your alleged non-compliance with this part  
2     or a ODOT agency drug and alcohol regulation may  
3     have resulted from these service agents'  
4     conduct."     You recognize that is the wording of  
5     that?

6             A.     Yes, sir.   I understand it to read  
7     that way.

8             MR. JONES:   Your Honor, that is all  
9     I have.

10            ATTORNEY EXAMINER:   Let's go off the  
11     record a minute.

12                   (DISCUSSION OFF THE RECORD)

13                   (WITNESS SWORN)

14                                 - - -

15                                 DANIEL L. WINNER

16     Called as a witness, being first duly sworn,  
17     testified as follows:

18                                 EXAMINATION

19     By the Hearing Officer:

20             Q.     I just want your testimony about  
21     this Exhibit 2.   Okay?   So go ahead and have a  
22     seat.   Now, you wrote Exhibit 2?

23             A.     Yes.

24             Q.     And you agree with what Mr. Plummer  
25     has testified about Exhibit 2?

1           A.   Exhibit 2, we couldn't find Exhibit  
2   2 the day of the audit because it was not in the  
3   correct file.

4           Q.   Okay.

5           A.   It was not in the file we were  
6   looking at.

7           Q.   Okay.

8           A.   But I did have Exhibit 3.

9           Q.   You agree with his testimony?

10          A.   Yes.

11                   ATTORNEY EXAMINER:   Okay.   Do you  
12   have any questions for him about this?

13                               CROSS-EXAMINATION

14   By Mr. Jones:

15           Q.   Mr. Winner, you stated that  
16   Respondent Exhibit 2 was not in the correct file  
17   at the time the compliance review was conducted;  
18   is that true?

19           A.   Yes.   We had it -- everything  
20   wasn't -- all the accident information was not  
21   all in the same file.   And we talked about it  
22   during the audit, he knew that it was not all in  
23   the same file.

24           Q.   Officer Barrett didn't have access  
25   to this document then; right?

1           A.    He didn't see that document, but he  
2    seen documents, Exhibit 3, and it says jail  
3    right on the bottom of the document. And I  
4    stressed that during the audit. And he seen it,  
5    and for some reason that document is not in  
6    Exhibit 4. It's a different document without  
7    the signatures.

8           Q.    Let me ask you about Exhibit 2.  
9    There is no date on this as to when you authored  
10   this. You are saying you authored Exhibit 2; is  
11   that correct? You wrote Exhibit 2?

12          A.    I wrote Exhibit 2.

13          Q.    That is your handwriting?

14          A.    Yes, sir.

15          Q.    But there is no date on Exhibit 2,  
16   correct, reflecting the date that this was  
17   written?

18          A.    No. The date on top was the date  
19   that -- 4-13-17 in type was the date Steve  
20   requested me to send him copies of everything I  
21   had concerning that. And at that point I sent  
22   him copies of Exhibit 2 and Exhibit 3. If you  
23   can see on top one minute or two minutes apart I  
24   faxed them to him that day in April 13th of '17.

25          Q.    So you --

1           A.    That date on there is just  
2   the accident date, and I wrote it up, threwed it  
3   in probably the drawer, got in the file. The  
4   audit was four months later, three or four  
5   months later. I don't know exactly when the  
6   audit was.

7           Q.    Okay.

8           A.    I mean --

9           Q.    The fax on here is April 13, 2017.  
10   The audit was done in 2016.

11          A.    Yes. But, the hearing that we had  
12   to have the papers ready for wasn't until the  
13   17th. That is what Steve requested, just send  
14   everything back to him. So that is when I faxed  
15   both those to him for the phone hearing. I  
16   think that is what it's for.

17          Q.    So, it's fair to say around April  
18   13th is when you discovered this document?

19          A.    I would say before that. It was  
20   probably in the file, the one with everything  
21   else before that date.

22          Q.    So I guess it's fair to say that you  
23   don't know what date --

24          A.    I don't know exactly when it was in  
25   there exactly. But, I mean, to me it's a



1 document, yes. You write a document down to  
2 remind yourself. Hey, this guy was  
3 incarcerated. I talked to the officer while the  
4 truck was still in the interstate, the officer  
5 contacted me. I was on the phone with him for  
6 45 minutes. He told me what was going on. I  
7 knew right away what was going on.

8 He faxed me a copy of the violations  
9 and it says his signature, jailed. I mean, I  
10 had it all right there. And I presented it at  
11 the audit.

12 It's cut and try. This guy was  
13 doing drugs, there was an accident, could not  
14 get to him to get the drug results. He was -- I  
15 don't think he was released until Monday. The  
16 accident happened on Friday afternoon, and he  
17 didn't get out until Monday.

18 And I was in contact with this  
19 officer over the weekend. I mean, I remember  
20 everything about this.

21 And I stressed at the audit, and I  
22 still don't understand why we were written a  
23 violation for something that I showed this  
24 document, Exhibit 3, to Mr. Barrett and showed  
25 him the police -- I mean, he had everything

1     there and still went ahead and wrote  
2     the violation.

3                 I am not trying to hide nothing.  
4     I showed him everything I had. What I knew,  
5     terminated him. I showed him the company rules  
6     on our drug policies, everything. We don't  
7     tolerate this.

8                 And then we get a violation for it.  
9     And I am sitting here wondering what's going on,  
10    you know.

11                Q.    Well, Mr. Winner, the regulation as  
12    you know, you know the regulation as well as I,  
13    that requires that this test be done within a  
14    certain period of time --

15                A.    I realize that.

16                Q.    -- following a crash, reportable  
17    crash. And from what Mr. Plummer testified to  
18    that he made no attempt to go to where he was  
19    incarcerated to try to get the test done, or to  
20    get whatever tests were done by the people, by  
21    the authorities that had this employee or past  
22    employee incarcerated. And you made no such  
23    attempt either; did you?

24                A.    I talked to the officer and he told  
25    me right on the scene they had the evidence

1     there. They were going to put him in jail and  
2     he wouldn't get out until Monday. I mean, what  
3     am I supposed to do? I mean, I can't go there  
4     and give him this test. The time is gone, you  
5     know.

6             Q. Well, you know Mr. Plummer is  
7     someone who is certified to go and do --

8             A. I am certified to do it too.

9             Q. But there was no attempt by either  
10    you or Mr. Plummer at your direction to attempt  
11    to have that done where he was incarcerated, or  
12    to get tests that were already done by the  
13    authorities who had him incarcerated in that  
14    time frame.

15            A. It's my understanding that the  
16    sheriff's department was going to do a test  
17    because they had drugs. So, you know, going to  
18    treat it like an OVI. But, I wasn't, you know,  
19    in contact with them. I was in contact with  
20    them during the weekend. But, I guess, you  
21    know, I tried to get the drug test results from  
22    other accidents later on, they wouldn't release  
23    stuff like that to me.

24                    I have done this. This isn't the  
25    first time that I tried to get a post-accident

1 drug test result from either a sheriff or a  
2 hospital where they took them. I just can't  
3 never get them.

4 I mean, there is privacy laws now  
5 that you cannot get what you need. And they  
6 don't care what the rules are that we have to  
7 abide by. You just -- I don't know how a guy is  
8 supposed to do something when the other side  
9 doesn't work with you to allow you to do what  
10 you got to do.

11 Q. The difference between this  
12 situation involving this particular driver and  
13 those other times you are referring to is that  
14 you didn't even make the attempt to, whereas you  
15 made attempts in the other situations; isn't  
16 that correct?

17 A. I made an attempt when I was in  
18 contact with the sheriff over the weekend, but,  
19 you know, how long are you supposed to try?  
20 Every day? I mean, I don't know.

21 I mean, it would have been great if  
22 they would have just sent it. But, you know, it  
23 didn't happen. And several months later if they  
24 get the results back, yes, it would be okay to  
25 have them in the file, but what good is it going

1 to do when we terminated the guy immediately?

2 I mean, I guess it would have made  
3 the file look letter. I don't know. The driver  
4 was terminated. I mean --

5 Q. Since this case has been initiated  
6 with the Commission, when it turned into a  
7 formal case here with the Commission, did at any  
8 time you try to provide your Exhibit 2 to  
9 anybody, or make it part of the record before  
10 today?

11 A. Who would I have provided it to?

12 Q. Well, you have filed things in the  
13 docket, right, the docket of this case?

14 A. I am not really familiar with how  
15 this stuff works. I mean, we got a letter, you  
16 know, we show up. I mean --

17 Q. That is fine.

18 A. Kind of a get to the point kind of a  
19 deal, and I don't know all the rules of what you  
20 are talking about, getting dockets and this and  
21 that.

22 MR. JONES: Your Honor, I have no  
23 further questions.

24 ATTORNEY EXAMINER: You are excused.  
25 Now, does that complete the Respondent's side

1 of the case? Are you done?

2 MR. PLUMMER: Yes, Your Honor.

3 ATTORNEY EXAMINER: Okay.

4 MR. JONES: Your Honor, I would  
5 object to the Exhibits 1, 2 and 3. No. 1, you  
6 know, again this is not certified, not a  
7 certified record according to Mr. Plummer who  
8 prepared it. It's something that contradicts  
9 the record that they provided as part of  
10 the compliance review. It wasn't provided in a  
11 timely manner, and relevant to the investigation  
12 and review or audit of the business for these  
13 records.

14 Same thing with Respondent's Exhibit  
15 2. As we heard from the testimony of Mr. Winner  
16 and Mr. Plummer, nobody knows when this  
17 statement was made relevant to this case, or to  
18 the date of incarceration of their former  
19 driver, employee.

20 So, the fact that it's a statement  
21 made, we don't know when it was made. And it  
22 was something that also was admittedly not  
23 provided any time during the course of the  
24 compliance review. You heard Mr. Plummer  
25 testify at the time of the closing interview

1 this was not something that was, you know, a  
2 record that they didn't know they had.

3 So, also Respondent's Exhibit 3,  
4 there is nothing really new here. The  
5 information that is being referenced here about  
6 the incarceration of Mr. Delzeith, well, that  
7 was already covered in the Staff Exhibit 4.  
8 That same information was provided in our  
9 records, that second page -- well, second page  
10 of that same report which is included in the  
11 reports provided in Staff Exhibit 4.

12 It also states that he was  
13 incarcerated at the DeKalb County jail. So  
14 really there is nothing new here.

15 So, I guess, I would just object to  
16 those three exhibits on the basis that I argued.

17 ATTORNEY EXAMINER: Well, I think  
18 the Commission can decide what weight to give  
19 those exhibits. And I am going to admit them  
20 into evidence over your objection.

21 (EXHIBITS HEREBY ADMITTED INTO  
22 EVIDENCE)

23 ATTORNEY EXAMINER: Now, you said  
24 something about recalling the officer.

25 MR. JONES: I do, your Honor. I

1 would call Officer Barrett back.

2 ATTORNEY EXAMINER: You are still  
3 under oath.

4 OFFICER BARRETT: Yes, sir.

5 - - -

6 OFFICER ROBERT BARRETT

7 Recalled as a witness, being first duly sworn,  
8 testified as follows:

9 FURTHER DIRECT EXAMINATION

10 By Mr. Jones:

11 Q. Office Barrett, you have heard  
12 the testimony of Mr. Plummer and Mr. Winner here  
13 today; correct?

14 A. Yes.

15 Q. Okay. Now, there was a discussion  
16 about using a third party consortium and that  
17 the responsibilities remain with the company in  
18 regards to that relationship, and also in  
19 regards to their compliance with the Federal  
20 Motor Carrier Safety Regulations; is that  
21 correct?

22 A. Yes.

23 Q. And are you familiar with  
24 the provisions that outline the terms of the  
25 relationship in terms of compliance and



1 responsibilities?

2 A. I know it's in the Part 40, and  
3 again as Mr. Plummer said, I can't dictate it  
4 per line. But I know ultimately the carrier is  
5 ultimately responsible for anybody that they  
6 contract to provide the service to them in the  
7 furtherance of compliance.

8 MR. JONES: May I approach, your  
9 Honor?

10 ATTORNEY EXAMINER: You may.

11 Q. If you want to read those provisions  
12 that are provided and cite where you are reading  
13 from and the source you are reading from for the  
14 record, please.

15 A. 49 CFR Part 40, Subpart 15. Subpart  
16 b. "As an employer you are responsible for  
17 ensuring that the service agency you use meets  
18 the qualifications set forth in this part,"  
19 which would be this book, or this part of Part  
20 40.

21 And then small letter c just talks  
22 about good faith use of the service agent is not  
23 a defense in an enforcement initiated by the DOT  
24 agency in which you are alleged in  
25 non-compliance with this part or a DOT agency

1 drug and alcohol violation may have resulted  
2 from a service agent's conduct.

3 Q. So, the testimony that we heard from  
4 Mr. Plummer about the disgruntled employee in  
5 skewing the information from 2014 to 2015, that  
6 is not a defense here to these violations; is  
7 that correct?

8 A. Based on the way that regulation is  
9 cited I don't believe it is.

10 Q. And were you given Respondent's  
11 Exhibit 1 during your review at the business  
12 when you were there in the summer of 2016?

13 A. We have had a lot of different  
14 exhibits. Can you provide me or show me what  
15 one we are talking about?

16 MR. JONES: Your Honor, may I  
17 approach?

18 ATTORNEY EXAMINER: You may.

19 Q. I am handing you what's been marked  
20 as Respondent's Exhibit 1. And that is  
21 the document I am referring to.

22 A. Okay. That's the annual summary for  
23 2015. I had a verbal conversation with Mr.  
24 Plummer on the phone after the review. Don't  
25 have a time date stamped in memory other than

1 the fact that it was completed.

2 He told me that he found that there  
3 was an error with the numbers related to Mr.  
4 Higgins, but I did not, and I don't recall, ever  
5 receiving this document. It was mentioned  
6 verbally, I can recall that it was mentioned  
7 verbally, that he had it.

8 Q. Do you remember when it was  
9 mentioned verbally that he had it?

10 A. I don't. It was 13 months ago.

11 Q. But is it possible that it was  
12 mentioned while you were doing your review?

13 A. I don't recall that I was provided  
14 this document while the review was still open  
15 and active. I remember referring him to due  
16 process because it had already been put into the  
17 system. That much I do recall of that  
18 conversation. And it was on the phone.

19 Q. And Respondent's Exhibit 2, was that  
20 ever -- is that up there?

21 A. 2? Yes.

22 Q. Okay. Were you provided that at any  
23 time?

24 A. No. I have never seen it before  
25 today.

1           Q.    So this is the first time you have  
2    seen that Respondent's Exhibit 2?

3           A.    That's correct.

4           Q.    Let me ask you I guess, Respondent's  
5    Exhibit 1, is today the first day you have seen  
6    that one as well?

7           A.    Yes.

8           Q.    And Officer Barrett, you have heard  
9    the testimony of both Mr. Plummer and Mr. Winner  
10   about being certified to conduct these drug  
11   tests and alcohol tests, and that no attempt was  
12   made to either go to the facility or obtain  
13   tests that were done at the facility on this  
14   former driver.

15                   Is that in your professional opinion  
16   a violation of the sections that you cited for  
17   having these post-tests done after a crash?

18           A.    It is. The guidance that we are  
19   given from FMCSA is that if the carrier does not  
20   complete the required testing the violation is  
21   to be cited. That's our standard guidance in  
22   relation to this cite during a compliance  
23   review.

24                   MR. JONES: I have no further  
25   questions, your Honor.

1 ATTORNEY EXAMINER: You are excused.

2 MR. JONES: That concludes our  
3 rebuttal, Your Honor.

4 ATTORNEY EXAMINER: Let's go off the  
5 record here for a minute.

6 (DISCUSSION OFF THE RECORD)

7 ATTORNEY EXAMINER: Do we have  
8 anymore today? Nothing more?

9 MR. JONES: Nothing.

10 ATTORNEY EXAMINER: Okay. We will  
11 consider this matter submitted on the record. I  
12 thank you all for coming.

13 MR. JONES: Thank you, your Honor

14 MR. PLUMMER: Thank you, your Honor.

15 (At 12:50 A.M. the hearing was  
16 concluded)

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CERTIFICATE

I do hereby certify that the foregoing  
is a true and correct transcript of the  
proceedings taken by me in this matter on August  
24, 2017, and carefully compared with my  
original stenographic notes.

\_\_\_\_\_  
Michael O. Spencer,  
Registered Professional  
Reporter.

- - -

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Summary: Transcript In the Matter of DL Winner Livestock Express, Inc. Notice of Apparent Violation and Intent to Assess Forfeiture, hearing held on August 24, 2017. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Spencer, Michael O. Mr.