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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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SECRETARY'S OFFICE
Public Utility Commission

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

ORDER DENYING MOTION TO TAKE OFFICIAL NOTICE OF FACTS

History of the Proceedings

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.

Central subsequently filed several restrictive amendments which resulted in the withdrawal of all but six of the protestants. As amended, the application seeks the following authority:

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Property, in bulk, in tank and hopper-type vehicles, between points in Pennsylvania. DEC 03 1990

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.

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

(Applicant's Supplemental Exhibit 5).

After several days of hearing, and the filing of briefs by several parties, I issued an Initial Decision on March 16, 1990, in which I granted the application in part. Exceptions and reply exceptions were filed to the Initial Decision. Also filed by Matlack, Inc., a protestant, was a petition to reopen the record. Central opposed the petition.

By Order adopted on August 16, 1990, and entered on August 23, 1990, Matlack's petition to reopen was granted. The Commission directed that the proceeding be 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." (Slip Op. at 9-10). By letter dated October 23, 1990, the Office of Administrative Law Judge notified the parties that a telephonic prehearing conference

would be held on November 6, 1990, and that further hearings would be held on December 4 and 5, 1990.

On November 9, 1990, Central filed a Motion To Take Official Notice Of Facts. By its motion, Central is requesting me to take official notice of the fact that on March 29, 1990, Matlack was named as a defendant in a complaint filed with the United States District Court, District of New Jersey, in which the United States, on behalf of the Administrator of the United States Environmental Protection Agency (EPA), seeks recovery of response costs, declaratory relief for future costs against Matlack, and the imposition of civil penalties and punitive damages owing to Matlack's failure to comply with EPA orders previously issued. Central has attached a copy of the complaint to its motion, and intends to introduce a certified copy of the complaint for receipt into evidence.

On November 16, 1990, Matlack filed a reply to Central's Motion To Take Official Notice of Facts. In its reply, Matlack maintains that the evidence sought to be introduced by Central is beyond the scope of the Commission's remand order.

Discussion

The Commission's order which granted Matlack's petition to reopen directed that the case be remanded "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." (Slip Op. at 9-10). The issue to be determined at this time is whether, by the underlined language, the Commission intended to permit the introduction of safety or environmental violations by parties other than Central.

During the hearings in this proceeding, I ruled that Central could offer into evidence the records of the protestant carriers with regard to violations of safety, environmental, and public utility laws and regulations. The protestants took the position that such evidence could not be admitted because only Central's fitness was at issue. Central, on the other hand, offered the evidence to demonstrate that its own record was not significantly different from industry experience in those areas. I ruled in favor of Central (see Initial Decision, pp. 138-139; Orders dated January 17, 1989 and February 2, 1989). I further refused Matlack's request to certify my ruling to the Commission. (Order dated February 28, 1989). Because this issue was discussed at length in my earlier orders, I will not dwell upon it in detail in this order. Suffice to say that I regard the evidence proffered by Central in its Motion To Take Official Notice of Facts as relevant evidence for the reasons discussed in my prior orders. Nevertheless, I must still consider whether

admission of the evidence proffered by Central is consistent with the scope of the Commission's remand order.

The Commission's remand order does not discuss my evidentiary rulings which permitted Central to offer into evidence the violation records of the protestants. The order itself contains no indication that the phrase "and any other environmental or safety violations occurring or becoming known since the close of the evidentiary record in this proceeding" applies to the violations of the protestants as well as Central's own violations. In fact, the ordering paragraph in which that phrase is included, Ordering Paragraph No. 3, appears to have been copied with only minor stylistic changes from the sixth prayer for relief set forth in Matlack's petition to reopen the record:

6. Permit protestants to introduce testimony and evidence regarding Central's 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;

Moreover, the entire remand order discusses the fitness issue only in the context of Matlack's petition to reopen the record which, in turn, sought only to offer evidence of Central's violations. For these reasons, I must conclude that the evidence proffered by Central with its Motion to Take Official Notice of Facts is beyond the scope of the remand order.

While it is my opinion that the evidence proffered by Central is beyond the scope of the Commission's remand order, it is also my opinion that the Commission may not have foreseen Central's proffer of such evidence when it issued its remand order. Accordingly, while I will deny Central's motion, I will certify (by separate order) my denial to the Commission for interlocutory review pursuant to 52 Pa. Code §5.305. I will not continue the hearings set for December 4 and 5, 1990, nor stay the proceedings pending the Commission's answer to the question. Hearings are necessary, in any event, to receive evidence regarding the Central violations described in the remand order. Should the Commission answer the certified question by authorizing the receipt of the evidence proffered by Central regarding Matlack's violations, another day of hearing can be scheduled for that purpose.

THEREFORE,

IT IS ORDERED:

1. That the Motion of Central Transport, Inc. To Take Official Notice of Facts filed on November 9, 1990, is denied.



MICHAEL C. SCHNIERLE
Administrative Law Judge

Dated: November 28, 1990

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Chief ALJ/Kelly/Scheduler