

ORIGINAL

Decision 88 08 031 AUG 10 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of:

TTT, INC., a California corporation,

Complainant,

v.

DONALD D. FINCHER, dba
FINCHER & SONS, PYRAMID
COMMODITIES, INC., a
California corporation and
LEE GALE,

Defendants.

Case 87-12-053
(Motion to Dismiss
filed April 5, 1988)

In the Matter of:

TTT, INC., a California corporation,

Complainant,

v.

CHARLES R. BAKER and MARILYN
BAKER, PYRAMID COMMODITIES,
INC., a California
corporation and LEE GALE,

Defendants.

Case 87-12-054

OPINION GRANTING MOTION TO DISMISS
CASES 87-12-053 AND 87-12-054
AND DENYING REQUEST FOR IMPOSITION OF
MONETARY SANCTION

In these complaints, complainant alleges that the cement carrier certificates previously held by defendant Pyramid and now held in individual parts by the other defendants automatically lapsed and terminated through the operation of Public Utilities

(PU) Code Section 1065.2 because Pyramid did not exercise the certificate between July, 1980 and May, 1982 when the certificate was in Pyramid's name. The pertinent portions of PU Code Section 1065.2, enacted in 1967, relied on by complainant is as follows:

"A certificate of public convenience and necessity to operate as a cement carrier...not exercised for a period of 12 consecutive months, inclusive of all periods of suspension, shall lapse and terminate."

Defendants move in writing to dismiss the two complaint cases on the alleged grounds that the claims asserted by complainant have been previously decided and fully adjudicated by the Commission in ex parte Decision (D.) 87-10-083 (rehearing denied in D.88-01-051) and ex parte D.87-11-056 (rehearing denied in D.88-01-053) (transfer decisions) and thus are barred under the principles of res judicata and collateral estoppel. The one decision referred to by defendants authorized the transfer of part of Pyramid's cement carrier certificate to one of the defendants herein and the other decision transferred the remainder of the certificate to the other defendants. Complainant herein was a protestant in both of the transfer cases and in both cases attempted to raise the PU Code Section 1065.2 issue. Complainant urges that the motion to dismiss be denied. The findings of fact and conclusions of law of each of the transfer decisions read, respectively, as follows:

D.87-10-083

"Findings of Fact

"1. Fincher has resided in the State of California continuously for not less than 90 days next preceding the filing of this application.

"2. Fincher applied to serve San Joaquin County under authority of a cement carrier certificate to be purchased and transferred from Pyramid.

"3. A protest was filed by a group of 3 non-carriers, plus a cement carrier who does not operate in San Joaquin County.

"4. Protestants have not alleged that granting the application will reduce their business or customers.

"5. It is alleged that protestants were informed that Pyramid Commodities abandoned its cement operating authority by not using it for 12 consecutive months and more during the period from 1976 through August of 1982.

"6. Pyramid has provided a freight bill to prove operation as cement carrier within the last 12 months.

"7. There is no indication that Pyramid Commodities has not operated under the certificate in recent years.

"8. Applicants seek to transfer an operating right where protestants have no right to serve. None of those who are objecting have sufficient interest to qualify as valid protestants.

"9. The letter from WMB is not a protest, nor does it raise issues which would justify continuing this proceeding and scheduling a hearing.

"10. The proposed transfer would not be adverse to the public interest.

"11. A public hearing is not necessary.

"Conclusions of Law

"1. The argument of protestants that an operating right to be transferred has been abandoned by nonuse for a 12-month period, 5 or more years prior to the transfer proceeding, should be rejected. (Readymix Concrete Co. Ltd. (1966) 65 Cal PUC 587, 590.)

"2. The application should be granted."

D.87-11-056

"Findings of Fact

"1. Charles Baker has resided in the State of California continuously for not less than 90 days next preceding the filing of this application.

"2. Baker applied to serve 9 counties under authority of a cement carrier certificate to be purchased and transferred from Pyramid.

"3. A protest was filed by a group of 3 noncarriers, and a cement carrier who operates in all 9 counties Baker has applied to serve.

"4. Protestants have not alleged that granting the application will reduce their business or customers.

"5. It is alleged that protestants were informed that Pyramid commodities abandoned its cement operating authority by not using it for 12 consecutive months and more during the period from 1976 through August of 1982.

"6. Pyramid has provided a freight bill to prove operation as a cement carrier within the last 12 months.

"7. There is no indication that Pyramid Commodities has not operated under the certificate in recent years.

"8. The noncarriers have failed to show sufficient interest in the transfer proceeding to qualify as Protestants.

"9. The carrier (TTT, Inc.) is qualified as a protestant, but does not indicate that granting the application will affect its cement hauling in any way.

"10. The letter from WMB is not a protest, nor does it raise issues which would justify continuing this proceeding and scheduling a hearing.

"11. The proposed transfer would not be adverse to the public interest.

"12. A public hearing is not necessary.

"Conclusions of Law

"1. The argument of protestants that an operating right to be transferred has been abandoned by nonuse for a 12-month period, 5 or more years prior to the transfer proceeding, should be rejected. (Readymix Concrete Co. Ltd. (1966) 65 Cal PUC 587, 590.)

"2. The application should be granted."

In each case, the protest was "dismissed."

Discussion

We should state at the outset that we do not ordinarily consider parties' motions to dismiss separately from consideration of the underlying proceeding itself. While parties are certainly entitled to make such motions, for the most part we prefer to go to hearing and to listen to all presentations before addressing motions to dismiss and accordingly, we ordinarily take them up as part of our decision indisposing of the underlying matter. We find that this procedure gives parties the greatest latitude in presenting their arguments and their cases, and it conserves our slender resources by requiring consideration of all matters at one time in a single decision.

In this case, however, different considerations cause us to address the motions to dismiss before we proceed further. Our reasons for doing this are twofold: first, we have issued a decision in which the same subject matter was raised but the decision itself is not clear as to the effect of our disposition, leaving parties in the present case arguing over our intent and second, in addition to the two matters consolidated in the present case, there is yet another complaint, not consolidated but involving the same parties, which will be impacted by our decision on the motion to dismiss. Therefore, in the interests of clarity, certainty and efficient use of time, we will dispose of the motion to dismiss separately from the underlying proceedings.

It is evident from Finding of Fact 5 in each of the transfer decisions that the nonexercise claim was raised by

protestants in those cases. Although Finding of Fact 7 suggests that protestants offered no facts tending to show nonuse, there is no finding of fact in either decision that there was or that there was not any exercise of the certificate during the critical period in question between July, 1980 and May, 1982. Rather, Conclusion of Law 1 in both decisions rejected consideration of the claim based on the Readymix case.

By citing Readymix the decision appears, without stating it explicitly, to reject the protestants' allegation of certificate lapse and termination on the basis that a transfer proceeding is not a proper place to raise such an issue. The present motion to dismiss has occasioned our further examination of Readymix, and we must conclude that a protest alleging lapse and termination will lie in a transfer proceeding.

Readymix and its progenitors dismissing protests based on lapse were decided before the Legislature enacted Public Utilities Code Section 1065.2 in 1967. Before Section 1065.2 protestants frequently argued that nonuser of the certificate was evidence of there being no public convenience or necessity to be served by the authority. We consistently rejected those arguments because we had made the finding of public convenience and necessity in originally granting the authority, and we would not allow a collateral attack on that finding in a transfer proceeding. Our position was correct until the Legislature provided that certificates would expire automatically by operation of law.

Under Section 1065.2 it is entirely possible that a certificate may lapse without our knowledge. In such a case, our approval of the transfer of an invalid certificate would likewise be invalid. Protestants alleging lapse under Section 1065.2 are not making the same argument as was made in the Readymix line of cases, and therefore, we should consider them in transfer proceedings. Our decision today is consistent with D.78029, D.78692 and D.85029, all of which were protested transfer

applications alleging lapse under Section 1065.2. Each was decided on its merits.

To the extent our denial of complainants' earlier protest was based on Readymix, we believe the decision was unclear. However, our decision was also based on protestants lack of proof that the certificate had not been used. (Finding of Fact 7; memo p. 5.) Complainants have had full opportunity to raise their issue before us, both in the protests and petitions for rehearing. We remain convinced that, given the practical difficulties of proving stale facts and that Pyramid was shown to have transported cement in 1986 it would be pointless to litigate this matter further. We note again, as we did in D.87-10-083 and D.87-11-056 that complainants have argued this matter extensively without offering anything more substantial than an allegation based on information and belief. Therefore, we will grant the motion to dismiss.

Defendants request that the Commission impose monetary sanctions under Code of Civil Procedure Section 2023(b)(1) against complainant TTT, Inc. and its counsel for attempting to subpoena an officer of defendant in questioning her on the certificate lapse and termination claim. Defendant argues that complainant knew the lapse issue had been adjudicated in our earlier proceedings. We will deny defendants' request.

Our references to Readymix in D.87-10-083 and D.88-01-051 could have led complainants to believe that, even following the enactment of Section 1065.2, we would not hear lapse allegations in protested applications to transfer authorities. We did not say, even in the Readymix cases, that protestants could not alternatively file complaints. We cannot, therefore, regard the present complaint frivolous. It follows that the attempt to subpoena Pyramid's officer does not warrant a discovery sanction.

Findings of Fact

1. Complainant alleges in its complaint that the cement carrier certificate previously held by defendant Pyramid and now

held in individual parts by the other defendants lapsed and terminated through the operation of PU Code Section 1065.2 because Pyramid did not exercise the certificate between July, 1980 and May, 1982 when the certificate was held by Pyramid.

2. Defendants filed a written motion to dismiss the complaints on the basis that the claims asserted by complainant have been previously decided and fully adjudicated by the Commission in the transfer cases (rehearing denied in both cases) and thus are barred under the principles of res judicata and collateral estoppel.

3. Conclusion of Law 1 in each of our earlier transfer proceedings cited Readymix Concrete Co. Ltd. (1966) 65 Cal PUC 587,590 in rejecting protests by complainant, TTT, Inc.

4. Readymix and decisions preceding it consistently held that protests amounting to a collateral attack against the issuance of a carrier's authority could not be sustained.

5. In 1967, the Legislature enacted Public Utilities Code Section 1065.2 which provided for the lapse and termination of operation by law of a certificate of public convenience or necessity to operate as a cement carrier if the certificate is not exercised for a period of one year.

6. Public Utilities Code Section 1065.2 creates a separate statutory ground for protesting an application to transfer a cement carrier certificate.

7. In neither transfer protest did complainants offer any more proof than an allegation based on information and belief that Pyramid did not exercise its cement carrier authority from 1976 to 1982.

Conclusions of Law

1. Defendants' motion to dismiss should be granted.
2. Defendants' motion to assess monetary sanctions against plaintiff and his lawyer should be denied.

ORDER

IT IS ORDERED that:

1. Defendants' motion to dismiss Case (C.) 87-12-053 is granted.
2. Defendants' motion to dismiss C.87-12-054 is granted.
3. Defendants' motion to assess sanctions is denied.
4. Defendants' motion to exclude the alleged factual statement of Glen E. Walker from consideration in deciding the motion to dismiss is granted.

This order becomes effective 30 days from today.

Dated August 10, 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

O R D E R

IT IS ORDERED that:

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Dated AUG 10 1988, at San Francisco, California.

STANLEY W. HULETT
President

DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.



Victor Weisser, Executive Director

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"Conclusions of Law

"1. The argument of protestants that an operating right to be transferred has been abandoned by nonuse for a 12-month period, 5 or more years prior to the transfer proceeding, should be rejected. (Readymix Concrete Co. Ltd. (1966) 65 Cal PUC 587, 590.)

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FINDINGS OF FACT

1. Complainant alleges in its complaint that the cement carrier certificate previously held by defendant Pyramid and now held in individual parts by the other defendants lapsed and terminated through the operation of PU Code Section 1065.2 because Pyramid did not exercise the certificate between July, 1980 and May, 1982 when the certificate was held by Pyramid.

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5. In 1967, the Legislative enacted Public Utilities Code 1065.2 which provide for the lapse and termination by operation of law of a certificate of public convenience or necessity to operate as a cement carrier if the certificate is not exercised for a period of one year.

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Conclusions of Law

1. Defendants' motion to dismiss should be granted.
2. Defendants' motion to assess monetary sanctions against plaintiff and his lawyer should be denied.