1976

Bowen Trucking, Inc., Dalbo, Inc., Northwest Carriers, Inc. , Philip W. Martin And D.E. Casada Construction v. Public Service Commission of Utah Frank S. Warner, Olof E. Zundel, And James N. Kimball, Commissioners of The] Public Service Commission of Utah, And Duane Hall Trucking, Inc : Brief of Respondent Duane Hall Trucking, Inc.

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, UTAH

BOWEN TRUCKING, INC., DALBO, INC., NORTHWEST CARRIERS, INC., PHILIP W. MARTIN and D.E. CASADA CONSTRUCTION, Plaintiffs-Appellants, vs. PUBLIC SERVICE COMMISSION OF UTAH, FRANK S. WARNER, OLOF E. ZUNDEL, and JAMES N. KIMBALL, Commissioners of the Public Service Commission of Utah, and DUANE HALL TRUCKING, INC., Defendants-Respondents.	)	Sup. Ct. No: 14533

BRIEF OF RESPONDENT DUANE HALL TRUCKING, INC.

TO HAVE THE REPORT AND ORDER DATED MARCH 3, 1976
OF THE PUBLIC SERVICE COMMISSION OF UTAH AFFIRMED

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TABLE OF CONTENTS

TABLE OF CONTENTS-Continued

IN THE SUPREME COURT OF THE STATE OF UTAH

BOWEN TRUCKING, INC., DALBO, INC., NORTHWEST CARRIERS, INC., PHILIP W. MARTIN AND D. E. CASADA CONSTRUCTION, Plaintiffs, vs. PUBLIC SERVICE COMMISSION OF UTAH, FRANK S. WARNER, OLOF E. ZUNDEL, and JAMES N. KIMBALL, Commissioners of the Public Service Commission of Utah, and DUANE HALL TRUCKING, INC., Defendants.	)	Case No. 14533

STATEMENT OF KIND OF CASE

This is an original action brought in this court in which the plaintiffs seek to reverse the order of the Public Service Commission of Utah, in the Matter of the Application of defendant Duane Hall Trucking, Inc. to acquire the operating authority of C & M Service, Inc., as set forth by Contract Carrier Permit No. 511, Case No. 6257.

DISPOSITION BY PUBLIC SERVICE COMMISSION OF UTAH

This case was originally heard on December 12, 1974. Based upon a Stipulation between counsel, the implication of which was not explained to Duane Hall, President of Duane Hall Trucking, Inc., plaintiff withdrew their opposition and on

January 6, 1975 the Public Service Commission issued Permit No. 557 which contained a restriction to service for and on behalf of Shell Oil Company only. (R. 133-134) Subsequently, Duane Hall Trucking, Inc. obtained new counsel and on June 13, 1975 filed a Petition for Rehearing. Various pleadings in support and opposing the Petition for Rehearing were also filed. On August 1, 1975 the Public Service Commission found that sufficient reason for rehearing had been made to appear but felt that they lacked jurisdiction to grant the petition for rehearing due to Section 54-7-15, Utah Code Annotated. (R. 184) On August 13, 1975 the Supreme Court of the State of Utah filed its decision in Case No. 13926, Mary A. Murphy, et al. vs. Public Service Commission of Utah, et al., reversing the previous order of the Commission in a Contract Carrier Permit Transfer proceeding. On September 9, 1975, defendant Duane Hall Trucking, Inc. filed a motion to reopen its proceeding on separate jurisdictional grounds. (R. 156) Again, after various memorandum from both sides, the Commission entered an Order granting the motion to reopen. (R. 184-185) After a full hearing on the transfer of authority to the applicant of B & M Service, Inc.'s full authority, the Commission entered an Order on March 3, 1976 granting to Duane Hall Trucking, Inc. Contract Carrier Permit No. 557 without the restriction previously imposed. (R. 218-220)

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the Report and Order of March 3, 1976 affirmed.

STATEMENT OF FACTS

Plaintiffs' Statement of Facts is mis-leading and inaccurate. It omits to include a number of very material and uncontroverted facts. For this reason, the defendant desires to make its own Statement of Facts covering the facts that are relevant and material to the issues in this appeal.

On September 18, 1974 Duane Hall Trucking, Inc. filed an application to acquire the full operating authority of B & M Service, Inc. with no restrictions or changes in the authority. (R. 110-118) The hearing on this matter was held January 6, 1975. The applicant was represented in this hearing by Mark K. Boyle, Esquire, who was also the attorney for B & M Service, Inc. In his uncontroverted affidavit, Duane Hall, the President of applicant, Duane Hall Trucking, Inc., set forth the factual background of the alleged stipulation which centered around limiting the application for authority to perform services for one shipper (Shell Oil Company) only. (R. 138)

On the morning of the hearing Mr. Boyle discussed the proposed stipulation with Mr. and Mrs. Hall. They both objected to the stipulation, stating that they could not accept anything less than the transfer of the full authority of B & M Service, Inc.

Duane Hall never conceded to a stipulation for less than the full authority in Mr. Boyle's office, at the hearing, or at any time. At the hearing Mr. Boyle apparently agreed to the stipulation, contrary to the instructions of Duane Hall. When Duane Hall received the written order with the limitation of authority he contacted his Vernal attorney, John Beaslin. Mr. Beaslin failed to inform Duane Hall of the twenty day limitation for petition for rehearing. On January 28, 1975, Duane Hall came to Salt Lake City to discuss the limitation of authority with Mr. Boyle. Mr. Boyle advised him that he was two days too late to file a Petition for Rehearing. Duane Hall then contacted Ronald E. Casper, Secretary of the Public Service Commission, where it was decided to order a transcript of the hearing to determine what the alleged stipulation actually covered. (R. 139)

Statements of counsel at the December 11, 1974 hearing indicate that the alleged stipulation was based on the erroneous assumption that the ruling of the Commission in the Pickering case id, was a final ruling, which was not the case. (R. 6) Duane Hall was never informed that the Pickering case was on appeal to the Supreme Court. (R. 146) Although Mr. Hall was at the hearing and personally voiced no objection to the stipulation, he thought that the stipulation meant they would be restricted to one type of contract and further thought that when Mr. Boyle objected to the words "or Shell Oil Company only"

(R. 5, Lines 13 and 24) that he was protected. (R. 145)

After Mr. Hall obtained a transcript of the hearing, he retained Keith E. Sohm, Esquire, to present the facts to the Commission and ask for a rehearing. The Petition for Rehearing was filed on June 13, 1975 and set forth the facts listed above. (R. 136) The thrust of the Petition for Rehearing was that Duane Hall Trucking, Inc. should be entitled to put on evidence and argument to support a transfer of the full authority which he had previously purchased and that this opportunity was denied him by a gross misunderstanding and completely contrary to his desires and his instructions to his own attorney. (R. 137) The five trucking companies who were competitors of B & M Service, Inc. and now competitors of Duane Hall Trucking, Inc. filed an objection to the Petition for Rehearing. (R. 141) After numerous pleadings were filed, on August 1, 1975, the Commission entered its Order denying the Petition for Rehearing. It is significant to note the language of the Order as follows:

> "The Commission is of the opinion that sufficient reason for rehearing has been made to appear. However Section 54-7-15, UCA, provides that applications for rehearing must be made prior to the effective date of the order or decision or within twenty days thereafter. The application in the present case was not within said time." (R. 154)

The Commission then concluded by denying the rehearing on the limited and technical basis of lack of jurisdiction for a timely rehearing.

On August 6, 1975, the Utah Supreme Court filed its Decision in Mary A. Murphy v. Public Service Commission of Utah, 539 P. 2d 367, clarifying the burden of proof in a transfer proceeding. Based upon this ruling, in addition to the previous pleadings before the Commission, a Motion to Reopen was filed September 9, 1975, under the jurisdictional basis of Rule 60 (b)(7), Utah Rules of Civil Procedure. (R. 156) Again, numerous memorandums were filed by the five trucking companies opposed to having a hearing on the merits. (R. 170) After considering the memorandums of law and the uncontroverted facts as set forth in the affidavit of Duane Hall concerning the alleged stipulation made against his will, by his former attorney, the Commission determined that it did have authority to reopen the matter and proceed with a full hearing under the provisions of Rule 60 (b)(7), Utah Rules of Civil Procedure, Rule 60 (b) having its counterpart in Section 21.6 of Rule 21 of the Commission's Rules of Practice and Procedure. (R. 184-185) The Commission's Order stated that this was to be done in order to prevent an "inequity which would result were we to fail to reopen this matter and hold a further hearing". (R 185)

After a full hearing on the transfer of the Contract Carrier Certificate, in which all parties participated, on March 3, 1976, the Public Service Commission entered its Report and Order granting the Applicant Duane Hall Trucking Inc. Contract Carrier Permit No. 557, which was the exact same authority

which previously was held by B & M Service, Inc. in Permit No. 511. (R. 218) In finding No. 3 of the Report and Order, the Commission stated that the alleged stipulation of limiting authority was based upon "the Commission's prior decision in the Murphy case", which was not correct. (R. 219) From its advantaged position of firsthand knowledge of the facts surrounding the alleged stipulation, the Commission unanimously recognized the inequality that would result without reopening the matter and having a full hearing on transferring the full authority to applicant.

ARGUMENT

POINT I

ON APPEAL THE FINDINGS AND REPORT OF THE COMMISSION ARE ENDOWED WITH THE PRESUMPTION OF VALIDITY AND CORRECTNESS AND WILL BE REVIEWED IN A LIGHT MOST FAVORABLE TO THEM.

The rule is well established in Utah that on appeal the Findings of Fact and Report of the Commission are presumed to be correct. This rule is set forth in Utah Gas Service Company v. Mountain Fuel Supply Company, 18 Utah 2d 310, 422 P. 2d 530, as follows:

> "When the Commission, in performing its duties has given consideration to pertinent facts and has made its findings and decision, they are endowed with a presumption of validity and correctness. In accordance with the recognized prerogatives of the trier of the facts, on appeal the evidence is viewed in the light most favorable to sustaining them; and the decision will not be reversed unless when

> the evidence is so viewed, there is no reasonable basis to support the Commission's action, so that it thus appears to be capricious and arbitrary."

Additional cases involving a review of the Public Service Commission orders being presumed to be correct, include the following: Utah Parks Company v. Kent Frost Canyonlands Tours, 19 Utah 2d 252, 430 P. 2d 171; Armored Motors Service v. Public Service Commission of Utah, 23 Utah 2d 418, 464 P. 2d 582; and Williams vs. Public Service Commission of Utah, 29 Utah 2d 9, 504 P. 2d 34.

This rule of review is based upon the sound reasoning "that some credit should be indulged in favor of the findings of the trial court because of the advantages peculiar to his position and immediate contact with the trial." Nokes v. Continental Mining & Milling Co., 6 Utah 2d 177, 308 P. 2d 954. Such findings are presumed to be correct and the burden is upon the appellant to show that they are in error. There is nothing in the record to indicate that the Commission misapplied any proven fact or made any findings against the weight of the evidence. The actions of the Commission in reopening this matter were based upon its view of the facts and its action was not arbitrary or capricious.

POINT II

IT WAS APPROPRIATE TO GRANT APPLICANT RELIEF UNDER RULE 60 (b)(7) UTAH RULES OF CIVIL PROCEDURE.

Under the facts as previously related herein, and presented to the Commission, the Commission was satisfied that Duane Hall was denied an effective opportunity to comply with Section 54-7-15, Utah Code Annotated, to request a rehearing within twenty days. After obtaining new counsel, and without mention of Rule 60 (b), applicant filed a Motion for Rehearing. Obviously impressed with the inequality of the situation, the Commission denied the Motion for Rehearing, stating that, "the Commission is of the opinion that significant reason for rehearing has been made to appear. However, Section 54-7-15, Utah Code Annotated, provides that application for rehearing must be made prior to the effective date of the Order or Decision or within twenty days thereafter. The application in the present case was not made in said time." (R. 154) Thus, on the limited grounds of this statute, the Commission correctly denied the right to a rehearing. Applicant chose not to appeal this decision within thirty days as specified in Section 54-7-16, Utah Code Annotated, because the decision was correct based on the narrow grounds on which it was presented and upon the narrow grounds upon which it was decided.

The question was confined to jurisdiction on the time limit for rehearing as reflected by the statement of the Commission in the Order. Thereafter, applicant petitioned the Commission for relief under Rule 60 (b) (7), Utah Rules of Civil Procedure. This was a separate remedy based upon the same grounds as the Motion for Rehearing and additional grounds. When presented with an additional jurisdictional basis under which to grant a full hearing into the matter, and with knowledge of the facts, the Commission unanimously granted the Order to Reopen.

Respondents agree with plaintiffs' characterization of the law that Rule 60 (b)(7) is not a substitute for the right to appeal. However, because the question of the applicability of Rule 60 (b)(7) had not been raised in the first Motion for Rehearing, an appeal would not have resolved the question which is now before the court, i.e., was there justification under Rule 60 (b) for reopening the case for further consideration. Even if an appeal had been taken, respondent would still be entitled to pursue his additional remedy under Rule 60 (b)(7).

Rule 60 (b) of the Utah Rules of Civil Procedure provides as follows:

> "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence,

surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4 (e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1),(2),(3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

It is respondent's position that the facts clearly justify relief under Sub-section (7) which allows relief for "any other reason justifying relief from the operation of the judgment."

Rule 60 (b)(7) has been construed by the Utah Supreme Court on several occasions. Most of the cases involve setting aside default judgments. One of the leading cases wherein the

court invokes Sub-section (7) of the Rule, is Dixon v. Dixon, 121 Utah 259, 240 P. 2d 1211. In that case the court held that a formal order signed and entered upon the erroneous assumption that it conformed to a direction of the court, is more than a mere inadvertence and can be set aside more than three months after its entry. The court in noting that it would work a "grave injustice to permit the order to stand" also noted that even in the absence of Rule 60 (b)(7), the court would have inherent power to set aside the formal order. This case is somewhat similar to the instant case in that here there was a mistaken assumption on the part of the Commission and the original attorneys involved as to the burden of proof in a transfer proceeding for a contract carrier permit and the effect of a stipulation.

Another case, the reasoning of which is in point, is Ney v. Harrison, 5 Utah 2d 217, 299 P. 2d 1114, where the court set aside a default judgment some eleven months after the date of judgment. The only grounds stated was that defendant was under the mistaken belief that she was fully protected under a divorce decree ordering her former husband to pay certain obligations. The court concluded that Rule 60 (b)(7) was intended to govern this type of situation, and pointed out the strong policy of the law to liberally construe the statutes and rules of procedure in favor of trial on the merits. The court

also recognized the latitude of discretion given the trial court in such matters and stated as follows:

> "The Utah decisions relied upon by plaintiff recognize the firmly established principle that it is largely within the discretion of the trial court whether a default should be relieved, which discretion will not be disturbed unless there is a patent abuse thereof."

The reasoning of Ney v. Harrison has application to the present case in that the Commission does have broad latitude of discretion in determining to reopen under Rule 60 (b)(7).

A case not involving Sub-section (7) of Rule 60 (b) but which strongly sets forth the policy of the law in granting relief from defaults the reasoning of which is analagous to the present case is Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P. 2d 951. In that case, the Supreme Court found an abuse of discretion and reversed the trial court for failing to grant relief. In speaking for a unanimous court, Justice Crockett wrote as follows:

> "It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case.

> For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside."

Warren v. Dixon Ranch Co., 123 Utah 416, 260 P. 2d 741 involves a situation where the court refused to set aside a default judgment. The case simply stands for the proposition that the Supreme Court will not reverse a decision of the trial court unless an abuse of discretion is clearly shown. Although in this case (which involved an entirely different fact situation) the Supreme Court refused to substitute its judgment for that of the trial court, the court commented that

> "Discretion must be exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that the party may have a hearing."

As to the matter of discretion, the court also stated as follows:

> "The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense. Equity considers factors which may be irrelevant in actions at law, such as the unfairness of a party's conduct, his delay in bringing or continuing the action, the hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown."

It should be pointed out that the order which plaintiffs are complaining of merely gave respondent defendant the right to put on his case and attempt to justify his right to acquire the complete authority he contracted to purchase. After being duly noticed, a hearing into the matter was conducted on February 5, 1976 at which all five plaintiffs were represented and took part. (R. 27) It was only after a full hearing into the issues that defendant was awarded his full authority.

The Public Service Commission is charged with "the prerogative and the responsibility of deciding questions relating to the regulation of carriers within this state for the purpose of seeing that the public receives the most efficient and economical service possible", Utah Parks Co. v. Kent Frost Canyonland Tours, 19 Utah 2d 252, 430 P. 2d 171. In carrying out this responsibility the Supreme Court will not question the wisdom of the decision made by the Commission. Rather, the Supreme Court is concerned with whether or not all parties are treated fairly. In Utah Gas Service Co. v. Mountain Fuel Supply Company, 18 Utah 2d 310, 422 P. 2d 530, the court stated as follows:

> "In proceedings before an administrative agency what a party is entitled to is to be treated with fairness: to have the opportunity to prepare and present his case and his contentions with respect thereo; and to have an adjudication in conformity with the law; and the decisions of the Commission will not be overturned because of irregularities of

> procedure from which there is no substantial prejudice or adverse effect. The matters plaintiff complains of are not of any such consequence. It in fact received notice, filed its protest and counter-petition; and was in no way limited or prevented from full participation in the proceedings."

The plaintiffs cannot claim that they were prejudiced or in any way prohibited from presenting their side of the issue to the Commission. In proceedings before the Public Service Commission the court has also stated in Armored Motors Service v. Public Service Commission of Utah, 23 Utah 2d 418, 464 P. 2d 582, that:

> "What a party is entitled to is a full and fair opportunity to present his evidence and contentions on the issues; and to have an adequate consideration and a correct determination of them. But if the findings and order are correct it is not his prerogative to dictate or to complain about internal method of procedure by which the tribunal arrives at its findings and conclusions."

This opportunity was presented fully to the plaintiffs.

Rule 60 (b) of the Utah Rules of Civil Procedure, is patterned after Rule 60 (b) of the Federal Rules of Civil Procedure. Sub-section (7) of the Utah Rule is identical to Sub-section (6) of the Federal Rule, which provides relief for "any other reason justifying relief from the operation of the judgment." Under the Federal Rule motions under Sub-sections (1), (2) and (3) can be made within one year which differs from the three months limitation under the Utah rule. There are

numerous federal cases interpreting Rule 60 (b)(6) of the Federal Rules. Some of these case may be of help to the court here.

The underlying principle of Federal Rule 60 (b)(6) is explained by Justice Black in the leading case of Klapprott v. United States, 335 U.S. 601, 69 S.CT. 384, 93 L.Ed. 266, wherein the plaintiff was granted relief from a default judgment of denaturalization after the judgment had been entered for four years. There it was stated:

> "In simple English the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

In interpreting the Klapprott and other Federal cases, Moore in his work on Federal Practice at Section 60.27 (2) sums up the effect of sub-section (6) as follows:

> "Seen in perspective, clause (6) is clearly a residual clause to cover unforseen contingencies; intended to be a means for accomplishing justice in, what may be termed generally, exceptional situations; and so confined, does not put the finality of judgments generally at large."

If there were ever a case where Rule 60 (b)(7) ought and should be properly invoked, it is this case.

CONCLUSION

Based upon all of the arguments and authorities as cited herein, defendants respectfully request the court to

affirm the judgment and order of the Public Service Commission of Utah.

Respectfully submitted,

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