

Decision No. 66249

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA MOTOR TRANSPORT CO.,
DELTA LINES, INC., FORTIER
TRANSPORTATION COMPANY, MERCHANTS
EXPRESS OF CALIFORNIA, PACIFIC MOTOR
TRUCKING COMPANY, AND WILLIG FREIGHT
LINES,

Complainants,

vs.

Case No. 7667

FRANK L. NOLAN, JR., an individual,
and MARY F. BARTHOLOMEW, an individual,
doing business as FRANK NOLAN DRAYAGE
CO., a co-partnership, and MOTOR
TRANSPORT TERMINALS, INC., a corporation,

Defendants.

PRELIMINARY ORDER

Complainants seek revocation of highway common carrier operating rights. Responsive to preliminary mailing of the complaint, prior to service thereof, in accordance with procedural Rule 12, defendants filed a motion to dismiss. Before considering the motion it is necessary to refer to an application proceeding wherein an order was issued authorizing the transfer of the rights.

On May 8, 1963, defendant Nolan sought authority to transfer the rights to defendant Motor Transport Terminals. (App. 45415.) Complainants requested leave to intervene. Authorization to transfer the rights was granted July 2, 1963. (Decision 65634.) That ex parte decision denied the petition to intervene. It stated that petitioners (complainants herein) alleged they were presently serving the area covered by the transfer application; were providing a service fully adequate for needs of the shipping public; were ready, willing and able to satisfy any needs for service in the area; and that public

interest would not be served by revival of the "dormant" certificate. The decision cited Stovall, 59 Cal.P.U.C. 373, and Bennett, Dec. No. 65427 in App. No. 45291, to the effect that in a transfer proceeding the Commission is primarily concerned with whether the transfer "would be adverse to the public interest", not whether a more competent carrier would unbalance the competitive status among existing carriers, and that the offer to adduce evidence on the issue of public convenience and necessity would be a collateral attack upon prior decisions.

Complainants' petition for reconsideration and rehearing of the ex parte decision authorizing the transfer was denied. (Decision No. 65936, September 3, 1963.)

The complaint herein, filed during the pendency of the above petition for rehearing, alleges in substance that by Commission order of July 28, 1959 the Nolan right was suspended for failure to pay fees; by order of May 17, 1960 suspension was continued, despite fee payment, because participation in the Western Classification had been cancelled; that by order of August 30, 1960 the right was reinstated; that by order of June 12, 1962 the right was again suspended for failure to have tariffs on file; and that this situation was corrected and the suspension vacated by order of June 26, 1962. On April 8, 1963 operations were discontinued without obtaining Commission authorization. That cessation is a breach of utility obligation under the certificated authority and filed tariffs. Sale of the right for a price in excess of original cost violates the purpose and spirit of Pub. Ut. Code section 820, prohibiting capitalization of operating authority in excess of the amount paid the State for the grant thereof. Since discontinuance of operations business formerly handled by Nolan has been handled by other carriers, including complainants. Service available to the shipping public

is fully adequate for the needs and convenience of the shipping public. Complainants will be injured by "revival" of the Nolan certificate in the hands of Motor Transport Terminals, and may lose business. Complainants seek revocation of the Nolan certificate, whether in the hands of Nolan or of Motor Transport Terminals.

The motion to dismiss urges that the present complaint is an attack on the transfer proceeding, and that there is nothing in the complaint which has not been brought to the attention of the Commission previously by complainants, in their petition for intervention in the transfer proceeding, and in their petition for rehearing of the order authorizing the transfer. Defendants submit that disgruntled parties should not be permitted to file one pleading after another just because they are not happy with a given decision, and that the allegations of the complaint have previously been presented to the Commission and decided.

The present complaint in part alleges unauthorized discontinuance of operations, and seeks revocation for this reason. The ex parte transfer decision did not discuss that question. It stated that intervention was denied because in a transfer proceeding the issue of public convenience and necessity would constitute a collateral attack upon prior decisions.

In any event, to bar complainants from being heard in the transfer proceeding, upon the basis that so to do would be a collateral attack on earlier decisions, and then to refuse to consider a complaint upon the ground that it would be a collateral attack upon the decision in the transfer proceeding, would be to foreclose complainants from ever raising the issue of unauthorized discontinuance of operation or possible revocation of certificate for that reason in any proceeding. Complainants are entitled to be heard on such issues.

IT IS ORDERED as follows:

1. The Secretary of the Commission is directed to cause to be served upon defendants copies of this order, together with copies of the complaint herein.

2. Defendants are directed to answer the complaint within ten days after service thereof, but only as to two issues,

(a) Whether or not there has been an unauthorized discontinuance of public utility operation, and

(b) Whether or not, for such reason, the Nolan certificate, authorized to be transferred to defendant Motor Transport Terminals, Inc. by Decision No. 65634 in Application No. 45415, should be revoked.

3. In all other respects Case No. 7667 is hereby dismissed.

Dated at San Francisco, California, this 5th day of NOVEMBER, 1963.

William G. Beards
President

John J. Ditchfield
Wood H. Kegan

George E. Brewer

Frederick B. Holshoff
Commissioners