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9-3001-5087-2
CC 29547, 44352/T-

LCC 526, 969/T-90-

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Joint Petition
To Transfer Contract Carrier Permit
Authority And Local Cartage Carrier
Permit Authority From M.W. Ettinger
Transfer Company To Transx Limited.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on November 27, 1990 and December 7, 1990 at the Administrative Truck Center, Second Floor Hearing Room, Livestock Exchange Building, 100 Stockyards Road, South St. Paul, Minnesota. The record in this matter closed upon receipt of the final submission of the parties on February 28, 1991.

Appearing on behalf of M.W. Ettinger Transfer Company (Transferor) and Transx, Ltd. (Transferee) was Andrew R. Clark, Attorney at Law, 1600 TCF Tower, 121 South 8th Street, Minneapolis, Minnesota 55402. Appearing on behalf of Hintz Companies (Protestant) was Mark J. Ayotte, Esq., Briggs & Morgan, 2200 First National Bank Building, St. Paul, Minnesota 55101.

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

The issue in this case is whether the Transportation Regulation Board should approve the transfer of contract carrier and local cartage carrier permits from M.W. Ettinger Transfer Company to Transx, Ltd., pursuant to Minn. Stat. 221.151, subd. 1 and Minn. Stat. 221.296, subd. 8 (1990).

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

FINDINGS OF FACT

Procedural Findings

1. On July 27, 1990, Transx, Ltd. (Transx) and M.W. Ettinger Transfer Company (Ettinger) (together referred to as "Petitioners") filed Joint Petitions with the Minnesota Department of Transportation requesting transfers of the local cartage authority and contract carrier authority held by Ettinger to Transx. Notice of the filing of the Petitions was published in the Transportation Regulation Board's Weekly Calendar on August 17, 1990. Interested persons were given until September 6, 1990 to protest the Petitions.

2. On September 6, 1990, Wintz Companies and Minnesota Transportation Services, Inc. filed timely protests to the Petitions. On October 3, 1990, Minnesota Transportation Services Association withdrew its protest to the Petitions.

3. The Board consolidated the local cartage carrier and contract carrier Petitions and published notice of a public hearing in its Weekly Calendar dated October 26, 1990. A hearing was scheduled for Tuesday, November 27, 1990 at 9:00 a.m. at the Administrative Truck Center in South St. Paul, Minnesota. Notice of the hearing was published in its Weekly Calendar beginning October 20, 1989 and continuing thereafter until the scheduled date for the hearing. Notice of the hearing was served upon the Petitioners and the Protestant on October 20, 1990. The matter was referred to the Office of Administrative Hearings to conduct the contested case hearing.

4. The matter was heard before Administrative Law Judge Phyllis A. Reha

on November 27, 1990 and December 7, 1990.

5. The Petitioners also filed Joint Petitions for temporary leases of the local cartage carrier and contract carrier permits on July 27, 1990. The Petitions were approved by the Board on August 1, 1990 and the Board then issued its Orders for ex parte temporary leases of local cartage carrier and contract carrier permit authority on August 8, 1990. On February 4, 1991, the Board issued an Order providing that the temporary leases would continue in effect until the final decision on the Petitions for permanent transfers of local cartage carrier and contract carrier permit authority.

M.W. Ettinger Transfer Company (Transferor)

6. M.W. Ettinger was a well known Minnesota carrier. In 1988, due to financial difficulties, it filed a Chapter 11 bankruptcy proceeding. Ettinger was released from Chapter 11 in July of 1989 after the approval by the bankruptcy court of a plan to pay creditors.

7. After the bankruptcy plan was approved by the bankruptcy court and the bankruptcy was closed, Ettinger continued to have financial difficulty.

8. By December of 1990, Ettinger was out of cash and in deep financial trouble. In April through July of 1990, the principal owners and directors of Ettinger looked for investors or buyers to put cash into the company or to purchase the assets of the company and take over its operations. During this period of time, Transx was contacted as was Hintz Companies. After investigating Ettinger's operations, Transx made an offer to purchase the assets of Ettinger, which offer was accepted on July 26, 1990. Subsequent to Transx's offer, Hintz Companies, on July 31, 1990, made an offer which was contingent upon a review of Ettinger's books and records. Ettinger considered the Hintz Companies' offer to be inadequate and too late.

9. As of July 26, 1990, Ettinger was three weeks behind on its payroll. It had earlier received notice from its worker's compensation insurer that in the absence of a substantial cash payment of approximately \$426,000 that the worker's compensation coverage would cease on August 3, 1990. If worker's compensation coverage ceased on that date, the doors would close and all employees would be laid off.

10. The agreement for the sale and purchase of Ettinger's assets by Transx was executed by the parties on July 31, 1990. The total purchase price was \$238,000 cash. Of that, \$217,000 was to be used to meet payroll obligations, the balance paid for attorney's fees. As a result of the sale, all employees of Ettinger were retained by Transx and worker's compensation coverage with Transx was extended. On July 27, 1990, the day after an agreement was reached for the sale and purchase of the assets, Ettinger and Transx filed the Joint Petition for temporary leases of authority from the Board which was approved by the Board on August 1, 1990 followed by the Board's Order granting ex parte temporary leases for both the local cartage carrier and contract carrier permits. The receipt of the temporary leases from the Board enabled Transx to retain the employees and maintain the local cartage and contract carrier permit service formerly provided by Ettinger.

11. Prior to the Board ex parte Ordeq; authorizing and approving the

temporary leases of contract carrier permit and local cartage permit held by Ettinger, Ettinger held local cartage carrier permit No. 526 and contract carrier permit No. 29547. It is these two authorities previously held by Ettinger that the Petitioners are now requesting to be permanently transferred to Transx.

12. The local cartage carrier permit No. 526 authorizes the transportation of property or freight within the local cartage zone. Contract carrier permit No. 29547 authorizes, in relevant part, service to the following accounts: (1) Toro Company, 8111 Lyndale Avenue South, Bloomington,

MN 55420, for the transportation of materials, equipment, and supplies used in the production of Toro products, including finished products; (2) 3-M Company, St. Paul, MN, for the transportation of materials, equipment or supplies used in the manufacture of 3-M products, including finished product (excluding commodities in bulk), and restricted to service between points in the Twin Cities' LCC zone, Lindstrom, Pine City and Rush City, MN; and (3) Crown Auto, Minneapolis, MN, for the transportation of auto parts, equipment and supplies, and such other equipment and supplies as are used in or sold by Crown Auto Stores, including their agents or dealers

Transx . Ltd.

13. Transx, Ltd. is a wholly-owned subsidiary of Transx Transport, Inc., a Canadian company based in Winnipeg, Canada. Transx, Ltd. is a Minnesota corporation which was incorporated December 7, 1984. The chief executive and owner of Transx Transport, Inc. is Louie Tolaine. Transx's president of United States operations is Joseph Fitzgerald. Its vice president of sales and operations is Daniel Downs, who was previously general manager of Ettinger until August 2, 1990, the date upon which the transfer of ownership from Ettinger to Transx became effective. Tim Brakstad is the vice president of risk management for Transx. Prior to his employment with Transx, he was employed with Ettinger also in the capacity of vice president of risk management. He became an employee of Transx on the closing date of the sale of Ettinger's assets on August 2, 1990.

14. Prior to the ex parte Orders of the Board granting temporary lease of local cartage carrier and contract carrier permit authority to Transx, Transx had no certificate or permit issued by the Board to engage in for-hire transportation in the State of Minnesota.

15. The financial strength of the parent company, Transx Transport, Inc. will support the Minnesota operations of Transx, Ltd. Submitted with the instant Petitions was the consolidated balance sheet of Transx Transport, Inc. as of July 2, 1989 and the consolidated statement of earnings and changes in cash resources for the period then ended. The auditor's examination was made in accordance with generally accepted auditing standards. Transx Transport, Inc.'s 1989 gross revenues were \$48,839,656. Its 1988 gross revenues were \$41,320,913. The company's net earnings for 1989 were \$1,470,086. Its 1988 net earnings were \$1,150,268. The financial position of the company as of July 2, 1989 and the results of its operations and the changes in its cash

resources for that period are compared to the period ending July 3, 1988 has improved. The company is currently profitable.

16. The general corporate offices of Transx, Ltd. are the former corporate offices of Ettinger located at 2360 West County Road C, in Roseville, Minnesota. Adjacent to the corporate offices is a 70,000 square foot warehouse facility and a 36-door dock which includes a 4-bay drive-through maintenance shop. The warehouse and docking facility was not owned by M.W. Ettinger Transfer Company and was not a part of the sale and transfer of ownership between Ettinger and Transx. The warehouse and dock facility is owned individually by Michael Ettinger, the former president of M.W. Ettinger Transfer Company and a partner. The partnership leases the facility to Transx.

17. The sale of assets did include all the shop inventory and equipment, office furniture and fixtures located at 2360 West County Road C in Roseville, personal computers and related software, the trade names of Ettinger, customer lists, cartage license, and equipment of Ettinger which was paid for in full and free and clear of liens and encumbrances. Also included within the purchase price were the hauling authority including the authorities which are the subject of this hearing. (See Ex. 11, Ex. A).

18. The allocation of value for each of the categories of assets included within the sale and transfer of ownership are shown in Exhibit 11, Exhibit B, summarized as follows:

ITEMS	
Shop Inventory	\$ 62,000
Shop Equipment	26,900
Licenses and Authorities	6,500
Trade Names	5,000
Customer Lists	10,000
Rolling Stock, Including Tractors and Trailers	127. 600
TOTAL	\$ 238,000

19. The price of \$238,000 paid for all assets was the result of negotiations between Ettinger and Transx and was the best price that could be obtained for the total package. It is reasonable because it is the best price that could be obtained for the total package from a qualified buyer. At the time of the transaction, Ettinger had serious cash flow problems and was working against an August 3 deadline because it had no money to meet three weeks of payroll and the worker's compensation insurance would run out on August 3, 1990. In addition, the company had previously filed for Chapter 11 bankruptcy and feared a subsequent bankruptcy liquidation would cause the business to end and all employees to lose their jobs without final payment on wages due.

20. The worker's compensation carrier of Ettinger had reaudited the annual premiums which increased from \$247,000 to \$708,000 and therefore, an additional \$426,000 was needed to keep worker's compensation in effect beyond August 3, 1990. Transx has paid the annual premiums and the worker's compensation coverage was not cancelled.

21. The shop inventory and equipment includes, but is not limited to, shop press, pressure washer, band saw, grinder, press, hoists and other equipment and small tools. The total value of the shop inventory and equipment was estimated to be \$95,572.09. The inventory of the equipment was

conducted by Ettinger mechanics. Each item appears on an inventory attached to the asset purchase agreement. (Exhibit A-1 to Exhibit 11). The value allocated for shop inventory and equipment was less than \$95,572.09. The amounts allocated were agreed to between the parties for income tax purposes only. (Tr. 262). It is the purchase price of the total package (\$238,000) where the "true" value of these assets is found, not the allocated value.

22. Office furniture and fixtures located at 2360 West County Road C was

also inventoried. It includes, but is not limited to, office desks, chairs, bookcases, files, tables, and typewriters. Also inventoried were personal computers and the company's primary computer system used by the operations administration of the company. This latter primary computer system is a DataPoint system which is leased by the company. This DataPoint system has no current value to the company. Transx is going to replace it with a new system. It currently has no market value. (Tr. 119). Ten thousand dollars was allocated for the furniture and fixtures and personal computers. However, Transx also assumed leases that Ettinger had which included telephone leases, equipment leases for rolling stock, and the computer lease for the DataPoint. This obligation is approximately \$40,000. (Tr. 120).

23. Twenty thousand, nine hundred and ninety dollars (\$20,999) was allocated for good will and for the value of the operating certificates acquired by Transx. Of that \$20,990, \$6,500 was allocated as the value of the permits to be acquired. However, the values allocated to these non-tangible items do not actually reflect their true value. Transx intentionally held low the value of these non-tangible items because they were not depreciable for tax purposes. (Tr. 261). It is the purchase price of the total package (\$238,000) which more appropriately reflects the true value of the assets purchased by Transx. Taking all of these factors into consideration, the price paid for the sale of the permit is reasonable. No evidence was introduced to indicate otherwise.

24. Transx owns, operates or leases approximately 100 power units in all of its ongoing operations including the business purchase from Ettinger. All of this equipment is shown on its master equipment list (Petitioners Ex. 4). Transx also owns, operates or leases approximately 150 trailer units for all of its ongoing operations including the business purchased from Ettinger. The trailer units are shown on Transx's trailer list. (Pet. Ex. 5).

25. As a result of the asset purchase agreement, Transx purchased 20 power units of Ettinger and 21 trailer units of Ettinger. All of the power units and trailers were subject to a security interest held by Republic Acceptance Corporation. All of the power units and trailers are shown on Exhibit A-9 to Exhibit 11. The tractors and trailers shown on Exhibit A-9 to Exhibit 11, which were sold to Transx, had a market value of \$50,000. Many

were inoperative or junk and were limited to being used for scrap parts or storage. (Tr. 98-101). The security interests held by Republic Acceptance Corporation has been satisfied and Transx now holds the titles to all of the equipment. Transx has allocated \$127,600 of the total purchase price toward the power units and trailers. Again, this allocation does not specifically reflect the actual value of the equipment purchased. The allocation is for Transx's tax purposes. Old equipment can be depreciated rapidly so a higher value was allocated to the equipment. The more appropriate price which reflects the actual value of the equipment purchased is the total package price of \$238,000. This total price was the result of negotiations and was the best price that could be obtained for the total package and is found to be reasonable.

Fitness and Ability-of Transx to Conduct_Operations

26. Transx has hired the entire employee staff of Ettinger including the vice president of sales and operations, Daniel Downs, who has five years of

experience with Ettinger prior to employment with Transx on August 3, 1990. With Ettinger, Mr. Downs was first the operations and sales manager of its truckload division and then became general manager of the corporation. (Tr. 9, 24-25). He has the experience necessary to manage the day-to-day operations of Transx.

27. Transx has also hired Joseph Fitzgerald as president. Mr. Fitzgerald's duties will be to plan, organize, direct and control the business functions of Transx towards profitability. (Tr. 116). Prior to being hired by Transx, Mr. Fitzgerald was the general manager of G.H. Transport in Saudi Arabia. He was employed by that company for ten years. Prior to his employment with G.H. Transport, Mr. Fitzgerald worked for Red Arrow Freight Lines of Dallas, Texas. He also worked for East Texas Motor Freight, also based in Dallas, Texas. Mr. Fitzgerald has many years of experience in trucking and is well qualified to direct the operations of the company.

28. Financial statements of Transx show that the Ettinger operations which were continued after Transx took over the company on August 3, 1990, have been operated at a profit. (Tr. 24-25). The revenue earned from August through October of 1990 by Transx from operations was \$171,466. (Pet. Ex. 6, 7; Tr. 138-9). Transx has the financial ability to conduct the proposed operation. Transx will also have the financial backing of its parent company, Transx Transport, Inc. (see, Finding 15).

Safety Standards

29. The facility leased by Transx in Roseville includes a 6,000 square foot shop. The shop has a wash-bay, four drive-through bays and a tractor maintenance area. It is fully equipped with exhaust systems, air, in-ground fuel, in-ground oil tanks, and a storage facility. Safety inspections are performed on the premises. Transx employs ten full-time mechanics of which three are state certified for inspection. All inspections follow state and federal rules on safety. Transx has received a satisfactory safety rating from the Federal Department of Transportation. (Tr. 89-90). The vehicles of Transx have passed the safety inspection by the Minnesota Department of Transportation in November of 1990. (Tr. 90). Kim Brakstad is vice president of Risk Management. He has previously held positions with Anderson Trucking Service as the director of safety and recruiting. He oversees the maintenance department and is also state certified to do state inspections. (Tr. 87-89). He is well qualified to supervise the safety and maintenance program of Transx.

Effects on Users of Service

30. Transx has continued to serve all contract and local cartage shippers under its temporary leases of authority from the Transportation Regulation Board. (Tr. 22). The service has not changed from the time the authority to lease was approved by the Board. (Tr. 12). All shippers have been informed of the temporary leases of authority.

31. No complaints have been received from the public on the service provided by Transx operating under the temporary authority. (Tr. 156-7). Transx has been able to meet demand for its services on short notice. Transx has maintained a large fleet of equipment on the streets to meet these needs. (Tr. 181-182).

Effect on Competing Carriers

32. No evidence was presented at the hearing which claimed an adverse effect on competing carriers.

Past Operations of Transferor

33. Transx seeks approval of the acquisition of the contract carrier authority of Ettinger to serve Crown Auto, Toro Manufacturing and 3-M Corporation. It also seeks approval of the acquisition of the local cartage carrier permits of Ettinger.

a. Crown Auto

34. Ettinger obtained an extension of its existing contract carrier permit authority to serve Crown Auto on July 26, 1989. (Pet. Ex. 1). The Order issued by the Board which was later amended on September 20, 1989 to reflect a stipulation agreed to between the parties authorized Ettinger under contract carrier permit No. 29547 to serve Crown Auto, of Minneapolis, Minnesota, for the transportation of auto parts, equipment and supplies, and such other equipment and supplies as are used in or sold by Crown Auto Stores, including their agents or dealers. (Pet. Ex. 1).

35. The activity of Ettinger with respect to its contract carrier authority to serve Crown Auto is reflected in an abstract of shipments handled for the period August 1989 through June, 1990. (Ex. 8). The underlying shipping documents including Ettinger invoices and Crown Auto bills of lading are contained in Exhibit 8-A.

36. The abstract of shipments lists all traffic handled by Ettinger for Crown Auto from their distribution center in Eden Prairie, Minnesota, until the date the distribution center closed in approximately December of 1990. Following the closure of the Eden Prairie distribution center, most of the shipments to various Crown Auto stores in Minnesota originate at the Crown Auto distribution center in Ohio. After the closure of the Eden Prairie distribution center, intrastate shipments under the contract carrier authority continued but with less frequency. The operation for Crown Auto now consists of stock transfers between other Crown Auto stores in Minnesota. (Tr. 143,

163).

37. Ettinger, and now Transx, operates six trailers with the name "Crown Auto" on them. (Tr. 164). Drivers of Transx are dedicated for service to the Crown Auto contract. The abstract of shipments (Ex. 8) contains 49 shipments for the period August 1989 through June of 1990. These shipments have origin points at Eden Prairie, Bloomington, St. Paul, Duluth, Minneapolis, and Cottage Grove. Destinations are throughout the state, including the 7-county metropolitan area with numerous stopoffs. The first shipment shown on the abstract is August 4, 1989 and the last shipment is June 19, 1990.

38. Some of the bills of lading contained in the underlying documents to the abstract of shipments for Crown Auto (Ex. 8-A) indicate the name of the

carrier as "Rushmore". On some of the bills of lading the name of the carrier "Rushmore" is crossed out and the name M.W. Ettinger is written in. Affixed to the same bills of lading is a sticker with a "pro number" and the name M.W. Ettinger Transfer. Prior to Ettinger obtaining the contract carrier permit authority to serve Crown Auto, Ettinger had a lease arrangement with Rushmore for providing service to Crown Auto and two other accounts (Toro and 3-M). After the contract carrier authority was granted to Ettinger by the Transportation Regulation Board, Ettinger discontinued its lease arrangement with Rushmore. Even though the Rushmore lease arrangement has been discontinued, some bills of lading continue to show Rushmore as the carrier. After the date upon which Ettinger obtained contract carrier authority to serve Crown Auto (and Toro and 3-M) any reference to Rushmore as the delivering carrier on bills of lading is a clerical mistake. (Tr. 208-211, 249-255). All freight bills were issued by Ettinger and paid by Crown Auto.

39. With respect to the Crown Auto portion of the contract carrier permit authority, Ettinger has actively exercised the authority to the extent of demand by the shipper and has, within the previous two-year period to this Petition, held itself out to provide such service.

b. Toro

40. The Board granted Ettinger contract carrier authority to serve Toro Company under contract carrier permit No. 29547 on July 26, 1989. The authority granted by the Board authorized Ettinger to serve Toro Company, 8111 Lyndale Avenue South, Bloomington, Minnesota 55420, for the transportation of materials, equipment, and supplies used in the production of Toro products, including finished products. (Pet. Ex. 1).

41. Ettinger's activity under the contract carrier authority to serve Toro is shown on an abstract of shipments for the period September through November 1989 (Pet. Ex. 9) and an abstract of shipments handled for December 1988 (Ex. 9-A). The shipments on the abstracts are representative of the nature of the contract carriage that was performed by Ettinger for the periods shown. The representative periods shown were selected at random. The random months are September, October, November of 1989; January, February, March of 1990; June, July, August of 1990. (Tr. 147, 151).

42. The traffic is comprised primarily of parts and supplies picked up at the vendors who supply Toro with parts and supplies for shipment to Toro plants. (Tr. 147-151). The majority of the traffic shown on the abstract originates from supplier points in Cambridge, Princeton, Stillwater, North Branch, Lindstrom and Hutchinson, Minnesota. The shipments were transported by Ettinger from these origin points to its facility in St. Paul. At the St. Paul facility, most of the shipments were unloaded from the Ettinger equipment onto Toro's private trailers for ultimate delivery to either Windom, Minnesota, or Tomah, Wisconsin. Shipments to Tomah or Windom were transported

by Toro's own drivers in Toro's private trucks. (Tr. 148-150). Ettinger did make some deliveries from its St. Paul facility, but only to destinations in the Twin Cities metropolitan area. (Tr. 148-149).

43. An Ettinger driver was dedicated to the Toro facilities in Lakeville and Shakopee and also for service from Toro's Lyndale Avenue facility in Minneapolis. These dedicated drivers delivered freight on behalf of Toro to

and from Twin Cities metropolitan points. (Tr. 149, 168-169).
The dedicated
drivers are dispatched by Toro. However, if a driver is not
needed for the
full eight hours of each day, he is used for other work. (Tr. 169-
170).

44. The movement of freight by Ettinger from the origin
points shown on
the abstract of shipments to Ettinger's St. Paul facility and
deliveries made
by Ettinger from the St. Paul facility to other destinations in the Twin
Cities area is appropriately classified as intrastate shipments under
contract
carrier permit authority from the Transportation Regulation Board.

C. 3-M Company

45. On July 26, 1989, as later amended by the Board on September 20,
1989, Ettinger was granted contract carrier permit authority to serve 3-M
Company, St. Paul, Minnesota, for the transportation of materials,
equipment
or supplies used in the manufacture of 3-M products, including finished
product (excluding commodities in bulk), restricted to service
between points
in the Twin Cities LCC zone, Lindstrom, Pine City, and Rush City,
Minnesota.
(Pet. Ex. 1).

46. Ettinger's activity under its contract carrier permit
authority to
serve 3-M is shown in an abstract of random sampling of shipments
handled by
Ettinger for 3-M Company, between St. Paul, Rush City, Pine City and
Lindstrom, Minnesota, for the period October 1989 through July
1990. (Pet.
Ex. 10; Tr. 152). The random sampling represents ten representative weeks
for
the ten-month period from October of 1989 through July of 1990.

47. Ettinger served 3-M five days per week, 52 weeks a year
for trips
between the 3-M facilities at St. Paul, Rush City, Pine City and
Lindstrom.
(Tr. 152-3). A single driver was dedicated for this daily
service. (Tr.
152-3). The driver was controlled by 3-M as to routes, schedules and
products. (Tr. 175).

48. Ettinger earned an average of \$1,600 per week in revenue for the
service it provided to 3-M over the ten-month period shown in the
abstract.
(Tr. 153; Pet. Ex. 10).

49. The name "Rushmore" appears on some of the underlying documents.
(Ex. 10-A). As was discussed in Finding 38 above with respect to
Crown Auto,

the insertion of the name "Rushmore" on some of the 3-M bills of lading was

most likely a clerical error by the shipper due to the previous lease arrangement that Ettinger had with Rushmore prior to the Board's granting of

the contract carrier permit authority to Ettinger in July of 1989.

(Tr. 226,

229, 239). All freight bills have a label with the name "M.N. Ettinger Transfer, Inc." and the appropriate "pro number" which indicates that all charges on all shipments shown on the abstract were made to 3-M by Ettinger,

not Rushmore. The underlying documents comprised of packing lists and bills

of lading describing the articles both by number and by name, origin and destination points, indicate an active contract carrier service provided by

Ettinger to 3-M within the parameters of the authority granted by the Board.

d. Local Cartage Carrier Authority

50. Ettinger was one of two major local cartage (LCC) carriers operating in the 7-county metropolitan area prior to the purchase of the company by Transx. The other large LCC carrier prior was Wintz Companies, the Protestant herein. (Tr. 156). United Van Bus also was a major competitor but it has since been acquired by Wintz leaving Ettinger and Wintz as the two largest local cartage carriers in Minnesota. (Tr. 156).

51. Ettinger's activity as a LCC carrier for the period July 1988 to July of 1990 is shown on a representative abstract of local cartage shipments for that period. (Pet. Ex. 12; Tr. 154). The abstract is a random sampling of one day per month which is representative of all other weekdays during the two-year period. Underlying documents to support the abstract were available. These documents included daily manifests which covered 20 of the 24 months. The other four months (July through October of 1988) were based on other records of the company. (Pet. Ex. 12).

52. For the 24 select days of the abstract, there were a total of 2,072 shipments. The total revenues for the sample was \$180,907.32. Computed on a per-day basis, there were an average of 87 shipments per day for an average of \$7,500.00 daily revenue. (Ex. 12). The abstract indicates an extremely active LCC operation by Ettinger for the two-year period immediately preceding the purchase by Transx of Ettinger's assets.

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

CQONCLUSIONS

1. The Transportation Regulation Board and the Administrative Law Judge have jurisdiction over the subject matter of the hearing pursuant to Minn. Stat. 14.57 - 14.62, and 221.151, subd. 1 (contract carrier permits) and 221.296, subd. 8 (LCC permit) (1990).

2. The Minnesota Transportation Regulation Board gave proper notice of the hearing in this matter, has fulfilled all relevant substantive and procedural requirements of law or rule and the Board has the authority to take the action proposed.

3. The Transferee is fit and able to conduct the proposed operations pursuant to Minn. Rules pt. 7800.0100, subp. 4, as it is financially able to

conduct the proposed business, it is competent, qualified and has the experience necessary to conduct the proposed business, and is mentally and physically able to comply with the rules and statutes of the Commission.

4. The vehicles to be used by the Transferee in the conduct of the proposed operations meet the safety standards of the Department of Transportation.

5. The price paid for the transfer of the permits is not disproportionate to the reasonable value of the permits considering all assets and good will sold, taking into consideration the Transferor's serious financial crisis at the time of the sale of assets.

6. Approval of the transfer of permits will not have an adverse effect upon other competing carriers and will not adversely affect the rights of the users of the service.

7. Transx holds no permit or certificate issued by the Board or any other agency regulating transportation in the State of Minnesota.

8. Within the two-year period immediately preceding the transfer, Ettinger conducted adequate shipping activity under the contract carrier permit issued by the Board for Crown Auto, Toro and 3-M Company as evidenced by bills of lading, company records, operation records, or other relevant evidence.

9. Within the two-year period immediately preceding the sale of assets, Ettinger shipping activity under its local cartage carrier permit authority constituted activity of sufficient frequency as evidenced by bills of lading, company records, operation records, or other relevant evidence.

10. Any Finding of Fact more appropriately considered a Conclusion, and any Conclusion more properly termed a Finding of Fact, is hereby expressly adopted as such.

11. The Administrative Law Judge makes these Conclusions for the reasons given in the attached Memorandum. Where necessary, reasons contained in the Memorandum are adopted and incorporated herein as Conclusions.

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

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

ORDER

That the joint petitions to transfer contract carrier permit authority and local cartage carrier permit authority from M.W. Ettinger Transfer Company to Transx, Ltd., be GRANTED.

Dated this 9th day of April, 1991.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Taped. Transcribed by
Jeffrey J. Watczak

Two Volumes.

MEMORANDUM

The Petitioner's request for transfer of contract carrier permit authority was filed pursuant to Minn. Stat. 221.151, subd. 1 (1990). Under this statute, the Board must consider the following issues in determining whether to permit the transfer of the contract carrier authority:

- (1) That the approval of the sale of the permit will not adversely affect the rights of the users of the service;
- (2) That the sale will not have an adverse effect upon competing carriers;
- (3) That the transferee may not presently hold a certificate or permit other than local cartage carrier permit from the Board;
- (4) That the price paid for the sale of a permit cannot be disproportionate to its reasonable value considering the assets and goodwill involved;
- (5) That the transferee is fit and able to conduct the operations authorized under the permit;
- (6) That the vehicles the transferee proposes to use in conducting the operations meet the safety standards of the Commissioner;
- (7) That only operating authority may be granted to the transferee as was actually exercised by the transferor under the transferor's authority within the two year period immediately preceding the transfer as evidenced by bills of lading, company records, operation records, or other relevant evidence.

The Petitioner's request for transfer of the LCC authority was filed pursuant to Minn. Stat. 221.296, subd. 8 (1990). The standards under this statute are essentially the same as the standards under the contract carrier permit statute except that the Board does not consider the effect on competition in the transfer of the LCC permit and instead of looking at the actual authority exercised in determining the extent of the authority to be conducted by the transferee, the LCC transfer statute requires only the seller be engaged in transportation "on a meaningful basis" within the two-year period immediately preceding the sale. The issues the Board must consider with respect to the transfer of the LCC authority under the statute are:

- (1) That the buyer is fit and able to conduct the business authorized under the permit;
- (2) That the vehicles the buyer proposes to use in conducting such business meet the safety standards of the Commissioner;

- (3) That the price paid for the purchase of the permit is not disproportionate to the reasonable value of the permit considering all assets and good will sold;
- (4) That the proposed sale is in the best interest of the shipping public; and
- (5) That the seller has legally engaged in the transportation of property or freight for hire on a meaningful basis as determined by the Board within the two-year period immediately preceding the sale as proven by accurate and complete bills of lading, company records, operating records, or other relevant evidence.

The burden of proof lies with the petitioners to establish by a preponderance of the evidence that the elements are satisfied. The one exception is that which considers the effect upon other competing carriers under the contract carrier transfer statute. Under Minn. Stat. 221.121 which governs the applications for authority, it has been consistently held that any carrier who protests such authority, carries the burden of proof to show that existing carrier adequately and fully meet the needs of shippers. *American Courier Corporation v. Loomis Armored Car Inc.*, 200 N.W.2d 175 (Minn. 1972); *Appeal of Signal Delivery Service Inc.*, 288 N.W.2d 707, 712 (Minn. 1980). The theory behind such a holding is that the Protestant has evidence which establishes its ability to provide such service. The same logic applies here. The Board can only consider adverse effect on competing carriers if such carriers come forth and provide their existing service and the effect that the transfer would have upon their service. Hintz Companies made an appearance as a Protestant in this case and its counsel conducted cross-examination. However, no employee or officer of Hintz appeared and presented evidence in this proceeding with respect to the scope of any authority held by Wintz or what effect, if any, the transfer of authority would have on Hintz or other competing carriers. A party who asserts an affirmative defense has the burden of proving that defense by a preponderance of the evidence and Wintz has failed to provide any testimony with respect to this issue.

With respect to the Petitioners' affirmative burden of proof, the Administrative Law Judge has found that the Petitioners have established by a preponderance of the evidence that the elements of the two statutes have been satisfied. The Protestant has argued that the Petitioners have failed to satisfy their burdens of proof with respect to the following:

- (1) That the price paid for the contract and LCC authorities are disproportionate to their reasonable value;
- (2) That the approval of the sale is inconsistent with the public interest since Ettinger company's creditors will never be satisfied;
- (3) That there is no specialized service needed or provided

to Toro or Crown Auto; and

- (4) That the traffic abstracts do not support a transfer of the contract carrier authority held by the Transferor.

(Protestant's Brief, p. 4). The Administrative Law Judge has rejected these arguments as will be discussed in the following sections of this Memorandum.

Price Paid for the Sale of the Permits is reasonable

As the Findings of Fact in this Report reflect, Ettinger was in serious financial trouble in the months immediately preceding the sale of its assets to Transx. It had no money with which to pay its wage obligations and it was facing a shutdown on August 3 due to a withdrawal of worker's compensation coverage without the payment of over \$400,000 in premiums. As a result of its financial circumstances, it actively sought investors and buyers. One of those solicited was the Protestant, Wintz Companies. However, only Transx submitted a concrete offer prior to the deadline which would enable the company to continue operation and pay its employees. The total purchase price of \$238,000 in cash enabled the company to continue servicing the public. Of the total cash price, \$217,000 was used to meet payroll obligations. All employees were retained by Transx and worker's compensation coverage with Transx was extended. The price of \$238,000 paid for all assets was a result of negotiations and was the best price that could be obtained for that package. The statute requires that the price paid may not be disproportionate to the reasonable value of the assets and good will involved. The testimony at the hearing indicates that the assets of Ettinger were very questionable. Their equipment was old, broken down and in disrepair. The office and computer equipment was out of date. For example, its main computer system which has an annual lease obligation of \$40,000 (for which Transx is responsible) has to be replaced by the company and essentially has no market value. In effect, due to Ettinger's financial circumstances at the time, the contract carrier and local cartage carrier permits had little value without the ability of the buyer to immediately infuse cash into the operation, to assume the leases of equipment and buildings, to pay for wages and similar obligations to keep employees, and to bring in new rolling stock.

Under the agreement, the purchase price was allocated to assets acquired by Transx as shown in Finding 18 of this Report. However, the testimony at the hearing indicated that the allocation was for income tax purposes only. For example, with respect to the rolling stock, Transx attempted to "write up"

this equipment as high as possible as this equipment is rapidly depreciable.

However, the authorities and good will of the company were given low allocation because such items are not depreciable for income tax purposes.

In addition, it was impossible to break down the specific figures into values to be attached to the assets because each of them depended upon the other.

The sale of the assets was a "package deal" and entire purchase price must be looked at to determine reasonableness. Transx did allocate \$6,500 to the permits and such allocation has been stated on the record to be reasonable in the views of both Ettinger and Transx. No evidence was presented by Wintz that the value other than that assigned is reasonable.

The Protestant argues in its post-hearing brief at page 10 that "the ALJ and Board can take administrative notice of the fact that the market value of

an LCC permit alone approximates \$15,000 to \$25,000." The Administrative Law

Judge disagrees with this statement. No evidence was introduced in this hearing record to establish market value of an LCC permit or a contract carrier permit. Market values of such permits vary and the variation in price

is recognized by the statute itself because it is one of the statutory factors that must be considered before the grant of transfer of authority can be accomplished. Furthermore, certainly the financial circumstances of the transferor has an impact on the value of LCC and contract carrier permits.

The Protestant has also argued that the price paid for the permits is low in view of the gross revenues generated by the permits. However, such a comparison is not the statutory test. Moreover, gross revenues which lead to losses and financial problems indicate a very low value of the permits.

The provisions of Minn. Stat. 221.151, subd. 1 and 221.296, subd. 8 requiring that the price paid for an operating authority be proportionate to reasonable value of the permit exists to prevent a new carrier from gaining an unfair competitive advantage over existing authorized carriers. Considering the testimony and evidence presented at this hearing, taking into consideration the financial circumstances of the Transferor, the price paid for the transfer of the assets including the permit authorities and good will has not given the Transferee an unfair advantage.

Approval of the Transfer is in the Public Interest

The Protestant argues that the transaction between Ettinger and Transx, with the resulting request to transfer the LCC and contract carrier authorities, should not be approved as it is contrary to the public interest because it impairs the rights of creditors. (Post-Hearing Brief, p. 12). The Protestant argues that the sale of its assets to Transx circumvented its obligation under the plan of reorganization that was approved by the Federal Bankruptcy Court in July of 1989. The plan of reorganization required Ettinger to pay its creditors under restructured terms, including an unsecured claim by a predecessor to Wintz Companies called Twin City Garage Services. (Tr. 13). At the time of its reorganization, Ettinger Company had owing unsecured claims totalling \$1,217,875. (Tr. 46). After coming out of bankruptcy, Ettinger apparently did not make payment to these creditors. At the date of the transaction with Transx, Ettinger was unable to pay its debts because of its financial circumstances. The Protestant argues that the Board should not "stand silent and permit this injustice." The Protestant argues that Minn. Stat. 221.151, subd. 1 and 221.296, subd. 8 allow the Board to consider these issues and deny the transfers of authority since it is unlikely

that Ettinger will be able to meet these obligations to its creditors.

In support of the proposition, the Protestant points out that the statutes require the Petition to contain "a statement of outstanding claims of creditors which are directly attributable to the operation to be conducted under the permit."

The statutory mission of the Board is to insure Minnesota a sound transportation system. That is evident in the general powers given to the Board in Minn. Stat. 174A.02 in which it is specifically required to consider the services which carriers provide to the public including the continuation, termination, or modification of such services. There is nothing Contained within Minn. Stat. 174A.02 which requires the Board to protect the interests of private creditors. If creditors have been harmed they have the light to all the legal protections provided by our judicial system. It is not for the Board to undertake the obligation on behalf of creditors. Furthermore, although there is no bankruptcy pending, it may be improper for the Board to refuse the transfer of the permits or otherwise discriminate

against a permit holder who is or has been a debtor solely because it is or has been a debtor or otherwise insolvent. Section 525 of the Bankruptcy Code prohibits a governmental unit from "denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, condition a grant to, or otherwise discriminate against a person who is or has been a debtor solely because they are or have been a debtor or otherwise insolvent." (Emphasis added). This statute codifies the result of *Perez v. Campbell* 402 U.S. 637 (1971), which held that a state may not refuse to renew a driver's license of a debtor whose tort judgment resulting from an auto collision was discharged in bankruptcy. Although the debts of Ettinger which remain outstanding may not have been specifically discharged in bankruptcy, it is clear that the creditor's remedy is not through the instant administrative proceeding but through other judicial forums.

The more appropriate considerations that the Board must determine in making a finding that the transfer is in the public interest is the future financial responsibility of the Transferee to serve the shipping public. In this case, the shipping public is better served by the continuation of the service. The testimony and exhibits received into evidence including the financial statements of Transx and its parent company show that the Ettinger operations which were continued under Transx after August 1, 1990 are operated at a profit and are likely to do so in the future. Transx is a financially sound company and has the financial resources to conduct the former operations of Ettinger. The Protestant offered no evidence to contest the financial fitness or ability of Transx to conduct the proposed operations. Transx has given financial stability to the service provided to the shipping public and its purchase has kept the former operations of Ettinger on a continuing basis which insure the continued employment of those who work for Ettinger and maintenance of service to the public.

Past Operations of Transferor

The Protestant argues that the contract carrier authority sought to be transferred from Ettinger to Transx should be limited to exclude the accounts of Toro and Crown Auto. Protestant argues that the nature of the service previously provided by Ettinger to these accounts within the preceding two years is not "contract carrier" service. In the alternative, the Protestant argues that the geographic scope of any such contract authority transferred to Transx should be limited to specified points of origin and destination. (Protestant Brief, p. 15).

With respect to the nature of the service previously provided by Ettinger, the testimony and evidence at the hearing demonstrated that Ettinger did provide an intrastate contract carrier service to Crown Auto and Toro within the past two years. With respect to Crown Auto, Exhibit 8 showed a consistent pattern of early shipments from Eden Prairie, Minnesota with numerous stopoffs. Although the Eden Prairie distribution center has now

closed, Ettinger continued to hold out service to Crown Auto by handling stock transfers between various stores in the State of Minnesota. There is clearly no abandonment of service. When contract carrier authority is granted, there are no minimum numbers of shipments which must be handled nor are there any stated number of origins and destinations which must be served in order to keep that authority active. Nor does the transfer statute impose such requirements. It is clear that with respect to Crown Auto, that the authority

has been actively exercised to the extent of demand by the shipper and that Ettinger held itself out to provide service, Furthermore, the evidence shows that Transx continues to provide trailer equipment with the name "Crown Auto" thereon and that drivers are assigned for service. These factors indicate that the nature of the service previously provided by Ettinger to Crown Auto constituted "contract carrier" service. Exhibit 8 contains 49 shipments with origins at Eden Prairie, Bloomington, St. Paul, Duluth, Minneapolis and Cottage Grove. Destinations are throughout the state including the 7-county area with numerous stopoffs. The abstract of shipments does not demonstrate that the geographic scope of any contract carrier authority transferred to Transx should be specifically limited. The origin and destination points have not significantly changed from the time when the original statewide contract carrier service was granted by the Board.

With respect to the Toro contract carrier authority, Exhibit 9 and 9-A show extensive service for Toro within the previous two year period. The Protestant argues that the movement of traffic from St. Paul to Tomah, Wisconsin is interstate in nature and therefore, the Administrative Law Judge and the Board should remove the traffic destined to St. Paul from the Exhibit and find that there is a lack of sufficient activity to justify a transfer of contract carrier permit authority for Toro. The evidence in this hearing was that Toro traffic moves from St. Paul to Tomah, Wisconsin in Toro's private vehicles. Simply because the ultimate destination of some of the freight is out of the State of Minnesota does not make the Minnesota service performed by Ettinger interstate. This issue was fully analyzed by the Interstate Commerce Commission in a proceeding entitled Motor Transportation_of Property Within a Single State, 94 MCC 541 (ICC 1964), affirmed 242 F.Supp. 890 (E.D.Pa. 1965) affirmed, per curiam, 86 Sup.Ct. 533, 382 U.S. 372, 15 Lawyers Edition 2d 421 (1966). The jurisdictional determination of intrastate or interstate transportation relates only to transportation provided by a carrier subject to economic regulation. A private carrier is not subject to economic regulation

under the Interstate Commerce Act. Thus, the movement of goods by a private carrier does not have an effect on determining whether a shipment is interstate or intrastate for purposes of determining the jurisdiction under which the for-hire service is regulated. The issue is resolved only by looking at the origins and destinations of the transportation provided by carriers who are, in fact, subject to economic regulation. Here, the transportation which is subject to economic regulation occurred only between Minnesota points and is thus Minnesota intrastate. Thus, all of the traffic shown in Exhibit 9 and 9-A is properly intrastate and supports the finding of activity under the contract permit to serve Toro.

With respect to the argument that the service was not contract carriage in nature, the testimony and evidence in the record indicates otherwise. An Ettinger driver is dedicated to the Toro Lakeville and Shakopee facilities and also for service from the Lyndale Avenue facility of Toro in Minneapolis. These drivers deliver freight to and from points in the Twin Cities. The driver is dispatched by Toro at all times. Simply because the driver is not needed the full eight hours each day and on occasion is used for other work, does not change the fact an Ettinger driver is dedicated to serve the needs of Toro.

Finally, the Protestant has questioned some of the underlying documents which identified "Rushmore" as the carrier of the freight. The Administrative Law Judge has carefully reviewed the underlying documents and the testimony

submitted by the witnesses in this hearing. The testimony indicates that the insertion of the name "Rushmore" on some of the bills of lading was most likely a clerical error by an employee of the shipper who was not aware that the lease arrangement between Ettinger and Rushmore had been terminated after Ettinger obtained contract carrier permit authority to serve the named accounts. The fact that all shipments were billed and collected by Ettinger and Ettinger had affixed a label to each document with the name "M.W. Ettinger Transfer" with the appropriate "pro number" indicates to the Administrative Law Judge that all shipments were billed, collected and transported by Ettinger under its contract carrier authority. The contract carrier transfer statute does not restrict evidence of activity to pure documentation such as bills of lading or company records. The statute speaks of "other relevant evidence." Such evidence is the testimony of Ettinger employees who have related their familiarity with the operations of each shipper and how Ettinger provides service.

In summary, the Administrative Law Judge has found that the Applicant has proven by a preponderance of the evidence that the transfer of the contract carrier and local cartage carrier permits should be granted.

P.A.R.