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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

NEAL R. MORRIS, doing business as
MARIAN DELIVERY SERVICE,
and ROBERT W. WATSON, doing
business as BOB WATSON MOV-
ING,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, HAL S. BENNETT, DON-
ALD HACKING, JESSE R. S.
BUDGE, Its Commissioners; BRUCE
TRANSFER & STORAGE CO.,
JIFFY MESSENGER SERVICE,
HADLEY TRANSFER & STORAGE
COMPANY, MOLLERUP MOVING
& STORAGE COMPANY, OVER-
LAND MOVING COMPANY, and
SUGARHOUSE VAN LINES,

Defendants.

No 8696

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Clerk, Supreme Court, Utah

DEFENDANTS' BRIEF

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No 8696

DEFENDANTS' BRIEF

STATEMENT OF FACTS

Defendants answering the Brief of the appel-
lants hereby adopt generally the statement of facts
as set forth therein, with the following additions.

Mr. Watson testified in addition that he had
sold his only truck (R. 139) and had cancelled his
insurance on the motor carrier operation (R. 140).

Then as to the reasons for the purported reactivation of operations he testified, (R. 142) “Q. Now, the reason you asked for your permit to be reactivated or your certificate was for the purpose of consummating this sale, was it not?

In other words, you had asked the Commission to approve the sale of your rights to Mr. Morris.

A. Yes.

Q. That was the reason you asked that —

A. Yes.

Q. — the suspension be revoked.

A. Yes.

Q. Otherwise you were still in a position so far as your health was concerned, that you couldn't operate this business yourself?

A. That's right.

Q. You didn't intend to operate it yourself?

A. No.

Q. And you didn't reactivate these for the purpose of anyone else operating it except Mr. Morris; isn't that correct?

A. That's right.” (R. 142)

Further he testified that he had no record of the one alleged haul of an appliance that he claimed

to have made with Mr. Morris and stated also, (R. 143)

BY MR. ADAMS:

Q. Mr. Watson, if this — if the Commission didn't allow Mr. Morris to assume your rights, would you ask that your certificate of convenience be suspended again?

MR. WORSLEY: I object to that as immaterial and argumentative.

COM. HACKING: Well, it may be helpful. The witness may answer.

I suppose what the question is, Mr. Watson:

If this application isn't granted, what will you do with your rights?

A. Well, I would try to dispose of them to someone else.

Q. You wouldn't attempt to carry them on yourself?

A. No." (R. 143)

STATEMENT OF POINTS

POINT I

THERE IS COMPETENT AND SUFFICIENT MATERIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER OF THE COMMISSION.

POINT II

THE ABANDONMENT OF OPERATIONS BY MR. WATSON SUBJECTED HIS AUTHORITY TO CANCELLATION AND THE COMMISSION HAD JURISDICTION TO CANCEL SUCH.

POINT III

APPLICANTS BOTH KNEW THAT IN THESE "TRANSFER" MATTERS THE COMMISSION MUST NECESSARILY CANCEL THE OLD AUTHORITY AS A CONDITION PRECEDENT TO ANY POSSIBLE ISSUE OF A NEW CERTIFICATE, SO THEIR ATTENDANCE AT AND PARTICIPATION IN THE PROCEEDINGS WAIVED ANY NEED FOR A SPECIAL NOTICE THAT THE OLD RIGHTS MIGHT BE CANCELLED.

POINT IV

THE ORDER DENYING THE PROPOSED TRANSFER OF OPERATING RIGHTS IS SUPPORTED BY COMPETENT AND ADEQUATE EVIDENCE.

ARGUMENT

POINT I

THERE IS COMPETENT AND SUFFICIENT MATERIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS AND ORDER OF THE COMMISSION.

POINT II

THE ABANDONMENT OF OPERATIONS BY MR. WATSON SUBJECTED HIS AUTHORITY TO CANCELLATION AND THE COMMISSION HAD JURISDICTION TO CANCEL SUCH.

The Public Service Commission is vested with numerous responsibilities and powers and must exercise such in the public good. Neither it nor the Legislature have permitted the sale or transfer of

motor carrier operating rights. The issue of public convenience and necessity is paramount when the so-called "transfer" cases come before the Commission.

Through the procedure of cancelling the old authority and issuing a new certificate to the new operator, the Commission has effectively sanctioned transfers of operating authority. It has not been required that new proof of public convenience and necessity be adduced where the vendor was *actively* engaged in the transporting of commodities for hire in Utah. The fact of such active operations has been deemed by the Commission in the past as good and sufficient proof of a need for a continuation of the same service by the vendee.

In the present case, no such active operational status existed. The transcript shows that prior to December of 1955 he stopped operations and on December 3rd applied to the Commission for suspension of operations. He continued inactive, sold his truck, cancelled his insurance and performed no service until Mr. Morris induced him to sign a contract for the sale of the rights for \$200.00. Then he was induced, by Mr. Morris's offer of purchase, to apply for resumption of service. This was in August of 1956.

At pages 142-143 of the record, Mr. Watson admitted that the only reason for requesting restor-

ation of his rights was to enable him to peddle them to Mr. Morris and that he, Mr. Watson, had no intention whatsoever of personally operating or serving the public. And if this application is not granted, he will not operate as a carrier, but will try to sell to someone else.

Based upon this and other evidence in the record it was found that the said Watson rights were "inactive" and "dead". Can anyone dispute that there was adequate, competent evidence in the record to support such a finding? The volume of evidence is not material on this point in an appeal. However, the testimony given by Mr. Watson himself was plain and adequate to sustain the said findings of the Commission.

On earlier proceedings of this nature your court has announced the rule to be that if there is *any* evidence to support the findings by the Commission, then your court will not interject itself to weigh and analyze that evidence, nor substitute its judgment for that of the Commission which has *seen* and *heard* the witnesses.

Two pertinent cases dealing with the scope of review are: *Los Angeles & Salt Lake R. Co. v. Public Service Commission*, 121 Utah 209, 240 Pac (2d) 493 and *Ashworth Transfer Company v. Public Service Commission*, 2 Utah (2d) 23, 268 Pac (2d) 990. In the first case your court said that the

power of review is limited to whether the Commission could reasonably find as it did from the evidence adduced. The decision then cited the statute, now 54-7-16, U.C.A. 1953 which states: "The findings and conclusions of the Commission on questions of fact shall be final and not subject to review."

In the Ashworth case your court stated:

"On review of an order of the Public Service Commission of Utah granting a certificate of convenience and necessity, it is not required that facts found by the Commission be conclusively established or shown by a preponderance of the evidence. The scope of review is limited to an ascertainment of whether the Commission had before it competent evidence upon which to base its decision. U.C.A. 1953, 54-7-16; *Wycoff Co., Inc. v. Public Service Commission, Utah*, 227 P. 2d 323; *Uintah Freight Lines v. Public Service Commission, Utah*, 229 P. 2d 675."

The plaintiffs cannot complain as to the competency of the evidence on the question of dormancy of Watson's rights because they were the witnesses from whom the evidence came. Granted, that some statements were also made indicating a half-hearted effort to operate after the Morris contract of purchase was made. However, the Commissioners after seeing the witnesses and hearing them chose to believe and find that:

"The evidence in this case discloses that the certificate of Watson was completely in-

active for several months. There is no evidence that the public suffered from any lack of carrier service during this period. The evidence clearly shows that the sole purpose of reactivating the Watson certificate was for the purpose of selling said certificate. In his application for reinstatement of Certificate of Convenience and Necessity No. 833 filed with the Commission on August 14, 1956, Watson alleged that "As of the date hereof, however, your petitioner has available trucks, motorcycles and other equipment, together with trained personnel to properly and adequately conduct all operations authorized under said Certificate of Convenience and Necessity, is financially able to do so, and therefore requests the Commission that its Order of December 13, 1955, be set aside and annulled." It is clear from the evidence that Watson never intended to personally operate his certificate of convenience and necessity and that the arrangement for equipment and financing as above set forth was with Morris as the prospective purchaser of Certificate of Convenience and Necessity No. 833.

"4. We are of the view that the rules of this Commission as above set forth with respect to the transferring of an authorized operation of a retiring carrier to a new carrier are proper, reasonable and legal. We do not believe, however, that the laws of the State of Utah contemplate that an inactive certificate and a service once dead should be resurrected merely for the purpose of selling the certificate. Such procedure, if approved by this Commission, would in our opinion be entirely repugnant to the provisions of the Motor Carrier Act." (R. 22)

POINT III

APPLICANTS BOTH KNEW THAT IN THESE "TRANSFER" MATTERS THE COMMISSION MUST NECESSARILY CANCEL THE OLD AUTHORITY AS A CONDITION PRECEDENT TO ANY POSSIBLE ISSUE OF A NEW CERTIFICATE, SO THEIR ATTENDANCE AT AND PARTICIPATION IN THE PROCEEDINGS WAIVED ANY NEED FOR A SPECIAL NOTICE THAT THE OLD RIGHTS MIGHT BE CANCELLED.

The application as presented (R. 1) was clearly a request that Morris "assume the operating rights" of Watson or as stated in the body, "perform the same operating authority" as evidenced by the Watson certificate. The notice of hearing set out similar phrases and both Mr. Morris and Mr. Watson were present at the hearing. Both were represented by competent legal counsel.

Each party to the matter was an experienced motor carrier, presumably aware of the statutes relating to "transfers" of rights. It is common knowledge that the "transfer" involves a cancellation of the vendor's rights and a request for a new certificate in the name of the vendee.

The Rules of Practice and Procedure published by the Commission Sept. 6, 1939, Section 21.3 provides:

"Section 21.3 TRANSFER OF OPERATING RIGHTS: The Commission will not permit the transfer or assignment of operating rights granted by it. Any bona fide purchaser of an option on the operating rights of

any person under the jurisdiction of the Commission may make application to the Commission for a grant of such rights. The granting of such rights will be discretionary with the Commission.”

In the face of this, the parties applied to the Commission and submitted their positions to its jurisdiction for action. Perhaps the calculated risk of having the Watson rights cancelled out was well known as the consideration for the rights was only \$200.00. Had the operating authority been active and had Mr. Watson preserved his rights, the same would have had a much greater value.

No separate proceeding is requisite to due process of law when the only two affected parties to the contract, Watson and Morris are personally before the Commission and represented by counsel. We are at a loss to know what different testimony would have been given by Mr. Watson had a different type notice been sent to him. He and counsel well knew that the first issue was the cancellation of his authority. They both knew of the dormancy thereof.

In the *Provo Transfer & Storage Co. v. Public Service Commission* case, 3 Utah (2d) 86, 287 Pac. (2d) 985 your court confirmed the right of the Commission to cancel and revoke a carriers operating authority in connection with a proposed transfer through an acquisition of stock. This decision reads in part:

"Petitioner argues that Sec. 54-6-20 should be construed as a narrow grant of discretionary power to the Commission as otherwise "no security of operation could be had by any motor carrier, and each would be subject to the whim of the succeeding members of the Public Service Commission." It is further asserted that "an administrative body such as the Public Service Commission cannot be a law unto itself in all things and arbitrarily take from the carrier its certificate, as a public utility has a substantial interest in the operation and should not without due process of law be deprived of its valuable property right without just and substantial cause being shown." Complaint is made that no standards were established by the Legislature as a guide to the Commission in the revocation or suspension of operating authority and it is asserted that the remedy in this case should be the initiation of the criminal proceeding contemplated by 54-6-18, U.C.A., 1953. No precedent is submitted in support of this argument.

"We do not sit in these certiorari proceedings to determine whether the action taken by the Commission is exactly to our liking. Suffice it to say that it appears that the Legislature has vested in this administrative tribunal plenary powers to revoke and suspend certificates of convenience, for good cause, and where it appears, as in the present case, that one motor carrier, in violation of the statute, purchased stock in another motor carrier and then proceeded to take over and operate the freight department of the corporation bought into without the consent of the Commission, we are not prepared to hold

that good cause for the revocation of the carrier's certificate has not been shown."

Upon that precedent alone, it is fair to assume that the Court will affirm the decision of the Commission in the instant case. Due process of law has been met by the personal appearances of Mr. Watson and Mr. Morris, their free and unhampered testimony and their representation by counsel before the Commission.

POINT IV

THE ORDER DENYING THE PROPOSED TRANSFER OF OPERATING RIGHTS IS SUPPORTED BY COMPETENT AND ADEQUATE EVIDENCE.

The need for findings on the financial ability, experience and fitness of applicant, Morris, presupposes an absolute right of transfer of the operating rights from Watson to Morris. No findings as to fitness were required as the Commission found that it was not in the public interest to continue the dormant operations.

It is entirely consistent for the Commission to block this transaction as it has long taken a position that the best interests of the public are the first consideration. Trafficking in certificates has never been approved by it. The bargain between these two parties was squarely in the face of the Commission's rule quoted above which states that the Commission will not permit a transfer.

How has Mr. Morris been prejudiced by the absence of a specific finding as to his fitness to operate? Had he been the largest and most affluent carrier in the United States, still in this instance no prejudice would result on the failure of the commission to recite his fitness. If no rights were to be issued to him (because of the dormancy and inactivity of the vendor) no further findings were material.

Defendants submit that the Report and Order of the Commission should be sustained by the Court.

Respectfully submitted,

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