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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SECRETARY'S OFFICE
Public Utility Commission

Application of Central Transport, :
Inc. :

A-00108155

ORDER

On May 26, 1988, Central Transport, Inc. (Central), filed an application for a certificate of public convenience to transport, as a common carrier, property, in bulk, in tank and hopper-type vehicles, between points in Pennsylvania. The application was protested and hearings have been held in the matter. Further hearings are presently scheduled for February 7, 8, 9, and 15, 1989. Central has restrictively amended its application to read as follows:

Property, in bulk, and hopper-type vehicles, between points in Pennsylvania.

Provided that no right, power or privilege is granted to transport asphalt, cement, cement waste, dolomitic limestone and dolomitic limestone products, dry litharge, fly ash, limestone and limestone products, mill scale, roofing granules, salt, sand, scrap metal and stack dust.

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Provided that no right, power or privilege is granted to transport aviation gasoline, butane, diesel fuel, fuel oil (grades 2, 4, 5 and 6), gasoline, kerosene, motor fuel, propane, turbo fuel, cryogenic liquids, dispersants and refrigerant gases.

Provided that no right, power or privilege is granted to transport corn syrup and blends of corn syrup, flour, honey, milk and milk products, molasses, sugar and sugar substitutes.

FOLDER

Provided that no right, power or privilege is granted to perform transportation in dump vehicles.

Provided that no right power or privilege is granted to provide services from the facilities of PENNWALT Corporation, located in the city and county of Philadelphia, or in the county of Bucks, to points in Pennsylvania, and vice versa.

At this point there are six protestants remaining in the case. Before me for resolution at this time is a Motion To Dismiss An Objection And To Direct Answering Of Interrogatories ("motion to compel"). This motion was filed by Central against Matlack on January 4, 1989. To date, more than eight days after Central filed its motion, Matlack has filed no answer thereto. 52 Pa. Code §5.342(e)(1) and 52 Pa. Code §1.56(b)

Background

On December 9, 1988, Matlack filed objections to interrogatories served by Central upon it on November 25, 1988. Matlack objected to Central Interrogatories 6, 15, 17, 18, 19, and 20. On December 20, 1988, Matlack filed Supplemental Objections to Interrogatories 17, 18, 19, and 20, stating further reasons why it objected to answering those interrogatories. On January 4, 1989, Central filed the subject motion to compel with respect to Interrogatories 17, 18, 19, and 20.

The interrogatories at issue read as follows:

17. Since January 1, 1986, has Protestant received any complaints, warnings, Notices of

Claim or citations from the Pennsylvania Public Utility Commission, the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, the United States Department of Transportation, the Federal Bureau of Investigation, or any other governmental agencies of the Commonwealth of Pennsylvania or of the state (other than Pennsylvania), in or through which Protestant's vehicles operated the most miles during 1986 and 1987, in connection with alleged violations involving or affecting transportation.* If so, give the following information for each instance:

(a) Date of alleged violation.

(b) Origin(s) and destination(s) of service being rendered or location of violation.

(c) Commodity or commodities being transported, or nature of service being rendered.

(d) Type of vehicle utilized, if any.

(e) Nature of the incident or problem which formed the basis for the complaint, warning, Notice of Claim, etc.

18. For each instance identified in response to Interrogatory 14 (sic), identify and produce all documents(s) which pertain(s) to the incident including all document(s) issued by any of the agencies listed in said Interrogatory.

19. Were there any instances during 1986, 1987 and 1988 (through September 30), in which protestant transported traffic between points in Pennsylvania, in which the moves were subject to the jurisdiction of the Pennsylvania Public Utility Commission, but were not authorized by certificates of public convenience issued to Protestant by the Pennsylvania Public Utility Commission? If so, give the following information for each instance:

(a) Date of trip;

(b) Origin of trip;

- (c) Destination point or points;
- (d) Commodity or commodities transported;
- (e) Number and type of vehicles used;
- (f) Name of entity utilizing applicant's service.

20. For each instance identified in answer to interrogatory 19 herein, identify and produce all documents which pertain to the service performed.

*The term "involving or affecting transportation" for the purposes of this interrogatory shall mean incidents or occurrences (i) during the operation of vehicles on the public highways, (ii) at or adjacent to terminals or cleaning facilities and (iii) during the process of repair or cleaning of vehicles.

With respect to Interrogatories 17 and 18, Matlack objects on two grounds. In its initial objections, Matlack objected that Interrogatories 17 and 18 are too broad. Matlack acknowledged that Interrogatories 17 and 18 are virtually identical to Interrogatories 14 and 15 propounded by Matlack to Central earlier in this proceeding. As Matlack noted, those interrogatories were discussed in detail by counsel and by the undersigned during several days of hearing, culminating in the form of the interrogatories set forth at 17 and 18, but accompanied by an understanding of counsel that ordinary traffic violations, warnings, parking tickets and the like need not be included in Central's response. In its original objections Matlack merely requested the same accommodation. In its

supplemental objections, Matlack further objected that Interrogatories 17 and 18 are not relevant to this proceeding because they bear upon Matlack's fitness. In its supplemental objections, Matlack has taken the position that its own fitness is not an issue to be considered in evaluating the evidence in support of a grant or denial of Central's application for intrastate operating authority. Matlack argues that the applicant's fitness is at issue in a motor carrier application case, but the protestant's fitness is irrelevant to the issues involved.

Matlack objects to Central Interrogatories 19 and 20 on the basis that the information sought therein relate to Matlack's fitness, which, as Matlack argues with respect to Interrogatories 17 and 18, is not at issue in this proceeding.

In its motion to compel, Central argues that the information sought by Interrogatories 17, 18, 19, and 20 is relevant not to Matlack's fitness, but rather is relevant to its own fitness. Specifically, Central argues:

The issues concerning an applicant's fitness cannot be evaluated in a vacuum. The question is not simply whether an applicant carrier has received "complaints, warnings, notices of claim or citations" from agencies regulating environmental and hazardous transportation areas, but whether the frequency or seriousness of those complaints, warnings, notices of claim or citations deviate significantly from industry experience in that area.

Central also notes that none of the other protestants objected to answering these interrogatories.

While Matlack's position, that its fitness is not an issue in this proceeding, is well taken, in my opinion Central's argument must prevail. Interrogatories 17, 18, 19, and 20 seek information concerning actual or potential violations of various laws pertaining to transportation, in which Matlack may have been engaged. Interrogatories 17 and 18 concern, primarily, violations of an environmental nature. Interrogatories 19 and 20 concern unauthorized transportation service in Pennsylvania. While Matlack is correct in asserting that its own fitness is not an issue in this proceeding, it is my opinion that Central is correct in averring that the information sought is nonetheless relevant because it would shed light on Central's fitness. In this proceeding there are six protestants, five of whom, according to Central, have answered Interrogatories 17 through 20. Should their answers, and those of Matlack's, disclose that those carriers have the same number or more of such violations than Central, Central will undoubtedly argue that its record is consistent with the industry standard and therefore it should be found fit. Without ruling on the merits of such an argument at this time, I do believe that Central is entitled to make such an

argument.¹ Moreover, I believe that Central is entitled to the information necessary to determine whether such an argument is supportable. On this basis, I believe that the information sought by these interrogatories is relevant to a material issue in the case.

I also believe that Central might use such information in an affirmative fashion. Specifically, the statutory standard for the granting of a certificate of public convenience requires that the Commission find that the granting of a certificate "is necessary or proper for the service, accommodation, convenience or safety of the public." The primary consideration in granting such an application is the public interest. Chemical Leaman Tank Lines, Inc. v. Pa. Public Utility Commission, 201 Pa. Superior Ct. 196, 191 A.2d 876, (1963). Should the information discovered by Central from the protestants, including Matlack, establish that it has many fewer violations and many fewer instances of unauthorized service, it is my opinion that Central could reasonably argue that approval of its application would be in the public interest because it would authorize a more law abiding

¹ In scholastic terms, Central would be arguing that they should be "graded on the curve." My preliminary view of such an argument is that it might have merit if the absolute number of violations is small. However, it would also seem to be the case that there is some absolute "failing" grade (i.e., if an applicant has an extremely large number of violations; it may not be found fit regardless of some "industry standard" -- in such a case the industry standard would be too low).

carrier to enter the market against carriers which had not been operating in compliance with the law. Such an argument, in my opinion, would carry considerable force if the specific violations involve environmental violations such as the deliberate or negligent release of hazardous substances. All other things being equal, it would appear to be in the public interest to approve a carrier's application if that carrier is shown to be much less likely than the existing carriers to engage in violations of the law, particularly those involving the release of hazardous substances into the environment. For this additional reason, I believe the information sought by Central is relevant.²

Finally, I believe that Matlack's original objection to Interrogatories 17 and 18 is well taken, and Matlack's obligation to answer those will be subject to the same understanding of counsel as applied to Matlack's similar interrogatories to Central.

THEREFORE,

IT IS ORDERED:

² I recognize that such an argument might be viewed as similar to proving "inadequacy of existing service", which no longer is a burden borne by an applicant. See 52 Pa. Code §41.14. However, I believe that such evidence would be relevant under the present scheme as an "alternative to inadequacy" beyond those listed in Re: Richard L. Kinard, Inc., 58 Pa. P.U.C. 548 (1984).

1. That Matlack's Objections to Interrogatories 19 and 20, and its Supplemental Objections to Interrogatories 17 and 18 are dismissed. Matlack's original Objections to Interrogatories 17 and 18 are sustained.

2. Central's motion to compel is granted, subject to the understanding of counsel applicable to Interrogatories 17 and 18.

3. Matlack shall answer Central Interrogatories 17, 18, 19, and 20, subject to the understanding that ordinary traffic violations, warnings, parking tickets, and the like need not be involved in its response, within 20 days of the date of this Order.

Dated: Jan. 17, 1989

Michael C. Schnierle
MICHAEL C. SCHNIERLE
Administrative Law Judge

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