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September 5, 1991

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SEP 05 1991

Jerry Rich, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17120

SECRETARY'S OFFICE  
Public Utility Commission

Re: Application of Central Transport, Inc.  
Docket No. A-108155

Dear Secretary Rich:

Enclosed please find the original and nine (9) copies of the Exceptions of Protestant Matlack, Inc., filed in connection with the above-captioned proceeding.

Copies of the enclosed are also being served upon all active parties of record.

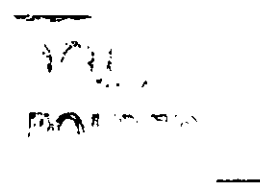
Very truly yours,



EDWARD L. CIEMNIECKI

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enclosures

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Kenneth Olsen, Esquire  
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Before The

PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF :  
CENTRAL TRANSPORT, INC. :

DOCKET NO. RECEIVED  
A-108155

SEP 05 1991

EXCEPTIONS OF PROTESTANT  
MATLACK, INC.

SECRETARY'S OFFICE  
Public Utility Commission

COMES NOW, Matlack, Inc. ("Matlack") through its attorneys and files these Exceptions to the Initial Decision on Remand of Administrative Law Judge Michael C. Schnierle in the above-captioned proceeding.

I. STATEMENT OF THE CASE

By application filed March 21, 1988 Central Transport, Inc. ("Central" or "Applicant") filed an application seeking common carrier authority to transport property, in bulk, in tank and hopper-type vehicles, between points in Pennsylvania. Numerous protests were filed in opposition to the application. Central subsequently filed several restrictive amendments which resulted in the withdrawal of all but six of the protestants.

Eight days of hearings were held before Administrative Law Judge Schnierle. Following the conclusion of the hearings and the filing of briefs by several of the parties, on March 16, 1990 Judge Schnierle issued an Initial Decision granting Central authority to provide service in connection with the facilities of seven (7) named shippers. Exceptions and Reply Exceptions were filed in response to the Initial Decision in April of 1990. The April, 1990

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Exceptions are still pending; no action has been taken with respect to them.

On May 31, 1990 Matlack filed a Petition to Reopen Record seeking a reopening of this proceeding for the limited purpose of receiving evidence relating to Central's fitness. Central filed a Reply opposing Matlack's Petition. By Order entered August 23, 1990 the Commission granted Matlack's Petition to Reopen Record.

Following various Motions, Replies and Orders relating to the nature of the evidence to be presented at the hearing on remand, a telephonic prehearing conference was held on November 6, 1990 and a hearing took place on December 4, 1990. Following the hearing and in accordance with Judge Schnierle's instructions, Central, Matlack and Crossett, Inc. filed briefs on a consecutive basis on the subject matter dealt with at the reopened hearing.

By Initial Decision on Remand dated August 2, 1991 and served August 16, 1991 Judge Schnierle, in essence, adopted his prior Initial Decision, modifying it only to the extent of conditioning Central's grant of authority upon its compliance with applicable federal and Pennsylvania statutes and regulations pertaining to the discharge of waste water.

**II. STATEMENT OF EXCEPTIONS**

1. The Initial Decision Errs In Concluding That Central Is Fit To Be The Recipient Of The Grant Of Certificate

**III. ARGUMENT IN SUPPORT OF EXCEPTIONS**

In concluding that Central possesses the requisite fitness to receive a statewide grant of operating authority for 7 shippers,

the Initial Decision fails to scrutinize the evidence presented at the hearing on remand as it relates to Central's awareness of continuing violations of the Clean Water Act at its Charlotte, NC terminal and the implications of Central's behavior there and in connection with earlier identified environmental and safety difficulties upon its fitness to be granted the rights recommended by the Administrative Law Judge. More importantly, the Decision fails to adequately weigh the public safety along with Central's significant environmental violations against the utility and value of adding another intrastate bulk carrier handling petroleum, chemicals and the like over Pennsylvania's highways.

Matlack's primary concern with the Initial Decision's analysis of the evidence of record relates to the conclusion that Central officials undertook measures to cure the environmental violations as soon as they learned of their existence. (I.D., pp. 28-31). This conclusion is squarely at odds with the testimony presented in this proceeding.

The facts of record indicate that Central was initially alerted during the week of April 7, 1987 that unlawful dumping activities were taking place at its Charlotte terminal. (T. 726). Despite this alert, Central did nothing at the Charlotte terminal to stop the unlawful activity. After being alerted to the illegal dumping, the only immediate activity undertaken by Central was to telephone the local Department of Environmental Health ("DEH") at

some unspecified point in time.<sup>1</sup> (T. 720). Correspondence to the DEH was finally sent in early May -- after one month of inactivity on Central's part. (T. 721).

It is incomprehensible that the Initial Decision could conclude that Central took immediate steps to cure the problem based upon this record. Making telephone contact with a local branch of a state agency and then taking no affirmative action for a full month because certain telephone calls were allegedly not returned hardly constitutes immediate action. Central offered absolutely no evidence that it took any steps to eliminate 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, Central has pled guilty to the allegations of the United States of America that on April 28 to April 29, 1987, April 30 to May 1, 1987 and May 4 to May 5, 1987 -- three weeks to one month after learning of the illegal dumping -- 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 H, pp. 2-3).

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<sup>1</sup> The Initial Decision somehow considers Central's telephone calls to the local DEH as indicative of its desire to cure its environmental problems. The record in this proceeding does not reveal the purpose of the call. It does reveal that, within five (5) days or so of the allegations in early April, Central and the DEH were aware of the "illegal dumping." (T. 720). Despite this awareness, two to three weeks later Central was still dumping untreated waste water into Charlotte's sewer system.

Were Central genuinely concerned about the illegal dumping, it could have taken affirmative action to quickly investigate the allegations that came to light in early April, 1987. It easily could have instructed the terminal manager at its Charlotte facility to inspect the trailer washing facility or observe those individuals involved in cleaning the trailers. It could have tested the water itself to determine if pollutants were being discharged. Instead, it did nothing, waiting a return phone call from a local branch of a state agency "with whom [it] had had some contact." (T. 720).

Contrary to the conclusion reached by the Initial Decision, the evidence does not indicate that Central took measures to immediately correct what it considered to be a serious situation. The record reveals that Central did not take a single affirmative step toward either investigating the basis of the allegations of illegal dumping or seeking to cure any problems that were uncovered until after Central was caught by a Federal agency.

The Initial Decision states that "(t)here is absolutely no evidence in the record to support Matlack's premise that the dumping of waste water continued for "months or even years." (I.D., p. 29). In response, Matlack directs the Commission to the testimony of John Doyle, counsel for Central. Mr. Doyle testified that Central was never able to accurately determine how long the dumping had taken place since some employees indicated it had occurred for "a couple months prior to the FBI showing up" while another employee indicated "it had been going on for a couple

years." (T. 739). The Initial Decision erred in not giving consideration to the fact that Central's employees were able to engage in unlawful activities "for months or even years" without management personnel becoming aware.

In addition to evidence of Clean Water Act violations that led to the imposition of criminal penalties against Central, evidence was offered as to other environmental violations committed by Central. The Initial Decision minimizes the significance of these violations, asserting that they were "of a different quality entirely than the violation to which Central pleaded guilty." (I.D., p. 32), going so far as to state that "there is no evidence in the record, despite the considerable efforts of the protestants, to show that Central has had similar problems at any of its other facilities, including its Karns City, PA terminal." (I.D., p. 32). This is plainly inaccurate.

Central has, in fact, had environmental difficulties at its Karns City, PA terminal. Pennsylvania's Department of Environmental Resources issued a Notice of Violation to Central alleging its failure to comply with hazardous waste generator, transporter and treatment facility requirements. (Matlack Exhibit 3, pp. 30-45). Indeed, these violations were discussed under the caption "Environmental Violations" in the Judge's March, 1990 Initial Decision.

The Initial Decision errs in viewing the violations in a vacuum. Central's environmental violations uncovered at the hearing on remand must be considered together with the other

incidents of environmental, safety and regulatory infractions present in this record. Only by considering the entire record can the Commission get a clear picture as to Central's method of operation and its regulatory fitness. In this regard, these Exceptions should be considered together with those filed by Matlack earlier in this proceeding<sup>2</sup> as they relate to Central's fitness to obtain Pennsylvania intrastate operating rights. Matlack feels certain that the Commission's consideration of Central's past history of unsafe operations will result in a denial of this application.

The Initial Decision goes to great lengths to minimize the shortcomings in Central's safety record. It exercises little skepticism in judging the testimony of employees of and counsel for Central in connection with Central's environmental difficulties. It relies upon "immediate remedial measures" that were never undertaken. It ignores evidence of record regarding the duration of Central's violations and of violations that occurred at Central's sole Pennsylvania terminal. It deals gratuitously with Central's slow reflexes -- Central reacted only after the FBI was involved. It defends Central's poor safety record (after much fuss and flurry regarding the value of comparative safety records) by noting that another carrier has been found guilty of an environmental violation, although not of the magnitude as that

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<sup>2</sup> As noted in the Statement of the Case, Matlack, Central and Crossett, Inc. filed Exceptions to the March 16, 1990 Initial Decision of Judge Schnierle. The Commission has yet to rule on those Exceptions.



committed by Central. If a valid comparison of safety records is to be made, should it not include that of Matlack? Was Matlack's unblemished record ignored because consideration thereof would have forced the conclusion that Central is unfit?

The responsibility to ensure that every certificate issued by it "is necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S. §1103(a) (emphasis added) is fundamental to the Commission's function. When an applicant carrier's operation includes the transportation of hazardous materials and the treatment and disposal of highly dangerous and toxic materials, the Commission's review of its safety record should be comprehensive and demanding.

We would put the policy question this way:

Why, in the absence of strong evidence of need for the proposed service, particularly in a field of service populated by large, experienced carriers of national presence, should the Commission authorize an additional carrier whose environmental record is so poor as to have recently pleaded guilty to environmental crimes?

The answer, we believe, is that it would be far wiser to deny the application.

No recognizable public purpose will be served by the authorization of Central. This record is devoid of any expression of substantial public need for the service proposed by Central. The shipper support was lukewarm. A balance of the limited expression of need against the potential threat to the public

safety posed by the authorization of Central can logically lead only to a denial of the application.

WHEREFORE, Matlack, Inc. requests the issuance of an Order granting these Exceptions and denying the application of Central Transport, Inc. at A-108155 in its entirety.

Respectfully submitted,



---

JAMES W. PATTERSON  
EDWARD L. CIEMNIECKI  
Attorneys for Matlack, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Exceptions of Protestant, Matlack, Inc., were served upon the following by United States mail, postage prepaid.

Dated at Philadelphia, Pennsylvania this 5th day of September, 1991.

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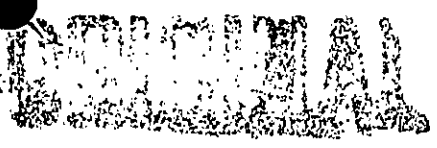
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September 16, 1991

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P. O. Box 3265  
Harrisburg, PA 17120

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SECRETARY'S OFFICE  
Public Utility Commission

Re: Application of Central Transport, Inc.  
PA PUC Docket No. A.00108155  
Our File: 12558-0001

Dear Secretary Rich:

Enclosed for filing with the Commission please find an original and nine (9) copies of the Reply Exceptions of Applicant Central Transport, Inc. to the Exceptions of Protestant Matlack, Inc. in the above-captioned proceeding.

Copies have also been served on all parties of record as indicated by the attached Certificate of Service.

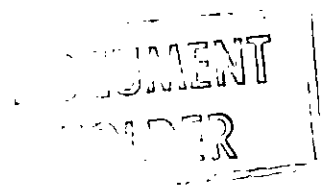
Please kindly date stamp the additional copy of this letter of transmittal for return to my office verifying your receipt of these documents.

Respectfully submitted,

McNEES, WALLACE & NURICK

By *William A. Chesnutt*

William A. Chesnutt  
Counsel for Applicant  
Central Transport, Inc.



WAC/law  
Enclosures  
cc: Attached Certificate of Service (w/enclosures)  
Ben T. Keller (w/enclosures)  
John Doyle, Esquire (w/enclosures)

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Application of Central :  
Transport, Inc. : Docket No. A-00108155

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SECRETARY'S OFFICE  
Public Utility Commission

REPLY BY APPLICANT CENTRAL TRANSPORT, INC.  
TO EXCEPTIONS OF PROTESTANT MATLACK, INC.

In accordance with a notice accompanying the issuance of an Initial Decision on Remand by Administration Law Judge Michael C. Schnierle, applicant Central Transport, Inc., by its counsel, McNees, Wallace & Nurick, hereby replies to the Exception taken by protestant Matlack, Inc. to that decision.

PRELIMINARY OBSERVATION

This matter was reopened and remanded to 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" (see Statement of Matlack's counsel at Tr. 755). The Clean Water Act violation is described in the Judge's Finding of Fact No. 1:

On March 5, 1990, Central pleaded guilty to three separate counts of an information alleging that between April 28 and May 5, 1987, it knowingly introduced into the Charlotte-Mechlenburg public sewer system certain pollutants, which Central knew or reasonably should have known could cause personal injury or property damage ....

(I.D. p. 20).

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INDEX

In addition to Finding of Fact No. 1 quoted immediately above, the Initial Decision on Remand contains 19 other enumerated findings of fact. Protestant Matlack, Inc. takes exception to none of those 19 findings, including findings such as the following:

5. The United States, as prosecutor in the criminal proceeding, acknowledged that Central cooperated fully in the conduct of the Government's investigation of the activities involved in the Plea Agreement.

6. There was no prosecution by the federal government of any officer, director, or employee of Central.

7. When Central's top management became aware of an allegation that illegal dumping had been occurring at the Charlotte terminal, the Vice President of Operations immediately notified the County Department of Environmental Health.

8. In 1987, once counsel for Central determined that there had been a dumping of untreated waste water, the President of Central, Mr. Gary Honbarrier, relieved the individual who was responsible for environmental affairs of his responsibilities, and assumed personal responsibility for all environmental matters in the company.

9. Also, in 1987, Central engaged the services of an engineering consulting firm to conduct environmental audits not only at Charlotte but at all other facilities for the purpose of insuring that Central was in compliance with all applicable environmental laws and regulations at all of its sites.

10. Also, in 1987, Central retained the services of a consulting firm to assist it in developing more effective communications to its employees to insure that all of the employees in the company were properly trained and thoroughly aware of applicable environmental laws and to insure that the employees got the message that Central complied with all environmental procedures.

11. In early 1988, Central employed a new Director of Environmental Affairs who has the technical background and training to manage, direct and oversee all of the environmental affairs of the company.

20. Other than the environmental violations described in this record, Central's Director of Environmental Affairs was aware of no environmental violations by Central occurring or becoming known after June 28, 1989.

(I.D. pp. 21, 22-23, 26).

Contrary to applicable Commission regulations, see 52 Pa. Code §5.533(b), protestant Matlack has not enumerated specific exceptions that it takes to the Initial Decision on Remand, other than to state "1. The Initial Decision errs in concluding that Central is fit to be the recipient of the grant of certificate." In a rambling, six-page argument in support of that single exception, the pleading of Matlack identifies five concerns or quarrels with the content of the Initial Decision. The responses on behalf of applicant Central to those five concerns are stated in sections A through E in the following reply argument.

#### REPLY ARGUMENT

- A. "Matlack's primary concern with the Initial Decision's analysis ... relates to the conclusion that Central officials undertook measures to cure the environmental violations as soon as they learned of their existence." (Matlack Exceptions, p. 3)

Matlack cites pages 28 through 31 of the Initial Decision as the source for the conclusion with which it is primarily concerned. There is no reason for the Commission to change the Judge's Initial Decision on Remand on the basis of this concern expressed by Matlack, most particularly because the Judge stated no such conclusion either on pages 28 through 31 of the Initial Decision, or anywhere else in that document. Quite simply, the Judge never made any statement that "Central officials undertook measures to

cure the environmental violations as soon as they learned of their existence."

After stating its "primary concern" with a conclusion never made by the Judge, Matlack goes on for almost two full pages arguing about what did or did not happen during a period of approximately 30 days in April and May of 1987, including a 20-20 hindsight recitation of observations about what Central "could have" done (see first paragraph of Matlack Exceptions, p. 5). The issue is not what Central could have or should have done in 1987. That issue has been decided in the federal courts. The issue properly before Administrative Law Judge Schnierle and before this Commission is whether at this time it can be found that the responsible officials of Central Transport have a propensity to operate safely and legally in the future. As the Judge noted "the fitness criteria [are] intended to protect the public and not to punish the carrier" (citing Brinks, Inc. v. Pa. Public Utility Commission, 500 Pa. 387, 456 A.2d 1342 (1983)). (See, I.D., p. 33). Again, citing Brinks, the Judge concluded "I do not find it fatal to Central's application that the violation of dumping waste water may have occurred due to insufficient administrative controls, because Central appears to have corrected that deficiency in its operation." (I.D., p. 30) (emphasis added).



B. "The Initial Decision states that '[t]here is absolutely no evidence in the record to support Matlack's premise that the dumping of waste water continued for months or even years. (Matlack Exceptions, p. 5).

It might well be said that the Judge overstated the case to say that "absolutely no evidence in the record" supports Matlack's premise; however, the Judge would have been correct to state that the record contains no clear evidence about the duration of the waste water dumping. As noted by the Judge, immediately following the observation to which Matlack voices objection, "the FBI conducted a criminal investigation lasting two and a half years and brought no charges other than those set forth in the information" to which Central entered a guilty plea (see I.D., pp. 29-30). The uncertain state of the record evidence on the question of duration can be seen in the following colloquy between counsel for Matlack and Central's principal witness:

Q. [By Mr. Patterson] Based on your investigation, which you detailed early in your testimony, how long, over what period of time, had ... the illegal dumping occurred?

A. [By Mr. Doyle] That's a question which I was never able to satisfactorily answer. It depended upon which employee you talked to. I interviewed employees who said it had been occurring for a couple of months prior to the FBI showing up at the terminal. There was at least one employee who told us it had been going on for a couple of years. Frankly, we were never able to determine over what period of time this had occurred. The only thing we were able to determine with reasonable certainty was that there had been bypassing of the waste treatment system, at least in 1987.

(Tr. 739).

Again this quarrel by counsel for Matlack fails to address the core issue of Central's propensity to operate safely and legally in the future.

- C. "The Initial Decision fails to scrutinize the evidence presented at the hearing on remand ...." (Matlack Exceptions, p. 3).

This observation by Matlack requires a very brief response. One needs only to read the 45-page Initial Decision on Remand by Administration Judge Schnierle to appreciate the thoroughness and comprehensive view of the evidence reflected in that document. As previously noted, 20 specific findings of fact are made, to which Matlack has taken no exception. Each argument raised by any of the parties participating in the remanded proceedings is fairly stated and squarely resolved. Credibility is seriously tested by Matlack's claim that the Judge failed to "scrutinize" this record.

- D. "The Initial Decision errs in viewing the violations in a vacuum." (Matlack Exceptions, p. 3).

This is an outrageous statement on behalf of Matlack. Matlack's argument in support of this criticism of the Initial Decision goes on to contend that "only by considering the entire record can the Commission get a clear picture as to Central's method of operation and its regulatory fitness." (Matlack Exceptions, p. 7). What makes Matlack's arguments in this regard especially outrageous is that it was counsel for Matlack that insisted that the decision on remand be made in the very "vacuum" about which it now complains.

At the hearing on remand it was counsel for Matlack who insisted that the focus be limited to "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 [initial]

evidentiary record." (Tr. 755). The point was pressed when Matlack's counsel expressed alarm that a witness was "going to talk about how good Central is about taking care of environmental problems ...." Counsel for Matlack stated: "I think that is beyond the scope of the Commission's remand, very clearly." (Tr. 755). The Judge sustained the objection of Matlack's counsel: "I think it is beyond the scope of the remand order to go into a long exploration of Central's operations at Karns City. I think that is clearly beyond the scope." (Tr. 759).

As counsel for applicant Central, the undersigned was incredulous that the Judge would exclude evidence about Central's current state of compliance at the only terminal facility that applicant operates in the Commonwealth of Pennsylvania - Karns City. Accordingly, counsel for applicant Central sought and received reaffirmation from the Judge that he was "not interested in learning the state of compliance of Karns City at this time." (Tr. 759).

In order to protect the record even further, counsel for applicant Central presented an offer of proof to the effect that

if [the witness] had been permitted to testify concerning the Karns City facility, it would have been our intent to show and to have him testify about continuing activities at that terminal with respect to the waste water treatment activities there, to indicate additional investment at that facility for the purpose of improving waste water treatment there, and to have sponsored an exhibit that I will tender for marking, and subsequent rejection, I am certain, of a DER inspection report of the Karns City facility which indicates that the company is in compliance at that facility.

(Tr. 763)

Matlack is hoist on its own petard with the "vacuum" contention. This argument advanced by Matlack is symptomatic of just how bankrupt its arguments are.

E. "The Decision fails to adequately weight the public safety ...." (Matlack Exceptions, p. 3).

This final argument advanced by Matlack finds no basis in precedential Commission and reviewing court case law. As stated by Matlack, the Judge had a responsibility to conduct some sort of "weighing" process placing public safety on one side of the balancing scales and "the utility and value of adding" additional carrier capacity to serve the public on the other side of the scale. No such comparative evaluation has ever been promulgated in Commission decisional guidelines, nor has it been articulated in pertinent case law. In short, this final argument by Matlack is a designation of a failure by the Judge to do something he was not required to do.

CONCLUSION

The exceptions of Matlack furnish no basis for the Commission to reject, reverse or in any way modify or change the Initial Decision of the Judge on remand. Accordingly, the Commission should adopt as its own both the Judge's original Initial Decision, as well as the Initial Decision on Remand.

Respectfully submitted,

McNEES, WALLACE & NURICK

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Counsel for Applicant  
Central Transport, Inc.

Dated: September 16, 1991

CERTIFICATE OF SERVICE

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