

Service Date: August 21, 1987

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of ELGIN TRUCKING, INC., Kalispell,)	
Montana for a Class C Certificate)	DOCKET NO. T-9049
of Public Convenience and)	
Necessity.)	ORDER NO. 5795

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Mr. Dean Jellison, 120 First Avenue West, Kalispell, Montana
59901

FOR THE PROTESTANTS:

Mr. David Jackson, 203 North Ewing Street, Helena, Montana
59601, appearing on behalf of Marks Trucking, Dick Irvin and
Americana Expressways

FOR THE COMMISSION:

Timothy R. Baker, Staff Attorney, 2701 Prospect Avenue,
Helena, Montana 59620-2601

BEFORE:

HOWARD L. ELLIS, Commissioner & Hearing Examiner

BACKGROUND

On or about February 23, 1987, the Montana Public Service Commission (Commission) received an application from Elgin Trucking, Inc. (Applicant or Elgin) for a Certificate of Public Convenience and Necessity, Class C, authorizing the transportation of lumber and other wood products used in construction between all points and places in the state of Montana, subject to the following limitations: Transportation must originate in Lincoln or Flathead Counties. Transportation service will be limited to continuing contracts with Fox Lumber Company, Inc. and/or Border Lumber. On February 25, 1987, the Applicant requested that the Commission amend its previous application by changing the second limitation on the requested authority as follows: Transportation service will be limited to continuing contracts with Fox Lumber Company, Inc. and/or Border Lumber or their successors in interest.

On or about March 4, 1987, Elgin's application was properly noticed. On March 6, 1987, a protest to Elgin's application was received by the Commission from Marks Trucking, Inc. On March 18, 1987, another protest to the application was received by the Commission from Americana Expressways, Inc. On March 20, 1987, a protest to the application was received by the Commission from Dick Irvin, Inc. No other protests were received.

Following proper issuance of notice, the Commission held a public hearing on Wednesday, April 22, 1987, at 9 a.m. in the small conference room No. 2, Flathead County Community Health Center, 723 Fifth Avenue, East, Kalispell, Montana. At the conclusion of the hearing, the parties to the proceeding stipulated that the Commission may proceed to issue a final order in this matter.

SUMMARY OF TESTIMONYTestimony of Applicant

Mrs. Joann Elgin, Secretary/Treasurer for the Applicant, appeared and testified in support of the application. Mrs. Elgin described the general operations of the Applicant. Mrs. Elgin testified that using piggyback vans, the Applicant is currently engaged in moving wood chips, and possesses ICC authority for nationwide activities. These activities are conducted under a lease arrangement with American Timber Company in Olney, Montana.

The interstate authority from the Interstate Commerce Commission authorizes the Applicant to operate in 48 states with movements involving moving vans and lumber. The Applicant currently focuses its operations in the five state area of Washington, Idaho, Montana, Wyoming and Utah. The activities involved under this authority primarily relate to the off-loading of piggyback trailers from the railroad, the loading of said trailers, and the movement of the loaded trailers back to the railroad ports. Mrs. Elgin testified that the Applicant has been engaged in these operations for approximately nine months, but added that Elgin Trucking was incorporated in 1982 and has been continuously engaged in the transportation business since that date.

Mrs. Elgin also described the equipment currently owned or operated by the Applicant. She testified that the Applicant currently has available to it for service three tractors and two trailers. It was the Applicant's intention that these vehicles would be used in providing the services sought in this application.

However, Mrs. Elgin also added that this equipment is also used currently by the Applicant in providing other transportation

services. Nevertheless, she indicated that this equipment would be available if needed.

Mrs. Elgin also described the current financial status of the Applicant. She testified that since the preparation of the application to the Commission, and the financial statement contained therein, there had not been any significant changes in the Applicant's financial statement. She added that she believed that the Applicant possessed the necessary record keeping capabilities that would be required to provide the reports and information needed by the Public Service Commission. Finally, Mrs. Elgin testified that if the Applicant were granted the authority that it was seeking, it would strive to operate in compliance with the various rules, regulations and statutes of the State of Montana and the Public Service Commission.

On cross-examination, Mrs. Elgin attempted to explain the breakdown of the financial statement contained in the application submitted to the Commission. At first, she indicated that she was not familiar with the makeup of the current assets figure totalling \$109,961. Reading from a statement prepared by the Applicant's accountant, Mrs. Elgin testified that the current assets figure consisted of cash in the bank, cash on hand, accounts receivable, and employee advances. She further testified that under the cash and bank category the accountant had listed \$30,000. In addition, the accounts receivable for the Applicant was listed at \$137,682.

She could not explain how these figures were used in arriving at a current assets figure of \$109,961 which was used on the original application. In attempting to describe the current liabilities of the Applicant, Mrs. Elgin was unsure of what comprised that category, but added that it would probably include accounts

payable, payroll taxes, miscellaneous payroll deductions, and current portions of long-term liabilities. Finally, Mrs. Elgin indicated that she would provide a copy of the accountant's statement to the Commission as an exhibit in this proceeding.

Mrs. Elgin also provided a general description of the Applicant's operations. She indicated that the Applicant had transported lumber under its ICC authority, and had moved shipments to Spokane on a fairly regular basis. She also testified that they had been conducting operations out of Wyoming. Mrs. Elgin stated that the Applicant usually does not have a backhaul from those areas. She also described the piggyback operations that are conducted by the Applicant. Mrs. Elgin testified that the Applicant has a contract with Burlington Northern, but could not provide it at the hearing. She agreed to provide this contract to the Commission as a late-filed exhibit. Mrs. Elgin testified that the Applicant will receive a call from a lumber broker who will order a piggyback van to be picked up at the railroad loading ramp.

The empty piggyback is picked up by the Applicant and taken to a mill, loaded and returned to the loading ramp. The railroad loading ramp is currently located in Missoula. Mrs. Elgin testified that the Applicant will go to Missoula with an empty trailer and return to the Flathead Valley for loading. At this point the loaded van is placed on the train for further transportation. She indicated that the Applicant began these operations to Missoula around the first of April. Prior to this time the loading ramp had been located in Spokane. Mrs. Elgin testified that the Applicant had never used the Burlington Northern trailers for moving materials locally in the Flathead Valley. She added that the Applicant provides the insurance on the trailers

which are provided by Burlington Northern. Mrs. Elgin stated that when the Applicant was moving vans out of Spokane, they had an agreement with the Burlington Northern which provided that they could use the Burlington trailers for private transportation moves.

She indicated that a representative with BN Intermodel had given the Applicant permits to pickup wood pellets from Sand Point, Idaho, and bring them into the Flathead Valley on those trailers.

She added that this was an interstate load which was authorized under a general commodities authority for the 48 states. She stated that she would be willing to furnish a copy of that ICC authority to the Commission. Mrs. Elgin testified that she did not have any letters or written authorization from the Burlington Northern to use their trailers in the private operation, but added that they were aware of it.

Mrs. Elgin testified that the Applicant had recently received a ticket issued by the State of Montana for unauthorized carriage. This ticket was issued on the Stillwater scale which is located at the Clearwater Junction. Mrs. Elgin indicated that the Applicant was carrying lumber which was loaded in Kalispell and was being moved to Great Falls. This ticket was issued approximately six months ago and was the only ticket that the Applicant has received.

Mrs. Elgin indicated that the Applicant has calculated that it currently costs approximately .90¢ per mile to operate a tractor and semi-trailer in its operations. She stated that the Applicant had proposed contracts with Border Lumber and Fox Lumber in the event that this application were granted. Mrs. Elgin indicated that she had discussed transportation rates with Border, but not with Fox, and added that the rate she had discussed with

Border was \$10 a thousand for their piggybacks, which is set on .90¢ a mile. Mrs. Elgin testified that the piggyback rate is very close to the cost for operating the truck and the trailer. She stated that on the piggyback operations the Applicant has a very small margin of profit, since they are using BN's trailers. She added that they figure the cost of operation on their own vehicles.

Mrs. Elgin testified that the Applicant will make about .13¢ a mile on operations that it conducts using its own equipment. She did not know the insurance factor per mile. Again, Mrs. Elgin testified that the rate she had discussed with Border was approximately \$10 a thousand which would apply from Border to Kalispell, a distance of approximately 200 miles. She stated that this rate worked out to about .90¢ a mile and added that on the Border move, the Applicant would be using its own trailer equipment. Mrs. Elgin testified that the Applicant would have to make more than .90¢ per mile to make any profits on these moves.

To her knowledge there was not a different rate for movement of rough or planed lumber. Mrs. Elgin testified that she was not sure whether or not the Applicant would be able to make a profit on its operations concerning Fox Lumber. She stated that the Applicant's usual rate for transportation services was .90¢ a mile, which was also their cost of operations. She added that this figure might not be applicable if a backhaul were available. She testified that the Applicant was not currently making any money on these operations, but added that they were trying to get established.

Mrs. Elgin also testified that the Applicant had conducted illegal operations prior to this application. She stated that she did not understand the difference between interstate and intrastate transportation moves, and when the Applicant received

its PSC Certificate of Public Convenience and Necessity, she thought it covered their transportation moves between loading in Kalispell and the Missoula railroad loading ramps. She indicated that within the last year, the Applicant moved approximately a dozen loads intrastate. The majority of these loads were for Fox Lumber. She stated that when the Applicant's received its citation for unauthorized transportation, she realized that the Applicant had been conducting illegal operations.

On further cross-examination, Mrs. Elgin elaborated on the Applicant's illegal operations. She indicated that she had received a PSC authority from the Commission, and believed that this authority authorized intrastate operations. In reality, it was only a PSC authority which was issued to cover the Applicant's ICC authority. Mrs. Elgin testified that when the Applicant found out the operations it was conducting were illegal, it immediately ceased those operations. Mrs. Elgin stated that Fox Lumber is located in Hamilton, Montana, and Border Lumber is located in Rexford, Montana, Lincoln County.

Mr. James Edward Elgin, President of Elgin Trucking, appeared and testified in support of the application. Mr. Elgin stated that he was present during the testimony of Mrs. Elgin and basically concurred in the testimony that she offered. He stated that he did not see any problems with the Applicant being able to perform the services that it proposes to provide in its application. He added that he believed that the Applicant possesses both the equipment and the financial backing to perform these services. Mr. Elgin testified that it was the Applicant's intention that the services provided under the authority sought would be performed in full compliance with the rules, regulations

and statutes governing such operations.

On cross-examination, Mr. Elgin indicated that he was the driver of the load for the Applicant that was ticketed at Clearwater. He stated that the load was two by four lumber moving from Libby to Great Falls, Montana. This distance was approximately 320 miles, and the shipper was Fox Lumber Company. Mr. Elgin indicated that the testimony of Mrs. Elgin was unclear on one point as to the rates charged by the Applicant. He stated that the .90¢ a mile figure which was used by the Applicant was on a running mile basis, not just a loaded mile. The Applicant would charge .90¢ a mile if it had both a head haul and a back haul, although he added that the rates are often a little cheaper if there is a back haul. Mr. Elgin testified that he believes that the Applicant is currently making a profit.

Testimony of Shipper Witnesses

Mr. Dennis J. Filcher, a representative of Fox Lumber Company, appeared and testified in support of the application. Mr. Filcher generally described the operations of Fox Lumber. He testified that Fox Lumber serves as lumber wholesalers throughout the entire nation. He described the transportation needs of Fox Lumber within the state of Montana, and added that the emphasis was on the ability to quickly negotiate a rate to be paid and to move the lumber quickly. It was unacceptable to wait as long as three days for transportation services. As to the transportation moves within Montana, Mr. Filcher testified that Fox often moves lumber from Libby to Kalispell, and also into the Belgrade and Billings area. On occasion there is a need to move lumber to other areas.

However, he indicated that there was no precise way to project or predict the future transportation needs of Fox Lumber in terms of specific locations. Mr. Filcher testified that in the past, the transportation services that have been provided have not been fast enough, and he added that Fox would like to be able to negotiate on the applicable rate. He testified that they did not like to have the rate quoted to them. Mr. Filcher testified that as a result of these problems, Fox Lumber has experienced certain problems but he could not elaborate or provide any specific instances. Mr. Filcher testified that at the present time Fox Lumber uses Americana Expressways, Dick Irvin and Ed Marks.

Mr. Filcher testified that there was nothing peculiar about the needs of Fox Lumber which would distinguish them from what would be the normal movement of lumber and lumber products. He believed that a benefit to his company and the general public if this application were granted would result from the existence of another carrier to call upon when transportation services are needed. He stated that they have had business experiences with the Applicant in the past and have found that they have performed a good service.

On cross-examination, Mr. Filcher described the activities of a lumber wholesaler. He stated that they will buy lumber from the mill and sell it to a customer. It is his responsibility to find a transportation service to move those commodities. He stated that essentially he has an office with a bank of phones, and added that he never actually sees the loads of lumber. Mr. Filcher testified that it is not even necessary for these loads of lumber to enter the state of Montana. He stated that he did not know, and

could not determine, the percentage of interstate and intrastate loads. Mr. Filcher testified that recently, Fox Lumber did have approximately 30 loads of lumber to move from Libby to Kalispell, and that they used a combination of carriers to provide this service. Mr. Filcher stated that the Protestant Ed Marks moved some of these loads, as did the Applicant. Mr. Filcher testified that these loads were moved from the Champion Mill in Libby to Kalispell Wood in Kalispell. He stated that these moves were made within the past year, and could not identify the nature of lumber that was moved.

Mr. Filcher testified that he was not familiar with the correspondence which was drafted by Mr. Fox of Fox Lumber and attached to the application submitted to the Commission by Elgin.

Mr. Filcher stated that he did not know if the Applicant had moved any loads interstate for Fox Lumber in the past six months, and added that he did not believe that he had booked any such loads with them. He indicated that it was likely that the corporate records of Fox Lumber would reflect whether or not the Applicant had in fact made such moves, but added that he was not in a position to provide such records to the Commission. Mr. Filcher stated that as assistant traffic manager for Fox Lumber he was authorized to appear at this proceeding, but added that he did not have any authority beyond that.

Mr. Filcher testified that generally Fox Lumber pays about \$1 a mile as a going rate for the movement of lumber. He also testified that the usual lead time on an order is generally two or three days in advance and that this type of delay time would be acceptable. Mr. Filcher examined what had been marked as

Protestant's Exhibit A which was purported to be a record of services provided to Fox by Ed Marks Trucking. In reviewing that document, and the loads handled by Ed Marks Trucking for Fox over the approximately past 12 months, Mr. Filcher testified that not many of those loads were unacceptable. Mr. Filcher agreed that Ed Marks Trucking has provided satisfactory service to Fox over the past 12 months. He indicated that his support of this application stems from his desire to have more trucks on the road and available for service.

On redirect examination, Mr. Filcher testified that the list of invoices contained in Protestant's Exhibit A would not reflect instances where he had placed a call to Ed Marks Trucking and they were unable to meet the time constraints that were imposed. Mr. Filcher stated that this list of invoices would only show the hauls that were actually made by Ed Marks Trucking for Fox. Mr. Filcher testified that he did not have any records of instances that he may have called Ed Marks Trucking or any other carrier and was unable to use their services because of the constraints involved. Mr. Filcher could not recall any specific instances when he contacted Ed Marks Trucking and they were unable to make the move that was needed.

On recross-examination, Mr. Filcher indicated that he believed that Protestant's Exhibit A was fairly accurate, as Ed Marks Trucking had made a lot of transportation moves for Fox. At this point the Protestants moved for the admission of Protestant's Exhibit A. There were no objections to this exhibit, and it was admitted as evidence in this proceeding.

Mr. Ivan Miller, Vice-president of Border Lumber Company,

appeared and testified in support of the application. Mr. Miller generally described the nature of the business conducted by Border Lumber. He testified that generally, Border Lumber is in the business of milling and processing lumber, as well as sales of lumber. Mr. Miller testified that Border Lumber does have a need for the transportation of lumber, which basically involves piggyback vans, but also includes flatbed type or over-the-road type loads. Mr. Miller testified that Border Lumber Company does have transportation needs which are both interstate and intrastate in nature. He stated that it was much cheaper for Border Lumber Company to use the piggyback vans and railroad services rather than ship by flatbed trailer and over-the-road loads. Mr. Miller testified that Border Lumber Company does have a need for transportation within the state of Montana, especially during the winter months. He stated that during the winter months Border Lumber keeps producing lumber but the lumber will not dry. Accordingly, the lumber needs to be transported to a kiln for drying. After the lumber is kiln dried and planed, then it is loaded onto a piggyback van and delivered to the railroads. Mr. Miller testified that Border Lumber Company produces lumber near Rexford, Montana in Lincoln County. He added that in the winter, the lumber needs to be transported for kiln drying to Montana Mokko in Kalispell, Montana.

Mr. Miller testified that when the kiln function is complete then the lumber will typically move on an interstate basis. He stated that the bulk of the intrastate transportation needs of Border Lumber Company involves moving the lumber from the mill to a further processing location.

Mr. Miller indicated that he was appearing in support of the application because the Applicant has always provided an excellent transportation service for Border Lumber. Mr. Miller added that the Applicant's rates are very reasonable and that he was very satisfied with the services provided. Mr. Miller added that he has had occasion to use other carriers for these intrastate moves, but added that he has not done so within the last year and a half. Mr. Miller testified that he did not believe that the intrastate needs of Border were unique or different from that of a normal customer moving lumber. He added that the business volume of Border Lumber has been steadily growing and that this would have the effect of increasing their transportation needs as time passes.

Mr. Miller testified that if the application sought in this proceeding were not granted, it would have a serious detrimental effect upon the operations of Border Lumber Company. Mr. Miller stated that they have been extensively using the services of the Applicant as often as four loads a day. Mr. Miller indicated that it would be hard to start over again and find a new carrier.

On cross-examination, Mr. Miller stated that during the summer peak, Border Lumber employes approximately 20 employees and produces around 50,000 board feet of lumber per day. He stated that in the past year he would guess that between 150 and 200 loads of lumber have been moved out of the mill. Mr. Miller stated that this would include the piggyback loads, which are all interstate. Mr. Miller stated that during the winter months, Border Lumber

would average approximately three loads a week for three months from the mill to the kiln at Kalispell. These are intrastate movements of lumber. Mr. Miller testified that the transportation moves from the kiln on to various points would be interstate in nature for the most part.

Mr. Miller stated that it was possible that he would also have other intrastate loads during the summer, although he added that usually the transportation is provided by lumber brokers. Mr. Miller testified that on approximately 5 percent of all intrastate loads, he is responsible for providing the transportation. He indicated that for about 5 percent of the winter loads he hires the carrier. Mr. Miller stated that for the remainder of his loads the lumber broker would typically pay the freight.

Mr. Miller testified that for the transportation moves from the mill to the kiln in Kalispell, Border Lumber currently has an agreement with Montana Mokko for a package deal which includes transportation provided by trucks owned by Montana Mokko. Mr. Miller testified that on occasion Montana Mokko will move the lumber on their own and added if they cannot provide the needed transportation services then he usually uses the services of the Applicant. Mr. Miller stated that the Applicant has probably made all of these transportation moves during the winter months, or the past six months. He testified that the number of moves made by the Applicant during the past six months could have been as high as 60.

Mr. Miller testified that these moves were made since the Applicant filed its application with the Commission. Montana Mokko would have moved only 2 or 3 percent of these loads with their own trucks. Mr. Miller also testified that he did not pay the

Applicant for its transportation services, and added that the Applicant was paid by Montana Mokko. However, Mr. Miller stated that he is usually responsible for contacting the Applicant and requesting its services when Montana Mokko cannot provide its own trucks.

Mr. Miller testified that Border Lumber Company has never used the services of either Ed Marks Trucking or Dick Irvin. He added that he has never given Americana Express an opportunity to provide these services either. Mr. Miller testified that if these carriers had trucks which were available that he would not have any objection to using their services. However, Mr. Miller testified that as a matter of preference he would prefer to use the Applicant because he is familiar with their operations. Mr. Miller agreed that if a trucker was familiar with securing and wrapping wood under tarps, and did a good job of tarping, there would be no problems. He testified that when Border Lumber pays the Applicant for its services, the rate is usually \$10 a thousand on the lumber that they ship over a distance of approximately 200 miles from the mill to Montana Mokko. Mr. Miller added that he believed that the rate charged by the Applicant was for a one-way haul.

On redirect, Mr. Miller testified that when the lumber leaves the Border mill for Montana Mokko, the ultimate destination of that lumber is already known. He added that at this point it is possible to complete interstate shipping documentation with a stop in Kalispell for processing. Mr. Miller also testified that the Applicant often uses a pup trailer on many of its loads, which will then increase the per mile income for transportation services provided.

On recross-examination, Mr. Miller stated that when the lumber is moved from the mill to the kiln in Kalispell, this movement is performed under one bill of lading. Mr. Miller also testified that when this lumber leaves the mill it is usually consigned to someone outside the state of Montana. Mr. Miller stated that the kiln drying process takes approximately one week.

The lumber is then planed immediately thereafter, and the lumber then goes directly from the planer into the piggyback vans and down the road. Mr. Miller testified that he did not know whether or not these loads would in fact be interstate shipments. At this point, Mr. Miller clarified his previous testimony, and indicated that when the lumber leaves the mill at Rexford the bill of lading destination will typically show Montana Mokko in Kalispell. He indicated that a new bill of lading is typically cut for the subsequent transportation outside the state of Montana so that the bill of lading can correspond to the appropriate piggyback van number.

Testimony of Protestants

Mr. Edward L. Marks, Kalispell, Montana, appeared and testified in opposition to the application. Mr. Marks is currently engaged in the trucking business and has been involved in this business since 1950. He indicated that he is familiar with all aspects of the operations of Marks Trucking, Inc. and serves as the president of that corporation. Mr. Marks described Protestant's Exhibit B which is a Class B lumber and lumber products authority from Flathead, Lake, Lincoln and Sanders Counties, to the rest of the state. Mr. Marks testified that this document accurately reflects the authority under which Marks Trucking conducts its operations. In addition, Mr. Marks indicated that Marks Trucking also holds authority for livestock feed, and used cars and machinery as well as insulation. He stated that the corporation is presently operating under this authority, and that the principle trucking service provided by the corporation is transportation services for lumber out of the Kalispell area and building materials, feed or salt back into the area. Mr. Marks testified that the corporation also holds ICC authority which authorizes movement of general commodities throughout the eight northwestern states. He stated that Marks Trucking, Inc. specializes in transporting the commodities which were described by the shipper witnesses from Fox Lumber and Border Lumber.

Examining the second page of proposed Protestant's Exhibit B, Mr. Marks indicated that this document is a list of trucks and trailers owned and operated by the corporation. He stated that the corporation operates four pieces of power equipment and four pieces of trailing equipment, and added that this

equipment is designed and utilized for the transportation of the products described by the shipping witnesses in this proceeding.

Mr. Marks testified that the corporation currently provides transportation services for Fox, and added that he thought that he had provided services for Border, but recently realized that he had confused the Border Lumber Company with another lumber company in the Rexford area. Mr. Marks indicated that now that he had realized his error, he would actively solicit the traffic of Border Lumber. Mr. Marks indicated that the capacity of his trailing equipment is approximately a 70,000 pound pay load.

In examining Protestant's Exhibit A, Mr. Marks testified that he had prepared this document from information contained in the corporate records. He stated that this information was true and accurate, and that he has not had any indication from Fox that he was not providing the type of services that they required. Mr. Marks added that he has received complaints from Fox regarding the price that he charges and they have indicated that they would like to receive the same services at the cheaper price. Referring to the back page of Exhibit A, Mr. Marks indicated that the document reflects approximately how many times a month he contacted Fox Lumber from July through March of this year. He added that in addition he was probably contacted by representatives of Fox Lumber about half as many times. Mr. Marks indicated that there have been instances where Fox indicated that they needed the transportation services provided on a quicker basis, but added that this problem is not necessarily specific to Fox. Mr. Marks indicated that he can meet the needs of the shipper witnesses that have appeared at

this proceeding if two or three days notice is sufficient time. He also testified that if business for either of these shippers were to develop to the point where additional equipment was required, the corporation currently had additional equipment sitting idle in Missoula. Mr. Marks indicated that he has been trying to sell this equipment for over a year because there has not been enough business to sustain its use.

Mr. Marks indicated that from his experience and at this time in the state of Montana, lumber sales and movement of lumber is definitely down. Mr. Marks indicated that if this application were granted he would probably have to sell additional equipment.

On cross-examination, Mr. Marks indicated that because the corporation is a Class B carrier there is no choice as to the rate that must be charged. Mr. Marks also indicated that he believed that the corporation could meet the needs of Border Lumber Company as they have been engaged in this business for the last 35 years.

On further cross-examination, Mr. Marks indicated that if the corporation were forced to sell more equipment the ability to provide the other services that it conducts would be adversely affected. For the most part, the corporation is currently utilizing all of its equipment, although there are occasions when an additional piece of equipment will sit for a long period of time because of a lack of business.

Mr. Charles R. "Dick" Irvin, Kalispell, Montana, appeared and testified in opposition to the application. Mr. Irvin is the

assistant general manager of Dick Irvin, Inc. He has been in the trucking business for approximately 36 years, and is fully familiar with the operations of Dick Irvin, Inc. Referring to Protestant's Exhibit C, Mr. Irvin indicated that this document accurately represents the authority under which the corporation operates. He added that the corporation is presently operating under that authority, and also holds interstate authority which is a general commodities authority including bulk throughout the United States.

Mr. Irvin indicated that the principle service provided by the corporation is as a common carrier in interstate and intrastate traffic. He stated that the corporation has done a great deal of business with Fox Lumber Company. Approximately 23 percent of the interstate lumber traffic of the corporation is obtained from Fox.

Mr. Irvin indicated that if the corporation were to lose that traffic there would probably be some idle equipment and unemployment.

In reviewing Protestant's Exhibit D, Mr. Irvin described that document as an accurate list of the equipment presently operated by the corporation. He indicated that the corporation operates about 90 pieces of equipment of trailing vehicles. This equipment is capable of transporting the products tendered by Fox and Border. For lumber specifically, the corporation has approximately 40 flatbed units and 4 vans. Mr. Irvin indicated that the corporation also has a contract with the Burlington Northern so that they are familiar with a piggyback operation. He testified that the corporation has six units located in Kalispell, one at Helmville and one at Lincoln. He stated that all of this equipment would be capable of serving either Fox or Border on a

"reasonable notice" basis. Mr. Irvin indicated that usually they would like to have two or three day's notice if possible but added that there are occasions where a rush order for transportation services is needed and arrangements have to be made.

Mr. Irvin indicated that he was not aware of any complaints from Fox in regard to the services provided by the corporation. He added that he was laboring under the same misunderstanding as Ed Marks and would now make serious efforts to solicit the traffic of Border Lumber as described in these proceedings.

Mr. Irvin also described the solicitation program maintained by the corporation. He indicated that the corporation employs two people that are involved in dispatching and that the corporation also has intrastate outgoing and incoming toll free watts lines. The corporation has a similar telephone setup for interstate services. Mr. Irvin indicated that the corporation has an agent in Billings that has talked to representatives from Fox Lumber on a daily basis. He added that if further equipment were required in this area to serve either of these shippers the corporation would be willing to provide it as it is readily available. Finally, Mr. Irvin indicated that if the authority sought in this application were granted it would seriously harm their existing operations, adding that the company currently has idle flatbed equipment.

At this point, the counsel for Protestants indicated that there was not a witness appearing on behalf of Americana. However, it was requested that their authority and the equipment that they have available which is enclosed in proposed Protestant's Exhibit E would be admitted. At this time the motion to admit Exhibits B,

C and D was also made. There were no objections to these exhibits and they were admitted as evidence into this proceeding.

The Protestant recalled Mr. Elgin to offer additional testimony. Mr. Elgin admitted that he had made a number of moves of lumber during the past winter for Border from the mill in Rexford to Kalispell. He estimated that there had been approximately 30 loads in this regard. Mr. Elgin testified that he recognized that he had no authority from the Commission to move these loads and that some of these loads were moved after the application had been filed with the Commission. He stated that the Applicant was paid by Montana Mokko for making these movements.

DISCUSSION, ANALYSIS AND FINDINGS

A threshold determination to be made by the Public Service Commission in ruling on an application for a Certificate of Public Convenience and Necessity is whether the applicant is fit, willing, and able to provide the service. Several factors need to be considered in making this determination: first, the intention of the applicant to perform the service sought; second, the experience of the applicant in conducting the service sought; third, the adequacy of the equipment the applicant has to perform the service; fourth, the financial condition of the applicant; and fifth, whether the applicant has in the past performed illegal operations. As to the first three considerations, the Commission does not find that extensive deliberation is required. The Applicant has enthusiastically stated its intentions as regards the current application. Further, the Applicant has adequate experience in providing the services which are the subject of this

application. The Applicant's existing equipment appears sufficient to meet any public need that may arise under this application. Finally, although the testimony presented by the Applicant regarding its financial condition was somewhat muddled, the Commission believes that the Applicant is financially fit to provide the services encompassed in this application.

However, there is evidence of extensive illegal operations by the Applicant conducted while this application was pending before the Commission.

In the past it has been the position of the Commission that unauthorized operations are not, as a matter of law, a total bar to an application for authority, provided that they were either conducted under a color of right, or in good faith. See In the Matter of John D. Walker, Docket No. T-5883, Order No. 4217. See also D.F. Bast, Inc. v. Pennsylvania Public Utility Commission, 154 A.2d 505, 31 PUR.3d 473 (PA. 1959). However, bad faith illegal operation is a very serious matter and has been found on occasion to justify a finding of unfitness without further consideration of the Applicant's case. See e.g., H.R. Ritter Trucking Co., Extension, 111 M.C.C. 771 (1970); and Antietam Transit Company, Inc., Common Carrier Application, 84 M.C.C. 459 (1961). This Commission expressed its opinion of bad faith illegal operation in the Application of Power Fuels, Inc., Docket No. T-4986, Order No. 3038, stating that "evidence [of knowledgeable illegal operations] casts a serious doubt as to whether Applicant is fit to provide the proposed service should this application be granted."

In this case, the Applicant was ticketed for illegal intrastate movements approximately six months prior to hearing.

Mrs. Elgin testified that within the last year, approximately 12 illegal movements were made. Mrs. Elgin also stated that they did not realize that they were conducting illegal operations at that point in time, and ceased such operations after receiving the citation. Mr. Elgin concurred in this testimony.

Mr. Miller, appearing on behalf of Border Lumber Co., indicated that during the six month period prior to the hearing, he believed that the applicant had made as many as 60 moves from Rexford to Kalispell, Montana. Many of these moves had apparently been made since this application was filed with the Commission. The lumber is moved from Rexford to Kalispell, where it is kiln-dried and planed. The finished lumber is subsequently moved interstate. A new bill of lading is usually cut for the subsequent interstate move.

Finally, Mr. Elgin was recalled by the Protestants. He admitted that he had made approximately 30 moves as described by Mr. Miller, and added that he realized he did not have the proper authority from the Commission. Further, some of these loads were moved after the application in this proceeding was filed with the Commission.

Based upon this record, the Commission finds that the Applicant has engaged in extensive illegal operations which were not conducted under a color of right, or in good faith. To the Commission, this activity, conducted in bad faith, "casts a serious doubt" on the Applicant's fitness. The Commission cannot condone, explicitly or implicitly, such "knowledgeable illegal operations."

Accordingly, the application in this proceeding is denied.

Even if these illegal activities were an insufficient

basis for denial of this application, the Applicant has failed to carry its burden regarding the public convenience and necessity.

Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

The questions to be considered in determining public convenience and necessity, implicit in the statute, were best stated in the case of Pan American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of

existing carriers contrary to the public interest.

1 M.C.C. at 203.

It is the Applicant's burden to demonstrate the existence of a public need which cannot be met by existing carriers. Two shipper witnesses appeared to support the application. However, Mr. Filcher, appearing on behalf of Fox Lumber, indicated that they have received satisfactory service from the Protestant Marks Trucking over the 12 month period prior to this hearing. Further, he could not project or predict the transportation needs of Fox Lumber. Finally, he stated that Fox Lumber had experienced certain problems with the existing transportation services, but could not elaborate or provide any specific instances. Mr. Miller appeared to present more concrete evidence of a need for services, but also stated that he had never used the services of any of the Protestants. His testimony was largely based upon preference. Further, the Protestants Marks Trucking and Dick Irvin, Inc. both indicated that because of a mistaken belief regarding the identity of the ownership of Border Lumber, they had not sought their business. After realizing this mistake, both Protestants expressed a strong desire to meet the needs of Border Lumber. All of the Protestants possess the equipment needed to serve the needs of

Border Lumber. The Protestants Dick Irvin, Inc. and Marks Trucking both testified that they currently had idle equipment.

Clearly, the Applicant has failed to meet its burden. The needs of Fox Lumber are currently being met in a satisfactory fashion. The needs of Border Lumber appear to be a matter of preference. Further, the Protestants possess the necessary equipment, some of which is currently idle, to meet the needs of Border. In addition, both Protestants have indicated a strong desire to serve Border. It is uncontradicted in the record that but for their misapprehensions regarding the ownership of Border Lumber, they would have actively sought its business.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. Applicant is not fit to provide the services proposed in this application.

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4. Applicant has not demonstrated that there exists a public demand or need which existing carriers cannot meet.

5. Following hearing on the application and based upon the evidence in the record, the Commission concludes that public convenience and necessity do not require the granting of the application herein.

ORDER

NOW THEREFORE IT IS ORDERED that the Application in Docket No. T-9049 be DENIED.

Done and Dated this 21st day of August, 1987, by a vote of 5-0.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.