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 : Defendants' Brief In Support Of Petition For Rehearing

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MARY A. MURPHY, dba ALEX PICKERING TRANSFER COMPANY,

Plaintiff,

vs.

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, PARK CITY TRUCK LINES, INC.,

Defendants.

Case No. 12920

DEFENDANTS' BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I

THIS COURT ERRONEOUSLY INTERPRETED THE PREMISE ON WHICH THE COMMISSION PREDICATED ITS ORDER OF JULY 10, 1972.

By its Order of July 10, 1972, the Commission determined that where a contract carrier had not filed any contracts or tarriffs from the 23rd day of December, 1954, to the 28th day of March, 1972, future implementation of its service required the assent of the Commission in accordance with Section 54-6-8, *Utah Code Annotated* (1953, as amended). In support of this conclusion, the Commission cited *Milne Truck Lines, Inc. v. Public Service Commission of Utah, et. al.*, 13 U. 2d 72, 368 P. 2d 590 (1962).

This Court erroneously concluded that the Commission's citation of the *Milne* case was improper because, ". . . in the Milne case there were two possible interpretations of the term 'general commodities' as used in the granted authority." However, the Commission did not cite the *Milne* case for the proposition referred to by this Court. Rather, the *Milne* case was cited as support for the Commission's conclusion that a contract carrier permit that had been dormant for 17 years and 4 months could not be revived without the Commission's review of the effect of such a revival on existing competing motor carriers and a finding that the same would not be determined to the best interests of the people of the State of Utah. In *Milne Truck Lines, Inc. v. Public Service Commission of Utah,* supra, Justice Callister stated at 13 U. 2d 75:

> "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 expressly limited in the carrier's certificate.* The same principle is applicable to the case now before us. To allow Milne and other general commodity carriers to transport petroleum and petroleum products in tank vehicles without first determining that such service is necessary and in the public interest, *would not only be contrary to our statutory purpose, but would substantially impede the regulatory function of the Public Service Commission."* (Emphasis added)

The Commission found, ". . . that the motor carrier complaintants have made substantial investments in equipment and facilities since the year 1954 and are presently providing a transportation service in the transportation of general commodities to the shipping public." (R. 82) Evidence to support this finding includes the following:

(1) In 1963, the complainant Barton Truck Line, Inc. received total revenue of $1,282,263 of which $564,195 was intrastate traffic subject to diversion by plaintiff's operations under its Contract Carrier Permit No. 130 as interpreted by this Court. In 1971, 44% of a total revenue of $2,603,403 or $1,145,497 was subject to diversion by plaintiff. In addition, 43.66% of Barton's total number of shipments and 41.66% of the total weight carried by Barton constituted

intrastate traffic within a 50 mile radius of Salt Lake City, Utah (Ex. 10, T. 63). Barton has made substantial investments in facilities and equipment, including equipment purchases for delivery in June, 1972, amounting to $498,000 (Ex. 7). The diversion of intrastate traffic within a 50 mile radius of Salt Lake City, Utah would have a drastic effect on Barton, including the curtailment of service and the reduction of schedules and labor force (T. 68);

(2) From 1954 to 1971, the complainant Redman Warehousing Corporation increased its net capital investment in buildings from $15,595 to $218,673 or 1,302% and revenue equipment from $33,079 to $105,230 or an increase of 218% (Ex. 21). In 1971, Redman had 789 shipments within a 50 mile radius of Salt Lake City, Utah excluding the area covered by local cartage certificates, which shipments produced a revenue of $63,398.09. Revenue from shipments of household goods within this area was estimated to be $49,796 (Ex. 20);

(3) General commodities shipments handled by the complaint Rio Grande Motor Way, Inc. for the period of April 3 through April 7, 1972, between points within the geographical area covered by plaintiff's Contract Carrier Permit No. 130 constituted 258 shipments weighing 939,440 pounds with a revenue of $3,323.69 (Ex. 14); and,

(4) In 1968, 51% of the total revenue of Magna-

Garfield Truck Line was generated by intrastate traffic and in 1971 the figure was 52%.

The Commission's concern regarding the entry of a new competitor into a presently highly competitive area where existing carriers have made substantial investments and are dependent on such traffic for their very existence is not only required by statute, Section 54-6-8, *Utah Code Annotated* (1953, as amended), but is also required by this Court's interpretation of the purpose of the Public Utilities Act. As stated in *Gilmer v. Public Utilities Commission of Utah,* 67 U. 222, 247 P. 284 (1926) at 67 U. 236:

> "*The very purpose of the Utilities Act is to prevent one public utility from destroying another.* When, therefore, it is made apparent to the Commission that the increase of the number of vehicles or trips by a common carrier which is using the public streets and highways must necessarily result in seriously affecting the ability of another utility to render service, or perhaps destroy its ability to do so * * * *the Commission undoubtedly may interfere to prevent such disasterous results. The Commission was created for that very purpose, and, where its orders are within its jurisdiction and bounds of reason, and not capricious and arbitrary, this court cannot interfere.*" (Emphasis added)

Contract Carrier Permit No. 130 authorizes plaintiff:

> ". . . to operate as a contract motor carrier of all kinds of personal property including merchandise, machinery, and other property which she has occasion to carry in the course of the conduct of her said transportation business within a fifty mile radius of Salt Lake City, excluding pick up and delivery service within the area described in Certificate of Convenience and Necessity No. 684." (R. 81)

Plaintiff contends that Contract Carrier Permit No. 130 constitutes a, ". . . general commodities contract carrier permit(s), unrestricted as to any particular shipper, and that prior hearing and approval of each articular contract pursuant to Section 54-6-8, U.C.A. 1953, is not required before (plaintiff) may transport goods under her contract carrier permit." (R.89, 90) In all practicality, plaintiff's definition as adopted by this Court converts Contract Carrier Permit No. 130 to a common carrier operation without the inherent obligation of a common carrier to serve the entire public at published rates and charges. Plaintiff is free to solicit and obtain the business of lucrative shippers by the simple expedient of undercutting the published tariffs of these defendants and leave the remaining public shippers to pay the higher competing tariffs. The refusal of the Commission to sanction such an operation is neither arbitrary nor capricious. Rather, the protection of existing competitors and public shippers is the statutory obligation of the Commission as interpreted by this Court in *Milne Truck Lines, Inc.*

v. Public Service Commission of Utah, supra, and *Gilmer v. Public Utilities Commission of Utah,* supra.

POINT II

THIS COURT ERRONEOUSLY RESTRICTED THE SCOPE OF THE PROCEEDINGS BEFORE THE COMMISSION.

This Court vacated the Order of July 10, 1972, on the apparent theory that the Commission had improperly restricted the scope of plaintiff's Contract Carrier Permit No. 130. However, by the Order and Notice of Hearing issued May 12, 1972, plaintiff was ordered to appear before the Commission:

> ". . . to show cause if any she (plaintiff) may have, why Contract Carrier Permit No. 130 should not be altered or cancelled, and why the Commission should not take such other and further action as allowed by law." (R.53)

Section 54-6-20, *Utah Code Annotated* (1953, as amended) provides:

> "The Commission may at any time for good cause and after notice and hearing, suspend, alter, amend or revoke any certificate, permit or license isued by it hereunder."

The latitude vested in the Commission by the above quoted statutory provision was established by this Court

in *Provo Transfer and Storage Company v. Public Service Commission,* 3 U. 2d 86, 278 P. 2d 985 (1955) wherein it is stated:

> "We do not sit in these certiorai 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. . .".* (Emphasis added)

There is no statutory distinction between a certifi cate, permit or license, and the rationale set forth in *Provo Transfer and Storage Company v Public Service Commission,* supra, is applicable in each situation. Therefore, even if this Court determined that the Commission's Order of July 10, 1972 constituted an alteration or amendment to plaintiff's Contract Carrier Permit No. 130, such action by the Commission was justified and statutorily sanctioned.

The "good cause" resulting in the alteration or amendment to plaintiff's permit was the destructive effect of plaintiff's expanded service after 17 years and 4 months of relative dormancy on the existing transportation facilities that had invested substantial amounts in equipment and facilities and rendered an adequate transportation service during plaintiff's period of inactivity. This destruction of competition would be deterimental to the interests of the people of the State of

Utah, and the Commission's *single* requirement that plaintiff first obtain the assent of the Commission and demonstrate the existence of the elements set forth in Section 54-6-8, *Utah Code Annotated* (1953, as amended) before expanding the service performed under Contract Carrier Permit 130 was not arbitrary and capricious.

POINT III

THIS COURT ERRED IN CONCLUDING THAT THE COMMISSION MISINTERPRETED ITS ORDER OF NOVEMBER 17, 1954, WHEREIN THE OPERATING RIGHT OF JOHN MURPHY WERE TRANSFERRED TO PLAINTIFF.

In its Report and Order issued November 17, 1954, the Commission transferred to Mary A. Murphy, Certificate of Convenience and Necessity No. 684 and Contract Carrier Permit No. 130. The Commission was required to investigate the operation being conducted by John M. Murphy at the time of his death because Section 54-6-24, *Utah Code Annotated* (1953, as amended) restricts the scope of the transferred right, permit, certificate or license to the operation being conducted by the deceased at that point in time.

The Commission was initially concerned with the legality of the "grandfather permit" issued to John M. Murphy because of the history surrounding the issuance

of the permit and this Court's holding in *McCarthy, et. al., v. Public Service Commission of Utah,* 94 U. 304, 77 P. 2d 331 (1938) wherein notice and hearings were considered prerequisites to the issuance of grandfather permits. Because the Commission had not complied with the requirements announced by this Court in *McCarthy, et. al., v. Public Service Commission of Utah,* supra, it was observed:

> "Were this an application to transfer Contract Carrier Permit No. 130 to one other than an heir of John M. Murphy, deceased, the Commission would be compelled to deny that part of the application on the ground that no hearing was afforded interested parties in the first instance and the operation has been conducted without strict attention to the provisions of the law relating to the filing of proper tariffs." (R.100)

The Commission further determined, based on the testimony of Charles E. Murphy, who actively conducted the company's business, ". . . The only part of the authority being operated under Contract Carrier Permit No. 130 at the time of the death of John M. Murphy was about twelve trips per year within a radius of 50 miles of Salt Lake City." (R. 100).

Based on the hearing, the Commission limited Contract Carrier Permit No. 130, ". . . to the area within the State of Utah within a 50 mile radius of Salt Lake City." (R. 100, 101). On the same evidence, the Commission 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." (R. 101).

There were at least three justifications for requiring Mary A. Murphy to file "contracts with respect to the permit" within twenty (20) days, to-wit: (1) the fact the operation had been conducted without compliance to the legal requirements relating to the filing of proper tariffs (R. 100); (2) the fact that the only operations conducted under Contract Carrier Permit No. 130 totalled, ". . . about twelve trips per year within a radius of 50 miles of Salt Lake City." (R. 100); and, (3) the fact that the only way the Commission had of determining the scope of the operations being conducted at the time of the death of John M. Murphy to comply with the transfer statute, Section 54-6-24, *Utah Code Annotated* (1953, as amended), was to require the transferee to file existing contracts. Plaintiff did not appeal this Order and, in fact, sought and obtained an extension of time within which to file the required contracts.

In the instant proceeding, the Commission properly recognized that a construction of Contract Carrier Permit No. 130 such as that rendered by this Court would convert a ". . . twelve trips per year. . ." (R.100) contract carrier operation to an unregulated and unsupervised open-ended general commodities contract carrier

permit. To now expand the authority transferred to Mary A. Murphy pursuant to Section 54-6-24, *Utah Code Annotated* (1953, as amended), in November, 1954, would violate that statutory provision and all of the rules of construction previously announced by this Court. As stated in *Reavely v. Public Service Commission,* 20 U. 2d 237, 436 P. 2d 797 (1968), at 20 U. 2d 239-240:

> "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 them."

The justification of the Commission's Order of July 10, 1972, is a comprehension of the Commission's investigation and Findings set forth in the Report and Order of November 17, 1954 (R. 97-102), and the Commission's present reluctance to expand the authority originally transferred to plaintiff without first ascertaining the affect of plaintiff's contemplated service on existing competitors and the shipping public.

POINT IV

THIS COURT ERRED IN CONCLUDING THAT THE ORDER OF NOVEMBER 17, 1954, GRANTED A GENERAL CONTRACT CARRIER PERMIT.

This Court concluded that the condition in the

Order of November 17, 1954, requiring plaintiff to file contracts within twenty days, ". . . was merely in accordance with Rule VII."

Defendancts respectfully submit that this conclusion is erroneous for the following reasons: (1) The Order specifically states, "(t)hat the above described Certificate and Permit shall become effective twenty (20) days from the date hereof upon the condition that applicant files the necessary . . . contracts with respect to the permit. . ."; (2) that this condition was a condition precedent to the transferred permit becoming effective; and, (3) since the rules and regulations of the Commission already required such filings and all successful applicants are required to abide thereby, the only reason for specifically including the requirement in the Order was to condition the effectiveness of the granted permit on compliance therewith.

This action was the Commission's method af assuring compliance with its rules and regulations and it may again be noted that plaintiff did not appeal this Order but, instead, obtained an extension of time to comply with the condition.

This Court's reference to Justice Wolfe's concurring opinion in *McCarthy v. Public Service Commission*, 111 U. 489, 184 P. 2d 220 (1947) is error because the permit considered by the Commission in the instant proceeding was the permit transferred to plaintiff in November, 1954, and *not* the original permit issued to John Murphy. By reason of Section 54-6-24, *Utah Code*

Annotated (1953, as amended), the transferred permit was limited to the operation being conducted by John Murphy at the time of his death.

However, even Justice Wolfe's concurring opinion contemplates Commission review and approval based upon the applicant's showing of need, and the Commission is empowered to protect competing carriers.

As stated at 111 U. 501:

> "The permits could limit the hauls to such distance *as would prevent undue competition with the satisfactory common carriers of the same comodities* in the same area." (Emphasis added)

The case of *McCarthy v. Public Service Commission,* supra, was decided in 1947, approximately seven years prior to the Commission's Order of November 17, 1954. Instead of appealing this Order, plaintiff obtained an extension of time within which to comply with the condition. Had Justice Wolfe's observations been the law, as assumed by this Court, the Commission's Order of November 17, 1954, could have been reversed. Plaintiff should not be allowed an appeal 17 years and 4 months after the fact. Obviously, plaintiff admitted the validity of the condition as a part of the transfer proceedings.

POINT V

THIS COURT ERRED IN COM-

PLETELY VACATING THE ORDER OF JULY 10, 1972.

The decision of this Court in the instant proceeding failed to distinguish between the issues relating to the scope of plaintiff's Contract Carrier Permit No. 130 and the finding of the Commission that plaintiff had ceased hauling traffic for Industrial Supply Company as of January, 1962; that plaintiff had forfeited the right to reinstitute said service; and, that plaintiff would have to demonstrate a need prior to reinstituting said service.

This finding was supported by the evidence and the Order based thereon was pursuant to Rule No. 5 of the Public Service Commission of Utah, Motor Carrier Rules and Regulations No. 3, which provides in part:

> "(b) All interruptions of regular service of common 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.
>
> "(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."

By vacating this Order, this Court holds that plaintiff may reinstitute service or initiate new service without demonstrating a public need or inadequacy of existing service. This is an untenable extension of a contract carrier permit transferred to plaintiff at a time when the only operation conducted thereunder was twelve (12) trips per year.

SUMMARY

For the reasons herein stated, defendants respectfully submit that their Petition for Rehearing be granted.

Respectfully submitted,

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