ORIGINAL

BEFORE THE
PENNSYLVANIA 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 not yet scheduled, but are anticipated. Central restrictively amended its application, which resulted in the withdrawal of several protests. At this point there are six protestants remaining in the case, including Matlack, Inc. Before me for resolution at this time is a Petition for Certification filed by Matlack on February 10, 1989. In its Petition, Matlack requests that the following question be certified to the Commission pursuant to 52 Pa Code §5.304:

> Whether information regarding the regulatory fitness of a Protestant is relevant to a motor carrier application proceeding and therefore discoverable under 52 Pa. code 5.321?

Matlack has filed a brief in support of certification; Central has filed a brief opposing certification. For the reasons explained herein, Matlack's Petition is denied.

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

On January 4, 1989, Central filed a Motion to Dismiss an Objection and to Direct Answering of Interrogatories ("motion

to compel"). At that time, a copy of Central's motion was not served on Matlack. In its motion to compel, Central argued 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 argued:

> 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.

(For ease of reference, I have been referring to Central's argument as the "industry standards" argument and will continue to use that short hand phrase.) Central also noted that none of the other protestants objected to answering these interrogatories.

On January 17, 1989, unaware that Central had failed to serve its motion on Matlack, I issued an Order directing that Matlack produce the information requested by Interrogatories 17-20 with the understanding that data relating to ordinary traffic violations, warnings, parking tickets and the like need not be supplied.

Following issuance of my January 17, 1989, order, it was brought to my attention that Central inadvertently failed to serve its motion on Matlack. Upon agreement of counsel, I

rescinded my January 17, order to afford Matlack an opportunity to reply to Central's motion. On January 27, 1989, Matlack filed its reply to the motion.

In its answer, Matlack raised several arguments in opposition to Central's "industry standards" argument. First, Matlack asserted that the law does not recognize Central's "industry standards" argument. Matlack further argued that the fitness test pertaining to the applicant in an application proceeding is not a "balancing test," as suggested by Central's argument. Matlack argued that acceptance of an "industry standards" argument will result in invalid comparisons because 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 asserted that acceptance of the "industry standards" argument would drastically change the manner in which motor carrier application cases are litigated; in particular Matlack argued that hearing time and expense will be increased substantially if the protestants' violations are accepted into evidence. Finally, Matlack argued 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.

By order dated February 2, 1989, I again directed that Matlack produce the data requested by Central's Interrogatories 17-20, subject to the same limitation relating to ordinary traffic violations, parking tickets and the like.

In each of my orders, I concluded that the material sought is arguably relevant to two issues in the case. While it appears to be a novel argument, I concluded that Central's claim that the information sought would be relevant to its own (Central's) fitness had merit. I also opined that the information sought by Central would be relevant to demonstrate an "alternative to inadequacy" as required under the doctrine of Re: Richard L. Kinard, 58 Pa. P.U.C. 548 (1984), if the evidence demonstrated that the applicant, Central, has a much better record of compliance with the law than do the protestants (Matlack, et. al).

On February 8, 1989, Matlack filed this Petition for Certification requesting that I certify to the Commission the following question:

> Whether information regarding the regulatory fitness of a Protestant is relevant to a motor carrier application proceeding and therefore discoverable under 52 Pa. Code §5.321?

Discussion

The standards governing certification of a question have been set forth in several Commission decisions. For example, in the case of Shea v. Freeport Telephone and Telegraph Co., C-812580 (Order adopted February 3, 1984, entered February 15, 1984), the Commission described the standards for certification as follows:

> With regard to such a request for certification, 52 Pa. Code §3.191(b) provides as follows:
>
> > (b) Request for certification. During the course of a proceeding, a party may submit a timely request to the presiding officer that a material question which has arisen or is likely to arise be certified to the Commission. The request shall be in writing with copies served upon all parties and shall state, in not more than one page, the question to be certified and the reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings. (Emphasis added).
>
> Bearing in mind that the certification procedure seeks interlocutory Commission review of an issue which has arisen during the proceeding, as distinguished from the customary review and consideration of the matter after the issuance of an Initial or Recommended Decision, the thrust of the underlined passage might more aptly have been stated as "why interlocutory review is necessary to prevent substantial prejudice." As we view it the request for certification procedure calls upon the Administrative Law Judge, in the exercise of his of her discretion, to determine whether the ruing or other matter involved is so peculiarly situated with regard to its factual context that the substantial prejudice which might be suffered

> by a party, would be incapable of being remedied during the normal process of Commission review of the matter.[1] (Emphasis in original).

(Shea, slip op. at 2).

The Commission has cited the Shea opinion on several occasions indicating that it continues to represent the standard to be applied in such cases. See e.g., Re: Pennsylvania Gas and Water Co., 58 Pa. P.U.C. 411, 414, 415 (1984). In Re: Intrastate Access Charges, 58 Pa. P.U.C. 659 (1984), the Commission, after quoting the foregoing passage from Shea, stated:

> The quoted passages should make it clear that, with regard to evidentiary rulings, every adverse ruling by an ALJ, even though prejudicial, does not warrant either certification or interlocutory review of a non-certified question. It is only those prejudicial adverse evidentiary rulings, which could not be satisfactorily cured upon Commission review, which qualify for certification or interlocutory review of a non-certified question. We do not comprehend why it should be necessary to state the fact, but apparently it is required, that this Commission sits as a reviewing body with regard to the Recommended Decisions of ALJs; it does not sit as a quasi-supervisory Presiding Officer to act immediately to review evidentiary, procedural and scheduling decisions of the assigned Presiding Officer.

Intrastate Access Charges, 58 Pa. P.U.C. at 665.

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[1] Shea interpreted the provisions of 52 Pa Code §3.191, the predecessor of the present 52 Pa. Code §§5.301-5.304. However, cases interpreting the standards required under the former §3.191 have been held to apply as well as to similar issues arising under the current §§5.301-5.304. See, Re: Knight's Limousine Service, Inc., 59 Pa. P.U.C. 538, 539 (1985).

In support of its request for certification, Matlack argues it will suffer substantial prejudice if certification is denied because "it will be required to expend a substantial amount of time and effort to gather information" which Matlack contends is irrelevant to the proceeding. Matlack also argues that it will be prejudiced because its personnel may be forced to spend considerable time on the witness stand explaining the circumstances surrounding various violations of which it has been accused[2] over a three-year period. Matlack avers that the time which it spends in gathering, reviewing, and explaining the data can never be recovered, and that, therefore, it will be irreparably harmed by a denial of the request for certification and by requiring that this matter proceed through "normal Commission review process." (Matlack Brief, p. 4). Matlack's argument is meritless.

What Matlack is arguing to constitute substantial prejudice is merely the same risk that any litigant in a Commission proceeding assumes by being a party to that proceeding. In every discovery dispute, it is possible that the Administrative Law Judge will rule on the dispute and a

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[2] Matlack attempts to make a point of the fact that Central has asked it to disclose "complaints, warnings, Notice of Claim or citations," thus requesting information about alleged as well as proven violations. As previously noted, this is the same series of interrogatories which Matlack propounded to Central. It is rather late for Matlack to complain about the form or breadth of the interrogatories.

subsequent Commission ruling in the case will indicate that the Judge's ruling was erroneous. In any such case, the litigant who complies with the Judge's order will have done so, despite the fact that the Judge is later determined to be wrong. If the mere possibility that the Judge's ruling might be wrong were "substantial prejudice", then every discovery dispute would have to be certified to the Commission. This is clearly not the rule. The Commission indicated in Shea that "[i]n order that we make ourselves perfectly clear, the correctness or erroneousness of the ALJ's ruling on admissability (sic) is not a relevant consideration, either initially in considering a request for certification of a question (except to the extent that such arguments might persuade the ALJ to reverse his or her ruling), or later in considering whether interlocutory review is warranted." Shea slip op., at p. 4. Moreover, in Re: Intrastate Access Charges, the Trial Staff and the Consumer Advocate argued that interlocutory review was justified to avoid "prejudice" because the Administrative Law Judge's ruling which was under attack would require them to "spread their limited resources even thinner" and would "unfairly drain" the financial resources of the OCA. The Commission responded to such arguments by concluding that "strained resources" and a "difficult burden" and "debilitating obligations" do not constitute prejudice. 58 Pa. P.U.C. at 666, note 15. Thus, Matlack's argument that

substantial prejudice would flow from having to respond to the discovery requests, and, potentially, to explain their violations in hearings, are without merit.

Matlack has not argued that certification is necessary to expedite the conduct of the proceedings. If it had, however, I would conclude that such an argument is also meritless. Every protestant in this case but Matlack has responded to the challenged interrogatories. Every protestant which has put on witnesses has had to deal with this issue during the course of its case. (See e.g., N.T. 380-383, 386, 436-438). The total amount of hearing time spent on these matters to date has not exceeded two hours. In fact, considerably more time has been spent by Matlack, Central, and the presiding officer in dealing with this discovery dispute. Therefore, in my opinion, certification of this question would not expedite the conduct of this proceeding.

Matlack further argues that certification is appropriate because my ruling would allegedly change established Commission practice by injecting into motor carrier application proceedings an issue not previously considered, the regulatory fitness of the protestants. While this particular argument goes to the merits of my ruling, rather than to the need for certification, Matlack supplements this argument by contending that if I elect not to consider the evidence of protestants'

fitness in evaluating that of Central, (or simply fail to state in the Initial Decision that such consideration was undertaken) Matlack and the remaining protestants will not have the opportunity to address the issue in exceptions to the Initial Decision. Matlack contends that in such a situation the issue will not ripen into one that will be considered through the normal Commission review process. Matlack further argues that in that event, the order directing production of the material at issue remains the law and can be relied upon in other proceedings without the Commission ever having reviewed it. In my opinion, Matlack's position is not well taken.

On the one hand, if I approve Central's application in my Initial Decision, then Matlack will have the opportunity to challenge my ruling through exceptions, including any ruling I may make in which I find Central to be fit. If I rule in favor of Matlack in my Initial Decision, whether I consider the disputed evidence or not, Matlack will not have been disadvantaged by having to answer the interrogatories in question. The fact that some other administrative law judge in another case may view my ruling as precedent and follow it is certainly not prejudicial to Matlack in this proceeding. Administrative law judges are frequently called upon to rule on novel evidentiary issues. Matlack's contention that the Commission should be asked to review this issue simply because it

is novel, is simply another way of arguing that the Commission should review this issue now because my ruling might be in error. If I were to certify this question to the Commission simply because it is novel, then any question of first impression would similarly have to be certified to the Commission. In my opinion, the standards enunciated by the Commission in cases such as Shea and Intrastate Access Charges do not support certification for this reason. As the Commission stated in Pennsylvania Gas and Water Co.:

> [T]he avoidance of reversal and remand is not the type of expedition of the proceeding which our rule contemplates. If it were, then the Commission could be called upon to cure every claimed reversible error on an interlocutory basis. such a situation would be both untenable and absurd . . . . The certified question and interlocutory appeal of a non-certified question procedures are not vehicles by which every adverse evidentiary ruing is to be reviewed, nor is it substitute for, or an alternative, to the exception or appeal procedures antecedent to a review by Commission in the normal course.

Pennsylvania Gas and Water Co., 58 Pa. P.U.C. at 415.

The balance of Matlack's Brief in support of certification deals with the merits of the question for which it seeks certification. Because the Commission has ruled that the merits are not an appropriate consideration upon review of a petition for certification, I do not intend to review that portion of Matlack's Brief in depth. However, because Matlack has raised an argument in its Brief which was not previously

raised in its answer to Central's motion to compel, I will briefly discuss that additional argument. At pages 7 and 8 of its Brief, Matlack argues that one result of my ruling may be that protestants will decline to raise the issue of fitness because they will not want to have their own violations placed on the record. Matlack further argues that such a result would be contrary to the public interest because the Ccommission will be left without "its primary source of developing evidence regarding an applicant's regulatory fitness." (Matlack Brief, p. 7, 8). Matlack further argues that this may result in many "unfit" carriers receiving operating authority simply because there is no one to press the issue before the Commission. There is a very simple response to Matlack's argument. The Commission staff is always available to challenge an applicant's fitness. Protestants in these cases typically launch their fitness attacks after submitting interrogatories to the applicant asking the applicant to disclose its violations. There is no reason why the Commission cannot elicit the same information by way of questions added to its motor carrier application forms (See 52 Pa. Code §3.551), by interrogatories propounded by the staff on a case-by-case basis, or by requiring such information to be supplied in verified statements filed in unprotested cases. As a matter of fact, such alternative approaches to this problem would much more reliable techniques for determining an applicant's

fitness than the present system of relying upon the protestants to present such evidence as they may be able to elicit from the applicant. Many motor carrier application cases are uncontested. If the Commission continues to rely only upon the protestants to elicit and produce evidence of an applicant's possible lack of fitness, then there is the potential for many applicants in unprotested cases to be certificated despite a lack of fitness. In several other cases, protestants initially enter the application case, and challenge fitness, but later drop out of the case upon the applicant's agreement to a restrictive amendment which protects the protestants' interests. Thus, reliance on the protestants to raise the issue of fitness is, in many cases, misplaced reliance.

Matlack also has requested that this proceeding be stayed pending disposition of the question to be certified. In support of its request for a stay, Matlack avers that in the absence of a stay, it will be required to produce the data required by my order directing compliance with Central's discovery request. In view of my conclusion that having to comply with the discovery request does not require substantial prejudice sufficient to warrant certification of this question to the Commission, I will also deny Matlack's request for a stay which is based on the same allegation of prejudice.

THEREFORE,

IT IS ORDERED:

1. That the Petition for Certification filed by Matlack on February 21, 1989, is denied.

2. That this proceeding shall not be stayed pending receipt of a Commission order disposing of the certified question posed in the Petition filed by Matlack on February 21, 1989.

Michael C. Schnierle

MICHAEL C. SCHNIERLE
Administrative Law Judge

Dated: 2/28/89

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