

DATE: November 28, 1990

SUBJECT: A-00108155

10/31/90

TO: Office of Special Assistants

FROM: Jerry Rich, Secretary

Application of Central Transport, Inc.

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Attached is copy of Administrative Law Judge Schnierle's order certifying a material question in the above entitled proceeding.

Please prepare a report on this matter within 30 days for the information of the Commission.

Attachment - copy of order

- cc: Chairman Smith - w/copy of order
- Commissioner Fischl - w/copy of order
- Commissioner Rhodes - w/copy of order
- Commissioner Rolka - w/copy of order

JEP

APPEARANCE SHEET

ALJ HEARING REPORT

DOCKET NO. A-00108155  
 CASE NAME Central Transport, Inc.  
 HEARING LOCATION Harrisburg, PA.  
 HEARING DATE December 4 & 5, 1990  
 ALJ Schnierle

CHECK THOSE BLOCKS WHICH APPLY: 02/13/1

Hearing held YES  NO   
 Testimony taken YES  NO   
 Hearing concluded YES  NO  ?  
 Further hearing needed YES  NO  ?  
 Estimated add'l days 1, if needed.  
 RECORD CLOSED YES  NO   
 Briefs to be filed YES  NO  ?  
 BENCH DECISION YES  NO

**RECEIVED**

DEC 05 1990

Office of A. L. J.  
 Public Utility Commission

REMARKS: I have certified a material question to the Commission. Depending on the answer, another day of hearing may be required.

NAMES, ADDRESSES AND TELEPHONE NUMBERS OF PARTIES OR COUNSEL OF RECORD  
 PLEASE PRINT CLEARLY  
 INCOMPLETE INFORMATION MAY RESULT IN DELAY OF PROCESS

| NAME and TELEPHONE NUMBER   | ADDRESS   | APPEARING FOR                        |
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| RUBIN QUINN MARYS HEANEY<br>PATTERSON<br>James W. Patterson<br>Telephone No. (215) 925-8300 | 1800 PENN MUTUAL TOWER<br>City: <u>PHILA</u> State: <u>PA</u> Zip: <u>19106</u>   | MATLACK, INC.                        |
| WICK STREIFF MEYER<br>METZ & O'BOYLE<br>HENRY M. WICK<br>Telephone No. (412) 765-1100       | 1450 TWO CLAYTON CTR<br>City: <u>PITTSBURG</u> State: <u>PA</u> Zip: <u>15219</u> | REFINERS TRANSPORT & TERMINAL CORP   |

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

Judith Merman Valencik  
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December 5, 1990

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

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DEC 6 1990

SECRETARY'S OFFICE  
Public Utility Commission

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

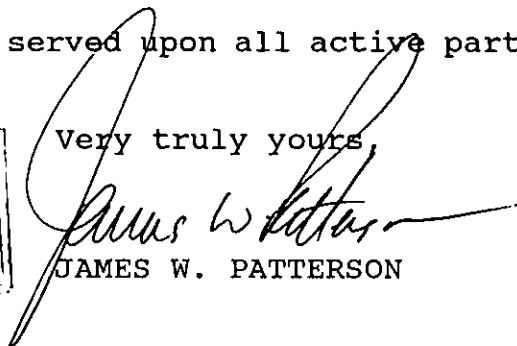
Dear Secretary Rich:

Enclosed please find the original and two (2) copies of the Brief of Matlack, Inc. Re Certification Of A Material Question, which is being filed in the above-captioned proceeding.

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

DOCUMENT  
FOLDER

Very truly yours,



JAMES W. PATTERSON

JWP/jal  
enclosures

cc: Michael J. Schnierle, Administrative Law Judge  
William A. Chesnutt, Esquire  
Ronald Malin, Esquire  
Henry Wick, Jr., Esquire  
Kenneth Olsen, Esquire  
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Andrew B. Eisman, Esquire

**ORIGINAL**

Before the  
**Pennsylvania Public Utility Commission**

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APPLICATION OF:

**CENTRAL TRANSPORT, INC.**

Docket No.

**A-108155**

**RECEIVED**

**DEC 6 1990**

**SECRETARY'S OFFICE  
Public Utility Commission**

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Brief of  
**MATLACK, INC.**  
RE  
**CERTIFICATION OF A MATERIAL QUESTION**

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**DOCKETED**  
**DEC 11 1990**

**MATLACK, INC.**

**By: JAMES W. PATTERSON, ESQUIRE  
EDWARD L. CIEMNIECKI, ESQUIRE**

OF COUNSEL:

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**DOCUMENT  
FOLDER**

**BRIEF OF MATLACK, INC.**  
**RE**  
**CERTIFICATION OF A MATERIAL QUESTION**

---

COMES NOW, Matlack, Inc. ("Matlack"), by its attorneys and, pursuant to 52 Pa. Code §5.305, files this Brief in connection with the certification of the material question propounded by Administrative Law Judge Michael C. Schnierle in the above-captioned proceeding.

I. HISTORY OF THE CASE

This proceeding involves an application filed by Central Transport, Inc. ("Central") requesting common carrier authority to transport property in bulk, in tank and hopper-type vehicles, between points in Pennsylvania. The application was later restrictively amended so as to eliminate certain transportation.

Following several hearings and the filing of Briefs by some of the parties, Judge Schnierle issued an Initial Decision which granted Central authority to render transportation to and/or from named facilities of seven (7) of Central's supporting shippers.

Exceptions to the Initial Decision as well as Replies to Exceptions were filed by, inter alia, Matlack and Central. Prior to the entry of a Commission Decision disposing of the Exceptions, Matlack filed a Petition to Reopen Record seeking a reopening of this proceeding for the receipt of newly-discovered evidence regarding environmental and safety violations of Central. By

Opinion and Order entered August 23, 1990 ("Remand Order") the Commission remanded this proceeding to the Office of Administrative Law Judge "for the limited purpose of obtaining testimony and evidence regarding Central Transport, Inc. Clean Water Act violations, and any other environmental or safety violations occurring or becoming known since the close of the evidentiary record in this proceeding . . . ." In accordance with the Remand Order, a further hearing was held in this matter on December 4, 1990.

On November 9, 1990 Central filed a Motion To Take Official Notice Of Facts requesting that the Commission take Official Notice of the filing and content of the Complaint filed in the United States District Court, District of New Jersey on behalf of the Environmental Protection Agency naming Matlack and several others as defendants. A Reply to Central's Motion To Take Official Notice Of Facts was filed by Matlack. On November 28, 1990, Judge Schnierle issued an Order denying Central's Motion.

In conjunction with his Order denying Central's Motion To Take Official Notice Of Facts Judge Schnierle issued an Order Certifying A Material Question ("Certification Order"). The stated purpose of the Certification Order is to certify to the Commission for review and answer the following material question:

Does the Opinion and Order adopted by the Commission on August 16, 1990 (entered on August 23, 1990), authorize the admission of testimony and evidence regarding environmental or safety violations of the protestants which occurred or became known since the close of the evidentiary record in this proceeding?

This Brief is filed in support of the position that the certified question must be answered in the negative.

II. ARGUMENT

A. The Commission's Order Reopened This Proceeding Solely For the Receipt Of Evidence Relating To Safety And Environmental Violations Committed By Central

In his Certification Order Judge Schnierle's holds that the evidence sought to be introduced by Central - evidence relating to environmental violations of which Matlack has been accused - is beyond the scope of the Commission's Remand Order. Matlack submits that Judge Schnierle's interpretation of the Remand Order is correct and therefore requests that the certified question be answered in the negative.

The Remand Order is quite specific regarding the limited purposes for which this record was reopened. The Remand Order grants Matlack's Petition to Reopen and remands this proceeding to the Office of Administrative Law Judge

. . . for the limited purpose of obtaining testimony and evidence regarding Central Transport, Inc. Clean Water Act violations, and any other environmental or safety violations, and any other environmental or safety violations occurring or becoming known since the close of the evidentiary record in this proceeding . . . .  
(Remand Order, pp. 9-10).

It is obvious that the additional testimony and evidence to be produced in this "limited" reopening is to relate only to Central's Clean Water Act, environmental and safety violations. Further support for this interpretation is found in the express purpose of Matlack's Petition to Reopen and the context



of the Remand Order.

Matlack requested a reopening of this record for the introduction of relevant, probative evidence that was unobtainable until after the close of the evidentiary record in this proceeding. This "newly-discovered evidence" related solely to environmental and safety violations committed by Central. Since Matlack's Petition to Reopen sought reopening for the receipt of evidence relating to Central's violations, the Commission's grant of said Petition could logically only apply to the taking of evidence relating to violations committed by Central.

Matlack does not for a moment suggest that the Commission is powerless to grant relief not specifically requested in a particular pleading. In the instant controversy, however, there is no indication that the Commission intended to go beyond the parameters of the relief requested in Matlack's Petition to Reopen. If the ordering paragraphs of the Remand Order (wherein the taking of additional evidence is directed) are read within the context of the entire Order, it is apparent that the Commission's only concern was with Central's violations. The Remand Order contains no mention of newly-discovered violations committed by Matlack or any other of the six (6) Protestants, nor does it suggest that evidence of violations by any of the six (6) Protestants would be relevant to the issues to be decided in this proceeding. An objective reading of the entire Remand Order clearly reveals that it is directed solely to evidence of transgressions committed by Central - after all, that is who the

Commission is being asked to certificate. The protestants seek no affirmative relief.

In considering the certified question the Commission must focus on the specific question presented. The Commission is not being requested to expand upon the scope of its initial Remand Order in order to authorize the introduction of evidence regarding Protestants' environmental and safety violations. Rather, the Commission is to advise Judge Schnierle of the relief it intended to grant at the time the Remand Order was adopted. The arguments presented in the Petition to Reopen and the analysis contained in the Remand Order indicate that the Commission contemplated a reopening of this record only for the receipt of evidence regarding Central's Clean Water Act violations, Central's environmental violations and Central's safety violations that occurred or became known since the close of the evidentiary record. The material question certified to the Commission must be answered in the negative.

B. In Ruling Upon The Material Question The Commission Is To Consider Only The Evidence It Evaluated In Ordering A Reopening of This Record

For reasons not entirely clear - since the question certified seeks clarification of the Commission's Remand Order - Judge Schnierle's Certification Order makes reference to rulings made by him during the course of this proceeding regarding the relevancy of evidence relating to a protestant's regulatory and technical fitness. The Judge also suggests that Central's Motion To Take Official Notice Of Facts, Matlack's reply thereto and his

Order disposing of the Motion are relevant to the disposition of the certified question and further indicates that portions of his Initial Decision and prior Orders concerning the propriety of Central's offering into evidence the records of protestant carriers with regard to violations of safety, environmental, and public utility laws and regulations may assist the Commission in its review of the certified question. (Certification Order, pp. 2-3). Matlack submits it would be wholly inappropriate for the Commission to consider these pleadings, rulings and Orders in answering the certified question.

The certified question does no more than seek clarification of the Commission's Remand Order of August 23, 1990 - whether the Remand Order contemplated the introduction of evidence of environmental or safety violations committed by Protestants.

The prior pleadings, rulings and orders to which Judge Schnierle has directed the Commission's attention are irrelevant to the issue to be decided relative to the certified question. Those matters are concerned primarily with the relevancy of a Protestant's fitness in a motor carrier application proceeding and are not germane to the certified question.

Matlack previously requested that Judge Schnierle certify to the Commission the question of whether evidence regarding the regulatory fitness of a protestant is relevant to a motor carrier application proceeding and therefore discoverable

under 52 Pa. Code §5.321.<sup>1</sup> Granting certification during the discovery phase of this proceeding would have permitted all parties to file briefs in support of their respective positions and afforded the Commission a complete record upon which to base its decision. Rather than allowing the issue to be determined by the Commission, Judge Schnierle denied Matlack's request for certification, holding the protestants' fitness to be relevant and therefore discoverable. Now is not the time to try that issue.

A determination of the issue of the relevancy of a protestant's fitness in a motor carrier application proceeding should not be made or impliedly made in the context of a certified question that, by its own terms, is considerably more limited in scope. Certainly, such a determination should not be made with reference only to those materials noted by Judge Schnierle - materials which are largely biased in favor of admitting such evidence.

The question regarding the relevancy of a

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<sup>1</sup> During the course of the proceeding extensive discovery was undertaken by Central and certain of the Protestants, including Matlack. Matlack filed objections to those interrogatories of Central which requested information relating to Matlack's regulatory fitness. Judge Schnierle denied Matlack's objections and directed that it produce the requested data and denied Matlack's request that the following material question be certified to the Commission for its consideration:

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?

protestant's fitness is now before this Commission, having been raised by Matlack in its Exceptions to the Initial Decision. That issue should be determined within the context of those Exceptions, based upon the entire record developed in this proceeding.

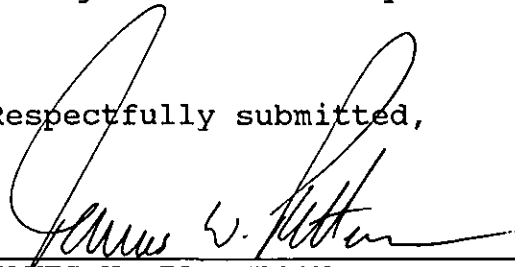
In disposing of the certified question the Commission should do just that, consider what it meant in issuing its Remand Order.

III. CONCLUSION

This proceeding was reopened only for the receipt of evidence relating to environmental and safety violations committed by Central. This conclusion is clear and unavoidable, particularly in light of the fact that, after all, this case is one in which Central, not the protestants, seeks certification; one in which Central's fitness is plainly at issue. Moreover, the base of the cause for re-opening was an environmental violation committed by Central, not the protestants.

WHEREFORE, Matlack, Inc. requests the issuance of an Order granting certification and answering the certified question in the negative.

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 Brief of Matlack, Inc. Re Certification Of A Material Question, were served upon the following by United States mail, postage prepaid.

Dated at Philadelphia, Pennsylvania this 5th day of December, 1990.

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Pennsylvania Public Utility Commission  
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Harrisburg, PA 17120

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

DATE: December 6, 1990

SUBJECT: A-00108155  
CENTRAL TRANSPORT, INC.

KJR

TO: The File

FROM: Bud Huntington  
Office of Administrative Law Judge

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DEC 11 1990

Hearings in the above matter were listed for Tuesday and Wednesday, December 4 & 5, 1990, commencing at 10:00 a.m., in Harrisburg.

Only the Tuesday hearing took place, the Wednesday hearing was cancelled.

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December 10, 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

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DEC 10 1990

Re: Application of Central Transport, Inc. SECRETARY'S OFFICE  
PA PUC Docket No. A.00108155 Public Utility Commission  
Our File: 12558-0001

Dear Secretary Rich:

Enclosed for filing with the Commission please find an original and nine (9) copies of a Brief of Applicant Central Transport, Inc. Addressing the Merits of a Certified Question in the above-referenced proceeding.

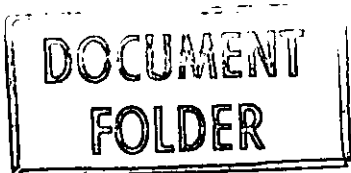
Copies have also been served on all parties of record as indicated by the attached Certificate of Service.

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)  
John Doyle, Esquire (w/enclosures)



BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

BRIEF OF APPLICANT CENTRAL TRANSPORT, INC.  
ADDRESSING THE MERITS OF A CERTIFIED QUESTION

Pursuant to the provisions of 52 Pa. Code §5.305(c), applicant Central Transport, Inc. submits this brief addressing the merits of a question certified to the Commission for review and answer by presiding Administrative Law Judge Michael C. Schnierle.

The specific material question certified to the Commission for review and answer is as follows:

Does the Opinion and Order adopted by the Commission on August 16, 1990 (entered on August 23, 1990), authorize the admission of testimony and evidence regarding environmental or safety violations of the protestants which occurred or became known since the close of the evidentiary record in this proceeding?

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DEC 13 1990

ARGUMENT

1. In an Opinion and Order dated August 16, 1990, the Commission remanded this proceeding to the Administrative Law Judge

for the limited purpose of obtaining testimony and evidence regarding Central Transport, Inc., Clean Water Act violations, and any other environmental or safety violations occurring or becoming known since the close of the evidentiary record in this proceeding, and the issuance of a supplemental initial decision (Order, pp. 9-10).

The foregoing quoted language reflects a directive by the Commission that this matter be reopened for the purpose of obtaining testimony and evidence in three distinct areas: (1) Central Transport, Inc.; (2) Clean Water Act

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violations; and (3) any other environmental or safety violations occurring or becoming known since the close of the evidentiary record in this proceeding. The third of those objectives is more than sufficiently broad enough to encompass submission of evidence regarding environmental or safety violations of protestant carriers which occurred or became known since the close of the evidentiary record. Accordingly, the question certified to the Commission should be answered in the affirmative. If only environmental or safety violations of Central were to be at issue, then the directive would have been stated as follows:

for the limited purpose of obtaining testimony and evidence regarding Clean Water Act violations and any other environmental or safety violations of Central Transport, Inc. occurring or becoming known, etc.

2. When protestant Matlack resisted a request by applicant Central Transport, Inc. that the Administrative Law Judge take official notice of a complaint issued on behalf of the Environmental Protection Agency against Matlack for environmental violations at a Super Fund site in the state of New Jersey, Matlack argued that the reopening and remand order of the Commission in this matter was circumscribed by what Matlack, for its purposes of self-interest, would like to have included, and what it would like to have excluded from this record. From that perspective of self-interest, Matlack obviously desires to exclude evidence about environmental violations alleged against it. The Commission's view is necessarily broader and more objective than that of Matlack. The Commission is entitled, in evaluating any evidence of violations of environmental laws by Central Transport, Inc.,

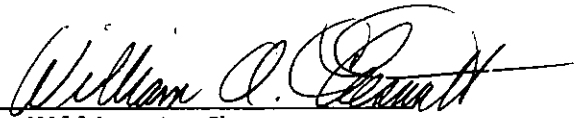
to have some perspective of how those violations compare with carriers engaged in a similar type of transportation.

3. The Commission should answer the certified question in the affirmative also because the introduction of evidence regarding environmental violations by a protestant carrier such as Matlack lends some perspective to Matlack's incredible claim of altruistic motivation in raising Central's environmental problems in this record. Matlack seems to be the only person aware of its appointment as the "guardian of the public interest". As previously pointed out by the Administrative Law Judge, "the Commission staff is always available to challenge an applicant's fitness". (See, Order of Administrative Law Judge Michael C. Schnierle dated February 28, 1990, at p. 15). Matlack's usurpation of that role is neither necessary nor appropriate. Matlack's solitary view of itself as a knight in white, shining armor is significantly blemished by disclosure of its environmental difficulties in New Jersey. As the Administrative Law Judge earlier observed, "Protestants...would be advised to heed the adage which admonishes the occupant of a glass house to refrain from throwing stones" (Order of Administrative Law Judge Michael C. Schnierle dated February 2, 1989, p. 15).

WHEREFORE, the Commission should answer the certified question in the affirmative.

Respectfully submitted,

McNEES, WALLACE & NURICK

By 

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(717) 232-8000

Counsel for Applicant  
Central Transport, Inc.

Dated: December 10, 1990

CERTIFICATE OF SERVICE

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

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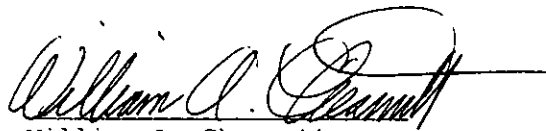
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Administrative Law Judge  
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Counsel for Applicant  
Central Transport, Inc.

Dated this 10th day of December, 1990, at Harrisburg, Pennsylvania.