

ORIGINAL

Decision No. 39537

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Application of WILLIAM L. CARPENTER, doing business under the fictitious names and styles of ARGONNE VAN LINES and ARGONNE VAN AND STORAGE COMPANY, to sell, and THE NEAL STORAGE COMPANY, a corporation, to purchase, the high-way common carrier operations of the Seller.

Application No. 27444

OPINION AND ORDER DENYING PETITION FOR VACATION AND SETTING ASIDE OF DECISION 39145.

HULLS, COMMISSIONER:

By ex parte order in Decision 39145, William L. Carpenter, doing business under the fictitious names and styles of Argonne Van Lines and Argonne Van and Storage Company, was authorized on or before September 30, 1946 to sell and transfer to The Neal Storage Company its common carrier operating rights, warehouse properties, trucking equipment and business of transporting household goods and related items operated by said William L. Carpenter; by said order also and in accordance with the terms of an agreement between them, The Neal Storage Company was authorized to issue to William L. Carpenter its promiscory notes for \$25,000 and \$80,000 and to execute a deed of trust to secure the payment of the latter note.

Petitioner Market Street Van and Storage, Inc. requested the vacation and setting aside of the said decision and a rehearing and reconsideration of the application, alleging that on August 8, 1944, said William L. Carpenter, doing business under the fictitious name and style of Argonne Van Lines, by written agreement purported to lease to petitioner its operating rights covering the transportation of household goods or related items from,

to and between certain points in California. Petitioner further alleged that pursuant to the said agreement, Petitioner Market Street Van and Storage Company purchased from said William L. Carpenter a piece of property in the City and County of San Francisco for \$11,500 and that said purchase constituted a part and parcel of the consideration for the execution of the lease.

The proceeding was reopened for hearing for the purpose of determining whether said Decision 39145 should be revoked, altered or amended in any particular, upon petitioner's charge that it was unaware of the negotiations between W. L. Carpenter and The Neal Storage Company leading to the filing of the application herein and knew nothing of the filing of the application until several days after the issuance of said decision, and upon petitioner's further charge of bad faith on the part of said W. L. Carpenter in failing to advise the Commission of the facts and circumstances surrounding the lease agreement of August 8, 1944, petitioner averring that had he done so petitioner believed that the application would have been set for a formal hearing at which petitioner would have appeared and offered evidence in opposition to the granting of the application. Petitioner's claim to entitlement to a fair hearing before the Commission upon the subject of its claims and equities in the operating rights in question was allowed and a hearing was accorded at which petitioner adduced testimony, both oral and documentary, in support of its contention.

The August 8, 1944 agreement (Exhibit 1) provided in part as follows:

"1. Carpenter hereby leases to the Company the operating rights, and the Company hereby takes from Carpenter said operating rights, for the term of three years from and after the date when approval of this agreement shall have been obtained from the California Railroad Commission * * * *"

"4. It is understood between the parties that the approval of the Railroad Commission of California must be obtained before this agreement shall take effect. For the purpose of securing such approval, the parties agree that as soon as practicable after the execution of this agreement they will join in and file with said Railroad Commission an application requesting approval of this agreement and the leasing of said operating rights in accordance with the terms hereof * * * *"

By a separate agreement on the same date (Exhibit 7) petitioner agreed to purchase and Carpenter agreed to sell the real estate in the City and County of San Francisco for \$11,500. On August 9, 1944, escrow No. 321-1133 in the Bank of America, Vermont and Forty-eighth Branch, Los Angeles, California, was entered into by petitioner and Carpenter wherein \$11,500 was deposited as evidenced by said escrow agreement (Exhibit 2) as "consideration for the real estate involved and \$600 being the first six months' rental of operating rights." The escrow instructions further state "this escrow is contingent upon the approval of agreement 'A' by the Railroad Commission." The instructions further contain this additional language: "This escrow is to be a ninety-day escrow, time being the essence and parties are placed in status quo. The deed is to be returned to Jessie Carpenter and all monies returned to purchasers, less costs, and, in the event the Railroad Commission fails or refuses to act or grant the application, there is no obligation between the parties hereto of any kind or nature. This escrow shall be closed upon receipt of copy of order of Railroad Commission granting application, and monies to be paid to W. L. Carpenter and deed to be recorded."

By subsequent written agreement (Exhibit 3) petitioner and Carpenter on September 1, 1944, referring to said agreement, dated August 8, 1944, for the purchase and sale of the real property in San Francisco (Exhibit 7), and referring also to the above-mentioned escrow withdrew and terminated the condition of the escrow to the effect that petitioner's obligation to purchase the real estate should be contingent upon approval of the Railroad Commission of the agreement to lease the operating rights. Said instrument reads in part: "It is further agreed that the agreement to purchase real property shall forthwith proceed to consummation of said agreement regardless of said agreement to lease operating rights or the approval thereof by said Railroad Commission." It was further agreed that the \$11,500 held in escrow be paid to Carpenter

upon delivery of the deed granting said real property to petitioner. It was stipulated (Tr.p.27) that the said real property was transferred and a consideration paid and the representative of the escrow department testified that it still held \$600.

The questionnaire containing information respecting transferor, William L. Carpenter, similar in form to that required for use in proceedings involving transfers of operative rights as highway common carriers, together with a letter filed by W. L. Carpenter August 29, 1944 to his attorney, Philip Selig, Jr., "for filing" was introduced in evidence as Exhibit 5. Various communications and telegrams passing between W. L. Carpenter and his attorney (Exhibit 4) need not be considered by the Commission other than that they indicate that negotiations were going on for a considerable time. Testimony by a witness for petitioner indicated that petitioner diligently continued its efforts to consummate the agreement originally made and that negotiations to that end were continued on into 1946 but that Mr. Carpenter "did not live up to the original agreement with us about certain things." (Tr.pp.32 and 33)

The original application herein was filed by W. L. Carpenter April 19, 1946.

Petitioner introduced in evidence a copy of the summons and complaint in an action brought in the Superior Court on August 15, 1946, by petitioner against said William L. Carpenter, said complaint being entitled, "Complaint for Specific Performance of Contract to Execute Lease" (Exhibit 6) In argument petitioner claimed bad faith on the part of Carpenter in the filing of the application herein in that he did not inform the Commission of the pendency of the negotiations evidenced by the escrow and agreements. Petitioner's attorney stated, however, that The Neal Storage Company, a co-applicant herein, was "an innocent transferee, a third party" (Tr.p.46) and further, "is an innocent purchaser in this proceeding" and that The Neal Storage Company had

no knowledge of these transactions or "perhaps was not advised of these dealings" * * * *. (Tr.p.67) Counsel, nevertheless, stated that "they stand in equal guilt with Mr. Carpenter" in failing to advise the Commission of the pending escrow transaction, and that his "judgment would be that they were not so advised." (Tr.p.68)

The situation presented here is that of a proposed transfer of operating rights instituted in August, 1944, but still incomplete and executory at the time of the filing of the application in April, 1946, and at the time of the hearing on August 16, 1946. No filing for the proposed transfer has been made with the Commission by Carpenter or Market Street Van and Storage, Inc. nor has the transferor's questionnaire (Exhibit 5) ever been filed with the Commission. The agreement for transfer of the operating rights has never been consummated and at no time has there been, or at present is there, any presentation upon which the Commission could predicate an order authorizing the transfer of said operating rights from Carpenter to Market Street Van and Storage, Inc.

The record discloses no evidence of bad faith on the part of The Neal Storage Company, the transferee under Decision 39145. With petitioner's contention of bad faith on the part of W. L. Carpenter, the Commission is not concerned. By petitioner's own testimony its agreement with Carpenter had never arrived at fruition. Petitioner's claims and equities, if any, against Carpenter are now before the Superior Court in the action brought by petitioner.

With the rights of an intending purchaser the Commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists or whether either party has a legal claim against the other under such a contract. These are questions for the courts and not for the Railroad Commission, which is merely authorized to prevent an owner of a public utility from disposing of it where such disposition would not safeguard the interests of the public. If the

owner does not desire to sell, the Commission cannot compel him to do so. If, having contracted to sell, he refuses to comply with the contract, the Commission is not empowered to determine that he should carry out his bargain. The provision of the Public Utilities Act that an owner may not sell without the consent of the Commission implies that there must be an owner ready to sell and seeking authority so to do before the Commission is called upon to act.

(Hanlon v. Eshleman (1915) 169 Cal.200, 202-3)

Petitioner urges that the case of Sale v. Railroad Commission, (1940) 15 C (2d) 612, enlarges the decision in Hanlon v. Eshlemen, supra, to the end that it might take cognizance of facts such as petitioner has brought to the Commission's attention here. In the Sale case the fact that the transferor's corporate powers had been suspended by the State was presented at the hearing but the Commission concluded, nevertheless, that public convenience and necessity would not be served by preventing the transferee from operating over the routes in question. Accordingly, it rendered a decision refusing to rescind the order authorizing the transfer.

In the Sale case the Supreme Court upheld the principles established in Hanlon v. Eshlemen, supra, but conceded that the principles expressed in the Hanlon case do not provide a universal test for determining the Commission's authority to pass upon questions of law. The Court said at pages 620-1, "because the Commission cannot decide questions concerning the legal rights and duties of private parties inter se does not mean that it is powerless to decide all legal questions or that it may, in its own discretion, disregard established rules of law * *. Thus if a proposed transferee lacked the legal capacity to do business, such fact would directly affect its ability to furnish the service which it proposed to assume." At page 621 the Court restated the Commission's constitutional and legislative duty "to safeguard the interests of the public with respect to the need for adequate transportation facilities." This is still the Commission's duty. The transferee herein, The Neal Storage Company, is

ready and willing to proceed to serve the public adequately under the operating rights it has received from Carpenter. The Commission is not disposed to determine petitioner's equities against Carpenter. Such equities will undoubtedly be determined by the Superior Court. The Commission is disposed to see that the transferee herein, The Neal Storage Company, proceeds to operate under the transfer from Carpenter to it to the end that the public may be served expeditiously by an operator anxious to serve it.

The petition for an order revoking, vacating and setting aside the previous order of this Commission issued June 25, 1946, is hereby denied.

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 15th day of

October, 1946.

Harold Huls

Justin J. Calver

Earl D. Howell

A. J. [Signature]

Commissioners