1972

Mary A. Murphy Dba Alex Pickering Transfer Company v. Public Service Commission of Utah, Redman Moving & Storage Company, Barton Truck Line, Inc., Uintah Freightways, Magna - Garfield Truck Line, Palmer Brothers, Inc., Rio Grande Motor Way, Inc., Milne Truck Lines, Inc., Ashworth Transfer, Inc., Bills Moving, Inc., A-One Moving And Delivery, Lewis Bros. Stage Lines, Utah Package Express, Inc., Denver & Rio Grande Western Railroad Company, And Park City Truck Line : Brief of Defendants

In The Supreme Court of the State of Utah

MARY A. MURPHY, dba ALEX PIONEER MOVING TRANSFER COMPANY,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, REDMAN MOVING & STORAGE COMPANY, BARTON TRUCK LINE, INC., UINTAH FREIGHTWAYS, INC., MAGNA-GARFIELD TRUCK LINE, PALMER BROTHERS, INC., RIO GRANDE MOTOR WAY, INC., MILNE TRUCK LINES, INC., ASHWORTH TRANSFER, INC., MOVING, INC., A-ONE MOVING & DELIVERY, LEWIS BROS. STAGES, UTAH PACKAGE LINES, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, MOTOR TRUCK LINES, INC.

Defendants.

BRIEF OF

Apeal from
Public Service

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STATUTES AND REGULATIONS

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Case No. 12920

BRIEF OF DEFENDANTS

The defendant Public Service Commission of Utah will be referred to as "the Commission". The defendants Redman Moving & Store Company, Barton Truck Line, Inc., Uintah Freightways, Magna-Garfield Truck Line, Palmer Brothers, Inc., Rio Grande Motor Way, Inc., Milne Truck Lines, Inc., Ashworth Transfer, Inc., Bills Moving, Inc., A-One Moving and Delivery,

Lewis Brothers Stage Lines, Utah Package Express, Inc., Denver and Rio Grande Western Railroad Company and Park City Truck Line, Inc. will collectively be referred to herein as "the defendants". The plaintiff Mary A. Murphy, d/b/a Alex Pickering Transfer Company will sometimes be referred to herein as "Pickering" and sometimes as "plaintiff".

References to the transcript herein will be designated as "T"; references to the record as "R", and references to the exhibits as "Ex".

STATEMENT OF THE CASE

This involves an action before the Commission to determine whether or not the tariff issued by plaintiff on March 28, 1972 and effective April 3, 1972, should be permanently suspended and why Contract Carrier Permit No. 130 issued to plaintiff in the year 1954 should not be altered or canceled.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

On May 12, 1972, the Commission suspended plaintiff's Contract Carrier Schedule No. 1 for a period of ninety days and ordered plaintiff to appear before the Commission on June 7, 1972 and show cause, if any she may have, why said schedule should not be permanently suspended and why her contract carrier permit should

not be altered or canceled. After hearing, and on July 10, 1972, the Commission permanently suspended Contract Carrier Schedule No. 1 and ordered plaintiff to cease and desist from rendering any transportation service pursuant to Contract Carrier Permit No. 130 except service for the account of Campbell Soup Company.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the Commission's Orders of May 12 and July 10, 1972 vacated. The defendants urge the Court to sustain the Commission.

STATEMENT OF FACTS

On May 16, 1936, the Public Service Commission of Utah, herein "Commission", issued to John M. Murphy, dba Alex Pickering Transfer Company, herein "Pickering", a contract carrier permit, Permit No. 130, authorizing him to operate on call over all of the highways of the State of Utah as a contract motor carrier of all kinds of personal property including merchandise, machinery and other property which he has occasion to carry in the course and conduct of his said transportation business. The permit was issued by the Commission without first giving notice to numerous interested motor and rail carriers. Upon learning of the Order and on June 15, 1936, interested parties filed a Petition for Reconsideration and Rehearing. (R 7-15, 105-113) Said Petition has never been acted upon by the Commission.

John M. Murphy died in the year 1953 and on November 17, 1954, the Commission caused to have transferred to Mary A. Murphy, widow of John M. Murphy, Contract Carrier Permit No. 130 and Certificate of Convenience and Necessity No. 684. The Certificate of Convenience and Necessity is not involved in the instant proceedings. (R 97-102)

In its Report and Order issued November 17, 1954, resulting in the transfer of the above referred to permit and certificate, the Commission acknowledged its failure to dispose of the pending Petition for Reconsideration and Rehearing, and recognized the existence of the decision of the Supreme Court of the State of Utah in the case of *McCarthy, et al v. Public Service Commission of Utah, et al,* 94 Utah 304, 77 P. 2d 331, wherein the Court held that the Commission did not legally pursue its authority under statute when it issued a permit under circumstances similar to those existing at the time it issued the Pickering permit No. 130. The Commission then concluded to issue to Mary A. Murphy, pursuant to Title 54-6-24, such rights, permits, certificates or licenses granted to her husband under the Act and being operated by her husband at the time of his death. The Commission found in its 1954 Order that, were the application to transfer the contract carrier permit an application to transfer to one other than an heir of John M. Murphy, deceased, the Commission would be compelled to deny the transfer of said permit on the ground and for the reason that no hearing

was afforded interested parties in the first instance, and that operations had been conducted without strict attention to the provision of the law relating to the filing of tariffs. It also found that the only service performed by John M. Murphy at the time of his death was approximately 12 trips per year within a radius of 50 miles of Salt Lake City, Utah. As a result, the contract carrier permit was restricted accordingly. (R 100)

As a prerequisite to the certificate and permit becoming effective and as a condition subsequent, the Commission ordered as follows:

> "IT IS FURTHER ORDERED, that the above described Certificate and Permit shall become effective twenty (20) days from the date hereof upon the condition that applicant files the necessary insurance and tariffs, *or contracts with respect to the permit,* in accordance with the Commission's rules and regulations. Upon failure to file insurance and tariffs within twenty (20) days after date of this order, the certificate and permit herein issued shall become null and void.
>
> IT IS FURTHER ORDERED, and is made a condition of the Certificate and Permit herein issued that the applicant *shall render reasonably adequate and continuous service* in pursuance of the authority herein granted, and that failure to do so shall constitute sufficient grounds for termination, change, or suspension of said Certificate and Permit." (R 102) (Emphasis added)

Pickering recognized the twenty day time limit within which to file insurance or tariffs with respect to the certificate and contracts with respect to the contract carrier permit, and requested an extension of the twenty day time period. (T 109, 113) The requested extension was granted and contracts with Campbell Soup Company and Industrial Supply Company were filed on December 23, 1954. (R 96) No additional contracts, memoranda containing an accurate and complete statement of the substance and terms of contracts, or other documents with respect to the Contract Carrier Permit No. 130 were filed for a period of approximately 18 years. On March 28, 1972, Pickering filed a Contract Carrier Schedule No. 1, which schedule was later determined inappropriate and permanently suspended by the Commission. (R 16, 52 and 84; T 166-168) The last service rendered by Pickering for Industrial Supply Company or its subsidiary Metal Supply Company was on January 25, 1962. (Ex 3; T 52) Four shipments were handled for Kaiser between August 7, 1962 and July 23, 1963. Two shipments were handled for Crane Supply Company during the year 1970, and one shipment handled for Wolfe's. (Ex 3) With the exception of the shipments handled for Industrial Supply Company and its subsidiary, all of the above referred to shipments were handled without the benefit of a written contract, and no memorandum containing an accurate and complete statement of the substance and terms of a contract was ever filed with the Commission. (T 29, 30) A complaint was made by the defendant Magna-

Garfield Truck Line in conjunction with the two shipments handled for Crane Supply Company. (T 216)

Prior to filing the Contract Carrier Schedule No. 1 on March 28, 1972, Pickering entered into an Agreement with Max W. Young for the purpose of ultimately selling to Young the certificate and contract carrier permit owned by Pickering. Pursuant to the Agreement and from and after the 1st day of March, 1972, the exclusive management of Pickering was with Young, and Young is entitled to all revenues and responsibile for all liabilities incurred from and after said date. (Ex 1, T 33, 176-177) From and after March 1, 1972, all decisions regarding the operations of Pickering, including the filing of rate schedules and contracts, were made by Young. (Ex 1, T 33)

Keith Sohm, a member of the Commission's staff and its commerce attorney, was called by Pickering and testified that the following "Motor Carrier Rules and Regulations No. 3", effective June 1, 1937, remain in full force and effect and have not been abrogated by any general order of the Commission: (T 195-199)

"Rule III - Permit ***

(d) In the event a person operating under a permit issued by the Commission enters into an agreement with another person to sell, assign, or transfer the operating rights covered by said permit the following procedures shall be followed before the Commission:

A joint application shall be filed by the persons involved which application shall request authority for the one person to discontinue operations as a motor carrier and for the other person to assume and take over said operations as a motor carrier. The person desiring to assume said operating rights shall comply with the provisions of Chapter 65, Laws of Utah, 1935, as in filing for a new permit." (T 195; Ex 37)

"Rule No. V - Abandoment or Discontinuance of Service * * *

(b) All interruptions of regular service of common motor carriers and contract motor carriers, where such interruptions are likely to continue for more than one scheduled trip shall be promptly reported in writing to the Commission, with full statement of cause of interruption, and its probable duration. (T 196, Ex 37)

(c) Discontinuance of service of a common or contract motor carrier whether with or without notice to the Commission and the public, shall be deemed a forfeiture of all rights secured under and by virtue of any order or permission to operate issued by the Commission, provided, however, that the Commission may permit resumption of operation on a proper showing that the carrier was not responsible for the failure to give service, and on a finding by the Commission that the service is necessary." (T 196, Ex 37)

"Rule No. VII - Filing of Contracts by Contract Carriers Property. * * *

"A copy of each and every contract of any such contract carrier, entered into or effective on or after July 1, 1937, shall be filed with the Commission in the same manner as required in relation to existing contracts, in the form and manner prescribed in Tariff Rule VI, Section A, B, C, D, E, and F, so far as the provisions of said Rule are applicable;

In each and every case in which any such contract is an oral one, the contract carrier who or which is party thereto shall prepare a memorandum containing an accurate and complete statement of the substance and terms of such contract, including the charges for transportation services performed or to be performed thereunder, and any rule, regulation, or practice affecting such charges and the value of such services, and shall cause to be endorsed thereon the written acknowledgment of each party to such contract that such memorandum contains an accurate and complete statement of the terms of such contract, and such memorandum so endorsed shall be filed with the Commission in accordance with the provisions herein contained with respect to written contracts;" (T 198, Ex 37)

As pertinent to the instant proceedings, the defendants, with the exception of defendant Commission, are all motor and rail carriers holding certificates of public convenience and necessity which collectively auth-

orize the transportation of general commodities within a 50 mile radius of Salt Lake City, Utah. Each of said defendants has made extensive investments in facilities, equipment and rolling stock in order to adequately serve the shipping public within a 50 mile radius of Salt Lake City, Utah. (T 62, 79, 122, 127, 131, 135, 139-140)

Based on the evidence, the Commission arrived at the following conclusions:

"CONCLUSIONS"

From the file and records in the instant matter, and from the evidence, the Commission concludes that:

1. The Order of November 17, 1954, in Case No. 2945 and Case No. 1863 contemplated that respondent would file contracts with the Commission designating shippers for whom she would render a transportation service. Within the extended time limit permitted by the Commission, the only shippers for whom contracts were file[d] were Campbell Soup Company and Industrial Supply Company. After the expiration of the extended time limit, the filing of additional contracts or tariffs would require notice, hearing a determination by the Commission that the highways over which respondent desired to operate were not unduly burdened; that the granting of the application would not unduly interfere with the traveling public; that the granting of the application would not be detrimental to the

best interests of the people of the State of Uah and/or the locality to be served and that existing transportation facilities did not provide adequate or reasonable service.

2. The failure on the part of respondent to render reasonably adequate and continuous service for Industrial Supply Company constitutes a forfeiture of the right to now reinstitute said service without first demonstrating to the Commission that the service is necessary or that (respondent was not, sic) respondent was not responsible for the failure to give said service. Respondent has not made either of the necessary showings.

3. That before Mary A. Murphy, dba Pickering Transfer Company, can contract with additional shippers pursuant to the Contract Carrier Permit No. 130, she must obtain the assent of the Commission in accordance with 54-6-8 Utah Code Annotated 1953, as amended. This she has not done. *Milne Truck Lines, Inc. v. Public Service Commission of Utah, et al,* 13 Utah 2d 72, 368 P.2d 590." (R 79)

ARGUMENT

POINT I

THE COMMISSION'S REQUIREMENT THAT PICKERING TAKE STEPS AS REQUIRED BY 54-6-8 UTAH CODE ANNOTATED, 1953 (AS AMENDED) BEFORE ADDING AD-

DITIONAL CONTRACT SHIPPERS, IS NOT ARBITRARILY AND CAPRICIOUS.

Because John M. Murphy, at the time of his death, was providing an extremely limited service pursuant to a questionable permit, the Commission, in the year 1954, pursuant to 54-6-24, Utah Code Annotated, 1953 (as amended), the pertinent part of which reads as follows:

> "All rights, permits, certificates or licenses granted to any person under this act *and being operated by that person alone or in conjunction with others at the time of his death,* shall be transferable the same as any other right or interest of the person's estate subject to the following * * *" (Emphasis added)

reduced the territorial scope of said permit to a 50 mile radius of Salt Lake City, Utah. Consistent with its power and authority to supervise and regulate every contract motor carrier in accordance with 54-6-11, Utah Code Annotated, 1953 (as amended), the Commission, as a condition to transferring permit No. 130, required Pickering to file contracts within a twenty day period.

Pickering contracted with two shippers and filed a copy of her contract with the Commission. Not until April 6, 1972 (Ex 31) approximately 18 years after the rights, if any, of her husband were transferred to

Mary A. Murphy, was any additional contract filed with the Commission. With the exception of service for the contract shipper Campbell Soup Company, no lawful service has been performed under any contract since January of the year 1962. Between the year 1954 and the year 1972, the defendant motor and rail carriers have made substantial investments in equipment and facilities in order to provide a transportation service to the shipping public. All of this has been done without the competitive interference of Pickering.

The Commission recognized the obligation imposed on it by the Legislature and, consistent with its own Rules and Regulations, came to the following conclusion:

> "After the expiration of the extended time limit, the filing of additional contracts or tariffs would require notice, hearing a determination by the Commission that the highways over which respondent desired to operate were not unduly burdened; that the granting of the application would not unduly interfere with the traveling public; that the granting of the application would not be detrimental to the best interests of the people of the State of Utah and/or the locality to be served, and that existing transportation facilities did not provide adequate or reasonable service." (R 83)

The Commission did so in order to prevent unfair and destructive service consistent with the holding in the case of *Milne Truck Lines, Inc. v. Public Service Com-*

mission of Utah, et al, 13 Utah 2d 72, 368 P. 2d 590 (1962) wherein the Court states as follows:

> "Recognizing that one purpose of this legislation was to prevent unfair and destructive service, this court has held that the Commission's assent was necessary before a carrier could increase its service, even though the scope of its service was not expresly limited in the carrier's certificate." (13 Utah 2d 75)

The Commission interpreted its Order of November 17, 1954 to require Pickering to file contracts within twenty days and the extended time limit sought by Piering. This determination is consistent with the language of the Order wherein the Commission in the year 1954 said:

> "* * * upon the condition that applicant files the necessary insurance and tariffs, or contracts with respect to the permit, in accordance with the Commission's Rules and Regulations." (R 101)

The 1954 Order resulted in the transfer of John M. Murphy's rights, if any, under both a permit and certificate. Pursuant to the Commission's Rules and Regulations, the certificate contemplates the filing of insurance and tariffs. A contract carrier permit contemplates the filing of insurance and contracts. The contract so filed must contain charges of the contract carrier and any rule, regulation or practice affecting such charges.

As stated in the case of *Reavley v. Public Service Commission*, 20 Utah 2d 237, 436 P. 2d 797 (1968):

> "The Commission is best suited to say what its orders mean, since it has the power to grant, amend, or refuse certificates, and its determination is final as to facts so long as there is competent evidence to justify the finding. Section 54-7-16, U.C.A. 1953." (20 Utah 2d 239)

In the year 1948, in the case of *Goodrich v. Public Service Commission of Utah*, 114 Utah 296, 198 P. 2d 975, the Court upheld an Order of the Commission denying to applicant the right to add additional contract shippers. The Commission in said case found that to grant four additional shipper contracts would impair existing and proposed common carrier service in the area; that the common carrier protestants were able and willing to render reasonably adequate service in the area, and that the grant of the application would be detrimental to the best interests of the people in the area sought to be served. The principle enunciated in *Goodrich v. Public Service Commission of Utah*, supra, holds true in the instant matter.

To place Pickering in a position where it could contract with shippers of its own choosing would make it possible for Pickering to siphon the cream from the top of the bottle and leave the defendant common and rail carriers with the skim milk. The Commission and the Court recognized this pitfall in *Goodrich v. Public Service Commission of Utah*, supra, and stated:

> "To take the principal shippers away from the common carrier might, and probably would, make the difference between a successful or unsuccessful operation. Undoubtedly the applicant and the four contractees would be benefited by the granting of the permit but to escape the charge of being arbitrary, the Commission need not recognize the demands of a few to the ruination of the many." (114 Utah 300)

The comment of Justice Henriod in his dissenting opinion in the case of *Williams v. Public Service Commission of Utah*, ...2d....., 504 P. 2d 34 (1972):

> "This is simply the exercise of good judgment in my opinion, to perpetuate the heart beat and guts of the public utility concept of protecting risk capital expenditure until the privilege of noncompetitive operation clearly is shown to have been abused." (504 P. 2d 38)

is appropriate in this case.

There is ample evidence to support the findings and conclusions of the Commission and its actions are not arbitrary and capricious and its decision must be sustained.

POINT II

PICKERING FAILED TO SHOW THAT SERVICE FOR INDUSTRIAL

SUPPLY COMPANY IS NECESSARY AND THE COMMISSION PROPERLY CONCLUDED THAT THE FAILURE ON THE PART OF PICKERING TO RENDER REASONABLY ADEQUATE AND CONTINUOUS SERVICE FOR INDUSTRIAL SUPPLY COMPANY CONSTITUTES A FORFEITURE OF THE RIGHT TO NOW REINSTITUTE SAID SERVICE.

Pursuant to the Order of the Commission dated November 17, 1954, Pickering filed contracts with the Commission for the accounts of Industrial Supply Company and Campbell Soup Company. Plaintiff ceased hauling traffic for Industrial Supply Company as of January 25, 1962. Pickering did not advise the Commission of her discontinuance of said service and no evidence was offered by Pickering in the instant matter to justify said discontinuance. Likewise, Pickering failed entirely to demonstrate that said service is now needed.

Rule No. 5 of the Public Service Commission of Utah, Motor Carrier Rules and Regulations No. 3 provides in part as follows:

> "(b) All interruptions of regular service of common motor carriers and contract motor carriers, where such interruptions are likely to continue for more than one scheduled trip shall be promptly reported in writing to the Com-

mission, with full statement of cause of interruption, and its probable duration.

"(c) Discontinuance of service of a common or contract motor carrier whether with or without notice to the Commission and the public, shall be deemed a forfeiture of all rights secured under and by virtue of any order or permission to operate issued by the Commission, provided, however, that the Commission may permit resumption of operation on a proper showing that the carrier was not responsible for the failure to give service, and on a finding by the Comission that the service is necessary."

The Commission properly concluded as follows:

"2. The failure on the part of respondent (Pickering) to render reasonably adequate and continuous service for Industrial Supply Company constitutes a forfeiture of the right to now reinstitute said service without first demonstrating to the Commission that the service is necessary or that respondent was not (respondent was not, sic) responsible for the failure to give said service. Respondent has not made either of the necessary showings." (R 83)

POINT III

THE DISPOSITION OF PICKERING'S WRIT OR CERTIORARI AS IT PERTAINS TO THE DENIAL OF PICKERING'S PETITION FOR RE-

CONSIDERATION DATED AUGUST 25, 1972, IS DISPOSITIVE OF PICKERING'S WRIT OF CERTIORARI INVOLVING THE COMMISSION'S ORDER OF MAY 12, 1972.

Pickering challenges the Order of the Commission dated May 12, 1972, which Order suspends Pickering's schedule of charges for ninety days and orders Pickering to appear on June 7, 1972 and show cause, if any she may have, why said schedule should not be permanently suspended. A petition for rehearing was filed by Pickering and denied by the Commission. Plaintiff, pursuant to an extraordinary writ sought a review of the Commission's action by this court. On June 5, 1972, the extradordinary writ was denied.

The ninety day suspension order was made permanent by the Commission's Report and Order of July 10, 1972. A Writ of Review has been filed as to this Order and the court's disposition of said Writ will dispose of any issues raised in Pickering's petition to review the suspension Order of May 12, 1972.

POINT IV

THE COMMISSION'S NOTICE OF APRIL 24, AND MAY 12, 1972, AND ITS ORDER OF JULY 10, 1972, WERE PROPERLY GIVEN AND MADE.

On April 24, 1972, the Commission gave notice to

the parties that it would hear the petition of defendant motor and rail carriers on May 2, 1972. Section 54-7-9 *Utah Code Annotated* (1953, as amended) provides that:

> "* * * The Commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than ten days before the time set for such hearing, *unless the commission shall find that public necessity requires such hearing to be held at an earlier date.*" (Emphasis added.)

In its Report and Order dated May 12, 1972, the Commission found:

> " * * * and it appearing from the petition that public necessity requires the hearing consistent with the petition and notice of the Commission on the date set therefor; * * * " (R 51)

Said hearing was clearly held with the lawful and required notice to plaintiff.

The involved proceedings were initiated by the petition filed by defendants on April 20, 1972. The Commission in its notice of hearing dated the 24th day of April, 1972, advised the parties as follows:

> "At said time and place the Commission shall hear oral arguments and receive any written briefs which may be submitted on the issues

> raised by said petitioners in their said request for immediate hearing on petition for reconsideration and rehearing and further petition, including the issue of whether Contract Carrier Permit No. 130 should be canceled or suspended. * * * "

The matter was heard on May 2, and on May 12, the Commission issued its Order suspending the Contract Carrier Schedule No. 1 for a ninety-day period and ordered Mary A. Murphy, d/b/a Pickering Transfer Co., to appear and show cause as follows:

> " * * * to show cause, if any she may have, why the tariff issued March 28, 1972, in the name of Mary A. Murphy, d/b/a Pickering Transfer Company, Contract Carriers Schedule No. 1 should not permanently be suspended *and to further show cause, if any she may have, why Contract Carrier Permit No.* 130 *should not be altered or canceled, and why the Commission should not take such other and further action as allowed by law.*" (R 53)

The matter was heard on June 7, 1972, and on July 10, 1972, the Commission issued its Report and Order.

Plaintiff was fully informed of all of the issues disposed of by the Commission and the plaintiff's points three and four are not well taken.

CONCLUSION

In the instant matter, the Commission properly

exercised the responsibility imposed on it by the Legislature. There is ample basis in the record to support the Commission's Findings and Conclusions and the Commission's action is not arbitrary and capricious. It is a wise decision supported by the record and should be sustained.

Respectully submitted,

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