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February 15, 1991

RECEIVED
FEB 19 1991
SECRETARY'S OFFICE
Pub's Utility Commission

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

HAND DELIVERY

RECEIVED
FEB 15 1991
OFFICE OF A.L.J.
HARRISBURG

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

Dear Judge Schnierle:

At page 775 of the transcript in this matter you stated that, with respect to a question certified by you to the PUC: "If the Commission answers the material question and says I was correct, I will set a briefing schedule." In an Order entered February 1, 1991, a copy of which is enclosed, the Commission answered the certified question "in the negative".

On behalf of applicant Central Transport, Inc., we would appreciate learning what the briefing schedule shall be.

Respectfully submitted,

McNEES, WALLACE & NURICK

By William A. Chesnutt
William A. Chesnutt

Counsel for Applicant
Central Transport, Inc.

DOCKETED
FEB 28 1991

WAC/law

Enclosure

cc: All parties of record (letter only)
W. David Fesperman (letter only)

DOCUMENT FOLDER

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

KJR

February 20, 1991

IN REPLY PLEASE
REFER TO OUR FILE

TO: All Parties

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

By Order dated November 28, 1990, I certified 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 into evidence regarding the environmental or safety violations of the protestants which occurred or became known since the close of the evidentiary record in this proceeding?

By Opinion and Order adopted on January 31, 1991 and entered on February 1, 1991, the Commission answered the certified question in the negative. Accordingly, there is no need to hold a further hearing in this proceeding.

At the close of the hearing held in this matter on December 4, 1990, the parties present agreed to file briefs limited to the subject matter of the Commission's Remand Order which was adopted on August 16, 1990, and entered on August 23, 1990. The parties agreed that briefs would be filed sequentially rather than simultaneously. Accordingly, the Applicant, Central Transport, shall file the initial brief no later than 30 days after the date of this letter. The Protestants may file responding briefs no later than 50 days after the date of this letter. They shall, in addition to conforming to 52 Pa. Code §5.101, contain a neutral summary of the testimony and evidence received at the hearing of December 4, 1990. Upon the receipt of responding briefs, the record in the proceeding shall be closed.

Your continuing cooperation in the efficient litigation of this proceeding is appreciated.

Very truly yours,

Michael C. Schnierle

MICHAEL C. SCHNIERLE
Administrative Law Judge

MCS:elp

A-108155 - Parties of Record:

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cc: New Filing
Mr. Bramson
Chief ALJ/Pappas/Scheduler

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

INITIAL BRIEF OF APPLICANT CENTRAL TRANSPORT, INC. AFTER REMAND TO THE ADMINISTRATIVE LAW JUDGE

In accordance with the briefing schedule set forth in the Administrative Law Judge's letter to counsel dated February 20, 1991, applicant Central Transport, Inc., by its counsel McNees, Wallace & Nurick, respectfully files this Initial Brief, following remand of the proceeding to the Administrative Law Judge, pursuant to an Opinion and Order by the Commission adopted August 16 and entered August 23, 1990 (hereinafter cited as "August 1990 Opinion and Order").

CONTEXT AND SCOPE OF THE REOPENED PROCEEDINGS

The subject application was filed March 21, 1988. Eight days of hearing were held during the period November 1, 1988 through June 28, 1989. Following the filing of briefs, Administrative Law Judge Michael C. Schnierle issued an Initial Decision on March 6, 1990. Exceptions and reply to exceptions were filed by Central and by Matlack, Inc., Crossett, Inc. and Refiners Transport & Terminal Corporation. Prior to any action being taken on the exceptions and replies thereto, protestant Matlack, Inc. filed, on May 31, 1990, a Petition to Open the Record. In the August 1990 Opinion and

Order, the Commission, responding to the Matlack Petition to Reopen, ordered that the proceeding be

> remanded to the Office of Administrative Law Judge, for the limited purpose of obtaining testimony and evidence regarding Central Transport, Inc. Clean Water Act violations, and any other environmental or safety violations occurring or becoming known since the close of the evidentiary record in this proceeding....
>
> (August 1990 Opinion and Order, at pp. 9-10).

The August 1990 Opinion and Order also directed that a "Supplemental Initial Decision" be issued.

Hearings were held December 4, 1990, at which applicant presented testimony by witnesses John Doyle and Glenn Simpson. Matlack Remand Exhibit Nos. 1 through 7 were received into evidence, and applicant's Remand Exhibit No. 1 was received into evidence.

The Commission found "that the evidence sought to be introduced by Matlack [in the remanded proceeding] has significant and far-reaching public safety implications" (August 1990 Opinion and Order, p. 8). Protestant Matlack had argued that the evidence it sought to introduce would "materially affect the Commission's findings regarding Central's regulatory and technical fitness" (Matlack Petition to Reopen, p. 3). Protestant Matlack urged, and the Commission concurred, that Central should be required "to introduce and fully develop that evidence regarding its violations of the Clean Water Act at its Charlotte, North Carolina terminal" and that Central should be allowed "an opportunity to present evidence regarding any

mitigating circumstances that may have been present at the time of the Clean Water Act violations" (See, Matlack Petition to Reopen, p. 8).

As the record in this proceeding stood prior to December 4, 1990, the Judge had unequivocally concluded, as a matter of law, that "the record does not demonstrate that Central lacks a propensity to operate safely and legally" (Initial Decision, p. 162). More specifically, the Judge had found, as a matter of fact, that Central promptly corrected violations pertaining to the cleaning of hazardous materials noted in April 1987 by the Pennsylvania Department of Environment Resources at applicant's only Pennsylvania terminal facility -- Karns City (Initial Decision, pp. 87-88).

REQUESTED FINDINGS OF FACT

Based on the record developed during the hearing held December 4, 1990, applicant requests that the following findings of fact be made in the Supplemental Decision to be issued by the Administrative Law Judge.

1. On March 5, 1990, applicant pled guilty to three separate counts of an information alleging that between April 28 and May 5, 1987, it "knowingly introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants, which [applicant] knew or reasonably should have known could cause personal injury or property damage" in violation of Title 33, U.S.C., §1319(c)(2)(B). (MREXH. Nos. 2 & 3).*

2. Applicant stipulated with the United States, as prosecutor, that a factual basis existed "in support of every element of each crime" to which applicant pled guilty (MREXH. No. 4, pp. 7-8).

3. An independent investigation by Central Transport's counsel in the criminal proceedings caused him to conclude that for an "undetermined period of time, there had been dumping of [untreated] wastewater into the Charlotte sewer system" (Tr. 710-712).

*MREXH. will be used as an abbreviation for Matlack Remand Exhibits.

4. The investigation of applicant's counsel in the criminal proceeding, also established

> that there were individuals at the Charlotte facility who were aware of it, that the practice was confined to the Charlotte facility, did not exist at the other waste treatment facilities that the company operated, and that the top management officials in High Point -- and I'm talking about Gary Honbarrier and his father and the Vice-President of Operations, Cliff James -- did not know about and had not authorized this activity.
>
> (Tr. 712).

5. The United States, as prosecutor in the criminal proceedings resulting in applicant's guilty plea, acknowledged that applicant "cooperated fully in the conduct of the Government's investigation of the activities concerning this Plea Agreement" (MREXH. No. 4, p. 7).

6. At the outset of the federal investigation which culminated in the plea agreement, government prosecutors had informed counsel for Central Transport "that they were going to seek indictments of the top management officials of the company" (Tr. 715).

7. There was, in fact, no prosecution by the federal government "of any officer, director, or employee of Central Transport" (Tr. 714).

8. Indictments of the top management officials of Central Transport were not brought "because there was no evidence to support such indictments. There was no knowledge or involvement by the top management officials of the company in these activities." (Tr. 715).

9. Under the law if any employee dumps untreated wastewater into a sewer system "then that's a knowing violation by the company whether [or not] it was authorized or approved by any management official of the company" (Tr. 715-716).

10. The dumping of...untreated wastewater, was, in fact, confined to [the Charlotte] facility. It was not a practice throughout the company" (Tr. 719).

11. The dumping of untreated wastewater "was not authorized, [nor] known about by the top management" of applicant (Tr. 719).

12. When top management became aware of an allegation that illegal dumping had been occurring at the Charlotte terminal, the Vice President of Operations immediately notified the County Department of Environmental Health (Tr. 719-720).

13. In 1987, once counsel for Central Transport determined that there had been a dumping of untreated wastewater, the President of Central, Mr. Gary Honbarrier, relieved the individual who was responsible for environmental affairs of his responsibilities, "and assumed personal responsibility for all environmental matters in the company" (Tr. 716, 718).

14. Also, in 1987:

> Mr. Honbarrier and the company engaged the services of an engineering consulting firm, O'Brien & Gere, to conduct environmental audits not only at Charlotte but at all other facilities for the purpose of insuring that the company was in compliance with all applicable environmental laws and regulations at all of its sites. (Tr. 717, 718).

15. Also, in 1987, applicant retained the services of a consulting firm

> to assist it in developing more effective communications, both video communications and written communications, to its employees to ensure that all of the employees in the company were properly trained and thoroughly aware of applicable environmental law that affected how they did their job[s], basically to ensure that the employees got the message, too, that the company complied with all environmental procedures.
>
> (Tr. 717).

16. In early 1988, the company employed a new Director of Environmental Affairs "who had the technical background and training to manage and direct and oversee all of the environmental affairs of the company" (Tr. 717, 718).

17. As part of the ongoing process of monitoring the discharge of treated wastewater at the Charlotte facility, Central is required to collect samples of that wastewater, to have those samples analyzed, and to submit the analytical results to the city sewer authorities (Tr. 760-761). Sixteen samples are collected per year -- eight by Central and eight by the sewer authority for its own analysis as an independent audit (Tr. 761). If the chemical

analysis of the wastewater indicates that any of the parameters for various chemical constituents exceed the permitted discharge limitation, then a Notice of Non-Compliance is issued concerning the parameter that has been exceeded (Tr. 761).

18. On May 31, August 24 and September 18, 1990, the Industrial Waste Division of the Charlotte-Mecklenburg Utility Department issued Notices of Non-Compliance to Central (MREXH. Nos. 5-7). Those notices required Central to monitor certain indicated parameters "for four consecutive discharge days" (MREXH. Nos. 5-7). In each instance of a Notice of Non-Compliance, if the subsequent four-consecutive-discharge-days analyses indicate continued violations of permit limitations, "a Compliance Agreement may be issued to establish a Schedule of Compliance with penalties and interim limitations, based on State and Federal Enforcement strategies" (MREXH. Nos. 5-7). No such Compliance Agreement has been issued with respect to any of the three Notices of Non-Compliance (Tr. 762). Neither has the Charlotte-Mecklenburg Utility Department requested Central Transport to take any actions with respect to changing its basic wastewater treatment operations at the Charlotte facility (Tr. 762).

19. As a further response to the three Notices of Non-Compliance, Central has hired a wastewater consultant to advise what improvements, changes or modifications could be made in the waste treatment process. That advice has resulted in Central adding another pre-treatment chemical to the process for the purpose of removing additional solids from the wastewater. Central has also made a physical modification to its pre-treatment equipment at the Charlotte terminal to improve efficiency and performance (Tr. 762).

20. In the fall of 1990, applicant established a new, small terminal facility at Aurora, North Carolina to serve a customer shipping phosphoric acid. Applicant intended to establish at the Aurora facility a tank wash, similar to the one in Charlotte but smaller in scale for the purpose of treating the residue left in tank trailers utilized to transport the phosphoric acid (Tr. 724).

21. Applicant applied for a permit to discharge the wastewater from that tank wash, after appropriate treatment, into the sewage system of the nearby town of Aurora (Tr. 724, 748). The application for permit was not granted because of pre-existing capacity limitations of the town's system (Tr. 724).

22. As an alternative, applicant then sought to dispose of the wastewater at an environmentally approved site in Harleyville, South Carolina. Acceptance of treated wastewater in Harleyville is

dependent upon laboratory testing and an evaluation of the chemical constituents of the wastewater (Tr. 724).

23. Applicant conducted a limited tank-wash operation at Aurora for, at most, three weeks generating enough wastewater to fill one tank trailer and part of another, from which samples were to be taken for chemical evaluation (Tr. 724, 749).

24. Based on an investigation conducted on October 15, 1990, the Division of Environmental Management of the State of North Carolina's Department of Environment, Health and Natural Resources issued a Notice of Violation alleging that applicant was conducting a wastewater collection system and that a "pump and haul permit" was required (Tr. 725; AREXH. No. 1)**

25. As soon as the described notice was received, applicant contacted its environmental law counsel, and terminated wash operations. As of December 4, 1990, no wash operations were being conducted at Aurora (Tr. 725, 749).

26. On October 31, 1990, environmental law counsel for the company responded to the Notice of Violation. Counsel for applicant contended, contrary to the allegation of the Division of Environmental Management, that the collecting and storing of wastewater at the Aurora facility did not constitute operation of a "sewer system, treatment works or disposal system" (Tr. 725, AREXH. No. 1). Applicant's counsel also challenged whether there was any statutory authority for the allegation that a permit needed to be obtained from the North Carolina Environmental Management Commission in order for applicant to conduct "pump and haul activities" at the Aurora terminal. The Division of Environmental Management was requested to furnish authority that would contradict either of the assertions made on behalf of applicant (AREXH. No. 1, p. 4).

27. As of December 4, 1990, the wastewater remained at the Aurora site awaiting a response from the State of North Carolina concerning whether a permit is required before transporting the wastewater to an approved disposal site in South Carolina (Tr. 749). As of December 4, 1990, the state had not responded to the October 31, 1990 letter from counsel for Central, nor had the state proposed any kind of penalty or taken any other action. The statute under which the state was proceeding calls for the issuance of a proposed penalty in connection with the issuance of a violation notice. No such issuance of proposed penalty had occurred as of December 4, 1990 (Tr. 725).

**AREXH. is an abbreviation for Applicant's Remand Exhibit.

ARGUMENT

As the Judge reiterated during the hearing on December 4, 1990: "The purpose of the fitness criteria is forward-looking rather than to punish the Applicant for past transgressions." This is clearly a correct statement of the law, as developed in PUC decisions and by appellate courts in review of PUC decisions. See, for example, Application of Friedman's Express, Inc., Docket Nos. A-00024369, Folder 9, Am-A, Folder 10, Am-I (Order entered August 17, 1989).

In the Initial Decision dated March 5, 1990, the Judge concluded, as a matter of law, that "The record does not demonstrate that Central lacks a propensity to operate safely and legally" (I.D., p. 162). The question is whether the record developed during the hearing of December 4, 1990 should lead the Judge to a contrary conclusion.

The record developed at the hearing held December 4, 1990, certainly does not lead to any contrary inference. Indeed, the record developed at the hearing on remand buttresses the conclusion that since May 1987, the top management of Central Transport has pursued a consistent pattern of constructive actions designed to correct and prevent the future occurrence of the specific violations of environmental law that occurred at Charlotte, North Carolina in the spring of 1987, and to insure that Central's record of satisfactory compliance at all its other facilities is maintained.. The 27 findings of fact that applicant has requested, all of which are amply supported by the record, lead inexorably to the conclusion that the top management of Central Transport, whose actions ultimately determine the

"propensity" of the corporation, have initiated and pursued a program of positive actions to achieve strict compliance with environmental regulations.

The record developed at the December 4, 1990 hearing shows that the violations to which Central pled guilty occurred almost four years ago, were isolated in number and confined to a single terminal facility not in Pennsylvania (See Requested Findings of Fact Nos. 1, 3, 10). Secondly, the violations involved a few individuals whose actions were not authorized nor condoned by policy-making, top management officials of the company, against whom the federal government never brought indictments notwithstanding a stated intention to do so (See Requested Findings of Fact Nos. 4, 6, 7, 8, 11). Finally, upon learning of the violations, top management of Central acted responsibly by immediately notifying local officials, relieving the individual in charge of environmental affairs at the time of the violations of his responsibilities, obtaining expert environmental engineering and educational expertise, and cooperating fully with the federal government in bringing the investigation to a final resolution (See Requested Findings of Fact Nos. 5, 12, 13, 14, 15, 16). The foregoing activities are not those of a company lacking a propensity to operate safely and legally.

The record developed at the December 4, 1990 hearing quite simply gives no credible support for Matlack's self-serving, alarmist allegation that "the health of Pennsylvania residents and cleanliness of their drinking water could be jeopardized by the authorization of a carrier that has admitted to knowingly polluting our environment". (See, Petition to Reopen,

p. 7). Putting aside Matlack's self-righteous posturing as a guardian of the public interest, it is just not credible that the health of Pennsylvania residents and the cleanliness of their drinking water will be affected by what plea Central may have entered in a criminal proceeding in Charlotte, North Carolina. Instead, the public will be affected by how Central is responding to the challenge of handling the discharge of wastewater from tank cleaning in Pennsylvania. Indeed, Pennsylvania residents are, at best, affected indirectly by the positive actions that Central is taking at its North Carolina facilities, which were the subject of extensive discussion at the remanded hearing. The real concern should be what Central is doing at the only terminal facility in the Central system that could have any direct impact on the health of Pennsylvania residents or the cleanliness of their drinking water. Counsel for Matlack objected to any information being introduced at the hearing on remand concerning the state of wastewater treatment operations at Central's Karns City, Pennsylvania facility and the Judge upheld that objection noting that he was "not interested in learning the state of compliance" at Karns City (Tr. 759). Had such testimony been allowed, it would have shown that additional investment had been made at the Karns City facility for the purpose of improving wastewater treatment and that a current DER inspection report of the Karns City facility disclosed complete compliance with environmental regulations (Tr. 763; Applicant's rejected Remand Exh. No. 2).

CONCLUSION

WHEREFORE, applicant Central Transport prays that a Supplemental Initial Decision be promptly issued adopting the requested Findings of Fact, and reaffirming the conclusion of law that "the record does not demonstrate that Central lacks a propensity to operate safely and legally".

Respectfully submitted,

McNEES, WALLACE & NURICK

By 

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Counsel for Applicant
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Dated: March 22, 1991

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FOLDER

March 22, 1991

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
New Filing Section, Room B-20
North Office Building
P. O. Box 3265
Harrisburg, PA 17120

HAND DELIVERY

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

Dear Secretary Rich:

Enclosed for filing with the Commission please find an original and nine (9) copies of the Initial Brief of Applicant Central Transport, Inc. After Remand To The Administrative Law Judge in the above-captioned proceeding.

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

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

Respectfully submitted,

McNEES, WALLACE & NURICK

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

WAC/law
Enclosures
cc: Attached Certificate of Service (w/enclosures)
W. David Fesperman (w/enclosures)
John Doyle, Esquire (w/enclosures)

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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Honorable Michael C. Schnierle
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Counsel for Applicant
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Dated this 22nd day of March, 1991, at Harrisburg, Pennsylvania.

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WILLIAM C. ARRISON (1925-1978)
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April 9, 1991

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

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

Dear Mr. Rich:

Enclosed for filing with the Commission please find an original and nine (9) copies of a Responding Brief on Behalf of Protestant, Crossett, Inc., in regard to the above referenced matter.

Attached to this letter is U.S. Postal Service Form 3817, Certificate of Mailing, showing that the Brief has been timely filed.

Copies of this Brief 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
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Warren, Pennsylvania 16365

BEFORE

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF

CENTRAL TRANSPORT, INC.

DOCKET NO. A-00108155

RESPONDING BRIEF

ON BEHALF OF PROTESTANT

CROSSETT, INC.

AFTER REMAND TO THE ADMINISTRATIVE LAW JUDGE

RONALD W. MALIN, ESQ.
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Due Date: April 11, 1991.

BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF

CENTRAL TRANSPORT, INC.

DOCKET NO. A-00108155

RESPONDING BRIEF

ON BEHALF OF PROTESTANT

CROSSETT, INC.

AFTER REMAND TO THE ADMINISTRATIVE LAW JUDGE

Comes now, Crossett, Inc. (Crossett), by its attorneys, Johnson, Peterson, Tener & Anderson, Ronald W. Malin, Esq., of counsel, and respectfully files this Responding Brief following remand of the proceeding to the Administrative Law Judge (ALJ) pursuant to Opinion and Order of the Commission, adopted August 16, 1990 and entered August 23, 1990, and in accordance with the briefing schedule set forth in the ALJ's letter to counsel, dated February 20, 1991.

PRELIMINARY STATEMENT

Central Transport's application was filed March 21, 1988 and was the subject of eight (8) days of hearing held during the period from November 1, 1988 through June 28, 1989.

Prior to the hearings before the Commission and certainly including that period between April 28, 1987 and May 5, 1987, Central Transport, including its top management and its counsel, John J. Doyle, Jr., knew that multiple individuals employed by Central Transport at its Charlotte, North Carolina facility had been dumping untreated waste water into the Charlotte sewer system. Such unlawful action by Central Transport and the criminal investigation by the government relating thereto was clearly apparent to Central Transport during 1987, but such pertinent facts were not brought to the attention of the Commission by the Applicant, either voluntarily or in response to Matlack's interrogatories, at any of the hearings held during the period from November 1, 1988 through June 28, 1989.

Therefore, ALJ Schnierle, in issuing the Initial Decision in this matter on March 6, 1990, did so without the benefit of full and complete evidence bearing upon the Applicant's fitness, or lack thereof.

As to the Initial Decision of March 6, 1990, Exceptions and Replies to Exceptions were filed by Central Transport, Matlack, Inc., Crossett and Refiners Transport & Terminal Corporation.

Prior to any decision being made by the Commission upon the Exceptions and the Replies to Exceptions, on May 31, 1990, a Petition to Reopen the Record was filed by the Protestant, Matlack, Inc. to offer into the record pertinent evidence relating to the Information and Plea Agreement of Central Transport in Docket No. C-CR-90-27, in which Central Transport pled guilty to knowingly

introducing into the public sewer system from on or about April 28, 1987 to April 29, 1987, pollutants which Central Transport knew or reasonably should have known could cause personal injury or property damage. Central Transport was assessed a fine totaling One Million Five Hundred Thousand Dollars ($1,500.000.00), with payment of One Million Dollars ($1,000,000.00) contingently suspended, agreed to certain environmental clean up projects, accepted a two (2) year probationary term and published a public apology. (See Matlack's Remand Exhibits No. 1 through 4).

The Commission ordered that the proceeding be reopened for a supplemental initial decision by ALJ Schnierle, and in response thereto, a hearing was held on December 4, 1990.

At the December 4, 1990 hearing, Central Transport presented testimony by two (2) witnesses, John J. Doyle, Jr., counsel for Central Transport, and Glenn Simpson, Director of Environmental Services for Central Transport. Central Transport did not introduce testimony by either Gary Hornbarrier, his father or Cliff James, the Vice-President of Operations of Central Transport, all of whom are described as top management officials of the Applicant (Tr. 712). Matlack's Remand Exhibits Nos. 1 through 7 were received into evidence and Central Transport's Remand Exhibit No. 1 was received into evidence.

Pursuant to the remand briefing schedule, Central Transport has filed a Brief, in essence arguing that the record of the December 4, 1990 hearing and the twenty-seven (27) Requested Findings of Fact as set forth on Pages 3 through 7 of the Applicant's

Brief, depicts that the record does not demonstrate that Central Transport lacks a propensity to operate safely and legally. To the contrary, the Applicant argues that:

> . . . the top management of Central Transport, whose actions ultimately determine the "propensity" of the corporation, have initiated and pursued a program of positive actions to achieve strict compliance with environmental regulations. (Applicant's Brief, Pages 8 and 9).

It is in response to the Applicant's Brief that this Responding Brief on behalf of Crossett is respectfully submitted.

ARGUMENT

To begin with, Central Transport holds no authority from the Commission. As such, by the instant application, Central Transport is seeking operating authority subject to the jurisdiction of the Commonwealth of Pennsylvania for the first time. It is basic that, under Section 332(a) of the Public Utility Code (the Code) 66 Pa. C.S. §1103(a), Central Transport, as the party seeking affirmative relief from the Commission, has the burden of proof as to all elements necessary to convince the Commission, by a preponderance of the evidence, that it meets the statutory requirements for the grant of a certificate of authority as a motor common carrier. In this regard, the Code, 66 Pa. C.S. §1103(a), provides:

> A certificate of public convenience shall be granted by order of the Commission, only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.

The statute is implemented through regulations adopted by the Commission governing the evidentiary criteria. These criteria, set forth in 52 Pa. Code §41.14, include in Subparagraph (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. (Emphasis added).

In the instant matter it is now clear that Central Transport has not at all times demonstrated a propensity to operate safely and legally. Indeed, the Applicant's Requested Findings of Fact Nos. 1, 2 and 3 (Applicant's Brief, Page 3) constitute an admission by Central Transport of a knowing, criminal, unsafe and repetitive violation of environmental laws at its Charlotte facility during 1987. Such violations culminated in a guilty plea and sentencing as filed in the U.S. District Court for the Western District of North Carolina on March 5, 1990. (See Matlack's Remand Exhibits Nos. 1 through 4).

In essence, the Applicant's Brief agrees that the facts as depicted in Matlack's Remand Exhibits Nos. 1 through 4, now of record, upon remand, should be discounted because the violations occurred four (4) years ago, occurred in a state other than Pennsylvania, and such violations were not authorized or condoned by the top management officials of Central Transport. (Applicant's Brief, Page 9).

It is respectfully submitted that these arguments (or excuses) for the illegal activities of Central Transport do not constitute

proof that Central Transport has a propensity to operate safely and legally. Although the violations did occur four (4) years ago, during 1987, the facts were not earlier revealed to the Commission even though Central Transport's top management was fully aware of the violations in 1987 (Tr. 716-718). There was ample time for Central Transport to disclose the facts and circumstances surrounding these violations during the hearings held from November 1, 1988 through June 28, 1989 (either voluntarily or in response to Matlack's Interrogatories). The argument that the violations occurred four (4) years ago, when such facts were not brought to the attention of the Commission in Pennsylvania until 1990 (and then only through the efforts of Protestant, Matlack, upon remand), should not result in discounting the seriousness of the violations.

Similarly, the argument that the violations occurred outside of Pennsylvania is not compelling. For the Commission to properly gauge an applicant's propensity to operate safely and legally, it is respectfully submitted that it is incumbent upon the Commission to consider violations by an applicant wherever they may occur.

As to the argument that top management officials of Central Transport did not condone or authorize such violations, it is noted that none of the top management of Central Transport (Gary Hornbarrier, his father or the Vice-President of Operations, Cliff James (Tr. 712)) saw fit to testify at the December 4, 1990 hearing. The record, to the extent that it sets forth the allegation that the top management officials of Central Transport did not

know about, authorize or condone the criminal activity perpetuated at Central Transport's Charlotte facility is predicated solely upon the testimony of Central Transport's counsel, John J. Doyle, Jr.. As such, the testimony is self-serving and predicated upon apparent hearsay. The Applicant's Requested Findings of Fact (to wit: Nos. 4, 8 and 11) relate to the testimony of John J. Doyle, Jr., reaching conclusions that, by their very nature, are predicated upon statements made by others to John J. Doyle, Jr.. As such, it is respectfully requested that the Applicant's Requested Findings of Fact Nos. 4, 8 and 11 be rejected as based on the statements of others and hearsay.

Furthermore, the argument that illegal activities conducted by an applicant without the knowledge or approval of its top management should be somehow discounted raises the additional issue as to whether or not an applicant which seeks authority from the Commission should be able to create within itself a two tier level of responsibility for separate evaluation. It is respectfully submitted that it would be a dangerous precedent for the Commission to accept the concept that an applicant should not be held accountable for the illegal activities of its company as long as top management does not condone or authorize the illegal or unsafe practices. It is, after all, the duty of top management to make certain that its company consistently maintains safe and legal operating procedures and it is the duty of the Commission to require applicant's to consistently operate legally and safely.

The basis for denying an application for lack of fitness was

aptly stated by ALJ Michael A. Nemec in Application of Newcomer Trucking, Inc., Docket No. A-00102265, F.1, Am-H, (Order entered September 11, 1985), as follows:

> The granting of authority to someone who the Commission believed was lacking a propensity to operate legally would pose different threats. Primarily, of course, such a grant would tend to undermine the authority of the Commission and the integrity of the entire regulatory structure. Lawful operators, seeing that unlawful operation had no effect on the granting of authority to operate, could well be tempted to unlawful activities of their own. Without the deterrent effect of operators' knowledge that illegal activity could lead to a finding of lack of fitness which would preclude the granting of new authority, the regulations governing grants of authority could become virtually meaningless.

In the instant matter, the lack of propensity of the Applicant to consistently operate safely and legally raises a serious issue as to the propriety of granting the Applicant authority.

Dated: April 9, 1991.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April, 1991, I served copies of the foregoing Responding Brief on Behalf of Protestant, Crossett, Inc., upon the following parties of record, by first-class mail, postage pre-paid:

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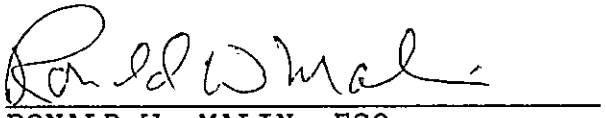

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April 11, 1991

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SECRETARY'S OFFICE
Public Utility Commission

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 Responding Brief of Matlack, Inc. Following Remand and Reopening of Record, which is being filed in the above-captioned proceeding.

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

Very truly yours,

Edward L. Ciemniecki

EDWARD L. CIEMNIECKI

DOCUMENT FOLDER

ELC/jal
enclosures

cc: Michael J. Schnierle, Administrative Law Judge
William A. Chesnutt, Esquire
Ronald Malin, Esquire
Henry Wick, Jr., Esquire
Kenneth Olsen, Esquire
Christian V. Graf, Esquire
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Gerard Trippitelli, President

FILE

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