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Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF CENTRAL TRANSPORT, INC.	: :	DOCKET NO. A-108155

RESPONDING BRIEF OF MATLACK, INC. FOLLOWING REMAND AND REOPENING OF RECORD

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COMES NOW, Matlack, Inc. ("Matlack") and, through its attorneys, files this Responding Brief in the above-captioned matter:

I. STATEMENT OF THE CASE

Matlack adopts the Statement of the Case set forth in its Responding Brief filed earlier in this proceeding, with the following addition:

By Initial Decision served March 16, 1990 Administrative Law Judge Michael C. Schnierle granted Central Transport, Inc. ("Central") a portion of the authority requested in this proceeding. Specifically, Central was granted authority to provide service from specified facilities of seven (7) named shippers to points in Pennsylvania. Inbound service to two (2) of the designated facilities was also authorized, while the authority granted was subject to restrictions eliminating service to and from certain facilities of a named shipper and prohibiting Central from transporting twenty-three (23) specified commodities.

Exceptions to Judge Schnierle's Initial Decision were filed by Central, Matlack, Crossett, Inc. and Refiners Transport

and Terminal Corporation and Replies to Exceptions were submitted by these same parties and by Marshall Service, Inc.

Prior to Commission action on the Exceptions Matlack filed a Petition to Reopen Record. The basis of Matlack's Petition was that the proceeding should be reopened to allow the introduction of evidence relating to Central's fitness that was discovered subsequent to the close of the evidentiary portion of this proceeding. On August 23, 1990 the Commission entered an Opinion and Order reopening this record and remanding the matter to the Office of the 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... ."

Following a telephonic prehearing conference on November 6, 1990, a further hearing was held in this matter on December 4, 1990[1]. At the hearing evidence and testimony was presented relating to environmental violations committed by Central.

Judge Schnierle directed that the parties file additional briefs in this proceeding, limited to the issues raised by the

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[1] On November 9, 1990 Central filed a Motion to Take Official Notice of Facts. Central's Motion was denied by Administrative Law Judge Schnierle by Order dated November 8, 1990. On the same date Judge Schnierle certified a material question to the Commission requesting clarification of the Commission's Order reopening this proceeding. In response, the Commission issued an Order holding that the evidence to be produced at the further hearing was to be limited to environmental and safety violations committed by Central.

evidence produced at the December 4, 1990 hearing. An Initial Brief of Applicant Central Transport, Inc. After Remand To The Administrative Law Judge was filed on March 22, 1991. This Responding Brief is in reply to Central's Initial Brief.

II. DIGEST OF TESTIMONY

Attached hereto as Appendix A is a summary of the evidence presented at the hearing held in this matter on December 4, 1990. The Digest of Testimony will be referred to throughout the Argument portion of this Brief.

III. ARGUMENT

A. Central Is Unfit To Be Granted A Certificate Of Public Convenience To Operate In Pennsylvania Intrastate Commerce

The position adopted by Central in its Brief is relatively simple. Central contends that since its top management was unaware of the violations that occurred at Central's Charlotte, NC terminal (those which resulted in the criminal indictment of Central and its guilty plea) and took remedial measures to rectify the problem upon learning of it, no conclusion can be reached that Central lacks a propensity to operate safely and legally.

Central's view of the issues raised by the evidence elicited at the December 4, 1990 hearing would have this Commission regard the impact of Central's unlawful activities as little more than a minor episode with no real or lasting significance. Central's attempt to minimize the impact of its unlawful activities must be disregarded. The violations that occurred at Central's Charlotte terminal were of significant magnitude to result in 1.

an FBI investigation of Central's operations during the period 1985 through January 31, 1990; 2. the filing of a Bill of Information by the United States of America, through the United States Attorney, charging Central with three (3) violations of the Clean Water Act; 3. the entry of a Plea Agreement whereby Central pleaded guilty to the violations described in the Bill of Information; and 4. the imposition of penalties against Central that included (a.) fines of $1.5 million dollars, (b.) the placing of Central on probation for a two (2) year period, (c.) the requirement that Central de-contaminate the areas it polluted, and (d.) the requirement that Central place an advertisement in a Charlotte, NC newspaper apologizing for polluting the sewer system and violating the law. (Exhibit MR-4). Clearly, the United States government considered Central's Clean Water Act violations to be of great significance. This Commission should do likewise.

When combined with the evidence of Central's health and safety violations produced during the initial set of hearings and discussed in Matlack's prior Responding Brief, the additional criminal violations discussed at the December 4, 1990 hearing require a finding that Central is unfit to obtain authority from this Commission.

Central adopts the position that as long as its top management personnel isolate themselves from day-to-day operations and remain ignorant of unlawful activities by terminal-level employees, Central should not be held accountable for violations of health and safety statutes and regulations. According to

Central, it is only the top management of Central that "ultimately determine the propensity of the corporation ...". (Central Brief, pp. 8-9).

Central's argument simply does not withstand analysis. Contrary to the position adopted by Central, Applicant's executives cannot sit back in their corporate offices, assert that it is they who determine corporate policy and are responsible for the "propensity of the corporation" and then disclaim responsibility for the actions of their employees when those actions violate the law.

The circumstances surrounding the environmental violations committed at Central's Charlotte terminal raise a very basic question: How were Central's employees able to engage in unlawful activities for months or even years without management-level personnel becoming aware? There appear to be only two possible answers: 1. either management actually was aware of the unlawful activities and ignored them or 2. Central lacked sufficient administrative controls to ensure that such violations did not occur. Regardless of which answer is correct, Central allowed conditions to exist at the Charlotte terminal which ultimately led to the entry of a guilty plea to criminal environmental violations and which resulted in the imposition of monetary fines and other penalties against Central. The situation at Charlotte undeniably reflects negatively upon Central's safety fitness.

In line with the second part of Central's argument - that it took remedial measures to cure the problems at its Charlotte terminal - Central would have this Commission believe that upon learning that illegal dumping was occurring, Central took immediate steps to rectify the situation. This argument simply does not correspond to the evidence of record.

The evidence indicates that Central was initially alerted as to unlawful dumping activities during the first week of April, 1987. (T. 726). Despite this knowledge, Central did nothing at the Charlotte terminal to stop the unlawful activity. John Doyle, counsel for Central, testified that following the initial allegations of illegal dumping Central "notified the local Department of Environmental Health, with whom we had had some contact...". (T. 720). Mr. Doyle never testified as to the reason the local environmental agency was contacted. It is curious that, for all the posturing by Central regarding the remedial measures taken, no evidence was presented that Central immediately investigated the operations at its Charlotte terminal or took any action designed to prevent continued illegal dumping. In fact, the FBI did not take its samples of waste water from Central's Charlotte terminal until the period April 28 to May 5, 1987 - three (3) weeks to a month after Central first became aware of the allegations of illegality. (T. 726-728).

No evidence was offered that Central took any steps toward eliminating the illegal activity during the period from the first week of April up to and including the date Central was served

with search warrants by the FBI (May 13, 1987). (T. 709-710). In point of fact, from April 28 to April 29, 1987, April 30 to May 1, 1987 and from May 4 to May 5, 1987 Central "knowingly introduced into the public sewer system and into...publicly owned treatment works pollutants, which [Central] knew or reasonably should have known could cause personal injury or property damage." (Exhibit MR-4, Appendix A, pp. 2-3). The only remedial measures taken on this record were taken only after Central was caught by a Federal agency. It is difficult to give much credit to such attempts; Central hardly had a choice.

Central likewise cannot deny that it is continuing to violate certain environmental regulations at its Charlotte facility. While not as serious as the criminal violations, evidence submitted at the December 4, 1990 hearing establishes that, as recently as July 9, 1990, Central was found to be in violation of its industrial waste permit. Exhibit MR-7 indicates that treated waste water that Central discharged from its Charlotte facility contained chemical constituents that exceeded the allowed discharge limitation. (Exhibit MR-7; T. 760-761). If Central is unable to comply with environmental regulations at a terminal which has just recently been the subject of a major federal investigation, one can only speculate as to the degree of compliance it achieves at facilities subjected to much less scrutiny.

The violations that occurred at the Charlotte terminal and which were discussed in detail at the December 4, 1990

hearing cannot be viewed in a vacuum but rather must be considered within the context of this entire proceeding. Based upon the evidence presented at the initial set of hearings - evidence which included indications of safety and environmental violations committed by Central - the Administrative Law Judge found that "(t)he record does not demonstrate that Central lacks a propensity to operate and legally." (I.D., p. 162). The issue now presented is whether the additional evidence of environmental violations presented at the December 4, 1990 hearing, when combined with that previously submitted, leads to a contrary conclusion. Matlack submits that, taken as a whole, the evidence of Central's environmental transgressions fully supports a finding that Central lacks a propensity to operate safely and that, as a result thereof, the instant application must be denied in its entirety.

Matlack submits that, at a minimum, the serious questions regarding Central's fitness raised by the evidence presented herein should result in any grant of authority to Central being modified to reduce the number of shippers to be served and/or the geographical territory within which Central may operate. Such a modification will enable Central to initiate operations on a smaller scale in order to develop a "track record" with respect to Pennsylvania intrastate operations. Only after Central has established that it can operate within Pennsylvania in a safe manner should it be entitled to later apply to this Commission to expand its service to include additional shippers or additional areas of the Commonwealth.

Finally, at the December 4, 1990 hearing Central attempted to introduce evidence regarding recent activities at its Karns City, PA terminal relating to waste water treatment. The Administrative Law Judge refused to allow the introduction of such evidence on the basis that it was beyond the scope of the Commission's Remand Order. (T. 759). Counsel for Central presented an offer of proof as to the evidence that Central would have presented had it been permitted by the ALJ Schnierle. Surprisingly, Counsel's offer of proof and information contained in an Exhibit not admitted into evidence were set forth as evidence - as fact - in the Argument portion of Central's Brief. (Central Brief, p. 10).

The information contained in Counsel's offer of proof is not evidence and should not be considered by the Administrative Law Judge and the Commission in reaching a decision in this proceeding. Offers of proof are used for the purpose of preserving an issue for appeal (interlocutory or otherwise). No appeal from the evidentiary ruling has been filed. The offer of proof is of no moment, at this stage, and should be entirely disregarded.

IV. CONCLUSION

Central attempts to dismiss the evidence of safety violations offered at the December 4, 1990 hearing by claiming that management's alleged ignorance of the violations warrants a finding that Central is somehow not culpable for the illegal activities engaged in by its employees at Central's Charlotte, NC terminal.

Moreover, Central would have the Commission believe that the remedial measures allegedly taken after learning of the violations reflect Central's concern regarding its past misdeeds and its determination to operate lawfully in the future.

The United States District Court for the Western District of North Carolina (Charlotte Division) did not buy this bill of goods; neither should this Commission.

This Commission has been directed by the Pennsylvania Legislature to grant a certificate of public convenience only if the Commission determines that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public. 66 Pa. C.S.A. §1103. The Commission therefore owes a duty to the public to ensure that motor carriers operating within this Commonwealth operate in a safe manner.

The service proposed by Central involves transportation of highly dangerous commodities in quantities running into the thousands of gallons. The dangers inherent in this type of transportation cannot be minimized. The Commission owes it to the residents of Pennsylvania to take care in reviewing Central's service proposal and in closely scrutinizing Central's fitness to render the involved transportation. Matlack submits that in view of the significant problems Central has encountered at its Charlotte terminal, the Commission is fully justified in either denying Central's application in its entirety or in limiting the authority granted to Central in the manner above-described.

WHEREFORE, Matlack, Inc. requests issuance of an Order 1. denying the application of Central Transport, Inc. at A-108155 in its entirety; or 2. modifying the authority granted to Central Transport, Inc. to the extent set forth herein.

Respectfully submitted,

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DIGEST OF TESTIMONY

Operating Witness

#1 - John Doyle, Esquire

Mr. Doyle an attorney is employed by the firm that represents Central Transport in a number of litigation matters. He first became aware of a federal investigation into Central's operations on or about May 13, 1987 when he received a telephone call from individuals at Central's Charlotte, North Carolina terminal facility indicating that the Federal Bureau of Investigation had served a search warrant at the premises. (T. 708-710). The search warrant concerned allegations that Central had been dumping untreated waste water into the Charlotte-Mecklenburg Sewer System. (T. 710-11). Mr. Doyle's own investigations, based largely on interviews that he conducted, concluded that for an undetermined period of time dumping of untreated waste water in the Charlotte sewer system had indeed occurred. Mr. Doyle also determined that 1. there were individuals at the Charlotte terminal who were aware of such dumping and 2. that the dumping was confined to the Charlotte facility. Mr. Doyle was convinced that the top management officials of Central were unaware of and did not authorize the unlawful dumping activity. (T. 712).

As a result of the FBI investigation, Central and the United States Government executed a Plea Agreement on March 5, 1990. No officers, directors or employees of Central Transport were prosecuted as a result of the FBI investigation. Mr. Doyle testified that no indictments against individuals were brought due to a lack of evidence to support such indictments. (T. 714-715).

As a result of the FBI investigation and publicity related thereto, Mr. Honbarrier, President of Central, the individual who was responsible for Central's environmental affairs was relieved of his responsibilities and Mr. Honbarrier personally assumed responsibility for all environmental matters in the company. Central thereafter engaged the services of an engineering consulting firm to conduct environmental audits at all Central facilities for the purposes of ensuring that the company was in compliance with all applicable environmental laws and regulations. Also, subsequent to the inception of the FBI investigation, Central retained the services of a new director of environmental affairs. (T. 716-717).

The individual who had been responsible for the environmental affairs of Central was relieved of his responsibilities within a few weeks of Central learning of the FBI investigation. The retaining of the environmental consulting firm occurred in late June or early July of 1987. Central's new environmental expert was

hired in early 1988. (T. 718).

As to mitigating circumstances regarding the illegal dumping by Central, Mr. Doyle testified that those environmental violations were limited to the Charlotte facility and also testified that Central had, in fact, turned itself in to the Federal Government upon learning of the violations. (T.719).

Mr. Doyle offered one (1) exhibit into evidence. That exhibit related to a Notice of Violation at Central's Aurora, North Carolina terminal and concerned a proposed tank cleaning operation that was to be established at that location. Mr. Doyle testified that no enforcement action resulted from the Notice of Violation. (Exhibit AR-1; T. 722-725).

Mr. Doyle testified that Mr. Belk, the employee of Central who first advised Central of alleged illegal dumping, contacted an executive with Central in the first week of April, 1987 to threaten to go to the FBI with information regarding Central's violations. The FBI collected samples of discharge from Central's system from April 28 through May 5, 1987. (T. 726-728).

Mr. Doyle was uncertain as to the period of time during which the illegal dumping had occurred. Certain employees indicated the illegal dumping had been occurring for a couple of months prior to the FBI's investigation while one employee indicated that the illegal activity had been going on for a couple of years. (T. 739).

Several Central employees employed at the Charlotte terminal admitted that they knew that the illegal dumping activities had been taken place. (T. 748).

#2 - <u>Glen Simpson</u>

Mr. Simpson is the Environmental Director of Central Transport and has been employed by the Applicant since March 14, 1988. (T. 753).

Mr. Simpson replied to Matlack Remand Exhibits 5, 6 and 7 which are Notices of Noncompliance relating to operations at Central's Charlotte terminal. The Notices of Noncompliance indicate that certain treated waste water discharged from the Charlotte facility had chemical constituents which exceeded the allowed discharge limitation. (T. 760-761). In response to the Notices of Noncompliance Central has both added a pretreatment chemical to its process and physically modified its pretreatment equipment to improve its efficiency and reduce the prohibited chemical constituents. (T. 760-762).

Matlack Remand Exhibits

Exhibit MR-1 is a list of docket entries in the proceeding The United States of America v. Central Transport, Inc., Docket No. C-CR-90-27. The docket entries indicate that a Bill of Information was filed on March 5, 1990. The Defendant waived arraignment on the same date and entered into a plea agreement whereby it agreed to plead guilty to the three counts contained in the Bill of Information. A Judgment and Commitment Order was also issued on March 5, 1990 and filed on March 8, 1990.

Exhibit MR-2 is the Bill of Information which sets forth the allegations against Central Transport and alleges that Central knowingly introduced into the public sewer system pollutants which it knew or reasonably should have known could cause personal injury or property damage. The information contains three separate counts which alleged that such violations occurred on April 28-29, 1987, April 30-May 1, 1987 and May 4-5, 1987.

Exhibit MR-3 is the Judgment and Commitment Order affirming that Central entered a plea of guilty and assessing certain monetary fines and other penalties against Central for its violations.

Exhibit MR-4 is the Plea Agreement whereby Central acknowledges its guilt for the violations contained in the Bill of Information and agrees to the fines and penalties set forth in the Judgment and Commitment Order.

Exhibit MR-5, MR-6 and MR-7 are Notices of Noncompliance relating to the violations committed by Central at its Charlotte facility indicating that unacceptable levels of certain contaminants were found in waste water discharged by Central.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Responding Brief of Matlack, Inc. Following Remand and Reopening of Record, were served upon the following by United States mail, postage prepaid.

Dated at Philadelphia, Pennsylvania this 11th day of April, 1991.

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