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January 27, 1989

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

**RECEIVED**

JAN 27 1989

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 Reply of Matlack, Inc. to Motion to Dismiss an Objection and To Direct Answering of Interrogatories filed in the above-captioned matter.

Copies of the enclosed are being served upon Administrative Law Judge Michael C. Schnierle and all active parties of record.

Very truly yours,

*James W. Patterson*  
JAMES W. PATTERSON

JWP:jal  
enclosures

cc: Michael C. Schnierle, Administrative Law Judge  
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

**DOCUMENT  
FOLDER**

Certificate of Mailing Enclosed

Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF  
CENTRAL TRANSPORT, INC. :

DOCKET NO.  
A-108155 :

**RECEIVED**

**JAN 27 1989**

**SECRETARY'S OFFICE  
Public Utility Commission**

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**REPLY OF MATLACK, INC. TO  
MOTION TO DISMISS AN OBJECTION  
AND TO DIRECT ANSWERING OF INTERROGATORIES**

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**COMES NOW**, Matlack, Inc. ("Matlack") by its attorneys and files this Reply to the Motion of Applicant Central Transport, Inc. ("Central") seeking to compel Matlack to answer certain Interrogatories filed by Central. Matlack respectfully represents:

**I. HISTORY OF CASE**

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 proceeding.

On January 4, 1989 Central filed the Motion to which this Reply is directed. At the time of filing, a copy of the Motion was not served upon Matlack.

**DOCKETED**

**JAN 31 1989**

**DOCUMENT  
FOLDER**

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 the Motion upon Matlack and the lack of an opportunity for Matlack to respond thereto. Upon agreement of Counsel and Judge Schnierle the January 17 Order was dismissed and Matlack was afforded an opportunity to Reply to the Motion on or before January 27, 1989.

II. ARGUMENT IN REPLY

As a preliminary consideration, Central claims that "(t)he Presiding Officer has already ruled that questions 'involving the violation of the environmental laws or transportation laws as to hazardous substances transportation are relevant' (See Transcript, p. 19)". (Motion to Dismiss, p.2). That ruling must be viewed within the context in which it was made.

The transcript shows that the question regarding environmental or transportation violations was directed to Applicant's witness, David Fesperman. Noting that the Commission denied authority to an applicant who was guilty of mail fraud, Judge Schnierle ruled that the question - relating, as it did to Central's, the applicant's, possible violations - was proper; that it sought relevant information. (T. 18-19). It is clear that the Presiding Officer ruled as to the relevancy of evidence regarding violations by the Applicant - whose fitness (by statute) is at issue - and did not rule generally regarding the relevancy of environmental or transportation violations.

The core of Central's argument that Matlack should produce the requested information is that Central's fitness "cannot be evaluated in a vacuum" but rather should be compared with the safety records of other carriers to see if it "deviate(s) significantly from industry experience . . . ." (Motion to Dismiss, p.2).

Central's argument fails to recognize the basic purpose of this proceeding - to determine whether or not the granting of a certificate of public convenience to Central is "necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S.A. §1103. The Commission and the Courts have agreed upon the factors to be considered in making this determination; namely, (1.) the existence of a public need for the proposed service, (2.) the regulatory, financial and technical fitness of the applicant to render that service; and (3.) the effect that authorization of the proposed service would have upon the operations of existing carriers. 52 Pa. Code §41.14; Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission, 99 Pa. Commw. 420, 512 A. 2d 1359 (1986) (emphasis added). Information regarding violations committed by a Protestant is simply not relevant to the issues to be resolved.

The irrelevancy of a Protestant's fitness is recognized by Central's counsel. For example, just recently in Application of Butler Trucking Company, Docket No. A-92978, F.1, Am-U, Central's counsel, on behalf of another client (a protestant in that case) objected to certain Interrogatories going to unlawful service by the protestant and argued: "(w)hile the applicant's fitness (i.e., propensity to operate legally) is relevant to an application proceeding (52 Pa. Code §41.14(b), the protestant's fitness is not at issue and is therefore not relevant", calling an interrogatory similar in nature to Central's Interrogatory 19 "a fishing expedition", and closing with the "black letter law" that

"(t)he fitness of a protestant is not relevant." <sup>1/</sup> (Emphasis added). We agree.

Central's position - that an Applicant's fitness should be evaluated in comparison to competing carriers or to those who happen to be participants in a particular case - is not now and has never been the test applied in Commission application proceedings. Rather, the applicable test is set forth in 52 Pa. Code §41.14(b) in the following manner:

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

The relevant inquiry is whether Central lacks a propensity to operate safely and legally. Inquiries made by Matlack during the course of this proceeding regarding transportation and environmental violations by Central go directly to this issue. The inquiry is not, as suggested by Central, whether Central operates either more safely and legally or less safely and legally than other certificated carriers or as compared to other carriers participating in this case.

Central's Motion to Dismiss seeks to alter existing law - to transform the fitness test from one in which only an applicant's fitness is considered into a balancing test comparing itself to the protestants, seeing the protestants as the "industry standard". This is not the proper forum in which to accomplish such a change and Central's Motion must be denied.

Central's "industry standard" concept is fatally flawed and will result in invalid comparisons being made. Application of the applicant's proposed "industry standard" test - using the Protestants in a particular proceeding as the

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<sup>1/</sup> A copy of those Objections to which reference is made here and the Interrogatories to which they are directed are attached hereto.

"standard" is unworkable and unreliable. Are we to add the total number of violations? Are we to exhaustively analyze each violation in terms of relative seriousness? How do you balance the "records" of a carrier with 6 vehicles against one with 2,000 vehicles?

The flaws in Central's proposal are evident. Assume, for example, that the Protestants in this proceeding averaged six (6) instances of unlawful service per year and Central commits only five (5). Does that qualify Central as fit? The answer, utilizing the "propensity to operate safely and legally" test, is no. Utilizing Central's "industry standard" test, however, results in a finding that Central is fit to receive additional authority.

Conversely, assume that the Protestants have pristine fitness records, having committed no violations over the past two (2) years. If Central has been guilty of one (1) violation during that period, must it be deemed unfit? Under the "industry standard" test, Central's fitness record falls short of that established by other competing carriers - the "industry standard" - and its application should be denied.

Central's "industry standard" proposal would generate results that run counter to years of Commission precedent and should not be adopted. Central's proposal, moreover, has far-reaching implications not only in terms of the decisional criteria to be employed in this matter, but also in terms of the manner in which motor carrier application proceedings are conducted.

An applicant's fitness has always been at issue in application matters; applicant's witness has always been put to task to explain away past violations in order to establish its regulatory fitness. Central now seeks a ruling that could force a protestant's witness to spend hours reviewing documents and hours on the witness stand all to explain the circumstances surrounding some PUC or EPA violations when the only purpose is to compare the applicant's record with that of

the protestants ! This would greatly increase the cost of motor carrier proceedings to the parties and to the Commission. There can be little doubt that additional hearing time would be required to handle the expanded range of facts necessary to come to grips with the "industry standard" approach.

Matlack submits a discovery dispute in this proceeding should not be the vehicle used to change years of Commission practice. A Protestant's fitness has never been relevant to the issues to be determined in a motor carrier application proceeding and Central's attempt to bring Matlack's fitness into issue into this matter should not be countenanced. Central's Motion to Compel Matlack to answer must be denied.

WHEREFORE, Matlack, Inc. requests issuance of an Order denying the Motion To Dismiss An Objection And To Direct Answering Of Interrogatories of Central Transport, Inc.

Respectfully submitted,

By: 

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

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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BUTLER TRUCKING :  
COMPANY, : Docket No. A-92978, F.1, Am-U  
Applicant :

OBJECTIONS TO INTERROGATORIES OF BUTLER TRUCKING  
COMPANY DIRECTED TO EAST PENN TRUCKING COMPANY,  
P.C.M. TRUCKING, INC., SAMUEL J. LANSBERRY, INC.,  
AND SCHWERMAN TRUCKING CO.

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COMES NOW East Penn Trucking Company, P.C.M. Trucking, Inc., Samuel J. Lansberry, Inc., and Schwerman Trucking Co. (hereinafter collectively referred to as "protestants"), by their attorneys, and file their objections to the following Interrogatories of Butler Trucking Company ("applicant") directed to the protestants, in the above-captioned matter, respectfully representing as follows (the specific Interrogatories objected to are attached hereto, as Appendix "A," for reference):

(14) Interrogatories may be served for the purpose of "discovering relevant, unprivileged information." 66 Pa.C.S. §333(d). The matter sought to be discovered must be "relevant to the subject matter involved in the pending action." 52 Pa. Code §5.321(b). The matter sought to be discovered in Interrogatory (14) is not relevant to the subject matter involved in the instant proceeding. While the applicant's fitness (i.e., propensity to operate legally) is relevant to an application proceeding (52



Pa. Code §41.14(b)), the protestant's fitness is not at issue and is therefore not relevant.

Furthermore, the protestants' activities beyond a two year period are too remote to be relevant in any event.

Assuming, solely arguendo, that a protestant's fitness would be relevant, the interrogatory is still not relevant because it asks for whether the protestants have "been accused" of providing certain services. Mere accusations are meaningless and are not relevant.

(15) Protestants incorporate their objection to Interrogatory (14) herein by reference.

(16) a. The instant proceeding is not a complaint case against any protestant; therefore, Interrogatory (16) is not relevant.

b. The fitness of a protestant is not relevant.

c. What occurred in 1986 is too remote to be relevant in any event.

d. The interrogatory is not relevant for the further reason that if the transportation was not authorized, the potential loss of said transportation, if the application would be approved, would be of no significance.

e. The interrogatory constitutes a fishing expedition.

"Anything in the nature of a mere fishing expedition is not to be encouraged." American Car & Foundry Company v. The Alexandria Water Company, 221 Pa. 529, 535-536 (1908). While the American Car & Foundry case is a leading case relating to

subpoenas duces tecum, the principle cited therein relates directly to the information sought in Interrogatory (16).

f. To check a company's massive amount of records to obtain the information sought would cause unreasonable annoyance, oppression, burden and expense on the protestants. No discovery is permitted where any of these causes would result. 52 Pa. Code §5.361(a)(2).

(17) Protestants incorporate paragraph 16, subparagraphs a, b, d, e, and f herein by reference.

(18) Protestants incorporate paragraph 17 herein by reference.

(19) The revenue for 1986 is too remote to be relevant.

(20) The revenue for 1986 is too remote to be relevant.

(21) The revenue for 1986 is too remote to be relevant.

(22) The annual report for 1986 is too remote to be relevant.

(24)(a) The service provided in 1986 is too remote to be relevant.

(28) Protestants incorporate paragraph 16, subparagraphs a-e, herein by reference.

(29) Protestants incorporate paragraph 28 herein by reference.

Respectfully submitted,

McNEES, WALLACE & NURICK

By *Herbert R. Nurick*  
Herbert R. Nurick, Esquire  
100 Pine Street  
P. O. Box 1166  
Harrisburg, PA 17108-1166  
(717) 232-8000

Attorneys for East Penn Trucking  
Company, P.C.M. Trucking, Inc., Samuel  
J. Lansberry, Inc., and Schwerman  
Trucking Co.

Dated: January 11, 1989

(14) During the past three years, have you been accused by the Pennsylvania Public Utility Commission or any representative or employee of the Pennsylvania Public Utility Commission of improperly providing service from, to or between any point in Pennsylvania? If so, please give all particulars pertaining to such incidence, including the date of the incident, the shipper involved, the origin point, the destination point, the commodity, the justification, if any, which you have asserted, and disclose the number of times that you hauled the particular shipment in question. Also, furnish a copy of any notices, reports, or orders that may have been served upon you by the Pennsylvania Public Utility Commission or its agents or representatives.

ANSWER:

(15) While all of the interrogatories set forth herein are of a continuing nature, it is specifically noted that the foregoing interrogatory requests continued information concerning the information and documents identified therein.

ANSWER:

(16) Are there any shipments which you hauled in 1986 for which operating authority from the Pennsylvania Public Utility Commission was required and for which you did not have the necessary operating authority? If so, please disclose the date, origin, destination, commodity and revenue for such shipment?

ANSWER:

(17) Are there any shipments which you hauled in 1987 for which operating authority from the Pennsylvania Public Utility Commission was required and for which you did not have the necessary operating authority? If so, please disclose the date, origin, destination, commodity and revenue for such shipment?

ANSWER

(18) Are there any shipments which you hauled in 1988 for which operating authority from the Pennsylvania Public Utility Commission was required and for which you did not have the necessary operating authority? If so, please disclose the date, origin, destination, commodity and revenue for such shipment?

ANSWER:

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Reply of Matlack, Inc. to Motion To Dismiss An Objection and To Direct Answering of Interrogatories was 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  
100 Pine Street, P.O. Box 1166  
Harrisburg, PA 17108

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

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

Henry M. Wick, Esquire  
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 27th day of January, 1989.

RUBIN, QUINN, MOSS & HEANEY

By: 

JAMES W. PATTERSON  
Attorney for Matlack, Inc.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17120  
January 27, 1989

In Re: A-00108155

(See letter dated 11/22/88)

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 a further hearing on the above captioned case will be held Tuesday, February 14, 1989, at 1:00 p.m., in the 11th Floor Hearing Room, Pittsburgh State Office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania.

This half-day is in addition to the previously scheduled day of hearing Wednesday, February 15, 1989.

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

