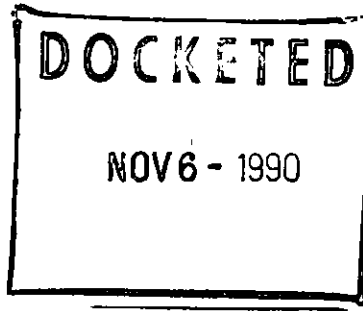


KJP

August 23, 1990

A-00108155

William A. Chesnutt, Esquire
McNees, Wallace & Nurick
P.O. Box 1166
Harrisburg, PA 17108-1166



Application of Central Transport, Inc., a corporation of the State
of North Carolina

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted
by the Commission in public meeting held August 16, 1990.

A copy of this Opinion and Order has been enclosed for your records.

Very truly yours,

Jerry Rich, Secretary

fao
Encls.
Certified Mail
O&A
Refer to attached list.



PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

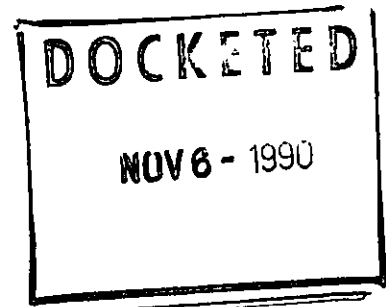
Public Meeting held August 16, 1990

Commissioners Present:

William H. Smith, Chairman
Joseph Rhodes, Jr.
Frank Fischl
David W. Rolka

Application of Central Transport, Inc.
A Corporation of the State of North
Carolina, for the right to transport,
as a common carrier, property, in bulk,
in tank and hopper-type vehicles,
between points in Pennsylvania.

A-00108155



OPINION AND ORDER

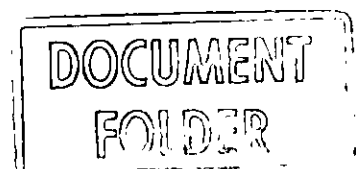
BY THE COMMISSION:

Before us for consideration is a Petition to Open the Record filed by Matlack, Inc. ("Matlack") on May 31, 1990, relative to the above-captioned proceeding. Central Transport, Inc. filed a Reply to the Petition to Reopen the Record on June 11, 1990. A Motion to Strike a portion of the Reply to the Petition to Reopen was filed by Matlack on June 25, 1990.

HISTORY OF THE PROCEEDING

On March 21, 1988, Central Transport, Inc. ("Central" or "Applicant") filed an Application seeking Commission authorization to transport:

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



Notice of the Application was published in the Pennsylvania Bulletin on June 11, 1988. Twenty common carriers and one contract carrier (Samuel Coraluzzo, Co., Inc.) filed timely Protests.

The Applicant subsequently filed several restrictive amendments, which resulted in the withdrawal of all but six of the protestants. As amended, the Application seeks authority to transport:

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

Provided that no right, power, or privilege is granted to transport asphalt, cement, cement mill 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.

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.

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 county of Philadelphia, or in the county of Bucks, to points in Pennsylvania, and vice versa.

(Applicant's Supplemental Exhibit 5).

The remaining Protestants are Chemical Leaman Tank Lines, Inc. ("Chemical Leaman"), Crossett, Inc. ("Crossett"), Marshall Service, Inc. ("Marshall"), Matlack, Inc. ("Matlack"), Oil Tank Lines, Inc. ("Oil Tank Lines"), and Refiners Transport & Terminal Corp. ("Refiners").

Hearings were held on November 1, 2, 9, and 18, 1988, and on February 7, 14, 15, 1989, and on June 28, 1989. The hearings resulted in a transcript of 701 pages. Sixty (60) Exhibits were offered into evidence, of which 56 were admitted into evidence. Central Exhibits 33 and 34, and Matlack Exhibit 6 and 7 were not admitted into evidence. Briefs were filed by all of the Parties except Chemical Leaman and Oil Tank Lines.

DISCUSSION

Subsequent to the filing of Briefs, Administrative Law Judge ("ALJ") Michael C. Schnierle issued his Initial Decision^{1/} on March 6, 1990. ALJ Schnierle made ninety-four (94) Findings of Fact (I.D., pp. 82-102), which are incorporated herein by reference. Based on his evaluation and analysis of the record as developed in the instant proceeding, the ALJ reached the following Conclusions of Law:

1. The Commission has jurisdiction over the subject matter and the parties of this proceeding by virtue of 66 Pa. C.S. §1101.
2. Central has demonstrated that its proposed service will serve a useful public purpose, responsive to a public demand or need, to the extent described in Findings of Fact 24 through 55.

^{1/} Exceptions and Reply to Exceptions were filed by Central and by Matlack, Crossett, Inc., and Refiners Transport & Terminal Corporation.

3. Central has demonstrated that it possesses the requisite financial and technical fitness to provide the proposed service subject to the condition that Central institute and maintain confined space entry and respiratory protection programs at its Karns City tank cleaning facility.
4. The record does not demonstrate that Central lacks a propensity to operate safely and legally.
5. A grant of authority to Central to the extent described in the Findings of Fact 24 through 55 would not endanger or impair protestants to such an extent that the granting of authority would be contrary to the public interest.
6. Common carrier authority should be granted commensurate with a demonstrated public need, as described in Findings of Fact 24 through 55.

I.D., p. 162.

Matlack's Petition to Re-Open

In its Petition, Matlack asserts, inter alia, that Central was accused in a 3 count Information filed by the U.S. Attorney in North Carolina on March 5, 1990, of violating the "Clean Water Act", and that Central lodged a plea of guilty to the violations. In addition, Matlack points out that Central is subject to a "Probation Order" entered by the United States District Court for the Western District of North Carolina imposing significant fines and other penalties. Matlack proffers that the violation, plea and Probation Order, were not known to Matlack and were not made available during the course of the instant proceeding. Matlack further asserts that subsequent to the close of the evidentiary record, the foregoing evidence was discovered. Matlack contends that this newly discovered evidence is relevant to the instant proceeding and will materially affect the Commission's findings regarding Central's regulatory and technical fitness.

Our review of the record indicates that ALJ Schnierle signed his Initial Decision in the instant proceeding on March 5, 1990. On this same date (March 5, 1990), the United States Attorney filed a Bill of Information with the U.S. District Court for the Western District of North Carolina averring that Central had violated the Federal Water Pollution Control Act, 33 U.S.C. §1251, et seq. (hereinafter referred to as the "Clean Water Act."). Specifically, the Bill of Information alleged that on three (3) separate occasions in April and May, 1987, Central knowingly introduced into the Charlotte-Mecklenburg Utility Department water treatment works pollutants which Central knew or reasonably should have known could cause personal injury or property damage.

We note further that Central entered into a Negotiated Plea Agreement duly executed on March 5, 1990, whereby Central agreed to waive indictment and arraignment and pleaded guilty to the violations described in the Bill of Information. Pursuant to the terms of the Plea Agreement, Central agreed inter alia, to:

1. Pay a fine of \$1.5 million dollars (\$1 million of which was suspended pending satisfaction by Central of certain conditions set forth in the Agreement);
2. Be placed on probation for a two year term;
3. Engage in an environmental cleanup of the areas damaged by Central's unlawful activities;
4. To place a full-page advertisement in the Charlotte Observer (a newspaper of general circulation in the Charlotte, NC area) apologizing for polluting the sewer system and for violating the law.

(Negotiated Plea Agreement, pp. 2-6).

Section 5.571 of our Rules of Administrative Practice and Procedure, 52 Pa. Code §5.571, governs the reopening of the record prior to the issuance of a final decision. Specifically, Section 5.571 permits, in pertinent part, that:

(a) At any time after the record is closed but before a final decision is issued, a participant may file a petition to reopen the proceeding for the purpose of taking additional evidence.

(b) A petition to reopen shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

* * *

(d) ...the Commission, upon notice to the participants, may reopen the proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

Our review of the record persuades us that the above-described evidence was not available until March 5, 1990, and was obtained by Matlack subsequent to the close of the record. Therefore, it was impossible for Matlack to introduce said evidence into the record prior to the close of the evidentiary portion of this record on June 28, 1989 - the date of the last oral hearing. We recognize that Matlack sought to obtain information bearing on environmental problems from Central, pursuant to interrogatories. However, even though the interrogatories were continuing, Central failed to produce any evidence regarding the Clean Water Act violations consonant with Matlack's interrogatory.

We note that Section 703 of the Public Utility Code, 66 Pa. C.S. §703(f), provides for a rehearing upon the request of

any party. We further note that the standard for determining whether we should exercise our discretion to grant a petition for rehearing under the provisions of 66 Pa. C.S. §703(f) was articulated in the Philip Duick Case^{2/} as follows:

A petition for rehearing, under the provisions of 66 Pa. C.S. §703(f), properly must seek the reopening of the record for the introduction of additional evidence of some sort. As ground therefore it must allege newly discovered evidence, not discoverable through the exercise of due diligence prior to the close of the record.

* * *

A petition seeking reopening of the record (more properly one for rehearing) may be entertained as a petition for reconsideration, under the provisions of 66 Pa. C.S. §703(g), if the newly discovered evidence, was not in existence, or was not discoverable through the exercise of due diligence, prior to the expiration of the time within which to file a petition for rehearing, under the provisions of 66 Pa. C.S. §703(f). (Emphasis Added)

Id. at pp. 558-559.

In our view, the newly discovered evidence, which involves environmental violations affecting the public safety, is clearly relevant to a determination of the issues presented in the instant proceeding. ALJ Schnierle, at pages 137-138 of the Initial Decision, made the following telling point:

The primary purpose of the fitness criteria is to protect the public. Brinks, Inc. v. Pa. Public Utility Commission, 500 Pa. 387, 456 A.2d 1342 (1983). The occupational

^{2/} Duick v. Pennsylvania Gas and Water Company, 56 Pa. P.U.C. 553 (December 17, 1982).

AT&T Communications of Pa. v. Pa. Public Utility Commission, ___ Pa. Cmwlth. Ct. ___, 568 A.2d 1362 (1990).

safety and health violations and the environmental violations at issue in this case involve the tank cleaning operations of Central. That these tank cleaning operations are an indispensable part of the trucking operation is evident from the considerable testimony both by the applicant (Central Exhibit 1, pp. 11-12) and by the various shippers (N.T. 152-153, 301, 334) of the need to clean the trailers between loads. Central's proposed service will be of little benefit to the public if it cannot conduct that service without endangering the health of its employees and the cleanliness of Pennsylvania's waters. Accordingly, Central's contention that the Commission may not consider incidents involving the occupational safety and health of Central's employees, as well as environmental violations, is rejected.

We find that the evidence sought to be introduced by Matlack has significant and far reaching public safety implications. Furthermore, we deem the newly discussed evidence to be in accord with the standard enunciated in the Duick Case, cited supra. For all of the foregoing reasons, we shall grant Matlack's Petition to Reopen the Record in the instant proceeding.

Matlack's Motion to Strike

The material sought to be stricken by Matlack in its Motion to Strike a Portion of [Central's] Reply to the Petition to Reopen the Record, is as follows:

Item 1. The word "voluntarily" from line 7 on page 3 of Central's Reply.

Item 2. The first sentence of paragraph 5 on page 4 of Central's Reply.

Item 3. Paragraphs 7 and 8 on pages 6-7 of Central's Reply.

Item 4. Paragraphs 10 and 11 on page 8 of Central's Reply.

Since we have decided to grant Matlack's Petition to Reopen, as discussed supra, we do not find it necessary to address the merits of the foregoing items, as contained in Matlack's Motion to Strike.

CONCLUSION

We have carefully reviewed Matlack's Petition to Reopen the Record, in light of the issues and the record developed in the instant proceeding. Finding said Petition to be meritorious, we shall grant Matlack's Petition to Reopen; **THEREFORE,**

IT IS ORDERED:

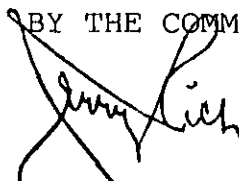
1. That the Petition to Open Record filed by Matlack, Inc. on May 31, 1990, be, and hereby is, granted consistent with this Opinion and Order.

2. That the Motion to Strike Portion of the Reply to Petition to Reopen Record filed by Matlack, Inc. on June 25, 1990, be, and hereby is, denied.

3. That this proceeding be, and hereby is, remanded to the Office of Administrative Law Judge, for the limited purpose of obtaining testimony and evidence regarding Central

Transport, Inc. Clean Water Act violations, and any other environmental or safety violations occurring or becoming known since the close of the evidentiary record in this proceeding, and the issuance of a Supplemental Initial Decision.

BY THE COMMISSION,



Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: August 16, 1990

ORDER ENTERED: AUG 23 1990

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