OAH Docket No. 12-3001-14998-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Petition of Rogness Leasing, Inc. for Household Goods Mover Permit Authority	**FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION**

The hearing in this matter was conducted by Administrative Law Judge Steve Mihalchick on September 25, 2002 at the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota. The record was closed on October 9, 2002 upon receipt of a letter from Protestant Lakes Moving.

James B. Hovland, Krause & Rollins, Chartered, 310 Groveland Avenue, Minneapolis, Minnesota 55403, appeared on behalf of the Applicant, Rogness Leasing, Inc. Douglas B. Bester, Manager and part owner, appeared on behalf of Protestant Bester Brothers Transfer & Storage Company, Inc. (Bester Bros.). Protestant Jeffrey Anderson, Lakes Moving, 25126 County Highway 88, Fergus Falls, Minnesota 56537, did not appear at the hearing but submitted two letters. Richard P. Anderson, Anderson & Bottrell, State Bank Center, Suite 202, 3100 – 13th Avenue SW, PO Box 10247, Fargo, North Dakota 58106-0247, also represents Lakes Moving, but did not appear at the hearing.

NOTICE

This Report is a recommendation, **not** a final decision. The Commissioner of the Minnesota Department of Transportation will make the final decision after reviewing the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner may not make his final decision until after the parties have had access to this Report for at least ten days. During that time, the Commissioner must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument to him. Parties should contact the office of Doug Weiszhaar, Acting Commissioner, Minnesota Department of Transportation, 4th Floor Transportation, 395 John Ireland Boulevard, St. Paul, Minnesota 551155-1899, to find out how to file objections or present argument.

Under Minn. Stat. § 14.62, subd. 2a, this Report shall constitute the final decision in this case unless the Commissioner modifies or rejects it within 90 days after the record before the Commissioner closes.

STATEMENT OF THE ISSUES

Whether the Commissioner should grant household goods mover permit authority to Rogness Leasing, Inc., and what restrictions should be applied if such authority is granted.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background and Prior Proceedings

1. On January 15, 2002, Applicant filed a Petition for Household Goods Mover Permit with the Department of Transportation. The Petition sought authority "between points in Minnesota on and west of US Highway 71 and on and north of US Highway 12."[1]

2. On January 18, 2002, a Notice of the Petition was published in the Rail and Motor Carrier Proceedings Notice and Hearing Bulletin. The Notice set a protest date of February 7, 2002.[2]

3. By letter of January 22, 2002, Bester Bros. filed a Petition to Intervene and Notice of Intent to Appear. On January 31, 2002, Lakes Moving, by its attorney, Richard P. Anderson, filed a Protest and Notice of Intent to Appear at Hearing.[3]

4. Applicant engaged in discussions with the Protestants and subsequently reached an agreement with counsel for Lakes Moving to restrict its requested authority to read as follows:

> Household goods, between points within a 50-mile radius of Fergus Falls, Minnesota, including Fergus Falls.
>
> <u>Restrictions:</u>
>
> 1. Restricted to the transportation of household goods in storage trailers owned by Rogness Leasing, Inc.; and
>
> 2. Restricted to the transportation of household goods to or from the storage facilities of Rogness Leasing, Inc., located at 715 East Hampden Avenue, Fergus Falls, Minnesota.

5. In a letter of April 23, 2002, counsel for Lakes Moving notified the Department that, "upon assurance that the application will be amended in the form set

forth in Attorney Hovland's correspondence of April 18, 2002, Jeffrey Anderson d/b/a Lakes Moving will withdraw its protest and request for hearing."[4]

6. On May 9, 2002, Jeffrey Anderson, owner of Lakes Moving, faxed a letter to the Department which stated as follows:

> On the matter of Glenn Rogness leasing before we go to court for protesting, I wanted you to know that I sent a letter to Clifford Stafford at MNDOT of complaint of operating a moving company without a permit. I was then contacted by Russ Henrikson of MNDOT that he was investigating Rogness leasing, after which Rogness leasing applied for a household goods moving permit. At the time of complaint he had 9 storage trailers. Within 3 months he had 12 storage trailers in use. My trailers are empty and I have nothing in storage. I then sent another letter of complaint to Clifford Stafford that Rogness Leasing has more trailers and also about Jerome Anderson also operating without a household movers permit. At this time how can I not protest!! Rogness Leasing has been offering storage trailers and moving people for at least 15 years. If I withdraw my protest how can I be assured that Rogness Leasing will stay within the limits of the law when he has continued to operate without a permit. I will continue to protest and I will not withdraw my protest I will continue to advise my lawyer Richard Anderson to do the same until he is stopped and fined. I have yet to move any trailers of his to and from his storage facility.[5]

Mr. Anderson did not send copies of his letter to the other parties.

7. By letter of May 21, 2002, counsel for Applicant notified the Department that Bester Bros. did not find the proposed restrictive amendment satisfactory, but that it did satisfy the interests of Lakes Moving. Applicant requested that the matter be set for hearing as soon as possible.[6]

8. On July 18, 2002, the Department issued a Notice of Hearing setting the hearing for September 25, 2002. The Notice included the amended authority. The Notice listed only the protest filed by Bester Bros. The Notice of Hearing was published in the July 19, 2002, Notice and Hearing Bulletin of the Department's Office of Motor Carrier Services.[7]

9. On July 23, 2002, a Notice and Order for Hearing was issued in this matter. The Notice and Order for Hearing described the amended and restricted authority being applied for and listed the parties to the proceeding as Rogness Leasing, Inc., Douglas B. Bester of Bester Bros., James B. Hovland, the attorney for applicant, Jeff Anderson of Lakes Moving, and Richard Anderson, counsel for Lakes Moving.[8]

10. On August 1, 2002, Jeffrey Anderson filed a Notice of Intention to Appear personally in this matter.

11. On September 25, 2002, the day of the hearing, Jeffrey Anderson came intending to appear at the hearing. It is unclear why he was there; he may have been invited by Mr. Bester to appear as a witness for Bester Bros. Counsel for Applicant did not want him at the hearing and apparently contacted Richard P. Anderson, Jeffrey Anderson's attorney. Jeffrey Anderson then had a telephone conference with his lawyer and was convinced that he should not be at the hearing. These matters were reported to the Administrative Law Judge, who arrived after Jeffrey Anderson had left. The Administrative Law Judge then raised the issue of the May 9, 2002, fax message from Jeffrey Anderson to the Department which stated that he wished to continue with his protest and would not withdraw. Over the objection of Applicant, the letter was made Exhibit 10 and the Administrative Law Judge informed the parties present that a clarification would be sought from Richard Anderson as to whether the protest had been withdrawn. That letter was sent September 25, 2002.

12. Richard Anderson forwarded the Administrative Law Judge's letter to Jeffrey Anderson.[9] During the week of October 1, 2002, Jeffrey Anderson called the Administrative Law Judge to explain his position on whether he had withdrawn his protest. The Administrative Law Judge asked him to put his position in writing. On October 9, 2002, the Administrative Law Judge received a letter from Jeffrey Anderson that stated as follows:

> When you consider the approval of Rogness leasing for his application for authority, in my opinion, I would not grant him authority. Rogness Leasing has defied and broken the law when hauling and storing household goods over the past years. If you feel you have to grant him the authority I would ask you to attach the following provisions:
>
> 1. All household good storage must remain at least 6 business days in storage before being allowed delivery.
>
> 2. A Log must be available for inspection during business hours.
>
> 3. Business must remain within a 50-mile radius of Fergus Falls.
>
> Thank you for your time,[10]

13. By letter of October 11, 2002, the Administrative Law Judge provided copies of the letter to Applicant and Bester Bros. and notified them that no further comment on the letter would be received because the issues raised by Mr. Anderson had been addressed adequately during the hearing.

Applicant's Work History and Business Experience

14. Applicant Rogness Leasing, Inc., is owned by Glenn Rogness and his wife, Yvonne Rogness. Mr. Rogness runs the business.[11] Prior to 1975, Mr. Rogness

had been in the feed business. During the drought in the summer of 1975, he started hauling hay as an exempt commodity. That evolved into a for-hire transportation business initially hauling flour to Chicago under ICC authority. The business grew into a trucking company with nationwide general commodities operating authority employing up to 40 people transporting food products and gas, fuel oil, and hot oil for road construction products. The company was known as Glenn D. Rogness Trucking, Inc. [12]

15. In about 1990, Mr. Rogness began receiving calls from businesses such as Pamida and Target requesting semi-trailers for storage of goods at their own facilities. Rogness Trucking began providing that service and that business "grew nicely."

16. In 1998, Mr. And Mrs. Rogness incorporated Rogness Leasing, Inc., anticipating Mr. Rogness's partial retirement. In 1999, Mr. Rogness retired from the trucking business and sold most of the assets of that business. However, he kept the trailer rental business and the real property in Fergus Falls in the new corporation. He now works part time in the leasing business and has a part time employee, Dale W. Light, who assists him.

17. At the present time, Applicant owns 61 trailers, 30 to 35 of which as being used by commercial or business customers and 20 to 25 of which are being used by residential customers. Most of the trailers are 48 feet long, a few are 45 feet long. Applicant prefers to provide refrigerated trailers, with the refrigeration units removed, to residential customers because they are air tight and cleaner than regular semi-trailers.[13]

18. With its commercial or business customers, Applicant delivers an empty trailer to the customer site and the customer uses it there for temporary or permanent storage. No transportation service is involved other than the delivery and pick up of Applicant's own empty trailer. On a few occasions, Applicant has had to move a trailer to a different location on a commercial customer's property.[14]

19. Applicant has developed a significant amount of business providing trailers to peoples' homes. Such customers may be seeking a place to temporarily store household goods while they remodel their home or build a new home or make repairs from storm damage. Applicant delivers an empty trailer to their residence and the customer loads the trailer at their convenience and locks it with their own padlock. Sometimes the trailer will be left there, but frequently the customer prefers to have the trailer stored at Applicant's lot in Fergus Falls and later delivered to their new home site. Other customers want the trailer moved directly to a new residence. The customers then unload the trailer themselves.

20. Prior to December 2001, Applicant moved all of its own trailers using its own tractor driven either by Mr. Rogness or Mr. Light. It did so regardless of whether the trailers were loaded with household goods at the time and it did so without any state or federal household goods mover authority.[15]

21. In December, 2001, Mr. Rogness received a called from a MnDOT representative who asked to see him. They met and the MnDOT representative stated that he had a complaint that Applicant was moving household goods without a permit. Mr. Rogness described his operation and the representative informed him that if he moved a trailer with household goods in it, he was moving household goods and either had to apply for authority to do so or stop doing it. Applicant was later issued a citation for moving household goods without proper authority. Ultimately, after Mr. Rogness discussed the matter the City Prosecutor, the citation was dismissed. Mr. Rogness then obtained legal counsel for assistance in obtaining appropriate authority. Since December, 2001, Applicant has not moved any trailers with household goods in them itself. Rather, it has employed a local carrier with household goods authority to move loaded trailers.

Applicants Proposed Household Goods Moving Service

22. Applicant does not intend to be in the household goods moving business. It intends to continue leasing trailers to residential customers who want to use the trailers for the temporary storage of household goods either at the customer's home or on Applicant's lot. Some residential customers, however, find that filling the trailer with household goods, then having it moved to their new home is an economical alternative to a traditional mover or to renting a moving truck. Applicant needs no authority to deliver or pick up empty trailers, but has had some difficulty finding authorized movers willing and able to move its trailers loaded with household goods on the schedule desired by Applicant's customers and for what it considers reasonable prices. Applicant is willing to limit its authority to deliver only its own trailers to and from points within 50 miles of Fergus Falls, and only to and from its own storage facilities in Fergus Falls. It is willing to do so primarily because that is all Mr. Rogness and Mr. Light want to work. Moving any of its trailers loaded with household goods to or from beyond 50 miles or between locations other than to or from the lot would be hired out to other authorized household movers.[16]

23. Applicant's 61 trailers are estimated to have a value of approximately $244,000.00.[17] The tractor unit is a 1987 freightliner, a small and maneuverable unit useful for maneuvering trailers on the lot and delivering them to a local area. It is valued at approximately $10,000.00.[18] The trailers and tractor are kept in excellent condition by Mr. White, who serves as Applicant's mechanic and who is certified as a Minnesota Commercial Vehicle Inspector.[19]

24. Mr. Rogness will be the person responsible for Applicant's compliance with federal and state insurance requirements and safety requirements. If any new drivers are added, which is not anticipated, they will be carefully investigated and provided with and tested on the rules and regulations governing both interstate and intrastate operations. Required medical certificates, trip reports and daily logs will be maintained for each driver.[20]

25. Applicant's financial statement as of January 9, 2002, showed net worth of $278,640.00. That included trailers valued at $232,500.00. As noted above, that has

increased to $244,000.00 with the addition of five new trailers and the sale of two old trailers. That was financed in part by a personal note to Mr. Rogness from a bank in the amount of $14,000.00, which he will pay in January, 2003. Neither the new trucks nor a bank note are shown on the January 9, 2002 financial statement.[21] The net effect would be a small reduction in new worth. The financial statement does include business property which is a lot about 2/3rd of a city block in Fergus Falls with a 40 x 84 foot shop/office facility with a service bay large enough to hold a tractor and trailer.[22]

Evidence of Need for the Proposed Household Goods Moving Service

26. During the two weeks prior to the hearing on September 25, 2002, Applicant delivered two or three trailers to commercial customers and three trailers to residential customers. If the requested authority is granted, Mr. Rogness expects that they would have to move trailers to or from Applicant's lot three or four times per week.[23]

27. Applicant submitted storage trailer rental forms for transactions from April, 2002 through September 17, 2002. Those show 23 residential customers during that time, although one or two appear to be electricians who use the trailers for temporary storage while working at a residence. The billings showed that Applicant typically charges $125.00 for the first month of trailer rental and $100.00 per month thereafter. There usually appears to be a $25.00 delivery charge for placing and picking up an empty trailer. If a trailer contained household goods during that period, it was transported by Larry Ott, who has household moving goods authority.[24] Since December, 2001, Larry Ott submitted bills to Applicant and was paid for moving trailers containing household goods for 10 of those customers, making a total of 14 separate trips. Four of the trips involved the loaded trailer being moved to the lot and then, later, being moved to a different location. (Debrito, Kinder, Ryan, and DeVries). Two of the trips were from the residence to Applicant's lot during August 2002, where the trailers apparently remain in storage awaiting delivery. (Stommes and Johnson). The remaining trips were all from one private location to another. Larry Ott charges Applicant $40.00 to $60.00 per trip, apparently depending on the distance.[25] Applicant passes that cost directly to the customer.[26] Thus, it appears that most, if not all the customers who have a loaded trailer moved to the lot then have it moved to another location. None of the deliveries of loaded trailers from the lot have been returned to the same location.

28. Several people who have used Applicant's service for storage and moving of household goods submitted letters of support. The Buckinghams were happy to have the trailer available to store their household goods in during June until they could get into their new home on July 1. Likewise, the Kinders believed they saved over $1,000.00 by being able to pack up their goods and move them to the lot for storage for two weeks until they were able to move into a home they had just purchased in the area. David Boese was happy to have been able to store his belongings in a trailer until it could be moved to his new home and unloaded. The Rosenes found it very useful to use a trailer when their new house closing was delayed for ten days. The Trommerdeles also found it very convenient to have the trailer brought to their property

while their house was being built because it gave them plenty of time to unpack once their house was ready.[27]

29. Applicant applied for and on February 20, 2002, received authority from the US Department of Transportation to engage in transportation as a contract carrier of household goods by motor vehicle in interstate or foreign commerce.[28] That authority was requested because Fergus Falls is only 23 miles from North Dakota and Applicant has customers there.

30. Mr. Rogness believes that with the authority requested, Applicant would be able to serve its customers more quickly and at a lower cost, which would be passed on as a savings to the customers. He has had difficulty finding people to move his trucks as quickly as customers desire and has lost some business because of it. Customers want the trailers picked up when they call and say they are ready. Even with Mr. Ott moving loaded trailers for Applicant on a fairly regular basis, Mr. Ott cannot always provide the response time Applicant desires. Mr. Ott has also indicated that he no longer desires to provide the service to Applicant. If the authority is granted, Mr. Rogness or Mr. Light would usually be able to provide immediate pickup of a loaded trailer or delivery of a loaded trailer from storage in the same manner that they now drop off and pick up empty trailers. Moving loaded trailers between other locations and to or from locations more than 50 miles from Fergus Falls will still depend on the availability of other authorized movers.[29]

31. In addition to Larry Ott, Applicant has used Elliot Transfer of Fergus Falls on one or two occasions. Mr. Rogness has talked with the owner of Elliot Transfer several times and that owner has called Mr. Rogness at times looking for trailers to be used for storage. Mr. Rogness testified that he has used Lakes Moving at least once to move a trailer. He testified that no one else in the Fergus Falls area was available to move his trailers.

Evidence Presented by Intervening Carriers

32. Bester Bros. Indicated that it was a Twin Cities company and could not itself economically respond to a request from Applicant to move a loaded trailer in the Fergus Falls area. It does point out that since December 2001 when Applicant started using authorized movers to move loaded trailers, there have been relatively few moves.

33. Jeffrey Anderson's primary complaint is that Applicant moved household goods without a permit for many years and should not be granted authority now because of the past violations. He is, however, willing to live with the amended authority that his lawyer had previously agreed to as long as there is some mechanism to ensure that loaded trailers are brought to the lot for actual storage. At the hearing, the Administrative Law Judge raised the same issue by asking whether it would be possible to avoid the restriction by bringing a loaded trailer to the lot and then immediately taking it out to the customer's new home. Applicant indicated it was not its intention to do so.

Based upon the Findings of Fact, the Administrative Law Judge makes the following Conclusions:

CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge authority to conduct this proceeding and to make recommendations to the Commissioner of the Department of Transportation. The law also gives the Commissioner authority to make findings, conclusions, and a final order in this proceeding.[30]

2. The Department gave the parties proper and timely notice of the hearing, and it has also complied with all of the law's substantive and procedural requirements for initiating and proceeding with this administrative contested case proceeding.

3. Minnesota law provides that persons desiring to hold themselves out as a carrier of household goods or to engage in that business must first apply for and obtain a household goods mover permit from the Department.[31]

4. Minnesota law requires that an applicant for household goods mover permit meet the following four conditions before the Commissioner can grant that authority:

(a) That the petitioner is fit and able to conduct the proposed operations;

(b) That the petitioner's vehicles meet the safety standards established by the department;

(c) That the area to be served has a need for the transportation services requested in the petition:

(d) That existing carriers have failed to prove that they offer sufficient services to fully and adequately meet the need.[32]

5. The Department has further defined the term "fit and able" in its rules:

> The term "fit and able" shall mean that the applicant is financially able to conduct the proposed business; that the applicant's equipment is adequate and properly maintained; that the applicant is competent, qualified, and has the experience necessary to conduct the proposed business; that the applicant is mentally and physically able to comply with rules and statutes of the commissioner of transportation.[33]

6. Applicant has the burden of proving by a preponderance of the evidence that it has met the conditions described in subparagraphs (a), (b), and (c) of Conclusion No. 4. If that burden is met, then the intervening carriers, Bester Bros. and Lakes Moving, have the burden of proving by a preponderance of the evidence that other carriers offer sufficient services to fully and adequately meet the need.[34]

7. Applicant is competent and qualified and has the experience necessary to conduct the proposed business. It is also financially able to conduct the proposed business. Applicant's failure to obtain proper authority for years is troublesome, but the criminal authorities decided to dismiss the citation that was issued. Mr. Rogness has taken all the steps necessary to operate legally and assures us he will do so. Applicant, therefore, is in all respects "fit and able" to conduct the proposed business within the meaning of Minn. Stat. § 221.121, subd. 1(b).

8. The area Applicant proposes to serve has a need for the transportation services requested in the petition. There are no authorized movers available in the Fergus Falls area to move Applicant's loaded trailers to and from his lot within the nearly immediate response time Applicant requires to serve his customers adequately and at rates low enough to enable Applicant to provide attractive prices. Other carriers do not offer sufficient services to fully and adequately meet the need that Applicant proposes to meet.

9. The restriction on the authority as proposed by Applicant is worded such as to allow Applicant to avoid the restriction against moving loaded trailers from a customer's old home to a customer's new home by simply moving the trailer to Applicant's lot then immediately moving it out to the new location. Thus, the restrictions should be modified to require a storage period of at least a week.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner GRANT the Petition of Rogness Leasing, Inc., for Household Goods Mover Permit Authority as follows:

Household goods, between points within a 50 mile radius of Fergus Falls, Minnesota, including Fergus Falls.

<u>Restrictions:</u>

1. Restricted to the transportation of household goods in storage trailers owned by Rogness Leasing, Inc.; and

2. Restricted to the transportation of household goods to or from storage of at least seven days at the facilities of Rogness Leasing, Inc., located at 715 East Hampden Avenue, Fergus Falls, Minnesota.

October 17, 2002

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped, 2 tapes, no transcript prepared

NOTICE

The Commissioner must serve his final decision upon each party and the Administrative Law Judge by first-class mail.[35]

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[1] Original in Department file, copy attached to Exhibit 1 as Appendix A
[2] Original in Department file.
[3] Original in Department file.
[4] Original in Department file and Exhibit 1, Attachment B.
[5] Exhibit 10
[6] Original letter in Department file.
[7].Original in Department record.
[8] Original in Department record.
[9] Exhibit 11
[10] Exhibit 12
[11] Exhibit 1, Appendix A; Testimony Glenn Rogness.
[12] Exhibit 1 at 3, Testimony of Glenn Rogness
[13] Exhibit 1 at 3-4; Testimony of Glenn Rogness
[14] Exhibit 1 at 4; Testimony of Glenn Rogness
[15] Exhibit 1 at 4-6; Testimony of Glenn Rogness
[16] Testimony of Glenn Rogness
[17] Exhibit 1, Appendix D
[18] Testimony of Glenn Rogness; Exhibit 1, Appendix C
[19] Exhibit 5; Exhibit 1 at 5-6
[20] Exhibit 1 at 6
[21] Exhibit 1, Appendix A; Testimony of Glenn Rogness
[22] Exhibit 1 at 6-7; Testimony of Glenn Rogness
[23] Testimony of Glenn Rogness
[24] Exhibit 7
[25] Exhibit 8
[26] Exhibit 7
[27] Exhibit 9
[28] Exhibit 3
[29] Testimony of Glenn Rogness
[30] Minn. Stat. §§ 14.50 and § 221.121, subds. 1 and 6a.
[31] Minn. Stat. § 221.121, subd. 6a.
[32] Minn. Stat. § 221.121, subd. 1(b).

[33] Minn. R. 7800.011, subp. 4.

[34] *Appeal of Signal Delivery Service, Inc.,* 288 N.W.2d 707, 712 (Minn. 1980).

[35] Minn. Stat. § 14.62, subd. 1