STD-501, 9-86

8/5

COMMONWEALTH OF PENNSYLVANIA KJR 8/15

DATE: July 31, 1991

SUBJECT: A-00109497; In re: Matthew S. Sieber, t/d/b/a Sieber Trucking

TO: Jerry Rich
Secretary

FROM: Cheryl Walker Davis, Director CWD
Office of Special Assistants

Pursuant to the requirements of Act 294, (66 Pa. C.S. §332(h)), Chairman Smith 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 July 30, 1991.

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

exception + replies filed

KJR

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DIRECT DIAL NO.

FILE NO. 3084/02

*ALSO ADMITTED TO THE FLORIDA BAR
**ADMITTED TO THE FLORIDA BAR ONLY

Re: Application of Matthew S. Sieber, t/a, Sieber Trucking,
A.109497 - Protest of Robert G. Hack

July 31, 1991

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

Dear Secretary Rich:

Enclosed you will please find an original and nine (9) copies of the Exceptions of Robert G. Hack, Protestant, in the above referenced proceeding, together with the accompanying Certificate of Service.

Very truly yours,

RHOADS & SINON

By: J. Bruce Walter

JBW/dah

Enclosures

cc: Administrative Law Judge Herbert S. Cohen
Christian V. Graf, Esquire
Christopher Zettlemoyer, Esquire

JBW/8/1/91/dah/motor:except.1/#4

ORIGINAL

Before the
Pennsylvania Public Utility Commission

A.109497

Application of Matthew S. Sieber, t/a
Sieber Trucking

EXCEPTIONS OF ROBERT G. HACK
PROTESTANT IN OPPOSITION

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P.O. Box 1146
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Counsel for Protestant,
Robert G. Hack

Due Date: August 5, 1991

1. The Administrative Law Judge Erred In Finding A Propensity To Act Legally When The Record, Including The Initial Decision, Clearly Requires A Contrary Finding.

The Administrative Law Judge has found that Applicant has violated the Commission's leasing regulations (initial decision 38) and ordered the Applicant to cease. The Administrative Law Judge has also found that the Applicant has engaged in prior uncertified and illegal operations (initial decision 37). The Administrative Law Judge has further merely found that when the applicant was told he needed authority, he "retained counsel and took the appropriate legal steps to obtain certification" (initial decision 37).

The Administrative Law Judge never found that the applicant ceased providing illegal service, because the record is clear that he did not. Applicant retained counsel and filed an application, but he continued to operate illegally and he continued to violate the Commission leasing regulations.

The record of this applicant demonstrates, without any contrary evidence of good faith, that this applicant has no propensity at all to act legally. Having found, prior uncertificated service and clear violation of the Commission's regulations on leasing, the remainder of the record must have provided the Administrative Law Judge with some comfort that this Applicant will operate legally.

But there is no comfort in this record.

The burden of proving good faith is on the Applicant and this burden must be met by clear and convincing evidence. National

Retail, 530 A.2d at 993. See also Re Antonio Romeo, 70 Pa. PUC 366 (1989). There is no such evidence on this record.

In the Blue Bird Coach Lines, Inc. decision, A.88802, F.2, Am-K, at page 59, the Commission cites in re Perry Hassman, 55 Pa. PUC 661 (1982) at 662-63, to explain the requirement dealing with propensity to operate safely and legally as follows:

> "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;"

The public interest is not served by a carrier who intentionally ignores the specific requirements of this Commission. This Applicant disregarded Commission requirements even after retaining counsel. Consider on this record:

(a) Although in the trucking business since 1982, Applicant is ignorant of regulatory requirements of this Commission (N.T. 12).

(b) Applicant admits being advised by a number of people that he needed authority as early as June of 1990 (N.T. 16), but filed no application until September 13, 1990. He continued, and continues, to operate. A temporary authority application was not filed until October 3, 1990. It was initially denied. At the time of hearing, Applicant was serving all of the witnesses in question.

(c) Applicant claims a lease with an authorized carrier but his Exhibit 3 is not signed by that carrier and there is no indication, on this record, that the carrier is even aware of Applicant.

(d) The lease is stated to cover only 2 tractors (N.T. 13). Applicant operates more than 2 tractors (see Applicant's Exhibit B).

(e) Applicant, and not the authorized carrier, bills the shippers (N.T. 13-14).

(f) The Bills of Lading do not identify the authorized carrier (N.T. 14).

(g) There is no arrangement for payment to the authorized carrier (N.T. 15). There is no contact with that carrier by shippers (N.T. 50, N.T. 37, N.T. 59, N.T. 74).

(h) Rates are agreed upon between Applicant and shipper and not based on the claimed authorized carrier's tariff (N.T. 35-36).

As of the date of the hearing, Applicant continued to serve each of the shippers in question on this illegal basis.

This record does not permit a finding of "good faith". The Administrative Law Judge erred, as a matter of law, in finding that merely retaining counsel and filing an application, without more, is a good faith effort. The Commission should not reward a carrier who is so willing to ignore legal requirements (or, at a minimum, is ignorant of the requirements) and who demonstrates a complete propensity to thumb his nose at this Commission's requirement of legal operation in public service.

The Administrative Law Judge erred in finding these continued illegal operations mere "technical violations" (initial decision p. 38).

The unauthorized service was not performed in good faith. A review of the record in this case reveals substantial evidence requiring a finding of bad faith, and the Administrative Law Judge erred in granting the application. There have been continued illegal operations. The method of operation established on this record, even after retention of counsel, does not come close to

being legal. Illegal service was not halted. There is no evidence which would permit a finding of good faith in performing otherwise illegal operations, in such a haphazard and illegal fashion. As stated by Judge Kashi in Application of Dart, Inc., A.109987 (June 12, 1991), at page 65:

> "It seems to us that some sort of honesty of intention or at least freedom from knowledge of circumstance which would put the Applicant on notice are required in the instant matter ... ."

In addition to these operations being illegal service and being performed in such a way as to violate the Commission leasing regulations, after receiving the advice of extremely competent counsel, there is no evidence in this record that the supposed authorized carrier is even aware of applicant's operations. That carrier did not sign the lease, that carrier's tariff was not observed and shippers had no contact whatsoever with the Carrier. The shipper's only contact was with the Applicant, pursuant to his illegal service.

Not only does Applicant not pay required assessments to the Commission for this illegal traffic, the alleged carrier he claims to lease to does not, because that Carrier receives no revenue and, without some sort of accounting, has not way to report any such revenue.

Perhaps the most pertinent statement on the issue of disregard of Commission orders and regulations was stated by Administrative Law Judge Herbert Cohen in his initial decision of August 21, 1987, in the Application of Robert F. Larsen, Neil C.

Donohue and Andrew W. Garban, Co-Partners, t/d/b/a Delta Motor Cars, A.107137, at page 24:

> A lack of fitness with regard to legality of operation is evidenced by a persistent disregard for, flouting or defiance of the Public Utility Law and the order and regulations of this Commission. Herbert v. Pa. Public Service Commission, 118 Pa. Super. 128 (1935); Associated Freight Forwarders, 21 Pa. PUC 654 (1940).
>
> Continuing operations after the Commission denied Applicant temporary authority, in our opinion, constituted persistent disregard for the orders and regulations of this Commission.
>
> Having determined the "fitness" issue we need not consider the "need" criteria also mandated by §41.14. (Emphasis Added)

The temporary authority of this Applicant was initially denied by decision dated December 11, 1990. It was never granted to all shippers but was granted on a limited basis to one shipper. Applicant continued to operate as of the date of the hearing, February 4, 1991, serving all shippers who testified. Applicant clearly was denied temporary authority for all but one shipper, but he never ceased operations as to any shipper.

There is no real difference between the above-referenced decision of Administrative Law Judge Cohen and the continued, persistent unauthorized service of this Applicant for those for whom temporary authority was denied. In the face of this record, clearly demonstrating no propensity to act legally, it was an error to grant any authority.

As stated by Judge Kashi in the Application of Dart, Inc., at page 68:

"We believe Protestant ETI summarizes the issue properly:

> If this record of conduct does not amount to willful flaunting or disregard of the PUC's authority, then those terms will have lost all meaning and the PUC will rapidly lose any authority that it presently holds over Pennsylvania shippers. This issue cannot be taken lightly. If any authority is granted in this situation, ETI predicts that this case will be cited by every applicant who wishes to have the Commission ignore its illegal activity (Protestant ETI Reply Brief p. 8).

We heartily agree. In fact, it is difficult to imagine how any future application could ever be denied if the record in this case is used as a barometer of "legal propensity." We will deny the application."

The Commission's second evidentiary criterion, found at 52 Pa. Code §41.14(b) and commonly referred to as "fitness", is as follows:

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

The record established by the Applicant itself provides evidence which would indicate that Applicant has acted and continues to act either in complete ignorance or with callous disregard for Commission rules and lacks the propensity to act legally. Since Applicant retained excellent counsel, it is impossible to argue that his ignorance continued. The only remaining possibility is callous disregard.

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, 456 A.2d 342 (1983):

> The Commission's statutory obligation to determine an Applicant's fitness prior to granting [authority] is ... a safeguard, the primary purpose of which is the protection of the public."
>
> (500 Pa. at 392, Footnote 3).
>
> Thus, the primary purpose of the fitness criteria is to protect the public. In fact, the statutory standard for the issuance of a certificate of public convenience does not mention the fitness of the Applicant. The standard requires that the Commission find that the granting of a certificate is "necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S. §1103(a). The primary consideration in granting such an application is the public interest.

The initial decision has failed to consider, let alone protect, the public interest in the face of such blatant and continued illegal conduct. No good faith finding is possible where illegal operations continue even after advice of counsel and after denial of temporary authority.

> 2. The Administrative Law Judge Erred In Failing To Consider Evidence That The Public Of The Commonwealth Has Not Been Protected By Required Insurance While Applicant Operated Illegally, Evidence Which Requires A Finding That The Applicant Lacks A Propensity To Act Safely.

The Administrative Law Judge found illegal service, found violations of the Commission's leasing regulations, but did not consider the additional evidence on the record that the Applicant has not been properly insured during those illegal operations. This evidence is clear and uncontradicted evidence of a lack of propensity to act safely. Indeed, it appears that the Applicant

misrepresented his insurance status with the filing of Appendix C to his prepared statement.

Consider the evidence of insurance provided and its affect on the safety of the public on the highways of the Commonwealth of Pennsylvania:

> (a) The original certificate of insurance (Appendix C to Applicant's prepared testimony, Exhibit 1) offered into evidence, covered 1 tractor and 1 trailer, a van trailer (N.T. 8), which is not used in the provided illegal service.
>
> (b) A subsequent certificate of insurance (Exhibit 2) was issued on February 25, 1991, 3 weeks after the initial hearing and request for insurance evidence and while Applicant continued, as he apparently does to this date, to provide service.
>
> (c) Exhibits 2 and 3 (the changed endorsement), when read together, provide insurance coverage for a total of 4 tractors (a 1987 International, Unit 102 on Applicant's Appendix B, and Unit 130, a 1977 International, and Unit 408, a 1981 International, and Unit 419, a 1987 International Tractor) and no trailers.
>
> (d) Applicant, however, operates 5 other tractors and 13 trailers (see Attachment B, Exhibit 1) for which no evidence of insurance exists. It is specifically those uninsured trailers which are now being illegally used in intrastate commerce for the transportation of pallets by Applicant, without the benefit of insurance.

What possible evidence could be presented to permit a finding of good faith, but illegal operations, where those illegal operations are performed without insurance, is unknown. When considered along with other evidence of illegal service and service not being properly performed, the characterization of Applicant's operations as illegal and unsafe is simply underscored. It is clear that the Administrative Law Judge's finding of fitness or a

propensity to act safely and legally is unsupported and unsupportable. This Applicant has no concern for the regulations of the Commission nor has he any concern for the safety of the public. The Administrative Law Judge gravely erred in rewarding this Applicant with operating authority.

3. The Administrative Law Judge Did Not Consider The Record Which Requires A Finding That Applicant Is Financially Unfit.

The initial decision, at page 38, provides a 5 line discussion of Applicant's financial statements. This discussion concedes that Applicant, despite his illegal operations for which there is no necessity to report income to this Commission, has a capital deficit.

52 Pa. Code §41.14(b) places on the Applicant the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service.

Applicant's prepared testimony acknowledges a deficit (Exhibit 1, page 5). Even a grant of this application will not eliminate the deficit (N.T. 15).

Appendix G, attached to Exhibit 1 as a part of Applicant's prepared testimony, is confirmation of lack of Applicant's financial fitness. Consider:

(a) The income statement does not provide for current depreciation.

(b) Applicant's capital account or equity position is a deficit $35,592.34.

(c) Interest expense is shown as $34,648.98 for 1990. There is insufficient cash flow to make any

current principal payments. The current portion of such debt is shown as $76,921.

(d) Applicant does not know what his notes payable entry of $76,921 or long-term debt entry of $276,262 are (N.T. 16).

(e) No owner's or officer's salaries are shown and Appendix E does not show Applicant as an employee.

In addition to proving technical fitness, Section 41.14(b) of the Commission's regulations requires that Applicant demonstrate that it is financially able to provide the proposed service.

The financial fitness standard to be applied in application cases is set forth in Re Cleo L. Holmes, 51 Pa. P.U.C. 336 (1977), wherein the Commission stated:

> The primary purpose in considering this area before approving an application is to assure that the Applicant's customers will be protected ....

This record provides no such assurance. The Administrative Law Judge erred in finding the Applicant financially fit.

4. The Administrative Law Judge Erred As A Matter Of Law In Considering Evidence Of Illegal Service As Evidence Of Need.

In North Penn Transfer, 54 Pa. 585 (1981), the Commission found that Applicant "failed to submit any evidence as to its good faith in rendering the illegal service", and concluded "that the Applicant has been providing illegal service, in bad faith, and that the Applicant's violations of the Public Utility Code are both willful and flagrant", 54 Pa. P.U.C. at 594. Accordingly, the

Commission denied North Penn's application in its entirety and refused to consider any of the evidence of need submitted on behalf of shippers currently using the Applicant, finding that "the Applicant is unfit to receive the authority for which it has applied" Ibid.

It is well settled that an applicant for common carrier authority, who has provided unauthorized services in the past, cannot sustain its burden of proving the need for service through evidence of an illegal cause of conduct if such conduct represents a bad faith violation of the code or of the PUC's regulations or orders. National Retail Transportation v. Pa. PUC, 109 Pa. Cmwlth. Ct. 72, 530 A.2d 987, 993 (1987).

The Commission must reach the same result here on the strength of that line of cases which holds that, absent a showing that the illegal service was in good faith or a bona fide misunderstanding of the law or the carrier's rights, the Commission is justified in denying the application. Bunting Bristol Transfer, Inc. v. Pa. P.U.C., 418 Pa. 286, 210 A.2d 281 (1965); Manganell v. Pa. P.U.C., 13 Pa. Cmwlth. 373, 335 A.2d 890 (1975); Armored Motor Service Corp. v. Pa. P.U.C., 49 Pa. Cmwlth. 623, 411 A.2d 900 (1980).

The Administrative Law Judge has found illegal service. The exceptions to his findings of fitness despite illegal operations are discussed infra at Section 1-4. Given the clear finding of illegal service and disregard of Commission

requirements, the Administrative Law Judge erred in considering the traffic evidence of the shippers who used the Applicant illegally.

5. The Administrative Law Judge Erred As Matter Of Law By Legitimizing Harmful And Illegal Competition.

The Commission is charged with the duty of considering whether injection of additional competitive service would harm existing carriers and therefore be detrimental to the public interest. D'Agata National Trucking Co. v. Pa. P.U.C., 25 Pa. Cmwlth. Ct. 365 (1976); Re Krevda Bros. Express, Inc., 51 Pa. P.U.C. 226 (1977) at 238-9.

The testimony is clear and uncontradicted. Applicant provided, up to the day of hearing, illegal service. The Administrative Law Judge recognized this service as illegal (initial decision 37-38). The revenues of protestants have been reduced by the service illegally performed by the Applicant. This is attributed directly to the illegal diversion of traffic by Applicant. A grant of this application is likely to result in an additional loss of revenue to protestants.

The Administrative Law Judge's sole response to this illegal diversion is found at page 40 of the initial decision:

> "The Protestants have successfully survived Applicants competition over all of those years he operated without Commission authority. Why can they not survive now?"

The administrative Law Judge erred as a matter of law. Protestants cannot be required to justify their ability to survive illegal operations. This approach to illegal service and harmful

diversion of revenues does not address the public interest and is in error, as a matter of law. Illegal service is, per se, harmful. Pennsylvania PUC v. Israel, et al., 356 Pa. 400, 52 A.2d 317 (1947).

Where, as in the instant proceeding, the Commission has acted to grant a certificate of public convenience to one utility, no other utility possesses the right to displace the service of the certificated utility, without first obtaining the approval of the Commission. See, also, Application of Corter et al., 15 Pa. P.S.C. 90 (1936), where the Commission cites City Transfer Company v. Public Service Commission, 93 Pa. Super. 210, 216 (1928).

Lacking any authority to provide the complained of service, Applicant could gain authorization to provide such service only by first receiving the consent of the Commission through a certificate of public convenience or a permit. Applicant did not do so. Applicant has illegally provided the complained of service on a regular basis in direct contravention of the Public Utility Law. His services was clearly unlawful and such illegal competition is per se harmful.

In Pennsylvania Public Utility Commission v. Israel et al., 356 Pa. 400, 52 A.2d 317 (1947), the Pennsylvania Supreme Court was faced with a situation in which the Court of Common Pleas of Dauphin County had issued a preliminary injunction restraining the defendants from operation of a taxi service without having first obtained certificates of public convenience. At the hearing,

no evidence of irreparable harm was offered. Rather, it was established that the defendant's operations were in violation of the Public Utility Law. In reviewing the action of the lower court, the Supreme Court held:

> At the hearing, the Commonwealth has made a prima facie showing that the defendants are operating taxicabs in violation of law. The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful, it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.
>
> 356 Pa. at 406. (Emphasis Added)

See also, Milk Marketing Board of Commonwealth v. United Diary Farmers Cooperative Association et al., 450 Pa. 497, 299 A.2d 191 (1975) where the Court upheld the issuance of a preliminary injunction restraining the selling of milk below the minimum price established by the Milk Marketing Board, notwithstanding the fact that there was no showing that greater injury would be done by not issuing a preliminary injunction than by granting it. The Supreme Court stated:

> The appellants' second contention, that more people are harmed by the injunction than are benefitted, ignores the existence of the statute. It is true, as stated in the brief of the intervening appellants, that a preliminary injunction will not be issued unless greater injury will be done by refusing it than by granting it. Herman v. Dixon, 393 Pa. 33, 36-37, 141 A.2d 576, 577 (1958). However, the balance between harm and benefit that would ordinarily be performed by an equity court in determining whether a preliminary injunction should be issued has already been done by the Legislature. The situation is quite simple. The Legislature has said that no one shall sell milk in Pennsylvania at a price lower than that established by the Milk Marketing Board. The Legislature also declared that, in the event of a

violation, the Board is entitled to enjoin the illegal activity. There is nothing left for the court to balance. The appellants are selling milk below the minimum permissible price and the law authorizes the Board to enjoin that illegal activity.

As stated by Judge Woodside in the germinal case of Pennsylvania Public Utility Commission v. Israel, 356 Pa. 400, 406, 52 A.2d 317, 321 (1947), "The argument that a violation of law can be of benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful, it is tantamount in law to calling it injurious to the public."

Id. at 504-06. (Emphasis Added; Footnotes Omitted)

The Administrative Law Judge erred, as a matter of law, in finding that there is a public need to continue Applicant's undisputed illegal conduct. Moreover, protestants are not required otherwise to establish financial harm to their operations, or harm to the public, because the harm established, caused by clearly illegal conduct, is per se contrary to the public interest and, therefore, per se harmful competition.

Protestants certainly cannot be required to justify their ability to survive illegal competition. The legislature has already decided that there should not be any such illegal competition. The rewarding of this Applicant by legitimizing his blatant conduct and his demonstrated lack of propensity to operate legally and safely is directly contrary to the terms of the Public Utility Law and Commission regulations.

CONCLUSION

The Administrative Law Judge erred, as a matter of law, in several respects.

The application of Matthew S. Sieber, t/a Sieber Trucking, should be refused as not in the public interest.

Respectfully submitted,

By: _____

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

Counsel for Protestant,
Robert G. Hack

CERTIFICATE OF SERVICE

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

Dated at Harrisburg, Pennsylvania, this 1ST day of August, 1991.

RHOADS & SINON

By: _____

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

Christian V. Graf, Esquire
Graf, Andrews & Radcliff
407 North Front Street
Harrisburg, PA 17101

Christopher Zettlemoyer, Esquire
Reed, Smith, Shaw & McClay
213 Market Street
Harrisburg, PA 17108

CHRISTIAN V. GRAF, P.C.
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TELEPHONE
AREA CODE 717
236-9318

ORIGINAL

AMH

August 6, 1991
File: 1307.0

RE: MATTHEW S. SIEBER, t/d/b/a SIEBER TRUCKING, A. 109497

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

Dear Mr. Rich:

Enclosed please find the original and 9 copies of Applicant's Reply to Exceptions of Robert G. Hack in the above-entitled matter.

As stated on the Certificate of Service, 3 copies have been mailed this date to J. Bruce Walter, Esquire, attorney for Exceptant; to Christopher Zettlemoyer, Esquire, attorney for Gary L. Ramsey Trucking, Inc. and to Judge Cohen and a single copy to the applicant.

Very truly yours,

Christian V. Graf

CVG:tcr
Enclosures

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

Christopher Zettlemoyer, Esquire
Reed, Smith, Shaw and McClay
213 Market Street
Harrisburg, PA 17108

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Mr. Matthew S. Sieber
Sieber Trucking
203 Licking Street
P.O. Box 328
Mifflin, PA 17058

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY
COMMISSION

In Re: Application of MATTHEW S. SIEBER
t/d/b/a SIEBER TRUCKING,
A. 00109497

APPLICANT'S REPLY TO EXCEPTIONS OF ROBERT G. HACK

CHRISTIAN V. GRAF, P.C.
407 North Front Street
Harrisburg, Pennsylvania 17101

Telephone; A.C. 717, 236-9318

DUE DATE: August 15, 1991

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY
COMMISSION

In Re: Application of MATTHEW S. SIEBER,
t/d/b/a SIEBER TRUCKING,
A. 00109497

APPLICANT'S REPLY TO EXCEPTIONS OF ROBERT G. HACK

I.

STATEMENT OF THE CASE

On or about September 13, 1990 the applicant sought the following authority:

> "To transport as a common carrier by motor vehicle wood products from points in the counties of Juniata, Mifflin and Perry to points in Pennsylvania."

On October 1, 1990 applications for emergency temporary authority and temporary authority were filed and both were denied. After Exceptions were filed temporary authority was granted on March 29, 1991 from Perry Pallets in Millerstown, Perry County, to points in Pennsylvania.

Protests were filed on behalf of Gary L. Ramsey Trucking, Inc. and Robert G. Hack as well as Butler Trucking Company. The application was amended on October 16, 1990 so as to provide that no right, power or privilege is granted to perform transportation to points in the county of Clearfield. As a result the protest of Butler Trucking Company was withdrawn.

The matter was heard at Harrisburg on February 4 and March 4, 1991.

The parties filed Briefs and the applicant filed a Reply Brief.

By Initial Decision filed July 15, 1991 Administrative Law Judge Herbert S. Cohen filed his Initial Decision granting applicant the following authority:

> "To transport as a common carrier by motor vehicle wooden pallets, skids and trusses from points in the counties of Juniata and Perry to points in Pennsylvania."

Exceptions were filed by Robert G. Hack, which Exceptions challenged the fitness of applicant, contending:

1. That applicant served each of the shippers in question illegally;

2. That the applicant's operations were illegal in that the lease was not proper;

3. That applicant lacks a propensity to operate safely and legally;

4. That applicant is financially unfit;

5. That the Administrative Law Judge erred in considering evidence of illegal service as evidence of need; and

6. That the Decision legitimatizes harmful and illegal competition.

We will consider these matters in our Answer.

II.

OUTLINE OF ARGUMENT

The Argument herein will be presented under the following headings:

A. The Judge Made no Error in Considering Applicant Fit.

B. The Judge Made no Error in his Interpretation of the Necessity Testimony.

C. The Judge Made no Error in Finding That There was no Evidence That Granting of Authority Would Contravene the Public Interest.

D. Conclusion.

IV.

ARGUMENT

A. THE JUDGE MADE NO ERROR IN CONSIDERING APPLICANT FIT

On the question of fitness the Exceptants aver that "At the time of hearing applicant was serving all of the witnesses in question" (Exceptions, page 2). Nothing could be further from the fact.

Oakland Pallet Company of McAllisterville, Juniata County: its witness testified that he has not used applicant in Pennsylvania (N.T. 79) but has used David Zimmerman Trucking and for extra loads Ramsey Trucking.

Witness Roy Weaver who has formed a new company named J & M Pallets located at R.D. 1, Mifflintown, Juniata County, has not used anyone as yet but considers the availability of applicant's service to be highly beneficial and would be used (N.T. 67).

Perry Pallets, Inc. of Millerstown, Perry County, has used the applicant on a single load on December 27, 1956 and received satisfactory service such as he would expect from a trucking company (N.T. 57). In discussing the Hack service the witness detailed that Hack had turned down a load and when the load was given to Treen's Trucking on a Friday, on Saturday morning Mr. Hack appeared

and cursed the witness for giving the pallets to somebody else. The witness added that that is why he needs other people to haul so that he can rely on somebody else (N.T. 60). He also complained about calls to Hack Trucking and difficulty in securing an answer as to when the vehicle might be available (N.T. 62).

Ridgeview Pallets of R.D. 1, Millerstown, uses Sieber Trucking for interstate traffic and in Pennsylvania under lease with Jay Fulkroad and Sons (N.T. 25, 26). The witness was dissatisfied with Ramsey Trucking because if they couldn't take a load they would call the pallet broker directly, which was unsatisfactory because if the load is not there on time it may be refused which happened once on a shipment to Baltimore, MD. and the load was rejected resulting in a loss of $4,000 (N.T. 28, 29). When she was recalled as a witness she testified that after her lease with Ramsey Trucking was cancelled she asked Mrs. Ramsey if the use of applicant did not work out whether she would be willing to handle the loads of this witness and was told "No. I am not going to take anything more out of this shop" (N.T. 83).

The Plant Manager of Treen Box and Pallet of R.D. 1, Mifflintown, has used the applicant for interstate movements with occasional loads to Pennsylvania points being transported by the applicant through lease with Jay Fulkroad and Sons (N.T. 43, 44). This happened on the average of twice per month and was a consequence of Hack not having vehicles available and because the loads are ordered and must be there at a certain date. If not there the customer is unhappy (N.T. 45, 46).

Truss-Tech of Mifflin, Juniata County, has shipped both beyond Pennsylvania and within Pennsylvania (N.T. 70, 71) with 95 to 98 percent moving to contractors and building suppliers with past Pennsylvania traffic having been handled by Charles Ryan Trucking and the applicant. The applicant has also been used for points beyond Pennsylvania (N.T. 71). Robert G. Hack was called 5 or 6 times for Pennsylvania service in the past and the shipper received no response. Ramsey Trucking was called 4 or 5 times and did not handle any of the loads. The Ryan Company has commenced hauling principally for Agway and put this company on the back burner, which is why the company finally called this applicant to move loads (N.T. 72). The service has been good by the applicant from Virginia on lumber and the availability of applicant's service is needed because his own trailers are only 37 feet long and they can not handle long trusses (N.T. 73).

While service was provided it is evident that it has been provided under the lease with Jay Fulkroad which, by the way, executed two leases, both dated August 28, 1990, before the filing of this application.

Another point worth mentioning is that the applicant was informed he needed interstate operating authority and he immediately applied for it and it was granted. He then checked with present counsel to determine whether authority was needed in Pennsylvania and was advised that it was and applications for permanent authority, emergency temporary authority and temporary authority were filed. In the meantime, and prior to the filing of this application, he worked out the lease arrangement with Jay Fulkroad and Sons, Inc. so that he could continue to provide service in Pennsyvlania (Exhibit 1, page 4). On the question of good faith, we note that when he checked with present counsel he was advised that he needed the authority. He filed for it, including ETA and T/A

both of which were denied, but on Exceptions temporary authority was granted so as to permit service for Perry Pallet from Millerstown, Perry County. The service provided for that account is totally legal.

At page 7 of the Exceptions the comment is made that the applicant has not been properly insured.

A check of the records will reveal that insurance is on file with the Commission covering the temporary authority grant which, far from proving that applicant lacks a propensity to operate safely, confirms the fact that he has, in fact, filed appropriate insurance and intends to maintain it. Further on this point we might observe that there is nothing in this record that reveals the presence of any accidents whatsoever. His safety record has been good and, in fact, Judge Cohen made a specific finding that applicant is adequately insured and conducts a meaningful driver education safety program (at page 15).

The comment is also made that applicant's equipment is not all properly insured. Exhibit A-1 will reveal that his insurance coverage is for $750,000 for public liability and property damage; cargo insurance is $75,000 per load subject to a $1,000 deductible. He also carries uninsured motorist coverage and first-party benefits (Exhibit 1, page 2). His equipment is garaged weekly for inspection, repair and routine maintenance coupled with his 30-day check and a 90-day major inspection. In addition, each driver makes a pre-departure 14-step inspection and any defects are repaired prior to departure. At the end of each run a report of vehicle condition is made and any defects noted thereon are repaired prior to the next run. All new employees take a physical, pass a road test. Investigation is made of the driver's habits and prior driving violation, all of which are checked (See Exhibit 1, page 3). The drivers'

vehicle inspection report and vehicle inspection procedure was attached as Appendix D to Exhibit 1.

The Exceptant also attacks the financial statement but the fact remains that his cash position was in excess of $9,000; his total assets equal $361,000; and he operated at a profit in 1990 of $21,803.52, which reduced his proprietor's equity deficit to $13,788.82. The comment is made that as an owner he did not take salary. As a sole proprietor his profit would constitute salary.

While it is true that applicant's prior uncertificated operations demonstrate negligent conduct, it does not rise to the court-enunciated standard of a persistent disregard for flouting or defiance of the Public Utility Code and the orders and regulations of the Commission, as the Judge found at page 37. The Judge explained in these words:

> "When told he needed authority to continue in his operations applicant retained counsel and took the approriate legal steps to obtain proper certification."

The technical violations of the leasing regulations were not condoned by the Judge, but he stated:

> "This practice, in the event the applicant is denied by this Commission, should cease."

The Judge went on to say:

> "I have given applicant's assertion that he was unaware of the need to obtain authority for his pallet moves and his interim solution of the problem by entering into the Fulkoad leasing arrangement shows a 'good faith' effort; however, technically improper to comply with the law as applicant imperfectly understood it." (page 38).

B. THE JUDGE MADE NO ERROR IN HIS INTERPRETATION OF THE NECESSITY TESTIMONY

Ridge View Pallets was dissatisfied with Ramsey's service which was discontinued on June 2, 1990, and is now securing services from the applicant under the lease with Jay Fulkroad and Sons. He also uses his own authority for interstate traffic (N.T. 25, 26). She named the points to which shipments are made (N.T. 27) and disclosed her reasons for support in that she was dissatisfied with Ramsey Trucking because if they couldn't take a load they would call the pallet broker directly which was unsatisfactory because if the load is not there on time it may be refused, which happened on a shipment to Baltimore, MD and the load was rejected, resulting in a loss of $4,000 (N.T. 28, 29). She also supports because applicant has aluminum trailers which permits a greater volume due to the light weight of the trailers and thus making the freight price per pallet cheaper and more competitive (N.T. 29, 30). Moreover, the applicant's drivers come in and strap down the loads on the vehicles and when Ramsey was used the drivers would not help strap down the loads which frequently resulted in overtime (N.T. 30). In addition, the applicant charges from her facility rather than Mifflintown, saving her money on 8 miles of transportation (N.T. 35).

Treen Box and Pallet has shipped to 112 separate Pennsylvania points, representative points of which were named on the record and extended from Allentown to Pittsburgh; from Bellefonte to Lancaster; including such other points as Tyrone, Wilkes-Barre and York (N.T. 44). Only occasional loads were transported under the Fulkroad lease (N.T. 44) and the service was considered necessary because if loads are ordered they must be at the destination at a certain date and if they are not there the customer is unhappy (N.T. 45, 46).

This shipper lost one account in New York which Hack flatly refused to haul for him, as did Ramsey Trucking (N.T. 46).

Perry Pallet of Millerstown, Perry County, ships to the same basic points as did Treen on approximately 7 loads per week to Pennsylvania points (N.T. 55). Support here is for a backup service because all loads are scheduled and if Hack doesn't have the equipment to meet the needs he must fall back on somebody else. The witness for this company testified that Hack had turned down a load and when the load was given to someone else on a Friday, on Saturday morning Mr. Hack appeared and cursed the witness for giving the pallets to somebody else. The witness added that that is why an additional service is needed that can be relied upon (N.T. 60). The witness also complained about calls to Hack Trucking and difficulty in securing an answer as to when vehicles might be available (N.T. 62).

J & M Pallet of Mifflintown, R.D. 1, Juniata County, is a new operation formed by Roy Weaver who had been in the pallet business before and sold his operation. He expects one or two truckloads per week at this new facility and would call the applicant because he knows the applicant has trucks available to perform and the availability of his service is considered highly beneficial and would be used (N.T. 67).

Truss-Tech, Inc. needs the service because his present principal carrier is hauling basically for Agway and not for Truss-Tech, which resulted in Truss-Tech calling Mr. Sieber to move loads (N.T. 72). Sieber has also been used on interstate traffic to transport lumber from the state of Virginia and the service has been good (N.T. 72, 73). The service is needed because the company's own two trailers are only 37 feet long and cannot handle the long trusses. The service was considered very necessary and would be used two or three times per week.

Oakland Pallet Company of R.D. 2, McAllisterville, Juniata County, has not used the applicant in Pennsyvlania but wants a backup carrier to be available to service Harrisburg, York and New Kensington on which he pays the transportation company from funds received from the pallet broker (N.T. 77). He has used David Zimmerman and for extra loads Ramsey Trucking. The Ramsey service has been only fair because sometimes they pick up the loads and sometimes someone else did (N.T. 79).

When the witness for Ridge View Pallets was recalled she testified that after her lease with Ramsey Trucking was cancelled, she asked Mrs. Ramsey whether in the event the applicant's service did not work out whether Ramsey Trucking would be willing to handle loads and she was informed that they would not take anything out of the shop (N.T. 35). She also specified that there were 31 manufacturing companies in the area (N.T. 83).

On all of this evidence it might be said that the applicant offers a service distinct from that of Hack and Ramsey and tends to correct the service deficiencies for which they are responsible. Accordingly, as Judge Cohen stated at page 35:

> "Moreover, we believe applicant is offering the pallet-truss shipping public an improved type of service which will enable them to operate more competitively in their respective specialized industries."

C. THE JUDGE MADE NO ERROR IN FINDING THAT THERE WAS NO EVIDENCE THAT GRANTING OF AUTHORITY WOULD CONTRAVENE THE PUBLIC INTEREST

The Exceptants contend here that without having shown anything other than a loss of revenue that alone contravenes the public interest.

Protestant Ramsey asserted it lost $50,000 in income and further admitted that Ramsey served Ridge View Pallets prior to initial granting of authority under a lease (N.T. 95, 96). However, the Ridge View witness testified she was not satisfied with Ramsey's service (N.T. 28, 29).

It is worth noting at this stage that with 31 pallet manufacturers in the area involved in the application (N.T. 83) there is no showing that with this backlog of accounts to fall back on that approval of this application would contravene the public interest.

D. CONCLUSION

While Robert G. Hack, through these Exceptions, contends basically that applicant is unfit, it is worthy to note that Witness Hack testified unequivocally that he had operated for 7 years without the requisite authority from this Commission (N.T. 104).

We have shown that the applicant indeed is fit and that the challenges to his fitness come in ill grace from one who operated for 7 years without authority.

We have shown that the applicant, when informed by present counsel that he needed authority from both the ICC and the PUC, applied to the ICC and was granted general commodity authority. It is also true that he filed an application for permanent, ETA and T/A authority and that on Exceptions to the denial of the ETA and T/A applications he was granted authority to serve from Perry County. A tariff has been filed and his insurance is on file under that T/A grant. He operated under a lease which, though imperfectly handled, is not sufficient to provide a propensity to operate illegally. He relied upon that

lease in providing service to the supporting shippers with the two exceptions we have previously named and in the case of Perry Pallets it is significant that he handled only one load in December of 1990 for that shipper. He has an adequate safety program; and adequate insurance consisting of $750,000 public liability and property damage insurance; $75,000 cargo insurance, uninsured motorist coverage and first-party benefits. He has adequte equipment and leases much of it to C. D. Zimmerman of Mifflintown (N.T. 19) and all of his equipment is company-owned; is garaged weekly for inspection, repairs and routine maintenance together with a 30-day check and a 90-day major inspection. His safety program on pre-departure is excellent in that the equipment goes through a 14-step inspection and defects are repaired prior to departure. At the end of each run a vehicle inspection run is submitted and defects are corrected before the unit is used again. All employees are subject to physical examination, road checks, investigation of driver habits and prior violations. Eleven drivers are presently employed and no other drivers would be necessary (Exhibit 1, page 4 and Appendix B thereto). The safety record is good and documentation relating to safety was attached as Appendix D to Exhibit 1 (See also N.T. 3).

It is evident that the proposed service would improve that presently available. In the case of Ridge View Pallets it would make available aluminum trailers which can carry a greater load. His drivers strap down the loads which Ramsey did not. His charges are based from the Ridge View Pallet plant rather than Mifflintown, saving 8 miles of charges. He has served Perry Pallets on one occasion when the existing carrier did not have equipment.

He would serve the new company of J & M Pallets becuase the owner thereof knows his equipment is available. For Treen he has provided interstate and intrastate service under the Fulkroad lease and has provided excellent service in the transportation of lumber from Virginia. He has the proper equipment to handle shipments for Truss-Tech. For Treen he has provided a necessary service on several occasions when Hack did not have vehicles available. The importance of this may be seen in the fact that Treen lost an account in New York which Hack flatly refused to haul for him, as did Ramsey Trucking (N.T. 46).

Oakland Pallets supports for a backup service once per week (N.T. 80). The Hack service was refused on one occasion and the witness for Oakland Pallet Company was told to get somebody else to haul his pallets; that Hack did not have time to do it (N.T. 80).

Finally, on the Ridge View Pallet testimony Ramsey Trucking has flatly refused to take anything more out of that company's shop (N.T. 83).

The protestants complain that they have lost business and Hack contends in its Exceptions that this is automatically a proof that the approval of the application would contravene the public interest. This is simply not the law, nor is it applicable in this case. There are 31 other accounts that Hack could solicit to make up any apparent loss which he feels he has sustained.

The shipping public will benefit from an improved service.

The Exceptions should be denied.

Respectfully submitted,

Christian V. Graf, Esquire

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded copies of the foregoing "Applicant's Reply to Exceptions of Robert G. Hack" to those set forth below by U.S. First Class Mail, postage prepaid.

Dated this 6 day of August, 1991.

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