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 : Plaintiff'S Reply Brief

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 [illegible] INC., UINTAH FREIGHTWAYS [illegible] GARFIELD TRUCK LINE [illegible] BROTHERS, INC., RIO GRA[illegible] TOR WAY, INC., MILNE T[illegible] INC., ASHWORTH TRA[illegible] BILLS MOVING, INC., A-ON[illegible] AND DELIVERY, LEWIS [illegible] LINES, UTAH PACKAGE E[illegible] DENVER & RIO GRANDE [illegible] RAILROAD COMPANY, [illegible] TRUCK LINE,

PLAINTIFF'S [illegible]

Original Action in the [illegible] Orders of the Public Service [illegible]

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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 COMPANY, and PARK CITY TRUCK LINE,

Defendants.

Case No. 22920

PLAINTIFF'S REPLY BRIEF

Plaintiff submits this Brief in reply to defendants' Brief.

ARGUMENT

POINT I. ARGUMENT ON FACTS

Defendants' statement of facts, page 3, says a petition was filed with the Commission on June 15, 1936,

praying for rehearing of the Commission's order of May 16, 1936, which granted plaintiff's predecessor in interest a contract carrier permit. Defendants' Brief says the petition for rehearing was never acted upon by the Commission. This is immaterial because:

(1) The petition for rehearing was not timely filed and hence the Commission was without jurisdiction to reconsider. Petitions for rehearing must be filed within 20, not 30 days. See 76-16-15, U.C.A. 1933, now 54-7-15 U.C.A. 1953.

(2) Defendants are barred by laches and are estopped from now claiming the Commission should reconsider its 1936 order.

(3) In the July 10, 1972, order, paragraph 6 thereof, the Commission found without merit defendants' claim that the Commission should reconsider its May, 1936, order, and no appeal herein has been taken therefrom by defendants.

Defendants' statement of facts, page 4, comments that the Commission's 1954 order, to which no one objected, in dictum, noted that had the 1954 application been one other than to transfer, the Commission would have been compelled by *McCarthy vs. Public Service Commission,* 94 Utah 304, 77 P.2d 331, to deny the transfer because no hearing was afforded interested parties when the permit was first issued in 1936. That comment is immaterial because:

(1) The Commission did approve the transfer to plaintiff in 1954 without objection from anyone, making the permit then and now perfectly valid. Indeed, the Commission in its 1972 order did not find to the contrary and defendants did not appeal therefrom.

(2) The Commission's 1954 dicta was wrong anyway. The *McCarthy* case did not require a hearing before granting a "granddaddy" permit, as the Commission in the 1954 order said. Instead, *McCarthy* held that "granddaddy" permits issued without hearing are prima facia valid but that upon *timely* filing of petition for rehearing the Commission must order hearing. In *McCarthy*, the Court reversed and remanded because the very same defendants as here there filed *timely* petition for rehearing but here defendants did not file timely petition for rehearing to the 1936 order and are estopped to complain now.

Defendants' statement of facts, page 5, quotes Commission Rule No. V (b) which says:

> "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 . . ."

This is immaterial because plaintiff's contract carrier authority is neither regular nor scheduled; it is irregular, radial, on-call authority.

POINT II. THE COMMISSION'S REQUIREMENT THAT PICKERING TAKE STATUTORY STEPS BEFORE ADDING ADDITIONAL CONTRACT SHIPPERS IS ARBITRARY AND CAPRICIOUS.

The Commission's 1972 order holds plaintiff must obtain a new contract carrier permit in the usual formal statutory process for each new shipper she might serve. Defendant's Brief, pages 12-13, attempts to justify this saying the Commission in 1954 pursuant to 54-6-24, U.C.A. 1953, reduced plaintiff's predecessor's permit to a 50 mile radial authority *and* to service to those shippers for whom she might file contracts within 20 days. The statutory language for such reduction, defendants claim, comes from emphasizing out of context the words ". . . and being operated by that person alone or in conjunction with others at the time of his death . . ."

The words "and being operated" do not appear to be words of limitation to the foregoing words "all rights, permits . . .". They cannot mean that only the rights to serve the territory and persons which the deceased was serving at his death may be transferred and no others, for if such were the meaning, the most snarly problems concerning where, how far, for whom, how long ago, and how many times did the deceased serve before his death would arise when no such problems would ever arise for corporate permit holders who cannot die. Instead, "and being operated" refers to the following words "by that person alone or in conjunction with others at the time of his death . . ."

At best, this statute might authorize the Commission not to transfer a wholly abandoned certificate or permit as one not "being operated" but it can hardly be read to authorize examination into the number of persons last served by a general commodities common or contract carrier, *inter vivos* and consequent restriction to precisely those persons thereafter. Whether a general unscheduled, on-call permit holder served one, ten or ten thousand persons the day or year before his death, he would still be "operating" his permit at time of death.

There certainly is no finding in the Commission's 1954 order that indicates or ever discusses the shippers Murphy was or was not serving, so the Commission cannot have intended in 1954 to find Murphy abandoned the right to serve any particular shippers and hence, his permit was clearly being operated in its entirety with respect to the unlimited number of shippers.

Contrast this to the Commission's express finding in the 1954 order, paragraph 3, that Murphy was operating at his death *only* the part of his authority within a fifty mile radius of Salt Lake City.

Hence, not only does defendants' reasoning for justifying the Commission's order fail, but we note defendants have wholly ignored explaining just how the Commission obtained authority in the 1954 transfer application to restrict the general permit to any particular shippers when no proposed restriction was noticed for hearing. Defendants wholly failed to distinguish *Morris*

vs. Public Service Commission, 7 Utah 2d 72, 368 P.2d 590, cited and relied upon in plaintiff's initial Brief. That case holds that in transfer applications, unless certificate or permit cancellation, and hence reduction, is noticed for hearing, the Commission is without authority to cancel and hence, to restrict, the certificate or permit.

Defendants' citation of *Goodrich vs. Public Service Commission*, 114 Utah 296, 198 P.2d 975 is inappropriate for that case concerned only the application of a contract carrier expressly limited to particular shippers. It did not concern a general contract carrier, as here.

POINT III. PLAINTIFF DID NOT DISCONTINUE SERVICE.

Defendants' Point II and the argument therein wholly begs the issue. Their brief, page 17, merely assumes the evidence shows that plaintiff "ceased" or "discontinued" service for Industrial Supply and states these verbs as proven facts. They are not so proven, nor is there a scintilla of evidence in the record to sustain these conclusions, as pointed out in plaintiff's initial brief, page 21-5, and defendants' brief does not cite us to any facts in the record to support these conclusions. All the record shows is that no service was called for by Industrial Supply after 1962; that is not "ceasing" or "discontinuing" service.

CONCLUSION

Defendants' Brief fails to cite where in the record there is any evidence to support the Commission's finding. The Commission's orders are, therefore, arbitrary and unreasonable.

Wherefore, plaintiff renews her prayer that the Court reverse the Commission's orders of May 12 and July 10, 1972, and that plaintiff be awarded her costs.

Respectfully submitted,

MOYLE & DRAPER

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