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April 6, 1990

RECEIVED
APR 9 1990
SECRETARY'S OFFICE
Public Utility Commission

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
Bureau of Transportation
P.O. Box #3265
Harrisburg, Pennsylvania 17120

DOCUMENT FOLDER

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

Dear Mr. Rich:

Enclosed please find the original and nine (9) copies of an Exception to the Initial Decision of ALJ Schnierle and the revised Supplemental Order issued March 29, 1990 in the above referenced matter.

Copies of this Exception have been sent to all parties as shown on the Certificate of Service annexed thereto.

Respectfully submitted,

Ronald W. Malin

RONALD W. MALIN

RWM:knw

Enclosures

C/C TO: Hon. Michael Schnierle
Administrative Law Judge
Pennsylvania Public Utility Commission
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Mr. Gary P. Wallin
Crossett, Inc.
P.O. Box #946
Warren, Pennsylvania 16365

ORIGINAL

BEFORE

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF

CENTRAL TRANSPORT, INC.

DOCKET NO. A-00108155

EXCEPTION

ON BEHALF OF PROTESTANT

CROSSETT, INC.

RONALD W. MALIN, ESQ.
Attorney for Protestant,
CROSSETT, INC.
Office and Post Office Address
Johnson, Peterson, Tener & Anderson
P.O. Box #1379 - Key Bank Building
Jamestown, New York 14702-1379
Telephone: (716) 664-5210

Due Date: April 12, 1990.

BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF
CENTRAL TRANSPORT, INC.
DOCKET NO. A-00108155

EXCEPTION
ON BEHALF OF PROTESTANT
CROSSETT, INC.

Comes now, Crossett, Inc. (Crossett or the Protestant), by its attorneys, Johnson, Peterson, Tener & Anderson, Ronald W. Malin, Esq., of counsel, and respectfully raises an Exception (or correction request) as to the Initial Decision of Hon. Michael C. Schnierle, Administrative Law Judge, dated March 5, 1990, served March 16, 1990, and revised by Supplemental Order issued March 29, 1990 in regard to the instant application of Central Transport, Inc. (Central Transport or the Applicant).

EXCEPTION TAKEN

This Exception, submitted on behalf of the Crossett, relates only to the need for the inclusion of the word "asphalt" in Restriction (1) as to any authority to be granted to the Applicant in the instant matter.

It is the respectful position of Crossett that Restriction (1) (set forth on Page 163 of the Initial Decision) should contain the word "asphalt" as originally written in the Order dated March 5, 1990, and that the word "asphalt" should not be deleted from Restriction (1) as stated in the revised Page 163 contained in the Supplemental Order issued March 29, 1990. For the convenience of the reader, a copy of the one (1) page Supplemental Order is attached hereto as Appendix "A".

ARGUMENT IN SUPPORT OF EXCEPTION

It is the position of Crossett that Central Transport, by its restrictive amendment, Restriction (1), to its application, has agreed that any authority to be granted it is to be restricted against the transportation of "asphalt", and Crossett (and undoubtedly others) relied upon the fact that any authority to be granted to Central Transport in the instant matter would contain a restriction against the transportation of "asphalt".

It is respectfully submitted that the inclusion of the word "asphalt" in Restriction (1) is appropriate and necessary in the instant matter.

It is apparent that ALJ Schnierle incorrectly assumed that "asphalt" is not embraced within the commodity description "liquid property in bulk in tank type vehicles" as utilized in framing the

authority to be granted the Applicant in the instant matter.

However, "asphalt" is often transported, in bulk, as a viscous liquid, in tank type vehicles, generally with the product being preheated, so that the liquid state of the product is maintained.

Through oversight of the fact that "asphalt" is often transported as a liquid property, in bulk, in tank vehicles, ALJ Schnierle erred by stating on Pages 159 and 160 of the Initial Decision that limiting the grant of authority to liquid property, in bulk, in tank vehicles, precludes the necessity for that part of the restrictive amendment which mentions "asphalt". See Pages 159 and 160 of the Initial Decision which state:

> Accordingly, I will limit the grant of authority to liquid property, in bulk, in tank vehicles. This limitation will preclude the need for that part of the restrictive amendment which mentions asphalt. . . .

Contrary to the foregoing finding, Restriction (1) should include "asphalt", as "asphalt" can be and is transported in bulk as a liquid property in tank type vehicles. Attached hereto as Appendix "B" is a copy of the cover and Page 92 of The Condensed Chemical Dictionary, Tenth Edition, which defines "asphalt" as being either a "black solid or viscous liquid", which is transported in "drums, barrels, tank trucks, tank cars", utilized for "paving and road coating" and stating that asphalt exists both in nature and "as residues in petroleum refining".

Crossett transports "asphalt" in bulk as a liquid petroleum product in tank vehicles within Pennsylvania. Crossett, in producing evidence in the instant matter as to its traffic in jeopardy or "subject to diversion", excluded its "asphalt" traffic because the Applicant had clearly stated in its restrictive amendment that the transportation of "asphalt" was excluded from its application.

Crossett is a member of the Bulk Carrier Conference, Inc. and tariffs on file with the Pennsylvania Public Utility Commission depict that bulk petroleum haulers, including Crossett, transport "asphalt" in Pennsylvania in its liquid state, in bulk, in tank vehicles. Reference is made to Supplement 12 To Freight PA PUC 348 Tariff, issued February 16, 1990, effective March 24, 1990. A copy of the title page of this tariff supplement is is attached hereto as Appendix "C". The heading of this tariff supplement clearly depicts its applicability to "asphalt, tar and products thereof" transported as a "liquid, in bulk, in tank vehicles". Judicial notice of Supplement 12 To Freight PA PUC 348 Tariff is respectfully requested.

From the foregoing, it should be clear that the restriction sought and agreed to by the Applicant that "asphalt" be excluded from its application, should be honored by the inclusion of the word "asphalt" in Restriction (1).

CONCLUSION

To remove the commodity "asphalt" from Restriction (1) would inadvertently grant authority to the Applicant to transport asphalt, as a liquid property, in bulk, in tank type vehicles. Of course, the Applicant did not seek such "asphalt" authority and there is no shipper witness proof presented in support of the transportation of "asphalt". Crossett (and undoubtedly others) relied upon the exclusion of "asphalt" from the instant application in presenting its evidence and position.

Under such circumstances, it is respectfully requested that, upon this Exception taken, any final order of the Pennsylvania Public Utility Commission granting authority to the Applicant in the instant matter include the word "asphalt" in Restriction (1).

Dated: April 6th, 1990.

Respectfully submitted,

Ronald W Malin

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Telephone: (716) 664-5210

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 1990, I served copies of the foregoing Exception on Behalf of Protestant, Crossett, Inc., upon the following parties of record, by first-class mail, postage pre-paid:

Hon. Michael Schnierle
Administrative Law Judge
PA Public Utility Commission
Bureau of Transportation
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Harrisburg, PA 17120

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P.O. Box #946
Warren, PA 16365

RONALD W. MALIN, ESQ.
Attorney for CROSSETT, INC.

APPENDIX "A"

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P. O. BOX 3265, HARRISBURG, Pa. 17120

ISSUED: March 29, 1990

IN REPLY PLEASE
REFER TO OUR FILE

A-00108155

Ronald W. Malin, Esquire
Johnson, Peterson, Tener &
Anderson
Key Bank Building, 4th Fl.
Jamestown, NY 14701

Application of Central Transport, Inc.

TO WHOM IT MAY CONCERN:

This is to advise you that pages 163, 164 and 165 of the Initial Decision in the above-captioned proceeding (served on March 16, 1990) are incorrect. Please find attached revised pages 163, 164 and 165 for your use. Please note the following changes:

Page 163, the authority should read: "To transport, as a Class D carrier, liquid property in bulk in tank type vehicles from . . ."

Page 163, Restriction (1) the commodities asphalt, cement, cement mill waste, and flour are deleted

Page 164, Order Paragraphs 2 and 3: The word "Commission" is changed to "Bureau of Safety and Compliance"

Page 165, Order Paragraph 8 should read: "That a copy of this Initial Decision . . ."

Because some of the errors are substantive in nature, the exception period is hereby extended to April 12, 1990, and reply exceptions are due within ten (10) days of the date that the exceptions are due.

Very truly yours,

Allison K. Turner

smk
Encls.
Certified Mail
Receipt Requested

Allison K. Turner
Chief Administrative Law Judge

The Condensed Chemical Dictionary

TENTH EDITION

Revised by

GESSNER G. HAWLEY

VAN NOSTRAND REINHOLD COMPANY

asparagic acid. See aspartic acid.

L-asparaginase. An enzyme used in the treatment of certain types of leukemia. Produced by biochemical activity of certain bacteria, yeasts, and fungi. Yields are in excess of 3500 units per gram of source.

asparagin (alpha-aminosuccinamic acid; beta-asparagine; althein; aspartamic acid; asparamide) $NH_2COCH_2CH(NH_2)COOH$. The beta amide of aspartic acid, a nonessential amino acid, existing in the D(+)- and L(−)-isomeric forms as well as the DL-racemic mixture. L(−)-asparagine is the most common form. Low toxicity.

Properties L(−)-*asparagine monohydrate*: White crystals; m.p. 234–235° C; acid to litmus; nearly insoluble in ethanol, methanol, ether, and benzene; soluble in acids and alkalies.

Derivation: Widely distributed in plants and animals, both free and combined with proteins.

Uses: Biochemical research; preparation of culture media; medicine.

asparaginic acid. See aspartic acid.

"Aspartame."[10] Trademark for a synthetic artificial sweetener for use as a food additive. Clearance by FDA is pending while several controversial safety questions are resolved. It is not a carcinogen.

aspartamic acid. See asparagine.

aspartamide. See asparagine.

aspartic acid (asparaginic acid; asparagic acid; aminosuccinic acid) $COOHCH_2CH(NH_2)COOH$. A naturally occurring nonessential amino acid. The common form is L(+)-aspartic acid. Low toxicity.

Properties: Colorless crystals; soluble in water; insoluble in alcohol and ether; optically active.

DL-aspartic acid: M.p. 278–280° C with decomposition; sp. gr. 1.663 (12/12° C).

L(+)-aspartic acid: M.p. 251° C.

D(−)-aspartic acid: M.p. 269–271° C with decomposition; sp. gr. 1.6613.

Source: Young sugar cane; sugar beet molasses.

Derivation: Hydrolysis of asparagine; reaction of ammonia with diethyl fumarate.

Uses: Biological and clinical studies; preparation of culture media; organic intermediate; dietary supplement; detergents; fungicides; germicides; metal complexation; synthetic sweetener base (L-form).

Available commercially as D(−)-, L(+)-, and DL-aspartic acid.

aspartocin. USAN for antibiotic produced by Streptomyces griseus.

aspergillic acid $C_{12}H_{18}N_2O_2$. 2-Hydroxy-3-isobutyl-6-(1-methylpropyl)pyrazine 1-oxide. An antibiotic from strains of Aspergillus flavus. Nontoxic.

Properties: Yellow crystals. M.p. 97° C; insoluble in cold water; soluble in common organic solvents and dilute acids. *Hydrochloride melts at 178° C and is soluble in water.*

asphalt (petroleum asphalt, Trinidad pitch, mineral pitch). A dark-brown to black cementitious material, solid or semisolid in consistency, in which the predominating constituents are bitumens, which occur in nature as such or are obtained as residua in petroleum refining (ASTM). It is a mixture of paraffinic and aromatic hydrocarbons and heterocyclic compounds containing sulfur, nitrogen, and oxygen.

Properties: Black solid or viscous liquid; sp. gr. about 1.0; soluble in carbon disulfide. Flash point 450° F (132° C); autoignition temp. 900° F (482° C); solid softens to viscous liquid at about 93° C; penetration value (paving) 40–300 (roofing) 10–40. Good electrical resistivity. Combustible.

Occurrence: California, Trinidad, Venezuela, Cuba, Canada (Athabasca tar sands).

Containers: Drums, barrels, tank trucks, tank cars.

Hazard: Moderately toxic by inhalation of fume. Tolerance, 5 mg per cubic meter of air.

Uses: Paving and road-coating; roofing; sealing and joint filling; special paints; adhesive in electrical laminates and hot-melt compositions; diluent in low-grade rubber products; fluid loss control in hydraulic fracturing of oil wells; medium for radioactive waste disposal; pipeline and underground cable coating; rust-preventive hot-dip coatings; base for synthetic turf; water-retaining barrier for sandy soils; supporter of rapid bacterial growth in converting petroleum components to protein.

See also bacteria; protein; oil sands. For further information on asphalt, refer to the Asphalt Institute, 1270 Avenue of the Americas, New York, N.Y.

asphalt, blown (mineral rubber, oxidized asphalt, hard hydrocarbon). Black, friable solid obtained by blowing air at high temperature through petroleum-derived asphalt, with subsequent cooling. Penetration value 10–40; softening point 85 to 121° C. Combustible. Uses are primarily roofing, as diluent in low-grade rubber products, and as thickener in oil-based drilling fluids. Shipped in 55-gal. metal drums.

asphalt, cut-back. A liquid petroleum product, produced by fluxing an asphaltic base with suitable distillates. (A.S.T.M.)

Properties: Flash point (open cup) 50° F (10° C). Solubility of residue from distillation in carbon tetrachloride 99.5%.

Hazard: Flammable, dangerous fire hazard.

Use: Road surfaces.

Shipping regulations: (Rail, Air) Flammable Liquid label.

asphaltene. A component of the bitumen in petroleums, petroleum products, malthas, asphalt cements, and solid native bitumens, soluble in carbon disulfide but insoluble in paraffin naphthas. (A.S.T.M.) It is comprised of polynuclear hydrocarbons of m.w. up to 20,000, joined by alkyl chains.

(Not subject to Sup. 11)

Supplements 4, 5, 6, 111 and 12 contain all changes.

i - Increase.

SUPPLEMENT 12
TO
ICC BCC 2003-H
IMCA TR 117
Freight PA PUC 348

BULK CARRIER CONFERENCE, INC., AGENT

BCC 2003-H

LOCAL AND JOINT FREIGHT TARIFF

OF

SPECIFIC, GENERAL AND DISTANCE COMMODITY RATES

APPLYING

ON

ASPHALT, TAR AND PRODUCTS THEREOF

NAMED IN TARIFF

LIQUID, IN BULK, IN TANK VEHICLES

BETWEEN POINTS IN

THE UNITED STATES (EXCEPT ALASKA AND HAWAII)

ALSO

BETWEEN POINTS IN THE UNITED STATES

(EXCEPT ALASKA AND HAWAII) ON THE

ONE HAND AND POINTS IN MEXICO

ON THE OTHER

AS SHOWN HEREIN

ASPHALT TARIFF

For Reference to Governing Publications, see Item 100.

ISSUED: FEBRUARY 16, 1990

¶EFFECTIVE: FEBRUARY 28, 1990
+EFFECTIVE: MARCH 24, 1990

ISSUED BY:
ROBERT A. ROPER
TARIFF ISSUING OFFICER
8007 CYRDEN WAY
FORESTVILLE, MD 20747

Address inquires regarding rates published herein to individual carriers parties hereto.

McNEES, WALLACE & NURICK

ATTORNEYS AT LAW

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F. MURRAY BRYAN
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MARK M. VAN BLARGAN
JONATHAN H. RUDD
ROBERT F. YOUNG
CAROL A. STEINOUR
JEFFREY L. KODROFF

April 12, 1990

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
New Filing Section, Room B-18
North Office Building
P. O. Box 3265
Harrisburg, PA 17120

HAND DELIVERY

RECEIVED
APR 12 1990
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 Exceptions on Behalf of Applicant Central Transport, Inc. in the above-referenced 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)
W. David Fesperman (w/enclosures)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Application of :
Central Transport, Inc. : Docket No. A-10815

EXCEPTIONS ON BEHALF OF APPLICANT CENTRAL TRANSPORT, INC.

Pursuant to 52 Pa. Code §5.533, Applicant Central Transport, Inc., by its counsel McNees, Wallace & Nurick, respectfully takes specific exception to one conclusion of law stated in the Initial Decision of Administrative Law Judge Michael C. Schnierle dated March 5, 1990.

SPECIFIC EXCEPTION

The specific conclusion of law to which applicant takes exception reads as follows:

> 6. Common carrier authority should be granted commensurate with a demonstrate[d] public need, as described in Findings of Fact 24 through 55.

The exceptions to this conclusion of law relate to the scope of the demonstrated public need perceived by the Administrative Law Judge, as more specifically described in Findings of Fact Nos. 28, 40, 49 and 52.

INTRODUCTORY STATEMENT OF EXPLANATION

The Judge commenced his discussion of legal issues by referring to the policy statement codified at 52 Pa. Code §41.14 (I.D., p. 103). The Judge went on to note as follows:

> The primary Commission decision interpreting this policy statement is Re: Richard L. Kinard, Inc., 58

> Pa. PUC 548 (1984). In Kinard, the Commission held that the policy statement at 52 Pa. Code §41.14 requires that the applicant demonstrate, in addition to need and fitness, that the proposed transportation will serve a useful public purpose.
> (I.D., pp. 103-104) (emphasis added).

Less than two weeks after the Initial Decision in this subject proceeding was written by Judge Schnierle, the Commission voted three-to-two at public session in favor of a motion of Chairman Bill Shane which contains the following language:

> [W]ith shipper support, an Applicant meets its entire burden under §41.14(a) of demonstrating that a 'useful public purpose responsive to a public demand or need' exists for its transportation service. To require an additional showing of 'useful public purpose' by way of 'alternatives to inadequacy' is redundant.

A copy of the motion of Chairman Bill Shane in Docket No. A-00088807, F.2, Am-K, Application of Blue Bird Coach Lines, Inc., dated March 14, 1990, is attached to these exceptions as Appendix A.

The motion of Chairman Shane in Blue Bird further directed that the Law Bureau prepare an appropriate order which is expected imminently. Upon issuance of that order, the Commission will have adopted "the decision in Application of Blue Bird Coach Lines, Inc., as its definitive interpretation of 52 Pa. Code §41.14(a)." (See Appendix A hereto, at p. 2).

Because the Judge in the subject proceeding based his analysis on the now repudiated Kinard decision, the scope of operating authority awarded Central Transport is not commensurate with the need shown, in the specific respects outlined in the argument below.

ARGUMENT

1. In part, the Initial Decision awards applicant Central Transport: "liquid property in bulk in tank type vehicles from the facilities of Witco Corporation in Petrolia, Butler County, to points in Pennsylvania" (I.D., p. 163). In Finding of Fact No. 28, the Judge found: "Witco [also] has a need for intrastate service from its Bradford facility" (I.D., p. 88). However, the Judge went on to state that "While the volume of shipments from Bradford is large (236 per month),...I am unable to conclude that Central has demonstrated that its proposed service for Witco from Witco's Bradford plant would serve a useful public purpose." (I.D., p. 121). This type of bifurcated analysis between "public need" and "useful public purpose" is not in accord with the "definitive interpretation of 52 Pa. Code §41.14(a)", established in the Commission's anticipated decision in Application of Blue Bird Coach Lines, Inc. (See Appendix A hereto).

2. Similarly, the Judge found that Calgon Corporation, with a facility located in Ellwood City (Beaver and Lawrence Counties), Pennsylvania, had established a need for transportation service (See Finding of Fact No. 49, I.D., p. 92). Nevertheless, the Judge failed to grant applicant any authority to transport liquid commodities in bulk for Calgon based on the now discredited rationale that "although Central has established that Calgon has a need for transportation service, I conclude that Central has failed to establish either that present service for Calgon is inadequate or any of the alternatives to inadequacy." (I.D. pp. 130-131; see also Finding of Fact No. 52, I.D., p. 92). The Judge erred in failing

to grant an authorization responsive to the needs for service established on this record by Calgon Corporation.

3. With respect to shipper E. F. Houghton & Co., the Judge found "The record contains no evidence of a need for intrastate inbound shipments received at the Fogelsville facility" (Finding of Fact No. 40, I.D., p. 90). That finding is in error:

> Q. [by Mr. Chesnutt]. Now, from what points in Pennsylvania does the Fogelsville facility receive inbound products?
>
> A. [by Mr. Dahms]. We receive from Bradford, Pennsylvania; Oil City; Petrolia; and Marcus Hook.
>
> Q. And what are the freight of the inbound products that you receive?
>
> A. Chemicals and raw materials and oils.
>
> (Tr. 261)

The discussion of Houghton's inbound traffic to Fogelsville continues throughout the examination of this witness (Tr. 263, 266, 271-275).

It seems likely that the first sentence of Finding of Fact No. 40, as it appears in the Initial Decision, is a misstatement, because the first sentence of that finding is contradicted by the second, which reads: "Houghton has no complaints about the service it has received from existing carriers on inbound shipments" (I.D., p. 90). Apparently, this is another application by the Judge of the discredited bifurcation analysis set out in Kinard. The supposed finding of "no evidence of a need for intrastate inbound shipments received at the Fogelsville facility" is in reality a finding that applicant has failed to show a material inadequacy in the

service of existing carriers, rather than a finding of no evidence of need. Under this faulty analysis, the Judge erroneously granted one-way authority from the Houghton facilities (See I.D., p. 163).

4. In light of the errors identified in the preceding paragraphs, the scope of authority granted in this proceeding should be modified to read as follows:

> To transport, as a Class D carrier, liquid property in bulk in tank type vehicles from points in the counties of Allegheny, Beaver, Butler, Lawrence, Lehigh, McKean and Philadelphia, to points in Pennsylvania, and vice versa; subject to the following conditions:
>
> (1) 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, corn syrup and blends of corn syrup, honey, milk and milk products, molasses, sugar and sugar substitutes.
>
> (2) 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.

The foregoing re-framing of the shipper specific grant of authority utilized by the Administrative Law Judge (See I.D., p. 163), is dictated by the Commission's recent decision in Application of Diamond J Transport, Inc., Docket No. A-00107314 (Opinion and Order adopted February 1, 1990, entered March 15, 1990). In the Diamond J decision, the Commission, on its own motion, expanded the authority recommended by the Administrative Law Judge from shipper-specific authorization to a description employing

county-wide authorizations for the counties from which shippers had appeared in support of the application. The Commission justified its simplification of the cumbersome description employed by the Judge with the following rationale:

> We note that the ALJ has limited transportation to ten named shippers from points in the counties of Allegheny and Westmoreland to points in Pennsylvania, and vice versa. This Commission has followed a policy of granting wide geographical rights to carriers engaged in hauling commodities where specialized service is performed requiring special equipment.
>
> (Diamond J Opinion and Order, at p. 9)

A similar result is warranted here.

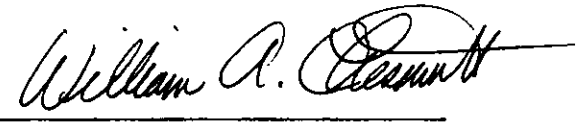
CONCLUSION

Applicant Central Transport has taken narrowly focused exception to the scope of the grant of authority awarded by the Judge in his Initial Decision. The requested modification of the grant of authority results in a streamlined, less cumbersome description that is warranted by the Commission's most recent pronouncements in the area of motor carrier regulation. The Opinion and Order entered March 15, 1990 in Diamond J, and the anticipated decision to be issued in Blue Bird, reflecting the views expressed in Chairman Shane's motion adopted that very same date, represent current Commission thinking. Admittedly, those pronouncements were not available at the time the Judge in this proceeding composed his Initial Decision; however, those pronouncements do represent the state of the law at the time the Commission will be rendering its decision on exceptions herein.

Accordingly, the grant of authority awarded here should be modified to conform with current Commission policy.

Respectfully submitted,

McNEES, WALLACE & NURICK

By 

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Counsel for Applicant
Central Transport, Inc.

Dated: April 12, 1990

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Application of Blue Bird Coach Lines, Inc.

Public Meeting - March 15, 1990
FEB-9-L-558*
Docket No.A-00088807,F.2, Am-K

MOTION OF CHAIRMAN BILL SHANE

In the case of Application of Blue Bird Coach Lines, Inc., the Law Bureau has provided an interpretation of the Commission's Transportation Regulatory Policy at 52 Pa. Code §41.14 which would require an applicant for motor common carrier authority to meet the following twofold burden of proof under Section 41.14(a):

1. An Applicant must demonstrate that a public demand or need exists for the proposed transportation service.

2. An Applicant must demonstrate that a useful public purpose exists for its proposed transportation service.

In providing its interpretation, the Law Bureau has relied on the case of Re Richard L. Kinard, Inc., 58 Pa. P.U.C. 548(1984) (Kinard), which the Commission has adopted as its definitive interpretation of its Transportation Regulatory Policy. I do not agree with the Commission's decision to embrace Kinard as the correct interpretation of an Applicant's burden of proof under Section 41.14(a) of its Policy. Kinard stands for the proposition that "mere shipper support" does not satisfy an Applicant's burden under 41.14(a). Kinard provides that while shipper support satisfies an Applicant's burden of proving that a "public demand or need" exists for its proposed service, shipper support does not satisfy an Applicant's burden of proving that its service will serve a "useful public purpose." Consequently Kinard proposes "alternatives to inadequacy" by which an Applicant may meet the "useful public purpose" requirement.

Section 41.14(a) of the Commission's Transportation Regulatory Policy requires an Applicant to demonstrate that a "useful public purpose responsive to a public demand or need" exists for its transportation service. I believe that shipper support satisfies that burden. Shippers (the "public") have commodities that "need" to be shipped, and a motor common carrier with the ability to serve that need as evidenced by our

fitness criteria[1/] serves a "useful public purpose" in transporting those commodities. Consequently, with shipper support, an Applicant meets its entire burden under 41.14(a) of demonstrating that a "useful public purpose responsive to a public demand or need" exists for its transportation service. To require an additional showing of "useful public purpose" by way of "alternatives to inadequacy" is redundant.

This interpretation of the Transportation Regulatory Policy is in accord with its original purpose of encouraging competition among motor common carriers in Pennsylvania. In addition, it satisfies the Commission's statutory requirement at 66 Pa. C.S.A. 1103(a) of granting a certificate of public convenience only where it is "necessary or proper for the service, accommodation, convenience, or safety of the public".

THEREFORE, I MOVE:

1. That the Order in Application of Blue Bird Coach Lines, Inc., be modified consistent with this motion.

2. That the Commission adopt the decision in Application of Blue Bird Coach Lines, Inc., as its definitive interpretation of 52 Pa. Code 41.14(a).

3. That it be noted in the Order in this case that Blue Bird Coach Lines, Inc., met its burden of demonstrating that a "useful public purpose responsive to a public demand or need" existed for its proposed service under the Commission's former interpretation of 52 Pa. Code§41.14(a); therefore, the change in the interpretation proposed by this Motion has not materially affected the grant of authority to be issued to this particular applicant.

4. That the Law Bureau prepare the appropriate Order.

Bill Shane

BILL SHANE
Chairman

Dated: 3/14/90

1/ Section 41.14(b) of the Transportation Regulatory Policy requires an applicant to demonstrate that it possesses technical and financial fitness, and authority may be withheld if an applicant lacks a propensity to operate safely and legally.

CERTIFICATE OF SERVICE

I hereby certify that I have served by first-class mail, postage prepaid, the foregoing Exceptions on Behalf of Applicant Central Transport, Inc. on the following counsel of record:

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Honorable Michael C. Schnierle
Administrative Law Judge
Pennsylvania Public Utility Commission
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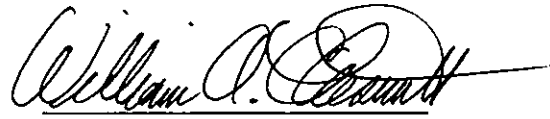
Harrisburg, PA 17120



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Dated this 12th day of April, 1990, at Harrisburg, Pennsylvania.

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SENIOR COUNSEL

ORIGINAL

April 12, 1990

RECEIVED
APR 12 1990
SECRETARY
Public Utility Commission

Re: Application of Central Transport, Inc
Docket No. A-108155
Our File 2583.501

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

Dear Mr. Rich:

We enclose the original and 9 copies of Exceptions in this proceeding. Copies have been served upon all parties of record.

Please acknowledge receipt and filing of the enclosed on the duplicate copy of this letter of transmittal and return it to us in the self-addressed, stamped envelope provided for that purpose.

Sincerely yours,

WICK, STREIFF, MEYER,
METZ & O'BOYLE

Henry M. Wick, Jr.

HMW/mem/4827w
Enclosure
cc: Counsel of Record

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF CENTRAL TRANSPORT, INC.

DOCKET NO. A-00108155

EXCEPTIONS OF REFINERS TRANSPORT & TERMINAL CORPORATION PROTESTANT, TO THE INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL C. SCHNIERLE

I. STATEMENT OF EXCEPTIONS

Refiners Transport & Terminal Corporation ("Refiners") takes exception to the following conclusions and findings of the Administrative Law Judge:

1. Exception is taken to the conclusion that applicant has sustained its burden that approval of the application will serve a useful public purpose, responsive to a public demand or need. (p. 162 of Initial Decision)

2. Exception is taken to the conclusion that Protestants would not be endangered or impaired to such an extent that the granting of the authority will be contrary to the public interest. (p. 162 of Initial Decision)

3. Exception is taken to the conclusion that common carrier authority should be granted as described in Findings of Fact 24 - 55. (p. 162 of Initial Decision)

4. Exception is taken to finding No. 27 that Central has shown its proposed service to Witco at Petrolia would serve a

useful public purpose in that it would be more efficient then existing services and would be useful to meet a future need. (p. 88 of Initial Decision)

5. Exception is taken to finding No. 34 that Central's proposed service to Pennzoil at Karns City would serve a useful public purpose in that it would be more efficient than existing services, and would be used as a back-up to Pennzoil's own fleet. (pp. 89-90 of Initial Decision)

6. Exception is taken to finding No. 86 that Refiners' operations will not be impaired to an extent, that on balance, the granting of the authority will be contrary to the public interest, if Central is authorized to rendered service to the supporting shippers to the extent that Central has demonstrated that its service will serve a useful public purpose responsive to the needs of the shipper (p. 99-100 of Initial Decision).

II. ARGUMENT ON EXCEPTIONS

1. Introduction

The Administrative Law Judge (ALJ or Judge) has written an extensive and carefully considered decision. He correctly found that Applicant Central failed to produce sufficient evidence to support a finding of need for statewide authority and further held that the cases cited by Central in support of its statewide argument were distinguishable from the instant cases (pp. 105-118). However, Protestant Refiners Transport & Terminal Corporation ("Refiners") believes that the Judge erroneously recommended a grant of authority for Central Transport to serve the principal supporting shippers Witco Corporation and Pennzoil

by an application of the Kinard criteria to the facts of this case*.

2. The Decision Does Not Properly Apply the Kinard Criteria.

In evaluating the testimony of Witco and Pennzoil (as well as the other shippers) the Judge first determined that public need was shown by each of the shippers since the shippers had traffic moving to or from their facilities. (For example, see pages 118 and 119 as to Witco and page 122 as to Pennzoil).

Having reached the conclusion that there was a public need for service, the Judge properly then considered and rejected any argument by Central that inadequacy of service had been established as to Witco (p. 119) or to Pennzoil (p. 123). However, the Judge then proceeded to make a completely mechanical application of the Kinard alternative criteria listed on page 120 of his report.

The Judge first comments that the three alternatives which would apply to the Witco service are efficiency, future need and ICC authority. The Judge properly rejected the "ICC authority" alternative since both interstate and intrastate traffic would move outbound only and, thus, there is no benefit to be gained by coordinating interstate and intrastate shipment (pp. 120 and 121).

The Judge carefully analyzed the situation at Witco's Bradford facility and concluded that the alternatives of Kinard did not apply and that Witco was already using 8 different common carriers to meet its transportation needs. The Judge

* Richard L. Kinard, Inc., 58 Pa. PUC 548 (1984)

then concluded that Central had failed to demonstrate that the proposed service from the Witco Bradford plant would serve a useful public purpose (p. 121).

However, the Judge, in reviewing the Kinard alternatives at the Karns City Witco plant appeared to accept the alternatives of future need and efficiency with little, if any, analysis or testing of the evidence. For example, the Judge concluded that the future need alternative was applicable since Witco had completed an expansion project of Petrolia which would increase its production, citing p. 150 of the record. However, that record reference does not provide any basis which would relate to additional carriers. The witness for Witco did not state whether the expansion would mean one more load in a month, ten more or any number. The Judge also concluded that the alternative of efficiency had been met simply because the Karns City terminal of Central was located near Witco's plant, while Refiners' terminal was in nearby Oil City. There was not one word of testimony by the supporting shipper for Witco that there had been any delays in securing equipment from the Oil City terminal of Refiners.

The Judge used the same technique in analyzing and weighing the testimony presented by Pennzoil. In the Judge's view, the mere fact that Pennzoil received product at its facilities established a need for service (p. 122 of Decision relating to Karns City). While the Judge properly held that there was no showing of inadequacy (p. 123), the Judge also held that Central had demonstrated that service to Pennzoil at Karns City would

serve a useful public purpose. That conclusion was based simply on a mechanical application of the Kinard criteria of efficiency and back-up service. The Judge's finding (No. 34) that Central's service at Karns City would be more efficient than other services is not supported by substantial evidence. While the witness did mention that the Central terminal is close to the Pennzoil facility, there was little, if any effort, by Pennzoil's witness to support a finding of efficiency which would not also be present in Pennzoil's use of existing carriers Refiners, Fleet and Matlack. All the witness said was that he was supporting Central because Pennzoil is "continually growing and we have to look out for our best interest to make sure that we have adequate equipment to transport the material that we are producing and selling." Protestant Refiners submits that this vague and ambivalent testimony cannot be used as support for a finding that Central will provide a more efficient service than does Refiners. Certainly, a finding of efficiency requires a careful comparison with service of existing carriers. The Judge did not compare the service proposed by Central with that provided by Refiners; in the absence of a comparison favorable to applicant, the finding and grant should not be allowed to stand.

The same comment applies to the Judge's finding No. 34 and his conclusion (p. 123 of Initial Decision) that "to the extent that Pennzoil would use Central's service as a back-up to its own equipment for inbound service, the back-up service alternative also applies". In this instance, the Judge has

equated a mere statement of future intent to use the carrier as the equivalent of a public interest for a back-up service.

The approach of the Judge on back-up service was correctly stated at p. 123 in analyzing the Witco situation at Bradford. The Judge held that a back-up alternative would not apply where existing carriers were already available and not used. The Judge made that same finding when he concluded (p. 131 of Initial Decision) that the back-up carrier alternative did not apply in the Calgon case since Refiners, Chemical Leaman and Matlack were already available to that shipper as back-up carriers (p. 327).

That same conclusion must follow as to the Pennzoil situation since the same three carriers -- Chemical Leaman, Matlack and Refiners -- are available at Karns City as a back-up to Pennzoil's own equipment. This is especially true since, as the Judge found (p. 122 of Decision), the vast majority of the inbound Pennzoil traffic is transported in Pennzoil's trucks (99 - 95 percent) and when asked whether any change would be made if the application were granted, the witness stated -- "probably not". (188).

Refiners submits that if the Kinard criteria are to have any meaning in regulation, a finding that they are applicable must be supported by substantial evidence and conclusions which flow from that evidence. For example, if an Applicant already is handling a major share of inbound transportation under ICC authority, a persuasive case could be made for a grant of authority to transport product outbound to Pennsylvania points

in the same vehicle which moved the product inbound. Further, if a shipper had heavy traffic and only one or two carriers, a persuasive argument could be made for an additional carrier as a back-up carrier, particularly if traffic were seasonal in nature. However, where there already are existing carriers (some of which have idle equipment and laid-off employees), it is not, we submit, sound transportation regulation from any view point to grant additional authority based upon the theory that the applicant would be a back-up carrier (where none is needed) or that mere existence of a terminal near the shipper's facility justify the grant of authority. What the Judge has done in this case is to simply apply the Kinard criteria in a mechanical fashion and thus reach a finding and a conclusion that authority should be granted to the applicant to serve the major shippers.

The same argument applies to the grants of authority to each of the smaller shippers who might have one or two shipments a month. Refiners does not intend to analyze each of the smaller shippers for which authority is granted. It does emphasize that the Judge's findings which resulted in a grant to Central to serve Valspar are not supported by substantial evidence. The Judge himself comments that Valspar has a "very slight need for intrastate transportation service." (p. 132 of Initial Decision) but found that a useful public purpose would be served by a grant. This finding was made despite the fact that Matlack dedicates equipment specifically to the account (304) and that Refiners has solicited without success over a period of two years (340-343). Refiners has provided rates and information to

Valspar; its witness admitted that all it wishes is the proper type of equipment and ability to provide service in a safe and efficient manner. The witness stated that it would be willing to consider Refiners as a back-up carrier (342). Despite this testimony, the Judge held that there was a lack of interest in Valspar's traffic and that Central would likely become the principal carrier of this small shipper.

3. The Administrative Law Judge's finding concerning the effect of a grant upon Refiners should be carefully reviewed.

As the Judge stated (p. 157 of decision), Refiners made the strongest effort to show that certification of Central, even limited to the supporting shippers, might endanger or impair its operation so that granting of the authority would be contrary to the public interest. The Judge, however, concluded in light of the limited service authorized, that Refiners failed to show that its Oil City or East Butler terminals are likely to lose "a sufficient amount of traffic to result in their closure." (p. 157 of Initial Decision).

Considering the grant of authority and the fact that evidence was presented based on total operations, it is difficult to identify precisely the amount of revenue which Refiners has at risk as a result of the grant. However, Refiners asks the Commission to review the testimony and the summary of idle equipment and drivers laid-off (even under present conditions) as summarized at pages 20 - 22 of the Brief. In addition, Refiners showed that it had at risk $3.6 million dollars of revenue annually, and that Witco and Pennzoil

accounted for 55 percent of Refiners' total intrastate revenue in 1987 and 47 percent of intrastate revenues in the first 6 months of 1988 (Refiners Exhibit 9, page 2). See also the discussion at pages 20 - 24 of Refiners' Brief of September 13, 1989.

The Judge appeared to conclude (p. 157 of Decision) that Refiners has failed to show that the grant would cause a sufficient loss of traffic so that its terminals at Oil City or East Butler would be closed, and therefore a grant should be made.

No precedent is cited by the Judge which would support a conclusion that, to warrant denial, a Protestant must show that its terminals will be closed if authority is granted. We suggest that in this case, the Commission has an opportunity to articulate standards as to the level of testimony which is required to support a grant of authority to serve major shippers in the face of uncontradicted testimony that the two shippers involved (Witco and Pennzoil) are the most important and significant shippers which Refiners served over a period of many years. In this case, the Judge found that there was no showing of inadequacy of service by Refiners or other carrier to those shippers. Refiners submits that the testimony of the witnesses for Witco and Pennzoil must be carefully analyzed to determine whether their extremely vague testimony justifies the risk that a grant of authority will indeed jeopardize the ability of Refiners to serve the public which it has faithfully served for so many years.

We respectfully request the Commission to review the testimony of Mr. Wilson at pages 515-517 of the record which demonstrates the significance of the Pennzoil and Witco traffic to Refiners, the dependence of Refiners upon that traffic and the struggle which Refiners has had to survive in an intensly competitive market. Rather than repeat the arguments in our brief, we respectfully request that the Commission review that brief, particularly at pages 42 - 49 where the business of Refiners and the effect of loss of business is fully discussed. That argument emphasizes the major points that:

1. Central Transport is in a position to divert traffic from Refiners and will do so if a grant is made.

2. Witco and Pennzoil represent significant percentages of the total traffic at Refiners East Butler and Oil City terminal.

3. The Witco and Pennzoil business provide the base of the operations of Refiners and the loss of any significant traffic would hamper its ability to serve the public.

4. Refiners has made special efforts to meet every demand of Witco and Pennzoil.

5. Its employees have accepted lesser wage scales in order to meet the competition of non-union carriers; Refiners will share profits with those employees as its business improves.

6. Refiners had idle equipment and laid-off drivers at the time of the hearing.

7. Central is an aggressive carrier with the ability to establish a rate structure which will have an immediate and adverse affect on Refiners; its own witness testified that he

expected the company to add 1 million dollars in revenue from the proposed operation; that revenue can only come from traffic handled by Refiners for Witco and Pennzoil.

The initial statement by Judge Christianson in the Kinard case we think is still valid. That statement was:

> If a Protestant is providing adequate service, it certainly has a claim to protection in the public interest. (Slip Opinion, p. 39).

The Commission must consider, as we emphasized in our brief, that neither Witco nor Pennzoil testified that it was handicapped in meeting business needs or meeting competition by reason of the quality of existing service. To avoid repetition, we will simply quote the following from our brief.

> The testimony spoke of the nebulous concept of "being more choosy" (Witco) or looking out for a company's own interest (Pennzoil) or of multiple potential backup carriers (Calgon). This case provides an excellent opportunity for the Commission to articulate clearly its policy in regard to such applications as to the instant one. Certainly, the alternatives to inadequacy suggested by Kinard require more substance than simply the appearance of a witness reciting the phrases from Kinard of "potential backup" or "more competition" or unspecified "future needs" or "conformity" of PUC authority to ICC authority.
>
> Refiners submits that these concepts must be related to some expressed and substantial public need for transportation which is articulated in far more precise terms than those presented by the witnesses in this case. In reaching a conclusion to deny this application, the Commission can properly signal the transportation community that substantial proof is still required to support an application for wide authority. This is particularly true where there are existing carriers such as Refiners, which have invested over 20 years of existence in serving Pennsylvania -- with equipment, with terminals, with personnel and capital -- all dedicated to providing a quality tank truck service in which employees are paid decent wages and provided reasonable fringe benefits.

The Commission must find, on the evidence of this case, that the interests of all Pennsylvania shippers and receivers of tank truck commodities, outweigh the interest of Central Transport and those few shippers who seek to secure, even on a temporary basis, a supposed advantage from the aggressive operations of Central Transport.

III. CONCLUSION

For the foregoing reasons, Protestant Refiners Transport & Terminal Corporation requests that the application be denied.

Respectfully submitted

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Attorneys for Protestant
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Terminal Corporation

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing pleading has been served upon counsel of record, by first-class, U.S. Mail, postage prepaid, this 12th day of April, 1990.

/Henry M. Wick, Jr.

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GOFF & RUBIN

APRIL

~~January~~ 16, 1990

CERTIFICATE OF MAILING ENCLOSED

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

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 the above-captioned matter.

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

Very truly yours,

James W. Patterson

JAMES W. PATTERSON

JWP/jal
enclosures

cc: William A. Chesnutt, Esquire
Ronald Malin, Esquire
Henry Wick, Jr., Esquire
Kenneth Olsen, Esquire
Christian V. Graf, Esquire
William O'Kane, Esquire
John C. Peet, Jr., Esquire, General Counsel

Before The

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF PROTESTANT MATLACK, INC.

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

I. STATEMENT OF THE CASE

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

By Initial Decision ("Decision") served March 16, 1990 Administrative Law Judge Michael C. Schnierle granted Central Transport, Inc. ("Central" or "Applicant") a portion of the operating rights it sought.[1] The Decision granted the right to provide service in connection with the facilities of seven (7) named shippers, as follows:

> To transport, as a Class D carrier, liquid property in bulk in tank type vehicles from the facilities of Witco Corporation in Petrolia, Butler County, to points in

[1] By letter dated March 29, 1990, Chief Administrative Law Judge Allison K. Turner served upon all parties three revised pages that contain certain ministerial corrections to Judge Schnierle's Initial Decision. Judge Turner's letter also advised the parties that the deadline for filing Exceptions to the Initial Decision was extended to April 12, 1990.

Pennsylvania; from the facilities of Pennzoil Products Corporation in Karns City, Butler County, to points in Pennsylvania and vice versa; from the facilities of McCloskey Corporation and Harry Miller Corporation in the City of Philadelphia to points in Pennsylvania; from the facilities of Para-Chem Southern, Inc. in the City of Philadelphia to points in Pennsylvania and vice versa; from the facilities of E.F. Houghton and Co. in the Township of Upper Macungie, Lehigh County, to points in Pennsylvania; and from the facilities of Valspar Corporation in the City of Pittsburgh, Allegheny County, and in the Borough of Rochester, Beaver County, to points in Pennsylvania; subject to the following conditions:

(1) 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, corn syrup and blends of corn syrup, honey, milk and milk products, molasses, sugar and sugar substitutes.

(2) 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.

In determining to grant limited authority to Central the Administrative Law Judge found that Central failed to establish the existence of a public need for the statewide service that it proposed. Moreover, although authority was granted to provide certain limited service for seven (7) of Central's eight (8) supporting shippers, the Decision found there was no need for additional service to or from either Calgon Corporation's Ellwood City facility or Witco Corporation's Bradford location.

Although holding that Central's employee safety problems in North Carolina and South Carolina did not preclude it from obtaining Pennsylvania intrastate operating authority, the Administrative Law Judge was sufficiently concerned regarding Central's safety problems to condition the suggested grant of authority upon Central's implementation of safety procedures at its Karns City, Pennsylvania terminal to prevent a recurrence of the problems Central experienced in North Carolina and South Carolina.

In ruling that there is insufficient evidence to support a finding that Central lacks the propensity to operate safely and legally, the Decision considers, inter alia, the safety records of certain of the Protestants. As the basis for its finding that Central possesses the requisite safety, regulatory and technical fitness, the Decision states that "(i)n terms of the severity of the (safety) violations, Central's are no worse than those of Chemical Leaman, Crossett, or Refiners". (Initial Decision, p.147).

Finally, the Initial Decision finds that a grant of limited authority to Central would not endanger or impair protestants to such an extent that the granting of authority would be contrary to the public interest.

II. STATEMENT OF EXCEPTIONS

1. The Initial Decision Errs In Concluding That Central Is Fit To Render The Proposed Transportation

III. ARGUMENT IN SUPPORT OF EXCEPTIONS

Matlack is in general agreement with the Decision. The

Decision is carefully drawn. It contains a comprehensive summary of the testimony and evidence of record, a careful and astute analysis of the applicable law and a cogent merger of both in addressing the standards set forth in 52 Pa. Code §41.14. Matlack has no quarrel with the bulk of the Decision.

Limiting the authority granted to Central to service involving the facilities of certain named shippers is certainly justified - the record will not support a conclusion that there exists a need for service beyond that granted by the Decision. Moreover, Matlack does not vigorously dispute the conclusions that Central possesses the requisite financial fitness and that approval of the application, as modified, will not severely endanger Matlack's existing operations.

Matlack submits, however, that the Decision misses the mark when it: 1. concludes that Central possesses the technical fitness required of an applicant for Pennsylvania intrastate authority and 2. fails to conclude that Central lacks the propensity to operate legally and safely.[2]

Employee Safety Problems

The Decision undertakes an in-depth analysis of the safety problems encountered by Central at its Charlotte, North

---

[2] The Decision finds that certain of Central's safety violations reflect upon its technical ability and therefore consolidates its discussion of Central's technical fitness with its consideration of Applicant's regulatory fitness. These two issues will therefore be similarly consolidated in these Exceptions.

Carolina and Greenville, South Carolina terminals.[3] The situation at the Charlotte terminal involved the deaths of two Central employees through asphyxiation. As a result of the deaths the North Carolina Department of Labor ("NCDOL") issued a citation to Central alleging violations of several occupational safety and health statutes and federal regulations. Central eventually withdrew its Notice of Contest to Citation, paid a penalty of $1,800, agreed to implement and enforce a confined space entry program and to establish a respiratory protection program in accordance with 29 CFR §1910.134. (I.D., pp. 139-140).

The incident at Central's Greenville, South Carolina terminal also involved violations of several occupational safety and health laws and regulations. These violations, as with those occurring in North Carolina, involved improper methods employed to clean tank trailers. Although Central did not admit the allegations, it did abate the items mentioned in the citation issued by the South Carolina Department of Labor ("SCDOL") by implementing a confined space entry program. (I.D., pp. 140-141).

After analyzing these violations the Decision concludes that the violations should not act as a bar to Central's authorization to provide intrastate service. The Decision's ruling

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[3] Prior to analyzing the specific violations involving Central, the Decision discusses the relevancy of violations not involving the Public Utility Code, the Commission's regulations and matters affecting "safety of operations." (I.D., pp. 136-138). The Decision concludes that violations of a different nature other than those enumerated must be considered in evaluating Central's fitness. Matlack wholeheartedly agrees with this conclusion.

is based upon a concern that utilizing past violations as a bar to authorization would result in the fitness criteria being used as a punitive measure rather than as a safeguard. (I.D., pp. 143-144). We disagree. The grant of authority to operate in Pennsylvania is a privilege - not a right. Snyder v. Pennsylvania Public Utility Commission, 147, 144 A.2d 468 (1958); Western Pennsylvania Water Company v. Pennsylvania Public Utility Commission, 10 Pa. Commw. 533, 311 A.2d 370 (1973). Withholding authority as a result of violations of a number of varieties has been a consistently applied regulatory technique; that it has some punitive overtones has never before caused this Commission to become bashful. Respectfully, the Commission's duty to the public in granting carriers the privilege of operating in intrastate commerce does not hinge on the existence of proof that an applicant will not operate safely. Quite the contrary, it is the applicant's burden to prove its propensity to operate safely and if it has not done so its application should be denied.

In order to fully appreciate the magnitude of Central's employee safety violations it is necessary to obtain an understanding of the sequence of events involved therewith.

The two fatalities that led to the investigation by the NCDOL occurred on June 4, 1986. (Matlack Exhibit 3, p.8). The NCDOL investigation concluded August 27, 1986, and a citation was issued to Central on September 15, 1986. At the time the citation was issued - more than three (3) months after the fatalities - Central had not yet instituted the programs necessary to comply

with 29 CFR 1910.134. (Matlack Exhibit 3, p.6). Such programs were apparently not implemented until sometime after a Consent Order was entered by an Administrative Law Judge on May 20, 1987. (Matlack Exhibit 3, pp. 6-13).

On December 3 and 19, 1986, the SCDOL conducted its investigation of Central's Greenville, South Carolina terminal. Although the investigation occurred approximately six months after the fatalities in Charlotte and three months after the issuance of citations by the NCDOL, the SCDOL discovered that Central had not implemented a respiratory protection program at the Greenville facility - the same violation cited by the NCDOL in connection with the dual fatalities. (I.D., pp. 140-142; Matlack Exhibit 3, pp.18-24).

In considering these violations it is important to note that the federal regulation dealing with respiratory protection programs, 29 CFR §1910.134, has been in effect since 1971. Obviously, federal regulations that have been in place for over 15 years, multiple fatalities and citations from one state's Department of Labor were insufficient to spur Central into implementing programs at its Greensville terminal designed to protect its employees. Central is apparently unwilling to implement required safety programs for its employees' protection until forced to do so by some state regulatory agency.

Matlack submits that these past violations reflect a willingness on Central's part to knowingly violate safety violations on a continuing basis until forced to cease and desist

by some regulatory agency. To preclude Central from obtaining Pennsylvania intrastate authority as a result of its past flagrant disregard for safety procedures would not, as asserted by the Decision, amount to a punitive measure. Rather, such action is necessary to ensure the safety of the public. See, 66 Pa. C.S.A. §1103(a).

Other Safety Violations

As noted by the Decision, the evidence of record indicates that Central has been guilty of several of safety violations of various types. In concluding that these violations do not require denial of this application the Decision states

> In terms of the severity of the violations, Central's are no worse than those of Chemical Leaman, Crossett, or Refiners. Any large company is bound to have accidents and incidents in which employees commit traffic and similar violations. Central's record in this regard is no better and no worse than one might expect. (I.D., p. 147). (Emphasis added).

The Decision erred in employing an improper fitness standard which, in turn, resulted in an erroneous conclusion regarding Central's regulatory and technical fitness.

It is a now well-established Commission policy that in determining whether to approve or deny an application for motor carrier operating authority consideration shall be given to (1.) the existence of a public need for the proposed service; (2.) the regulatory, financial and technical fitness of the applicant to render that service; and (3.) the effect that authorization of the proposed service would have upon the operations of existing

carriers. 52 Pa. Code §41.14; Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission, 99 Pa. Commw. 420, 512 A.2d 1359 (1986)(emphasis added). Information regarding violations committed by the Protestants is not relevant to a determination of Central's regulatory and technical fitness.

The Decision adopts the position that an Applicant's fitness should be evaluated in comparison to that of the protestants - to carriers who happen to be participants in a particular case.[4] Comparative fitness is not now and has never been the test applied in Commission application proceedings. It is never applied in testing an applicants "propensity to operate . . . legally." Whether an applicant or the protestants violate the law more often - a "comparative lawlessness" standard - has never been used as a measure of an applicant's fitness. Comparative safety records or comparative level of involvement in environmental difficulties should likewise be rejected as a standard. The applicable test is set forth in 52 Pa. Code §41.14(b):

> (b) An applicant seeking motor common carrier authority has the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service, and, in addition, authority may be withheld if the record demonstrates that the applicant lacks a propensity to operate safely and legally.

The relevant inquiry is whether Central lacks a propensity to operate safely and legally, not whether Central

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[4] To be clear the Decision does not suggest an "industry standard" test.

operates either more safely and legally or less safely and legally than the protestants. Evidence produced during the course of this proceeding regarding transportation, safety and environmental violations by Central go directly to Central's fitness. Comparison waters down the standard.

The test applied by the Decision alters existing law by transforming the fitness test into a balancing act comparing the applicant to the protestants. It is improper for the Decision to attempt to accomplish a fundamental change in Commission policy in this manner, without notice and without measurement of the effect of the change on other Commission concerns.

The test employed by the Decision is flawed and, if allowed to stand and adopted in other cases, could destroy any meaningful safety or fitness barrier to entry. For example, suppose an applicant with a long history of safety violations files an application for new or additional intrastate authority. Further suppose that the protestants in that case have horrendous safety records. Under those circumstances, utilization of the comparative fitness test employed by the Decision could well force a finding that the applicant is fit to obtain the requested authority despite its poor safety record; that, by comparison to the protestants, the applicant is fit. This result would certainly be contrary to the public interest - adding an additional unfit carrier is certainly contrary to the best interests of the public. If an unfit applicant is fortunate enough to be opposed only by Protestants with less than sparkling fitness records, this could well be the

result. Moreover, what is the standard in an unopposed case?

The comparative fitness test utilized by the Decision runs counter to years of Commission precedent. It has resulted, in this proceeding, in a finding that Central is fit to receive authority from this Commission. Central's safety record should be reviewed on its own merits. Independent consideration of Central's employee safety problems, its environmental difficulties and its other safety violations must result in a finding that Central is unfit to receive any operating authority from this Commission.

Assuming, arguendo, that the comparative fitness test adopted by the Decision is proper, Matlack asserts that it was improperly applied in this proceeding. In comparing Central's fitness record to those of the Protestants, the Decision compares only the safety records of Central, Chemical Leaman, Crossett and Refiners. Matlack submits that for a comparative fitness test to be valid, consideration must be given, at a minimum, to the safety records of all Protestants, including Matlack, Marshall Service, Inc. and Oil Tank Lines, Inc. A review of this record indicates an absence of any safety violations by Marshall, Oil Tank Lines, or Matlack. Utilization of a true comparative fitness test - one that involves all Protestants - would result in a finding that Central lacks the fitness required of an applicant for intrastate motor carrier operating authority.

Central is unfit; this application should be denied in its entirety.

IV. CONCLUSION

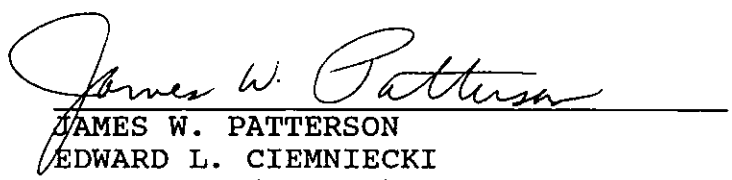
The Decision, although painstakingly drawn and largely accurate in terms of its grasp of the evidence to be considered and the issues to be determined, reaches an erroneous conclusion regarding Central's fitness.

An accurate, objective assessment of Central's fitness record discloses that Applicant has been guilty of 1. employee safety violations; 2. environmental violations; and 3. a variety of operational safety violations. Moreover, certain of the employee safety violations were committed with flagrant disregard for the safety of the employees working at Central's Greenville, South Carolina terminal.

Matlack submits that this record makes it clear that Central lacks a propensity to operate safely and legally. In that Central bears the burden of establishing, by substantial evidence, that it is fit and has failed to do so, the instant application must be denied in its entirety.

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 12th day of April, 1990.

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

William A. Chesnutt, Esquire
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Henry Wick, Jr., Esquire
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Kenneth Olsen, Esquire
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Christian V. Graf, Esquire
Graf, Andrews & Radcliff
407 N. Front Street
Harrisburg, PA 17101

William O'Kane, Esquire
Chemical Leaman Tank Lines Inc.
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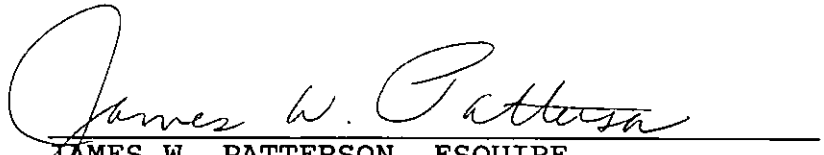
Exton, PA 19341-0200



JAMES W. PATTERSON, ESQUIRE
EDWARD L. CIEMNIECKI, ESQUIRE
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Pennsylvania

Kenneth A. Olsen
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April 19, 1990

Express Mail No. B097681210
(Return Receipt Requested)

New Filing Section
Secretary's Bureau, Room B-18
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, Pennsylvania 17120

Gentlemen:

Re: Application of Central Transport, Inc.
No. A-00108155

Attached hereto for filing with your Commission on behalf of my client, find original and nine copies of Reply of Protestant, Marshall Service, Inc., to Applicant's Exceptions in the above captioned proceeding.

I hereby certify that I have served one copy of the attached Reply of Protestant on the Presiding Officer, and copy of the attached Reply of Protestant on all counsel of record as noted on the Certificate of Service, in accordance with this Commission's Rules of Practice.

Kindly acknowledge receipt on the duplicate of this letter attached, showing thereon that this document was duly filed. A self-addressed stamped envelope is enclosed for your convenience.

Your cooperation and expedited handling are greatly appreciated.

Very truly yours,

Kenneth A. Olsen

KAO:jnw
Enc.
cc with encl.: Hon. Michael C. Schnierle, ALJ
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

All Parties of Record

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

NO. A-00108155

APPLICATION OF

CENTRAL TRANSPORT, INC.

REPLY

OF

PROTESTANT

MARSHALL SERVICE, INC.

TO

EXCEPTIONS OF APPLICANT

Dated: April 19, 1990

Due Date: April 23, 1990

Filed By:
Kenneth A. Olsen
P. O. Box 357
Gladstone, NJ 07034
Attorney for Marshall
Service, Inc.
Protestant

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

NO. A-00108155

APPLICATION OF

CENTRAL TRANSPORT, INC.

REPLY

OF

PROTESTANT

MARSHALL SERVICE, INC.

TO

EXCEPTIONS OF APPLICANT

Comes now, Marshall Service, Inc., (hereinafter called Marshall, or Protestant), in the above entitled proceeding, with offices and principal place of doing business at Pearl Street, Newfield, New Jersey 08344, by its attorney, Kenneth A. Olsen, and submits this,its Reply to the Exceptions of Applicant, in the above captioned proceeding.

I
STATEMENT OF THE CASE

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

By Initial Decision, (hereinafter called Decision), served March 16, 1990, Administrative Law Judge Michael C. Schnierle granted Central Transport, Inc., (hereinafter called Central or Applicant), a portion of the operating rights it sought. [1] The Decision granted the right to provide service in connection with

1 By letter dated March 29, 1990, Chief Administrative Law Judge Allison K. Turner served upon all parties three revised pages that contain certain ministerial corrections to Judge Schnierle's Initial Decision. Judge Turner's letter also advised the parties that the deadline for filing Exceptions to the Initial Decision was extended to April 12, 1990, and the deadline for filing Replies to Exceptions was to be ten (10) days after April 12, 1990, or April 23, 1990.

the facilities of seven (7) named shippers, as follows:

> To transport, as a Class D carrier, liquid property in bulk in tank type vehicles from the facilities of Witco Corporation in Petrolia, Butler County, to points in Pennsylvania; from the facilities of Pennzoil Products Corporation in Karns City, Butler County, to points in Pennsylvania and vice versa; from the facilities of McCloskey Corporation and Harry Miller Corporation in the City of Philadelphia to points in Pennsylvania; from the facilities of Para-Chem Southern, Inc. in the City of Philadelphia to points in Pennsylvania and vice versa; from the facilities of E.F. Houghton and Co. in the Township of Upper Macungie, Lehigh County, to points in Pennsylvania; and from the facilities of Valspar Corporation in the City of Pittsburgh, Allegheny County, and in the Borough of Rochester, Beaver County, to points in Pennsylvania; subject to the following conditions:
>
> (1) 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, corn syrup and blends of corn syrup, honey, milk and milk products, molasses, sugar and sugar substitutes.
>
> (2) 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.

In deciding to grant limited authority to Central, the Honorable Administrative Law Judge found that Central failed to establish the existence of a public need for the statewide service that it proposed. Moreover, although authority was granted to provide certain limited service for seven (7) of Central's eight (8) supporting shippers, the Decision found there was no need for additional service to or from either Calgon Corporation's Ellwood City facility or Witco Corporation's Bradford location.

While finding that Central's employee safety problems in North Carolina and South Carolina did not preclude it from obtaining Pennsylvania intrastate operating authority, the Honorable Administrative Law Judge was sufficiently concerned regarding Central's safety problems to condition the suggested grant of authority upon Central's implementation of safety procedures at its Karns City, Pennsylvania terminal to prevent a recurrence of the problems Central experienced in North Carolina and South Carolina.

By ruling that there is insufficient evidence to support a finding that Central lacks the propensity to operate safely and legally, the Decision considers, inter alia, the safety records of certain of the Protestants.

Finally, the Initial Decision finds that a grant of limited authority to Central would not endanger or impair protestants to such an extent that the granting of authority would be contrary to the public interest.

Exceptions to the Decision were filed by Central, Refiners Transport & Terminal Corporation, Matlack, Inc., and Crossett, Inc.

II
REPLY TO APPLICANT'S SPECIFIC EXCEPTION, INTRODUCTORY STATEMENT OF EXPLANATION, AND ARGUMENT

While Marshall is in agreement with the Decision, Marshall also believes the Decision is carefully drawn, contains a comprehensive summary of the testimony and evidence of record, and contains a careful and knowledgeable analysis of the applicable law in addressing the standards set forth in 52 Pa. Code §41.14. Thus, Marshall has no quarrel with the Decision, but only Applicant's filed Exceptions to same.

Limiting the authority granted to Central to service involving the facilities of certain named shippers is justified by the record, which will not support a conclusion that there exists a need for service beyond that granted by the Decision.

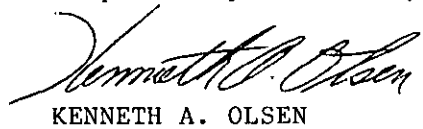
Marshall submits that the Honorable Administrative Law Judge did not base his findings solely on the principles espoused in Re: Richard L. Kinard, Inc., 58 Pa. PUC 548 (1984), but also, on the entire evidentiary record. If the motion of Chairman Bill Shane in Docket No. A-00088807, Folder 2, Am-K, Application of Blue Bird Coach Lines, Inc., dated March 14, 1990, does in fact become controlling Commission policy in motor carrier application cases, there is no showing or proof in said motion or in Central's Exceptions as to its retroactive effect to the proceeding at hand. Moreover, a plain reading of the evidentiary record of the public witnesses clearly does not support any need for service beyond that granted in the Decision. Thus, even if the Commission were to adopt the motion of Chairman Shane in Application of Blue Bird Coach Lines, Inc., as its definitive policy statement regarding public need in motor carrier application proceedings, and apply same retroactively to the case at hand, the Decision's findings as to public need and scope of authority granted conform to the evidentiary record and any policy interpretation to come out of Blue Bird.

III

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the above premises being considered, Marshall respectfully prays the honorable Commission: (1) deny Applicant's Exceptions to the Decision; (2) find that no public policy, administrative law, or regulatory purpose would be served by enlarging the scope of the Decision's grant of authority; and (3) find the evidentiary record as to public need herein and prevailing case law do not support any grant of authority beyond that set forth in the Decision.

Respectfully submitted,



KENNETH A. OLSEN
P. O. Box 357
Gladstone, New Jersey 07934
Attorney for Marshall Service, Inc.
Protestant

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a true copy of the foregoing Reply of Protestant, Marshall Service, Inc., to Applicant's Exceptions in this proceeding to the following counsel of record: William A. Chesnutt, Esq., McNees, Wallace & Nurick, 100 Pine Street, P. O. Box 1166, Harrisburg, Pennsylvania 17108-1166; James W. Patterson, Esq., Rubin Quinn Moss & Heaney, 1800 Penn Mutual Tower, 510 Walnut Street, Philadelphia, PA 19106-3619; William J. O'Kane, Esq., 102 Pickering Way, Exton, Pennsylvania 19341-0200; Christian V. Graf, Esq. and David H. Radcliff, Esq., Graf, Andrews & Radcliff, P.C., 407 North Front Street, Harrisburg, Pennsylvania 17101; Henry W. Wick, Jr., Esq., Wick, Streiff, Meyer, Metz & O'Boyle, 1450 Two Chatham Center, Pittsburgh, Pennsylvania 15219-3427; and Ronald W. Malin, Esq., Johnson, Peterson, Tener & Anderson, Key Bank Building, 4th Floor, Jamestown, New York 14701, by first class mail, postage prepaid. I hereby certify that copies of the foregoing Reply of Protestant Marshall Service, Inc., to Applicant's Exceptions in this proceeding, have been served upon the Secretary and presiding officer in accordance with the statements made in my cover filing letter dated this date.

Dated at Gladstone, New Jersey this 19th day of April, 1990.

Kenneth A. Olsen
Attorney for Marshall Service, Inc.
Protestant

FILE

CONTINUED