



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

ISSUED: February 6, 1992

IN REPLY PLEASE
REFER TO OUR FILE

A-00107365,
F001, Am-A

DOCUMENT
FOLDER

J BRUCE WALTER ESQUIRE
RHOADS & SINON
PO BOX 1146
HARRISBURG PA 17108

Application of H.Fred Barefoot Trucking, Inc.
TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Herbert S. Cohen. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-18, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17120, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

Allison K. Turner

Allison K. Turner
Chief Administrative Law Judge

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Encls.
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ALJ Cohen, Office of ALJ, Chairman, Commissioners, OSA, Bureau of Transportation,
Law Bureau, Mr. Frazier, Our File, New Filing
Copy of Initial Decision to: William A. Gray Esq. Vuono, Lavelle & Gray,
2310 Grant Buidling, Pgh, PA 15219
(for Dan Fleegle Trucking)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of H. Fred Barefoot : Docket No.
Trucking, Inc. : A-00107365, F001, Am-A

**DOCUMENT
FOLDER**

INITIAL DECISION

Before
Herbert S. Cohen
Administrative Law Judge

DOCKETED
FEB 10 1992

On or about March 28, 1991, H. Fred Barefoot Trucking, Inc., filed an Application seeking amendment to its existing authority at Docket No. A-00107365, F001, Am-A, 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.

Thereafter, a timely protest to the Application was filed by Dan Fleegle Trucking.

An evidentiary hearing was held in Harrisburg on July 19, 1991, at which time appearances were entered by J. Bruce Walter, Esquire, for the Applicant, H. Fred Barefoot Trucking. Applicant offered the testimony of a supporting shipper, namely, David Pickard, Production Supervisor of Mayfair Creamery and additionally sponsored three exhibits. Protestant, Dan Fleegle Trucking, was represented by William A. Gray, Esquire, who offered the testimony of Protestant, Daniel Fleegle, and who also

sponsored a single exhibit. The transcribed record of this proceeding consists of ninety-seven (97) pages.

The matter is now before us for disposition thereof.

Summary of Testimony

Rick Barefoot is vice president of H. Fred Barefoot Trucking, Inc., Alum Bank, Bedford County, Pennsylvania. Mr. Barefoot submitted his prepared direct testimony consisting of five (5) pages. In it he described his existing interstate authority, his terminal facilities, equipment, safety program and the nature of the proposed service sought by the instant Application. He also submitted as an exhibit the Applicant's current balance sheet and income statement.

The oral testimony of witness Rick Barefoot and Applicant's supporting shipper witness, David Pickard of Mayfair Creamery, has been succinctly and accurately summarized by Applicant in its Main Brief. Accordingly, we are adopting and incorporating same herein, as follows:

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 [sic] [intrastate] 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 [sic] (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 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).

(Applicant's M.B., pp. 3-8).

Likewise, we adopt herein Protestant's summary of the testimony of its witness Daniel Fleegle, as follows:

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 ar \$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)

(Protestant's M.B., pp. 9-11).

Findings of Fact

1. Applicant, H. Fred Barefoot Trucking, Inc., with terminal facilities in Alum Bank, Beauford County, seeks an amendment to its existing intrastate authority.

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.

2. Applicant's existing authority permits him to serve Galliker Dairy from its facilities in the City of Johnstown, Cambria County, to all points in Pennsylvania and vice versa.

3. Applicant currently transports milk from the farm to the Mayfair facilities. The proposed service contemplates transportation of this commodity via a combination of bulk service and refrigerated in van service.

4. Applicant has the required technical and financial qualifications to conduct the proposed service.

5. Applicant presently provides transportation services to Mayfair Creamery on an interstate basis.

6. Applicant's present PUC authority enables it to transport "products or any food-related products out of Cambria County to all points in Pennsylvania to and from Galliker's Dairy facility in the City of Johnstown" (Tr. 6, 7).

7. On one occasion prior to April 1991, Applicant provided intrastate transportation for Mayfair Creamery under the auspices of a broker (T.C. Jacoby in St. Louis) for Kraft Foods' facility in Philadelphia (Tr. 8, 9).

8. Within the past two years, Applicant also provided intrastate transportation for Pepsi-Cola within Cambria County (Tr. 11, 12).

9. On one occasion in May or June 1991, Applicant provided transportation service for Holly Milk in Somerset County to a milk processing plant in Mount Holly Springs, Cumberland County (Tr. 21, 22). This move was also arranged by the broker, T.C. Jacoby.

10. Applicant's terminal facility in Alum Bank, Bedford County, is approximately 35.40 miles from Mayfair's Dairy facility in Somerset County (Tr. 32).

11. Applicant did not solicit any of its unauthorized, intrastate moves (Tr. 34).

12. Mayfair Creamery has its principal office at 1019 North Center Avenue, Somerset, Pennsylvania. It is a creamery manufacturing and distributing butter, ice cream mix, skim powder, buttermilk powder and anhydrous milk fat.

13. Mayfair would use Applicant's proposed services between two and nine trips per week. Each trip would utilize a bulk tank capable of handling 47,000 pounds of product. Mayfair now uses Applicant's services on an interstate basis.

14. In the event the instant Application is granted, Mayfair would still employ the services of Protestant, Daniel Fleegle (Tr. 38).

15. One of the main reasons for Mayfair supporting the instant Application is its desire to avail itself of an additional carrier to handle traffic during its peak periods, namely, during spring and summer seasons.

16. Mayfair's customers include cheese plants, ice cream producers and certain candy manufacturers.

17. Inbound products to Mayfair's Somerset facility comes from such origin points as Johnstown, Uniontown and Pittsburgh.

18. At the present time, Protestant Fleegle serves Mayfair in connection with movements from its Somerset facility

to Hershey Creamery in Harrisburg. Fleegle moves an average of seven or eight loads a week to this customer during the peak spring and summer seasons (Tr. 47).

19. Mayfair now has or anticipates outbound movements to Johnstown, Harrisburg, Philadelphia, Carlisle, DuBois and the Allentown area. Brokers may select many outbound destination points.

20. Protestant Fleegle is located approximately eight miles from the Mayfair facility in Jennerstown, Somerset County. Mayfair still is utilizing his services for movements from Somerset County to Hershey Creamery in Harrisburg (Tr. 63). Mayfair writes the check for this transportation (Tr. 71). Protestant hauls approximately seven loads per week from Somerset to the Hershey Creamery in Harrisburg (Tr. 79). However, in the winter, the loads are reduced by 50 percent (Tr. 89).

21. Mayfair intends to utilize two primary carriers for its Somerset to Hershey Creamery--Harrisburg traffic, namely, Protestant Fleegle and Applicant (Tr. 72).

22. Mr. Dan Fleegle operates Dan Fleegle Trucking as a sole proprietorship (Tr. 75). His principal office is in Jennerstown, Somerset County.

23. 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 (Exhibit P-1, p. 4).

24. The Protestant employs six full-time drivers, three part-time drivers, and one full-time secretary (Tr. 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 (Tr. 78).

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

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

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

28. The Protestant lost approximately \$16,000 on \$500,000 of revenues in 1990 (Tr. 84-87).

29. Protestant at the present time does not intend to sell his business (Tr. 86).

30. Applicant is fit to provide the proposed service.

31. Protestant has not established harmful competition.

Discussion

Applicant, H. Fred Barefoot Trucking, Inc., presently holds authority from both the Interstate Commerce Commission and this Commission. Its current and only PUC contract carrier authority authorizes it to service Galliker Dairy from its facilities in the City of Johnstown, Cambria County. Applicant now seeks an amendment to its existing authority;

[S]o 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.

The only protest to the instant Application has been filed by Daniel Fleegle t/d/b/a Dan Fleegle Trucking. Subject to certain minor restrictions, Protestant Fleegle is authorized to transport, as a class D carrier, cream, ice cream mix, skim condense and dairy products, in bulk in tank vehicles, between points in Pennsylvania (Protestant's Exhibit No. 1, p. 4).

The instant protest poses the following issues for resolution:

- (1) Whether the Applicant has demonstrated that it is fit, willing and able to perform the proposed service;
- (2) Is there is a need for the proposed service and/or is the proposed service in the public interest; and
- (3) Whether allowance of the Application would be detrimental to the public interest and to the inherent advantages of common carriage by motor vehicle.

Fitness Of The Applicant

Protestant does not challenge Applicant's financial and/or technical ability to conduct the proposed operation for Mayfair Creamery. Protestant's "fitness" challenge stems from numerous past unauthorized intrastate movements. These unauthorized movements can be broken down into three defined categories, namely, (1) some alleged 20 movements in Johnstown for Pepsi Cola; (2) transportation of milk from farms to Galliker Dairy; and (3) transportation to Kraft in Philadelphia and Holly Dairy near Carlisle at the request of a St. Louis based broker, Mr. T.C. Jacoby, as well as other alleged but unspecified "illegal" moves at Mr. Jacoby's request.

A. The Pepsi-Cola Moves

On cross-examination, Applicant, Fred Barefoot, admitted it was "possible" that between September 1990 to July 1991 he handled approximately 20 movements for Pepsi-Cola within the Johnstown, Cambria County, area (Tr. 14). The product transported was fructose which was pumped from railroad cars directly into Applicant's vehicles. From there it was taken directly to Pepsi's bottling plant at an Industrial Park approximately five miles from the railroad siding (Tr. 11).¹ Pepsi has their own vehicles to do this and only contacted

¹Applicant testified that the bottling plant is located "just down the street from Galliker's" (Tr. 15).

Applicant on an "emergency" basis (Tr. 12). Applicant's explanation for these moves was, "I originally thought that being that it was coming out of Cambria County, that I was okay to do that" (Tr. 12). When asked, Mr. Barefoot stated he had no actual knowledge of where the railroad cars came from--he never asked, but "imagined" they probably came from Chicago (Tr. 16). The fructose is not stored in Pennsylvania. The rail cars are sited at a "transfer station" since Pepsi has no tank facility (Id.). Applicant was paid by Pepsi for these movements.

B. Transportation Of Milk From Farms

As previously noted, supra, Applicant's existing authority permits transportation for Galliker's Dairy from its facilities in Johnstown, to points in Pennsylvania and vice versa. Applicant currently transports what it characterizes "exempt" milk from farms to Galliker's or to Galliker's customers, including hauls to Mayfair Creamery's Somerset facilities (Tr. 26, 30). Mr. Barefoot testified the milk is picked up from a farmer and hauled to "wherever they want it to go" (Tr. 27). He further testified he was paid by the farm (Id.). In fact, Mr. Barefoot stated hauling milk from farms for delivery to the end user is his principal business (Tr. 28). He testified ninety-five percent of it goes to Galliker's facility. The other five percent goes to Galliker's plant in Maryland. The actual mode of payment occurs by Galliker deducting the

transportation charges from the farmer's gross proceeds from the sale of the milk. In effect, the farmer receives "X" dollars for the milk less transportation charges (Tr. 31).

C. Transportation To Kraft Foods

Applicant admitted to one-time service for Kraft Foods by transporting product from Mayfair's facility in Somerset County to Kraft's Philadelphia plant (Tr. 7). This move was made at the request of a broker, T.C. Jacoby, who is situated in St. Louis. Mr. Barefoot characterized this move as "a spur of the moment thing" (Tr. 8). Mr. Barefoot contended that "at the time, I wasn't sure that it was going to Philadelphia. Kraft has many plants and they said that it was going to Kraft" (Tr. 9). He further stated:

They weren't sure which plant, and they said could you handle it? I said we probably can. Well, when it come [sic] down to it, it ended up it was Philadelphia; and I had committed myself, so we did honor it.

Q Did you tell the person from E. C. [sic] Jacoby before you handled the movement that you were not permitted to handle movements within Pennsylvania except from the facilities of Galliker Dairy?

A No.

Q You didn't tell E. C. [sic] Jacoby that?

A No. Like I said, I initially felt that it was an interstate--going to be an interstate haul because almost always--well, in the past any time they called me, we have always done interstate work for them.

(Tr. 10).

Mr. Barefoot testified he initially discovered the Kraft shipment would be a move to Philadelphia only "hours" before the scheduled trip (Tr. 11). This was the only occasion when Applicant provided intrastate service to Kraft (Id.).

D. Transportation To Holly Dairy

Applicant recently provided transportation services through the broker, T.C. Jacoby, for Holly Dairy to Mt. Holly Springs in Cumberland County (Tr. 22). Holly Dairy is the site of a milk processing plant. This move was made approximately two months before the date of the evidentiary hearing of July 19, 1991. This too was an unsolicited move made "at the last minute" because of a cancellation by the originally scheduled carrier (Tr. 23).

In passing on an application for a certificate of public convenience, it is necessary to consider the fitness of the applicant in light of his past record. We are aware that a persistent disregard for, flouting or defiance of the Public Utility Code, and the Orders and Regulations of the Commission warrant a finding of lack of fitness, relative to a propensity to operate illegally. Hubert, et al. v. Pennsylvania Public Utility Commission, 118 Pa. Super. 128 (1935).

However, it is also well established that an applicant's propensity to operate legally is only one aspect of

"fitness." In the case of B. B. Motors Carriers, Inc. v. Pennsylvania Public Utility Commission, 36 Pa. Commonwealth Ct. 26, 289 A.2d 210 (1978), the court stated that:

Finally, we reject Protestant's urging to find Applicant unfit for certification due to prior violations of the Public Utility Law. Certainly, a carrier's willingness to obey is a factor that reflects on that carrier's fitness; yet obedience to the law is only one of many factors that compose a legal concept of "fitness." The record in the instant case clearly establishes that the Applicant has the quality and quantity of personnel and equipment to provide the service applied for. Additionally, Applicant has the requisite experience in the transportation industry; Applicant's past performance record, being a timely, safe and efficient service indicate Applicant's physical ability to provide the service sought in the instant application. [Emphasis added.]

Consequently, more recently, this Commission has stated, "it is clear to us that past violations of the Public Utility Code and our Regulation per se, do not automatically create a barrier so as to preclude the approval of an application requesting motor carrier authority" Application of Mansun North, Inc., Docket No. A-00101577, F.1, Am-C, (Opinion and Order entered January 24, 1990, p. 10).

What we must decide in the instant matter is whether or not the above-cited violations were made in "good faith." Regarding the Pepsi-Cola moves, Protestant assumes and argues that they were intrastate in nature and that Mr. Barefoot undertook to provide same knowing he had no authority to do so,

since the only intrastate authority he possessed was limited to transportation for the Galliker Dairy. Applicant, however, considers and contends these moves were interstate in nature and not subject to this Commission's jurisdiction. Neither Protestant nor Applicant clearly established in this record the point of origin of the railroad cars at the siding in Johnstown from which fructose was directly injected into Applicant's tank trucks where it was directly transported some five miles to Pepsi's facility. Applicant didn't know where these railroad cars came from. He surmised it probably came from out west or Chicago. Applicant's counsel argues, but presented no evidence, that "the Kraft [sic] 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" (Applicant's M.B., p. 15). This statement is probably correct--it was never proven--since it is highly unlikely that fructose would be shipped by rail car from any point within Pennsylvania to its Johnstown destination. However, assuming it was intrastate in nature--again, not proven--in our opinion, there are sufficient mitigating circumstances surrounding these moves to show "good faith" on Applicant's part. Pepsi's own vehicles normally handle this traffic and only contact Applicant on a last minute, emergency basis (Tr. 12). Applicant never solicited this traffic. The Pepsi bottling plant

to which the fructose was delivered is "just down the street from Galliker's" (Tr. 15). The record indicates Mr. Barefoot has refused what he clearly believed to be intrastate transportation while the instant Application is pending--notwithstanding an admitted Pepsi move a week before the initial Application hearing (Tr. 19, 20). What the record does show is that Applicant has never been cited by this Commission for any violations of its rules or regulations (Tr. 5).

The Kraft move from Mayfair's facility in Somerset to Kraft's plant in Philadelphia was a singular occurrence. It was not solicited by Applicant, rather, it was done at the request of the broker in St. Louis, T.C. Jacoby. As characterized by Applicant, it was "a spur of the moment thing" (Tr. 8). Kraft has many plants, not all in Pennsylvania. Mr. Barefoot claimed when he agreed to the transportation, he felt the move was interstate in nature because, as he testified, "in the past any time they called me, we have always done interstate work for them" (Tr. 10). It was only hours before the scheduled move that Applicant discovered that the load was going to a Pennsylvania destination (Tr. 11).

More recently, again, as part of a last minute transaction due to a cancellation, Applicant provided transportation services through the broker, T.C. Jacoby, for Holly Dairy to Mt. Holly Springs in Cumberland County (Tr. 21-

23). As in the above-referenced instances, Applicant did not solicit this move.

We are not convinced Applicant has exhibited the mindset or conduct that would clearly establish his predilection for a persistent disregard for flouting or defiance of the Public Utility Code and its orders and regulations. Moreover, these alleged illegal moves had no negative impact upon the public. However, we admonish Applicant not to continue to grant favors to T.C. Jacoby and/or last minute shippers in those instances where he clearly has no legal authority to provide such moves. Like many of our young (and old) people, the Applicant will have to learn to "just say no!"

Need For The Proposed Service

Protestant claims there is no need for Applicant's proposed service. Mayfair's shipping concerns, it asserts, can be adequately handled by Protestant and/or other available local carriers. Furthermore, it contends Mayfair's anticipated acquisition of new business accounts in the Philadelphia, Carlisle, DuBois and Allentown areas is, at best, speculative at this time (Tr. 39, 67, 68).

Supporting shipper witness David Pickard, Production Supervisor at Mayfair Creamery, testified Mayfair currently uses the services of Applicant on an interstate basis (Tr. 40). Protestant currently handles the bulk of Mayfair's outbound

traffic from its Somerset facility to facilities of Hershey Creamery in Harrisburg. One load per week is carried by Nelson Road and Trucking, a carrier allegedly holding no authority from this Commission (Tr. 48). Mayfair also requires regular movements from its Somerset facility to Galliker's Johnstown facility (Tr. 49). As currently contemplated, Mayfair would continue to employ Protestant as its primary carrier on the Somerset-Harrisburg run to the Hershey Creamery. Applicant would be utilized as a backup carrier during peak seasons (Tr. 37). Mayfair would use Applicant for bulk transportation for approximately two to nine trips per week. It anticipates requiring more service in the future because of its solicitation for more raw milk in the Philadelphia, Carlisle, DuBois and Allentown areas (Tr. 39, 67, 68). It also is soliciting new business for other Pennsylvania locations. Mr. Pickard further indicated inbound transportation originates from Johnstown, Uniontown and Pittsburgh (Tr. 41). However, Mr. Pikard also testified "...inbound products could come from anywhere within the state" (Tr. 40). Mayfair has contacted two other carriers to provide service as a backup to Fleegle Trucking, but the services of one carrier, Milk Transport, are contingent on its being in Mayfair's vicinity and the other carrier, Horst Trucking, has refused to provide service (Tr. 36, 58, 60).

66 Pa. C.S.A. §2503 dealing with permits required of contract carriers states:

(a) **General rule.**--No person or corporation shall render service as a contract carrier by motor vehicle unless there is in force with respect to such carrier a permit issued by the commission, authorizing such person or corporation to engage in such business.

In order to obtain such a permit, an applicant must prove to the satisfaction of the Commission that it is fit, willing and able to perform the services of a contract carrier, and that such services would not be to the detriment of common carriers. See Brink's, Inc. v. Pennsylvania Public Utility Commission, 424 A.2d 1010, 56 Pa. Cmwlth. 371, 1981.

As applicable to contract carrier authority, 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. An examination of the "harmful competition" issue is reserved for later discussion.

Protestant also claims that the supporting shipper, Mayfair Creamery, is expressing a preference for Applicant's

proposed service rather than a bona-fide need for same (Protestant's M.B., p. 14).

Our courts have also declared that the particular circumstances of a case determine what constitutes sufficient evidence of a public demand/need for the Applicant's proposed service. Noerr Freight, Inc. v. Pennsylvania Public Utility Commission, 181 Pa. Superior Ct. 322, 124 A.2d 493 (1956).

We believe that the need referenced in Subsection 41.14(a), 52 Pa. Code §41.14(a), refers to a supporting shipper's "need" to ship a product, rather than the "need" of the shipper for a particular transportation service. If a proposed transportation service will satisfy a shipper's "need" to ship a product, a responsive useful public purpose for the proposed service is deemed to exist, regardless of whether there are other transportation services available that will satisfy the shipper's need to ship its product.

The record discloses that the bulk of Mayfair's traffic is to the Hershey Creamery in Harrisburg and is presently being serviced by Protestant. Applicant also is satisfactorily serving Mayfair on an interstate basis (Tr. 40). Mayfair's witness Pickard explained why the near exclusive use of Protestant's transportation services was "not totally acceptable" to it

(Tr. 36, 37, 45, 46, 48, 69, 70, 92, 93).² Moreover, one load a week is now being served by an allegedly uncertificated carrier. Finally, we note Applicant's allegation that two local carriers, Horst and Milk Transport, have either outright refused to provide it with service or have attached unacceptable conditions to same.

Inasmuch as there is sufficient evidence in the instant proceeding that Mayfair Creamery has products that need to be shipped, and inasmuch as it has expressed a desire to use the Applicant's proposed service, we find that the Applicant has satisfied its prima facie burden of proof to support approval of the instant Application.

Harmful Competition

At the outset, we again note that Mayfair Creamery intends to retain the services of Protestant as its primary carrier to the Hershey Creamery in Harrisburg. Applicant will be used as a backup service during peak periods. Nevertheless,

²Specifically, the record discloses the following testimony by Mr. Pickard:

Q Mr. Pickard, you indicated in response to some of Mr. Gray's questions that you are currently using Mr. Fleegle almost exclusively for the traffic that's at issue here. Is that acceptable to you?

A Well, not totally because at this point, we don't have anyone else. We are forced to use Mr. Fleegle at this particular point.

(Tr. 68).

Protestant contends the proposed operations of Applicant would create competition with its existing common carrier service to the detriment of the public interest. However, no protest has been lodged against the known one-load per week move to the Hershey Creamery by an alleged uncertificated carrier, Nelson Road and Trucking (Tr. 48).

Obviously, Protestant is living with a competitor on the Hershey Creamery run now. Applicant is seeking limited authority, namely, the right to serve Mayfair Creamery. While the grant of this authority may divert a portion of existing traffic from Protestant, it will not be detrimental either to common carriers and/or the public interest.

Consequently, we conclude that the expanded authority of Applicant to permit service to Mayfair Creamery will not endanger or impair the operation of existing common carriers to such an extent that, on balance, granting its Application would be contrary to the public interest. In point of fact, the injection of Applicant as a new competitor serving Mayfair Creamery may well prove to be a benefit to the public by inducing the participants in this market to maintain quality service in order to retain this account.

Scope Of The Authority To Be Granted

In its Application, Applicant seeks to serve Mayfair Creamery, from its facilities in Somerset, to points in

Pennsylvania and vice versa. In our opinion, the evidence does not demonstrate the existence of a public need for the proposed statewide authority. Apart from service to the Hershey Creamery, there is no concrete, present need for service to other outbound destination points. Recognizing Mayfair's testimony that it has solicited business and expects to obtain same, in the Philadelphia, Carlisle, DuBois and Allentown areas, it nevertheless has no specific customers in these areas at this time. In Application of Bruce Trent Trucking, Inc., Docket No. A-00108190, F.1, Am-G, this Commission held a list of potential customers does not constitute evidence of need and that a grant of operating authority cannot be premised upon conjecture. With respect to inbound transportation needs, Mayfair has traffic originating from Johnstown, Uniontown and Pittsburgh (Tr. 41). This traffic consists of what was characterized as "diverted milk" (Id.).

Accordingly, we shall grant Applicant the right "to transport, as a contract carrier, property, for Mayfair Creamery, from its facilities located in Somerset, Somerset County, to and from the Hershey Creamery in Harrisburg, Pennsylvania, and from points of origin in Johnstown, Uniontown and Pittsburgh to Mayfair Creamery in Somerset and vice versa.

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

3. Applicant has demonstrated by clear and convincing evidence, the need for the proposed service for Mayfair Creamery.

4. 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. Harmful competition has not been established.

5. The need for statewide authority has not been established.

Order

THEREFORE,

IT IS HEREBY ORDERED:

1. That the Application of H. Fred Barefoot Trucking, Inc., at A-00107365, F001, Am-A for additional operating authority is hereby approved in part and denied in part. The following operating authority is hereby granted:

To transport, as a contract carrier, property, for Mayfair Creamery, from its facilities located in the borough and township of Somerset, Somerset

County, to and from the facilities of Hershey Creamery in Harrisburg, Pennsylvania.

To transport, as a contract carrier, property, from points in Johnstown, Uniontown and Pittsburgh to the facilities of Mayfair Creamery in Somerset, Somerset County and vice versa.

2. That upon compliance with the requirements of the Pennsylvania Public Utility Code and the rules and regulations of the Commission relating to the filing of evidence of insurance and the filing of a schedule of minimum rates and charges in accordance with 66 Pa. C.S.A. §2506, a permit issue evidencing the Commission's approval of the right to operate as above determined.

3. That the issuance of the permit is subject to the Applicant filing an acceptable contract with the Commission in accordance with 66 Pa. C.S.A. §2506 and 52 Pa. Code §31.45.

4. That in the event Applicant has not, on or before 60 days from the date of the service of this order, complied with the requirements set forth above, the Application shall be dismissed without further proceedings.

5. 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.

Herbert S. Cohen

HERBERT S. COHEN
Administrative Law Judge

Dated:

December 13, 1951

SENDER:

- Complete items 1 and 2 for additional services.
- Complete items 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

- Addressee's Address
- Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to: *I.N.* **A-00107365**
F.1-Am-A

4a. Article Number **044928**

- 4b. Service Type
- Registered Insured
- Certified COD
- Express Mail Return Receipt for Merchandise

7. Date of Delivery *10/15/91*

J. Bruce Walter, Esq.
5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent) *Harold Slack*

PS Form 3811, November 1990 * U.S. GPO: 1991-287-066

DOMESTIC RETURN RECEIPT

SENDER:

- Complete items 1 and 2 for additional services.
- Complete items 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

- Addressee's Addr.
- Restricted Delive.

Consult postmaster for fee.

3. Article Addressed to: *I.N.* **A-107365**
F.001-Am-A

4a. Article Number **044929**

- 4b. Service Type
- Registered Insured
- Certified COD
- Express Mail Return Receipt for Merchandise

7. Date of Delivery **FEB 10 1992**

J. M. A. Gray, Esq.
5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)

PS Form 3811, November 1990 * U.S. GPO: 1991-287-066

DOMESTIC RETURN RECEIPT

KR

DATE: February 25, 1992

SUBJECT: A-00107365, F001, Am-A; Application of H. Fred Barefoot Trucking, Inc.

TO: Jerry Rich
Secretary

FROM: Cheryl Walker Davis, Director
Office of Special Assistants

CWD

Pursuant to the requirements of Act 294, (66 Pa. C.S. §332(h)), Chairman Rolka and Commissioner Holland have requested full review of the Administrative Law Judge's Initial Decision in the above captioned proceeding. The second request for review was dated February 25, 1992.

Please notify the Office of Administrative Law Judge to prepare the case for consideration at a future Public Meeting.

**DOCUMENT
FOLDED**

DOCKETED
MAR 11 1992

Act 294

Case Identification: A-00107365, F001, Am-a
Application of H. Fred Barefoot
Trucking, Inc.

Initial Decision By: ALJ Herbert S. Cohen

Deadline for Return to OSA: February 20, 1992

This decision has not been reviewed by OSA.

* * * * *

I want full Commission review of this decision.

David M. Rolka Jr
Commissioner

2/25/92
Date

I do not want full Commission review of this decision.

~~David M. Rolka Jr~~
Commissioner

~~2/20/92~~
Date

Act 294

Case Identification: A-00107365, F001, Am-a
Application of H. Fred Barefoot
Trucking, Inc.

Initial Decision By: ALJ Herbert S. Cohen

Deadline for Return to OSA: February 20, 1992

This decision has not been reviewed by OSA.

* * * * *

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

Joseph P. Phelan, Jr.

Commissioner

2/10/92

Date

Act 294

ch

Case Identification:

A-00107365, F001, Am-a
Application of H. Fred Barefoot
Trucking, Inc.

Initial Decision By:

ALJ Herbert S. Cohen

Deadline for Return to OSA:

February 20, 1992

This decision has not been reviewed by OSA.

... 0 1992

* * * * *

I want full Commission review of this decision.

Kennell F. Spiland
Commissioner

2/25/92
Date

I do not want full Commission review of this decision.

~~*Kennell F. Spiland*~~
Commissioner

ch

~~*2/20/92*~~
Date