

89-54

6-3001-3495-2
RRCC 515 V. IRCC 6955/C-

and
IRCC 6955,64210/T-89-180

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

In the Matter of the
Consolidated Proceeding
RECOMMENDATION
Relating to Virginia
Alfred, Florian Dittrich
and D & A Truck Line

FINDINGS OF FACT,
CONCLUSIONS,
AND-MEMORANDUM ON
REGULAR ROUTE/
IRREGULAR ROUTE ISSUE

A contested case hearing on a portion of this consolidated proceeding was held on December 4, 5 and 6, 1989, in South St. Paul before Allan W. Klein, Administrative Law Judge.

Appearing on behalf of Quast Transfer, Inc., the Complainant/Protestant herein, was James F. Ballenthin, of the firm of Luther, Ballenthin & Carruthers, 4624 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402. Appearing on behalf of D & A Truck Line, Inc. and Florian Dittrich, Respondents herein, was Grant J. Merritt, of the firm Grant Merritt & Associates, Ltd., 4690 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402. Appearing on behalf of the Estate of Robert Alfred, Virginia Alfred, Personal Representative, Respondents and Transferor herein, was Thomas P. Donnelly, Attorney at Law, 1424 Hilltop, New Ulm, Minnesota 56073.

The record closed on March 19, 1990.

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

Was D & A Truck Line, Inc. operated as an irregular route common carrier, or was it operated as a regular route common carrier?

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

Procedural-History

1. On February 24, 1989, Quast Transfer, Inc. filed a formal Complaint with the Minnesota Transportation Regulation Board. The Complaint raised two issues regarding D & A Truck Line. The first was that IRCC Permit No. 6955 had been unlawfully assigned or transferred from Robert Alfred to Florian Dittrich. The second was that D & A Truck Line was being operated as a regular route common carrier when, in fact, its operating authority was only an irregular route permit.

Answers to the Complaint were filed with the Board by D & A Truck Line, Inc. and Florian Dittrich, and also by the Estate of Robert Alfred.

2. On April 19, 1989, the Board issued its Notice of Hearing and Statement of Complaint. This set a hearing for July, and listed both of the issues described above. Copies were sent to the parties and counsel of record, and a capsule description of the notice was published in the Board's weekly calendar from April 28 onward.

3. On May 22, 1989, the Board received an application for the ex, parte transfer of IRCC Permit 6955 from Robert Alfred (Deceased) to Virginia Alfred, his widow.

4. On June 12, 1989, the first prehearing conference in this matter was

held involving all counsel and the Administrative Law Judge and on June 13, the First Prehearing Order was issued, which provided a schedule for discovery and prehearing motions, and continued the hearing from the July dates to December 4, 1989.

5. On July 23, 1989, the Board published notice of the Petition for Ex Parte Transfer in its weekly calendar, setting a protest date of July 13.

6. On July 10, 1989, Quast submitted a protest to the ex parte transfer petition, and suggested that the matter be consolidated with the pending complaint proceedings

7. On July 13, Wren, Inc., d/b/a Lakeville Motor Express filed a protest of the ex parte transfer petition.

8. On July 31, 1989, D & A Truck Line filed a Motion to dismiss the complaint proceeding on the grounds that the statute required that any suspension or revocation be preceded by a court's determination that a violation was willful. After the parties to the complaint proceeding had been given an opportunity to file briefs on the question, the Administrative Law Judge denied the Motion by Order of August 23.

9. On October 5, 1989, the Administrative Law Judge issued an Order consolidating the complaint proceeding and the transfer proceeding, but limiting Lakeville's participation to the transfer portion of the consolidated proceeding. On November 13, Lakeville withdrew as a party to the consolidated proceeding.

10. On November 13, 1989, D & A Truck Line filed a Motion for separate trials on the regular route/irregular route issue from the alleged unlawful transfer issue, on the grounds that if D & A were found to be operating as a regular route carrier, that would likely end the entire consolidated proceeding without there having to be a hearing on the second issue.

11. Following the prehearing conference on November 15, the Administrative Law Judge did issue a Second Prehearing Order, separating the issues for hearing and clarifying certain other matters which had arisen.

12. On December 4, the hearing began on the regular route/irregular route portion of the consolidated proceeding. The hearing took parts of three days, ending on December 6.

Operations of D & A Truck Line

13. Minnesota Irregular Route Common Carrier Permit No. 6955 has been outstanding since 1941, and is considered a "grandfather" IRCC permit. In approximately 1969, Florian Dittrich became the manager of a business which came to be known as D & A Truck Line, as well as Robert Alfred, d/b/a D & A Truck Line. D & A has always had an irregular permit. It has never had a regular route certificate.

14. D & A has always been headquartered in New Ulm. In the early 1970s, it operated out of a one-stall garage. In approximately 1976, it moved to a five-door terminal facility. Then, in October of 1988, it moved to a newly constructed facility, which has an office, a mechanical shop area, and a 14-door dock area, with the doors arranged on the opposite sides of a crossdock. Tr. 207-09. This New Ulm terminal is D & A's only terminal.

The precise questions of ownership and control of this operation have been reserved for the second part of this hearing, if it is held. The parties agreed that for purposes of this first part of the hearing, all operations at issue (except for the transportation of livestock) could be referred to as D & A Truck Line.

15. In September of 1982, Florian Dittrich, d/b/a Florian Dittrich Trucking, filed an application for a regular route certificate, seeking authority to serve seven routes in southcentral and southwestern Minnesota. He proposed a daily operation, using one terminal in New Ulm. The application was protested by Lakeville (a regular route carrier), was never set for hearing, and was ultimately dismissed, without prejudice. Docket No. RRCC 690/A-82-650, Order No. 2069, Order of Dismissal, January 11, 1984. Exhibit 45. Dittrich wanted to get some authority in his own name because he thought the authority might be a saleable item. Tr. 231.

16. As of December 31, 1988, D & A owned 19 trucks, 46 trailers, and an unknown number of service vehicles. See, Amended Class "C" Annual Report labeled as Brief Exhibit C to Brief of Estate of Robert Alfred.

17. D & A operates in both interstate service and intrastate (Minnesota only) service. It offers both full truckload (TL) services and less than truckload (LTL) services. It offers to carry TL shipments anywhere in a seven-state region, including Minnesota. It offers its LTL services to a portion of the State of Minnesota generally centered around New Ulm and Mankato, which could be characterized as the southcentral part of the State. The LTL service area is generally bounded by Marshall on the west, Hutchinson and the Minneapolis-St. Paul area on the north, Northfield and Owatonna on the east, and Blue Earth and Fairmont on the south. Exhibits 1-5 and B.

18. D & A only accepts TL shipments if they can be carried at a profit. However, it accepts LTL shipments for its service area regardless of their individual profitability. The firm's profit on LTL shipments comes from aggregating numerous LTL shipments on one truck. Tr. 46-49 and 227-29.

19. D & A's personnel, for purposes of intrastate work, include one salesperson, four office people and nine regular drivers, with a tenth who fills in for vacations.

20. D & A's business grew substantially during the 1970s and 1980s. One reason for this growth was the addition of interstate traffic sometime between 1974 and 1982. However, even putting that interstate business aside, D & A's intrastate business grew substantially from the 1970s to the 1980s. In the early 1970s, its peak intrastate mileage was 42,500, which was achieved in 1974. During the 1980s, its peak Minnesota intrastate mileage was 1,062,780, achieved in 1988. Using those two years alone, the intrastate mileage has grown some 25 times in that 13-year period. Set forth, in Table I below, is 11 years of data on Minnesota intrastate mileage and an estimate of intrastate revenues.

Revenue	ANNUAL	MINNESOTA	TABLE I INTRASTATE	MILEAGE	AND-
MINNESOTA	YEAR		MINNESOTA	--MILES	REVENUE
(ESTIMATE)					
	1971			28,000	\$
11,850	1972			43,000	
13,200	1973			9,500	
12,450	1974			42,500	
11,725					
	1982			302,017	
747,142	1983			588,761	
891,916	1984			741,967	
1,149,842	1985			878,410	
1,227,023	1986			883,769	
1,292,537	1987			1,007,439	
1,633,022	1988			1,062,780	
1,741,005					

Both in terms of mileage and revenues, Minnesota intrastate constitutes a little more than 50% of D & A's total mileage and revenues, while interstate constitutes a little less than 50%. For the most recent year of record, 1988, percentages were 65.7% intrastate, and 34.2% interstate. Tr. 2-210-216 and 242.

For purposes of this hearing, the parties analyzed all shipments carried by D & A during the month of March 1989. March was a representative month. During March, D & A carried 1.95 million pounds of LTL intrastate traffic and 5.3 million pounds of intrastate full truckload shipments. The separating point for these was 10,000 pounds or more. The average weight of the LTL shipments was 1,100 pounds per shipment, while the average weight of the truckload shipments was 25,900 pounds per shipment. There were a total of 1,762 LTL shipments, and 205 TL shipments, but the weight of the LTL shipments was 1.9 million pounds, while the weight of the truckload shipments was 5.3 million pounds. The 1,762 LTL shipments constituted 90% of the 1,967 shipments.

21. The 1,762 LTL shipments during March of 1989 generated revenues of \$84,105. The revenues for the truckload shipments is not readily computed from

the record.

22. During March of 1989, D & A served ten communities either four or five business days each week. For example, D & A made either a pickup or a delivery in New Ulm every business day of the month. It had the same frequency of service in Mankato. In St. James, however, it served the community 18 of the 23 business days, and St. Peter was served only 17 of the days. The communities that were served either four or five days per week were the following: New Ulm; Mankato; North Mankato; Fairmont; Waseca; St. James; Sleepy Eye; St. Peter; Redwood Falls and Hutchinson.

23. A smaller group of communities was served at least three days each week during the March study. These communities were: LeSueur; Springfield; Blue Earth; Owatonna; Marshall; Windom; and Lake Crystal.

24. The communities served at least two days each week during the March 1989 study period were: Olivia; Madelia; Gaylord; Arlington; Winnebago;

Winthrop; Wabasso; New Prague; Fairfax; Young America; Walnut Grove and Lamberton.

25. The communities served at least one day per week during the study period were the following: Sandborn; Montgomery; Comfrey; Westbrook; Morgan; Lafayette; Bird Island; Nicollet; LeCentre; Janesville; Gibbon and Belle Plaine.

26. The LTL operations of D & A have not changed substantially over the last few years in terms of how D & A operates. While its operations have certainly expanded in terms of the amount of equipment, and number of shipments transported, the basic operation has not changed.

27. D & A's TL shipments are picked up and delivered in the same vehicle, direct from origin to destination, without any intermediate stops or handling.
Tr. 180-81 and 222-24.

28. D & A's LTL operation is more complex, but can be summarized as follows, using the scenario of a typical business day.

D & A's nine regular drivers are divided into two distinct groups: "area drivers" and "Pool drivers". The area drivers operate in and around New Ulm, while the pool drivers operate between New Ulm and the Twin Cities metropolitan area. Each driver, whether he is an area driver or a pool driver, generally works in the same geographic area every day.

There are four area drivers. One works in the City of New Ulm, and its immediate environs. Another works to the south of New Ulm, all the way down to Fairmont. Another works to the west of New Ulm, as far west as Marshall. Finally, one works to the east of New Ulm, to communities such as Waseca and Owatonna. Traffic to and from the points north of New Ulm is generally handled by the pool drivers on their way to or from the Twin Cities. This would include communities such as Hutchinson, St. Peter, Young America and New Prague
(Tr. 171-74; 193).

The pool drivers, the ones who travel between New Ulm and the metropolitan area, have also divided up the metropolitan area so that each covers the same area on a daily basis. Dean Ellanson serves downtown Minneapolis and the western part of St. Paul (Tr. 355). Robert Tietel serves the south metro area (Tr. 374-75). Wayne Nelson serves St. Paul, the midway area, and the northeastern metro area (Tr. 429). Brian Meier serves north Minneapolis, the northwestern suburbs, Roseville and Arden Hills. In addition, these pool drivers serve areas such as Belle Plaine, Gaylord, Hutchinson, Jordan, Norwood, St. Peter and Young America.

29. The area drivers report to the New Ulm terminal at approximately 5:00 a.m. They unload the trailers which have arrived from the metro area the previous evening, sort the incoming freight according to its delivery area, and then crossdock and load the freight into the appropriate delivery trucks. The area drivers then depart from the New Ulm terminal to begin their deliveries between 7:30 and 8:00 a.m. They normally complete their deliveries by 2:00 p.m., but continue to make pickups, and then return to the New Ulm terminal (Tr. 175-78; 465-70).

30. The pool drivers, on the other hand, report to the New Ulm terminal between 7:30 and 8:00 a.m. (Tr. 353, 372, 425, 510). They then depart the New

Ulm terminal to make deliveries en route to the metro area between 8:00 a.m. and 9:00 a.m. (Tr. 353, 373, 425, 511). They arrive in the metro area and commence making deliveries and pickups between 10:30 a.m. and noon. (Tr. 354, 373, 425, 511). They finally leave the metro area for return to the New Ulm terminal between 5:00 and 6:30 p.m., and arrive back in New Ulm between 8:00 and 9:00 p.m. (Tr. 354-55, 373, 512, 526).

31. LTL service between New Ulm and the metro area is provided five days a week, every business day. Tr. 178, 277, 372.

32. D & A strives for overnight delivery and, in the vast majority of cases, achieves overnight delivery in its Minnesota LTL service. Recently, D & A has actually provided overnight LTL service approximately 99% of the time. During the March 1989 study period, there were no deliveries shown which took longer than one day, although there were quite a few where the delivery date was not specified. For those specified, however, there are none that took longer than one day. age, Ex. 9 and 11.

33. D & A only goes to a shipper's dock to make a pickup in response to a specific request for service. It does not have any "standing orders", whereby it goes to a shipper's dock every business day, regardless of whether the shipper has called D & A or not. Tr. 52-53, 109 and 246.

34. When a shipper calls D & A for a pickup, there is no certainty regarding whether the pickup will be made that day, the next day, or two days later. It depends on the town and the time of day. If a truck is going through the shipper's town either on its way from New Ulm outbound, or from an outer point towards New Ulm, the shipment will be picked up that day. If the truck has already gone through the town, and the driver was not intending to come back that day, he might turn around to make the pickup or he might not, depending upon his workload and the importance to the shipper of having the pickup made that day or later on. In some cases, the shipper would be told that the pickup could not be made that day, and if it had to be picked up that day, the shipper would have to call another trucking company to do it. Tr. 186-87, 194-95.

35. Whether or not a pickup can be made on the same day as the request also depends on the location of the pickup. If it is on one of the outer boundaries of D & A's service area, such as Marshall, then there is only one truck there on any given day, and on some days there are no trucks there at all. But on the other hand, if the pickup is in Mankato, then there are a number of trucks there each day. A Mankato pickup might be made by either an area driver or a pool driver. It might be made on the way into the Twin Cities, or on the way back to New Ulm. There are no hard and fast rules. Tr. 187-88.

36. All trucks are equipped with two-way radios, enabling the drivers to keep in contact with both the dispatcher in New Ulm and other D & A drivers. The dispatcher is kept informed of the delivery schedule of each of the area

drivers, so that when the dispatcher receives a request for a pickup, it can be quickly determined whether or not it is feasible for it to be made that day, or the next. Tr. 194-96. In addition to the office staff in New Ulm, D & A also uses an answering service in South St. Paul to take calls from metro area shippers. The answering service has been equipped with a radio capable of communicating with the D & A trucks, and so when a call for a pickup is made to

the answering service, she can inform the pool drivers in the Twin Cities area that a pickup is needed. Tr. 197 and 202-03.

37. Radios are used to inform drivers of pickups which are called in to the dispatcher. If possible, both area drivers and pool drivers will "double back" to pick up packages in towns they've already gone through if it is possible to do so in light of their other freight and the time. Tr. 458. However, in many cases the distance is too great or the disruption to the drivers' remaining work is too great, and the customer must be told to either wait another day, or find another carrier. Tr. 177, 187, 204-05.

38. Although D & A is able to make the vast majority of its deliveries on the day following pickup, it has avoided making any written claims for "guaranteed overnight service" in advertising, such as in the yellow pages, mass media, or even in written materials given to shippers. There were two exceptions to this, but both were stopped as soon as Florian Dittrich learned about them. For example, back in the mid-1970s, D & A sponsored a radio advertisement for the parochial school in New Ulm. The school, or somebody associated with the school, wrote the advertisement. In the course of the advertisement, it was stated that D & A gave overnight service. That advertisement was aired only once, but it was heard by a highway department inspector, who informed Florian Dittrich that he ought not to be advertising overnight service. The radio advertisement was not run again. Tr. 245 and 485-87. Similarly, when D & A's salesman, James Roberts, began working for D & A in the spring of 1987, he sent out a series of letters to potential customers. Generally, these letters were followup letters after meetings or telephone conversations. Typically, the letters would enclose a "points list", similar to Ex. 1, listing the towns which D & A served on a regular basis. The letters during the first few months, however, went on to state that the points are given overnight service from the Twin City metropolitan area. When Florian Dittrich learned that these letters were offering overnight service, he told Roberts to stop making that claim. Dittrich believed that if he put it in writing, it was a guarantee, and Dittrich did not want to guarantee overnight service. Roberts promptly stopped the practice. Tr. 83-86 and 486-88.

39. Roberts spends 90% of his time soliciting LTL shipments. Tr. 41-43. In connection with LTL solicitations, Roberts does make oral representations to potential customers that D & A offers an overnight service to the listed towns on the points list. Sometimes the word "overnight" is used, and other times

the words "next day" are used. Roberts means the same thing by both. Tr. 59, 71-72 and 77-78. Neither he, nor any other person affiliated with D & A, makes any guarantees of this service, however. The company will not rebate any charges, or reduce them if it fails to deliver a package the next business day after pickup. Tr. 83 and 244.

40. The towns which D & A has offered LTL service to have remained relatively static since at least 1986, which is the first dated points list in the record. Major additions have been Marshall and Jackson. There have not been any major deletions. The current points list, Ex. 1, is headed "LTL and TL shipments from the Twin Cities metro area to:", followed by a list of approximately 65 towns. The list goes on to state "or: full-load shipments anywhere in MN, IA, IL, NE, SD, ND, HI." The layout of the points list makes it clear that LTL shipments are offered only to the Minnesota points listed. Roberts, however, tells customers that the list is "not etched in granite", and D & A will consider going to other points if the size of the shipment is such that the revenue generated will generate a profit. Tr. 45-48.

41. D & A's TL operations are conducted over the most direct or efficient route between the origin and destination.

42. In the case of LTL operations, the area drivers who peddle freight to the east, south, and west of New Ulm, as well as within New Ulm itself, select their routes of travel in their respective pie-shaped territories depending upon the location of their deliveries and pickups for each particular day. Service is normally provided first to those points with the bulk of the business. Tr. 459-64. There is no evidence in the record regarding the precise roads taken by the area drivers on any given day. Instead, the area drivers themselves decide what roads to use, and in what order to make their pickups and deliveries, based upon requests from customers. As one area driver testified, each morning he looks at his manifests to see what kind of freight is going to which site, and then tries to lay out a route that results in his being able to deliver the bulk of the freight first. He picks the route that is the handiest in order to take care of the most freight first. Tr. 459-60. Thus, his route can vary from day to day. Tr. 464. Some days he goes first to Lake Crystal, and then south toward Blue Earth on U.S. Highway 169. Other days, he will go south to St. James and southwest to Windom. Still on other days, he will go south on Trunk Highway 15 all the way down to Fairmont. Both Fairmont and St. James are served four to five days a week, while Windom and Blue Earth are only served three days a week. There is no set pattern of which town is served first. Tr. 464-65. It depends on the amount of freight. Tr. 459-64.

43. The pool drivers, on the other hand, who go from New Ulm to the Twin Cities metropolitan area every day, tend to have a more predictable route simply because there are a limited number of routes that make sense to use from New Ulm to the Twin Cities. There are, essentially, two main routes. One goes north of New Ulm on Trunk Highway 15 to Winthrop, then northeast out of Winthrop on Trunk Highway 19 to the Norwood area, and then northeast out of Norwood on Trunk Highway 5 into the Twin Cities area. This was referred to as the 15-19-5 route. The second route from New Ulm to the Twin Cities involves going east out of New Ulm on U.S. Highway 14 to Nicollet, then east out of Nicollet on Trunk Highway 99 to St. Peter, and then northeast from St. Peter on U.S. Highway 169 to the Twin Cities area. This was referred to as the

14-99-169 route.

44. An analysis of 654 trips between New Ulm and the Twin Cities (including returns) between January 1988 and June 1989 showed that 57% of the time, the drivers took the 14-19-169 route, whereas 29% of the time they took the 15-19-5 route. These two principal routes, therefore, accounted for 86% of the trips made by D & A's pool drivers. Routes other than those two accounted for the remaining 13% of the trips. Brief of Quast Transfer, Inc., p. 10 and Appendix A.

45. Some of the drivers had a definite preference for one of the two routes over the other, while others seemed to take each about the same number of times. The factors that dictated which route was taken included a pickup or delivery at an off-route point, as well as less predictable factors such as a desire for a change in scenery, facilitating stopping at a particular restaurant for dinner, or other reasons unrelated to providing any pickup or delivery service. Another factor determining what route to take was an accident report or traffic conditions on one road or another. The drivers had

complete control over which of the two routes they took, except when a pickup or delivery required one route or another. Tr. 252-54 and 352.

46. Once a pool driver reached his assigned portion of the metro area, his route varied depending upon the location of the pickups and deliveries that he had to make that day. It varied from day to day with no discernible pattern.

47. D & A has never published a "schedule" in the sense of a railroad or bus schedule which lists specific towns and specific times. Shippers in outlying towns such as Marshall or Fairmont would have no way of knowing when a D & A truck might be in the area. But shippers in towns like St. Peter or Gaylord, which are located on major routes between New Ulm and the Twin Cities, must have come to know that there was a D & A truck there at least daily. No shippers testified, so there is no direct evidence of what any shippers knew or relied on.

48. Neither D & A Truck Line nor Florian Dittrich individually ever sought a formal, written opinion from the Board or any of its predecessor agencies regarding the legality of its operations vis-a-vis the regular route/irregular route issue. Nor did either ever seek a formal opinion of counsel regarding the issue. The Department of Transportation has had a MTR stationed in New Ulm for many years, first a Don Roble, then later a Red Jensen. Dittrich knew them both, and talked with them from time to time, but never sought or received any advice about the propriety of his operations on the regular route/irregular route issue. Tr. 254-64. D & A was only "audited" once in the period 1969 to 1989. That "audit" occurred sometime in 1986 or 1987. It is not clear from the record what the purpose or scope of the "audit" was. It was described as: "He (Jensen) just stopped in and audited the bills and he was on his way." Tr. 263. D & A was never told that it revealed any problems, and when Florian Dittrich asked Jensen if the audit revealed any problems, Jensen indicated that he didn't know of any. Tr. 263. This "audit" cannot be used as the basis for a claim of equitable estoppel.

49. Dittrich has engaged in other conversations and correspondence with various MNDOT and Board personnel over the years, but none of the contacts were sufficiently detailed or focused on the regular route/irregular route issue to give rise to any reasonable claim of equitable estoppel.

50. Since D & A has never had a regular route certificate, it has never comingled regular route and irregular route freight on the same truck.

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

CONCLUSIONS

1. The Transportation Regulation Board has jurisdiction over the subject matter of the hearing, and the matter is properly before the Board and the Administrative Law Judge. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

2. The burden of proof in this part of the proceeding is upon the Complainant, Quast, and the standard of proof is by a preponderance of the evidence.

3. D & A Truck Line has engaged in the transportation of freight for hire to 29 points in Minnesota on a biweekly or more frequent basis during the month of March, 1989, and, by inference, over a longer period of time. During this time, D & A did not hold a regular route certificate. Nevertheless, this operation was a regular route operation, and should not have been conducted without a certificate.

4. D & A ought to have sought a formal opinion of counsel or an opinion from the Board or Department that its operations were within the law, particularly after the Board's decision in the Lakeville v. Quast matter dated December 23, 1987 or the Court of Appeals affirmance in August of 1988. It did not do either.

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.

On the basis of the foregoing, the Administrative Law Judge recommends that the Transportation Regulation Board enter the following:

ORDER

IT IS ORDERED that Irregular Route Common Carrier Permit No. 6955 be suspended for a period of twenty-one (21) consecutive days, and that a Cease and Desist Order be issued prohibiting D & A from further regular route operations without a certificate.

ORDERED FURTHER that this matter shall be remanded to the Administrative Law Judge for further proceeding on the control/transfer issue, and that the suspension ordered above be stayed until the control/transfer issued is resolved.

Dated this 3rd day of April, 1990.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant 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 .

Reported: Tape Recorded, Transcribed by Jeffrey J. Watzak.

MEMORANDUM

1. GOVERNING LEGAL CRITERIA

There is no clear demarcation between regular route service and irregular route service. Instead, there are only vague definitions and a series of cases applying those definitions to specific facts.

A regular route common carrier is defined as:

A person who holds out to the public as willing, for hire, to transport passengers or property by motor vehicle between fixed termini over a regular route upon the public highways.

An irregular route common carrier is defined as:

A person who holds out to the public as willing to transport property from place to place over highways for hire but who does not operate between fixed termini or over a regular route or on regular time schedules.

Minn. Stat. 221.011, subds. 9 and 11 (1988).

For purposes of this case, the distinguishing characteristics are: "between fixed termini", "from place to place", "over a regular route", and "on regular time schedules".

In the federal case of Transportation Activities of Brady Transfer Storage Company, 47 M.C.C. 23 (1947), the Interstate Commerce Commission noted the tendency for irregular route carriers to gradually gravitate toward providing regular route service. This observation is as relevant in 1990 as it was in 1947. The Commission noted:

The extremes of regular- and irregular-route services are easily recognized, but the line of demarcation between such services is indefinite and indistinct. Most irregular route carriers supplying only specialized services present no particular problem, because their operations do not tend to gravitate into regular routes. Those, however, where authorized to transport general commodities, have a pronounced tendency to evolve into regular-route operations. They spring up to meet a need for a flexible service in a given territory, but as each operation matures it frequently works out that most of the available traffic moves between certain points and over certain highways. The very consistency of such an operation, and its consequent convenience to the shipping public, stimulate its normal tendency to evolve, until finally it achieves a regularity in point of time and a fixed territorial pattern which the public recognizes and comes to rely upon. When this has been accomplished, the

operation has become one which should probably be classified as regular-route.

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Noting a tendency for its operation to fall into regular routes, it is the obligation of every irregular-route carrier either to check the tendency and preserve its status, or to obtain appropriate authority for the conversion.

Brady at 40.)

The Brady case established eight practices or characteristics as indicia of regular route operations. In Minnesota, however, the eight Brady standards have never been accepted as the definitive test, in part because of statutory differences between the federal system and the state one. In the Matter of Murghy Motor Freight Lines, Inc., Hyman Freightways, Inc., Docket No. 0295-BT, issued November 20, 1972, by the Minnesota Public Service Commission. Instead, Minnesota has relied on a case-by-case analysis of the particular facts in each challenged operation. Therefore, it is appropriate to look at some of these past cases to determine where D & A fits in the continuum, keeping in mind that the critical tests in Minnesota are "fixed termini", "from place to place", "fixed routes" and "regular time schedules".

The case of State v. Boyd Transfer & Storage -Co., 209 N.W. 873 (1926), was decided at a time when the phrase "between fixed termini or over a regular route" was actually defined by statute to mean "the termini or route between or over which any auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or routes." Gen. Laws 1925, c. 185, 2, subd. (g). In the Boyd case, a household mover offered to transport household goods between the Twin Cities and outlying points within a radius of 600 miles. The Railroad & Warehouse Commission issued a cease and desist order to stop Brady from operating as an auto transportation company (now known as a regular route carrier). The district court affirmed the Commission, but the Supreme Court reversed. The Supreme Court noted:

We take the statute to mean that, in order to come within its purview, a business must be confined, through custom or predetermined plan, to a selected route or routes traveled habitually if not at stated intervals. There is nothing of that kind in this case -- nothing regular or predetermined about either routes or termini. Recurring but constantly varying occasion and no pre-existing plan or custom determines the right of each haul, and it may not be followed again for months, and in some cases not at all.

The termini of defendant's hauls are no more fixed than its routes are regular. They are no more fixed or regular than are those of the ordinary drayman. They are as much subject to the caprice of occasion, and so cannot

be either "fixed" or regular. "Fixed" as a modifier of "termini" denotes predetermination, establishment, and a

degree of consistency and invariability which excludes subservience alone to mere occasion.

The court compared this kind of service to that of an ordinary railroad, noting that a railroad's routes and termini are, both regular and fixed, the routes being fixed by the line itself and the termini confined to established stations. A railroad passenger train, such as the Empire Builder, is perhaps the ultimate example of a regular route carrier, in that it operates between fixed termini, along a regular route, and on an established scheduled.

There are a number of factors that must be considered in labeling a service either regular route or irregular route, and no one factor is determinative.

Given the uncertainty of the statute and the lack of an interpretive rule, we must be guided by the case-by-case accumulation of standards which has developed over the years. One of the cautions frequently expressed in past decisions is that no one factor, standing alone, is determinative; all factors must be considered before a decision is made. Murphy . Hyman, supra, at 910.

Fixed_Terminiv. Place to Place

Case law over the years, as recently adopted by the Court of Appeals in the Quast case [a Transfer Inc. v. Minnesota Transportation Regulation Board 428 N.W.2d 462 (Minn. App. 1988)] has developed an understanding of "fixed termini". It is most clearly explained in the Wendell Moore case [in the-Matter of the Application of Wendell Moore (unpublished), slip op. at 3-4 (Minn. Railroad & Warehouse Commission August 14, 1961)], as follows:

The law states affirmatively, that an irregular route carrier is one who transports property from place to place. It states negatively, that he may not transport property between fixed termini It is apparent that the legislature intended to differentiate between the two. We do not think that the words "between fixed termini" as used in the law are to be taken geographically, but only in relation to carriers' actual operations, and as so taken it has a definite meaning. The word "termini" means both ends of a transportation line; one the origin and the other the destination. In transportation usage "fixed termini" means two points between which the carrier regularly operates. On the other hand, in transportation usage, the words "from place to place" means from here to there, or hither and thither, or in various directions, It is the exact opposite of the meaning of the term "fixed termini". He

conclude that termini become fixed within the meaning of the motor carrier act when the carrier operates habitually between specified points.

There is a tendency, either conscious or unconscious, to confuse the statutory word "termini" with the plural of the word "terminal" as commonly used to designate a carrier's physical facility, such as a warehouse with docking facilities. Such confusion is mistaken. It is not the carrier's terminal that is at issue. Instead, it is the geographic location of the various points that are served on a regular basis. Minnesota Department-of

Public Service v. New Ulm Transfer Inc. C-BT-IRCC & LS 31677,
CC&LS 28454-1
(Minnesota Public Service Commission, April 14, 1976). Indeed, in the New-
Ulm
Transfer case, there was only one trucking terminal, but the Commission had
no
trouble finding a regular route operation.

One problem with the "fixed termini" test is that if economic activity
requiring trucking service, such as manufacturing, becomes concentrated in
one
area of the State, then it will be difficult for an IRCC operator
headquartered
in another part of the State to avoid the "fixed termini" label, because
responding to market demands will cause some number of his trucks to be
regularly directed to that area of concentrated trucking need. In this case,
for example, the Twin Cities metro area is such an area of concentrated
activity, and it is not surprising that a trucker in New Ulm would find
itself
with substantial demand to carry goods to and from the Twin Cities. In
addition, this problem is exacerbated as the definition of the "Twin Cities
metro area" expands, taking in a larger and larger area. There are good and
valid reasons why the definition has expanded over the years, but in order to
have a full appreciation of some of the problems raised by the fixed termini
test, that expansion must be acknowledged.

Regular Routes

Regular routes go hand-in-glove with fixed termini, as they are the
routes
which a carrier customarily and repeatedly travels over between the fixed
termini. As Wendell -Moore, supra, put it:

The definition of an irregular route common carrier . . .
states that such a carrier may not operate over a regular
route, meaning a highway or highways which he customarily
and repeatedly travels over. This prohibition is designed
by law to reinforce the provisions forbidding him to
operate between fixed termini, for obviously if a carrier
repeatedly and customarily transports freight between
fixed termini, he will repeatedly and customarily follow
the most convenient route between such fixed termini.
Therefore, the prohibition against one requires
prohibition against both features of motor carriage.
Both prohibitions are inserted to prevent the irregular
route common carrier from operating under his permit as a
regular route common carrier.

Regular Time Schedules

The statute does not define regular route carriage in terms of time
schedules, but it does define irregular route carriage as not on regular time
schedules.

In Wendell Moore, the Commission discussed this as follows:

By regular time schedules the statute means that the carrier's operations are marked by a regularity of service which is so fixed and definite that it becomes known to, and is relied upon by, all shippers and

consignees who use his service, It may be triweekly or bi-weekly, but if the carrier holds out to the public that on certain days he makes trips to a given point and return, he is operating on regular schedules, which he is forbidden to do as an irregular route common carrier. The occasional changing of the departure or arrival time, or the changing of the day or days during the week on which he operates, does not change the character of his operation and eliminate the prohibition.

The Commission expanded on this in the *Murphy v.-Hyman* case, supra, a case where Hyman was offering customers overnight delivery in a certain service area. The Commission noted:

To construe and phrase "regular time schedules" to mean a published schedule with fixed departure and arrival times would lead to an absurd and unintended result. Unlike regular route carriers of passengers, only a very few regular route carriers of property achieve this level of scheduled service. The commission has determined that any service which establishes a pattern of departures and arrivals which the public comes to know and rely upon for its transportation needs is a service provided on a regular time schedule. Providing service on a daily-overnight basis as Hyman has to the points in question meets this criteria.

In the *New-Ulm Transfer* case, the Commission held that a service which is at least bi-weekly constitutes a regular service which the public comes to know and rely upon for its transportation needs. *New Ulm Transfer*, supra, at 14.

Finally, the Court of Appeals in the *Quast* case, supra, had no problems affirming a finding of a regular schedule when Quast advertised overnight service between the Twin Cities and 970 points in southcentral Minnesota, regardless of the size of the shipment, noting that "a change in the hour or day of the week does not change the character of the operation". *Quast*, at 466.

Other Factors

Both the Board's predecessor Commissions and the courts have considered other logically related matters which help to "flesh out" the stated statutory standards. These include the manner in which service is advertised, whether or not pickups are made on an "on call" basis, and the aggregation of numerous LTL shipments in a truck, as opposed to one or two large shipments.

With regard to the LTL/TL distinction, Wendell Moore reasoned as follows:

One important difference between the operations . . . is that the irregular route common carrier offers his service "on-call" which the regular route carrier does not do as a practice. By "on-call" is meant that the carrier subjects his operations to the convenience of the shipper, and when he receives a call for service, so long as it is

on a working day and at a reasonable hour, he will respond forthwith. For good customers he will quite often respond at what might be termed unreasonable hours. It is manifest, however, that such response must be accompanied by an offer of a cargo which will yield sufficient revenue to the carrier to justify making the trip. That again brings up one of the principal differences between the regular route carrier and irregular route carrier. The regular route carrier operating on a regular schedule and between fixed termini assembles a large number of LTL shipments tendered by numerous shippers and sufficient to make a truckload or near truckload

The irregular route carrier, on the other hand, offers his service to any shipper to travel in any direction at any time. In order to do this, he has to limit himself to volume shipments because he could not afford to transport small shipments in any direction the shipper may choose to send him. If he does assemble LTL freight, it would only be to points he regularly serves, otherwise his operations would be wholly unprofitable for he cannot possibly transport a large number of small shipments hither and thither. It is manifest that if he is to operate "from place to place" he must have volume shipments sufficient to pay expenses of a round trip. Furthermore, he cannot lawfully offer a small shipment service to one shipper and not to other; therefore, he cannot file a point-to-point tariff designed for the use of special shippers. His tariff must be on a scale which makes it usable to all of the general shipping public. He cannot refuse a shipment no matter where consigned and how small unless he places a volume limitation in his tariff.

The statute contemplates by its definition that the irregular route common carrier shall be a carrier of volume shipments only, shipments of such size that they will yield sufficient revenue to pay the carrier's expenses. Thus no small or LTL shipments will do. The statute contemplates that the regular route common carrier . . . will transport the package or LTL freight. It is true that he may pick up truckload lots for transportation between points on his regular route, but such volume shipments constitute only a small portion of his business. His real business is the transportation of numerous small shipments for numerous shippers.

The statute contemplates, on the other hand, that the irregular route carrier will transport only truckload shipments from and to any point in the state.

This same concept was used by the Commission in the New Ulm Transfer case, wherein it announced four "essential criteria" of a regular route operation. These included fixed termini, regular routes, regularity of service, and "carrying LTL shipments from many shippers to the points which it regularly serves".

Finally, in one of the Board's most recent decisions, *Lakeville Moror Express . . . v. Quast Transfer, Inc.* (Minnesota Transportation Regulation Board, December 23, 1987), the Board stated:

A characteristic of irregular route carriage is transporting freight direct from shipper to consignee. [Citations omitted.] Because the shipments must be large enough to cover costs, another characteristic of irregular route carriage is truckload or large volume carriage rather than less than truckload aggregation of small shipments from many different shippers. Because irregular route carriage is direct from shipper to consignee, it follows that the routine breaking of freight at a terminal and redistributing that freight in other vehicles for delivery is not an irregular route operation. Carriers engaged in this type of activity must be presumed to be engaged in motor carrier operations other than irregular route. The habitual shipment of LTL freight is the hallmark of regular route operations. Daily overnight service is a service under a regular schedule and, therefore, characteristic of a regular route service.

id. at 26-27.

Another factor worth noting is the advertising of overnight service and the use of a "points list" of towns served on a regular basis for shipments of any size. In affirming the Board's revocation of Quast's irregular route permit, the Court of Appeals noted that Quast advertised overnight service between the Twin Cities and 970 points in the southcentral portion of Minnesota, regardless of the size of the shipments. Quast at 466.

Summary

The present statutory definitions are incomplete and unclear, making them difficult to apply to a given situation. However, the distinction between regular and irregular route service has been addressed in substantial detail in such cases as *Wendell Moore*, *Murphy-v.. Hyman*, *New_Ulm Transfer*, and *Quast Transfer*. The case-by-case method chosen by the Board has been sanctioned by our courts in cases such as *Bunge Corp. v. Commissioner-of Revenue*, 305 N.W.2d 779 (Minn. 1981), *in re Northwestern Bell Tel. Co.*, 371 N.W.2d 563, 567-68 (Minn. App. 1985), and *St.-Paul Companies v. Hatch*, 449 N.W.2d 130, 133-34 (Minn. 1990). Those who make their living in a regulated industry such as trucking in Minnesota have a responsibility to keep themselves abreast of the law, either through direct contact with regulatory officials or by consulting with knowledgeable counsel.

II. APPLICATION OF D & A FACTS TO LEGAL CRITERIA

D & A offered both an LTL service and a TL service. Its LTL service was restricted to the southcentral part of the state, whereas its TL service was

statewide. The discussion below focuses on the LTL service, as there is no allegation that the TL service was a regular route service.

Fixed Termini vs. Place to Place

D & A is habitually operating between specified points in providing its LTL service. These points are listed in the "points list" which D & A distributes to the public. D & A's salesperson tells customers that D & A will provide overnight service, every business day, from the metro area to these points. If D & A has a shipment to deliver to these points, it will provide the delivery, five days a week, every business day. D & A has limited its daily, overnight LTL service to these points, although it is willing to discuss the addition of other points, depending on a customer's needs.

D & A is, in fact, regularly and habitually serving many of the points. During the test month of March, 1989, D & A provided service on a near-daily basis to New Ulm, Mankato, North Mankato, Fairmont, Waseca, St. James, Sleepy Eye, St. Peter, Redwood Falls and Hutchinson. Other points were served at least three days a week, or two days a week. These are graphically portrayed on Exhibit 20.

That does not mean, however, that D & A does not go to other cities and towns. During the test month, for example, D & A did go to Norwood, but only on two days during the month. It went to Morton only once, Jordan only once, Jackson only once, and numerous others. Jackson, for example, appears on the most recent points list, but it cannot be said to be a place where D & A habitually operates if D & A only goes there once a month.

It is entirely possible that a carrier may be engaging in regular route operations to some points, but only irregular route operations to others. The two are not mutually exclusive, so that an occasional excursion beyond the regular service area will not cause the entire operation to become an irregular route operation. Drawing a precise line is difficult. But based on the cited precedent, it can be said that with regard to the 29 towns which D & A serviced at least two days a week, D & A was providing service between fixed termini within the meaning of the statute and the cases.

As noted earlier, the economic concentration in the Twin Cities metro area, and its large size, raise problems with the concept of fixed termini. It is

not appropriate to treat each shipper or receiver in the Twin Cities area as one terminus, separate from the others. It makes more sense to aggregate them in one geographic area, so that when D & A holds itself out as providing LTL service "from the Twin Cities metro area", that defines the scope of the terminus. But given any reasonable interpretation of that term, D & A has provided regular route service to customers within it such that it is one terminus of a regular route.

D & A has only one terminal, not multiple terminals. Many of the larger regular route carriers such as Hyman and Quast have multiple terminals, But the size of D & A's service area is such that multiple terminals are not necessary, particularly when the other end of the route is the Twin Cities. The travel times are such that multiple terminals are not needed, and one terminal in New Ulm is enough. Multiple terminals are one indicia of a regular route operation that is not present in D & A's operation.

Regular Routes

D & A's habitual use of Routes 15-19-5 and 14-99-169 to travel between New Ulm and the Twin Cities constitutes travel over fixed routes. As Wendell Moore noted, if a carrier repeatedly and customarily transports freight between fixed termini, it will repeatedly and customarily follow the most convenient route between such fixed termini. D & A's drivers used one of those two routes 86% of the trips between the Twin Cities and New Ulm. They are clearly regular routes. Moreover, the logic of the past cases leads to the conclusion that for many, if not all, of the 29 points served on a biweekly or more frequent basis, they were served over regular routes as well. Quast at 465.

Regular Time Schedules

There were no shippers or members of the public who testified in this proceeding, so it is impossible to know, from direct testimony, whether D & A's service had become "so fixed and definite that it becomes known to, and is relied upon by, all shippers and consignees who use his service." As noted earlier, there are ten cities that D & A served on a four or five-day-a-week basis. There are an additional seven served on a three-day-per-week basis, and an additional 12 served two days a week. Also, when salesperson Roberts handed out his points list and talked with customers, he told them that D & A provided overnight service between these points and the Twin Cities. Moreover, the testimony shows that all LTL drivers report to work at regular times, depart from New Ulm at regular times, complete their pickups and deliveries at regular times, and return to New Ulm at regular times. Any shipper who deals with D & A reasonably often would come to recognize these patterns. While direct testimony from shippers would have been desirable, common sense and past precedent discussed above allow a conclusion that D & A's operations are on a regular schedule.

Other Factors

D & A's operations are overwhelmingly LTL. During the test month of March, 1989, 90% of D & A's total intrastate shipments were LTL. Those 90% constituted 26% of the total intrastate weight carried that month. Regardless of how it is measured, the LTL freight was not just an incidental or occasional matter. In fact, it occupied the services of nine full-time drivers. D & A's operations were characterized by the aggregation of small shipments from many different shippers and the routine breaking of that freight at a terminal and redistributing it in other vehicles for delivery.

D & A advertised its overnight service and used a "points list" to show

what towns were served on a regular basis for LTL shipments.

Summary

The facts of D & A's LTL operation fit rather cleanly into the test developed by the Board (and its predecessors) and approved by the courts as characteristic of regular route service. It operates between fixed termini, over regular routes, and on a regular schedule. Although the fit is not perfect (D & A has only one terminal, picks up only "on call" and the drivers

select which routes they take based upon a variety of factors), viewed as a whole, the evidence weighs in favor of a conclusion that D & A was operating a regular route service.

III. PENALTY

The Administrative Law Judge has recommended that a Cease and Desist Order be issued and that D & A be suspended from operation for a period of 21 consecutive days. It is further recommended, however, that the Board stay imposition of the suspension until completion of the second part of this hearing (if it is held) so that the penalty for the regular route operations can be combined with any penalty that might be imposed as a result of the illegal transfer issue.

The recommendation for a 21-day suspension was arrived at by weighing a number of factors surrounding the amount of "fault" that occurred in this case. Obviously, this case is not as severe as was the Quast Transfer situation, in that Quast had fair warning from the Board that it could not serve certain communities with regular route service. Quast's actions were far more "knowing" than were Florian Dittrich's actions in this case. Dittrich can be characterized as proceeding in blissful ignorance of the law. He had not been warned, either by the Board or the Department, that he was doing anything wrong. But on the other hand, he never asked in such a way that he could claim to have gotten a definitive answer to the legality of his operations. It would be too harsh for the Board to revoke this permit entirely; it would be too lenient for the Board to merely issue a Cease and Desist Order. Something in between the two is called for. It is well within the discretion of the Board to impose whatever penalty it sees fit, within the bounds of reason. The Board could increase or decrease the length of the proposed suspension as it saw fit.

A.W.K.