6-3001-3495-2
IRCC 6955,64210/T-89-180
and
IRCC 515 v. IRCC 6955/C-

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

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

FINDINGS OF FACT, CONCLUSIONS, RECOMMENDATION AND MEMORANDUM ON TRANSFER/CONTROL ISSUE

A hearing on the second half of this consolidated contested case procee was held on April 23, 1991, in South St. Paul before Allan W. Klein, Administrative Law Judge.

Appearing on behalf of the Estate of Robert Alfred, Virginia Alfred, Personal Representative, (hereinafter "the Estate") was Thomas P. Donnelly, 1424 Hilltop, New Ulm, Minnesota 56073. Appearing on behalf of D & A Truck Line, Inc., Florian Dittrich and Rosemary Dittrich (hereinafter "D & A Truck Line") was Grant J. Merritt, 4690 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402. Appearing on behalf of Lakeville Motor Expres (hereinafter "Lakeville") was Richard L. Gill, of the firm of Robins, Kaplan Miller & Ciresi, 1800 International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402-3394.

The record closed on July 5, 1991.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the R of Practice of the Public Utilities Commission, as applicable to the Transportation Regulation Board, and the Rules of the Office of Administrati Hearings, exceptions to this Report, if any, by any party adversely affecte must be filed within 20 days of the mailing date hereof with the Transporta Regulation Board, Minnesota Administrative Truck Center, 254 Livestock Excha Building, 100 Stockyards Road, South St. Paul, Minnesota 55075. Exceptions 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 requ such argument. Such request must accompany the filed exceptions or reply, a 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 had in the matter.

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

STATEMENT OF ISSUE

Did Robert Alfred sell or otherwise transfer control of his IRCC permit 1969 without approval from the appropriate regulatory authority? If so, wha an appropriate penalty? How does it impact the requested ex parte transfer his estate to his widow?

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

FINDINGS OF FACT

1. Robert Alfred and Florian Dittrich came to know each other as truc in the New Ulm area during the 1950s and 1960s.

2. Florian Dittrich began driving for his father's livestock transportation business in 1959, and his father transferred the livestock carrier permit to him in 1961. Ex. 3, p. 2. Operating as a sole proprietor doing business as Florian Dittrich Trucking, he was hauling livestock to Sou St. Paul and freight back to the New Ulm area. Ex. 5, pp. 6-7. By April of 1969, Dittrich had between two and four straight trucks. The precise amount revenues are unknown, but it was almost certainly less than $10,000 per year Ex. 5, p. 32.

3. Robert Alfred operated a sole proprietorship under the name of Rob Alfred Trucking. He had only one truck, a 1951 GMC livestock truck. He had "grandfather" irregular route permit which contained no geographic or commod restrictions. He, like Dittrich, would carry livestock (primarily) from the Ulm area up to South St. Paul, and then general freight back to the New Ulm area. Ex. 5, p. 18.

4. Robert Alfred was 62 years old in 1968. At some time in late 1968 Alfred approached Dittrich with a proposal that they work together. Alfred wanted to cut down on the amount of driving he had to do. Ex. 5, p. 14. Th two talked back and forth for several months until finally, in May of 1969, entered into a formal contract. Id. at pp. 17-18. The contract, drafted by Alfred's attorney, is unambiguous and relatively brief. It is reproduced in pertinent part below:

AGREEMENT

THIS AGREEMENT made and entered into this 10 day of May, 1969, by and between Robert J. Alfred . . . first party, and Florian Dittrich . . . second party.

WHEREAS, first party owns a 1951 GMC livestock and freight truck together with other equipment and a socalled White Permit Plate granted by the Minnesota Public Service

Commission as an irregular route common carrier carrying statewide authority, and

WHEREAS, the parties understand that the laws of the State of Minnesota and the regulations of the Minnesota Public Service Commission provide that the purchaser of a permit will only be extended authority to the extent of the experience of operations in the two-year period immediately preceding the transfer and,

WHEREAS, the parties desire to operate for at least two years from the date hereof to acquire the broadest possible authority when formal application is made for transfer of the authority,

NOW, THEREFORE, in consideration of the sum of Twenty-four Hundred . . . Dollars paid by second party to first party, the receipt of which is hereby acknowledged by first party, the parties hereto agree as follows:

1. First party hereby . . . sells . . . to second party all of his right, title and interest in a 1951 GMC livestock and freight truck together with allied equipment and all of his right, title, and interest in the socalled White Permit Plate as an irregular route common carrier issued by the Minnesota Public Service Commission which has statewide authority.

2. It is agreed that the title to the said truck as it is registered with the Department of Motor Vehicles for the State of Minnesota shall continue to remain in the name of the first party and that the authority as an irregular route comon carrier granted by the Minnesota Public Service Commission shall remain in the first party until such time as the second party, in his sole discretion, notifies first party of his intention to seek the formal transfer at which time the first party agrees . . . that he will immediately sign the necessary documents to effectuate such transfer of the above described truck, equipment and Minnesota Public Service Commission authority as an irregular route common carrier. It is specifically understood by and between the parties hereto that the second party is the actual owner of the above described truck, equipment, and Minnesota Public Service Commission authority as an irregular route common carrier.

3. The parties hereto agree that they will operate as D & A Truck Lines for such period of time as the second party shall decide in his sole discretion.

4. Second party shall actually operate the said D & A Truck Lines, be responsible for all expenses of operation, and shall receive all income and profits therefrom. It is agreed second party shall also be responsible for any losses which may occur in the operation of said D & A truck lines.

The agreement is notarized and signed with the signatures of Robert J. Alfre and Florian Dittrich. Ex. 5, Ex. B. Dittrich did pay Alfred $2400. Ex. 5, 45.

5. The law in effect between 1965 and 1973 provided for the sale or transfer of permits, but only upon Order of the Commission or Department. law further prohibited the sale of a permit to any person who already held a permit or certificate. The law also restricted the scope of any transferred permit to the scope of operations actually exercised in the two years immediately preceding the transfer. These provisions of Minn. Stat. § 221.1 remained unchanged from 1965 to 1973.

6. At some point in the spring of 1971, Dittrich and Alfred had a conversation with a Don Roble, who was a motor transportation representative with the Minnesota Department of Public Service. He worked in the New Ulm area. During the course of this conversation, they discussed the fact that formal transfer of the permit from Alfred to Dittrich might be detrimental i that the statewide scope would be cut back to the scope actually exercised i the prior two years. It is also likely that Roble informed them of the prohibition against transfers to an existing permit holder.

7. By letter dated April 19, 1971, Alfred informed the Public Service Commission that he was "turning the full management of the Robert Alfred Trucking . . . over to Florian and/or Rosemary Dittrich," and that he was giving them full authority to deal with the Commission in the future. Ex. 5 Ex. D. On June 7, 1971, Robert O. Dale, Assistant Division Director of the Motor, Bus and Truck Division of the Department of Public Service replied th division had changed its files to comport with the request, but that all service must be performed in the name of Robert Alfred, d/b/a D & A Truck Line. Ex. 5, Ex. E.

8. D & A Truck Line grew substantially over the 1970s and 1980s. Interstate authority was received sometime in the mid-1970s, but leaving tha aside, the intrastate mileage and revenue grew substantially. For example, 1971, Dittrich reported 28,000 Minnesota miles and $11,850 Minnesota revenue By 1982, there were 302,017 miles and $747,142 in revenue. By 1987, there w 1,007,439 miles and $1,633,022 in Minnesota revenue. These figures include operation of IRCC 6955, as well as Dittrich's own livestock operation and hi other trucking income. Dittrich's financial records are so intertwined that is impossible to separate out the operations of IRCC 6955 from the other operations. See, for example, Ex. 5, Ex. C, particularly the affidavits attached thereto. However, there is no question but that the business has grown substantially. For example, immediately after the contract there were

between three to five trucks. By the end of 1987 there were 19 trucks and 46 trailers. Id.

9. During the 1970s and into the 1980s, Robert Alfred remained a part time employee of D & A Truck Line. He did some driving, but that gradually declined until he stopped around 1976. Tr. 91. But he spent more and more time doing maintenance work. Eventually, in 1981 or 1982, Robert Alfred was replaced by another person as mechanic. Tr. 96. In addition to these functions, however, Alfred had an unusual relationship with Florian Dittrich which has been compared to a "father-son" relationship. It had emotional overtones that transcended a mere business relationship. Ex. 6, pp. 11-12. Bob Alfred essentially taught and guided Florian Dittrich, investing time an

thought into the operation, despite the fact that Alfred had sold his intere in it back in 1969. He did not receive any share of the revenues or otherwi participate in the financial success of the firm, other than as a part-time employee. Tr. 56-57. Alfred wanted to see it succeed for emotional reasons that substituted for the more ordinary financial incentives. Tr. 56. This relationship, however, did not give Alfred the right to control the business Florian and Rosemary Dittrich had the sole right to control the business.

10. In 1982 or 1983, Dittrich formed a corporation named "D & A Trucklines, Inc." The name was subsequently changed to "D & A Truck Line, Inc." This corporation was 80% owned by Florian Dittrich, and 20% by his wi Rose Dittrich. Robert Alfred did not own any part of the corporation. Ex. p. 33. Ex. 5, Ex. C. All of the operating equipment used in the operation IRCC Permit No. 6955 is owned by the corporation or by the Dittrichs individually. Tr. 40. The terminal out of which operations are conducted i owned by the Dittrichs, and leased to the corporation. Tr. 39. All revenue generated under the permit are comingled in the corporate checking account w other Dittrich operations. Tr. 43. All workers and creditors are paid thro the corporate checking account. Tr. 41. The bonuses and dividends availabl to the Dittrichs as sole shareholders of the corporation are directly influenced by the profits or losses generated by the permit. Tr. pp. 44-46 The Dittrichs have assumed all of the transportation risks related to the operation under the permit. Robert Alfred did not participate in any formul for the division of permit revenues. Tr. 57. He owned none of the equipmen and incurred no financial risk. Tr. pp. 57-58.

11. On December 26, 1984, Robert Alfred died following a short hospitalization. He was 78 years old.

12. Alfred had executed a codicil to his will on May 10, 1969 (the sam day that he entered into the agreement with Dittrich). Rather than take pursuant to his will and that codicil, Virginia Alfred (his widow) renounced and petitioned the probate court for an allowance of personal property. On March 23, 1989, the Last Will and Testament of Robert Alfred, including the codicil, was presented for allowance as part of a petition for determinatio descent. The sole items of property for which determination of descent was petitioned were household furnishings and a 1951 GMC livestock and freight truck with "white plate authority #6955 from the State of Minnesota". On Ap 5, 1989, Virginia Alfred petitioned for allowance of personal property, seek all household goods, the 1951 GMC truck and the IRCC authority. A hearing w held on April 24, 1989. No person appeared in opposition to the petition. Order dated April 24, 1989, District Judge Warren E. Litynski granted Virgin Alfred's petition and awarded to Virginia Alfred the household furnishings, 1951 GMC truck, and "white plate authority #6955". Ex. 1 and Ex. 5, Ex. B.

13. The 1951 GMC truck had been sold or disposed of by Florian Dittric long before 1989. It was never physically in the possession of either Flori Dittrich or Virginia Alfred in 1989 or 1990. Id. Tr. 42-43.

14. The only monies paid to Virginia Alfred by the Dittrichs or D & A Truck Line in 1988, 1989, and 1990 consist of the following checks, drawn on the D & A corporate account (Ex. 6, Exs. H, I and J):

Date	Amount
1-06-88	$97.95
8-12-88	l95.90
1-13-89	195.90
6-19-89	245.90
2-23-90	195.90
7-05-90	130.00

Neither of the Dittrichs could explain the basis for these amounts. The gis of their testimony was that Virginia Alfred would call and ask for a check i specific amount, and Rosemary Dittrich would make out the check with no idea what it was for or how the amount was calculated. Ex. 6, Exs. H, I and J, a Ex. 6, pp. 14-19; Tr. 33, 69-70 and 78-83. Virginia Alfred suffered a serio stroke in the fall of 1989 and was placed in a nursing home. Her ability to communicate and think on any specific issue was impaired. Affidavit of Florian Dittrich dated December 20, 1990. On August 20, 1990, an Order appointing a general guardian of the person and estate of Virginia Alfred wa entered by the Brown County District Court appointing Leo Alfred to be the guardian of Virginia Alfred. Ex. 2. As of December 20, 1990, her doctor indicated, "She still is not oriented to time and place. . . . I believe sh still has persistent impaired judgment." Letter from Basil C. LeBlanc, M.D to Mr. Tom Donnelly dated December 20, 1990. It is beyond the realm of believability that in February of 1990, Mrs. Alfred was in a position to cal either Florian or Rosemary Dittrich and request a check for such a specific amount as $195.90 without there being some knowledge on the part of the Dittrichs as to the nature of the payment or at least how the amount was computed. The Dittrichs' professed ignorance regarding these checks on this point is not credible.

14. Considering the very substantial assets and revenues of D & A Truc Line, Inc. for the years 1988-1990, the payments to Virginia Alfred of a few hundred dollars in very precise amounts are not consistent with her ownershi of IRCC Permit No. 6955. There is no evidence of any payments to the Estate Robert Alfred.

Procedural History of this Case

15. On February 24, 1989, Quast Transfer, Inc. filed a formal complain with the Minnesota Transportation Regulation Board. The complaint raised tw issues regarding D & A Truck Line. The first was that IRCC Permit No. 6955

been unlawfully assigned or transferred from Robert Alfred to Florian Dittrich. The second was that D & A Truck Line was being operated as a regu route common carrier. Answers to the complaint were filed with the Board by & A Truck Line, Inc. and Florian Dittrich, and also by the Estate of Robert Alfred. On April 19, 1989, the Board issued a Notice of Hearing and Stateme 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 capsule description of the Notice was published in the Board's weekly calend from April 28 onward.

16. On May 22, 1989, the Board received an application for the ex part transfer of IRCC Permit No. 6955 from Robert Alfred (deceased) to Virginia Alfred, his widow. Attached to it was the Order permitting selection of property issued by Judge Litynski on April 24.

17. On June 7, the Board received a letter from the attorney represent Quast in the "complaint case". The letter indicates that Quast does not believe that the requested ex parte transfer complies with the law, and that the matter must be assigned for hearing. Quast raises two grounds for its position: (1) that in fact the permit was transferred from Alfred to Dittri some time ago, and thus this would not be a bona fide transfer, and (2) Dittrich controls both his own livestock permit and this IRCC permit, an the substance of this ex parte transaction is the formal transfer of the IRC permit to Dittrich, which is not a bona fide transfer.

18. On June 8, the attorney for the estate of Robert Alfred responded Quast's letter, essentially arguing that Quast had no standing to object to ex parte transfer, and that there was no reason why the transfer could not b approved forthwith.

19. On June 12, 1989, the first prehearing conference in the case was held, involving counsel for D & A, the Estate and Quast. While all parties were aware that there was a potential dispute over the ex parte transfer petition, the only matter that had been referred to the Administrative Law Judge by June 12 was the "complaint case". The Administrative Law Judge iss the First Prehearing Order on June 13, setting a schedule for discovery and prehearing motions in the "complaint case", and continuing the start date o the hearing from July to December.

20. 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

21. On July 10, Quast submitted a Protest to the ex parte transfer petition. Quast alleged a number of grounds for its Protest, the most important of which are: (1) that Alfred effectively sold or transferred the permit to Florian Dittrich some time ago, and that the ex parte transfer statute applies only in cases where there is a bona fide transfer to members the immediate family, and (2) there is presently pending a formal complaint the matter. Quast recommended to the Board that the ex parte transfer proceeding be consolidated with the complaint proceeding, as a number of the issues were the same.

22. On July 13, the Board received a response to Quast's Protest from Robert Alfred Estate. The Estate alleged that the factual allegations in th

Quast Protest were untrue, and asked that it be given an opportunity to be heard before the Board allows the Protest.

23. On July 14, 1989, Wren, Inc., d/b/a Lakeville Motor Express, filed Protest of the ex parte transfer petition. It was marked "timely", as it wa postmarked on or before July 13. It essentially repeats the allegations contained in the Quast Protest.

24. On July 31, 1989, D & A Truck Line and the Estate filed a Motion t dismiss a portion of the prayer for relief in the complaint case, on the grounds that the statute required that any suspension or revocation of a

permit be preceded by a court's determination that a violation was willful. After the parties to the complaint proceeding had been given an opportunity file briefs on the question, the Administrative Law Judge denied the Motion Order of August 23.

25. At some point prior to September 5, the Board referred the ex part transfer petition to the Administrative Law Judge for hearing. On Septembe 1989, the Administrative Law Judge sent a memorandum to all counsel in both complaint case and the transfer case, soliciting their input on the questio consolidating the two. Quast responded in favor of consolidation, while D & and the Estate responded in opposition to it. On October 5, 1989, the Administrative Law Judge issued an Order consolidating the complaint proceed and the ex parte transfer proceeding, but limiting Lakeville's participatio the transfer portion of the consolidated proceeding.

26. The practical impact of the consolidation was to merge together tw legal proceedings involving a total of three issues. The first legal proceeding, the "complaint case", involved both a regular route/irregular ro issue and an illegal transfer/control issue. The ex parte transfer proceedi involved the same illegal transfer/control issue, in the context of determi whether or not the proposed transfer was a "bona fide transfer".

27. On November 8, 1989, Lakeville withdrew from the consolidated proceeding.

28. On November 13, 1989, D & A Truck Line and the Estate filed a Mot for separate trials on the regular route/irregular route issue from the all unlawful transfer issue. Grounds for the motion were that if Quast prevail on the regular route/irregular route issue, there would be no need for a tr of the unlawful transfer issue. The Motion was served upon the Administrat Law Judge, the Board, and counsel for Quast. It was not served upon counse for Lakeville.

29. On November 15, a prehearing conference was held in the consolida case. Attending were counsel for D & A, the Estate, and Quast. Lakeville not attend, and there is no indication that its attorney was even aware of Motion or the prehearing conference. At the prehearing conference, all cou agreed that there was a possibility of avoiding a hearing on the transfer/control issue if the regular route/irregular route issue were reso first. Therefore, on November 21, 1989, the Administrative Law Judge issue Second Prehearing Order, which did separate the trial of the transfer/contr issue from the trial of the regular route/irregular route issue, and ordere that the hearing (which had been set for some time for December 4) should d only with the regular route/irregular route issue.

30. A trial on the regular route/irregular route issue did occur on December 4, 5 and 6, 1989, in South St. Paul. The record closed on March 19 1990, and the Administrative Law Judge issued his Findings of Fact, Conclusions, Recommendation and Memorandum on April 3, 1990. That Report concluded that D & A Truck Line had, in fact, engaged in a regular route operation without a certificate, and recommended that the Board issue a cease and desist Order and suspend the irregular route permit for a period of 21 consecutive days.

31. Following the filing of exceptions and oral argument, the Board issued its Order on the regular route/irregular route issue on August 23, 1990. The Order adopted the Findings and Conclusions of the Administrative Judge. The Order had a number of provisions, the most important of which were: (1) D & A Truck Line was ordered to cease and desist from regular rou operations without a certificate; (2) the irregular route permit was suspend for a period of five consecutive days, stayed until final disposition of the matter; (3) D & A Truck Line was placed on probation for a period of one yea under the threat of retroactive suspension or revocation of the permit; and the control/transfer issue was remanded to the Administrative Law Judge for further proceedings.

32. Immediately after the Board's deliberation, and even before the Board's Order was written up, Quast withdrew its Protest in the transfer proceeding, indicating that its interest in the transfer proceeding was clos related to its complaint action, and the purpose of both was to obtain a Boa Order requiring D & A to stop operating as a regular route carrier. In ligh of the Board's decision to issue a cease and desist Order, Quast had decided withdraw its Protest in the transfer proceeding. That letter was dated Augu 8, and received by the Administrative Law Judge on August 9.

33. On August 24, 1990, after reviewing the Board's final Order, the Administrative Law Judge solicited comments from counsel as to whether there was any reason why the entire case should not be returned to the Board with recommendation that the Board proceed with the transfer issue as an unconte matter.

34. On August 30, 1990, the Administrative Law Judge received a letter from counsel for Lakeville, indicating Lakeville's strenuous opposition to handling the transfer issue as an uncontested matter.

35. On September 24, 1990, the Board issued an Order denying petitions for reconsideration, rehearing, and similar relief which had been filed by D & A Truck Line and the Estate. On October 9, 1990, the Court of Appeals issued an Order staying the Board's suspension of D & A's irregular route permit until the court could rule on an appeal of the Board's Order on the regular route/irregular route issue.

36. On September 26, 1990, a telephone conference call was held betwee counsel for Lakeville, D & A Truck Line and the Administrative Law Judge, whereby it was agreed that the parties would submit memoranda on Lakeville's standing and the appropriate way to proceed in light of the Board's remand o the control/transfer issue. Memoranda were received, and on October 29, 199 the Administrative Law Judge issued his Order reinstating Lakeville as a par

but limiting its participation to the transfer/control issue, and restricti
it from participating in any further aspects of the regular route/irregular
route issue. The Order contained a memorandum, which explained the basis f
it.

37. On December 12, 1990, Lakeville noticed the deposition of Virgini
Alfred for January 8, 1991. On December 20, counsel for the Estate (Virgin
Alfred is the personal representative of the estate) filed a Motion to dela
the hearing. One of the grounds for the Motion was that a deposition of
Virginia Alfred could not be complied with due to her health. Attached to
was the affidavit of Florian Dittrich dated December 20, 1990, noted earlie

indicating that Mrs. Alfred had suffered a "very serious stroke" in the fal 1989, but that she was improving. On December 20, her physician, Basil C. LeBlanc, directed a letter to Mr. Donnelly, indicating that although Mrs. Alfred had stabilized and improved, "she still is not fully oriented to time and place . . . . She still has persistent impaired judgment and is unable fully and appropriately manage her affairs." In lieu of the deposition of Virginia Alfred, counsel for Lakeville agreed to substitute depositions of Florian Dittrich and Rosemary Dittrich. Those depositions were taken in New Ulm on January 25, 1991, and were introduced into the record of this proceed as Exhibits 5 and 6, respectively.

38. On January 4, 1991, a prehearing conference telephone call was hel involving Lakeville, D & A and the Estate. On that same date, the Administrative Law Judge issued his Order continuing the hearing to April 23 1991 in hopes that the Granite City case (In the Matter of the Petition of D. Wilson, d/b/a Granite City Moving & Storage, Transferor, and John S. Herold, Transferee, to Transfer Irregular Route Common Carrier Permit Authority, would have been decided by the Court of Appeals. Counsel had asserted that a number of the issues in that case were similar to the critic issues in the control/transfer case, and there was a possibility that the Court's decision might eliminate the need for a hearing in this case.

39. The Minnesota Court of Appeals did issue its decision in the Gran City case on February 19, 1991.

40. On April 23, 1991, a contested case hearing was held on the transfer/control issue. In order to save time, counsel agreed to submit the depositions (Exs. 5 and 6) and prefiled direct testimony (Ex. 3, 4 and 7). hearing consisted primarily of cross-examination, and was completed in less than a day. Original and reply briefs were submitted, the last being receiv on July 5.

41. At all times from 1971 to the current date, cab cards have been in the name of "Robert Alfred d/b/a: D & A Truck Line". Ex. 8. However, a 19 freight bill bears the letterhead "D & A Truck Line/Florian Dittrich, Mgr", with no mention of Robert Alfred. Ex. 4, Attachment 1.

PERTINENT STATUTORY EXCERPTS

1. Minn. Stat. § 221.151 (1969) read, in pertinent part, as follows:

> Subdivision 1. Permits, except for livestock permits, issued under the provisions of sections 221.011 to 221.291

may be assigned or transferred but only upon the order of the department approving same after notice and hearing. * * * Provided, however, that the department shall make no order granting the sale or lease of a permit to any person or corporation or association which holds any other permit or certificate from the department pursuant to chapter 221. * * * In determining the extent of the operating authority to be conducted by the transferee under the sale or lease of the permit, past operations of the transferor within the two-year period immediately preceding the transfer shall be considered

and only such operating authority shall be granted to the transferee as was actually exercised by the transferor under his authority within the two-year period immediately preceding the transfer as evidenced by bills of lading, company records, operation records or other relevant evidence.

2. Minn. Stat. § 221.021 (1990) provides, in pertinent part, as follo

The board may, for good cause after a hearing suspend or revoke a permit for a violation of a provision of sections 221.011 to 221.296 or an order or rule of the commissioner or board issued under this chapter.

3. Minn. Stat. § 221.293 (1990) provides, in pertinent part, as follo

Where any provision of this chapter or any order adopted thereunder or any rule of the commissioner or board has been violated, the board upon complaint being filed with it or on its own motion, may issue and serve upon the person engaged in such violation, a complaint stating the charges in that respect, and containing a notice of hearing . . . requiring the person so complained of to appear at the time and place fixed in the notice of hearing and show cause why an order should not be ordered by the board requiring such person to cease and desist from the violation alleged. If upon such hearing the board shall find that any of the violations alleged in the order to show cause are true, it shall so find and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such violation.

4. Minn. Stat. § 221.151, subd. 2 (1990) provides, in pertinent part, follows:

The board shall allow the bona fide transfer of a permit, except a livestock carrier permit, ex parte without hearing, if the transferee of the permit is in fact a member or members of the transferor's immediate family. For the purposes of this subdivision, immediate family consists of the lawful spouse, adult child or children . . . of the transferor. Provided further that the immediate

family as defined in this subdivision does not include a person under legal disability . . .

* * *

No determination of the extent of the operating authority previously exercised is required.

> If it appears to the board that the petition and exhibits do not reasonably comply with the standards set forth in this section, then after notice to interested parties and the petitioners, the board shall assign the matter for hearing to determine compliance with this section. A user of the service, competing carrier, or interested party shall have the right to file a protest on the transfer as provided in this subdivision by filing a sworn statement with the board within six months from the effective date of the transfer, whereupon the board shall assign the matter for hearing and the continuance of the permit may be only upon the transferee's compliance with the standards and procedures otherwise imposed by this section.

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

CONCLUSIONS

1. That this portion of the consolidated proceeding involves both the transfer/control portion of the initial Quast complaint and the ex parte transfer petition filed by Virginia Alfred and the Estate of Robert Alfred.

2. That the Board gave proper notice of this proceeding and all other substantive requirements of law or rule necessary to vest jurisdiction in th Board and the Administrative Law Judge have been complied with.

3. That the contract between Robert Alfred and Florian Dittrich of May 10, 1969 is clear and unambiguous. As of that date, Alfred sold the per to Dittrich, and Dittrich acquired the right to control the operations under the permit. After that date, Florian Dittrich was the sole owner of the permit. The agreement to delay the "formal application" for transfer was nothing more than an attempt to avoid the requirements of law. After May 10 1969, Robert Alfred had no legally cognizable interest in the permit. It, therefore, follows that his estate has nothing to transfer to Virginia Alfre In the alternative, if the sale were deemed to be void, then the Estate stil holds the permit, but it holds the permit subject to disciplinary action by Board.

4. If the Board should conclude that there is something that can be transferred to Virginia Alfred, then it is concluded that the appointment of Leo Alfred as her guardian cures whatever defects may arise as a result of h

mental incapacity. There is no evidence in the record regarding his fitness however.

5. The "management" notification given to the Public Service Commissi in 1971 has no bearing on the foregoing Conclusions.

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

Based upon the foregoing, the Administrative Law Judge recommends to th Board that it issue the following:

ORDER

That irregular route common carrier Permit No. 6955 be REVOKED;

That the ex parte petition to transfer said Permit be DENIED.

Dated this 31st day of July, 1991.

s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to ser its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded, Transcript Prepared by Jeffrey J. Watczak.

MEMORANDUM

I.

The contract between Robert Alfred and Florian Dittrich of May 10, 1969 the crucial and determinative piece of evidence in this case. On that date, Robert Alfred sold to Florian Dittrich "all of his right, title and interest the socalled white permit plate as irregular route common carrier issued by Minnesota Public Service Commission which has statewide authority". This conclusion is buttressed by another provision of the contract, which provide

> It is specifically understood by and between the parties hereto that [Dittrich] is the actual owner of the . . . Minnesota Public Service Commission Authority as an irregular route common carrier.

The contract went on to provide that Dittrich would operate the authority, b responsible for all expenses, receive all income and profits, and be responsible for any losses which might occur.

The contract was also clear in providing that the parties desired to operate for at least two years so that when "formal application is made for transfer of the authority", the broadest possible authority could be grantec Dittrich had the right to decide when "formal transfer" would occur, and Alt was obligated to sign all necessary documents to effectuate the transfer.

In sum, the sale of the permit occurred in May of 1969, but with full knowledge of what they were doing, Dittrich and Alfred agreed to withhold notification to the Commission until Dittrich had been able to operate it so to achieve the broadest possible authority. The notification to the Commiss in 1971 of the Dittrichs as managers did not alter the legal effect of what happened in 1969. The 1971 notification most likely reflects the realizatio that unless Florian Dittrich was going to give up his livestock permit, then was no way that the IRCC permit could be transferred to him, but in order to avoid any questions regarding Dittrich's role, or questions of Dittrich's authority to file documents with the Commission, he and Alfred agreed to nam Dittrich as manager.

D & A and the Estate argue that this case is controlled by the decision the Court of Appeals in the Granite City case, formally known as In the Matt of the Petition of Glen D. Wilson, d/b/a Granite City Moving & Storage, Transferor, and John S. Herold, Transferee, to Transfer Irregular Route Comm Carrier Permit Authority, 466 N.W.2d 17 (Minn. App. 1991). There is a cruci difference between the two cases. In the Granite City case, the Court belie that the parties intended a valid employment arrangement and that Wilson retained the legal authority to control the operations. In the case of D & however, the intention of the parties is clearly spelled out in the 1969 contract, and borne out by what happened over the years after the contract. The parties intended an absolute sale of the permit, to be effective in 1969 Dittrich acquired the entire right to control. None was reserved for Alfred They also agreed not to report it to the Commission until Dittrich had expan the scope of operations. To suggest that that agreement not to report, and subsequent letter notifying the Commission of Dittrich as manager, were enou to amend the contract before it could take effect is not a legally sound position. The difference between Granite City and the D & A case is the May 1969 contract, which clearly spells out the intent of the parties to absolut and unreservedly sell the authority and the right to control.

It could be argued that the sale back in 1969 was void because Dittrich already had a livestock permit, and thus was prohibited from acquiring another. If the sale were void, then Robert Alfred would still have owned t permit at the time of his death in 1984, and the permit would have passed to his estate. It could be further argued (as the Estate does, in fact, argue) that the transfer statute gives the Estate an absolute right to transfer to widow, and the Board is powerless to prevent it. That argument must fail, however, because the legal status of the permit did not change when it passe to the Estate. The Estate took the permit subject to the same obligations a if Robert Alfred had lived, and still held the permit. As such, the permit subject to disciplinary action by the Board for failure to report the 1969 transfer of control. The Board is, therefore, fully entitled to take

disciplinary action against the permit in the hands of the Estate. If the Board elects to revoke, then the Estate has nothing to transfer to Virginia Alfred. Although it is perhaps only fortuitous, the complaint by Quast was filed before the transfer application was filed, and the Board could legitimately act on the complaint before it acts on the transfer. Moreover, would be inappropriate to say that the death of a wrongdoer somehow "wipes t slate clean", and prohibits the Board from taking action to enforce the laws While Virginia Alfred did not personally participate in the sham, the Board ought not to be estopped from taking action designed, in part, to deter othe from similar violations. If all of these facts had come to light in

1983, for example, before Alfred's death, the Board certainly could have tal action against the permit. There is no reason why the Board's right is extinguished by his death. This is particularly the case when the action is against the permit, not against the person.

The most difficult question in this part of the consolidated proceedin to determine the appropriate sanction for the Board to impose. The Administrative Law Judge has recommended revocation based on this part of th case alone, without considering the irregular route/regular route issue. He recommended revocation of the permit because he believes that the record demonstrates a very conscious and knowing effort to avoid the operation of t law over an extended period of time. Florian Dittrich has benefited substantially from the ability to operate his intrastate business without limitation from 1969 onward. But for this evasion and subterfuge, he would still be limited to operations as a livestock carrier. While there has been evidence of the amount of business that he would have been able to do with a livestock permit, and thus there is no way that his profits from the illeg operation can be quantified, it is certain that his livestock permit would allow him to do but a fraction of what he has done over the years since 1969

It can be argued that Virginia Alfred should not be penalized for her husband's and Dittrich's illegal actions. However, her husband voluntarily chose to sell his permit in 1969. He negotiated a price of $2400 for the tr and the permit. Had he sold it to someone other than Florian Dittrich and h the transfer been reported and approved, Virginia Alfred would only share in whatever was left of that $2400 at the time of Robert Alfred's death. Since the $2400 was paid, she has received exactly what she would have gotten if h had chosen to sell it to a "legal" transferee. Therefore, any value that is being taken away from her by virtue of this recommended revocation is someth she has no reasonable expectation of receiving.

The person who is being deprived by the revocation is Florian Dittrich, but that is not an inappropriate result, because he is the person who commit the wrongful acts that caused the revocation. Moreover, he has received substantial income over the years, and built a substantial trucking operatio through the exercise of this authority. He should not now be heard to compl when all he is losing is the right to future income.

II.

At the start of the hearing on April 23, the Estate of Robert Alfred, joined by D & A, made a number of procedural Motions relating to the jurisdiction of the Board and the Administrative Law Judge to hear this port of the matter. These Motions had not been filed in advance of the hearing,

had Lakeville been given notice of them. The Administrative Law Judge decli
to rule on them at the time, but instead took them under advisement. Lakevi
responded to them in its post-hearing briefs, the Estate responded, so they
now ripe for decision.

The first Motion was for dismissal of the matter because the Board allegedly failed to follow the procedures of the ex parte transfer statute. Minn. Stat. § 221.151, subd. 2. Lakeville responds that the Board, in fact, did follow the statute and there is no basis for the Motions. The Administrative Law Judge denies the Motion to dismiss because the Board did

follow the statute. The statute directs the Board to allow a "bona fide transfer" of a permit ex parte without hearing if the transferee is a member the transferor's immediately family. However, the Board is allowed to consi the contents of the petition, as well as "pertinent information available to the Board and the Department, and their records and files". If it appears t the Board that the petition and exhibits do not reasonably comply with the standards set forth in this section, then after notice to interested parties and the petitioners, the Board may set the matter on for hearing "to determi compliance with this section". It must be remembered that Quast's complaint alleging an undisclosed transfer from Alfred to Dittrich had already been reviewed by the Board and set for hearing well before the ex parte transfer even filed. In other words, the Board had already determined that there was reasonable basis to instigate a proceeding on the complaint. The Board had legitimate grounds for questioning whether or not there could be a "bona fid transfer". The Board was well within its rights to assign the matter for hearing to determine compliance with the law before allowing the transfer.

The Estate and D & A also moved to prohibit Lakeville from participatin in the transfer/control proceeding because it had earlier withdrawn. As ful explained in the Memorandum attached to the Administrative Law Judge's October 29, 1990 Order Reinstating Lakeville as a Party, the balancing of th equities in light of the circumstances surrounding the consolidation and separate trials did, on balance, require that Lakeville be reinstated. That October 29, 1990 Order and Memorandum are part of the record, and the ratior will not be repeated here again.

A.W.K.