



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

AMH

March 29, 1991

IN REPLY PLEASE
REFER TO OUR FILE

A-109497

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

Application of Matthew S. Sieber, t/d/b/a Sieber Trucking; Mifflin,
Juniata County; Exceptions to Tentative Decision Denying Temporary
Authority.

To Whom It May Concern:

Enclosed is an Order granting emergency temporary authority
issued by the Commission in this proceeding.

Prior to beginning operations under this grant of authority,
it will be necessary for you to obtain public liability and property
damage insurance coverage and arrange for your insurance company to
submit proof of coverage (a Form E) to the PUC. Minimum insurance
limits are shown on the back of this sheet.

Very truly yours,

Jerry Rich, Secretary

**DOCUMENT
FOLDER**

cc:applicant
Matthew S. Sieber
203 Licking Street
Mifflin, PA 17058

lg

Enclosures
Certified Mail
Receipt Requested

Contact Person

Insurance: James McCarthy (717) 787-5933

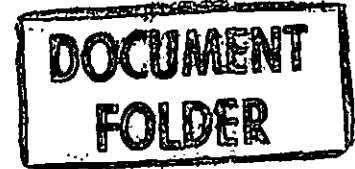
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MAY 24 1991

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held March 22, 1991

Commissioners Present:

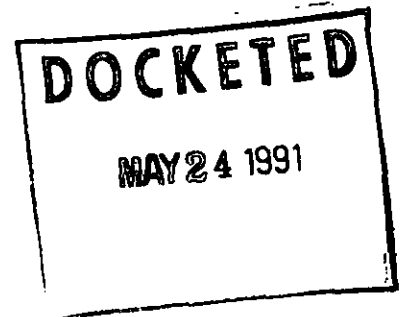
William H. Smith, Chairman
Joseph Rhodes, Jr., Vice-Chairman
Frank Fischl, Commissioner
Wendell F. Holland, Commissioner
David W. Rolka, Commissioner



Application of Matthew S. Sieber,
t/d/b/a Sieber Trucking; Mifflin,
Juniata County; Exceptions to
Tentative Decision Denying Temporary
Authority.

Docket No.
A-00109497

Christian V. Graf, Esquire,
for Applicant Sieber.



Christopher Zettlemoyer, Esquire,
for Protestant Ramsey Trucking.

J. Bruce Walter, Esquire,
for Protestant Hack.

O R D E R

BY THE COMMISSION:

Now before the Commission for disposition are the exceptions of Applicant Matthew S. Sieber, t/d/b/a Sieber Trucking (Sieber) to the Commission's December 11, 1990 Tentative Decision which denied Sieber's application for temporary authority. Also before the Commission for disposition are the reply exceptions of Protestant Gary L. Ramsey Trucking, Inc. (Ramsey) and Protestant Robert G. Hack (Hack), which were filed in response to Sieber's exceptions. For the following reasons, we grant in part and deny in part the exceptions of Applicant Sieber and the reply exceptions of Protestants Ramsey and Hack.

On October 3, 1990, Sieber simultaneously filed applications for emergency temporary authority (ETA) and temporary authority (TA). Sieber's TA application was published in the Pennsylvania Bulletin on October 20, 1990, and protests to the TA application were filed by Ramsey and Hack. Sieber also filed a permanent authority application which was published in the Pennsylvania Bulletin on October 6, 1990.

Sieber's ETA application was denied due to a lack of shipper support establishing an immediate need for Sieber's proposed service. Inasmuch as Sieber's TA application was identical to Sieber's ETA application and Sieber's TA application was duly protested, Sieber's TA application was denied by a Tentative Decision adopted December 6, 1990 and entered December 11, 1990. Applicant Sieber's timely exceptions to the Tentative Decision are now before the Commission for resolution along with the timely reply exceptions of Protestants Ramsey and Hack.

The grant of TA is a form of extraordinary relief afforded only under unusual circumstances in which the public will otherwise be without necessary transportation. See 52 Pa. Code §§ 3.383-.384. In accordance with subsection 1103(d) of the Public Utility Code, the Commission has established regulations at 52 Pa. Code §§ 3.383-.384 which outline an applicant's burden of proof for TA applications. As explained in section 3.384, an applicant for TA must demonstrate (1) an immediate need for transportation in the area covered by the TA application and (2) the applicant's fitness to provide the proposed transportation.

Proof of an immediate transportation need may be based upon the "failure of existing carriers to provide service . . . [but] [a]n immediate need will not normally be found to exist where there are other carriers capable of rendering the service unless it is determined that there is a substantial benefit to be derived from the initiation of a competitive service." 52 Pa. Code § 3.384(b)(2); Application of White Line Taxi and Transfer Co., A-00000990, F.5 (order adopted June 25, 1987, entered July 10, 1987); Application of Leaseway Deliveries, Inc., A-00105056, F.602 (order adopted April 9, 1987, entered April 9, 1987).

Nonspecific, broad, conclusory statements of supporting shippers do not satisfy the mandates of subsection 3.383(c)(3)(ii) or subsection 3.384(b) because they lack any definite details which would permit the Commission's verification of the supporting shippers' averments regarding the unwillingness or inability of existing carriers to fulfill the supporting shippers' transportation needs. The Commission's requirement for more exact information regarding the supporting shippers' needs vis-a-vis existing carriers' services stems both from the Commission's responsibility "to develop and preserve a safe highway transportation system properly adapted to the needs of the commerce of this Commonwealth and insure its availability between all points of production and markets of this Commonwealth," 66 Pa. C.S. § 2501(a), and from the authorized carriers' duty to render service to the public in accordance with

the carriers' Commission-issued operating authority. E.g., 66 Pa. C.S. §§ 501 and 3301.

In his exceptions, Sieber attempts to provide additional shipper support for his TA application in order to establish an immediate need for his proposed transportation. As noted earlier, Sieber's original TA application was identical to Sieber's ETA application which was denied. By supplementing his original TA application, Sieber impliedly concedes that his original TA application was deficient and did not establish an immediate need for his proposed transportation.

We strongly discourage the use of exceptions to establish the evidentiary record in a case. The proper method for building a record is to adhere to the Commission regulation at 52 Pa. Code § 3.383 which gives a detailed analysis of the information to be provided in an applicant's statement and in the statements of shippers supporting the applicant's request for TA. Nevertheless, in accordance with 52 Pa. Code § 1.2, we shall evaluate the additional information provided in Sieber's exceptions under the TA criteria enumerated in sections 3.383 and 3.384. We note that the Protestants' substantive rights are not adversely affected by our consideration of the supplemental data included in Sieber's exceptions since the Protestants were afforded an opportunity to challenge the additional information by filing reply exceptions. 52 Pa. Code § 5.535.

In their reply exceptions, both Protestants contend that even the supplemental supporting shipper statements contained in Sieber's exceptions lack sufficient specificity to form the basis for a grant of TA. With one qualification, we agree with the Protestants.

In our December 11, 1990 Tentative Decision, we denied Sieber's TA application on three grounds: (1) the failure of supporting shippers to identify service problems at points within the operating territory requested by Sieber, (2) the failure of supporting shippers to identify any current service problems, and (3) the failure of supporting shippers to name existing carriers that failed to provide them service. In his exceptions, Sieber provides supplemental data from three supporting shippers: Ridge View Pallets (Ridge), Treen Pallets (Treen), and Perry Pallet (Perry).

In their supplemental statements, Ridge and Perry enumerate particular points throughout Pennsylvania to which they have had difficulty obtaining prompt deliveries. These supporting shippers' supplemental statements are sufficiently specific to satisfy the requirements of subsection 3.383(c)(3)(ii)(B) and subsection 3.384(b)(1). Treen's supplemental statement does not name any particular points in Pennsylvania to which it requires the shipment of pallets. Thus,

Treen's supplemental statement is too vague to satisfy the requirements of subsection 3.383(c)(3)(ii)(B) and subsection 3.384(b)(1).

The supplemental statements of shippers Ridge, Treen and Perry describe the shippers' ongoing problems in finding carriers that are available to deliver loads in the time frames required by the respective shippers. At a minimum, these supporting shippers' supplemental statements satisfy the criteria of subsection 3.383(c)(3)(ii)(F)-(G). See also 52 Pa. Code § 3.384(b)(3).

In part, these supplemental statements also provide information required by subsection 3.383(c)(3)(ii)(H) and subsection 3.384(b)(2)-(3) concerning whether the supporting shippers have tried to obtain service from existing carriers and the results of the shippers' efforts. However, the supplemental statements of Ridge and Treen are too general to satisfy fully the criteria of subsections 3.383(c)(3)(ii)(H)-(I) and 3.384(b)(2)-(3) because the statements do not include any specific data which the Commission can independently verify to determine whether or not existing carriers are neglecting their duty to provide service or cannot meet the demand for service. For example, while Ridge and Treen claim that "all the present carriers" are unable to meet their transportation needs, Ridge and Treen do not identify the names of carriers that were actually contacted by them but were unwilling or unable to satisfy their service requirements. Moreover, the supporting shipper statements of Ridge and Treen do not indicate any explanations concerning why the existing carriers cannot fulfill Ridge's and Treen's transportation needs.

By contrast, Perry's supplemental statement contains details absent from the supplemental statements of Ridge and Treen. Perry identifies Hack as its primary carrier but complains that Hack cannot deliver all of Perry's loads at the necessary times. See 52 Pa. Code § 3.383(c)(3)(ii)(H)-(I) and 3.384(b)(2)-(3). Furthermore, Perry explains that it has an increased need for transportation because it is in the process of expanding its business and augmenting its production capacity. See 52 Pa. Code §§ 3.383(c)(3)(ii)(C), (E)-(G) and 3.384(b)(2).

Given the imprecision of Ridge's and Treen's supplemental statements concerning existing carriers' services and Treen's failure to designate specific points in Pennsylvania where it has not received adequate transportation services, we conclude that Sieber has not established an immediate need for his proposed service to shippers Ridge and Treen. However, we conclude that the exactitude of the information provided in Perry's supplemental supporting statement warrants a grant of TA for Sieber to serve Perry pending a determination of Sieber's application for permanent authority.

For the purpose of clarification, we shall also address two other issues raised by the Protestants. First, Protestant Ramsey incorrectly argues that Sieber's TA application must be denied because the supporting shippers failed to describe specifically their efforts to obtain service from authorized carriers other than the Protestants. We have repeatedly held that because TA proceedings offer an opportunity for protests to be submitted by existing carriers, "little if any weight should be accorded the interest of carriers which may be able to render service, but which do not protest the TA application. Therefore, although the existence of available carriers is a relevant factor to determining an ETA application [which is ex parte in nature], it does not control the determination of a TA application [which is adversarial in nature]." Application of Samuel Coraluzzo Co., Inc., A-00107600, F.2 (order adopted December 17, 1987, entered December 31, 1987) at 2 (quoting Application of Charles S. Creighton, t/d/b/a 5C Delivery Service, A-00106772 (order adopted July 24, 1986, entered August 11, 1986) at 2.

Second, Protestant Hack correctly argues that, in Sieber's exceptions, Sieber misconstrues the scope of Hack's operating authority. We agree with Hack that, contrary to Sieber's summarization of Hack's authority, Hack is not limited to transportation on behalf of Treen "only from Huntingdon, Clinton and Blair Counties to the Treen facilities in Mifflin County." Sieber's Exceptions, para. 11, at 4.

By an order adopted May 10, 1990 and entered May 17, 1990 at A-00108883, we granted Hack operating authority:

To transport, as a Class D carrier, pallets and lumber between points in the counties of Juniata, Perry, Snyder and Mifflin, and from points in said counties to points in Pennsylvania and vice versa;

subject to the following conditions:

That no right, power or privilege is granted to provide service from points in the counties of Clearfield, Erie, Centre, Lycoming and Union;

That no right, power or privilege is granted to provide service from points in the counties of Clinton, Huntingdon and Blair except for Treen Box & Pallet Corp. to its facilities in Mifflin County.

Based upon the quoted grant of authority, Hack may, inter alia, transport pallets and lumber to points in the

counties of Juniata, Perry, Snyder and Mifflin, from any point in Pennsylvania except from points in the counties of Clearfield, Erie, Centre, Lycoming, Union, Clinton, Huntingdon, and Blair although it may transport pallets and lumber for Treen from the counties of Clinton, Huntingdon and Blair to Treen's facilities in Mifflin County. In short, Hack may transport pallets and lumber to Treen's facilities in Mifflin County from any point in the Commonwealth except from points in the counties of Clearfield, Erie, Centre, Lycoming and Union. Additionally, Hack may, inter alia, transport pallets and lumber, on behalf of Treen, between points in the counties of Juniata, Perry, Snyder and Mifflin, and from points in these four counties to points in Pennsylvania. Accordingly, Hack's authority to serve Treen is much broader than Sieber acknowledged in Sieber's exceptions.

In conformity with the evidentiary criteria of sections 3.383 and 3.384, we shall grant Sieber TA to serve supporting shipper Perry and shall therefore partially grant and partially deny Sieber's exceptions and the reply exceptions of Protestants Ramsey and Hack.

THEREFORE, IT IS ORDERED:

1. That the exceptions of Applicant Matthew S. Sieber, t/d/b/a Sieber Trucking to the Commission's December 11, 1990 Tentative Decision at A-00109497 are hereby granted in part and approved in part in accordance with 52 Pa. Code §§ 3.383-3.384, to include the following authority:

To transport, as a common carrier by motor vehicle, wood products from the facilities of Perry Pallet, Millerstown, Perry County, to points in Pennsylvania.

2. That the exceptions of Applicant Matthew S. Sieber, t/d/b/a Sieber Trucking to the Commission's December 11, 1990 Tentative Decision at A-00109497 are hereby denied in all other respects without prejudice to the right of Applicant Matthew S. Sieber, t/d/b/a Sieber Trucking to file another application for temporary authority and to supply detailed statements in support thereof. See 52 Pa. Code §§ 3.383-.384.

3. That the action taken on this application for temporary authority shall have no bearing on the application for permanent authority. See, e.g., 52 Pa. Code § 3.384(c)(3); 66 Pa. C.S. § 1103(d).

4. That the authority granted herein, to the extent that it duplicates authority now held by or subsequently granted to Matthew S. Sieber, t/d/b/a Sieber Trucking, shall not be construed as conferring more than one operating right.

5. That Matthew S. Sieber, t/d/b/a Sieber Trucking shall not engage in any transportation granted herein until Matthew S. Sieber, t/d/b/a Sieber Trucking has complied with the requirements of the Public Utility Code and the Commission's rules and regulations regarding the filing and acceptance of a tariff establishing just and reasonable rates and the filing of evidence of insurance. E.g., 52 Pa. Code §§ 3.385 and 32.1-.16.

6. That in the event Matthew S. Sieber, t/d/b/a Sieber Trucking has not, on or before sixty (60) days from the date of service of this order, complied with requirements herein stated, the application of Matthew S. Sieber, t/d/b/a Sieber Trucking for temporary authority at A-00109497 shall be dismissed without further proceedings.

BY THE COMMISSION,


Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: March 22, 1991

ORDER ENTERED: MAR 29 1991