

LAW OFFICES

VUONO, LAVELLE & GRAY

2310 GRANT BUILDING

PITTSBURGH, PA. 15219-2383

(412) 471-1800

JOHN A. VUONO
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MARK T. VUONO*
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DENNIS J. KUSTURISS
CHRISTINE M. DOLFI
PETER J. SCANLON

TELECOPIER
(412) 471-4477

April 29, 1991

*ALSO MEMBER OF FLORIDA BAR

Re: Application of H. Fred Barefoot Trucking, Inc.
Docket No. A-00107365, *F-1, AM A*

RF *LD*
APR 29 1991
SECRETARY'S OFFICE
Public Utility Commission

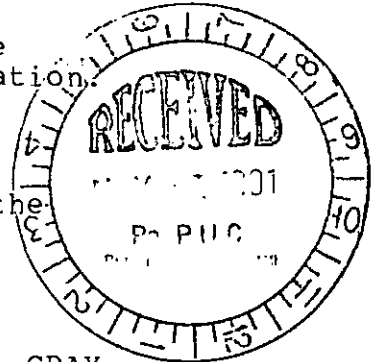
Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

FILE

Dear Mr. Rich:

We enclose for filing with the Commission the signed original of a protest to the above application.

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



Sincerely yours,

VUONO, LAVELLE & GRAY

W. A. Gray
William A. Gray

jv

cc: J. Bruce Walter, Esquire (w/enc.) (certified mail)
Dan Fleegle Trucking (w/enc.)

Enclosure

DOCUMENT
FOLDER

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

APR 29 1991

SECRETARY'S OFFICE
Public Utility Commission

DOCKET NO. A-00107365, F. 1, Am-A

H. FRED BAREFOOT TRUCKING, INC.

PROTEST AND REQUEST
FOR ORAL HEARING

FILE



The motor carrier shown on Appendix A hereof (herein called protestant) protests the above application and requests that the application be assigned for oral hearing and in support thereof respectfully represents as follows:

1. By this application, notice of which has been published in the Pennsylvania Bulletin, applicant seeks authority as set forth in Appendix A.

2. Protestant holds authority from this Commission at the docket numbers shown in Appendix A and the relevant portions of the authority are attached to the protest. Unless otherwise indicated in Appendix A, protestant will withdraw the protest only in the event an amendment is made which will totally eliminate the conflict between the authority sought by the application and the authority presently held by protestant.

DOCUMENT
FOLDER

DOCKETED
APPLICATION DOCKET
MAY 03 1991
ENTRY No. 1/1

3. Approval of this application is neither necessary nor proper for the service, accommodation, safety or convenience of the public since (a) protestant presently holds authority to provide service in the area affected by the application, (b) protestant and other existing carriers are providing adequate service to the shipping public in the areas involved in the application, (c) there is no need for the service proposed by applicant and approval of the application will result in the diversion from existing carriers of tonnage and revenue necessary to sustain their existing operations, and (d) approval of the application will adversely affect protestant and other existing carriers which have a substantial investment in facilities and equipment and are willing and able to provide service in the application area.

4. Protestant requests that the application be set for oral hearing and that applicant be required to prove by competent evidence the elements of proof required by statute. If an oral hearing is held, protestant will appear and present evidence of protestant's own operations and particular interest unless this application is amended so as to eliminate that interest as set forth in this protest.

WHEREFORE, protestant requests that the granting of the application be withheld; the proceeding be assigned for oral hearing with leave to protestant to participate fully therein;

and applicant be required to make available at the hearing competent witnesses for examination on all material and relevant facts bearing on the application.

Respectfully submitted,

DAN FLEEGLE t/d/b/a DAN FLEEGLE
TRUCKING

By: 

William A. Gray
Attorney for Protestant

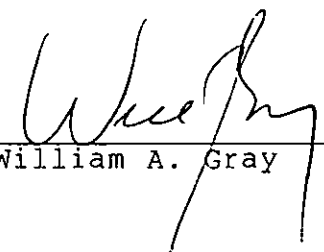
VUONO, LAVELLE & GRAY
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800
Of Counsel

Dated: April 29, 1991

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above protest and request for oral hearing upon applicant or upon applicant's attorney or representative as shown in the Pennsylvania Bulletin notice.

Dated at Pittsburgh, Pa. this 29th day of April, 1991.


William A. Gray

Re: H. Barefoot Trucking, Inc.
Docket No. A-00107365, F. 1, Am-A

APPENDIX A

SCOPE OF AUTHORITY SOUGHT:

By application published in the Pennsylvania Bulletin on April 20, 1991, applicant seeks authority to operate as a common carrier, transporting:

Property, for Mayfair Creamery, from its facilities located in the borough of Somerset, Somerset County, to points in Pennsylvania, and vice versa.

INTEREST OF PROTESTANT:

Dan Fleegle, t/d/b/a Dan Fleegle Trucking, R.D. #2, Boswell, PA 15531, (814) 629-7159, holds authority at Docket No. A-00108421. A copy of the relevant authority of Fleegle is attached hereto. Fleegle does not know of any amendment which would result in the withdrawal of its protest.

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held July 19, 1990

Commissioners Present:

William H. Smith, Chairman
Joseph Rhodes, Jr.
Frank Fischl
David W. Rolka

Application of Dan Fleegle, t/d/b/a Dan Fleegle Trucking, for the right to begin to transport, as a common carrier by motor vehicle, cream, ice cream mixes, skim condense and dairy products, in bulk, in tank vehicles, between points in Pennsylvania: WHICH IS TO BE IN LIEU OF the contract carrier permit issued to Dan Fleegle, t/d/b/a Dan Fleegle Trucking at A-00108421, F. 1, which grants the right to transport, as a contract carrier by motor vehicle, property for Meadow Gold Dairy Division of Borden, Inc., between points in Pennsylvania; subject to the following condition: That no right, power or privilege is granted to transport household goods and office furniture in use and petroleum and petroleum products in bulk in tank-type vehicles.

A-00108421
F. 2

Vuono, Lavelle & Gray, by William A. Gray for the applicant.
McNees, Wallace & Nurick, by Herbert R. Nurick for protestants, R. W. Bird Trucking, Inc. and Pelton Trucking Company, Inc.

O R D E R

BY THE COMMISSION:

This matter comes before the Commission by an application filed on January 26, 1990, and published in the Pennsylvania Bulletin of February 17, 1990. Two carriers filed protests. Both withdrew pursuant to the provisions of a restrictive amendment which precludes the transportation of certain commodities in specific areas.

The unopposed record is now certified to the Commission for its decision without oral hearing. Verified statements were submitted by the applicant and seven supporting shippers.

Dan Fleegle operates as a sole proprietor under the name of Dan Fleegle Trucking (applicant), and sets forth in his verified statement that the business is conducted from facilities located at R.D. 2, Boswell, Somerset County. He is currently authorized to provide contract carrier services for one shipper, Meadow Gold Dairy Division of Borden, Inc. He is not affiliated with other carriers.

The applicant owns one tractor, three tank trailers and three tri-axle tank trucks. All of the equipment is in good operating condition, and he states that to the best of his knowledge, he is in compliance with the prescribed safety regulations.

An unaudited balance sheet reveals that as of December 31, 1989, the applicant had current assets of \$44,539, total assets of \$303,435, with current liabilities of \$124,925 and total liabilities of \$269,100, leaving proprietor's capital of \$34,335. The assets include vehicles having a net book value of \$178,314.

Robert M. Dever is assistant general manager for Atlantic Dairy Cooperative which has a business address at 1225 Industrial Highway, Southampton, Bucks County. He supports the applicant and attests to the need for transportation of fluid milk products having origin at Mt. Holly Springs, Cumberland County, with destination at points such as Pittsburgh and New Wilmington (Lawrence County). The applicant's services would be used on a weekly basis.

Gerald Shick is vice president of operations for R. Bruce Fike & Sons Dairy located at 47 West Craig Street, Uniontown, Fayette County. He states that the company is involved in the manufacture of milk and ice cream which it ships from Uniontown to various destinations such as New Wilmington and Pittsburgh. A very reliable carrier with tank vehicles is required. The company feels that the applicant is capable of furnishing good service and would give it approximately 42 shipments per month.

John R. Greubel is plant manager for Fairview Dairy, Inc., domiciled in Windber, Somerset County, and supports the applicant. As an ice cream manufacturer, the company would use the applicant to transport ice cream mix approximately five to six times a month. The shipments would originate in Belleville, Mifflin County, and Johnstown, Cambria County, with destination at points such as Butler, DuBois and Connellsville. It is confident that the applicant is capable of providing the quality of service required.

Kenneth Norway, general manager of Mayfair Creamery located in Somerset, Somerset County, supports the applicant. The company would require the applicant to transport cream, skim condensed milk and ice cream mix from Somerset to points such as Harrisburg, Pittsburgh, New Wilmington and York. It would give the applicant approximately 25 to 35 shipments per month.

Andy Langmyer is division manager for Milk Marketing, Inc., located in Washington, Washington County, and supports the applicant. In its business of milk marketing, the Company has need for transportation of milk which originates at points in Somerset, Cambria and Fayette Counties, with destination at New Wilmington, Greensburg and Belleville. Approximately six shipments per month are involved. The applicant has provided some service for the company in the past with satisfactory results.

Thomas J. Ryan, III, is vice president of Hershey Creamery Company located at 301 South Cameron Street, Harrisburg, Dauphin County. He supports the applicant stating that the company would use the applicant to transport approximately 25 shipments of skim condense and cream per month. These shipments would move from Mayfair Creamery in Somerset to the Harrisburg facility, and from Harrisburg back to Somerset.

Robert E. Paxton, vice president-manufacturing for Sani-Dairy Division of Penn Traffic Co., supports the applicant. The company produces fluid milk, ice cream and dairy products at a facility in Johnstown, Cambria County. The applicant's services would be required from Johnstown to points such as DuBois, Philadelphia, Erie, Pittsburgh and Uniontown. It also has inbound shipments from Philadelphia. The applicant has provided reliable service in the past in interstate commerce, and the same service is desired for the Pennsylvania intrastate traffic.

DISCUSSION AND FINDINGS

Dan Fleegle, t/d/b/a Dan Fleegle Trucking has held a contract carrier permit issued at Folder 1 since May 11, 1989, authorizing him to transport property for Meadow Gold Dairy Division of Borden, Inc., between points in Pennsylvania. He now desires to hold his services out to a certain segment of the general public and convert the contract carrier permit to a common carrier certificate of public convenience.

The applicant no longer intends to tailor his service exclusively to the operations of one shipper. By this application, he seeks a certificate which would give him the right to transport cream, ice cream mixes, skim condense and dairy products, in bulk in tank vehicles, between points in Pennsylvania. Under such authority, he can still serve Meadow Gold Dairy Division of Borden, Inc. He has gathered support from seven shippers who are either engaged in the dairy business or are associated with the business.

The support of the seven shippers is convincing and we believe approval of the application is necessary for the accommodation and convenience of that segment of the public involved. We further conclude that the applicant is capable of providing the proposed service adequately in the capacity of a common carrier. Each shipper requires transportation of their products in tank-type vehicles which the applicant now owns. The applicant is experienced in catering to the transportation needs of the dairy industry, and his financial position is favorable.

We find:

1. That a public need for the service as proposed and amended does exist.

2. That the applicant is fit, ready, willing and able to provide the service as proposed and amended.

3. That approval of the application, as amended, is necessary for the accommodation and convenience of the public; THEREFORE,

IT IS ORDERED: That the application be and is hereby approved as amended, and that a certificate be issued granting the applicant the right to operate as follows:

To transport, as a Class D carrier, cream, ice cream mixes, skim condense and dairy products, in bulk in tank vehicles, between points in Pennsylvania;

subject to the following conditions:

- (1) That no right, power or privilege is granted to transport milk, milk products and by-products, milk mixes, and commodities used in the manufacture, processing, sale and distribution of milk, milk products and by-products, and milk mixes, between points in the counties of Bradford, Sullivan, Susquehanna, Tioga and Wyoming, and from points in said counties, to points in Pennsylvania, and vice versa.
- (2) That no right, power or privilege is granted to transport raw and processed milk and milk products, between points in the township of College, Centre County, and from points in said township to points within an airline distance of seventy-five (75) statute miles of the limits of said township.

IT IS FURTHER ORDERED: That the applicant shall not engage in any transportation granted herein until he shall have complied with the requirements of the Pennsylvania Public Utility Code and the rules and regulations of the Commission relative to the filing of evidence of cargo insurance and acceptance of a tariff establishing just and reasonable rates.

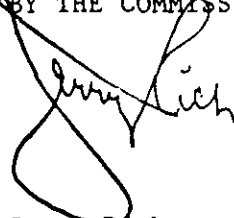
IT IS FURTHER ORDERED: That upon compliance with the requirements as set forth, a certificate issue evidencing the Commission's approval of the right to operate as above-determined.

IT IS FURTHER ORDERED: That in the event the 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 the authority granted herein, to the extent that it duplicates authority now held by or subsequently granted to the applicant, shall not be construed as conferring more than one operating right.

IT IS FURTHER ORDERED: That upon compliance with this order, the contract carrier permit issued to Dan Fleegle, t/d/b/a Dan Fleegle Trucking at A-00108421, F. 1, be cancelled and the record marked "CLOSED".

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Jerry Rich", written over a large, stylized scribble or flourish.

Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: July 19, 1990

ORDER ENTERED: JUL 26 1990

PENNSYLVANIA PUBLIC UTILITY COMMISSION

KJR



RECEIPT

The addressee named hereunder has paid Pennsylvania Public Utility Commission for the following bill, subject to final collection of check or money order tendered for such payment.

H. Fred Barefoot Trucking Inc.
Box 25
Alum Bank, PA 15521

Date May 6, 1991

CR 144158 A

DOCKETED
MAY 13 1991

COMMIT
FOLDER

In re application of H. Fred Barefoot Trucking, Inc.
A-107365, P.1, Am-A.....\$350.00

Revenue account 001780-017601-102 (ck)

ck 8629 Checks \$350.00 Currency _____

Utility account _____ 50:26

C. Joseph Meisner
For Department of Revenue

RHOADS & SINON

ATTORNEYS AT LAW

DAUPHIN BANK BUILDING

TWELFTH FLOOR

ONE SOUTH MARKET SQUARE

P.O. BOX 1146

HARRISBURG, PA-17108-1146

TELEPHONE (717) 233-5731

FAX: (717) 232-1459

OF COUNSEL
FRANK A. SINON

PAUL H. RHOADS

1907-1984

JOHN M. MUSSELMAN

1919-1980

CLYDE R. HENDERSHOT

1922-1980

AFFILIATED OFFICE:

SUITE 301

299 W. CAMINO GARDENS BLVD.

BOCA RATON, FL 33432

TELEPHONE (407) 395-5595

FAX (407) 395-9497

3032/02

DIRECT DIAL NO.

FILE NO.

HENRY W. RHOADS
ROBERT H. LONG, JR.*
SHERILL T. MOYER
JAN P. PADEN
RICHARD B. WOOD
LAWRENCE B. ABRAMS III*
J. BRUCE WALTER
JOHN P. MANBECK
FRANK J. LEBER
R. STEPHEN SHIBLA
CHARLES L. SIECK*
PAUL A. LUNDEEN
JACK F. HURLEY, JR.
NATHAN H. WATERS, JR.
DAVID B. DOWLING
EVELYN S. HARRIS
DAVID F. O'LEARY
DAVID O. TWADDELL

CHARLES J. FERRY
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JOHN B. CONSEVAGE
TIMOTHY M. ANSTINE
RICHARD H. FRIEDMAN
JESSE R. RUHL
LORI J. MCELROY
KIMBERLY J. ALBRIGHT

*ALSO ADMITTED TO THE FLORIDA BAR

Re: Application of H. Fred Barefoot Trucking, Inc.,
A.107365, F.1, Am-A

May 30, 1991

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

Attention: David Ehrhart, Supervisor, Applications Section
Bureau of Transportation

Dear Mr. Ehrhart:

The protest period in the above referenced proceeding closed on May 13, 1991. Although there is a single protest, there is no room for amendment of the application. We would ask that you immediately forward the application to the Office of the Administrative Law Judge for the scheduling of a hearing.

Very truly yours,

RHOADS & SINON

By:

J. Bruce Walter

JBW/dah

cc: H. Fred Barefoot Trucking, Inc.

DOCUMENT
FOLDER

DOCKETED
APPLICATION DOCKET
MAY 31 1991
ENTRY No.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265
June 5, 1991

In Re: A-00107365, F001, Am-A

(See attached list)

Application of H. Fred Barefoot Trucking, Inc.

Amendment so as to permit the transportation of property, for Mayfair Creamery, from its facilities located in the borough and township of Somerset, Somerset County, to points in Pennsylvania, and vice versa.

BTL

NOTICE

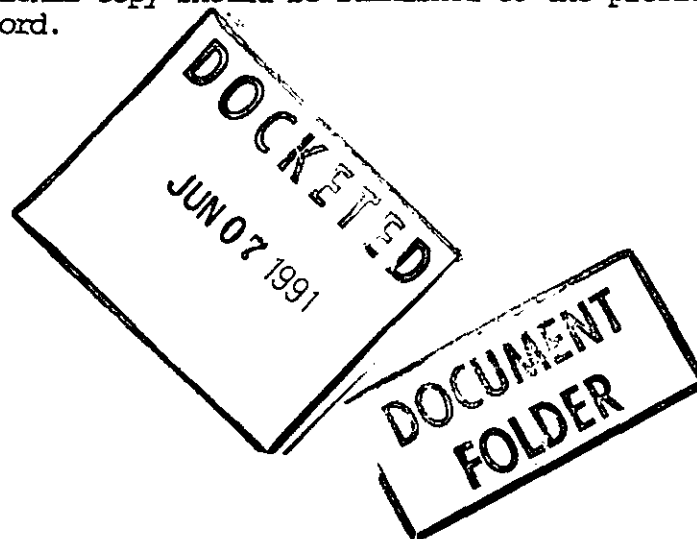
The Public Utility Code directs that hearings shall be commenced in this case by the Administrative Law Judge within 90 days after the proceeding is initiated.

In compliance with this directive, an initial hearing is hereby scheduled for Friday, July 12, 1991, at 10:00 a.m., in an available hearing room, Ground Floor, North Office Building, North Street and Commonwealth Avenue, Harrisburg, Pennsylvania 17120.

The presiding officer in this proceeding is Administrative Law Judge Herbert Cohen. Judge Cohen can be contacted at P.O. Box 3265, Harrisburg, Pennsylvania 17105-3265; telephone (717) 783-5452.

If you intend to file exhibits, please be advised that two copies of all hearing exhibits to be presented into evidence must be submitted to the Reporter and an additional copy should be furnished to the presiding officer and each party of record.

cc: Judge Cohen
Mr. Bramson
Ms. Kelly
Mrs. Howell
Docket Room



A-00107365, F001, Am-A Parties of Record

J. Bruce Walter, Esquire
Rhoads & Sinon
P.O. Box 1146
Harrisburg, PA 17108

H. Fred Barefoot Trucking, Inc.
Box 25
Alum Bank, PA 15521

William A. Gray, Esquire
Vuono, Lavelle & Gray
2310 Grant Building
Pittsburgh, PA 15219

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265
June 19, 1991

In Re: A-00107365, F001, Am-A

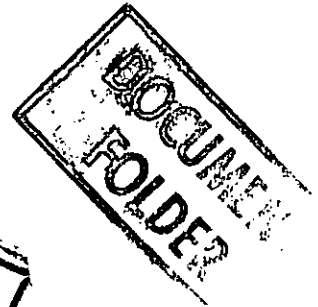
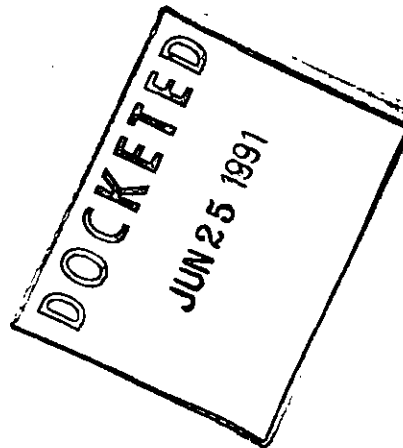
(See letter of 6/5/91)

Application of H. Fred Barefoot Trucking, Inc.
Amendment so as to permit the transportation of property, for Mayfair Creamery, from its facilities located in the borough and township of Somerset, Somerset County, to points in Pennsylvania, and vice versa.

NOTICE

This is to inform you that the initial hearing now scheduled to be held on Friday, July 12, 1991, in Harrisburg, in the subject proceeding has been postponed to Friday, July 19, 1991, at 10:00 a.m., in Harrisburg.

cc: Judge Cohen
Mr. Bramson
Ms. Kelly
Mrs. Howell
Docket Room



BTL

APPEARANCE SHEET

ALJ HEARING REPORT

BTL

DOCKET NO. A-00107365, F001, Am-A
 CASE NAME H. Fred Barefoot Trucking,
Inc.
 HEARING LOCATION Harrisburg, PA.
 HEARING DATE July 19, 1991
 ALJ Cohen

CHECK THOSE BLOCKS WHICH APPLY:

Hearing held YES NO
 Testimony taken YES NO
 Hearing concluded YES NO
 Further hearing needed YES NO
 Estimated add'l days _____
 RECORD CLOSED YES NO
 Briefs to be filed YES NO
 BENCH DECISION YES NO

RECEIVED
 JUL 22 1991
 Office of A. L. J.
 Public Utility Commission

REMARKS: Brief filed and docketed 7/19/91
DOCKETED
 JUL 31 1991

NAMES, ADDRESSES AND TELEPHONE NUMBERS OF PARTIES OR COUNSEL OF RECORD
 PLEASE PRINT CLEARLY
 INCOMPLETE INFORMATION MAY RESULT IN DELAY OF PROCESS

NAME and TELEPHONE NUMBER	ADDRESS	APPEARING FOR
Uono, Lavelle J Gray Rhodes + Simon By: J. Bruce Walter Telephone No. (717) 233-5731	one south market sq PO Box 1146 City: HB 26 State: PA Zip: 17108-1146	applicant: H. Fred Barefoot Trucking Inc
Uono, Lavelle J Gray By: William A. Gray Telephone No. (412) 47-1800	2310 Grant Bldg City: Pgh State: PA Zip: 15219	Dan Fleagle et al Dan Fleagle Trucking Applicant

CHECK THIS BOX IF ADDITIONAL PARTIES OR COUNSEL OF RECORD APPEAR ON BACK.

[Signature]
 Reporter

Address

City State Zip

Telephone No. ()

Address

City State Zip

Telephone No. ()

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KJR

RHOADS & SINON

ATTORNEYS AT LAW
DAUPHIN BANK BUILDING
TWELFTH FLOOR
ONE SOUTH MARKET SQUARE
P.O. BOX 1146
HARRISBURG, PA 17108-1146
TELEPHONE (717) 233-5731
FAX: (717) 232-1459

ORIGINAL

HENRY W. RHOADS
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OF COUNSEL
FRANK A. SINON
PAUL H. RHOADS
1907-1854
JOHN M. MUSSELMAN
1919-1980
CLYDE R. HENDERSHOT
1922-1980

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SEP 24 1991

SECRETARY'S OFFICE
Public Utility Commission

AFFILIATED OFFICE:
SUITE 301
299 W. CAMINO GARDENS BLVD.
BOCA RATON, FL 33432
TELEPHONE (407) 395-5595
FAX (407) 395-9497

DIRECT DIAL NO.
FILE 3032/02

*ALSO ADMITTED TO THE FLORIDA BAR

Re: Application of H. Fred Barefoot Trucking, Inc.,
A.107365, F.1, Am-A (Mayfair Creamery)

September 24, 1991

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT
FOLDER

Dear Secretary Rich:

Enclosed you will please find an original and nine (9) copies of the Main Brief on Behalf of the Applicant, H. F. Barefoot Trucking, Inc., in the above referenced proceeding. In accordance with the Certificate of Service, copies have been served upon Administrative Law Judge Herbert Cohen and William Gray, Esquire, counsel for the sole protestant.

Very truly yours,

RHOADS & SINON

By: *JBW*
J. Bruce Walter

JBW/dah

Enclosure

cc: Administrative Law Judge Herbert Cohen
William A. Gray, Esquire
Rick Barefoot, Vice President
H. Fred Barefoot Trucking, Inc.

RECEIVED

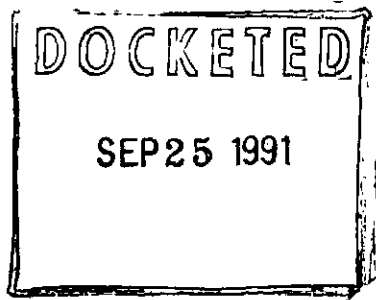
SEP 24 1991

SECRETARY'S OFFICE
Public Utility Commission

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF H. FRED BAREFOOT TRUCKING, INC.
A-00107365, F.1, Am-A

BRIEF ON BEHALF OF APPLICANT



J. Bruce Walter
Rhoads & Sinon
One South Market Square
Twelfth Floor
P.O. Box 1146
Harrisburg, PA 17108-1146
(717) 233-5731

Counsel for Applicant

Dated: September 24, 1991

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I. STATEMENT OF THE CASE

Applicant, H. Fred Barefoot Trucking, Inc. (hereafter "Barefoot Trucking"), seeks an amendment to its existing authority. The amendment would permit the transportation of property, as a contract carrier, for Mayfair Creamery (hereafter "Mayfair"), from its facilities located in the Borough and Township of Somerset, Somerset County, to points in Pennsylvania, and vice versa.

The application amendment was filed in April of 1991 and was protested by Dan Fleegle Trucking (hereafter "Fleegle Trucking"). A hearing was held before Administrative Law Judge Herbert Cohen on July 19, 1991 in Harrisburg. The record consists of 96 pages of transcript, Applicant's Exhibits 1-3 and Protestant's Exhibit 1. At the conclusion of the hearing permission was granted for the filing of these Briefs under the due date of September 25, 1991.

II. NOTES OF TESTIMONY

Witness, Rick Barefoot (N.T. 3, 33), identified Applicant's Exhibits 1 through 2. Mr. Barefoot (hereafter "Barefoot") is Vice-President of Barefoot Trucking (Applicant's Exhibit 1, paragraph 2; N.T. 4). Exhibit 1 consists of the Applicant's basic statement. Exhibit 2 consists of Barefoot Trucking's current Balance Sheet and Income Statement. Applicant holds authority at MC 19607 from the Interstate Commerce Commission ("ICC") to transport food and related products between points in Pennsylvania on the one hand and on the other, points in New

Jersey, Maryland, Virginia, West Virginia and Ohio (Applicant's Exhibit 1, paragraph 5). Applicant holds a single permit before the Pennsylvania Public Utility Commission ("PUC"), to serve Galliker Dairy (hereafter "Galliker") from its facilities in the city of Johnstown, Cambria County, Pennsylvania (Applicant's Exhibit 1, paragraph 5). Applicant presently provides services under this PUC authority to all points in Pennsylvania to and from Galliker's facility in Johnstown (N.T. 6-7).

Applicant currently provides service to Mayfair Creamery on an interstate capacity (N.T. 5). Applicant seeks an amendment to its existing authority in order to transport property for Mayfair from its facilities in the Borough of Somerset, Somerset County, to points in Pennsylvania and vice versa (Applicant's Exhibit 1, paragraph 4).

Applicant's terminal facility is located in Alum Bank, Bedford County (N.T. 32), Pennsylvania (Applicant's Exhibit 1, paragraph 1). This facility houses its office and shop equipment for servicing trucks (Applicant's Exhibit 1, paragraph 8), and is located 35-40 miles from Mayfair's facility located in Somerset County (N.T. 32). Applicant provides for telephone communications and two-way communications with every truck which is on duty (Applicant's Exhibit 1, paragraph 8). Applicant owns 9 tractors, 5 Barbells, 4 Brenner trailers, 1 Mack tri-axle truck, 2 Chevy pick-ups (Applicant's Exhibit 1, paragraph 9) and an additional bulk transport trailer (N.T. 5). Applicant is familiar with all

applicable regulations of the U.S. Department of Transportation relating to the safe operation of commercial vehicles; moreover, Applicant's operations are in compliance with these regulations (Applicant's Exhibit 1, paragraph 10).

Applicant currently transports "exempt" milk from farms to Galliker's (N.T. 26), or to Galliker's customers, including hauls to Mayfair's Somerset facilities (N.T. 26, 30). Applicant proposes a combination of bulk service and refrigerated in-van service for Mayfair (Applicant's Exhibit 1, paragraph 11). Applicant's service would be designed to meet the shipper's requirements and the demands of its customers, and applicant is able to meet such requirements and demands (Applicant's Exhibit 1, paragraph 11). The shipper and state commodities to be transported would include: raw milk to dairy, bulk and finished product from the dairy, and related products and sugar to the dairy (Applicant's Exhibit 1, paragraph 14). Very few empty miles would be created, but some bulk transportation is inherently one-way (Applicant's Exhibit 1, paragraph 13).

Barefoot testified that Barefoot Trucking has never been served with a complaint from the PUC (N.T. 5), nor did he have knowledge of any citations that would indicate a complaint would be forthcoming (N.T. 5). However, Barefoot did acknowledge that Barefoot Trucking had provided some service, as a last minute thing, which it did not have PUC authority to provide (N.T. 20). First, it has provided interstate service for Pepsi-Cola by pulling

fructose from Pepsi-Cola's Johnstown railroad car siding in Cambria County (N.T. 11) to Pepsi-Cola's Industrial Plant Park facility in Cambria County (N.T. 11) from September of 1990 through July of 1991 (N.T. 14). Applicant moved about 20 loads, each on an emergency basis (N.T. 11, 12) for Pepsi-Cola during this time period (N.T. 14). Applicant was phoned directly by Pepsi each time services were required. Each movement only encompassed a 10-mile round-trip (N.T. 11, 33). The corn sugar is piped directly from a rail car into the truck with no storage (N.T. 15). It originates in Chicago (N.T. 16) or some other point "out West").

Second, Applicant provided one time service for Kraft by pulling product from Mayfair's facility in Somerset County to Kraft's Philadelphia plant (N.T. 7) in April or May of 1991. This service was provided to Kraft as "last minute thing" (N.T. 8). Barefoot Trucking's broker, T.C. Jacoby, located in St. Louis, Minnesota (N.T. 9), phoned Applicant (N.T. 9). Applicant assumed the Kraft delivery would be interstate delivery (N.T. 10) because in the past the work done for Kraft was always interstate (N.T. 10). Applicant found out only hours before service (N.T. 11) that the load was going to a Pennsylvania location. This was the only time Applicant provided intrastate service to Kraft (N.T. 10). Finally, Applicant believes it more recently provided services through T.C. Jacoby (N.T. 23), for Holly Dairy (N.T. 22), to Mt. Holly Springs (N.T. 21, 22). Again, this was on a last minute basis, due to a cancellation (N.T. 23).

None of the above-mentioned instances of illegal activity were solicited by Applicant (N.T. 33), nor were they done at Mayfair's request (N.T. 23). They do not constitute a common practice for Barefoot Trucking (N.T. 20) as it does not condone trying to do things illegally (N.T. 20). Applicant no longer feels pressure to accept all shipments which T.C. Jacoby tenders, and since the proceedings started Applicant has declined to undertake any service which it has no PUC authority to provide (N.T. 19). Thus, Applicant does intrastate work solely for Galliker at present (N.T. 26).

Witness, David Pickard (N.T. 34), testifying on behalf of Barefoot Trucking, identified Applicant's Exhibit 3. Mr. Pickard (hereafter "Pickard") is Production Supervisor at Mayfair (N.T. 35), located in Somerset, Pennsylvania, and has held that position for 14 years (Applicant's Exhibit 2, paragraph 2). Applicant's Exhibit 3 consists of Pickard's personal statement. Mayfair is a creamery which manufactures and distributes butter, ice cream mix, skim, powder, buttermilk powder and anhydrous milk fat (Applicant's Exhibit 2, paragraph 3). Pickard controls much of the transportation for Mayfair, including the transporting of the fluid milk products (N.T. 35).

Mayfair currently uses the services of Barefoot Trucking on an interstate basis (N.T. 40). Pickard testified that Mayfair supports the application of Barefoot Trucking to attain an amendment to its existing authority in order to transport property

for Mayfair, from its facilities located in Somerset County, to points in Pennsylvania, and vice versa. The bulk of Mayfair's outbound traffic goes from Mayfair's Somerset facility to facilities of Hershey Creamery (hereafter "Hershey"), located in Harrisburg, Pennsylvania (Applicant's Exhibit 2, paragraph 5, N.T. 38, 46). Fleegle Trucking presently handles nearly all this traffic to Hershey (N.T. 48). One load per week is carried by Nelson Road and Trucking (hereafter "Nelson Trucking") (N.T. 48). Although Nelson Trucking has no PUC authority, Fleegle Trucking has not objected because it refuses to match Nelson Trucking's low rates (N.T. 48). Mayfair also requires regular movement from its Somerset facility to Galliker's Johnstown facility (N.T. 49). Notably, Mayfair chooses the carrier in all these outbound shipments (N.T. 51).

The principal reason why Mayfair is supporting Barefoot Trucking's application is that Mayfair's primary customer, Hershey, has expressed dissatisfaction with the transportation services provided by Fleegle Trucking (Applicant's Exhibit 2, paragraph 8, N.T. 92). Near exclusive use of Fleegle Trucking's services is "not totally acceptable" to Mayfair (N.T. 69) for additional reasons: First, Pickard believes that Fleegle Trucking's rates are exorbitant unless it is doing a back-haul (N.T. 36, 48), and Mayfair has been charged more for Fleegle Trucking's services than authorized by the tariff filed with the Commission (N.T. 92). Second, Mayfair has received complaints from another customer, Gold

Bond Ice Cream (N.T. 46), concerning Fleegle Trucking's services (N.T. 37). Third, there have been objections to Fleegle Trucking's services within Mayfair's plant (N.T. 45) because of communication problems (N.T. 70). Fourth, there were major concerns that Dan Fleegle (hereafter "Fleegle") was selling his business (N.T. 71). In fact, Fleegle testified that he had sent a copy of Fleegle Trucking's PUC authority to an interested buyer, Mr. Boring, to review (N.T. 93). Because of its concerns with Fleegle Trucking, Mayfair has contacted two other carriers to provide service as a back-up to Fleegle Trucking, but the services of one carrier, Milk Transport, are contingent on its being in Mayfair's vicinity (N.T. 58) and the other carrier, Horst Trucking, has refused to provide service (N.T. 36, 60).

Mayfair requires service in bulk, in tank vehicles (Applicant's Exhibit 2, paragraph 6). Mayfair has no intentions of ceasing to use Fleegle Trucking's services (N.T. 37). Rather, Mayfair needs an additional carrier to handle current business in a peak period season (N.T. 37). Mayfair would use the services of Barefoot Trucking for bulk transportation for approximately 2-9 trips per week, depending on the demands of Mayfair's customers (Applicant's Exhibit 2, paragraph 4). Moreover, Mayfair anticipates requiring more service in the future because it has gone out and actively solicited more raw milk (N.T. 38). New deliveries, both inbound and outbound (N.T. 67), are anticipated in the Philadelphia (N.T. 39, 67), Carlisle (N.T. 39, 67), DuBois

(N.T. 39, 68), and Allentown (N.T. 67) areas. Marketing efforts continue for other Pennsylvania locations (Ex. P-3, p. 2). Inbound transportation originates from Johnstown, Uniontown and Pittsburgh (N.T. 41). The Somerset to Johnstown run is a regular run (N.T. 49). Mayfair has concerns about the financial stability of Fleegle (N.T. 71).

Witness, Daniel Fleegle (N.T. 75), testifying on behalf of the Protestant, Fleegle Trucking, identified Protestant's Exhibit 1. Fleegle operates as a sole proprietor under the name of Dan Fleegle Trucking (N.T. 76). Protestant's Exhibit 1 consists of a copy of the PUC Operating Authority for Fleegle Trucking. Fleegle Trucking, previously authorized to provide contract carrier services (N.T. 76) was granted authority in July of 1990 to transport as a common carrier by motor vehicle, cream, ice cream mixes, skim condense and dairy products, in bulk and in tank vehicles, between points in Pennsylvania (Protestant's Exhibit 1, page 1). Fleegle Trucking's facilities are located in Jennerstown, Somerset County (Protestant's Exhibit 1, page 2) (N.T. 75).

Fleegle Trucking currently provides intrastate service for Mayfair, specifically daily hauls from Mayfair Creamery's Somerset facility to Hershey Creamery in Harrisburg (N.T. 78), and one haul per week from Johnstown Sani-Dairy to Mayfair's Somerset facility (N.T. 78). Fleegle Trucking charges a flat rate of \$266/load for the service to Hershey (N.T. 79), and \$130/load for

the service to Sani-Dairy (N.T. 79). Fleegle Trucking is seeking approval of a new tariff with the Commission (N.T. 89).

III. DISCUSSION

(a) Statutory Test

The issuance of a contract carrier permit is governed by Section 2503(b) of the Public Utility Code, 66 Pa. C.S. §2503(b), which states in part:

... A permit shall be issued by the Commission to any qualified applicant therefor authorizing in whole or in part the service covered by the application, if it appears ... that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful orders or regulations of the Commission thereunder, and that the proposed service to the extent authorized by the permit will be consistent with the public interest and the policy declared in Section 2501

In Brink's v. Pa. Public Utility Commission, 56 Pa. Cmwlth. Ct. 371, 424 A.2d 1010 (1981), the Commonwealth Court discussed the standard for contract carrier applications, determining that the public interest would not be served if "harmful competition" resulted to common carriers. The term harmful competition was defined by the Court as:

[C]ompetition with a common carrier where there is insufficient need for additional service to warrant a grant of authority to another common carrier or a contract carrier.

Brink's, 56 Pa. Cmwlth. Ct. at 375, n.2.

The Commission has clearly redirected its focus from fostering monopolistic protection for existing carriers to

encouraging increased, legitimate competition among carriers consonant with the demonstrated public demand or need for transportation. Seaboard Tank Lines, Inc., 93 Pa. Cmwlth. 601, 502 A.2d 762; Commission's Adoption of Transportation Regulatory Policy Statement at 52 Pa. Code §41.14.

(b) Applicant Has Established Need For Its Proposed Service

The Commission has long held that, even through there are existing certified carriers with sufficient equipment and facilities to meet the needs of the shipper, the Commission may still grant applicant authority to provide a similar service. John Benkart & Sons Co. v. Pennsylvania P.U.C., 137 Pa.Super. 5, ___, 7 A.2d 584, 586 (1939).

Barefoot Trucking's proposed service will serve a useful public purpose, responsive to a public demand or need.

As proof of necessity, Barefoot Trucking introduced the testimony of David Pickard, Production Supervisor at Mayfair for the past 14 years (Applicant's Exhibit 2, paragraph 2). Pickard testified that the proposed service is necessary for the accommodation or convenience of the public, that the existing service does not satisfy Mayfair's need and that the proposed service would correct or substantially improve conditions. See, D. F. Bast, Inc. v. Pa. P.U.C., 397 Pa. Super. 246, 250 (1959). Pickard gave testimony that Mayfair supports Barefoot Trucking's application for authority as necessary for a number of reasons.

The bulk of Mayfair's outbound traffic goes from Mayfair's Somerset facility to facilities of Hershey Creamery (hereafter "Hershey"), located in Harrisburg, Pennsylvania (Applicant's Exhibit 2, paragraph 5, N.T. 38, 46). Mayfair needs an additional carrier to handle current business in a peak period season (N.T. 37). Mayfair would use the services of Barefoot Trucking for bulk transportation for approximately 2-9 trips per week, depending on the demands of Mayfair's customers (Applicant's Exhibit 2, paragraph 4). Moreover, Mayfair anticipates requiring more service in the future because it has gone out and actively solicited more raw milk (N.T. 38). New deliveries, both inbound and outbound (N.T. 67), are anticipated in the Philadelphia (N.T. 39, 67), Carlisle (N.T. 39, 67), DuBois (N.T. 39, 68), and Allentown (N.T. 67) areas. Marketing efforts continue for other Pennsylvania locations (Ex. P-3, p. 2). Inbound transportation originates from Johnstown, Uniontown and Pittsburgh (N.T. 41). The Somerset to Johnstown run is a regular run (N.T. 49). Mayfair has concerns about the financial stability of Fleegle (N.T. 71).

Mayfair has also been generally dissatisfied with Fleegle Trucking's services. Mayfair's primary customer, Hershey (N.T. 92), and another customer, Gold Bond Ice Cream (N.T. 46), have complained about the transportation services provided by Fleegle Trucking. Also, Pickard believes Fleegle Trucking's rates are exorbitant unless it is doing a back-haul (N.T. 36, 48) and Mayfair has been overcharged in the past (N.T. 92). In addition, there

have been objections to Fleegle Trucking's services within Mayfair's plant (N.T. 45). Finally, there was a major concern that Fleegle was selling his business and over the financial stability of that business (N.T. 71). This concern was well-founded, as Fleegle testified that he had sent a copy of Fleegle Trucking's PUC authority to be reviewed by a prospective buyer (N.T. 93).

The Protestant, Fleegle Trucking, may argue that service is available and "adequate" and therefore, this application should be denied (N.T. 88, 94). This is a back door version of arguing about need under 66 Pa. C.S. §2503. In support of this position, the record shows only Fleegle Trucking, Horst and Milk Transport as available carriers. Yet, in reality, Fleegle Trucking possesses a monopolistic position with regard to local services. This is partially because Horst is located in Hagerstown, Maryland (N.T. 94), and Milk Transport is located in Grove City, Pennsylvania (N.T. 94), Milk Transport cannot be relied on unless it is in Mayfair's vicinity (N.T. 58) and Horst has refused to provide service (N.T. 60). Thus, as Mayfair has no meaningful choice in selecting a carrier that it is satisfied with, Fleegle's protests are without regard to any consideration as to whether the public interest in general, and Mayfair Creamery in particular, would be served by a grant of this authority.

The Commission need not wait until the public in general and the testifying witness in particular suffers from lack of service before it can authorize service which the evidence

indicates will ultimately be necessary. Highway Express Lines, Inc. v. Pennsylvania P.U.C., 195 Pa.Super. 92, 169 A.2d 798 (1961); Tranter v. Pennsylvania P.U.C., 4 Pa. Cmwlth. 585, 288 A.2d 837 (1972). As stated in Highway Express Lines, Inc. at 195 Pa. Super 102-103, at 169 A.2d ____:

This is a rapidly moving world. The law and its administration must try to keep pace with the developments of commerce and business and science. The Commission may not be chained to the past in determining the need for future service. It must not wait until the public suffers from the lack of service before it can authorize service which the evidence indicates will be necessary by the time a final order is made or within a reasonable time thereafter.

(c) Applicant Is Fit To Provide The Proposed Service

In all proceedings, a determination must be made concerning the Applicant's fitness. Application of Dart, Inc., A-108987, Order entered on May 29, 1991. The concept of fitness does not differ as applied to contract or common carriers. Subsection 41.14(b) of 52 Pa. Code requires a motor carrier applicant to prove its technical and financial ability to provide the proposed service. In addition, subsection 41.14(b) states that a motor carrier application may be denied if the record shows that the applicant lacks a propensity to operate safely and legally. In Re Perry Hassman, 55 Pa. P.U.C. 661, 662-63 (1982), the Commission set forth the definition of fitness:

1. Technical expertise - applicant must have technical capacity to meet the need in a satisfactory fashion Applicant must possess sufficient staff, facilities, and operating skills, to make the proposed service feasible, profitable, and a distinct service to the public

2. Financial capacity - applicant should possess the financial ability to give reliable and respectable service to the public Applicant should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service.

3. Propensity to operate safely and legally - in this regard, lack of fitness is demonstrated by persistent disregard for, flouting, or defiance of the Public Utility Law and the commission's orders and regulations ...; and by violations in matters affecting the safety of operations

(i) Applicant Is Presumed Fit

Where, as in the case of Barefoot Trucking, a motor carrier applicant already possesses a certificate of public convenience (or permit) issued by this Commission and is seeking merely to expand its authority, the applicant is presumed to be technically and financially fit. Re V.I.P. Travel Service, Inc., 56 Pa. P.U.C. 625 (1982).

(ii) The Record Emphasizes And Does Not Rebut This Presumption

In the present matter, the record regarding Barefoot Trucking's application is devoid of any evidence challenging Barefoot Trucking's technical and financial ability to provide the service proposed in Barefoot Trucking's application for additional operating authority. Nor does the record contain any suggestion that Barefoot Trucking lacks a propensity to operate safely. What the record does reveal is, based upon years of public operation, that Barefoot Trucking has the experience, the equipment (Applicant's Exhibit 1, paragraphs 8, 9, N.T. 5), the facilities (Applicant's Exhibit, paragraph 8), and the financial ability (Applicant's Exhibit 2) required.

Barefoot Trucking has never been served with a complaint by the PUC, N.T, 5. The record reveals that the Applicant admitted quite candidly that it had performed a very limited intrastate operation in Pennsylvania on a last minute basis for Kraft (N.T. 7), and Holly Dairy (N.T. 22). This unauthorized activity was not solicited by Applicant (N.T. 33) was not a regular practice of Barefoot Trucking (N.T. 20) and the minimal activity in violation of Public Utility Law has ceased (N.T. 19). The Kraft service from the rail car is clearly interstate and not illegal service at all having originated outside of Pennsylvania and not having been subject to storage in Pennsylvania.

In Application of Smith Hauling, Inc., A.96241, F.2, 50 Pa. P.U.C. 721 (1977), grant aff'd at B.B. Motor Carriers, Inc., et. al. v. Pa. P.U.C., 36 Pa. Cmwlt. 26, 30, 389 A.2d 210, _____, (1978), Judge DiSalle in speaking for the Commonwealth Court wrote:

The PUC concluded that Smith had openly operated its service, that there had been no complaints from the public, shippers, other carriers or the PUC, and that although the operations of Smith from 1967 through 1975 were illegal, there was no bad faith conduct on its part. A careful scrutiny of the record reveals that there is substantial evidence present to support those necessary findings of fact. The mere fact of operation without approval is not per se an offense prohibiting the subsequent acquisition of authority. Johnstown-Pittsburgh Express, Inc. v. Pennsylvania Public Utility Commission, 5 Pa. Cmwlt. 521, 291 A.2d 545 (1972).

(Emphasis added).

See also, Brink's, Incorporated v. Pa. P.U.C., 456 A.2d 1342, 1344. As with the Applicant in Smith Hauling, Inc., A.96241, F.2, 50 Pa.P.U.C. 721, Barefoot Trucking's provision of some past services

without PUC authority is not per se an offense prohibiting its current request for an amendment to its existing authority.

In Application of Dart, Inc., A-108987, Order entered on May 29, 1991, the Commission discussed how much illegal activity is necessary for a finding of "lacks propensity to operate ... legally". The Commission stated "[O]ur understanding of the law where illegal activity is concerned is that a prior illegal move(s) does not in and of itself require an automatic finding of lack of fitness".

The focus of any argument with regard to the fitness of Barefoot Trucking to operate legally must necessarily begin and end with its impact on the public. Chemical Leaman Tank Lines, Inc. v. Pa. Utility Commission, 201 Pa.Super. 196, 191 A.2d 876 (1963). Applicant has ceased to provide any unauthorized services (N.T. 19) and they were few to begin with. Moreover, the record fails to reveal that the few instances of unauthorized activity on the part of Applicant had any negative impact on the public. As most aptly discussed by Administrative Law Judge Schnierle in his order dated February 2, 1989, in the Application of Central Transport, Inc., A.108155, quoting in part the Pennsylvania Supreme Court decision in Brinks, Inc. v. Pa. PUC, 500 Pa. 387, 392 (Footnote 3), 456 A.2d 342, ___, (1983):

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 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.

Clearly then, although a carrier's willingness to obey the law is a factor that reflects on the carrier's fitness, obedience to the law is only one of many factors that compose the legal concept of "fitness". Smith Hauling, Inc., 50 Pa. P.U.C. 728. The record is uncontradicted that Barefoot Trucking has the quality and quantity of personnel, and the facilities and equipment (Applicant's Exhibit 1, paragraphs 8, 9, N.T. 5) to provide the proposed service. Additionally, Barefoot Trucking has years of experience in the transportation industry. Barefoot Trucking has provided timely, safe and efficient service in the past. Furthermore, it is financially fit to perform the proposed service (Applicant's Exhibit 2). Accordingly, Barefoot Trucking has sustained its burden of proof by establishing its fitness to perform the proposed transportation service. Considering Barefoot Trucking's overall fitness to perform the service sought in the instant application, and the fact that applicant's prior violations of the Public Utility Law involved no question of human safety, Barefoot Trucking should receive the applied for permit.

(d) Protestant Has Failed To Establish On The Record That Approval Would Result In Harmful Competition

Since need, service failings, concern for Fleegle's financial stability and the need for an additional carrier in peak requirement times have all been established, there can be no finding of harmful competition.

By analogy, existing common carriers/protestants carry a heavy burden of proof under 52 Pa. Code §41.14(c); they must show that the entry of a new carrier into the transportation field would endanger or impair their existing operations to such an extent that, on balance, the granting of the requested authority would contravene the public interest. See, e.g., Yellow Cab Co. of Pittsburgh, 105 Pa. Cmwlth. 513, 524 A.2d 1069; Seaboard Tank Lines, Inc., 93 Pa. Cmwlth. 601, 502 A.2d 762. Only the threat of unrestrained and destructive competition which is inimical to the public interest precludes the grant of an application pursuant to subsection 41.14 (c). Id. Fleegle testified that his company would be devastated if it lost the 8 shipments per week it currently provides for Mayfair (N.T. 84). He indicated that 20 percent of his \$500,000 annual revenues comes from this intrastate service to Mayfair (N.T. 84). Yet, as Pickard discussed, Mayfair would not be eliminating Fleegle Trucking's services but only supplementing them by bringing in Barefoot Trucking as a needed supplemental carrier in part to cure major shipper complaints. Thus, far less than 20 percent of Fleegle's revenues would be affected. Subsection 41.14(c) recognizes that "[t]he legislature

in enacting the Public Utility Code did not intend to benefit established carriers by erecting artificial barriers to the entry of new competitors. It is the public interest and convenience which the law seeks to protect." Mobilfone of Northeastern Pennsylvania v. Pennsylvania Public Utility Commission, 73 Pa. Cmwlth. 340, 346, 458 A.2d 1030, 1034 (1983). The allegation of potential diversion of traffic volume away from Protestant's operations to Applicant failed to establish any destructive effects upon the public. It would not be harmful competition. No question of testimony which would permit a finding that "sound economic conditions" would be threatened by this application being granted. No evidence has been presented suggesting unfair or destructive practices would result. 66 Pa. C.S.A. §2501(a). The record clearly is insufficient to sustain Fleegle's burden as Protestant of showing that approval of Barefoot Trucking's application would on balance be detrimental to the general public interest.

Both Pennsylvania appellate courts and the Commission have repeatedly advised that "[n]o carrier has a right to be guaranteed freedom from competition." Mobilfone of Northeastern Pennsylvania, Inc., 73 Pa. Cmwlth. at 351, 458 A.2d at 1037 (quoting Reeder v. Pennsylvania Public Utility Commission, 192 Pa.Super. 298, 303, 162 A.2d 231, 233 (1960)). The existence of adequate service by extant carriers does not, by itself, preclude the granting of a certificate to an applicant. Seaboard Tank Lines, Inc., 93 Pa. Cmwlth, 601, 502 A.2d 762. In fact, in some

instances, an increase in competition will tend to improve the service and efficiency of other carriers in the market. Re Perkiomen Airways, Ltd., 51 Pa. P.U.C. 267 (1977). This statement has relevance to the current situation, where previous discussion has disclosed that Fleegle Trucking has a virtual monopoly on Mayfair's traffic and that Mayfair and Mayfair's customers are dissatisfied with the service of Fleegle Trucking. Authorizing this single additional carrier would offer Mayfair a choice in carriers, would require existing carriers in the area to render adequate public service of all types in order to meet the competition, while at the same time allowing Barefoot Trucking to satisfy existing public need.

IV. CONCLUSIONS OF FACT

1. The Commission has jurisdiction over the subject matter and the parties.
2. Applicant has established by a public witness a need for and demand for its proposed service.
3. Applicant has established that it is fit, willing and able to properly provide the service of a contract carrier.
4. The proposed service is consistent with the public interest as established by public witnesses.
5. The introduction of a locally-based carrier into competition will tend to improve existing service.

6. The protestant has failed to establish harmful competition.

V. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the subject matter and the parties by virtue of Section 2501 of the Public Utility Code, 66 Pa. C.S.A. §2501.

2. Under the statutory test set forth in Section 2503(b) of the Public Utility Code, the evidence in this case adduced by the Applicant supports a determination that Applicant be granted a permit as a contract carrier.

3. Applicant has demonstrated, by clear and convincing evidence, its fitness to render the proposed service.

4. Applicant has demonstrated by clear and convincing evidence, the public need for the proposed service.

5. Protestant has failed to demonstrate that approval of Applicant's application would endanger or impair the operations of existing carriers to such an extent that the grant of authority would be contrary to the public interest. In other words, harmful competition has not been established.

Respectfully submitted,

RHOADS & SIMON

By: 

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P.O. Box 1146
Harrisburg, PA 17108-1146
(717) 233-5731

CERTIFICATE OF SERVICE

I hereby certify that I have this date served three (3) copies of the foregoing "Brief on Behalf of Applicant" upon the parties listed below, at the addresses indicated, by U.S. First Class Mail, postage prepaid.

Dated at Harrisburg, Pennsylvania, this 24th day of September, 1991.

RHOADS & SINON

By: _____


J. Bruce Walter

Administrative Law Judge Herbert Cohen
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

William A. Gray, Esquire
Vuono, Lavelle & Gray
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ORIGINAL

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SEP 25 1991

OFFICE
COMMUNICATION

September 25, 1991

* ALSO MEMBER OF FLORIDA BAR

Re: Application of H. Fred Barefoot Trucking, Inc.
Docket No. A-00107365, F.1, Am-A
Our File 1773P-129

301

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

MAILED WITH U.S. POSTAL
SERVICE CERTIFICATE
OF MAILING FORM 3817

Dear Mr. Rich:

We enclose for filing with the Commission the signed original and nine (9) copies of Brief of Protestant Dan Fleegle t/d/b/a Dan Fleegle Trucking, in connection with the above captioned proceeding.

A copy of the Brief has been sent to Administrative Law Judge Herbert Cohen and to counsel for the Applicant.

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

Very truly yours,

VUONO, LAVELLE & GRAY


William A. Gray

jr

Enclosures

cc: The Honorable Herbert Cohen (w/enc.)
J. Bruce Walter, Esq. (w/enc.)
Dan Fleegle Trucking (w/enc.)

ORIGINAL

BEFORE THE
Pennsylvania Public Utility Commission

DOCKET NO. A-00107365, F.1, Am-A
H. FRED BAREFOOT TRUCKING, INC.

F.
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BRIEF FOR PROTESTANT

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Due Date: September 25, 1991

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00107365, F. 1, Am-A
H. FRED BAREFOOT TRUCKING, INC.

BRIEF FOR PROTESTANT

I. STATEMENT OF THE CASE

By this application, H. Fred Barefoot Trucking, Inc. (Barefoot or Applicant) seeks contract carrier authority to transport:

Property, for Mayfair Creamery, from its facilities located in the Borough of Somerset, Somerset County, to points in Pennsylvania, and visa versa.

A hearing was held in this case in Harrisburg, Pennsylvania on July 19, 1991 before Administrative Law Judge Herbert Cohen.

Testimony was presented by the Applicant and by Daniel Fleegle t/d/b/a Dan Fleegle Trucking (Fleegle or Protestant).

Protestant hereby submits its Main Brief in opposition to the application.

II. STATEMENT OF THE ISSUES INVOLVED

The issues involved in this case are: (1) whether the Applicant has demonstrated that it is fit, willing and able to perform the proposed service; (2) whether the existing common

carrier service available to the shipper is satisfactory and adequate; and (3) whether the interjection of a contract carrier in competition with the satisfactory and adequate common carrier service would be detrimental to the public interest and to the inherent advantages of common carriage by motor vehicle.

III. SUMMARY OF THE TESTIMONY

1. Applicant's Evidence.

1. Rick Barefoot is the Vice President of H. Fred Barefoot Trucking, Inc. (4, A-1)*

2. The Applicant holds one grant of authority from the Pennsylvania Public Utility Commission, authorizing the Applicant to provide contract carrier service for Galliker Dairy to and from its facilities in the city of Johnstown, Cambria County. (6-7, A-1, p. 2)

3. The Applicant's facilities are located in Alum Bank, Bedford County, Pennsylvania, approximately 35 to 40 miles from Mayfair Creamery's facility in Somerset, Somerset County. (32)

4. The Applicant operates nine tractors and nine tank trailers as well as one Mack tri-axle truck and two Chevy Pick-ups. (A-3, p. 2).

*Numbers in parenthesis preceded by "A" refer to Applicant's exhibits; and numbers in parenthesis preceded by "P" refer to Protestant's exhibits. All other numbers in parenthesis refer to pages of the transcript.

5. Mr. Barefoot admitted that the Applicant has handled shipments within Pennsylvania for which the Applicant knew it did not have authority. (11-12)

6. Mr. Barefoot admitted that the Applicant continued, even during the week of the hearing, to handle intrastate shipments for Pepsi Cola between points in Cambria County.

(11, 13) Mr. Barefoot admitted that he knew the shipments were beyond the Applicant's authority because the shipments were not going to Galliker's facility. (12) Mr. Barefoot testified that the Applicant handles three loads at a time for Pepsi, and it is possible that the Applicant handled 20 such loads between September of 1990 and the week of the hearing. (14)

7. Mr. Barefoot also admitted that the Applicant occasionally handles unauthorized intrastate shipments of food products for T.C. Jacoby, a food broker located in St. Louis. (7-10, 18-26)

8. At least one shipment for T.C. Jacoby involved a movement between Mayfair Creamery's facility in Somerset, and Kraft's facility in Philadelphia. (7-10) The shipment occurred in either April or May of 1991, and may have been handled after this application was filed. (8)

9. Mr. Barefoot also testified that approximately two months prior to the hearing, he handled a shipment through T.C. Jacoby which moved from Somerset to the facility of Holly Milk in Mt. Holly Springs near Carlisle. (21-23)

10. When asked whether the shipments to Kraft and to Mt. Holly Springs were the only shipments beyond the Applicant's

authority which they handled through T.C. Jacoby during the last two years, Mr. Barefoot replied:

While, I know of two, those two. It's kind of like asking me how many times I've speeded and never got caught. I don't know. (25)

11. Mr. Barefoot testified that the Applicant had handled other illegal moves prior to the application being filed. (26)

12. Mr. Barefoot did not deny that, at least prior to filing this application, the Applicant would handle both ICC and PUC moves for all of its customers, regardless of whether it had operating authority. (19-20)

13. Despite having transported during the last year approximately 20 unauthorized loads for Pepsi, and at least the two unauthorized loads through T.C. Jacoby, Mr. Barefoot attempted to rationalize the illegal moves as only occurring on an occasional basis, when someone needed a truck at the last minute. (20; 23)

14. Mr. Barefoot testified that when the Applicant first started working with T.C. Jacoby it would handle trips for them regardless of whether they were intrastate or interstate. (24)

15. Mr. Barefoot testified that the Applicant currently transports "exempt milk" from farms to the Mayfair Creamery facility. (A-3, p. 3)

16. Mr. Barefoot explained that the "exempt milk" shipments involve Barefoot picking up milk from farms in Pennsylvania and transporting the milk to either Galliker's Johnstown facility or directly to a customer of Galliker's (such as Mayfair Creamery). (27-30) The Applicant has handled

approximately one such shipment per month to Mayfair Creamery during the past year. (30) Galliker controls the destination of such shipments, the farmer pays the freight, but the Applicant receives the payment from Galliker's account. (30-31)

17. During the past two years, all of the "farm pickups" or "diverted milk" shipments handled by Applicant have all gone to either Galliker's facility in Johnstown, or to Mayfair's facility in Somerset. (32)

18. Due to the geographic location of the Applicant's facility, another carrier usually transports the loads of milk destined for Mayfair Creamery. (30)

19. David Pickard is the Production Supervisor for Mayfair Creamery. (34) Mr. Pickard controls and schedules the transportation of most of the fluid milk products for Mayfair Creamery. (35)

20. Mayfair Creamery manufactures and distributes butter, ice cream mix, skim, powder, buttermilk powder and anhydrous milk fat. (A-3, p. 1)

21. Prior to April of 1991, Charles Randall was also responsible for arranging the transportation of liquid milk products, but Mr. Pickard has been in charge since that time.

22. Although some of Mayfair's products are transported in refrigerated van trailers, this application involves the transportation of milk products, in bulk, in tank vehicles. (A-3, p. 2)

23. The primary Pennsylvania destinations for the bulk shipments of Mayfair are Hershey Creamery located in Harrisburg

and Galliker Dairy located in Johnstown. (49; A-3, p. 2)

24. This application is primarily concerned with the shipments from Mayfair to Hershey Creamery in Harrisburg. (A-3, p. 2)

25. Mayfair Creamery ships between six and ten loads per week to Hershey Creamery in Harrisburg during peak periods, and from one to three loads per week during the winter. (46-47)

26. Nelson Rowen Trucking handles one load per week to Hershey Creamery. The Protestant handles the remainder of the loads to Hershey Creamery. (48) Mayfair uses Rowen once a week because his rates are very low, despite the fact that Mayfair is not aware of Rowen having PUC authority. (48)

27. Galliker's pays the freight charges and chooses the trucking company for the shipments from Mayfair to Galliker's. (51) Lybarger & Son usually handles those movements. (50) Mr. Pickard does not think Lybarger & Son has PUC authority. (51)

28. Other than the shipments to Hershey Creamery (Harrisburg) and Galliker's (Johnstown), the remainder of Mayfair's intrastate outbound shipments involve sales of their products to a food broker. The food broker always arranges the transportation. (52-53, 63-64)

29. Inbound shipments to the Mayfair Creamery originate from Sani-Dairy (Johnstown), Galliker's Dairy (Johnstown), Fike's Dairy (Uniontown), Turner's Dairy (Pittsburgh), Dean Foods, and Milk Marketing (Ohio). (41, 53-55)

30. Mayfair's suppliers pay the freight and choose the

carrier for all of the inbound shipments to Mayfair's facility.
(53-56)

31. The Protestant handles the shipments from Sani-Dairy's Johnstown facility, and he handles a substantial amount of the shipments from Milk Marketing to Mayfair. (56)

32. Other than the shipments to the Hershey Creamery in Harrisburg, Mr. Pickard could not remember any outbound intrastate shipments where Mayfair chooses the carrier. (67-68)

33. Mayfair Creamery is looking for new suppliers and new customers. (38-39) Possible additional customers include Kraft (Philadelphia), Holly Milk Company (Carlisle), Beatrice Cheese Products (Allentown), and Beaver Meadow Creamery (DuBois). The witness was not sure if any past shipments to these four possible additional customers were arranged by Mayfair or by a broker, because other Mayfair employees are responsible for that part of the business. (68)

34. Mr. Pickard testified that he had received complaints from Hershey Creamery because deliveries from Mayfair were not arriving on time. (37-38, 43)

35. Mr. Pickard admitted that the problem involving Hershey Creamery was often caused by Mayfair Creamery not having its product ready on time. (43)

36. Mr. Pickard also raised concerns about the Protestant's financial stability and the possibility that he may sell his business. (71)

37. Apparently there is a personal problem between the Protestant and Mr. Randall (Mr. Pickard's predecessor). (46,

70)

38. Mr. Pickard admitted that any past problems involving the Protestant have been worked out, and Mayfair Creamery has no present problems with the Protestant's service. (42)

39. The contract between the Protestant and Mayfair Creamery has been discontinued because the Protestant changed from being a contract carrier to a common carrier. (62-63, A-3, p. 3)

40. Mayfair Creamery does not intend to stop using the Protestant's service. (36-37, 71-72) Mayfair Creamery is merely looking for a backup carrier to handle additional business during the peak season. (37)

41. Milk Transport is available to provide service for Mayfair Creamery, but they prefer not to use Milk Transport because Milk Transport's rates are too high unless the shipment is a backhaul. (36, 57-58) Mayfair has used Milk Transport for numerous shipments in the past year. (58) Milk Transport has handled shipments from Mayfair to Hershey Creamery in Harrisburg. (61) Milk Transport is more available for backhauls during the peak season. (59)

42. The Protestant is located only 12-15 miles from the Mayfair Creamery. (60)

43. Mayfair Creamery's service requests are often on short notice. (60)

44. The Protestant always provides a truck when Mayfair Creamery needs one. (60)

2. Protestant's Evidence.

1. Mr. Dan Fleegle operates Dan Fleegle Trucking as a sole proprietorship. (75)

2. The Protestant's garage, terminal and office facility is located approximately eight miles from Mayfair Creamery. (75, 77)

3. Subject to certain minor restrictions, the Protestant is authorized to transport, as a class D carrier, cream, ice cream mixes, skim condense and dairy products, in bulk in tank vehicles, between points in Pennsylvania. (P-1, p. 4)

4. The rights applied for by Barefoot Trucking conflict with the Protestant's existing authority. (76)

5. The Protestant currently provides service for Mayfair Creamery under his PUC authority. (77)

6. The Protestant employs six full time drivers, three part time drivers, and one full time secretary. (77) Mr. Fleegle is the full time mechanic and is assisted by one of the drivers on a part time basis. All repair work is performed in-house. (78)

7. The Protestant operates three tri-axle, straight tank trucks, three tractors and three tank trailers. (79-80)

8. The Protestant does not intend to sell his business or his operating authority. (85-86) Mr. Fleegle was approached by a Mr. Boring regarding the purchase of Mr. Fleegle's authority when Mr. Boring was purchasing a trailer from Mr. Fleegle. (93) Mr. Fleegle intends to continue providing what ever service Mayfair requests. (86)

9. Past problems with shipments arriving late at the Hershey Creamery and Goldbond Ice Cream resulted from Mayfair Creamery's product not being loaded into Mr. Fleegle's trucks on time. (81) The trucks were not taking excessive time in transit, but were arriving late because they were loaded late. (82) On one particular day, Mr. Fleegle had two trucks waiting to be loaded at the Mayfair Creamery facility for 11 hours. (82) The problems with late loading and late delivery have been resolved since Mr. Pickard took over the responsibility for arranging the shipments. (81, 83)

10. The Protestant has always been able to meet the transportation needs of Mayfair Creamery. (80-81)

11. The Protestant believes that there are adequate carriers available to provide service to Mayfair Creamery. (87-88)

12. The Protestant handles approximately one shipment per week from Johnstown to Mayfair's facility. (79) Mr. Fleegle's freight charges for those shipments are \$130 per load. (79)

13. The Protestant handles an average of seven loads per week from the Mayfair Creamery to the Hershey Creamery. (79) Mr. Fleegle's current freight charges for the Hershey Creamery movements are \$266 per load, and Mr. Fleegle has applied for a new tariff rate of \$310 per load. (79, 91) Mayfair Creamery has agreed to the higher tariff rate. (95) Mr. Fleegle mistakenly charged the new rate before the tariff was approved, but refunded the money back to Mayfair Creamery when he realized the mistake. (91, 95)

14. Mayfair is the Protestant's biggest intrastate customer, and their second biggest customer overall. (84-85) Intrastate shipments for Mayfair made up approximately 20% of the Protestant's total 1990 revenues. (84)

15. The Protestant lost approximately \$16,000 on \$500,000 of revenues in 1990. The loss of all or part of the Mayfair Creamery business would have a devastating effect on the Protestant's business. (84, 87) Mr. Fleegle would be forced to lay off drivers if he loses the revenue from Mayfair shipments.

(87)

16. Dividing Mayfair's shipments among additional carriers would have a bad effect on all of the haulers in the area. (88). The Protestant desperately needs the Mayfair shipments in order for his business to survive. (88)

IV. ARGUMENT

1. STANDARD FOR GRANTING CONTRACT CARRIER APPLICATIONS.

The granting of contract carrier authority is governed by 66 Pa. C.S.A. §2503(b), which provides, inter alia:

A permit shall be issued by the Commission to any qualified applicant therefor authorizing in whole or in part the service covered by the application, if it appears from the application, or from any hearing held thereon, that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful orders or regulations of the Commission thereunder, and that the proposed service to the extent authorized by the permit will be consistent with

the public interest and the policy declared in section 2501 (relating to declaration of policy and definitions); otherwise such application shall be denied.

The policy and intent of the General Assembly in regulating contract carriers, and the interplay of that regulation with the regulation of common carriers, is set forth in 66 Pa.

C.S.A. §2501(a), which provides, inter alia:

It is hereby declared to be the policy of the General Assembly to regulate . . . the service of common carriers . . . in such manner as to recognize and preserve the inherent advantages of . . . such carriers It is hereby found as a fact . . . that the service of common carriers by motor vehicle, forwarders, contract carriers by motor vehicle, and brokers . . . are so closely interwoven and interdependent, and so directly affect each other, that in order to effectively regulate such common carriers by motor vehicle and forwarders, and to provide a proper and safe highway transportation system in the public interest, it is necessary to regulate the service of such contract carriers

The Superior Court of Pennsylvania in Wylie v. Pa. Public Utility Commission, 186 Pa. Super. 309, 142 A.2d 763, 767 (1958), discussed the standards to be applied in a contract carrier application proceeding, stating as follows:

In view of the fact that the purpose of regulating contract carriers and requiring them to obtain a permit before beginning to render service is to promote and foster sound economic conditions and safe, adequate, economical, and efficient service to the public by common carriers by motor vehicle it is fundamental that the commission consider the existing common carrier service available to the shipper who desires the services of a contract carrier and that it determine whether the interjection of the contract carrier in competition with the satisfactory and adequate common carrier service would be detrimental to the public interest and to the inherent advantages of common carriage by motor vehicle. If the commission did not

consider the effect the granting of the permit to the contract carrier would have upon the common carriers certificated to operate and serve in the same area and the same shipper, it would not fulfill its duty to promote the policy declared by the Legislature. Where the commission finds that the existing common carrier service by motor vehicle is safe, adequate, economical, and efficient, it may determine that the addition of a contract carrier in competition would not in fact promote or improve such existing service by common carrier. In this instance the commission has found that it would not. (emphasis added)

The factual background presented to the Commission by the Wylie application and the arguments advanced by Wylie in support of its position that contract carrier authority should be granted were as follows:

The commission concluded that the service proposed by Wiley was not superior in character to the service rendered by other motor carriers; that the service which he proposed to render was available, adequate, and satisfactory from common carriers; and that the principal reason Tidewater desired Wiley's service was to obtain favorable rates. Although the commission found that Wiley was able to satisfactorily perform the services desired by Tidewater, it concluded that the proposed service was not consistent with the public interest and the policy declared in section 801 of the Law, 66 P.S. §1301. (at p.766)

Wiley contends that, where, as here, a shipper has expressed a desire for the services of an admittedly competent contract carrier to promote efficiency and economy in its operation and to obtain a service available to a competitor, the granting of an application to furnish such service as a contract carrier is consistent with the public interest, and policy of the Public Utility Law, and the constitutional rights of the parties. The contention in effect is that the commission may not deny a permit where a shipper desires the services of a contract carrier, available to a competitor, regardless of the sufficiency of the existing common carrier service which is admittedly satisfactory. (at p.766)

In Wiley, the Superior Court affirmed the Commission's denial of the contract carrier application on the basis that existing common carrier service was adequate and satisfactory and the granting of the application was not consistent with the public interest. The Superior Court compared a contract carrier application to a common carrier application for class D authority for one shipper and concluded that applying a standard of "mere shipper desire" would create an improper distinction between applications for contract carrier authority and applications for single shipper class D authority. In this regard, the Court stated:

For example, a class D common carrier by motor vehicle is often certified to haul the product or goods of one particular shipper. (citations omitted) The applicant for a class D common carrier certificate is obliged nevertheless to prove not only his ability to render the proposed service but the need therefor and the inadequacy of the existing service. The extent of the burden upon such applicant and the sufficiency of the evidence to support a grant of such limited authority are of course directly related to the nature and extent of the authority sought and in such instances may be less than if more extensive rights were involved. (citations omitted) If, as Wiley seems to contend, an applicant for a permit to haul goods for one shipper need only show that the shipper desires his service as a convenience, and perhaps as more economical than existing service, it would be useless for any applicant to apply for a class D certificate. (at p.768)
(emphasis added)

The Commonwealth Court in Brink's, Inc. v. Pa. P.U.C., 56 Pa. Cmwlth. 371, 424 A.2d 1010, 1012 (1981), also discussed the standards for contract carrier applications and also made it clear that "mere shipper desire" is not sufficient to establish that a grant of contract carrier authority will be consistent

with the public interest. The Commonwealth Court determined that the public interest would not be served if "harmful competition" resulted to common carriers. The Commonwealth Court defined "harmful competition" as follows:

"Harmful competition" refers to competition with a common carrier where there is insufficient need for additional service to warrant a grant of authority to another common carrier or a contract carrier. (at p.1012) (emphasis added)

The Commonwealth Court in Brink's also determined that competition without need for additional service would be "harmful competition" to the common carrier. In that regard, the Commonwealth Court stated:

Findings of fact concerning the need for additional service would be necessary to support a grant of contract carrier authority where it is shown that the application will result in competition with a common carrier. Clearly, competition without need for additional service would be harmful to the common carrier. (at p.1013) (emphasis added)

This Commission has also previously determined that the standard of "public interest" in a contract carrier application is basically the equivalent of the standard of "public need" in connection with a common carrier application. Re: Krevda Bros. Express, Inc., 51 Pa. P.U.C. 226, 238-239 (1977). In Krevda, the Commission stated:

Even were we to make a finding that the proposed service is that of a contract rather than a common carrier, the applicant would bear a very similar burden. Necessity, in matters relating to whether a proposed contract carrier service is in the public interest and in accord with the policy §801 of the Public Utility Law, supra, is the same as in cases involving necessity of service by a common carrier. Merchants Parcel Delivery, Inc. v. Pennsylvania Pub. Utility Commission, 150 Pa. Super. Ct. 120. (emphasis added)

Although the Public Utility Law does not require the commission, in a contract carrier proceeding, to find a "necessity" or "public need" for the proposed service, the commission is required to consider the existing common carrier service available to the shipper. If that service is satisfactory and adequate, the commission must then consider whether the injection of a contract carrier in competition with the adequate common carrier service would be detrimental to the public interest and the inherent advantages of common carriage by motor vehicle. D'Agata National Trucking Co. v. Pennsylvania Pub. Utility Commission, 1976), 25 Pa. Commw. Ct. 365.

Applying the traditional standard to the record in this proceeding, and viewing the evidence in a light most favorable to applicant in view of the circumstances, we are persuaded for reasons stated below that it has failed to meet its burden. While it is clear that the shipper has a need for intrastate transportation service both from and between its three Pennsylvania facilities, it is equally apparent that there are existing authorized carriers holding appropriate authority and possessing sufficient ability to meet such required service.

It is generally recognized that shippers continually seek to obtain better transportation service and that few would concede that they at all times have service adequate to meet their needs. Shippers and receivers of freight frequently are convinced that it is to their advantage if an additional carrier can be added to those already available to serve them. Their support frequently stems, as is apparent herein, from a personal preference for a particular carrier rather than a need for additional service. Although the record clearly reveals that the supporting firm desires the availability of the proposed service, it fails to establish that reasonably adequate service is not presently available. It has frequently been observed in proceedings of the instant type that the mere desire for additional service as a "convenience" or "benefit" does not indicate that a shipper's reasonable transportation requirements are not already being adequately met by existing carriers.

It is clear that the proper standard for contract carrier applications, both as decided by this Commission and the

Superior and Commonwealth Courts, is that an application for contract carrier authority must be denied if existing common carrier service is satisfactory and adequate and if the interjection of a contract carrier in competition with the satisfactory and adequate common carrier service would be detrimental to the public interest and to the inherent advantages of common carriage by motor vehicle, which would be the case if the addition of a contract carrier in competition with the satisfactory and adequate common carrier service would not, in fact, improve such existing service.

2. THE RECORD DEMONSTRATES THAT THE APPLICANT LACKS A PROPENSITY TO OPERATE LEGALLY.

As noted above, 66 Pa. C.S.A. §2503(b) requires that an applicant prove that it is fit to properly perform the proposed service before the Commission will grant a contract carrier application. The Commission has developed a three-part definition of fitness. In Re: Perry Hassman, 55 Pa. P.U.C. 661, 662-663 (1982). Under that test, an applicant must have the technical capacity and financial ability to provide the proposed service. Furthermore, the applicant must also have a propensity to operate safely and legally. Id. In that regard, a lack of fitness is demonstrated by persistent disregard for, flouting or defiance of the Public Utility Law and the Commission's Orders and Regulations. Id. Evidence of illegal operations creates a negative inference regarding an Applicant's propensity to obey the law. Re: Heeter, 56 Pa. P.U.C. 279, 281-282 (1982).

The record in this case demonstrates that the Applicant lacks a propensity to operate legally. After filing the present application, the Applicant provided transportation for Pepsi Cola, believing at the time that it lacked authority.

The applicant testified as follows:

Q. And what did you transport for Pepsi-Cola?

A. It would have been fructose. It came out of Johnstown and went ten miles to the top of the hill, five miles to the top of the hill, to their plant up in the Industrial Park.

Q. For how many months or years were you involved in that transportation?

A. We've only done that for--I think since last fall, and it's on a very as-need basis. They have a truck of their own. They called me only whenever their truck is either not working--it's basically on an emergency basis.

We are not a regular--it's not a regular entity that we do. I originally thought that being that it was coming out of Cambria County, that I was okay to do that.

Q. Why?

A. I wasn't totally clear--being that it wasn't for Galliker Dairy, I took the assumption that, yes, it was coming out of Cambria County, that I was okay; and that I realized then that, no, it isn't because it wasn't going to Galliker Dairy because we had pulled product out of the same place for Galliker.

Q. But you know, of course--

A. But now I know that that was wrong.

Q. Well, you've known all along that your authority from the PUC is contract carrier authority for Galliker Dairy, correct?

A. Correct. (11-12)

Q. And how long--are you still hauling for Pepsi-Cola today?

A. No. We haven't--we have hauled within the past week. They had a guy that was sick, yes. (13)

The Applicant's testimony clearly establishes that he handled movements for Pepsi-Cola fully believing that he did not have authority to do so. The Applicant continued to do so even up to the week of the hearing. The Applicant also testified that the Applicant probably handled 20 such shipments in the ten month period prior to the hearing. (14)

The Applicant also testified that it handles movements of "exempt milk". What Applicant refers to as "exempt milk" involves the Applicant picking up milk from farms in Pennsylvania and transporting the milk directly to the Mayfair Creamery. (27-30, 32) The milk is purchased from the farmers by Galliker's Dairy, the farmers pay Galliker's the transportation costs, and Galliker's pays the Applicant for transporting the milk. (30-31) The Applicant handles approximately one such shipment per month from farms to Mayfair Creamery. (30)

The "exempt milk" shipments are clearly beyond the scope of Applicant's rights from the Commission since the shipments do not originate or terminate at Galliker's facility. Contrary to the Applicant's characterization of the shipments as "exempt", there is no applicable exemption within the Public Utility Code. The closest possible exemption is set forth in 66 Pa. C.S.A. §102(3) which sets forth the following exemption:

Any owner or operator of a farm transporting agricultural products from, or farm supplies to, such farm, or any independent contractor or cooperative agricultural association hauling agricultural products or farm supplies exclusively for one or more owners or operators of farms.

This exemption is clearly not applicable since the Applicant is not hauling the milk exclusively for owners or operators of farms, but rather is hauling for Galliker's Dairy, which purchases the milk and pays for the transportation.

The most glaring example of the Applicant's illegal operations involve shipments Applicant handled for T.C. Jacoby. The Applicant admitted that it handled unauthorized intrastate shipments of food products for T.C. Jacoby, which is a food broker located in St. Louis. (7-10, 18-26). The Applicant admitted handling one such shipment moving from Mayfair Creamery's facility to Philadelphia in April or May of 1991. It is likely that this movement was handled after this application was filed. (7-10) The Applicant also admitted handling at least one other unauthorized shipment for T.C. Jacoby from Mayfair Creamery to Carlisle approximately two months prior to the hearing. (21-23) The Applicant also admitted that other illegal movements had been handled prior to the filing of this application. (26) When the Applicant first started working for T.C. Jacoby, he handled trips for the company regardless of whether it had authority to handle them in order to build a relationship with T.C. Jacoby. (24)

It is evident that the Applicant has also handled other unauthorized shipments. When asked whether he had handled

unauthorized shipments other than the two movements from Mayfair to Philadelphia and to Carlisle, Mr. Barefoot replied:

Well, I know of two, those two. It's kind of like asking me how many times I've speeded and never got caught. I don't know. (25)

During the cross examination which led to the Applicant's admission that he handled the movement from Mayfair to Carlisle, Mr. Barefoot made the following remark regarding illegal movements: "but once it was done, I forget about it". (19)

Clearly, the Applicant lacks a propensity to operate within the bounds of his authority. The Applicant's statements hinting that it will not handle any more unauthorized movements are not credible in light of the numerous unauthorized movements handled by the Applicant, including shipments handled even after this application was filed.

The Commission has frequently in the past denied applications where an Applicant has operated illegally. The basis for such a denial was appropriately set forth by Administrative Law Judge Michael A. Nemec in Application of Newcomer Trucking, Inc., Docket No. A-00102265, F.1, Am-H (application denied because of Applicant's lack of fitness), where Judge Nemec stated in his Initial Decision (dated September 11, 1985) as follows:

The granting of authority to someone who the Commission believed was lacking a propensity to operate legally would pose different threats. Primarily, of course, such a grant would tend to undermine the authority of the Commission and the integrity of the entire regulatory structure. Lawful operators, seeing that unlawful operation

had no effect on the granting of authority to operate, could well be tempted to unlawful activities of their own. Without the deterrent effect of operators' knowledge that illegal activity could lead to a finding of lack of fitness which would preclude the granting of new authority, the regulations governing grants of authority could become virtually meaningless. Even if monetary sanctions remained, operators could conduct their business in utter disregard of their Commission-granted authority, secure in the knowledge that any occasional fines could readily be paid from the proceeds of their illegal activity and that there would be no other adverse effects on their operations. Encouraging such contempt for the law relating to matters of authority could easily lead to contempt for the law relating to other matters as well--safety comes first to mind. More immediately, creating a likelihood of illegal operation would create a likelihood of economic harm to any legal operators who might lose the business involved. (21)

In his Ruling on Exceptions in the Newcomer case, Administrative Law Judge Nemec stated:

Compliance with the law is the normal behavior which is to be expected of each carrier who has been given the privilege of conducting regulated activity within this state. The benefit which a carrier realizes from compliance with the law is the profit which it makes on its legal activity, not a license to conduct illegal activity. (4-5)

The Commission has consistently denied applications for new authority where it has been shown that the Applicant operated unlawfully in the past. Re: Heeter, 56 Pa. P.U.C. 279 (1982); Re: North Penn Transfer, 54 Pa. P.U.C. 585 (1981); Re: Robert Gray's Sons, Inc., 51 Pa. P.U.C. 246 (1977). The Courts have, in fact, reversed the Commission for failing to properly consider prior illegal service rendered by an Applicant for new authority. Bunting Bristol Transfer, Inc. v. Pa. P.U.C., 418 Pa. 286, 210 A.2d 281 (1965), D.F. Bast, Inc. v. Pa. P.U.C., 397 Pa. 246, 154 A.2d 505 (1959).

The Commission should deny this application on the basis that Applicant's prior illegal activities make it unfit to receive the authority sought by this application. Granting this application will reward the Applicant for its past illegal conduct. Approving this application would send a message to other carriers that it is permissible to operate beyond the scope of their authority.

3. THE EXISTING COMMON CARRIER SERVICE IS SATISFACTORY AND ADEQUATE.

The supporting shipper testified that it has no problems with the service provided by the Protestant. (42) The supporting shipper also testified that the Protestant always provides a truck when the supporting shipper needs one. (60) There was testimony by the supporting shipper concerning some prior late deliveries but most of the late delivery problems were created by the supporting shipper not having its product ready on time. (43, 81-83)

The supporting shipper testified that it does not intend to stop using the service of the Protestant. (36-37) With the exception of one load per week handled by Nelson Rowen, the Protestant handles all of the shipments which the supporting shipper presently has. (48)

The supporting shipper testified that it is supporting the application because it is looking for an additional carrier to handle business during the peak period season. (37) The supporting shipper acknowledged that Milk Transport is available to provide such backup service. (36, 57-58) Due to Milk

Transport's rate structure, the supporting shipper prefers not to use Milk Transport unless Milk Transport is handling the shipment as a backhaul. (58) The supporting shipper acknowledged that Milk Transport is more readily available on a backhaul basis during the peak season. (59) Since the supporting shipper is looking for a backup carrier during the peak season, and Milk Transport is available on a backhaul basis during that season, an adequate backup to the Protestant's service already exists. Furthermore, the supporting shipper's only objection to using Milk Transport for all of its backup needs is the rate charged by Milk Transport. This Commission and the Pennsylvania Courts have denied contract carrier applications where the shipper's choice of an applicant was dictated only by a lower rate. See Re: Dennis J. Davison, 68 Pa. P.U.C. 293 (1988); and Wylie v. Pa. Public Utility Commission, supra., at p. 766.

The supporting shipper mentioned that it is looking for new suppliers and new customers. (38-39, 67-69) The Commission has held that shipper testimony of need based on a forecast of future business is a conclusory statement and is not substantive evidence of need unless supported by the basis for the forecast and a specific estimate of the contemplated business expansion. Application of Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262 (1990). The shipper's testimony as to possible new customers and suppliers does not demonstrate that the existing service is not satisfactory and adequate. The testimony did not include the estimated volume, nor did it

specifically state the basis for the forecast. The supporting witness was not even sure if it would be handling the arrangements for transportation to the new possible customers and suppliers. (68) Furthermore, there is no basis for concluding that existing common carriers, including the Protestant, cannot handle any such new business.

In sum, the record demonstrates that existing common carrier service is adequate and satisfactory.

4. THE INTERJECTION OF THE CONTRACT CARRIER SERVICE SOUGHT BY THIS APPLICATION IN COMPETITION WITH THE SATISFACTORY AND ADEQUATE COMMON CARRIER SERVICE OF FLEMING WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST AND TO THE INHERENT ADVANTAGES OF COMMON CARRIAGE BY MOTOR VEHICLE.

As noted previously, the Pennsylvania Courts have held that a need for additional service must be proven to support a grant of contract carrier authority where it is shown that the application will result in competition with adequate and satisfactory common carrier service. Brinks, Inc. v. Pennsylvania Public Utility Commission, supra., at p. 1013 n.3. The Court there defined "harmful competition" as competition between a contract carrier and a common carrier where there is insufficient need for the additional service requested. Id. at 1012 n.2.

In the present case, the Applicant has failed to demonstrate a need for service in addition to the adequate and satisfactory service presently available, including from the Protestant. Clearly the proposed operations of Applicant would create competition with the existing common carrier service. Since there is no need for the Applicant's additional service,

the competition would be harmful as a matter of law and approval of the application would not be in the public interest. See Id. at 1012 n.2.

Furthermore, the Protestant's testimony demonstrates that a grant of this application will have a severe adverse impact on Protestant's operations. The supporting shipper is the Protestant's biggest customer for intrastate shipments. Revenues from intrastate shipments handled for the supporting shipper made up approximately 20% of the Protestant's total 1990 revenues. (84-85, 87) Losing all of part of the supporting shipper's business would have a devastating effect on the Protestant's operations, forcing the Protestant to lay off drivers. (84, 87) The Protestant desperately needs the supporting shipper's business in order for his operation to survive. (88)

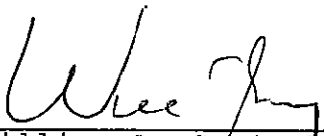
V. CONCLUSION

The application should be denied since the record demonstrates that the Applicant lacks a propensity to operate legally. Furthermore, the record clearly demonstrates that the existing common carrier service of the Protestant is adequate and satisfactory.

The Applicant has failed to demonstrate a need for additional service beyond the adequate and satisfactory service of the Protestant. Granting this application would result in

"harmful competition" to the Protestant. The application must therefore be denied.

Respectfully submitted,
VUONO, LAVELLE & GRAY

By: 

William A. Gray, Esq.
Attorney for Protestant
DAN FLEEGLE t/d/b/a
DAN FLEEGLE TRUCKING

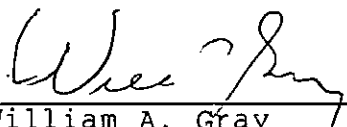
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Dated: September 25, 1991

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing upon all parties of record in accordance with the Rules of Practice.

Dated at Pittsburgh, PA this 25th day of September, 1991.



William A. Gray

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DIRECT DIAL NO.

FILE NO. 3032/02

*ALSO ADMITTED TO THE FLORIDA BAR

Re: Application of H. Fred Barefoot Trucking, Inc.,
A.107365, F.1, Am-A (Mayfair Creamery)

October 3, 1991

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RECEIVED
OCT 3 - 1991
SECRETARY'S OFFICE
Public Utility Commission

Dear Secretary Rich:

Enclosed you will please find an original and nine (9) copies of the Reply Brief on Behalf of the Applicant, H. F. Barefoot Trucking, Inc., in the above referenced proceeding. In accordance with the Certificate of Service, copies have been served upon Administrative Law Judge Herbert Cohen and William Gray, Esquire, counsel for the sole protestant.

Very truly yours,

RHOADS & SINON

By:

J. Bruce Walter
J. Bruce Walter

DOCUMENT
FOLDER

JBW/dah

Enclosure

cc: Administrative Law Judge Herbert Cohen
William A. Gray, Esquire
Rick Barefoot, Vice President
H. Fred Barefoot Trucking, Inc.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

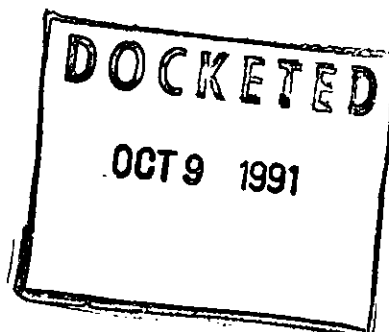
APPLICATION OF H. FRED BAREFOOT TRUCKING, INC.
A-00107365, F.1, Am-A

REPLY BRIEF ON BEHALF OF Applicant

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Counsel for Applicant

Dated: October 3, 1991



Under Pa. C.S.A. §2501, Applicant's Characterization
Of "Exempt" Milk Is Correct

Protestant, at page 19 of its Brief, questions movements of "exempt milk" asserting "the farmers pay Galliker for the transportation cost and Galliker pays Applicant for transporting the milk". The actual transcript (N.T. 30-31, emphasis added), however sets forth entirely different facts, as follows:

Q. And you would haul those directly from the farmer to Mayfair Creamery?

A. They call it farm diverted milk. It would be farm milk diverted via Galliker paperwork-wise to, good example, Mayfair Creamery. We very seldom do that because of our location of where we're based because it's geographically better to send someone else to go there, so we normally go to Johnstown.

Q. How frequently in the past year have you handled movements from the farmer directly to Mayfair Creamery where it hasn't gone into Galliker's Johnstown facility?

A. Maybe once a month.

Q. Once a month. And on those occasions, you're paid by Galliker, correct?

A. Negative, no. We get paid by the farmer.

Q. Well, I mean the check to you, though, comes from Galliker; and it's deducted out of the farmer's account again, correct?

A. That's who pays us.

Q. Have you ever had a check--

A. I do not send Galliker Dairy a bill for me taking milk to Mayfair. Regardless of where the milk is delivered to, I pick it up from the farm. I take it to where they say.

Q. Where who says?

A. Where Galliker says. But I do not have to bill them for milk taken from John Smith's farm and Bill

Smith's farm and anybody else's farm. I do not have to bill them. It is automatically deducted from the farmer's check and then mailed to me.

- Q. But the check that you received in the mail is a check which bears the name Galliker's as opposed to the farmer? .
- A. Sure, correct. I wouldn't get paid if I had to ask every farmer.
- Q. I understand the economics of it, but nevertheless the check is Galliker's check?

ADMINISTRATIVE LAW JUDGE COHEN: In effect, Galliker is paying the farmer ex-dollars per gallon less cost of transportation.

THE WITNESS: Correct."

It is clear that the money is due to the farmer, that it is deducted by the dairy, and in protestant's counsel's own words "its deducted out of the farmer's account" (N.T. 30).

Protestant cites 66 Pa. C.S.A. §102(3) as the applicable law. Since this is an application for a contract carrier permit, the applicable law is actually section 2501(b), under the definition of contract carrier by motor vehicle, at subsection (2)(iii) (supplement). Under either test, the question turns on the language "for one or more owners or operators of farm". Really the question is what does the word "for" mean. As the record indicates, without question or distinction, the farmer is receiving less than the full price he is to be paid for his milk. Obviously the farmer is paying for the transportation, regardless of who writes the check. The characterization of the payments as being deducted out of the farmer's account by protestant's counsel is, of

course, exactly correct. In this case, the exempt milk hauler works for the farmer who sells his milk to a dairy. The word "for" in this case is a form of the term "for the account of", which for nearly a century has been defined as a person entitled to receive the proceeds of the account in question. See, Freiberg v. Stoddard, 161 Pa. 259, 28 A. 1111 (1894). The farmer who sells his milk to a dairy is clearly entitled to the full proceeds of the sale, but as an accounting process, the transportation costs are deducted from them and paid to exempt milk haulers.

The record does not support any argument of any kind that Galliker or any other dairy has the right to the proceeds of the sale of exempt farm milk. It is clear, therefore, that the Applicant in its exempt milk transportation is working for the owner or operator of the farm.

The Record Establishes Applicant's Propensity
To Operate Legally

Protestant argues, at page 21 of its Brief, that Applicant handled shipments even after this application was filed which could be characterized as illegal. Protestant cites no point in the record to substantiate this argument and no such citation is available. The reason protestant cites no point in the record for this argument is that it is clear, based upon the testimony of Mr. Barefoot, that he has refused intrastate transportation (N.T. 19, 20) while the application is pending.

As set forth in the Main Brief of Applicant, Applicant has, at a previous time, performed some last minute operations,

operations that were not solicited, that were not a regular practice (see Main Brief at pgs. 15-17) and that turned out to be intrastate. What also is clear that these situations, if not actually misleading, were at least last minutes switches from what Applicant believed to be the destination of the transportation (N.T. 21). The description of these situations is rather graphically set forth at N.T. 64 by the shipper witness, indicating that even the shipper believed, from his information, that the shipment was going out of state. The shipper in this case did not have complete control over or knowledge about the destination of these broker related shipments (N.T. 64).

Protestant's emphasis on transportation for Pepsi-Cola (Protestant's Main Brief at 18) is discussed from a factual basis at pages 3 and 4 of Applicant's Main Brief and argued at page 15. This transportation clearly is interstate and authorized to Applicant. It cannot be properly characterized as intrastate and protestant does not extensively argue that this transportation is actually intrastate.

Applicant Has Demonstrated That It Is In The Public Interest That This Permit Be Issued

In addition to the fact that Blue Bird Coach deals exclusively with the procedure to issue certificates of public convenience under subsection 1103(a) of the Public Utility Code, Application of Blue Bird Coach Lines, 72 Pa. PUC 262 (1990) [Commission Order at p. 13], it is clear that the elements of proof are different when considering a contract carrier permit (for

example, the concept of adequate service and harmful competition are argued by protestant and they clearly have no application under Blue Bird or the Commission's stated policy at 52 Pa. Code §41.14).

What then remains as to a contract carrier's burden? Under §2503(b), the permit will be issued to the extent it "will be consistent with the public interest". This is less rigorous than the test required for a certificate of public convenience as "necessary and proper" under §1103(a), in part because of the statutory language and in part because the component parts of the test are different.

Even under the perceived "restrictive concept" set forth in Blue Bird, the Commission has stated:

"Our avowed reason for promulgating the transportation regulatory policy statement at 52 Pa. Code §41.14, namely, to eliminate monopolistic protection of existing motor carriers and to promote healthy competition among motor carriers for the purpose of assuring the availability of transportation service commensurate with the demonstrated public demand/need"

Both appellate court decisions and Commission orders have confirmed that, in the context of subsection 1103(a), a public demand/need for an applicant's proposed transportation service may be proven through witnesses comprising a representative sampling of the public that will use the applicant's proposed service within the territory encompassed by the application. Purolator Courier Corp. v. Pennsylvania Public Utility Commission (Purolator Courier Corp. II), 51 Pa. Cmwlth. Ct. 377, 414 A.2d 450 (1980); Purolator Courier Corp. I; Application of Van Trans, Inc., A-00101053, F.5 (order adopted June 25, 1987, entered July 8, 1987); Re Eagle Courier and Limousine Service, Inc. (Re Eagle Courier), 57 Pa. PUC 404 (1983).

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. Super. Ct. 322, 124 A.2d 493 (1956); 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.

It is in the last quoted sentence that the key to the distinction between a broad common carrier application and a clearly restrictive and narrow contract carrier application is found. There is no question of a cross section of public need here. The one and only question for decision is what is the expression of public interest of Mayfair Creamery for transportation by Barefoot Trucking?

Even as stated in the Blue Bird decision at Note 27, where operating territory involves a single origin point and a limited type of service, it is clear that one witness can adequately support such a limited grant of authority. By analogy, the testimony of Mr. Pickard, discussed at p. 5-8 and 10-12 of Applicant's Main Brief supports this limited grant of authority.

An applicant need not "show a demand for its service at every point within the proposed territory", but only "show that necessity existed within the area generally [to be] served". Purolator Courier Corp. v. Pa. PUC, 51 Pa. Cmwlth. 377, at 380, 414

A.2d 450 (1980). The Commission has routinely granted authority based upon a "representative" showing of public need and the Courts have affirmed these grants because "in order to establish need it is not necessary to prove an absolute necessity or present demand for the service in every part of the territory involved". Pa. PUC v. Purolator Courier Corp., 24 Pa. Cmwlth. 301, 305, 355 A.2d 850 (1976). This Commission has, instead, explained "it is well established that an applicant in proceedings such as these need not prove necessity for every square mile for which it seeks operating authority. Proof of necessity for the area involved is sufficient." Application of Lyons Transportation Lines, Inc., 42 Pa. PUC 605 (1966); Reeder v. Pa. PUC, 192 Pa. Super. 298 (1980); Application of C. Veneziale, 44 Pa. PUC 170, 181 (1969). Blue Bird did not create a standard that is substantially different from the "representative proof" requirement and certainly did not as to an application for a permit.


Although protestant asserts that Blue Bird Coach Lines requires specific economic forecasts and specific estimates of economic expansion (Protestant's Brief at p. 24), Blue Bird makes no such statement and requires no such evidence. Mr. Pickard, in his testimony for Mayfair, establishes certain specific points where he anticipated additional need as well as referencing more general prediction of expansion. Mr. Pickard specifically explained the basis and necessity for that expanded traffic as well (N.T. 38-39 and 67). Mr. Pickard has established that it is in the

public interest that this permit be granted to permit the complete servicing of the requirements of the Mayfair Creamery by H. Fred Barefoot Trucking, Inc. as a contract carrier.

Respectfully submitted,

RHOADS & SINON

By: _____


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One South Market Square
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(717) 233-5731

CERTIFICATE OF SERVICE

I hereby certify that I have this date served three (3) copies of the foregoing "Reply Brief on Behalf of Applicant" upon the parties listed below, at the addresses indicated, by U.S. First Class Mail, postage prepaid.

Dated at Harrisburg, Pennsylvania, this 3rd day of October, 1991.

RHOADS & SINON

By: _____


J. Bruce Walter

Administrative Law Judge Herbert Cohen
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

William A. Gray, Esquire
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October 10, 1991

* ALSO MEMBER OF FLORIDA BAR

Re: Application of H. Fred Barefoot Trucking, Inc.
Docket No. A-00107365, F. 1, Am-A
Our File 1773P-129

MAILED WITH U.S. POSTAL
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MAILING FORM 3817

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



Dear Mr. Rich:

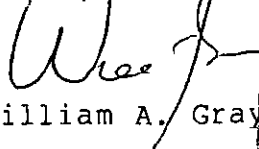
We enclose for filing with the Commission the signed original and nine (9) copies of the Reply Brief of Protestant Dan Fleegle t/d/b/a Dan Fleegle Trucking, in connection with the above-captioned proceeding.

A copy of the Reply Brief has been sent to Administrative Law Judge Herbert Cohen and to counsel for the Applicant.

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

Very truly yours,

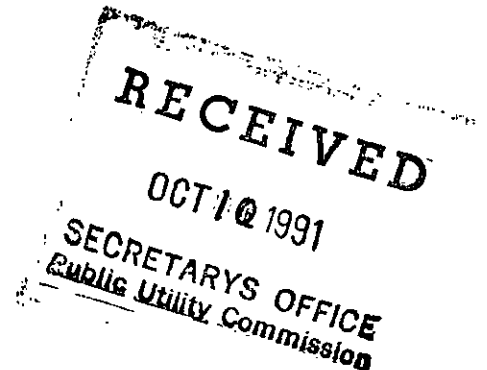
VUONO, LAVELLE & GRAY


William A. Gray

mm

Enclosures

cc: Honorable Herbert Cohen (w/ enc.)
J. Bruce Walter, Esq. (w/ enc.)
Dan Fleegle Trucking (w/ enc.)



**BEFORE THE
Pennsylvania Public Utility Commission**

DOCKET NO. A-00107365, F.1, Am-A

H. FRED BAREFOOT TRUCKING, INC.

REPLY BRIEF FOR PROTESTANT

DOCKETED
OCT 16 1991

**DOCUMENT
FOLDER**

RECEIVED

OCT 10 1991

SECRETARYS OFFICE
Public Utility Commission

WILLIAM A. GRAY, ESQ.,
Attorney for
DAN FLEEGLÉ t/d/b/a
DAN FLEEGLÉ TRUCKING,
Protestant.

Of Counsel:
VUONO, LAVELLE & GRAY
2310 Grant Building
Pittsburgh, Pennsylvania 15219

Due Date: October 10, 1991

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00107365, F. 1, Am-A
H. FRED BAREFOOT TRUCKING, INC.

REPLY BRIEF FOR PROTESTANT

I. STATEMENT OF THE CASE

By this application, H. Fred Barefoot Trucking, Inc. (Barefoot or Applicant) seeks contract carrier authority to transport:

Property, for Mayfair Creamery, from its facilities located in the Borough of Somerset, Somerset County, to points in Pennsylvania, and visa versa.

A hearing was held in this case in Harrisburg, Pennsylvania on July 19, 1991 before Administrative Law Judge Herbert Cohen.

Testimony was presented by the Applicant and by Daniel Fleegle t/d/b/a Dan Fleegle Trucking (Fleegle or Protestant).

Main Briefs were filed by the Applicant and by the Protestant. This Reply Brief is being filed to respond to certain legal arguments and factual averments raised by the Applicant in its Main Brief.

II. REBUTTAL ARGUMENT

A. THE RECORD IN THIS CASE DEMONSTRATES THAT THE APPLICANT LACKS A PROPENSITY TO OPERATE LEGALLY.

The Applicant argues at page 15 of its Main Brief that "...the Applicant admitted quite candidly that it had performed a very limited intrastate operation in Pennsylvania...." In fact, the only admissions made by the witness for the Applicant were made on cross examination and these admissions did not relate only to very limited unlawful operations. The Applicant has engaged in substantial unlawful operations as indicated by Mr. Barefoot's response to a question concerning whether the Applicant had handled unauthorized shipments other than two movements from the supporting shipper's facility in Somerset to Philadelphia and to Carlisle, where he replied:

Well, I know of two, those two. It's kind of like asking me how many times I've speeded and never got caught. I don't know. (25)

During the cross examination which led to his admission that he handled the movement from Somerset to Carlisle, Mr. Barefoot made the following remark regarding illegal movements: "but once it was done, I forget about it." (19)

The cases relied upon by the Applicant in support of its argument concerning fitness are distinguishable from this case since those cases involve a good faith belief by the carriers that their operations were legal. In this case, the Applicant

did not have a good faith belief that its operations were legal. For example, the witness admitted providing unlawful service for Pepsi-Cola a week before the hearing in this case. Concerning service for Pepsi-Cola, the witness testified:

- A. I wasn't totally clear--being that it wasn't for Galliker Dairy, I took the assumption that, yes, it was coming out of Cambria County, that I was okay; and that I realized then that, no, it isn't because it wasn't going to Galliker Dairy because we had pulled product out of the same place for Galliker.
- Q. But you know, of course--
- A. But now I know that that was wrong.
- Q. Well, you've known all along that your authority from the PUC is contract carrier authority for Galliker Dairy, correct?
- A. Correct. (11-12)
- Q. And now long--are you still hauling for Pepsi-Cola today?
- A. No. We haven't--we have hauled within the past week. They had a guy that was sick, yes. (13)

The Applicant's testimony clearly establishes that he handled movements for Pepsi-Cola knowing that he did not have authority to do so and understanding that it was wrong. The Applicant continued to do so even up to the week before the hearing in this case. The Applicant also testified that the Applicant probably handled 20 such shipments in the ten month period prior to the hearing. (14) The Applicant states at pages 3 and 4 of its Main Brief that the service for Pepsi-Cola is interstate service, despite the fact that the Applicant handled

the movements strictly within Cambria County, based upon the fact that the involved commodity is shipped by rail car to the point where it is loaded on the Applicant's vehicle. There is no factual basis to support this argument. In response to a question concerning where the rail cars come from, the witness for the Applicant testified: "I have no idea." (16)

Subsequently, the Applicant testified that he "imagined" that they came from "out West" but further stated: "...but I have no way of knowing that." In fact, the testimony set forth above clearly indicates that the Applicant believed that these were shipments which required authority from the Public Utility Commission.

Although this application was filed on April 4, 1991, and although the Applicant was aware that it only had contract carrier authority for Galliker Dairy, the Applicant nevertheless provided service from Mayfair Creamery's facility in Somerset to Philadelphia in April or May of 1991. (8) The witness for the Applicant also admitted handling at least one other unauthorized shipment for T.C. Jacoby from Mayfair Creamery in Somerset to Carlisle (actually Mt. Holly Springs) approximately two months prior to the hearing (July 19, 1991), which would obviously have been after this application was filed. (21-23) The Applicant also admitted that other illegal movements had been handled prior to the filing of this application. (26)

The Applicant also argues in its Main Brief at page 15 that the service provided for T. C. Jacoby to Kraft in Philadelphia and Holly Dairy near Carlisle were handled on a "last minute basis." The Applicant presumably believes that if unlawful shipments are handled on a "last minute basis", even with full and complete knowledge that the Applicant does not have authority to handle the shipments, that it somehow excuses the Applicant's conduct. Not surprisingly, the Applicant failed to cite any cases in support of such an argument.

The Applicant argues at page 15 of its Main Brief that the Kraft service is clearly interstate. This statement is not correct and it must be assumed that the Applicant meant to state that the Pepsi-Cola service was interstate. As discussed above, the record in this case does not support that argument.

The Applicant argues at page 15 of its Main Brief that the Applicant has never been served with a complaint by the PUC. This only means that the Applicant has never been caught providing unlawful service by the PUC. The fact that the PUC has never filed a complaint against the Applicant does not mean that the Applicant is fit to be granted the authority sought by this application, particularly where the record indicates that the Applicant has in fact provided unlawful service without a good faith belief that the service was lawful, including after this application was filed.

The Applicant also argues at page 15 of its Main Brief that the unauthorized service provided by the Applicant "...was not a regular practice...." Even if this were true, which it does not appear to be, it does not mean that the Applicant should be deemed fit to be granted the authority sought by this application. As Administrative Law Judge Michael A. Nemec stated in his Ruling on Exceptions in Application of Newcomer Trucking, Inc., Docket No. A-00102265, F. 1, Am-H:

Compliance with the law is the normal behavior which is to be expected of each carrier who has been given the privilege of conducting regulated activity within this state. The benefit which a carrier realizes from compliance with the law is the profit which it makes on its legal activity, not a license to conduct illegal activity. (4-5)

The Applicant argues at page 17 of its Main Brief that its prior violations of the Public Utility Law should not result in the denial of the application. The Commission has recently determined that where the unlawful operations of an Applicant result from the deliberate disregard for the provisions of the Public Utility Code or the Commission's rules and regulations, which is the situation in this case, the Applicant should not profit from its deliberate wrong and its application should be denied. Application of Ronald M. McDonald t/d/b/a Rusmin Trucking, Docket No. A-00107696, F. 2 (Order entered February 21, 1989) More recently, Administrative Law Judge John H. Corbett, Jr. came to the same conclusion in Application of Robert Lee Easley, Jr., t/d/b/a Highway America, Docket No. A-00105096, F. 1, Am-A (Initial Decision dated March 11, 1991), where he stated:

An applicant seeking additional common carrier operating rights has the burden of proving good faith by clear and convincing evidence, when a question of the illegality of operations is asserted. National Retail Transp., Inc. v. Pa. P.U.C., 109 Pa. Cmwlth. 72, 530 A.2d 987 (1987). The record fails to reveal any basis upon which the Applicant can claim a bona fide misunderstanding of the law.

Instead, it appears the Applicant has acted in deliberate disregard of the law. This propensity to operate illegally reveals the Applicant is unfit to receive additional authority. (at p. 71)

This application should be denied on the basis that the Applicant has not demonstrated that it is fit to receive the authority sought by this application.

B. THE RECORD IN THIS CASE FAILS TO ESTABLISH A NEED FOR THE PROPOSED SERVICE.

The Commonwealth Court in Brink's, Inc. v. Pa. P.U.C., 56 Pa. Cmwlth. 371, 424 A.2d 1010, 1012 (1981) determined that the public interest would not be served in granting a contract carrier application if "harmful competition" resulted to common carriers. The Commonwealth Court defined "harmful competition" as follows:

"Harmful competition" refers to competition with a common carrier where there is insufficient need for additional service to warrant a grant of authority to another common carrier or a contract carrier. (at p. 1012) (emphasis added)

The Commonwealth Court in Brink's also determined that competition without need for additional service would be "harmful competition" to the common carrier. In that regard, the Commonwealth Court stated:

Findings of fact concerning the need for additional service would be necessary to support a grant of contract carrier authority where it is shown that the application will result in competition with a common carrier. Clearly, competition without need for additional service would be harmful to the common carrier. (at p.1013) (emphasis added)

The Applicant argues at page 11 of its Main Brief that the shipper has been "generally dissatisfied" with the service of the Protestant. In fact, the record in this case does not support such an argument. The supporting shipper testified that it has no problems with the service provided by the Protestant. (42) The supporting shipper also testified that the Protestant always provides a truck when the supporting shipper needs one. (60) There was testimony by the supporting shipper concerning some prior late deliveries but most of the late delivery problems were created by the supporting shipper not having its product ready on time. (43, 81-83)

The Applicant mistakenly argues at page 11 of its Main Brief that the supporting shipper is dissatisfied with the exorbitant rates of the Protestant. (citing transcript of testimony, pages 36 and 48) In fact, the supporting shipper was referring to the service of another carrier and not the service of the Protestant on page 36 of the transcript and the testimony at page 48 related to Mr. Fleegle's refusal to meet the rates of an unauthorized carrier being utilized by the supporting shipper (Nelson Rowen) for one load per week. There is clearly no indication anywhere in the transcript that the Protestant's rates are exorbitant.

The Applicant argues at page 11 of its Main Brief that the witness for the supporting shipper believed that Mayfair had been overcharged in the past. (citing transcript of testimony, page 92) In fact, the testimony at page 92 was not the testimony of the witness for the supporting shipper but rather the testimony of Mr. Fleegle, who explained that he had inadvertently charged the shipper a higher rate that he was publishing in his tariff, with the shipper's consent, prior to the higher rate actually being published. The incorrect rate has changed only for a short period of time and a refund had been made to the shipper prior to the hearing. Concerning this matter, Mr. Fleegle testified:

Q. Mr. Fleegle, was this matter that was--that you were just asked about involving the tariff situation--was that entirely an honest mistake?

A. Yes, it was. And as a matter of fact, I contacted Mr. Northway and I told him on two different occasions.

Q. And has there been any criticism of you at all by Mayfair about that mistake?

A. No.

Q. And in fact, has Mayfair agreed to the increased tariff rate that you are putting into effect?

A. Yes.

(at p. 95)

The Applicant agrees at page 11 of the Main Brief that Gold Bond Ice Cream complained about the Protestant's service. However, these shipments are interstate shipments (to Hagerstown, Maryland) and the problem resulted from the shipper not getting the shipments loaded on time, thereby making it impossible for the Protestant to make the deliveries on time (83).

The Applicant argues at page 12 of its Main Brief that the supporting shipper was concerned that the Protestant was selling his business (citing transcript of testimony, page 71). In fact, the witness for the supporting shipper testified that Mr Fleegle had told him that he was not selling his business (71). Concerning this matter, Mr. Fleegle testified:

Q. There was some testimony from Mr. Pickard about your possibly selling your business. Do you have any intention whatsoever of selling your business?

A. No. At one point, I had a lot of people calling, trying to buy the business.

Q. How long ago was that?

A. That was between March and April, and they were really quite--everybody was interested in the Hershey business; and that was the reason I had intentions of selling one trailer to replace it, not selling the entire business although people wanted to buy my authority; and they tried to tack that onto this trailer, but there was no intentions of selling.

Q. As you sit here today, Mr. Fleegle, do you have any intention whatsoever of selling your business?

A. None.

(Tr. 85-86)

The Applicant argues at page 11 of its Main Brief that the witness for the supporting shipper testified that the shipper, "...anticipates requiring more service in the future because it has gone out and actively solicited more raw milk. (N.T. 38)" This testimony does not demonstrate any present need for service. The shipper's testimony as to possible new customers and suppliers does not demonstrate that the existing service is not satisfactory and adequate to handle any new business if in fact it does materialize. The testimony did not include the estimated volume, nor did it specifically state the basis for the forecast. The supporting witness was not even sure if it would be handling the arrangements for transportation to the new possible customers and suppliers. (68)

The Applicant has clearly failed to establish that there is a need for the additional service proposed by the Applicant.

C. THE INTERJECTION OF THE CONTRACT CARRIER SERVICE SOUGHT BY THIS APPLICATION IN COMPETITION WITH THE SATISFACTORY AND ADEQUATE COMMON CARRIER SERVICE WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST AND TO THE INHERENT ADVANTAGES OF COMMON CARRIAGE BY MOTOR VEHICLE.

The Applicant argues at page 18 of its Main Brief that the Protestant has failed to demonstrate that approval of the application would result in harmful competition to it and, in so arguing, has referred to the Commission's regulations at 52 Pa. Code §41.14(c), pointing out that protestants carry a heavy burden of proof under this section. The problem with this

argument is that 52 Pa. Code §41.14(c) applies only to common carriers. The common carrier cases cited by the Applicant are irrelevant to the issue of whether the interjection of the Applicant's service in this case would be detrimental to the public interest and to the inherent advantages of common carriage by motor vehicle.

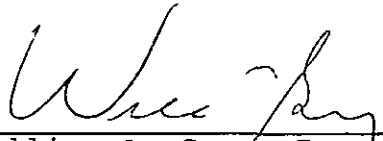
III. CONCLUSION

For the reasons set forth herein and for the additional reasons set forth in the Protestant's Main Brief, it is respectfully submitted that this application should be denied.

Respectfully submitted,

VUONO, LAVELLE & GRAY

By: _____


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DAN FLEEGLE TRUCKING

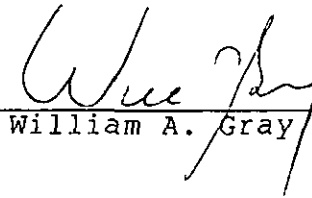
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Dated: October 10, 1991

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing upon all parties of record in accordance with the Rules of Practice.

Dated at Pittsburgh, PA this 10th day of October, 1991.



William A. Gray