

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Truck Rental Rate **SECOND PREHEARING ORDER**
Effective December 20, 2004.

Telephone conferences were conducted on July 20 and 28, and August 3, 2005, on discovery motions.

The following persons appeared on the conferences:

Gregg J. Cavanagh, Attorney at Law, 13277 94th Avenue North, Maple Grove, MN 55369, appeared on behalf of the Petitioners who requested the administrative hearing in this matter.

Michael A. Sindt, Assistant Attorney General, Bremer Tower, Suite 1800, 445 Minnesota Street, St. Paul, MN 55101-2134, appeared on behalf of the Department of Labor and Industry (DLI) and the Department of Transportation (MnDOT).

Paul W. Iverson, Williams & Iversen, P.A., 1611 West County Road B, Suite 208, St. Paul, MN 55113, appeared on behalf of the Minnesota Construction Conference of Teamsters (the Teamsters).

The parties requested this order memorializing rulings made during the conferences, along with rulings on identification of the issues and burden of proof as had been addressed by the parties in memoranda.

Based upon the discussions during the conferences and the memoranda and documents filed by the parties, and for reasons set forth during the conferences and below, the Administrative Law Judge makes the following:

ORDER

Nature of the Case, Burden of Proof, Order of Proof

1. This matter is a “contested case” because it arises under the provision of Minn. Stat. § 177.44, subd. 4, that allows a person to petition “for a public hearing as in a contested case under sections 14.57 to 14.61.” Unless modified by statute or rule, contested cases are hearings *de novo* conducted by an Administrative Law Judge who makes a recommendation to the agency head. The agency head then makes the final administrative decision.

2. Because Petitioners are challenging the correctness of the truck rental rates established by DLI, the burden is upon Petitioners to prove the facts at issue by a preponderance of the evidence.¹

3. Having the burden of proof, Petitioners shall present their evidence first. DLI shall proceed with its evidence, followed by the Teamsters. All parties shall be allowed rebuttal, in the same order. Any public testimony shall be taken August 9, 2005, at 2:00 p.m., and any other convenient time.

4. Because this is not a judicial review of an agency decision, rules and standards applicable to judicial review do not apply. Deference to agency interpretations does not apply because there is not a final agency interpretation yet. However, agency personnel may be accorded some deference based upon any expertise acquired through their training and experience determining prevailing wage rates and applying the relevant statutes and rules.

Issues to be Decided

5. The following issues have been raised by Petitioners:

(1) DLI sent surveys to over 1,000 trucking firms and over 8,000 registered truck owners. Persons returning the surveys had to indicate that their vehicle was used in construction. Surveys so indicating were used, the other were not. Did that process violate the requirement of Minn. R. 5200.1105, to determine operating cost “by averaging the itemized costs of operating a vehicle as submitted by at least five trucking firms of various size and five independent truck owner operators, all selected by the commissioner as representative of the industry?”

(2) Whether DLI used survey data from persons who were not “selected by the commissioner as representative of the industry.” This issue is a sub-issue of the first issue.

(3) Whether DLI improperly included road contractors or others in the survey who are not “trucking firms” or independent truck operators.” This issue is also a sub-issue of the first issue.

(4) Whether DLI was authorized by Minn. Stat. § 177.41, *et seq.* and Minn. R. 1100, *et seq.*, to set separate rates for trailers and tractor-trailers.

(5) Whether DLI failed to consider the “nature of the equipment furnished,” in violation of Minn. Stat. § 177.44, subd. 3, by setting rates for a generic trailer rather than more specific types of trailers.

¹ Minn. R. 1400.7300, subp. 5. The Administrative Law Judge notes that in this case are relatively few fact issues and many legal issues. Burden of proof analysis does not apply to legal issues.

(6) Whether the truck broker fees were required to be “representative of the industry,” were required to be set as a separate rate, or were otherwise improperly determined under Minn. R. 5200.1105.

(7) Whether DLI failed to send survey forms to “enough” trucking firms and independent truck owner operators to obtain data that was representative of the industry. This issue is also a sub-issue of the first issue.

(8) Whether DLI violated Minn. Stat. § 177.41, *et seq.* and Minn. R. 1100, *et seq.*, by determining statewide, rather than area-wide, rates. Though not raised previously, this issue will be considered because this hearing is *de novo* and because it requires little, if any, factual development.

(9) Whether the rates, costs, and broker fees determined unconstitutionally impair existing contracts. This is claimed to be an issue of the adequacy of the determined rates. If so, this is a question of application of the statute or the rule properly before the Administrative Law Judge and the Commissioner. If it is actually a challenge to the validity of the statute or rule, then it is appropriate to take some evidence on the issue to provide a factual record for the Court of Appeals to use upon any appeal.

Discovery

6. Petitioners’ motion to compel disclosure of the names of persons who completed surveys by the Department of Labor and Industry is **DENIED**. Release of such data is prohibited by statutes. Petitioners’ need for the data does not outweigh the privacy interests of the subjects of the data.

7. Petitioner responded to DLI’s interrogatories by objecting to all of them. DLI’s motion to require answers to interrogatories is **DENIED**. Most of the interrogatories request information that is not related to the issues in this matter, are extremely burdensome, and were served shortly before the end of the discovery period. The depositions and production ordered next should provide adequate discovery at this late stage.

8. DLI’s motion to allow depositions of all fourteen Petitioners is **DENIED IN PART AND GRANTED IN PART** as follows: DLI may depose three Petitioners of its choice during the week of August 1, 2005. Issues regarding Petitioners discussing methods, strategies, and the like of challenging the truck rental rates are not likely to lead to relevant information and may not be inquired into. Issues related to the costs of operating trucks on construction projects are relevant. DLI may also inquire into the background of the deponents as to familiarity with operations and costs in the industry.

9. The persons being deposed by DLI shall provide their companies’ operating cost data, accounting statements, and a list of highway construction projects

for the year 2004 to DLI and the Teamsters. This data may be relevant to the issues raised by Petitioners and the evidence they intend to offer. Petitioners may redact data they believe is irrelevant to the issues in this matter, but must provide both redacted and unredacted copies to the Administrative Law Judge. They may mark any trade secret data as such. The required documents shall be provided by the start of the hearing on August 8, 2005.

10. All trade secret data and survey data shall be maintained by the parties as not public data under Minn. Stat. §§ 13.01 – 13.90, the Minnesota Government Data Practices Act. It shall be used the parties and counsel only for purposes of this proceeding.

11. The hearing shall be public, but shall be closed if it is necessary to discuss not public data.

Dated: August 3, 2005

s/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge