

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Petition of Gary Tormoen for Irregular Route common Carrier Permit Authority to Transport Household Goods, Restricted to the Transportation of Personal Effects and Property Used or to be Used by the Owner in his Dwelling Between Points Located in the Counties of Anoka, Washington, Ramsey, Hennepin, Carver, Scott and Dakota.

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on May 1, 1989 at the Transportation Regulation Board (TRB) Offices in South St. Paul. The record in this matter closed on May 8, 1989.

Gene P. Johnson, Esq., P.O. Box 2471, 118 Broadway, Fargo, North Dakota 58108, appeared on behalf of the Petitioner. Andrew C. McIntosh, Esq., 1012 Grain Exchange Building, Minneapolis, Minnesota 55415, appeared on behalf -of Protestants A & M Moving, Gazda Moving & Storage and C-A-T Worldwide Moving & Storage, Andrew R. Clark, Esq., 1600 TCF Tower, Minneapolis, Minnesota 55402, appeared on behalf of Protestant Berger Transfer & Storage, Inc. Robert Brady, d/b/a The Movers, 1804 Fourth Avenue South, Minneapolis, Minnesota 55404, appeared on his own behalf. Gordon L. Moore 111, Special Assistant Attorney General, 515 Transportation Building, John Ireland Boulevard, St. Paul, Minnesota 55155, appeared on behalf of the Commissioner of Transportation, who was admitted as a Party-Intervenor in this action through an Order issued by the Administrative Law Judge on April 27, 1989.

Notice is hereby given that, pursuant to Minn. Stat. sec. 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

Whether the Petitioner is fit and able to conduct the proposed operations within the meaning of Minn. Stat. S 221.121, subd. 1 and Minn. Rule 7800.0100, subp. 4.

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

#### FINDINGS OF FACT

##### Procedural History

1. On April 10, 1986, Mike and Gary Tormoen, d/b/a Mike's Cut-Rate Moving, filed a Petition with the Minnesota Department of Transportation (DOT) for irregular route common carrier permit authority to transport household goods and office furniture between points in the counties of Anoka, Washington, Ramsey, Hennepin, Carver, Scott and Dakota. The Petition was forwarded to the TRB on April 18, 1986.

2. At the beginning of the hearing on May 1, 1989, the Petition was amended to list only Gary Tormoen as the sole Petitioner, and the scope of the authority sought was restricted to the type of household goods defined in Minn. Rule 7800,0100, subp. 6A (personal effects and property used or to be used by the owner in his dwelling). The Amended Petition is correctly identified in the title of this Report.

3. Subject to approval by the Board of the amended-restricted Petition, Protestant Berger Transfer withdraws its Protest in this proceeding. Berger remains a party herein for receipt of correspondence and Orders.

4. At the outset of the hearing on May 1, prior to the taking of any

testimony or the introduction of any other evidence, counsel for A & M, C-A-T and Gazda made a Motion for Summary Disposition of the matter under Minn. Rule 1400.1500K. The Motion was joined by The Movers and the Commissioner. Rule 1400.1500K allows an administrative law judge in a contested case to recommend summary disposition of a case, or any part thereof, if there is no genuine issue as to any material fact. In this instance, the Motion is for the Judge to recommend to the TRB that it deny the Petition because, based on undisputed facts, the Petitioner is unfit for a grant of the permit authority sought.

5. In response to counsel's Motion, as described in the preceding Finding, the Administrative Law Judge has heard arguments from counsel and parties on the Motion and taken the matter under advisement with the understanding that testimony would be taken on May I from witnesses solely as

part of offers of proof on the questions of Whether the facts advanced by the Protestants in support of summary disposition are undisputed; and (2) Whether the Petitioner, should he be allowed to proceed, has evidence which, standing alone, establishes that he is fit and able to conduct the proposed operations within the meaning of Minn. Stat. sec. 221.121, subd. 1 and Minn. Rule 7800.0100, subp. 4.

6. In order to accommodate one witness who cannot reappear, testimony regarding the need for the services proposed by the Petitioner was taken from that witness, to be used as evidence if this matter proceeds to consideration of the issue of need.

#### Fitness and ability

7. Gary Tormoen has been engaged in various capacities within the moving business since 1955. From 1955 to 1966 he gained experience as a mover working on various contract jobs for Manpower Services of Chicago and Los Angeles. In 1960, he loaded and unloaded trucks for Consolidated Freightways. Between 1961 and 1979, in his employment capacity as a carpenter, Mr. Tormoen was involved in numerous assignments wrapping, moving, loading, unloading and assembling store fixtures, some of which had delicate components that required special handling. This work involved assembling cabinets and cases that had parts made of glass or other fragile or valuable material. On many such occasions, he performed work that was restricted to authorized carpenters. He continued to perform such work from 1981 to 1987, as a laborer hired through various labor pools.

8. On or before September 28, 1985, the Petitioner and his son, Mike Tormoen, formed a business entity known variously as Mike's Cut-Rate Moving & Delivery Service, Mike's Cut-Rate Moving & Hauling, Right-to-Work Movers and Mr. Taxpaying Working Stiff. They began moving household goods for hire and held themselves out, through advertising (business cards, handbills and posters) as motor carriers.

9. On October 4, 1985, Gary Tormoen was contacted by a telephone call from Charles Stadt, an enforcement officer from the Minnesota Department of Transportation, and was informed by Stadt that he could no longer conduct business as a mover without a permit, that to conduct such moves without a

permit was illegal and that he should apply for a permit.

10. On September 25, 1986, the DOT filed a complaint with the Board against the Tormoens, which complaint alleged that they, as individuals, and as partners doing business as Mike's Cut-Rate Moving & Delivery Service, Right-to-Work Movers and Mr. Taxpaying Working Stiff had, without motor carrier authority under Minn. Stat. Ch. 221, held themselves out as a motor carrier in the Twin Cities Metropolitan Area. The complaint alleged further that representatives of the DOT twice advised the Tormoens that operating or holding out as a motor carrier without a permit or authority was unlawful and warned them to discontinue. It further alleged that despite the warnings the Tormoens continued to hold themselves out as motor carriers in violation of Minn. Stat. sec. 221.021.

11. As a result of the DOT complaint against the Tormoens summarized in the preceding Finding, the Tormoens were ordered, by issuance of an Order to Show Cause on October 15, 1986, to come forward before the Board and admit or

deny the allegations in the complaint, and were further ordered to show cause why the Board should not issue an Order requiring them to cease and desist from advertising or otherwise holding themselves out as a motor carrier. The Order to Show Cause provided that the Tormoens' failure to respond to the Order would constitute an admission of the allegations contained in the complaint and would result in an Order to cease and desist from the activities alleged in the complaint.

12. The Tormoens did not respond to the Order to Show Cause issued by the Board. On November 19, 1986, the Board issued a Cease and Desist Order against them requiring them to cease and desist from advertising or otherwise holding themselves out as motor carriers without proper operating authority, pursuant to Minn. Stat. sec. 221.121.

13. After issuance of the Cease and Desist Order noted in the preceding Finding, the Tormoens continued to advertise and hold themselves out as a motor carrier in March and April of 1987 by causing notices and business cards to be posted in various locations throughout the Twin Cities Metropolitan Area, including three different apartment buildings and three commercial establishments in St. Paul.

14. On September 4, 1987, the Department of Transportation served a Summons and Complaint on the Tormoens in connection with pursuing a Hennepin County District Court action for a permanent injunction to enforce the Board's Cease and Desist Order. The Tormoens did not answer that Summons and Complaint.

15. On March 9, 1988, Hennepin County District Judge Charles A. Porter, Jr. granted the DOT's Motion for Default Judgment and issued a Permanent Injunction directing the Tormoens to immediately cease and desist from operating or advertising or otherwise holding themselves out as a motor carrier and directing them to remove all public advertisements or notices presently posted or appearing which holds them out to be a motor carrier or to be authorized to provide the services of a motor carrier under Minn. Stat. Ch. 221. The Permanent Injunction was entered in the judgment rolls on March 11, 1988.

16. On July 29, 1988, counsel for Protestants A & M Moving & Storage,

Gazda Moving and C-A-T Worldwide Moving filed a Motion with the Administrative Law Judge for an Order Directing Discovery, which Motion requested that the Tormoens be compelled to answer Interrogatories 1 and 2, served on February 9, 1988, which Interrogatories ask for details of any household goods moves for hire performed by them since January 1, 1986, and for details of any advertising or other holding out as being able to perform the moving of household goods for hire since November 19, 1986.

17. On March 20, 1989, the Administrative Law Judge issued Orders Directing Discovery in this matter. In part, those Orders provided that, should the Petitioners refuse to provide Answers to Interrogatories 1 and 2, the Administrative Law Judge would make the adverse inferences allowed and deem admitted the following facts:

1. That the Petitioners have moved household goods for hire since January 1, 1986; and
2. That the Petitioners have advertised or otherwise held themselves out to others as being able to perform the

moving of household goods for hire at any time since November 19, 1986, in violation of a Cease and Desist Order issued by the Minnesota Transportation Regulation Board on that date ordering them to cease and desist from such advertising or otherwise holding out; and

3. That the Petitioners have moved household goods for hire and advertised or otherwise held themselves out to others as being able to perform the moving of household goods for hire since March 11, 1988, in violation of a permanent injunction issued by the Hennepin County District Court on that date directing them to cease and desist from such operating, advertising or otherwise holding out.

18. Counsel's Interrogatories were not answered, so the facts listed in the preceding Finding are deemed admitted.

19. On November 3, 1988, Mike Tormoen moved 150 to 160 pieces of household goods from 3200 France Avenue to 2600 Kipling Avenue. The owner of the goods, Lisa Etziony, paid \$310 for the move. The move was done in a truck driven by Mike Tormoen, with the letters "M.G.T." displayed on each side. Mike Tormoen's full name is Michael Gary Tormoen. Ms. Etziony understood that she was moved by a business called "Mike's Moving".

20. On January 18, 1989, Richard Rasmussen, a Motor Transport Representative (MTR) for the DOT, found advertising for 'Mike's Cut-Rate Moving', in the form of signs and business cards, on bulletin boards at five different locations (two street corners, a drugstore, a superette and a laundromat), two in St. Paul's Highland Park neighborhood and three in South Minneapolis. Rasmussen removed the advertising. The signs had tabs on the bottom, which a potential customer could pull off, listing 'Mike's Moving' and a telephone number.

21. On February 13, 1989, Rasmussen found a newly-posted 'Mike's Cut-Rate Moving' sign at the Highland News Center, Ford Parkway and Cleveland Avenue, St. Paul. This was a location from which Rasmussen had removed a sign on January 18. He also found a similar sign on a bulletin board at a drugstore in Bloomington.

22. On March 24, 1989, Mike Tormoen hauled goods for Annette Melin, formerly of West St. Paul, from a mini-storage shipment facility in South St. Paul. While at the facility, Tormoen produced a business card for Mike's Cut-Rate Moving.

23. On April 4, 1989, Ms. Kathryn Hischev of Minneapolis reported to MTR Ted Coulianos that she had received a Mike's Cut-Rate Moving Services advertising flyer in her mailbox. When she decided to move to Brooklyn Park, she contacted Mike's. who delivered moving cartons to her home to prepare for

the move. When she heard that Mike's was "not licensed and wasn't reputable", she cancelled the move, but was later contacted by Mike's in an attempt to find out who had given her such information.

24. Findings 19-23 are supported by affidavits from MTRs Rasmussen, coulianos and Fred Danzl. These affidavits, along with that of MTR Pete Marcotte, were submitted by the DOT in connection with a Motion made by the DOT before Judge Porter on April 12, 1989. In that action, the DOT sought an

order of the Court holding both Gary and Michael Tormoen in contempt for violation of its March 1988 Permanent Injunction.

Judge Porter found each defendant, Gary and Mike Tormoen, in contempt. He sentenced each to six-month jail terms and fined Mike \$1,250 and Gary \$1,000. Gary's jail term was stayed, based upon payment of the \$1,250 within 30 days and on continued compliance with the Permanent Injunction. Michael was ordered to serve five days in jail, with parole after five days. If Michael fails to pay his fine within 30 days, he must serve the balance of the six-month jail sentence in the County's Adult Correction Facility.

25 State Representative Wes Skoglund and State Senator Donna Peterson each filed letters with Board Chairman Roger Laufenburger in this case. The Administrative Law Judge was copied. Representative Skoglund supports the Petition and Senator Peterson urges a fair hearing.

26. Michael Tormoen, who withdrew as a Petitioner prior to the start of the hearing, suffers from dyslexia, a learning disability. His abilities to communicate orally, to read and especially to write are impaired. Brenda Knapper, Youth Services Coordinator at the Minnesota Association for Children with Learning Disabilities, filed a letter with the Administrative Law Judge on May 8, 1989 in support of the Petition. She attached a newspaper article citing dyslexics who overcame their handicap and became prominent and an informational brochure on recognizing and dealing with dyslexia.

Mike Tormoen had difficulty expressing himself at the hearing, but understood the nature of the proceedings. When asked questions by the Judge regarding the significance of not answering questions on Fifth Amendment grounds in this proceeding, Mr. Tormoen responded in a fashion that showed he understood the implications. When cross-examined by counsel, he refused to answer, on Fifth Amendment grounds, the following questions:

How long have you been in business with your father?

Have you been in business the last four years?

Have you done business as Mike's Cut-Rate Moving?

When did you learn you needed a license to operate a moving business?

After November 19, 1986, did you cease and desist from

operating or advertising as a motor carrier?

After Judge Porter's Injunction of March 11, 1988, did you cease and desist from operating or advertising as a motor carrier?

Were you personally served with Judge Porter's Injunction in August of 1988?

Did you move Lisa Etziony in November 1988?

Did you contact Kathryn Hischey?

Did you receive a certified letter from the DOT in December 1985, warning you that you had been engaging in illegal activities?

27. Gary Tormoen clearly understood the proceedings at the May 1 hearing. He testified that he knows he needs a permit to operate the business he intends to undertake. He admitted that this application has been pending since April of 1986. He refused, on Fifth Amendment grounds, to answer the following questions:

- When did you learn you needed a permit to operate?
- Did you and your son, Mike, operate a business called Mike's Cut-Rate Moving?
- Did you disobey the Board's Cease and Desist Order of November 19, 1986?
- Did you disobey Judge Porter's Injunction of March 9, 1988?

Do you now or have you ever advertised your moving business?

Did Charles Stadt of the DOT call you on October 4, 1985 and warn you to cease moving, that your moving had been illegal, and that you should apply for a permit?

Did you receive a certified letter from the DOT in December 1985 telling you to cease and desist moving goods for hire and advising you on how to apply for a permit?

Did you receive a certified letter of warning from the DOT in April 1987 advising you that you had been operating in violation of the Transportation Regulation Board's Cease and Desist Order and advising you to contact the DOT?

Were you the primary operator of Mike's Cut-Rate Moving between April 1986 and April 1987?

28. For all of the questions listed at Findings 26 and 27, the Administrative Law Judge has taken the permitted adverse inferences and deemed all allegations contained in the questions to be facts.

Based upon the above 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. The Petitioner is not 'fit and able" to receive authority for transporting personal effects and property used or to be used by the owner in

his dwelling bec a use he has f ailed to demonst rate that he wi II fol low statutes and rules governing such an operation. He has been judged in contempt by a court of proper jurisdiction of the Board's Order to Cease and Desist from conducting motor carrier operations and from advertising or other-wise holding himself out as a motor carrier, and of a subsequent District Court Injunction directing obedience of the Board's Order. This activity demonstrates a continuing and willful disregard for the law applicable to motor carriers.

4. Petitioner has failed to demonstrate facts that mitigate his willful and continuing disregard for the law applicable to motor carriers within the meaning of Brinks Inc. v. Minnesota Public Utilitie Commission , 355 N.W.2d 446 (Minn. App. 1984).

5. Pursuant to Minn. Stat. sec. 221.121, subds. 1 and 6a, the Petitioner's failure to establish his fitness and ability to conduct the proposed operations makes it unnecessary to decide whether his vehicles meet Department of Transportation safety standards, whether the area to be served has a need for the services requested in the Petition, or whether the Protestants have demonstrated that existing certificated carriers adequately and fully meet that need.

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 on the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

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

#### ORDERS

IT IS HEREBY ORDERED that the Motion for Summary Disposition by Protestants A & M Moving, Gazda Moving & Storage and C-A-T Worldwide Moving & Storage on the question of the Petitioner's fitness and ability is GRANTED; and

IT IS FURTHER ORDERED that the Petition of Gary Tormoen for irregular route common carrier permit authority to transport household goods, restricted to the

transportation of personal effects and property used or to be used by the owner in his dwelling between points located in the counties of Anoka, Washington, Ramsey, Hennepin, Carver, Scott and Dakota is DENIED.

Dated this 16th day of May, 1989.

RICHARD C. LUIS  
Administrative Law Judge

NOTICE

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

Reported: Taped.

MEMORANDUM

The undisputed facts in this case make it clear that summary disposition is appropriate. Gary Tormoen has engaged in moving household goods for hire, without a permit, for nearly four years. He has known such activity was unauthorized since at least the fall of 1985. He was ordered by the Board to cease and desist from such activities, and from advertising to perform them, in the fall of 1986. Performance of such activities, by Mr. Tormoen or his agents-employees has continued through the spring of 1989. A District Court's permanent injunction, issued in March 1988, did not stop him. It is unknown whether being found in contempt and fined, with the possibility of going to jail for six months if the activity continues, will succeed in bringing these illegal operations to an end. The undisputed evidence leaves no alternative but to conclude that the Petitioner's past actions signal, loudly and clearly, an unwillingness and inability to comply with the governing statutes and rules.

The Administrative Law Judge allowed the Tormoens to testify after counsel argued that his client may have operated without authority because he simply did not understand that he had to operate within the parameters of the regulatory system. It was argued that his client needed to make a living, that he was honest and worked hard and competently, and should be given a chance in a free enterprise society. Counsel also implied that the Petitioner had been victimized by a conspiracy of the certified movers of household goods in the area and had been undercut by DOT personnel in his efforts to make a living by leasing his trucks to a carrier with appropriate authority. None of these allegations were established during the testimony taken on the offer of proof. It is noted that, had Mr. Tormoen's inability to comprehend the necessity of complying with governing statutes and rules been established by the Petitioner, the Petitioner would have, in effect, proven his own unfitness and inability for the grant of the permit authority sought.

After observing Gary Tormoen, the Judge concludes he has understood that it was illegal to operate as he has for several years. He demonstrated the intellectual ability to understand the significance of refusing to answer

questions he felt were incriminating. He is correct in thinking that not answering the questions noted in Finding 27 left the Judge with the choice of making positive, as well as adverse inferences. In the complete absence of any evidence to the contrary, however, the Administrative Law Judge has made the inferences suggested by the documentary evidence, including transcripts, affidavits and records of the DOT, TRB and District Court.

R.C.L.