

OAH Docket No. 3-3001-8438-2
TRB Docket No. CC 71574/A-93-240

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of Conzemius Companies, Inc., W. 8290 U.S. Highway 10, Ellsworth, Wisconsin 54011: Petition for Contract Carrier Permit Authority to Serve Hastings Co-operative Creamery Company for the Transportation of General Commodities.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on before Administrative Law Judge Allen E. Giles on January 20, 1993 at 9:30 a.m. at the Transportation Board's Second Floor Hearing Room, Administrative Truck Center, 100 Stockyards Road, South St. Paul, Minnesota 55075.

Appearing on behalf of the Applicant, Conzemius Companies, Inc. (hereinafter also referred to as "Conzemius"), was Robert D. Gisvold, Kalina, Wills, Woods, Gisvold & Clark, Attorneys at Law, Suite 200, 941 Hillwind Road N.E., Minneapolis, Minnesota 55432-5964.

Appearing on behalf of the Protestant, Robinson Transport, Inc. was Samuel Rubenstein, Practitioner, Freight Transportation Consultants, Inc., P.O. Box 5, Minneapolis, Minnesota 55440.

The record closed on April 8, 1994, after a telephone conference hearing on the Protestant's Post-Hearing Motion to reopen the record for further proceedings.

Notice is hereby given that, pursuant to Minn. Stat. 14.61, and the Rules of Practice of 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

Whether Conzemius Companies, Inc. has met the conditions necessary for issuance of a contract carrier permit to serve Hastings Co-op Creamery as required by Minn. Stat. 221.121, subd. 1 (1992). More specifically whether Conzemius Companies, Inc. (a) is fit and able to conduct the proposed operations; (b) vehicles meet the safety standards established by the Minnesota Department of Transportation; (c) whether there is a need for the transportation services proposed in the Petition; and (d) if a need exists do the existing carriers offer sufficient services to fully and adequately meet the need?

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

FINDINGS OF FACT

Procedural Requirements.

1. On May 17, 1993, Conzemius filed an application with the Minnesota Transportation Regulation Board seeking Contract Carrier Permit Authority to serve Hastings Co-operative Creamery Company for the transportation of general commodities. Ex. 1.

2. On May 21, 1993, and weekly thereafter, the Board published notice of the application in its Weekly Calendar; interested persons were given until June 10, 1993 to file protests against the application.

3. Timely protests were filed by Hyman Freightways, Inc. and Robinson Transfer, Inc. By letter dated June 14, 1993, the Board informed Applicant that because protests had been filed a hearing would be necessary. Prior to any such hearing, the Applicant was advised to contact the Protestants to discuss and consider a settlement. Conzemius was required to respond within 30 days regarding its efforts to settle the case and inform the Board whether the application should be scheduled for hearing. On August 5, 1993, the Board was informed that the Applicant had

been unable to reach a settlement with the Protestants. The Board was requested to delay setting this matter for hearing while the parties further considered the possibility of settlement. The attempts at settlement were unsuccessful.

4. The Board scheduled and noticed a hearing in its Weekly Calendar beginning December 10, 1993. and continuing thereafter up to the scheduled date for the hearing. The Notice indicated that a hearing on the application would be held on January 20, 1994 at 9:30 a.m. in the Second Floor Hearing Room, Administrative Truck Center, 100 Stockyards Road, South St. Paul, Minnesota 55075. The Notice of Hearing was served upon the Applicant and the Protestants on December 10, 1993.

5. The matter was referred to the Office of Administrative Hearings for the purpose of conducting a contested case hearing. The hearing was held on the date and at the location contained in the Notice of Hearing. Protestant Hyman Freightways withdrew its protest and did not appear at the hearing.

Specialized Transportation Services

6. Conzemius Companies has applied for authority as a "contract carrier" on behalf of one shipper, the Hastings Co-operative Creamery Company. Authority as a "contract carrier" requires that a motor carrier provide specialized transportation services pursuant to a contract for carriage. In support of its request for the specialized services of a contract carrier the Hastings Co-operative Creamery Company filed the following statement of specialized service:

We support the Application of Conzemius Companies, Inc. for authority as a contract carrier because they will provide the following special services.

1. They will dedicate and provide the necessary equipment to handle our product for our transportation needs.
2. They will provide specially trained and qualified drivers for loading and unloading this product.
3. They are available and provide specified time pickups and deliveries.
4. They are a dependable company.

Exhibit 1.

7. Applicant has not identified any specialized equipment necessary for transporting the milk containers. Applicant has not identified any specialized training or driving qualifications necessary for loading or unloading the milk containers. Applicant has failed to identify a unique transportation need associated with transport of the milk containers.

Fitness and Ability.

8. The Applicant must be fit and able to perform the services proposed. Minn. Stat. 221.121, subd. 1. "Fit and able" is further defined in Minn. Rules Pt. 7000.0100, subp. 4 as follows:

The term 'fit and able' shall mean that the Applicant is financial 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 rules and statutes of the Commission.

9. The Applicant, Conzemius Companies, Inc. was started in the Spring of 1992. It is the successor corporation to Conzemius Carriers, Inc. Mr. Leo Conzemius is president, only board member and equity owner of Conzemius Companies, Inc. The Applicant's base of operations (street address) are 1303-1/2 Canton North, Prescott, Wisconsin 54021, and W. 8290 U.S. Highway 10, Ellsworth, Wisconsin 554011. Mr. Conzemius has been involved in providing motor carrier transportation services for approximately 30 years.
10. The predecessor to the Applicant, Conzemius Carriers, Inc., was based in Hastings, Minnesota. Conzemius Carriers, Inc. expanded, changed its name and moved its operations to Prescott and Ellsworth, Wisconsin in 1992. The Applicant still owns the physical facilities in Hastings but leases the facilities which include a garage and motor vehicle maintenance workshop to an organization unnamed in this proceeding. The unnamed organization provides maintenance services for Conzemius' motor vehicles.
11. Conzemius currently holds Interstate Commerce Commission Certificates to provide interstate motor carrier service as a Contract Carrier and as an Irregular Route Common Carrier throughout the United States, excluding Alaska and Hawaii, certificate No. MC 248073. Exs. 2 and 3. Conzemius currently holds no motor carrier authority for transportation of freight between points within the State of Minnesota; this application is the first request for Minnesota intrastate authority. The Applicant currently provides interstate transportation services within the geographical region identified in Exhibit 4.
12. Applicant has 30 employees, 27 drivers and three office employees. The Office employees include Mr. Conzemius, a dispatcher and an accountant, all located at the Prescott facility. The drivers possess the required motor vehicle licenses and have met physical requirements of the United States Department of Transportation.
13. Exhibit 5 identifies the motor carrier equipment that will be used to provide the proposed transportation services. The Applicant operates 21 tractors and 40 trailers. Ex. 5. These vehicles are serviced and maintained by the unidentified business that currently occupies the

facilities previously used by Conzemius Carriers, Inc. in Hastings, Minnesota. The Applicant has had vehicle safety checks by Minnesota, Wisconsin and U.S. Departments of Transportation. Conzemius has had only minor problems. The Applicant has received a satisfactory rating from the U.S. Department of Transportation.

14. The Statement of Assets and Liabilities contained in Exhibit 1 indicates that as of April 1, 1993, the Applicant had \$20,000.00 cash with no liabilities. Exhibit 1 indicates that Conzemius Companies, Inc. owns no fixed assets; the fix assets are owned by Mr. Leo Conzemius and leased to Applicant. Conzemius Companies, Inc. does not own any tractors or trailers. The tractors and trailers are leased from a business identified as All States Leasing of Ellsworth, Wisconsin. Ex. 1.
15. Exhibits 6 and 10 were filed by Conzemius Companies, Inc. to update and clarify Applicant's financial position. The information was compiled by the accounting firm N. F. Perkins & Associates, P.A. The accounting firm stated as follows at the beginning of the statement of assets and liabilities:

Management has elected to omit substantially all of the disclosures, the statement of cash flows, and income tax accruals required by generally accepted accounting principles. If the admitted disclosures, statement of cash flows, and tax accruals were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

Applicant's own accounting firm views Exhibits 6 and 10 as being incomplete. The accounting firm suggests that if the excluded information were reviewed, the review "might influence the user's conclusions about the company's financial position."

16. Exhibits 6 and 10 contain balance sheet information, information on assets and liabilities, equity, income and earnings regarding Conzemius Companies, Inc. However, because these statements do not contain statements regarding cash flows and income tax accruals and other items required by generally accepted accounting principles, the statements regarding Applicant's financial condition contained in Exhibits 6 and 10 are not useful or helpful in determining the financial position of Conzemius Companies, Inc.
17. The Applicant currently provides transportation services for Hastings Co-operative Creamery Company (hereinafter also referred to as the "Hastings Creamery" or "the Creamery") on both an interstate and intrastate basis. The Minnesota in-state transportation services to the Hastings Co-operative Creamery are provided by

transporting empty milk containers from a shipper in Bayport to Hastings. Because the empty milk containers are first delivered to Applicant's facility in Prescott, Wisconsin, before delivery to Hastings, the Applicant asserts that the transportation is interstate.

18. This transportation service has been challenged by the Minnesota Department of Transportation (hereinafter also "the Department"). The Department contends that because the transportation of the empty milk containers is between two points in Minnesota, a Minnesota license is required. The Minnesota Department of Transportation has asserted that Conzemius has initiated a scheme to circumvent a motor carrier license requirement by first shipping the empty milk containers to Prescott in Wisconsin before delivering the containers to Hastings. After the Department was unable to get Applicant to voluntarily cease, an enforcement proceeding was initiated against Conzemius Companies
19. The Minnesota Department of Transportation issued an Administrative Penalty Order on September 7, 1993, against Conzemius Companies asserting that Applicant had violated Minn. Stat. 221.021 seventeen times between January 29, 1993 and March 11, 1993. Conzemius Companies, Inc. appealed the Administrative Penalty Order. While the Administrative Penalty Order was pending, the Department of Transportation and Conzemius Companies entered a Stipulation for Settlement of Appeal whereby Conzemius Companies admitted violating Minn. Stat. 221.021 on one occasion between January 29, 1993 and March 11, 1993. Conzemius Companies also, as a part of the settlement or stipulation, paid a sum of \$800.00 in recognition of the admitted violation.
20. The Applicant maintains that the shipment of empty milk containers from Bayport to Hastings by way of Prescott is interstate transportation because the containers are temporarily stored at Applicant's facility in Prescott. The freight is shipped to Prescott and left in a trailer at Applicant's facility. There are approximately four shipments each week. The containers are delivered to Hastings Co-operative Creamery on an as-needed basis; the freight stored the longest is delivered first. Because the freight is stored in Prescott before being shipped to Hastings, "for legitimate business reasons" the Applicant believes the freight is in interstate commerce.
21. All milk containers picked up in Bayport are intended to be delivered to the Hastings Co-operative Creamery in Hastings, Minnesota.
22. As a part of the stipulation between Conzemius Companies, Inc. and the Minnesota Department of Transportation, the Department agreed not to intervene in this application proceeding to challenge Conzemius Companies, Inc.'s application for contract carrier authority to serve

Hastings Co-operative Creamery Company. Ex. 9.

23. Conzemius Companies, Inc. continues to believe that the challenged transportation of the empty milk containers from Bayport to Hastings for Hastings Co-operative Creamery Company is interstate commerce. On the day of the hearing Applicant transported a shipment of empty containers from Bayport to the Applicant's facilities in Prescott, Wisconsin.
24. Exhibit 8 is a letter from Mr. Ward Briggs of the Minnesota Department of Transportation to Mr. Samuel Rubenstein indicating that the Minnesota Department of Transportation is investigating a complaint against Conzemius Companies, Inc. that was filed after the issuance of the Administrative Penalty Order. However, the investigation of a complaint is irrelevant to this proceeding. Without an adjudicated violation or an admitted violation, the investigation by the Minnesota Department of Transportation is irrelevant to this proceeding and does not bear on the fitness or cannot be used to determine whether the Applicant is fit and able to operate as a motor carrier.
25. The Applicant filed this Petition for Motor Carrier Authority at the urging of the Hastings Creamery to resolve the dispute with the Minnesota Department of Transportation.

Hastings Co-operative Creamery Company

26. The Hastings Creamery is located in Hastings, Minnesota. It is a distributor of Grade A dairy products. As a part of its operations it needs a constant supply of milk containers.
27. The Hastings Creamery has nine trailers, two straight trucks and one tractor. The Creamery uses the tractor to haul trailers around in its yard 99% of the time. The Hastings Creamery's tractor is also used to transport returnable bottles used in cooperation with a dairy on Rice Street in St. Paul; the bottles are exchanged once every three weeks. Recently the driver for the Creamery was incapacitated with a sore leg, and in this instance the Creamery used Protestant Robinson Transfer to haul the bottles. In the future the Creamery will haul the returnable bottles itself or use Robinson or Conzemius, depending on the circumstances. The Hastings Creamery also ships recyclables such as cardboard to Horner-Waldorf in St. Paul. The Protestant, Robinson Transfer, handled two such loads since April, 1993 (two in approximately nine months). Although the Creamery could use its own tractor to do this, it is not the Creamery's intent to haul the cardboard, and will use or intends to use either Robinson or Conzemius in the future.
28. The primary transportation service identified as needed by

the Hastings Creamery is the transportation of the empty milk containers from Bayport to Hastings. In a two-week period the Creamery may have a need to transport nine loads of milk containers. The Creamery desires to have an inventory of more containers than it uses to forestall production shortages. Because it has limited storage space, the Creamery has relied upon the Applicant for storage. The Applicant stores the containers in trailers in Prescott. The Creamery has used Conzemius to haul the milk containers from Bayport for approximately two years.

29. At the present time Applicant dedicates trailers to the account of the Hastings Creamery and intends to continue to do so. Applicant guarantees that power units will be available for the needs of the Hastings Creamery. Applicant currently provides an interstate transportation service to the Creamery by transporting empty orange juice cartons from Milwaukee to Lindstrom, Minnesota on a seasonal basis, one shipment a month during the season. Ex. 7.
30. The Applicant and its predecessor, Conzemius Carriers, Inc. and Mr. Leo Conzemius have had a relationship with the Creamery for approximately 30 years. At the present time they have a very close working relationship. The unnamed business entity that provides maintenance to vehicles used by the Applicant also provides maintenance for the Hastings Creamery's transportation equipment.

Protestant Robinson Transfer, Inc.

31. Robinson Transfer, Inc. possesses Minnesota motor carrier operating authority, holding permits as follows: II-T 73177, II-L 73177, CC 73177, TCC 73177 and HHG 73177, issued by the Minnesota Transportation Regulation Board. Robinson Transfer, Inc. is authorized to transport truckload or less than truckload freight to and from points in the Hastings area to points within the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington. Robinson Transfer Inc.'s motor carrier authority would allow it to transport the empty milk containers from Bayport to Hastings, Minnesota. Ex. 11.
32. Robinson Transfer, Inc. is available and willing to transport the milk containers from Bayport to Hastings. It operates four tractors, eight trailers, and two 22-foot straight trucks. The Company has experienced, qualified drivers and is willing to dedicate the transportation equipment necessary.
33. Robinson Transfer did not solicit or offer its transportation services to the Hastings Creamery for movement of the milk containers from Bayport to Hastings until after the complaint against Applicant was filed with the Minnesota Department of Transportation. The Creamery does not plan to use Robinson for the transportation of milk containers because it believes that Robinson has

engaged in unethical business practices by complaining to the Department.

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

CONCLUSIONS

1. The Minnesota Transportation Regulation Board and the Administrative Law Judge have jurisdiction of the subject matter of the hearing herein pursuant to Minn. Stat. 221.121, subd. 1 (1992). DQG

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

3. Minn. Stat. 221.011, subd. 12, defines contract carrier as follows:

'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.

Because the Applicant has failed to identify a special transportation service needed by the Hastings Creamery, it has failed to establish that the proposed motor carrier service offered to Hastings Creamery is consistent with the definition of contract carriage.

4. Minn. Stat. 221.121, subd. 1 requires that the following conditions be met prior to the issuance of contract carrier permit authority:

- (a) That the Petitioner is fit and able to conduct the proposed operations;
- (b) That Petitioner's vehicles meet the safety standards established by the Minnesota Department of Transportation;
- (c) That the area to be served must have a need for the Transportation Services proposed in the petition; and
- (d) that existing carriers have failed to prove that they offer sufficient services to fully and adequately meet the need.

5. The Applicant has the burden of proving by a preponderance of the evidence that it has met the conditions, subparagraphs (a) through (c) above. If a need for the proposed transportation service is proved then the Protestant carrier has the burden of proving by the preponderance of the evidence that it offers sufficient services to fully and adequately meet the need.

5. Although Applicant's financial condition is uncertain from the record, Applicant is solvent and appears to have the financial ability to render the proposed service. The vehicles that Applicant proposes to use to

perform the proposed transportation services meet the safety standards of the Minnesota Department of Transportation and are regularly maintained by Applicant's agents.

6. The Applicant's resistance and refusal to comply with the enforcement efforts of the Department of Transportation suggests an unwillingness to comply with statute and rules in the future. Therefore, the Applicant has failed to prove by a preponderance of the evidence that it is fit and able.

7. The Applicant has proved by a preponderance of the evidence that the Hastings Creamery has a need for transportation of empty milk containers from Bayport to Hastings.

8. Protestant Robinson Transfer, Inc. has proved by a preponderance of the evidence that it offers sufficient services to fully and adequately meet the need for transporting empty milk containers from Bayport to Hastings.

9. The transportation of empty milk containers from Bayport to Hastings by way of Prescott constitutes movement of freight between points in Minnesota. Minnesota motor carrier operating authority is required to provide this transportation service.

10. The Administrative Law Judge makes these Conclusions for the reasons given in the attached Memorandum. Where necessary, the 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 Petition of Konzemius Companies, Inc. for contract carrier permit authority to serve Hastings Co-operative Creamery Company is hereby DENIED.

Dated this 5th day of May, 1994.

s/Allen E. Giles

ALLEN E. GILES
Administrative Law Judge

Reported: Tape Recorded

NOTICE

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

MEMORANDUM

An applicant for contract carrier permit authority has an affirmative obligation to establish the conditions required by Minn. Stat. 221.121, subd. 1. Once those standards have been met, including the showing of a need for the transportation service, a protestant carrier must show that existing carriers offer transportation services that adequately and fully meet the need found to exist. Appeal of Signal Delivery Service, Inc., 288 N.W.2d 707, 712 (Minn. 1980); American Courier Corp. v. Loomis Armored Car, Inc., 200 N.W.2d 175, 178 (Minn. 1972); Five Star Trucking, Inc. v. Minnesota Transportation Regulation Board, 370 N.W.2d 666, 671 (Minn. Ct. App. 1985).
Contract Carriage

This is an application for contract carriage. Protestant asserts that the proposed transportation of the milk containers does not constitute a "contract carrier" service. The parties address superficially the question as to whether or not the transportation service actually constitutes "contract carriage". This record fails to identify any specialized transportation equipment, training or driver qualifications necessary for providing the transportation service.

Conzemius asserts that temporarily holding or storing the containers in Wisconsin and delivering them as needed to Hastings constitutes a specialized transportation service. The Applicant has cited no statute or case law in support of this claim. The Judge rejects this claim. Temporary storage of the milk containers in a trailer at Applicant's Prescott facility does not constitute a transportation service.

The Applicant also asserts that it will dedicate equipment for the transportation of the milk containers. By dedication of equipment, the Applicant means that it would spot a trailer at Bayport for loading and return to pick the trailer up when full. Trailers would also be spotted at the Hastings Creamery facility and removed after being emptied. The Protestant, Robinson Transfer had stated that it is willing to spot trailers in Bayport or Hastings for loading or unloading and is willing to do this on an on-call basis. The dedication of trailers, unless specialized equipment is involved, standing alone does not constitute a specialized transportation service. Common carriers such as the Protestant routinely provide the service of spotting trailers for loading or unloading.

To establish that the movement is contract carriage the Applicant must identify some unique or special requirements for the transportation of the milk containers. This obviously would not be necessary if this case was resolved by stipulation or agreement - was not contested. Because this case is contested and one of the issues being contested is the nature of the carriage, Applicant must prove contract carriage is involved. On the record of this proceeding the Applicant has failed to identify any unique or special requirements for the proposed transportation service.

Recognizing that the Board might disagree with the Judge's view and conclude that the subject transportation service constitutes contract carriage, the Judge will continue analysis of the Application.
Fitness and Ability

Applicant has the background and experience necessary for providing the proposed transportation services. Conzemius also recognizes its responsibility for maintaining its vehicles according to Department of Transportation standards. Applicant has submitted confusing evidence regarding its financial condition. The financial statements contained in Exhibits 6 and 10 are incomplete and provide so little information that Applicant's own accountant warns the reader against using the information to determine the financial condition of the Applicant. It appears that Mr. Leo Conzemius has established a number of financially related corporations. However, the relationships are not identified in this proceeding. Though the Applicant's financial circumstances are incomplete and appear unusual, they are not challenged in this proceeding. Based on Mr. Conzemius' testimony that the Applicant had a positive profit ratio, the Administrative Law Judge has concluded that the Applicant is solvent and has the financial ability to provide the proposed transportation services.

"Fitness and ability" also requires an applicant to affirmatively demonstrate knowledge of motor carrier laws and a willingness to comply with these laws. Conzemius has failed to do this. By its resistance and defiance of the enforcement efforts by the Minnesota Department of Transportation, the Applicant has shown that it is unfit to be a regulated motor carrier. Despite the Department's enforcement efforts, including the Agreement and Stipulation, Conzemius continues to transport containers from Bayport to Hastings. Mr. Conzemius testified that the Applicant transported milk containers on behalf of the Hastings Creamery on the day of the hearing. He further testified, and the Applicant has taken the position in this proceeding, that the movement of milk containers from Bayport by way of Prescott to Hastings is for a legitimate purpose; therefore, the shipment constitutes an interstate movement. The Applicant's position in this regard is unreasonable, and its unwillingness to submit to the enforcement authority of the Department establishes that it is unfit to be a Minnesota regulated motor carrier.

Conzemius' position is unreasonable because the law applicable

to the movement of the milk containers from Bayport to Hastings is clear and unambiguous. The key factor in evaluating whether a shipment of goods is intrastate or interstate is the shipper's intent at the time of the shipment. *Roberts v. Levine*, 921 F.2d 804, 812, 816 (8th Cir. 1990). This record clearly establishes that the movement of the containers was intended by the shipper to be between two points within the state of Minnesota. Temporary storage in Wisconsin does not change the shipper's intention. Therefore, the movement is intrastate. This is not a matter where reasonable minds would differ as to the proper designation of the shipment.

Applicant's assertion that the containers were in Wisconsin for a "legitimate purpose" calls attention to the fact that Conzemius began transporting the containers approximately the same time that it moved its base of operations out of Minnesota to Wisconsin. The "legitimate purpose" came into existence coincidentally with Applicant's move to Wisconsin. This lends credence to the Department's assertion that Applicant has created a scheme to circumvent the motor carrier laws. After moving its base of operations to Wisconsin, Applicant believed that it could provide a transportation service to Hastings Creamery that it previously could not provide while it was located in Minnesota. Temporarily holding the freight in Wisconsin does not change the fact that the shipper intended an intrastate movement.

The Applicant is unfit because of its affirmative defiance of Department enforcement efforts. Mr. Conzemius does not attempt to cast himself or his company in the light of a person who has had a misunderstanding or reasonable disagreement with enforcement officials. Applicant insists that it was correct and the Department (DOT) was wrong. Not only was DOT wrong, but DOT has apparently been unable to stop Applicant from performing the transportation service. As stated above, Applicant has taken an unreasonable position because the law is unambiguous. A reasonable, knowledgeable motor carrier willing to be subject to regulation would have ceased providing the transportation and attempted to resolve this issue with DOT. Applicant has been and continues to be defiant. For example, Applicant filed this petition for authority at the urging of Hastings Creamery, not because it conceded that DOT was correct.

For the foregoing reasons the Judge believes that Applicant is unfit to become a Minnesota regulated motor carrier. Recognizing that the Board might disagree with this conclusion the Judge will continue the analysis of the Application.

Need for Service and Ability of Existing Carriers

Applicant has established a need for transportation services. As a retail distributor of Grade A milk products, the Hastings Creamery has a constant need for containers. Approximately four truckloads of containers are needed each week. However, as discussed earlier, the Applicant has failed to establish that Hastings Creamery has a need for the specialized transportation service of a contract carrier.

The need for transportation service identified in this proceeding could be met by a "common carrier" willing to spot trailers at the Bayport location and at the Hastings Creamery. Protestant Robinson is willing and able to spot trailers at the Bayport location and at the Hastings Creamery. Robinson would also move the trailers once they are loaded or unloaded. Mr. Robinson testified that his company could fully and adequately perform these services. There is no testimony on this record that challenges Robinson's ability to perform the transportation service needed by Hastings Creamery.

Motion to Reopen

After the hearing, Robinson filed a Motion requesting that the hearing record be reopened to take testimony from Department of Transportation personnel regarding complaints or investigations of Conzemius. Conzemius opposed the Motion. During a telephone conference hearing, the Judge denied the Motion on the basis that Robinson failed to demonstrate that the request involved new evidence that could not have been obtained prior to the hearing. Minn. Rules Pt. 1400.8300 appears to require that Robinson's Motion be made to the Board instead of the Judge. Nevertheless, the Judge has denied the Motion based on standards that apply to motions for rehearing contained in Minn. Rules Pt. 1400.8300.

A.E.G.