

2-3001-5243-2  
CC 53717/E-90-346, Sub.  
CC 53717/E-90-397, Sub.

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

Sumik Transfer, Inc., 2328 Territorial  
Rd., St. Paul, MN 55114: Petition for  
Extension of Contract Carrier Permit  
Authority to Serve (1) American Red Cross,  
St. Paul, MN, for the Transportation of  
Hemapheresis (Blood Cell Separator)  
Machines and Accessories and Parts;  
and (2) Paper Cal Steel Co., St. Paul,  
MN, for the Transportation of Iron or  
Steel or Iron or Steel Products

FINDINGS OF FACT  
CONCLUSIONS AND  
RECOMMENDED ORDERS

and

Petition for Extension of Contract  
Carrier Permit Authority to Serve  
Greif Brothers Corporation, 1821  
University Avenue, St. Paul, MN,  
for the Transportation of Drums  
and Containers.

The above-entitled consolidated proceeding came on for hearing in  
Minneapolis, Minnesota on April 11 and April 25, 1991, before Bruce D.  
Campbell, Administrative Law Judge from the Minnesota Office of Administrative  
Hearings.

Appearances: Samuel Rubenstein, Practitioner, P.O. Box 5, Minneapolis  
Minnesota 55440, appeared on behalf of the Petitioner, Sumik Transfer, Inc.  
(Sumik, Petitioner or Company); and Mark J. Ayotte, Briggs & Morgan, 2200 First  
National Bank Building, St. Paul, Minnesota 55101, appeared on behalf of Wintz  
Companies (Wintz or Protestant).

The record closed on June 12, 1991, with the receipt by the Administrative  
Law Judge of the final post-hearing memorandum of law.

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 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 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 final Order.

#### STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Petitioner Sumik Transfer, Inc., has established the statutory conditions for an extension of its contract carrier permit authority to serve any or all of the following accounts: American Red Cross, St. Paul, Minnesota; Paper Cal Steel Co., St. Paul, Minnesota; or Greif Brothers Corp., St. Paul, Minnesota, for the transportation of enumerated products.

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

#### FINDINGS OF FACT

1. By Petition filed with the Minnesota Transportation Regulation Board (Board) on October 30, 1990, Sumik Transfer, Inc. requested an extension of contract carrier permit authority to transport hemapheresis (blood cell separator) machines, accessories and parts for the American Red Cross of St. Paul, Minnesota and iron or steel and iron or steel products for Paper Cal Steel Co., St. Paul, Minnesota.

2. The Board published notice of the Petition in its weekly calendar commencing on November 9, 1990 and established November 29, 1990 as the final date for filing Protests to the Petition.

3. A timely Protest was filed by Wintz Companies.

4. The Board referred the protested Petition to the Office of Administrative Hearings for a contested case proceeding and published notice of the hearings in its weekly bulletin, commencing on January 4, 1991, to and through the dates of scheduled hearings.

5. By Petition filed with the Board on December 14, 1990, Sumik Transfer Inc. requested an extension of its contract carrier permit authority to serve Greif Brothers Corporation, St. Paul, Minnesota, for the transportation of drums and containers.

6. The Board published notice of the Petition in its weekly calendar commencing on December 21, 1990, and fixed January 10, 1991, as the final date for filing Protests to the Petition.

7. A timely Protest was filed by Wintz Companies.

8. The Board, by Order dated March 27, 1991, consolidated for hearing the Petition for contract authority to serve Greif Brothers Corp. with the Petition stated in Finding 1, supra. Thereafter, the Board, in its weekly calendar, published notice of the consolidated hearings.

9. Based on its timely Protests and with the consent of Sumik Transfer, Wintz Companies was made a party to this proceeding as an Intervenor.

10. At the hearing herein, the parties stipulated that the Protests of Wintz Companies did not extend to the request of Sumik for an extension of contract carrier permit authority to serve the American Red Cross of St. Paul, Minnesota, for the transportation of hemapheresis (blood cell separator) machines, accessories and parts.

11. Sumik Transfer holds 48 state interstate authority from the Interstate Commerce Commission to provide service in interstate commerce under the name of Sumik Transport. Tr. 197. Within the State of Minnesota, Sumik is basically a Local Cartage Carrier. Tr. 197. It also has authority to provide intrastate contract carrier service to seven or eight accounts. Tr. 197. Sumik operates 15 tractors and six straight trucks in its combined fleet. Sumik also utilizes 25 van trailers and two flatbed trailers. Tr. 197; Tr. 209. Sumik owns its own equipment and does not use owner-operators. Tr. 197. The Sumik equipment meets federal and state DOT safety standards. Tr. 198; Tr. 209. Sumik inspects its own vehicles for safety compliance and is authorized at least at the federal level, to provide safety inspections for other carriers. Tr. 198. Sumik maintains garage facilities for vehicle repair and maintenance. All Petitioner's vehicles are equipped with two-way radios. Sumik Company's drivers are dispatched by two-way radio. Tr. 198-99. Several Sumik drivers also have individual pagers. Tr. 199.

12. Sumik regularly solicits business through direct shipper contact. Tr. 199. Drivers also provide sales leads to the Company. Tr. 199-200. Some limited expenditures are made advertising for new business. Tr. 200. Sumik is capable of serving the accounts named in the consolidated proceeding without expanding its existing fleet. Sumik currently employs approximately 18-20 full-time drivers, all of whom are nonunion. Tr. 212. Two or three of its

current regular drivers are dedicated to particular accounts within the LCC zone. Tr. 213-14. If the authority sought were granted, the accounts would be served by regular drivers and trained relief personnel. Tr. 212-13.

13. Sumik is currently providing service to a number of shippers, including supporting shippers who testified in this proceeding, within the LCC zone. Tr. 206-07. The LCC zone is not entirely coincident geographically

with the seven-county metropolitan area. Tr. 202-03.

14. Although Sumik was aware that the LCC zone does not include the entire seven-county metropolitan area, on a number of occasions, its drivers have transported shipments to portions of the seven-county metropolitan area and other locations the Company cannot legally serve. Tr. 78-91; Tr. 204; Tr. 206; Tr. 138-39; Tr. 191-92.

15. Sumik does not dispatch its own drivers. Sumik drivers are dispatched by the shippers. Tr. 205. The Petitioner does not use bills of lading, but receives compensation on a straight hourly basis for its equipment and drivers. Tr. 205. The compensation and dispatching arrangements Sumik uses make control over the destination of Sumik drivers in accordance with the Company's existing authority more difficult. Tr. 204-05. Moreover, the mix of LCC, contract and interstate traffic makes it difficult for a Sumik driver to know precisely the nature of the traffic movement involved. Tr. 206-07.

16. Sumik has made some illegal traffic movements for Paper Cal and Greif Brothers, outside of the LCC zone, during the pendency of this proceeding, although the Company is aware it has no authority to provide such service. Tr. 207-08.

17. The traffic movements for Greif Brothers and Paper Cal Steel Co. performed by Sumik outside of the LCC zone are all within 100 miles of Minneapolis. Tr. 82; Tr. 190-92; Tr. 215.

18. Paper Cal Steel Co, formerly a part of the Paper Calmenson Company manufactures and processes steel coil into sheets, plate bars and steel tubing. Tr. 48; Prot Ex 4. The national sales of Paper Cal Steel Co. are approximately \$35 million per year. Tr. 32. About 13 or 14 percent of sales are made within the state of Minnesota. Tr. 32. The Minnesota portion of intrastate revenues is important to Paper Cal. Tr. 32. Intrastate sales involve higher margins (for the company). Tr. 33. Control of transportation costs is an essential aspect of Paper Cal retaining its Minnesota intrastate sales against outstate competition. Tr. 33. Approximately 87% of Paper Cal shipments are interstate, 10% are within the LCC zone and only two or three percent are to Minnesota intrastate points outside of the LCC zone. Tr. 28. The bulk of Paper Cal's sales are to the seven-county metropolitan area and other points adjacent to Minneapolis, including St. Cloud, Cambridge, Onamia and New Prague. Tr. 28. The need experienced by Paper Cal for transporting shipments outside of the LCC zone is to areas within 50 miles of the Twin Cities. Tr. 82. Currently, Paper Cal uses common carriers to make deliveries outside of the LCC zone. Tr. 24. Paper Cal has, however, used Sumik outside of the LCC zone to locations such as Forest Lake and Stillwater. Tr. 90.

Paper Cal is satisfied with the service it receives from existing carriers at points outside of the LCC zone. Tr. 69-70; Tr. 77.

19. Between August 1978 and May 11, 1990, Van Bus served Paper Cal as contract carrier. Tr. 261-62. In 1978, Van Bus purchased the trucking equipment and Paper Calmenson Company hired its drivers. Prot. Ex. 9; Tr. 258. Van Bus dedicated 17 tractors and straight trucks, 30 trailers and union drivers to Paper Cal. Prot. Ex. 9; Tr. 258-59. As Paper Calmenson's needs changed, Van Bus reduced its dedicated equipment and drivers to Paper Cal. Tr. 258-59. The units furnished to Paper Cal were painted in the

company's colors and Paper Cal dispatched the dedicated Van Bus drivers. Tr. 222; Tr. 262. In May of 1990, Wintz Companies acquired the equipment and drivers of Van Bus and continued to provide dedicated service to Paper Cal. Tr. 37; Tr. 259. The drivers servicing the Paper Cal account worked exclusively on that account and were, in fact, the same drivers who had been on the Paper Calmenson seniority list in 1978. Tr. 260. Wintz Companies continued to provide service to Paper Cal between May and October of 1990. Tr. 68; Tr. 258. The contract between Wintz Companies through Van Bus and Paper Cal Steel Co. expired on October 1, 1990, and no new contract was executed. Tr. 23; Prot. Ex. 5. The September 19, 1990 contract bid proposal submitted by Wintz Companies was never accepted by Paper Cal.

20. When Paper Cal decided to cease using Wintz's services, effective October 1, 1990, it did so because it believed it could obtain lower rates and "flexible hours" from Sumik Transfer. Tr. 50-51. The flexibility desired by Paper Cal involves the availability of service on one-hour's notice and a minimum charge of no more than four hours of driver's time. At some time in the past there had been a practice of Paper Cal compensating Van Bus drivers on an eight-hour basis irrespective of the time actually worked. Tr. 15; Tr. 23; Tr. 51; Tr. 225-26. The earlier practice of compensating Van Bus drivers dedicated to the Paper Cal account on an eight-hour minimum basis apparently resulted from two letters written in 1983 by Paper Cal's labor lawyer to Teamsters Local 120. Prot. Ex. 11; Prot. Ex. 12. The letters were not binding on Van Bus, did not establish any specific eight-hour minimum and expired on March 31, 1985. Tr. 108; Prot. Ex. 11; Prot. Ex. 12. The transportation contracts between Paper Cal and Van Bus and Paper Cal and Wintz contain no eight-hour minimum provision. Prot. Ex. 9; Prot. Ex. 5. Paper Cal's proposed contract sent to Wintz Companies on September 13, 1990, did not contain any specific provision for an eight-hour minimum payment. Prot. Ex. 6; Tr. 58. In response to the Paper Cal request for bids, Wintz Companies did not propose a minimum guarantee of driver pay. Tr. 38-39; Pet. Ex. 2. Billing records from Wintz reflect examples in which Paper Cal was charged less than an eight-hour minimum per day for the house account drivers. Prot. Ex. 18; Tr. 270-72. During negotiations on the proposed 1990 replacement contract, Paper Cal did not discuss with Wintz Companies the existence of any eight-hour minimum driver payment. Wintz Companies agreed to Paper Cal's request for service on the basis of a one-hour notice. Pet. Ex. 2; Prot. Ex. 6.

21. Paper Cal supports the Sumik petition because it believes that the Petitioner's rates will be lower than those of Wintz. Tr. 13-14. Sumik proposes to charge \$33.75 per hour per driver and Wintz proposes to charge \$35.93 per hour. Pet. Ex. 1; Pet. Ex. 2. Other aspects of the rate proposal, including Sumik's four-hour minimum guarantee per driver and an \$8.00 per hour additional charge for overtime make any detailed comparison of rates or cost savings difficult to forecast with precision.

22. There is no evidence in the record that the rates charged by Wintz were unreasonable or that the Wintz rates worked a hardship on Paper Cal.

23. Greif Brothers manufactures packaging material and storage containers, including fiber containers and metal barrels. Tr. 128; Prot. Ex. 14. Approximately 70% of Greif Brothers' shipments are picked up by the customers. Tr. 115. Greif Brothers' Minnesota intrastate shipments are

primarily within the LCC zone. Tr. 116-17. Within the LCC zone it uses Sumik and a number of other local cartage carriers. Tr. 116-17. The Greif Brothers shipments within Minnesota outside of the LCC zone include shipments primarily to Bongards, Litchfield, St. Peter and Nicollet, Minnesota. Tr. 116-17. Except for Litchfield, Sumik is currently servicing Greif Brothers to these locations outside of the LCC zone. Tr. 118; Tr. 138; Tr. 191-92. Sumik has also provided service for Greif Brothers to Long Prairie and Montrose. Tr. 192. Greif Brothers uses other carriers, including Road Runner and Midwest Delivery to points outside of the LCC zone. Tr. 194-95.

24. Van Bus provided some service to Greif Brothers as a dedicated account since 1985. In August of 1989, Van Bus began serving Greif Brothers on a regular basis. Tr. 122; Tr. 295; Prot. Ex. 14. The service provided included a dedicated union driver and power unit to move Greif Brothers trailers. Additional power units were available on demand. Tr. 295-96. Greif Brothers dispatched the dedicated driver. On May 11, 1990, as noted in Findings 19, supra, Wintz Companies assumed the Van Bus accounts. Between May 11, 1990 and November, 1990, Wintz Companies provided service to Greif Brothers. Tr. 158. Even though Greif Brothers and Wintz still have a transportation contract, the shipper ceased using the Protestant's services in November of 1990. Wintz has never refused to service the Greif Brothers account.

25. The articulated reason Greif Brothers supports the Sumik Application is perceived difficulties with the service provided by Wintz and Van Bus. Greif Brothers has made no detailed comparison of the rates of Wintz and Sumik. Rates or perceived savings were not stated as a significant factor in the shipper's support of Sumik. Tr. 163-164; Tr. 167; Tr. 181; Tr. 186-187. Greif Brothers initially complained about the conduct of a driver named Jim Green. Mr. Green had provided service to Greif Brothers through Van Bus prior to Wintz Companies assuming the Greif Brothers' account. Tr. 144; Tr. 310. When Greif Brothers complained about Mr. Green, Van Bus removed him from the account. Tr. 144. Mr. Green never provided service to Greif Brothers while Wintz Companies served the account.

26. Wintz Companies was responsible for damage to a Greif Brothers' trailer when the Wintz driver attempted to pull the trailer after it had been marked out of service by the company. Tr. 111-112. The cost of repairing the Greif Brothers trailer was \$333.13. At the request of Greif Brothers the driver was suspended for three days by Wintz Companies and transferred from the account. Tr. 301; Tr. 312; Prot. Ex. 21.

27. Greif Brothers also suspects that a Wintz driver was reporting too much time on traffic movement to Bongards, Minnesota. On one occasion, a Greif Brothers employee followed the Wintz Companies truck to Bongards and then returned to the Twin Cities after the driver had unloaded his vehicle. The Greif Brothers employee returned to the Twin Cities approximately 45 minutes before the Wintz Companies driver arrived. Wintz Companies conducted an

investigation of the alleged service inadequacy. Tr. 305-306. The 45-minute difference in time is accounted for by the fact that the driver took an authorized one half-hour lunch break before returning, Prot. Ex. 20, and the Wintz driver picked up a "higher profile" trailer at Bongards for a return to Greif Brothers which necessitated a different return route to avoid certain lower road bridges. Tr. 309; Tr. 316-17; Prot. Ex. 20.

28. On one occasion, a Wintz driver refused to transport a Greif Brothers trailer. Tr. 178. The reason the driver could not transport the load, however, was because of DOT regulations concerning hours of service. Tr. 178; Tr. 185. Greif Brothers made a request for another Wintz driver and he transported the shipment. Tr. 178; Tr. 185. There is no evidence in the record that Greif Brothers was inconvenienced by Wintz providing a substitute driver.

29. The transportation needs of Greif Brothers are adequately met by existing carriers. Tr. 137; Tr. 166; Tr. 168; Tr. 182. Greif Brothers believes that regulation of the trucking industry, particularly as regards competitive entry, is inappropriate. Pet. Ex. 13; Tr. 119-120. It favors unlimited competition.

30. Wintz Companies holds both interstate and intrastate operating authority. Wintz has Minnesota intrastate contract carrier permit authority to serve 38 named accounts, transporting a variety of commodities. Tr. 153; Pet. Ex. 17. Wintz also has local cartage authority and provides public warehousing. Tr. 252-54. Wintz Companies holds interstate authority throughout the contiguous 48 states to provide both common carrier and contract carrier services. Tr. 254. Its interstate contract authority is class-wide. Tr. 254. Wintz holds Minnesota intrastate authority to provide contract carrier services to both Paper Cal and Greif Brothers. Prot. Ex. 17. Wintz Companies dedicates equipment and specially trained drivers to its customers and offers specialized services not generally available, except through contract carriers. Tr. 257-58.

31. Wintz owns and operates approximately 700 power units, including single and tandem axle trailers and straight trucks. Tr. 254. Approximately 200 of its power units were purchased within the past year. Tr. 254. Wintz uses approximately 1,400 trailers to service contract accounts. Tr. 255. Approximately 350 of those trailers were acquired within the past year. Tr. 255. Wintz equipment is regularly and properly maintained by at least 4 certified journeyman mechanics at its facility in Roseville. Tr. 255. The Wintz equipment is in safe operating condition. Tr. 255-56. Approximately 20-25% of the power units and 20-25% of the Wintz trailers are under-utilized. Tr. 256.

32. The main Wintz terminal is a 26-acre facility located in Roseville, Minnesota, which includes a 156-door terminal, corporate offices and extensive maintenance and repair shop capability. Tr. 256.

33. Wintz employs several hundred non-union drivers, Tr. 256, and it has in excess of 275 union drivers available in the Twin Cities area on lease from Wintz Parcel Drivers, Inc. Tr. 257. Wintz uses both union and non-union drivers to suit customer preference. Tr. 257.

34. Prior to May 11, 1990, both Paper Cal and Greif Brothers were served by Van Bus Delivery Company. On May 11, 1990, Van Bus ceased its normal business operations because it lost its major shipping customer, Sears, and faced cancellation of its workers compensation insurance policy. Tr. 251. Bus entered into an agreement with Wintz Companies under which Wintz purchased equipment, customer accounts, contracts and other assets from

Van Bus. Tr. 250. The former Van Bus union drivers were hired by Wintz Parcel. Tr. 250-51. Wintz acquired from Van Bus the transportation equipment that had been dedicated and used to provide service to Paper Cal and Greif Brothers and employed the same union drivers that had been providing service for Van Bus to these two accounts. Both Paper Cal and Greif Brothers consented to the continuation of service by Wintz Companies and signed applications on behalf of Wintz for additional intrastate contract carrier permit authority to serve their accounts on a temporary basis. Tr. 39; Prot. Ex. 4; Prot. Ex. 1. After May 11, 1990, Wintz continued to serve both Paper Cal and Greif Brothers using the same equipment and personnel as had Van Bus. Tr. 38; Tr. 258; Tr. 295. Wintz Companies has never refused to provide contract carrier service to either Paper Cal or Greif Brothers. Tr. 68; Tr. 158.

35. Paper Cal had never discussed with Wintz Companies the question of whether an eight-hour driver minimum was part of their contractual agreement. Paper Cal made no service complaints to Wintz Companies. On September 13, 1990, Wintz Companies received a contract bid solicitation from Paper Cal, stating contractual conditions the shipper desired. On September 25, 1990, Wintz Companies responded to the Paper Cal Steel Co. bid solicitation and accepted the substantive portions of the contract with stated rates. Pet. Ex. 2. On September 26, 1990, an official of Wintz Companies had a luncheon meeting with a Paper Cal representative. The Paper Cal Steel Co. representative did not complain about the Wintz service or directly seek lower rates. Tr. 267-68. During the next few days certain contractual issues were clarified. Tr. 268. Sometime during those conversations, Paper Cal asked Wintz Companies could lower its rates in the contract period. Tr. 269. Wintz Companies responded that the rates were required to provide the services under the contract. Tr. 269. On September 28, 1990, Paper Cal gave notice of its non-intention to renew the contract. Prot. Ex. 7.

36. Wintz Companies serviced the Greif Brothers account through November of 1990. Tr. 295. Wintz Companies was aware of the incident in which its driver attempted to move a Greif Brothers trailer while it was disabled, as described in Finding 26, supra. A representative of Wintz Companies was informed by Greif Brothers on January 18, 1991, that it supported Sumik rather than Wintz because the Petitioner's rates were more favorable, even though a separate rate study or productivity inquiry was conducted by Greif Brothers. Tr. 303-304. During this meeting, Greif Brothers indicated their general satisfaction with the service Wintz provided.

#### PERTINENT STATUTORY AND RULE EXCERPTS

Minn. Stat. § 221.011, subd. 12 (1990), provides:

"Contract carrier" means a person engaged in the business of transporting property for hire over the highways under special contracts of carriage with the shippers or

receivers of freight who require a specialized service to meet their needs.

Minn. Stat. § 221.121, subd. 1 (1990), in relevant part, provides:

The board, after notice to interested parties and a hearing, shall issue the permit upon compliance with the laws and rules relating to it, if it finds that petitioner is fit and able to conduct the proposed operation, that petitioner's vehicles meet the safety standards established by the department, that the area to be served has a need for the transportation services requested in the petition, and that existing permit and certificated carriers in the area to be served have failed to demonstrate that they offer sufficient transportation services to meet fully and adequately those needs . . . .

Minn. Rule pt. 7800.0100, subp. 4 (1990), provides:

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

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

#### CONCLUSIONS

1. The Transportation Regulation Board has jurisdiction over the subject matter of the hearing.
2. Proper notice of the hearing was timely given, and all relevant, substantive and procedural requirements of law or rule have been fulfilled and therefore, the matter is properly before the Administrative Law Judge.
3. Since Wintz Companies has contract carrier authority to serve both Greif Brothers and Paper Cal Steel Co., it has standing as a Protestant-Intervenor in this proceeding to contest Sumik's Petition. Petition of Burn Service Corp., 392 N.W.2d 294, 297 (Minn. App. 1986).
4. From Petitioner's experience, knowledge of the regulations and financial conditions, it is fit and able within the meaning of Minn. Rule 7800.0100, subp. 4 (1990).
5. Petitioner's vehicles are being regularly maintained, free from defects, and are within the safety requirements prescribed by the Department

6. Since the Application to serve the Red Cross of St. Paul, Minnesota for the transportation of hemapheresis (blood cell separator) machines and accessories and parts is not contested, that authority should be granted without a contested demonstration of public need.

7. Petitioner has not established a need for additional contract carrier authority to serve either Greif Brothers or Paper Cal Steel Co.

8. Protestant Wintz has demonstrated that it and other existing carriers fully and adequately meet the transportation needs of Greif Brothers and Paper Cal Steel Co.

9. As a consequence of Conclusions 7 - 8, supra, the Petitions of Sumik Transfer, combined into this consolidated proceeding, should be denied, except for contract carrier authority to serve Red Cross of St. Paul, Minnesota as stated in Conclusion 6, supra.

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

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

Based upon the foregoing Conclusions, it is the Recommendation of the Administrative Law Judge to the Board that it issue the following:

ORDER

1. The Petition of Sumik Transfer, Inc. for contract carrier authority to provide service to Greif Brothers Corporation for the transportation of drums and containers in Docket CC 53717/E-90-397, Sub. 5 is DENIED.

2. The Petition of Sumik Transfer, Inc. for contract carrier authority to provide service to the American Red Cross of St. Paul, Minnesota for the transportation of hemapheresis (blood cell separator) machines and accessories and parts in Docket CC 53717/E-90-346, Sub. 4 is GRANTED. Its request for contract carrier authority to serve Paper Cal Steel Co., St. Paul, MN for the transportation of iron or steel or iron or steel products in the same docket is DENIED.

Dated this 23rd day of July, 1991.

BRUCE D. CAMPBELL  
Administrative Law Judge

NOTICE

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

Reported: Transcript Prepared from Audio-Magnetic Recording. Jeffrey J. Watzak, Court Reporter.

## MEMORANDUM

The request of Sumik Transfer for additional contract carrier authority involves resolution of a number of issues under Minn. Stat. § 221.121, subd. 1 (1990), including the fitness and ability of the Petitioner, the condition of its equipment, the existence of a demonstrated need for additional services and the adequacy of existing services. Petitioner, at least partially, has also challenged the standing of the Protestant.

Wintz Companies currently holds a transportation contract with Greif Brothers; its contract with Paper Cal Steel Co., however, expired in 1990 and has not been renewed. Sumik argues that Wintz Companies lacks standing to protest the Petition insofar as it involves Paper Cal Steel Co. As noted by Wintz Companies, in Petition of Burnham Service Corp., 392 N.W.2d 294, 297 (Minn. App. 1986), the court authoritatively rejected a similar challenge to standing:

Finally, Burnham contends that Berger does not have standing to protest its application. Neither the ALJ nor the MTRB expressly addressed the issue, whether properly raised or not. The argument appears relatively meritless. Section 221.121, subd. 1, requires the MTRB to issue notice to "interested parties" and to conduct contested case proceedings when a timely protest is received by "any person." Berger was served notice of the application and filed a timely protest. Although it no longer holds a contract with IBM, it continues to have the contract carrier authority to serve IBM and has standing to contest Burnham's application in this case.

This case is identical to Burnham, supra, as regards standing. Wintz Companies currently has contract carrier authority to serve both Greif Brothers and Paper Cal Steel Co. Prot. Ex. 17. It received notice of the proceeding, filed a timely Protest and was made a party to the proceeding without objection from Sumik Transfer. Under these circumstances, Wintz Companies has standing to contest a grant of contract carrier permit authority to serve both Greif Brothers and Paper Cal Steel Co. even though its contract with Paper Cal has expired.

Wintz Companies also argues that Sumik has not affirmatively established its fitness and ability. It argues that there is no evidence in the record regarding the current safety status of the Petitioner's vehicles or its financial condition. Wintz Companies does not ask the Administrative Law Judge to find that the Sumik equipment is not properly maintained or that it does not have the requisite financial ability to conduct the proposed operations. It concludes only that Sumik has failed to meet its burden of proof on these

issues. Sumik argues that its fitness was authoritatively established in previous proceedings.

With respect to the condition of the Sumik equipment, the Administrative Law Judge finds that Sumik has presented sufficient evidence of compliance with safety standards. At page 198 of the transcript, the following statements appear:

Q All right. Do your vehicles meet the safety standards of the State of Minnesota?

A I guess I'm going to answer that by saying as far as I know, we do. We do have a copy of a certificate from the Federal Highway Administration.

Q That's my next question. You're ahead of me.

A Okay, then I'll say yes and let you ask me the next question.

Q Do you hold a safety report from Federal DOT?

A Yes, I do.

Q And is it satisfactory?

A Yes, it is.

Q Do you have your vehicles inspected by an outside firm?

A No, we do it ourselves. We're presently certificated to perform that service for other carriers as far as the federal inspection goes and on the 17th, we have two people, I believe, attending a school to be certified for state inspection.

Q Then you have your own garage facilities?

A Yes, we do.

Similar testimony, on cross-examination, was also given. Tr. 208-09. Further, Sumik is a currently authorized carrier subject to Board and DOT safety regulation. Attached to its Petition for contract carrier permit authority to serve Greif Brothers is a motor carrier profile prepared by the Department of Transportation. It shows a satisfactory safety rating, an accident history, and an inspection history analysis. While the Petition itself was not offered as evidence, the Administrative Law Judge may properly take notice of both the Petition and its attachments as being a part of the official files of the Board maintained in this docket. Moreover, the Administrative Law Judge believes that the Sumik argument has merit. Given an existing carrier with a satisfactory safety record and some evidence of compliance, with no evidence of adverse equipment concerns, the proof necessary to carry the burden of establishing the satisfactory condition of equipment is minimal. Sumik has the burden.

Wintz Companies also asserts that Sumik has not introduced evidence of current financial condition. Wintz concludes that Sumik has not shown the financial ability to carry on the proposed service for Greif Brothers and Pacific Steel Co. It is important to note, again, that Sumik currently

holds motor carrier permit authority. As such, it is required to file statements with the Board regarding its financial condition. Those documents are on file with the Board. The Administrative Law Judge must conclude that the financial condition of the Petitioner, apart from the proposed new operations, is satisfactory to the Board. No enforcement action has been undertaken against Sumik for financial instability. Petitioner Request for Hearing Examiner Service, December 14, 1990, Attachment, Motor Carrier Management Information System Carrier Profile, Inspection History Analysis. the financial condition of Sumik is satisfactory, apart from the proposed new operations, a grant of the authority requested would not place additional financial pressure on the Company. As noted in the Findings, the vast majority of traffic for both of the supporting shippers is within the LCC zone, traffic which Sumik can transport under its current authority. Moreover, the traffic movements for Greif Brothers and Paper Cal outside of the LCC zone are within 50-100 miles of downtown Minneapolis. See, Finding 17-18, supra, and Finding 23, supra. Even if the full authority requested were granted, Sumik could service the new accounts without adding new equipment or substantial additional expense. The Administrative Law Judge, therefore, finds that the financial condition of Sumik would allow it to conduct the proposed additional contract carrier business without jeopardy.

Finally, Wintz points to illegal traffic movements made by Sumik outside of the LCC zone. See, Findings 14, 16, 18 and 23, supra. The Administrative Law Judge finds that Sumik has established its present fitness and ability. is an existing interstate and intrastate carrier that must operate on a daily basis in conformity with Minnesota trucking regulations. Its violations summary over the past two years show few infractions. Further, the statements in the record regarding some illegal traffic movements by Sumik outside of the LCC zone do not establish that Sumik would be unwilling to abide by defined restrictions on its authority. There has not been such flagrant and persistent violations as would evidence a cast of mind in which Sumik would knowingly and persistently disregard Minnesota trucking regulations. That is the test that has been established. Brinks, Inc. v. Minnesota Public Utilities Commission, 355 N.W.2d 446, 450 (Minn. App. 1984); In the Matter of the Petition of Twin Cities International Courier, Inc., CSC 5-338/A-83-354, Order No. 5, March 12, 1984; In the Matter of the Joint Petition of Howard Taylor d/b/a Taylor Transfer and Metropolitan Contract Services, Inc. to Transfer Local Cartage Authority, LCC 713,827/T-84-304, Order, May 30, 1985.

Sumik must also demonstrate that there is a need for the transportation services requested in the Petition. As noted in the Findings, the Administrative Law Judge has determined that the only need presented is an arguable ability by Greif Brothers and Paper Cal Steel Co. to obtain somewhat lower rates from Sumik for the transportation service previously provided by Wintz Companies. Paper Cal Steel Co. supported the petition to obtain lower rates and more "flexibility" in scheduling. As noted in the Findings, it has

no current service need that was not adequately serviced. Tr. 69-70; Tr. 71; Tr. 50.

Paper Cal asserts that it can obtain from Sumik a four-hour minimum charge for the use of a driver and equipment, while the Wintz Companies contract required an eight-hour minimum. As noted in Finding 20, supra, all of the objective evidence entered into the record demonstrates that Wintz Companies did not subject Paper Cal to an eight-hour driver minimum. The only

documents that Paper Cal witnesses relied upon to establish their claim of an eight-hour minimum are in no way binding on Paper Cal, do not specifically address the situation of an eight-hour minimum, and, in any event, have long since expired. There is no mention in any legal document binding Paper Cal or Wintz Companies that relates to an eight-hour minimum charge. Further, actual Company records tend to establish that no such eight-hour minimum charge is universally imposed. Prot. Ex. 18. Finally, the Administrative Law Judge questioned the Paper Cal witness about whether the eight-hour minimum was even discussed with Wintz Companies at the time the new contract was being negotiated in 1990. The witness stated that no such discussions occurred either in 1990 or at an earlier time. Tr. 97-99. The Administrative Law Judge does believe that Paper Cal was sincere in its belief that it was normally subject to an eight-hour minimum. This was not, however, a misconception that was fostered by Wintz Companies. Moreover, the fact that Paper Cal dispatched the Wintz drivers and controlled their hours of work, would make it difficult for Wintz Companies to be aware of Paper Cal's erroneous construction of the contract. The Administrative Law Judge, therefore, finds that the four-hour minimum driver charge proposed by Sumik when compared to the contract between Wintz Companies and Paper Cal Steel Co., as respects a driver's minimum charge does not establish public need within the meaning of the statute.

Both shippers indicate that they would be charged lower rates by Sumik compared to Wintz Companies. There is no substantial quantification in the record from which the Administrative Law Judge can determine, authoritatively, differences in rates of the two companies and the impact on shippers. While Sumik proposes to Paper Cal a \$33.75 per hour charge as compared to a \$35.93 per hour charge by Wintz, Sumik's rates include a four-hour minimum guarantee per driver and an \$8.00 per hour additional charge for overtime. Sumik has also promised Paper Cal an inappropriate discount of two percent for payment within 14 days. Pet. Ex. 1. While Greif Brothers testified that rates were not a significant factor in its support of Sumik, it also stated that not all of Petitioner's rates were lower.

In Petition of Burnham Service Corp., 392 N.W.2d 294 (Minn. Ct. App. 1986), the court held that the ability of a contract carrier to provide identical service at a lower rate does not establish a public need for a grant of authority under Minn. Stat. § 221.121, subd. 1 (1990). See also, Brinks, Inc. v. Minnesota Public Utilities Commission, 355 N.W.2d 446, 451 (Minn. Ct. App. 1984).

While the Administrative Law Judge accepts the court's statement in Burnham, *supra*, he does not conclude that in no circumstances may a difference in rates establish a public need. One could posit a case, for example, when a carrier receives contract carrier authority and then does not negotiate rates in good faith for a renewal contract. If the rates charged by that carrier were a significant burden to the shipper, the shipper could be held as a captive customer of the trucking firm who could protest any grant of additional

contract carrier authority to serve that customer. Burnham, supra, apparently recognizes that possibility by stating that there was no evidence in the record that the shipper could "no longer afford the rates those carriers were charging." Hence, given a sufficient showing, a sufficiently quantified rate differential may be the determinative factor in establishing need. That detailed a showing, however, was not made in this case. Under

Burnham, supra, the shippers' desires for the lowest possible rate do not establish public need.

Greif Brothers testified that a desire to obtain lower rates did not motivate its support of the Sumik Petition. See, Finding 25, supra. The Administrative Law Judge, however, credits the testimony of a Wintz executive who had discussed the reason for the Greif Brothers support of the Sumik Petition with a witness who testified for Greif Brothers. The Wintz representative was told that financial considerations were the determinative factor. See, Finding 36, supra.

Greif Brothers testified about four alleged service problems experienced with Wintz. The only substantiated instance of inappropriate service, however, was the attempt by a Wintz driver to move a disabled Greif Brothers trailer. See, Finding 26, supra. This was inappropriate conduct on the part of the Wintz driver for which he was disciplined and reassigned. The Administrative Law Judge does not find that this one isolated incident is sufficient to establish a public need to grant additional contract carrier permit authority to Sumik.

Apart from the issue of public need, the Administrative Law Judge finds that service by existing permitted carriers could fully meet the needs of both shippers. The witnesses who testified on behalf of Paper Cal Steel Co. and Greif Brothers specifically stated their satisfaction with existing carriers. Tr. 137; Tr. 166; Tr. 168; Tr. 182; Tr. 50; Tr. 260; Tr. 268. The service to both Greif Brothers and Paper Cal Steel Co. are receiving from Sumik is the same service that was formerly provided by Wintz Companies. Wintz Companies currently has contract carrier authority to serve both shippers. It is ready, willing and able to provide the service that both shippers require from a contract carrier. The only discernible difference between the Wintz proposed contract and that offered by Sumik is some arguable and largely unquantified rate differential. Under Burnham, supra, that is not a sufficient reason to grant additional contract carrier permit authority.

B.D.C.

