

1957

Neal B. Morris et al v. Public Service Commission of Utah et al : Plaintiffs' Brief

Utah Supreme Court

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IN THE SUPREME COURT **STATE OF UTAH**

of the

STATE OF UTAH

NOV 1 1957

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NEAL R. MORRIS, doing business
as MARTIAN DELIVERY SER-
VICE, and ROBERT W. WAT-
SON, doing business as BOB WAT-
SON MOVING,

Plaintiffs,

— vs. —

PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT,
DONALD HACKING, JESSE R.
S. B U D G E , Its commissioners,
BRUCE TRANSFER & STOR-
AGE CO., JIFFY MESSENGER
SERVICE, HADLEY TRANSFER
& STORAGE COMPANY, MOL-
LERUP MOVING & STORAGE
COMPANY, OVERLAND MOV-
ING COMPANY, and SUGAR-
HOUSE VAN LINES,

Defendants.

FILED

AUG 29 1957

Clerk, Supreme Court, Utah

No. 8696

PLAINTIFFS' BRIEF

**MERLIN R. LYBBERT &
WOOD R. WORSLEY**

Attorneys for Plaintiffs

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NEAL R. MORRIS, doing business
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COMPANY, OVERLAND MOV-
ING COMPANY, a n d SUGAR-
HOUSE VAN LINES,

Defendants.

No. 8696

PLAINTIFFS' BRIEF

STATEMENT OF FACTS

This is an appeal taken pursuant to Section 54-7-16, Utah Code Annotated (1953), and Rule 65 B, Utah Rules of Civil Procedure, from an order entered by the Public Service Commission of Utah in Case No. 3106, cancelling Certificate of Convenience and Necessity No. 833 (R. 83), and also an appeal from an order in Case No. 4294 denying the application of Neal R. Morris, doing business as Martian Delivery Service for a Certificate of Convenience and Necessity to operate as a common motor carrier of household goods as defined by Interstate Commerce Commission 17-MCC-467, assuming the operating rights of Robert W. Watson, doing business as Bob Watson Moving, under Certificate No. 833.

For the convenience of the Court, and to avoid confusion, the parties will be designated by name as they appeared in the proceedings before the Public Service Commission.

On June 14, 1956, Neal R. Morris, doing business as Martian Delivery Service, applied to the Public Service Commission of Utah for issuance of a certificate of convenience and necessity to operate as a common motor carrier of property in intrastate commerce in Case No. 4294, and with the approval of the Commission he proposed to assume and perform the same operating authority as evidenced in Certificate of Convenience and Necessity No. 833, issued May 24, 1948, to Robert W. Watson, an individual, doing business as Bob Watson

Moving, which certificate, upon issuance of a new certificate, would be cancelled (R. 1).

Neal R. Morris is an individual whose place of business is in Murray, Utah. He presently holds contract carrier permit No. 422, Subs 1, 2 and 3 (R. 165, 200, 215-216). This permit authorizes operations as a contract motor carrier of property over irregular routes in the Salt Lake City area, bounded on the East by the foothills of Wasatch Mountains, on the North by the city limits of Salt Lake City, on the West by Garfield, Utah, and on the South by Sandy, Utah, and to use motorcycle sidecars, trailers and automobiles of the passenger car size capacity (R. 165-67). The transportation service so rendered is of a fast package type for named accounts, with whom Neal R. Morris holds contracts which have been approved by the Commission.

On May 24, 1948, Certificate of Convenience and Necessity No. 833 was issued to Robert W. Watson, doing business as Bob Watson Moving, after a hearing before the Commission, which authorized operations as a common motor carrier for the transportation of household goods, as defined by Interstate Commerce Commission in 17-MCC-467, and commodities in general, over irregular routes, within the corporate area of Salt Lake City, Fort Douglas, Cudahay Packing, area on South State Street and adjacent thereto as far south as 39th South; also Salt Lake County now not served by regular on route motor carriers (R. 70). Robert W. Watson had been engaged as a common carrier in the Salt Lake

City area for approximately 30 years previously (R. 137). He operated under the certificate continuously until approximately December 3, 1955, at which time he notified the Commission that his health was poor and that he was unable to continue his truck operations at that time. An order of the Commission was requested by him authorizing a suspension of operations until January 1, 1957 (R. 74). The order was granted December 13, 1955 (R. 75). On June 12, 1956, Robert W. Watson and Neal R. Morris entered into a contract whereby Robert W. Watson agreed to sell and assign to Neal R. Morris all rights under Certificate of Convenience and Necessity No. 833, subject, however, to the approval of the Commission (R. 4-6). On August 14, 1956, Robert W. Watson filed his application with the Public Service Commission, for an order authorizing the resumption of transportation service under Certificate of Convenience and Necessity No. 833, and for a further order canceling and rescinding the previous temporary suspension order of the Commission dated December 13, 1955 (R. 78-79). On September 5, 1956, the Commission issued its order rescinding and setting aside its suspension order of December 13, 1955, and reinstated Certificate of Convenience and Necessity No. 833 (R. 80-81). The order recited in part that Robert W. Watson "was authorized to operate over the highways of the State of Utah under the same rights and with the same restrictions and under the same provisions that are set forth in the Commission's order granting Certificate of Convenience and Necessity No. 833, dated May 24, 1948" (R. 80).

The Public Service Commission of Utah issued a notice of hearing in case No. 4294, being the matter of the application of Neal R. Morris for a Certificate of Convenience and Necessity, October 11, 1956, which stated in part as follows:

“This is an application by Neal R. Morris, doing business as Martian Delivery Service, for a certificate of convenience and necessity to operate as a common motor carrier of household goods as defined by Interstate Commerce Commission 17-MCC-467, to assume the operating rights of Robert W. Watson, an individual, doing business as Bob Watson Moving, under Certificate of Convenience and Necessity No. 833, Case No. 3106” (R. 8).

The hearing of the application was once continued, and a notice of the continued hearing was issued by the Commission under date of November 13, 1956, in which the purpose of the hearing as originally stated was reiterated (R. 10). The notice of hearing was duly published in the Salt Lake Tribune, a daily newspaper published in Salt Lake City, Utah (R. 12).

At the hearing held December 3, 1956, Neal R. Morris testified that he had been engaged in the delivery business on a contract basis for approximately three years and had been associated with the delivery business in a general way for several years prior to that (R. 94). He was an experienced motor carrier operator. A schedule of equipment used by him in his delivery business was received in evidence as Exhibit 3 (R. 17). In con-

nection with this equipment, Mr. Morris has purchased and installed two-way radios which greatly facilitate the dispatch of his business (R. 96). Exhibit 2 (R. 16), itemizes the assets of Neal R. Morris as modified by his oral testimony on cross-examination as appears in the Record pages 106 to 110. In any event, his total net assets are shown to be approximately \$5,500.00. Neal R. Morris further testified that he could make necessary financing arrangements to purchase additional equipment if such became necessary to properly discharge the services demanded of him under the operating rights he was petitioning the Commission to grant him (R. 99-100).

Robert W. Watson testified that following the suspension order of the Commission on December 13, 1955, he continued to receive calls for his services although as time passed they decreased in number (R. 138). Following the authorization by the Commission to resume the active operation of Certificate No. 833 on September 5, 1956, such operations were commenced and service rendered to the shipping public (R. 139).

Subsequent to the hearing on the Neal R. Morris application, the Commission on March 11, 1957, in Case No. 4294, entered its Findings of Fact and Conclusions of Law and determined that an order should be entered denying the application of Neal R. Morris for a Certificate of Public Convenience and Necessity (R. 19-22). In such case it then entered its order denying the application. At the same time, in Case No. 3106, and without

specific findings and conclusions in that case, it entered its order cancelling Certificate of Convenience and Necessity No. 833. No finding of fact was made by the Commission relative to the ability, financial or otherwise, of Neal R. Morris to operate under the authority requested. Thereafter, a petition for rehearing and reconsideration was filed May 29, 1957, on behalf of Neal R. Morris and Robert W. Watson in which they specified errors of the Commission in making its Findings of Fact and Conclusions of Law and in issuing the orders referred to above (R. 25, 27). A reply to the petition for rehearing and reconsideration was filed by the protestants April 19, 1957. On April 23, 1957, an order of the Commission denying the petition for rehearing was issued. Subsequently on May 23, 1957, a petition for Writ of Review was filed with this Court which petition was granted the same day.

STATEMENT OF POINTS

POINT I

THE PUBLIC SERVICE COMMISSION OF UTAH ERRED IN CANCELLING CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 833 IN CASE NO. 3106, IN THAT IT PROCEEDED WITHOUT JURISDICTION AND FAILED TO GIVE NOTICE TO PLAINTIFF ROBERT W. WATSON THAT THE ISSUE OF UNQUALIFIED CANCELLATION OF SUCH CERTIFICATE WAS BEFORE THE COMMISSION, ALL OF WHICH DEPRIVED PLAINTIFF ROBERT W. WATSON AND HIS HEIRS OF PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE CONSTITUTION OF THE STATE

OF UTAH, ARTICLE I, SECTION 7, AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

POINT II

THE PUBLIC SERVICE COMMISSION OF UTAH ERRED IN FINDING THAT CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 833 WAS "COMPLETELY INACTIVE" AND "DEAD," SUCH FINDING BEING CONTRARY TO THE EVIDENCE.

POINT III

THE PUBLIC SERVICE COMMISSION OF UTAH ERRED IN FAILING TO FIND THAT NEAL R. MORRIS WAS QUALIFIED TO ASSUME THE OPERATING RIGHTS UNDER CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 833, AND IN FAILING TO ISSUE ITS ORDER CANCELLING THE SAID CERTIFICATE AND ISSUING LIKE AUTHORITY TO NEAL R. MORRIS.

ARGUMENT

POINT I

THE PUBLIC SERVICE COMMISSION OF UTAH ERRED IN CANCELLING CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 833 IN CASE NO. 3106, IN THAT IT PROCEEDED WITHOUT JURISDICTION AND FAILED TO GIVE NOTICE TO PLAINTIFF ROBERT W. WATSON THAT THE ISSUE OF UNQUALIFIED CANCELLATION OF SUCH CERTIFICATE WAS BEFORE THE COMMISSION, ALL OF WHICH DEPRIVED PLAINTIFF ROBERT W. WATSON AND

HIS HEIRS OF PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE CONSTITUTION OF THE STATE OF UTAH, ARTICLE I, SECTION 7, AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Utah Code Annotated 54-6-5 (1953) sets forth the procedure to be followed by an applicant seeking a certificate of convenience and necessity from the Public Service Commission. The statute states in part as follows:

“. . . The Commission, upon the filing of an application for such certificate, shall fix a time and place for hearing thereon, which shall not be less than 10 days after such filing. The Commission shall cause notice of such hearing to be served at least five days before the hearing upon an officer or owner of every common carrier that is operating, or has applied for a certificate to operate, in the territory proposed to be served by the applicant . . . If the Commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof *it may issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, otherwise such certificate shall be denied . . .*” (Italics Supplied).

In the instant case, the application of Neal R. Morris, doing business as Martian Delivery Service, was filed in Case No. 4292, June 14, 1956 (R. 1). Notice of hearing

was prepared by the Public Service Commission of Utah under date of October 11, 1956, and the hearing set on October 26. It stated the purpose of the hearing as follows:

“This is an application by Neal R. Morris, doing business as Martian Delivery Service, for a certificate of convenience and necessity to operate as a common motor carrier of household goods as defined by Interstate Commerce Commission 17-MCC-467, to assume the operating rights of Robert W. Watson, an individual, doing business as Bob Watson Moving, under Certificate of Convenience and Necessity No. 833, Case No. 3106.” (R. 8).

The hearing was subsequently continued to December 3, 1956, and a notice to that effect was also published and the purpose of the hearing was reiterated by the Commission as being identical to the hearing as originally set (R. 10, 12).

The hearing issues were thus defined by the Commission as involving the question of the right to assumption by Neal R. Morris of the operating rights of Robert W. Watson who held Certificate of Convenience and Necessity No. 833. Under the Utah Statutes and applicable decisions of this Court, the only question was whether or not the certificate of Robert W. Watson was to be cancelled and an identical certificate issued to Neal R. Morris, or whether the application of Neal R. Morris was to be denied and Robert W. Watson's certificate left as it was in full force and effect. The position of

plaintiffs is that the application of Neal R. Morris should have been granted, and this is specifically detailed in Point Three. However, there was no issue before the Commission whatsoever as to whether or not there would be a cancellation of the certificate issued to Robert W. Watson in an entirely separate proceeding. This is precisely what the Commission has done, and has recognized the problem itself since it has filed the order of cancellation in Case No. 3106, which is clearly not involved in this proceeding at all.

The proceeding in practical reality in this case involves the transfer of a certificate of convenience and necessity, and this is the sole issue. Because of the fact that as of the date of hearing, Utah statutes do not provide in cases of this type for a transfer of such a certificate, the practice is followed of cancellation of the old certificate and reissuance of like authority to the new applicant. It will be noted, however, that there is involved a cancellation conditioned upon reissuance, and there cannot be any consideration of whether or not the old certificate should be cancelled, in the event the Commission does not contemporaneously issue the new certificate to the applicant. This matter has been reviewed in considerable detail by this Court in the case of *Collett vs. Public Service Commission*, 116 Utah 413, 418, 211 Pac. (2d) 185, 187 (Utah, 1949), in which case the court held that:

“ . . . the principal question in such a problem as this is that of the financial status, fitness,

willingness and ability of the proposed new certificate holder to carry on the business; that so far as the public is concerned, the public convenience and necessity would not be adversely affected by the change in certificate carriers . . .”

It will be noted that there is specifically no issue involved as to the problem of convenience and necessity. We believe there can be no question on this point since the Commission itself in its third finding of fact (R. 42, 43) held that the Commission would not require a new showing of public convenience and necessity under circumstances where a party requests the consent of the Commission to assume the operating rights previously issued to another.

Notwithstanding the very limited aspect of the hearing and the issues before the Commission, by its order in Case No. 4294, which is the assigned number of the hearing on the application itself, the Commission has attempted to issue its order cancelling the existing certificate without qualification. The recognition by the Commission of the inherent difficulty involved, is that it has not only issued an order in Case No. 4294, but it has perceived the obvious necessity of properly issuing an order in Case No. 3106 which is the proceeding under which the certificate was issued in the first place. By its act in so doing, the Commission has clearly recognized the error of its decision, since there was no issue involved in this latter case, and quite obviously no notice which would indicate the possibility that such action was contemplated in this hearing.

We believe it apparent that the real decision of the Commission here was to cancel a certificate upon the thinly veiled theory that it was dormant. This is the subject of discussion in Point Two hereafter. We believe it is significant that the Commission has totally failed to make any finding on the only issue involved in this proceeding which is the ability of the applicant to operate under the franchise as a common motor carrier.

We believe it axiomatic that the order of an administrative body issued without notice to affected individuals is violative of due process. There are numerous cases on such subject, but a brief reference may prove of assistance to the Court.

Article I, Section 7 of the Utah Constitution prohibits the State of Utah from depriving a person of life, liberty or property without due process of law. As will appear, this injunction applies to administrative agencies as well as to established courts. The Public Service Commission of Utah is empowered by statute in Section 54-6-20, Utah Code Annotated (1953) to “. . . at any time for good cause, and *after notice and hearing*, suspend, alter, amend or revoke any certificate, permit or license issued by it . . .” (Italics Supplied). A proceeding which results in the cancellation of a certificate of convenience and necessity without proper notice being previously given as required by this statute contravenes the due process clause of the Fourteenth Amendment to the United States Constitution and is also contrary to Article

I, Section 7 of the Constitution of the State of Utah. This Court has recognized the necessity of the Public Service Commission adhering to this fundamental right. In the case of *Provo Transfer and Storage Company vs. Public Service Commission*, 3 Utah 2d 86, 278 P. 2d 985, 986 (1955), the court stated as follows:

“The Legislature has seen fit to vest in the Commission the power to ‘supervise and regulate all common motor carriers,’ section 54-6-4, U.C.A. (1953), and armed it with the power ‘for good cause, and *after notice and hearing*, (to) suspend, alter, amend or revoke any certificate ***.’ Section 54-6-20, *supra*.” (Italics supplied.)

Again, in the case of *Denver and Rio Grande Western Railway Company v. Industrial Commission of Utah*, 74 Utah 316, 319, 279 Pac. 612, 613 (1929), the court stated without qualification that notice and opportunity to be heard are elementary requirements of due process of law. In that case, an award by the Industrial Commission was remanded to the Commission for further proceedings. After the cause was remanded, the findings of fact were amended to support the award. No notice was given to the railroad company of the commission’s intention to amend the findings, and no opportunity was given the railroad company to offer further evidence or to be further heard. The railroad company on appeal alleged that the commission was without authority to amend its findings and to make an award without first giving it notice and an opportunity to be heard. In agreeing with this contention, the court said:

“We are of the opinion that the railroad company is entitled to prevail in its contention. Notice and opportunity to be heard are elementary requirements of due process of law when the rights of a party are to be affected by judicial proceeding. (Citing cases.) . . . Our Workmen’s Compensation Law, inferentially at least, provides that the commission shall give notice and an opportunity to be heard to all parties whose rights may be affected by its award . . . Indeed, if the legislature should enact a law dispensing with notice and an opportunity to be heard to a party whose rights would be affected by an award of the commission, such law would be a nullity.”

On the basis of this error, the Supreme Court annulled the award of the Commission.

It is to be noted that the court observed that the provision for notice was provided by inference whereas in this case before the Public Service Commission the provision for notice is statutory and specific.

Again, in *Fuller-Toponce Truck Company v. Public Service Commission*, 99 Utah 28, 36, 96 P. 2d 722, 725 (1939), this Court restated its position on this question in quoting the following language:

“‘The essential elements of due process of law are *notice*, and *the 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.’ ” (Italics added by the court.)

The same principle of law is recognized in cases factually similar by the courts of other jurisdictions. In the case of *Bohon v. Department of Public Service*, 6 Wash. 676, 108 P. 2d 663, 666-667 (1940), a very similar issue was before the court. An appeal was taken from a judgment of the Superior Court affirming an order of the Commission cancelling certain rate schedules filed by a group of railroad companies. The departmental order also fixed certain minimum rates to be charged by common carriers of the bulk petroleum products. A Writ of Review was filed by several railroad companies who assigned as error the department's failure to acquire jurisdiction, and therefore, alleged the Commission was without power to fix rates upon the ground that the railroad companies were not given notice that the question of rates was to be considered at the proposed hearing, and asserted further that there was nothing contained in the notice of hearing which would tend to raise any issue other than whether specific rates would be permitted to become effective or would be cancelled. In relation to this problem, the court said:

"The question, then, with which we are presently concerned, is not whether the department has power, generally, to fix minimum rates for the future, but, rather, whether appellants had notice of the intention of the department to exercise that power.

"That the Department of public service is limited to the hearing and determination of those issues only which are raised by the pleadings is well settled in this jurisdiction. . . . (Citing cases.)

“The purpose of the rule just stated, is, of course, to insure to the carriers or utilities affected full opportunity to be heard upon any matter before any ruling is made.”

The court then found that the order as published was sufficiently comprehensive to include the issue of minimum rates, and was adequate to inform the railroad companies that the question of minimum rates was to be presented and adjudicated at the hearing. See also *North Pacific Public Service Company v. Kuykendall*, 127 Wash. 73, 219 Pac. 834 (1923) to the same effect.

In the case of *State ex rel. Northern Pacific Railway Company v. Railroad Commission of Washington*, 52 Wash. 440, 100 Pac. 987, 988 (1909), this point was again considered. An appeal was taken from an order of the Superior Court adjudging as void an order of the commission establishing a terminal rate on hay, oats, barley and mill feed from points on the line of the Northern Pacific Railway. A complaint was filed by the Railroad Commission against certain railway companies, charging that certain rates were unreasonable and excessive. Evidence was taken by the commission, and final findings of fact were made, and an order followed fixing certain joint rates on wheat and potatoes between certain points in the state, and ordered certain track concessions to be made and fixed the rate on hay, oats, barley and mill feed, shipped over the respondent's railroad line to certain points within the state. The Northern Pacific Railroad obtained a Writ of Review to the Superior Court for the purpose of reviewing the finding and

order of the Railroad Commission relating to the rate on hay, oats, barley and mill feed. The Superior Court found that the order was void and this appeal was taken from that part of the order by the Railroad Commission. In affirming the Superior Court's order, finding the portion referred to as void, the Court stated in part as follows:

"We find nothing in the complaint which indicates that there was anything in the complaint about the rates on hay, oats, barley and mill feed, or that there would be any hearing or any investigation on the rate on these commodities between points in eastern Washington and points in western Washington branch lines of the Northern Pacific Railway Company As we have seen above, no complaint was made against the existing rates on hay, oats, barley, and mill feed to Gray's Harbor points, and no hearing was or could have been had thereon, and the commission was not authorized to make an order therein changing such rates."

In the instant case, what the Commission has attempted to do is to utilize the evidence in the hearing properly before it, in an entirely separate proceeding in which its order of cancellation was entered in Case No. 3106. This practice, which can lead to far-reaching and disastrous results in orderly utility regulation, has been specifically condemned by this Court. In *Los Angeles and Salt Lake Railroad Co. v. Public Service Commission*, 81 Utah 286, 297, 17 P. 2d 287, 291 (1932) the court stated, quoting in part from a decision of another court:

“The commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.”

In the instant case, the notice provided only that an application of Neal R. Morris for a certificate of public convenience and necessity and to assume the operating rights of Robert W. Watson would be entertained by the Commission. Further, under such an application, the Commission was limited in the ruling it could make with respect to it. It could, (1) issue the certificate as prayed, (2) issue it for the partial exercise of the privilege sought, (3) issue it upon specific conditions and restrictions or, (4) deny the certificate. Section 54-6-20, Utah Code Annotated, 1953. The issue of unqualified cancellation of the certificate of Robert W. Watson was not before the Commission. Notice had not been given that such an issue would be entertained, and the petitioner was not given an opportunity to present evidence, call witnesses, introduce documents or in any other way defend himself or present information which would be beneficial and helpful to the Commission in determining whether or not the certificate should be cancelled. If the Commission had intended to entertain the issue of unqualified cancellation, it should have notified Robert W. Watson and informed him specifically of the

grounds upon which cancellation was being sought. The Commission should have proceeded under Section 54-6-20, *supra*, which sets forth the procedure for cancellation or amendment and contemplates an entirely separate proceedings. It is significant that the Commission recognized such necessity since the order of cancellation is issued in a wholly separate proceeding, Case No. 3106.

The Commission found in paragraph three of its findings that in a proceeding of this type convenience and necessity is not an issue. Its further finding in paragraph three, that: "There is no evidence that the public suffered from any lack of carrier service during this period," is wholly inconsistent with the purpose of the hearing. Robert W. Watson did not present evidence of public need for his services because that matter was not in issue, and it is in part upon this finding that the Commission relied in cancelling Certificate of Convenience and Necessity No. 833.

The Commission's failure to notify Robert W. Watson, as the statute required, that the cancellation of his Certificate No. 833 would be determined at the hearing on the Neal R. Morris application for a certificate of convenience and necessity, deprived him of a "fundamental right" guaranteed by Article I Section 7 of the Constitution of Utah, and the Fourteenth Amendment to the Constitution of the United States, which denial deprived him of property without the established processes of law, and is therefore wholly void and of no force and effect.

POINT II

THE PUBLIC SERVICE COMMISSION OF UTAH ERRED IN FINDING THAT CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 833 WAS "COMPLETELY INACTIVE" AND "DEAD," SUCH FINDING BEING CONTRARY TO THE EVIDENCE.

Robert W. Watson served the Salt Lake City area as a common carrier for approximately thirty nine years (R. 137). His original rights arose out of the "Grandfather" provision of the Motor Carrier Act. On May 24, 1948, he was granted Certificate of Public Convenience and Necessity No. 833 by the Commission after a full hearing on September 23, 1947 (R. 71, 72). The Commission then found: "That present and future convenience and necessity require applicant's (Robert W. Watson) service as a common carrier for the transportation of household goods, as defined by Interstate Commerce Commission in 17-MCC-467, and commodities in general, over irregular routes, within the corporate area of Salt Lake City, Fort Douglas, Cudahay Packing, area on South State Street and adjacent thereto as far south as 39th South; also Salt Lake County now not served by regular route motor carriers" (R. 70). Robert W. Watson's business was never large. He conducted it from his home, and he gained a very good business reputation as being a very competent workman (R. 146). During 1953 he suffered an illness which required him to suspend, in large measure, his business operations. To insure that his Certificate of Convenience and Nec-

essity would not be jeopardized by reason of his inability to devote his time as he had previously done, he petitioned the Commission for an order granting him permission to temporarily suspend operations under Certificate No. 833. An order was granted December 13, 1956 authorizing a suspension until January 1, 1957 (R. 75-76). Although Mr. Watson continued to receive calls for his services following the suspension order (R. 138), he declined to render the requested service. This was in accordance with the terms of the suspension order for it was not possible for him to operate under the authority of the Certificate in order to preserve his rights under it.

Considerably prior to the expiration of the suspension order Robert W. Watson filed his application requesting an order of the Commission authorizing a resumption of the transportation service under suspended Certificate No. 833 (R. 78, 79). Under date of September 5, 1956, a Reinstatement Order of the Commission was issued, vacating and setting aside the suspension order of December 3, 1956, and authorized him "to operate over the highways of the State of Utah under the same rights and with the same restrictions and under the same provisions" that were set forth in the original order granting Certificate No. 833 (R. 80). This order of the Commission reactivated the authority granted under the Certificate No. 833. The Commission did not hear testimony concerning the public need for the service, for that had been established in the hearing upon the original application September 23, 1947.

Subsequent to the Reinstatement Order of September 5, 1956, Mr. Watson continued to receive requests for services under the authority of his Certificate. He actively participated in the movement of merchandise (R. 139), and had entered into an operational agreement with Neal R. Morris, who assisted as his agent in the motor carrier operation. Upon reactivation motor carrier operations were conducted and actively continued to time of hearing. To hold that Robert W. Watson was obligated to personally do all acts under the authority of Certificate No. 833 would place a limitation upon the exercise of the Certificate authority which is not contained in the certificate and not required of any other carriers, all of whom employ others to assist in the conduct of their operations. If any modification in the terms of the Certificate as originally granted is to be made effective, it must be done after proper notice and hearing as statutorily required by section 54-6-20, Utah Code Annotated (1953).

The Commission's finding No. 3 and 4 (R. 21-22) to the effect that Certificate of Public Convenience and Necessity No. 833 was "completely inactive" and "dead," is not only contrary to the clear evidence in the case, but is contrary to and inconsistent with the prior orders of the Commission. If "inactivity" or "death" occurred it was during the time the suspension order was in full force and effect, and thus, the very purpose of the order would have been defeated. Although business operations were inactive, as intended, during the time the suspen-

sion order was in force, such is a very different matter than finding, as did the Commission, that the authority under the Certificate became inactive and died. As previously noted, there is only one way in which a Certificate can become "dead," and that is through revocation after notice and a proper hearing as outlined in section 54-6-20, Utah Code Annotated (1953). Moreover, the action of the Commission is untenable and inequitable when it is considered that it is attempting to penalize the owner for doing precisely what the Commission, by its specific order, had directed.

POINT III

THE PUBLIC SERVICE COMMISSION OF UTAH ERRED IN FAILING TO FIND THAT NEAL R. MORRIS WAS QUALIFIED TO ASSUME THE OPERATING RIGHTS UNDER CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 833, AND IN FAILING TO ISSUE ITS ORDER CANCELLING THE SAID CERTIFICATE AND ISSUING LIKE AUTHORITY TO NEAL R. MORRIS.

As previously noted, the sole purpose of the hearing on December 3, 1956, in Case No. 4294, was to consider the granting of a certificate of convenience and necessity to Neal R. Morris as a common motor carrier of property, in assumption of the operating rights of Robert W. Watson under Certificate No. 833. The limited scope of grant, which does not involve convenience and necessity, has been set forth by this court in the case of *Collett v. Public Service Commission*, 116 Utah 413, 415-

418, 211 P. 2d 185, 186-87 (1949). There, R. A. Gould, a common carrier, sought to have his certificate transferred to Lang Transportation Company, another common carrier. The petition sought either an approval of the transfer, or the cancellation of Gould's certificate and the issuance of a similar certificate to the Lang Company. In approving the cancellation of the Gould certificate and the granting of like authority to Lang Company, the court approved the following language:

“ . . . The motor carrier rules and regulations of this Commission now in force and effect preclude transfer from one carrier to another of operating authority and require that the certificate of convenience and necessity of the retiring carrier be cancelled and annulled and that a new certificate of convenience and necessity with like authority be issued to the carrier who undertakes the performance of the service . . . ”

Under this procedure, the cancellation of the old certificate is expressly conditioned upon the granting of like authority under a new certificate. It was further observed, as in the case now before the Court:

“ . . . Lang proposes simply that he may be authorized to enjoy the rights and discharge the obligations and duties of Gould. Lang seeks the right to perform those services which Gould is presently authorized to perform, nothing more. It having been determined by this Commission the public convenience and necessity require such

service, that question is not an issue in this case and need not again be determined . . .”

* * *

“ . . . the principal question in such a problem as this is that of the financial status, fitness, willingness and ability of the proposed new certificate holder to carry on the business; that so far as the public is concerned, the public convenience and necessity would not be adversely affected by the change in certificate holders . . .”

As in the present case, no attempt was made by either applicant or protestants to show the existence or absence of public convenience and necessity. The primary question before the Commission was to determine the fitness of Neal R. Morris, financially and otherwise, to assume the operating rights under the Robert W. Watson Certificate No. 833. The Commission, however, failed to make a finding as to the fitness of Neal R. Morris to assume the rights of Robert W. Watson. This was the only issue before the Commission, and the only basis upon which the application of Neal R. Morris could be granted or denied.

The record contains ample evidence demonstrating that Neal R. Morris is qualified to assume the rights held by Robert W. Watson. Neal R. Morris has sufficient assets, including moving equipment, to adequately discharge the obligations and duties which previously had been the responsibility of Robert W. Watson under his operating authority. Robert W. Watson's business was

not extensive. He had depended considerably on personalized service and had served the public well, and under his operating agreement with Neal R. Morris had given him the benefit of his years of experience (R. 139, 146).

In addition to the motorcycles and automobiles used by Neal R. Morris in his contract delivery work, he had acquired a one and one-half ton truck which was designed to be used in the operations upon Commission approval. In the event additional equipment was needed, arrangements had been made to acquire it (R. 99-100). It is important to note that Neal R. Morris was seeking Commission approval to assume the operating rights of a party who was engaged in the common motor carrier business on a limited scale, and not those of a carrier with vast resources and correspondingly great responsibilities. The implication of the *Collett v. Public Service Commission* case, *supra*, is that Morris' ability to operate under the authority sought is to be judged in terms of the authority and operation he is seeking to assume.

Neal R. Morris testified that if an office in downtown Salt Lake City became necessary, one would be established. Preliminary inquiry had been made prior to the hearing (R. 13). He has been engaged in the contract delivery business for approximately three years and had several years prior experience in the motor carrier business. The protestants did not produce a scintilla

of evidence which showed any dissatisfaction with the service Neal R. Morris has been rendering the public during the past three years. In fact, a witness appeared in his behalf and testified to his complete satisfaction with past service (R. 127-136). As Mr. C. M. Hirsch of Seagull Drug testified:

Q. "And as manager of the pharmacy division do you have close contact with the shipping requirements of the drug store?"

A. "Yes."

Q. "And how have you found the service of Mr. Morris?"

A. "It has been good."

Q. "Have you had prompt service deliveries of your various commodities?"

A. "Yes."

Q. "Now, I understand that he has a radio connection between his equipment, his motorcycles and the office of the Martian Delivery."

A. "That's right."

Q. "Has that been of an advantage to you?"

A. "Yes, that is an advantage."

Q. "And how does that advantage work out — how do you find it?"

A. "Occasionally in our line of business we have an emergency delivery, either an accident or a sudden illness, and you have got to get sup-

plies or medication out to a customer. I can call in to the office and they will route a man out for an emergency delivery besides regular pickups."

Q. "That has been of assistance to you, has it?"

A. "Yes."

Q. "Have you during this period had occasion to use other services in Salt Lake in the delivery of your —"

A. "Yes, we used other services. We tried the Yellow Cab Company, and at one time we had Jiffy deliver."

Q. "How did you get along with those other services compared to that of Mr. Morris?"

A. "They weren't as good." (R. 128-129).

The two-way radio equipment now in use by Neal R. Morris will enable him to improve upon the calibre of service rendered to the public by Robert W. Watson. The acquisition of such equipment, together with accompanying operating authority, is an asset which will enable the most efficient use of his present motor equipment.

There cannot be the slightest doubt on this record that Neal R. Morris has sufficient assets, equipment and experience to assume the operating rights of Robert W. Watson. In fact, it is submitted that the testimony clearly shows an operation which would in many ways be superior to that which has been conducted by Robert

W. Watson. The Commission could not otherwise have found, and therefore has ignored the entire matter since there is no finding or conclusion which directly relates to the abilities of Neal R. Morris to discharge the operational requirements of the certificate. Plaintiffs do not believe, moreover, that any useful purpose would be served by submitting this matter for further hearing to determine an issue which can and should have been determined upon the record which was introduced. The judgment of this court should direct the Public Service Commission of Utah to issue to Neal R. Morris operating rights identical to those set forth in Certificate No. 833.

CONCLUSION

Appellant Robert W. Watson respectfully urges that he was denied due process of law through the act of the Public Service Commission of Utah in failing to notify him as required by statute that the issue of unqualified cancellation of his Certificate of Convenience and Necessity No. 833 would be considered or determined at the hearing upon the application of Neal R. Morris for similar authority. This being so, the order of the Public Service Commission unqualifiedly cancelling Certificate of Convenience and Necessity is totally void and of no force and effect. Further, it is respectfully submitted that the Public Service Commission of Utah erred in finding Certificate No. 833 "completely inactive" and "dead" since by the order of the Commission the authority under the Certificate was first suspended and then

reinstated, and the authority was thereafter actively exercised by Robert W. Watson.

Appellant Neal R. Morris respectfully urges that the Public Service Commission of Utah erred in failing to find that he was qualified to assume the operating rights under Certificate of Convenience and Necessity No. 833, and in failing to issue its order cancelling the said Certificate and issuing like authority to him. The Commission should be directed by this Court to make and enter its order granting to applicant Neal R. Morris, a Certificate of Convenience and Necessity identical with Certificate No. 833.

Respectfully submitted,

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