**BEFORE THE**
**PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of FedEx Custom Critical, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture. | : : : : | Case No. 17-1960-TR-CVF |

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# POST-HEARING BRIEF

**SUBMITTED ON BEHALF OF THE STAFF OF**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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June 26, 2018

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## I. INTRODUCTION

As part of a focused compliance review, FedEx Custom Critical, Inc. (Respondent or Company) was found to have violated provisions of the Federal Motor Carrier Safety Regulations. Each of the violations found were also found during the Company's most recent compliance review, confirming concerns that these issues were unresolved. It was preliminarily assessed a forfeiture of $3,950.00.

The record shows that the Staff of the Public Utilities Commission of Ohio (Staff) offered the testimony of a highly qualified and credible Hazardous Materials Specialist, as well as the testimony of the Chief of the Transportation Compliance Division of the Public Utilities Commission of Ohio (Commission), to support both the violations and the resulting civil forfeitures. The record supports the finding of the violations of the regulations at issue in this proceeding. Based on the evidence of record, established precedent of the Commission, and sound public policy, the total monetary civil forfeiture of $3,950.00 should be imposed against Respondent.

## II. STATEMENT OF FACTS

### A. Procedural History of the Cases

In April 2013, a review of the Company's operations revealed issues with vehicle maintenance and drug and alcohol. Tr. 49. Because those issues were considered "unresolved," Hazmat Specialist Neal Hedrick was assigned to conduct a compliance review of the Company, with special attention to these issues. That review was conducted in September 2015. Tr. 48. This was a focused, not a comprehensive, review. Tr. 53. Specifically, Specialist Hedrick was assigned to "look at hazardous material compliance, drug and alcohol compliance, and vehicle maintenance compliance." Tr. 51-52. Following his review, Specialist Hedrick prepared a report, noting numerous violations.

Respondent was timely sent a Notice of Preliminary Determination on August 27, 2017, as required and described in Ohio Admin. Code §4901:2-7-12. Staff Exhibit 9, Tr. 106. The Notice of Preliminary Determination cited the following violation

| | |
|---|---|
| 382.303(a) | Failing to conduct post accident alcohol testing on driver following a recordable crash. |
| 382.303(b) | Failing to conduct post accident testing on driver for controlled substances. |
| 396.3(b) | Failing to keep minimum records of inspection and vehicle maintenance. |
| 396.11(a) | Failing to require driver to prepare driver vehicle inspection report. |

Respondent timely filed a request for a hearing. The evidentiary hearing was conducted on May 8, 2018.

### B. Factual background of the violations at issue in this proceeding

#### 1. Drug and Alcohol Violations

Hazardous Materials Specialist Hedrick examined all accidents in the company records from the preceding 365 days that "involved a fatality, a tow away, or an injury requiring treatment away from the scene in which either a fatality requires testing all of the time or the driver was cited at the time of the accident for causing the accident." Tr. 60. There were seven (7) such accidents. Of those, Specialist Hedrick found what he believed to be three (3) violations.

##### a. The Wyoming Accident

On December 21, 2014, at 10:37 p.m., a Company vehicle lost control on Interstate 80 east of westbound Exit 146 in Sweetwater County, Wyoming. The Company's driver lost control on icy roads "due to driving too fast for conditions." Staff Ex. 2 at 4. The truck "fishtailed out of control and veered toward the median where it overturned coming to rest on its passenger side." *Id*. The vehicle was towed from the scene. *Id*. at 5, Tr. 61. The driver was cited by the Wyoming Highway Patrol for "Speed too Fast." *Id*. A drug test was performed, but an alcohol test was not. Staff Ex. 2 at 7.

##### b. The Ohio Accident

On February 4, 2015, at 8:31 p.m., a Company vehicle lost control on Interstate 80 (Ohio Turnpike) just east of the Wyandot Service Plaza. The Company's driver "lost control, crossed two lanes, left the left side of the roadway, and struck the median wall." Staff Ex. 3 at 2. The vehicle was towed from the scene. *Id*. at 3, Tr. 69. The driver was

cited by the Ohio State Highway Patrol for a violation of Ohio Rev. Code 4511.33, failure to drive in marked lanes. Staff Ex. 3 at 4, Tr. 69. A drug test was performed, but an alcohol test was not. Staff Ex. 3 at 5.

#### c. The New York Accident

On April 21, 2015, at 10:23 a.m., a Company vehicle failed to maintain an assured clear distance ahead on State Route 281 ("West Road") at Madison Street in Cortland, New York. The Company's driver "failed to observe [a] vehicle in front of him stopping and was unable to avoid striking [the] vehicle." Staff Ex. 4 at 5. The vehicle was towed from the scene. *Id*. at 2, Tr. 71. The driver was cited by the New York State Police for a violation of N.Y. Crim Law §1129, "Following too closely." Staff Ex. 4 at 2, Tr. 71. Neither a drug test nor an alcohol test was performed. *Id*. at 8.

### 2. Vehicle Maintenance Violations

#### a. Maintenance Records Violations

Hazardous Materials Specialist Hedrick examined 125 files in the Company records from the preceding 365 days of "vehicles that had been stopped for roadside inspections and written a defect or a violation on a roadside inspection." Tr. 75. the Of those, Specialist Hedrick found what he believed to be three (3) files that he believed inadequately documented maintenance performed on those vehicles.

### (1) Vehicle E10674

The maintenance file for Vehicle E10674 contains three (3) Vehicle Inspection reports, dated July 21, 2014, January 21, 2015, and July 21, 2015. Staff Ex. 5. None of these reports indicate that any level of maintenance had been performed on the vehicle during the year in review. There was a Driver/Vehicle Examination Report dated May 12, 2015 finding defective brake tubing and hoses, and an invoice dated the same day showing that that problem had been repaired.

The file did contain two (2) Vehicle Maintenance Records provided by the owner, dated January 21, 2015 and July 21, 2015. Remarkably, neither document indicated that any maintenance of any kind had been performed on that vehicle.

> Q [Margard]: For that unit. And what conclusions did you draw from reviewing these records?
>
> A [Hedrick]: That the vehicle was -- traveled over 120,000 miles in the past 365 days. The only thing that was in the maintenance file beyond the verification of repairs for the one roadside inspection were the periodic inspections. They were not documenting oil changes, preventive maintenance that might have been performed, or any other type of repairs or maintenance at all.

Tr. 77-78.

### (2) Vehicle D8665

The maintenance file for Vehicle D8665 contains one (1) Vehicle Inspection report, dated March 21, 2015. Staff Ex. 6. It also contained a Vehicle Maintenance Record provided by the owner, dated March 23, 2015. This is the type of maintenance

record that Specialist Hedrick had expected to see for all of the vehicles, and was missing for Vehicle E10674.

There was, however, a Driver/Vehicle Examination Report dated May 12, 2015 finding an inoperative turn signal. Unlike Vehicle E10674, however, there was no indication that that defect had ever been repaired.

> Q [Margard]: Now, is this the entirety of the maintenance file that you found for this unit?
>
> A [Hedrick]: Yes. There's nothing indicating that that inoperative turn signal was repaired and it is required that that be maintained with a maintenance documentation that it, of course, had to be repaired before removed from the scene, the stop, and had to be documented that it was repaired.
>
> Q: That's a document you would have expected to find.
>
> A: Yes. It was missing.

Tr. 78-79.

**(3) Vehicle DR8749**

The maintenance file for Vehicle DR8749 contained one (1) Vehicle Inspection report, dated March 19, 2015, but no Vehicle Maintenance Records. Staff Ex. 7. There was also a Driver/Vehicle Examination Report dated June 2, 2015, finding a number of brake defects. But the file contained no indication that those defects were ever repaired. Moreover, it contained a letter to the owner from the Company chastising it for not having performed "good pre-trip and post-trip inspection[s]." Remarkably, that letter did not request any records showing that the braking defects had been repaired.

> Q [Margard]: And what conclusions did you draw from reviewing this?

> A [Hedrick]: The vehicle traveled over 50,000 miles. There were no records of any repairs for that roadside inspection. The only thing in the maintenance file was a periodic inspection.

Tr. 79.

#### b. Driver/Vehicle Inspection Report Violations

Hazardous Materials Specialist Hedrick examined 27 files in the Company records from the preceding 365 days where drivers would have been required to complete a Driver/Vehicle Inspection Report (DVIR). Tr. 80. Of those, Specialist Hedrick found what he believed to be 23 files where required DVIRs had not been completed.

Specialist Hedrick's handwritten notes detail, for each vehicle examined, roadside inspections, carefully noting violations and whether DVIRs were prepared. Staff Ex. 8, Tr. 83-85. He compared these finding together with the vehicle maintenance records to determine when a DVIR should have been prepared. Tr. 86. He carefully compiled all of these into a detailed table, noting the missing DVIRs for each vehicle examined. Staff Ex. 8 at 11. The exhibit also contains 24 inspection reports for which Specialist Hedrick expected to find a DVIR, but found none. Tr. 86.

## III. LAW AND ARGUMENT

### A. Drivers must comply with the Motor Carrier Safety Regulations.

The Commission, as the lead agency for the Motor Carrier Safety Assistance Program (MCSAP) in Ohio, regulates operation of commercial motor vehicles. Ohio Rev. Code § 4905.80. In furtherance of this obligation, the Commission has adopted rules governing the conduct of drivers, shippers, and motor carriers that are engaged in

commerce. The Commission has adopted standards for motor carrier safety pursuant to authority delegated by the Ohio General Assembly. Ohio Rev. Code § 4905.81. These rules, which are found under Ohio Admin. Code § 4901:2-5, largely adopt the U.S. Department of Transportation motor carrier safety regulations.

The Commission has also adopted "Safety Rules" for transportation of hazardous materials in intrastate commerce pursuant to its statutory authority. Ohio Rev. Code §4923.03(C). These rules, which are found in Ohio Admin. Code § 4901:2-5-02, largely adopt the U.S. Department of Transportation ("USDOT") Hazardous Materials Regulations.

The state has continually sought to implement programs to ensure the safety of the motoring public and to reduce accidents involving commercial motor carriers. It is the Commission's duty to keep Ohio's roadway safe from accidents involving commercial motor vehicles. Compliance with the regulations is imperative.

### B. The Company failed to conduct post-accident alcohol and controlled substance testing on its drivers.

There are three circumstances under which a post-accident drug and alcohol test **must** be conducted. A test must always be conducted on a surviving driver when an accident involving a commercial motor vehicle results in a fatality. The driver does not need to be cited for a moving traffic violation nor does the driver need to be deemed at fault. If a fatality occurs, the driver is tested. None of the violations in this case involved a fatality.

Where there is no fatality, but the driver is cited for a moving traffic violation, testing must occur if either (1) one or more of the vehicles involved in the accident is towed from the scene of the accident; or (2) one or more persons involved in the accident immediately receives medical treatment away from the scene of the accident. The regulation, which is contained in 49 C.F.R. 382.303, imposes additional requirements. Specifically, that section provides that:

> (a) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each of its surviving drivers:
>
> (1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or
>
> (2) Who receives a citation within 8 hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:
>
> (i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or
>
> (ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.
>
> (b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:
>
> (1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or
>
> (2) Who receives a citation within thirty-two hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

There is no dispute in this case about which drivers were tested, or which tests were performed. None of the drivers in the three accidents cited by Specialist Hedrick had alcohol tests performed. Two of the three drivers had drug tests administered; the driver in the New York accident did not.

The issue in this case involves timing – who knew what when and what efforts were taken to ensure that the appropriate testing was performed. Staff respectfully submits that the Company remained under an obligation to ensure that the necessary testing was performed, but failed to do so.

**1. Alcohol Testing Violations**

The alcohol test should be conducted within two hours of the accident. If the alcohol test is not conducted within two hours, the employer must continue to make an effort to have the driver tested for up to eight hours and prepare and maintain, on file, a record why the test was not administered:

(d)(1) *Alcohol tests*. If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same

> record. Records shall be submitted to the FMCSA upon request.

49 C.F.R. 382.303(d)(1).

The language is clear. When required, an employer must endeavor to ensure that an alcohol test is conducted within eight (8) hours following an accident. This regulation prescribes that the employer must create and maintain a record if a test is not performed, regardless of the time elapsed since the accident. It also prescribes that the employer must continue "attempts to administer an alcohol test" for a full eight (8) hours following an accident.

Each of the three violations found by Specialist Hedrick involved accidents where the Company driver was cited and a vehicle was towed, but no alcohol test was performed within the eight (8) hour period. In each instance, the Company created and provided a "record" listing the sequence and timing of events to satisfy the reporting requirements. While Specialist Hedrick found these records to be "adequate," he nonetheless testified that he believed that they did not excuse the employer from performing the tests. Tr. 64.

The Company offers a number of excuses why testing was not conducted. In a couple of cases, drivers were delinquent in informing the Company that they had been issued citations. In another situation, the driver left the scene of an accident, and claimed to be unaware that the car he struck had to be towed. In one circumstance, the remoteness of the accident location was blamed for the delay in obtaining testing. None of these rationale excuses performance under the regulations.

Specialist Hedrick testified that, on the basis of his training and experience, a violation for failure to test for alcohol is appropriate if not performed within eight (8) hours, "unless the driver was inaccessible in that he's in a hospital or he's held up at the scene past the 8-hour timeline for . . . alcohol, 32 for drugs." Tr. 93-94. Instances of driver inadvertence, neglect, or downright avoidance are simply not justifications for the Company's failure to take all reasonable efforts to ensure that the necessary testing is performed.

Poor communication cannot justify a failure to perform an alcohol test. To find otherwise would encourage drivers to simply not report critical incidents, to absolve both themselves and their employers of costly tests and possible liability. Drivers function as agents of the Company. They have a duty to report accidents and events that could trigger the need for alcohol testing, to the Company in a timely fashion. As Specialist Hedrick testified, "[t]he driver not telling the carrier that he was issued a citation is still the responsibility of the carrier. The driver is part of the carrier." Tr. 64.

This was an issue in the Ohio and New York accidents. The Company did not learn that a citation had been issued in the Ohio incident until 9:40 a.m. the following morning, nearly 12 hours after the accident occurred. In the New York incident, the Company did not learn that one of the vehicles had been towed until seven (7) days after the accident since the Company driver left the scene before the police arrived. As Specialist Hedrick testified, "the driver should not have left the scene in the first place and should have been aware that there was a tow away. An accident is an accident. He rear ended another

vehicle." Tr. 95. In both incidents, the drivers should have notified the Company about the citation immediately. Tr. 70, 73.

This is different than a citation being issued long after the accident occurred. Because the deadlines for conducting tests are measured from the time of the accident, regardless of when the citation issued, a vehicle is towed, or a person involved is transported for medical treatment, the necessary "triggers" for testing may compress the time in which the employer must act:

> Q [Wiseman]: Okay. So if a citation isn't issued let's say for 10 hours after the accident, would that be a sufficient excuse that the test wasn't done?
>
> A [Hedrick]: Well, there's a provision that he has to be cited at the time of the crash so, yes, I wouldn't call it an excuse. They are exempted from it.
>
> Q. So what does that mean at the time of the crash because in FedEx's notes they indicated the citation wasn't issued at the time of the crash?
>
> A. At the time of the crash investigation.
>
> Q. It was two and a half hours later.
>
> A. Within the eight hours.
>
> Q. Okay. But you would agree that delay from the time the accident occurred until the citation is issued compresses the time that the company has to get that alcohol test done.
>
> A. Yes, that's true.

Tr. 99.

The problem in this case, however, is that the record does not reflect *when* the citations were issued, only *that* they were issued. Although the Company-provided call screens appear to indicate that citations may have been issued after on-scene accident

investigations occurred, there is simply no way to know, and the record does not demonstrate, exactly when the citations were issued. The Wyoming accident is a case in point:

> Q [Wiseman]: And based on your review of this document, why was the alcohol test not able to be completed?
>
> A [McCahan]: It's due to the time the notification of the accident involving a tow, no citation had been given. The citation was actually issued 2 hours and 20 minutes after the accident occurred, and then we found out about it at 7:50 in the morning.
>
> Q: Okay. And do you have -- just to make this point, do you have 24-hour access to, you know, help your drivers and help the process of getting the drug and alcohol test conducted after hours?
>
> A: Yes.
>
> Q: But in this case you just weren't able to get that process rolling within that eight-hour window?
>
> A: Correct.

Tr. 14. The same was true of the Ohio accident:

> Q [Wiseman]: Okay. And on the alcohol test, based on your review of this document today, what was the reason that the test was not conducted within such a short eight-hour window?
>
> A [McCahan]: So, again, when we reached out in the morning to No. 1, we were notified of the citation given in association with the tow. Knew there was a tow; didn't know there was a citation. The alcohol obviously had expired prior to us getting that information. The drug test was completed on time.
>
> Q: So sometimes you're kind of -- especially when accidents occur at 10 o'clock at night like this one, if your driver doesn't give you accurate information or contact you immediately after the accident, it's -- would you say it's difficult to get that test done within the required eight-hour window?

A: It is.

Tr. 15-16. The problem had nothing to do with when the citation was issued. The problem was the result of communication issues between the drivers and the Company, or its third party agent, and a lack of appropriate follow-up.

While the incident in Wyoming was admittedly remote, the accidents in Ohio and New York were not. Nonetheless, even that accident site was within easy – and timely – reach of numerous metropolitan areas. It was, for instance, within 240 miles of Denver, Colorado, 200 miles of Cheyenne, Wyoming, 185 miles of Salt Lake City, Utah, and 100 miles of Laramie, Wyoming. Even without having some sort of portable kit on board for collecting samples, third-party administrators have networks that permit them to either reach drivers with mobile units, or to send them to collection sites well within the eight (8) hour time limit. Tr. 66.

Specialist Hedrick found that a major problem was with the Company's communications:

> Q [Margard]: Do you believe that the training provided to the drivers is adequate?
>
> A [Hedrick]: Considering the -- the reasoning being that the drivers are not notifying their employer that they received a citation or the employers not getting back to the driver in a timely manner to find out if they were cited until someone comes in the next morning, I would say that there's a communication problem between the drivers and the management at the time that I did this review and which led to the violations of not getting the testing done.

Tr. 67. Indeed, the Company indicated that it doesn't provide training to drivers on accident reporting protocols. As Company witness McCahan testified, "[i]t's the

obligation – again, it's in the owner-operator lease agreement so every owner-operator knows in there and it's their responsibility to ensure their contracted drivers are following those standards." Tr. 17.

In each of these instances, actions of the Company or its agents – whether its drivers or its third-party administrators – were responsible for either not communicating or appropriately following up on accidents that required timely alcohol testing. The Commission should find that FedEx Custom Critical, Inc. violated 49 C.F.R. 382.303(a).

### 2. Drug Testing Violations

A controlled substance, or drug, test is to be conducted in the same circumstances, although the time period is longer:

> (d)(2) *Controlled substance tests*. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

49 C.F.R. 382.303(d)(2).

As with the alcohol testing, the language here is equally clear. When required, an employer must endeavor to ensure that an alcohol test is conducted within 32 hours following an accident. This regulation prescribes that the employer must create and maintain a record if a test is not performed, regardless of the time elapsed since the accident. An employer must continue attempts to administer a drug test for a full 32 hours following an accident.

Of the three accidents where Specialist Hedrick found alcohol testing violations, in only one was a drug test also not performed. As with the other accidents, the Company created and provided a "record" listing the sequence and timing of events relating to the New York accident that satisfied the reporting requirements, but failed to demonstrate compliance with the testing requirement.

As noted above, the driver in the New York accident wasn't tested because neither he nor the Company, apparently, were aware that a vehicle involved in the accident had been towed until well after the time for drug testing had passed. The reason for this lack of awareness, though, was because the driver left the scene of an accident even before the police arrived. While Specialist Hedrick acknowledged that there was no regulatory obligation for the driver to verify, after the fact, that a tow had occurred, he stated very firmly that the driver should not have left the scene. Had he not fled, he would have been aware that a tow was required, and the necessary testing could have been performed. Condoning actions like the driver's here would be unacceptable public policy. The Commission simply cannot absolve a carrier of responsibility simply because its driver determined to neglect his responsibility to report an accident that he had caused to the appropriate local authorities.

In this instance, actions of the Company or its driver were responsible for either not communicating or appropriately following up on accidents that required timely drug testing. The Commission should find that FedEx Custom Critical, Inc. violated 49 C.F.R. 382.303(b).

### C. The Company failed to keep minimum records of inspection and vehicle maintenance.

As was the case during the 2013 review, the Company was cited for violations of 49 C.F.R. § 396.3(b). That section provides that:

> (b) Required records. Motor carriers, except for a private motor carrier of passengers (nonbusiness), must maintain, or cause to be maintained, records for each motor vehicle they control for 30 consecutive days. Intermodal equipment providers must maintain or cause to be maintained, records for each unit of intermodal equipment they tender or intend to tender to a motor carrier. These records must include:
>
> (1) An identification of the vehicle including company number, if so marked, make, serial number, year, and tire size. In addition, if the motor vehicle is not owned by the motor carrier, the record shall identify the name of the person furnishing the vehicle;
>
> (2) A means to indicate the nature and due date of the various inspection and maintenance operations to be performed;
>
> (3) A record of inspection, repairs, and maintenance indicating their date and nature; and
>
> (4) A record of tests conducted on pushout windows, emergency doors, and emergency door marking lights on buses.

The Company requires that maintenance files be kept on vehicles leased to it by its owner-operators. Company witness McCahan described their requirements this way:

> Q [Wiseman]: Can you briefly describe what your process is to ensure that all vehicles that are operated under your DOT authority are properly maintained and inspected. What's your, you know, requirements to maintain and keep those records?
>
> A [McCahan]: So our maintenance program requires that there are two DOT inspections per year so one every six months and then in between those six months

there's a maintenance recap that is required to be sent in as well.

Q: And these -- just to clarify all of these trucks are not owned by FedEx. They are owned by individual contractors who lease them to FedEx, correct?

A: Correct.

Q: So your requirement is that they have the annual periodic DOT inspection done twice which is twice what the DOT requires, correct?

A: Yes.

Q: And they also submit periodic maintenance records showing what work they've done on their truck.

A: Correct.

Q: And, again, that is spelled out from the owner-operator lease as a contractual requirement to do this?

A: It's actually in a separate maintenance kind of program document that each agreement does touch on the maintenance, but the requirements are actually in a separate maintenance program.

Tr. 19-20.

Of the three (3) maintenance files produced in their entirety in Staff Exhibits 5, 6, and 7, none had any "means to indicate the nature and due date of the various inspection and maintenance operations to be performed" required by 49 C.F.R. § 396.3(b)(2). Of the three (3) files, only one, Staff Exhibit 6, contained any "record of inspection, repairs, and maintenance indicating their date and nature" as required by 49 C.F.R. § 396.3(b)(3). And that file failed to contain any repair record for a defect found on a roadside inspection.

The Company may have had a policy in place. It may have had a "separate maintenance program." It may have even had internal audits to ensure that contractors

and drivers are complying with the maintenance requirements. Tr. 20-21. But it failed to maintain the requisite records for these three (3) vehicles. The Commission should find that FedEx Custom Critical, Inc. violated 49 C.F.R. § 396.3(b).

### D. The Company failed to require drivers to prepare driver vehicle inspection reports.

As was the case during the 2013 review, the Company was cited for violations of 49 C.F.R. § 396.11(a). That section provides, in pertinent part, that:

> (a) *Equipment provided by motor carrier*. (1) Report required. Every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated, except for intermodal equipment tendered by an intermodal equipment provider. The report shall cover at least the following parts and accessories:
> * * *
> (2) Report content. (i) The report must identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown. If a driver operates more than one vehicle during the day, a report must be prepared for each vehicle operated. The driver of a passenger-carrying CMV subject to this regulation must prepare and submit a report even if no defect or deficiency is discovered by or reported to the driver; the drivers of all other commercial motor vehicles are not required to prepare or submit a report if no defect or deficiency is discovered by or reported to the driver.
> (ii) The driver must sign the report. On two-driver operations, only one driver needs to sign the driver vehicle inspection report, provided both drivers agree as to the defects or deficiencies identified.
> (3) *Corrective action*. (i) Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the

> driver vehicle inspection report which would be likely to affect the safety of operation of the vehicle.
>
> (ii) Every motor carrier or its agent shall certify on the driver vehicle inspection report which lists any defect or deficiency that the defect or deficiency has been repaired or that repair is unnecessary before the vehicle is operated again.

In general, drivers of non-passenger-carrying commercial motor vehicles are not required to prepare or submit a DVIR if no defect or deficiency is discovered when inspecting the vehicle. As Specialist Hedrick testified, he only reviewed vehicles that had had roadside inspections where defects were found. Even then, he did not consider circumstances where out-of-service violations were found, as those would have had to be corrected before the vehicle could move again.

In other words, Specialist Hedrick expected to find a DVIR for every vehicle where a defect was found on a roadside inspection prior to that vehicle being operated on a subsequent day. If the defect had been repaired prior to the end of the day, he would have expected to find maintenance and repair records to that effect if no DVIR had been prepared. He found violations only where defects were found on roadside inspections on vehicles that were operated on subsequent days without either appropriate repair records or a DVIR. His notes were thorough and complete, and more than adequately document the violations.

Company witness McCahan acknowledged that the violations were written for vehicles "off of roadside inspections for that day where there was a defect noted but then there was no DVIR associated with that. Tr. 22. He could not recall whether Specialist

Hedrick also reviewed the maintenance files for those vehicles. Tr. 23. He admitted, however, that there should have been DVIRs under those circumstances:

> Q [Margard]: If the defect is found on an inspection and is not repaired, it is FXCC's expectation that the driver will prepare a DVIR for that vehicle for that day; is that correct?
>
> A [McCahan]: That's correct.
>
> Q: And presumably for every subsequent day until the defect or deficiency is repaired, correct?
>
> A: Yes.
>
> Q: If, in fact, the defect or deficiency was repaired, there would be a record of that as well, would there not?
>
> A: Yes.

Tr. 43-44. In 23 instances Specialist Hedrick found defects, but no repair records. The Commission should find that FedEx Custom Critical, Inc. violated 49 C.F.R. § 396.11(a).

### E. The Commission has authority to assess civil forfeitures.

The Commission has authority to adopt safety rules applicable to motor carrier regulation and has, in fact, adopted the Federal Motor Carrier Safety Regulations of the U.S. Department of Transportation in Title 49 of the Code of Federal Regulations, Parts 40, 367, 380, 382, 383, 385, 386, 387 and 390 through 397. Ohio Admin. Code § 4901:2-5-03(A). In addition, the Commission has also adopted the federal Hazardous Materials Regulations of the U.S. Department of Transportation in Title 49 of the C.F.R., parts 171 to 180. O.A.C. §4901:2-5-02(A). The Commission enforces the Motor Carrier Safety and Hazardous Materials Regulations for the State of Ohio.

The Commission has the statutory power to assess monetary forfeitures against motor transportation Companies for non-compliance with Federal Motor Carrier Safety and Hazardous Materials Regulations. Ohio Rev. Code § 4923.99. Pursuant to this enforcement authority, the Commission has adopted civil forfeiture and procedural rules. Ohio Admin. Code §§ 4901:2-7-01-4901:2-7-22.

Staff witness Rod Moser testified that the procedure for determining forfeiture assessments for violations of the Motor Carrier Safety and Hazardous Materials Regulations is consistent with that recommended by the Commercial Vehicle Safety Alliance (CVSA). Tr. 109. These procedures, and the resulting forfeiture amounts, are consistently followed and equally applied to all drivers, shippers, and carriers. The 49 C.F.R. § 382.303(b) violation carries a $400.00 forfeiture, doubled in this case since the Company was found to be in violation of the same regulation in its most recent compliance review for a total of $800.00. Tr. 106. The 49 C.F.R. § 396.11(a) violations carry a $975.00 forfeiture, doubled again for the same reason for a total of $1,950. Tr. 106-107. The 49 C.F.R. § 382.303(a) violations carry a $600.00 forfeiture, doubled as the other for a total of $1,200.00. Tr. 107. The total assessed forfeiture for all violations equals $3,950.00. In Mr. Moser's opinion, based on his experience as a Compliance Officer in the Commission Transportation Department, these amounts were properly and fairly assessed against the Respondent. Tr. at 109.

## IV. CONCLUSION

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Commission find that the Respondent violated Sections 382.303(a), 382.303(b), 396.3(b), and 396.11(a) of the Federal Motor Carrier Safety Regulations, and that the Commission hold Respondent liable for the civil forfeiture of $3,950.00 as recommended by the Staff.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief on Behalf of the Staff of the Public Utilities Commission of Ohio** was served by regular U.S. mail, postage prepaid, and fax, upon the following parties of record, this 26th day of June, 2018.

*Werner. L. Margard III*
**Werner L. Margard III**
Assistant Attorney General

**PARTIES OF RECORD:**

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**This foregoing document was electronically filed with the Public Utilities**

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Summary: Brief Post Hearing Brief electronically filed by Ms. Tonnetta  Scott on behalf of PUC