

A. 102471
F. 1, AM-AF

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

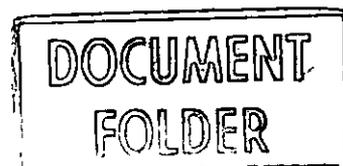
Public Meeting held November 22, 1989

Commissioners Present:

Bill Shane, Chairman
William H. Smith, Vice-Chairman
Joseph Rhodes, Jr.
Frank Fischl

Application of Atlantic Contract Carriers Corp., a corporation of the State of Delaware, for the transfer of a portion of the operating rights of Tose-Fowler, Inc., under the certificate issued at A-00068623, F. 15, Am-C, subject to the same limitations and conditions.

A-00108568
F. 2



Vuono, Lavelle & Gray, by John A. Vuono, for the applicant.
Rubin, Quinn, Moss & Heaney, by James W. Patterson, for the transferor.

O R D E R

BY THE COMMISSION:

This matter comes before the Commission on an application filed August 9, 1989. Public notice of the application was given in the Pennsylvania Bulletin of September 16, 1989. The unopposed application is certified to the Commission for its decision without oral hearing.

This application is one of a series of actions involving Tose-Fowler, Inc. (Tose-Fowler or transferor), which ultimately will result in it ceasing operations and going out of business. Four applications have been filed, by (1) ATSL, Inc., MC-F-19494, (2) Atlantic Contract Carriers Corp., MC-F-19419, (3) Pitt-Ohio Express, Inc., MC-F-19416, and (4) Yellow Freight System, Inc., MC-F-19418, with the Interstate Commerce Commission (ICC) pursuant to 49 U.S.C. §11341(a), for the transfer of portions of Tose-Fowler's interstate and intrastate operating authority. Additionally, Tose-Fowler has petitioned this Commission for cancellation of any portion of its intrastate authority not sold to one of the above-named purchasers/transferees.

While this Commission retains jurisdiction over the interpretation of intrastate operating authority, with regard to the meaning and scope of rights and matters relating to duplicative or overlapping rights, federal regulations specifically exempt the parties involved in such transfers from interference by the states in consolidation, merger, and acquisition of control transactions before the ICC when the applications are approved by the ICC. The applicant is still required, however, to file a transfer application with this Commission, pursuant to 66 Pa. C.S. §1102(a)(3), even though we cannot raise questions concerning the ICC's action.

The ICC granted the temporary authority applications of the four purchasers to operate Tose-Fowler's authority. Public notice of the applications was given in the ICC Register. Pursuant to the notice, if no comments were received within thirty days, the parties could consummate the transactions sixty days after publication of the notice, without further action by the ICC. No comments were received and the parties have moved to complete the transfers.

The total consideration for the rights is \$26,000. No tangible assets are involved. The sales agreement requires the consideration to be paid as follows: ten percent at execution of the sales agreement and the balance at closing after approval of this transfer.

A review of the record before us indicates that the applicant possesses the requisite experience, equipment and financial capacity to provide the proposed service.

The authority to be transferred has been operated by the transferor, therefore, it is presumed that there is a continuing public need, which may be overcome only by evidence to the contrary. In re: Byerly, 440 Pa. 521 (1970); Hostetter v. Pa. P.U.C., 160 Super. Ct. 94 (1947). Since the record is void of any such evidence, this presumption of continuing public need applies in this transfer proceeding.

We find:

1. The applicant is fit, willing and able to provide the service proposed.
2. Transfer of the authority is in the public interest and is necessary for the continued accommodation and convenience of the public;
THEREFORE,

IT IS ORDERED: That the transfer application be and is hereby approved and that a certificate be issued granting the following rights:

To transport, as a Class D carrier, property from points in the city of Scranton, Lackawanna County, and within an airline distance of fifty (50) statute miles of the limits thereof, to points in the counties of Washington,

Allegheny, Beaver, Butler, Lawrence, Mercer, Venango, Crawford, Erie and Westmoreland, and vice versa; excluding the transportation of commodities in dump trucks or hopper-type vehicles; household goods, in use; materials which, because of its size and weight, requires the use of special equipment; and excluding the transportation of garments and materials, supplies and trimmings incidental to the manufacture of said garments between manufacturers and processors and contractors.

subject to the following conditions:

- (a) That no right, power or privilege is granted to transport iron and steel and iron and steel articles, to or from the plantsites or other facilities of Wheeling-Pittsburgh Steel Corporation, in the city of Monessen, Westmoreland County, and the borough of Allenport, Washington County, and points within an airline distance of five (5) statute miles from the limits of said city and borough.
- (b) That no right, power or privilege is granted to transport from Petrolia, Butler County, Karns City, Butler County, Emlenton, Venango County, and vice versa.
- (c) That no right, power or privilege is granted to transport property, in bulk, in tank vehicles, from points within an airline distance of thirty-five (35) statute miles of the limits of the city of Pittsburgh, Allegheny County, to points in that portion of Monroe County on and south of U.S. 209, including East Stroudsburg and Stroudsburg; points in Lehigh and Northampton Counties and that portion of Carbon County on and south of U.S. 209, including Jim Thorpe and Leighton, and east of the Northeast Extension of the Pennsylvania Turnpike and vice versa; except that transportation may be performed for Binney & Smith to or from its facilities in Northampton County.

subject to the following general conditions:

1. That the approval hereby given is not to be understood as committing the Commission, in any proceedings that may be brought before it for any purpose, to fix a valuation on the property and rights to be acquired by applicant from the present certificate holder equal to the consideration to be paid therefor, or equal to any value that may be placed thereon by applicant, or to approve or prescribe rates sufficient to yield a return thereon.
2. That applicant shall not record in its utility accounts any amount representing the rights herein granted in excess of the actual cost of such rights to the original holder thereof.
3. That the applicant charge to Account 1550, Other Intangible Property, \$26,000, being the amount of the consideration payable by it for the rights and going concern value attributable thereto; less any amount recorded under condition 2 above; and subject to further adjustment due to any normal interim transactions to the date of actual transfer.
4. That the accounts of the transferee shall reflect the same book values as the records of the transferor at the effective date of the transfer, any previously recorded appreciation having been deleted therefrom; provided that the applicant shall not record in its utility accounts any amounts representing the rights herein granted in excess of the actual cost of such rights to the original holder thereof.
5. That the operating authority granted herein, or now held or subsequently granted to the applicant to the extent that it is duplicative shall not be construed as conferring more than one operating right.
6. That the certificate holder shall not transfer, sell or in any way convey any of its outstanding capital stock to any individual, partnership, corporation or any entity, without the prior filing of an application and approval thereof by the Commission under 66 Pa. C.S. §1102(a)(3).

IT IS FURTHER ORDERED: That the applicant shall not engage in any transportation granted herein until it has complied with the requirements of the Pennsylvania Public Utility Code and the rules and regulations of this

Commission relative to the filing and acceptance of evidence of insurance and a tariff establishing just and reasonable rates.

IT IS FURTHER ORDERED: That upon compliance with the requirements above set forth, a certificate issue evidencing the Commission's approval of the right to operate as above-determined.

IT IS FURTHER ORDERED: That in the event said applicant has not, on or before sixty (60) days from the date of the service of this order, complied with the requirements hereinbefore set forth, the application shall be dismissed without further proceedings.

IT IS FURTHER ORDERED: That upon receipt of a final order from the Interstate Commerce Commission, the applicant shall forward a copy to this Commission for inclusion in its file.

IT IS FURTHER ORDERED: That upon compliance with the conditions set forth in the orders at ATSL, Inc., at A-00100024, F. 1, Am-J; Atlantic Contract Carriers Corp., at A-00108568, F. 2; Pitt-Ohio Express, Inc., at A-00102471, F. 1, Am-AF; and Yellow Freight System, Inc., at A-00108952, all of the remaining rights granted the transferor, Tose-Fowler, Inc., at A-00068623, be cancelled by supplemental order and the record be marked closed.

BY THE COMMISSION,



Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: November 22, 1989

ORDER ENTERED: November 28, 1989