

1. <u>REPORT DATE:</u> October 21, 1993	: 2. <u>BUREAU AGENDA NO.:</u>
3. <u>BUREAU:</u> Office of Special Assistants	: OCT-93-OSA-226*
4. <u>SECTION(S):</u>	: 5. <u>PUBLIC MEETING DATE:</u>
6. <u>APPROVED BY:</u> Director: Cheryl W. Davis 7-1827 Supervisor: Russel Albert 7-8108	: October 28, 1993
7. <u>MONITOR:</u>	: <i>[Signature]</i>
8. <u>PERSON IN CHARGE:</u> George E. Strella 7-1023	:
9. <u>DOCKET NO.:</u> A-00109244 F.001 Am-A	:

10. (a) CAPTION (abbreviate if more than 4 lines)
 (b) Short summary of history & facts, documents & briefs
 (c) Recommendation

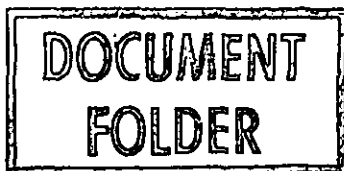
(a) Application of Tad's Delivery Service, Inc., t/a T & N Van Service

(b) On June 15, 1992, and as amended on July 7, 1992, Tad's Delivery Service, Inc., trading as T & N Van Service ("Applicant") filed an Application for the transfer of common carrier authority presently held by Domenic Cristinzio, Inc., at Docket No. A-00086551, F.2. On August 11, 1993, after conducting hearings and receiving briefs, Administrative Law Judge Marlane R. Chestnut issued an Initial Decision recommending that the Application be granted. On August 30 1993, J. C. Services ("Protestant") filed Exceptions. On September 9, 1993, the Applicant filed Reply Exceptions, which also contained a Motion to Dismiss Exceptions 5 and 6. On September 1, 1993, the Protestant filed a Petition to Reconsider or Reopen. On September 9, 1993, the Applicant filed a Motion to Strike the Protestant's Petition. On September 16, 1993, the Protestant filed an Answer to Motion to Strike.

(c) The Office of Special Assistants recommends that the Commission adopt a proposed draft Opinion and Order which (1) grants the Applicant's Motion to Dismiss Exceptions 5 and 6; (2) grants, in part, Applicant's Motion to Dismiss Protestant's Petition to Reconsider; (3) denies the Protestant's Petition to Reconsider; and (4) denies Protestant's Exceptions, thereby adopting the ALJ's Initial Decision.

10. MOTION BY:	Commissioner Chm. Rolka	Commissioner Quain - Yes
SECONDED:	Commissioner Rhodes	Commissioner Crutchfield-Yes
		Commissioner Hanger - Yes

CONTENT OF MOTION: Staff recommendation adopted.



DOCKETED
FEB 23 1994



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

October 29, 1993

IN REPLY PLEASE
REFER TO OUR FILE

A. 00109244
F. 1, Am-A

DONALD M DAVIS ESQUIRE
CURTIS CENTER FOURTH FLOOR
INDEPENDENT SQUARE WEST
PHILADELPHIA PA 19106-3304

Application of TAD'S DELIVERY SERVICE, INC., trading as T & N VAN SERVICE

To Whom It May Concern:

Enclosed is the compliance order issued by the Commission in this proceeding.

The application will not be permitted to operate or engage in any transportation granted by the enclosed order until a tariff has been prepared and filed in accordance with the enclosed instructions.

Motor carriers operating without complying with the above requirement will be subject to the penalty provisions of the Public Utility Commission.

Commission regulations require compliance with the above requirements within sixty (60) days of the date of this letter. Failure to comply within the sixty (60) day period will cause the Commission to rescind the action of October 28, 1993 and dismiss the application without further proceeding.

Very truly yours,

John G. Alford, Secretary

DOCUMENT
FOLDER

DOCKETED

NOV 08 1993

smk
Encls.
Cert. Mail
Receipt Requested
Tariff Contact Person: Joseph Machulsky (717) 787-5521

TAD'S DELIVERY SERVICE, INC
t/a T & N VAN SERVICE
835 INDUSTRIAL HIGHWAY
UNIT #4
CENNA MINSON NJ 08077

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
HARRISBURG, PA. 17105-3265

DOCUMENT
FOLDER

Public Meeting held October 28, 1993

Commissioners Present:

David W. Rolka, Chairman
Joseph Rhodes, Jr., Vice-Chairman
John M. Quain,
Lisa Crutchfield,
John Hanger

DOCKETED
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Application of Tad's Delivery
Service, Inc., trading as
T & N Van Service

A-00109244, F001, Am-A

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for disposition are the Exceptions ("Exc") filed on August 30, 1993, by J. C. Services ("Protestant" or "J. C.") to the Initial Decision ("I.D.") of Administrative Law Judge ("ALJ") Marlane R. Chestnut issued on August 11, 1993. On September 9, 1993, Tad's Delivery Service, Inc., trading as T & N Van Service ("Applicant", "Transferee", "T & N" or "Tad's") filed Reply Exceptions ("R.E."), which also contains a Motion to Strike Exception Numbers 5 and 6.

Also before us are: the Protestant's Petition to Reconsider the Initial Decision and/or Reopen the Record ("Petition to Reconsider or Reopen") filed on September 1, 1993; the Applicant's Motion to Strike Protestant's Petition to Reconsider or Reopen ("Motion to Strike") filed on September 9, 1993; and the Protestant's Answer to Motion to Strike Protestant's Petition to Reconsider or Reopen ("Answer to Motion to Strike") filed on September 16, 1993.

Background

By Application filed on June 15, 1992, and amended on July 7, 1992, the Applicant is seeking to amend its certificate of public convenience at Docket No. A-00109244 by acquiring, through transfer, operating authority currently held by Domenic Cristinzio, Inc. at Docket No. A-00086551, F002, to include, as Amendment A, the following authority:

SO AS TO PERMIT the transportation of (1) tabulating and office machines for the International Business Machine Corporation between points in the City of Philadelphia, Philadelphia County, and from points in said City to points within an airline distance of twenty-five (25) miles of the City Hall in said City, and vice versa; (2) cases for the International Business Machine Corporation from points within an airline distance of twenty-five (25) miles of the City Hall in the City of Philadelphia, Philadelphia County, to points in said City, and vice versa; (3) office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 3328 Amber Street, in the City and County of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (4) office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 2073 Bennett Road, in the City and County of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (5) uncrated office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, between points in the Counties of Bucks, Chester, Delaware, Montgomery, Philadelphia, and from said Counties to points in Pennsylvania, and vice versa; (6) business and office machines,

electronic manufacturing systems, parts and supplies thereof, that are manufactured, sold, leased, distributed or dealt in by International Business Machine Corporation, for International Business Machine Corporation between points in the Counties of Adams, Berks, Bucks, Carbon, Centre, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Schuylkill, Snyder, Union and York; (7) business and office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines, and inserting machines, and new office furniture, between points in the Counties of Luzerne, Lackawanna, Monroe, Carbon, Northampton, Lehigh, Berks, Schuylkill, Columbia and Montour, and from points in said Counties, to points in Pennsylvania, and vice versa.

Notice of the Application was published in the Pennsylvania Bulletin on June 27, 1992. One Protest was filed by J. C. Services, Inc., as identified above. On August 11, 1993, after conducting evidentiary hearings, the Administrative Law Judge issued an Initial Decision recommending that the Application be granted.

Discussion

The first matter we will address is the Protestant's Petition to Reconsider Initial Decision and/or Reopen Record, and the filings related thereto. In the Petition, the Protestant states, in pertinent part;

5. Protestant has discovered new information which it believes establishes that Applicant has since November 4, 1992, the date of the initial hearing and continues to provide intrastate shipments without authority.

6. The initial decision granting the transfer of rights to Applicant is based upon the finding that the Applicant was confused about the distinction between its PUC and ICC rights and that the Applicant ceased its illegal activities. A full and complete copy of the Initial Decision of Administrative Law Judge Marlane R. Chestnut is attached hereto as Exhibit "A".

7. Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony concerning illegal activities by Applicant following the date of hearing and prior to the final granting of the transfer of authority.

8. An Affidavit in support of the new evidence by Protestant is attached hereto as Exhibit "B" and incorporated herein be reference.

(Petition to Reconsider or Reopen, pp. 1-2).

Based on the foregoing arguments, the Protestant requests that we reopen the record in this proceeding so that the Protestant can present additional testimony concerning illegal activities by the Applicant following the date of hearing and prior to the final granting of the transfer of authority.

Protestant's Exhibit B attached to the Petition is an affidavit of Steven J. McGary, Protestant's President, which alleges that the Applicant transported office equipment and furnishings, in use, for Monroe Business Systems, Inc., from Horsham, Pennsylvania, to Blue Bell, Pennsylvania, in late May, 1993. Mr. McGary further alleges that, since the date of the hearing held on November 4, 1992, the Applicant has transported on numerous occasions electronic equipment for Monroe Business Systems, Inc., in intrastate service. The Protestant alleges that these shipments are illegal and not within the Applicant's existing intrastate authority.

The Protestant further contends that these alleged illegal shipments bear directly upon the finding by the ALJ that the Applicant performed illegal service as a result of its good faith misunderstanding concerning its intrastate authority, and that the Applicant cannot demonstrate confusion or good faith for the shipments made since November 4, 1992. (Petition, Exhibit B).

In response, the Applicant filed a Motion to Strike Protestant's Petition to Reconsider and/or Reopen, wherein the Applicant argues that, while the Initial Decision was issued on August 11, 1993, the Protestant's Petition was not served on the Applicant until August 30, 1993. The Applicant further notes that the Protestant bases its Petition on our regulations at 52 Pa. Code Section 5.571. The Applicant contends that Section 703(f) of the Public Utility Code, 66 Pa. C.S. Section 703(f), which controls our regulation at 52 Pa. Code Section 5.571, states that any petition seeking a rehearing on an order made by the Commission must be filed within 15 days after the service of the order. Since the Protestant filed its Petition 19 days after the Initial Decision was served, the Petition is not timely filed and must be dismissed with prejudice. (Applicant's Motion to Strike, pp. 1-3).

The Applicant further argues that, even assuming arguendo that the Protestant's Petition was filed in a timely manner, the Petition does not meet the standards of law for granting a rehearing or reopening of the record. The Applicant contends that, under 66 Pa. C.S. Section 703(f), a petition for rehearing must allege newly discovered evidence not discoverable through the exercise of due diligence prior to the close of the record. To support this contention, the Applicant cites Philip Duick v. Pa. Gas and Water Co., 56 Pa. PUC 553, 558-559 (1982); and Michael Dayton t/a Tailored Promotions v. AT&T Communications of Pa., Inc., 70 Pa. PUC 138 (1989). The Applicant argues, in pertinent part, as follows:

12. Protestant's Affidavit to its Petition alleges that upon information and belief T&N conducted operations outside the scope of its authority with a Monroe Business Systems, Inc. "in late May 1993".

13. Protestant's Petition Paragraph 5 relates that this is "discovered new information" [sic], yet apparently in a direct attempt to avoid any issues of timeliness or diligence fails to identify any specific information, the source of the information, the date or even a general time period that the "new" information was discovered, inter alia.

14. Protestant did not timely present or show any exercise of due diligence in stating, let alone discovering, its alleged "new information" and therefore, Protestant's Petition does not meet the standard set forth by the Commission for consideration of Petition for Rehearing.

15. This broad-based, undocumented, unsubstantiated, and self-serving allegation of "new information" as stated in Protestant's Petition clearly is not sufficient or specific enough to meet the standard set forth by the Commission or to warrant any action by the Commission.

16. The Commission may further deny a request for rehearing if the grounds alleged in the Petition, even if proven at the hearing, would not change the Commission's decision. Application of Susquehanna Mobile Communications, Inc., 47 Pa. PUC 238, 242 (1973).

17. Even assuming arguendo that Protestant's allegations have any merit, T&N avers that there is sufficient independent positive evidence on the record of T&N's good faith and propensity to act legally and safely that said allegations would not establish or warrant a reversal of the Initial Decision.

18. Protestant's Petition for Reconsideration and/or to Re-Open the Record must be dismissed and stricken as it fails to

meet the standards set forth by the Commission for addressing a Petition for Rehearing.

19. Applicant avers and believes that the filing of this Petition is yet another calculated, dilatory tactic by Protestant to delay the subject transfer of authority. Further, Applicant avers and believes that Protestant's motive in pursuing these dilatory tactics is grounded in personal animosity to the principals of T&N based on their prior employment and on Protestant's effort to defeat any existing competitive economic forces.

20. As Protestant's Petition for Reconsideration and/or to Re-open the Record is based on grounds other than the public interest, as a matter of policy, Protestant's Petition must be dismissed and stricken.

(Applicant's Motion to Strike Petition, pp. 4-5).

In Answer of J.C. Services, Inc. to Motion to Strike Protestant's Petition to Reconsider the Initial Decision and/or Reopen the Record, the Protestant argues that its Petition is not based solely on 52 Pa. Code Section 5.571. Furthermore, the Protestant denies that a petition for rehearing must be filed within fifteen (15) days after service of an order. The Protestant avers that such a petition must be filed within the time period for filing Exceptions. The Protestant denies that its Petition to Reconsider or Reopen is not timely filed, nor that it should be dismissed.

The Protestant contends that the evidence that will be presented will be evidence of an ongoing, continuous provision of illegal service. The Protestant also denies that the allegations, even if proven, would not warrant a reversal of the Initial Decision. The Protestant further denies that the Petition does not meet the standards set forth by the Commission for addressing a petition for rehearing.

The Protestant further denies that the motive underlying its Petition is grounded in personal animosity toward the Applicant's principal owners, or that it is motivated by considerations other than the public interest. Accordingly, the Protestant requests that its Petition be granted. (Protestant's Answer, pp. 1-3).

In considering these matters, we concur with the Protestant that its Petition to Reconsider or Reopen the Record is not untimely filed. Section 5.571 of our regulations states:

[Section] 5.571. Reopening prior to a final decision.

(a) At any time after the record is closed but before a final decision is issued, a participant may file a petition to reopen the proceeding for the purpose of taking additional evidence.

(b) A petition to reopen shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(c) Within 10 days following the service of the petition, another participant may file an answer thereto.

(d) The presiding officer, before issuance of the presiding officer's decision or certification of the record to the Commission, otherwise the Commission, upon notice to the participants, may reopen the proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

(52 Pa. Code Section 5.571(a)-(d), emphasis added).

Since this Petition was filed prior to the issuance of the our final order in this proceeding, Section 5.571 controls,

and not Section 5.572, as contended by the Applicant. However, we do find it appropriate, under Section 5.571, to consider the Protestant's Petition only as a request for reopening the record in this proceeding, since Section 5.571 does not provide for reconsideration. Nevertheless, it is clearly stated at 5.571(a), above, as underscored, that such a petition for rehearing can be filed after the close of the record, but prior to our issuance of the final order in the proceeding. There is no 15-day filing period.

Additionally, Section 5.572, upon which the Applicant relies for its contention that the Protestant should have filed its Petition within 15 days of the Initial Decision, applies only to petitions for relief after the issuance of our final decision or order. Thus, we conclude that the Protestant's Petition to Reconsider or Reopen is properly before us to the extent that it is a petition to reopen the record under Section 5.571. On this basis, we will grant the Applicant's Motion to Strike Protestant's Petition to Reconsider with regard to reconsideration of the ALJ's Initial Decision, but deny it with respect to reopening the record.

Regarding the merits of the Petition, as presented above, Exhibit B attached to the Petition alleges that the Applicant transported office equipment and furnishings, in use, for Monroe Business Systems, Inc. in late May, 1993. The Exhibit further alleges that the Applicant has transported electronic equipment "on numerous occasions" for Monroe Business Systems, Inc. in illegal intrastate service.

The Applicant argues, among other things, that the Petition should be denied because the Protestant failed "to identify any specific information, the source of the information, the date or even a general time period that the 'new' information was discovered." The Applicant contends that the Petition is not sufficient or specific enough to meet the standard for granting such a petition, or to warrant any action by the Commission.

We concur with the Applicant that the allegations contained in the Petition are not set forth in sufficient detail to establish that the Applicant has engaged in illegal service to such an extent that it would convince us to reopen the record to receive further evidence. The Protestant has presented absolutely no information or details of illegal service to support the allegation of continuous illegal service. The only specific information presented by the Protestant concerns an alleged illegal act of transportation which purportedly occurred in "late May, 1993." Even if proven, this single violation would not convince us that the Applicant has been performing illegal service continuously since the close of the record in this proceeding, as alleged by the Protestant.

In the absence of such information, we find that the Petition does not meet the requirements of Section 5.571(b), supra, which states that "a petition to reopen shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material change of fact or of law alleged to have occurred since the conclusion of the hearing."

In the absence of specific information which would support the Protestant's averment of continuous illegal service by the Applicant, we cannot conclude, as the Protestant would have us, that there has been a change of material fact or of law of such magnitude that would lead us to conclude that it is necessary, or in the public interest, to reopen the record in this proceeding. Accordingly, we will deny the Protestant's Petition to Reconsider or Reopen the Record.

Before considering the individual Exceptions of the parties, we note that any issue or Exception which we do not specifically address has been duly considered and will not be

further discussed. See, generally, University of Pennsylvania v. Pa. P.U.C., 86 Pa. Commonwealth Ct. 140, 485 A.2d 1217 (1984).

We further note that the Administrative Law Judge made specific Findings of Fact and Conclusions of Law. (I.D., pp. 14-16, and p. 17, respectively). We adopt these herein by reference, unless modified or reversed by this final Opinion and Order.

Also before discussing the Exceptions, we will review the requirements of law regarding the granting of an application to provide service as a common carrier. The Public Utility Code states that it shall be lawful to provide service as a public utility only after applying for and obtaining a certificate of public convenience from this Commission. 66 Pa. C.S. Section 1101. Included in the definition of a "public utility" is any person or corporation transporting persons or property as a common carrier. 66 Pa. C.S. Section 102. The Public Utility Code further states:

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.
(Emphasis added).

(66 Pa. C.S. Section 1103 (a)).

In applying these requirements to motor carrier applications, we adopted Section 41.14 of our regulations, which states:

- (a) An applicant seeking motor common carrier authority has the burden of demonstrating that 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 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.

- (c) The Commission will grant motor carrier authority commensurate with the 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 granting of authority would be contrary to the public interest.

(52 Pa. Code Section 41.14).

In Application of Blue Bird Coach Lines, Inc., (Blue Bird) 72 Pa. P.U.C. 262 (1990), we stated, in pertinent part, that:

When, through relevant, probative, competent and credible evidence of record, a motor common carrier applicant has shown that the applicant's proposed service will satisfy the supporting witnesses' asserted transportation demand/need; the applicant has sustained its burden of proof under subsection 41.14(a) by establishing that "approval of the application will serve a useful public purpose, responsive to a public demand or need." E.g., Seaboard Tank Lines, Inc., 93 Pa. Commonwealth Ct. at 613, 502 A.2d at 768; Re Lenzner Coach Lines, Inc., 63 Pa. P.U.C. 217 (1987). See also Morgan Drive Away, Inc., v. Pennsylvania Public Utility Commission (Morgan Drive Away, Inc. II) 16 Pa. Commonwealth Ct. 293, 328 A.2d 194 (1974). This interpretation of subsection 41.14(a) is consonant with our avowed reason for promulgating the transportation regulatory policy statement at 52 Pa. Code [Section] 41.14, namely, to eliminate

monopolistic protection of existing motor carriers and to promote healthy competition among motor carriers for the purpose of assuring the availability of transportation service commensurate with the demonstrated public demand/need.

(Blue Bird, at p. 274).

We further stated:

Moreover, the supporting witnesses must identify Pennsylvania origin and destination points between which they require transportation, and these points must correspond with the scope of the operating territory specified in the application. E.g. Re Nothstein Bros. Inc., 64 Pa. P.U.C. 411 (1987); Re Purolator Courier Corp., 50 Pa. P.U.C. 308 (1976).

The particular circumstances of a case determine what constitutes sufficient evidence of a public demand/need for the applicant's proposed service. Noerr Motor Freight. Inc. v. Pennsylvania Public Utility Commission, 181 Pa. Superior Ct. 322, 124 A.2d 493 (1956); Re Purolator Courier Corp. Therefore, the number of witnesses which will comprise a cross section of the public on the issue of the public demand/need for an applicant's proposed service will necessarily vary with the circumstances of the case such as the breadth of the applicant's intended operating territory, the population density in the intended operating territory, and the scope of the requested operating authority. Purolator Courier Corp. II; Purolator Courier Corp. I; Noerr Motor Freight. Inc.; Application of Suburban Transit, Inc., A-00107286 (order adopted October 27, 1988, entered November 4, 1988); Re Purolator Courier Corp. Where the intended operating territory is broad and heavily populated and the applicant seeks an expansive grant of operating authority, more witnesses are required to show a cross section of the public needing the applicant's proposed transportation in the intended operating territory. Conversely, where the intended operating territory is restricted and not populous and the applicant seeks a narrow grant of operating authority, fewer witnesses

are required to show a cross section of the public needing the applicant's proposed transportation in the intended operating territory.

(Blue Bird at pp. 274-275).

In Re Perry Hassman, 55 Pa. P.U.C. 661, 662-663 (1982), we stated that fitness consists of three elements: (1) the Applicant must have sufficient technical and operating knowledge, staff and facilities to provide the proposed service; (2) the Applicant must have sufficient financial ability to provide reliable and safe service; and (3) the Applicant must exhibit a propensity to operate safely and legally. With regard to the third item, a lack of fitness is demonstrated by persistent disregard for, flouting or defiance of the Public Utility Code and the Orders and regulations of this Commission.

Regarding technical fitness, in our decision at Application of Adgebola Ige, t/a Globe Limousine Service, Docket No. A-00108943 (Order entered August 7, 1991), we stated:

An applicant must have the technical capacity to meet the need for the proposed service in a satisfactory fashion. An applicant must possess sufficient staff and facilities or operating skills to make the proposed service feasible, profitable, and a distinct service to the public.

As part of its Exceptions, the Protestant raises six specific Exceptions to the ALJ's conclusions and recommendations regarding the Applicant's fitness. In the first Exception, the Protestant excepts to the ALJ's recommended finding that the illegal shipments transported by the Applicant were performed in a good faith, reasonable misunderstanding of its operating authority. The Protestant contends:

The record establishes a disregard for the authority of the P.U.C. The P.U.C. should not allow carriers to act in such a way as to disregard its authority. The Initial Decision, if not overturned, will encourage other carriers to willfully operate illegally.

(Exc., p. 1).

The Protestant further argues that the Applicant did not produce any testimony in support of the confusion to which the ALJ referred at pages 9-10 and 16 of the Initial Decision. In fact, argues the Protestant, when the Applicant was questioned on cross-examination, the Applicant admitted he was not confused. The Protestant also excepts to the ALJ's recommended finding that there is positive evidence of fitness independent of the Applicant's admission of unlawful activities. (Exc., p. 2)

In its second Exception, the Protestant excepts to the ALJ's recommended finding that the Applicant does not lack a propensity to operate safely or illegally. The Protestant contends that it is clear from the record that the Applicant was not concerned with its lack of authority to operate legally and operated illegally from March, 1992, to the date of the hearing, November 4, 1992. (Exc., p. 2)

In its third Exception, the Protestant excepts to the ALJ's recommended finding that the payment of a fine and the ceasing of illegal operations is evidence of good faith by the Applicant. The Protestant's fourth Exception is to the ALJ's finding that the Applicant has sustained its burden of proof of establishing that it possesses a propensity to operate safely and legally. The Protestant's fifth Exception is to the ALJ's recommended finding that the Applicant has ceased its illegal activities. (Exc., pp. 2-3)

In its sixth Exception, the Protestant contends that the Applicant continues to perform illegal intrastate shipments, and refers to its Petition to Reconsider, which we discussed above. In its seventh Exception, the Protestant objects to the ALJ's finding that the Applicant has established its financial fitness. (Exc., pp. 3-4).

In response to the Protestant's Exceptions 1 through 4, regarding fitness and illegal service, the Applicant argues that the record in this proceeding establishes the Applicant's ability to operate safely and legally. The Applicant contends that the record further establishes that its illegal operations were performed under the good faith, if mistaken, understanding of the scope of its intrastate operating authority.

The Applicant further asserts that the record contains sufficient positive evidence, independent of the of the illegal operations, to conclusively establish that it is fit to provide the service at issue because, once it became aware of the illegal operation, it cured the problem, as noted by the ALJ. (R.E., p. 3).

Regarding the Protestant's argument that the Applicant was not confused about the scope of its authority, as evidenced by the testimony of the Applicant's witness, Mr. David Nelson, the Applicant contends that the record simply shows that Mr. Nelson candidly admitted that he incorrectly interpreted the scope of the Applicant's operating authority. The Applicant further argues that, upon learning of his mistake, Mr. Nelson agreed to cease and desist from these questionable operations, in an effort to comply with the law. This prompt effort to cure this problem, argues the Applicant, is evidence of its "good faith" efforts to comply with the law. The Applicant further contends that there is no evidence whatsoever of any bad faith on the part of the Applicant. (R.E., p. 6).

In reply to the Protestant's Exception Nos. 5 and 6, which aver that the Applicant continued to perform illegal operations after the close of record, the Applicant argues that, under our regulations at 52 Pa. Code Section 5.431, no additional evidence may be introduced or relied upon after the close of record, unless allowed for good cause. The Applicant, therefore, moves that Exceptions 5 and 6 be stricken.

Regarding this last issue, we concur with the Applicant that Protestant's Exceptions 5 and 6 should be stricken. The allegations contained therein are not part of the record as developed in this proceeding. Furthermore, the Protestant has raised these same issues by filing its Petition to Reconsider or Reopen, which we addressed above. Therefore, we will grant the Applicant's Motion to Strike Exception Nos. 5 and 6.

In addressing the issue of illegal service and its affect on her recommendation concerning the Applicant's fitness, the ALJ stated:

As a result of cross-examination, applicant agreed that it appeared that certain moves it had performed were not within the scope of either its existing PUC or ICC authority. Subsequently, at Docket No. A-00109244C9301, a Complaint was adopted by the Commission upon its own Motion charging applicant with 12 instances of illegal intrastate service. Applicant's February 2, 1993 letter to Secretary Alford indicates that the Complaint was resolved by payment of the \$3,000.00 fine, and that applicant has ceased performing such transportation pending resolution of this Application.

There is ample administrative and legal precedent on the issue of prior illegal service as it relates to fitness. It is well-settled that while misconduct is a factor for the Commission to consider when determining fitness, it is not conclusive. An applicant may present offsetting evidence to prove its present legal fitness to provide

a proposed service. The Commission has discretionary authority to grant an application as long as there is evidence of present fitness independent of the evidence relating to the unlawful activities.

Most recently, in Hercik v. Pa. P.U.C., 137 Pa. Commonwealth Ct. 377, 586 A.2d 492, 492-95 (1991), the Commonwealth Court, citing Brinks, Inc. v. Pa. P.U.C., 500 Pa. 387, 456 A.2d 1342 (1983),

Thus, under Brinks, it is clear that the incident of Conaway's past unlawful operations are not conclusive of the question of Conaway's present fitness and such prior unlawful operations do not preclude Conaway from obtaining an authority. It is in the discretion of the PUC to determine whether authority must be withheld considering other evidentiary criteria under 52 Pa. Code [Section] 41.14. This Court must then examine the record to decide whether the PUC's decision was based upon the fitness independent of the evidence of prior unlawful operations. (citations omitted).

* * *

Here, I find that applicant's admittedly illegal service (transporting electronic equipment intrastate not connected to commercial moves) was provided pursuant to a good faith, reasonable misunderstanding of the terms of its ICC authority. Further evidence of applicant's good faith, and propensity to act legally, is found in the fact that when its illegal activities were brought to the Commission's attention (by the protestant), applicant paid the fine and ceased the operations in question. Also, the Commission's files show that no complaints were filed against applicant in 1991 or 1992. Therefore, I do not find that applicant lacks a propensity to operate safely and legally.

(I.D., pp. 7-10).

We concur with the ALJ's recommendation, the Protestant's Exceptions notwithstanding. The record in this proceeding shows that the Applicant ceased performing this illegal service and paid a fine of \$3,000. The Protestant contends that the allegations contained in its Petition to Reconsider or Reopen would disprove this conclusion. However, as discussed above, the allegations do not contain sufficient detail to warrant a reopening of the record. Therefore, the ALJ's recommendation, in our view, represents a proper weighing and analysis of the record consistent with the current case law involving this issue. Accordingly, the Protestant's Exceptions 1 through 4 are denied.

In its seventh Exception, the Protestant excepts to the ALJ's reliance on an unverified financial statement in finding that the Applicant is financially fit. The Protestant also excepts to the ALJ's finding that the Applicant possesses the required operational fitness. The Protestant argues that the Applicant's principals have no managerial experience, since they were employed only in sales and dispatch. (Exc., pp. 4-9).

In response, the Applicant argues that the record contains sufficient information and documentation concerning the financial and operational capabilities of the Applicant. Therefore, concludes the Applicant, it has met its burden of proof. (R.E., p. 8).

Regarding this issue, the ALJ stated that the Applicant relied on Exhibits I and L as evidence of its financial and technical fitness. The Applicant also relied on the presumption of fitness arising out of its status as a certificated carrier, and stated that its principals have over 30 experience combined in the transportation industry. Exhibit I, noted the ALJ, purports to be a statement of financial position as of March 1, 1992, although it is not verified. This Exhibit shows assets of

\$48,900 in cash, \$40,000 for the common carrier authority, no liabilities, \$128,950 in owner's equity and a projected net income of \$150,000. The ALJ observed that:

Although the evidence on operational fitness was extremely skimpy, I find that applicant has sustained its burden of proof on this issue. It seems to have adequate financial resources, and the applicant's principals appear to be well experienced in the trucking industry.

(I.D., pp. 11-12).

It is well settled in the law that there is a general presumption of fitness for an applicant who already holds common carrier authority from this Commission, and is seeking additional common carrier authority, as distinguished from an applicant who is not already certified, and is seeking common carrier authority. See Re V.I.P. Travel Service, Inc., 56 Pa. PUC 625 (1982). This presumption is rebuttable by the appropriate evidence of record. This presumption has not been rebutted regarding operational and financial fitness. Accordingly, we concur with the ALJ that the Applicant has met its burden regarding financial and operational fitness.

We agree with the Protestant's contention that illegal service must be discouraged, and we do not want to give the impression that illegal service will be tolerated on the part of any carrier. However, as the Applicant argued, the ALJ is correct in determining, based on the Commonwealth Court's decision in Hercik and the Pennsylvania Supreme Court's decision in Brinks, both cited supra, that illegal service is not the only aspect of fitness that we consider. Furthermore, with regard to its Petition to Reconsider or Reopen, the Protestant has not presented sufficient information, with adequate specificity, to persuade us that it is in the public interest to reopen the record in this proceeding. The fact that the evidence of illegal service in the record resulted in complaints on our own motion

with resultant fines against the Applicant indicates our resolve to prosecute illegal service, when there is sufficient evidence to do so; **THEREFORE,**

IT IS ORDERED:

1. That the Motion to Strike Exceptions 5 and 6 filed by Tad's Delivery Service, trading as T & N Van Service, on September 9, 1993, be, and hereby is, granted.

2. That the Motion to Strike Protestant's Petition to Reconsider and/or Reopen Record filed by Tad's Delivery Service, trading as T & N Van Service, on September 9, 1993, be, and hereby is, granted, in part, and denied in part, consistent with this Order.

3. That the Petition to Reconsider the Initial Decision and/or Reopen the Record filed by J. C. Services, Inc., on September 1, 1993, be, and hereby is, denied, consistent with this Order.

4. That the Exceptions filed by J. C. Services, Inc., on August 30, 1993, to the Initial Decision of Administrative Law Judge Marlane R. Chestnut issued on August 11, 1993, be, and hereby are, denied, consistent with this Opinion and Order.

5. That the Initial Decision of Administrative Law Judge Marlane R. Chestnut be, and hereby is, adopted, consistent with this Opinion and Order.

6. That the Application of Tad's Delivery Service, Inc., trading as T&N Van Service, at Docket No. A-00109244, F.1 Am-A, for transfer of the rights held by Domenic Cristinzio, Inc. at Docket No. A-0086551, F.2, be, and hereby is, approved, and that the certificate of public convenience issued to the Applicant be amended to include the following rights:

To transport, as a Class D carrier: (1) tabulating and office machines for the International Business Machine Corporation between points in the City of Philadelphia, Philadelphia County, and from points in said City to points within an airline distance of twenty-five (25) miles of the City Hall in said City, and vice versa; (2) cases for the International Business Machine Corporation from points within an airline distance of twenty-five (25) miles of the City Hall in the City of Philadelphia, Philadelphia County, to points in said City, and vice versa; (3) office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 3328 Amber Street, in the City and County of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (4) office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 2073 Bennett Road, in the City and County of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (5) uncrated office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, between points in the Counties of Bucks, Chester, Delaware, Montgomery, Philadelphia, and from said Counties to points in Pennsylvania, and vice versa; (6) business and office machines, electronic manufacturing systems, parts and supplies thereof, that are manufactured, sold, leased, distributed or dealt in by International Business Machine Corporation, for International Business Machine Corporation between points in the Counties of Adams, Berks, Bucks, Carbon, Centre, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Schuylkill, Snyder, Union and York; (7) business and office machines and electronic or mechanical equipment, including, but not limited to, copiers,

computers, x-ray machines, and inserting machines, and new office furniture, between points in the Counties of Luzerne, Lackawanna, Monroe, Carbon, Northampton, Lehigh, Berks, Schuylkill, Columbia and Montour, and from points in said Counties, to points in Pennsylvania, and vice versa.

7. That this grant of authority is subject to the following conditions:

- A. That the approval hereby given is not to be understood as committing this Commission, in any proceedings that may be brought before it for any purpose, to fix a valuation on the rights to be acquired by the Applicant from the present certificate holder equal to the consideration to be paid, or equal to any value that may be placed on them by the Applicant, or to approve or prescribe rates sufficient to yield a return thereon.
- B. That the Applicant shall not record in its utility accounts any amount representing the rights granted by this Order in excess of the actual cost of such rights to the original certificate holder.
- C. That the Applicant shall charge to Account 1550, "Other Intangible Property", \$7,500, being the amount of consideration payable by it for the rights granted by this Order, less any amount recorded under Condition B above.

8. That the operating authority granted herein, to the extent that it duplicates authority now held by or subsequently granted to the Applicant, shall not be construed as conferring more than one operating right.

9. That the Applicant shall not engage in any transportation authorized herein until it has complied with the requirements of the Pennsylvania Public Utility Code and the rules and regulations of this Commission relative to the filing of insurance and the filing of a tariff establishing just and reasonable rates.

10. That the certificate holder shall comply with all of the provisions of the Public Utility Code now existing or as may be amended, and with all pertinent regulations of this Commission now in effect or as may be prescribed by the Commission. Failure to comply will be sufficient cause to suspend, revoke, or rescind the rights and privileges which are conferred by this certificate.

11. That issuance of a certificate of public convenience will become final only upon submission of the transferor's assessments due.

12. That, in the event the Applicant has not, on or before sixty (60) days from the date of entry of this Opinion and Order, complied with the requirements set forth herein, the Application shall be dismissed without further proceeding.

13. That, upon compliance with this Order, the rights granted to the transferor, Domenic Cristinzio, Inc., at Docket No. A-0086551, F.2, be, and hereby are, cancelled.

14. That the Protestant's Exhibit No. 5, and the

Applicant's Letter to Secretary Alford dated February, 2, 1993,
be, and hereby are, admitted into the record in this proceeding.

BY THE COMMISSION


John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: **October 28, 1993**

ORDER ENTERED: October 29, 1993