

1954

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

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.

FILED
OCT - 6 1954
Supreme Court, Utah

NO. 8168

BRIEF OF DEFENDANTS

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NO. 8168

STATEMENT OF FACTS

The facts here involved are not in substantial dispute. In our opinion, when fully understood, they determine the issues in this case. Because we believe the statement of the petitioner wholly insufficient, we have undertaken to present the facts in full.

There being no substantial dispute on the facts our record references in this statement are to the report

and order of the defendant Public Service Commission of Utah, herein referred to as the "Commission".

In 1946 the Commission issued to one Orson A. Johnson a certificate of convenience and necessity authorizing him to engage in a local delivery service operation in the Provo, Utah area. (R-14)

The authority so issued to Johnson passed through a series of transfers, each accomplished under the summary procedure of the Commission, which is conducted without a determination of the question of public convenience and necessity, and finally on June 22, 1953, likewise under summary procedure, the authority was transferred in case No. 3905 from Ralph W. Miller to Provo Transfer & Storage Co., a Utah corporation, and certificate of convenience and necessity No. 1049 issued to this corporation. (R.10)

The authority originally issued to Johnson was restricted to the movement of commodities from retailers to purchasers. In one of the transfers this restriction was dropped. However, each of the holders of this authority prior to the transfer of June 22, 1953 engaged only in a local delivery service and cartage operation, and none of such carriers ever undertook to perform freight transportation service on an interline joint through basis with line haul carriers. (R.14-17)

Provo Transfer & Storage Co. was organized on April 30, 1953. Its officers and directors were Ralph W. Miller, president and director, S. E. Blackham, vice president and director, Verla Swapp, secretary and

director, Helen S. Miller, director, and F. V. Nichols, director. (R.10)

Certificate No. 1049 was issued by the Commission upon the express representation of Ralph W. Miller personally and by Provo Transfer & Storage Co. that this corporation would perform the service and exercise the privileges conferred upon it as a result of the transfer sought and authorized in case No. 3905. (R. 28-30) However, Provo Transfer & Storage Co. as the holder of certificate No. 1049 actually never, to any real extent, performed any of the functions authorized by the Commission, for immediately after issuance of certificate No. 1049 Clifford W. Bailey and Wallace A. Peterson conceived a plan whereby the corporation would be converted into a mere shell, its assets diverted, its authority broken up and certain transportation operations carried on by them individually as their separate responsibility and for their individual profit and benefit. (R.18)

Under the plan all of the physical assets of the corporation were transferred to Bailey individually. He then undertook personally to engage in the household goods moving business in the Provo area. Although Bailey used the name of Provo Transfer & Storage Co. in connection with these operations, the corporate entity was completely disregarded. He was personally responsible for all obligations incurred and he was entitled to receive and did receive personally all profits which arose from this business. (R.12)

Though none of the prior holders of the authority

conferred on Provo Transfer & Storage Co. by the Commission had ever undertaken to engage in any over-the-road line haul freight operations, Peterson under the plan, immediately commenced and thereafter carried on a freight operation in the entire Utah Valley area from Lehi to Payson. In doing so the corporate entity was again completely disregarded and Peterson personally took over this operation, conducting the same under the name of Wally's Motor Line. He used his own equipment, discharged all costs in connection with the operation of the same, hired his own personnel, collected all revenues for the movement of commodities and received personally all profits in connection with the operation and was liable personally for any debts or losses incurred. (R. 12)

No effective tariff of any kind was on file for Provo Transfer & Storage Co., from June 22, 1953, to August 17, 1953. On the latter date Provo Transfer & Storage Co. adopted a local cartage tariff of Right Weight Coal and Delivery Service Company, one of the prior holders of the said authority. No effective tariff was ever filed by Peterson or Provo Transfer & Storage Co. for the line haul freight operations between Lehi and Payson. This movement was carried on by Peterson under a subterfuge of so called "purchased transportation" which was clearly unlawful because neither Peterson nor Provo Transfer & Storage Co. had filed the necessary tariffs to conduct such operation even if Provo Transfer & Storage had any right to engage in such movement. (R. 12)

Bailey and Peterson so completely ignored and disregarded the corporate existence of Provo Transfer & Storage Co. that they never filed any oaths of office or actually acquired the ownership of any of the stock in the corporation until after the issuance of the order of the Commission to show cause. (R. 17)

Both Bailey and Peterson have long been engaged in public transportation in this state and are familiar with the requirements of law and the rules and regulations of the Commission. (R. 14)

Neither Peterson nor Bailey ever voluntarily disclosed to the Commission their dealings with Provo Transfer & Storage Co. or submitted for the prior approval of the Commission their plan of operation as herein set forth. They simply took matters into their own hands and went forward during the summer of 1953 in the conduct of these operations pursuant to the plan. The Commission became aware of the situation on the hearing in its I. & S. Docket 97, held before the Commission on October 13, 1953, (R. 12)

Immediately after the hearing of October 13, 1953, Bailey organized a corporation under the name of Provo Transfer Company and on November 4, 1953, two applications were filed with the Commission, one being No. 3982 by the new corporation seeking to carve out of certificate 1049 authority to engage in the household goods moving business in the Provo area and the other No. 3986 by Provo Transfer & Storage Co. seeking to have certificates No. 1049 cancelled and a new certificate issued to it excluding household goods moving. These applications

were set for hearing before the Commission on December 15, 1953. (R. 8)

On December 2, 1953, the Commission issued its order to Provo Transfer & Storage Co. to show cause on December 15, 1953, why its certificate No. 1049 should not be cancelled. (R. 8-9)

After the issuance of the order to show cause and on December 9, 1953, Bailey, Peterson, Helen Peterson, wife of Wallace A. Peterson, one Clarence E. Tucker and their attorneys held a meeting in Salt Lake City for the apparent purpose of putting a belated stamp of approval upon their conduct. At this meeting the parties undertook to authorize issuance from the 2,500 shares of stock which Peterson had undertaken to purchase, 1,720 shares to his wife Helen Peterson and 780 shares to Tucker. They then elected Bailey as president, Tucker as vice president, and Helen Peterson as secretary and treasurer of the corporation and authorized the attempted breaking up of the authority of the corporation in accordance with the application filed in said cases No. 3982 and 3986. (R. 17-18)

The order to show cause and the applications in said two cases No. 3982 and 3986 came on for hearing before the Commission on the 15th of December, 1953 on a consolidated record, and as a result of such hearing the Commission issued its order cancelling said certificate No. 1049. (R. 8, 9, 20)

~~ARGUMENT~~

STATEMENT OF POINTS

POINT I.

IN CANCELLING THE CERTIFICATE OF PROVO TRANSFER & STORAGE CO. THE COMMISSION ACTED WITHIN ITS JURISDICTION.

POINT II.

DUE PROCESS OF LAW WAS AFFORDED PROVO TRANSFER & STORAGE CO.

POINT III.

THE ACTION OF THE COMMISSION WAS NOT AN IMPAIRMENT OF ANY CONTRACTUAL RIGHT OF PETITIONER.

POINT IV.

THE FINDINGS OF THE COMMISSION ARE SUPPORTED BY THE EVIDENCE. NO SUBSTANTIAL QUESTION OF FACT IS INVOLVED.

POINT V.

THE COMMISSION'S ORDER WAS NEITHER ARBITRARY NOR CAPRICIOUS. IT WAS CLEARLY JUSTIFIED BY THE FACTS.

POINT VI.

THE ISSUES HERE INVOLVED ARE WHOLLY SEPARATE FROM THE QUESTIONS PRESENTED IN PETERSON V. PUBLIC SERVICE COMMISSION OF UTAH.

~~ARGUMENT~~

POINT I.

IN CANCELLING THE CERTIFICATE OF PROVO TRANSFER & STORAGE CO. THE COMMISSION ACTED WITHIN ITS JURISDICTION.

Section 54-6-4 U.C.A. 1953 confers a continuing and supervisory jurisdiction in the Commission over the certificates and operations of common motor carriers.

Section 54-6-20, U.C.A. 1953 empowers the Commission at any time for good cause and after notice and hearing to suspend, alter, amend or revoke any certificate, permit or license issued by it under chapter 5. title 54, U.C.A. 1953. These sections have been considered and their validity sustained in *Fuller-Toponce Truck v. Public Service Commission*, 99 Utah 28, 96 P. 2d 722, and *Peterson v. Public Service Commission of Utah*, 266 P. 2d 497.

POINT II.

DUE PROCESS OF LAW WAS AFFORDED PROVO TRANSFER & STORAGE CO.

In *Fuller-Toponce Truck Co. v. Public Service Commission*, supra, this court speaking through Justice Wolfe, and considering the requirements of due process quoted with approval the general rule as stated in 12 Am. Jur. Sec. 573 to the effect that

“The essential elements of due process of law are noticed, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.”

Tested in the light of this rule, there can be no doubt that due process was afforded to the petitioner, Provo Transfer & Storage Co.

POINT III.

THE ACTION OF THE COMMISSION WAS NOT AN IMPAIRMENT OF ANY CONTRACTUAL RIGHT OF TION OF FACT IS INVOLVED.

A certificate of convenience and necessity issued by

the Commission to a motor carrier is in the nature of a permit or license and is not property in any legal or constitutional sense. See *Effinberger v. Marconnit*, 283, N.W. 223. To the same effect is *Hogan v. Public Utilities Commission of Ohio*, 148 N.E. 581 where the court in its syllabus of the case states the rule to be that

“A certificate of convenience and necessity issued to a motor transportation company by the Public Utilities Commission is a revocable license which confers no property rights upon the holder thereof, and for good cause shown, the same may at any time be revoked, altered or amended by the Commission.”

The question of impairment of contracts was considered by this court in the Fuller-Toponce Truck Co. case supra where Justice Wolfe quotes the rule from 12 Am. Jur. Sec. 396, to the effect that

“The prohibition is aimed at the legislative power of the state, and not at the decision of its courts, the acts of administrative or executive boards or officers, or the doings of corporations or individuals.”

Quite clearly no impairment of any contractual right is here involved.

POINT IV.

THE FINDINGS OF THE COMMISSION ARE SUPPORTED BY THE EVIDENCE. NO SUBSTANTIAL QUESTION OF FACT IS INVOLVED.

Petitioner does not assail the Commission's findings on the basis of fact. These are not disputed in any substantial respect. Petitioner deems itself aggrieved

only because of the action which the Commission took on the state of facts which were found to exist. There is accordingly no issue of fact here involved.

POINT V.

THE COMMISSION'S ORDER WAS NEITHER ARBITRARY NOR CAPRICIOUS. IT WAS CLEARLY JUSTIFIED BY THE FACTS.

Provo Transfer & Storage Co. in case No. 3945 represented to the Commission that it intended to acquire the operating authority of Ralph W. Miller, and conduct a bona fide operation in its own name. Upon the transfer of this authority, acting upon these representations the Commission issued certificate No. 1049. This certificate, however, contained an express provision as follows:

“It is further ordered, and made a condition of the certificate herein issued that the holder hereof shall render reasonably adequate and continuous service to the public in pursuance of the authority herein granted and that the failure to do so shall constitute sufficient grounds for change, suspension or revocation of this certificate.”

The undisputed fact is that the corporation Provo Transfer & Storage Company never as such conducted any substantial transportation service, and attempted immediately to surrender its authority to Bailey and Peterson personally. If there were nothing more in this case, the failure of the corporation to exercise its authority and its act of attempting to surrender its rights to individuals is alone enough to justify the cancellation of the certificate.

Section 54-3-6 U.C.A. 1953 prohibits a carrier from engaging in operations without a tariff on file. Peterson never had any effective tariff on file for his attempted freight operations and Bailey had none on file for the movement of household goods prior to August 17, 1953.

Sections 54-4-29 and 54-4-30 U.C.A. 1953 prohibit the acquisition of voting stock or facilities by one carrier from another without the consent of the Commission. Both Bailey and Peterson, who had been engaged in motor carrier operations for many years were apparently acquiring stock in Provo Transfer & Storage Co., and acting as though they were officers of this corporation, without any approval of the Commission, through Peterson on December 9, 1953, five days after the show cause order of the Commission was issued undertook to switch this stock acquisition from himself to his wife Helen Peterson.

Section 54-6-5 makes it unlawful for any one to act as a common carrier without a certificate from the Commission, yet Bailey and Peterson were each individually acting as carriers without any certificate.

Bailey and Peterson after June 22, 1953 pretended to be officers of Provo Transfer & Storage Co. and in charge of its affairs, yet no oaths of office, as required by Section 16-2-8, U.C.A. 1953 were ever filed until after the show cause order was issued.

Both Peterson and Bailey were not only experienced motor carrier operators, but were represented by counsel in the transactions here involved. In the face of these facts and on this record how can it seriously be contended

that good cause did not exist for the cancellation of certificate No. 1049?

POINT VI.

THE ISSUES HERE INVOLVED ARE WHOLLY SEPARATE FROM THE QUESTIONS PRESENTED IN *PETERSON V. PUBLIC SERVICE COMMISSION OF UTAH*.

Petitioner contends that the case at bar should be determined by the results reached in *Peterson v. Public Service Commission of Utah* supra. The two cases are entirely separate and distinct. The decision in the one case has no actual bearing on the other.

In *Peterson v. Public Service Commission of Utah*, the question was whether the Peterson authority authorized him to transport commodities from Salt Lake City to Provo and from Provo to Salt Lake City by way of Heber City.

The question presented here is whether Provo Transfer & Storage Co. and those who acted or purported to act on its behalf had so violated the provisions of its certificate and the laws and rules and regulations of the Commission that cancellation of the certificate was justified.

So far as highway transportation is concerned, the freight operations sought to be carried on by Peterson in this case concerned the movement of commodities in the whole Utah Valley between Lehi and Payson. The movement between Provo and Salt Lake City is only incidentally involved.

The real concern which the Commission felt in this case had nothing to do with Peterson's Salt Lake City-

Provo operations, which were conducted under the name of Wally's Motor Line. Those operations, it is true, had been under observation by the Commission. However, the Commission made it plain that no action was being taken in that connection by its findings (R. 20) where it said:

“We believe that no formal action with regard to Peterson's actions in respect to Wally's Motor Line can properly be taken in this case.”

If anything more were needed to demonstrate the separate character of the two cases it is found in the fact that while in *Peterson v. Public Service Commission of Utah*, there was sharp division of opinion among the members of the Commission no such disagreement is found in their disposition of this case.

CONCLUSION

The wisdom and justice of the Commission's order in this case is very apparent, and can be further demonstrated by the following example of what could happen should the appellant's theory of the case be adopted by this Court. If a cartage company in Salt Lake should have authority for hauling within a 15 mile radius; and another company in Ogden should have authority to haul within a 15 mile radius; since the air-distance between Salt Lake and Ogden is approximately 30 miles; then, under the theory of appellant, without consulting the Commission and without the Commission having the power to prevent it the two companies could interline with each other, and thus establish a new line-haul carrier

between Ogden and Salt Lake. The foregoing example has many variations and combinations which, according to appellant, is outside of the power and authority of the Commission to regulate or control.

Again we must say that the Order of the Commission is correct and should be affirmed.

Respectfully submitted,

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PETER M. LOWE
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