6-3001-2766-2
CHTR 6179/A-88-288

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Petition of Borton Leasing, Inc., d/b/a Borton Limousine for Charter Carrier Permit Authority.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION ON REMAND

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on July 6, 1989, in Minneapolis.

Elizabeth Hoene Martin, with the firm of Doherty, Rumble & Butler, 2800 Minnesota World Trade Center, 30 East Seventh Street, St. Paul, Minnesota 55101-4999, appeared on behalf of the Petitioner, Borton Leasing, Inc., d/b/a Borton Limousine. Brent Wm. Primus, Primus Law Office, 432 Norwest Midland Building, Minneapolis, Minnesota appeared on behalf of Protestant International Express Corporation, d/b/a Airport Express. Samuel Rubenstein of Freight Transportation Consultants, Inc., P.O. Box 5, Minneapolis, Minnesota 55440, appeared on behalf of Protestant Transportation Management, Inc., d/b/a Airport Limousine service.

The Record herein closed on August 29, 1989, upon receipt of the last post-hearing brief.

Notice is hereby given that, pursuant to Minn. Stat. 14.61, and the Rules of Practice of the Public Utilities Commission, as applicable to 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.

STATEMENT OF ISSUE

is Petitioner fit and able to conduct the proposed operation?

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

FINDINGS OF FACT

Procedural Background.

1. This matter initially came before Administrative Law Judge Stephen D. Swanson on November 14 and 16, 1988. He issued Findings of Fact, Conclusions and a Recommended Order dated February 24, 1989. Judge Swanson concluded that the then-applicant, as an operating division of a corporation, was not a "person" that could obtain charter carrier permit authority. Although Judge Swanson concluded that the operating division had the experience, equipment and safety standards to be fit and able, he found that the applicant had not shown financial fitness and ability. The case is now before the undersigned Administrative Law Judge pursuant to a letter dated March 23, 1989 from Timothy S. Perry, Administrative Director, Transportation Regulation Board (hereinafter, TRB or Board). The Board remanded this case for findings on the sole issue of fitness and ability of the Petitioner to carry out the proposed service. The Board also requested a current financial statement and equipment list for Bergh International Holdings, Inc. (BIH). BIH was the corporate entity (of which Borton Limousine was an operating division) making application for charter authority at the time of Judge Swanson's proceeding.

2. On April 27, 1989, a new Minnesota corporation was formed. it is named Borton Leasing, Inc. It was formed to provide a proper entity to hold the permit and conduct the business at issue in this proceeding.

3. On May 26, 1989, Judge Swanson issued a pre-hearing order granting Petitioner's motion to amend the Petition to indicate Borton Leasing, Inc., d/b/a Borton Limousine (hereinafter "Borton" or "Petitioner") as the Petitioner. This order set June 22, 1989 as the hearing date. The hearing was rescheduled to July 6. 1989.

Services Proposed.

4. Borton proposes to transport passengers under charter in vehicles not exceeding 15 passengers and vehicles not exceeding 24

passengers with conference seating and luxury amenities. The application, as amended, describes the proposed authority as follows:

> Transport passengers under charter in Minnesota from all points in the seven county metro area (Hennepin, Ramsey, Dakota, Washington, Anoka, Carver and Scott Counties) and from all points outside of said metro areas south of U.S. Highway 12, to all points in Minnesota and return, restricted to operations with vehicles not exceeding 15 passengers, and vehicles not exceeding 24 passengers with conference seating and luxury amenities.

5. Petitioner presently has available ten vehicles to provide the proposed service: (1) 1984 Volvo limousine; (2) 1985 Volvo limousine; (3) 1988 Lincoln Town Car; (4) 1986 EMC Starfire; (5) 1987 EMC Execustar; (6) 1984 Ford Club Van; (7, 8) two 1989 Lincoln limousines; (9) 1988 Volvo Sedan; and (10) 1986 Zimmer Coach. Petitioner's Exhibit 29.

Fitness and Ability.

6. The business operation now described as Borton Leasing, Inc. dates back to 1972, when it was known as 0. 1. Borton Motor Leasing, Inc. In 1976, the name of the corporation was changed Lo Borton Leasing, Inc. This operation existed as an independent corporation until it was merged with BIH in 1987 for tax reasons. After the merger in 1987, the actual business operation continued as a separate division of BIH. BIH, in its status as a holding company, does not conduct business operations independent of the its divisions and subsidiary corporations. Certificates of assumed names were acquired by BIH to permit the division to continue operating under the name of Borton Leasing, Inc. and to permit the division to operate under the name of "Borton Limousine."

7. As noted above, Borton is a Minnesota Corporation incorporated on April 27, 1989. Exhibit 23. Kjell Bergh is the president and sole director. Exhibit 24. The corporation issued 1,000 shares of Class A voting common stock to Bergh International Holdings, Inc., which is the sole shareholder. Exhibit 27. Mr. Bergh is the beneficial owner of Borton Leasing, Inc. Remand Transcript, at 16.

8. Borton Leasing, Inc. operates three separate businesses, all transportation related. one is the daily rental of automobiles. Another is the long term leasing of automobiles. The third is the limousine service that is the subject of this proceeding. Remand Transcript, at 22.

9. Administrative Law Judge Swanson found that the business operation (which now exists as the Applicant) is fit and able to provide the proposed services, except that it had failed to demonstrate financial

fitness. Borton Leasing, Inc. Petition for Charter Carrier Authority, (Recommended Order issued February 24, 1989)(Findings 9-22 and Conclusions 8-10). Those Findings and Conclusions are hereby adopted and made part of this report, except as Conclusion 8 is modified below. See, Memorandum, infra.

10. Borton Leasing, Inc., as a whole, has not been profitable, at least on paper. The most recent financial statement in the record is as

of May 31, 1989. It shows that for the fiscal year (from August 1, 1988) to May 31, 1989, Borton Leasing, Inc. had just about broken even. On sales of $644,288, it had lost $4,753. That cumulative figure includes some months of profit (up to $58,736 in February) and some months of loss (up to $34,754 in October). The trend however, is clearly positive, with the corporation having been profitable in each of the latest 4 months. More importantly, those losses are after deductions for non-cash items, including substantial depreciation. If depreciation were ignored, the corporation would have a substantial net profit for the year. Exhibit 36.

11. The limousine operation, one of the three lines of business of Borton Leasing, Inc., has been less profitable than the corporation as a whole. As of May 31, 1989, the limousine operation had lost $70,613 since August 1, 1988. It had generated revenues of $21B,346, but direct expenses of $102,186 and G & A expenses of $188,759. After minor adjustments, the net loss was $70,613 for the first 10 months of the year. This figure includes depreciation expenses of $47,134. But even if depreciation were ignored, the limousine operation is losing money.

12. Borton's past losses are less of a factor than might otherwise be the case because of the ability of the beneficial owner, Mr. Kjell Bergh, to infuse capital into the corporation. Mr. Berqh estimated his net worth as being in excess of 4 million dollars. Although this figure is an estimate, Mr. Bergh's testimony substantiated the presence of reasonable amounts of capital available for infusion into this corporation. He had placed $200,000 into a corporation only three months prior to the hearing. Remand Transcript, at 38. Mr. Bergh described such infusions as done "routinely." Id. Mr. Bergh does intend to keep the corporation in operation. Remand Transcript, at 39.

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. Applicant is financially fit and able to conduct the proposed transportation services.

4. From the applicant's experience providing luxury limousine and executive coach service, knowledge of the regulations governing common carriers and financial condition, the Applicant is fit and able to conduct the proposed transportation services.

5. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE TRANSPORTATION REGULATION BOARD WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

It is the recommendation of the Administrative Law Judge to the Board that it issue the following:

ORDER

That a permit be issued to the Petitioner for the following authority:

> Transport passengers under charter in Minnesota from all points in the seven county metro area (Hennepin, Ramsey, Dakota, Washington, Anoka, Carver and Scott Counties) and from all points outside of said metro areas south of U.S. Highway 12, to all points in Minnesota and return, restricted to operations with vehicles not exceeding 15 passengers, and vehicles not exceeding 24 passengers with conference seating and luxury amenities.

Dated: September 28 1989.

Allan W. KLEIN
Administrative Law Judge

Reported: Tape Recorded, transcribed by
Jeffrey J. Watczak

MEMORANDUM

Financial Fitness of the Applicant.

Pursuant to Minn. Stat. 221.121, the applicant must be fit and able to perform the services proposed. "Fit and able" is further defined in Minn. Rules 7800.0100, subp. 4, as follows:

> The term "fit and able" shall mean that the applicant is financially able to conduct the proposed business; that the applicant's equipment is adequately 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 the rules, regulations and statutes of the Commission.

Judge Swanson's Findings indicate that the business operation now known as Borton Leasing, Inc. is fit and able to conduct the proposed business with regard to maintenance of equipment, competence and qualification of personnel and compliance with Commission regulations. The business has

been in operation for 17 years. The Board remanded this matter to determine whether the Petitioner was financially fit to conduct business. This remand was needed to produce findings on the proposed permit holder, since no such findings could be made from the record in the first hearing of this matter.

The findings indicate that the Applicant had operated at a small loss for the most recent 10 month period. I have concluded that it is financially fit, nonetheless, for the reasons set forth below.

The Highway Carrier Statutes, Minn. Stat. 221, serve to restrict entry into the business of for-hire transportation of passengers and property. Restricting entry into the field was done to meet a particular problem. Back in 1957, the Commission to Study the Railroad and Warehouse Commission stated the problem as follows:

> The indiscriminate issuing of permits is a problem. At present the commission has no power to deny an applicant a permit whether or not he is responsible or properly equipped. As a result, many irresponsible people get permits, keep them a few months, and quit. The turnover is about 12 percent of all such registered truckers each year. Many operate on a sub-marginal basis without means to buy proper equipment or maintain insurance resulting in undue hazards to the traveling public.

Report of the Commission to Study the Railroad and Warehouse Commission, at 27 (1957)(emphasis added). The Supreme Court has indicated that the purpose of the 1957 rewrite of Ch. 221 (following the issuance of the Report) was to alleviate the problem caused by under-financed operators. Mitchell Transport, Inc. v. Railroad and Warehouse Commission, 272 Minn. 121, 137 N.W.2d 561, 565 (1965). Therefore, it is appropriate to examine the underlying financial foundation of this Applicant to determine whether granting the permit would be consistent with the legislative intent.

The Administrative Law Judge is unaware of this parent-subsidiary question having arisen before the Board on any prior occasion. However, it has arisen on a federal level. In the case of Spokane, Portland and Seattle Transportation Company, 26 M.C.C. 260 (1940), the ICC was faced with a similar parent-subsidiary situation. In that case, the parent was the Spokane, Portland and Seattle Railway Co., a class I railroad. Its subsidiary was the Spokane, Portland and Seattle Transportation Co. The subsidiary applied to the Commission for extension of its authority. A protest was filed. One of the grounds for the protest was the Applicant's (i.e. the subsidiary's) financial fitness. The Commission stated:

> Although applicant's statement of assets and liabilities ... and its profit-and-loss statement for the year ... are unfavorable, principally because of its indebtedness to the parent corporation, our conclusion is that applicant should be given the benefit of all reasonable doubts and an opportunity to survive. In a number of cases we have said, in effect, that

> doubt as to the financial success of a proposed operation which appears to be otherwise justified is not ground for denying the operating authority sought where the applicant is financially responsible and is capable of sustaining any probable loss without in any degree jeopardizing its remaining service. That clearly is the situation here. Furthermore, as previously stated, applicant is a subsidiary corporation of the ... Railway Company. The parent is a class I railroad. We are therefore of the opinion that the applicant is fit financially ...
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> 26 M.C.C. 260, 264-265.

Borton Leasing, Inc. has a long-term history of providing service; maintaining proper equipment; holding the proper insurance for its operations; and being adequately backed financially by its de facto beneficial owner, Kjell Bergh. Granting the requested authority meets an existing public need for service without exposing the public to the hazards enumerated by the 1957 Study that let to the current statutory scheme.

Other Fitness Issues.

At the start of the remand hearing, it was decided that Protestants could present evidence of compliance violations that had occurred subsequent to Judge Swanson's hearing, and that any such evidence would be evaluated in determining whether to adopt, reject or modify Judge Swanson's findings and conclusions on compliance. Remand Transcript, at 13-14.

The Protestants did present evidence relating to three compliance issues - - failure to change a tariff; failure to change the registered titles of vehicles; and failure to properly identify a lease arrangement on advertising materials and correspondence.

These matters are not discussed in the findings and conclusions because they are not material enough to warrant further attention. Each of them is technically a violation of law or practice, but none of them individually, or collectively, are serious enough to alter Judge Swanson's decisions on the fitness issues.

A.W.K.