ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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SECRETARY'S OFFICE
Public Utility Commission

Application of Central Transport, Inc. : A-00108155

ORDER

On May 26, 1988, Central Transport, Inc. (Central), filed an application for a certificate of public convenience to transport, as a common carrier, property, in bulk, in tank and hopper-type vehicles, between points in Pennsylvania. The application was protested and hearings have been held in the matter. Further hearings are presently scheduled for February 7, 8, 9, 14, and 15, 1989. Central has restrictively amended its application to read as follows:

> Property, in bulk, and hopper-type vehicles, between points in Pennsylvania.
>
> > Provided that no right, power or privilege is granted to transport asphalt, cement, cement mill waste, dolomitic limestone and dolomitic limestone products, dry litharge, fly ash, limestone and limestone products, mill scale, roofing granules, salt, sand, scrap metal and stack dust.
> >
> > 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.
> >
> > Provided that no right, power or privilege is granted to transport corn syrup and blends of corn syrup, flour, honey, milk and milk products, molasses, sugar and sugar substitutes.

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Provided that no right, power or privilege is granted to perform transportation in dump vehicles.

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.

At this point there are six protestants remaining in the case, including Matlack, Inc. Before me for resolution at this time is a Motion To Dismiss An Objection And To Direct Answering Of Interrogatories ("motion to compel"). This motion was filed by Central against Matlack on January 4, 1989. No answer was filed by Matlack and, by order dated January 17, 1989, I granted the motion. By letters dated January 20, 1989, and January 23, 1989, from counsel for Central and Matlack, respectively, I was informed that Central inadvertently neglected to serve a copy of its motion on Matlack. Accordingly, by order dated January 26, 1989, I withdrew my order of January 17, 1989, in order to allow Matlack to file an answer. On January 30, 1989, Matlack filed its answer. The issue is now ripe for decision.

Background

On December 9, 1988, Matlack filed objections to interrogatories served by Central upon it on November 25, 1988. Matlack objected to Central Interrogatories 6, 15, 17, 18, 19, and 20. On December 20, 1988, Matlack filed Supplemental Objections to Interrogatories 17, 18, 19, and 20, stating further

reasons why it objected to answering those interrogatories. On January 4, 1989, Central filed the subject motion to compel with respect to Interrogatories 17, 18, 19, and 20.

The interrogatories at issue read as follows:

> 17. Since January 1, 1986, has Protestant received any complaints, warnings, Notices of Claim or citations from the Pennsylvania Public Utility Commission, the Pennsylvania Department of Environmental Resources, the United States Environmental Protection Agency, the United States Department of Transportation, the Federal Bureau of Investigation, or any other governmental agencies of the Commonwealth of Pennsylvania or of the state (other than Pennsylvania), in or through which Protestant's vehicles operated the most miles during 1986 and 1987, in connection with alleged violations involving or affecting transportation.* If so, give the following information for each instance:
>
> (a) Date of alleged violation.
>
> (b) Origin(s) and destination(s) of service being rendered or location of violation.
>
> (c) Commodity or commodities being transported, or nature of service being rendered.
>
> (d) Type of vehicle utilized, if any.
>
> (e) Nature of the incident or problem which formed the basis for the complaint, warning, Notice of Claim, etc.
>
> 18. For each instance identified in response to Interrogatory 14 (sic), identify and produce all documents(s) which pertain(s) to the incident including all document(s) issued by any of the agencies listed in said Interrogatory.
>
> 19. Were there any instances during 1986, 1987 and 1988 (through September 30), in which protestant transported traffic between points in Pennsylvania, in which the moves were subject to

the jurisdiction of the Pennsylvania Public Utility Commission, but were not authorized by certificates of public convenience issued to Protestant by the Pennsylvania Public Utility Commission? If so, give the following information for each instance:

(a) Date of trip;

(b) Origin of trip;

(c) Destination point or points;

(d) Commodity or commodities transported;

(e) Number and type of vehicles used;

(f) Name of entity utilizing applicant's service.

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

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

With respect to Interrogatories 17 and 18, Matlack objects on two grounds. In its initial objections, Matlack objected that Interrogatories 17 and 18 are too broad. Matlack acknowledged that Interrogatories 17 and 18 are virtually identical to Interrogatories 14 and 15 propounded by Matlack to Central earlier in this proceeding. As Matlack noted, those interrogatories were discussed in detail by counsel and by the undersigned during several days of hearing, culminating in the

form of the interrogatories set forth at 17 and 18, but accompanied by an understanding of counsel that ordinary traffic violations, warnings, parking tickets and the like need not be included in Central's response. In its original objections Matlack merely requested the same accommodation. In its supplemental objections, Matlack further objected that Interrogatories 17 and 18 are not relevant to this proceeding because they bear upon Matlack's fitness. In its supplemental objections, Matlack has taken the position that its own fitness is not an issue to be considered in evaluating the evidence in support of a grant or denial of Central's application for intrastate operating authority. Matlack argues that the applicant's fitness is at issue in a motor carrier application case, but the protestant's fitness is irrelevant to the issues involved.

Matlack objects to Central Interrogatories 19 and 20 on the basis that the information sought therein relate to Matlack's fitness, which, as Matlack argues with respect to Interrogatories 17 and 18, is not at issue in this proceeding.

In its motion to compel, Central argues that the information sought by Interrogatories 17, 18, 19, and 20 is relevant not to Matlack's fitness, but rather is relevant to its own fitness. Specifically, Central argues:

> The issues concerning an applicant's fitness cannot be evaluated in a vacuum. The question is

> not simply whether an applicant carrier has received "complaints, warnings, notices of claim or citations" from agencies regulating environmental and hazardous transportation areas, but whether the frequency or seriousness of those complaints, warnings, notices of claim or citations deviate significantly from industry experience in that area.

(Henceforth, for ease of reference, I will refer to Central's argument as the "industry standards" argument.) Central also notes that none of the other protestants objected to answering these interrogatories.

In its answer, Matlack raises several arguments in opposition to Central's "industry standards" argument. First, Matlack asserts that the law does not recognize Central's "industry standards" argument.[1] Matlack further argues that the fitness test pertaining to the applicant in an application proceeding is not a "balancing test," as suggested by Central's argument. Matlack argues that acceptance of an "industry standards" argument will result in invalid comparisons because

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[1] In support of this argument, Matlack avers that in another unrelated application proceeding before the Commission, Application of Butler Trucking Co., A-00092978, F.1, Am-U, Central's counsel is arguing this same issue from the other side (i.e., in representing a protestant in Butler, Central's counsel is attempting to resist the applicant's discovery of protestant's violations by raising essentially the same argument as Matlack in this case). I have reviewed the record in that other proceeding and find that, as yet, no order has been issued by the judge therein. The mere fact that Central's counsel is able to argue inconsistent positions on behalf of different parties in different cases does not establish the state of the law on a particular issue.

the protestant carriers may not be representative of the "industry," and that an "industry standard" is unworkable because it would be impossibly difficult and complex to develop a standard of comparison of violations in terms of number and relative seriousness, taking into account the varying sizes of the carriers. Matlack also asserts that acceptance of the "industry standards" argument would drastically change the manner in which motor carrier application cases are litigated; in particular Matlack argues that hearing time and expense will be increased substantially if the protestants' violations are accepted into evidence. Finally, Matlack argues that Central's "industry standards" concept should not be adopted through the resolution of a discovery dispute because it would drastically alter well-established Commission practices.

Discussion

In my earlier order on this matter, I noted that while I agreed with Matlack's position that its fitness is not an issue in this proceeding, I was of the opinion that Central's argument prevailed. Matlack's answer, while it raised several pertinent and troublesome points, has not changed my basic conclusion that the motion to compel should be granted. I will discuss each of Matlack's arguments separately.

Before discussing Matlack's specific arguments, it is helpful to consider the purpose of the fitness criteria as it

relates to motor carrier application proceedings.[2] The most recent Supreme Court decision involving fitness in relationship to motor carrier application proceedings is Brinks, Inc. v. Pa. Public Utility Commission, 500 Pa. 387, 456, A.2d 1342 (1983). In that case, the Commission granted contract carrier operating authority to Brooks Armored Car, Inc., despite evidence in the record that Brooks had knowingly engaged in unauthorized operations in Pennsylvania. Brinks appealed the Commission's grant of authority to the Commonwealth Court. The Commonwealth Court reversed the Commission, and held that the evidence in the case had demonstrated that Brooks was unfit to hold authority. Brinks, Inc. v. Pa. Public Utility Commission, 54 Pa. Commonwealth Ct. 452, 421 A.2d 1244 (1980). Brooks and the Commission then appealed the Commonwealth Court's order to the Supreme Court. The Supreme Court reversed the order of the Commonwealth Court and reinstated the Commission's order granting authority. The Court, in ruling upon the issue, discussed the rationale behind the fitness requirement:

> The essence of public utility regulation is to ensure that the public's needs are best served at the most reasonable rates. If past unlawful

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[2] "Fitness" as that term is used in motor carrier application proceedings encompasses three separate criteria: financial fitness, technical fitness, and the "propensity to operate safely and legally." 52 Pa. Code §41.14(b). This discovery dispute concerns only the last of the three criteria, and this discussion, of necessity, applies only to that criterion of fitness which involves safe and legal operations.

> operations were deemed conclusive of an applicant's fitness, the Commission would be powerless to grant the application of a carrier who, despite its unlawful activities, has otherwise demonstrated its present fitness to perform services beneficial to the public. Such an automatic disqualification, moreover, would improperly view the Commission's statutory obligation to determine an applicant's fitness prior to granting a contract carrier permit as a punitive measure directed against the individual wrongdoer rather than as a safeguard, the primary purpose of which is the protection of the public.

(500 Pa. at 392, Footnote 3).

Thus, the primary purpose of the fitness criteria is to protect the public. In fact, the statutory standard for the issuance of a certificate of public convenience does not mention the fitness of the applicant. The standard requires that the Commission find that the granting of a certificate is "necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S. §1103(a). The primary consideration in granting such an application is the public interest. Chemical Leaman Tank Lines, Inc. v. Pa. Public Utility Commission, 201 Pa. Superior Court 196, 191 A.2d 876 (1963). These principles must be kept in mind during the balance of this discussion.

It is also important to understand the role of the protestants in a motor carrier application proceeding. In a typical motor carrier application proceeding, such as the present case, the protestants do not intervene in the case for the altruistic purpose of protecting the public interest. The

protestants are persons or corporations who will be competitors of the applicant should the application be granted. The objective of a protestant in intervening in an application case is to narrow, to the greatest extent possible, the authority awarded to the applicant; in the best possible case, the protestant would prevail upon the Commission to award no authority to the applicant. Thus, a protestant raises the issue of fitness not for the benefit of the public, but for the personal benefit of reducing competition to the lowest possible degree. Nevertheless, there is a public benefit in this system in that certain private parties (the protestants) are motivated by an extremely strong pecuniary interest to bring to the attention of the Commission any violations by the applicant which might adversely reflect upon the applicant's fitness to render service. So long as such a system serves the public interest, as well as the private interest of the protestant, it is defensible. On the other hand, if the system would permit a protestant with many violations to successfully resist the application of an applicant with considerably fewer violations, then it would be serving the interest of the protestant, but not the interest of the public. In that case, the system would be indefensible.

In this particular case, should the information discovered by Central from the protestants, including Matlack, establish that it has many fewer safety or environmental

violations or many fewer instances of unauthorized service, it is my opinion that Central could reasonably argue that approval of its application would be in the public interest because it would authorize a more law abiding carrier to enter the market against carriers which had not been operating in compliance with the law. Such an argument, in my opinion, would carry considerable force if the specific violations involved safety violations or environmental violations such as the deliberate or negligent release of hazardous substances. All other things being equal, it would be in the public interest to approve a carrier's application if that carrier is shown to be much less likely than the existing carriers to engage in violations of the law, particularly violations involving safety or the release of hazardous substances into the environment.

One other observation needs to be made before addressing Matlack's specific objections to supplying the requested information. Central is seeking evidence regarding two general classes of violations of the law: unauthorized transportation service (which is a specific violation of the Public Utility Code), and violations of other laws related to transportation (such as the unlawful discharge of hazardous substances and other safety violations). Arguably, safety violations and hazardous substance violations should be considered more serious because they affect the public generally,

whereas unauthorized service violations primarily harm the violator's competitors, who are deprived of the opportunity to render service which they are lawfully entitled to render. Nevertheless, in my view, unauthorized service violations are also serious because they tend to undermine the scheme of regulation set forth in the Public Utility Code. For this reason, for the balance of this discussion, I will not distinguish between unauthorized service violations and other types of violations.[3]

Matlack initially argues that to grant Central's motion would be contrary to existing law, and that the present fitness test is not a "balancing test" as suggested by Central's

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[3] In the course of this proceeding, Central has questioned whether the Commission, in ruling on such an application, can consider violations of laws other than the Public Utility Code. This issue was initially raised in an objection to a question asked of a Central witness on cross-examination (N.T. 14, 15), and again in Central's motion to compel and Matlack's answer to that motion. In the interest of putting this issue to rest, I would direct counsel's attention to the following cases: Byham v. Pa. Pub. Util. Comm., 16 Pa. Superior Ct. 248, 67 A.2d 626 (1949). (Commission affirmed after it refused to issue a certificate for taxicab service to a person who had been arrested and convicted several times for drunkenness and disorderly conduct, and the Commission considered these convictions in its refusal to grant a certificate); Re: Betz, 63 Pa. PUC 500 (1987) (Commission refused to issue a certificate for taxicab service to an individual who, as a taxi driver, had made improper advances to female patrons); Re: Xpress Truck Lines, Inc., A-00104745 (initial decision issued April 24, 1985, final order entered May 22, 1985) (Commission refused to issue certificate to trucking company which had pleaded guilty to violations of federal mail fraud statute), aff'd on other grounds, Xpress Truck Lines, Inc. v. Pa. Pub. Util. Comm., No. 2782 C.D. 1985 (Pa. Commonwealth, Aug. 13, 1986).

"industry standards" argument. While Matlack may be correct that Central's argument is novel in the context of the fitness issue, it is my opinion that the evidence sought by Central might be relevant to other issues in the case, even if not strictly applicable to the fitness issue. Whether Central can utilize an "industry standards" argument regarding its own fitness appears to be an issue of first impression. I have been able to find no case or order on point, despite an extensive search. Neither counsel for Central nor counsel for Matlack has cited any authority directly on point. Since I am aware that both counsel have considerable experience in this area of the law, I am convinced that there is no opinion or order directly on point. However, I am of the opinion that the evidence sought by Central would be relevant as an "alternative to inadequacy" if used to demonstrate that Central's record of compliance with the law is superior to that of the protestants. Under the doctrine announced in Re: Richard L. Kinard, Inc., 58 Pa. P.U.C. 548 (1984), an applicant for motor carrier authority must demonstrate, in addition to need for the service and its own fitness, that approval of the application "will serve a useful public purpose." 58 Pa. P.U.C. at 550. In order to make that demonstration, an applicant may either prove the inadequacy of the existing services, or meet several other criteria which are viewed as "alternatives to inadequacy". In Kinard, the

Commission listed nine such alternatives. However, the list in Kinard clearly was not intended to be exclusive of other alternatives. 58 Pa. P.U.C. at 551. In my view, another "alternative to inadequacy" would be evidence that the applicant operates a safer transportation service and operates more frequently in compliance with the law than the protestants. For this reason, even if Central's "industry standards" argument is not supportable under present law, I believe the information sought is relevant.

Matlack further argues that acceptance of the "industry standards" argument will result in invalid comparisons because the protestant carriers may not be representative of the "industry" and because it would be impossibly difficult and complex to develop a standard of comparison of violations, in terms of number and relative seriousness, taking into account the varying sizes of the carriers. I disagree with this argument. This same argument could be raised with respect to the fitness test applied to the applicant alone. In any given application proceeding, the applicant will be of a particular size, and will have certain experience in the transportation industry. If it is shown that the applicant has committed violations of the Public Utility Code or of other laws, the Commission must determine whether such violations are sufficient to disqualify the particular applicant from approval of its application. In each

case, it is necessary to take into account the size of the applicant and the extent of its experience in the industry. I am satisfied that it would not be considerably more difficult to also weigh the records of the protestants in determining, on balance, whether issuance of a certificate to the applicant would be in the public interest.

Matlack also argues that adoption of the "industry standards" concept would drastically change the manner in which such cases are litigated; in particular, Matlack argues that hearing time and expense would be increased substantially if the protestants' violations are brought into evidence. I disagree. A prudent protestant would not launch a major attack on an applicant's fitness if that protestant knew that its own record was as bad as, or even worse than, that of the applicant. Without question, the applicant and the protestant in such cases will exchange interrogatories seeking to determine how frequently the other party has operated in an unlawful or unsafe fashion. However, only a party which enjoys a substantial "fitness advantage" over the other, whether it be the applicant or protestant, would then seek to vigorously litigate the fitness issue in hearings before the presiding officer. Protestants, as well as applicants, would be advised to heed the adage which admonishes the occupant of a glass house to refrain from throwing stones. Moreover, the possibility that an applicant might

actually use the compliance records of protestants against them might persuade presently operating carriers to operate in a safe and legal fashion if they are contemplating protesting the applications of potential competitors. Such a result would be indeed in the public interest.

As to Matlack's argument that this kind of decision should not be reached in the context of a discovery dispute, I would point out that this issue will most often arise either in a discovery dispute or in an evidentiary ruling when a protestant objects to the applicant's offer of the protestant's record into evidence. Since I conclude that the interrogatories in this case seek relevant evidence, I am unwilling to refuse the applicant access to relevant evidence simply because the applicant might present it in support of a novel, but arguable, interpretation of the law.

For the foregoing reasons, it is my opinion that the motion to compel should be granted. However, I believe that Matlack's original objection to Interrogatories 17 and 18 is well taken. Thus, Matlack's obligation to answer those will be subject to the same understanding of counsel as applied to Matlack's similar interrogatories to Central.

THEREFORE,

IT IS ORDERED:

1. That Matlack's Objections to Interrogatories 19 and 20, and its Supplemental Objections to Interrogatories 17 and 18 are dismissed. Matlack's original Objections to Interrogatories 17 and 18 are sustained.

2. Central's motion to compel is granted, subject to the understanding of counsel applicable to Interrogatories 17 and 18.

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

Dated: Feb. 2, 1989

Michael C. Schnierle

MICHAEL C. SCHNIERLE
Administrative Law Judge

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