

1954

Provo Transfer & Storage Co. v. Public Service Commission of Utah et al : Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

PROVO TRANSFER & STORAGE
CO.,

Petitioner,

— vs. —

PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT,
DONALD HACKING, and
STEWART M. HANSON, its
Commissioners,

Defendants.

No. 8168

DEC 3 1954

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

STATEMENT OF FACTS

The Public Service Commission of Utah, herein referred to as the "Commission" issued its "Order to Appear and Show Cause" directed to Provo Transfer & Storage Co. requiring it to show cause why the operating authority heretofore issued to it should not be revoked, suspended, or such other penalties imposed as are provided by law. (R. 1)

At that time Provo Transfer held Certificate No. 1049 issued to it by the Commission authorizing it to operate as a common carrier by motor vehicle of commodities generally within Provo City and a 15 mile radius thereof. This Certificate No. 1049 was issued June 22, 1953 (R. 28 - 31), signed by all three Commissioners and proper tariffs and insurance had been filed with the Commission and operations continuously conducted.

On Feb. 1, 1954 the Commission issued its Report and Order (R. 8 - 21) in Case No. 3945 after hearing evidence on the investigation, and made rather extended findings wherein the history of the carrier was reviewed and certain "Irregularities and violations of the law" concluded. These latter were primarily based upon a premise since determined by your Court to be false, namely that Wallace A. Peterson, d/b/a Wally's Motor Line had no authority to serve between Salt Lake City and Provo, and that hence it could not interchange traffic at Provo. Then the Commission ordered that the Certificate of Provo Transfer be "cancelled and annulled" effective February 1, 1954, the date of the Order.

A petition for Rehearing was duly filed (R. 23) and denied March 1, 1954 (R. 25). From this denial the present appeal to your court is taken. More detailed reference to particular facts will be stated in the argument.

STATEMENT OF POINTS

POINT ONE

THAT THE REPORT AND ORDER OF THE COMMISSION, TOGETHER WITH ITS ORDER DENYING THE PETITION FOR REHEARING ARE CONTRARY TO LAW, AND ARE IN EXCESS OF THE AUTHORITY OF THE PUBLIC SERVICE COMMISSION OF UTAH.

POINT TWO

THAT THE REPORT AND ORDER IS CONTRARY TO THE EVIDENCE ADDUCED AT THE HEARING AND VIOLATES THE CONSTITUTION OF THE STATE OF UTAH AND THE LAW AND ESTABLISHED PROCEDURE RELATING TO SAID MATTERS.

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POINT FOUR

THAT THE REPORT AND ORDER DENY TO CARRIERS AND THE PUBLIC THE RIGHT OF INTERCHANGE OF FREIGHT AS REQUIRED BY THE STATUTES AND CONSTITUTION OF UTAH.

POINT FIVE

THAT THE REPORT AND ORDER IS NOT SUPPORTED BY COMPETENT EVIDENCE.

POINT SIX

THAT THE REPORT AND ORDER IS ARBITRARY AND CAPRICIOUS.

ARGUMENT

POINT ONE

THAT THE REPORT AND ORDER OF THE COMMISSION, TOGETHER WITH ITS ORDER DENYING THE PETITION FOR REHEARING ARE CONTRARY TO LAW, AND ARE IN EXCESS OF THE AUTHORITY OF THE PUBLIC SERVICE COMMISSION OF UTAH.

POINT TWO

THAT THE REPORT AND ORDER IS CONTRARY TO THE EVIDENCE ADDUCED AT THE HEARING AND VIOLATES THE CONSTITUTION OF THE STATE OF UTAH AND THE LAW AND ESTABLISHED PROCEDURE RELATING TO SAID MATTERS.

This proceeding was initiated by an Order to Appear and Show Cause which required production of all books and records and to show cause why its operating authority should not be revoked, suspended or other penalties imposed should it appear that Provo Transfer "is not operating in accordance with its operating authority and the laws of the State of Utah and the rules of the Commission". No specification of charges is made but a grand "fishing expedition" was initiated by the Commission.

We recognize the powers and duties of the Commission under Section 54-6-4, U.C.A. 1953 to "super-vise and regulate all common motor carriers" and Section 54-6-20 granting it the power "for good cause, and after notice and hearing (to) suspend, alter, amend or revoke any certificate, permit or license issued by it hereunder." However, we do not acknowledge that

such is an arbitrary, unrestricted power vested in the hands of the three Commissioners.

The Utah Court has considered Section 54-6-20 in the case of Fuller Toponce Trucking Co. v. Public Service Commission, 99 Utah 28; 96 Pac. (2d) 722. That was an application for a certificate of convenience and necessity wherein a petition for rehearing had been duly filed, but the Commission delayed more than twenty days after completion of the rehearing before issuing its order revoking the certificate and granting a new one. It was held that such did not deprive the Commission of its jurisdiction and that the Commission still had authority under due process of law to modify the original order by which a certificate had been authorized in favor of the applicant. Obviously an entirely different situation existed there as the matter had been heard on an application for a public convenience and necessity certificate, the hearing of the matter had been had, a rehearing requested and granted and the rehearing conducted and there was merely a delay in the rendition of the decision that had been taken under advisement by the Commission.

If Section 54-6-20, which authorizes the revocation of certificates, permits or licenses, were to be construed as a broad grant of discretionary arbitrary power, no security of operation could be had by any motor carrier and each would be subject to the whim of succeeding members of the Public Service Commission. We submit that such is not the intent or pur-

pose of the law and that due process and orderly procedure require that such power be exercised only in the event of a substantial change in circumstances or wilful and flagrant violation of the laws of the state or the rules of the Commission. In other words, "for good cause" is inherent in a statute of this nature. To hold otherwise would obviate all constitutional guarantees of due process.

An administrative body such as the Public Service Commission cannot be a law unto itself in all things and arbitrarily take from a carrier its certificate, as a public utility has a substantial invested interest in the operations and should not without due process of law be deprived of its valuable property right without just and substantial cause being shown.

We call to your attention the fact that Certificate No. 1049 had been duly issued, was identical with the certificate of the transferror, due notice to the public and all competing carriers had been given and no appeal had ever been taken from the Order. No abandonment of said rights was asserted, rather the Commission seems to criticise and revoke upon the basis of too active service to the public and other carriers.

Let us look at the reasons set forth by the Commission for this revocation of authority:

(a) They base the Order primarily upon a historical background (R. 14-17) wherein they review a series of six Certificates of Convenience and Necessity issued by the Commission in succession between 1946 and 1953 covering succeeding operators in the Provo

area. All had Provo City and a 15 mile radial area duly authorized. The first was limited to service for retail establishments. In 1950 the Commisison issued its Certificate No. 919 to Donald Ellison & John A. Ellison covering commodities generally within Provo City and the 15 mile radial area. This authority was reissued on transfers until finally Provo Transfer became the holder under its present Certificate No. 1049. At each step the Commission had before it an application specifying the scope of authority and each time issued its Order and Certificate reaffirming the commodity and area descriptions and each time due notice was published as prescribed by the Commission's own rules. Now they say in essence that they could not do just what they had approved in this case and many other similar transfer of authority matters and thus they will now just cancel everything granted to this carrier.

(b) The Commission found that Provo Transfer had interlined or interchanged freight with Wally's Motor Line at Provo and such was illegal because Wally's Motor Line had no authority to operate between Salt Lake City and Provo, Utah. (R. 10, 11, 18 & 19). We wish to call the attention of the court to its own decision in the case of Peterson v. Public Service Commission of Utah, 266 Pac. (2d) 497 which was decided on January 29, 1954, two days prior to the Report and Order in this case, wherein your Court held that Peterson did have authority under his Certificate 992 to transport commodities between Salt Lake City and

Provo. Apparently the Commission in anger at the decision of your Court decided to punish someone and took the steps of cancelling the authority of Provo Transfer as a means of retribution.

POINT THREE

THAT THE REPORT AND ORDER IS PREDICATED UPON FACTS NOT SUPPORTED BY THE EVIDENCE AND IS SUBSEQUENT AND CONTRARY TO THE DECISION ISSUED BY THE SUPREME COURT OF THE STATE OF UTAH IN THE CASE OF WALLACE A. PETERSON, d/b/a WALLY'S MOTOR LINE, VS. PUBLIC SERVICE COMMISSION OF UTAH, ET AL. 266 Pac. (2d) 497.

POINT FOUR

THAT THE REPORT AND ORDER DENY TO CARRIERS AND THE PUBLIC THE RIGHT OF INTERCHANGE OF FREIGHT AS REQUIRED BY THE STATUTES AND CONSTITUTION OF UTAH.

The Commission found the facts to be that the petitioner is a Utah corporation and that after issuance of its certificate, its principal stock holder, Miller negotiated with Mr. Clifford W. Bailey, Mr. Wallace A. Peterson and Mr. Clem Tucker for sale of all of the corporation stock and that such negotiations were completed in the office of an attorney in Provo and thereupon Mr. Clifford W. Bailey and Mr. Clem Tucker in cooperation with Mr. Peterson undertook management of the corporate affairs, assuming that they had complied with all necessary requirements. However, they had neglected to file Oaths of Office and complete the transfer of the stock, and just prior to the hearing on the Order to Show Cause it was discovered that

such corporate niceties had not been conformed to and though de facto officers had been conducting the operations, technically they had not fully qualified to perform such official acts relative to the corporation. Prior to the time of the Order to Show Cause the interest which Wallace A. Peterson had attempted to acquire in the corporation was transferred from him to his wife, Helen Peterson, and prior to the hearing the stock certificates were duly issued and delivered and the Oaths of Office filed, and all corporate procedures fully complied with by the officers and stockholders. The Commission reads some sinister meaning into the fact that these parties, wholly uninitiated in the procedures of corporate practice, and feeling that their counsel in Provo had completed the transaction, nevertheless carried on the corporate affairs in the same manner as they would have done had they actually filed their Oaths of Office as prescribed by law. No difference in procedure is found by the Commission by reason of this failure to comply with the corporate steps, but nevertheless such is used as a primary ground for cancellation of the operating authority.

It is submitted that one of the principles of an order to show cause wherein a carrier or individual presents itself before the administrative body is that such carrier be afforded the opportunity to show that it has rectified any defects theretofore existing and has complied with the rules and regulations material to the situation at hand. These individuals first became aware of the deficiency in the corporate re-

cords when the Order to Show Cause was served upon them and without dispute immediately took the necessary steps to comply with the oral requests of the Commission's representatives.

The final basis for the cancellation appears to be that Provo Transfer accepted an interchange of freight from Wally's Motor Line but did not have on file with the Commission such tariffs as in the opinion of the Commission prescribed for the interchange of traffic. It is submitted that at all times the Provo Transfer had on file a tariff prescribing routes and rates for the transportation of commodities generally throughout Provo City and the 15 mile radial authority covered by its certificate. Testimony was presented without dispute that Mr. Peterson, desiring to serve the public in the transportation of commodities from Salt Lake City to points outside of Provo, Utah, but within the scope of the Provo Transfer's authority, had talked with representatives and commissioners relative to a "purchased transportation" arrangement by which there could be an interchange of freight. He was advised that the Commission had not established any rules thereon and no written Order as prescribed by statute was ever given to Mr. Peterson or to Provo Transfer requiring them to cease and desist from the interchange of freight through the purchased transportation medium, notwithstanding the fact that the commissioners and their representatives had full notice of the method of interchanging freight. A formal application was made to the Commission for establishment

of through routes and rates by Provo Transfer and Peterson in August of 1953, being I & S Docket No. 97, but because the Commission claimed that Peterson had no authority into Provo, Utah, they refused to act upon said formal application for interchange of freight and establishment of through routes and rates, and held under consideration such request for establishment of through rates for interlining of freight until after its decision in this case and then on Feb. 10, 1954 finally denied authority to publish such a tariff.

We wish to call to your attention the fact that such a refusal to permit the establishment of through routes and rates and the interchange of freight between these two carriers is in direct violation of the Constitution of the State of Utah and of the Statutes of Utah, and contrary to the established principles applied to every other carrier in the State of Utah for the interchange of traffic.

The primary basis of the obligation in such matters is spelled out by the Utah Constitution, Section 12, Article XII, which reads as follows :

“All railroad and other transportation companies are declared to be common carriers, and subject to legislative control; and such companies shall receive and transport each other’s passengers and freight, without discrimination or unnecessary delay.”

This is then further supplemented by Section 54-3-10, U.C.A. 1953, which reads as follows :

“INTERCHANGE OF BUSINESS REQUIRED. - (1) Every common carrier shall

afford all reasonable, proper and equal facilities for the prompt and efficient interchange and transfer of passengers, tonnage and cars loaded or empty, between the lines owned, operated, controlled or leased by it and the lines of every other common carrier, and shall make such interchange and transfer promptly, without discrimination between shippers, passengers or carriers as to compensation charged, service rendered or facilities afforded. Every railroad corporation shall receive from every other railroad corporation at any point of connection freight cars of proper standard and in proper condition and shall haul the same either to destination, if the destination be upon a line owned, operated or controlled by such railroad corporation, or to point of transfer according to route billed, if the destination is upon the line of some other railroad corporation. Nothing in this section contained shall be construed as in anywise limiting or modifying the duty of a common carrier to establish joint rates, fares and charges for the transportation of passengers and property over the lines owned, operated, controlled or leased by it and the lines of other common carriers, or as in any manner limiting or modifying the power of the commission to require the establishment of such joint rates, fares and charges.

(2) Every telephone corporation and telegraph corporation operating in this state shall receive, transmit and deliver, without discrimination or delay, the conversations and messages of every other telephone or telegraph corporation with whose line a physical connection may have been made."

General citations as to the recognized responsibility of carriers to interchange freight may be found

at 13 C.J.S. 52 and at 13 C.J.S. 917. The general content of these citations is that a carrier may be lawfully required to provide reasonable facilities to other carriers including the facilities for interchange of traffic and transportation under its line of freight from a connecting line.

The Commission therefore has condemned the action of these two carriers in attempting to provide service as requested by the public through interchange of freight and has used their efforts to conform with the statutory and constitutional requirements as an excuse for cancelling these operating rights notwithstanding the fact that the Commission itself stubbornly refused to hear or act upon the formal application in August of 1953 for tariffs providing for the through routes and rates. It is significant that in the present case the Commission in its Findings has utterly ignored the evidences of good faith of the carriers in not only applying for the tariff as prescribed by law, but also in discussing this matter of interchange of freight with the Commissioners and with the Commission representatives in an effort to operate legally and provide for the public the service demanded of them.

POINT FIVE

THAT THE REPORT AND ORDER IS NOT SUPPORTED BY COMPETENT EVIDENCE.

POINT SIX

THAT THE REPORT AND ORDER IS ARBITRARY AND CAPRICIOUS.

The exercise of powers by a regulatory body such

as the Public Service Commission of Utah must be within certain limits and cannot be of an arbitrary and capricious character. The record in this case shows that the officers of the Provo Transfer & Storage Co. at the time of the hearing were Clifford W. Bailey, President, Clarence E. Tucker, Vice-President and Helen Peterson (wife of Wallace A. Peterson) Secretary-Treasurer. It has been shown above that the Commission, notwithstanding the decision of this court in Peterson v. Public Service Commission, which was fully known to it, nevertheless still found that ~~Provo Transfer~~ ^{Peterson} did not have authority to serve between Salt Lake City and Provo, and stubbornly reaffirmed that position after the Petition for Rehearing before this Court had been denied, and thus it appears that the Commission has taken an arbitrary and defiant attitude in this matter. This is further reaffirmed by the fact that said Commission in its Report and Order found that Clifford W. Bailey and Mr. Peterson presumed to act on behalf of the corporation and did so illegally by having failed to file their Oaths of Office and complete the corporate procedures. "These operations were wholly illegal and irregular in that neither Bailey nor Peterson were legal officers, stockholders or agents of the corporation;" (R. 18) However, immediately following the issuance of the Order in this present case the Commission granted, and still maintains in force, temporary authority to the Provo Transfer Co., a new corporation organized by Mr. Clifford W. Bailey, of which he is also the President, to conduct within

Provo City and a 15 mile radius a household goods operation.

You will recall that the records showed that notwithstanding the broad scope of the authority of Provo Transfer & Storage, petitioner herein, the operations were divided into two divisions, namely, the household goods division and the general commodities division, and Mr. Bailey had the exclusive control over the household goods division and Mr. Tucker and Peterson had control over the general commodities, being principally the freight which was interchanged between Wally's Motor Line and petitioner. There is no dispute but that a very substantial volume of traffic was handled in both of these departments of petitioner.

We challenge the sincerity and fairness of the Commission in finding on February 1, 1954 that Mr. C. W. Bailey is guilty of illegal and irregular conduct of business and within two weeks granting to his wholly owned corporation, bearing substantially the same name as petitioner, authority to carry on the very business which they found to be apparently unnecessary, illegal and irregular.

The Commission at no place finds that there is not a need for the service that was being performed by petitioner and does not dispute the fact that substantial volumes of freight were being transported for the public continuously from August of 1953 and that during all of said period there was pending before the Commission not only the formal application for establishment of through routes and rates, but also the

informal request for approval of the lease or purchased transportation arrangements so that the public could be served while the Commission could make up its mind on the tariff matter.

No specification of violations were made in the order directing the petitioner to appear before the Commission and show cause, and hence no opportunity was presented for knowing what the Commission would rely upon in the cancellation of this valid operating authority. We submit that the principles of constitutional law, both of the State of Utah and the United States, have been violated in this arbitrary and capricious action by the Commission and desire to refer the Court to a recent decision of the U. S. Supreme Court wherein the quotation of suspension of a physician's license was considered. Therein the Court found in a divided 6-3 decision that due process had been followed in that particular case, but the following citation is a reiteration of the rule as applicable to our situation:

Barsky v. Board of Regents of N.Y., 98 L. Ed 545 at 559:

“This latter ground, if the basis of the Regent's action, would indicate that in New York a doctor's right to practice rests on no more than the will of the Regents. This Court, however, said many years ago that “the nature and theory of our institutions of government do not mean to leave room for the play and action of purely personal and arbitrary power For, the very idea that one man may be com-

pelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails” Yick Wo v. Hopkins, 118 U.S. 356, 369, 370, 30 L ed 220, 226, 6 S Ct 1064.”

No standards have been established by the Legislature of the State of Utah as a guide to the Public Service Commission in the revocation or suspension of operating authority. The affirmative guide for the granting of authority to a common carrier is the existence of public convenience and necessity, which requires the performance of the particular service in the area involved. The converse of that would seem to be that the Commission should find that no public convenience and necessity exists for the operation which has been cancelled and annulled. However, even that has not been spelled out or defined by the Legislature. Therefore, under the guise of “good cause” the Commission may arbitrarily and for any peculiar reason deemed good cause by it, “suspend, alter, amend or revoke any certificate.” Perhaps the Commission in this present case by an Order which purports to “cancel and annul” has conformed with such statute, but we doubt that constitutionally it has any grounds for this action.

It is significant that the Legislature has set up a different penalty for the type of conduct which the Commission purports to find in its Findings of Fact in that Section 54-6-18 U.C.A., 1953, provides that a

carrier who violates the provisions of this act or who fails to obey any lawful order, decision, or regulation of the commission shall be deemed guilty of a misdemeanor. Surely the Legislature did not intend that action such as is shown by the record in this case and outlined in the Findings should be a basis for cancellation of a carrier's authority, particularly where the absolute evidence of good faith is shown in the attempts of the carrier to publish tariffs, inquire of the Commission for guidance and procure the decision of the Supreme Court of the State of Utah as to the scope of connecting carriers authority. Should all of the things found to be facts by the Commission be true, nevertheless the most that should be imposed on this carrier should be the charge of a misdemeanor and not the radical cancellation and annulment of its certificate.

We quote this significant language from the Peterson v. Public Service Commission case, supra 266 P. (2d) 497:

“It is the prerogative of this Court to determine whether the Commission regularly pursued its authority. Under Sec. 54-6-4, U.C.A. 1953 vesting in the Commission power to regulate motor carriers we do not find any authority either directly, or reasonably incident thereto, by which the Commission could arbitrarily refuse to approve a tariff, and, thus nullify the rights a carrier possesses under a Certificate of Convenience and Necessity.”

CONCLUSION

This petitioner respectfully submits that the Supreme Court should reverse the Order of the Public Service Commission and direct that the operating rights and authority be restored to the Provo Transfer & Storage Co.

Respectfully submitted,

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