

Decision No. 28876

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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In the Matter of the Application of)
Benjamin Walters, doing business under)
the name and style of Island Trans-)
portation Company, Island Oil Trans-)
portation Company and Delta Transporta-) Application No. 20,164
tion Company, to establish (1) owner-)
ship of right to operate vessels in the)
transportation of property for hire on)
the inland waters of the State, (2) to)
file appropriate tariffs governing such)
operation of transportation, and (3) to)
resume operations.)

ORIGINAL

Gwyn H. Baker and Harry M. Wade for
Applicant.

J. Richard Townsend for Freighters, Inc.,
Protestant.

DEVLIN, Commissioner:

O P I N I O N

Benjamin Walters, the applicant herein, formerly operated a group of vessels and barges upon the San Francisco Bay and tributary rivers under the names of Delta Transportation Company, Island Oil Transportation Company and Island Transportation Company. His service was public in character, and his rates were on file with this Commission. His operative right was not one obtained through certificate granted by this authority, but was what is generally termed a "prior right," since he and others operating vessels upon the inland waters at the time the Legislature in 1923 first required certification of such public services were by statute exempted from the duty of obtaining certificates as to their existing operations. (Public Utilities Act, Sec. 50(d).)

On November 30, 1934, Walters joined in an application (No. 19728) to this Commission for authority to sell his operative rights and floating equipment to a newly created corporation, and on December 17, 1934 the Commission granted that application (Decision 27592.) In his present application filed October 5, 1935, he prays in effect that the Commission now rescind that order. ⁽¹⁾ For an understanding of the grounds upon which he bases his petition it is necessary to recount in some detail the occasion which prompted his original application to transfer and what has since occurred to cause him to now seek relief from the effects thereof.

Walters' original application to the Commission was joined in by five other operators of vessels, all public carriers. Together they proposed to transfer their respective operative rights and floating equipment to Freighters, Inc., a new corporation which also joined in the application and which prayed for authority to issue its capital stock to the sellers in payment for the properties received.

Attached as Exhibit "B" to that application of the six carriers by vessels was a copy of their mutual agreement for the creation of the new corporation intending to acquire their businesses. The floating equipment of each had been appraised at its then value,

(1) Walters' present application prays for an order as follows:

"(1) Decreeing that Benjamin Walters is the present owner of all the rights to conduct said operations for the transportation of property on the inland waters of the State as were conducted by him prior to March 22, 1935, * * *; and that such rights * * * shall be decreed to lawfully belong to Benjamin Walters, and may be exercised by him in the future;

(2) That the Commission make an appropriate order authorizing the filing and making effective by Benjamin Walters, of tariffs filed by him and in effect before the cancellation of said tariffs on March 22, 1935, * * *;

(3) That the Commission make its order authorizing Benjamin Walters, upon the filing of such tariffs and schedules as the Commission may require, to resume operations as theretofore conducted by him prior to March 22, 1935 * * *."

a total value of \$143,700⁽²⁾ being assigned to the physical property of the six applicants, and Freighters, Inc. was to issue to each respectively a sufficient number of shares of its preferred stock at \$25 per share to equal 50 per cent of the values assigned to the properties. The common stock of the corporation, without par value, was to be issued without consideration in the ratio of one share for each share of preferred.

That agreement provided further that the property transferred by the sellers should give the corporation an "absolutely free, clear and marketable title thereto, free and clear of all liens and encumbrances." The corporation, however, was entitled at its election to have the properties transferred immediately upon demand, even though clear title could not be given at the time, but in that event the seller was not to be entitled to delivery of any shares of stock until title had been cleared.

The above briefly summarizes the agreement of the parties entered into on October 31, 1934, for the formation of the new corporation. Something should be added concerning the recitals contained in the application which they thereupon made to the Commission for its approval of that arrangement. In some respects the application itself did not conform strictly to the agreement upon which they had acted.

Their application of November 30, 1934 recites that Freighters, Inc. would succeed to the rights and businesses of each applicant carrier whenever by resolution it should declare that it "will and does thereby acquire and succeed" thereto. It was then declared

(2) Exhibit 6 submitted in the proceeding shows that the Island Transportation Company (Walters) owned six units of floating equipment having a present value of \$29,500. Exhibit "C" attached to the application indicates that there was an outstanding mortgage upon this equipment securing a note in the sum of \$25,000.

that Freighters, Inc. would thereupon issue to the seller 4 shares of preferred and 4 shares of common stock "in consideration of and for the property rights, franchises, good will and business." The physical property also was deliverable upon demand by resolution, and it was stated that stock "in exchange for any such piece of property so demanded shall be issued at such times as Freighters, Inc. shall have received title thereto free and clear of all liens and encumbrances, * * *." Pieces of property free of liens could be transferred immediately and stock issued in exchange, but the 8 shares above referred to were to be deemed a part of the total number of shares to which each would be entitled.

In granting that application the Commission's order of December 17, 1934 authorized the six operators, including Walters, "to transfer their operating rights and properties, as proposed in the application, to Freighters, Inc., such transfer to be in accordance with the terms and conditions of the agreement, dated October 31, 1934." The corporation was authorized to issue on or before June 30, 1935 not exceeding 5,748 shares of stock consisting of 2,874 shares of preferred and 2,874 shares of common. It was stated in the opinion: "The record shows that the number of shares of stock applied for in the application was determined by the estimated present value of \$143,700. With this figure as a basis the proposed stock issue of 5,748 shares would be at the rate of \$25.00 a share for both common and preferred shares, it appearing that the properties in all cases would be transferred free and clear of indebtedness and encumbrances."

It thus clearly appears that the Commission's authorization granted to the respective applicants in that proceeding was wholly permissive in character. The applicant carriers were not required

either singly or jointly to convey either their physical properties or operative rights to the new corporation. The corporation, on the other hand, if it should actually obtain clear title to any of the physical properties listed by the respective carriers and which were totally appraised at \$143,700, might in payment therefor issue stock equal to the value of the physical properties acquired. In other words, if before June 30, 1935, it had not obtained clear title to all of those units of floating equipment listed, then the total amount of stock issued at \$25 per share was not to exceed the value assigned to such units as had been actually acquired. Thus, the number of shares which might be issued was limited by the value of the physical properties acquired, the relationship between the stock issue authorized and the physical properties acquired free and clear of encumbrances to be maintained at a ratio of \$25 capital value for each share of stock issued. No right was granted to issue stock in payment for operative rights alone.

In the petition since filed by Walters he alleges that on March 18, 1935, he canceled his tariffs and discontinued his operations, but that the transfer of his floating equipment to Freighters, Inc. has not been accomplished. He states, however, that 7 shares of stock were issued to him by the corporation, but asserts that such issue is void, inasmuch as it was contrary to the provisions of the Commission's order and also for the reason that the Commission is without power to permit the issuance of stock in exchange for the intangible value of a certificate alone. He declares that he is ready to resume operations upon receiving an order from the Commission reestablishing his rights as a public carrier and permitting him to refile the rates formerly effective.

It appears from the testimony presented upon this petition of

Walters that after issuance of the Commission's Order No. 27592 authorizing the several transfers to Freighters, Inc. he thereupon executed an agreement which recited that he was thereby conveying his operative rights, together with all his right, title and interest to six pieces of floating equipment, in consideration of the issue to him of 4 shares of preferred and 4 shares of common stock of the corporation. In that instrument it was agreed that when Walters should remove the liens upon such floating equipment, he would be entitled to receive additional shares of stock. Still other agreements seem to have been executed by Walters and Freighters, Inc., but it is unnecessary to further advert to them here.

The contention advanced by Walters is that he was induced to transfer his property and operative rights through misrepresentation. Appearing in protest to his petition, Freighters, Inc. contends that in no respect has it violated the Commission's order, and that Walters himself has made it impossible for it to issue stock to him in accordance with their agreement by his failure to remove the liens against the properties conveyed.

The jurisdiction of this Commission to dispose of the issues which have thus been presented is limited solely to determining whether the Commission's approval of the original application was obtained by some fraud or misrepresentation of the parties, or whether the provisions of that order have since been violated. There is no evidence, we believe, that the parties had joined therein in bad faith or that they in any way misrepresented the facts to induce the Commission to grant the application.

The meaning and intent of the Commission's order in that matter, as above expressed, seems entirely clear from the language of the opinion and order themselves, and is in accordance with its

precedent established in similar proceedings. Although no authority was granted to Freighters, Inc. to issue stock in exchange for operative rights alone without having received tangible properties of a value sufficient to support the issue, we cannot find that Freighters, Inc. has violated our order in that respect. The evidence indicates that the total amount of stock issued to all those conveying floating equipment free from encumbrance has not exceeded the physical values assigned thereto. There is some dispute as to whether the 8 shares of stock were actually issued to Walters. It is unnecessary for us to determine this question, inasmuch as the evidence does clearly indicate that Freighters, Inc. has not issued stock of a value in excess of the reported value of the physical properties actually acquired free and clear of encumbrance.

The Commission has frequently stated that in such cases it is not concerned with the distribution of corporate stock among the several parties who may have agreed together to convey their properties to a new corporation. It is concerned primarily with the amount of stock issued against the assets acquired. (Re Orval Overall, 30 C.R.C. 87, 91; Re Motor Freight Terminal Co., 31 C.R.C. 264, 268; Re Modern Warehouses, Inc., 35 C.R.C. 144, 145; Re Sanford and Word, 35 C.R.C. 553, 558.)

We must conclude, therefore, that we are without jurisdiction to grant the relief for which Walters prays in this application. This is not the tribunal to determine whether there has actually been a valid transfer of his properties or operative rights to the corporation, or whether any of the agreements to convey are subject to rescission because of fraud or misrepresentation. Upon these questions relief must be sought in the civil courts.

It should be added, however, that should it be determined by a court of competent jurisdiction that Walters has not conveyed to Freighters, Inc. his right to conduct a common carrier service by vessel, or is entitled to a rescission of such conveyance, this Commission will then entertain his further petition for an order permitting the refiling of his rates and resumption of service. Likewise, should Walters now offer to convey clear title to his floating equipment and the corporation desire to issue its corporate stock in payment therefor, we perceive no reason why we should not, upon further application, now extend the time as limited in the original order within which Freighters, Inc. might issue the stock therein authorized.

I am of the opinion that the application should be dismissed and, therefore, recommend the following order.

O R D E R

Hearing having been held upon the above entitled application, the matter submitted and now being ready for decision, and it appearing that the Commission is without jurisdiction to grant the relief prayed for; therefore, and good cause appearing, IT IS ORDERED that the application of Benjamin Walters herein be and the same is hereby dismissed.

The foregoing Opinion and Order are hereby approved and ordered filed as the Opinion and Order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 30th day of March 1936.

W. B. Davis
Leon ...
W. J. ...
Walter ...
John ...
Commissioners