

ORIGINAL

Decision No. 58640

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 (1) A.T.L., Inc., a California Corpo-)
 ration, for authority to sell certain)
 of its operative rights and personal)
 property and lease its terminal to)
 American Furniture Transport, Inc., a)
 California corporation, and American)
 Furniture Transport, Inc., for auth-)
 ority to purchase said operative rights)
 and personal property and lease said)
 terminal;)
 (2) A.T.L., Inc., for authority to)
 transfer the remainder of its opera-)
 tive rights to Pixley Transportation,)
 a California corporation, and Pixley)
 Transportation for authority to acquire)
 said rights; and)
 (3) American Furniture Transport, Inc.,)
 for authority to incur the required)
 indebtedness to acquire the rights and)
 property involved, and for authority)
 to issue stock to named parties at par)
 for cash.)

Application No. 39582
 (Amended)

Jack O. Goldsmith, F. W. Turcotte, R. C. Fels, for
 Applicant American Furniture Transport, Inc.
Melvin A. Pixley, for Applicants Pixley Transporta-
 tion and A.T.L., Inc.
Anthony V. Danna, for Furniture Manufacturers Asso-
 ciation; Loyd B. Turner, for Blue Truck Lines;
 interested parties.
Elmer J. Sjostrom and Richard Entwistle, for the
 Commission staff.

OPINION AND ORDER

This amended application seeks Commission approval of two agreements and permission for one of the applicants to issue \$10,000 in capital stock. One agreement is between A.T.L., Inc., hereinafter referred to as A.T.L., and American Furniture Transport, Inc., hereinafter referred to as American. The other agreement is between A.T.L. and Pixley Transportation, a corporation, hereinafter referred

to as Pixley. A.T.L. and Pixley hold certificates of public convenience and necessity to operate as highway common carriers and express corporations between various points in the state. American is a newly created corporation and has not engaged in business to date.

The contract between A.T.L. and American, which is in the form of a conditional sales contract, provides essentially for the following:

- (1) The transfer from A.T.L. to American for \$37,080.00 of the goodwill and most of the operating rights now held by A.T.L.
- (2) The subleasing by American for 10 years of terminal facilities now leased by A.T.L. at a total rental of \$84,120.00.
- (3) The purchase from A.T.L. by American for \$10,800.00 of certain personal property including five semi-trailers, furniture pads and miscellaneous office equipment.

Under the terms of said contract American would be obligated to pay A.T.L. the sum of \$132,000 in 120 installments at the rate of \$1100 per month. In addition, if taxes levied against the leased terminal facilities exceed in amount those for the tax year 1957-1958, American is obligated to pay to A.T.L. the amount of said excess.

The agreement between A.T.L. and Pixley is for a nominal consideration. It provides for the transfer by A.T.L. to Pixley of the remaining operating rights held by A.T.L. and not transferred to American.

A duly noticed public hearing was held in this matter in Los Angeles on February 10, 1958 before Examiner Donald B. Jarvis.

The Commission is of the opinion, for the reasons hereinafter stated, that the relief sought in the application should not be granted and that the application should be denied.

The agreement between A.T.L. and American provides in part that:

"Sections 1, 2 and 3 of this agreement, while separately stated, shall constitute but one single agreement and transaction, and in the event AMERICAN fails for any reason to pay any of the installments in any section of th's agreement provided to be paid within the time in said respect of section provided, then in such event ATL shall have the full right, power and authority to terminate each and all sections of this agreement and to repossess the operating rights conditionally sold, the personal property conditionally sold, unless the same has heretofore been fully paid for, and to terminate the lease on the real property."

At the hearing Melvin A. Pixley, the sole stockholder of A.T.L., testifying in behalf of that applicant, stated that the aforementioned provision was so germane to the terms of the contract that he would be unwilling to consummate the transaction if said provision did not receive Commission approval. One effect of said provision is to provide for the possible reverter of public utility operating rights without approval by this Commission. The Commission finds that this is contrary to public policy and the express language of Section 851 of the Public Utilities Code which provides in part as follows:

"No public utility shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void."

In addition, said contract provision is against public policy and Public Utilities Code Section 851 because it provides for the possible reverter of public utility operating equipment and facilities without approval of this Commission. It is also noted in passing that all of said reverter provisions heretofore discussed are interdependent and if the contract were approved the slightest default could cause the destruction of American and return of the operating rights and property here involved all without approval of this Commission.

Another reason why this application must be denied is that the form of the agreement is contrary to the public interest. It has been heretofore indicated that the contract between A.T.L. and American is one of conditional sale. As a general rule, a conditional sales contract whereby a seller retains legal title to a public utility's operating property and attempts to divest himself of public responsibility is not in the public interest. (Re Max Karp, et al., 47 Cal. P.U.C. 187; Re J. J. Dulcich, 45 C.R.C. 350.) The Commission will, of course, in a proper case approve the mortgage of public utility operating property to secure an indebtedness. There is yet another important reason why the application must be denied. The Commission finds that the capitalization of American is such that it will not be able to adequately maintain the operating rights sought to be transferred. It is against policy to approve a transfer when the value of the property or the payments agreed upon require applicant to assume an almost insurmountable burden. (Re Harry D. Riley, 22 C.R.C. 500.)

By this application American seeks authority to issue \$10,000 worth of capital stock. Two thousand dollars worth of this capital stock is to be immediately purchased by three named individuals and these individuals are committed to purchase the

remaining \$8,000 of said stock within a period of six months. The Commission finds as a fact that said individuals have the financial ability to purchase said stock in accordance with said agreement. For the purposes of this opinion the Commission will treat the capital structure of American as being \$10,000.

American proposed to take over, continue and revamp the operations of A.T.L. Exhibit 6, attached to the application, indicates that A.T.L. had a net income for the 9-month period ending September 30, 1957 of \$2,840.66. As heretofore indicated, under the terms of said contract American would be obligated to pay A.T.L. \$1100 per month or \$13,200 per year. After adjusting A.T.L.'s 1957 net income to an estimated yearly figure, it would seem that if American continued A.T.L.'s operations it would, because of said contract payments, suffer a yearly loss of approximately \$9,400. Such a situation would threaten the continued operation of the operating rights here involved. The termination of these rights would be injurious to the public. It is, therefore, the Commission's duty to scrutinize the transaction to protect and safeguard the interests of the public. (Re Richmond and San Rafael Ferry and Transportation Company, 52 Cal. P.U.C. 420.)

At the hearing applicants presented evidence attempting to show that they could operate more efficiently than A.T.L. and thereby make the enterprise more profitable. Some of this testimony was far from forthright. For example, part of the equipment which American seeks to purchase consists of 5 semi-trailers. Paragraph IX of the application states that these semi-trailers are to be used as operating equipment in order to effectively utilize the operating rights sought to be transferred. Frank W. Turcotte, testifying as

a witness for applicants, stated that these 5 semi-trailers would be used in the ordinary operations of American:

"There are going to be a number of sublessees who own their own tractors and who are going to haul the five semi-trailers which will be purchased by American. ..."

However, R. C. Fels, president of American, who appeared as a witness for applicants, testified in connection with a cost study submitted in evidence to persuade the Commission that American could operate more efficiently than A.T.L., that the amount shown as the depreciation reserve for said 5 semi-trailers was actually a method of writing up payments for the personal property to be transferred under the provisions of the contract between A.T.L. and American. He further testified,

"... The semi-trailers actually owned by American will be on an auxiliary basis only.

"There has been no provision made in my cost study for that depreciation. ..."

He later testified, with regard to a matter not involving the cost study, that the semi-trailers would be used in the regular operations of American. Also, said cost study did not take into account prospective income taxes.

While the aforesaid cost study relied upon by applicants was based upon the current gross revenues of A.T.L., no evidence was presented to show that American would receive substantially all of the business now tendered to A.T.L. Some of the witnesses for applicants testified that after the prospective transfer of operating rights from A.T.L. to American they hoped to encourage more shippers to ship by American than formerly shipped by A.T.L. However, no shipper witnesses were called and no specific shippers were named to substantiate the contention of forthcoming additional business. Witnesses for applicants testified that American had

negotiated an agreement with Southern Pacific Company whereby American would receive property under its express corporation rights and such property would be transported by Southern Pacific via "piggyback" service. It was asserted that such operation would reduce costs and increase American's profits. Aside from self-serving generalizations, no evidence was presented to the Commission concerning the terms of said contract with Southern Pacific or the anticipated volume of traffic and the revenue to be derived therefrom.

While the Commission does not disparage the fact that an aggressive management might produce greater revenues with the operating rights here involved, the Commission finds as a fact that the burden of the payments called for in the contract between A.T.L. and American would be so great that the capital of American would be exhausted before the effects of new management could be realized. If the Commission permitted said transfer under the terms of the contract the operating rights here involved would be threatened. The Commission is of the opinion, based upon the facts in the record, that it would take approximately one year for an aggressively and efficiently managed American to reach the point where it would not be operating at a loss in view of the said \$1100 monthly payments; and that a minimum capital structure of \$15,000 would be necessary to insure operations for said period. While A.T.L. has not been operating at a great profit, it made a net profit in 1957. The public interest dictates that under the circumstances it should maintain the operating rights here involved until such time as it may, subject to Commission approval, agree to the transfer of said rights in such a manner so as not to jeopardize their continued existence. The Commission finds that a transfer in accordance with the terms of said contract between A.T.L. and American would be adverse to the public interest.

The contract between A.T.L. and Pixley is for but a nominal consideration. The main purpose of the contract is to permit Pixley to take over certain operating rights that A.T.L. and American deem unprofitable for the proposed operation to be taken over by American. This contract is subsidiary to the main contract between A.T.L. and American. Because of the disposition heretofore indicated upon the contract between A.T.L. and American this subsidiary contract need not be further considered. Likewise, since the request by American for authority to issue capital stock is predicated upon the contract heretofore disapproved, it will not be further considered.

O R D E R

A public hearing having been held in the above-entitled matter, the matter having been duly submitted, and the Commission now being fully advised, and basing its order upon the findings of fact as hereinabove set forth, it is hereby ordered that this application be, and the same is, hereby denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 6th day of May, 1958.

Robert L. ... President
...
Theodore J. ...
Commissioners

Peter E. Mitchell
Commissioner C. Lynn Fox, being necessarily absent, did not participate in the disposition of this proceeding.