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Acme Delivery Service, Inc. v. Cargo Freight Systems, Inc.

SUPREME COURT, STATE OF COLORADO

Case No. 84SA12

BRIEF OF THE COLORADO PUBLIC UTILITIES COMMISSION

ACME DELIVERY SERVICE, INC., a corporation,

Plaintiff-Appellee,

v.

CARGO FREIGHT SYSTEMS INC.,
a Colorado corporation,

Defendant-Appellant,

and

THE COLORADO PUBLIC UTILITIES COMMISSION,

Defendant-Appellant.

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STATEMENT OF THE CASE

On September 16, 1982, the applicant, Cargo Freight Systems Inc. (Cargo Freight) filed an application with the Colorado Public Utilities Commission (PUC) for authority to operate as a class B contract carrier for hire pursuant to section 40-11-401, C.R.S. (1973). Plaintiff-appellee Acme Delivery Service, Inc. (Acme) filed a protest to Cargo Freight's application for authority. After a public hearing on the matter, the PUC hearing examiner, in decision No. R83-1019, granted authority to Cargo

Freight generally so as to allow it to transport newspapers for the Denver Post between certain points in the Denver Metro area. The hearing examiner for the commission found that the proposed service would be distinctly superior or unique and that the granting of the authority would not impair the efficient operation of authorized common carriers. In making these findings, the examiner relied principally on the fact that newspapers require special handling and prompt, same day delivery with the resulting specialized delivery service. The hearing examiner concluded that Cargo Freight would be able to meet the Denver Post's distinct needs better than Acme.

Acme filed exceptions to decision R83-1019 on August 24, 1983 pursuant to section 40-6-109(2), C.R.S. (1973). The PUC, acting en banc overruled and denied Acme's exceptions in decision C83-1474 issued September 20, 1983, noting that, "Cargo properly leases equipment and maintains appropriate control over the operators of such equipment so that Cargo is fit to provide the service as herein requested." Acting pursuant to section 40-6-114(1), C.R.S. (1973) Acme filed an application for reconsideration raising for the first time the issue of the PUC violating its own rule 12(B) (hereinafter PUC rule 12(B)) of the rules and regulations governing private carriers by motor vehicle (4 CCR 723-11) by allowing Cargo Freight to operate with leased equipment and noncontract drivers. This "leased equipment issue" was

not raised by Acme at hearing before the PUC hearing examiner or in its exceptions to decision C83-1019. By decision C83-1596, issued October 12, 1983, the PUC denied Acme's application for reconsideration. Acme filed a timely appeal of the case to the Denver District Court where Judge Roger Cisneros reversed the PUC decision.

The district court found that Cargo Freight leased its equipment from third parties and that such parties then hired drivers who were not employees of Cargo Freight, thus violating PUC rule 12(B). Furthermore, the court found that "from the hearing officer to the ultimate decision, the PUC was leaning over backwards to give the Denver Post what it wanted. The purpose of the licensing requirements was not met by the PUC in this case" (see transcript of district court hearing). The court concluded that under the circumstances, Cargo Freight should not have been granted a contract carrier permit.

STATEMENT OF THE ISSUES

1. Did Acmes' failure to timely raise the "leased equipment issue" under PUC rule 12 preclude the PUC hearing examiner from considering waiver of the rule?

2. If not, did the PUC decision granting the Cargo Freight application for contract carrier authority amount to an

arbitrary and capricious action requiring reversal by the district court?

SUMMARY OF THE ARGUMENT

1. The Denver District Court committed error in reversing the PUC decision.

2. Acme's failure to timely raise the "leased equipment issue" precluded the PUC from specifying a waiver under PUC rule 12 or PUC rule 29.

3. The PUC hearing examiner applied the proper standard of review in granting Cargo Freight's contract carrier permit application.

ARGUMENT

I.

THE DENVER DISTRICT COURT COMMITTED ERROR IN REVERSING THE PUC DECISION.

The Denver District Court set aside the PUC decision granting Cargo Freight contract carrier authority as being arbitrary and capricious. The court felt that the PUC hearing examiner had "leaned over backwards" for the Denver Post.

By making such findings the district court ignored the presumption of regularity that accompanies PUC proceedings. The or-

ders and proceedings of the PUC are always presumed to be reasonable and valid. See Caldwell v. Public Utilities Commission, 613 P.2d 328 (1980); see also Contact v. Mobil-Radio, 191 Colo. 180, 551 P.2d 203 (1976) and Public Utilities Commission v. District Court, 163 Colo. 462, 431 P.2d 773 (1967). The burden of showing the improprieties or illegality of a commission order is always upon the party attacking that order. Public Utilities Commission v. Weicker Transportation Company, 102 Colo. 211, 78 P.2d 633 (1938).

When reviewing commission decisions, the court must review the evidence in the light most favorable to the PUC's findings and decisions and search the record for evidence which is favorable to the prevailing party. Northeastern Motor Freight v. Public Utilities Commission, 197 Colo. 433, 498 P.2d 923, at 925 (1972); People's Natural Gas v. Public Utilities Commission, 193 Colo. 421, 567 P.2d 377 (1977). See also Morey v. Public Utilities Commission, 629 P.2d 1061 (1981) (Additional citations omitted). In the instant case, the Denver District Court failed to view the evidence in a light most favorable to the PUC decision. A reading of decision R83-1019 indicates that hearing examiner Thomas F. Dixon made extensive findings of fact and granted the application in compliance with statutory and case law standards. The Denver Post was not a party in the matter before the hearing examiner and implications that the examiner or the commissioners

were influenced by the Denver Post are preposterous. As Justice Frankfurter said in the case of United States v. Morgan, 313 U.S. 409, 421, 85 L.Ed. 1429 (1941):

> Officers charged ... with adjudicatory functions are not assumed to be flabby creatures anymore than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

Furthermore, the Denver District Court did not apply the proper standards to determine that the PUC decision was arbitrary and capricious. It is well settled in Colorado that the capricious or arbitrary exercise of discretion by an administrative board can arise in only three ways:

a. By neglecting or refusing to use reasonable diligence and care to procure such evidence as the board is by law authorized to consider in exercising the discretion vested in it.

b. By failing to give candid and honest consideration to the evidence before the board on which it is authorized to act in the exercise of its discretion.

c. By exercising its discretion in such a manner after a consideration of evidence before it as to clearly indicate the board's actions and conclusions are contrary to those of

reasonable men, fairly and honestly considering the evidence. Van DeVegt v. Board of County Commissioners of Larimer County, 98 Colo. 161, 166, 55 P.2d 703 (1936). See also Goehring v. County Commissioners, 172 Colo. 1, 469 P.2d 137 (1970).

In the case of Rais v. City of Gunnison, 539 P.2d 1330 (Colo. App. 1975) the court of appeals held that the refusal to issue a liquor license for reasons insufficient as a matter of law, and the failure to consider evidence presented at a hearing, constituted arbitrary and capricious behavior.

Acme, made no allegations in the district court that the hearing examiner failed to consider the evidence presented to him. Furthermore, there were no allegations that the hearing examiner failed to give honest and candid consideration to the evidence or neglected to use reasonable diligence to procure any evidence. Acme's sole argument in district court urging reversal of the PUC decision was that the PUC failed to comply with rule 12(B) of the rules governing private carriers by motor vehicles. However this alleged violation occurred because Acme failed to raise the issue during hearing before the PUC. The hearing examiner is familiar with PUC rules and regulations so the reviewing court must assume under Caldwell v. PUC, supra, that the issue could have been decided if it had been raised with specificity.

II.

ACME'S FAILURE TO TIMELY RAISE THE "LEASED EQUIPMENT ISSUE" PRECLUDED THE PUC FROM SPECIFYING A WAIVER UNDER PUC RULE 12 OR PUC RULE 29.

Acme's argument urging reversal of the PUC decision is that the PUC violated its own rule 12(B) of the rules and regulations governing private carriers by motor vehicle (4 CCR 723-11) by granting Cargo Freight's application, because Cargo Freight leased its equipment and used noncontract drivers. Rule 12(B) requires the driver of a leased vehicle to be on the lessee's payroll. However, rule 12 initially provides:

> Leasing of Equipment as Lessee
>
> Unless the commission finds after a hearing that the public interest otherwise requires, no private carrier shall, as lessee, lease or rent equipment to be used under his permit except in accordance with these rules. Leases shall be filed in the form attached hereto as "appendix A"....
>
> (b) leasing of equipment shall not include the service of a driver or operator. Employment of drivers or operators shall be made on the basis of a contract by which the driver or operator shall bear the relationship of an employee to the carrier. The leasing of equipment or employing of drivers, with compensation, on a percentage basis depending on gross receipts per trip, or for any period of time, is prohibited.

(emphasis supplied)

The above emphasized language clearly states that after a

public hearing, the PUC may waive provisions of rule 12. Acme did not bring the substance of the entire rule before the Denver District Court and did not raise the "leased equipment issue" in either its original protest, at hearing, or in its exceptions to the initial PUC decision, R83-1019. Because Acme raised this issue without specificity in an untimely manner in its application for reconsideration, the hearing examiner and the PUC were precluded from issuing a specific finding of fact or conclusion of law relating thereto. If Acme had properly raised this issue the hearing examiner may have found a specific waiver under rule 12 above, or under rule 29 of the rule and regulations governing private carriers by motor vehicle which provides:

> Rule Exemption
>
> In case of hardship, a carrier may file written application for relief, stating therein the grounds for relief, and the commission, after hearing, if satisfied, may suspend such rule(s) or regulation(s) affecting such carrier as it deems just.

Two separate rules governing private carriers by motor vehicle provide the mechanism for the PUC to waive provisions of those rules. The district court's reasoning that as long as a permit system was set up there must be obedience to the rules is not persuasive. Indeed, the Colorado appellate rules allow this court to suspend the requirements of its procedural rules. See C.A.R. 2.

Contract or private carrier capabilities and their respective authorities vary significantly. As a result PUC rules governing this type of transportation must be flexible to administer the situations encountered. Waiver provisions contained within PUC rules and regulations provide needed flexibility. As can be noted from the language of PUC rule 12 and PUC rule 29 in regards to private carriers, a waiver is permitted after hearing.

Acme's failure to timely raise the "leased equipment issue" precluded the PUC from making a specific finding of waiver which is clearly allowed by PUC rules and regulations. As such, Acme should not be allowed to bootstrap its procedural failure into a reversal of a PUC decision which was fairly arrived at after litigation between Cargo Freight and Acme.

III.

THE PUC HEARING EXAMINER PROPERLY APPLIED THE STANDARD OF REVIEW IN GRANTING CARGO FREIGHT'S CONTRACT CARRIER PERMIT APPLICATION.

The hearing examiner properly applied the standards promulgated by statute and case law in approving Cargo Freight's application for a contract carrier permit. These standards are contained in section 40-11-103, C.R.S. (1973) which provides in part:

> (2) No permit nor any extension or enlargement of an existing permit shall be

> granted by the commission if in its judgment the proposed operation of any such contract carrier will impair the efficient public service of any authorized motor vehicle common carrier then adequately serving the same territory over the same general highway route. The commission shall give written notice of any application for the same to all persons interested in or affected by the issuance of such permit or any extension or enlargement thereof, pursuant to section 40-6-108 (2).

The above standards have been added to by the Colorado Supreme Court in the case of Denver Cleanup v. PUC, 192 Colo. 537, 561 P.2d 1252 (1977) and further defined in Pollard Contracting Co. v. PUC, 644 P.2d 7 (1982). In Denver Cleanup v. PUC, supra, the court overturned the guidelines of In Re Curnow Transportation Company, PUC decision 76151 (1970) and instituted the standards promulgated by the United States Supreme Court in I.C.C. v. J.T. Transport Company, 368 U.S. 81, 7 L.Ed.2d 147 (1961). The hearing examiner properly noted these standards in decision R83-1019 and incorporated by reference the I.C.C. v. J.T. Transport decision as follows:

> "Proper procedure, we concluded, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants."
>
> Applying the same criteria to the facts in

> this case, applicant specializes in speedy, same day delivery, with special handling of newspapers for the Denver Post. The drivers have been instructed on special care to be accorded the newspapers and the requirements that the newspapers be timely delivered to distribution centers. Applicant has established that its services are superior to or distinctly different from those offered by existing common carriers because of the specialized care and handling commodities, prompt same day delivery, and specialized types of delivery. In addition, Acme Delivery Service has failed to demonstrate that they have the ability to meet the needs of the Denver Post. While Acme Delivery Service, Inc., may have the willingness to provide the service, the quality of service provided by Acme Delivery Service Inc., in the past does not support a finding that they have the ability to meet the distinct needs of the Denver Post. The evidence also shows that the Denver Post has a need for the applicant's service in the areas where applicant seeks authority, and that applicant is better able to meet these distinct needs than Acme Delivery Service, Inc. is.

(Emphasis supplied). See discussion, decision R83-1019.

It is obvious from a review of the hearing examiner's decision that he believed Cargo Freight's proposed service to be distinctly different to that being provided by authorized common carriers and that the operations of the authorized common carriers would not have been impaired by granting Cargo Freight's application for a contract carrier permit. The examiner further expressly held that Acme failed to meet its burden of proof and demonstrate that it was better able to fill the distinct needs of

the Denver Post. Under the above cited statutory and case law guidelines, the PUC's granting of Cargo Freight's application was proper and lawful.

In a review proceeding the district court may make an independent judgment of the propriety of the administrative hearing but it may not substitute its judgment for the judgment of the PUC especially when there is competent evidence in the record to support the PUC decision. Public Service Company of Colorado v. PUC, 653 P.2d 1117 (1982); North Eastern Motor Freight v. PUC, 178 Colo. 433, 498 P.2d 923 (1972) (additional citations omitted). Here the Denver District Court did not judge the propriety of the PUC proceedings but instead imposed its judgment over that of the PUC in deciding the matter. This is clearly an improper review.

CONCLUSION

The Denver District Court committed error by reversing the PUC decision in that it failed to view the evidence in a light most favorable to the PUC decision, ignored the presumption of regularity that accompanies PUC proceedings, and did not use the proper standards to determine if the PUC decision was arbitrary and capricious. Acme's failure to raise the "leased equipment issue" in a timely manner, precluded the PUC from making a spe-

cific finding of waiver as provided for in PUC rule 12 or PUC rule 29. Furthermore, the examiner applied the proper standards of review in granting contract carrier permit applications and made a specific finding that Acme failed to carry its burden of proof. As such, the hearing examiner's decision, which was affirmed by the PUC, should be given full force and effect and the order of the Denver District Court reversing the PUC should be set aside. Wherefore, the Colorado Public Utilities Commission prays for judgment as follows:

1. That this court enter an order affirming the decision of the PUC, and reversing the Denver District Court decision.

2. For other relief as this court deems just and equitable.

Dated this 8th day of June 1984.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF OF THE COLORADO PUBLIC UTILITIES COMMISSION upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 11th day of June 1984, addressed as follows:

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