FILE

CONTINUED

LAW OFFICES

JOHNSON, PETERSON, TENER & ANDERSON

KENNETH T. JOHNSON
RAYMOND A. ANDERSON
RONALD W. MALIN
WARD W. WESTERBERG

KEY BANK BUILDING
P. O. BOX 1379
JAMESTOWN, NEW YORK 14702-1379
AREA CODE (716)
TELEPHONE 664-[illegible]

FAX (716) 664-1865

ALBERT J. TENER (OF COUNSEL)
JOHN A. PETERSON (1919-1971)
WILLIAM C. ARRISON (1925-1978)
CHARLES J. PHILLIPS (1919-1986)

April 19, 1990

RECEIVED
APR 19 1990
SECRETARY'S OFFICE
Public Utility Commission

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

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

Dear Mr. Rich:

Enclosed please find the original and nine (9) copies of a Reply on Behalf of Protestant, Crossett, Inc., to the Exceptions taken by Applicant to the Initial Decision of ALJ Schnierle in the above referenced matter.

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

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

Respectfully submitted,

Ronald W. Malin

RONALD W. MALIN

RWM:knw

Enclosures

C/C TO: Hon. Michael Schnierle
Administrative Law Judge
Pennsylvania Public Utility Commission
Bureau of Transportation
P.O. Box #3265
Harrisburg, Pennsylvania 17120

William A. Chesnutt, Esq.
100 Pine Street
P.O. Box #1166
Harrisburg, Pennsylvania 17108

William J. O'Kane, Esq.
Chemical Leaman Corporation
102 Pickering Way
Exton, Pennsylvania 19341-0200

Kenneth A. Olsen, Esq.
P.O. Box #357
Gladstone, New Jersey 07934

James W. Patterson, Esq.
Rubin, Quinn, Moss & Heaney
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106

David H. Radcliff, Esq.
Graf, Andrews & Radcliff, P.C.
407 North Front Street
Harrisburg, Pennsylvania 17101

Henry M. Wick, Jr., Esq.
1450 Two Chatham Center
Pittsburgh, Pennsylvania 15219

Mr. Gary P. Wallin
Crossett, Inc.
P.O. Box #946
Warren, Pennsylvania 16365

BEFORE

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF

CENTRAL TRANSPORT, INC.

DOCKET NO. A-00108155

REPLY TO EXCEPTIONS OF APPLICANT

ON BEHALF OF PROTESTANT

CROSSETT, INC.

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

Due Date: April 23, 1990.

BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF

CENTRAL TRANSPORT, INC.

DOCKET NO. A-00108155

REPLY TO EXCEPTIONS OF APPLICANT

ON BEHALF OF PROTESTANT

CROSSETT, INC.

Comes now, Crossett, Inc. (Crossett or the Protestant), by its attorneys, Johnson, Peterson, Tener & Anderson, Ronald W. Malin, Esq., of counsel, and respectfully replies to the Exceptions taken by Central Transport, Inc. (Central Transport or the Applicant) to the Initial Decision of Hon. Michael C. Schnierle, Administrative Law Judge (ALJ), dated March 5, 1990, served March 16, 1990, and revised by Supplemental Order issued March 29, 1990.

PRELIMINARY STATEMENT

By the Exceptions taken, the Applicant seeks to substantially broaden the grant of authority from that recommended in the Initial Decision of ALJ Schnierle, in that the Applicant now requests that its authority:

(1) Include Witco Corporation's Bradford facility as an origin;

(2) Include Calgon Corporation's Ellwood City facility as an origin; and

(3) Include inbound shipments for E.F. Houghton & Co. as to its Fogelsville facility.

The Applicant then further requested by its Exceptions taken that its proposed authority grant be further expanded to include all points in every County mentioned by a shipper, inbound and outbound, to all points in Pennsylvania.

Specifically, by the Exceptions taken, the Applicant now requests authority:

> To transport, as a Class D carrier, liquid property, in bulk, in tank vehicles, from point in the Counties of Allegheny, Beaver, Butler, Lawrence, Lehigh, McKean and Philadelphia, to points in Pennsylvania, and vice versa; subject to the following conditions:
>
> (1) Provided that no right, power or privilege is granted to transport aviation gasoline, butane, diesel fuel, fuel oil (grades 2, 4, 5 and 6), gasoline, kerosene, motor fuel, propane, turbo fuel, cryogenic liquids, dispersants and refrigerant gases, corn syrup and blends of corn syrup, honey, milk and milk products, molasses, sugar and sugar substitutes.
>
> (2) Provided that no right, power or privilege is granted to provide services from the facilities of Pennwalt Corporation, located in the City and County of Philadelphia, or in the County of Bucks, to points in Pennsylvania, and vice versa.

Thus, Central Transport, by its Exceptions taken, requests a substantial expansion of the authority recommended to be granted to it in the Initial Decision in the instant matter. Instead of

authority to serve seven (7) specific shippers as recommended in the Initial Decision, the Applicant now seeks broad territorial authority to serve anyone as to seven (7) Counties, inbound and outbound, from and to all points in Pennsylvania.

It is the respectful position of Crossett that the grant of authority to Central Transport, as recommended by ALJ Schnierle in the Initial Decision, should not be expanded.

REPLY ARGUMENT

In essence, by its Exceptions taken, Central Transport argues that the three (3) to two (2) Motion granted by the Pennsylvania Public Utility Commission (the Commission) in the Application of Blue Bird Coach Lines, Inc. (Docket No. A-00088807, F.2, Am-K, dated March 14, 1990) now requires all ALJ's to grant all applicants all authority sought whenever a shipper witness with traffic appears at a hearing in support of the application.

It is respectfully submitted that such is not the intent of the Commission. With or without the Kinard alternatives as to "a useful public purpose", it is and will remain the duty of the Commission (and most particularly, the ALJ's duty) to evaluate whether or not a shipper witness demonstrated a bona fide need for the transportation service proposed by an applicant. The three (3) to two (2) Motion granted by the Commission in the Application of Blue Bird Coach Lines, Inc. (supra) did not reject

part 1 of the burden of proof of an applicant (See Page 1 of the Motion Order) which requires that:

> 1. An applicant must demonstrate that a public demand or need exists for the proposed transportation service. (Emphasis Added).

Although ALJ Schnierle's language in the Initial Decision utilized the Kinard alternatives, it is clear that the Initial Decision thoughtfully evaluated the testimony of each shipper witness as to whether or not the witness demonstrated a need for Central Transport's proposed transportation service in light of all the circumstances. Such careful evaluation by ALJ Schnierle should not be overruled.

Looking, for example, at Witco Corporation's testimony (Exhibits 8-10, Transcript 146-162), it is respectfully submitted that the shipper witness, although he had traffic at Bradford (McKean County) and Petrolia (Butler County), did not demonstrate a need for Central Transport's proposed service as to its Bradford facility.

As to Witco at Bradford, Witco was already using, without complaint, eight existing carriers presently available and authorized. From Bradford, Witco tendered existing carriers the following loads for a three month period for Pennsylvania destinations: Crossett (327), Lease-way (194), George M. Maust (96), Chemical Leaman (47), Zappi (28), Matlack (14), Quality Carriers (2) and Oil Tank Lines (1), as well as utilizing private carriage (Exhibit 10; Transcript 155).

Crossett, which handled most of the Bradford loads, has vehi-

cles stationed right in Bradford, convenient to Witco's Bradford facility. Witco, of course, prefers a carrier to have equipment based close to its facility (Transcript 157). In fact, it can be reasonably concluded that Witco's support of Central Transport's instant application relates to Central Transport's terminal at Karns City being locally based as compared to Witco's facility located in Petrolia (Butler County), rather than a need for service from Central Transport at Witco's Bradford facility. The witness emphasized that Central Transport's Karns City terminal was only one mile from its Petrolia facility (Transcript 158). As to Bradford, Crossett is the carrier which is locally based.

As to Central Transport's proposed service at Bradford, such would be inferior to that of Crossett, as Central Transport's terminal and tank cleaning facilities are located at Karns City and a greater distance from Bradford as compared to those of Crossett.

Upon such circumstances, although ALJ Schnierle determined to grant authority as to Witco's Petrolia (Butler County) facility, he correctly decided to deny the application as to Witco's Bradford (McKean County) facility.

There simply was an insufficient demonstration of need for the Applicant's proposed service at Bradford (McKean County). See Page 121 of the Initial Decision, where it is stated:

> The situation at Witco's Bradford facility is somewhat different. The Bradford facility is served by eight common carriers. (Central Exhibit 10; N.T. 153-155). Moreover, one of those common carriers, Crossett, maintains a terminal in Bradford. (N.T. 453).

> There was no testimony that Witco's Bradford facility is undergoing any expansion which would substantially increase its need for transportation. . . . Finally, it is difficult to ascertain a need for an additional carrier to provide either more competition among the carriers for Witco's business or backup service. While the volume of shipments from Bradford is large (236 per month), Witco is already using eight different common carriers to meet its transportation needs from that location. . . .

It is respectfully submitted that even if one changes the standard from the Kinard alternatives as to a "useful public purpose" to one where an applicant must prove that a "need exists for its proposed transportation service", there is an insufficient demonstration of need for the proposed service of Central Transport as to Witco's Bradford facility.

Similarly, there is an insufficient demonstration of need for the proposed service of Central Transport as it pertains to Calgon Corporation, as found by ALJ Schnierle on Page 131 of the Initial Decision:

> Calgon testified that at the present time all of its shipments are being satisfactorily handled by Schneider. Calgon also acknowledged that Refiners, Chemical Leaman, and Matlack are all available to Calgon as backup carriers. (N.T. 327). . . . Calgon has available at least four intrastate common carriers. Calgon expressed dissatisfaction with neither the rates nor the service of presently authorized carriers. There is no evidence in the record on which to conclude that the injection of another carrier would improve the situation in any respect. As noted previously, a policy to favor increased competition is no substitute for substantial evidence in a particular case.

Similarly, there is an insufficient demonstration of need for the proposed service of Central Transport as it pertains to inbound traffic for E.F. Houghton & Co., as found by ALJ Schnierle

on Page 126 of the Initial Decision:

> The Folgelsville facility receives inbound products in the nature of chemicals, raw materials, and oil from Bradford, Oil City, Petrolia and Marcus Hook, all in Pennsylvania (N.T. 261). The witness did not detail the frequency of the inbound shipments. Inbound service is provided by Crossett and Oil Tank Lines. Houghton has no complaints about the service received from those carriers. (N.T. 263, 275-278). . . . Houghton's interest in Central appears to be primarily for outbound shipments. Houghton expressed no dissatisfaction with the service received from its existing carriers on inbound movements. Houghton expressed no particular intent to use Central on intrastate inbound movements. Accordingly, I find that Central has failed to establish a need for inbound service to Houghton's facility.

Therefore, changing the standard from evaluating "useful public purpose" under the Kinard alternatives to evaluating whether or not an applicant sustained its burden of proof that a "need exists for the (applicant's) proposed transportation service" pursuant to burden 1 contained in the Motion Order of the Application of Blue Bird Coach Lines, Inc. (supra) does not change the outcome in the instant matter.

It is respectfully submitted that the Applicant's Exceptions Numbers 1, 2 and 3 in its argument on Pages 3 through 5 of the Exceptions taken should be denied.

Nor should the grant of authority contained in the Initial Decision be expanded upon the Exception taken (Number 4 in the Applicant's argument) that countywide authority should automatically be issued to it in lieu of specific shipper facilities grants, citing the Decision in the Application of Diamond J Transport, Inc., Docket No. A-00107314 (Opinion and Order adopted Feb-

ruary 1, 1990, entered March 15, 1990).

It is respectfully submitted that in the Application of Diamond J Transport, Inc. (supra), the applicant had ten (10) shippers supporting two (2) Counties, or an average of five (5) shippers per County. It is no wonder that the Commission thought that countywide authority was appropriate in the Application of Diamond J Transport, Inc. (supra), matter.

Here, in the instant matter, there exists no geographic shipper saturation. In fact, recognizing that the Applicant sought statewide authority, the eight (8) shippers witnesses represented only isolated and non-representative support to the instant application. See Page 107 of the Initial Decision where ALJ Schnierle, as part of a detailed analysis of the situation, correctly concluded:

> In short, not only did Central make no attempt to meet its burden of demonstrating the representative nature of the supporting shippers, but, in fact, the overwhelming evidence of record indicates that those eight shippers are far from representative of any general need for the transportation of the commodities involved in this application between all points in Pennsylvania.

ALJ Schnierle was correct in treating each shipper witness independently and it is respectfully submitted that the Applicant's Exception Number 4 in its argument on Pages 5 through 6 of the Exceptions taken should be denied.

ADDITIONAL REPLY ARGUMENT

It is the position of Crossett that the Exceptions of Central Transport should be denied as previously argued herein.

However, in the unlikely event that the Commission determines that any of Central Transport's Exceptions have merit, before the Commission can consider broadening the proposed grant of authority, it will become necessary for the Commission to evaluate the potential adverse impact that such broadened authority would have upon the protestants.

ALJ Schnierle, as to the potential adverse impact on the protestants, limited his analysis to conform to the limited authority to be granted to the Applicant. ALJ Schnierle clearly and accurately stated on Page 151 of the Initial Decision that:

> Because I have determined that Central has failed to demonstrate a need for the statewide authority which it seeks, but only for a very limited portion of that authority, the potential adverse impact upon protestants must be analyzed in light of the limited grant of authority for which Central has demonstrated need. <u>If, upon review of this Initial Decision, the Commission decides to grant substantially broader authority, the following analysis will not be valid</u>. (Emphasis added).

In evaluating Crossett's traffic in jeopardy, ALJ Schnierle noted on Pages 154 through 155 of the Initial Decision that Crossett's traffic as to Witco at Bradford (McKean County), Pennzoil at Rouseville (Venango County) and inbound traffic for

E.F. Houghton (which includes traffic from McKean and Venango Counties) was substantially protected by the grant of authority to Central Transport as framed in the Initial Decision. Overall, the Initial Decision essentially granted no originating authority to Central Transport as to McKean, Warren or Venango Counties and therefore any substantial adverse impact upon Crossett's operations was unlikely.

Crossett, as demonstrated on the record, had one-third (1/3rd) of its Pennsylvania traffic in jeopardy as it pertains to the Applicant's authority request from the Counties of McKean, Warren and Venango.

See Page 60 of the Initial Decision which states:

> For the year ending December 31, 1988, Crossett had Pennsylvania intrastate operating revenues from traffic originating in the counties of McKean, Warren and Venango of $4,496,081.30. (N.T. 476; Crossett Exhibit 6). That figure includes revenue from transportation of products which Central has excluded from its application by restrictive amendment. (N.T. 476). For the year ending December 31, 1988, Crossett had revenues from Warren, McKean and Venango County for the transportation of products which Central is seeking to transport of $1,690,888.56. (Crossett Exhibit 7; N.T. 477-478, 486-488, 504-505). To the extent that Central, by this application, seeks to transport petroleum and petroleum products which are not excluded by restrictive amendment, between points in McKean, Venango and Warren Counties and from those counties to points in Pennsylvania, approximately one third of Crossett's Pennsylvania intrastate revenue is threatened by Central's application. (Emphasis added).

By Exceptions taken, Central Transport now seeks McKean County as an origin to all points in Pennsylvania, as well as authority from Warren and Venango Counties to the Counties of Allegheny,

Beaver, Butler, Lawrence, Lehigh, McKean and Philadelphia (under the vice versa request), and the grant of such authority to Central Transport would substantially adversely impact Crossett's operations.

Therefore, it is the respectful position of Crossett that in the unlikely event that the Exceptions taken by the Applicant are considered meritorious, the evidence of record still depicts that no additional authority should be granted to Central Transport to transport petroleum and petroleum products from points in the Counties of Warren, McKean and Venango to points in Pennsylvania beyond that recommended in the Initial Decision by ALJ Schnierle.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Initial Decision grant of authority by ALJ Schnierle should not be expanded and the Exceptions taken by Central Transport should be denied.

Dated: April 19th, 1990.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 1990, I served copies of the foregoing Reply to Exceptions of Applicant on Behalf of Protestant, Crossett, Inc., upon the following parties of record, by first-class mail, postage pre-paid:

Hon. Michael C. Schnierle
Administrative Law Judge
PA Public Utility Commission
Bureau of Transportation
P.O. Box #3265
Harrisburg, PA 17120

James W. Patterson, Esq.
Rubin, Quinn, Moss & Heaney
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

William A. Chesnutt, Esq.
100 Pine Street
P.O. Box #1166
Harrisburg, PA 17108

David H. Radcliff, Esq.
Graf, Andrews & Radcliff, P.C.
407 North Front Street
Harrisburg, PA 17101

William J. O'Kane, Esq.
Chemical Leaman Corporation
102 Pickering Way
Exton, PA 9341-0200

Henry M. Wick, Jr., Esq.
1450 Two Chatham Center
Pittsburgh, PA 15219

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

Mr. Gary P. Wallin
Crossett, Inc.
P.O. Box #946
Warren, PA 16365

Ronald W. Malin

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

ORIGINAL

McNEES, WALLACE & NURICK
ATTORNEYS AT LAW
100 PINE STREET
P. O. BOX 1166
HARRISBURG, PA. 17108-1166
TELEPHONE (717) 232-8000
FAX (717) 236-2665

April 20, 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

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 Reply Exceptions on Behalf of Applicant Central Transport, Inc. in the above-referenced proceeding.

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

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

Respectfully submitted,

McNEES, WALLACE & NURICK

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

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**REPLY TO PROTESTANTS' EXCEPTIONS
ON BEHALF OF APPLICANT
CENTRAL TRANSPORT, INC.**

Pursuant to 52 Pa. Code §5.535, applicant Central Transport, Inc., by its counsel McNees, Wallace & Nurick, respectfully replies to exceptions filed separately on behalf of protestants Crossett, Inc., Matlack, Inc., and Refiners Transport & Terminal Corporation.

**REPLY TO EXCEPTION OF PROTESTANT
CROSSETT, INC.**

1. The Judge, in his Initial Decision eliminated from a restrictive amendment agreed to by applicant, a preclusion against the transportation of asphalt. The Judge acted in the mistaken belief that asphalt is not a "liquid" bulk commodity. Applicant agrees with the argument made in the Exception of protestant Crossett, Inc. that asphalt may indeed move in liquid form. Accordingly, applicant has no objection to the reintroduction of the term "asphalt" into paragraph (1) of the conditions attached to the amended scope of authority requested (see Applicant's Exceptions at p. 5).

**REPLY TO EXCEPTIONS OF PROTESTANT
MATLACK, INC.**

2. As a preliminary observation, applicant notes that the pleading of Matlack fails to comply with the requirement of 52 Pa. Code §5.533(b) that

"Exceptions...identify the finding of fact or conclusion of law to which exception is taken...." For example, Matlack does not take specific issue with the Judge's conclusion of law numbered 4: "The record does not demonstrate that Central lacks a propensity to operate safely and legally" (I.D., p. 162).* Instead, the Matlack pleading notes "that the Decision misses the mark when it...fails to conclude that Central lacks the propensity to operate legally and safely" (Matlack Exceptions, p. 4). The issue is not whether Matlack believes the Judge should have reached a conclusion one way or the other, but rather whether "the record demonstrates that the applicant lacks a propensity to operate safely and legally". See 52 Pa. Code §41.14(b) (emphasis added). Nowhere in the 12-page pleading of Matlack is there any reference to the portions of the evidentiary record at which it is claimed there is a demonstration that "applicant lacks a propensity to operate safely and legally".

3. It is not clear precisely what point protestant Matlack is making when it argues as follows:

> Withholding authority as a result of violations of a number of varieties has been a consistently applied regulatory technique; that it has some punitive overtones has never before caused this Commission to become bashful.
>
> (Matlack Exceptions, p. 6)

The foregoing quote appears following Matlack's statement that it disagrees with the Judge's expressed concern that utilizing "past violations as a bar

*"I.D." is an abbreviation for Initial Decision.

to authorization would result in the fitness criteria being used as a punitive measure rather than as a safeguard" (see Matlack Exceptions, p. 6).

If Matlack's use of the phrase "punitive overtones [have] never before caused this Commission to become bashful" is intended to suggest that there is no Commission or court precedent on the issue of the punitive aspects of denials based on fitness, protestant Matlack is just plain wrong. As the Judge himself noted, the most recent Pennsylvania Supreme Court decision involving fitness stated that "unlawful activities" should not automatically disqualify an applicant from obtaining authority because such a result would constitute a "punitive measure directed against the individual wrongdoer...." (see I.D., p. 143). Moreover, the Commission itself, in an exhaustive discussion of fitness issues in Application of Friedman's Express, Inc., Docket Nos. A-00024369, F.9, Am-B, F.10, Am-I (Order entered August 17, 1989), cited with approval its decision in Re: Perry Hassman, 55 Pa.PUC 661 (1982) as follows:

> Propensity to operate safely and legally -- in this regard, lack of fitness is demonstrated by persistent disregard for, flouting, or defiance of the public utility law and the Commission's order and regulations...; and by violations in matters affecting the safety of operations...

4. The record in this matter is completely devoid of any showing of disregard, flouting or defiance by applicant Central of the Pennsylvania Public Utility Law or any Commission order or regulation. Instead of concerning itself with public utility law, orders and regulations of this Commission and "violations in matters affecting the safety of operations",

Matlack wanders far afield in its exceptions to raise issues concerning occupational safety and health administration matters involving Central's terminals in Charlotte, North Carolina and Greenville, South Carolina (see Matlack Exceptions, pp. 4-8). Despite Matlack's false statements that "applicant has been guilty of...employee safety violations", the record evidence in this proceeding reflects that no such violations have been established (see Matlack Exh. 3, sheet 11, sheet 26). Moreover, the evidence produced by Matlack itself demonstrates that the OSHA Division of the South Carolina Department of Labor concluded that "in the last five years [Central] has had one inspection with no serious violations [and] has demonstrated its good faith by abating all items while under protest..." (Matlack Exh. 3, sheet 25).

5. Clearly, the Commission has recognized that its concern for the fitness of an applicant should be forward looking, rather than retrospective, in nature. The Judge has appropriately implemented that concept by requiring--as a condition precedent to issuance of a certificate of public convenience--certification to the Bureau of Safety and Compliance of this Commission, that respiratory protection and confined space entry programs have been instituted at Central's Karns City, Pennsylvania tank-cleaning facility in accordance with federal regulations. This is precisely the type of "safeguard [for] the protection of the public" that the Supreme Court had in mind in the decision of Brinks, Inc. v. Pa. Public Utility Commission, 500 Pa. 387, 392, fn.3, 456 A.2d 1342, 1344, fn.3 (1983).

REPLY TO EXCEPTIONS OF PROTESTANT
REFINERS TRANSPORT & TERMINAL CORPORATION

6. Refiners Transport identifies six specific exceptions to the Initial Decision. All of those exceptions, other than enumerated exceptions 2 and 6, are based on a contention that applicant has failed to sustain a burden of demonstrating that a grant of authority would "serve a useful public purpose" (see Refiners Exceptions, pp. 1-2). The contentions of Refiners Transport in this regard place heavy emphasis on the so-called Kinard alternative criteria (Refiners Exceptions, pp. 3-8).

7. In light of recent developments at the Commission, Refiners Transport's reliance on the Commission's decision in Richard L. Kinard, Inc., 58 Pa.PUC 548 (1984), is misplaced. Throughout the Initial Decision, the Judge did indeed apply the bifurcated analysis approved in the Kinard decision, which distinguishes between "public need" and "useful public purpose". Refiners Transport contends that the Judge did not apply those criteria well (see Refiners Transport Exceptions, p. 3). The arguments of Refiners Transport in regard to the Kinard criteria have no present validity in light of the motion of Chairman Bill Shane adopted by a three-to-two vote of the Commission at Public Session held March 15, 1990 with respect to the Application of Blue Bird Coach Lines, Inc., Docket No. A-00088807, F.2, Am-K. For convenient reference, a copy of that motion is attached to this pleading as Appendix A.

8. The crucial holding by the Commission in the decision soon to be issued in Application of Blue Bird is unequivocally stated in the motion of Chairman Shane as follows:

> [W]ith shipper support, an Applicant meets its entire burden under 41.14(a) of demonstrating that a 'useful public purpose responsive to a public demand or need' exists for its transportation service. To require an additional showing of 'useful public purpose' by way of 'alternatives to inadequacy' is redundant.
>
> (Appendix A, p. 2)

The motion of Chairman Shane goes on to state that the Commission will "adopt the decision in Application of Blue Bird Coach Lines, Inc. as its definitive interpretation of 52 Pa. Code §41.14(a)." Id.

9. The Commission has already begun to implement the definitive interpretation adopted in Blue Bird. (See the Motions from Public Meetings of April 12 and 19, 1990, attached hereto as Appendix B). The Blue Bird decision therefore requires that the exceptions of Refiners Transport enumerated 1, 3, 4 and 5, be denied. Refiners Transport takes no issue with the Judge's findings that a need for Central's service has been established in this evidentiary record: "the Judge first determined that public need was shown by each of the shippers...." (Refiners Transport Exceptions, p. 3).

10. Exceptions Nos. 2 and 6 of Refiners Transport are also without merit. In those two exceptions, Refiners Transport quarrels with the Judge's conclusion that the operations of Refiners in particular, and protestants in general, would not be impaired by the grant of limited authority awarded to applicant Central (see Refiners Transport Exceptions, pp. 1, 2, 8-12). Protestant emphasizes that applicant "is in a position to divert traffic from Refiners and will do so if a grant is made", and that

there will be "an immediate and adverse affect [sic] on Refiners" (Refiners Transport Exceptions, p. 10). Neither of these arguments, even if valid, would support the contention of Refiners Transport that protestants in general would be endangered by a grant of this application (see Exception No. 2 at Refiners Transport Exceptions, p. 1).

11. Refiners Transport's arguments concerning harm to itself are focused on diversion of traffic from Refiners. In this regard, the Commission has held that "the mere diversion of traffic volume is not sufficient to satisfy the burden under subsection 41.14(c)" Application of Amram Enterprises, Ltd., Docket No. A-330237 (Opinion and Order of the Commission entered February 25, 1985), at p. 8. The Commission went on to state in Amram, at page 8:

> We are of the opinion that injury to existing carriers through competition becomes relevant only when there is corresponding injury to the public.

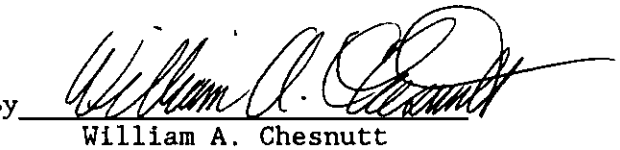
No such showing has been made on this record.

CONCLUSION

WHEREFORE, applicant Central Transport urges that the Exceptions of the three protesting carriers be denied, and that the amended authority requested in applicant's Exceptions be granted.

Respectfully submitted,

McNEES, WALLACE & NURICK

By 

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

Counsel for Applicant
Central Transport, Inc.

Dated: April 20, 1990

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Application of Blue Bird Coach Lines, Inc.

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

MOTION OF CHAIRMAN BILL SHANE

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

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

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

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

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

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

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

THEREFORE, I MOVE:

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

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

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

4. That the Law Bureau prepare the appropriate Order.

Bill Shane

BILL SHANE
Chairman

Dated: 3/14/90

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

PENNSYLVANIA PUBLIC UTILITY COMMISISON
Harrisburg, PA 17120

Application of J.E.T. Enterprises, Inc., t/d/b/a Londonderry Limousines, Ltd.

Public Meeting April 12, 1990
APR-90-ALJ-43*
Docket No. A-108299

MOTION OF CHAIRMAN BILL SHANE

At Public Meeting of March 15, 1990 in the case of Application of Blue Bird Coach Lines, Inc., (A-00088807, F.2, Am-K), the Commission adopted a new definitive interpretation of Section 41.14(a) of its Transportation Regulatory Policy. This interpretation replaces that adopted by the Commission in Re Richard L. Kinard, Inc., 58 Pa. P.U.C. 548(1984), and would no longer require an applicant for motor common carrier authority to demonstrate that "alternatives to inadequacy" exist for its transportation service. The Blue Bird interpretation of Section 41.14(a) stands for the proposition that an applicant can prove that a "useful public purpose responsive to a public demand or need" exists for its transportation service by producing appropriate shipper support for the area it proposes to serve.

THEREFORE, I MOVE:

1. That the discussion in this proceeding be revised consistent with the decision in Application of Blue Bird Coach Lines, Inc., (A-00088807, F.2, Am-K).

2. That OSA prepare the appropriate Order.

Bill Shane

BILL SHANE
Chairman

Dated: 4/11/90

PENNSYLVANIA PUBLIC UTILITY COMMISISON
Harrisburg, PA 17120

Application of Bulkmatic Transport Company

Public Meeting: April 19, 1990
APR-90-ALJ-47*
Docket No. A-00103077,F.1, Am-F

MOTION OF CHAIRMAN BILL SHANE

At Public Meeting of March 15, 1990 in the case of Application of Blue Bird Coach Lines, Inc., (A-00088807, F.2, Am-K), the Commission adopted a new definitive interpretation of Section 41.14(a) of its Transportation Regulatory Policy. This interpretation replaces that adopted by the Commission in Re Richard L. Kinard, Inc., 58 Pa. P.U.C. 548(1984), and would no longer require an applicant for motor common carrier authority to demonstrate that "alternatives to inadequacy" exist for its transportation service. The Blue Bird interpretation of Section 41.14(a) stands for the proposition that an applicant can prove that a "useful public purpose responsive to a public demand or need" exists for its transportation service by producing appropriate shipper support for the area it proposes to serve.

THEREFORE, I MOVE:

1. That the discussion in this proceeding be revised consistent with the decision in Application of Blue Bird Coach Lines, Inc., (A-00088807, F.2, Am-K).

2. That Law Bureau prepare the appropriate Order.

Bill Shane
BILL SHANE
Chairman

Dated: 4/17/90

CERTIFICATE OF SERVICE

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

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

James W. Patterson, Esquire
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

Kenneth A. Olsen, Esquire
P. O. Box 357
Gladstone, NJ 07934-0357

Henry M. Wick, Jr., Esquire
1450 Two Chatham Center
Pittsburgh, PA 15219

Ronald W. Malin, Esquire
P. O. Box 1379
Key Bank Building, Fourth Floor
Jamestown, NY 14702-1379

David H. Radcliff, Esquire
407 North Front Street
Harrisburg, PA 17101

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

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

Counsel for Applicant
Central Transport, Inc.

Dated this 20th day of April, 1990, at Harrisburg, Pennsylvania.

RUBIN QUINN MOSS & HEANEY
ATTORNEYS AT LAW
1800 PENN MUTUAL TOWER
510 WALNUT STREET
PHILADELPHIA, PA 19106-3619
(215) 925-8300
DIRECT DIAL NUMBER
FAX:(215) 925-1572
931-0692

ALEXANDER N. RUBIN, JR.
JERROLD V. MOSS
JAMES W. PATTERSON
DANIEL B. PIERSON, V.
ALAN KAHN
WILLIAM D. PARRY
ROBERT SZWAJKOS
JOHN R. KENNEL, II
ERIC M. HOCKY
JOSEPH F. MESSINA
LESLIE BETH BASKIN
CHRISTOPHER C. CARR
JOAN F. JAFFE
VICKIE E. LeDUC
HOWARD H. SOFFER
PATRICIA H. PASIC
WILLIAM P. QUINN
TERENCE K. HEANEY
MALCOLM L. LAZIN
DENIS JAMES LAWLER
ROBERT P. STYLE
G. BRADLEY RAINER
DON P. FOSTER
MARY ELLEN O'LAUGHLIN
EDWARD L. CIEMNIECKI
MICHAEL D. BUTLER
PETER C. CILIO
RICHARD A. FRANKLIN
ELLEN B. JUCKETT
CHERYL GALLAGHER-CARNEY
JANET I. MOORE
JEFFREY P. BATES

KING OF PRUSSIA OFFICE
216 GODDARD BOULEVARD
GENERAL WASHINGTON BUILDING
KING OF PRUSSIA, PA 19406
(215) 337-4080

JENKINTOWN OFFICE
SUITE 421
BENJAMIN FOX PAVILION
JENKINTOWN, PA 19046
(215) 884-4600

OF COUNSEL
ROBERT B. EINHORN

COFF & RUBIN

ORIGINAL

RECEIVED
APR 23 1990
SECRETARY'S OFFICE
Public Utility Commission

April 23, 1990

FEDERAL EXPRESS AIRBILL #5175152065

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 Reply of Matlack, Inc. to Exceptions, filed in the above-captioned matter.

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

Very truly yours,

JAMES W. PATTERSON

JWP/jal
enclosures

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

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF MATLACK, INC. TO EXCEPTIONS OF CENTRAL TRANSPORT, INC.

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

Of Counsel:

RUBIN QUINN MOSS & HEANEY
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106
(215) 925-8300

BRIEFS\CENTRAL.REP-042390-jal

Before The

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF MATLACK, INC. TO EXCEPTIONS OF CENTRAL TRANSPORT, INC.

COMES NOW, Matlack, Inc. ("Matlack") and, through its attorneys, files this Reply to the Exceptions submitted by Central Transport, Inc. ("Central" or "Applicant") in the above-captioned proceeding.

I. STATEMENT OF THE CASE

By Initial Decision ("Decision") served March 16, 1990 Administrative Law Judge Michael C. Schnierle granted Central a portion of the authority sought in this proceeding. Exceptions to the Decision were filed by Matlack and Central as well as by Protestants Refiners Transport & Terminal Corporation ("Refiners") and Crossett, Inc. ("Crossett").

This Reply is directed to the Exceptions of Applicant, Central Transport, Inc.

II. POSITION OF APPLICANT ON EXCEPTIONS

Central does not contend that the Decision errs in granting less than the full scope of the authority requested in this proceeding. Rather, Central asserts that the authority granted to it should be expanded inasmuch as it has satisfied its

burden of proof as to a need for liquid bulk transportation from points in the counties of Allegheny, Beaver, Butler, Lawrence, Lehigh, McKean and Philadelphia, to points in Pennsylvania, and vice versa.

Central's position is based entirely upon 1./ a Motion made by Chairman Shane at the Commission's public meeting of March 15, 1990 in Application of Blue Bird Coach Lines, Inc., Docket No. A-88807, F.2, Am-K and 2./ the Commission's Opinion and Order entered March 15, 1990 in Application of Diamond J. Transport, Inc., Docket No. A-107314.

III. REPLY

Through its Exceptions Central seeks an expansion of the authority granted by the Decision. In connection therewith, Central claims that, in addition to the authority granted, it has established a need for service 1. from the facilities of Witco Corporation ("Witco") in Bradford, McKean County, to points in Pennsylvania; 2. from the facilities of Calgon Corporation ("Calgon") in Ellwood City, Beaver and Lawrence Counties, to points in Pennsylvania; and 3. from points in Pennsylvania to the facilities of E.F. Houghton & Co. ("Houghton") in the Township of Upper Macungie, Lehigh County. (Central Exceptions, pp. 3-5). Moreover, Central requests that the authority be expanded from one authorizing service to and from specifically identified facilities to authority permitting the transportation of liquid property, in bulk in tank type vehicles, to and from the entire counties in which the identified facilities are situated.

Central's justification for granting additional authority to serve Witco, Calgon and E.F. Houghton is that the Decision improperly applied the "alternatives to inadequacy" test set forth in Re Richard L. Kinard, Inc., 58 Pa. PUC 548 (1984). Central asserts that the Kinard decision has been repudiated as a result of the Motion of Chairman Bill Shane in the Blue Bird proceeding and that it was improper for the Decision to impose upon Central the additional burden of establishing that approval of its application will serve a useful public purpose. (Central Exceptions, pp. 1-2).

The Motion relied upon by Central is not law. It is no more than an expression by the Chairman of the Commission of his intention to interpret 52 Pa. Code §41.14(a) in a particular manner. Chairman Shane's Motion gives no indication as to the type and degree of shipper support that the Commission will require in order for an applicant to satisfy the Section 41.14(a) burden. Until the "definitive interpretation" is issued by the Commission in the Blue Bird proceeding, the parties in this proceeding have no option but to abide by the guidelines set forth in past Commission decisions dealing with the issue of need for service. Under those guidelines, the Administrative Law Judge properly limited the authority granted to Central. Whether Blue Bird will become the law and precisely what it will mean to certification proceedings will not be known for some time. It certainly cannot be relied upon as policy or precedent before an Order is issued.

Even assuming that no consideration is to be given to the

"useful public purpose" standard and the Kinard alternatives to inadequacy, Central has nevertheless failed to establish the existence of a need for the additional service it seeks through its Exceptions. An applicant must do more than prove its fitness willingness and ability and, through shipper testimony, prove that there is freight moving from point to point in Pennsyvlania. To reach a prima facie establishment of need for service a supporting shipper must do more than testify that it has traffic moving between points in Pennsylvania. A shipper must also establish that it has a need for additional motor carrier service to transport that traffic. An example or two will illustrate the point.

Assume shipper testimony in support of an application which establishes that 1. the shipper operates its own fleet of equipment that is employed to handle all of the traffic the shipper has moving in intrastate commerce and 2. the shipper intends to continue its private carriage operation for the foreseeable future. Clearly, this shipper requires transportation between points in Pennsylvania. Just as clearly, this shipper has no "need" for the carrier service proposed by the applicant.

Similarly, assume testimony from a shipper witness that although his company ships freight moving in Pennsylvania intrastate commerce, numerous carriers are available to handle that traffic, many of whom have never been utilized because the carriers used have met all of the shipper's transportation needs. This testimony cannot be twisted to become evidence of need for the additional service proposed by the applicant. Any lesser standard

would fail to address the obvious. The statute is intended to limit entry not to encourage it. Entry regulation, although capable of wide swings of interpretation, cannot be sensibly thought of as a device to increase competition.

In considering the evidence presented by the witnesses from Witco, Calgon and Houghton, a straightforward need analysis - without reference to the Kinard alternatives - forces the conclusion that no need exists for the additional authority sought by Central's Exceptions. Traffic originating at Witco's Bradford facility is handled either in Witco's own vehicles, via customer pickup or by one of the eight (8) intrastate common carriers authorized to serve that facility. (Central Exhibit 10; T. 153-155). There was not a scintilla of evidence that Witco was unable to obtain all of the service it needs. In fact, Witco's Bradford facility has so many sources of transportation available to it that the Decision found it "difficult to ascertain a need for an additional carrier to provide either more competition among the carriers for Witco's business or backup service." (Initial Decision, p. 121).

A similar situation exists with respect to the intrastate transportation requirements of Calgon. All of Calgon's intrastate traffic is being handled by Schneider National Bulk Carriers, Inc. Schneider's service has been so satisfactory that Calgon has not been utilizing the three (3) other carriers already available to it - Matlack, Chemical Leaman and Refiners. (T. 327-330). Moreover, Calgon supported Central solely in order to obtain the

availability of yet another backup carrier; no testimony was offered that Central would obtain any of Calgon's traffic if this application is approved.

The third shipper in question, Houghton, does have traffic moving inbound to its Fogelsville facility from points within Pennsylvania, as asserted by Central. The Decision was fully justified, however, in finding that "(t)he record contains no evidence of a need for intrastate inbound shipments received at the Fogelsville facility." (Initial Decision, p. 90). The Houghton witness offered no testimony regarding the volume of its inbound traffic and indicated satisfaction with the service received from its existing carriers. (T. 263, 275-278). More importantly, Houghton failed to indicate any intention to utilize the service proposed by Central for the handling of inbound shipments.

The evidence detailed above reflects an absence of any need for additional motor carrier service. There is no basis upon which to grant the additional authority requested by Central's Exceptions.

Central's request to expand the authority from one permitting service to and/or from certain specified facilities to one allowing service to and from entire counties must also be denied.

This latter request is based entirely upon the Diamond J. decision. That decision is clearly distinguishable from the instant proceeding.

In Diamond J. the Administrative Law Judge granted the applicant authority to provide heavy hauling service for ten (10) named shippers from points in Allegheny and Westmoreland Counties to points in Pennsylvania, and vice versa. The Commission, citing its prior decision in Rule Against W.J. Dillner Transfer Co., 30 Pa. PUC 365 (1952), modified the Judge's Initial Decision and held that since heavy hauling is a specialized service requiring specialized equipment it was appropriate to expand the specific shipper authority to one authorizing service to and from all points in Allegheny and Westmoreland Counties.

Although transportation of liquid commodities in bulk in tank vehicles is a specialized service, it does not justify the expansion of authority sought by Central. Unlike the situation presented in Diamond J. - where ten (10) shippers were situated in two counties - there is no concentration of shippers in this proceeding. Assuming, arguendo, that the Commission agrees with Central and authorizes the additional service for Witco, Calgon and Houghton sought by Central's Exceptions, the shipping points of the supporting shippers, by county, is as follows: Butler County - 2; Philadelphia County - 3; Beaver County - 2; Lehigh County - 1; Allegheny County - 1; McKean County - 1; and Lawrence County - 1.

Having one, two or three shipping points in a particular county, particularly counties having the substantial numbers of shippers as those involved herein, is a far cry from the ten (10) shippers considered by the Commission in Diamond J. It falls far short of justifying a grant of the county-wide authority sought by Central. Central's Exceptions must be denied in their entirety.

WHEREFORE, Matlack, Inc. prays denial of the Exceptions of Central Transport, Inc. and further prays the grant of its Exceptions.

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 Reply of Matlack, Inc. to Exceptions of Central Transport, Inc., were served as follows this 23rd day of April, 1990, in the following manner:

By overnight express package delivery service to

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120
(Original and 9 copies)

By postage prepaid first class mail to

William A. Chesnutt, Esquire
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108

Ronald Malin, Esquire
Johnson Peterson Tener & Anderson
Key Bank Bldg., 4th Floor
Jamestown, NY 14701

Henry Wick, Jr., Esquire
Wick Streiff Meyer Metz and O'Boyle
1450 Two Chatham Center
Pittsburgh, PA 15219

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

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

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

LAW OFFICES

WICK, STREIFF, MEYER, METZ & O'BOYLE

1450 TWO CHATHAM CENTER

PITTSBURGH, PA 15219-3427

(412) 765-1600

HENRY M. WICK, JR.
CHARLES J. STREIFF
CARL F. MEYER
LeROY L. METZ, II
DAVID M. O'BOYLE
VINCENT P. SZELIGO
LUCILLE N. WICK
PATRICIA LIPTAK-McGRAIL
WILLIAM H. HUMPHRIES, III
KATHRYN KNEE

ARTHUR J. DISKIN
SENIOR COUNSEL

TELECOPIER
(412) 261-3783

April 23, 1990

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

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

Dear Mr. Rich:

We enclose the original and nine copies of Reply of Refiners Transport & Terminal Corporation, Protestant, to the Exceptions filed by Applicant, Central Transport, Inc. Copies have been served upon all parties of record.

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

Sincerely yours,

WICK, STREIFF, MEYER,
METZ & O'BOYLE

Henry M. Wick, Jr.

HMW/mem/4884w
Enclosure

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF CENTRAL TRANSPORT, INC.

DOCKET NO. A-00108155

REPLY OF REFINERS TRANSPORT & TERMINAL CORPORATION, PROTESTANT, TO THE EXCEPTIONS OF CENTRAL TRANSPORT, INC.

I. STATEMENT OF THE CASE

Applicant, Central Transport, Inc. (Central or Applicant) has filed an Exception to the initial decision of the administrative Law Judge seeking to have the grant of authority greatly enlarged. Instead of the specific shipper grants proposed by the Judge, Applicant argues that its proof entitles it to countywide authority from the industrial counties of Allegheny, Beaver, Butler, Lawrence, Lehigh, McKean and Philadelphia, to points in Pennsylvania, and vice versa. In support of this approach, the Applicant contends that the "re-framing" of the shipper specific grant of authority used by the Judge is "dictated" by the Commission's recent decision in application of Diamond J. Transport, Inc. (Diamond J.) at Docket No. A-00107314 (Opinion and Order adopted February 1, 1990 entered March 15, 1990).

The Applicant also contends that any limitation on the grant is forbidden by the Motion adopted March 15, 1990 and the "anticipated decision" in Application of Blue Bird Coach Lines, Inc. at Docket No. A-00088807, F.2, Am-K.

Protestant, Refiners Transport & Terminal Corporation (Refiners or Protestant) submits that the Motion adopted in Blue Bird does not reach the result for which Applicant contends; further, the decision in Diamond J. does not support Applicant's contention that it is entitled to broad countywide authority.

II. ARGUMENT IN SUPPORT OF REPLY

1. The Decision in Diamond J. Transport, Inc. does not Support Applicant's Position.

Applicant contends that it is entitled to secure authority on a statewide basis to and from every county which a witness mentioned in testimony. For example, Applicant contends (page 5 of Exceptions) that it is entitled to countywide authority to and from the most populated and highly industrialized counties in the state (Allegheny and Philadelphia) as well as the major counties of Beaver, Butler, Lawrence, Lehigh and McKean, based upon the testimony of a total of 8 witnesses. The decision in Diamond J. does not provide support for that expansive grant.

In Diamond J., the application, as amended, sought "heavy hauling" authority.

The Commission commented specifically in the Diamond J. case (pages 9 and 10 of decision) that it has followed a policy of granting wide geographical rights to carriers in the "heavy hauling" field, since these commodities do not move with regularity or frequency between specific points. Based upon that policy and the fact that Applicant presented 10 witnesses, the Commission granted heavy hauling authority from points in the counties of Allegheny and Westmoreland to points in Pennsylvania and vice versa.

The factual situation is completely different as the transportation of liquid bulk commodities between points in Pennsylvania. The uncontradicted testimony of Protestant Refiners show that it serves approximately 150 shippers on an intrastate basis in Pennsylvania, hauling commodities involved in the application. Major shippers include Ashland Oil, British Petroleum, Boler Petroleum, Exxon Company, Quaker Chemical, Quaker State Oil Refining, Texaco, Sun Oil and Union Chemical (536-538)*. The Judge referred to this testimony of Refiners and commented on the limited testimony offered in support of the application (pages 66 and 118 of initial decision), in finding that Applicant failed to show a need for statewide authority.

The Commission in Diamond J. (page 8 of slip opinion) was careful to emphasize that the Applicant seeking a certificate has the burden of proof, and that any decision of the Commission must be supported by substantial evidence. The Commission said (page 8 of slip opinion):

> We recognize in order to determine whether or not a party has satisfied its burden of proof, it is incumbent upon us to ensure that our decision is supported by substantial evidence in the record (Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704). We hasten to point out that the term "substantial evidence" has been defined by the Pennsylvania Supreme, Superior, and Commonwealth Courts as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. P.U.C., 489 Pa. 413 A.2d 1027 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and Murphy v. Com., Dept. of Public Welfare, White Haven Center, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

* Numbers in parenthesis refer to pages of the transcript of testimony.

The sparse and fragmentary evidence presented by Applicant does not constitute "substantial evidence" which would support a grant on a statewide basis to and from the counties named by Applicant. Applicant had three shippers from the industrialized Philadelphia area - McCloskey Corporation, Harry Miller Corporation and Para-Chem Southern. The Judge held that McCloskey had only three intrastate shipments per month; that Harry Miller Corporation had three intrastate shipments and that Para-Chem Southern had 9 intrastate shipments per month (pp 90-91 of initial decision). Three small shippers do not provide support for statewide liquid bulk authority from and to Philadelphia County. One shipper, Houghton, had 8 intrastate shipments per month fron Lehigh County; Calgon Corporation has one facility in Ellwood City (presumably Lawrence county) Valspar has a facility in Rochester, Beaver County and one in Pittsburgh, Allegheny County; (page 92 of initial decision); Pennzoil has a facility in Butler County and one in Venango County, while Witco has a facility in Butler County and one in McKean County (pp 88-90 of initial decision). In contrast, in Diamond J., the Applicant presented 10 witnesses having traffic from points in Allegheny and Westmoreland Counties.

Protestant Refiners submits that this evidence does not support Applicant's claim for a grant from seven counties to all points in Pennsylvania, and vice versa.

2. The Commission's Motion in the Blue Bird Coach Lines Case Does Not Entitle Applicant to The Grant Of Authority It Now Seeks.

Applicant has attached to its Exceptions a Motion of the Chairman adopted by 3 - 2 vote March 15, 1990 in the Blue Bird Coach Lines case. The Motion appears to state that shipper support can satisfy the "useful public purpose" test and that there is no requirement to show alternatives to inadequacy.

The document attached as Appendix A to the Applicant's Exceptions is a copy of the Motion, but that Motion includes a direction to the Law Bureau to prepare an appropriate Order. Until that Order is adopted and entered on the Commission's Records, discussion of its precedential value is speculative. If the Commission does elect to change its policy retroactively, Protestants may be entitled to seek rehearing in order to satisfy due process requirements.

In any event, any decision of the Commission must meet the substantial evidence test, and authority can be granted only to the extent of the proof. Simply stated, the Applicant has not presented substantial evidence to support the grant of authority for which it argues in its Exceptions. Significantly, Chairman Shane has recognized in his later Motion in the Application of Bulkmatic Transport Company (Docket No. A.00103077, F.1, Am-F) at the public meeting of April 19, 1990, that an Applicant must still produce appropriate shipper support for the area it proposes to serve.

III. CONCLUSION

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

Respectfully submitted

Henry M. Wick, Jr.
Lucille N. Wick
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600
Attorneys for Protestant
Refiners Transport &
Terminal Corporation

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing pleading has been served upon counsel of record, by first-class, U.S. Mail, postage prepaid, this 23rd day of April, 1990:

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

James W. Patterson, Esquire
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

Kenneth A. Olsen, Esquire
P. O. Box 857
Gladstone, NJ 07934-0357

William A. Chesnutt, Esquire
P. O. Box 1166
Harrisburg, PA 17108-1166

Ronald W. Malin, Esquire
P. O. Box 1379
Key Bank Building, Fourth Floor
Jamestown, NY 14702-1379

David H. Radcliff, Esquire
407 North Front Street
Harrisburg, PA 17101

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

Henry M. Wick, Jr.

ORIGINAL

RUBIN QUINN MOSS & HEANEY

ATTORNEYS AT LAW

1800 PENN MUTUAL TOWER

510 WALNUT STREET

PHILADELPHIA, PA 19106-3619

(215) 925-8300

DIRECT DIAL NUMBER

FAX:(215) 925-1572

(215) 931-0604

ALEXANDER N. RUBIN, JR.
JERROLD V. MOSS
JAMES W. PATTERSON
DANIEL B. PIERSON, V.
ALAN KAHN
WILLIAM D. PARRY
ROBERT SZWAJKOS
JOHN R. KENNEL, II
ERIC M. HOCKY
JOSEPH F. MESSINA
LESLIE BETH BASKIN
CHRISTOPHER C. CARR
JOAN F. JAFFE
VICKIE E. LeDUC
HOWARD H. SOFFER
PATRICIA H. PASIC

WILLIAM P. QUINN
TERENCE K. HEANEY
MALCOLM L. LAZIN
DENIS JAMES LAWLER
ROBERT P. STYLE
G. BRADLEY RAINER
DON P. FOSTER
MARY ELLEN O'LAUGHLIN
EDWARD L. CIEMNIECKI
MICHAEL D. BUTLER
PETER C. CILIO
RICHARD A. FRANKLIN
ELLEN B. JUCKETT
CHERYL GALLAGHER-CARNEY
JANET I. MOORE
JEFFREY P. BATES

KING OF PRUSSIA OFFICE
216 GODDARD BOULEVARD
GENERAL WASHINGTON BUILDING
KING OF PRUSSIA, PA 19406
(215) 337-4080

JENKINTOWN OFFICE
SUITE 421
BENJAMIN FOX PAVILION
JENKINTOWN, PA 19046
(215) 884-4600

OF COUNSEL
ROBERT B. EINHORN

GOFF & RUBIN

May 29, 1990

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 two (2) copies of the Petition to Reopen Record filed by Matlack, Inc. in the above-captioned proceeding.

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

Very truly yours,

JAMES W. PATTERSON

JWP/jal
enclosure

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

ORIGINAL

PUC\MATLACK.PET-052990jal

Before The

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

PETITION TO REOPEN RECORD

COMES NOW, Matlack, Inc. ("Matlack") and, through its attorneys and pursuant to 52 Pa. Code §5.571 files this Petition to Reopen the record in the above-captioned proceeding.

I. STATEMENT OF THE CASE

By application published in the Pennsylvania Bulletin on June 11, 1988, Central Transport, Inc. ("Central" or "Applicant") requested common carrier authority to transport property in bulk, in tank and hopper-type vehicles, between points in Pennsylvania.

Numerous protests were filed in opposition to the application. In response, Central amended its application so as to eliminate the transportation of certain specified commodities. Six protestants remained active in opposing the grant of authority, even as amended.

Nine (9) hearings were held before Administrative Law Judge Michael Schnierle. At the hearings two company witnesses and eight public witnesses testified in support of Central's application. A witness for each protestant appeared and testified in opposition to the relief sought.

In accordance with Judge Schnierle's instructions regarding the sequential filings of briefs, Central filed a Main Brief. Responding Briefs were filed by four (4) of the remaining six (6) protestants.

By Initial Decision dated March 5, 1990, Judge Schnierle granted Central authority to serve seven (7) of Central's eight (8) supporting shippers to and/or from certain specifically-identified facilities.

Exceptions and Replies to Exceptions were filed by Central and by Matlack, Crossett, Inc. and Refiners Transport & Terminal Corp. No order has been adopted or entered by the Commission.

This Petition seeks a reopening of the record in this matter to allow for the introduction of recently discovered evidence material to a determination of Central's technical and regulatory fitness.

II. APPLICABLE REGULATIONS

Petitions to Reopen are governed by 52 Pa. Code §5.571 which, in relevant part, provides that

> (b) A petition to reopen shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.
>
> (d) . . . the Commission, upon notice to the participants, may reopen the proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

III. FACTS CONSTITUTING GROUNDS FOR REOPENING

1. Central was accused in a 3 count Information filed by the U.S. Attorney in North Carolina on March 5, 1990 of violating the "Clean Water Act", as more fully described hereinafter.

2. Central lodged a plea of guilty to the violations of which it was accused on that same date.

3. Central is subject to a "Probation Order" entered by the United States District Court for the Western District of North Carolina imposing significant fines and other penalties.

4. The violation, plea and Probation Order were not known to Matlack and not made available during the course of this proceeding.

IV. ARGUMENT

Subsequent to the close of the evidentiary record, Matlack discovered evidence relevant to this proceeding that will materially affect the Commission's findings regarding Central's regulatory and technical fitness. The public interest demands that the record be opened to allow for the introduction of this evidence.

On March 5, 1990 - the date the Initial Decision was signed by Judge Schnierle - the United States Attorney filed a Bill of Information with the U.S. District Court for the Western District of North Carolina averring that Central had violated the Federal Water Pollution Control Act, 33 U.S.C. §1251, et seq. (hereinafter referred to as the "Clean Water Act."). Specifically, the Bill of Information alleged that on three (3)

separate occasions in April and May, 1987 Central knowingly introduced into the Charlotte-Mecklenburg Utility Department water treatment works pollutants which Central knew or reasonably should have known could cause personal injury or property damage.

On that same day (March 5) Central entered into a Negotiated Plea Agreement whereby it agreed to waive indictment and arraignment and pleaded guilty to the violations described in the Bill of Information. Pursuant to the Plea Agreement Central also: 1. agreed to pay a fine of $1.5 million dollars ($1 million of which was suspended pending satisfaction by Central of certain conditions set forth in the Agreement); 2. agreed to be placed on probation for a two-year term; 3. agreed to engage in an environmental cleanup of the areas damaged by Central's unlawful activities; and 4. agreed to place a full-page advertisement in the Charlotte Observer (a newspaper of general circulation in the Charlotte, NC area) apologizing for polluting the sewer system and for violating the law. The above facts are confirmed by the following certified court documents attached hereto: Appendix 1 - List of Docket Entries; Appendix 2 - The Bill of Information; Appendix 3 - The Judgment and Probation/Commitment Order; Appendix 4 - The Negotiated Plea Agreement.

Because the above-described evidence was unavailable until March 5, 1990 and was not obtained by Matlack until just recently, it was impossible for Matlack to introduce it into the record prior to the close of the evidentiary portion of this record on June 28, 1989 - the date of the last oral hearing.

During the course of this proceeding - as early as

October of 1988 - Matlack made a determined effort to obtain information bearing on environmental problems from Central, serving interrogatories upon Central that requested, inter alia, the following:

> 14. Since January 1, 1986, has Applicant received any complaints, warnings or Notices of Claim from or been cited by 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, the North Carolina Division of Environmental Management or other federal governmental agencies or governmental agencies in the states of North Carolina and Pennsylvania 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.
>
> * Upon stipulation of Matlack, Inc. and Central Transport, Inc. the term "involving or affecting transportation" for the purposes of this interrogatory shall be interpreted to mean: Incidents and occurrences i/during the operation of vehicles on the public highways, ii/at or adjacent to terminals and iii/during the process of repair or cleaning of vehicles.

The Interrogatories were continuing and advised Central that " . . . any information secured subsequent to the filing of your answers, which would have been includable in the answers had it been known or available, is to be supplied by supplemental answer."

Central failed to produce any evidence regarding the Clean Water Act violations in response to this interrogatory.[1]

The evidence sought to be introduced through this Petition to Reopen is clearly newly-discovered evidence that was not discoverable by Matlack through the exercise of due diligence prior to the close of the record. Philip Duick v. Pennsylvania Gas and Water Company, 56 Pa. PUC 553 (1982).

As recognized by Judge Schnierle in his Initial Decision this newly-discovered evidence, which involves environmental violations affecting the public safety, is clearly relevant to the issues to be determined by the Commission in this proceeding. In discussing the relevancy of evidence regarding environmental violations of which Central may be guilty, Judge Schnierle stated

> The primary purpose of the fitness criteria is to protect the public. Brinks, Inc. v. Pa. Public Utility Commission, 500 Pa. 387, 456 A.2d 1342 (1983). The occupational safety and health violations and the environmental violations at issue in this case involve the tank cleaning operations of

[1] Central's failure to supply any information relating to the investigation being conducted into Central's Clean Water Act violations by the Federal Bureau of Investigation and other regulatory agencies raises the issue as to whether Central fully responded to the interrogatory propounded by Matlack or whether it intentionally hid information sought by Matlack. This issue raises further questions regarding Central's fitness.

> Central.[2] That these tank cleaning operations are an indispensable part of the trucking operation is evident from the considerable testimony both by the applicant (Central Exhibit 1, pp. 11-12) and by the various shippers (N.T. 152-153, 301, 334) of the need to clean the trailers between loads. Central's proposed service will be of little benefit to the public if it cannot conduct that service without endangering the health of its employees and the cleanliness of Pennsylvania's waters. Accordingly, Central's contention that the Commission may not consider incidents involving the occupational safety and health of Central's employees, as well as environmental violations, is rejected. (I.D., pp. 137-138).

Matlack submits that Judge Schnierle's decision to consider environmental offenses committed by Central was correct. Clearly, Central's willingness and ability to abide by applicable environmental laws in connection with its tank cleaning operations reflects upon both its technical fitness - its capacity or ability to operate safely in Pennsylvania, including its ability to safely clean its tank trailers - and its regulatory fitness, ie., its willingness to abide by those rules and regulations to which it is subject. It is equally plain that the evidence sought to be introduced has significant public safety implications. The health of Pennsylvania residents and the cleanliness of their drinking water could be jeopardized by the authorization of a carrier that has admitted to knowingly polluting our environment. This evidence

---

[2] Evidence was presented regarding employee safety problems at Central's Charlotte, NC and Greenville, SC terminals as well as environmental violations involving tank cleaning at Central's Karns City, PA terminal. (I.D., pp. 139-145). This evidence, which was considered by Judge Schnierle and which is the subject of the passage quoted above, involves incidents unrelated to that sought to be introduced through this Petition.

should be available to the Commission for its consideration in reaching a judgment whether to grant or deny Central's application.

Finally, it is a long-standing policy of this Commission to allow the participation of additional parties and to permit the introduction of a broad spectrum of evidence in any given proceeding for the stated purpose of building a "complete record." In view of the important issues at stake in this proceeding, it is imperative that the Commission have at its disposal all of the relevant evidence bearing upon Central's fitness to obtain the authority sought in this proceeding. The newly-discovered evidence constitutes a material change of fact since the close of the record that will offer additional insight into Central's technical and regulatory fitness; to exclude it will serve no useful purpose.

This proceeding should be reopened in order to:

1. Require Central to introduce and fully develop that evidence regarding its violations of the Clean Water Act at its Charlotte, North Carolina terminal;

2. Determine the manner in which Central's violations impact upon its operations at its Pennsylvania terminals, and its fitness to hold operating authority from this Commission;

3. Determine whether Central fully and properly responded to Matlack's discovery requests;

4. Allow Central an opportunity to present evidence regarding any mitigating circumstances that may have been present at the time of the Clean Water Act violations;

5. Determine whether any further conditions or limitations should be imposed upon the authority, if any, to be

granted to Central or whether the application should be denied or a decision postponed;

6. Permit protestants to introduce testimony and evidence regarding Central's 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

7. Afford the Commission an opportunity to gather any further evidence or conduct any investigation that it deems appropriate or as deemed proper by the presiding Administrative Law Judge.

In connection with the reopening of this record, Matlack requests that an additional hearing be scheduled for the presentation of evidence on the issues outlined above and that Central be directed, in addition to fully developing the record, to produce a witness who is aware of the circumstances surrounding Central's Clean Water Act violations and can respond fully to questions regarding those violations. Matlack also requests that the parties be permitted to file supplemental briefs discussing the legal issues raised by the evidence obtained at the further hearing.

WHEREFORE, Matlack, Inc. requests the issuance of an Order consistent with the arguments set forth above.

Respectfully submitted,

By: _____
James W. Patterson
Edward L. Ciemniecki
Attorneys for Matlack, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Petition To Reopen Record, were served upon the following by United States mail, postage prepaid.

Dated at Philadelphia, Pennsylvania this 29th day of May, 1990.

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120
(Original and 2 copies)

William A. Chesnutt, Esquire
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108

Ronald Malin, Esquire
Johnson Peterson Tener & Anderson
Key Bank Bldg., 4th Floor
Jamestown, NY 14701

Henry Wick, Jr., Esquire
Wick Streiff Meyer Metz and O'Boyle
1450 Two Chatham Center
Pittsburgh, PA 15219

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

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

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

CRIMINAL DOdocket U.S. District Court

PO ☐ Misd ☐ Felony ☒ | 0419 | 3 | 1907 Assigned / Disp./Sentence | District | Off | Judge/Magistr

☐ GRIT ☐ JUVENILE ☐ ALIAS | U.S. VS ● | OFFENSE ON INDEX CARD ☐

(LAST, FIRST, MIDDLE) Central Transport, [redacted]c.

Case Filed: Mo 3 Day 5 Yr 90 | No of Def's 1 | ● U.S. MAG CASE NO ▶

Docket No. 00027 | Def 1

I. CHARGES

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS	DISM ¶ NG
33:1319 (c)(2)(B)	Introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants, which deft. knew or reasonably should have known could cause personal injury or property damage.	3	

SUPERSEDING COUNTS

II. KEY DATE

INTERVAL ONE — KEY DATE (EARLIEST OF): ☐ arrest ☐ sum'ns ☐ custody ☐ appears—on complaint

END ONE AND/OR BEGIN TWO (OR RESTART PERIOD TO TRIAL) — KEY DATE: 3-5-90 (APPLICABLE): ☐ Indictment filed/unsealed ☐ consent to Magr. trial on complaint ☒ Information ☐ Felony-W/waiver

KEY DATE: a) ☐ 1st appears on pending charge /R40 b) ☐ Receive file R20/21 c) ☐ Supsdg: ☐ Indt ☐ Inf d) ☐ Order New trial e) ☐ Remand f) ☐ G/P Withdrawn

END INTERVAL TWO — KEY DATE (APPLICABLE): ☐ Dismissal ☐ Plea ☐ guilty ☐ After N. ☐ Nolo ☐ After no ☐ Trial (voir dire) begar ☐ Jury ☐ N.J

1st appears with or waives counsel	ARRAIGNMENT	1st Trial Ended	RE-TRIAL	2nd Trial Began	DISPOSITION DATE	SENTENCE DATE	☐ PTD ☐ Nolle ☐ Pros.	FINAL CHARGES DISMISSED ☐ on S.T. grounds ☐ W.P. ☐ WOP ☐ on di motir ☐ on go motic

III. MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT ▶			
Date of Arrest		OFFENSE (In Complaint)	

INITIAL APPEARANCE DATE ▶

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶

☐ WAIVED ☐ NOT WAIVED

☐ INTERVENING INDICTMENT

Tape Number

INITIAL/NO.

OUTCOME:

☐ DISMISSED

☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

Show last names and suffix numbers of other defendants on same indictment/information:

RULE 20 ☐ 21 ☐ 40 ☐ In ☐ Ou

IV. NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC.

ATTORNEYS

U. S. Attorney or Asst.

(Trial Attorney) Floyd Clardy, III

Defense: 1 ☐ CJA. 2 ☐ Ret. 3 ☐ Waived. 4 ☐ Self. 5 ☐ Non / Other. 6 ☐ PD. 7 ☐ CD

Certified to be a true and correct copy of the original
U. S. District Court
Thomas J. McGraw, Clerk
Western Dist. of N. C.
By Mabelle Anderson
Deputy Clerk
Date 5/11/90

Penalty:
33:1319 (c)(2)(B)
3 yrs / not less than 5,000 or more than 50,000 per each day of the violation or both

BAIL ● RELEASE

PRE-INDICTMENT

Release Date

☐ Bail Denied ☐ Fugitive ☐ Pers. Rec. ☐ PSA

AMOUNT SET $

Date Set

☐ Bail Not Made

Date Bond Made

Conditions: ☐ 10% Dep. ☐ Surety Bnd ☐ Collateral ☐ 3rd Prty ☐ Other

POST-INDICTMENT

Release Date

☐ Bail Denied ☐ Fugitive ☐ Pers. Rec. ☐ PSA

AMOUNT SET $

Date Set

☐ Bail Not Made

Date Bond Made

Conditions: ☐ 10% Dep. ☐ Surety Bnd ☐ Collateral ☐ 3rd Prty ☐ Other

APPEALS FEE PAYMENTS

FINE AND RESTITUTION PAYMENTS ☐ Docket Entries Begin On Reverse Side

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE / DOCUMENT NO		V: Docket No: 90 00027 1 Def:	MASTER DOCKET - MULTIPLE DEFENDANT CASE / PROCEEDINGS DOCKET FOR SINGLE DEFENDANT	PAGE ___ OF ___	VI EXCLUDABLE DELAY Start Date / End Date	Ex Code	Total Days
		(OPTIONAL: Show last name of defendant)	**V. PROCEEDINGS**				
-05-90		Bill of Information Filed					ma
	1	Plea Agreement-will waive indictment and plea guilty to the three counts of the Bill of Information. cc: RDP					ma
5-90	2	Waiver of indictment					
5-90	3	Waiver of arraignment.					
		Case called for plea and sentencing before RDP in Charlotte. Gary L. Honbarrier, president of co. present repr the Co. Cnsl Parnell present repr. Central Trans. USA Ashcraft & atty Floyd Clardy, III repr the Govt. Deft pleads GUILTY to the 3 ct. info. Rule 11 inq and findings made. Court finds F/B for the plea and enters the following judg: 2 yrs probation, + $1,500,000 fine total + cleanup agreement and public apology. + $150 assessment. ($1,000,000 fine SUSPENDED leaving a balance of $500,000.)					
		J & C issued					
-08-90		Judgment & Commitment order filed in CR. VOL. XXXI pg. 127.					ma

CONTINUED TO PAGE ___

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA)	DOCKET NO. C-CR-90-27
)	
)	INFORMATION
vs.)	
)	
)	
CENTRAL TRANSPORT, INC.)	

The United States Attorney informs the Court that:

INTRODUCTION

At all times material to this Information:

1. Defendant CENTRAL TRANSPORT, INC., was a North Carolina corporation engaged in the business of transporting chemicals by tanker trailer trucks. Defendant CENTRAL TRANSPORT, INC. operated a facility located on Melynda Road in Charlotte, North Carolina.

2. The Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., commonly referred to as the Clean Water Act (CWA), was enacted by Congress to restore and maintain the integrity of our Nation's waters.

3. Section 309(c)(2)(B), 33 U.S.C. 1319(c)(2)(B) of the Clean Water Act prohibits any person from knowingly introducing into a sewer system or publicly owned treatment works any pollutant or hazardous substance which the person knew or reasonably should have known could cause personal injury or property damage.

4. "Publicly owned treatment works" is defined to include

sewers, pipes and other conveyances which convey waste water into the publicly owned treatment plant. 40 C.F.R. § 403.5.

6. Defendant CENTRAL TRANSPORT, INC.'s Charlotte Plant is connected to and discharges into a public sewer system which conveys waste water to the Charlotte-Mecklenburg Utility Department ("CMUD"), a publicly owned treatment works.

COUNT I

1. The allegations contained in the Introduction of this Information are realleged and incorporated in this Count by reference.

2. From on or about April 28, 1987, to April 29, 1987, within the Western District of North Carolina, defendant CENTRAL TRANSPORT, INC. knowingly introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants, which Defendant CENTRAL TRANSPORT, INC. knew or reasonably should have known could cause personal injury or property damage.

In violation of Title 33, United States Code, Section 1319(c)(2)(B).

COUNT II

1. The allegations contained in the Introduction of this Information are realleged and incorporated in this Count by reference.

2. From on or about April 30, 1987, to May 1, 1987, within the Western District of North Carolina, defendant CENTRAL TRANSPORT, INC. knowingly introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants which

Defendant CENTRAL TRANSPORT, INC. knew or reasonably should have known could cause personal injury or property damage.

In violation of Title 33, United States Code, Section 1319(c)(2)(B).

COUNT III

1. The allegations contained in the Introduction of this Information are realleged and incorporated in this Count by reference.

2. From on or about May 4, 1987, to May 5, 1987, within the Western District of North Carolina, defendant CENTRAL TRANSPORT, INC. knowingly introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants which Defendant CENTRAL TRANSPORT, INC. knew or reasonably should have known could cause personal injury or property damage.

In violation of Title 33, United States Code, Section 1319(c)(2)(B).

THOMAS J. ASHCRAFT
United States Attorney
Western District of North Carolina

by: Floyd Clardy
FLOYD CLARDY III
Trial Attorney, Environmental Crimes Section
U.S. Department of Justice

Certified to be a true and correct copy of the original
U. S. District Court
Thomas J. McGraw, Clerk
Western Dist. of N. C.
By Michelle Anderson
Deputy Clerk
Date 5/11/90

United States of America vs.

DEFENDANT: CENTRAL TRANSPORT, INC.

United States District Court fo
WEST[illegible]STRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO → C-CR-90-27-01

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (9/82

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: March DAY: 5, YEAR: 1990

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to ha counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL E. Fitzgerald Parnell, III, retained (Name of Counsel)

FILED
CHARLOTTE, N. C.
MAR 08 199[illegible]

U. S. DISTRICT COU
W. DIST. OF N. C.

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. as to the 3 count information

Defendant has been convicted as charged of the offense(s) of Knowingly introduce pollutants into Publ Sewer System and Publicly Owned Treatment Works, in violation of 33 U.S S1319(c)(2)(B) (Clean Watter Act) as charged in the 3 count indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contra was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YE

PROBATION plus a $500,000 fine on each count for a total fine of $1,500,000. million ($1,000,000) dollars of the fine is SUSPENDED. Defendant will proper implement lagoon closure at the Melynda Road facility and present to the Cou certification from NC Dept. of Environment, Health, and Natural Resources that logo closure has been completed. Deft will also implement cleanup of environment problems related to the lagoons, including ground water contamination, at its Melyn Road terminal in Charlotte, NC. Defendant will also make a public apology.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on th reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, ar at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant ar revoke probation for a violation occurring during the probation period

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Mar shal or other qualified officer.

[illegible] U. S. District Court
Thomas J. McGraw, Cler
Western Dist. of N. C.
By Michelle Anderson
Deputy Clerk
Date 5/11/90

APPENDIX 3

SIGNED BY

[X] U.S District Judge

[ ] U S Magistrate

Robert D. Potter, Chief

Date March 5, 1990

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA)	DOCKET NO. C-CR-90-27
)	
)	PLEA AGREEMENT
vs.)	
)	
)	
CENTRAL TRANSPORT, INC.)	

NEGOTIATED PLEA AGREEMENT

The United States of America and the defendant, CENTRAL TRANSPORT, INC., following Rule 11(e), Federal Rules of Criminal Procedure, do hereby enter into the Negotiated Plea Agreement set forth below.

(1) CENTRAL TRANSPORT, INC. agrees to waive indictment and plead guilty to a three-count information. Each count in the information charges a violation of Section 309 of the Clean Water Act, 33 U.S.C. § 1319(c)(2)(B). A copy of the Information is attached to this agreement as Exhibit A. The Chief Executive Officer of CENTRAL TRANSPORT, INC., Gary L. Honbarrier, will appear in court and enter the guilty pleas for the corporation.

(2) The United States agrees not to further prosecute criminally CENTRAL TRANSPORT, INC., its subsidiaries, divisions, officers, employees, or directors for the dumping, disposing, storage, or introduction, of any pollutant or hazardous substance, material, or waste into the ground, water, or air, at CENTRAL TRANSPORT, INC.'s terminal located on Melynda Road in

Charlotte, North Carolina. This provision applies to criminal environmental violations which either the government knew about on the date the parties signed this agreement, which are within the scope of the government's investigation from 1985 to January 31, 1990, or which CENTRAL TRANSPORT, INC. disclosed to the United States before January 31, 1990. This provision will be construed to include, but not necessarily be limited to, the three lagoons maintained at the terminal for the disposal, treatment, and storage of waste, the waste treatment system located at the terminal, and the introduction into the Charlotte sewer system of waste products. This Plea Agreement applies only to criminal violations that occurred in the Western District of North Carolina.

(3) If acceptable to the Court, CENTRAL TRANSPORT, INC. hereby waives the presentence investigation and report following Rule 32(c)(1) of the Federal Rules of Criminal Procedure. The United States does not oppose such waiver.

(4) The United States and CENTRAL TRANSPORT, INC. agree that after entry of the guilty pleas of CENTRAL TRANSPORT, INC., following Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the appropriate disposition at the time of sentencing is:

(a) CENTRAL TRANSPORT, INC. will pay a fine of Five-Hundred Thousand Dollars ($500,000), as provided in Title 18, United States Code, Section 3571(c)(3), for each count of the three counts in the information, which fines total $1.5 million

dollars. Of this total fine, $1 million shall be suspended, and the Court will place CENTRAL TRANSPORT, INC. on probation for two years on the condition that during the two-year probationary term CENTRAL TRANSPORT, INC. properly implement lagoon closure at the Melynda Road facility and present to the Court certification from the North Carolina Department of Environment, Health, and Natural Resources that lagoon closure has been completed. Central Transport, Inc. will also implement cleanup of environmental problems related to the lagoons, including ground water contamination, at its Melynda Road terminal in Charlotte, North Carolina.

(b) This environmental cleanup will be subject to the oversight and jurisdiction of the North Carolina Department of Environment, Health, and Natural Resources or its successor. The United States agrees that CENTRAL TRANSPORT, INC. retains any right it may have to contest, in good faith, any order, directive, or condition issued by the North Carolina Department of Environment, Health, and Natural Resources or its successor. The United States agrees that during the two-year probationary term it will not criminally prosecute CENTRAL TRANSPORT, INC. for maintenance of its lagoons so long as CENTRAL TRANSPORT, INC. is proceeding in good faith with the environmental cleanup under the provisions of this agreement.

(c) The United States agrees not to petition to revoke the probation of CENTRAL TRANSPORT, INC. so long as CENTRAL TRANSPORT, INC. is proceeding in good faith with the

environmental cleanup of CENTRAL TRANSPORT, INC.'s facility. The parties understand that the environmental cleanup of CENTRAL TRANSPORT, INC.'s facility may exceed the two year probationary term. For example, the cleanup of ground water contamination often takes many years. The parties, therefore, agree that if lagoon closure takes more than two years, despite CENTRAL TRANSPORT, INC.'s proceeding in good faith to complete lagoon closure, and CENTRAL TRANSPORT, INC. is otherwise in compliance with the terms of this plea agreement, the United States will not oppose CENTRAL TRANSPORT, INC.'s motion to extend probation up to five years from the date of the judgment of conviction. In addition, the parties agree that if any CENTRAL TRANSPORT, INC. challenge to any North Carolina Department of Environment, Health, and Natural Resources order, directive, or condition is made in good faith and results in delay in completion of the terms of probation, and CENTRAL TRANSPORT, INC. is otherwise in compliance with the terms of this plea agreement, the United States will not oppose CENTRAL TRANSPORT, INC.'s motion to extend probation up to five years from the date of conviction.

(d) CENTRAL TRANSPORT, INC. agrees that on the date it enters its pleas pursuant to this Plea Agreement, it will deliver to the United States a certified check payable to the United States Department of Justice, in the amount of Five Hundred Thousand Dollars ($500,000).

(e) If CENTRAL TRANSPORT, INC. fails to comply with this Plea Agreement or the terms of probation, the United States may

initiate proceedings against CENTRAL TRANSPORT, INC. to revoke probation, including proceedings to collect the suspended portion of the fine. CENTRAL TRANSPORT, INC.'s contesting an order, directive, or condition of the North Carolina Department of Environment, Health, and Natural Resources under the preceding subparagraph (c) shall not be deemed a violation of the Plea Agreement or probation so long as it is otherwise in compliance with the Plea Agreement and probation.

(f) CENTRAL TRANSPORT, INC. agrees that if the Court should determine that it has failed reasonably to fulfill its obligations under this Plea Agreement, the government shall be free to prosecute CENTRAL TRANSPORT, INC. for the environmental offenses that occurred at CENTRAL TRANSPORT, INC.'s Charlotte terminal between 1985 and the date the parties sign this agreement, that would be otherwise barred from being prosecuted because of the expiration of the applicable statute of limitations. Such prosecution must, however, be commenced within 90 days after the Court has determined that CENTRAL TRANSPORT, INC. has breached the Plea Agreement. All guilty verdicts and sentences shall stand. It is agreed that the entry of judgment in this case does not bind the State of North Carolina in any future civil or criminal prosecution of CENTRAL TRANSPORT, INC.

(g) It is agreed that the provisions of this Plea Agreement do not preclude the United States from prosecuting CENTRAL TRANSPORT, INC. or any of its divisions or subsidiaries for Obstruction of Justice, 18 U.S.C. Section 1501 et. seq; or

Misprision of a Felony, 18 U.S.C. Section 4; or for any offenses defined in Title 26 and such Title 18 offenses as may be investigated by agents of the Internal Revenue Service concerning the enforcement of federal revenue laws. The United States represents that now the Department of Justice does not know of any such violations.

(h) The United States District Court for the Western District of North Carolina is the sole judge of any disagreements arising concerning this Plea Agreement, and this Court is the sole judge of whether CENTRAL TRANSPORT, INC. has complied with the Plea Agreement.

(5) CENTRAL TRANSPORT, INC. will pay for and place a full-page advertisement in the Charlotte Observer, in the form attached as Exhibit B apologizing for polluting the sewer system and violating the law. The advertisement shall be placed within three days of entering the guilty pleas and published as soon as practicable thereafter. The advertisement will run once a week for two consecutive weeks.

(6) It is agreed that if the Court refuses to accept any provision of this Plea Agreement neither party is bound by any of the provisions of the Agreement. In addition, if the Court refuses to accept the Plea Agreement, the United States may seek to dismiss the Information without prejudice, and no statement in this Plea Agreement or its attachments will be admissible against either party in any proceeding. CENTRAL TRANSPORT, INC. will not object to such dismissal of the Information. CENTRAL TRANSPORT,

INC. further agrees that if the Court refuses to accept this Plea Agreement, CENTRAL TRANSPORT, INC. will waive all applicable civil and criminal statutes of limitations concerning the matters set out in the Information and the environmental violations that occurred at CENTRAL TRANSPORT, INC.'s Melynda Road terminal, Charlotte, North Carolina, to the extent that this Agreement has delayed any action that otherwise may have been taken.

(7) This document contains the parties' entire agreement. No other agreement, understanding, promise, or condition between the United States Attorney's Office for the Western District of North Carolina, the Department of Justice and CENTRAL TRANSPORT, INC. exists, nor will such agreement, understanding, promise or condition exist unless it is committed to writing in an amendment attached to this document and signed by CENTRAL TRANSPORT, INC., an attorney for CENTRAL TRANSPORT, INC., and a representative of the United States Attorney for the Western District of North Carolina.

(8) The United States and CENTRAL TRANSPORT, INC. agree that the Government's written offer of proof, appended hereto as Exhibit C, is substantially correct.

(9) The United States acknowledges that CENTRAL TRANSPORT, INC. has cooperated fully in the conduct of the Government's investigation of the activities concerning this Plea Agreement.

(10) In establishing the factual basis for these pleas of guilty, the United States and the Defendant do stipulate and shall stipulate if allowed to do so by the Court to the existence

of a factual basis in support of every element of each crime which CENTRAL TRANSPORT, INC. pleads guilty following this plea agreement.

DATE March 5, 1990

Respectfully Submitted,
Thomas J. Ashcraft
United States Attorney

CENTRAL TRANSPORT, INC.
By Its Attorneys

Floyd Clardy
Floyd Clardy, III
Susan B. Squires
Trial Attorneys
Environmental Crimes Section
U.S. Department of Justice

Notary Public
5/11/90

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. C-CR-90-27
	)	
	)	INFORMATION
vs.	)	
	)	
	)	
CENTRAL TRANSPORT, INC.	)	

The United States Attorney informs the Court that:

INTRODUCTION

At all times material to this Information:

1. Defendant CENTRAL TRANSPORT, INC., was a North Carolina corporation engaged in the business of transporting chemicals by tanker trailer trucks. Defendant CENTRAL TRANSPORT, INC. operated a facility located on Melynda Road in Charlotte, North Carolina.

2. The Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., commonly referred to as the Clean Water Act (CWA), was enacted by Congress to restore and maintain the integrity of our Nation's waters.

3. Section 309(c)(2)(B), 33 U.S.C. 1319(c)(2)(B) of the Clean Water Act prohibits any person from knowingly introducing into a sewer system or publicly owned treatment works any pollutant or hazardous substance which the person knew or reasonably should have known could cause personal injury or property damage.

4. "Publicly owned treatment works" is defined to include

sewers, pipes and other conveyances which convey waste water into the publicly owned treatment plant. 40 C.F.R. § 403.5.

6. Defendant CENTRAL TRANSPORT, INC.'s Charlotte Plant is connected to and discharges into a public sewer system which conveys waste water to the Charlotte-Mecklenburg Utility Department ("CMUD"), a publicly owned treatment works.

COUNT I

1. The allegations contained in the Introduction of this Information are realleged and incorporated in this Count by reference.

2. From on or about April 28, 1987, to April 29, 1987, within the Western District of North Carolina, defendant CENTRAL TRANSPORT, INC. knowingly introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants, which Defendant CENTRAL TRANSPORT, INC. knew or reasonably should have known could cause personal injury or property damage.

In violation of Title 33, United States Code, Section 1319(c)(2)(B).

COUNT II

1. The allegations contained in the Introduction of this Information are realleged and incorporated in this Count by reference.

2. From on or about April 30, 1987, to May 1, 1987, within the Western District of North Carolina, defendant CENTRAL TRANSPORT, INC. knowingly introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants which

Defendant CENTRAL TRANSPORT, INC. knew or reasonably should have known could cause personal injury or property damage.

In violation of Title 33, United States Code, Section 1319(c)(2)(B).

COUNT III

1. The allegations contained in the Introduction of this Information are realleged and incorporated in this Count by reference.

2. From on or about May 4, 1987, to May 5, 1987, within the Western District of North Carolina, defendant CENTRAL TRANSPORT, INC. knowingly introduced into the public sewer system and into the CMUD publicly owned treatment works pollutants which Defendant CENTRAL TRANSPORT, INC. knew or reasonably should have known could cause personal injury or property damage.

In violation of Title 33, United States Code, Section 1319(c)(2)(B).

THOMAS J. ASHCRAFT
United States Attorney
Western District of North Carolina

by: _____
FLOYD CLARDY III
Trial Attorney, Environmental Crimes Section
U.S. Department of Justice

EXHIBIT B

WE APOLOGIZE

FOR

POLLUTING

THE

ENVIRONMENT

CENTRAL TRANSPORT, INC. RECENTLY PLED GUILTY IN FEDERAL COURT TO DISPOSING OF POLLUTANTS ILLEGALLY IN 1987 AT ITS FACILITY IN CHARLOTTE, NORTH CAROLINA. AS A RESULT, CENTRAL TRANSPORT, INC. PAID THE UNITED STATES FIVE HUNDRED THOUSAND DOLLARS, AGREED TO CLEAN UP LAGOONS AT ITS CHARLOTTE FACILITY, TO PAY THE UNITED STATES ANOTHER ONE MILLION DOLLARS IF IT FAILS TO COMPLETE THE CLEANUP, AND TO PUBLISH THIS ADVERTISEMENT. WE ARE SORRY THAT THIS HAS OCCURRED AND WE WILL TAKE ALL STEPS NECESSARY TO INSURE THAT IN THE FUTURE ENVIRONMENTAL LAWS ARE RESPECTED. WE HOPE THAT OTHERS WILL LEARN FROM OUR EXPERIENCE.

GARY L. HONBARRIER
CENTRAL TRANSPORT, INC.

EXHIBIT C

FACTUAL BASIS

The United States provides the Court with this factual basis in support of the information filed in the United States of America v. Central Transport, Inc. The United States will show to the Court the following facts:

1. The Information charges Central Transport, Inc. (CTI) with three counts of knowingly introducing pollutants into the Charlotte Mecklenburg Utility Department's (CMUD) public sewer which conveyed these pollutants to a publicly owned treatment works (POTW). It further charges that CTI knew or reasonably should have known that this action could cause personal injury or property damage in violation of the Clean Water Act. The dates in the Information are from April 28 to April 29; April 30 to May 1; and from May 4 to May 5, in 1987. To establish these violations, the Government must prove the following elements: (1) CTI knowingly; (2) discharged pollutants; (3) from a point source; (4) into a POTW, or sewer system; (5) when CTI knew or reasonably should have known that this action could cause personal injury or property damage.

The waters CTI discharged contained "pollutants." The Clean Water Act (CWA) broadly defines the term pollutant to include chemical wastes. 33 U.S.C. 1362(6).

CTI discharged the pollutants through a point source, a term defined by CWA to include pipes, ditches, and conduits. The essence of the definition of point source discharge is that it must be from a discernible, confined, and discrete conveyance. 33 U.S.C. 1362(14).

A Publicly Owned Treatment Works (POTW) includes sewers, pipes and other conveyances which carry waste water to a POTW. 33 u.S.C. 1292(2)(A)(B). The Charlotte Mecklenburg Utility Department (CMUD) is a POTW. CTI's Charlotte facility has a sewer connection to the Charlotte Mecklenburg (CMUD) sewer. CTI's Charlotte facility also had a four inch sewer clean out line which was connected to the CMUD sewer system. This line was located in the ground just outside the boiler room at CTI's Charlotte facility. On May 13, 1987, during a search at CTI's Charlotte facility, FBI Agent Burleson saw a Regional Supervisor of the North Carolina Department of Natural Resources and Community Development, Ron McMillian, put dye in the four inch line. FBI Agent Burleson watched Ron McMillian pour dye into this line and then saw it as it came out the other end of the line. This procedure proved that the four inch line was connected to the CMUD sewer system. The four inch line is a point source.

2. CTI is a North Carolina corporation with its corporate headquarters located in High Point, North Carolina. CTI is a family owned corporation and is engaged in the bulk transportation of various chemical products. For many years CTI has operated a terminal and tank cleaning facility at Charlotte.

On the three dates in the Information, the FBI found chemical wastes in the CMUD public sewer. On each of those dates Ron McMillian and FBI Agent Tom Burleson placed an automatic sampling device on a sewer line located upstream from

CTI. These persons also placed an identical device on the same sewer line at a location downstream from CTI. They placed the sampling device in the sewer at about 4:00 p.m. and left the sampling device in the sewer overnight. On every following morning at about 7:00 a.m. they removed the samples.

The North Carolina Department of Natural Resources (NCDNR) analyzed these samples and found high concentrations of organic compounds in the sample. These same organic compounds also were present in some of the chemicals hauled by CTI, the residues of which were contained in waste water discharged by CTI.

3. Documents gathered by using grand jury subpoenas show that CTI knew or should have known that the introduction of these pollutants containing these organic compounds into CMUD's sewer system could have caused personal injury or property damage. As a chemical hauler, the U.S. Department of Transportation requires CTI to label their trailers with placards that show the contents of the tanker. These placards help police and fire officials respond to accidents. They list the action emergency personnel need to take regarding fighting fires or evacuating citizens because of toxic fumes. They show that the chemicals CTI hauled can be dangerous.

CTI also had extensive safety procedures in place for its own personnel regarding the wearing of protective clothing, eye protection, tanker entry procedures, and actions to take if an

accident happened involving the chemicals which they hauled. Additionally, CTI maintained a file of material safety data sheets (MSDS) which list the dangerous properties of the chemicals which they haul and how safely to control them. Central Transport, Inc. maintained these documents at the Charlotte terminal as well as their headquarters in High Point, North Carolina. Also, CTI's employees testified they knew about the hazardous nature of some of the chemicals CTI hauled.

JJD/614

ORIGINAL

McNEES, WALLACE & NURICK

ATTORNEYS AT LAW

100 PINE STREET

P. O. BOX 1166

HARRISBURG, PA. 17108-1166

TELEPHONE (717) 232-8000

FAX (717) 236-2665

June 11, 1990

RECEIVED

JUN 11 1990

SECRETARY'S OFFICE
Public Utility Commission

HAND DELIVERY

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

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 two (2) copies of Reply of Applicant Central Transport, Inc. to Protestant Matlack, Inc.'s Petition to Reopen Record 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 (law)
William A. Chesnutt
Counsel for Applicant
Central Transport, Inc.

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF APPLICANT CENTRAL TRANSPORT, INC.
TO PROTESTANT MATLACK, INC.'S PETITION TO REOPEN RECORD

Pursuant to 52 Pa. Code §5.571(c), applicant Central Transport, Inc., by its counsel McNees, Wallace & Nurick, respectfully files this reply to a petition by protestant Matlack, Inc. seeking reopening of this record for receipt of additional evidence.

In support of its petition to reopen, Matlack argues that the evidence it seeks to introduce "will materially affect the Commission's findings regarding Central's regulatory and technical fitness" (Pet. p. 3). Matlack offers no support for this bare supposition. As shown below, the supposition is unsupportable. In the absence of a material affect on the Commission's findings, there is no reason to reopen the record for the purpose of receiving the proffered evidence.

The evidence sought to be introduced by Matlack concerns applicant's guilty plea, on March 5, 1990, to having introduced pollutants into the sewer system of Charlotte, North Carolina, on three occasions between April 28 and May 5, 1987. (Attachments to Matlack Petition). Matlack alleges that introduction of this evidence will allow the Commission to "determine the manner in which Central's violations impact upon its operations at its Pennsylvania terminals [sic], and its fitness to hold operating authority

from this Commission" (Petition, p. 8). Reopening of the record is not necessary for this purpose or for any of the other spurious purposes suggested by Matlack (See points 3 through 7 at Petition, pp. 8-9), simply because the record on the issue has already been fully developed. Moreover, the Administrative Law Judge has considered the evidence on "disposal, treatment, and storage of waste" at applicant's only Pennsylvania terminal and found applicant "now in compliance with the applicable laws and regulations" (Initial Decision, p. 145) (emphasis added).

1. The record in this proceeding shows indisputably that applicant Central has a single terminal facility in Pennsylvania--at Karns City (Butler County) (Exh. 1, p. 5; Tr. 34-35). The Karns City terminal has been in operation since January 1987 (see Tr. 66, 103) for purposes of supporting Central's operations in interstate and foreign commerce to and from points in Pennsylvania (Exh. 1B). There is no evidence in this record that even a denial of this application--a result obviously desired by protestant Matlack--would cause Central to close the Karns City facility. Thus, activities at that facility pertaining to "disposal, treatment, and storage of waste" are occurring now, have occurred there since January 1987, and will continue to occur there irrespective of the outcome of this proceeding. The public has been and will continue to be protected by comprehensive statutory provisions and implementing regulations administered and enforced by the Pennsylvania Department of Environmental Resources and the federal Environmental Protection Agency.

2. The Commonwealth of Pennsylvania's Department of Environmental Resources (DER) is fully apprised of applicant Central's "disposal, treatment, and storage of waste" activities at the Karns City facility. Moreover, DER's regulatory involvement in that regard is a matter that is already in this record in considerable detail--the bulk of that evidence having been introduced and developed by Matlack on cross-examination of a qualified Central witness, utilizing documents voluntarily furnished by applicant (See Matlack Exh. 3, Sheets 30-46, 51-65; Tr. 690-691).

3. Despite having developed 34 pages of evidence pertaining to applicant's "disposal, treatment, and storage of waste" activities at the Karns City terminal, protestant Matlack made no request of the Judge for a finding of fact on that issue (See Responding Brief of Matlack, pp. 22-29). The absence of any request by Matlack for a finding concerning the specific evidence about Central's Karns City activities is especially significant because the Matlack Brief was in response to applicant's Brief contending that no adverse finding concerning fitness was warranted on the basis of that evidence (See Main Brief of Applicant, pp. 14-16, 23).

4. More importantly, however, the Administrative Law Judge in a thorough 165-page Initial Decision issued March 16, 1990, considered the 34 pages of evidence about Karns City and specifically made the favorable fitness finding requested by applicant Central (See I.D., p. 145). In a detailed discussion, the Judge found:

> The environmental violations included those which occurred at Central's Karns City facility as a result of its lack of knowledge regarding Pennsylvania environmental law (Matlack Exhibit 3, pp. 30-

> 42, 47-61)... It is my conclusion that neither of these violations preclude certification of Central. Central attributed the violations at its Karns City tank cleaning facility to its lack of knowledge of Pennsylvania environmental regulations. The DER inspector who uncovered the violations agreed. While lack of knowledge of environmental rules on Central's part does not speak well of its technical fitness to engage in the transportation of hazardous materials, the fact that it is now in compliance with the applicable laws and regulations is in its favor. Because the rationale behind the fitness criteria is to protect the safety of the public rather than to punish the carrier for misdeeds, I conclude that these violations should not preclude approval of Central's application.

5. Contrary to the contention of Matlack, evidence about the guilty plea of March 5, 1990, concerning activities in the spring of 1987 at Central's Charlotte, NC, terminal, does not constitute "a material change of fact since the close of the record" having an "impact on" Central's activities at its Karns City, PA terminal. In addition to the obvious geographical diversity of the two terminal facilities, the record in this proceeding already shows that subsequent to occurrence of the violations at Charlotte, NC between April 28 and May 5, 1987, the Pennsylvania DER and federal EPA had received notice of Central's full compliance at the Karns City, PA facility (Matlack Exh. 3, sheet 62). Indeed, it was Matlack's counsel himself who engaged in the following colloquy with Central's director of cleaning and waste treatment systems (See Tr. 661) on June 26, 1989:

> Q. [by Mr. Patterson] Now sir, let's turn to instance number 4 which has to do with your Pennsylvania terminal at Karns City. Does this kind of alleged problem come under your supervision and control for Central Transport?

* * *

A. [by Mr. Skidmore] Yes, sir.

Q. Now, sir, just for the record, tell me what the general nature of the instance had to do with?

A. This was a brand new facility at this time and we had a waste treatment facility and it had arrangements with the city of Parker to transport our water to them.

Q. That's washing water?

A. Right, after it's been pre-treated. Upon really getting into the training of the people and just starting up Mr. Wozineck with the Department of Environmental Resources came to our facility for an investigation. We had not taken any water off site....

We were having an analysis run of the water to determine if it was a hazardous or non-hazardous commodity along with the diatomaceous earth which comes off the vacuum cleaner drum. His contention was that if we cleaned anything on the EPA's priority prudence list, that it would pollute the whole -- everything.... I was not familiar with the no mix law in Pennsylvania.

Q. And what have you done to correct that problem?

A. We clean no priority pollutants under the U's or P's on Pa.'s list at that facility.

Q. And that's still the case that that facility does not clean hazardous materials that are characterized or categorized as P or U materials?

A. Yes, sir, that's true. We do not.

(Tr. 690-691).

In short, Central's acknowledgment that between April 28 and May 5, 1987 it introduced pollutants into a sewer system in Charlotte, NC, has no relevance, much less materiality, to Central's operations at Karns City, PA

where applicant cleans "no priority pollutants under the U's or P's on Pa.'s list...." (Tr. 691). In addition to the lack of substantive connection with respect to "pollutants", this record now contains evidence about waste treatment at Karns City current as of June 26, 1989. Matlack's alleged "new evidence" is stale. That evidence pertains to a factual situation existing at another facility more than two years prior to the most current facts already in this record concerning Pennsylvania.

6. It is the June 26, 1989 testimony that reflects what this Commission can expect from applicant in the future. As noted in the material appended to Matlack's petition, the United States acknowledged on March 5, 1990 that Central "cooperated fully in the conduct of the Government's investigation" of the May 1987 activities at Charlotte. Significantly, none of the officers of Central was personally implicated in the guilty plea. Compare and contrast United States v. Borowski, DC Mass, CR 89-256 (May 23, 1990).

7. Matlack also makes the incredible suggestion that this proceeding should be reopened for the purpose of determining "whether Central fully and properly responded to Matlack's discovery requests" (Petition, p. 8). In this connection, Matlack's pleading contains the false statement that Central failed "to supply any information relating to the investigation being conducted into Central's Clean Water Act violations by the Federal Bureau of Investigation and other regulatory agencies...." (Petition, p. 6, fn. 1).

8. The evidentiary record flatly contradicts the assertion made by Matlack in this regard. Both Central witnesses testifying in this proceeding acknowledged that in or about May 1987 the FBI had investigated the dumping of hazardous waste at the Charlotte terminal into the sewer system (Tr. 26, 27-28, 693). Matlack's veiled allegation that Central "intentionally hid information sought by Matlack" (Petition, p. 6, fn. 1) is outrageously inaccurate.

9. Not only does the record reflect the fact of FBI investigation into the dumping of hazardous wastes in the Charlotte sewer system, but Matlack, in fact, relied on that evidence in arguing for denial of this application on fitness grounds (Responding Brief of Matlack, p. 16). Despite an acknowledgment that it "did not prove Central to be unfit" (Id.), Matlack argued to the Judge that the fitness issue should be resolved by focusing on the past, rather than relying on Central's commitment to compliance in the future (Matlack Brief, p. 17). The Judge expressly rejected Matlack's position "because the rationale behind the fitness criteria is to protect the safety of the public rather than to punish the carrier for misdeeds...." (I.D., 145). With the existence of an FBI investigation at Charlotte indisputably in evidence, the Judge nevertheless concluded: "The record does not demonstrate that Central lacks a propensity to operate safely and legally" (I.D., p. 162).

10. Matlack's final effort of sophistry is to suggest that Central had an obligation to supply copies of the material appended to Matlack's petition because of the following boiler-plate language appearing in Matlack's original interrogatories:

> These Interrogatories are continuing, and any information secured subsequent to the filing of your answers, which would have been includable in the answers had it been known or available, is to be supplied by supplemental answer.

11. Matlack's contention concerning any obligation imposed on Central by that boiler-plate provision is without merit for at least four reasons:

(a) The interrogatories were propounded explicitly "pursuant to the provisions of Section 333(d) of the Public Utility Code" which, on its face, relates to "prehearing procedures", not to conduct of the parties after hearing has begun;

(b) Implementing regulations adopted by the Commission clearly provide that "discovery" terminates at "the close of evidentiary hearings" unless otherwise ordered by the presiding officer (see 52 Pa. Code §5.331(d)). No order was issued in this proceeding providing for interminable discovery;

(c) The data appended to Matlack's petition does not cause any response previously offered by the two Central witnesses to become "incorrect or incomplete" within the meaning of 52 Pa. Code §5.332(2), even if one assumes arguendo that discovery in PUC proceedings never ends; and

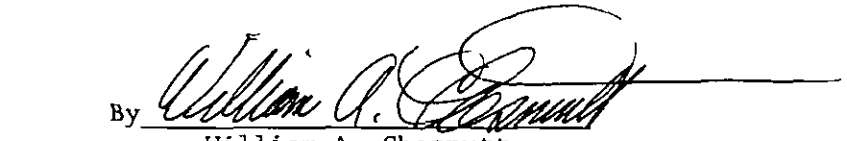
(d) Case law in other forums supports the view that an obligation to respond to discovery terminates contemporaneously with the close of evidentiary hearings. Troutner v. Philadelphia Transportation Company, 5 D & C 2nd. 545 (1954); Wolf v. Dickinson, 16 F.R.D. 250 (E.D. Pa. 1952); Novick v. Pennsylvania Railroad Company, 18 F.R.D. 296 (W.D. Pa. 1955).

CONCLUSION

For the foregoing reasons, the petition to reopen should be denied. The pleading is nothing more than a thinly disguised effort to delay a final decision on this licensing application, for the purposes of the economic self-interest of protestant Matlack.

Respectfully submitted,

McNEES, WALLACE & NURICK

By 

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

Counsel for Applicant
Central Transport, Inc.

Dated: June 11, 1990

CERTIFICATE OF SERVICE

I hereby certify that I have served by first-class mail, postage prepaid, the foregoing Reply to Protestant's Petition to Reopen Record on Behalf of Applicant Central Transport, Inc. on the following counsel of record:

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

James W. Patterson, Esquire
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

Kenneth A. Olsen, Esquire
P. O. Box 357
Gladstone, NJ 07934-0357

Henry M. Wick, Jr., Esquire
1450 Two Chatham Center
Pittsburgh, PA 15219

Ronald W. Malin, Esquire
P. O. Box 1379
Key Bank Building, Fourth Floor
Jamestown, NY 14702-1379

David H. Radcliff, Esquire
407 North Front Street
Harrisburg, PA 17101

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

William A. Chesnutt (law)

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

Counsel for Applicant
Central Transport, Inc.

Dated this 11th day of June, 1990, at Harrisburg, Pennsylvania.

ORIGINAL

RUBIN QUINN MOSS & HEANEY

ATTORNEYS AT LAW

1800 PENN MUTUAL TOWER

510 WALNUT STREET

PHILADELPHIA, PA 19106-3619

(215) 925-8300

DIRECT DIAL NUMBER

FAX:(215) 925-1572

(215) 931-0692

ALEXANDER N. RUBIN, JR.
JERROLD V. MOSS
JAMES W. PATTERSON
DANIEL B. PIERSON, V.
ALAN KAHN
WILLIAM D. PARRY
ROBERT SZWAJKOS
JOHN R. KENNEL, II
ERIC M. HOCKY
JOSEPH F. MESSINA
LESLIE BETH BASKIN
CHRISTOPHER C. CARR
JOAN F. JAFFE
VICKIE E. LEDUC
HOWARD H. SOFFER
PATRICIA H. PASIC

WILLIAM P. QUINN
TERENCE K. HEANEY
MALCOLM L. LAZIN
DENIS JAMES LAWLER
ROBERT P. STYLE
G. BRADLEY RAINER
DON P. FOSTER
MARY ELLEN O'LAUGHLIN
EDWARD L. CIEMNIECKI
MICHAEL D. BUTLER
PETER C. CILIO
RICHARD A. FRANKLIN
ELLEN B. JUCKETT
CHERYL GALLAGHER-CARNEY
JANET I. MOORE
JEFFREY P. BATES

KING OF PRUSSIA OFFICE
216 GODDARD BOULEVARD
GENERAL WASHINGTON BUILDING
KING OF PRUSSIA, PA 19406
(215) 337-4080

JENKINTOWN OFFICE
SUITE 421
BENJAMIN FOX PAVILION
JENKINTOWN, PA 19046
(215) 884-4600

OF COUNSEL
ROBERT B. EINHORN

GOFF & RUBIN

June 22, 1990

RECEIVED
JUN 25 1990
SECRETARYS 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 two (2) copies of the Motion to Strike filed by Matlack, Inc. in the above-captioned proceeding.

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

Very truly yours,

JAMES W. PATTERSON

DOCUMENT FOLDER

JWP/jal
enclosure

cc: William A. Chesnutt, Esquire
Ronald Malin, Esquire
Henry Wick, Jr., Esquire
Kenneth Olsen, Esquire
William O'Kane, Esquire
John C. Peet, Jr., Esquire, General Counsel
Daniel McGaughey, Director of Pricing

ORIGINAL

Before The

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MOTION TO STRIKE PORTION OF
REPLY TO PETITION TO REOPEN RECORD

COMES NOW, Matlack, Inc. ("Matlack") and, through its attorneys, files this Motion to Strike a Portion of the Reply to Petition to Reopen Record submitted by Applicant, Central Transport, Inc. ("Central" or "Applicant") in the above-captioned proceeding.

I. STATEMENT OF THE CASE

Matlack adopts the Statement of the Case set forth in its Petition to Reopen filed earlier in this proceeding, with the following addition:

On May 29, 1990 Matlack filed a Petition to Reopen seeking a reopening of the record in this proceeding to allow the introduction of evidence relevant to Central's fitness that was discovered after the close of the evidentiary record. On June 11, 1990 a Reply to Petition to Reopen ("Central's Reply") was filed by Central.

Through this Motion Matlack seeks to have portions of Central's Reply stricken from this record as non-responsive,

misleading and inaccurate. In addition we note that Central in its Reply disputes not one iota of the center of Matlack's Petition - III. FACTS CONSTITUTING GROUNDS FOR REOPENING. Central only disputes some of Matlack's arguments and suppositions - even though stated as arguments and suppositions.

II. MATERIAL SOUGHT TO BE STRICKEN

Item 1. The word "voluntarily" from line 7 on page 3 of Central's Reply.

Item 2. The first sentence of paragraph 5 on page 4 of Central's Reply.

Item 3. Paragraphs 7 and 8 on pages 6-7 of Central's Reply.

Item 4. Paragraphs 10 and 11 on page 8 of Central's Reply.

III. ARGUMENT IN SUPPORT OF MOTION

Item 1.

Matlack seeks to have stricken from Central's Reply the word "voluntarily" which is set forth in the following:

> Moreover, DER's regulatory involvement in that regard is a matter that is already in this record in considerable detail -- the bulk of that evidence having been introduced and developed by Matlack on cross-examination of a qualified Central witness, utilizing documents voluntarily furnished by applicant. Central Reply, p.3 (citations omitted)(emphasis in original).

The documents in question were, indeed, supplied to Matlack by Central. However, Central produced the documents in

response to an interrogatory propounded by Matlack to which Central filed objections. It was only after Central was ordered by the presiding Administrative Law Judge to answer the interrogatory and produce the documents (T. 24-25) that they were supplied. There was nothing "voluntary" about Central's actions.

It is recognized that the striking of the word "voluntarily" will not impact significantly upon the Commission's determination whether to grant Matlack's request that this record be reopened. This item is included to emphasize the manner in which Central has mischaracterized the actions of the parties throughout its Reply. Rather than a voluntary accommodation, Central vigorously fought to keep from this record evidence of its environmental and safety violations unrelated to Pennsylvania operations. The word "voluntarily" should be stricken from Central's pleading to reflect this fact.

Item 2.

The first sentence of paragraph 5 of Central's Reply asserts

> Contrary to the contention of Matlack, evidence about the guilty plea of March 5, 1990, concerning activities in the spring of 1987 at Central's Charlotte, NC, terminal, does not constitute "a material change of fact since the close of the record" having an "impact on" Central's activities at its Karns City, PA terminal. Central Reply, p.4 (emphasis in original).

Matlack has argued nothing of the kind. Matlack did not argue that Central's acknowledgement of guilt has some

impact upon activities at Central's Karns City, PA facility; no attempt is made to argue that because violations occurred in Charlotte, they must also have occurred in Karns City. Rather, Matlack's Petition contends that the North Carolina violations reflect Central's willingness to ignore or knowingly flaunt environmental regulations and, as such, should be considered by this Commission. Central has again mischaracterized the arguments presented by Matlack and the sentence should be stricken.

Item 3.

Paragraphs 7 and 8 of Central's Reply read as follows:

> 7. Matlack also makes the incredible suggestion that this proceeding should be reopened for the purpose of determining "whether Central fully and properly responded to Matlack's discovery requests" (Petition, p. 8). In this connection, Matlack's pleading contains the false statement that Central failed "to supply any information relating to the investigation being conducted into Central's Clean Water Act violations by the Federal Bureau of Investigation and other regulatory agencies . . . . " (Petition, p.6, fn. 1).
>
> 8. The evidentiary record flatly contradicts the assertion made by Matlack in this regard. Both Central witnesses testifying in this proceeding acknowledged that in or about May 1987 the FBI had investigated the dumping of hazardous waste at the Charlotte terminal into the sewer system (Tr. 26, 27-28, 693). Matlack's veiled allegation that Central "intentionally hid information sought by Matlack" (Petition, p.6, fn. 1) is outrageously inaccurate. Central Reply, pp. 6-7.

Central quotes a portion of Matlack's footnote out of context and otherwise distorts the evidence of record.

Matlack's Petition to Reopen stated that "Central failed to produce any evidence regarding the Clean Water Act violations in response to [the above-quoted] interrogatory" and referenced a footnote wherein Matlack asserted that "Central's failure to supply any information relating to the investigation being conducted in Central's Clean Water Act violations by the Federal Bureau of Investigation and other regulatory agencies raises the issue as to whether Central fully responded to the interrogatory propounded by Matlack or whether it intentionally hid information sought by Matlack." Matlack Petition, p.6 (Emphasis Added). Viewed in context, Matlack's allegation that Central failed to supply information regarding the FBI's investigation was limited to Central's response to Matlack's interrogatories - an allegation that is absolutely accurate.

The fact that two of Central's witnesses acknowledged - under cross-examination from Matlack's counsel - that they were aware of an FBI investigation does not contradict Matlack's claim that Central may have failed to fully respond to Matlack's interrogatory. To the contrary, such evidence supports the contention that information was purposefully and knowingly withheld from Matlack. If Central was aware of the investigation, why were the circumstances surrounding the environmental violations not made known to Matlack and the Commission in response to Matlack's interrogatory? Why were no documents relating to the

FBI investigation supplied? A reopening will permit Central to answer that question.

Matlack's Petition does not contain a "false statement". The evidentiary record fully supports Matlack's position. Paragraphs 7 and 8 of Central's Reply must be stricken as, at best, misleading. Certainly, the record in this matter does not support the allegations contained therein.

Item 4

Central's Reply contains the following contentions at paragraphs 10. and 11.:

> 10. Matlack's final effort of sophistry is to suggest that Central had an obligation to supply copies of the material appended to Matlack's petition because of the following boiler-plate language appearing in Matlack's original interrogatories:
>
> > These Interrogatories are continuing, and any information secured subsequent to the filing of your answers, which would have been includable in the answers had it been known or available, is to be supplied by supplemental answer.
>
> 11. Matlack's contention concerning any obligation imposed on Central by that boiler-plate provision is without merit for at least four reasons:
>
> > (a) The interrogatories were propounded explicitly "pursuant to the provisions of Section 333(d) of the Public Utility Code" which, on its face, relates to "prehearing procedures", not to conduct of the parties after hearing has begun;
> >
> > (b) Implementing regulations adopted by the Commission clearly provide that "discovery" terminates at "the close of evidentiary hearings" unless otherwise ordered by the presiding officer (see 52 Pa. Code §5.331(d)). No order was issued in this proceeding providing for interminable discovery;

(c) The data appended to Matlack's petition does not cause any response previously offered by the two Central witnesses to become "incorrect or incomplete" within the meaning of 52 Pa. Code §5.332(2), even if one assumes arguendo that discovery in PUC proceedings never ends; and

(d) Case law in other forums supports the view that an obligation to respond to discovery terminates contemporaneously with the close of evidentiary hearings. Troutner v. Philadelphia Transportation Company, 5 D & C 2nd. 545 (1954); Wolf v. Dickinson, 16 F.R.D. 250 (E.D. Pa. 1952); Novick v. Pennsylvania Railroad Company, 18 F.R.D. 296 (W.D. Pa. 1955). Central's Reply, p.8.

Matlack agrees with Central's position that discovery ends with the close of the evidentiary record. Matlack did not and does not suggest that the materials appended to its Petition should have been provided by Central. Rather, the suggestion that information may have been withheld relates to the belief that in the period from the date of the violations (April, 1987) to the close of the evidentiary record (June 28, 1989) Central likely obtained certain documentation that should have been produced in response to Matlack's interrogatory and the Judge's directive.

Paragraphs 10 and 11 of Central's Reply do not address any of the issues raised by Matlack's Petition and must be stricken as non-responsive.

WHEREFORE, Matlack, Inc. requests that the language described in Section II, above be stricken from the Reply of Central Transport, Inc. to Matlack's Petition to Reopen Record.

Respectfully submitted,

By: _____

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Motion to Strike Portion of Reply to Petition to Reopen Record, were served upon the following by United States mail, postage prepaid.

Dated at Philadelphia, Pennsylvania this 21st day of June, 1990.

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120
(Original and 2 copies)

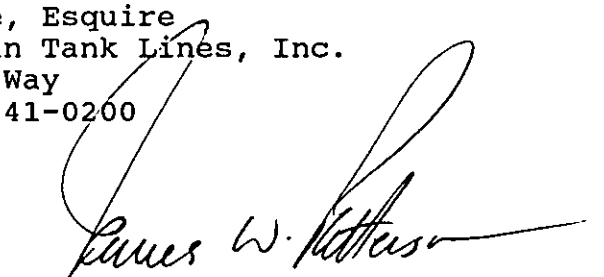
William A. Chesnutt, Esquire
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108

Ronald Malin, Esquire
Johnson Peterson Tener & Anderson
Key Bank Bldg., 4th Floor
Jamestown, NY 14701

Henry Wick, Jr., Esquire
Wick Streiff Meyer Metz and O'Boyle
1450 Two Chatham Center
Pittsburgh, PA 15219

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

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



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

ORIGINAL

McNEES, WALLACE & NURICK

ATTORNEYS AT LAW

100 PINE STREET
P. O. BOX 1166
HARRISBURG, PA. 17108-1166
TELEPHONE (717) 232-8000
FAX (717) 236-2665

June 29, 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

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 two (2) copies of Reply of Applicant Central Transport, Inc. To Protestant Matlack, Inc.'s Motion To Strike 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
Counsel for Applicant
Central Transport, Inc.

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

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF APPLICANT CENTRAL TRANSPORT, INC. TO PROTESTANT MATLACK, INC.'S MOTION TO STRIKE

Applicant Central Transport, Inc., by its counsel McNees, Wallace & Nurick, respectfully files this reply to an unauthorized pleading by protestant Matlack, Inc. entitled "Motion to Strike Portion of Reply to Petition to Reopen Record".

PRELIMINARY OBSERVATION

The pleading of Matlack, Inc. identified immediately above is not authorized by the Commission's rules of practice. Significantly, Matlack cites no Code section, pursuant to which the Motion is supposedly being filed. That omission is understandable. There simply is no basis for Matlack's pleading.

This proceeding has been pending on the merits since Reply Exceptions were filed by various parties on April 20, 1990. Subsequent to the filing of those pleadings, Matlack, Inc., joined by none of the other five (5) protestants, sought relief pursuant to 52 Pa. Code §5.571(a), in the form of a Petition to Reopen the Proceeding for the purpose of taking additional evidence. As permitted by 52 Pa. Code §5.571(c), applicant Central Transport, Inc. answered that petition.

Section 5.571 of Title 52, Pa. Code makes no provision for any further reply to the petition of Matlack or to the answer filed by Central Transport. Matlack attempts, through the device of this frivolous and unauthorized Motion to Strike, to reargue essentially the points made in its initial Petition to Reopen the Proceeding. The Commission should reject the Motion to Strike.

PROVISIONAL ANSWER PURSUANT TO
52 PA. CODE §5.101(d)

If the Commission chooses not to reject Matlack's so-called Motion to Strike as an unauthorized pleading, then Central Transport by this provisional answer will demonstrate that the Motion to Strike should be denied and/or rejected under 52 Pa. Code §5.101.

The provisions of 52 Pa. Code §5.101(a) make clear the limited bases on which a "Motion to Strike" will be entertained.[1/] In strictest terms a "Motion to Strike" must be directed to a pleading that "is in insufficient as to form". Giving the Matlack document every benefit of the doubt, 52 Pa. Code §5.101(a) might also be construed to cover a "Motion to Strike" a pleading that is "insufficient as to substance ...." The pleading filed by Matlack is grounded on neither of the cognizable bases specified in 52 Pa. Code §5.101(a). There is no allegation in the Matlack pleading that the answer by Central to Matlack's Petition to Reopen for the

1/ Section 5.101 is entitled "Preliminary Motion" and is incorporated in a Subchapter entitled "Pleadings and Other Preliminary Matters" occurring prior to commencement of hearings in a formal proceeding. This case has been fully heard and has been the subject of an Initial Decision.

receipt of additional evidence was "insufficient" either as to "form" or "substance".

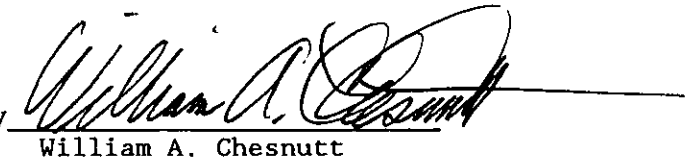
Instead, the "Motion to Strike" by Matlack is being employed as a ruse to allow Matlack to reargue its basic petition for reopening, and thus to obtain the unfair advantage of filing an unauthorized answer to an answer. Indeed, the Motion to Strike is so thinly disguised that on its face reference is made to the striking of a "portion" of the reply filed by Central. Provisions of 52 Pa. Code §5.101(a) do not countenance motions to strike "portions" of pleadings. To illustrate just how preposterous the pleading of Matlack is, one needs only to look at the first item sought to be stricken viz. the adverb "voluntarily". The frivolous nature of Matlack's pleading is self-evident from Matlack's acknowledgment that "striking of the word 'voluntarily' will not impact significantly upon the Commission's determination whether to grant Matlack's request that this record be reopened." This acknowledgment by Matlack is a scathing self-indictment of its own pleading.

CONCLUSION

Whether viewed as a wholly unauthorized pleading or as a pleading which fails to conform to the limitations of 52 Pa. Code §5.101(a), the putative "Motion to Strike" tendered for filing by Matlack should be rejected, or denied.

Respectfully submitted,

McNEES, WALLACE & NURICK

By 

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

Dated: June 29, 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:

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

James W. Patterson, Esquire
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

Kenneth A. Olsen, Esquire
P. O. Box 357
Gladstone, NJ 07934-0357

Henry M. Wick, Jr., Esquire
1450 Two Chatham Center
Pittsburgh, PA 15219

Ronald W. Malin, Esquire
P. O. Box 1379
Key Bank Building, Fourth Floor
Jamestown, NY 14702-1379

David H. Radcliff, Esquire
407 North Front Street
Harrisburg, PA 17101

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

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

Counsel for Applicant
Central Transport, Inc.

Dated this 29th day of June, 1990, at Harrisburg, Pennsylvania.