



COMMONWEALTH OF PENNSYLVANIA
 PENNSYLVANIA PUBLIC UTILITY COMMISSION
 P. O. BOX 3265, HARRISBURG, Pa. 17120
 February 9, 1984

IN REPLY PLEASE
 REFER TO OUR FILE
 A-00102471C831

Samuel Brusceci, President
 Newcomer Trucking, Inc.
 1200 Island Avenue
 McKees Rocks, PA 15136

Newcomer Trucking, Inc.
 v.
 Pitt-Ohio Express, Inc.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Allison K. Turner.

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 exceptions MUST BE RECEIVED BY THE SECRETARY OF THE COMMISSION IN ROOM B-18, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PENNSYLVANIA 17120, within fifteen (15) days of the date of this letter because the time period is set by law (66 Pa. C.S. 332(h)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must be sent to each party of record and to the Administrative Law Judge whose address is Pennsylvania Public Utility Commission, Pittsburgh State Office Building, Room 1103, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222.

If you receive exceptions from other parties, you may submit written replies to those exceptions in a manner similar to that stated above within twenty (20) days of the date of this letter.

Exceptions and reply exceptions shall obey 1 Pa. Code 35.212, particularly the 50 page limit.

Exceptions should clearly be labeled as "EXCEPTIONS OF (Name of Party) - (protestant, complainant, staff, etc.)". Do not label exceptions as a "Brief" or "Brief on Exceptions".

If no exceptions are received within fifteen (15) days, the decision of the Administrative Law Judge will become final without further Commission action. You will receive written notification if this occurs.

cc: ALJ Turner/B. Bigelow/Bureau of S&C/Law Bureau/Chairman/Commissioners
 OSA/Mr. Bramson

jr

Encls.

Certified Mail

Receipt Requested

Very truly yours,

Wm H. Smith

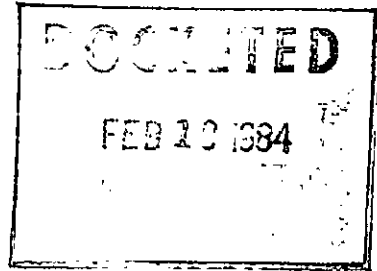
William H. Smith

Chief Administrative Law Judge

Similar letters to: William J. Lavelle, Esquire, 2310 Grant Building
 Pittsburgh, PA 15219 (Pitt-Ohio Express, Inc.)
 John A. Pillar, Esq., 307 Fourth Avenue
 Pittsburgh, PA 15222 (Pitt-Ohio Express, Inc.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Newcomer Trucking, Inc. : A-00102471C831
v. :
Pitt-Ohio Express, Inc. :



INITIAL DECISION

Before
Allison K. Turner
Administrative Law Judge

History of Proceedings

On April 20, 1983, complainant Newcomer Trucking, Inc. (Newcomer) filed a formal complaint with the Pennsylvania Public Utility Commission against Pitt-Ohio Express, Inc. (Pitt-Ohio). The complaint alleged that Pitt-Ohio was handling and soliciting transportation between points in Pennsylvania without appropriate authority from the Commission.

Newcomer asserted that Pitt-Ohio's unlawful activities were harmful to its own operations. By Answer filed on June 21, 1983, respondent Pitt-Ohio denied the allegations of unlawful operations. The Answer stated that the transportation being complained of was authorized by ICC authority since the normal route of movement was via the East Palestine, Ohio terminal. Specifically, Pitt-Ohio averred that "the transportation of freight in this manner between points in Pennsylvania via a point in Ohio is interstate in nature." Respondent Pitt-Ohio also answered that the Commission's prior dismissal of a complaint at Docket No. A-00102471C821, in December 1982, was dispositive of this complaint.

Two hearings were held in Pittsburgh. At the first hearing on August 26, 1983, the complainant Newcomer, represented by counsel, introduced the testimony of eight witnesses. Six of these witnesses were employees of the Public Utility Commission Office of Safety and Compliance. At the second hearing on September 12, 1983, respondent Pitt-Ohio, represented by counsel, introduced the testimony of two witnesses.

Briefs were filed by both parties subsequent to the hearings. On November 9, 1983, a signed Settlement Stipulation by the parties dated November 7, 1983, was submitted. Said stipulation included Newcomer's

request to withdraw the complaint and both parties' requests that the complaint be dismissed.

Summary of Testimony

Due to the fact the complainant Newcomer is withdrawing its complaint upon approval of the parties' submitted Settlement Stipulation, a summary of testimony is not presented. Relevant portions of the testimony are referred to in the Findings of Fact and Discussion portions of this Decision.

Findings of Fact

1. The complainant in this proceeding is Newcomer Trucking, Inc., (Newcomer) a motor common carrier having its terminal in McKees Rocks, Pennsylvania.
2. The respondent is Pitt-Ohio Express, Inc. (Pitt-Ohio) whose main terminal is located in Darlington Township, Beaver County, Pennsylvania.
3. Pitt-Ohio also uses the terminal of Hammel's Express/Capp's Express in Pittsburgh as its general office and for local cartage service.
4. The Darlington Township terminal is 200 feet from the East Palestine, Ohio city limits and thus referred to by Pitt-Ohio as its East Palestine Ohio terminal.
5. From 1979 until October 1982, Pitt-Ohio operated from a terminal located in East Liverpool, Ohio, which is approximately fifteen (15) miles from its present location.
6. A complaint by the Commission in 1980 (when Pitt-Ohio's terminal was in East Liverpool, Ohio) alleging unauthorized Pennsylvania intrastate shipments resulted in a determination that the movements were

interstate in nature and authorized by I.C.C. certificate. (PUC Docket No. C-80021846).

7. In December 1982, when again subject to a Commission complaint, Pitt-Ohio again asserted that its I.C.C. certificate authorized shipments between points in Pennsylvania as these shipments had been processed through the East Liverpool, Ohio terminal for distribution.

8. This second Commission complaint against Pitt-Ohio was dismissed in December 1982. (Docket No. A-00102471C821).

9. In its Answer to the present complaint, Pitt-Ohio repeatedly referred to its terminal as being in East Palestine, Ohio, and supported its position that the shipments in question were interstate in nature by referring to the above-mentioned second complaint dismissal.

10. Pitt-Ohio's distribution terminal is no longer in East Liverpool, Ohio, but rather in Pennsylvania. The basis of those complaint dismissals upon which Pitt-Ohio relies was that the shipments between points in Pennsylvania were being processed for distribution in a terminal located in Ohio.

11. Pitt-Ohio on a daily basis picks up shipments throughout Western Pennsylvania which are returned to the Darlington Township terminal the same day.

12. Freight from Pitt-Ohio's multiple vehicles is unloaded at this terminal, sorted, and reloaded for delivery the following day on "peddle runs".

13. Each of these peddle runs is designed so that the vehicle leaving the Darlington Township (Pa) terminal proceeds westward into Ohio to Ohio Route 170, and then continues on an elliptical loop into Pennsylvania

and returns to and terminates at the Darlington Township terminal.

14. Although Pennsylvania Route 51 is available to access these peddle runs to major Pennsylvania highways for Pennsylvania deliveries, Pitt-Ohio does not utilize Pennsylvania Route 51 choosing instead to route its runs via Ohio Route 170.

15. The Settlement Stipulation submitted by both parties, dated November 7, 1983, expresses that Pitt-Ohio will limit its handling of freight between points in Pennsylvania which are within complainant Newcomer's authorized territory.

16. Specifically, Pitt-Ohio agrees to terminate transportation of property under its I.C.C. certificate from points in the County of Allegheny to points in the Counties of Armstrong, Butler, Clarion, Greene and Indiana, and vice versa.

17. Pitt-Ohio explicitly states in the Settlement Stipulation that it is not admitting that the freight transportations which were the subject of this complaint were in any way unlawful.

18. Complainant Newcomer seeks to withdraw this complaint upon Commission approval of the Settlement Stipulation.

19. The preponderance of the evidence offered by Newcomer to support its complaint allegations was offered by six employees of the Commission's Office of Safety and Compliance.

20. Although the Commission never intervened as a party to this complaint proceeding, an investigation into Pitt-Ohio's activities was carried on by the Office of Safety and Compliance.

21. An investigation conducted by Officer Ballard in February 1983 resulted in Mr. Robert Hammel, an officer of Pitt-Ohio, expressing to

Officer Ballard that the shipments in question were being processed for distribution through East Palestine, Ohio. (Tr. 127-132, Newcomer Exhibit 11).

Discussion

This complaint proceeding raised numerous issues which cannot be properly addressed by merely approving the parties' stipulation agreement and dismissing the complaint. However, I have decided to approve this agreement because the sole complaining party, Newcomer, wishes to withdraw its complaint because it has been satisfied. It must be noted that the Settlement Stipulation, in which Pitt-Ohio agrees to halt these alleged unauthorized intrastate transportations, is limited in that it only pertains to Newcomer's authorized territory. There certainly remains the possibility that Pitt-Ohio will continue the transportation as described outside of Newcomer's authorized area.

Additional issues were also raised and need to be addressed to support my recommendation that the Commission institute an investigation regarding these matters. This investigation could incorporate the record made in this case. Specifically, it is charged that Pitt-Ohio attempted to misrepresent facts to the Commission when it referred to a previous complaint dismissal (Docket No. A-00102471C821) as being dispositive in this complaint. Pitt-Ohio had relocated its terminal from Ohio to Pennsylvania since the time of the prior complaint dismissal, and prior to the investigation set forth on this record and the institution of this complaint. The possible outcomes of such an investigation would include the imposition of such Commission sanctions as might be appropriate and initiation of a complaint before the ICC: Service Storage & Transfer Co.

v. Commonwealth of Virginia, 359 U.S. 185, 79 S. Ct. 714 (1959).

I will also discuss the effect of the Commission's failure to initiate its own complaint or intervene and join the complainant Newcomer as a party to this complaint proceeding. The fact that the Commission did not institute its own complaint or intervene has in effect limited the issues which can be considered in this decision.

Pitt-Ohio's Limited Agreement

Pitt-Ohio has reached an agreement with Newcomer that it will terminate its freight handling of shipments between points in the County of Allegheny to points in the Counties of Armstrong, Butler, Clarion, Greene and Indiana, and vice versa. Pitt-Ohio explicitly states that it does not admit that these shipments between points in Pennsylvania are in any way unlawful. Pitt-Ohio does not indicate that it will terminate such shipments between points outside of Allegheny and the above-mentioned five counties. A careful reading of the submitted agreement indicates that Pitt-Ohio may continue to handle freight between points in Pennsylvania within Newcomer's territory as long as the shipment or delivery point is not in Allegheny County. It would seem fair to assume, then, that apart from Commission approval of the Stipulation Agreement, Pitt-Ohio will continue to handle freight between points in Pennsylvania on its I.C.C. certificate as long as its activities are not harmful to Newcomer.

Pitt-Ohio's Attempts to Deceive the Commission

Throughout this entire proceeding, Pitt-Ohio stubbornly continued to refer to its terminal which is located in Darlington Township, Pennsylvania as its "East Palestine, Ohio" terminal. There is no reason to quarrel

with this labeling if its usage is to facilitate "in-house" communication. However, Pitt-Ohio used the Ohio label in its formal Answer filed with the Commission and throughout the hearing and its brief. Testimony was given at the hearings that officers of Pitt-Ohio explained to Enforcement Officers from the Commission's Office of Safety and Compliance that the freight movements in question between points in Pennsylvania were being processed through its East Palestine, Ohio, terminal and were thus interstate in nature. However, it is clear on this record that the terminal in question is actually in Darlington Township, PA.

Further, Pitt-Ohio's repeated assertion that an earlier complaint dismissal regarding similar transportations as being dispositive is highly questionable. The December, 1982, complaint dismissal concerned shipments that were processed for distribution at the terminal then located in East Liverpool, Ohio. Surely Pitt-Ohio must have realized that moving its terminal from Ohio to Pennsylvania would result in the possibility that previous regulatory determinations would not continue to apply to its on-going operations. The December, 1982, dismissal was based on the fact that freight between points in Pennsylvania was being processed for delivery in a terminal in Ohio. That is no longer true. The fact that Pitt-Ohio currently sends its delivery trucks from its Pennsylvania terminal through Ohio to make Pennsylvania deliveries certainly raises the strong possibility that "The use of these routes constitutes a subterfuge to avoid P.U.C. Jurisdiction" (Newcomer's brief p. 17).

Pitt-Ohio asserts that it does not handle freight deliveries between two points in Pennsylvania which would be served by the same peddle run. Pitt-Ohio also asserts that these peddle routes are not circuitous

as they utilize normal routes of movement via highways in Ohio (and/or West Virginia). Neither of these arguments is particularly persuasive to me.

Pitt-Ohio in fact appears to have been previously conducting its operations from an Ohio terminal located near the Pennsylvania border in order in part to allow it to conduct transportation in Pennsylvania. When Pitt-Ohio was forced to move its terminal it ended up in a Pennsylvania location which it chose to label an "Ohio" location so that it could continue its former operations. Its former operations, i.e., those emanating from the terminal actually in Ohio, are questionable as to their nature as legitimate interstate operations. That is, it appears that the peddle runs were designed to originate and terminate in Ohio after looping through Pennsylvania, with no delivery from pick-up point to destination being on the same run. This can hardly be characterized as intrastate transportation conducted as part of a normal interstate operation: Pa. PUC v. Arrow Carrier Corporation 88 MCC 745 (1962); also See, e.g. Pa. PUC v. De-Pen lines, Inc., A-00092681C811, where the Commission found the transportation in question to be interstate in nature; see also discussion at Pa. PUC v. Arrow Carrier Corporation 113 MCC 213 (1971) at 218-222, here the ICC denies the PUC complaint but discusses standards for an inter versus intrastate determination. Now that the peddle runs actually originate in Pennsylvania, the characterization of this transportation as interstate is even more questionable.

Lack of Commission Action

It would be improper to require time and money expenditures from Newcomer to continue with this complaint when it no longer requires

Commission action, for it has settled its dispute with Pitt-Ohio. Had the Commission initiated a complaint or intervened and become party to this complaint proceeding, Newcomer's withdrawal would yet leave the Commission in a position to pursue this proceeding to an end result of an Initial Decision determining the legality under existing law of the activities in question. As it stands, Newcomer's request to withdraw its complaint is allowed and the parties' Settlement Stipulation is approved. However, I do recommend that the Commission institute an investigation regarding Pitt-Ohio's on-going handling of freight between points in Pennsylvania. Pitt-Ohio has only agreed to limit shipments which Newcomer considered harmful to its interests. Since the primary positive outcomes of such an investigation would be the initiation of a complaint before the ICC, and or the imposition of sanctions on Pitt-Ohio, that investigation would need to go into the detail necessary to support the allegations for filing a complaint, or Commission sanctions but could incorporate and rely in part on the record made here.

Conclusions of Law

1. The subject matter of and parties to this complaint proceeding are properly before the Commission.
2. Approval of the parties' Stipulation Settlement and the withdrawal of Newcomer's complaint in this proceeding precludes the rendering of an Initial Decision which would reach the merits of the original complaint allegations.
3. Approval of this Stipulation Settlement and complaint withdrawal is in the public interest because it resolves the issues raised in

the complaint to the satisfaction of the complainant without need for further litigation.

4. It is in the public interest to consider in a separate proceeding conduct by the respondent which affects other carriers and their customers, but which cannot properly be considered in this complaint proceeding.

ORDER

In consideration of the foregoing, it is ordered that:

1. The complaint be dismissed upon Commission approval of the following Settlement Stipulation which was submitted by both parties, dated November 7, 1983:

A. Respondent will immediately terminate the transportation of property under its certificate of public convenience and necessity issued by the Interstate Commerce Commission at Docket No. MC-30136 from points in the County of Allegheny to points in the Counties of Armstrong, Butler, Clarion, Greene and Indiana, and vice versa.

B. Respondent by voluntarily agreeing to terminate these operations does not admit that the operations are in any way unlawful.

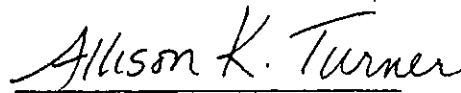
C. Complainant and Respondent agree that no conclusion or inference of unlawfulness may be drawn from the Settlement Stipulation, and that it may not be used adversely to the interests of Respondent in any other formal or informal proceeding.

D. Complainant is not precluded from raising the issue of lawfulness of the prior transportation complained of by Complainant, and which Respondent has agreed to terminate, in any future application proceeding before this Commission involving the territory set forth in paragraph 1 above, in the event that there is any attempt by any participant in such application proceeding to rely on the prior transportation as a basis for approval of the application.

E. On the basis of the Settlement Stipulation, Complainant agrees to withdraw the Complaint at Docket No. A. 00102471C831 with prejudice.

2. By adoption of this initial decision, the Commission shall institute its own investigation regarding Pitt-Ohio's on-going handling of freight between points in Pennsylvania to determine whether a complaint should be filed with the ICC against Pitt-Ohio.

January 27, 1984


ALLISON K. TURNER
Administrative Law Judge

0001
PITT-OHIO EXPRESS, INC.
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RESPONDENT, POR C831

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4/23

ACT 294

Case Identification: A-00102471C831; Newcomer Trucking, Inc. v. Pitt-Ohio Express, Inc.

Initial Decision by: ALJ Allison K. Turner

Date Issued for Exceptions: April 9, 1984

ALJ Recommendation: That the exceptions be denied.

* * * *

I want full Commission review of this decision.

Commissioner

DATE

I do not want full Commission review of this decision.

Linda P. Salofers

Commissioner

4/12/84

DATE

DOCUMENTED
APR 18 1984

DOCUMENT

ACT 294

Case Identification: A-00102471C831; Newcomer Trucking, Inc. v.
Pitt-Ohio Express, Inc.

Initial Decision by: ALJ Allison K. Turner

Date Issued for Exceptions: April 9, 1984

ALJ Recommendation: That the exceptions be denied.

* * * *

I want full Commission review of this decision.

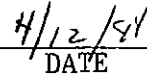
Commissioner

DATE

I do not want full Commission review of this decision.



Commissioner



DATE

4-23-84

ACT 294

Case Identification: A-00102471C831; Newcomer Trucking, Inc. v. Pitt-Ohio Express, Inc.

Ruling On Exceptions
~~Initial Decision~~ by:

ALJ Allison K. Turner

RECEIVED

APR 11 1984

Date Issued for Exceptions: April 9, 1984

PA. PUBLIC UTILITY COMMISSION
COMMISSIONER JOHNSON

ALJ Recommendation: That the exceptions be denied.

* * * *

I want full Commission review of this decision.

Commissioner

DATE

I do not want full Commission review of this decision.

X *Michael Johnson*

Commissioner

by N. McDonnell

DATE