

1948

George A. Sims v. Public Service Commission of Utah : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

DOCKET NO. 7377D

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In the Supreme Court of the State of Utah

GEORGE A. SIMS, M. K. SIMS,
ELMER L. SIMS AND G. GRANT
SIMS, d/b/a SALT LAKE
TRANSFER COMPANY,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH AND MAGNA-
GARFIELD TRUCK LINE, a
corporation,

Defendants.

CASE No. 7377

BRIEF OF DEFENDANTS

SUPPLEMENTAL STATEMENT OF FACTS

The statement of facts contained in plaintiffs' brief fails to set forth certain evidence vital to the rights in these proceedings of defendant Magna-Garfield Truck Line. It is, therefore, deemed necessary to supplement plaintiffs' statement of facts, in order to present to the Court the full force of the evidence received by the Public Service Commission, upon which it denied plaintiffs' application for a contract carrier's permit.

The defendant Magna-Garfield Truck Line is a consolidated corporation organized and existing under and by virtue of the laws of the State of Utah, consisting of two former corporations organized and existing under the laws of the State of Utah, known and designated as Magna-Garfield Truck Line and Salt Lake & Bingham Freight Lines. The said defendant received its Certificate of Incorporation from the Secretary of State of Utah on the 31st day of December, 1946. (R. 113, 114) Salt Lake & Bingham Freight Lines (being one of the consolidating corporations as aforesaid) was the owner and holder as a common motor carrier of property in intra-state commerce of the following Certificates of Convenience and Necessity issued by the Public Service Commission of Utah (R. 115):

Certificate No.	Date	Case No.
296	April 21, 1927	963
658	April 23, 1945	2833

Said Magna-Garfield Truck Line (being also one of the consolidating corporations as aforesaid) was the owner and holder as a common motor carrier of property in intra-state commerce of the following Certificate of Convenience and Necessity issued by the Public Service Commission of Utah (R. 114, 115):

Certificate No.	Date	Case No.
262	March 6, 1946	847

In a proceeding instituted before the Public Service Commission of Utah on the 5th day of February, 1947, by said defendant company, in the matter of the application of Magna-Garfield Truck Line, a consolidated corporation of Magna-Garfield Truck Line and Salt Lake & Bingham Freight Lines, designated No. 3092, the said Commission, by order dated the 6th day of May, 1947 (R. 113, 118) did cancel and annul Certificate of Convenience and Necessity No. 262, issued to said Magna-Garfield Truck Line (being one of the consolidating corporations) in Case No. 847, and Certificates of Convenience and Necessity Nos. 296 and 658 issued to Salt Lake & Bingham Freight Lines (being one of the consolidating corporations) in Cases Nos. 963 and 2833, and in lieu thereof said Commission issued unto defendant company Certificate of Convenience and Necessity No. 771 (R. 113) to operate as common motor carrier for the transportation of commodities generally from Salt Lake City, Utah, to Garfield, Utah, over United States Highway No. 91 to junction with United States Highway No. 50, thence over United States Highway No. 50 and return over the same route, including all intermediate points and off-route point of Bacchus, Utah; and from Salt Lake City, Utah, to West Jordan, South Jordan, Riverton, Bluffdale, Herriman and Bingham, Utah, over United States Highway No. 91 and State and County roads and return, including all intermediate points, except that no service was authorized on United States Highway No. 91 between 33rd South St. and Sandy, Utah, including Midvale, Utah.

Acting under and by virtue of the authority con-

tained in and incidental to said Certificate of Convenience and Necessity No. 771 as aforesaid, defendant Magna-Garfield Truck Line (the consolidated corporation) has continuously since the 6th day of May, 1947, operated as a common carrier for the transportation of commodities generally over and upon the aforesaid routes described in said Certificate of Convenience and Necessity. (R. 140, 141, 142)

The defendant Magna-Garfield Truck Line has in all respects and particulars complied with the terms, conditions and restrictions contained in said Certificate of Convenience and Necessity (R. 140) and in particular said defendant has maintained on file with the aforesaid Commission all insurance required by law, and all tariffs, containing complete information as to rates, rules, regulations and schedules. (R. 140) Said defendant has operated as a common motor carrier of commodities over the aforesaid routes at all times in accordance with the statutes of the State of Utah and the rules and regulations of the Public Service Commission of Utah existing on the date of said Certificate of Convenience and Necessity, and which were thereafter prescribed by said Commission, governing the operations of common motor carriers over the public highways of the State of Utah. (R. 140)

For a long time prior to the granting of said Certificate of Convenience and Necessity No. 771, the two consolidating corporations aforesaid (predecessors of this defendant) operated over the aforesaid routes described in the aforesaid Certificate of Convenience and Necessity,

as common motor carriers of commodities generally, and rendered unto the public reasonably adequate and continuous service as such carriers. (R. 114, 115, 141) Said defendant, as the consolidated corporation, has continued said operation, and has fulfilled all requirements of law and all of the requirements and regulations of the aforesaid Public Service Commission in the aforesaid operations. (R. 140, 141) The said defendant has operated upon a regular schedule, averaging three truck movements per day from Salt Lake City to Bingham and Lark and return. (R. 142, 153) The said defendant company owns four trucks capable of handling five tons, or 10,000 pounds each, three trucks capable of handling ten tons, or 20,000 pounds each, one pickup truck, and one ten-ton semi-trailer. (R. 142) It has twelve employees, six of whom are regularly employed as truck drivers. (R. 143, 155) Two of its shop men are also qualified truck drivers, and can be used in emergency to drive trucks. (R. 155) Its trucks are capable of handling 100,000 pounds of commodities per-day. (R. 145) It is able to rent trucks for operations in excess of its normal operations or scheduled runs. (R. 145) All equipment is in "A-1 condition". (R. 144)

The West Jordan plant of Utah-Idaho Sugar Company is located about ten miles south of Salt Lake City, on Redwood Road. The factory itself stands about two or three blocks from the highway. (R. 142) The defendant company operates its scheduled freight service over Redwood Road from Salt Lake City to Bingham and Lark. (R. 142) The defendant company has taken care

of all requests made by the Utah-Idaho Sugar Company to move sugar from West Jordan to Salt Lake City, with one exception. (R. 144) This exception involved a telephone call in the late afternoon, whereby the Sugar Company requested a truck at its West Jordan plant within one-half hour. The defendant company informed the Sugar Company that it would provide a truck within two hours, which still permitted the movement of the sugar into Salt Lake City the same day. (R. 144) This episode occurred during the peak season of sugar haulage in June. (R. 144) The handling of sugar does not require any unusual or extraordinary equipment other than it must be of such nature as to keep the sugar dry. (R. 107, 146) The equipment of the defendant Magna-Garfield Truck Line is of that nature, four trucks being closed trucks. (R. 146) Said defendant has handled both l.t.l. shipments and t.l. shipments, some of the shipments being from the Sugar Factory to towns served directly by said defendant. These shipments were usually small—5 to 10 bags each. (R. 110, 146) Said defendant company has also moved some truckload shipments from West Jordan to Security Warehouse in Salt Lake and to candy companies. (R. 147) These shipments occurred only during the peak season, which is the canning season. (R. 147) Said defendant is able to handle all peak sugar movements (R. 150) and if the movement of more than 1,000 bags a day is required, said defendant is in a position to buy more trucks or rent trucks to take care of the emergency. (R. 151)

The Utah-Idaho Sugar Company offered no criticism

of the handling of its shipments by the defendant company, nor did it make any criticism of its automotive equipment. (R. 106) The service rendered it by defendant company has been very satisfactory. (R. 106) It supported plaintiffs' application for a contract carrier permit because it desired speedy service rather than "emergency" service. (R. 103, 107) The defendant company has never refused the Sugar Company common carrier service. (R. 103)

The plaintiffs prior to the filing of their application for a contract carrier's permit in the instant case had served Utah-Idaho Sugar Company under a "purported oral agreement". (R. 70, 71, 73, 75; 92, 102) They rendered such service without any formal authority from the Public Service Commission. (R. 84)

The following colloquy between Mr. Donald Hacking, Chairman of the Public Service Commission of Utah, and Mr. Elmer L. Sims, a witness for the plaintiffs, is pertinent:

“COM. HACKING: As I understand your testimony, you have rendered this service to the Utah-Idaho Sugar Company at West Jordan for some considerable period of time?

A. Yes.

COM. HACKING: And are still rendering it. As you stated, you sent a truck out yesterday?

A. Yes.

COM. HACKING: Now, under what claim of authority have you been rendering this service since the effective day of the 1945 Amendment to the Motor Carrier Act, excluding from the exemp-

tion the contract hauls fifteen miles beyond the city limits?

A. Well, I thought that we automatically had the right to continue doing the type of business we were prior to 1945; that if we were operating as a contract carrier permit prior to that time, we could continue to operate.

COM. HACKING: That is, you had the view that you would have that authority automatically, without any specific written authority from this Commission?

A. I thought we could continue it, see.

COM. HACKING: Has the Commission, through its enforcement department, questioned that authority and checked you on that?

A. They have never questioned us on this West Jordan haul. I believe the Commission has known for quite a period of time, we were hauling this sugar. As a matter of fact, I filed a contract with you. No one seems to be able to find it, but, if I remember correctly, I filed the contract with the Commission almost a year ago.

COM. HACKING: Isn't it a fact, Elmer, that you have procured temporary authorities from time to time in some of these cases, where there has been a big movement of sugar, to make the haul?

A. Yes sir, we have. From Ogden and Lehi.

COM. HACKING: Have you ever from West Jordan?

A. I don't believe so." (R. 84, 85)

Also, the following part of the testimony of Mr. George A. Sims, a witness on behalf of plaintiffs, given on direct examination is extremely relevant:

“Q. Mr. Sims, this is an application relative to a contract carrier authority to operate for and on behalf of the Utah-Idaho Sugar Company between West Jordan and Salt Lake City. Will you state how long you have engaged in that type of operation?

A. Well, we have been hauling for the Sugar Company back as far as I can remember, and that would be in '35, 1935. And we have produced evidence at our hearing when we applied for our rights, and the Commission said we were not only common carriers for certain articles, but we were a contract carrier and we were given the rights to be a contract carrier at that time.

Q. Directing your attention to the year 1940, were you, during 1940 and prior thereto, engaged as a contract carrier, by verbal contract, with the Utah-Idaho Sugar Company in transporting their commodities between West Jordan and Salt Lake?

A. Yes; we made an agreement with them to haul—

MR. RITER: I am going to object to that question, and I am doing it for the purpose of the record here. * * *

COM. HACKING: The objection will be overruled.

MR. PUGSLEY: You may answer.

THE WITNESS: Repeat that question:
(Question read.)

A. Yes sir, and since that time.

Q (By Mr. Pugsley). Since that time have you served them under this oral arrangement, from time to time?

A. Yes, whenever they needed us.” (R. 65, 66, 67)

Mr. George A. Sims also testified on cross-examination in part as follows:

“Q. Well now, you used a clause here on a statement, that interested me very much, in testifying as to your service to the Utah-Idaho Sugar Company. You said, ‘Whenever they needed it’.

As a matter of fact, your practice has been that when the Sugar Company called up you responded with one of your trucks, didn’t you?

A. Yes sir.

O. And you made your arrangement then and there as to what the rate would be?

A. They already had our price we were working for.

Q. You had discussed the prices, what you were working for, previously?

A. Oh yes.

Q. But so far as the immediate arrangement went, it was principally by telephone, I assume?

A. After the first arrangement was made with them, yes sir.

Q. Well, what do you mean by ‘an oral agreement’, then?

A. By an oral agreement is where you go see a firm, and they ask you what you would haul—how much a hundred pounds you would haul from a certain point to a certain point, based on a quantity of so much.

Q. Well, Mr. Sims, when you examined the record in your case—you recall your case that made a lot of law for us, that went to the Supreme Court?

A. Yes, it went to the Supreme Court twice.

Q. Yes, it went to the Supreme Court twice, and when you examined the Public Service Commission's record in that case, you recall—when the permit as contract carrier was issued to you there was six different firms specified you would serve?

A. Yes, sir, but I was given the impression that all that was necessary after we were given the rights of a contract carrier, all we would have to do was file another contract, and it would automatically go into effect. That was the understanding of why they gave us this as a contract carrier.

Q. All right. You could read the orders of the Commission in that respect, couldn't you?

A. Yes sir.

Q. And you know that—what those orders specified, didn't you—in detail the Commission pursued that matter, and very carefully enumerated the concerns for which you could carry as contract carrier?

MR. PUGSLEY: Well, just one moment. I object to this as calling for a legal conclusion, and, further, the fact that the Commission will take judicial notice of the fact that this sugar factory is within the fifteen-mile zone which was exempt at the time this former order was issued. * * *

* * * * *

COM. HACKING: The objection will be overruled.

A. I thought I knew, but the thing has been twisted around now so I don't know where I am at.

Q. Well, Mr. Sims, as a matter of fairness to you, would you like to see the copy of the amended order of the Commission on the 23rd of February, 1939, in Case 1849? * * *

A. It is case No. 1849. Yes, I have read it.

Q. (By Mr. Riter): You don't notice the name of the Utah-Idaho Sugar in there, do you?

A. No sir.

Q. Were you hauling for the Utah-Idaho Sugar at that time?

A. Yes sir.

Q. Do you want to go back there and read the whole opinion of the Commission on there, where they define the difference between the contract carriers and common carriers?

A. I think I know.

Q. You think you know that?

A. Right.

Q. Then you recall what the Commission told you at that time was the exact difference between the two, and they defined it?

A. I think I could define it.

Q. My point is this, after that extensive litigation which you took to the Supreme Court twice, and after these elaborate proceedings before the Public Service Commission, all of which you were informed of because you paid for, of course—now I want to know why, in face of that, did you ignore this Utah-Idaho Sugar situation?

MR. PUGSLEY: I object to that, as no evidence in the record he has ignored the Utah-Idaho situation at all.

MR. RITER: Perhaps the best way right now is to withdraw.

I expected Mr. Pugsley would introduce into this hearing these basic proceedings that enter relevantly into any consideration of this. Are you going to introduce them in evidence?

MR. PUGSLEY: I am not.

MR. RITER: Will you take judicial notice of it?

COM. HACKING: Mr. Riter, is West Jordan within fifteen miles of Salt Lake City limits?

MR. RITER: Yes, it is.

MR. PUGSLEY: Yes sir.

COM. HACKING: Well, at that time the Salt Lake Transfer could have served West Jordan without any authority.

MR. RITER: Under the old law.

COM. HACKING: Under the old law.

MR. PUGSLEY: That's right.

COM. HACKING: That is, at the time this report and order was made and issued by the Commission, there was no particular need to consider the West Jordan movement, was there?

MR. RITER: Except this, that this whole matter of their contract carrier status was being considered by the Commission, and Mr. Sims has testified that at that time they were serving Utah-Idaho Sugar Company, and what I want to know is why, in view of these plenary proceedings that were before this Commission and before the Supreme Court, why at that time this Utah-Idaho Sugar situation wasn't brought to the attention of the Commission?

COM. HACKING: Can you answer that, Mr. Sims?

A. Yes sir. There was a clause in the law that we were operating under then that we had a right to take care of interurban delivery of general commodities anywhere within a radius of fifteen miles of the city limits, and that wasn't only for one firm, but that was a State-wide exemption, so that a man living in the country could deliver something over fifteen miles to a neighbor in town, and likewise, here, and we operated under that. I helped put the clause in." (R. 70-76)

The plaintiffs are the owners and holders of Certificate of Convenience and Necessity No. 512 dated January 19, 1939. (R. 119, 135) This Certificate permits them to transport in intra-state commerce commodities which by reason of their size, shape, weight, origin or destination require special equipment or service of a character not regularly furnished by common carriers at regular line rates; commodities in connection with the transportation of which is rendered a special service in preparing such commodities for shipment or setting up after delivery, or otherwise rendering a service not a part of ordinary act of transportation, and not regularly furnished by other common carriers; and camp site equipment. (R. 135, 137) Plaintiffs are also the holders of contract carrier permit No. 212 (amended) dated February 23, 1939, issued in Case No. 1849 (R. 73, 125, 126, 132) wherein the plaintiffs are authorized to transport certain specified property for six identified contractees (*none of whom was the Utah-Idaho Sugar Company*) over several separate routes in the State of Utah. (R. 73, 75)

ARGUMENT

I.

THE PLAINTIFFS WERE NOT ENTITLED AS A MATTER OF RIGHT TO A CONTRACT CARRIER PERMIT UNDER THE SO-CALLED "GRANDFATHER" RIGHT AS PROVIDED BY SECTION 76-5-21, UTAH CODE 1943, AS AMENDED BY LAWS OF UTAH 1945, CHAPTER 105, SECTION 3, PAGE 209.

Section 76-5-21 Utah Code 1943, as amended by Laws of Utah, 1945, Chapter 105, Section 3, Page 209, was operative on the date of the application of plaintiffs for a contract carrier permit. The present statute reads as follows:

76-5-21.

"It shall be unlawful for any contract motor carrier to operate as a carrier in intrastate commerce without having first obtained from the commission a permit therefor. The Commission shall grant on application to any applicant who was a contract motor carrier as defined by this act on the 1st day of January, 1940, a permit to operate as a contract motor carrier on the same highways and to carry on the same type of motor service as he was on said date.

"The commission upon the filing of an application for a contract motor carrier's permit shall fix a time and place for hearing thereon and may give the same notice as provided in section 76-5-18 hereof. If, from all the testimony offered at said hearing, the commission shall determine that the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting

of the application will not be detrimental to the best interests of the people of the state of Utah and/or to the localities to be served, and if the existing transportation facilities do not provide adequate or reasonable service, the commission shall grant such permit."

The plaintiffs assign as error the action of the Commission in refusing to grant plaintiffs a contract carrier permit to haul sugar between West Jordan and Salt Lake City, Utah, for the Utah-Idaho Sugar Company. Fundamentally, this claim of error is based upon the purported "grandfather" clause contained in the above quoted statute, and reading as follows:

"The commission shall grant on application to any applicant who was a contract motor carrier as defined by this act on the 1st day of January, 1940, a permit to operate as a contract motor carrier on the same highways and to carry on the same type of motor service as he was on said date."

According to plaintiffs' contention, this permit should have issued to the plaintiffs *as a matter of right* upon their showing that on the 1st day of January, 1940, they were operating as a contract carrier for the Utah-Idaho Sugar Company on the public highway between West Jordan and Salt Lake City, Utah.

The immediate antecedent of the present statute is Section 9 of Chapter 65, Laws of Utah, 1935, which reads in pertinent part as follows:

"It shall be unlawful for any contract motor carrier to operate as a carrier in interstate commerce without having first obtained from the com-

mission a permit therefor. The commission shall grant on application to any applicant who was a contract motor carrier as defined by this act on the fifteenth day of March, 1933, a permit to operate as a contract motor carrier on the same highways and to carry on the same type of motor service as he was prior to said date. Where said applicants were operating on all the highways of the state prior to said date, the permit shall authorize them to continue to operate on all of said highways. The commission shall furthermore grant on application to any applicant who received a permit to operate as a contract motor carrier between the fifteenth day of March, 1933, and the date on which this act takes effect, a permit to continue to operate in the same manner and over the same highways as the terms of said permit allowed.

“The commission upon the filing of an application for a contract motor carrier’s permit *by any other person than those referred to above in this section* shall fix a time and place for hearing thereon and shall give the same notice as provided in section 6 hereof. * * * If, from all the testimony offered at said hearing, the commission shall determine that the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting of the application will not be detrimental to the best interests of the people of the state of Utah and/or to the localities to be served, the commission shall grant such permit; * * *”
(Italics supplied)

A comparison of the law under which plaintiffs made their application on November 10, 1947, with the relevant

provisions of the 1935 statute last above quoted, clearly shows that the Legislature, in providing for the "grandfather" rights, intended to modify in a radical manner the provisions of the prior law. In order to understand this change, it is necessary to refer to the case of *McCarthy v. Public Service Commission of Utah*, 94 Ut. 304, 77 Pac. 2d 331. This decision, in interpreting Section 9 of Chapter 65, Laws of Utah, 1935, took note of the fact that the statute made no provision for notice and hearing in the granting of contract carrier permits under the "grandfather" clause, but that the application for such permit by any other contract motor carrier, viz. new-comers in the contract motor business, should be set for hearing at a time and place fixed by the Commission, and notice be given to all adversely interested in the same. The "grandfather" clause of this statute favored two classes: (a) those who were contract carriers as defined by the act on March 15, 1933, and (b) those who received a permit as contract carrier after March 15, 1933 and before the effective date of Chapter 65 (December 31, 1935). The Court, however, specifically declined to accept the literal reading of the statute, using this language:

"But it was never intended by the Legislature that these permits issued under the act to existing or antecedent contract carriers without a hearing or notice to others, should be conclusive and binding determinations of the right of such permittees to operate thereunder, or to perform any other or different service than specified therein or even the class of service therein stated. In the nature of the case, such permits can only operate as prima

facie evidence of the right of the permittee to operate thereunder. Least of all, can it be properly said that such a permit, issued upon application, excludes the right of a competitor to contend and to show to the Commission by protest, objection, or otherwise that the permittee in his operations thereunder has exceeded the limits or character of service permitted thereby, and has entered into regular competition with—let us say—common motor carriers; that the permittee is holding himself out to the public as equipped, ready, and willing to accept loads wherever and by whomsoever tendered; or that he has provided himself with equipment for use in hauling loads that unduly injure the highway, the public, and all competitors; or that he is hauling regularly over highways not specified in his permit. These and many like subjects of inquiry might be suggested. In any such case it would be the Commission's duty to receive and file the complaints or objections made and to order a hearing to determine the truth of the matter, notwithstanding that a permit had already issued to the contract carrier in question. This is not unfair to the latter, for, had the permittee desired a permit or a certificate of necessity that would be conclusive and binding upon all comers, he had it in his power to request a hearing of the Commission and notice to all adversely concerned before the issuance or acceptance of the permit. Upon constitutional principles the applicant cannot expect a conclusive or binding determination upon an ex parte application. Least of all, can he expect that persons adversely affected by his application shall be held bound or affected by mere self-serving declarations or statements contained in his application for a permit." (pp. 336-337 of 77 Pac. 2d)

As the *McCarthy* case, *supra*, points out, a distinction was made by the statute between applicants coming under the "grandfather" clause and those who applied for a permit who were not within the preferred classes. Plaintiffs' argument would find weight had the 1935 statute been in operation at the time their application with which the Court is now concerned was filed.

When reference is made to Section 76-5-21 Utah Code 1943, as amended by Laws of Utah 1945, it will be seen that the Legislature radically changed the practice in this regard. The statute, after providing that a contract motor carrier on the first day of January, 1940, should be granted a permit, directs:

"The Commission upon the filing of an application for a contract motor carrier's permit shall fix a time and place for hearing thereon and may give the same notice as provided in Section 76-5-18 hereof. If, from all the testimony offered at said hearing, the commission shall determine that the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting of the application will not be detrimental to the best interests of the people of the state of Utah and/or to the localities to be served, and if the existing transportation facilities do not provide adequate or reasonable service, the commission shall grant such permit."

Compare the correlative provisions of Chapter 65, Laws of Utah 1935, which read:

"The commission, upon the filing of an application for a contract motor carrier's permit *by*

any other person than those referred to above, etc.," (Italics supplied)

with the provisions of Section 76-5-21 Utah Code 1943, as amended by the Laws of Utah of 1945, and it will be thus seen that in the 1945 act the legislature purposely eliminated the phrase "*by any other person than those referred to above in this section,*" and added the words "and if the existing transportation facilities do not provide adequate or reasonable service." This change in phraseology clearly expresses an intent on the part of the legislature that the practice of granting "grandfather" permits without notice would thereafter be eliminated, and that *all* applications, whether under the "grandfather" preference or without the preference, should be set for hearing, and notice thereof should be given to interested parties. The *McCarthy* decision, *supra*, was announced on March 12, 1938. It undoubtedly influenced the form of the 1945 amendment.

It is manifest that the Court is now required to construe Section 76-5-21 Utah Code 1943, as amended by Laws of Utah 1945, inasmuch as there exists on the face of the statute an apparent contradiction. By the first paragraph, the Commission is directed to grant on application to any applicant who was a contract motor carrier as defined by the act on January 1, 1940, a permit to operate as a contract motor carrier on the same highways and to carry on the same type of motor service as he was on said date. By the second paragraph of said section, the Commission is directed upon the filing of an application for a contract motor carrier's permit

to fix a time and place of hearing thereon, and to give notice thereof. It may use the method of notice provided in Section 76-5-18 Utah Code 1943. However, notice in some form must be given. It is then provided that if the Commission shall determine "from all the testimony offered at said hearing" that four enumerated conditions are shown to exist, that a permit shall issue. A literal reading of this statute produces confusion and contradiction. The section, after directing that an applicant who was a contract motor carrier on January 1, 1940, shall receive a permit to operate as such motor carrier, then provides that the Commission shall hold a hearing after notice, and receive evidence, and if such evidence meets the conditions named, it shall grant a permit. If the construction is adopted such as the literal reading of the statute suggests, then the "grandfather" clause is wholly destroyed. It is not believed that such construction or interpretation of the statute would carry out the legislative intent. Therefore, the task devolves upon the Court to discover, if possible, a construction of the statute which will give full weight to all its parts, eliminate absurdities, and at the same time express the legislative intent.

The following rules for statutory construction are applicable:

"In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose, and to have intended that every part of a statute should be carried into effect. The maxim, 'ut res magis, quam pereat,' requires not merely that a statute should be given effect as a whole, but that effect should be given to each of its express provisions. A

statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. Indeed, it is a cardinal rule of statutory construction that significance and effect should, if possible, without destroying the sense or effect of the law, be accorded every part of the act, including every section, paragraph, sentence, clause, phrase, and word. Under this rule, that construction is favored which will render every word operative, rather than one which makes some words idle and nugatory. Sometimes, however, it is not possible, in arriving at the meaning of statutes, to give force and effect to every word and phrase used. The court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context, that is, give them a significance which would be clearly repugnant to the statute looked at as a whole and destructive of its obvious intent. It has also been declared that if a word is used unnecessarily in one part of a statute, it may well be regarded as so used in another." (*50 Am. Jur., Sec. 358, pp. 361-364.*)

"It is a general rule of interpretation that statutes should, if possible, be so construed as to make them practicable. Hence, a construction of an ambiguous statute should be avoided, which would render the application of the statute impracticable, or which would require the performance of a vain, idle, or futile thing, or attempt to require the performance of an impossible act. Indeed, a statute will not be construed so as to require the performance of an impossible act, if any other construction can be legitimately given it. There are some statutes, however, the utility of which may not be considered. The courts can only interpret a statute as framed, notwithstand-

ing difficulties in its application.” (50 *Am. Jur.*,
Sec. 360, p. 365.)

“Consistency in statutes is of prime importance, and in the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions. A construction of a statute which creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act and will carry out the intention of Congress. * * * In order that effect may be given to every part of an act in accordance with the legislative intent, all the language of the act must be brought into accord. The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole. Hence, where two constructions of a statute are possible, by one of which the entire act may be harmonious while the other will create discord between different provisions, the former should be adopted. Although the courts cannot add to, take from, or change the language of a statute to give effect to any supposed intention of the legislature, words and phrases may be altered and supplied when that is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the legislature. The legislative intention will prevail over the literal import of particular terms, and will control the strict letter of the statute, where an

adherence to such strict letter would lead to contradictory provisions. * * * " (50 *Am. Jur.*, Sec. 363, pp. 367-369.)

"Particular statutory provisions may present such an inconsistency as cannot be harmonized or reconciled. It is obvious that effect cannot be given to all the provisions of a statute where some of them are inconsistent and irreconcilable. In such case, as in other cases, a construction is sought which would give effect to the purpose of the statute and the intention of the legislature. * * * " (50 *Am. Jur.*, Sec. 364, pp. 369-370.)

"It is a cardinal rule of construction that significance and effect shall, if possible, be accorded to every section, clause, word or part of the act." (25 *R.C.L.* 1004.)

"The several provisions of the statute should be construed together in the light of the general purpose and object of the act and so as to give effect to the main intent and purpose of the legislature as therein expressed." (25 *R.C.L.* 1007.)

"An interpretation which defeats any of the manifest purposes of the statute cannot be accepted." (25 *R.C.L.* 1014.)

Using these well established rules of construction as a basis for determining the legislative intent in amending in 1945, Section 76-5-21, Utah Code 1943 to its present form, it is seen that the legislature had in mind the decision of the Supreme Court in the *McCarthy* case *supra*, and that it intended to codify the rule of that case by requiring that all applications for contract carrier's permits should be granted only after hearing, whereof notice had been given. This purpose is clearly shown by the elimi-

nation of the phrase "by any other person than those referred to above in this section", which was contained in the 1935 act (Sec. 9, Chapt. 65, Laws of Utah 1935). As to practice and procedure, the legislature made no distinction between those entitled to permits under the "grandfather" clause and late comers, but required in all cases that the permit be granted only after hearing upon notice. With this purpose definitely ascertained, the task remains to discover a construction which will maintain the integrity of this legislative purpose, and at the same time reconcile the "grandfather" clause with the second paragraph of the section. In this connection, the excerpt from the *McCarthy* opinion above quoted is pertinent, and particularly the statement:

"In the nature of the case, such permits [meaning permits issued without notice or hearing] can only operate as prima facie evidence of the right of the permittee to operate thereunder. Least of all, can it be properly said that such a permit, issued upon application, excludes the right of a competitor to contend and to show to the Commission * * * that the permittee in his operations * * * *has entered into regular competition with—let us say—common motor carriers* * * * " (Italics supplied)

That declaration suggests strongly a construction and interpretation of the statute which will attain the main objective of the legislature and at the same time make effective all provisions of the statute. It is believed, and it is hereby earnestly urged, that a reasonable meaning of the statute may be deduced as follows:

- (a) **That all applications for a contract carrier's carrier's permit, whether by preferred persons**

under the "grandfather" clause or by late comers into the transportation field, must be set for hearing upon a date certain, and notice of the hearing be given;

- (b) That no contract carrier's permit shall issue until after a hearing in which persons adversely affected may appear and submit evidence on their behalf, and cross-examine opposing witnesses;
- (c) In the event there is a "full dress" hearing held after interested parties have appeared in opposition, the Commission must, from the evidence, find the four conditions existing as set forth in the second paragraph of the statute before a permit may issue;
- (d) In determining the existence of such conditions, proof that the applicant is a preferred person under the "grandfather" clause will prima facie establish his right to a permit, and cast the burden of going forward with the proof upon his opponents to disestablish this prima facie right, the burden of proof remaining, however, in toto upon the applicant to establish the four conditions named in the statute.
- (e) If after the Commission has set the application for hearing upon a date certain and has given notice, no interested persons appear in opposition to the granting of the permit, proof that the applicant is a preferred person under the "grandfather" clause will entitle him to a permit.

Under the foregoing construction, the "grandfather" clause, in view of the 1945 amendment, does not confer upon an applicant a substantive right, but rather a procedural advantage. This procedural advantage is not a mere shadow or chimera, but is a process of value to an applicant in seeking a permit. It is an advantage well known to legal procedure.*

*As an example, Section 80-12-4 Utah Code 1943 provides that a transfer of a material part of a decedent's estate in the nature of a final distribution thereof, made by a decedent within three years

It is earnestly contended by the defendants that the foregoing construction and interpretation of this statute complies with recognized rules of statutory construction; perpetuates the intention of the legislature; does no violence to the rights of the parties interested, but rather preserves the same and recognizes due process procedure, so strongly implied in the *McCarthy* decision, *supra*.

A review of the record in this case reveals that the Commission recognized both the rule of the *McCarthy* decision and the mandates of the 1945 act. The plaintiffs' application was set for hearing upon a date certain, and all interested persons notified. The defendant carrier appeared in response to said notice, and contested the application. The plaintiff primarily rested its case (mistakenly, we believe) upon its "grandfather" rights, as it does in these review proceedings. Substantial evidence was submitted which enabled the Commission to make definite findings: (a) that the applicant had failed to show that existing transportation facilities did not provide adequate or reasonable service, as required by Section 76-5-21, as amended; (b) that the granting of the permit would detract from the business of the existing carriers, which would eventually impair rather than improve transportation service in the area proposed to be served; (c) that the defendant carrier is ready, able, and willing to render reasonable, adequate

prior to his death, except a bona fide sale for a fair consideration, "shall be presumed to have been made in contemplation of death." Any lawyer is well aware of the difficulties of overcoming this presumption or *prima facie* case in opposition to the tax authorities' purpose to tax such transfer.

service to the area and the shipper covered by the application; (d) that sufficient service is already available in the area proposed to be served by the applicant; and (e) that the granting of the application would be detrimental to the best interests of the people in the area covered by the application.

In view of the foregoing, it is submitted that plaintiffs' contention that it was automatically entitled to a contract carrier's permit in the instant case by virtue of preferred rights conferred upon it by the "grandfather" clause, is without merit.

II.

PLAINTIFFS ARE NOT ENTITLED TO THE BENEFIT OF THE "GRANDFATHER" RIGHTS UNDER SECTION 76-5-21, UTAH CODE 1943, AS AMENDED BY CHAPTER 105, LAWS OF UTAH 1945, BECAUSE (1) THEY WERE NOT A CONTRACT CARRIER ON JANUARY 1, 1940 AND (2) THEY ILLEGALLY TRANSPORTED SUGAR OVER PUBLIC HIGHWAYS FOR UTAH-IDAHO SUGAR COMPANY FROM WEST JORDAN, UTAH, TO SALT LAKE CITY, UTAH, DURING THE PERIOD FROM MAY 8, 1945, TO THE DATE OF HEARING BEFORE THE PUBLIC SERVICE COMMISSION IN THIS MATTER.

Even though plaintiffs' construction of Section 76-5-21, Utah Code 1943, as amended by Chapter 105, Laws of Utah 1945, be adopted, the evidence in this case proves that they were operating on January 1, 1940 under the "15 mile" exemption and also that they had forfeited their right to claim privileges under the "grandfather" clause of the statute. The testimony of George A. Sims and Elmer A. Sims, witnesses

on behalf of plaintiffs at the hearing before the Commission, hereinbefore set forth in the defendant carrier's supplemental statement of facts, abundantly demonstrates that the plaintiffs transported sugar for the Utah-Idaho Sugar Company upon the public highways of Utah between the West Jordan plant of the Sugar Company and Salt Lake City, Utah, during the period commencing May 8, 1945 and up to the date of hearing before the Commission. Their testimony also shows without contradiction that the plaintiffs did not secure from the Commission a contract carrier's permit to cover this transportation.

Chapter 105, Laws of Utah 1945, also amended Section 76-5-25 Utah Code 1943 by striking therefrom these two exemptions from the operation of the Motor Carriers Act:

(a) "To contract motor carriers of property when operating wholly within the limits of an incorporated city or town and for a distance of not exceeding fifteen road miles beyond the corporate limits of the city or town in Utah in which the point of origin of any property or passenger movement is located or when operated within a radius of 15 miles from any point of origin outside of an incorporated city or town in Utah, and which movement either alone or in conjunction with another vehicle or vehicles is not a part of any journey or haul beyond said fifteen-mile limit;"

(i) "To the casual or occasional transportation of persons or property for compensation by any person not regularly engaged in transportation

by motor vehicles as his or its principal occupation or business.”

The legal result of the repeal of the “15 mile” exemption formerly contained in the 1935 act (Section 76-5-25 Utah Code 1943) is described by Mr. Justice Latimer in the prevailing opinion in *Rowley v. Public Service Commission of Utah*, Utah, 185 Pac. (2d) 514, at 519 as follows:

“The effect of these latter amendments was to bring under the control of the commission all carriers operating within cities and towns and for a distance of not to exceed 15 miles beyond the corporate limits, and also to the casual or occasional operator who was operating but whose principal business was not transportation.”

When Commissioner Hacking interrogated both Mr. Elmer L. Sims and Mr. George A. Sims, witnesses for plaintiffs, he particularly directed his questions as to the plaintiffs’ conduct of their business after the effective date (May 8, 1945) of Chapter 105 Laws of Utah 1945, amending Sections 76-5-21 and 76-5-25 Utah Code 1943. Both of these witnesses gave responses that indicated definitely that the plaintiffs had been using the public highways for transportation of sugar for the Utah-Idaho Sugar Company during said period without securing any contract carrier’s permit therefor. Mr. George A. Sims’ testimony further indicates that the plaintiffs had prior to May 8, 1945, hauled the sugar under the “15 mile” exemption contained in sub-paragraph (a) of Section 76-5-25 Utah Code 1943 before it was eliminated by the 1945 amendment. There is abso-

lutely no evidence in the record that on January 1, 1940, or at any other time, the plaintiffs had obtained a contract carrier's permit to handle sugar for the Utah-Idaho Sugar Company. Conversely, the evidence shows without contradiction that the plaintiffs transported this sugar under the "15 mile" exemption, and that when that exemption was repealed on May 8, 1945, they did not make any effort to secure a contract carrier's permit. Rather, they continued operations without authority, and speciously explained such conduct at the hearing by stating they believed they had authority automatically to continue such service without specific written authority from the Commission. (R. 84)

The evidence shows that plaintiffs were the holders of Contract Carrier Permit No. 212, as amended, dated February 23, 1939, issued in Case No. 1849 (R. 73, 125, 126, 132) wherein the plaintiffs were authorized to transport certain specific property for six identified contractees (none of which was the Utah-Idaho Sugar Company) over several separate routes in the State of Utah. (R. 73, 75) There is no evidence that the plaintiffs were ever granted a "general contract carrier permit" such as suggested by Mr. Justice Wolfe in his concurring opinion in the *McCarthy* case, *supra*. (P. 226 of 184 Pac. 2d) The evidence in fact shows that the plaintiffs had been granted permits covering services to be rendered to six contractees over defined routes, none of which was the West Jordan-Salt Lake City route. Prior to the 1945 amendment, the plaintiffs had operated under the "15 mile" exemption, but upon the removal of this

exemption from the law, the plaintiffs automatically came under the control of the Commission, and it was their duty to apply at once to the Commission for a contract carrier's permit covering the transportation of sugar for the Utah-Idaho Sugar Company. The failure or refusal of plaintiffs to secure this permit made their transportation of sugar over public highways an illegal operation, and brings it squarely within the rule of the *Rowley* case.

Section 76-5-21 Utah Code 1943, as amended by Chapter 105 Laws of Utah 1945, denounces as unlawful the act of any contract motor carrier in operating as such carrier in intrastate commerce without first having obtained from the Commission a permit therefor. After the repeal of the "15 mile" exemption on May 8, 1945, the plaintiffs in transporting sugar for Utah-Idaho Sugar Company were as guilty of violating the law as Rowley had been. They had no right to use the public highways of Utah for such purpose. The fallacy of plaintiffs' position is demonstrated by this simple factual statement:

(a) Since repeal of the "15 mile" exemption, plaintiffs' transportation of sugar from West Jordan to Salt Lake City could not rest upon the "15 mile" exemption. It was gone.

(b) Plaintiffs at no time held a general contract carrier's permit (assuming such type of permit is authorized by law), but its contract carrier's permits covered contractees other than the Sugar Company and specifically covered other routes.

(c) The plaintiffs at no time obtained a contract carrier's permit for their sugar hauling operations.

The plaintiffs continued their illegal operations even after they filed their application for the permit now involved. Note the following exchange between Commissioner Hacking and the witness Elmer L. Sims:

“COMMISSIONER HACKING: As I understand your testimony, you have rendered this service to the Utah-Idaho Sugar Company at West Jordan for some considerable period of time?

A. Yes.

COM. HACKING: And are still rendering it. As you stated, you sent a truck out yesterday?

A. Yes.” (R. 84)

There is a suggestion in the testimony of plaintiffs' witnesses that they had filed with the Commission a contract with the Utah-Idaho Sugar Company other than the contract now involved in this action. (R. 71, 85) The contention of plaintiffs (R. 71, 85) that the mere filing of the other contract (if one existed; it was never found) with the Commission was a sufficient compliance with the law, is a ridiculous conception. The mere filing of a contract with the Commission is certainly not obtaining a permit.

With respect to sugar hauling operations for the Utah-Idaho Sugar Company, the plaintiffs were not in a position to claim the benefits of the “grandfather” clause, either as a substantive or as a procedural right. *First*, because on January 1, 1940 they transported sugar

under the "15 mile" exemption. At the hearing they repeatedly made this claim. This operation certainly was not a contract carrier operation. *Second*, they had been engaged since May 8, 1945 in an illegal operation, and under the doctrine of the *Rowley* case should be denied the right to assert the privileges of the "grandfather" clause. The Commission committed no error in its failure to make a finding regarding the status of plaintiffs as a contract motor carrier on January 1, 1940. The absence of any such finding from the record is wholly justified because plaintiffs on January 1, 1940 operated under the "15 mile" exemption and also because of plaintiffs' illegal use of public highways of the State of Utah subsequent to May 8, 1945.

III.

THE DENIAL OF PLAINTIFFS' APPLICATION FOR A CONTRACT CARRIER PERMIT WAS NOT AN ARBITRARY ACT OF THE COMMISSION, BUT WAS BASED UPON SUBSTANTIAL EVIDENCE WHICH NEGATED PLAINTIFFS' RIGHT TO SUCH PERMIT.

Plaintiffs have argued in this litigation that even if their purported or alleged rights under the "grandfather" clause are eliminated from consideration, they submitted to the Commission substantial evidence which entitled them to a contract carrier's permit. This is but another way of asserting that the Findings of the Commission are not supported by substantial evidence and that its denial of the application was capricious and arbitrary, and therefore constituted error of which the Supreme Court may take cognizance in these proceed-

ings. With respect to the Supreme Court's authority on this aspect of the case, the following quotation from *Goodrich vs. Public Service Commission et al*, (..... Ut., 198 Pac. 2d 975) is pertinent:

“We have repeatedly held that in reviewing cases certified to this court from the Public Service Commission on a statement of error that the Commission's report, findings, conclusions and order are unlawful, we are limited in our review to ascertaining whether or not the Commission had before it substantial evidence upon which to base its decision. Only in the event that we find the Commission acted arbitrarily, capriciously or unreasonably in denying applicant's petition can we set aside the order.”

It was the obligation of the plaintiffs to demonstrate to the Commission by competent evidence that: (a) the highway over which the applicant desired to operate was not unduly burdened; (b) the granting of the application would not unduly interfere with the traveling public; (c) the granting of the application would not be detrimental to the best interests of the public of the State of Utah and/or to the localities served; and (d) the existing transportation facilities do not provide adequate or reasonable service (Sec. 76-5-21 Utah Code 1943, as amended by Chapter 105 Laws of Utah 1945). The burden was upon the plaintiffs to establish these conditions.

However, the defendants will assume in their argument on this aspect of the case (without waiving their contention that the plaintiffs are not entitled to “grandfather rights”) that the plaintiffs in this application

were a contract motor carrier on January 1, 1940, and were entitled prima facie to a contract carrier's permit under the construction of the statute hereinbefore submitted under point I of this brief. This problem is therefore approached with the assumption that the plaintiffs, without submitting any further evidence than their contract carrier status on January 1, 1940, "made their case" and cast the burden on the defendant carrier of going forward with the evidence to disestablish this prima facie right to a permit. This is a radical concession in plaintiffs' favor, but the defendant carrier makes this hypothetical concession in the full faith and belief that the evidence submitted by it plus the admissions of Mr. H. W. Ansell, a witness on behalf of the plaintiffs, fully supports the Findings of the Commission. Mr. Ansell was the General Traffic Manager of the Utah-Idaho Sugar Company, and the Sugar Company would be the direct beneficiary of any contract carrier's permit granted plaintiffs. (R. 87) In this connection, Mr. Ansell's admission upon cross examination is most pertinent:

"Q. Do I understand you only call on Salt Lake Transfer in these emergencies?

A. In general, yes. It might be times when our office is rushed, and rather than calling Magna-Garfield and then waiting for a while to see whether they can do it or not, they just want to satisfy that man, and they call the Salt Lake Transfer Company.

Q. As a matter of fact, it is a continuous practice, isn't it, Mr. Ansell, emergency or no emergency?

A. No, I don't think so. I wouldn't say that.

Q. Do you know?

A. Well, I know that we endeavor to give the Magna-Garfield a good share of our business, of the normal business, you might say.

Q. Then you are representing to this Commission that this contract really only becomes operative in these emergency periods; is that correct?

A. In general.

Q. Why do you qualify it, in general? Why that expression?

A. Well, as I just said, something might come up after lunch, and the man wants his sugar delivered to him that day.

Q. So, it is pretty much of a practice throughout the year, isn't it?

A. To the extent it could happen almost any time.

Q. So, this isn't an emergency at all. It is a continuous process you contemplate?

* * * * *

A. I have endeavored to show these things happen on a little unusual circumstance, and, in general, as I keep saying, we give the Magna-Garfield a steady flow of business when they can give us the service we require. But if some occasion has brought about necessity for quick service from West Jordan within the hour, then we give the business to the Salt Lake Transfer Company.

Q. Well, now, with this new contract, if it is approved by the Commission and a permit issued, you are going to give the Salt Lake Transfer all the business, aren't you?

A. No, that is not true. We would still give the Magna-Garfield the business on which there is no emergency for quick delivery.

Q. *Well, you have no criticism of the handling of the shipments by Magna & Garfield, that you have given to them?*

A. *No; it has been very satisfactory.*

Q. *You have no criticism of its automotive equipment it uses in that respect?*

A. *No.*

Q. Your whole contention is, then, Mr. Ansell, that the common carrier here involved cannot render this emergency, is that the theory, which emergency service is brought about by comparative conditions?

A. That's right, cannot render a speedy service, would probably be a better word than 'emergency'.

* * * * *

Q. And the handling of sugar does not require any particular type of automotive equipment, does it?

A. No, except it has got to be kept from the weather, of course.

Q. *Of course. And you have no complaint of the equipment of the Magna-Garfield on that score?*

A. *I do not.*" (Italics supplied) (R. 104, 105, 106, 107)

Therefore, plaintiffs' own evidence establishes beyond peradventure that the defendant carrier has ren-

dered to the Utah-Idaho Sugar Company a service which has been free from criticism, and which has been very satisfactory. Furthermore, Mr. Ansell admits that the Sugar Company has no complaint as to the type of equipment used by the defendant carrier. It is weather proof equipment. It is obvious from Mr. Ansell's testimony that the Sugar Company supported plaintiffs' application on the single basis that it could obtain from the applicants a speedier service. The issue therefore becomes a narrow one, and that is whether the defendant carrier proved that it can render this speedier service. The evidence on behalf of the defendant carrier definitely proves that it has both the equipment and the personnel to render this speedier service. The President of the defendant carrier denied the assertion that his company was not able to render the Sugar Company the service required by it. (R. 144, 145, 151) He described at length the equipment maintained and operated by the defendant carrier. The company maintains a regular schedule to Bingham and Garfield. (R. 142) The regularly scheduled trucks leave Salt Lake at 10:00 A.M. each week-day morning, but his company is prepared to furnish other and additional trucks in any emergency. (R. 153) Three trucks are operated on the Salt Lake-Bingham route, and one on the Salt Lake-Garfield route. (R. 153) The Company owns eight trucks at present and employs six drivers, but it has available sources to secure other automotive equipment upon immediate demand, and has available two emergency drivers. (R. 142, 143) In the knowledge of the President there was only

one instance of the defendant carrier's failure to comply with the Sugar Company's request, and that was a demand late in the afternoon for a delivery within a half hour from the call. The President explained to the Sugar Company that he could not meet the demand for a delivery within the half hour, but was prepared to make it within two hours. (R. 144) No employee of the defendant carrier is authorized to refuse any shipments. (R. 157, 158) The haulage of sugar from the West Jordan factory is on the Salt Lake-Bingham operation of defendant carrier. (R. 152) On the return trip from Bingham these trucks are authorized to make "pickups" at intermediate points. (R. 156) The back haul is very small, and a stop at the West Jordan factory to pick up a shipment would be entirely possible. (R. 156) If the Sugar Company requires full truck loads to be moved, the defendant carrier is prepared, upon notification, to provide such truck equipment. (R. 151) The defendant carrier is prepared at all times to render the Sugar Company the quick deliveries of large quantities of sugar to Salt Lake City. (R. 145) Specifically, the President of defendant company denied the testimony of the Sugar Company witness that the defendant carrier had not been able to render the service required by the Sugar Company, in view of competitive conditions in Salt Lake City. (R. 145) He asserted that his company was able and willing to handle the same quantities of sugar as have been handled by the applicants, and to render the transportation service with the same speed and efficiency as the applicants. (R. 145)

It is not the task of the Supreme Court to weigh evidence or resolve conflicts in evidence. Its function in reviewing cases of this type is to determine whether there was substantial evidence before the Commission to support its findings. Conflicts in the evidence as to whether the defendant carrier was ready, willing and able to render the so-called speedier service were for the Commission alone to resolve. By its findings the Commission resolved this issue against the plaintiffs. At this hearing there was no issue concerning the burdening of the West Jordan-Salt Lake highway, or of undue interference with the traveling public. The evidence was directed solely to the question whether the granting of the application would be detrimental to the best interests of the State of Utah and/or to the localities to be served, and as to whether the existing transportation facilities provide adequate and reasonable service. There was substantial evidence before the Commission from which it could reasonably find that the transportation facilities offered by the defendant carrier were and would be adequate and reasonable, even considering the extraordinary demand of the Sugar Company for "speedier service." The evidence also justified the Commission in reaching the conclusion that public interest would be damaged if it granted the requested permit. In this connection the quotation from *People's Transit Company v. Henshaw* (8 Cir., 20 Fed. 2d 87 at p. 90) quoted in the *McCarthy* opinion, *supra*, is appropriate:

"The results of such competition, where there is not sufficient business to sustain all of the

competitors, is that a season of experience causes all or some to drop out or compels the purchase of competitors (usually at exaggerated amounts), thus causing an increase of capital expenditure of the purchasers upon which the charges to the public must be based and thereby increased.

“These considerations, and others, amply justify differences to protect and preserve the existing permanent system. No new system has a legal right to destroy such existing system and have the public at its mercy. The public welfare is not served, but harmed thereby. The public may protect itself against such results. Nor can any theory of free competition change this situation. Competition is recognized and encouraged for the sole reason that it is supposed to result in the public good. But competition is not necessarily unrestrainable. It cannot be allowed to harm the very public it was designed to protect and aid. It may be restrained for the public welfare just the same as monopoly may be restrained or as competition may be left unrestrained. The test in each instance is the public good. Where the restraint upon competition is for the public good, it is sustainable just as restraint upon freedom of action by the individual is valid where for the public good. Such is the basis of and the reason for the entire police power.”

- 1. It will be detrimental to the best interests of the public and to the localities served, to grant the permit to plaintiffs.**

The decision in the instant case may in a general manner set a precedent with respect to motor vehicle transportation in the State of Utah, and far-reaching consequences may result therefrom. The problem presented to the Commission was an exceedingly important

one, not only to the plaintiffs, the defendant carrier of Utah-Idaho Sugar Company but also to the public at large. There is fundamentally involved the responsibility of the Public Service Commission with respect to its administration of the act governing transportation by motor vehicles. One of the principal purposes of the act is to insure that the public will secure an efficient permanent transportation service, whether that service be rendered by common or contract carriers. It is the duty of the Commission to administer the law with wisdom and foresight, to the end that the public may be best served. The spirit of the act envisions a state-wide transportation system composed of numerous units, be they either common or contract carriers, who are financially responsible and are ready, willing and able to furnish to the public the service that it deserves and requires. While neither certificates of convenience and necessity nor contract carrier permits grant any monopoly, and certainly do not vest in the recipients thereof any right to be free from competition or to hold a monopoly against the public, there exists intrinsically in the regulatory provisions of the statute the purpose and intention of the legislature to prevent uncontrolled competition between motor carriers of such nature as would eventually either seriously impair transportation facilities or perhaps utterly destroy them. By vesting in the Commission a controlled discretion as to either granting or withholding certificates and permits, dependent upon circumstances, the legislature evinced its intention that motor vehicle transportation should

be so regulated as to prevent the evils of a monopoly on the one hand and the destructive influence of uncontrolled competition on the other. It is by striking a happy medium between the two extremes that the Commission achieves the purpose of the law. An administrative body like the Commission is best qualified to weigh and measure the facts and circumstances of a given case, in order to strike this balance.

It would be lawful for the Commission, under facts and circumstances which control the exercise of its discretion, to issue a contract carrier permit over the identical route of, and in competition with a previously authorized common carrier. The law did not intend that a common carrier holding a Certificate should have, for all time, a monopoly on the transportation over the route served by it, but this is not necessarily justification for licensing competing carriers where there is no public interest involved. The Supreme Court in its decision in the case of *Utah Light & Traction Company v. Public Service Commission of Utah*, (101 Ut. 99; 118 Pac. 2d 683 at 690) stated:

“ * * * but when a territory is satisfactorily serviced and its transportation facilities are ample, a duplication of such service, which unfairly interferes with existing carriers *may undermine and weaken the transportation setup generally, and thus deprive the public of an efficient, permanent service.*”

The defendant carrier is the owner and holder of a Certificate of Convenience and Necessity issued by the Public Service Commission, authorizing it to carry on

the business of a common carrier between Salt Lake City and Bingham, Utah, over the highways stated in said Certificate. The West Jordan factory of the Sugar Company is served by this common carrier route. There is a public necessity existing for the maintenance of a motor vehicle common carrier operation between Salt Lake and Bingham. At the latter point is conducted one of the most important industries in the State of Utah, and the service of that community by an efficient, financially responsible common motor carrier is of great importance, not only to Bingham and Salt Lake City, but also to the public at large. While Bingham is served by common carriers by rail, operations of the defendant carrier over a long period of time have proved the fact that there does exist a necessity and demand for motor vehicle carrier service. The Commission, by granting the Certificate to the defendant carrier, has in effect found such fact. The maintenance of such service in an efficient manner, is of course dependent primarily upon the financial returns received by the defendant carrier, and these returns are dependent upon the volume of business arising not only in Salt Lake City and Bingham, but also along its route. The business of the Sugar Company in the movement of sugar to Salt Lake City from its West Jordan factory is a legitimate contribution to the financial welfare of defendant carrier. Prima facie this business belongs to the common carriers which serve the factory, provided, of course, that their service is adequate. The defendant carrier is ready, willing and able to furnish the service to the Sugar Company which

will meet its demands and requirements, resultant upon the highly competitive conditions revealed by the evidence. The testimony of the Sugar Company witness in its fullest thrust serves only to establish the fact that should this permit be granted, the Sugar Company will be given additional choice of carriers. But this fact does not establish the ultimate fact which must be found by the Commission, viz: that it will not be detrimental to the best interests of the people and of the localities to be served if such permit is granted. It is vigorously urged by the defendants that there is no basis in fact to justify the Commission in introducing competition in the hauling of sugar between West Jordan and Salt Lake City as against the defendant carrier. The result of granting such permit would only be to subtract from the defendant carrier a certain volume of business in order to give the Sugar Company a further choice of carriers. The granting of the permit might very well establish a pattern for the Commission in similar cases which are sure to arise. Let there be a certain number of incidents, destructive competition between carriers will be encouraged rather than restrained as contemplated by the law. The mere convenience of one shipper along a common carrier route is not sufficient reason to justify the Commission in introducing competition against its previously licensed common carrier where there is no evidence that the public at large will benefit from the same.

The crux of the plaintiffs' case is simply this: The Sugar Company encounters vigorous competition from

other sugar companies which maintain large stocks of sugar in Salt Lake City, and it seeks to meet this competition by securing from the plaintiffs a transportation service which the evidence fails to prove as being necessary, but which simply serves the convenience of the Sugar Company. It is the contention of defendants that such evidence utterly fails to support a finding that the granting of the application would not be detrimental to the best interests of the people and of the localities served. If the mere convenience of one shipper on defendant carrier's route is reason for the Commission introducing competition against it, like convenience of other shippers, multiplied several times, may easily destroy defendant carrier's business. This is the exact type of competition which the statute intended the Commission to control or restrict. Let it be supposed that other owners of motor vehicles apply to the Commission for contract carrier permits over defendant carrier's route, and base their applications upon asserted convenience of certain other shippers. What will then be the attitude of the Commission when it is faced with the problem of either serving the convenience of the shippers or weakening the ability of the defendant carrier to perform its public service? The time to stop such process is at the present. The public good can be best served by sustaining defendant carrier in its common carrier operation over the route involved.

2. Existing transportation facilities operated by defendant carrier provide adequate and reasonable service over its route.

The Commission, in order to justify the issuance of

a permit to plaintiffs, must also find that existing transportation facilities over the Salt Lake-Bingham route do not provide adequate or reasonable service. The evidence in this case does not even suggest that the defendant carrier has failed in any respect in the performance of its duties as common carrier over the route involved. No complaint has been registered against defendant carrier for its failure to serve the public. The Sugar Company witness at the hearing frankly stated that the basis of the application was solely a question of speedier rather than emergency service. In other words, there as a true admission by this witness that defendant carrier is ready, willing and able to render even the so-called emergency service to the Sugar Company. Apparently the only criticism which the Sugar Company could make against defendant carrier's service was the question of time. There is not a scintilla of evidence in the record that defendant carrier does not possess adequate automotive equipment nor the necessary personnel to operate the equipment. The testimony of the President of the defendant carrier, assuring the Commission of the ability of his company to perform its functions as common carrier, stands uncontradicted, and even the Sugar Company witness did not dispute this statement. The defendant carrier admitted frankly that there had been one occasion when the Sugar Company requested a movement of sugar within a half hour's time, and due to circumstances then prevailing the carrier requested two hours' time. The ability of the defendant carrier to serve the public and also to serve the Sugar Company

must stand as a definite fact in this case. The President of the defendant carrier declared that his company was in a position, upon demand of the Sugar Company, to dispatch extra trucks in order to effect this "speedy" delivery of sugar into Salt Lake. It is impossible, therefore, to torture from this evidence a finding that existing transportation facilities, as furnished by defendant carrier, do not provide adequate or reasonable service for the shippers along its route, be they the public in general or the Sugar Company in particular. There is no particular conflict of evidence in this case, when it is carefully analyzed and considered. Unless the Commission could find that defendant carrier's transportation facilities now and in the future do not provide adequate and reasonable service, it is not authorized to grant the plaintiffs' application.

The defendants earnestly submit to the Court that the Commission committed no error in denying plaintiffs' application for a contract carrier permit to serve the Utah-Idaho Sugar Company from its West Jordan Plant.

Respectfully submitted,

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