

ORIGINAL

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April 3, 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, PA 17120

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APR 3 1991

SECRETARYS OFFICE
Public Utility Commission

Dear Mr. Rich:

Pursuant to instructions given for the filing of Briefs in the above-entitled case we enclose herewith the original and 9 copies of Brief on Behalf of Applicant.

As stated on the Certificate of Service we are serving 3 copies of this Brief upon opposing counsel and upon Judge Banzhoff and 2 copies to the Applicant.



Very truly yours,

Christian V. Graf
Christian V. Graf

CVG:tcr
Enclosures

cc: Harry Banzhoff,
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

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Public Utility Com.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY
COMMISSION

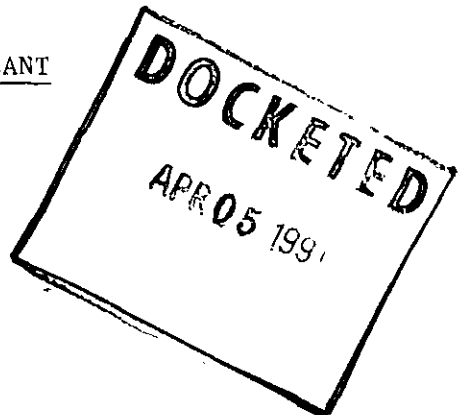
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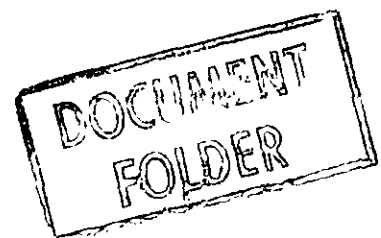
In Re: Application of MATTHEW S. SIEBER,
t/d/b/a SIEBER TRUCKING,
A. 00109497

BRIEF ON BEHALF OF APPLICANT



GRAF, ANDREWS & RADCLIFF, P.C.
Christian V. Graf, Esquire
David H. Radcliff, Esquire
407 North Front Street
Harrisburg, Pennsylvania 17101

DUE DATE: April 19, 1991



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY
COMMISSION

In Re: MATTHEW S. SIEBER,
t/d/b/a SIEBER TRUCKING

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:
:

A. 00109497

BRIEF ON BEHALF OF APPLICANT

I.

STATEMENT OF THE CASE

By application filed on or about September 13, 1990, the applicant herein 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 or about October 1, 1990 an application for temporary authority and ETA, both of which were denied. By Order on Exceptions T/A was granted on March 29, 1991 from Perry Pallet, Millerstown, Perry County, to points in Pennsylvania.

Protests were filed on behalf of Gary L. RAsmey Trucking, Inc. and Robert G. Hack as well as Butler Trucking Company.

By amendment forwarded to the Commission and to the parties under date of October 16, 1990 the application was amended by the addition thereto of the following:

"PROVIDED 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.

Due to the protests the matter was set for hearing and heard at Harrisburg on February 4, 1991, at which time applicant testified producing 7 witnesses and introducing the partial testimony of the applicant as Exhibit 1. A second hearing was held at Harrisburg on March 4, 1991 for protestants' presentation, at which time testimony was received from Carol Ramsey, Robert G. Hack and in rebuttal by the applicant, Matthew S. Sieber. At the second hearing applicant presented, on request, as Applicant's Exhibit 2 a Certificate of Insurance; as Exhibit 3 data with respect to cargo coverage; as Exhibit 4 a lease for 2 units and as Exhibit 5 a lease for one unit. The protestants appeared through the partial testimony as Ramsey Exhibit No. 1 and Hack Exhibit No. 1.

At the conclusion of the hearing permission was granted for the filing of these Briefs under the due date of April 19, 1991.

II.

ABSTRACT OF TESTIMONY

Applicant's Case

Matthew S. Sieber, t/d/b/a Sieber Trucking, has registered the fictitious name with the Department of State (Appendix F. Exhibit 1). While he has no intrastate authority his application for ETA and T/A having been denied,^(*) he does have a Certificate from the Interstate Commerce Commission at MC-22350, Sub 1 (Exhibit 1, N.T. 1, Appendix A), which Certificate permits the transportation of general commodities with the usual exceptions between points in the U.S. except AK and HI.

(*) By Order on Exceptions T/A was granted on March 29, 1991 from Perry Pallet, Millerstown, Perry County, to points in Pennsylvania.

His terminal is located at 203 Licking Street, Mifflin, PA, and consists of a cement block and brick front 2-bay structure with attached office at which he maintains an official inspection station. The building measures 45 ft. x 60 ft. with parking front and rear. All record-keeping is computerized and he has telephone facilities, a garage capable of performing all major repairs and staffed by 2 mechanics. No additional terminal would be required (Exhibit 1, page 2).

He operates 9 tractors and 14 trailers (Appendix B, Exhibit 1). One of the trailers is a van and 13 are flatbed units (Exhibit 1, page 2). Five of these units, however, are leased to C.D. Zimmerman of Mifflintown (N.T. 19), and 2 of the units are leased to Jay Fulkroad & Sons, Inc. (N.T. 19, Exhibits 4 & 5). All are company-owned (N.T. 6).

Applicant carries insurance for public liability and property damage in the amount of \$750,000 and cargo insurance of \$75,000 per load, subject to a \$1,000 deductible. He also carries uninsured motorist coverage and first-party benefits (Exhibit 1, page 2).

The equipment is garaged weekly for inspection, repair and routine maintenance, coupled with a 30-day check and a 90-day major inspection.

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 are repaired prior to the next run. All new employees are subject to a physical exam, pass a road test; investigation of driver habits and prior traffic violations, all of which are checked.

Traffic violations or equipment abuses have been grounds for past dismissal. The safety record is good and documents relating to safety were attached as Appendix D to Exhibit 1 (N.T. 3).

No duplicate authority and no dual operations are involved (page 3, Exhibit 1).

Eleven drivers are employed and no additional drivers would be necessary (Exhibit 1, page 4 and Appendix 5).

Mr. Sieber frankly admitted that he commenced operations in interstate commerce and in Pennsylvania in the belief that he did not need that authority. When informed that he needed interstate authority he immediately applied for it and it was granted. When one of the protestants advised him that he needed authority in Pennsylvania he checked with present counsel who advised him that authority was needed and he immediately filed for permanent authority, followed by ETA and T/A. In the meantime he worked out a lease arrangement with Jay Fulkroad & Sons, Inc. whereunder he leased his equipment to that carrier so he could continue to provide service in Pennsylvania and has been running under that lease ever since (Exhibit 1, page 4). From the financial standpoint a Balance Sheet and Profit & Loss Statement for the year 1990 was attached as Appendix G to Exhibit 1. These documents reveal that as to the balance sheet he had a cash position in excess of \$9,000 and total assets of \$361,923.16. His Income Statement reveals that during the year of 1990 he operated at a profit of \$21,803.52 which reduced his proprietorship capital deficit to \$13,788.82. Accordingly, he was of the opinion that approval of the application would eliminate the deficit situation (Exhibit 1, page 5).

Jill A. Becker, Secretary of Rockland Ridge Farms, Incorporated, d/b/a Ridgeview Pallets of R.D. 1, Mifflintown, a pallet manufacturer, ships both beyond Pennsylvania and within Pennsylvania (N.T. 25, 26). She now uses Sieber Trucking for interstate work and she uses them within Pennsylvania under lease with Jay Fulkroad & Sons.

A list of destination points to which this company has shipped in the past include Bethlehem, Brockway, Boyertown, Berwick, Aston, Allentown, Denver, Hazleton, New Castle, Lebanon, Lansdowne, Mechanicsburg, Hamburg, Lampeter, Laureldale, Harrisburg (N.T. 26); Mountain Top, New Oxford, Morrisville, Trexlertown, Stowe, Pittston, Philadelphia, Quakertown, Reading, West Point, Whitehall, Wrightsville, York and Columbia (N.T. 27).

In the past 2 years, which were the first two years of business, Ramsey Trucking was used, as were Eddie Mayes and Garrison. 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 and the pallets are still back at the witness's shop with no customer in sight (N.T. 28, 29). She needs the service because the applicant has aluminum trailers which permit her to carry a greater volume due to the light weight, which makes the freight price per pallet cheaper and makes her company more competitive in the pallet market (N.T. 29, 30). The service would be used at least once per week and perhaps more frequently. Between interstate and intrastate the applicant is used from 5 to 7 loads per week and the service has been excellent. For example, the applicant's drivers come in and strap down the trucks. When Ramsey was used the drivers would sit in the truck and would not help strap down the load

which frequently resulted in overtime (N.T. 30). Now with 2 trailers allotted to her while one is out on the road the other can be loaded directly off the nailing machine and is set and ready to go. On broker's loads the broker assigns this company whatever loads he sees fit and if the applicant doesn't have the authority to get into Pennsylvania, then the witness cannot load those loads into Pennsylvania (N.T. 31).

On cross-examination the witness indicated that she had called Robert Hack once for a Baltimore load and he was unable to supply it because he was full up (N.T. 31). She also admitted that she had never seen a filed tariff by any of the carriers. She also reiterated her testimony that the aluminum trailers enable her to carry more traffic and added that Sieber charges on a Fulkroad lease from her facility rather than from Mifflintown saving her money on 8 miles of transportation (N.T. 35). When asked why if the applicant does not receive the authority requested there would be any difference in the service, the witness replied that if the applicant has only 2 trucks leased to Fulkroad and she needed 3 loads going out she would be stuck with the third load (N.T. 36).

Robert Sheaffer, the Plant Manager of Treen Box and Pallet of R.D. 1, Mifflintown, arranges transportation for all of the outbound pallets shipped from his Mifflintown, Juniata County, facility (N.T. 42, 43). He ships both beyond Pennsylvania and within Pennsylvania and has used Sieber Trucking for the interstate movements. The list of points in Pennsylvania numbers 112 of which the witness named as representative points Allentown, Bellefonte, Bristol, Carnegie, Connellsville, Conshohocken, Downingtown, Fairless Hills, Gettysburg, Harrisburg, Lancaster, Lititz, Logan's Ferry, Mechanicsburg, New Cumberland, Philadelphia, Pittsburgh, Punxsutawney, Tyrone, West Chester, Wilkes-Barre and York (N.T. 44). The Pennsylvania traffic ranges from 12 to 15 loads per week

mostly moving by Hack Trucking with occasional loads being transported by the applicant through the lease with Jay Fulkroad & Sons (N.T. 44). The service is considered necessary because on several occasions Hack did not have vehicles available and the applicant was used. This occurred on the average of twice per month, but when it happens it is important to have Sieber Trucking available because the loads are ordered and they must be there at a certain date. If the loads are not there the customer is unhappy and they have to run 2 loads or deliver them at night (N.T. 45, 46). He has lost one account in New York which Hack flatly refused to haul for him, as did Ramsey Trucking (N.T. 461).

The Sieber service has been very good and is the type of service that is desired and would be used (N.T. 46). Treen Box and Pallet has trailers which the haulers pull with their own equipment (N.T. 48) though there are 2 permanently leased units driven by employees of Treen which sometimes haul loads (N.T. 49). The witness has not asked Ramsey Trucking because they rejected him on the New York State load (N.T. 52).

Donald Sheaffer, a part owner of Perry Pallet, Inc., testified his company has a manufacturing facility in Millerstown, Perry County, at which point pallets are manufactured and shipped to the same points as mentioned by the previous witness because all of their production is manufactured for Treen who pays for the pallets, finds the customers and pays Perry Pallet for the transportation which, in turn, Perry Pallet pays the hauler (N.T. 54, 55). The same points of destination as applied for the prior witness apply since they have over 100 destinations. Approximately 7 loads per week go to Pennsylvania points (N.T. 55). Treen has delivered some loads, as had protestant Hack, as has the applicant who handled a load on December 27th (N.T. 56). He appeared in support for a

backup service because it is needed due to the fact that all loads are scheduled and if Hack doesn't have equipment to meet the needs he must fall back on somebody else. Sieber's service on the one load he handled was what he would expect from a trucking company (N.T. 57). On cross-examination the witness details an instance where Hack had turned down a load and when the load was given to Treen's trucks on a Friday and Saturday morning Mr. Hack appeared and, as the witness stated:

"...Mr. Hack is down there in my face cursing me out to no end why I'd give a load of pallets away, you know, to somebody else. And that's what I'm not going to put up with."

He added:

"...that's why we need other people to haul, so we can, you know, rely on somebody else."

And he added again:

"...I ain't going to tell you he is going to get it all." (N.T. 60)

Further on cross-examination and with respect to the Hack service, he stated:

"...when you do call up to Hack's you're calling the garage and some mechanic answers the phone and you cannot get no answer until later on that afternoon; they have no dispatcher and evidently nobody to keep records because if you need a truck at the spirit of the moment there's nobody to give you that decision whether they can give you three tomorrow or two. I think they should be able to tell you a little bit, maybe not right down to the truck, but you would know how to run your business." (N.T. 62).

Hack is doing an 80% good job (N.T. 63).

Roy Weaver has been in the pallet business for some time and is not currently manufacturing pallets (N.T. 64) but has formed a company named J & M Pallet which expects to commence operations in 1991. He is the only owner of the business having sold his prior pallet business in 1989. The shop is located at R.D. 1, Mifflintown, Juniata County, and the shop has been built and 80% of the equipment has been purchased (N.T. 65). He expects one or two truck-loads per week at this new facility and customers will be located through pallet brokers such as Remmy Wood Products, Robison Pallet, Acme Pallet, Albany Pallet, Stroudsburg Pallet (N.T. 66). He will call the trucking company and pay for the freight and is familiar with the applicant, Mr. Sieber; knows that he has trucks available to perform and the availability of his service is considered highly beneficial and would be used, maybe once or twice per month (N.T. 67). When asked whether he would check with the existing carriers, he said he probably won't because of the small volume (N.T. 68, 69).

Randall Pellman of Truss-Tech, Mifflin, Juniata County, is the Manager and is familiar with the transportation requirements of his company which manufactures wooden roof trusses which are shipped both beyond Pennsylvania and within Pennsylvania (N.T. 70, 71). Ninety-five to 98% move to contractors and building suppliers and past Pennsylvania traffic has 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 he received no response. Ramsey Trucking was called four or five times and did not handle any of the loads (N.T. 72). As far as the

Ryan Company they began hauling principally for Agway and put this company on the back burner which resulted in them finally getting hold of Mr. Sieber to move loads (N.T. 72). He has shipped in the past to Mechanicsburg, Camp Hill, Carlisle, Dillsburg, Harrisburg, State College as principal points (N.T. 72). The service has been very good as has his service from Virginia on lumber. He needs the availability of the applicant's service because his own two trailers are only 37 feet long and they cannot haul 45-foot to 65-foot long trusses (N.T. 73). During the summer months and fall months he would use the applicant two or three times per week and feels the service is very necessary (N.T. 74).

Daniel Wingert, a partner in Oakland Pallet Company of R.D. 2, McAllisterville, Juniata County, testified his company ships 6 or 7 loads of wooden pallets per week to points in New Jersey and Pennsylvania, with the Pennsylvania traffic going to Harrisburg, York and New Kensington. He pays the transportation company from funds received from the broker (N.T. 77). Some of the pallet brokers he has worked with are Acme Pallet, Treen Pallet, Albany Pallet and Woodville (N.T. 78). He calls the trucking company and he calls David Zimmerman Trucking and his extra loads he calls Ramsey Trucking. The Ramsey response to service has only been fair because sometimes they took the loads and sometimes somebody else picked them up. He has not used the applicant in Pennsylvania but wants a backup service available which would be used to the three points he named (N.T. 79), which points are served approximately once per week (N.T. 80). While he used the Hack service once he doesn't regularly call Hack because on one occasion Mr. Hack called him back and told him to get someone else to haul his pallets; that he did not have time to do it (N.T. 80).

Jill A. Becker was recalled and testified that when the lease with Ramsey Trucking was cancelled she asked Mrs. Ramsey that if the use of applicant did not work out whether she would be willing to handle the loads of this witness and she replied "No, I am not going to take anything more out of this shop." She also testified that there are 31 pallet manufacturers in the 3-county area (N.T. 83).

Protestants' Evidence

Carol L. Ramsey appeared for Gary L. Ramsey Trucking, Inc. and her basic testimony was via Ramsey Exhibit 1, in which she states she had 18 years experience in the trucking business and received authority at Docket A. 108324 as a contract carrier on February 9, 1989 (Ramsey Exhibit 1, page 1, and Exhibit A) which permitted service for Rockland Pallets, Inc., Ridge View Pallets, J Box and Lumber, Oakland Pallets and J&N pallet Company. This authority was changed to common carrier at Folder 2 on January 24, 1991 (Ramsey Exhibit 1, page 2, Exhibit B). The significant thing about this authority is that it does not authorize service from Perry County nor does the upgraded authority permit service for Truss-Tech. She also holds interstate authority; owns 8 tractors and 8 flatbed trailers and 2 vans; carries appropriate insurance and the equipment is used primarily for the transportation of wood pallets. Her records reveal that for the 14 months from January 1990 through February 1991 they hauled approximately 30 loads of pallets per week from shippers located in Juniata, Mifflin and Huntingdon Counties and testified that there are approximately three spare units available every day. She averred there had been no complaints and admitted that she terminated the service to Ridge View Pallets on June 2, 1990 (Ramsey Exhibit 1, pages 3, 4) and indicated that she lost \$50,000 in income when she lost the Ridge View Pallet business.

She also stated that she had spoken to Mr. Sieber advising him that he needed authority on May 4, 1990.

On cross-examination she admitted that she transported for Ridge View Pallets prior to the grant of her initial authority on February 9, 1989 under a lease which was in effect for a year or a year and a half, though she was unsure about whether she had served any of the other companies listed in her contract carrier authority, stating she would have to check her records (N.T. 95, 96). She had no financial data with her to show what her total revenue was in the years 1988, 1989 and 1990 and, accordingly, her Annual Reports for 1988 and 1989 were incorporated into the record by reference (N.T. 97). She had no revenue figures with her, nor did she have a good estimate of how much her revenues would have been (N.T. 99).

Robert G. Hack also testified by use of Hack Exhibit No. 1 wherein he identified his authority, both PUC and ICC; his terminal facility near Middletown; the description of his equipment which consists of 8 tractors, 3 van trailers and 10 flat trailers; and 90% of his revenue is in the transportation of pallets. He has a safety program and transports 15 to 20 loads per week serving Treen Box and Pallet and Perry Pallet and has provided limited service to Oakland Pallet Company. He cannot serve Truss-Tech (Pages 1, 2, 3, Hack Exhibit 1). More importantly, he stated that Ridge View Pallets closed down on February 27, 1991.

His authority covers the counties of Juniata, Perry, Snyder and Mifflin on pallets and lumber and was initially issued May 17, 1990 at Docket A. 108883 (See also N.T. 102). He brought with him no financial statements to establish

whether his statement that he had less than \$50,000 debt was correct (N.T. 103). He admitted that he had hauled pallets prior to the grant of his authority on May 17, 1990 for a period of 7 years (N.T. 104). Though he stated in his prepared testimony that Jordan Trucking and Butler Trucking have authority to provide the transportation Applicant seeks he had never seen the authority (N.T. 103).

Applicant's Rebuttal

Mr. Sieber was recalled to challenge the statement Mr. Hack made at page 4 of his prepared testimony that Ridge View Pallets closed on February 27, 1990. Mr. Sieber testified on March 4, 1991 that he had hauled a load for them that day and had a load scheduled for the next day (N.T. 105, 106).

III.

STATEMENT OF QUESTIONS INVOLVED

A. IS APPLICANT FIT, READY, WILLING AND ABLE TO SERVE?

Answered in the affirmative.

B. IS THERE A NEED FOR HIS PROPOSED SERVICE?

Answered in the affirmative.

C. HAVE THE PROTESTANTS ESTABLISHED THAT APPROVAL WOULD BE CONTRARY TO THE PUBLIC INTEREST?

Answered in the negative.

IV.

OUTLINE OF ARGUMENT

The argument herein will be presented under the following headings:

- A. Applicant is fit, ready, willing and able to provide the proposed service.
- B. Applicant has established need for his proposed service.
- C. Protestants have failed to indicate that approval would be contrary to the public interest.
- D. Conclusion.

V.

ARGUMENT

A. APPLICANT IS FIT, READY, WILLING AND ABLE TO PROVIDE THE PROPOSED SERVICE

Matthew S. Sieber, t/d/b/a Sieber Trucking Company, has registered his fictitious name with the Department of State (Appendix F, Exhibit 1). He possesses a Certificate from the Interstate Commerce Commission at Docket MC-22350, Sub 1 (Appendix A to Exhibit 1) which permits the transportation of general commodities with the usual exceptions between points in the U.S. except AK and HI.

The applicant has no current permanent intrastate operating authority but had applied for both ETA and T/A, both of which were denied, but by Order on Exceptions temporary authority was granted on March 29, 1991 from Perry Pallet, Millerstown, Perry County, to points in Pennsylvania.

Applicant's terminal is located at 203 Licking Street, Mifflin, PA, and consists of a cement block and brick front, 2-bay structure, with attached office and also contains an official inspection station. The building measures 45 x 60 ft. with parking front and rear; has telephone facilities, a garage capable of performing all major and minor repairs staffed by two mechanics. All record-keeping is computerized (Exhibit 1, page 2).

From the equipment standpoint Applicant operates 9 tractors and 14 trailers (Appendix B, Exhibit 1). Of the 14 trailers 13 are flatbed units and one is a van (Exhibit 1, page 2). Five of the units are leased to C. D. Zimmerman, Mifflintown (N.T. 19) and 3 units are leased to Jay Fulkroad & Sons, Inc. (N.T. 19, Exhibits 4 and 5). All of this equipment is company-owned (N.T. 6).

Applicant has public liability and property damage in the amount of Seven hundred fifty-thousand (\$750,000) Dollars, cargo insurance of Seventy-five thousand (\$75,000) Dollars per load subject to a One thousand (\$1,000) Dollar deductible. He also carries uninsured motorist coverage and first-party benefits (Exhibit 1, page 2).

All of the equipment is garaged weekly for inspection, repair and maintenance, coupled with a 30-day check and a 90-day major inspection. From the personnel standpoint each driver makes a pre-departure 14-step inspection and any defects disclosed are repaired prior to departure. At the end of each run a report of vehicle condition is entered and any defects noted thereon are repaired prior to the next run. All new employees are subject to a physical exam, pass a road test; investigation of driver habits and prior traffic violations, all of which are checked. The safety record is good and documents relating to safety were attached as Appendix D to Exhibit 1 (See page 3 of Exhibit 1). No duplicate authority and no dual operations are involved in this matter (Page 3, Exhibit 1).

Eleven drivers are currently employed and no additional drivers would be necessary (Exhibit 1, page 4 and Appendix 5).

Financially the Balance Sheet and Profit and Loss Statement for the year 1990 which was attached as Appendix G to Exhibit 1 reveals that Applicant had a cash position in excess of \$9,000 and total assets of \$361,923.16. His Income Statement reveals that during 1990 he operated at a profit of \$21,803.52.

From all of these aspects Applicant has met the burden of proof of fitness in accordance with Merz WhiteWay Tours v. Pa. PUC, 204 Pa. Sup. Ct. 43 (1964).

The Applicant admitted quite candidly that he had commenced operations in interstate commerce and in Pennsylvania in the belief that he did not need that authority. When informed that he needed interstate authority he immediately applied for it and it was granted. When one of the protestants advised him that he needed authority in Pennsylvania he checked with present counsel who advised him that authority was indeed required and he filed for permanent authority followed by applications for ETA and T/A. In the meantime he worked out a Lease Agreement with Jay Fulkroad & Sons, Inc. whereunder he leased his equipment to that carrier so that he could continue to provide service in Pennsylvania and has been running under that authority ever since (Exhibit 1, page 4). For copies of the leases see Exhibits 4 and 5 (See also Exhibit 1, page 4).

It may be argued that these operations are improper since Applicant initially lacked authority to provide service and subsequently entered into a Lease Agreement. On this point we would also point out that by Order entered March 29, 1991 temporary authority was granted to the Applicant to serve Perry Pallets from Mifflintown, Perry County, to points in Pennsylvania.

The prior operations without authority should not act as a bar to approval for several reasons. In Brink's, Incorporated v. Pa. PUC, 456 A.2d 1342 at 1344, the Court stated:

"Our case is clear that, although a favorable finding of fitness may not be based upon evidence of the quality of service conducted in willfull violation of a court order or the Commission's authority, the mere fact of prior operation in violation of a court order or the Commission's authority does not preclude a carrier from obtaining lawful authority in a subsequent proceeding before the Commission. See Bunting Bristol Transfer, Inc. v. Pa. P.U.C., 418 Pa. 286, 210 A.2d 281 (1965); D. F. Bast, Inc. v. Pa. P.U.C., 397 Pa. 246, 154 A.2d 505 (1959). See also Gettysburg Tours, Inc. v. Pa. P.U.C., 42 Pa. Cmwlt. 399, 400 A.2d 945 (1959); Johnstown-Pittsburgh Express v. Pa. P.U.C., 5 Pa. Cmwlt. 521, 291 A.2d 545 (1972); Lancaster Transportation Co. v. Pa. P.U.C., 181 Pa. Super. 129, 124 A.2d 380 (1956). Thus, while WFB's continuing to haul money in deliberate disregard of the Commonwealth Court's order gave rise to a negative inference concerning Brooks' fitness, the Commission could still have granted the requested contract carrier authority without abusing its discretion, so long as the Commission had before it positive evidence of Brooks' fitness independent of the evidence relating to the period of unlawful operation. (3).

and Footnote 3 referred to therein stated the justification for this rule as follows:

3. The justification for the rule permitting the acquisition of contract carrier rights despite past unlawful operations is evident. The essence of public utility regulation is to assure that the public's needs are best served at the most reasonable rates. If past unlawful operations were deemed conclusive of an applicant's fitness, the Commission would be powerless to grant the application of a carrier who, despite its past unlawful activities, has otherwise demonstrated its present fitness to perform services beneficial to the public. Such as automatic disqualification, moreover, would improperly view the Commission's statutory obligation to determine an applicant's fitness prior to granting a contract carrier permit as a punitive measure directed against the individual wrongdoer rather than as a safeguard, the primary purpose of which is the protection of the public. See 66 Pa. C.S. §2501."

This case has applicability for several important reasons. Initially when it was disclosed to him that he needed interstate authority he applied for it and it was granted. When it was further disclosed to him that he needed authority from Pennsylvania he immediately applied for permanent authority followed by subsequent application for ETA and T/A. When both were denied he filed Exceptions, whereupon the Commission, on March 29, 1991, granted him temporary authority to serve Perry Pallets from Mifflintown, Perry County, to points in Pennsylvania. In the meantime he also sought out an authorized carrier and entered into two leases with that carrier so that he could continue to provide service in Pennsylvania pending action on his application for permanent authority. These elements clearly establish good faith consistent with the cases and such action is justified here under Brink's, supra. See also Gettysburg Tours, Inc. v. Pa. P.U.C., 42 Pa. Cmwlth Ct. 399; 400 A.2d 945 (1979).

B. APPLICANT HAS ESTABLISHED NEED FOR HIS PROPOSED SERVICE

As proof of necessity the Applicant presented a number of public witnesses, the first of whom was Jill A. Becker, Secretary of Rockland Ridge Farms, Incorporated, d/b/a Ridge View Pallets, of R.D. 1, Middletown, a pallet manufacturer which ships both beyond Pennsylvania and within Pennsylvania (N.T. 25, 26). She now uses Sieber Trucking for interstate traffic and in Pennsylvania under lease with Jay Fulkroad & Sons.

In the past Ridge View Pallets has shipped to such points as Bethlehem, Brockway, Boyertown, Berwick, Aston, Allentown, Denver, Hazleton, New Castle, Lebanon, Lansdowne, Gettysburg, Hamburg, Lampeter, Laureldale, Harrisburg, (N.T. 26) Mountain Top, New Oxford, Morrisville, Trexlertown, Stowe, Pittston, Philadelphia, Quakertown, Reading, West Point, Whitehall, Wrightsville, York and Columbia (N.T. 27).

Since the inception of its business two years ago Ramsey Trucking was used together with Eddie Mayes and Garrison. The witness expressed dissatisfaction 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. This happened on a shipment to Baltimore, MD, and the load was rejected, resulting in a loss of \$4,000 (N.T. 28, 29).

The service is needed for several reasons, among which is the fact that Applicant has aluminum trailers which would permit a greater volume due to the light weight of the trailers, thus making the freight price per pallet cheaper and her company more competitive (N.T. 29, 30). Another reason why the service is needed is that Applicant's drivers come in and strap down the loads on the vehicles and when Ramsey was used the driver would not help strap down the loads, which frequently resulted in overtime (N.T. 30). The service would be used at least once per week and perhaps more frequently (N.T. 30). The witness also stated that Sieber charges from her facility rather than Mifflintown, saving her money on 8 miles of transportation (N.T. 35).

The second witness was Robert Sheaffer, Plant Manager of Treen Box and Pallet of R.D. 1, Mifflintown, Juniata County, who arranges transportation of all the outbound pallets shipped from his facility (N.T. 42, 43). He uses Sieber Trucking for interstate movements and has shipped to a total of 112 Pennsylvania points, representative of which are the destinations of Allentown, Bellfonte, Bristol, Carnegie, Connellsville, Conshohocken, Downingtown, Fairless Hills, Gettysburg, Harrisburg, Lancaster, Lititz, Logan's Ferry, Mechanicsburg, New Cumberland, Philadelphia, Pittsburgh, Punxsutawney, Tyrone, West Chester, Wilkes-Barre and York (N.T. 44). The Pennsylvania traffic ranges from 12 to

15 loads per week, mostly moving by Hack Trucking, with occasional loads being transported by Applicant under his lease with Jay Fulkroad & Sons (N.T. 44). This shipper has trailers which the transporters haul with their own equipment (N.T. 48), though there are presently two permanently-leased units driven by employees of Treen which sometimes haul loads (N.T. 49).

The service is considered necessary because on several occasions Hack Trucking did not have vehicles available and Applicant was used on the average of twice per month. The use of Sieber Trucking is important because if the loads are ordered they must be there at a certain date and if they are not the customer is unhappy and they have to run two loads or deliver them at night (N.T. 45, 46). Treen has lost one account in New York which Hack flatly refused to haul for him, as did Ramsey Trucking (N.T. 46).

The third witness, a part owner of Perry Pallet, Inc., Donald Sheaffer, testified his company has a manufacturing facility at Millerstown, Perry County, at which shipments are made of pallets. All of the production is manufactured for Treen Box & Pallet, which company pays for the pallets, finds the customer and pays Perry Pallet for the transportation which Perry Pallet in turn pays to the hauler (N.T. 54, 55). The same points of destination as were mentioned by the Treen witness are applicable here and approximately 7 loads per week go to Pennsylvania points (N.T. 55). Applicant handled a single load on Dec. 27th (N.T. 56). Support here was for a backup service because all loads are scheduled and if Hack Trucking doesn't have equipment to meet the needs he must fall back on somebody else. The Sieber service on the one load he handled was what he would expect from a trucking company (N.T. 57).

On cross-examination the witness detailed that Hack had turned down a load and when the load was given to Treen's trucks on a Friday, on Saturday morning Mr. Hack appeared and cursed the witness for giving the pallets away to someone else, adding that that is why we need other people to haul so we 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 vehicles might be available (N.T. 62).

It is this company for whom the temporary authority was granted on March 29, 1991.

The fourth witness, Roy Weaver, had been in the pallet business before and sold the operation but has formed a new company named J & M Pallet, of which he is the sole owner. His shop is located at R.D. 1, Mifflintown, Juniata County. The shop has been built and 80 percent of the equipment has been purchased (N.T. 65). He expects one to two truckloads per week at this new facility and customers will be located through pallet brokers (N.T. 66). He will call the trucking company and pay for the freight and is familiar with the applicant; knows that he has trucks available to perform and the availability of his service is considered highly beneficial and would be used perhaps once or twice per month (N.T. 67).

Randall Pellman of Truss-Tech of Mifflin, Juniata County, stated his company manufactures wooden roof trusses which are shipped both beyond Pennsylvania and within Pennsylvania (N.T. 70, 71). Ninety-five to 98 percent moves to contractors and building suppliers and past Pennsylvania traffic has been handled by Charles Ryan Trucking and the Applicant. The Applicant has also been used for points beyond Pennsylvania (N.T. 71).

He called the Hack service 5 or 6 times for Pennsylvania service and received no response. He also called Ramsey Trucking 4 or 5 times without success (N.T. 72). The Ryan Company began hauling principally for Agway and has placed this company on the back burner, which resulted in them finally getting hold of Mr. Sieber to move loads (N.T. 72).

Past shipments have gone to Mechanicsburg, Camp Hill, Carlisle, Dillsburg, Harrisburg and State College as principal points (N.T. 72). The service has been good as rendered by Applicant, as has his service from Virginia on lumber. The service is needed because this company's own two trailers are only 37 ft. long and cannot handle the 45 ft. to 65 ft. long trusses (N.T. 73). During the summer or fall months he would use the applicant two or three times per week and feels the service is very necessary (N.T. 74).

Oakland Pallet Company of R.D. 2, McAllisterville, Juniata County, appeared through its partner, Daniel Wingert, who testified his company ships 6 to 7 loads of wooden pallets per week to points in New Jersey and Pennsylvania with the Pennsylvania traffic being destined to Harrisburg, York and New Kensington. He pays the transportation company from funds received from the pallet broker (N.T. 77).

He calls the trucking company, using David Zimmerman Trucking, and for extra loads Ramsey Trucking. The Ramsey response to service has only been fair because sometimes they took the loads and sometimes somebody else picked them up. He has not used the applicant in Pennsylvania, but wants a backup service available which would be used to the 3 points he named (N.T. 79), which points are served approximately once per week (N.T. 80). He has used

the Hack service once but doesn't regularly call Hack because on one occasion Mr. Hack called him back and told him to get somebody else to haul his pallets because Hack did not have the time to do it (N.T. 80).

Jill Becker was recalled and testified that when the 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 was informed that they are not going to take anything more out (N.T. 83).

From the cases certain principles can be established, among which are:

An applicant need not establish a public demand for the proposed service in every point in the requested operating authority. [See Morgan Drive Away v. Pa. P.U.C., etal, 328 A.2d 194; Blue Bird Coach Lines, Inc., A. 00088807, Folder 2, Am-K, order entered April 27, 1990; Zurcher v. Pa. P.U.C., 173 Pa. Sup. Ct. 343; Carl R. Bieber v. Pa. P.U.C., 3 Pa. Cmwlth. Ct. 236; 281 A.2d 351 (1971)].

Here the witnesses indicated the points to which they need service, explained that the service was necessary and explained why and added that the service would be used, designating the number of times per week or month that it would be used. A finding that the service is necessary is warranted by the cases cited.

C. PROTESTANTS HAVE FAILED TO INDICATE
THAT APPROVAL WOULD BE CONTRARY TO THE PUBLIC INTEREST

The testimony received from Carol L. Ramsey for Gary L. Ramsey Trucking, Inc. discloses initially that her authority originally granted on February 9, 1989 has a contract carrier service; and the authority granted on January 24, 1991

as a common carrier does not authorize service from Perry County, nor permit service for Truss-Tech, two of the supporting shippers herein. Though she claimed that she had lost \$50,000 in income when she lost the Ridge View Pallet business (Exhibit 1, pages 3, 4) she did not present any financial data showing what her total revenue was; had no revenue figures with her; nor did she have a good estimate of how much her revenues would have been (N.T. 95, 96, 99). She also admitted that she had served Ridge View Pallets prior to the grant of her initial authority under a lease, but was unsure about whether she served any of the other companies prior to her grant of authority (N.T. 95, 96). She also did not present any figures anywhere as to the extent of the service she was providing any of the supporting witnesses.

Robert G. Hack admitted that his authority was initially issued on May 17, 1990 (N.T. 102) but further admitted that he had hauled pallets prior to the grant of his authority for a period of 7 years (N.T. 104). He indicated he had served Treen Box and Pallet; Perry Pallet and limited service to Oakland Pallet Company in the movement of 15 to 20 loads per week (Hack Exhibit 1, pages 1, 2 3) and further admitted that he could not serve Truss-Tech. He brought with him no financial data, either to show what losses, if any, he had sustained but further could not show that his testimony that he had less than \$50,000 debt was correct (N.T. 103). Though he stated in his prepared testimony that Jordan Trucking and Butler Trucking have authority to provide the transportation Applicant seeks, he admitted that he had never seen the authority (N.T. 103).

Mr. Hack also stated that Ridge View Pallets closed down on February 27, 1991 but this was rebutted by Mr. Sieber who testified that as recently as March 4, 1991 he had hauled a load for them that day and had a load scheduled for the next day (N.T. 105, 106).

The significant thing about the testimony of these witnesses is that they failed to show any adverse impact upon their companies by referring to their own financial records, but spoke in generalities. Neither of these protestants has met the burden of proving the threat of unrestrained and destructive competition contrary to the public interest as set forth in 52 Pa. Code 41.14(c). The cases have also held that no carrier has a right to be guaranteed freedom from competition (Mobile Phone of Northeastern Pennsylvania, Inc., 73 Pa. Cmwlth Ct. at 351; 458 A.2d at 1037). It has also been held that the existence of adequate service by opposing carriers (which they by no means have established) does not preclude the grant of a Certificate [Seaboard Tank Lines, Inc. v. Pa. P.U.C., 93 Pa. Cmwlth. Ct. 601, 611; 502 A.2d 762 (1985)].

When we couple this with the cases that have held that the extent of competition to be permitted is within the discretion of the Commission, we find ample justification for approval [See Ruettger v. Pa. P.U.C., 164 Pa. Sup. Ct. 388, 392 (1949); Pennsylvania P.U.C. v. Pa. Radio Telephone Corp., 20 Pa. Cmwlth Ct. 591 (1975)].

It must be assumed that these protestants did not meet the burden of proof imposed upon them by 52 Pa. Code 41.14(c) or the cases herein cited.

D. CONCLUSION

The Applicant is fit, ready, willing and able to perform. It has an ICC Certificate; it has been granted temporary authority to serve Perry Pallets; it has proper terminal facilities and sufficient equipment and driver personnel to operate it; it is financially sound; it has an effective safety program; and it would need neither additional equipment, terminals or employees to serve.

While it admittedly provided transportation without authority, when informed that the authority was necessary it applied for same, including ETA and T/A and ICC authority which was subsequently granted. It also entered into a lease with Jay Fulkroad & Sons, Inc., an authorized carrier, to enable it to continue to provide the service while its application was being heard. It has provided service under that lease consistently ever since.

Applicant clearly is fit.

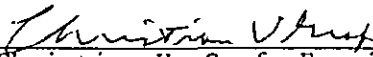
The Applicant presented public witnesses who attested uniformly to the satisfactory nature of the service; who named the points of destination to which service is needed and gave their reasons therefor and uniformly indicated that the service would be used, specifying the number of times it would be used. Some of them expressed dissatisfaction with one or both of these protestants and gave their reasons therefor, including availability of proper equipment which enables larger loads to be transported; assistance in loading and lack of outbursts when someone else was afforded the traffic.

Clearly, the service is needed.

The protestants both admitted that they had provided service without authority prior to the grant of their authority, one of them for 7 years; admitted that they had brought with them no financial information from which their contentions of loss of business and status of debt could be ascertained; gave no indication whatever as to the impact which approval would have upon not only their own operations but upon the general public; and failed to establish in any way consistent with 52 Pa. Code 41.14(c) that there was a threat of unrestrained and destructive competition contrary to the public interest.

The application should be approved.

Respectfully submitted,

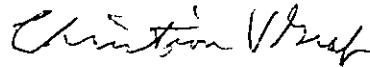


Christian V. Graf, Esquire

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded copies of the foregoing "Brief on Behalf of Applicant" to those set forth below by U.S. First Class Mail, postage prepaid.

Dated this 3rd day of APRIL 1991.



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*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

April 12, 1991

RECEIVED

APR 15 1991

SECRETARY'S OFFICE
Public Utility Commission

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

Dear Secretary Rich:

Enclosed you will please find an original and nine (9) copies of the Brief of Robert H. 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

Enclosure

cc: Administrative Law Judge Harry Banzhoff
Christian V. Graf, Esquire
Christopher Zettlemyer, Esquire

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APR 15 1991

SECRETARY'S OFFICE
Public Utility Commission

Before the
Pennsylvania Public Utility Commission

A.109497

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

BRIEF OF ROBERT G. HACK
PROTESTANT IN OPPOSITION

DOCUMENT
FOLDER

DOCKETED
APR 22 1991

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Due Date: April 19, 1991

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I. HISTORY OF CASE

Applicant seeks authority to transport as follows:

Application of Matthew S. Sieber, t/a Sieber Trucking. Right to transport, as a common carrier, wood products from points in the counties of Juniata, Mifflin and Perry, to points in Pennsylvania.

A protest was filed by Robert G. Hack and by Gary L. Ramsey Trucking, Inc. Hearings were held on February 4, 1991 and March 4, 1991. At the close of the proceedings, the Administrative Law Judge directed that main briefs be filed on or before April 19, 1991.

II. SUMMARY OF TESTIMONY

Applicant, Matthew S. Sieber: On Applicant's equipment list, trailer number 102A is a van trailer and the rest are flatbed trailers, N.T. 6. Tractor numbers 400, 137, 142, 436, 433, and 419 are covered by security interest, as are all of the trailers of Applicant, N.T. 7. The van trailer identified on Applicant's equipment list was the only trailer identified as being insured, N.T. 8, Appendix C to Exhibit 1, and Exhibits 2 and 3, N.T. 9. The request for supplemental insurance, N.T. 9, resulted in the provision of Applicant's Exhibit's 2 and 3. Applicant is not sure whether worker's compensation is reflected in his financial statement, N.T. 10. There is no question that Applicant began to provide intrastate service in 1990 without authority, N.T. 11, Applicant's Exhibit 1, page 4. Applicant has been involved in the trucking business since May of 1982, N.T. 12, but was not aware of any of the regulatory requirements imposed upon the trucking

industry, N.T. 12. Applicant did not know over eight years that there was a difference between intra and interstate transportation, N.T. 12. Applicant claims a lease with J. Fulkroad & Sons, Inc., N.T. 13. The lease covered 2 vehicles, an 87 International and a 77 International, N.T. 13. No additional tractors were leased to Fulkroad, N.T. 13. Applicant bills the shipper directly, N.T. 13 and 14, and Fulkroad does not bill them and, by implication, Fulkroad does not bill the shipper. The bills of lading produced do not identify J. Fulkroad & Sons, N.T. 14. Applicant currently is operating under a deficit situation, N.T. 15, and it does not anticipate that the grant of the application will eliminate the deficit, N.T. 15. Despite operating under the lease, Applicant had made no arrangement for revenue sharing between J. Fulkroad & Sons and himself, N.T. 15. Applicant does not know the source of the notes payable and long term debt in his financial statement, N.T. 16. Applicant was advised by a number of people, as early as June or July of 1990, that he needed authority. No application was filed with the Commission until October 3, 1990 (temporary authority, with the permanent authority being filed on September 13, 1990).

Witness Jill Becker does business as Ridgeview Pallets, N.T. 25. Witness currently uses Sieber Trucking, N.T. 26. Witness is largely unable to detail her traffic since she deals with a broker mainly "he gives me whatever loads he sees fit", N.T. 31. Applicant, Sieber, is providing all of witnesses' transportation

right now, N.T. 32-33. Witness is unaware of the filed tariff or schedule of rates for any of the carriers she has dealt with, N.T. 34. Witness is actually receiving the service from Applicant right now at the rate she has agreed upon, N.T. 35-36. Witness does not call Fulkroad currently to dispatch the loads, but rather call Sieber directly, N.T. 37. Witness generally only uses one of Sieber's drivers, N.T. 38.

Witness Robert Schaeffer representing Treen Box & Pallet, N.T. 42. Witness currently uses Sieber Trucking beyond Pennsylvania, N.T. 43. Witness is using Hack Trucking, but will occasionally call Applicant, N.T. 44. Witness also has drivers on his payroll, N.T. 49. Witness has had no direct contact with Fulkroad, N.T. 50. Witness does not expect the grant of the authority to change anything, N.T. 50. Witness currently calls Applicant for one of its vehicles and, if the Commission grants authority, witness "does not think there will be anything different, except it would be more legal".

Witness Donald Schaeffer, N.T. 53, representing Perry Pallet. Witness currently uses the services of Matt Sieber, Applicant, N.T. 56. Witness did not pay Fulkroad & Sons, but paid Sieber when he uses his service, N.T. 59. Witness did not inquire into any arrangement that was made with Fulkroad, N.T. 59. Witness can and, in fact, does use Applicant currently, N.T. 61.

Witness Roy Weaver, N.T. 64. Witness is not currently manufacturing pallets. Witness expects to do a "little volume", N.T. 68, not requiring any other carriers.

Witness Randall Pellman, N.T. 70, of Truss Tech, Inc. Witness ships wooden roof trusses and currently uses Applicant, N.T. 71. Witness uses Sieber's services currently and pays service to Sieber directly, N.T. 74. Witness does not ship pallets or lumber outbound, N.T. 74.

Witness Daniel Wingert, N.T. 76, of Oakland Pallet Company, N.T. 77. Uses 2 carriers (Zimmerman and protestant, Ramsey (N.T. 78), as well as protestant, Hack (N.T. 80). Would use Applicant only as a backup.

Testimony of Robert G. Hack, Protestant (N.T. 99, Hack Exhibit 1). Protestant can transport "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 certain conditions (N.T. 102) at a certificate issued at A.108883. Intrastate transportation amounts to 15-20 loads per week (Exhibit 1, page 3).

III. DISCUSSION

The Public Utility Code Act of July 1, 1978, P.L. 598, No. 116 §1 66 Pa. C.S.A. §1103(a), provides in part that:

"A certificate of public convenience shall be granted by order of the Commission, only if the Commission shall find or determine that the granting of

such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public ..."

More detailed criteria are set forth at 52 Pa. Code §41.14. Initially an Applicant for a certificate of public convenience carries the burden of providing (1) a public need for the proposed additional service, and (2) the capacity of the Applicant to satisfactorily meet the need. Pennsylvania Public Utility Commission v. Pennsylvania Radio Telephone Corp., 20 Pa. Cmwlth. Ct. 592, 342 A.2d 789 (1975); Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission, 18 Pa. Cmwlth. Ct. 114, 334 A.2d 806 (1975); Seiferd v. Pennsylvania Public Utility Commission, 12 Pa. Cmwlth. Ct. 85, 315 A.2d 320 (1974).

The initial issue presented is the failure of the Applicant to show public need for additional or new service. Applicant is, on this record, now actually performing the service applied for. Applicant has to choose whether the service he is now and continually performing is legal or not. Having chosen to rest his case on the theory that current service by Applicant for each public witness is legal, there can be no finding of a need for additional authorized service.

(a) On This Record No Public Need For New Service Exists

The testimony of witnesses who only express a preference for Applicant's service does not establish need. Amram Enterprises, Ltd., A.100531, F.1, Am-C, Commission Order adopted February 15, 1985.

Applicant has presented only witnesses who currently use its service, with the possible exception of Oakland Pallet and Roy Weaver, who each were unable to establish or quantify any need at all.

Applicant has not established need from any point in Juniata, Mifflin or Perry County, authorized to Robert Hack, which is not now being provided by Applicant under claimed legal operations.¹ There is, therefore, no testimony in the record concerning the need for additional or new service. Consider:

(1) No mention of traffic of any kind is established by competent evidence of new traffic not being performed by Applicant, other than the vague possibility of backup service for Oakland Pallet in McAlisterville or Roy Weaver. No volume figure was provided for this alleged traffic.

(2) One witness who did testify established no need at all because he has no traffic currently or need for other carriers in the future (Roy Weaver, N.T. 64, 68).

(3) Each and every witness is currently having his or her needs met by the Applicant and others, or in the case of Oakland Pallet, three (3) carriers.

(4) There is only one witness from one point in Perry County (Donald Schaeffer, N.T. 53).

It is well established, and not altered or limited in any fashion by 52 Pa. Code §41.14, that any new operating authority granted must be limited to transportation from points testified to by public witnesses on the record. See, Application of McCutcheon Transfer, Inc., 44 Pa. P.C.U., 697 (1970).

¹The Hack authority does not cover the wooden trusses of Truss Tech, Inc. (N.T. 70).

The Transportation Regulatory Policy of the Commission, 52 Pa. Code §41.14, makes it clear that the Applicant must meet the fundamental requirement of establishing public need. Applicant has merely presented evidence of service it is now providing. There is no evidence of need for new or additional service. Since the record established by Applicant is devoid of any proof of what the public might need in the way of additional or new authority, the Applicant has failed to establish public need. This application cannot be granted.

Applicant has failed to prove a public demand or need. As stated in Lehman Trans. Corp., et al. v. Pa. P.U.C., 153 Pa. Super. 303 (1943) at 307-308, reversing a gratuitous grant of authority where the Applicant failed to establish need for such authority:

But neither policy, nor discretion resting in the Commission can justify an order without substantial evidence in support of it, establishing not only demands for additional service but a need extending throughout the area to which the order applies. It does not follow from evidence of need for additional service between specific points that existing transportation facilities are inadequate between all points within an area or that inadequacy exists in adjacent territory as to which there is no evidence. (Emphasis Added)

Although the Applicant has called witnesses, an examination of the testimony reveals that the testimony presented fails to rise to the level of substantial evidence to support any grant of additional or new operating authority. As the Commonwealth Court stated in Dutchland Tours v. Pa. P.U.C., 19 Pa. Cmwlth. Ct. 1, at page 7:

Substantial evidence is such relevant and competent evidence having a rational probative force which a reasonable mind might accept as adequate to support a conclusion.

This is not a question of whether the Applicant must establish testimony with regard to every little hamlet and borough. The Applicant has simply failed to establish such testimony with regard to any traffic it claims it cannot now perform and is performing. Nor is the evidence of record traffic which is representative of additional need, because the record discloses only existing service being performed by Applicant, not public demand or need for any new service.

There is not a shred of evidence that the Applicant's proposal will meet any new or additional public demand or need because, on this record, there is no specific and competent evidence of public demand or need for new or additional service.

On the record, Applicant has been providing all of the transportation which it currently seeks to use as support for this application. If the Commission finds Applicant's conduct to be legal, then Applicant will continue to provide the same transportation, whether or not this application is granted.

(b) Mere Desire To Use Applicant Does Not Establish Public Need

Mere desire to utilize a carrier is not the equivalent of need, even if the testimony reached any actual service need which Applicant is not now providing. As stated in Silver Line, Inc., 50 Pa. P.U.C. 500 (1978):

"[2] A few of the supporting shippers desire that another carrier be available as a supplementary carrier, even though there are already other carriers available. As stated in Coastal Tank Lines, Inc. et al. v. Pennsylvania Public Utility Commission (1960), 193 Pa. Super. 22, 25:

"... Under the established law, the Commission cannot grant additional authority for the sole purpose of creating competition and without reference to need ..."

In Motor Freight Express et al. v. Pennsylvania Public Utility Commission (1958), 188 Pa. Super. 80, the Commission said:

"... This record is barren of any evidence that the existing carriers are either unable or unwilling to meet any reasonable demands for service that may be made upon them. And while Applicant, quite naturally, desires to perform the service requested and the shipper desires to obtain the services of the Applicant, neither the desire to serve nor the desire to obtain the Applicant's services is sufficient to grant the Applicant." (Emphasis Added).

The mere preference of a public witness, especially where that traffic is already being handled by Applicant, cannot establish public need. See, E. J. Breneman, Inc., at A.107248 by Administrative Law Judge Christianson, opinion dated February 23, 1989. See, Wiley v. Pennsylvania Public Utility Commission, 186 Pa. Superior Ct. 309, 317-318, 142 A.2d 763, ____ (1958); Application William Grimm, t/d/b/a Johnstown-Pittsburgh Express, 38 Pa. P.U.C. 81, 84 (1960); Application of Chapman Johnson, Sr. t/a Johnson Trading Company, 50 Pa. P.U.C. 696 (1977).

This result is not changed by the Commission's Blue Bird Coach Lines Order. See, Bird Coach, supra, at pages 18-19. See

also, Blue Bird Coach Lines, supra, at 21-23. The public witness testimony in Blue Bird, pages 25-53 is clearly for service Blue Bird was not authorized to perform and was not performing. More importantly, the Commission, at pages 54-55 of the decision, confirms the "basic precept in Pennsylvania motor carrier law" that a motor carriers cannot hold duplicating operating authority. It seems obvious that if such authority cannot be held, transportation already being performed cannot be used as evidence of public need for additional, but duplicating, authority. This result is confirmed by the E. J. Breneman decision cited above.

(c) Applicant Is Not A Fit Applicant As A Result Of Illegal Service And Service Under Lease Being Performed In An Illegal Manner

Protestants do not accept Applicant's theory that his current service is lawful.

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 with callous disregard for Commission rules and lacks the propensity to act legally. 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.

As stated in the Application of Blue Bird Coach Lines, Inc., A.88807, F.2, Am-K, entered April 27, 1990:

"Under the new criteria at Section 41.14, a motor common carrier Applicant now has a bipartite burden of proof. Subsection 41.14(a) places upon an Applicant the "burden of demonstrating that approval of the application will serve a useful public purpose, responsive to a public demand or need." Subsection 41.14(b) places upon an Applicant the "burden of demonstrating that it possesses the technical and financial ability to provide the proposed service." Subsection 41.14(b) also contains the caveat that operating "authority may be withheld if the record demonstrates that the Applicant lacks a propensity to operate safely and legally." Together, the evidentiary criteria at Subsection 41.14(a) and 41.14(b) constitute an Applicant's prima facie burden of proof in an application proceeding to acquire motor common carrier authority."

The Commission also has a mandate to protect the public interest by preventing unrestrained and destructive competition

amongst motor carriers. This burden has been re-emphasized the Blue Bird Coach Lines, Inc. decision at page 12 thereof, citing Seaboard Tank Lines, Inc. v. Pennsylvania Public Utility Commission, 93 Pa. Cmwlth. Ct. 601, 611, 502 A.2d 762, 766 (1985) and other cases. Illegal service is a prima facie case for such irreparable harm and destructive competition. See, Pa. PUC v. Israel, 356 Pa. 400 (1947), discussed at p. 17, infra.

At page 15 of the Blue Bird decision, the Commission has repeated that §41.14(b) provides that "operating authority may be withheld if the record demonstrates that the Applicant lacks a propensity to operate safely and legally." Blue Bird also found that §41.14(b) constitutes an Applicant's prima facie burden of proof in an application proceeding to acquire motor common carrier authority.

In the Blue Bird decision, 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. 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 but, 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).

(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 carrier² (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 basis.

The record does not permit a conclusion to be drawn on the question of "good faith". The Commission should not reward a shipper or a carrier who is so willing to ignore legal requirements (or, at a minimum, is ignorant of the requirements) and who

²Not only does Applicant not pay required assessments to the Commission, the carrier he claims to lease to does not because it receives no revenue and, without some sort of accounting, has no way to report any such revenue.

demonstrates a complete propensity to thumb its nose at this Commission's requirement of legal operation in public service.

It will be argued that the determinative criterion is not illegal operation, per se, but whether the unauthorized service was performed in good faith. Bunting Bristol Transfer, Inc. v. Pa. PUC, 418 Pa. 286, 210 A.2d 281 (1965); D. F. Bast v. Pa. PUC, 397 Pa. 246, 154 A.2d 505 (1959); Dutchland Tours, Inc. v. Pa. PUC, 19 Cmwlth. Ct. 1, 337 A.2d 922 (1975); Daily Motor Express v. Pa. PUC, 183 Pa. Super. 120, 130 A.2d 234 (1957). A review of the record in this case reveals substantial evidence requiring a finding of bad faith, and the Commission should deny the application. There have been continued illegal operations. The method of operation established on this record does not come close to being legal. They have not been 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 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.

The temporary authority of this Applicant was initially denied by decision dated December 11, 1990. He continued to operate as of the date of the hearing, February 4, 1991.

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 deed, if current operations are legal, why bother to apply for temporary authority? This Application should be denied.

(d) A Grant Of This Application Would Legitimize Harmful Competition

The Commission must consider 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. The revenues of protestants based on the service now performed by the Applicant have decreased. This is attributed directly to the illegal diversion of traffic by Applicant. A grant of this application could result in an additional loss of revenue (quantification thereof being admittedly difficult).

A denial of the application will cause no public injury. The public will continue to receive adequate and reliable transportation service from Robert Hack and others and the public, which benefits by Hack's services, will continue to be able to rely thereon.

The Applicant at the present time has no legitimate investment in serving the public. It is equally clear that the protestants who provide service, who have made the investment in facilities and equipment to provide service to the citizens of Pennsylvania, and who pay their required assessments to the Commission, in contrast to the Applicant, have demonstrated potential economic hardship as a result of the grant of an application which diverts that traffic, especially in an application proceeding devoid of any evidence of public need for new service.

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 has not done so. Applicant has provided the complained of service on a regular basis in direct contravention of the Public Utility Law. The services thus are clearly unlawful.

(e) 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 Dairy 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)

Applicant may not argue that there is a public need to continue its illegal conduct. Moreover, protestant need not otherwise establish financial harm to its 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. The rewarding of this Applicant by legitimizing its blatant conduct and its demonstrated lack of

propensity to operate legally would be directly contrary to the terms of the Public Utility Law.

(f) Authority Should Be Withheld Because The Record Demonstrates That Applicant Lacks A Propensity To Operate Legally In That He Is Without Required Insurance

Even if the Commission could conclude that public need has been established, that the service now performed is lawful and performed in a lawful manner, and that no harmful competition is present, the authority should still be withheld because the record demonstrates that Applicant further lacks any propensity to operate legally. (See, pages 10-15, supra).

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 service in question.

(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 trailers which are now being used in intrastate for the transportation of pallets by Applicant.

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, finding that "the Applicant is unfit to receive the authority for which it has applied" Ibid. 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). What possible evidence could be presented for continued, but good faith, operations, where those 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 is simply underscored.

(g) Applicant Is Financially Unfit

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.

IV. CONCLUSION

The Transportation Regulatory Policy of the Commission, 52 Pa. Code §41.14, makes it clear that the fundamental statutory requirement of establishing public need for new service has been retained. See, York v. Pa. P.U.C., 449 Pa. 136 (1972). Since the record established by Applicant is devoid of any indication of public need for additional or new service, the Applicant has failed to establish public need and this application cannot be granted. User support from the public for new or additional service is wholly absent. Testimony presented covers only service now provided by Applicant. There being no evidence of need, Applicant has failed to meet its threshold burden.

In view of the evidence established by the Applicant that it has disregarded and flouted the requirements of the Commission, Applicant is not a fit Applicant. The record establishes a disregard for legal authority. The record is devoid of any excuse or reason which would permit the Commission to conclude that this flouting of authority was performed in a good faith manner.

Applicant lacks insurance for vehicles being operated and is not financially fit. It must be determined that the Applicant has failed to sustain its burden of proof under §41.14(b) and has failed to establish its fitness to perform the proposed transportation.

V. REQUESTED FINDINGS OF FACT

1. Applicant has established no need for service beyond service it is already actually performing.
2. Applicant has failed to establish technical fitness.
3. Applicant has demonstrated a propensity to act illegally.
4. Applicant has not demonstrated financial fitness.
5. There is no basis in fact for grant of the application.

VI. REQUESTED CONCLUSIONS OF LAW

1. In view of the statutory test of public interest set forth in the Act of July 1, 1978, P.L. 398, 66 Pa. C.S.A. 1103(a) and the evidence in this case, the Applicant is not entitled to a certificate of public convenience.
2. Mere desire of a person for the services of a particular Applicant, where that person is currently using the Applicant for that same service, does not meet the statutory burden of proving a need for additional or new service under current law or policy.

3. The Applicant has the burden of proof to establish need, that the certification applied for is for the convenience and accommodation of the public, and that Applicant is a fit Applicant.

4. The Applicant has not met its burden of proof that there exists a need for additional or new service or that it is a fit Applicant.

5. Without proof of public need above and beyond service already provided Applicant, no grant of additional authority is possible, as a matter of law.

6. Illegally provided service, especially without evidence of insurance, is evidence per se of harmful competition.

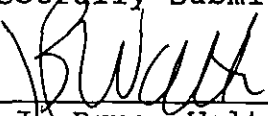
VII. ORDER REQUIRED IN THE CIRCUMSTANCES

It is respectfully submitted that it be ordered, subject to Commission approval:

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

Respectfully submitted,

By: _____


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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 "Brief 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 5th day of April, 1991.

RHOADS & SINON

By: J. B. Wain

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Pennsylvania Public Utility Commission
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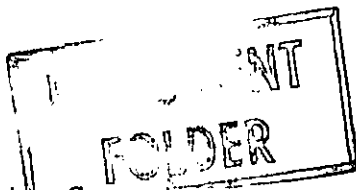
ORIGINAL

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April 18, 1991
HAND DELIVERED

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
North Office Building, Room G-18
Harrisburg, Pennsylvania 17120

RE: Application of Matthew S. Sieber, t/a Sieber
Trucking
Docket No. A.109497

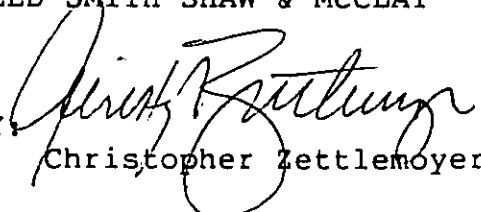
Dear Secretary Rich:

Enclosed please find the original and nine (9) copies of
the Brief on behalf of Gary L. Ramsey Trucking, Inc.

If you have any questions, please do not hesitate to
contact the undersigned.

Very truly yours,

REED SMITH SHAW & McCLAY

BY: 
Christopher Zettlemoyer

CZ:cgb

Enclosures

cc: Administrative Law Judge Harry Banzhoff
Christian V. Graf, Esquire
J. Bruce Walter, Esquire

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APR 18 1991

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Public Utility Commission

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FOLDER

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. 00109497

APPLICATION OF MATTHEW S. SIEBER, T/D/B/A
SIEBER TRUCKING

BRIEF ON BEHALF OF GARY L. RAMSEY TRUCKING, INC.,
PROTESTANT, IN OPPOSITION

DOCKETED
APR 23 1991

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Counsel for Gary L. Ramsey
Trucking, Inc., Protestant

Due Date: April 19, 1991

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I. HISTORY OF THE CASE

By application filed September 13, 1990, Matthew S. Sieber, t/d/b/a Sieber Trucking ("Applicant") seeks 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.

Protests were filed by Gary L. Ramsey Trucking, Inc. ("Ramsey") and Robert G. Hack ("Hack") as well as Butler Trucking Company.

By Amendment submitted to the Commission on October 16, 1990, the application was restrictively amended as follows:

PROVIDED, that no right, power or privileges granted to perform transportation to points in the counties of Clearfield.

Based on the foregoing amendment the protest of Butler Trucking Company was withdrawn.

Hearings were held on February 4, 1991 and March 4, 1991, at the close of which, the Administrative Law Judge directed main briefs to be filed on or before April 19, 1991.

II. SUMMARY OF TESTIMONY

Matthew S. Sieber, Applicant: Applicant began to provide intrastate service without authority from this Commission (N.T. 11, Applicant's Exhibit 1, p.4). Applicant has been engaged in the trucking business since May, 1982 (N.T. 12), but was not aware of the regulations of the Commission imposed the trucking

industry (N.T. 12). After eight years Applicant was not aware of the difference between interstate and intrastate transportation (N.T. 12). Applicant was advised no later than late June or early July that he needed authority to operate within Pennsylvania (Applicant's Exhibit 1, p.4, N.T. 17). Applicant said he contacted various people, including the dispatcher for C.D. Zimmerman (N.T. 17-18), to find out what authority he needed in July, 1990 (N.T. 18).

Applicant testified he leased equipment to Jay Fulkroad & Sons, Inc. ("Fulkroad") in order to continue to provide service within Pennsylvania (N.T. 13). Applicant claimed his lease with Fulkroad covered two tractors; an '87 International and a '77 International (N.T. 13). No other of Applicant's vehicles were under lease to Fulkroad (N.T. 13). Copies of the Fulkroad leases were supplied for the record as Exhibits 4 and 5 (N.T. 22-23).

Applicant was unsure about the scope of Fulkroad's Pennsylvania intrastate authority, but thought it included pallets from Mifflin, Juniata and maybe Perry counties (N.T. 13). Applicant testified he billed his shippers directly (N.T. 13-14) and those shippers were not billed by Fulkroad. Applicant also testified that he and Fulkroad had no income sharing arrangement (N.T. 15).

Applicant's van trailer, unit number 102A on his equipment list (Applicant's Exhibit 1, Appendix B), was the only trailer included on Applicant's insurance certificates (N.T. 8, Applicant's Exhibit 1, Appendix C and Exhibits 2 and 3). Applicant submitted a balance sheet and profit and loss statement

for the year 1990 which were attached as Exhibit G to Applicant's Exhibit 1. Applicant's income statement revealed that during 1990 he operated at a deficit of \$21,803.52 (N.T. 15). Applicant testified that the grant of the authority would not eliminate the deficit (N.T. 15). Applicant could not explain the notes payable or long-term debt entries on his balance sheet (N.T. 16) or whether worker's compensation was shown on his balance sheet (N.T. 10).

Jill A. Becker, secretary of Rockland Ridge Farms, Incorporated, d/b/a Ridge View Pallets, of R.D. #1, Mifflintown, Juniata County (N.T. 26) testified her company currently uses Applicant to provide transportation services (N.T. 26). The witness had difficulty identifying her traffic because she dealt through a pallet broker (N.T. 31). The witness testified she paid Applicant for his services at a rate agreed upon (N.T. 35-36), but had not seen a tariff filed by any carrier (N.T. 34). The witness also testified that she paid Applicant directly for loads that he transported for her company (N.T. 41). The witness also indicated she was dissatisfied with Ramsey because on one occasion Ramsey was unable to accommodate her schedule for an interstate shipment to Baltimore, Maryland (N.T. 28-29, 39). The witness testified there were 31 pallet manufacturers in Perry, Juniata and Mifflin Counties (N.T. 83).

Robert Sheaffer, plant manager of Treen Box and Pallet, R.D. #1, Mifflintown, Juniata County (N.T. 42-43) testified he uses Hack to handle his loads of pallets and would continue to use Hack (N.T. 44-45). The witness has drivers on his payroll (N.T.

49). The witness also stated had no contact with Fulkroad (N.T. 50). The witness did not expect the grant of the requested authority to Applicant to change the way he conducted business (N.T. 50). On one occasion the witness called Ramsey for a shipment to New York State (N.T. 46) but had not contracted Ramsey to transport loads to points in Pennsylvania (N.T. 46, 52).

Donald Sheaffer, part owner of Perry Pallet Inc., Millerstown, Perry County, testified his company would use Applicant for backup service when Hack wasn't available (N.T. 56). He stated he had used Applicant once in December, 1990 for an interstate shipment, but had not had need for his services within Pennsylvania (N.T. 58- 59). He also testified his company paid Applicant directly for his service and was unaware of Applicant's arrangement with Fulkroad (N.T. 59). The witness testified he had not contacted Ramsey for intrastate service (N.T. 62).

Roy Weaver, owner of J & M Pallet, R.D. #1, Mifflintown, Juniata County, testified he had formed a company, but was not currently in operation (N.T. 64-65). He speculated he would have one or two shipments per month (N.T. 67) and indicated that he had not checked on any other carriers to provide service (N.T. 68-69).

Randall Pellman, manager of Truss-Tech, Inc., Mifflin, Juniata County, testified he contacted Applicant directly for service and paid applicant for his services (N.T. 74).

Daniel Wingert, a partner in Oakland Pallet Company, R.D. #2, McCallisterville, Juniata County, testified that he used Zimmerman Trucking, Ramsey and Hack (N.T. 80) for trucking service

(N.T. 78). He testified he might consider Applicant for backup service (N.T. 79).

Carol L. Ramsey testified that Gary L. Ramsey Trucking, Inc. ("Ramsey") has authority to transport wood products, building materials, pallets, pallet lumber, graded lumber, wood ties, slab wood, aluminum siding, nails, insulation and wood fence between points in the counties of Juniata, Mifflin and Huntingdon and from points in said counties to points in Pennsylvania and vice versa (Ramsey Exhibit 1, p.2, Exhibit B).

Mrs. Ramsey testified that she owns eight tractors, eight flatbed trailers and two van trailers which are used primarily for the transportation of wood pallets. She testified that during a fourteen month period, January, 1990 through February, 1991 her company hauled approximately thirty loads per week. She testified she had, on the average, three tractors available every day to provide service to additional customers. (Ramsey Exhibit 1, p.3). Mrs. Ramsey testified that after her services to Ridge View Pallets were terminated on June 2, 1990 (Ramsey Exhibit 1, p.3-4) her company experienced a loss in excess of \$51,000 in income as compared to her company's income from Ridge View Pallets for the year 1990.

Mrs. Ramsey testified that she advised the Applicant about his need for authority to operate in Pennsylvania on May 4, 1990 (N.T. 92).

Mrs. Ramsey indicated she was not aware of her total revenue for the years 1988, 1989 and 1990. The Annual Reports

filed with the Pennsylvania Public Utility Commission for 1988 and 1989 were incorporated into the record by reference (N.T. 97).

III. QUESTIONS PRESENTED

- A. Whether Applicant has demonstrated a public need for the service proposed?

Answered in the negative

- B. Whether Applicant is "fit" to provided the service proposed and in a legal and safe fashion?

Answered in the negative

- C. Whether approval of the authority sought will be contrary to public interest?

Answered in the affirmative

IV. DISCUSSION

The Public Utility Code ("the Code"), 66 Pa. C.S.A.

§ 1103(a), provides inter alia that:

A certificate of public convenience shall be granted by order of the Commission, only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.

This statutory provision has been effected by regulations adopted by the Commission governing the evidentiary criteria to be used to decide motor common carrier applications.

These criteria, set forth in 52 Pa. Code § 41.14, state:

(a) An applicant seeking motor common carrier authority has a burden of demonstrating that the approval of the application will serve a useful public purpose, responsive to a public demand or need.

(b) An applicant seeking motor common carrier authority has the burden of demonstrating that it possess the technical and financial ability to provide for the service, and, in addition, authority maybe withheld if the record demonstrates that the application lacks a propensity to operate safely and legally.

(c) The Commission will grant motor common carrier authority commencing with the demonstrative public need unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to the extent that, on balance, the granting of authority would be contrary to the public interest.

A. Applicant Has Not Demonstrated A Need For The Service Proposed

In order to demonstrate "need" sufficient to satisfy 52 Pa. Code § 41.14(a), Applicant must present public witnesses who provide testimony regarding Pennsylvania points of origin and destination which correspond with the authority requested.

Application of Nothstein Bros., Inc., 64 Pa. P.U.C. 411, 416-417 (1987). Applicant has failed to satisfy this burden through testimony of six public witnesses.

No testimony has been submitted whatsoever of a need for service in Mifflin County. Therefore, without any analysis of the specific content of testimony presented, Applicant has not supported his request for authority to service Mifflin County and the requested authority must be so limited. See Application of Blue Bird Coach Lines, Inc., Docket No. A-00088807, F.2, Am-K (entered April 27, 1990, at p. 23)(authority will not be granted for which there is no support).

Five of Applicant's six witnesses represented businesses located in Juniata County, and the other witness was from Perry County. But, this testimony fails to sufficiently support Applicant's argument of need in either of these counties. Witnesses Becker and Pellman testified they were using Applicant to meet their current service needs. Witnesses Robert Sheaffer and Donald Sheaffer (the only witnesses from Perry County) testified they would use Applicant for backup service. Witness Roy Weaver (N.T. 64 and 68) testified he has no traffic at present time, and one other witness, Daniel Wright, is currently getting service from three carriers and testified he might use applicant for backup service but stated no volume. While this testimony may demonstrate some preference of those supporting witnesses, such testimony is not enough to establish public need. Application of E.J. Breneman, Inc., Docket No. A-107248, entered February 23, 1989.

Additionally, Applicant is now substantially performing the service proposed. Applicant has been providing all of the transportation services for which he has presented testimony of public witnesses. However, this testimony cannot be considered when determining need for the service proposed if the Commission finds Applicant's operations to be unlawful and in deliberate disregard for the law. Application of Robert Lee Easley, Jr., t/d/b/a Highway America, Docket No. A-00105096, F.1, Am-A (Initial Decision, A.L.J. Corbett, dated March 11, 1991 at p. 69) (citations omitted). As discussed below (subsection B infra),

Protestant Ramsey believes that Applicant has operated in such an illegal manner and continues to do so.

Even assuming Applicant's current service is legal, Applicant has not presented testimony of a substantial nature which is representative of need for additional or new service which he is not already performing or which he could perform. In short, if the Commission finds Applicant's current service legal, Applicant can continue to produce service without this application being granted.

Finally, there is nothing in this record which indicates that existing carriers are unwilling or unable to meet all reasonable demands for service. In many cases they are already providing service. Relevant in this regard is Protestant Ramsey's indication of willingness to once again provide service with available equipment to Ridge View Pallets. Although there was some testimony about both protestants not being able to meet demands of several witnesses for interstate service, this testimony is clearly irrelevant. See Application of D's Limousine Service, Ltd., Docket No. A-00108173 (Initial Decision of A.L.J. Fountain, dated July 19, 1990 at p. 21) (testimony of supporting witnesses must be relevant to the scope of the application).

B. Applicant is Not "Fit" To Provide The Service
Proposed And Fails to Display The
Propensity To Operate Legally And Safely

Applicant must demonstrate the "technical and financial ability" to provide the proposed service. 52 Pa. Code § 41.14(b). However, this record is replete with evidence that Applicant does not possess such ability.

For instance, Applicant testified that he operated at a deficit (Exhibit 1, p.5). He admitted that a grant of the application would not erase that deficit (N.T. 15). Also, Applicant's balance sheet (Exhibit G) shows a negative net equity of \$35,592.34 which would be even lower if that balance sheet showed current depreciation on Applicant's equipment. Applicant could not explain the notes payable or long-term debt entries on his balance sheet (N.T. 16) or whether worker's compensation was shown on his balance sheet (N.T. 10).

Not only does Applicant not have the requisite ability to satisfy § 41.14(b), Protestant Ramsey believes that Applicant is operating illegally and is therefore unfit to provide the proposed service. As stated in Application of Blue Bird Coach Lines, Inc., A-00088807, F.2, Am-K, entered April 27, 1990:

Subsection 41.14(b) contains the caveat that operating "authority may be withheld if the record demonstrates that the applicant lacks a propensity to operate safely and legally. . ."

Also, cited in Blue Bird is In Re Perry Hassman, 55 Pa. P.U.C. 661 (1982), to explain as follows the standard of review regarding an applicant's propensity to operate legally and safely:

In this regard, lack of fitness is demonstrated by a persistent disregard for, flouting, or defiance of the Public Utility Law and the Commission's Orders and Regulations. . .; for applicants who do not possess operating authority, the Commission may consider any evidence which would bear upon the applicant's propensity to operate public utilities safely and legally.

Protestant Ramsey believes the following demonstrates Applicant's lack of propensity to operate legally:

1. Applicant is not aware of the requirements of this Commission although he has been involved in the trucking business since 1982 (N.T. 12).
2. Ramsey advised Applicant on May 4, 1990, that he needed authority from this Commission, but he did not file his application until September 13, 1990.
3. Applicant continued to serve some of the public witnesses while his application is pending.
4. Applicant filed an application for temporary authority on October 3, 1990, which was initially denied at the time of hearing, but was subsequently granted to serve only one shipper.
5. Applicant's lease with Fulkroad, dated August, 1990 covers only two tractors (N.T. 13).
6. Applicant bills shippers even though he is not an authorized carrier (N.T. 13-14).
7. The bills of lading do not identify an authorized carrier (N.T. 14).
8. Applicant has no arrangement with the authorized carrier (N.T. 15).
9. Applicant's shippers have no contract with the authorized carrier (N.T. 50, N.T. 37, N.T. 59, and N.T. 74).
10. Applicant charges rates based upon agreement with shippers and not the tariff of an authorized carrier (N.T. 35-36).

Applicant argues that if his operation is illegal he performed his service in good faith. Dutchland Tours, Inc. V. PA.

PUC, 19 Pa. Commw. 1, 337 A.2d 922 (1975). This is simply not the case. As the record shows, Applicant has continued to operate illegally for a very considerable time and is in no way close to being legal. Such persistent illegal operation, particularly for that period after Applicant had been informed of the necessity for authority, goes beyond merely creating a negative inference of Applicant's propensity to obey the law. See In Re Heeter, 56 Pa. P.U.C. 279, 281-282 (1982). It strongly suggests that Applicant has operated in bad faith by deliberately and continually ignoring the legal requirements of his industry.

Applicant's lack of propensity to operate legally and safely is further demonstrated by evidence related to insurance. Applicant's insurance certificate submitted with his Exhibit 1 covered one tractor and one trailer. The trailer was a van trailer which is not used in Applicant's service (N.T. 8). A new insurance certificate dated February 25, 1991 (Applicant's Exhibit 2) when read together with an insurance change endorsement (Applicant's Exhibit 3), covered a total of four tractors and no trailers. No evidence of insurance is shown for Applicant's other vehicles on his equipment list (Applicant's Exhibit 1, Appendix B) and no explanation for this deficiency is provided. Clearly, this evidence bears upon an important public interest for which Applicant lacks either sufficient concern or the ability to adequately safeguard.

In sum, for all the reasons stated above, Applicant is technically and financially unfit to perform the service proposed and has not shown a propensity to operate legally and safely. In

this light, the Commission need not even consider evidence of need. See Application of Robert F. Larsen, Neil C. Donohue and Andrew W. Barbar, Co.-Partners, t/d/b/a Delta Motor Cars, A.107137 (1987) at p. 24 (Commission need not consider "need" criteria also mandated by §41.14 when "fitness" issue determined).

C. Approval Of The Application Would Be
Contrary To The Public Interest

Approval of this application would, in effect, countenance Applicant's unfair diversion of protestants' business traffic by illegal service. Protestants have provided clear testimony that Applicant's illegal service has created a significant decrease in revenue. Carol Ramsey testified that Ramsey experienced a harmful loss of revenue in excess of \$51,000.00 in 1990 from Applicant's service to one particular shipper alone. (Ramsey Exhibit 1, p.3-4). Suffice it to say that Applicant must not be provided opportunity to continue his destructive competition and thereby benefit from any competitive advantage wrongfully gained. Otherwise, protestants will surely continue to suffer loss of business first experienced while they operated their businesses legally but Applicant failed to do the same.

The public will not be harmed by this application being denied. Instead, the public will continue to receive service on which it can rely. Protestants have sufficient equipment and resources to provide such service in a reliable and adequate manner, service which Applicant is providing illegally.

Particularly relevant is evidence on this record that Protestant Ramsey has, on average, three tractors available every day to meet the needs (if any) of additional customers (Ramsey Exhibit 1, p.3).

V. CONCLUSION

Testimony in support of the application has not demonstrated any need for service in Mifflin County and has not provided sufficient basis upon which to conclude there is a need for service in any other county requested by Applicant. Instead, the record suggests that the marketplace which Applicant proposes to serve does not need another carrier. Public witness testimony fails to indicate that such witnesses exhausted all existing sources of reasonable service when they needed a carrier but failed to find one.

Applicant is not fit to perform the requested service. Applicant has operated without appropriate leases, does not have the technical ability or financial resources to provide the proposed service, and Applicant has operated contrary to the Rules and Regulations of this Commission and the Public Utility Code.

Protestant Ramsey has demonstrated substantial financial impact upon its business by the loss of one shipper while at the same time demonstrating that it has equipment available to provide the service. This unrestrained and destructive competition will be contrary to the public interest.

This application should be denied.

VI. FINDINGS OF FACT REQUESTED

A. Applicant has not demonstrated a need for the service proposed.

B. Applicant has failed to demonstrate technical fitness.

C. Applicant has failed to demonstrate financial fitness.

D. Applicant has demonstrated a propensity to operate illegally and without sufficient regard to the public's safety.

E. Approval of the Application would not be in the public interest.

VII. CONCLUSIONS OF LAW REQUESTED

A. Applicant is not entitled to a certificate of public convenience because the requisite showing under 66 Pa. C.S.A. §1103(a) has not been made in this case.

B. An applicant for a certificate of public convenience has the burden of demonstrating a need for the service proposed, the technical and financial ability to provide that service and a propensity to operate legally and safely.

C. Applicant has not met his burden of proof of need, he has not shown the technical and financial ability to provide the service proposed, and he has shown a propensity to operate unlawfully and unsafely.

D. Approval of this application would not serve the public interest by allowing harmful competition stemming from illegal service and authorizing service for which existing authorized carriers are willing and able to provide.

VIII. ORDER REQUESTED

Protestant requests that the following order be entered:

That the Application of Matthew S. Sieber, t/d/b/a Sieber Trucking, be denied.

Respectfully submitted,

REED SMITH SHAW & McCLAY

By: 

Christopher Zettlemyer, Esquire
213 Market Street, P.O. Box 11844
Harrisburg, PA 17108-1184
(717) 234-5988

Attorneys for Gary L. Ramsey
Trucking, Inc.

Dated: April 18, 1991

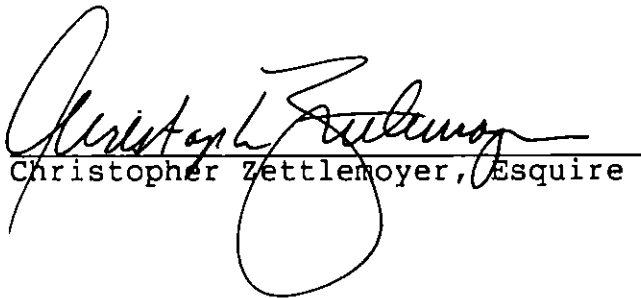
CERTIFICATE OF SERVICE

I hereby certify that I have this day forwarded copies of the foregoing "Brief on Behalf of Gary L. Ramsey Trucking, Inc., Protestant in Opposition" by first class mail, postage pre-paid, addressed as follows:

The Honorable Harry Banzoff
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17201

Christian B. Graff, Esquire
David H. Radcliff, Esquire
407 North Front Street
Harrisburg, PA 17101

J. Bruce Walter, Esquire
Rhodes & Sinon, P.C.
One South Market Square
Harrisburg, PA 17108


Christopher Zettlemoyer, Esquire

Dated: April 18, 1991

DATE: April 22, 1991

SUBJECT: A-00109497
Application of Matthew S. Sieber, t/a SIEBER TRUCKING

TO: Administrative Law Judge Herbert S. Cohen

FROM: *Allison K. Turner*
Allison K. Turner
Chief Administrative Law Judge

DOCKETED
APR 29 1991

This motor carrier application, previously assigned to Administrative Law Judge Harry G. Banzhoff, is reassigned to you.

A hearing took place on March 4, 1991, Main Briefs due April 19, 1991 and Reply Briefs due April 26, 1991. Decision is due July 25, 1991.

The transcript, etc., is available through this office.

cc: Annette Shelley
Docket Room

DOCUMENT
FOLDER

KJR

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OF COUNSEL
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TELEPHONE: A. C. 717-236-9318

April 22, 1991
File: 1307.0

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

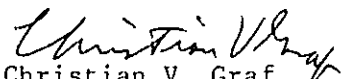
Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, Pennsylvania 17120

Dear Mr. Rich:

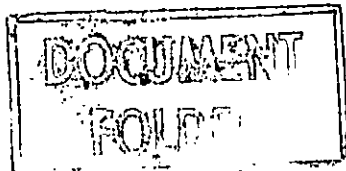
We enclose herewith the Reply Brief on Behalf of Applicant consisting of the original and 9 copies.

As stated on the Certificate of Service, we are serving 3 copies of this Brief upon opposing counsel and upon Judge Banzhoff and 2 copies upon the applicant.

Very truly yours,


Christian V. Graf

CVG:ter
Enclosures



cc: Harry Banzhoff,
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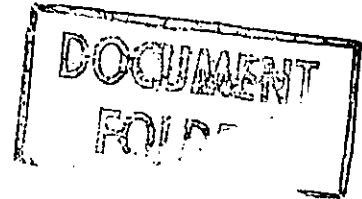
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APR 22 1991

**SECRETARYS OFFICE
Public Utility Commission**

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY
COMMISSION



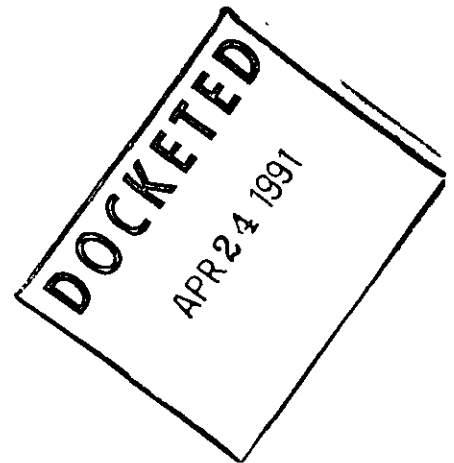
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In Re: Application of MATTHEW S. SIEBER,
t/d/b/a SIEBER TRUCKING,
A. 00109497

APR 22 1991

SECRETARY'S OFFICE
Public Utility Commission

REPLY BRIEF ON BEHALF OF APPLICANT



GRAF, ANDREWS & RADCLIFF, P.C.
Christian V. Graf, Esquire
David H. Radcliff, Esquire
407 North Front Street
Harrisburg, Pennsylvania 17101

DUE DATE: April 26, 1991

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY
COMMISSION

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

REPLY BRIEF ON BEHALF OF APPLICANT

I.

STATEMENT OF THE CASE

The statement of the case was set forth in our main Brief and will not be repeated here except to note that this Reply Brief is filed in response to opposing counsels' Briefs.

II.

COMMENTS CONCERNING THE BRIEF OF ROBERT G. HACK

Initially it may be stated that the summary of testimony as applicable makes certain fundamental errors.

As to the supporting shippers the Hack Brief glosses over certain pertinent facts concerning all of the shippers reviewed. For example, Jill A. Becker of Ridgeview Pallets stated she uses Sieber Trucking for interstate work and uses them within Pennsylvania under lease with Jay Fulkroad & Sons (N.T. 25, 26). She listed a number of points to which this company has shipped in the past. In addition, she detailed the carriers used in the past and the dissatisfaction with Ramsey Trucking which consisted of the following elements:

1. If Ramsey could not take a load when it was supposed to go, they would call the pallet broker directly, which was unsatisfactory because if the load is not there on time it may be refused as happened once on a shipment to Baltimore, resulting in the rejection of the load and a loss of \$4,000 (N.T. 28, 29).

2. When Ramsey was used the drivers would not help strap down the load which frequently resulted in overtime (N.T. 30).

3. Concerning Robert Hack he was called on for a load and unable to supply it because he was fully booked (N.T. 31).

She desired the service because:

1. The applicant has aluminum trailers which enable her to carry a greater volume, which makes the freight price per pallet cheaper and makes her more competitive in the market.

2. The drivers do strap down the loads.

Concerning Robert Sheaffer of Treen Box and Pallet, he testified that he uses Sieber for the interstate movements (N.T. 43, 44) and has a list of 112 Pennsylvania points to which he ships and he named a representative group thereof (N.T. 44). He testified that he uses Hack Trucking with only occasional loads being transported by the applicant through the lease with Jay Fulkroad & Sons (N.T. 44). The service is needed because on several occasions Hack did not have vehicles available and if this happens, as it has twice per month, it is important to have shipper trucks available because the loads are ordered

and must be there at a certain date to avoid customer dissatisfaction (N.T. 45, 46). The witness has not used Ramsey Trucking because they rejected him on a New York state load (N.T. 52).

Donald Sheaffer of Perry Pallet ships to the same basic points as Treen which pays for the pallets, finds the customer and pays Perry Pallet for the transportation and Perry Pallet in turn pays the hauler (N.T. 54, 55). The applicant has been used for one load on December 27th (N.T. 56). His service is needed as a backup service because on one occasion when Hack did not have equipment to meet the needs he used a Treen truck and added that though Mr. Hack had refused the load he cursed out this witness for giving the load to somebody else, which the witness was not going to stand for, and cited as a reason he needed the applicant (N.T. 60). He also complained about the Hack service being unable to get answers when he needed because a mechanic answers the phone (N.T. 62). Moreover, Hack is only 80 percent efficient (N.T. 63).

It is also significant to note that temporary authority was granted to the applicant to serve this company by Order granted on March 29, 1991 and the Fulkroad lease need no longer be relied upon.

J & M Pallets, through its witness Roy Weaver, testified that he would use the service once or twice per month because he knows that the applicant has trucks available to perform and since this is a new company he has had no past shipments from this company but will commence operations in 1991 (N.T. 65).

Randall Pellman of Truss Tech, Mifflin County, has called Hack five or six times for Pennsylvania service and has received no response. This company also called Ramsey Trucking four or five times and it did not handle any of his loads (N.T. 72). He also named the points to which service was desired (N.T. 72), and characterized the service from Virginia on lumber as very good as received from the applicant and added that he needs the applicant's service because his own equipment cannot handle 45-foot to 65-foot long trusses (N.T. 77). During the summer and fall he would use the applicant two or three times per week and feels the service is very necessary.

Donald Wenger, a partner in Oakland Pallets, testified that he has Pennsylvania traffic going to Harrisburg, York and New Kensington and characterized Ramsey Trucking as only fair because sometimes they took the load and sometimes someone else showed up. He has not used the applicant in Pennsylvania (N.T. 79). With respect to Hack Trucking, he called Hack for service and was told by him to go to someone else; that he did not have time to serve this company (N.T. 80).

From the argument standpoint the Hack Brief argues somewhat in a circle. First it says that if applicant's service under the Fulkroad lease is legal there is no need to have the authority granted and, secondly, that the operation under the Fulkroad lease is illegal and, therefore, applicant lacks the propensity to operate legally. This appears to be arguing in a circle, particularly when it is followed by the statement that since the Fulkroad lease is being operated there is no new service required.

This overlooks the fact that Witness Becker of Ridgeview Pallets named the points to which she had shipped in the past rather than all the points to which she had used Fulkroad (N.T. 27). Furthermore, Oakland Pallets has not used the applicant at all in Pennsylvania (See N.T. 80) and as far as Perry Pallet is concerned the applicant need no longer rely upon the Fulkroad lease, having received temporary authority to operate on March 29, 1991. With respect to Treen Box and Pallet, which is mostly moving by Hack Trucking to its 112 points and only occasional loads were transported through the lease with Jay Fulkroad & Sons (N.T. 44).

Concerning Roy Weaver of J&M Pallet, it has not yet started to operate, but considers the service of Mr. Sieber to be beneficial due to the availability of his service and Sieber would be used once or twice per month (N.T. 67). He would not check with the existing carriers because of the small volume involved.

Truss Tech has called both of these protestants without success numerous times.

III.

COMMENTS CONCERNING GARY L. RAMSEY TRUCKING, INC.

At page 4 of this carrier's Brief the protestant states that Witness Becker of Ridgeview Pallets had difficulty identifying her traffic. Nothing could be further from the fact because she listed the destination points to which the company has shipped in the past to include Bethlehem, Brockway, Boyertown, Berwick, Aston, Allentown, Denver, Hazleton, New Castle, Lebanon, Lansdowne, Mechanicsburg, Hamburg, Lampeter, Laureldale, Harrisburg (N.T. 26), Mountain Top, New Oxford, Morrisville, Trexlertown, Stowe, Pittston, Philadelphia, Quakertown, Reading,

West Point, Whitehall, Wrightsville, York and Columbia (N.T. 27). The same paragraph states that this same witness was dissatisfied with Ramsey because on one occasion it did not accommodate her schedule for an interstate shipment to Baltimore. This does not go far enough because the load was rejected as not being on time, resulting in a loss of \$4,000 (N.T. 28, 29). Other comments concerning Ramsey were the fact that when Ramsey was used, the driver would not help strap down the load, which resulted in overtime (N.T. 30). Also, the dissatisfaction was because if Ramsey could not take a load they would call the pallet broker directly, which was unsatisfactory (N.T. 28). She also stated that the Applicant's aluminum trailers enabled her to carry more traffic than by use of Ramsey (N.T. 35).

At page 5 in discussing the traffic for Perry Pallet, it is correct that as stated the Applicant handled a load on December 27th (N.T. 56), but it is incorrect to state as stated that there was no need for the service expressed because the witness stated that he supported the application for a backup service which was needed due to the fact that all loads are scheduled and if equipment is not available by Hack he must rely on somebody else (N.T. 57). Concerning his comments at pages 5 and 6 relative to Witness Wingert of Oakland Pallet Company, it overlooks the fact that the applicant has not been used in Pennsylvania and Ramsey is used only for extra loads and its service has only been fair because sometimes they picked up the loads and sometimes somebody else picked up the loads (N.T. 78, 79). Concerning the testimony of Carol L. Ramsey it is significant that she did not sustain her testimony that she lost \$50,000 in revenue with the loss of the Ridgeview Pallet business.

It was overlooked that this protestant cannot serve Truss Tech, one of the supporting witnesses (See Ramsey Exhibit 1, page 2, Exhibit B).

IV.

CONTENTIONS OF PROTESTANTS

Both protestants contend that Applicant is not fit; that need has not been established; and that they should be protected. We shall contest these in the subsequent portion of this Brief under the following headings:

- A. Applicant is fit.
- B. The need has been established.
- C. Protestants have not met their burden of proving that approval would be contrary to the public interest.

V.

ARGUMENT

A. APPLICANT IS FIT

Both protestants here take a curious position. They first urge that the Applicant is not fit and follow this with the averment that Applicant can continue to do the transportation under lease to Jay Fulkroad and Sons and hence there is no need for approval of the application.

As we stated in our initial Brief, when Applicant consulted present counsel he was informed that authority was, in fact, needed and an application was promptly filed, followed by applications for ETA and T/A, both of which were initially denied (Exhibit A-1, page 4). In the meantime he worked out a lease arrangement with Jay Fulkroad and Sons, Inc. and thereunder has provided

service in Pennsylvania (Exhibit A-1, page 4). Both of these leases were executed on August 28, 1990 and set to expire on August 28, 1991 (Exhibit A-4, Exhibit A-5). These protestants contend that for some reason the leases are invalid because the Applicant collects for the service. While this may be technically a violation it is not a violation in bad faith and the mere fact of securing the leases gives indication that the Applicant sought to do what was correct while his application was pending. As evidence of his good faith we note that Oakland Pallet Company has not used the Applicant in Pennsylvania, but supports for a backup service (N.T. 79).

With respect to the witness for Truss Tech, it is significant to note that Gary L. Ramsey Trucking, Inc. cannot serve this company (Ramsey Exhibit 1, page 2, Exhibit B), and we also note that Hack has declined loads for Truss Tech having been called five or six times for Pennsylvania service and having received no response thereto (N.T. 72).

Another element that is pertinent here is that Applicant need no longer rely on the Jay Fulkroad lease for, as stated in our Brief in chief, temporary authority was granted from Perry Pallet in Millerstown, Perry County, to points in Pennsylvania on March 29, 1991.

Concerning the argument that because operations admittedly performed before August 28, 1990, the dates on the leases to Jay Fulkroad and Sons, renders the Applicant unfit, we would point out that the witness for Robert G. Hack candidly admitted that he had operated for 7 years without authority before receiving the rights which he now holds (N.T. 904). The question is risen concerning the fact that the Applicant has been in the trucking business for 8 years and that this somehow militates against his knowledge that authority in Pennsylvania is needed. It must be remembered that the Applicant clearly

stated that he had leased equipment to C. D. Zimmerman of Mifflintown (N.T. 19). The mere fact of his having leased to C. D. Zimmerman does not per se indicate bad faith.

Comment is made concerning Applicant's financial fitness and the mistaken opinion is given that he is not operating at a profit and that his deficit was over \$20,000. The financials statements, Appendix G to Exhibit 1, will reveal a cash position in excess of \$9,000; total assets of \$361,920 and a profit during the year of 1990 of \$21,853.52, which reduced his capital deficit to \$13,788.82. Accordingly, Applicant was of the opinion that approval of the application would eliminate the deficit situation (Exhibit A.-1, page 5).

As we stated in our main Brief, the Applicant has terminal, available equipment, insurance coverage, ICC authority, employees, a safety program and assets of over \$360,000 and was operating at a profit in excess of \$21,000 during 1990. We felt that this met the burden of proof of fitness in accordance with Merz White Way Tours v. Pa. PUC, 204 Pa. Sup. Ct. 43 (1964). From the standpoint of prior operations without authority, we continue to rely on Brinks, Incorporated v. Pa. PUC, 456 A.2d 1342 at 1344 and Footnote 3 thereto quoted at page 17 of our Brief. The reasons were amplified at page 18 of our Brief.

Applicant's fitness has been established.

B. THE NEED HAS BEEN ESTABLISHED

On the question of need, we have already reviewed the fact that public witnesses appeared and named the points to which they desired service. In the case of Oakland Pallets, it had not used the Applicant in interstate commerce (N.T. 79). In the case of Truss Tech, Inc., Protestant Ramsey lacks the authority to serve and Protestant Hack has failed to respond on

five or six calls for Pennsylvania service (N.T. 72). In the case of Perry Pallets, on March 29, 1991 temporary authority was granted to serve that company. In the case of Treen Box and Pallet which has 112 Pennsylvania destinations, representative points having been named on the record (N.T. 44), and J & M Pallets is a new company with limited traffic but supports the application because the witness knows that Applicant has trucks available to perform and the availability of his service is considered highly beneficial and would be used once or twice per month (N.T. 67). Ridgeview Pallets gave specific reasons why the service was needed, among which were: Applicant assists in strapping down the loads, whereas Ramsey does not (N.T. 30), resulting in overtime. Applicant's aluminum trailers permit a greater volume due to the light weight, making per freight price cheaper and her company more competitive (N.T. 29, 30). This witness also named specific points to which past shipments have moved (N.T. 27).

To counter this evidence Protestants come up with the curious argument first, they argue that the lease arrangement is improper and the Applicant should, therefore, be considered unfit; and in the next breath they argue that approval is not needed because the Applicant can continue the lease arrangement which they, themselves, have condemned. The witness for Ridgeview Pallets knocked this argument on the head when she stated that since the Applicant has only two trucks leased to Fulkroad and if she needed three loads going out she would be stuck with the third load (N.T. 36). Another factor which militates against this argument is the fact that when Applicant checked with present counsel and was informed that authority was indeed needed he immediately applied, in the meantime having worked out a lease arrangement with Jay Fulkroad and Sons so that his service could continue.

The testimony of the witnesses makes it clear that the service is needed and consistent with Blue Bird Coach Lines, Inc., A.00088807, Folder 2, Am-K, the points have been named; the commodities have been named; the origins have been named; the fact that the service was beneficial or necessary and would be used have all been set forth.

The application should be granted.

C. PROTESTANTS HAVE NOT MET THEIR BURDEN OF PROVING
THAT APPROVAL WOULD BE CONTRARY TO THE PUBLIC INTEREST

The Protestants contend that the mere fact that they have handled traffic and stand to lose revenue establishes that approval would be contrary to the public interest. This simply is not the case. 52 Pa. Code 41.14(c) emphasizes the advantages of healthy competition in the motor carrier industry and states that:

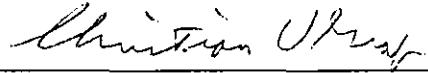
"The Commission will grant motor carrier authority commensurate with a demonstrated public need unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to such an extent, that, on balance, the grant of authority would be contrary to the public interest."

Nowhere in this case has it said that the public interest would be contravened by approval of this application.

There is testimony that there are 31 pallet manufacturers in the 3-county area (N.T. 83). Compared to the witnesses who testified it would appear that there are ample other sources of income available to these protestants to enable them to remain in business so that their operations will not be impaired.

The application should be granted.

Respectfully submitted,

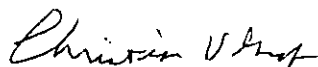
A handwritten signature in cursive script, appearing to read "Christian V. Graf".

Christian V. Graf, Esquire

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded copies of the foregoing "Reply Brief on Behalf of Applicant" to those set forth below by U.S. First Class Mail, postage prepaid.

Dated this 22 day of April, 1991.



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