

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 Appellant

Utah Supreme Court

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-IN THE SUPREME COURT OF THE STATE OF UTAH-

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BOWEN TRUCKING, INC., DALBO, INC., ]  
NORTHWEST CARRIERS, INC., PHILIP W. ]  
MARTIN AND D.E. CASADA CONSTRUCTION, ]

Plaintiffs, ]

vs. ]

CASE NO. 14533

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. ]

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NATURE OF THE CASE

This is an original action brought in this Court to review orders 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 B & M Service, Inc., as evidenced by Contract Carrier Permit No. 511, Case No. 6257.

DISPOSITION BY PUBLIC SERVICE COMMISSION OF UTAH

This case was originally heard by the Public Service Commission of Utah on the 12th day of December, 1974, and on the 6th day of January, 1975, the Commission issued Permit No. 557 restricted to service for and on behalf of Shell Oil Company (R. 133-134). On June 13, 1975, 178

days after the decision of the Commission, and 159 days after expiration of the statutorily required filing date, applicant filed a Petition for Rehearing. Protestants (Plaintiffs herein) filed a reply and applicant and protestants filed other pleadings. Ultimately, on the 1st day of August, 1975, the Commission denied the Petition for lack of jurisdiction because of the failure of applicant to file said petition within the time required by 54-7-15 Utah Code Annotated, 1953 (as amended). On September 9, 1975, 39 days after the order denying the Petition for Rehearing, applicant filed a Motion to Reopen, to which Protestants filed a Motion to Strike and Memorandum in Support Thereof. Applicant then filed its Answer to Motion to Strike and Memorandum in Support of Reopening. On the 14th day of January, 1976, the Commission issued its order reopening the case and on the 5th day of February, held a hearing and issued its Report and Order dated March 3, 1976, granting to Defendant, Duane Hall Trucking, Inc., Contract Carrier Permit No. 557, unrestricted as to shipper (R. 218-220).

#### RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the Report and Order dated March 3, 1976, set aside.

#### STATEMENT OF FACTS

On September 18, 1974, Duane Hall Trucking, Inc., filed an application to acquire the operating authority of B

& M Service, Inc., (R. 110-118). That application was set for hearing on December 11, 1974. At the time of the hearing, applicant, counsel for applicant, and counsel for protestants entered into a stipulation that any authority which would be issued pursuant to that proceeding would consist of a Contract Carrier Permit limited to service for and on behalf of Shell Oil Company. The Commission accepted that stipulation (R. 5-6). Based upon that stipulation, the protestants withdrew their opposition to the application. On January 6, 1975, the Public Service Commission issued its Report and Order in Case No. 7062, cancelling the authority previously held by B & M Service, Inc., and granting to Duane Hall Trucking, Inc., a permit in accordance with the stipulation entered into on the date of the hearing. That order became effective January 6, 1975 (R. 134).

On June 13, 1975, 178 days after the effective date of the Order, applicant filed its Petition for Rehearing (R. 136), protestants filed their reply to the document entitled, "Additional Ground for Rehearing and Answer to Reply" (R. 145). On July 10, 1975, protestants filed a reply to said document (R. 148), and applicant filed an additional document entitled: "Supplemental Information, Answering the Reply of Protestants" (R. 150). On the 1st day of August, 1975, the Commission entered its Order

denying the Petition for Rehearing, and found that the Commission was without jurisdiction to grant applicant's Petition for Rehearing pursuant to 54-7-15 Utah Code Annotated, 1953 (as amended) (R. 154).

On September 9, 1975, 39 days after the Commission's Order denying the Petition for Rehearing, and without taking an appeal to the Supreme Court of the State of Utah, within thirty days as required by 54-7-16 Utah Code Annotated, 1953 (as amended), applicant filed its Motion to Reopen (R. 156). On September 17, 1975, Protestants filed their Motion to Strike the applicant's Motion to Reopen and Memorandum in Support Thereof (R. 169), and on October 3, 1975, the applicant filed its Answer to said Motion. On January 14, 1976, the Commission issued its Order granting the Motion to Reopen (R. 184). The Commission based its Order on Rule 60 (b)(7) of the Utah Rules of Civil Procedure, stating that said rule is an "escape valve" to prevent inequity. On January 5, 1976, the Commission held a hearing and on the 3rd day of March, 1976, issued its Report and Order granting the applicant, Duane Hall Trucking, Inc., Contract Carrier Permit No. 557, as follows:

" \* \* \* to operate as a contract motor carrier transporting oil based muds in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields or within areas being prospected by oil drilling



operations, over irregular routes, to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk in tank vehicles. \* \* \* " (R. 219).

Subsequent to that order, and on March 9, 1976, Protestants timely filed their Petition for Reconsideration and Rehearing (R. 223). As of this date, the Commission has not acted upon that Order. However, pursuant to 54-7-15, Utah Code Annotated, 1953 (as amended) protestants petitioned for Writ of Certiorari on the 29th day of March, 1976.

#### ARGUMENT

#### POINT I

THE COMMISSION'S ORDER OF JANUARY 6, 1975, WAS ADMINISTRATIVELY FINAL NINETEEN DAYS AFTER ITS EFFECTIVE DATE AND ANY ACTION BY THE COMMISSION SUBSEQUENT TO THAT DATE WAS WITHOUT JURISDICTION.

The Public Service Commission of Utah issued its initial decision in this matter on January 6, 1975. The Order stated that it would become effective on that date. Section 54-7-15, Utah Code Annotated, 1953 (as amended) provides:

" \* \* \* No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made application to the commission for a rehearing before the effective date of such order or decision, or, if such order or decision becomes effective prior to twenty days after its date, before twenty days after the order or decision. \* \* \* " (Emphasis added)

The record demonstrates that in fact no Petition for Reconsideration was filed before twenty days after the

Commission's order as required by statute, and in fact, it was June 13, 1975, approximately five months after the effective date of the order, that a Petition for Reconsideration was filed.

The Public Service Commission of Utah on the 1st day of August, 1975, issued its Order denying the Petition for Rehearing for lack of jurisdiction based upon 54-7-15, Utah Code Annotated, 1953 (as amended). That decision was correct. Pursuant to 54-7-15, Utah Code Annotated, 1953 (as amended), a Petition for Rehearing must be filed before the effective date of the Commission's order or decision and if the order or decision becomes effective prior to twenty days, said petition must be filed before twenty days after the order or decision.

Defendant, Duane Hall Trucking, Inc., admits that no written Petition for Rehearing was filed with the Commission prior to the petition dated June 13, 1974 (R. 145). However, Defendant, Duane Hall Trucking, Inc., alleges that it made verbal objections to the Commission staff on January 28, 1975, and that this verbal complaint should be treated as a Petition for Rehearing. The Order of the Commission was issued on the 6th day of January, 1975, and became effective on said date. In order for a Petition for Rehearing to be considered timely filed, the same must have been filed with the Commission not later than the 25th day of January, 1975, which would be the day before twenty

days after the order or decision. In Barton Truck Line, Inc. vs. Public Service Commission of Utah, et. al., Case No. 9841 (Motion to Dismiss granted August 14, 1963), the Supreme Court of the State of Utah had before it the issue of the timely filing of a Petition for Reconsideration. Barton did not file its Petition for Reconsideration prior to twenty days after the effective date of the Order and the Commission denied the Petition for Reconsideration. The Plaintiff, Barton, filed a Petition for Writ of Certiorari which was granted and filed its briefs. Defendants moved to dismiss the appeal because the Petition for Reconsideration was not filed within the time frame provided by the statutes. The Court, without comment, granted the motion to dismiss.

#### POINT II

DEFENDANT, DUANE HALL TRUCKING, INC., TOTALLY FAILED TO COMPLY WITH THE REQUIREMENTS OR AVAIL ITSELF OF THE REMEDIES PROVIDED BY STATUTE.

Notwithstanding its failure to timely file a Petition for Reconsideration, Defendant, Duane Hall Trucking, Inc., had another statutory remedy which it failed to pursue in that it could have appealed the order denying the Petition for Rehearing. Section 54-7-16, Utah Code Annotated, 1953 (as amended) provides:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on rehearing, the applicant or any party to the proceeding deeming himself aggrieved by such order or decision rendered upon rehearing may apply to the Supreme Court for a writ of certiorari for the purpose of having the lawfulness of the order or decision, or the order or decision on the rehearing inquired into and determined."

Defendant, Duane Hall Trucking, Inc., did not avail itself of this remedy and did not file any Petition for Writ of Certiorari within thirty days after the order denying the Petition for Rehearing.

The Supreme Court of the State of Utah has uniformly held that failure to avail oneself of statutory remedies will preclude a party from asserting any further claim. Recently, in the case of Provo City vs. Lambert, 545 P.2d 185 (January 7, 1976), the Supreme Court of the State of Utah had before it a case where Plaintiff had failed to pursue its statutory right of review. The Supreme Court held:

" \* \* \* We have carefully considered the contentions of the parties and we can only conclude that one who is aggrieved with the decision of the state engineer must comply with the provisions of Sections 73-3-14 and 73-3-15 in pursuing a right of review. \* \* \* The right of appeal as provided for in the statutes above referred to is the only method provided for by the legislature for a review. We are of the opinion that Provo City in filing its complaint more than 23 years after the decision of the state engineer comes too late. \* \* \* "

Also, in the case of George O. Smith, deceased and Lila J. Smith, widow, vs. Industrial Commission of the State, Weyher Construction Company and the State Insurance Fund, 549 P.2d 499 (April 28, 1976), the Court found that failure to follow statutory remedies precluded plaintiff from asserting any further claim.

The Commission issued its initial order January 6, 1975. For Duane Hall Trucking, Inc. to satisfy the juris-

dictional requirement of 54-7-15 Utah Code Annotated, 1953 (as amended), it was required to file a petition for reconsideration by January 25, 1975. It did not satisfy this requirement. In accordance with the decisions interpreting this provision, the order of the Public Service Commission was then administratively and judicially final. Defendant alleges that it did not know of this requirement until approximately January 28, 1975. Assuming this is the first day that he became aware of the requirement, it was then approximately six months until a Petition for Rehearing was filed, which was denied August 1, 1975.

On August 6, 1975, the Supreme Court of Utah issued its decision in Mary A. Murphy vs. Public Service Commission of Utah, 539 P.2d 367 (1975) clarifying the burden of proof in a transfer proceeding. This is the decision that Duane Hall Trucking, Inc. relies on to support the need to reopen this proceeding. The Defendant, Duane Hall Trucking, Inc., and his counsel, Keith Sohm, knew of that decision approximately two weeks after its issuance (R. 182) well within the time frame allowed by 54-7-16 Utah Code Annotated, 1953 (as amended) to appeal the denial of the Petition for Rehearing. Duane Hall Trucking, Inc., and its counsel knew of all the facts alleged in its subsequent Motion to Reopen by approximately August 20th; still it failed to avail itself of the statutory remedies and waited until after the time for appeal had expired to attempt to reopen this matter. Duane Hall Trucking, Inc. and its counsel completely ignored all statutory requirements and yet claim in its Motion to Reopen that it was prejudiced by the initial decision of January 6, 1975.

POINT III

RULE 60 (b)(7) UTAH RULES OF CIVIL PROCEDURE IS NOT APPLICABLE AND THE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY AND CONTRARY TO FACT AND LAW WHEN IT REOPENED THIS PROCEEDING.

Notwithstanding its failure to avail itself of its statutory remedies, on September 9, 1975, 7 months after the initial decision and 39 days after the denial of the Petition for Rehearing, applicant filed a Motion to Reopen proceedings. The applicant took a 'shotgun' type approach and alleged several reasons, among them Rule 60 of the Utah Rules of Civil Procedure. The Commission in granting the Motion to Reopen stated:

"The Commission is persuaded that as a result of the erroneous assumption on the part of the Commission and all parties concerning the status of the law regarding transfer of Contract Carrier Permits an inequity has resulted in the present proceeding." (R. 184).

The Commission went on to state:

"While we are not in favor or (sic) protracted proceedings before this Commission, particularly in the case such as this where we have entered our decision and denied a Petition for Rehearing, we do believe that Rule 60 (b)(7) was intended as an "escape valve" to prevent the type of inequity which would result were we to fail to reopen this matter and hold a further hearing." (R. 184).

The Defendant, Duane Hall Trucking, Inc. based its motion to reopen on the decision in the case of Mary A. Murphy vs. Public Service Commission of Utah, et. al., 539 P.2d 367 (1975) which it had knowledge of prior to the expiration of time for appeal and also on the allegation that the

Defendant, Duane Hall Trucking, Inc., had not received that for which it had bargained.

The latter allegation was directly refuted by Defendant's witness, Duane Hall. When the witness was questioned as to the value of the permit as restricted, he testified that it was worth the \$40,000.00 he paid for it, "as it stands now, yes." (R. 88). This demonstrates that the Defendant, Duane Hall Trucking, Inc., had received in the initial order dated January 6, 1975, what he bargained for and expected. Where is the inequity?

It is respectfully submitted that the Commission's application of Rule 60 (b)(7) based upon these circumstances is not in accord with the judicial decisions applying this provision. The Utah Supreme Court has held that Rule 60 (b) will not substitute for appeal except in very extraordinary circumstances. In Anderson vs. Anderson, 3 U.2d 277, 282 P.2d 845 (1955) the Court held that Rule 60 (b)(1) authorizing the Court to relieve a party from final judgment does not apply where the notice of appeal regarding Rule 73 of the Utah Rules of Civil Procedure was not timely filed. The Court stated that the appeal was not taken in time, and that failure to do so is jurisdictional requiring dismissal of appeal.

In Kettner vs. Snow, 13 U.2d 382, 375 P.2d 28 (1962) this Court found that Rule 60 (b) is not a device to be used to revive the time for taking required steps in a



legal proceeding after the statutory time for doing so has elapsed. If a party could do so, the rules of procedure would be rendered ineffectual.

In addition to the Utah cases there are many Federal cases interpreting Rule 60 (b) of the Federal Rules of Procedure which rule, in substance, is identical to Rule 60 (b) of the Utah Rules of Civil Procedure.

A case very similar to the present proceeding is Annat vs. United States, 277 F.2d 554 (5th Cir. 1960). In that case, two land owners were sued in a condemnation action. Judgment was taken against both and only one appealed. The judgment as to the party that appealed was reversed and the other party moved to set aside its judgment based upon Rule 60, much the same as Defendant Duane Hall, sought to have this matter reopened because of the decision in Murphy vs. Public Service Commission of Utah, supra. The 5th Circuit in sustaining the trial court found the following:

"Relief under Rule 60 (b) was properly denied. The judgment, insofar as it affected Mrs. Annat's rights was not a void judgment, nor is there any other valid reason justifying relief upon the judgment. Mrs. Annat's counsel, as we have already observed, were fully cognizant of the legal question involved in the adoption by the Court of Petitioner's Exhibit 1. The ruling of the Court in adopting that map as fixing locations, boundaries, and areas become the law of the case and since Mrs. Annat did not appeal, it remained the law of the case so far as she is concerned, even though as was determined in the Paradise Prairie Land case, the judgment was erroneous. However,



it is not void and not subject to being vacated under Rule 60 (b)(4). The fact that the judgment was erroneous does not constitute any other reason justifying relief. The remedy was by appeal."

The Court applied the rationale of Ackermann vs. United States, 340 U.S. 193, 71 S. Ct. 209, 95 L.Ed. 207, and stated at 277 F.2d 559:

"There Ackermann and his wife, and his cousin, Max Keilbar, had been defendants in a denaturalization proceeding and judgments were entered cancelling their citizenship. From this judgment, Keilbar appealed and, on stipulation of the United States there was a reversal and the complaint as to Keilbar was dismissed. The Ackermann's did not appeal. Thereafter, the Ackermann's sought to vacate the judgment under Rule 60 (b). The District Court denied relief and this Court affirmed. \* \* \* The Supreme Court in affirming said, "'Petitioner made a considered choice not to appeal \* \* \* His choice was a risk but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar Case \* \* \*. There must be an end to litigation someday, and free, calculated and deliberate choices are not to be relieved from.'"

It is obvious from the decision of the Supreme Court of the United States that a subsequent decision in the Murphy Case may not be a basis to reopen a final judgment or order under Rule 60 (b). This view is further sustained in the case of Collins vs. the City of Wichita, Kansas, 254 F.2d 837 (10th Cir. 1958). This case also involved a condemnation proceeding where one land owner appealed and others did not. Those that did not appeal sought to set aside the judgment based upon Rule 60. The Court held that:

"Litigation must end sometime, and the fact that a Court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the Court's view of the law after its entry, does not justify setting it aside. Sunal vs. Large, 382 U.S. 174, 67 S.Ct. 158, 891 L.Ed. 1982, Simmons Co. vs. Grier Bros. Co. 258 U.S. 82, 42 S.Ct. 146, 66 L.Ed. 457; Elgin National Watch Company vs. Barrett, 5th Circuit, 213 F. 2d 776; Berryhill vs. United States 6th circuit, 199 F. 2d 217, United States vs. Kunz, 2nd Circuit, 163 F. 2d 344." (Emphasis added).

In the case of Loucke vs. United States, 21 F.R.D. 305 (1957), the Court considered the question of whether a change in the law would constitute grounds to reopen under Rule 60 (b). The Court found:

"Moved by the foregoing consideration, the Courts have enunciated the dual proposition that Rule 60 (b) (6) is not a substitute for appeal and that resort to the Rule in order to obtain relief from a judgment is not justified merely because the judgment is erroneous or because the decisional law has been changed by a subsequent ruling. Ackermann vs. United States, 1950, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207; Elgin National Watch Company vs. Barrett, 5 Cir., 1954, 213 F.2d 776; Berryhill vs. United States, 6 Cir., 1952, 199 F. 2d 217. " (Emphasis added)

In addition, in the case of Wagner vs. United States, 316 F. 2d 871 (1963), the 2nd Circuit held that:

"[2] The catch-all clause of Rule 60 (b)(6), authorizing the court to relieve a party from a judgment for "any other reason justifying relief," cannot be read to encompass a claim of error for which appeal is the proper remedy; such a reading would emasculate the provisions of Rule 73(a), <sup>now</sup> codified in 28 U.S.C. § 2107, which strictly limit the time for appeal and which are reinforced by the last clause of Rule 77(d). Elgin National Watch Company vs. Barrett, 213 F.2d 776, 779-780 (5 Cir. 1954).

It is apparent from the cases cited that a change in the status of the law will not support a reopening of the case where available statutory remedies were not pursued. See also Rinieri vs. News Syndicate Company, 385 F. 2d 818 (2nd Cir. 1967); Lubben vs. Selective Service System Local Board No. 27, 453 F.2d 645 (1972) and cases cited therein.

If the Court were to adopt the Commission's view every contract carrier transfer proceeding prior to August 6, 1975, the date of the Murphy decision, would be subject to review by the simple expedient of a Motion to Reopen under Rule 60 (b). It is obvious that such a situation would be untenable, impractical and a total violation of present standards of finality.

The Motion to Reopen constituted a stray pleading, the filing of which was procedurally unauthorized and consideration of the motion by the Commission was without jurisdictional basis. The Supreme Court has held that once it has dismissed an appeal because it has no jurisdiction after the time for appeal has expired that it is powerless to reinstate that appeal. Holbrook vs. Hodson, 24 U. 2d 120, 466 P.2d 843 (1970). In the instant proceeding the Public Service Commission denied the Petition for Rehearing for lack of jurisdiction and then, contrary to existing statutes and case law, reopened this proceeding. This procedure is clearly contrary to the Rules of Civil Procedure, and applicable statutes governing the judicial review of administrative proceedings.

## CONCLUSION

By Order, dated January 6, 1975, the Public Service Commission of Utah cancelled the authority held by B & M Service, Inc., and issued to Duane Hall Trucking, Inc., pursuant to stipulation, a permit to provide a transportation service for and on behalf of Shell Oil Company. The Defendant did not petition for rehearing within the time allowed by statute and when it did file its petition, seven months after the order, it was denied for lack of jurisdiction. The Defendant, Duane Hall, did not attempt to appeal that order and after the time for appeal had expired, filed a Motion to Reopen. The Commission in granting that Motion acted arbitrarily, capriciously and without basis in fact or law in reopening the proceeding. In addition, the Commission acted arbitrarily and capriciously in expanding the permit issued to Duane Hall based upon the previously cancelled authority of B & M Service, Inc.

The Defendant, Duane Hall Trucking, Inc., and his counsel completely ignored all the statutory requirements relating to proceedings before the Public Service Commission of Utah. They then sought to be relieved of their decision to ignore the requirements by filing a Motion to Reopen. The Commission acted arbitrarily, capriciously, and without basis in law or fact in perpetuating and condoning the complete disregard that the Defendant, Duane Hall Trucking, Inc., and its counsel have shown for the statutory requirements.

If the decision of the Commission is allowed to stand, it will completely emasculate the statutes and rules of the Commission and any application, past, present, or future, would be subject to the arbitrary and capricious whim of the Commission. The statutes were designed to bring proceedings to an end and the cases have supported that intent. Failure of this court to set aside the Commission's order of March 3, 1976, will set a precedent in this state that allows the Commission to completely ignore the statutes by which it exists.

It is, therefore, respectfully submitted that the Commission's order of March 3, 1976, be set aside.

Respectfully submitted, .

*William S. Richards*

*D. Michael Jorgensen*

William S. Richards

D. Michael Jorgensen

NELSON, HARDING, RICHARDS,  
LEONARD & TATE  
Attorneys for Plaintiffs  
1515 Walker Bank Building  
Post Office Box 2465  
Salt Lake City, Utah 84110