

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Petition of  
Express Shuttle, Inc., d/b/a  
Railroad Crew Transport, for  
Charter Carrier Permit Authority

FINDINGS OF FACT,  
CONCLUSIONS,  
RECOMMENDATION  
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on February 8, 1995 in Moorhead, Minnesota.

Appearing for the Petitioner, Express Shuttle, Inc., d/b/a Railroad Crew Transport, was Richard P. Anderson, of the firm of Anderson & Bailly, State Bank Center, Suite 202, P.O. Box 10247, Fargo, North Dakota 58106-0247.

Appearing for the remaining Protestant in this matter, Brown's Crew Car of Wyoming, Inc., d/b/a Armadillo Express, was Dawn M. Parsons, 5200 West 73rd Street, Edina, Minnesota 55439.

The record closed on March 7, 1995, upon receipt of the final post-hearing submission.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 and the Rules of the Office of Administrative Hearings and the Transportation Regulation Board, 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

1. Is Petitioner fit and able in light of its past illegal moves and ongoing operations without authority?
2. Has Protestant demonstrated that existing permitted carriers can fully meet the needs demonstrated on the record?

### EVIDENTIARY RULING

By letter dated February 22, 1995, Petitioner's counsel submitted a document and moved that it be admitted into the record as a late-filed exhibit. The document is a letter, dated February 16, 1995 (written after the hearing had concluded). The letter was written by Crew Transport Services, Inc., and purports to interpret a contract between Crew Transport Services and Petitioner. The contract is in the record, and it is clear and unambiguous. The late-filed exhibit "interprets" the contract in a manner contrary to its plain meaning. Protestant objected to the admission of the letter, pointing out that there would be no opportunity to cross-examine the author regarding it. No person from Crew Transport Services testified at the hearing. The Administrative Law Judge has determined that the letter should not be admitted into the record without giving Protestant an opportunity to cross-examine. For reasons which will become clear below, the Administrative Law Judge does not believe that the issue discussed in the letter is a particularly important one. It would not affect the critical facts or conclusions which govern the outcome of this case. There is no need, therefore, to reconvene the hearing to further consider the letter or the cross-examination by Protestant.

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

### FINDINGS OF FACT

#### The Petitioner

1. Express Shuttle, Inc. is a North Dakota corporation formed in 1989 to continue a business which had been operating since 1962. The Company has been involved in transporting railroad crews since 1983. It is solely owned by Gary A. Schumacher of Bismarck, and its headquarters is in Bismarck. The corporation has two operating divisions. One is the transportation of railroad crews under the name of Railroad Crew Transport. The second is a taxi and limousine service operating under a separate corporation known as Bismarck Transportation Services, Inc., d/b/a Taxi 9000.

Express Shuttle operates primarily in North Dakota, but also does business in Minnesota, Montana and South Dakota. It does not currently hold any Minnesota

intrastate operating authority from the Board. It does hold ICC contract authority, under Permit No. MC 254884, which provides as follows:

To operate as a contract carrier, by motor vehicle, interstate or foreign commerce, over irregular routes, transporting passengers, and their baggage . . . under continuing contract(s) with persons requiring passenger transportation.

Exhibit 1. It also holds contract motor carrier Permit No. 552, issued by the North Dakota Public Service Commission, providing for the transportation of passengers and their baggage between points in North Dakota under contract with Crew Transport Services Company. This permit was issued on February 6, 1995. Ex. 2.

2. Express Shuttle, Inc. (both the railroad and taxi operations combined) has current assets of \$144,875 and current liabilities of \$120,158. It has total assets of \$419,385 and total liabilities of \$320,865. Looking only at the railroad side of the business, for the 11 months ended November 30, 1994, there were total revenues of \$389,107 and total expenses of \$299,096, resulting in net income from operations of \$90,011.

3. Express Shuttle has a total of 20 crew transport vehicles in operation, located at five North Dakota sites and one Minnesota site (Glyndon). Glyndon is roughly eight miles east of Dilworth. There are two vans and drivers stationed there. They serve Burlington Northern out of Fargo and Dilworth. The Company's equipment is properly maintained, and is in good operating condition. Railroad Crew Transport has experienced no accidents since 1989, and its vehicles are insured for \$1,500,000 per accident.

4. Express Shuttle performed almost 2,000 trips for Burlington Northern in all states during 1994. It performed roughly 3,000 trips for its other railroad customers, for a total of 5,000 railroad trips in 1994. It performed roughly 200 trips for BN from Dilworth to North Dakota in 1994. Express Shuttle anticipates that its volume of interstate trips from Dilworth into North Dakota will grow to 300 in 1995. Between May and December of 1994, it provided 65 Minnesota intrastate moves from Dilworth to other points in Minnesota (which will be explained below).

#### Procedural History and Scope of Authority Sought

5. On June 6, 1994, the Board received an application for emergency and permanent charter service authority from Interstate Truck Licensing of Bismarck, acting on behalf of Express Shuttle, Inc. The petition for permanent charter authority requested authority as follows:

From Dilworth, MN, and all other Burlington Northern sites in MN, mainly Staples, Willmar and Minneapolis.

It was accompanied by a letter dated April 29, 1994 from Crew Transport Services, Inc., supporting the Petition. It was also accompanied by a letter dated June 1, 1994, from Byron Youngmark of Burlington Northern's Fargo office, supporting the Petition.

6. On June 17, 1994, the Board published notice of the Petition in its calendar, using the following language:

Petition for charter carrier permit authority to transport train crews under charter from the Burlington Northern Railroad Co. yard in Dilworth, MN to other BN yards located in Staples, Willmar and Minneapolis, MN.

The Notice set a protest date of July 6.

7. On June 22, 1994, the Board issued its ex parte temporary order denying Petitioner's request for temporary authority.

8. On July 6, the Board received a Protest from Brown's Crew Car of Wyoming.

9. On July 6, 1994, Interstate Truck Licensing sought to amend the Petition to provide authority from or to the Burlington Northern yard in Dilworth to or from other Minnesota Burlington Northern yards, excluding Willmar. This letter is not in the file, but is referred to in subsequent letters from Interstate Truck Licensing and Protestants' attorney.

10. On July 22, 1994, Interstate Truck Licensing again sought to amend the Petition to read as follows:

From Burlington Northern Railroad yard in Dilworth, to other Burlington Northern Railroad yards in MN except Willmar.

On August 5, 1994, the Board republished notice of the Petition, as follows:

Petition for charter carrier permit authority to transport train crews under charter from the Burlington Northern yard in Dilworth, MN to other BN yards located in Minnesota, except Willmar, MN.

This Notice contained a protest date of August 25.

11. On August 8, the Board received a revised Protest from Brown's Crew Car of Wyoming, Inc. The republished notice also drew a Protest from Randall's Staples Taxi, Inc., which was received on August 22.

12. In early December 1994, Attorney Richard Anderson was retained to represent Petitioner, and he attempted to resolve the matter by negotiation. He was able to reach a settlement with Randall's Staples Taxi, Inc., which agreed to withdraw its Protest if the Petition were further amended as follows:

From the Burlington Northern Railroad Co. yard in Dilworth, MN to other BN yards located in Minnesota, except Willmar and Staples.

This amendment was offered at the start of the hearing, and accepted, subject to the Board's final approval. Therefore, the hearing went forward on the basis of that amendment.

13. The amended Petition seeks authority on a one-way basis: from Dilworth to other BN yards. It does not seek authority from those other BN yards to Dilworth.

Neither does it seek authority for points of origin outside of the Dilworth yard, such as “dogcatching” (which will be explained below) along the railroad’s line east of the Dilworth yard.

#### Burlington Northern’s Needs and Past Dealings with Motor Carriers

14. Burlington Northern, like all other railroads, has a need to transport its crews from point to point in order to properly staff its railroad equipment. Not only is it sometimes necessary to transport a crew from the Twin Cities (the Northtown yard is the most common Twin Cities point, but there are others) to places such as Dilworth, but it is also necessary to replace crews at any point along the railroad line. This need arises because the Federal Hours of Service Act essentially prohibits the railroad from using a crew for more than 12 hours at a time. While the Railroad attempts to schedule its crews such that they will be replaced at a regular replacement terminal (such as a major facility like Dilworth or Northtown), switching delays, bad weather, and other factors sometimes cause the 12-hour “bell” to toll when a train is still far from a terminal. When it becomes obvious that this is going to happen, the train is pulled onto a siding (if possible), and remains there until the crew is replaced. The replacement process, known as “dogcatching”, requires that the Railroad have access to 24-hour-per-day, seven-day-per-week transportation services. While the Railroad sometimes uses its own clerks and other personnel to accomplish crew transport, its union contracts limit this practice, and the Railroad must have alternative transportation services available to it. There has evolved, in the United States, a handful of firms which specialize in providing railroad crew transport.

15. Railroad crew transport is a specialized need, both in terms of expertise and equipment. Drivers must have a knowledge of the sidings used for crew transfers, some of which are located in hard-to-find locations. There is a definite “jargon” used in the railroad business, and reliable communications between the transport drivers and the railroad crew require that the transport drivers understand the jargon. In terms of equipment, the Burlington Northern requires that its crew transporter vehicles be equipped with radios for railroad frequencies so that the crew transporters can talk both with Burlington Northern dispatchers and Burlington Northern trains.

16. Burlington Northern has used a variety of services to perform its crew hauling in Minnesota. It has used taxi services, “livery” services, Protestant Armadillo and other charter carriers. BN has also used Express Shuttle from Dilworth into North Dakota and Minnesota.

17. In the fall of 1993, Protestant Armadillo was contacted by a BN employee from either Fort Worth or Minneapolis (as opposed to an employee from Fargo) and asked whether Armadillo could station equipment in Dilworth. At that time, Armadillo’s permit from the Board restricted it from originating trips in the northwestern corner of the state, including Dilworth. Armadillo did serve BN out of the Twin Cities area, and had seven vehicles based in Fridley, serving the Northtown yard and other locations. When contacted by BN, Armadillo indicated it did not have authority for Dilworth, but that it

would seek it. Armadillo filed for an extension of its charter authority in November of 1993. Its expanded authority (which would permit it to serve Dilworth) was granted in August of 1994.

18. Burlington Northern operates a main line which runs from Minneapolis through Staples, Dilworth and westerly into North Dakota. Between Minneapolis and Dilworth, BN used to change crews in Staples. But at least as early as 1993, BN began negotiating with its unions for a change in staffing patterns such that regular crew transfers would occur either at Dilworth or Minneapolis, but nowhere inbetween. This became known as the "Staples run-through". This change reduced the need for crew transportation services in and out of Staples, but increased the need for crew transportation services in and out of Dilworth. It also increased the need for "dogcatching" crews when a train was not able to make it all the way between Dilworth and Minneapolis in time to satisfy the 12-hour time limit. The likelihood of this change taking effect is what motivated BN to contact Armadillo in 1993.

19. The actual work of contacting crew transporters is (and was) performed by a staff of "crew callers" located in Fargo. They are responsible for handling crews in all areas relevant hereto, except for Northtown. In 1993, 1994, and up until March of 1995, Northtown was handled separately, by its own personnel. In March of 1995, the Northtown crew calling positions were moved to Fargo, and consolidated with existing Fargo positions. However, the separation before 1995 is important because it resulted in duplicate and overlapping attempts to plan for the need for additional crew transportation in Dilworth. In March of 1994, Byron Youngmark, the assistant superintendent of crew management services in Fargo, began looking for crew transporters for increased work in Dilworth. He was unaware of the contacts made with Armadillo. He contacted Express Shuttle and asked if they could do it. He was aware of Express Shuttle because Express Shuttle had just recently commenced hauling BN crews from Dilworth to Mandan. When Youngmark called Express Shuttle, he inquired about authority in Minnesota. Express Shuttle told him that it did not have authority, but that it would seek it. Express Shuttle (which is located in Bismarck) called the Department of Transportation and the Transportation Regulation Board in St. Paul, and was sent application forms. Before it had even submitted the forms, however, it began making occasional moves from Dilworth to Minneapolis and other points in Minnesota. When it examined the application forms, it decided that they were too complicated, and so Express Shuttle contacted Interstate Truck Licensing for assistance. In the course of that contact, it learned that it was illegal to be performing intrastate moves until it had obtained intrastate authority. Express Shuttle stopped making such moves, and applied for temporary authority on June 1, 1994. The authority was denied in an ex parte order issued June 22. Prior to June 22, Express Shuttle had made six illegal trips.

20. Following the denial of the temporary authority, Express Shuttle realized it would have some difficulty in obtaining permanent authority, and that it would take time. In order to avoid losing BN's intrastate business out of Dilworth, Express Shuttle devised a scheme whereby crews needing transportation from Dilworth to points in Minnesota would be taken by BN personnel to the Expressway Inn, which is located in North Dakota, just over the state border. The crews would then immediately be picked up at the Expressway Inn by Express Shuttle, and taken to Minneapolis or wherever

their destination would be. When a Burlington Northern crew needed to be put in a hotel for the night, they were put in the Madison Inn, which happens to be in Moorhead, Minnesota. If they needed to be transported to Minneapolis the next day, they would be picked up at the Madison Inn by BN personnel, taken across the line to the Expressway Inn in North Dakota. They would then immediately board an Express Shuttle van, and be taken to Minneapolis. In addition to using the Expressway Inn as a dropoff point, BN's office at 801 Main Street in Fargo is also used in the same fashion. This practice began in late June or July of 1994, and is still continuing. It will be referred to below as the "Fargo bypass".

21. Between May and December of 1994, Express Shuttle made 65 moves from either the Expressway Inn or 801 Main Street to points in Minnesota.

22. On June 28, after the temporary authority had been denied, Express Shuttle's dispatchers were told the following (Ex. 5.):

Do not pick-up out of state if dropped off out of state.

Only: If picked up in N.D., we can drop off out of state.

If picked up out of state, we can drop off in N.D.

23. Despite this advice, there was one move in July (Breckenridge, Minnesota to Dilworth) which was made by Express Shuttle. Express Shuttle does not have records of the exact routes taken, so it is unknown whether or not North Dakota roads were used. Except for that instance, however, all of the Dilworth-to-Minnesota traffic has been handled by the Fargo bypass, using either the Expressway Inn or BN's Fargo headquarters.

24. There have been four situations where a driver going from Dilworth to Minneapolis (for example) finds a BN crew waiting for him at his destination, asking to be taken back to Dilworth. In September, there was a Minneapolis-to-Dilworth run, in October, a Willmar-to-Dilworth run, and in November, a Breckenridge-to-Dilworth and Staples-to-Dilworth run. In each of those cases, the run was not dispatched out of Express Shuttle's central dispatch office. It is contrary to the instructions given to the dispatchers, and they would not dispatch it. In each of the cases, the drivers were confronted with a "load" waiting to return to Dilworth. The drivers picked them up without being dispatched to do so. In each of the cases, the crews were dropped in Dilworth, not taken to Fargo first. Express Shuttle understands that its Petition only covers trips from Dilworth to intrastate points, and not return. It agreed, at the hearing, that if this Petition were granted, it would explicitly instruct every driver, dispatcher and crew caller that it is not authorized to bring return trips back to Dilworth. But it went on to say that if people want return service, it would take them to Fargo but they would have to find their own way from Fargo to Dilworth.

25. Express Shuttle made the same commitment with regard to dogcatching. It agreed that the authority sought in this proceeding would not allow it to dogcatch, but stated that if asked to do so, it would take crews to and from Fargo, rather than Dilworth.

26. The Administrative Law Judge asked Express Shuttle whether it would cease the "Fargo bypass" if told by a competent Minnesota authority that it was

inadequate to legalize the otherwise unauthorized intrastate trips. Express Shuttle agreed, in a manner which the Administrative Law Judge finds credible, that if Express Shuttle received an authoritative ruling on the legality of intrastate trips based on the "Fargo bypass", it would abide by that ruling, or appeal it through the courts.

27. Burlington Northern anticipates it will need intrastate service from Dilworth approximately eight to ten times per month. It has been satisfied with Express Shuttle's service into North Dakota, and would prefer to use it for its Minnesota transportation out of Dilworth as well. BN does not want to continue the Fargo bypass any longer than is necessary, as it does not want to have to transport the crews from Dilworth to Fargo. There are 54 crew callers in Fargo, and the number will be up to 60 soon. Burlington Northern claims that these callers would be confused if they had to call more than one carrier. However, there are numerous situations around the country where a crew caller has to deal with more than one carrier, and while there have been occasional misdirected calls, they have not been so frequent as to create a problem for Burlington Northern. In addition, the Fargo callers will have to deal with other carriers anyway because Express Shuttle failed to petition for round trip authority and dogcatching authority. The Administrative Law Judge finds that if Burlington Northern had to call more than one carrier in order to find a crew transporter who had authority to go to a certain destination, Burlington Northern personnel would be able to do so, and there would not be an inordinate amount of confusion.

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#### Crew Transport Services, Inc.

28. The confusion created by BN's duplicate requests to Armadillo and Express Shuttle was further complicated by the entry of a third party, a corporation entitled Crew Transport Services, Inc., which now acts as BN's agent in contracting with crew transporters.

29. Crew Transport Services, Inc. ("CTS") arranges crew transportation and lodging for BN crews. A copy of whatever contract may exist between BN and CTS is not in the record, and not much is known about the arrangement. The record does indicate, however, that CTS contracts with firms such as Armadillo and Express Shuttle on behalf of Burlington Northern and the Soo Line (and perhaps others). When Express Shuttle applied for temporary authority, it received a letter of support from CTS, in Wichita, Kansas. Express Shuttle currently has a contract with CTS for crew transportation services for the Soo Line throughout North Dakota. Express Shuttle also has a contract, dated April 25, 1994, to provide crew transportation services at Dilworth, Minnesota for the BN. ES also has a contract with CTS to provide crew transportation services at Minot, North Dakota and Bismarck/Mandan for the BN. Ex. 7.

30. Despite these contracts with CTS, the BN crew callers communicate directly with the Express Shuttle dispatcher. Requests for service do not go through CTS. And when Express Shuttle and Byron Youngmark originally worked out the arrangements for service from Dilworth to Mandan, and then from Dilworth to Minnesota, the discussions and rate quotations were directly between Youngmark in Fargo and Express Shuttle in Bismarck. The written contracts, however, are with CTS.

31. As a practical matter, BN can tell CTS which carrier should be selected if BN has a preference. It is unclear, however, whether that power can be exercised by someone in Fort Worth or someone in Fargo.

32. Express Shuttle has no direct contract with BN. Its contract with CTS specifies that its services are to be provided "at or between the following and related locations: Dilworth, MN". There is no mention of Fargo, North Dakota, in that contract or any other contract. Express Shuttle is relying on the Dilworth contract to provide the authority for the Fargo bypass services.

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### The Protestant

33. Brown's Crew Car of Wyoming, Inc., d/b/a Armadillo Express, has been in business in one form or another since 1974. It was incorporated in 1980, and its sole shareholder is Joe C. Brown, Jr. It is based in Cheyenne, Wyoming. Ninety-eight percent of its business is in moving railroad train crews. It holds authority in seven states.

34. Armadillo first obtained Minnesota authority in 1989. This was done at the request of Burlington Northern. Although it initially sought statewide authority, it ended up with limited authority to transport BN railroad crews between points in Minnesota, restricted against origins in the northwestern corner of the state. Return trips coming out of that restricted area were not prohibited. Armadillo was also prohibited against trips to and from the Minneapolis/St. Paul International Airport, as well as trips originating in Kandiyohi County.

35. As noted earlier, in 1993 BN asked Armadillo if it could serve Dilworth, and Armadillo agreed to immediately seek to expand its authority to do so. During the time between the filing of its extension petition in November of 1993 and the hearing in that matter in March of 1994, CTS entered the picture. Armadillo was informed that selection of carriers was no longer the responsibility of Byron Youngmark, but that CTS would solicit bids or proposals for serving Dilworth. As it worked out, Armadillo was never informed of any opportunity to bid on Dilworth. Armadillo was unaware that there was a contract between CTS and Express Shuttle to serve Dilworth until well after the contract had been executed.

36. Armadillo has six vehicles stationed around the Fridley area to serve Northtown, and has another one on order. Despite the fact that its extension petition was ultimately granted in August of 1994, it has not received any business in the area covered by the extension. Its equipment is not being used to capacity.

37. Armadillo is interested in serving BN out of Dilworth, and would station equipment there if he were offered the business. Armadillo is interested in performing not only the Dilworth intrastate business, but it is also interested in competing for the much more important BN interstate business out of Dilworth.

38. Express Shuttle's petition is severely limited. It does not include return trips to Dilworth from Minneapolis or other intrastate points. It does not include dogcatching stranded crews outside of the Dilworth yard. Armadillo's authority, on the

other hand, would permit it to perform both of those services without having to resort to a "Fargo Bypass".

39. Armadillo's tariff provides for a rate of \$.55 per running mile, loaded or unloaded. Express Shuttle's contract to serve Dilworth provides for \$1.05 per loaded mile. There are no statistics in the record, from either Armadillo or Express Shuttle, to indicate whether there are many unloaded miles driven or not.

40. Armadillo has equipment which is not being fully used. It has a ten-passenger van permanently stationed in the Northtown yard, which is going virtually unused. If Armadillo had received the expected business from BN, it would have moved that van, plus two others, up to Dilworth. Armadillo can meet all of BN's needs once it knows that it is going to get business from BN at Dilworth. BN is the only railroad which Armadillo serves in Minnesota, and Armadillo is very desirous of maintaining, and expanding, its business with BN.

41. Armadillo was told that if it got the authority, it would get the Minnesota intrastate business out of Dilworth. Armadillo applied for authority after BN asked it to do the business, but the regulatory delay worked to Armadillo's disadvantage because it chose not to conduct the business without appropriate authority. Armadillo was prejudiced by Express Shuttle's willingness to handle the Dilworth intrastate business by use of the Fargo bypass.

Based upon 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. From Petitioner's experience, willingness to follow authoritative interpretations, and financial condition, the Judge concludes that it is fit and able within the meaning of Minn. Rule 7800.0100, subp. 4.

4. Petitioner's vehicles, being regularly maintained and free from defects, are within the safety requirements prescribed by the Department.

5. Burlington Northern does have a need for intrastate transportation of crews from its Dilworth yard to other BN yards.

6. Armadillo has demonstrated that it can offer sufficient transportation services to fully and completely meet BN's needs.

7. The Petition does not seek authority to "dogcatch" stranded crews at any point outside of the Dilworth yard, nor does it seek authority to transport crews from other yards in Minnesota to Dilworth.

8. The Conclusion regarding fitness and ability was based upon the Administrative Law Judge's belief that Express Shuttle would discontinue the Fargo bypass for all purposes if it were told that its actions were not legal. The basis for this Conclusion is set forth more fully in the Memorandum below.

9. The attached Memorandum is incorporated herein.

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, the Administrative Law Judge respectfully recommends to the Board that it issue the following:

#### ORDER

That the Petition of Express Shuttle, Inc., d/b/a Railroad Crew Transport, for charter carrier permit authority to transport train crews under charter from the Burlington Northern Railroad Co. yard in Dilworth, MN to other BN yards in MN, except Willmar and Staples, be DENIED.

Dated this 6th of April, 1995

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ALLAN W. KLEIN  
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

The conclusion on fitness and ability was based upon the Board's past practice of looking to the future, rather than the past, in deciding whether or not a petitioner would follow the law. The Administrative Law Judge believes that Express Shuttle would discontinue using the Fargo bypass if it were told that it was inadequate to legalize their intrastate operations. The Board has, in the past, stated that the determinative question is whether or not a petitioner is willing to comply with regulatory authority in the future. Brink's v. Minnesota Public Utility Commission, 355 N.W.2d 446, 450 (Minn. App. 1984).

Armadillo is a large, multi-state operator who is willing and able to meet BN's needs. Under our statutory scheme, once a need has been shown, the burden shifts to the Protestant to show that existing permitted carriers can meet the need. In this case, Armadillo has met that burden, and the Petition must be denied.