

Act 294

Case Identification: A-00106208, F0001, Am-A;
Application of Towaway Express,
Inc.

Initial Decision By: ALJ Robert A. Christianson

Deadline for Return to OSA: February 2, 1993

This decision has not been reviewed by OSA.

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Commissioner

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Commissioner

1-25-93

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Joseph P. Rucker, Jr.

Commissioner

1/27/93

Date

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Initial Decision By: ALJ Robert A. Christianson

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COMMISSIONER HOLLAND

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Kendall F. Spilland

Commissioner

2/4/93

Date

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ALJ

February 5, 1993

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**SECRETARY'S OFFICE
Public Utility Commission**

Honorable John G. Alford, Secretary
PA Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Re: Application of Towaway Express, Inc.
Docket A-00106208, Folder 1,
Amendment-A
EXCEPTIONS of Protestant,
Courier Unlimited, Inc.

Dear Secretary Alford:

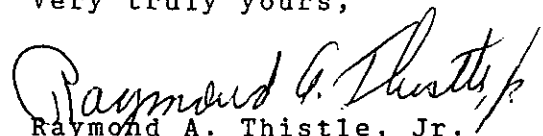
Enclosed herewith for filing is an original plus nine (9) copies of protestant's Exceptions to the Initial Decision of ALJ Robert A. Christianson, served January 19, 1993.

Proper, receipted and timely filing has been made per the Certificate of Service.

Please acknowledge receipt hereof on that provided.

Thank you for your attention and consideration in this matter.

Very truly yours,


Raymond A. Thistle, Jr.
for Courier Unlimited, Inc.

RAT:mt

cc: Courier Unlimited, Inc.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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SECRETARY'S OFFICE
Public Utility Commission

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IN RE: APPLICATION OF TOWAWAY EXPRESS, INC.

DOCKET A-00106208, FOLDER 1,
AMENDMENT-A

EXCEPTIONS OF COURIER UNLIMITED, INC.
TO INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE ROBERT A. CHRISTIANSON,
SERVED JANUARY 19, 1993

DOCKETED

FEB 17 1993

AND NOW COMES Courier Unlimited, Inc., by its attorney,
and files this its Exceptions to the Initial Decision of
Administrative Law Judge Robert A. Christianson, served January 19,
1993, the basis of which are as follows:

Preliminary Statement

At the conclusion of the evidentiary hearings herein, his
Honor, Robert A. Christianson, Administrative Law Judge in this
subject proceeding, stated that he had no particular desire for
Briefs. After an off-record discussion, Judge Christianson stated
that counsel for Protestant, Courier Unlimited, Inc., indicated a
desire to file a Brief just in the nature of Summary of Testimony
and Argument of Facts. Both Applicant and Protestant accordingly

filed Initial Briefs and Reply Briefs; Judge Christianson issued his Initial Decision served January 19, 1993. These Exceptions to such Initial Decision are filed pursuant to statutory provisions and Commission rules governing such pleading.

The Initial Decision of the Administrative Law Judge contains no formal, numerically listed findings of fact nor conclusions of law. Therefore, each and every Exceptions which follows includes Exception to paragraph 2 of the CONCLUSION of the Initial Decision on page 6, which reads

"2. Approval of the application, as amended and subject to further limitation, is necessary or proper for the service, accommodation, convenience or safety of the public;"

The conclusion is broad enough to include all of the Exceptions herein filed and thus exceptions automatically include this conclusion.

In view of all of the foregoing, Exceptions had to be taken to various identified portions of "DISCUSSION AND FINDINGS", beginning on page 50 of the Initial Decision.

Lastly, for convenience, the following is a key to references to the transcript of testimony, the Initial Decision, Applicant's Initial Brief, Protestant Courier Unlimited, Inc.'s Brief and Courier Unlimited, Inc.'s Reply Brief:

(N.T.) Transcript of Testimony
(ID) Initial Decision
(A) Applicant's Initial Brief
(CU) Courier Unlimited, Inc.'s Initial Brief
(CUR) Courier Unlimited, Inc.'s Reply Brief

The Exceptions follow.

FIRST EXCEPTION:

The Administrative Law Judge (hereinafter referred to respectfully as ALJ) erred, when discussing the applicable law in motor carrier cases of this nature (ID 51,52), in failing to cite and then applying the following quoted portion of the Application of Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262 (1990), thereby limiting the authority granted to the representative proof presented.

"Moreover, the supporting witnesses must identify Pennsylvania origin and destination points between which they require transportation, and these points must correspond with the scope of the operating territory specified in the application. E.g. Re Nothstein Bros. Inc., 64 Pa. P.U.C. 411 (1987); Re Purolator Courier Corp., 50 Pa. P.U.C. 308 (1976).

The particular circumstances of a case determine what constitutes sufficient evidence of a public demand/need for the applicant's proposed service. Noerr Motor Freight. Inc. v. Pennsylvania Public Utility Commission, 181 Pa. Superior Ct. 322, 124 A.2d 493 (1956); Re Purolator Courier Corp. Therefore, the number of witnesses which will comprise a cross section of the public on the issue of the public demand/need for an applicant's proposed service will necessarily vary with the circumstances of the case such as the breadth of the applicant's intended operating territory, the population density in the intended operating territory, and the scope of the requested operating authority. Purolator Courier Corp. II; Purolator Courier Corp. I; Noerr Motor Freight. Inc.; Application of Suburban Transit, Inc., A-00107286 (order adopted October 27, 1988, entered November 4, 1988); Re Purolator Courier Corp. Where the intended operating territory is broad and heavily populated and the applicant seeks an expansive grant of operating authority, more witnesses are required to show a cross section of the public needing the applicant's proposed transportation in the intended operating territory. Conversely, where the intended

operating territory is restricted and not populous and the applicant seeks a narrow grant of operating authority, fewer witnesses are required to show a cross section of the public needing the applicant's proposed transportation in the intended operating territory."

No single supporting witness supported the subject application between points in Pennsylvania. The ALJ's entire Initial Decision confirms this conclusion. The ALJ concluded that the combined testimony of the supporting witnesses justified such a total territorial grant of authority (ID 5,6, 1st full paragraph). The Exceptions which follow relating to the individual witnesses will demonstrate this erroneous conclusion of the ALJ.

SECOND EXCEPTION:

The ALJ erred in his discussion on pages 50, 53 (Conclusion) and 54, of the Initial Decision in concluding adversely and in failing to make a conclusion of law that failure of a protestant to meet the impossible burden placed upon protestants by 52 Pa. Code §41.14(c) does not relieve an applicant from meeting its burdens of proof under 52 Pa. Code §41.14(a) and (b). See also discussion at N.T.189 and 190.

THIRD EXCEPTION:

The ALJ erred in giving weight to the testimony of Michael J. Cleary (N.T.87-93), President of Cleary Rehabilitation Services, Incorporated (ID 55, 1st full paragraph). The ALJ reasons that he sees no problem because Mr. Cleary is President of the Company.

The ALJ ignores Mr. Cleary's testimony that shipper has not had a need (N.T.92); that he could have used it [the proposed service] yesterday [7-20-92], but he was not authorized; the people in the home services would have to go through their supervisors (N.T.92,93) (CU 9,19)(CUR 2). Other than general vague and unsubstantiated conclusions with reference only to pages at which such general testimony could be found, there was no detailed analysis of this shipper's testimony by Applicant in its Brief (A 4-18).

FOURTH EXCEPTION:

The ALJ erred in giving any weight to the testimony of Allen J. Bloom, owner and CEO of MCI Packaging Company (ID 55,56). Either the U.S. government pays the transportation charges or the government contractor, not witness's company, if he can help it (N.T.135,136,137). The ALJ states he will give weight based on defacto control. There is no convincing evidence that this shipper, in fact, does control the selection of the carrier. No representative points of destinations were given; only paper support; no support for between points in PA (N.T.131-139)(CU 13,20).

FIFTH EXCEPTION:

The ALJ erred in stating on page 56 of his Initial Decision:

"I tend to agree with Protestant that most of the witness testified to rather particular needs often with one end of the transportation at a particular headquarters location."

There is no testimony of any single alleged supporting witness as to its need for "between points" in Pennsylvania (CU 4,5; 5,6;

6,7; 7; 7,8; 9; 10,11; 11,12; 12; 13; 13,14; and III Analysis of Supporting Witnesses Testimony and Conclusion, 19-25).

SIXTH EXCEPTION:

The ALJ should have found that no single shipper expressed or testified to a transportation need between points in Pennsylvania; nor any need other than (a) to and from place of business, (b) to place of business, and (c) from place of business. Record and Brief basis is the same as set forth in FIFTH EXCEPTION.

NOTE: The following Exceptions relate to the ALJ's numerical short descriptions of the evidence of the supporting shippers. The numerical listings here correspond to the ALJ's numerical listings for the various witness. The ALJ's key is here repeated for convenience of the reader (ID 56,57). (1) the main base or bases, (2) other points of service, (3) the traffic pattern, (4) frequency of need, (5) special needs, (6) existing transportation arrangements, (7) control of traffic and (8) the commodity description.

SEVENTH EXCEPTION: (ALJ erred and should have found)

Brode (ID 57)

1. Lemoyne is the only point of either origin or destination (N.T.36,39,40)(CU 4,5).

2. The points mentioned were perimeters and not offered as representative points. No other representative points (N.T.36,37; 34-47)(CU 4,5).

3. On inbound shipments, customer pays the freight and can choose whatever means necessary to get product to supporting shipper. This includes the hard copy (magnetic media and tapes) (N.T.45,46)(CU 4,5). There is no need for hard copy on outbound from Lemoyne once the hard copy has been keyed (N.T.43-45)(CU 5).

8. No need for magnetic media and tapes because they are inbound only and customers controls (N.T.43-46)(CU 4,5).

EIGHTH EXCEPTION: (ALJ erred and should have found)

Dags (ID 57)

1. The only support by this witness was for shipments to or from Camp Hill (N.T.47)(CU 5).

2. While witness stated generally that his shipments were within a 50 mile radius, no representative points were given. The only discernible representative points given by this witness were Allentown, Philadelphia and Millersberg (N.T.52-55). Shipper is content to use his own people right now (N.T.55,56)(CU 5,6). See also (CU 22,23).

NINTH EXCEPTION: (ALJ erred and should have found)

Butler (ID 58)

2. This description should not read ". . . ; most Pennsylvania counties." The witness stated:

"So I would say over the past 20 years, I've probably had business dealings in most of the counties in Pennsylvania, probably not all of them." (N.T.60)

In the last two (2) years he has not had occasion to ship to 67 counties (N.T.61). From and to his office is involved not between points in Pennsylvania (CU 6,7,23).

TENTH EXCEPTION: (ALJ erred and should have found)

Shiner (ID 58)

1. This is complete error. Nowhere in the testimony of this witness is the location of the office of witness given to and from which shipments may be made. Near Harrisburg is a guess on part of the ALJ from witness's statement that settlements are held within a four or five county area around here [Harrisburg] (N.T.71). This does not mean that shipper's office is near Harrisburg. Mansfield is another office of shipper to or from which shipments may be required and shippers headquarters in (wherever).

2. Tioga county is the county in which the satellite office is located (N.T.67). Very few shipments are to shipper's office wherever that is (N.T.67). Witness has never had a problem with getting anything to Erie where Erie Insurance is located (N.T.67, 68). Four or five counties near Harrisburg is not representative points as envisioned by the Blue Bird case, supra (CU 7).

ELEVENTH EXCEPTION: (ALJ erred and should have found)

Swank (ID 58)

8. Protestant representative, in preparing protestant's Initial Brief, missed this witness's single sentence reference to magnetic media inbound only for analysis from state agencies at the

universities (N.T.76,77). However, such was the only reference by this witness without further explanation or statement of type service required for such transportation. This is hardly sufficient to grant magnetic media state wide.

TWELFTH EXCEPTION: (ALJ erred and should have found)

Cleary (ID 59)

2. Although this witness is not authorized to use applicant as set forth in Exception THIRD herein, the Altoona area, north, south and east is not accurate. Points given were only to state he shipped as far west as Altoona, Johnstown and Bedford area (N.T.90) (CU 9).

7. No control of traffic. See Exception THIRD herein.

8. Xrays were not among the commodities sought in this application. (See Applicant's Restrictive Amendment (ID 1).

THIRTEENTH EXCEPTION: (ALJ erred and should have found)

Torcaso (ID 59)

2. Witness states, as a conclusion, that he has need for shipping and receiving "all of Pennsylvania, every area" (N.T.96). This did not stand up under cross-examination. He shipped to Erie a couple of months ago. There were no other points he stated he shipped to or from. After being questioned concerning numerous counties, this witness recanted and said because his insurance license is good throughout the state, the need could arise where he could go into a lot of counties (CU 10,11).

7. This witness's testimony included the activities and shipments of other agents and salespeople in his company who apparently control their own movements (N.T.103,104)(CU 10,11).

FOURTEENTH EXCEPTION: (ALJ erred and should have found)

Lowy (ID 60)

2. Selinsgrove is a store about to open but had not opened by the close of the evidentiary hearing (N.T.109,110)(CU 11,12).

FIFTEENTH EXCEPTION: (ALJ erred and should have found)

Bower (ID 60)

2. The ALJ failed to find that most of shipper's clients would be in Harrisburg, Cumberland County, York, Lancaster and the surrounding suburban areas of those cities (N.T.122,123)(CU 12).

SIXTEENTH EXCEPTION: (ALJ erred and should have found)

Bloom (ID 61)

2. It is vague whether shipper arranges transportation to Mechanicsberg (which appears to be a government issuing agency) (N.T.133,134) or to Reading. The testimony was indefinite (N.T.131-139) (CU 13).

There appears to be no clear and specific testimony that shipper ships to Reading. Either the government pays the transportation freight charges or the government contractor pays the transportation freight charges (N.T.133)(CU 13).

3. The writer has been unable to find any testimony that shipper arranges or controls transportation from other firms to Mechanicsburg and Reading (N.T.131-139).

7. Not usually does the government or another pays, but always. This shipper never pays the freight (N.T.137)(CU 13). Transportation is always the contractor's responsibility unless it is a government bill of lading. Then the government pays for it (N.T.136).

SEVENTEENTH EXCEPTION: (ALJ erred and should have found)

Rimbey (ID 61)

2. Other than witness stating that he has insurance clients "as far East as Oreysburg" (N.T.141), no other representative point was mentioned (N.T.141,143)(CU 13,14).

EIGHTEENTH EXCEPTION:

The ALJ erred in concluding 61 and 62 of his Initial Decision,

"I do not find the support for state-wide authority to be overwhelming but upon reflection, I conclude that the support is substantial and that a full state-wide grant (subject to the restrictive amendment) has been made out."
(ID 61,62)

In view of the foregoing Exceptions, the following Exceptions and Protestant's analysis of supporting witnesses' testimony in the Initial and Reply Briefs (CU 19-25)(CUR 2-4), it is respectfully submitted that the ALJ seriously erred in his conclusion set forth

above. The above quoted portion of the ALJ's Initial Decision (ID 61, 62) reflects a lack of strong conviction that applicant has met the tests in the Blue Bird Coach case.

NINETEENTH EXCEPTION:

The ALJ erred in his reasoning for granting state-wide authority (ID 62, first full paragraph). Few, even transportation people, have stopped to fully realize and comprehend what "between points in Pennsylvania" really entails, geographically and operationally feasibility. First, this geographic description enables a carrier to transport shipments from each of the 67 counties in the Commonwealth to the 66 other counties in the state. Therefore, even one shipment from one entire county to the other 66 counties results in 4422 separate and distinct movements each involving a different origin point. Secondly, the description enables a carrier to transport shipments between two points in the same county. Therefore, even one shipment from one point in one county to another point in the same county times 67 counties results in 134 movements. Total separate movements described amount to 4556 separate shipments involving mileages of 1 mile to 300 to 400 miles. In the subject application applicant has not presented any one shipper who requires transportation between points in Pennsylvania.

Lancaster involves Gary Torcaso, Carpenski Associates Insurance Agency. This was the witness whose testimony included alleged needs of other independent contractors in his office who managed their own

accounts. Beaver Falls involves the testimony of Thomas B. Rimbeey who gave no representative points other than as far east as Oreysburg (CU 19-22)(CUR 2-4).

Only one shipper gave substantial testimony of an origin point and destination points, Rodney Swank, Sprint Communications Company. Origin point - Camp Hill, Dauphin County; destination points - State Universities, and vice versa. The two to four shipments a month for this one shipper would not justify an open end state-wide authority grant (CU 7,8).

Therefore, taking the cumulative testimony of the qualified shippers, there are only 3 representative origin points shown, 2 of which are located in Dauphin County and 1 located in Cumberland County (CU 22). Except for Rodney Swank's testimony, the cumulative representative destination points are 13 points and some suburbs. See Courier's main brief at pages 19-25 for complete analysis.

There is no evidence of transportation need for Allegheny County to Allegheny County; for York to York; for Somerset to Somerset; Luzerne to Luzerne; for Clinton to Clinton; and on and on ad infinitum. No representative points were given for transportation required to or from Allegheny County nor the counties of Crawford, Venango, West Moreland, Cambria, McKean, Warren, Potter, Montour, and on and on ad infinitum. Except for the testimony of Rodney Swank, there were many times more counties not involved than there were involved in representative points named.

TWENTIETH EXCEPTION:

The ALJ erred in finding that a restriction probably to a four county area would unduly limit applicant's operations and that state-wide authority would tend to increase applicant's efficiency and better serve the public (ID 62). This appears to be findings in accordance with the holdings in the case of Richard L. Kinard, Inc. 58 Pa. P.U.C. 548 (1984) which the Commission overruled and replaced with the decision in Application of Blue Bird Coach Lines, Inc., supra.

TWENTY-FIRST EXCEPTION:

The ALJ erred in finding that the commodity description is quite narrow and the proposed operation is specialized (ID 63). There are quite a few competitors in the courier segment of the motor carrier industry (N.T.179,180)(CU 18). The description "business records in paper form" includes a great many items carried by couriers. The ALJ conclusion of appropriate support for a state-wide grant of authority is error based upon all of the Exceptions contained herein.

TWENTY-SECOND EXCEPTION:

The ALJ erred in granting business records in magnetic form. There was only one credible witness who barely mentioned this commodity in passing. No details were given. The ALJ correctly finds the support not strong or broad; but nevertheless includes it in his initial grant of authority (ID 63,64). It also appears that

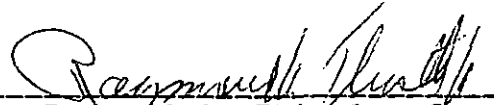
the ALJ relied upon the applicant's own witness for support as need for this commodity (ID 63), first full paragraph). The ALJ's initial conclusion to limit a grant to papers was correct (ID 61, last paragraph on page).

WHEREFORE, Protestant, Courier Unlimited, Inc. prays your Honorable Commission to grant the foregoing Exceptions and to modify the grant of authority by the Administrative Law Judge so that it conforms to the limits of the proof, offered and presented.

Respectfully Submitted

COURIER UNLIMITED, INC.

By



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Attorney for Protestant
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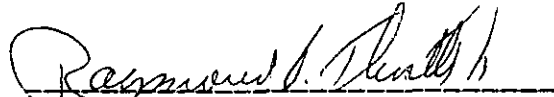
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served a copy of the foregoing Exceptions to Initial Decision upon all known parties of record, or their counsel, at their proper addresses as indicated below and upon the Administrative Law Judge, by placing a copy thereof with the United States Postal Service, first-class postage, prepaid:

Honorable Robert A. Christianson
Administrative Law Judge
PA Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Keith B. Fickel, Esquire
Farr & Cunningham, P.C.
P. O. Box 1855
2320 North Second Street
Harrisburg, PA 17105

Dated at Jenkintown, PA, this 5th day of January, 1993.


Raymond A. Thistle, Jr.
Attorney for Protestant

DUE DATE OF EXCEPTIONS:
January 8, 1993
DATE POSTED WITH U.S. POSTAL
RECEIPT #3817 ATTACHED
TO ORIGINAL:
January 5, 1993

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IN RE: : PENNSYLVANIA PUBLIC
: UTILITY COMMISSION
APPLICATION OF :
TOWAWAY EXPRESS, INC. : NO. A-00106208, F001, Am-A

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Public Utility Commission
SECRETARY'S BUREAU
Information Control Division

REPLY BRIEF OF APPLICANT, TOWAWAY EXPRESS,
TO EXCEPTIONS FILED BY PROTESTANT,
COURIER UNLIMITED, INC.

RLS

Submitted by:

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	B. WHETHER APPLICANT HAS SUCCESSFULLY MET ITS BURDEN OF PROOF IN ESTABLISHING THAT ITS PROPOSED SERVICE WILL SERVE A USEFUL PUBLIC PURPOSE, RESPONSIVE TO A PUBLIC DEMAND OR NEED?	
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IN RE: : PENNSYLVANIA PUBLIC
: UTILITY COMMISSION
APPLICATION OF :
TOWAWAY EXPRESS, INC. : NO. A-00106208, F001, Am-A

REPLY BRIEF OF APPLICANT, TO EXCEPTIONS
FILED BY PROTESTANT, COURIER UNLIMITED, INC.

I. STATEMENT OF THE CASE

Applicant, Towaway Express, Inc., ("Towaway") operates under authority issued by the Pennsylvania Public Utility Commission at the above-referenced file number. Towaway has operated under such authority for over six (6) years. On February 10, 1992, Towaway filed an Application for Motor Carrier Certificate or Permit seeking to amend its authority to transport business records in magnetic, microfilm and paper form within Pennsylvania.

Two (2) protests were filed to the requested amendment of authority. One protest was filed by Hatboro Delivery Service, Inc., and the other protest was filed by Courier Unlimited, Inc. The protest of Hatboro Delivery was resolved by agreement. After a series of proposals and extensive negotiations, the protest filed by Courier Unlimited, Inc., could not be resolved and the matter was scheduled for hearing.

The initial hearing in this matter was held on July 21, 1992, before the Honorable Robert A. Christianson, Administrative Law Judge. The hearing was continued until August 28, 1992, when the case of the Protestant was presented. Following the completion of the Protestant's case on August 28, the record was closed.

Pursuant to a letter from Judge Christianson of September 16, 1992, initial Briefs were to be filed within thirty (30) days from the date of that letter. Subsequently, the parties had twenty (20) days from October 16, 1992, in which to file Reply Briefs.

On January 8, 1993, an Initial Decision was issued by Administrative Law Judge Robert A. Christianson. In his Initial Decision, Judge Christianson determined that Applicant, Towaway Express, had met its burden of proof in sustaining its Application for Motor Common Carrier authority, and that Towaway Express should be granted statewide authority to transport business records in paper and magnetic form.

On February 5, 1993, Protestant, Courier Unlimited, filed Exceptions to the initial decision issued by Administrative Law Judge Christianson. This Brief is Applicant's reply to the Exceptions filed by Protestant.

II. SUMMARY

Towaway Express, Inc. currently operates under Pennsylvania Public Utility Authority and has so operated for over six (6) years. Towaway has had no service failures, safety violations or other violations. Towaway has an excellent financial condition. The company has an extensive fleet of vehicles and has the immediate ability to obtain as many more as is necessary to meet the increased transportation needs which will accompany the additional authority.

Towaway has highly qualified personnel employed in its operation in Mr. Thomas Sheaffer and Mr. Karl Mundis, and has a full-time safety director and full-time mechanics. These individuals will be able to operate the company in an effective and efficient manner.

The need for the service which Towaway seeks to provide has been clearly demonstrated by testimony from the supporting shippers. The individuals who testified represent a broad spectrum of industries and businesses and identified statewide transportation needs.

The burden of proof having been met by Towaway and not rebutted by the Protestant, the authority requested by Towaway must be granted and issued in its entirety.

III. SUMMARY OF TESTIMONY

Thomas Sheaffer, President of Towaway, testified as to the overall qualifications regarding fitness technical ability and financial ability of Towaway to perform under the requested authority. Mr. Sheaffer is the President and Chief Executive Officer of Towaway. (N.T. p.6) Towaway is a transportation company currently operating under Pennsylvania Public Utility Commission Authority and Interstate Commerce Commission Authority as a common carrier. (N.T. p.6) Under its current authority, Towaway operates throughout the entire state of Pennsylvania with a few restrictions as stated in its authority. (N.T. p.6) Mr. Sheaffer has been involved in the transportation business for over twenty two (22) years. (N.T. p.8)

Over the years, Mr. Sheaffer has been involved in various types of systems of transportation. (N.T. p.8) Through his extensive experience, he has found that a central dispatching system is most efficient and cost effective and plans to use this type of system for the authority which he is seeking. (N.T. p.8)

In its current operation, Towaway has approximately fifty five (55) operating units. (N.T. p.9) In addition to

the units which it currently uses for its present operations, Towaway also owns several units which it will use in the operation of the additional authority. (N.T. p.9) Additional vehicles can be readily obtained through leases through a Lease Agreement which Towaway already has in place with Hertz Penske. (N.T. p.9) Further, Towaway has plans to purchase an additional twelve (12) units. (N.T. p.30)

Finally, Towaway has its own service facilities and maintenance facilities along with in-house mechanics. (N.T. p.12)

The financial position of Towaway is excellent. (N.T. p.9) Any financial outlays required as a result of the additional authority can be easily met by Towaway. Towaway has sufficient lines of credit and cash reserves. (N.T. p.10)

Towaway's performance on the road is also excellent. Since Towaway first obtained authority from the Pennsylvania Public Utility Commission, it has suffered no service failures. (N.T. p.17) Further, Towaway has in place an excellent safety program. Towaway employs a full-time director of safety. (N.T. p.13) The safety manual of Towaway is used as a model by other carriers as an example

of the type of safety requirements other carriers should look for with their drivers and operators. Towaway has never been cited for any safety violations or other violations. (N.T. p.159) (N.T. p.14) Towaway has had no difficulty serving the entire state under the authority which it currently has. (N.T. p.18)

The testimony of Karl Mundis, Director of Operations for Towaway, shows that he is capable of managing the day-to-day operations which would be involved in the authority being sought by Towaway. Mr. Mundis has over twenty five (25) years experience in the computer field. (N.T. p.151) He also was Vice-President of information processing for Pennsylvania Blue Shield. (N.T. p.151) He has knowledge regarding the requirements for the transportation and storage of magnetic tapes and microfilm. (N.T. p.154) Further, he has demonstrated that he had the ability to successfully organize and run a business as he is currently operating a business which provides various services to insurance companies, law firms and other businesses. (N.T. p.146, 147, 148)

Towaway presented testimony in support of its Application from a wide range of businesses. These businesses included data processing and computer businesses.

(N.T. p.35, 54) Other businesses included the legal profession, (N.T. p.57) the communications industry, (N.T. p.75) a medical rehabilitation firm, (N.T. p.88) a manufacturing firm, (N.T. p.110) a packaging company, (N.T. p.31) and insurance companies. (N.T. p.66, 94, 119, 140) Each supporting shipper testified as to a need for the service which is to be provided by Towaway pursuant to its Application for Authority. (N.T. p.36, 54, 58, 67, 77, 90, 95, 111, 120, 134, 143) Many of these supporting witnesses have extensive knowledge not only of their own business and their own transportation needs, but also through experience, have knowledge of the transportation needs of their industries in general. (N.T. p.37, 60, 68, 97, 123)

All supporting shippers testified as to the need and desire for safe, reliable and efficient service. (N.T. p.48, 49, 59, 68, 78, 96, 111, 112, 123, 135, 143)

Each supporting shipper testified as to the geographic territory of their transportation needs. The cumulative testimony of each of the shippers demonstrates a need for transportation throughout the entire Commonwealth of Pennsylvania. (N.T. p.36, 41, 55, 58, 67, 71, 77, 84, 85, 86, 90, 105, 108, 110, 123, 133, 141)

IV. ISSUES

- A. WHETHER THE ADMINISTRATIVE LAW JUDGE CORRECTLY APPLIED THE APPLICABLE LAW IN MOTOR CARRIER CASES OF THIS NATURE IN GRANTING APPLICANT STATEWIDE AUTHORITY, SUBJECT TO CERTAIN LIMITATIONS, TO TRANSPORT BUSINESS RECORDS IN PAPER AND MAGNETIC FORM?

Suggested answer in the affirmative.

- B. WHETHER APPLICANT HAS SUCCESSFULLY MET ITS BURDEN OF PROOF IN ESTABLISHING THAT ITS PROPOSED SERVICE WILL SERVE A USEFUL PUBLIC PURPOSE, RESPONSIVE TO A PUBLIC DEMAND OR NEED?

Suggested answer in the affirmative.

V. ARGUMENT

A. THE ADMINISTRATIVE LAW JUDGE CORRECTLY APPLIED THE APPLICABLE LAW IN MOTOR CARRIER CASES OF THIS NATURE IN GRANTING APPLICANT STATEWIDE AUTHORITY, SUBJECT TO CERTAIN LIMITATIONS, TO TRANSPORT BUSINESS RECORDS IN PAPER AND MAGNETIC FORM.

Applicants for motor common carrier authority bear the burden of establishing that the following evidentiary criteria, promulgated by the Pennsylvania Public Utility Commission, have been met:

(a) An applicant seeking motor common carrier authority has a burden of demonstrating that the approval of the application will serve a useful public purpose, responsible to a public demand or need.

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

52 Pa. Code §41.14 (a) and (b).

In his Initial Decision, Administrative Law Judge Christianson (hereinafter "ALJ"), acknowledged that the main focus of this proceeding has been on issues relating to §41.14(a), to public demand or need. (Initial Decision at 54). Applicant, Towaway Express, provided several witnesses who testified as to an immediate need for transportation services of the type which Towaway is seeking authority for. The Protestant, however, has argued that the evidence does

not support a statewide grant of authority, but at most, supports authority which is limited to the particular needs of the supporting shippers. (Initial Decision at 54). Applying the evidentiary criteria necessary to satisfy §41.14(a) as interpreted by the Public Utility Commission in Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262 (1990), the ALJ correctly concluded in his Initial Decision that Towaway Express has satisfied its evidentiary burden under 52 Pa. Code §41.14(a). (Initial Decision at 63, 67).

There are several major holdings in the Blue Bird decision, all of which were addressed by the ALJ in his Initial Decision, contrary to the argument raised in Protestant's First Exception. (Protestant Exception at p.3). Three of the holdings, however, were particularly addressed in the Initial Decision as they specifically state what criteria the applicant must satisfy in order to procure Commission authority. First, an applicant for motor common carrier authority sustains its burden of proof under 52 Pa. Code §41.14(a) when, through relevant, probative, competent and credible evidence, it has shown that the proposed services will satisfy witnesses' asserted transportation demand or need. (This first holding conforms with an indisputable and long-standing benchmark in motor carrier cases, that a certificate of public

convenience will be issued to an applicant only if the applicant establishes that the approval of the application will serve a useful purpose responsible to a public need or demand. See e.g., Seaboard Tank Lines, Inc. v. Pennsylvania Public Utility Commission, 93 Pa. Cmwlth. at 613, 502 A.2d 768 (1985); Blue Bird, supra., at 274). Second, supporting witnesses must articulate a demand or need for the type of service embodied in the application. Blue Bird, at 274. Third, a representative sampling of the public is expected and the scope of authority granted should correspond with identified origin and destination points. Id.

The supporting shippers who were present and testified on behalf of Towaway all testified as to an immediate need for transportation services of the type which Towaway is seeking authority for. Each shipper has indicated that it intends to use Towaway for its shipping needs once the applicant has been granted its authority. Finally, the supporting shippers who were present and testified constituted a representative sampling of the public who would benefit from Towaway's proposed service. Having satisfied the evidentiary criteria set forth in Blue Bird, the ALJ was correct in concluding that Towaway's Application should be granted.

The major argument which Protestant repeatedly raises, in its Exceptions to the Initial Decision, is that the ALJ erred in applying the evidentiary criteria set forth in Blue Bird, and consequently, erred in his decision to grant Towaway's Application for statewide authority. Such position is unfounded, however, in light of the testimony of Applicant's supporting witnesses.

In his Initial Decision, the ALJ reviewed each witnesses' testimony and analyzed the same in relation to the evidentiary criteria set forth in Blue Bird. (Initial Decision pp. 57-61). The ALJ did find that Applicant's support was substantial. (Initial Decision p. 62) (Emphasis added). It is important to note that Blue Bird does not require an Applicant to put forward "overwhelming" evidence to support its Application for motor common carrier authority. Rather, Blue Bird states that when, through relevant, probative, competent and credible evidence of record, a motor common carrier applicant has shown that the applicant's proposed service will satisfy the supporting witnesses' asserted transportation demand or need, the applicant has sustained its burden of proof under subsection 41.14(a).

Certainly, the Applicant did not establish that a need exists in every square mile within the Commonwealth of Pennsylvania, however, such requirement is not the law. Contrary to Protestant's Exception Number Nineteen, all that Blue Bird requires of the applicant is that the supporting witnesses identify Pennsylvania origin and destination points between which they require transportation, and these points must correspond with the scope of operating territory specified in the application. Blue Bird, at 274. An applicant is not required to show a demand for its service at every point within the proposed territory, but rather, it is sufficient that the necessity generally exist within the scope of the operating territory. See, Purolator Courier Corp. v. Pennsylvania Public Utility Commission, 51 Pa. Cmwlth. 377, 414 A.2d 450 (1980).

In his Initial Decision, the Administrative Law Judge reviewed the testimony of Applicant's witnesses and made the following determination in regard to the "need" for the operating territory:

Most of the support is from shippers in the Harrisburg area. However, other points (such as Lancaster and Beaver Falls) are included. Many destination points, substantially throughout Pennsylvania were mentioned. Both outgoing and incoming authority is needed by several witnesses . . . Statewide authority would tend to increase Applicant's efficiency and better serve the public.

(Initial Decision, p. 62). (Emphasis added)

Thus, the Administrative Law Judge, having concluded that there was proof in the record of a public demand and need for Towaway's proposed service between specified intrastate points, as required by Blue Bird, was correct in granting Towaway's statewide authority.

B. APPLICANT HAS SUCCESSFULLY MET ITS BURDEN OF PROOF IN ESTABLISHING THAT ITS PROPOSED SERVICE WILL SERVE A USEFUL PUBLIC PURPOSE, RESPONSIVE TO A PUBLIC DEMAND OR NEED.

The supporting shippers who were present and testified on behalf of Towaway all testified as to an immediate need for transportation services of the type which Towaway is seeking authority for. Each shipper indicated that it intends to use Towaway for its shipping needs once the Applicant has been granted its authority. The needs demonstrated and to be served by Towaway are common not just to the individuals who testified, but to all similar businesses throughout the state, and the witnesses presented by Towaway were merely a representative sampling of the public that will use the Applicant's proposed service within the territory encompassed by the Application. See, Purolator Courier Corp. v. Pennsylvania Public Utility Commission, 51 Pa. Cmwlth. 377, 414 A.2d 450 (1980).

Towaway's supporting evidence demonstrates that a need exists for transportation service in every county of Pennsylvania. Mr. Terry Bride, of Solution Technologies, needs service in every county. (N.T. p.41). Mr. James Bower needs service for the middle and eastern part of the state. (N.T. p.90). Mr. Thomas Rimby needs service for all the middle and western part of the state. (N.T. p.141). The other supporting shippers testified as to similar needs. Clearly, the testimony presented establishes the public demand and need for services to be provided by Towaway.

Protestant, in its Exceptions, argues that Towaway's supporting witnesses have not established a statewide need for the proposed service of Towaway, and in a series of mischaracterizations of the witness testimony, attacks the ALJ for finding the contrary. The most blatant mischaracterization by Protestant is in regard to the testimony of Michael J. Cleary. (Protestant Exception Three, p. 4-5). Protestant incorrectly reproduces Mr. Cleary's testimony as follows:

The Administrative Law Judge ignores Mr. Cleary's testimony that shipper has not had a need (N.T. p.92); that he could have used it [the proposed service] yesterday {07/20/92}, but he was not authorized; the people in the home services would have to go through their supervisors. (N.T. p.92-93).

(Protestant Exception Three, p.5), (Emphasis added).

A cursory review of Mr. Cleary's testimony as memorialized in the transcript, reveals that Protestant has misstated Mr. Cleary's testimony and taken portions of his testimony out of context. Mr. Cleary actually testified as follows:

I have discussed it [Towaway's service] with several people. We have not had a need yet. We would have [had a need] yesterday, but I was not involved to authorize.

(N.T. p.92-93), (Emphasis added).

Mr. Cleary further testified that people in his company would have to go through their supervisors, who he also supervises, if they wished to use Towaway's service. (N.T. p.93), (Emphasis added). Clearly, as the Administrative Law Judge correctly noted in his Initial Decision, Mr. Cleary, as President of his own company, has the authority to use the carrier of his choice. (Initial Decision p.55).

The mischaracterization of Michael J. Cleary's testimony is only one example of the several mischaracterizations that Protestant has employed to support its Exceptions. One only has to review the actual hearing transcript, however, to realize that Protestant has grossly

misstated and taken out of context the testimony of Towaway's witnesses which otherwise clearly lend support and provide the necessary evidentiary criteria set forth in Blue Bird. In light of the evidence revealed in the actual hearing transcript, the ALJ was correct in concluding that Applicant had sustained its burden of proof, and that the grant of statewide authority to transport business records in paper and magnetic form was appropriate.

VI. CONCLUSION

WHEREFORE, Applicant, Towaway Express, Inc., respectfully requests that your Honorable Commission find in favor of the Administrative Law Judge's Initial Decision, and grant Applicant the authority to transport business records in paper and magnetic form throughout the Commonwealth of Pennsylvania.

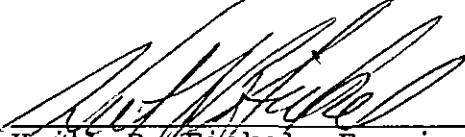
Respectfully submitted,

FARR & CUNNINGHAM, P.C.

Date:

2/16/93

By:



Keith B. Fickel, Esquire
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IN RE: : PENNSYLVANIA PUBLIC
: UTILITY COMMISSION
APPLICATION OF :
TOWAWAY EXPRESS, INC. : NO. A-00106208, F001 Am-A

CERTIFICATE OF SERVICE

I, Keith B. Fickel, Esquire, do hereby certify that a true and correct copy of the Reply Brief of Applicant in the above-captioned matter was placed in the United States Mail, First Class delivery in Harrisburg, Pennsylvania on February 17, 1993, on the following:

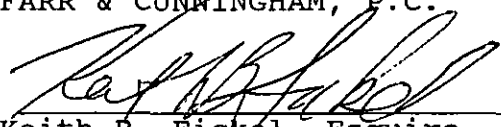
Raymond A. Thistle, Esquire
206-B Benson East
100 Old York Road
Jenkintown, PA 19046

The Honorable Robert A. Christianson
Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

FARR & CUNNINGHAM, P.C.

Date: February 17, 1993

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February 18, 1993

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Public Utility Commission

RE: Application of Towaway Express, Inc.
Docket No. A-00106208, F001, Am-A

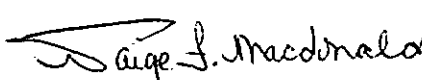
Dear Sir:

Please be advised that our client, Towaway Express, Inc., has filed a Reply to the Exceptions filed by Protestant, Courier Unlimited, Inc., in the above-captioned matter. It has been brought to our attention by Administrative Law Judge Christianson, that the cover page to the Reply that we filed was incorrectly captioned. The correct cover page should read Applicant's Reply To Exceptions Filed by Courier Unlimited, Inc. Enclosed is a corrected copy of the cover page to the Reply which we filed. Please remove the previous cover page and replace it with this one.

Should you have any questions or concerns regarding this matter, please do not hesitate to contact Keith B. Fickel or me. Thank you for your cooperation.

Very truly yours,

FARR & CUNNINGHAM, P.C.



Paige F. Macdonald

PFM/bjf

Enclosure

DOCUMENT
FOLDER

IN RE: : PENNSYLVANIA PUBLIC
: UTILITY COMMISSION
APPLICATION OF :
TOWAWAY EXPRESS, INC. : NO. A-00106208, F001, Am-A

APPLICANT'S REPLY TO EXCEPTIONS
FILED BY PROTESTANT,
COURIER UNLIMITED, INC.

BUCKETED
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Submitted by: **RECEIVED**
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