

1977

Rio Grande Motorway Inc. v. Public Service Commission of Utah et al : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Ireme Warr; Attorney for Respondent;

Mark K. Boyle; Brinton R. Burbidge; Attorneys for Appellants;

Recommended Citation

Brief of Appellant, *Rio Grande Motorway Inc. v. Public Service Comm. Of Utah*, No. 15156 (Utah Supreme Court, 1977).
https://digitalcommons.law.byu.edu/uofu_sc2/633

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

RIO GRANDE MOTORWAY, INC. :

Appellant, :

vs. :

PUBLIC SERVICE COMMISSION OF :
UTAH, MILLY O. BERNARD, OLOF :
E. ZUNDEL, and KENNETH RIGTRUP, :
Commissioners of the Public :
Service Commission of Utah, :
and UINTAH FREIGHTWAYS, :

Case No. 15156

Respondents. :

BRIEF OF APPELLANT

Appeal, by writ of certiorari, from an order of the
PUBLIC SERVICE COMMISSION
OF UTAH

MARK K. BOYLE
345 S. State, Suite 101
Salt Lake City, UT 84111
ATTORNEY FOR APPELLANT,
RIO GRANDE MOTORWAY, INC.

IRENE WARR
430 Judge Building
Salt Lake City, UT 84111
ATTORNEY FOR RESPONDENT,
UINTAH FREIGHTWAYS

BRINTON R. BURBIDGE
Assistant Attorney General
ATTORNEY FOR THE DIVISION
OF PUBLIC UTILITIES

FILED

JUN 17 1977

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	3
POINT I. THE GRANT OF AUTHORITY TO UINTAH IN 1958 WAS A SINGLE GRANT AND THE COMPONANT PARTS THEREOF CANNOT BE "TACKED".	3
POINT II ANY SERVICE BY RESPONDENT FROM SALT LAKE CITY TO PRICE IS WITHOUT AUTHORITY AND THEREFORE ILLEGAL.	3
POINT III ASSUMING, ARGUENDO, THAT THE CIRCUITOUS ROUTE FROM SALT LAKE CITY TO PRICE IS NOT ILLEGAL, RESPONDENT HAS WHOLLY FAILED TO MEET IT'S BURDEN IN PROVING THAT THE PROPOSED "ALTERNATE ROUTE" SHOULD BE AUTHORIZED.	9
POINT IV THE COMMISSION ERRED IN IT'S APPLICATION OF THE STATUTORY AND CASE LAW.	17
CONCLUSION	24

* * * * *

AUTHORITIES CITED

Cases

<u>Campbell Sixty-six vs. United States</u> , 259 F. Supp. 529, 1966 F.C.C. 81,843	17
<u>Cantlay and Tanzola vs. Public Service Commission</u> , 233 P. 2d 344	17, 18, 20
<u>Central Motor Lines--Alternate Routes</u> , 1967 F.C.C. 36,157	17
<u>Daily Express, Inc. vs. United States of America</u> , 342 F. Supp. 1295, 1972 F.C.C. 82,321	7

<u>Davidson Transfer and Storage Co. Extension--Alternate Routes</u> , 91 M.C.C. 687, 15 F.C.C. 35,530	11,
<u>Falwell Fast Freight, Inc.</u> , 46 M.C.C. 804, 5 F.C.C. 31,093	8
<u>Interstate Commerce Commission vs. G. and M. Motor Transfer Co.</u> , 5 F.C.C. 80,251, 64 F. Supp. 302	5
<u>Los Angeles and Salt Lake Railroad Company vs. Public Service Commission</u> , 15 P. 2d 358	21
<u>Lewis Brothers Stages, Inc. vs. Public Service Commission</u> , 547 P. 2d 199	21
<u>Malone Freight Lines, Inc.--Investigation of Operations and Practices</u> , 113 M.C.C. 442, 1971 F.C.C. 36,542	6
<u>Mulcahy vs. Public Service Commission</u> , 101 Utah 245, 117 P. 2d 298	20
<u>Michigan Express, Inc. Extension</u> , 108 M.C.C. 245 1969 F.C.C. 36,273	10,
<u>Palmer Brothers, Inc.</u> , case 4869 sub 1, Utah Public Service Commission, May 14, 1962	9,
<u>Weigand, Inc., Modification of Certificate</u> , 114 M.C.C. 806, 1972 F.C.C. 36,600	5
<u>Zirbel--Investigation of Operations</u> , 35 M.C.C. 684, 8 F.C.C. 32	4,

Statutes

Section 54-4-25 U.C.A., 1953 as amended	22,
Section 54-6-5 U.C.A., 1953 as amended	22,
Section 54-6-8 U.C.A., 1953 as amended	17
Section 76-5-21 U.C.A., 1953 as amended	17

IN THE SUPREME COURT OF THE
STATE OF UTAH

RIO GRANDE MOTORWAY, INC. :

Appellant, :

vs. :

PUBLIC SERVICE COMMISSION OF :
UTAH, MILLY O. BERNARD, OLOF E. :
ZUNDELL, and KENNETH RIGTRUP, :
Commissioners of the Public :
Service Commission of Utah, :
and UINTAH FREIGHTWAYS, :

Case No. 15156

Respondents.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Petition of respondent, Uintah Freightways (hereinafter referred to as Uintah) to provide direct motor carrier service from Salt Lake City to Price, Utah on the theory of an alternate route deviation.

DISPOSITION IN LOWER TRIBUNAL

The Public Service Commission (hereinafter referred to as the "Commission") granted respondent's petition.

RELIEF SOUGHT ON APPEAL

Appellant asks the court to reverse and set aside the order of the Commission.

STATEMENT OF FACTS

necessity 1288 from the Commission (R. 9)¹ authorizing it to operate as a common carrier in intrastate commerce. The certificate is couched in three subparagraphs, with restrictions not here pertinent, as follows:

- (A) Between Salt Lake City, Utah and all points within the Uintah Basin over U.S. Highway 40 and other various Utah State and County highways to all points within the Uintah Basin serving to, from and between all Uintah Basin points.
- (B) Between Vernal, Utah and Price, Utah via Duchesne County, Utah serving Vernal, Utah and Price, Utah and all intermediate points.
- (C) Between all points in Utah authorized in A and B above, on the one hand, and all points in Daggett County, Utah on the other.

Respondent has provided no service from Salt Lake City to Price since the issuance of the certificate in 1958 until May, 1976 except for an occasional undefined and irrelevant "hot shot service." (T. 10, 16)

In May, 1976, the respondent, for the first time, began running schedules from Salt Lake City to Price via either U.S. Highway 40 to the junction of Utah Highway 33 at Duchesne and thence over Utah Highway 33 to Price or via U.S. Highway 91 from Salt Lake City, Utah to Provo, thence over U.S. Highway 189 to Heber and thence over U.S. Highway 40 to Duchesne and over Utah Highway 33 to Price.

Some three months later, on August 20, 1976, respondent filed a petition with the Commission (R. 1) entitled "Petition to Deviate Over an Alternate Route," that route being U.S. Highway 50-6 between Provo and Castle Gate.

¹ References to the official record are designated "R" and references to the reporters transcript are designated "T".

The application was heard before Commissioner Olof E. Zundel on September 22, 1976. Appellant and Asnworth Transfer appeared at the hearing in protest to the application. Subsequently the Commission issued it's order granting the relief prayed for in the petition, authorizing direct service from Salt Lake City to Price. (R. 78) Appropriate petitions for reconsideration were filed and denied and the appellant is here before the Supreme Court seeking a reversal of the Commission's order.

ARGUMENT

I

THE GRANT OF AUTHORITY TO UINTAH IN 1958 WAS A SINGLE GRANT AND THE COMPONANT PARTS THEREOF CANNOT BE "TACKED."

II

ANY SERVICE BY RESPONDENT FROM SALT LAKE CITY TO PRICE IS WITHOUT AUTHORITY AND THEREFORE ILLEGAL.

III

ASSUMING, ARGUENDO, THAT THE CIRCUITOUS ROUTE FROM SALT LAKE CITY TO PRICE IS NOT ILLEGAL, RESPONDENT HAS WHOLLY FAILED TO MEET IT'S BURDEN IN PROVING THAT THE PROPOSED "ALTERNATE ROUTE" SHOULD BE AUTHORIZED.

IV

THE COMMISSION ERRED IN IT'S APPLICATION OF THE STATUTORY AND CASE LAW.

Points I and II above will be argued jointly.

Respondent's certificate 1288 is a single grant of authority, issued pursuant to a single application in the single proceeding and consists of three parts designated (A) (B) and (C). Part (A) authorizes service between Salt Lake City, Utah and all points in the Uintah Basin.

Part (B) authorizes service between Vernal, Utah (in the Uintah Basin) and Price, Utah via Duchesne County. Part (C) authorizes service between the points authorized in parts (A) and (B) on the one hand and all points in Daggett County on the other, with restrictions not here pertinent.

It was not until May, 1976, in obvious preparation for the petition under consideration here, that respondent, for the first time, instituted a service between Salt Lake City and Price, via Duchesne. Respondent argues that such a service is authorized by "tacking" its authorities under parts (A) and (B) of certificate 1288 at Duchesne. We contend that such an alleged "tacking" is patently without any authority whatever and is unlawful and illegal.

Basic rules of construction and common sense dictate that the Commission never intended to authorize such service. Obviously, service between Salt Lake City and Price was not part of the original application and no proof was adduced in support thereof. Had the Commission intended to authorize such service it would have been easy to do so in direct and specific terms.

We are unable to find any guidelines in the Utah statutes or case law defining what authorities may or may not be tacked. However, the Interstate Commerce Commission has a long line of cases prohibiting the tacking of separate paragraphs of authorities issued in a single proceeding, except in unusual circumstances.

In the case of Zirbel--Investigation of Operations, 35 M.C.C. 684; 8 F.C.C. 32, the Commission stated:

"The right of a motor common carrier to tack separate grants of unrestricted authorities is well settled regardless of whether the authorities involve regular routes, irregular routes, or a combination of both."

The question of what is a separate grant of irregular-route authority has been fully discussed and determined in several proceedings before this Commission. It is axiomatic that only a single grant of irregular-route authority can emanate from one proceeding. It is not uncommon to describe such a single or separate grant of irregular-route authority, . . . in two or more paragraphs or parts in the certificate or permit subsequently issued." (emphasis added)

Upon reconsideration of the Zirbel proceeding in 54 M.C.C. 409; 9 F.C.C. 32,468 the above-stated finding was restated with approval. The Commission, again, in the case of Weigand, Inc., Modification of Certificate 114 M.C.C. 806; 1972 F.C.C. 36,600 quoted from and approved the finding in Zirbel, Supra.

The position of the Interstate Commerce Commission was clearly set forth in the case of Interstate Commerce Commission vs. G. and M. Motor Transfer Company, Inc., 5 F.C.C. 80,251, United States District Court, Western District of North Carolina, Statesville, Division, April 30, 1945; 64 F. Supp. 302, wherein the District Court upheld and adopted the following finding by the Interstate Commerce Commission:

"It should be observed that operations are authorized (1) from Elkin and Statesville, N. C., to points in the District of Columbia and 11 states, not including North Carolina, and (2) from the District of Columbia and the same 11 states to points in North Carolina. There is no authority, for example, to operate from any point in New York to any point in Georgia. The certificate specified the service to be performed out-bound from Elkin and Statesville and from points in the District of Columbia and 11 states to Elkin and Statesville and all other points in North Carolina. . . . The Authority granted is set forth in clear and unambiguous terms. As stated, applicant, however, would have us read into the certificate authority, for example, to transport a shipment from a New York point to a Georgia point by way of Statesville. It would do so apparently

on the theory that, since it has authority to operate from a point in inbound service to Statesville and in outbound service from Statesville to a point in Georgia, it may, under the two separately stated authorities, interchange with itself and provide through service.

Applicant's position is untenable. Plainly, Division 5 did not intend to grant applicant the authority it would have us find it contained in its certificate. . . . Nor is the interpretation requested warranted by the language of the certificate; rather, it would be contrary thereto. Section 208 (a) of the act provides that we shall specify in a certificate "the service to be rendered" . . . and in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate. . . . The words "to" and "from" in applicant's certificate define the territory in which it may operate. This territory may not be increased by the expedient of interpreting "to" and "from" a point to mean also through such point. If Division 5 had intended to grant applicant that authority, it would have done so with more appropriate language.

In this connection, we are unable to subscribe to the fiction of an interchange with oneself as authorizing an operation not otherwise authorized. . . . Under the certificate it now holds, applicant is authorized to conduct only service from and to certain base points. By proper arrangements it may interchange with other carriers at any point which it is authorized to serve, and the same shipment may be both received from and delivered to any other carrier, but its service as to any particular shipment must either begin or end at one of the authorized base points.

. . . We find no merit in applicant's petition, and it therefore will be denied."

This case was cited with approval in Malone Freight Lines, Inc.--Investigation of Operations and Practices, 113 M.C.C. 442; 1971

F.C.C. 36,542, wherein the Commission again stated the time-honored rule that "it is a basic principle that separate segments or paragraphs of a single grant of authority may not be combined."

The reasons for describing different portions of a single grant of authority are many and varied and often present difficult questions of interpretation. See Daily Express, Inc. vs. United States of America, 342 F. Supp. 1295; 1972 F.C.C. 82,321. However, it is clear beyond question in the case under consideration that the Commission intended Parts A and B and C to be part of the single grant of authority issued in respondent's certificate of convenience and necessity 1288. As such, the alleged "tacking" is unauthorized and is illegal and cannot be the basis of the authority granted by the Commission.

If respondent's theory and the decision of the Commission were allowed to become law the door would be flung wide open for wholesale evasion of motor carrier regulation in the State of Utah. For example, an applicant could seek authority from the Commission in a single application under Part (A) to transport general commodities from Salt Lake County to Simpson Springs in South Central Tooele County, near the Dugway Proving Grounds, and in Part (B) from Simpson Springs to all points in the State of Utah. Such an application would attract little, if any, attention inasmuch as there is no traffic moving from Salt Lake County to Simpson Springs and none from Simpson Springs to the balance of the State. Such an unopposed applicant could present testimony, real or illusory, from an optimistic and ambitious witness

indicating he planned to construct some type of facility at Simpson Springs which would require the transportation of inbound and outbound commodities. Once such an unopposed application ripened into a certificate the applicant could, following in Uintah's footsteps, file an alternate route application asking that the Commission approve authority to provide transportation from all points in Salt Lake County directly to all points in the State of Utah. Under respondent's theory this would require no proof of public convenience and necessity because under such theory Parts (A) and (B) of the application could be "tacked" and the resulting savings in mileage by the alternate route application would be all that would be required to give the fictional applicant state-wide service. A similar situation could exist by choosing any destination and origin point throughout the State which would be so remote as to escape attention of existing potentially protesting carriers. Obviously such a precedent would lead to chaos rather than intelligent regulation. If the Public Service Commission had intended to authorize Uintah, in 1958, to provide service from Salt Lake City to Price via Duchesne, it would have been a simple matter to couch a grant of authority in those terms.

The three parts of the single grant of authority issued in certificate 1288 cannot legally be tacked and for this reason alone the decision of the Commission must be reversed.

The Interstate Commerce Commission, in Falwell Fast Freight, Inc., 46 M.C.C. 804; 5 F.C.C. 31,093, aptly stated:

"Thus applicant has no authorized route between Gauley Bridge and Charlottesville, which points are the termini of the alternate route requested

in No. MC-903 (Sub-No. 19). Clearly a carrier may not be granted an 'alternate' route between points as to which it presently has no authorized route. To do so would enable such a carrier to institute a new operation without a showing that it was required by the public convenience and necessity."

However, the following argument presents a further and equally cogent reason which compels a reversal of the Commission's decision.

III

ASSUMING, ARGUENDO, THAT THE CIRCUITOUS ROUTE FROM SALT LAKE CITY TO PRICE IS NOT ILLEGAL, RESPONDENT HAS WHOLLY FAILED TO MEET IT'S BURDEN OF PROVING THAT THE PROPOSED "ALTERNATE ROUTE" SHOULD BE AUTHORIZED.

We are unaware of any Supreme Court decision or statutory provision in the State of Utah specifically dealing with the requirements covering an alternate route application. Respondent relies heavily upon the application of Palmer Brothers, Inc. in case 4869 sub 1 issued by the Commission on May 14, 1962. In that case, Palmer was authorized specifically to transport commodities between Salt Lake City and Provo, Utah utilizing U.S. Highway 40 to Heber City and Utah Highway 189 to Provo, restricted against service to any of the intermediate points between Salt Lake City and Provo over the Heber route. Palmer was also authorized specifically to traverse U.S. Highway 91 fully loaded between Salt Lake City and Provo enroute to the area of Delta and Fillmore. Upon Palmer's application to the Commission to amend it's certificate to substitute a direct route via U.S. Highway 91 in lieu of the circuitous route via Heber City, the Commission properly granted the application upon the findings that Palmer was an effective competitor for traffic originating in Salt Lake City and destined to Provo; that it specifically held authority from Salt Lake

City to Provo via the circuitous route and upon the further finding that the granting of the authority would have no materially adverse effect upon the services of existing carriers.

We have no quarrel whatever with the Commission's decision in the Palmer case and submit that it applied the customary criteria to be used in an alternate route deviation case. We strongly contend, however, that Palmer Brothers is clearly distinguishable from the case at hand. Palmer had specific authority from the origin to the destination via the circuitous route. Uintah does not. Palmer was an effective competitor for the traffic from origin to destination. Uintah is not. The granting of the Palmer application did not impair the services of existing carriers. The granting of the instant application would seriously impair the services of existing carriers.

There are a multitude of Interstate Commerce Commission decisions and court decisions which set forth alternate route guidelines in substantially the same language used by the Commission in Palmer.

In the case of Michigan Express, Inc. Extension, 108 M.C.C. 245; 1969 F.C.C. 36,273, the Interstate Commerce Commission set forth the alternate route criteria as follows:

" . . . it is well established that to justify a grant of alternate route authority solely on the basis of operating economy and efficiency, applicant must show (1) that it is operating between the involved termini over a practicable and feasible service route, (2) that it is an effective competitor with existing carriers for traffic moving between the termini and (3) that a grant of the authority sought will not enable applicant to institute a new service or a service so different from that presently provided as to improve materially its competitive position."

In denying the alternate route application, the Commission stated:

"However, applicant's operations between South Bend, Indiana, and the other-named Michigan points present a different situation. Protestants compete vigorously for and transport substantial volumes of traffic between these points, and applicant's participation in such traffic is, by volume, relatively small in comparison. It's unfavorable competitive position is, no doubt, due to the relatively high degree of circuitry involved in observing Michigan City, Indiana, as a gateway in the case of truckload traffic, and in employing Chicago, Illinois, as a break-bulk point for less-than-truckload shipments. Because the proposed alternate route would reduce circuitry by an average of over 20%, we believe that it's use in the transportation of this traffic would permit improvement in the applicant's service to a degree sufficient to constitute a new service which would work a detriment to existing carriers."

It is seen from the above quotation and from the following language in Davidson Transfer and Storage Co. Extension--Alternate Routes, 91 M.C.C. 687; 15 F.C.C. 35,530, that the applicant has the burden of concurrently proving the three elements required to justify an alternate route. In Davidson, the Commission stated:

"It is our opinion, however, that should applicant be allowed to operate over the proposed alternate route, it is probable that a considerable proportion of the Norfolk traffic would be diverted from the service route. . . In our opinion this would permit applicant to institute a new service which would be significantly different from that presently provided and would materially improve applicant's competitive position to the detriment of existing carriers. Although we are sympathetic with applicant's desire to operate as efficiently and economically as possible, protestants are entitled, in a case of this type, to a showing that the use of the proposed alternate route will not materially change the competitive situation; there is no such showing. Under these circumstances, we conclude that the applicant has failed

to satisfy the required criteria and, consequently, that the application should be denied." (emphasis added)

In the instant case, the Public Service Commission wholly misconstrued the burden of proof upon the applicant and erroneously placed it upon protestants (appellant). On page 2 of it's order the Commission stated:

"No evidence was adduced by the protestants at the time of the hearing to show that applicant was not an effective competition (sic) with them, nor did protestants demonstrate that there had been any adverse or decreased revenues or any other evidence of destructive competition by reason of the performance of the service by UINTAH FREIGHTWAYS." (emphasis added)

The burden of proof is, of course, upon the applicant to show that it is an effective competitor and protestants are under no obligation whatever to supply this burden when the applicant fails to meet it. Furthermore, appellant contends that it's revenues have not been decreased by the operations of respondent from May until the hearing since the respondent was not an active competitor.

An examination of the evidence adduced at the hearing by respondent clearly shows it's failure to meet it's burden in this regard.

The first burden upon the applicant is to show that it is operating between the involved termini over a practicable and feasible service route. The applicant's evidence shows that the service route between Salt Lake City and Price via Dushesne is over Utah Highway 33 between Dushesne and Price which route is commonly

called "Indian Canyon." Indian Canyon is a difficult route in the wintertime and the road is often closed. (T. 9, 17) This route requires an additional 140 miles per round trip which results in a 70% deviation over the direct route. The service route is also two hours longer one-way loaded in good weather and involves an undetermined delay in bad weather which often results in a complete prohibition of the use of this route in wintertime. We respectfully submit that this evidence wholly fails to satisfy the applicant's burden that the circuitous route is indeed a practicable and feasible one. (T. 9, 10, 16-19)

The second criteria which applicant must prove is that it is an effective competitor with existing carriers for traffic moving between the termini. In this regard, the evidence of the applicant falls far short of meeting it's burden. The testimony of Mr. Smith representing the applicant indicates that a regular service was instituted in May, 1976 which operates once per day, five days per week. He stated that he had developed "some traffic" on this route since May, 1976. (T. 10, 11) No other testimony was given by applicant. The applicant wholly failed to establish the amount of traffic, if any, being handled in the newly instituted daily schedules. It wholly failed to show whether it was transporting any traffic at a profit. It wholly failed to show that it was a competitor of any kind let alone an "effective" competitor, notwithstanding the fact that it clearly has the burden of proving this element. Applicant was content to establish that it had recently operated over the alternate route

and nothing more. The Commission was clearly in error in it's finding that the protestants had failed to show that applicant was not an effective competitor. The burden is upon the applicant, not upon the protestant.

The third element required to establish an alternate route case is that a grant of the authority sought will not enable applicant to institute a new service or a service so different from that presently provided as to materially improve it's competitive position. Mr. Smith testified in this regard as follows:

"Q All right, sir. Have you made a calculation, sir, with respect to the miles that you are presently operating on your regular route service between Salt Lake City, and Price?

A We have.

Q What were your findings?

A The present route that we are traveling requires us to traverse an additional 140 miles per round trip in excess of what we would be traversing if we had the route that we are requesting in this application.

Q All right, sir. Have you calculated any advantages that might accrue to your company were you permitted to perform this service over a less circuitous routing.

A Yes. There would be a savings of fuel in the amount of what we approximate to be 8,424 gallons per year. It would save us in man hour production in excess of three and a half hours per day for each day that we operate this. The savings in oil, tires, maintenance, and replacement parts and equipment we have not been able to calculate, but they're sizeable, and this route would be the most economical, convenient way to serve the public, and it would reduce the burden of the highways that we're traveling.

Q Is there anything particularly unusual about the route that you are traveling at the present time with respect to the condition of those highways as it applies to year round service?

A In the wintertime it's going to be more difficult to serve this area because of the mountain known as Indian Canyon, which is between Duschene and Castle Gate, which is in excess of 9,000 feet, and it's not one of the primary highways that's kept clear of ice and snow by the Highway Department, and it will make it inconvenient to travel that way, and sometimes it will make it impassable, at which time we will have to petition the Commission for special temporary permits to use Highway 6 and 50." (T. 9, 10)

The evidence of appellant shows that it operated during the first eight months of 1976 at a 99% operating ratio earning a net income of only \$1,447.97 on an adjusted gross revenue of \$540,337.00. (R. 11)

In this connection, Mr. Marsh, representing the appellant, testified:

"Q (By Mr. Boyle) Mrs. Marsh, that shows that your operating ratio is 99 and that you had a net income of less than fifteen hundred dollars on a gross of over half a million?

A That's correct.

Q You are sending three schedules per day to Salt Lake City to Price?

A That's correct.

Q Do you also have extra schedules?

A Yes, we do.

Q How often and how do you handle those?

A On the average of two or three times a week we have sometimes two or three extra schedules, and we send those out as they come up with extra drivers to Price to cover the loads.

Q What time do you run your schedules? What time of day?

A Our normal schedules, on leaves at 11:00 p.m. in the evening, two will leave at 12:01 a.m., and the rest will leave at 7:30 the following morning.

Canyon would not in effect create a new service which respondent cannot now provide. The evidence shows, and common sense dictates, that if respondent can reduce it's mileage by 30%, save 8,424 gallons of fuel per year, save 3 1/2 hours per day in operational time, save 30% in oil, tires, maintenance and replacement parts and avoid wintertime ice, snow and road closures, it would put respondent in a new competitive position which it does not now enjoy.

The Courts and the Commission have consistently held that the burden is upon the applicant to concurrently meet all three tests enumerated above in order to qualify for a grant of alternate-route authority. The failure of applicant to meet any one of the three tests

is fatal to it's cause. Here the applicant has wholly failed to meet any of the three tests and the order of the Commission granting the alternate-route application must be reversed. See Central Motor Lines--Alternate Routes, 1967 F.C.C. 36,157; Campbell Sixty-six vs. United States, 259 F. Supp. 529, 1966 F.C.C. 81,843; Michigan Express, Inc., Supra, and Davidson Transfer and Storage, Extension, Supra.

IV

THE COMMISSION ERRED IN ITS APPLICATION OF THE STATUTORY AND CASE LAW.

We think the most orderly procedure in setting forth the errors committed by the Commission in it's order is to proceed chronologically with an examination of the provisions thereof.

Reliance by the Commission on the case of Cantlay and Tanzola vs. Public Service Commission, 233 P. 2d 344 (in the middle of page 2 of the order) (R. 78) is a good example of the misapplication of Utah law to the facts under consideration. The Cantlay and Tanzola case is entirely foreign to the factual situation presented here and the law enunciated therein has no application whatever to the problem at hand.

That case involved an application for a contract carrier permit pursuant to Section 54-6-8 U.C.A. 1953, as amended (formerly 76-5-21 U.C.A. 1943). In that case, the applicant (I. Sander, Inc.) already held a contract carrier permit to transport gasoline from Salt Lake City to Roosevelt where it deposited the gasoline in a bulk storage plant from which it transported gasoline in a small 1400

gallon tank wagon in private carriage from Roosevelt to Vernal-- a distance of 24 miles. The applicant sought an extension of it's contract carrier permit from Roosevelt to Vernal so that it could transport directly from Salt Lake City to Vernal in it's larger 5500 or 7000 gallon semi-trailer tanks. The applicant had a contract with Standard Oil Company and the evidence was clear that the traffic from Roosevelt to Vernal would not be tendered to the protestants under any circumstances and further that if the application were denied that Standard Oil would continue to use the private carriage of I. Sander in it's 1400 gallon unit from Roosevelt to Vernal. The Commission properly granted the contract carrier permit authorizing an extension from Roosevelt to Vernal under the proof required for a contract carrier permit pursuant to the above-mentioned statute.

The distinctions between Cantlay and the instant case are so many and apparent that it's application here is clearly error. First, the burden of proof required to obtain a contract carrier permit is far less stringent than that required under Section 54-6-5 U.C.A. 1953, as amended, to obtain a certificate to operate as a common carrier. Second, Cantlay did not involve an alternate route. Proof of a need was present. Third, the applicant was transporting all of the traffic involved under contract with the shipper and would continue to do so under any circumstance. Fourth, the only effect of granting the application would be to decrease the operating costs of the applicant and to decrease the number of trips between Vernal and Roosevelt by use of the larger equipment. Fifth, none of the protestants had ever participated in any of the traffic involved and the evidence was clear that they would not

participate in that traffic in the future, regardless of the action of the Commission on the permit application.

In the next paragraph of its order, the Commission states:

"Protestant, Rio Grande Motor Ways, Inc. argues that the Public Service Commission of Utah ought to be bound by the Interstate Commerce Commission policy determinations on route deviation. It further argues that any carrier seeking a route deviation must prove public convenience and necessity." (T. 78)

Appellant, Rio Grande, has never made such an argument.

Appellant has argued that good regulation and common sense dictates that the Commission should examine the decisions of the Commission and avail itself of the Commission's expertise where appropriate. In its legal memorandum, counsel for appellant stated:

On the other hand, the Interstate Commerce Commission has a multitude of cases covering the criteria to be used in deciding cases of this nature and the I.C.C. has likewise promulgated 'deviation regulations'. It is respectfully submitted that this Commission should look to the rules and regulations and decisions of the I.C.C. expertise in this regard. These rules have been applied many, many times and have been consistently reiterated as the proper considerations to govern applications of this nature." (R. 61) (emphasis added)

Again, on page 4 of this same memorandum:

"We respectfully submit that the rules applied by the Interstate Commerce Commission are based upon twenty years of experience and have withstood challenge during that period of time and certainly are reasonable and equitable guidelines to be used by this Commission." (R. 64) (emphasis added)

We clearly set forth throughout all of our memoranda and legal argument that the applicant had a burden to prove (1) that it is

While this matter has been covered in part in prior argument, we deem it important to point out the misconception on the part of the Commission as to the burden of proof. Clearly, based upon authority heretofore cited, the burden of proving that applicant is an effective competitor is upon the applicant. The applicant failed in this burden. It is reversible error for the Commission to shift this burden to the protestants. There is no way that the protestants could determine how much traffic was handled by the applicant and, therefore, no way to determine whether or not the unknown quantity of traffic handled by the applicant had any effect whatever upon their existing operations. We contend that they were not an effective competitor over the Indian Canyon route.

The first full paragraph on page 3 of the Commission's order (R. 79) refers to the Lewis Brothers and Los Angeles and Salt Lake Railroad Company Cases. We have no quarrel with the rule of law set forth in those cases, namely that the Commission has the duty to exercise it's own judgment on the facts. We are here complaining about basic and far-reaching errors in law.

The balance of that paragraph again indicates a misconception on the part of the Commission as to the issues involved. It provides:

"The Public Service Commission is, indeed, not bound by the policies of the Interstate Commerce Commission in determinations on route deviation. In fact, the policy for route deviation laid down by this Commission in the Palmer Brothers Case 4869 Sub. 1, is indicative of the distinct difference between this Commission's policy and that of the Interstate Commerce Commission." (emphasis added)

We have indicated our position concerning whether or not the Commission is bound by the Interstate Commerce Commission rules and

We further emphasize that the policy laid down by the Utah Commission

in the Palmer Brothers case is, in fact, identical to that enunciated by the Interstate Commerce Commission. As indicated in our prior discussion of Palmer, the Commission properly found that (1) Palmer was operating between the involved termini over a practical and feasible route (from Salt Lake City to Provo) and (2) it was an effective competitor with existing carriers for the traffic moving between those points and that (3) a grant of authority to Palmer would not enable it to institute a new service or a service so different from that presently provided as to improve materially its competitive position.

We have no quarrel whatever with the rules applied by the Commission in Palmer. We do submit, however, that the application of those same rules to the petition of respondent, Uintah Freightways, compels a conclusion that its application must be denied.

In the next two paragraphs of its order (R. 79) the Commission again mis-states the contention of appellant concerning proof of public convenience and necessity and clearly shows a misapplication of Section 54-4-25 U.C.A., as amended, to the subject at hand in lieu of Section 54-6-5 U.C.A., as amended. Our position is clear that proof of public convenience and necessity is required only if an applicant for a route deviation fails to sustain its burden of proving the three basic elements required in such an application.

The last two full paragraphs on page 3 of its order (R. 79), discussing the application of Sections 54-6-5 and 54-4-25, clearly show an erroneous misapplication of the appropriate statutory criteria. The Commission lifted from context the following language from Section 54-4-25:

"Provided that this section shall not be construed to require any such corporation to secure such certificate for an extension within any city or town within which it shall heretofore lawfully commence operations or . . . for an extension within or to territory already served by it, necessary in the ordinary course of its business." (R. 79)

We submit that if such language were applicable to applications by motor common carriers for extensions of an existing certificate of convenience and necessity that a carrier once certified from point A to point B, to serve any type of commodity, could enlarge the commodity description and the territorial scope of that certificate without proof of further public convenience and necessity or proof of an alternate route application or any proof whatever.

Clearly Section 54-4-25 has no application to the subject matter at hand. That section is entitled "CERTIFICATE OF CONVENIENCE AND NECESSITY PREREQUISITE TO CONSTRUCTION AND OPERATION." (emphasis added) A mere reading of the title and the section, which is too long to quote in this brief, clearly shows that it is inapplicable to the factual matter being here considered. The entire section applies to the construction of physical properties of railroad corporations, street-railroad corporations, aerial-bucket tramway corporations, gas corporations, electric corporations, telephone corporations, telegraph corporations, etc., all of which require the construction of physical plants and facilities in order to provide service.

On the other hand, once an applicant has failed to satisfy the three concurrent basic criteria to warrant the grant of an alternate route application it must, like any other applicant, be guided

by the provisions of Section 54-6-5 relating to the proof required to obtain a certificate of convenience and necessity.

CONCLUSION

The authority issued by the Commission in 1958 in certificate 1288 was a single grant of authority authorizing service (A) between Salt Lake City, Utah and points in the Uintah Basin (B) between Vernal, Utah and Price, Utah and (C) between all points in Utah authorized in (A) and (B) on the one hand and all points in Daggett County, Utah on the other with restrictions not here pertinent.

That authority was never intended to and did not, in fact, grant respondent authority to provide service between Salt Lake City and Price. The attempted "tacking" of the individual paragraphs of that separate grant was illegal and cannot under any circumstances be used as the basis for granting additional authority.

Without basic authority between the two termini there can be no alternate route relief. This, alone, compels a denial of the application. However, under any circumstances, respondent has wholly failed to meet the three basic concurrent criteria required for an alternate route application.

The Commission further misapplied the statutory and case law to the factual situation under consideration. Such misapplication constitutes serious error in law which, if not remedied, will result in irreparable damage to appellant.

WHEREFORE, appellant respectfully prays that the Court reverse the decision of the Commission and direct it to deny the respondent's application.

Respectfully submitted,

Mark K. Boyle
345 S. State, Suite 101
Salt Lake City, UT 84111
ATTORNEY FOR APPELLANT
RIO GRANDE MOTORWAYS, INC.