

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17120
February 6, 1989

In Re: A-00108155

(See letter dated 1/27/89)

Application of Central Transport, Inc.

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

NOTICE

This is to inform you that at the request of counsel for applicant, the third day of three, Thursday, February 9, 1989, in Philadelphia, in the subject proceeding is hereby cancelled; other dates remain as scheduled below:

Pittsburgh

Tuesday, February 14, 1989 - 1:00 p.m.

Wednesday, February 15, 1989 - 10:00 a.m.

cc: Judge Schnierle
Mrs. Pappas
Mrs. Howell
Mr. Bramson
File Room

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APPEARANCE SHEET

ALJ HEARING REPORT

DOCKET NO. A-00108155
 CASE NAME Central Transport, Inc.
 HEARING LOCATION Philadelphia, PA.
 HEARING DATE Feb. 7, ~~8~~ & ~~9~~ 1989
 ALJ Schnierle

CHECK THOSE BLOCKS WHICH APPLY:

Hearing held YES NO
 Testimony taken YES NO
 Hearing concluded YES NO
 Further hearing needed YES NO
 Estimated add'l days 2 days + 2 already rescheduled
 RECORD CLOSED YES NO
 Briefs to be filed YES NO
 BENCH DECISION YES NO

REMARKS: Hearing days for 2/8 + 2/9 were cancelled.

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FEB 8 1989

Office of A. L. J.
Public Utility Commission

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FEB 13 1989

**DOCUMENT
FOUNDER
OF RECORD**

NAMES, ADDRESSES AND TELEPHONE NUMBERS OF PARTIES OR COUNSEL OF RECORD
 PLEASE PRINT CLEARLY
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NAME and TELEPHONE NUMBER	ADDRESS	APPEARING FOR
WILLIAM A. CHESNUTT McNees, Wallace & Nunnick Telephone No. (717) 232-8000	P.O. Box 1166 City: <u>H36</u> State: <u>PA</u> Zip: <u>17108</u>	APPLICANT <u>Central Transport, Inc.</u>
WILLIAM J. O'KANE Telephone No. (610) 363-4444	107 PICKERING WAY City: <u>EXTON</u> State: <u>PA</u> Zip: <u>19341</u>	CHEMICAL LEAMAN TANK LINES, INC.
KENNETH A. OLSEN AND GEORGE A. OLSEN Telephone No. (201) 234-0301	P.O. BOX 357 City: <u>GLADSTONE</u> State: <u>NJ</u> Zip: <u>07034</u>	MARSHALL SERVICE, INC.

CHECK THIS BOX IF ADDITIONAL PARTIES OR COUNSEL OF RECORD APPEAR ON BACK.

Schnierle
 Reporter

RUBIN QUINN MOSS & HEANEY

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OF COUNSEL
ROBERT B. EINHORN

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**SECRETARY'S OFFICE
Public Utility Commission**

February 8, 1989

Michael J. Schnierle, Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265, North Office Building
Harrisburg, PA 17120

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

Dear Judge Schnierle:

Enclosed please find a Petition for Certification filed by Matlack, Inc. 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
enclosure

- cc: William A. Chesnutt, Esquire
- Christian V. Graf, Esquire
- William J. O'Kane, Esquire
- Henry M. Wick, Esquire
- Ronald W. Malin, Esquire
- Kenneth A. Olsen, Esquire
- Martin C. Hynes, Jr., Vice President-Marketing

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Certificate of Mailing Enclosed

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Office of A. L. J.
Harrisburg

* ALSO ADMITTED TO NJ BAR

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APPLICATION OF
CENTRAL TRANSPORT, INC.

DOCKET NO.
A-108155

FEB 8 1989

PETITION FOR CERTIFICATION

SECRETARY'S OFFICE
Public Utility Commission

COMES NOW, Matlack, Inc. ("Matlack"), by its attorneys and, pursuant to 52 Pa. Code §5.304, files this Petition seeking certification to the Commission of the following material question:

Whether information regarding the regulatory fitness of a Protestant is relevant to a motor carrier application proceeding and therefore discoverable under 52 Pa. Code §5.321?

I. ARGUMENT IN SUPPORT OF PETITION

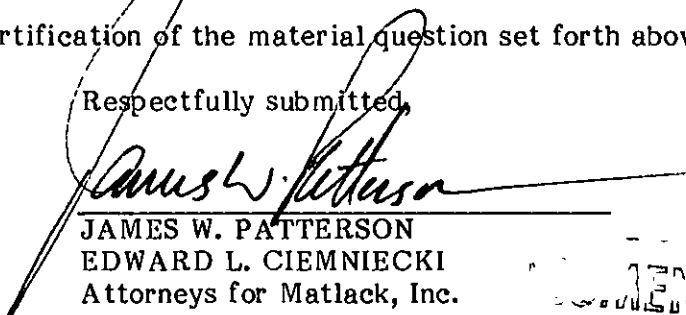
The instant matter involves a discovery request by applicant Central Transport, Inc. ("Central") seeking information and documentation from protestant Matlack regarding complaints, warnings, Notices of Claim, citations and other matters relating to Matlack's fitness. Matlack objected to producing evidence and Central responded. By Order dated February 2, 1989 (the "Order"), Administrative Law Judge Schnierle directed Matlack to produce the requested documentation.

Interlocutory review through certification of the above material question will allow the Commission to speak on an important question of Commission policy. The Order recognizes that the issue presented is one of first impression. Adoption of the position taken by Central and validated by the Order will fundamentally alter the nature and volume of evidence presented and considered in motor carrier application cases and the manner in which such proceedings are conducted. It will profoundly affect a carrier's determination whether to protest and will have far-reaching implications in respect of the manner and means by which the Commission obtains information regarding the fitness of applicants. A change in policy as fundamental as that effectuated by the Order should be reviewed and considered by the Commission itself.

Granting this request for certification will prevent substantial prejudice to Matlack and expedite the conduct of this proceeding. Matlack will be spared having to expend substantial time and effort in generating and subsequently presenting testimony regarding information that may ultimately be deemed irrelevant to this proceeding. Moreover, if the ALJ's evaluation of Central's regulatory fitness includes consideration of protestant Matlack's fitness (through application of the "industry standards" test suggested by the Order), the legal and policy implications of utilizing that method of evaluation will likely be placed before the Commission through the filing of Exceptions to the Initial Decision. A Commission determination of this issue at this juncture will lend direction to this matter and conserve the resources of the Commission and the parties.

WHEREFORE, Matlack, Inc. requests certification of the material question set forth above.

Respectfully submitted,



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

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FEB 17 1989

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Certification were served upon the following by postage prepaid, first class mail:

Michael C. Schnierle, Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265, North Office Building
Harrisburg, PA 17120

William A. Chesnutt, Esquire
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Harrisburg, PA 17108

Christian V. Graf, Esquire
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William J. O'Kane, Esquire
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1450 Two Chatham Center
Pittsburgh, PA 15219

Ronald W. Malin, Esquire
Key Bank Building, 4th Floor
Jamestown, NY 14701

Kenneth A. Olsen, Esquire
P.O. Box 357
Gladstone, NJ 07934

Dated at Philadelphia, Pennsylvania this 8th day of February, 1989.

RUBIN, QUINN, MOSS & HEANEY

By: 

JAMES W. PATTERSON
Attorney for Matlack, Inc.

APPEARANCE SHEET

ALJ HEARING REPORT

DOCKET NO. A-00108155
 CASE NAME Central Transport, Inc.
 HEARING LOCATION Pittsburgh, PA
 HEARING DATE February 14, 1989
February 15, 1989
 ALJ Schnierle

CHECK THOSE BLOCKS WHICH APPLY:

Hearing held YES NO

Testimony taken YES NO

Hearing concluded YES NO

Further hearing needed YES NO

Estimated add'l days 2

RECORD CLOSED YES NO

Date

Briefs to be filed YES NO

Date

BENCH DECISION YES NO

REMARKS: _____

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FEB 16 1989

Office of A. L. J.
Public Utility Commission

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NAMES, ADDRESSES AND TELEPHONE NUMBERS OF PARTIES OR COUNSEL OF RECORD
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NAME and TELEPHONE NUMBER	ADDRESS			APPEARING FOR
McNEES, WALLACE & NURECK William A. [Signature] Telephone No. ()	P.O. BOX 1166 City: HBG State: PA Zip: 17108			APPLICANT Central Transport, Inc.
RONALD W MALIN Telephone No. (716) 664 5210	KEY BANK BLDG - 4TH FLOOR City: JAMESTOWN State: N.Y. Zip: 14701			PROTESTANT CROSSETT, INC.
HENRY M WICKER Telephone No. (412) 765-1600 PITTSBURGH	1450 TWO CHATHAM CTR City: PA State: PA Zip: 15219			PROTESTANT REFINERS TRANSPORT & TERMINAL CORP.

CHECK THIS BOX IF ADDITIONAL PARTIES OR COUNSEL OF RECORD APPEAR ON BACK.

Lisa J. [Signature]
Reporter

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DONALD R. WAISEL
RICHARD R. LEFEVER
J. THOMAS MENAKER
CLYDE W. MCINTYRE
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EDWARD W. ROTHMAN
ROBERT A. MILLS
W. JEFFRY JAMOUNEAU
HERBERT R. NURICK
DAVID E. LEHMAN
NORMAN I. WHITE
F. MURRAY BRYAN
RICHARD W. STEVENSON
WILLIAM A. CHESNUTT
HENRY R. MacNICHOLAS
WILLIAM M. YOUNG, JR.
ROBERT M. CHERRY
DAVID B. DISNEY
H. LEE ROUSSEL
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ORIGINAL
OFFICE OF COUNSEL
PUBLIC UTILITY COMMISSION

EDWARD C. GREGG, JR.
ROBERT H. GRISWOLD
JEFFERSON C. BARNHART
SAMUEL A. SCHRECKENGAUST, JR.

February 21, 1989

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

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FEB 21 1989
SECRETARY'S OFFICE
Public Utility Commission

Re: Application of Central Transport, Inc.
PA PUC Docket No. A.00108155
Our File: 12558-001-9

Dear Secretary Rich:

Enclosed for filing with the Commission are an original and two (2) copies of a Brief Opposing Certification of a Ruling on Discovery on behalf of Applicant Central Transport, Inc. in the above-captioned proceeding.

Copies of this document have also been served on all parties of record as indicated by the attached Certificate of Service. Please date stamp the attached duplicate of this letter of transmittal for return to my office verifying your receipt of this document.

Respectfully submitted,

McNEES, WALLACE & NURICK

By

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

DOCUMENT
FOLD

WAC/law
Enclosure
cc: Attached Certificate of Service
W. David Fesperman (w/enclosure)

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FEB 21 1989
SECRETARY'S OFFICE
Public Utility Commission

RE CENTRAL TRANSPORT, INC. : DOCKET NO. A-00108155
: :
: :
: Hearing Before
: Administrative Law Judge

BRIEF OF APPLICANT CENTRAL TRANSPORT, INC.
OPPOSING CERTIFICATION OF A RULING ON DISCOVERY

Applicant Central Transport, Inc., by its counsel, McNeese, Wallace & Nurick, hereby files this brief pursuant to 52 Pa. Code §5.304(a)(2).

BACKGROUND

The ruling of Administrative Law Judge Michael C. Schnierle which Protestant Matlack, Inc. seeks to have certified to the Commission for interlocutory review is succinctly stated at page 17 of an Order dated February 2, 1989:

Matlack shall answer Central Interrogatories 17, 18, 19, and 20, subject to the understanding that ordinary traffic violations, warnings, parking tickets, and the like need not be involved in its response, within 20 days of the date of this Order.

The substantive content of "Central Interrogatories 17, 18, 19, and 20" is set forth in Appendix "A" to this brief.

STANDARD FOR INTERLOCUTORY REVIEW

Matlack's request for certification must be evaluated against the basic standard that "... rulings of presiding officers on discovery are not subject to interlocutory review...." Exceptions to this basic rule occur

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upon a "certification by the presiding officer that the ruling involves an important question of law or policy that should be resolved immediately by the Commission...." The other exception to the basic rule "unless otherwise ordered by the Commission in exceptional situations" is not involved here.

MATLACK HAS NOT MET THE STANDARD FOR CERTIFICATION

In attempting to meet the required showing that "the ruling involves an important question of law or policy that should be resolved immediately by the Commission", Matlack makes the following points:

(1) Certification ... will allow the Commission to speak on an important question of Commission policy;

(2) The Order recognizes that the issue presented is one of first impression;

(3) Adoption of the position taken by Central and validated by the Order will

(a) fundamentally alter the nature and volume of evidence presented and considered in motor carrier application cases;

(b) fundamentally alter the manner in which such proceedings are conducted;

(c) profoundly affect a carrier's determination whether to protest; and

(d) will have far-reaching implications in respect of the manner and means by which the Commission obtains information regarding the fitness of applicants.

(4) Certification will prevent substantial prejudice to Matlack and expedite the conduct of this proceeding;

(5) Matlack will be spared having to expend substantial time and effort in generating and subsequently presenting

testimony regarding information that may ultimately be deemed irrelevant to this proceeding;

(6) If the ALJ's evaluation of Central's regulatory fitness includes consideration of Protestant Matlack's fitness (through application of the 'industry standards' test suggested by the Order), the legal and policy implications of utilizing that method of evaluation will likely be placed before the Commission through the filing of exceptions to the Initial Decision; and

(7) Commission determination of this issue at this juncture will lend direction to this matter and conserve the resources of the Commission and the parties.

Certification is not warranted by any of the seven individual points raised by Matlack, nor by all of them considered collectively.

ARGUMENT

Response to Matlack Contention No. 1.

Assuming that the material question of whether information regarding the regulatory fitness of a protestant is relevant and discoverable in a motor carrier application proceeding is indeed "an important question of Commission policy", as contended by Matlack, certification of that question for interlocutory review is not necessary in order to "allow the Commission to speak...." The Commission will have that opportunity even if certification and interlocutory review is not permitted; indeed, Matlack itself guarantees that the Commission will have that opportunity by the representation made in its Contention No. 6.

Response to Matlack Contention No. 2.

Matlack claims that the language of the Order contains a recognition that the "issue presented" is one of first impression. In the Order dated February 2, 1989, the Judge stated "Whether Central can utilize an 'industry standards' argument regarding its own fitness appears to be an issue of first impression." The Order contains no recognition of whether or not the introduction of information regarding the regulatory fitness of a protestant in a motor carrier application proceeding is a matter of first impression. But irrespective of whether the issue is or is not one of first impression, does that necessarily make it "an important" question of law or policy that needs to be resolved immediately by the Commission? Clearly, we think it does not fall into that category because there is an opportunity for the Commission to rule on the question at a later time and Matlack promises to create that opportunity (See Matlack Contention No. 6).

Response to Matlack Contention No. 3.

In a cascade of adjectival and adverbial excess,^{1/} Matlack attempts to paint a picture of chaos flowing from "adoption of the position taken by Central and validated by the Order." But all of Matlack's predictions of procedural doom and gloom ignore the fact that the Commission itself will have an opportunity to pass on this matter under normal appellate processes. Further, the "change" in policy that Matlack claims the Judge's ruling represents has not been established to be a change in policy;

^{1/} "Fundamentally alter ... profoundly affect ... far-reaching implications."

indeed, Matlack itself elsewhere argues that there is no existing policy on this issue, inasmuch as it is one of first impression.

Response to Matlack Contention No. 4.

It is unclear what "substantial prejudice" Matlack would be spared by certification. It is equally obscure how certification would expedite the conduct of this proceeding. Apparently, what would "prejudice" Matlack would be the disclosure of certain regulatory violations. That is information to which this Commission would be entitled in any event pursuant to its broad investigative and audit powers.

Insofar as expediting the conduct of this proceeding, it is not certification of the material question framed by Matlack that is going to bring about that result. The conduct of the proceeding would have been expedited had Matlack furnished the limited responses to which Central had agreed on the basis of Matlack's initial objections to interrogatories filed December 9, 1988, wherein Matlack stated that its "safety practices and environmental problems" were relevant to this proceeding. It was only "upon further consideration" that Matlack divined the irrelevancy of these issues, although that revelation seems to be related more to Matlack's unexplained concern over the "implications of supplying the requested information." (See Matlack's Supplemental Objections, p. 2.)

Response to Matlack Contention No. 5.

The amount of time and effort that Matlack may have to expend in order to present testimony in this proceeding is not a basis for certifica-

tion of a material question. Matlack has not been compelled by Commission order to participate in this proceeding -- to the contrary, it is a participant in this proceeding by its own choosing. As the Judge has pointed out in his Order, Matlack is not here as the champion of the public interest, but rather as an advocate of its own economic self-interests. Matlack was the perpetrator of the frolic and detour into the area of environmental concerns, and it has only itself to thank for the fact that those issues are now put into play concerning its own operations. The fact that such violations within the Matlack system may be of such a voluminous nature as to require the expenditure of considerable time and effort should be no basis for the Commission to close its eyes to an opportunity to have those violations brought to light.

Response to Matlack Contention No. 6.

As indicated in the response to Matlack Contention No. 2 above, Matlack's threat to file exceptions to the Initial Decision rendered by the Administrative Law Judge in this proceeding simply highlights the fact that the issue with which it is concerned will indeed be placed before the Commission for ultimate decision.

Response to Matlack Contention No. 7.

Certification of the question posed by Matlack offers no prospect for significant conservation of resources of the Commission or the parties. The resources of the Commission are being called upon to dispose of this unnecessary petition for certification. Insofar as the resources of the

parties are concerned, all protestant parties other than Matlack have already responded to the interrogatories that it is resisting. Moreover, a Commission determination will not "lend direction to this matter" -- whatever that means. The record already contains evidence of shipments handled by Protestant Marshall Services, Inc. beyond the scope of its Pennsylvania intrastate operating authority; evidence that Protestant Chemical Leaman Tank Lines' parent recorded a pre-tax charge of \$4,702,314 in the third quarter of 1988 "as estimated environmental clean-up costs at several locations, including two Superfund sites", with a recognition that "each of these locations are either on property owned by the Company or on a site used for disposal of its wastes" (Central Exhibit No. 25); evidence that an accident involving a tank trailer of Protestant Crossett, Inc., November 10, 1987, caused a spill of approximately 7,000 gallons of diesel fuel into streams in violation of the Clean Streams Law of Pennsylvania and the Fish and Boat Code, for which Crossett paid a civil penalty of \$2,500 (Central Exh. No. 29); and evidence that Protestant Refiners Transport and Terminal Corporation discharged inadequately treated industrial wastewater contrary to Sections 401 and 3 of the Clean Streams Law, for which Refiners paid a civil penalty of \$5,600.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the presiding officer should deny Matlack's request for certification.

Respectfully submitted,

MCNEES, WALLACE & NURICK

By 

William A. Chesnutt
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Counsel for Applicant
Central Transport, Inc.

Dated: February 21, 1989

17. Since January 1, 1986, has Protestant received any complaints, warnings, Notices of Claim or citations from the Pennsylvania Public Utility Commission, the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, the United States Department of Transportation, the Federal Bureau of Investigation, or any other governmental agencies of the Commonwealth of Pennsylvania or of the state (other than Pennsylvania), in or through which Protestant's vehicles operated the most miles during 1986 and 1987, in connection with alleged violations involving or affecting transportation.* If so, give the following information for each instance:

- (a) Date of alleged violation.
- (b) Origin(s) and destination(s) of service being rendered or location of violation.
- (c) Commodity or commodities being transported, or nature of service being rendered.
- (d) Type of vehicle utilized, if any.
- (e) Nature of the incident or problem which formed the basis for the complaint, warning, Notice of Claim, etc.

18. For each instance identified in response to Interrogatory 14, identify and produce all document(s) which pertain(s) to the incident

* The term "involving or affecting transportation" for the purposes of this interrogatory shall mean incidents or occurrences (i) during the operation of vehicles on the public highways, (ii) at or adjacent to terminals or cleaning facilities and (iii) during the process of repair or cleaning of vehicles.

including all document(s) issued by any of the agencies listed in said Interrogatory.

19. Were there any instances during 1986, 1987 and 1988 (through September 30), in which protestant transported traffic between points in Pennsylvania, in which the moves were subject to the jurisdiction of the Pennsylvania Public Utility Commission, but were not authorized by certificates of public convenience issued to Protestant by the Pennsylvania Public Utility Commission? If so, give the following information for each instance:

- (a) Date of trip;
- (b) Origin of trip;
- (c) Destination point or points;
- (d) Commodity or commodities transported;
- (e) Number and type of vehicles used;
- (f) Name of entity utilizing applicant's service.

20. For each instance identified in answer to interrogatory 19 herein, identify and produce all documents which pertain to the service performed.

CERTIFICATE OF SERVICE

I hereby certify that I have served on all parties of record in this matter on the date indicated below, by first class mail, postage prepaid, unless otherwise indicated, the foregoing document on behalf of Central Transport, Inc.

Ronald W. Malin, Esquire
Key Bank Building Fourth Floor
Jamestown, NY 14701

Henry M. Wick, Jr., Esquire
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Pittsburgh, PA 15219

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Gladstone, NJ 07934-0357


James W. Patterson, Esquire
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Philadelphia, PA 19106

Christian V. Graf, Esquire
407 North Front Street
Harrisburg, PA 17101

William J. O'Kane, Esquire
102 Pickering Way
Exton, PA 19341-0200

Honorable Michael C. Schnierle**
Administrative Law Judge
Pennsylvania Public Utility
Commission
P. O. Box 3265
Harrisburg, PA 17120

Dated this 21st day of February, 1989, at Harrisburg, Pennsylvania.


William A. Chesnutt
McNEES, WALLACE & NURICK
P. O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Counsel for Applicant
Central Transport, Inc.

**Indicates Hand Delivery

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ROBERT P. STYLE
ROBERT SZWAJKOS
JOHN R. KENNEL, II
MARY ELLEN O'LAUGHLIN
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DON R. POSTER
ERIC M. HOCKY
EDWARD L. CIEMNIECKI
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OF COUNSEL
ROBERT B. EINHORN
GOFF & RUBIN

February 21, 1989

Michael J. Schnierle, Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265, North Office Building
Harrisburg, PA 17120

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

SECRETARY'S OFFICE
Public Utility Commission

Dear Judge Schnierle:

Enclosed please find a Brief in Support of Petition for Certification filed by Matlack, Inc. in the above-captioned matter.

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

Very truly yours,


JAMES W. PATTERSON

JWP/jal
enclosure

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cc: William A. Chesnutt, Esquire
Christian V. Graf, Esquire
William J. O'Kane, Esquire
Henry M. Wick, Esquire
Ronald W. Malin, Esquire
Kenneth A. Olsen, Esquire
Martin C. Hynes, Jr., Vice President-Marketing

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OFFICE OF A.L.J.
HARRISBURG

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Before The

PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF
CENTRAL TRANSPORT, INC.

:
:

DOCKET NO.
A-108155

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SECRETARY'S OFFICE
Public Utility Commission

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**BRIEF OF MATLACK, INC.
IN SUPPORT OF
PETITION FOR CERTIFICATION**

COMES NOW, Matlack, Inc. ("Matlack"), by its attorneys and, pursuant to 52 Pa. Code §5.304, files this Brief in support of its Petition for Certification.

Matlack respectfully represents:

I. HISTORY OF THE CASE

On May 26, 1988 Central Transport, Inc. ("Central") filed an application seeking authority to transport property, in bulk, in tank and hopper type vehicles, between points in Pennsylvania. Numerous protests including that of Matlack were filed in opposition to the application and hearings have been held before Administrative Law Judge Michael C. Schnierle.

On November 25, 1988 Central served interrogatories upon Matlack which requested, inter alia, information and documentation relating to complaints, warnings, Notices of Claim or citations issued to Matlack by specified state and federal agencies. (Interrogatories 17. and 18.). Central also requested that Matlack produce data relating to any possible transportation performed by Matlack in Pennsylvania intrastate commerce beyond the scope of its existing authority. (Interrogatories 19. and 20.).

In early and mid December Matlack filed Objections and Supplemental Objections to Interrogatories 17. to 20. The principal basis of Matlack's opposition is that the information sought is not relevant to the issues to be determined in this

**DOCUMENT
FOLDER**

proceeding.

On January 4, 1989 Central filed a Motion to Dismiss an Objection and to Direct Answering of Interrogatories. At the time of filing a copy of said Motion was not served upon Matlack.

On January 17, 1989 Administrative Law Judge Michael C. Schnierle, after noting the filing of Central's Motion and the absence of a response from Matlack, issued an Order directing that Matlack produce the information requested by Interrogatories 17. - 20. with the understanding that data relating to ordinary traffic violations, warnings, parking tickets and the like (so-called "paper violations") need not be supplied.

Following issuance of the January 17, 1989 Order, discussions were held between Judge Schnierle, Counsel for Central and undersigned Counsel concerning Central's inadvertent failure to serve its Motion upon Matlack. Upon agreement of Counsel and Judge Schnierle the January 17 Order was rescinded and Matlack was afforded an opportunity to Reply to Central's Motion. On January 27, 1989 Matlack filed its Reply to the Motion.

By Order dated February 2, 1989 ("the Order") Administrative Law Judge Schnierle again directed that Matlack produce the data requested by Central's Interrogatories 17. - 20., subject to the same limitation relating to "paper violations".

On February 8, 1989, Matlack filed a Petition for Certification requesting that Judge Schnierle certify to the Commission the following material question:

Whether information regarding the regulatory fitness of a Protestant is relevant to a motor carrier application proceeding and therefore discoverable under 52 Pa. Code §5.321?

This Brief is filed in support of Matlack's Petition for Certification.

II. ARGUMENT IN SUPPORT OF CERTIFICATION

A. Failure To Grant Certification Will Result In Substantial Prejudice To Matlack

Certification of the above question is to be granted if it is found to be necessary in order to prevent substantial prejudice to Matlack or if it would expedite the conduct of this proceeding. 52 Pa. Code §5.304; In Re: Application of Mary Margaret Coutts, Docket No. A-105757 (March 3, 1986). Substantial prejudice has been found to occur when "the error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process". Shea v. Freeport Telephone and Telegraph, Docket No. C-812580 (February 15, 1984).^{1/}

The Commission clearly outlined those circumstances under which certification of a material question was appropriate in Re: Pennsylvania Gas and Water Company, 58 Pa. PUC 411 (1984) wherein it stated:

The certified question and interlocutory appeal of a noncertified question procedures are not vehicles by which every adverse evidentiary ruling is to be reviewed, nor is it a substitute for, or an alternative, to the exception or appeal procedures antecedent to a review by Commission in the normal course. Rather it is a procedure to be utilized sparingly, in the most unusual of circumstances such as those in which reversal and remand would not adequately cure the prejudice to a party, or in those circumstances in which guidance from the Commission is necessary regarding a dispute as to the major direction of an investigation, or where the relevancy of a major issue is involved, when, if guidance is not forthcoming, many days of hearing time may be needlessly expended.

^{1/} Several of the cases cited herein interpret the provisions of 52 Pa. Code §3.191 - the predecessor of the present 52 Pa. Code §§5.301-5.304. However, cases interpreting the standards required under the former Section 3.191 have been held to hold precedential value for interpreting issues arising under the current Sections 5.301-5.304. See, In Re: Application of Knight Limousine Service, Inc., Docket No. A-105973 (July 22, 1985).

This matter fits squarely within these guidelines for certification. Matlack will suffer substantial prejudice if certification is denied. It will be required to expend a substantial amount of time and effort to gather information which is irrelevant to this proceeding. ^{2/} Furthermore, depending upon the volume of data produced, Matlack personnel may be forced to spend considerable time on the witness stand explaining the circumstances surrounding various violations of which it has been accused ^{3/} over a three (3) year period. The time spent in gathering, reviewing and explaining the data can never be recovered. Matlack will be irreparably harmed by a denial of the requested certification and by requiring that this matter proceed through the "normal Commission review process."

This is clearly a situation where guidance from the Commission is warranted. The relevancy of a major issue - a Protestant's regulatory fitness - is involved. The position adopted by Central has the effect of altering years of practice before this Commission. It seeks to inject into motor carrier application proceedings an issue never before considered - the regulatory fitness of the Protestants. It also seeks to change the decisional criteria to be employed by an Administrative Law Judge and, ultimately, the Commission in determining whether to approve or deny an application for motor carrier operating authority. Rather than considering whether the applicant lacks a propensity to operate safely and legally - as directed by 52 Pa. Code §41.14(b) - Central suggests that the test

^{2/} The issue as to the relevancy of the information requested by Central will be addressed in full in Section II. B, *infra*.

^{3/} Central has sought production of all "complaints, warnings, Notice of Claim or citations" issued by this Commission and by various other state and federal agencies. These include alleged violations of which Matlack was subsequently found innocent as well as matters which are still pending before the appropriate agency.

should be whether an applicant operates more safely and legally or less safely and legally than those carriers that have elected to oppose the application.

Central's proposal will affect a fundamental change in the manner in which applicants are evaluated and application proceedings are conducted. It will have a chilling effect upon the willingness of protestants to raise a question regarding an applicant's fitness - a protestant will be less inclined to raise such questions if it faces the prospect of spending hours gathering documentation and being cross-examined regarding its own fitness and safety record.

The chilling effect upon a vital source of information to the Commission may be the single most important public interest consequence to flow from Central's proposal. If protestants elect not to raise fitness matters or even to forbear from participation entirely, how will the Commission garner information regarding the regulatory fitness of an applicant? From its own sources? Yes, but to a limited extent. Will the applicant volunteer information regarding unlawful service, environmental problems or criminal-wrongdoing? Clearly not. Such information is developed principally through adversary proceedings wherein a protestant forces the applicant to fully disclose evidence of past wrongdoing. It is only through this full disclosure that the Commission can fully and accurately evaluate a motor carrier applicant.

The issue is one of great significance that requires immediate direction from the Commission. The Order directing Matlack to produce the requested documentation carries precedential value and can be utilized by future applicants to force production of similar materials. Moreover, absent certification, the Order and its impact upon motor carrier application proceedings, may escape Commission review. Should the Administrative Law Judge elect not to consider the evidence of Protestants' fitness in evaluating that of Central, (or simply fail to state in the Initial Decision that such consideration

was undertaken) Matlack and the remaining Protestants will not have the opportunity to address the issue of the relevancy of Protestants' fitness in any *Exceptions to be filed to the Initial Decision*. The issue will therefore not ripen into one that will be considered through the "normal review process." Consequently, absent certification, the Order directing production remains the law and can be relied upon in other proceedings - practice before this Commission can change without the Commission participation in the change. Direction from the Commission is needed. This request for certification should be approved.

B. The Information Requested By Central Is Irrelevant To The Issues To Be Determined In This Proceeding; Central's Motion To Compel Must Be Denied

The data sought by Central relates to regulatory and safety violations of which Matlack has been accused. As such, Central's request seeks production of evidence that is irrelevant to the issues to be determined in this proceeding.

Years of Commission and Court precedent have held that in order for an applicant to show that approval of its application was "necessary or proper for the service, accommodation, convenience or safety of the public" it had to establish: 1. the existence of a public need for the proposed service; 2. the inadequacy of existing service to satisfy the need; and 3. the fitness of the applicant to render the service. Pennsylvania Public Utility Commission v. Pennsylvania Radio Telephone Corp., 20 Pa. Commw. 591, 342 A.2d 789 (1975); Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission, 18 Pa. Commw. 114,334 A.2d 806 (1975). In 1982, the Commission adopted 52 Pa. Code §41.14 which, in essence, removed inadequacy as part of an applicant's burden of proof. However, an applicant's fitness is still to be scrutinized, with operating authority to be withheld "if the record demonstrates that the applicant lacks a propensity to operate safely and legally." 52 Pa. Code §41.14(b).

In the instant proceeding, the relevant inquiry is whether Central lacks

a propensity to operate safely and legally and inquiries made by Matlack regarding transportation and environmental violations by Central are relevant because they go directly to this issue. Central's Motion to Compel seeks to alter the issue - to transform it from an evaluation solely of Central's fitness into a balancing test whereby Central's fitness is considered vis-a-vis the fitness of the Protestants. Precedent dictates that this is not the test to be applied. Precedent must be followed in this proceeding.

The Order notes that Protestants generally oppose applications for personal reasons, seeking to reduce competition to the lowest possible degree. The Order also notes that Protestants "are motivated by an extremely strong pecuniary interest to bring to the attention of the Commission any violations by the applicant which might adversely reflect upon the applicant's fitness to render service." (Order of ALJ Schnierle, p.10). The Order fails to recognize that, absent the willingness of protestants to vigorously question an applicant's fitness or the participation of Protestants altogether, critical sources of information regarding an applicant's fitness will be lost to the Commission.

Section 41.14(b) does not require that an applicant establish its ability to operate safely and legally; an applicant's fitness burden is limited to demonstrating that it possesses the technical and financial ability to provide the proposed service. The presentation of evidence regarding an applicant's lack of fitness is left to the Protestants. To the extent adoption of Central's proposal chills the pursuit of discovery or even participation in the process - either through a potential protestant's concern for creating a complete record of its past violations, through a concern that its violations may out-number those of the applicant and therefore actually aid the applicant, or through an unwillingness to expend the time and effort necessary to produce the requested fitness information - the Commission will be left without its primary source of developing evidence

regarding an applicant's regulatory fitness. This may result in many "unfit" carriers receiving operating authority simply because there is no one to press the issue before the Commission. Matlack submits that such a result is not in the public interest.

The Order reasons that "if the system (whereby protestants bring evidence of an applicant's unfitness to the attention of the Commission) would permit a protestant with many violations to successfully resist the application of an applicant with considerably fewer violations, then it would be serving the interest of the protestant, but not the interest of the public. In that case, the system would be indefensible." (Order of ALJ Schnierle, p.10). This reasoning is clearly faulted. The Order's reasoning suggest that certification of a knowing violator of the Public Utility Code or of the environmental laws is appropriate so long as the number of violations committed by the applicant is fewer than those committed by a protestant. The concept that "two violators are potentially better than one" escapes logic. The public interest will not be served through certification of an unfit applicant regardless of the fact that the applicant may be somewhat less culpable than one or more of the protestants.

Central's "industry standard" test is inherently flawed and inappropriate in motor carrier application proceeding. The group against which the applicant's fitness is to be compared consists solely of the protestants in that proceeding. There is no reason to assume that the fitness records of the protestants in a particular matter are indicative of other, similar carriers. Their safety records may be better or worse than other carriers that provide similar service. If the protestants in a particular matter are more frequent violators than the industry as a whole, the applicant in that case is quite fortunate - it will be deemed fit even though it may have a history of past violations. If, on the other hand, the protestants have admirable fitness records, that unlucky applicant, who

may be only an occasional violator, will not receive the authority it requested. In either instance, the standard shifts with the participants and the public interest is not served.

In its Reply to Central's Motion to Compel, Matlack argued that adoption of Central's proposed "industry standards" test will result in invalid comparisons being made. The Order dismissed this argument, stating that in every application proceeding "it is necessary to take into account the size of the applicant and the extent of its experience in the industry" in determining whether its "(past) violations are sufficient to disqualify the particular applicant from approval of its application." (Order of ALJ Schnierle, pp.14-15). We agree, but that does not respond to the point that a shifting standards test - a "comparative unfitness" standard serves no one's interest, particularly that of the public.

Matlack's regulatory fitness is not at issue in this proceeding. Central's request for documentation relating thereto must be denied.

C. This Proceeding Should Be Stayed Pending Disposition Of The Question To Be Certified

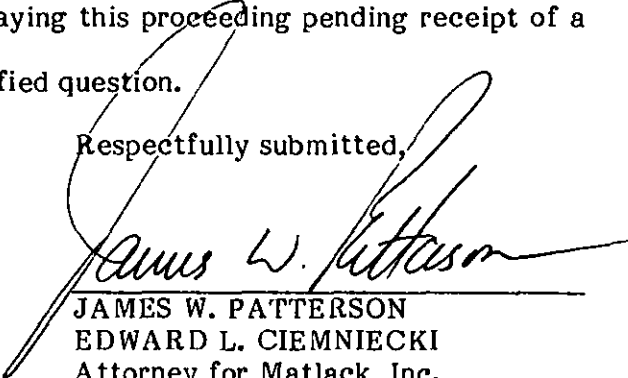
The instant controversy involves Central's request for the production of certain information and documentation and Matlack's opposition to that request. If certification is granted, the only sensible course to pursue is to stay further action in this matter until the certified question is answered by the Commission. Absent a Stay, Matlack will be required to accumulate and produce the requested data in accordance with Judge Schnierle's Order of February 2, 1989 - data which may ultimately be deemed irrelevant to this proceeding by the Commission. Matlack submits that it should not be required to expend the resources necessary to produce the information prior to receiving an Order from the Commission disposing of this issue.

If certification is denied, this proceeding should still be stayed to allow Matlack to make a determination whether to petition the Commission to review

this matter on the basis that this is one of the "exceptional situations" envisioned by 52 Pa. Code §5.304(a). Again, requiring Matlack to produce the requested documentation while such a Petition is pending will effectively make the issue moot before the Commission has an opportunity to determine the merits of Matlack's position.

WHEREFORE, Matlack, Inc. requests issuance of an Order (1.) granting its Petition for Certification and (2.) staying this proceeding pending receipt of a Commission Order disposing of the certified question.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief in Support of Petition for Certification were served upon the following by postage prepaid, first class mail:

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