

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Complaint of
Rochester Express Against Rochester
Direct Corporation

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on December 5, 1995, and January 16 and January 24, 1996, at the Rochester City Hall, Rochester, Minnesota. The record in this matter closed on May 16, 1996.

Dan Moulton, Esq., Moulton Law Office, 976 S.W. 14th Avenue, Rochester, Minnesota 55902, represented the Complainant, Rochester Express Airport Shuttle, Inc. ("Express", "Rochester Express"). Dawn M. Parsons, Esq., 5200 West 73rd Street, Edina, Minnesota 55439, represented the Respondent, Rochester Direct Corporation ("Direct", "Rochester Direct").

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Transportation Regulation Board, and the Rules of the Office of Administrative Hearings, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with the Transportation Regulation Board, Minnesota Administrative Truck Center, 254 Livestock Exchange Building, 100 Stockyards Road, South St. Paul, Minnesota 55075. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Board may be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and five copies of each document must be filed with the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Board may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as its final Order.

Based on all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Background

1. On August 10, 1995, the Complainant filed a formal Complaint (Ex. 6) with the Minnesota Transportation Regulation Board (TRB) against Rochester Direct. The Complaint charged that Direct, which had never held authority to transport passengers to serve the Mall of America ("Mall"), was advertising and had advertised that it provided such service, and was announcing such services to the public and holding itself out as providing those services.

2. The August 10 Complaint was accompanied by supporting Affidavits alleging that Direct had advertised, by causing the distribution of a mailing throughout the Rochester area of a handbill that stated rates and a schedule, that it provided passenger van service between Rochester and the Mall of America. The Affidavits included also a February 14, 1995 letter from Attorney Dan Moulton to the Board and to the Minnesota Department of Transportation, which letter was accompanied by documentation of specific alleged violations of Direct's authority.

The violations alleged included the placement in a Rochester-area shopping guide on November 30, 1994 of a paid advertisement announcing Direct's passenger service to the Mall of America, the operation of vans leaving Rochester at hours outside their scheduled departure times, stopping vans at locations along the route between Rochester and the Minneapolis/St. Paul International Airport ("MSP International") when Direct's authority was for non-stop service only, the removal of Rochester Express schedules from a bulletin board at a hotel serviced by each, and the "pirating" of passengers scheduled originally to ride with Express from Rochester to MSP International.

3. On September 5, 1995, Rochester Express supplemented its August 10 Complaint by filing an Affidavit from one of Direct's former van drivers (Kurt Niebruegge), which Affidavit (Ex. 2) alleged that he drove Direct vans carrying passengers to and from the Mall of America "at least 10 to 15 times", that at least one other driver for Direct also transported passengers to and from the Mall, that such trips were made within the knowledge of Direct's general manager and dispatcher, who knew Direct had no authority to do so, that Direct imposed a separate, same-day round-trip fare between Rochester and the Mall, that he had made stops at interim points to pick up or drop off passengers, that Direct personnel had covered up Express's schedules in

certain public places and that Direct's drivers had driven vans containing passengers through railroad crossings without stopping.

4. On September 20, 1995, the TRB conducted a hearing at which Rochester Direct was ordered to show cause why disciplinary action should not be taken.

5. On September 25, 1995, Rochester Express's counsel filed with the Board an advertising supplement, entitled "Golden Generation", that appeared in the Rochester Post-Bulletin newspaper on September 18, 1995 (Ex. 8). The supplement listed vendors who had booths at a senior citizen exposition at the Mayo Civic Center in Rochester on September 21, including a listing reading "Rochester Direct-Booth 1. Van transportation between Rochester and the Mpls./St. Paul airport and the Mall of America eight times daily."

6. On August 19 and September 26, 1995, Rochester Direct's president, Dean Wickstrom, and its General Manager, Kurt Marquardt, filed letters with the Board outlining defenses to the allegations noted in Findings 1-3. These defenses acknowledge the receipt by Direct of the August 10 Complaint and Kurt Niebruegge's Affidavit.

7. On September 27, 1995, the Board decided to refer this matter to the Office of Administrative Hearings for a contested case hearing to determine "material facts in dispute". In that connection, a "Notice of and Order for Hearing" was issued by the Board on September 29, 1995, which Notice and Order apprised the parties that the disputed facts involved alleged advertising and provision of services outside the scope of Direct's regular route authority and alleged driving and safety violations.

8. At the hearing on December 5, 1995, counsel for the Respondent made a Motion to Limit the scope of the hearing to allegations specified in the August 10 Complaint, which Motion was subsequently denied. The Respondent also moved for the exclusion of the testimony of witnesses whose statements were filed on December 1, 1995, regarding alleged incidents of Direct drivers failing to stop at railroad crossings. This Motion was also denied subsequently because the Administrative Law Judge decided that the continuing of the unfinished hearing until mid-January 1996 allowed the Respondent sufficient time to prepare for the testimony, which testimony was directly relevant to the disputed issues referred to the ALJ by the Board on September 29, 1995.

9. On May 25, 1993, the Board issued an Order in Docket No. RRCC 681/T-89-126, Ord. 2, granting authority to Rochester Direct Corporation as a regular route carrier to transport passengers, baggage, U.S. Mail and express (limit 50 lbs. per package) between MSP International Airport and points located in the City of Rochester, serving no intermediate points, and restricted to "maxi-van" vehicles not to exceed 12 persons on any one trip. The Order also prohibited Direct from transporting passengers under charter. The foregoing describes the authority Rochester Direct is alleged to have violated.

Specific Alleged Violations

10. On November 9, 1995, Bonita Koenig was a passenger from MSP International on a Rochester Direct van. Ms. Koenig had been driven to the airport from a Rochester hotel by Rochester Direct several days earlier.

11. When she checked in at Direct's airport desk on November 9, Ms. Koenig asked if she could be dropped off at Oronoco, a community located 12 miles north of downtown Rochester, which location was convenient to her residence. There followed a surreptitious conversation between Koenig and Direct's desk agent. Following that exchange, Koenig announced out loud, "Oh, drop me at the (Rochester) Radisson." This incident was observed by agents of Rochester Express, who were at or near Express's airport counter, which is located only a few feet from that of Direct.

Rochester Express is authorized to make interim stops between Rochester and the MSP International Airport, but Rochester Direct is not. This situation was applicable on November 9, 1995.

12. At approximately 9:00 p.m. on November 9, the Rochester Direct van carrying Koenig and three other passengers stopped at J.C.'s, a gas station and convenience store located just off U.S. Highway 52 in Oronoco. Ms. Koenig got off the van, and Direct's driver, Brian Wallerich, removed her luggage and carried it inside the store. Ms. Koenig used the rest room, then made a phone call.

13. After Ms. Koenig went into the rest room at J.C.'s, Alan Keune, a Rochester Express driver who had observed Koenig at the airport and was operating an Express van along the same route and had seen Direct's van pull in to J.C.'s, confronted Wallerich and reminded him that Direct lacked authority to make the stop. Wallerich told Keune he had stopped because the passenger needed to use the rest room, and Keune replied by asking why she needed all her luggage for that.

14. After Ms. Koenig made her telephone call, Wallerich asked her to get back on the van and she refused, stating that she had just been called to be picked up. Keune asked Koenig for her name, address and/or phone number, which information she refused to give. Wallerich drove away without her, and Koenig was picked up shortly by car and driven away from J.C.'s.

15. Koenig was dropped off in Oronoco by prior arrangement with agents of Rochester Direct. Her oral declaration regarding being dropped off at the Radisson Hotel was an attempt to cover up the prior arrangement. The apparent attempt by Wallerich to persuade Koenig to go back onto Direct's van and finish the trip to Rochester was another attempt to conceal the attempt to drop Koenig in Oronoco.

16. On December 1, 1994, Rochester Direct applied to the Transportation Regulation Board to amend its authority by adding an additional route between Rochester and the Mall of America. It was discovered subsequently that Jefferson Lines held authority to provide the service sought by Direct, so Rochester Direct requested that its petition be withdrawn. On December 10, 1994, the Board issued an Order dismissing the petition.

Prior to filing the petition to amend Direct's authority, Dean Wickstrom had asked Jefferson Lines' desk agent at the airport whether Jefferson had authority to transport passengers between Rochester and the Mall of America, and was told that it did not. Direct's application was filed, in part, based on that erroneous information.

17. On November 30, 1994 the "City Paper", a commercial publication distributed in the Rochester area, published a paid advertisement inserted by Rochester Direct, which ad was carried on the publication's front page. The headline read, "Rochester Direct has eight departures to MegaMall and Mpls. Airport". The text included a picture of one of Direct's vans and a representation that the firm had eight departures daily to the Mall at a rate of \$27 for same-day round-trip service or for \$19.50 (\$9.75 one-way) if the service was not "same-day". A schedule, with departures every two hours from Rochester and the Minneapolis/St. Paul Airport, was also outlined. This advertisement was arranged, paid for and published prior to the application for authority outlined in the preceding Finding.

18. The advertisement noted in the preceding Finding and other marketing efforts by Direct generated an interest in Rochester for such service, and a number of persons contacted Rochester Direct to reserve trips to the Mall of America and back from Rochester. Although they were aware that they had no authority to serve the Mall, Wickstrom and Marquardt decided to honor the reservations, and a number of runs were made by Rochester Direct carrying passengers for hire between Rochester and the Mall of America in December of 1994 and January of 1995.

19. On one occasion in December of 1994 or January of 1995, Dave Hansen, one of Rochester Direct's van drivers, picked up a passenger at the Mall of America and drove him to Rochester. Hansen responded to the customer's call at the Company's desk at the International Airport and picked the passenger up because he was unaware that Direct lacked the authority for such services.

20. On two or three occasions in late 1994 and early 1995, Tim Roberton, another of Direct's drivers, transported passengers between Rochester and the Mall of America. He did so without question because he believed, at the time, that Rochester Direct had been granted temporary authority to provide such service.

21. Kurt Niebruegge was employed as a driver for Rochester Direct from September 8, 1994 to July of 1995. During the months of December 1994 and January 1995, Niebruegge transported passengers between Rochester and the Mall of America approximately two to four times per week. These passengers had pre-arranged reservations for such trips. Niebruegge was aware that Direct had no authority to provide service to or from the Mall, and he raised his concern over the lack of authority to Kurt Marquardt, Direct's General Manager, and to the Company's dispatcher, George Vallejo. Marquardt told him not to worry and that he (Marquardt) would "take care of it" if any problems arose. Both Marquardt and Vallejo told Niebruegge that they wanted to establish such service before the competition (Rochester Express) was granted such authority.

22. On several occasions in late 1994 and early 1995, Niebruegge discussed driving passengers to and from the Mall of America with four of Rochester Direct's

drivers other than Hansen and Robertson, each of which admitted that they had made such trips.

23. At some time early in December of 1994, Niebruegge was requested by Carlton Wickstrom, an airport desk agent for Direct, to draw a map showing in detail the pick up and drop off areas for passengers on the Mall of America property and directions in detail for driving in to, out of and within the Mall property. Niebruegge complied with the request, and his map (Ex. 14) was distributed by Marquardt to all Direct drivers with their paychecks on December 15, 1994. A note attached to the maps distributed reads, in part:

"Get to know map of Mall of America. We will drop off and pick up at the taxi doorway (marked in pink). Except at 5:30 from Mpls. For that van, have customers go to airport desk."

Marquardt subsequently thanked Niebruegge for drawing the map.

24. Prior to his employment as a driver for Rochester Direct, Niebruegge had been a driver for Rochester Limousine Service, which company had since gone out of business and transferred its authority to Direct. Rochester Limousine had authority to stop at interim points between Rochester and the International Airport, and Niebruegge had one "regular" customer he picked up and dropped off at Oronoco during that time. That same customer subsequently became a customer of Rochester Direct, and Niebruegge picked him up and dropped him off in Oronoco at least once.

Pursuant to an order from Marquardt or Vallejo, Niebruegge also stopped in Zumbrota, at the Covered Bridge Restaurant near Highway 52, to drop off a customer in 1995.

25. On several different occasions during his employment with Rochester Direct, Niebruegge observed at least five other Direct drivers fail to stop at railroad crossings while transporting passengers. He did not mention his observations to the drivers, but mentioned it to Don Wickstrom, another airport desk agent for the Company. He also mentioned the problem to Marquardt, who responded by asking Niebruegge "Who did you tell?", and Niebruegge responded that he had only told Don Wickstrom. Some of the incidents occurred after Direct's management distributed a letter (Ex. 31) to the drivers in late September, 1995, reminding them that state law required any van carrying passengers for hire to stop at railroad crossings.

26. Rochester Direct driver Dave Hansen has, on more than one occasion, driven over railroad tracks without stopping in the course of transporting passengers from the International Airport to Rochester. On October 16, 1995, Mr. Hansen failed to stop at the railroad crossing north of Cannon Falls. He had a passenger on board at the time.

27. On one occasion late in the fall of 1994, while driving a Rochester Direct van, Niebruegge was proceeding northbound to the International Airport and was passed by another Direct van, driven by Marquardt, who was accompanied by one passenger. Marquardt failed to stop the van at a railroad crossing north of Cannon Falls. When Niebruegge asked Marquardt why he had not stopped, Marquardt replied, "The guy was in a hurry to get to the airport."

28. In approximately May of 1995, Rochester Direct's drivers were informed that if passengers inquired about being taken to the Mall of America, they should inform the passengers that they could only take them to the International Airport, from which they could then take a shuttle bus to the Mall.

29. On June 4, 1995, Rochester Direct applied to the Interstate Commerce Commission (ICC) for Interstate authority to transport passengers, their baggage and express packages between Decorah, Iowa and Hudson Wisconsin, via the International Airport and downtown Minneapolis. One such route, between the Airport and Minneapolis, was designed to include the Mall of America as an intermediate point. An information sheet sent to Dean Wickstrom in connection with filing the application states, in part, "Applications which reached the ICC January 1, 1995 or later will be processed in approximately 30 days."

30. On August 15, 1995, the ICC informed Rochester Direct by mail that its ". . . application has been reviewed and accepted . . ." and that "This letter does not constitute authority to operate. Operations may begin only following issuance of a certificate, license, or permit which will be issued once compliance is made with the following requirements . . .". The letter listed requirements for filing a certificate of insurance, a designation of agents for service of process and tariffs or schedules. The letter notes also that "Notice of grant of authority was published in the ICC Register issue of August 15, 1995."

31. During a telephone conversation with an ICC official in Washington in late July of 1995, Mr. Wickstrom was informed that the application process would take approximately another 60 days. ICC authority was granted to Rochester Direct on November 30, 1995 to provide regular route interstate passenger service between Decorah, Iowa and Hudson, Wisconsin, over certain designated routes and to serve all intermediate points along those routes. The Respondent maintains that Route (6) of the authority granted, over Highways 494 and 5 between Interstate 35W and MSP International Airport, includes the Mall of America as an intermediate point.

32. Clark Phelps has been a driver for Rochester Direct since July 14, 1995. For approximately one month prior to July 14, Phelps was a driver for Rochester Express, which has had interstate authority since March 13, 1995 for service to Rochester and the Mall of America as part of its routes between Decorah, Iowa and Minneapolis.

On August 26, 1995, Phelps was requested by two passengers (Mr. and Mr. Martinez) en route from Rochester to the International Airport to take them on to the Mall of America. Phelps had been informed by Marquardt that Direct would be getting such authority "soon", so he drove the Martinezes to the Mall. Phelps understood Marquardt's statement that authority would be granted "soon" to mean that it was all right to begin to transport passengers to the Mall. When Marquardt learned that Phelps had made the run to the Mall, he informed Phelps not to do it again.

33. On several occasions, Phelps has transported his girlfriend and her son to the International Airport when he had no other passengers. They were not paying passengers. On such occasions, until Rochester Direct's management issued a written directive in late September, 1995 to always stop at railroad crossings, Phelps did not stop the van at railroad crossings.

34. On or about August 1, 1995, Rochester Direct, in anticipation of receiving soon its ICC interstate permit that would allow service between Rochester and the Mall of America, distributed a postcard-sized handbill (Ex. 3) advertising "Van Service Between Rochester and MPLS. Airport and Mall of America", which handbill quoted rates and stated a detailed schedule for such service. Approximately 27,000 such handbills were distributed in the Rochester area in envelopes from Metro Marketing Associates, Inc.

35. The distribution of the handbills noted in the preceding Finding was arranged at a time after Direct had applied for ICC authority and anticipated it would be a short process. After Wickstrom was told in late July that the issuance of authority would take at least another 60 days, Marquardt contacted Metro Marketing and was informed that 20,000 of the 27,000 envelopes had already been stuffed for mailing. Marquardt took no action to try to prevent, or to inquire about the cost of preventing the mailing of the envelopes already stuffed or to attempt to prevent the other 7,000 envelopes from being stuffed with Rochester Direct's advertising handbill. He decided rather to use the handbills as an ad for Direct's airport service and simply to order that anyone inquiring about service to the Mall of America be informed that the company could not perform that service. During the period after distribution of the handbills until it was granted interstate authority on November 30, 1995, Rochester Direct accepted no reservations for trips to the Mall of America.

36. On September 18, 1995, an advertising supplement (Ex. 32) Rochester Post-Bulletin of that date was published regarding a "Golden Generation" exposition to be held at the Mayo Civic Center in Rochester on September 21. This supplement noted that Rochester Direct would have a booth at the exposition and contained a representation that Direct provided van transportation services to the Mall of America. See Finding 5. Marquardt arranged the ad sometime during the summer of 1995, when he thought direct would "easily" have obtained by September the interstate authority it had applied for on June 4, 1995. At the time, he expected the grant of authority to come though within a month, and the exposition was over two months away. No attempt was made by Marquardt or anyone else in the management of Rochester Direct to pull the ad or change its text after they learned in late July that the grant of authority would not be issued for at least 60 more days.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Transportation Regulation Board has jurisdiction over the subject matter of the hearing.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. The Respondent violated Minn. Stat. § 221.021 by representing, or causing a representation to be made, to the public on various occasions between November 1994 and September 1995 that it had authority to provide passenger service between Rochester and the Mall of America, and that it was providing such service, including the publication of rates and schedules.

4. The Respondent violated Minn. Stat. § 221.021 by advertising on November 30, 1994 that it provided passenger service between Rochester and the Mall of America, including in such advertising the publication of rates and schedules.

5. The Respondent violated Minn. Stat. § 221.021 by providing service between Rochester and the Mall of America on over 20 occasions, mostly in late December of 1994 and early January of 1995, and as late as August 26, 1995. The Respondent had no authority to provide such service on or before November 30, 1995.

6. The Respondent violated Minn. Stat. § 221.021 by distributing 27,000 handbills advertising rates and schedules between Rochester and the Mall of America on or about August 1, 1995, at a time when it had no authority to provide such service.

7. The Respondent violated Minn. Stat. § 221.021 by advertising in a newspaper advertising supplement printed in the paper of general circulation in Rochester on September 18, 1995 that it was providing van service to the Mall of America eight times daily, even though it knew that it had not yet obtained authority to perform such service.

8. The Respondent violated Minn. Stat. § 221.021 by dropping passengers off and picking them up at interim points between Rochester and the Minneapolis-St. Paul International Airport, in violation of its authority, which provides that Rochester Direct is allowed to make no intermediate stops.

9. For most of the period between September 1994 and October 1995, the Respondent ignored the fact that its drivers had failed to stop on various occasions at railroad crossings while transporting passengers for hire in violation of Minn. Stat. § 169.28. The Board has authority, under Minn. Stat. § 221.021, to take disciplinary action (suspension or revocation of the Respondent's operating certificate) against the Respondent for allowing its drivers to violate Minn. Stat. § 169.28.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Transportation Regulation Board issue the following:

ORDER

1. The Respondent, Rochester Direct Corporation, shall cease and desist from all violations of Minn. Stat. Ch. 221, effective immediately.

2. The Respondent's operating authority is SUSPENDED for 21 days, effective the first day of the month following the issuance of this Order.

Dated this ____ day of June, 1996.

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped (14 tapes)

NOTICE

Under to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Respondent admits to violating Minn. Stat. § 221.021 in several particulars, including specifically advertising or holding out that it could perform passenger van service between Rochester and the Mall of America on a number of occasions, specified in the Findings above, when it had no such authority until November 30, 1995. The Administrative Law Judge (ALJ) does not find Rochester Direct's excuses for these violations to be justified, so he has recommended a penalty that he believes is an appropriate sanction for the Respondent's culpability.

It seems that in its eagerness to seize for itself the potentially lucrative market for passenger van service to the relatively new Mall of America from an affluent community that plays perpetual host to a significant number of affluent visitors from around the world (who come to Rochester to avail themselves of the medical services of the Mayo Clinic and its affiliated hospitals), the Respondent has, on more than one occasion, marketed those services when it knew or should have known it had no authority to do

so. The fact that it repeated the violations on two distinct occasions approximately nine months after its first violation of that type compounds its culpability.

The first violation occurred in late November, 1994, when the Respondent took out an ad in a local commercial publication before it even applied to the Board for authority to provide the claimed service. The ALJ accepts Mr. Wickstrom's testimony that he relied on the word of Jefferson's airport agent as authority for the proposition that no one had authority to serve the Mall of America from Rochester before applying for that authority. This admission makes Mr. Wickstrom seem naive (to rely on the representations of an official who had no decision-making authority over the area of inquiry), but not culpable. What is problematic in this situation is that Rochester Direct chose to advertise that it was providing such service before even applying for authority to do so. This is a blatant violation of the intent of Minn. Stat. § 221.021, and Direct should be punished for it. The excuse that it made a business decision because it felt that the granting of an application for this service was a "sure thing" does not mitigate the seriousness of the offense. Mr. Marquardt's testimony to the effect that he believed the fact that Direct had applied for the authority meant, in effect, that they had it especially stretches credibility, in light of the fact that the authority had not yet even been applied for before the ad was arranged, paid for and published.

The decision to provide services to passengers who reserved trips to and/or from the Mall of America after withdrawing its application for authority to do so compounds the fault of Rochester Direct. Again, Direct admits that it did so, particularly in December 1994 and January 1995, on the grounds that it felt an obligation to honor the reservations. The ALJ grants this justification no credibility. He is persuaded that Direct honored the reservations so that it could provide such services prior to the competition's doing so. It is noted that Rochester Express was granted ICC Interstate Authority to serve the Mall in March of 1995. Rochester Direct's actions in this regard can be viewed as a blatantly predatory practice, precisely the type that Minn. Stat. § 221.021 is designed to stop. The record is clear that the practice continued for at least two months, easily long enough for Direct to build a reputation in Rochester as a carrier to the Mall of America, in plain circumvention of its lack of authority to perform such services. This practice, based on a cold business decision to "get the jump" on the competition, especially during months of heavy retail activity at the Mall of America, should be punished.

A similar attitude prevailed among Rochester Direct's management in July, August and September, 1995. To distribute 27,000 handbills by mail advertising service it knew or should have known it had no authority to perform compounds the violations noted from the previous fall and winter. Direct's proffered justification, that it felt certain when the advertising was arranged that authority would be granted by the time such advertising was distributed, simply ignores the statutory prohibitions against such advertising or "holding out" found in Section 221.021. And, after learning that it would be a significant amount of time after the ads went out before authority could be granted, Direct made no effort to stop the 7,000 mailings over which it still had control or to inquire into the expense of pulling its ad from the 20,000 other envelopes. Its justification, that the ads were to be "considered" as advertising its airport service only, holds no credibility in light of the fact that rates and schedules for service to the Mall

were displayed prominently and the ads contained an obvious representation that such service was now available. This violation of Minn. Stat. § 221.021 should be sanctioned.

With regard to the newspaper ad that appeared in the "Golden Generation" supplement on September 18, 1995, it is noted that this advertisement was also arranged at a time when Direct thought it would soon be granted authority to serve the Mall in the future. And, even when it learned in late July that the authority would not be granted for at least two more months, it knew or should have known clearly that the ad would be published before authority was granted. On this occasion, when it should have been alerted by its past problems that the ad should not be run, Rochester Direct did nothing to stop it. This clear and blatant violation of Minn. Stat. § 221.021 merits punishment as well.

In arriving at Findings that Direct's drivers, including Marquardt, drove through railroad crossings on more than one occasion while carrying passengers for hire, the ALJ has accorded greater credibility to witnesses for Rochester Express who testified to observing such events than to the witnesses for Rochester Direct who testified about the subject. It is noted that the observations testified to by Express's witnesses were all made through windshields or front windows, which are not allowed to be tinted. This evidence tends to diminish the defense on the part of Direct that its vans have tinted windows, which makes it difficult or impossible to distinguish who is inside the vans. When asked directly whether they had "blown" through railroad crossings while carrying paying passengers, two drivers so accused (Dave Hansen and Tim Robertson) failed to deny the allegations. One driver said he could not recall having done so intentionally (implying he had done it unintentionally) and another testified he could not recall not stopping. The Judge considers these evasive responses to be tantamount to admissions of culpability. And, he believes the establishment that Rochester Direct's drivers failed to stop at railroad crossings while carrying paying passengers provides further grounds for disciplinary action.

Kurt Niebruegge's allegations that Kurt Marquardt, Direct's General Manager, once failed to stop at a crossing while transporting a paying passenger, was asked about it by Niebruegge subsequently, and replied that "The guy was in a hurry to get to the airport", is considered by the Judge to be credible. As such, it stands as further evidence that Direct's drivers violated Minn. Stat. § 169.28, which prohibits driving a vehicle carrying passengers for hire across railroad tracks without stopping. It also establishes that the Respondent's management ignored the fact that its drivers were failing to stop when they should. No corrective action was taken until on or about September 29, 1995, when Marquardt distributed a written reminder to the drivers that it was against the law not to stop at railroad crossings when carrying passengers. Even after that, Dave Hansen violated Section 169.28 on October 16, 1995. It is noted that the ALJ, in finding that fact, believes the testimony of Express witness Jessica Dorn.

The Administrative Law Judge rejects the argument of counsel for Direct that the Board has no authority to sanction an employer for individual employee violations of § 169.28. The Board has broad general power under Minn. Stat. § 221.021 to impose disciplinary action on carriers who are not fit and able to provide the services they are

authorized to perform, and Direct's toleration of such behavior by its drivers is a demonstration of a lack of fitness and ability to provide van passenger service that merits disciplinary action. Such action by the TRB against the employer in no way infringes on the power of law enforcement officials and the court system to impose criminal penalties on the individual drivers at fault.

Regarding the dropping off of Bonita Koenig at Oronoco, the ALJ has granted more credibility to the account of Rochester Express's witnesses, Alan and Holly Keune, than to that of Direct's driver, Brian Wallerich. He believes that the passenger was dropped off by prior arrangement and that her declaration about wanting to go to the Radisson Hotel and her refusal to honor the driver's request to get back on the van at Oronoco were subterfuges designed to fool the Keunes into thinking that Koenig and Rochester Direct had not made arrangements to stop and drop her off intentionally. The Judge also grants credibility to Mr. Niebruegge's assertion that he was ordered once to stop at Zumbrota and that he had a "regular" customer he picked up and dropped off in Oronoco. Because it has been established that Rochester Direct served intermediate points, which services are outside the scope of its authority, disciplinary action is warranted.

For all of the violations established herein, the Administrative Law Judge has recommended a penalty of suspending Direct's operations for a significant period of time - three weeks. He believes such a penalty is warranted because it should be sufficient to make an economic impact on Direct's business. It is appropriate to do so because it is reasonable to conclude that Rochester Direct's predatory practices in blatant violation of its authority had the effect of inflicting economic damage on Rochester Express, its chief competitor and the Complainant herein. The extent of that damage is unclear from the record, but it is evident, for example, that transporting passengers to and from the Mall of America before Express did, even though Express ultimately obtained authority to do so over eight months earlier than the Respondent obtained that authority, gave Direct an unfair advantage in the Rochester market. A severe penalty is appropriate to recognize such a level of harm.

The Administrative Law Judge believes it is appropriate to analyze the past unlawful operations of the Respondent with a view to determining its willingness and ability to conduct future operations in conformity with the statutes and applicable rules and regulations of the Board. The Administrative Law Judge believes it has been established that Rochester Direct has demonstrated through its flagrant, persistent illegal activity a character of mind making it unlikely to comply with transportation rules and regulations of the State in the future unless a severe penalty is imposed. He concludes that an examination of the past unauthorized activity would indicate a lack of future compliance because the past violations were, to a large degree, intentional, and it is reasoned that Rochester Direct's current disposition would be not to follow applicable statutes and rules governing the conduct of Minnesota carrier service absent a severe penalty for its past violations. Direct's past unauthorized activity evidences a cast of mind making it likely that it would fail to comply with applicable statutes and rules of the Transportation Regulation Board regarding van passenger service in the future if a severe punishment is not imposed at this time. See Spirit Coaches, Inc., CHTR 59202, Sub. 1(10-23-90), Aff'd, Spirit Coaches, Inc. v. Minnesota Transportation Regulation

Board, C7-90-2488 (Minn. App. 1991) (unpublished); and Brinks, Inc. v. Minnesota Public Utilities Commission, 355 N.W.2d 446, 450 (Minn. App. 1984).

R.C.L.