1977

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

Utah Supreme Court

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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,

Respondents.

BRIEF OF [illegible]

Appeal, by writ of [illegible]
PUBLIC [illegible]
OF [illegible]

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IN THE SUPREME COURT OF THE

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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 RESPONDENTS

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

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as amended 11,

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as amended . . . . . .

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* * * * *

BRIEF OF RESPONDENTS

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 BY THE PUBLIC SERVICE COMMISSION

Following the filing of the petition of Uintah Freightways, The Public Service Commission convened a hearing in Salt Lake City, Utah, on September 22, 1976. Testimony and other evidence of all interested parties was received at that time. Following the submission of briefs by the parties, a decision was handed down by the Commission on February 4, 1977,

granting the proposed route deviation. The Appellant requested reconsideration and filed additional briefs with the Commission. Reconsideration was denied by the Commission and Appellant's petition for certiorari.

NATURE OF RELIEF SOUGHT ON APPEAL

Respondents seek dismissal of the petition for writ of certiorari and urge this Court to uphold the Commission's findings and order. The Appellant asks that this Court substitute its own findings for those of the Commission and to have the Commission's order vacated.

STATEMENT OF FACTS

Petitioner Respondent currently holds a Certificate of Convenience and Necessity No. 1288 from The Public Service Commission of the State of Utah. That Certificate authorizes it to operate, as pertinent here, as a common carrier, transporting general commodities,

> (A) between Salt Lake City, Utah, and all points within the Uintah Basin, over U. S. Highway 91, from Salt Lake City to Provo, thence over U. S. Highway 189 to Heber City, and thence over U. S. Highway 40 and various Utah State and County highways to all points within the Uintah Basin, with permission to use the Orem cut-off, designated as Highway U-52, as an alternate route, serving to, from and between all Uintah Basin points; and
>
> (B) between Vernal, Utah and Price, Utah, via Duchesne County, Utah, serving Vernal, Utah and Price, Utah, and all intermediate points. (T-9.)

The above-noted authority was issued to Uintah in 1958. Uintah operated from 1958 to May of 1976, from Salt Lake City to Price, on an irregular, on-call type service

(R-10.) During that period, Uintah developed some traffic movements over its authority from Salt Lake City to Price. (R-10.) In May of 1976, Uintah found that it was having difficulty with freight interlines and concurrent rates and routings with Appellant protestant, Rio Grande Motor Ways. (R-11.) In an effort to provide responsive service to the public, it upgraded its existing service from irregular service to regular route, daily service. (R-11.) That service operated from Salt Lake City via U. S. 89-91, or Interstate 15, to Provo, and then up Provo Canyon to Heber, and then to Duchesne, Utah. At Duchesne, Utah, it would "tack" with (B) of Certificate 1288 and provide service south from Duchesne, Utah, to Castle Gate, Helper and Price. (R-7.)

The instant petition for route deviation seeks to operate between Salt Lake City, Utah, and Price, Utah, by deviating at Provo, Utah to U. S. Highway 50-6, to Junction of U. S. Highway 50-6, and Utah Highway 33, serving no intermediate points. The deviation would save 140 miles, 8,424 gallons of fuel, and would eliminate the necessity of having to traverse the sometimes dangerous Indian Canyon. (R-9, 10.)

Petitioner petitioned The Public Service Commission for the above-noted route deviation and hearing was held on September 22, 1976. At the conclusion of that hearing, petitioners and protestants filed briefs in support of their respective positions. By Report and Order issued February 4, 1977, the Commission found that it was in the public interest that the Petition for Deviation be granted and the Commission entered an Order to that effect.

ARGUMENT

I

THE GRANTS OF AUTHORITY CONTAINED IN THE CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 1288 ARE NOT PARTS OF A SINGLE GRANT OF AUTHORITY AND MAY BE TACKED.

A diligent search of the rules of The Public Service Commission of the State of Utah and the decisions of the Supreme Court of the State of Utah disclosed that there are no regulations or decision which govern the tacking of authority. In such an instance, the rules and case law of the Interstate Commerce Commission may provide some guidance.

The Interstate Commerce Commission has long held that regular route authority, i.e., authority which allows transportation over a specifically described route, may be joined together to provide a through service where in fact those routes intersect. There are no rules or decisions which have found that the tacking of two regular route pieces of authority, although found in the same grant, may not be "tacked".

The major source of concern to the Interstate Commerce Commission is the tacking of two sets of irregular route operating authority granted to a carrier in a single proceeding. The Commission set down the criteria it would use for allowing the tacking of two sets of irregular route operating authorities granted to a carrier in a single proceeding in the case of Miller, Extension -- Poughkeepsie, New York, 61 M.C.C. 631, 637.

> "However the mere fact that here both grants of authority were authorized in the same proceeding does not establish per se that they are parts of a single grant and, as such, may not be joined.

> Although it is difficult to lay down a definite rule by which two parts of a single grant may be readily recognized, the underlying reason for describing a single grant in separate parts arises for the most part, in those instances where the base area for outbound radial authority is smaller than, and included within a larger base area for the corresponding inbound authority, necessitating, of course, a separate description of each. Where this occurs, the result is a pattern of radial territorial authority which would ordinarily be authorized as a between rather than a from and to operation, except for the variation in territorial scope or radial base."

It is our contention that the grant of authority contained in Uintah's Certificate No. 1288 is not a grant of radial authority, but is in actual fact a grant of non-radial authority and, therefore, is a description of two separate grants of authority.

The Interstate Commerce Commission first defined "irregular route non-radial authority" in classification case M 2, M.C.C. 703. There the Commission defined that type of authority as authority for a person,

> "who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce, by motor vehicle, for compensation, over irregular routes, between points in communities located within such general territory as shall have been defined geographically and authorized in Certificate of Public Convenience and Necessity or Permit and any other points or communities located within the named general territory, without respect to a hub community or fixed base point of operations."

More recently, the Interstate Commerce Commission has delineated the distinction between radial and non-radial authority in the case of T. I. McCormack Trucking Co., Inc., 1966 F. Car. Cases #36,037. In that case, the Commission stated:

> "Radial authority is distinguished from non-radial authority in that the latter allows operations between designated points, or between all points within a single described area (which often comprises a number of states), where the former contains the phrase 'on the one hand, and on the other', and is one which describes two areas between which service may be rendered."

In the case of Uintah Freightways Certificate No. 1288, none of the language describing the authority contained therein is of the type used by the Public Service Commission or the Interstate Commerce Commission to describe radial authority. The language contained therein is non-radial authority. Under such circumstances, the underlying reasons stated in Miller, supra, for describing a single grant of authority, no longer exists since there is no possibility of a "pattern of radial authority" in this case. The Interstate Commerce Commission has held in several cases that where there is non-radial authority of the type found here, the authority may be tacked. In the case of Frozen Food Express, Extension Yeast, 91 M.C.C. 592, 594, the Commission stated:

> "Separately stated grants which have nevertheless been found to be single grants of authority which cannot be tacked are ordinarily easily distinguishable as such since they merely constitute what is in effect a single, radial 'between' authority stated in two parts; for example, from a base point to points in an outlying territory and from points in the latter territory back to the base point. The authority in the Schenecker and Boswell case cited by protestants is of this kind, as was that in G & M Motor Transfer Co., Inc., common carrier application, 42 M.C.C. 497. Where the separately stated authorities have not been of this type, it has been found that they may be tacked, even though they have been granted in the same proceeding." (Cf. AAA Trucking Corp., Inc., v. Burgmyer Bros., 100 M.C.C. 470, and Houff Transfer, Inc. -- Purchase -- Board Truck Lines, Inc., 101 M.C.C. 727.)

In light of the fact that the authority contained in Uintah Freightways Certificate No. 1288 is non-radial authority, and in light of the above-quoted cases, we respectfully submit that the descriptions are two separate grants of authority granted in one proceeding and, therefore, they may be tacked.

II

THE COMMISSION CORRECTLY FOUND THAT THE PETITIONER HAD MET ITS BURDEN OF PROOF THAT THE PROPOSED ALTERNATE ROUTE SERVICE SHOULD BE AUTHORIZED

Appellant-Respondent from the very outset of the hearing in the instant matter has urged upon the Commission and this Court that the Interstate Commerce Commission rules and case law on the subject of alternate route deviation have certain precedent value. At the hearing, Mr. Boyle, Appellant-Protestant counsel, urged that the rule and cases of the Interstate Commerce Commission to the effect that if a deviation is more than 10%, the applicant must prove public convenience and necessity, should be applied to the instant petition. (R-46.) Moreover, in its brief before this Court, The Appellant-Protestant further urges the criteria established in the Michigan Express, Inc., Extension case, 108 M.C.C. 245, upon the Court and the Commission.

It has long been the position of this Court that the rules and cases of the Interstate Commerce Commission do not bind the Public Service Commission. Los Angeles & Salt Lake Railway Co. v. Public Service Comm., 15 P. 2d 538, 369. This Court, in the case of Lewis Bros. Stages v. Public Service Comm., 547 P. 2d 199, 201, stated:

> "The assertion that the splitting of the regular route authority is illegal is predicated on the decisions and regulations of the Interstate Commerce Commission. It has not shown that the Public Service Commission has established a similar policy."

It is respectfully submitted that, certainly, the rules and case law of the Interstate Commerce Commission evidence certain guidelines by which policy may be initially set by the Public Service Commission. However, the Interstate Commerce Commission rules and regulations cease to be of precedent value where, as in the case of alternate route deviation, the Public Service Commission has laid down its own guidelines.

In the case of Palmer Brothers, Inc., Case No. 4869, Sub-No. 1, Report and Order, the Commission laid down its own guidelines in the area of alternate route deviation. In the case of Palmer Brothers, Inc., the Commission found that the petitioner had authority to serve in the transportation of commodities between Salt Lake City and Provo, Utah, utilizing Highway 40 to Heber City and Utah Highway 189 to it not serving any of the intermediate points between Salt Lake and Provo over said routes. The Commission further found that the applicant daily transported in interstate commerce over the said Heber City route substantial quantities of freight originating at or destined for Salt Lake City or Provo, and as such, was presently in active competition for traffic to and from such cities. The Commission found that the proposed alternate route was some 35 miles shorter and took approximately 2-1/4 hours less for a complete round trip. Additionally, the Commission found that it was uneconomical and more dangerous for the applicant to operate over the

Heber City gateway between Salt Lake City and Provo "by reason of the additional mileage, the steeper grades involved, and the condition of said route during the winter months;". After making such findings of fact, the Commission found it to be in the public interests to make the amendment to the applicant's Certificate. It is respectfully submitted that in every particular the Palmer case is identical to the instant case.

In the instant case, the applicant has authority by virtue of its tacking of parts A and B of its Certificate No. 1288 to provide service from Salt Lake City, Utah to Price, via Duchesne, Utah. The applicant daily transports intrastate over said Duchesne route substantial quantities of freight originating at or destined for Salt Lake City or Price. (R-7.) Additionally, the route deviation involved herein would save approximately 140 miles and a fuel saving of approximately 8,424 gallons of fuel per year. The route deviation would also save in excess of 3-1/2 hours per day in the performance of the service from Salt Lake City to Price and return. (R-7, 8 and 9.)

In addition to the foregoing, it was noted at the time of the hearing that the route which the petitioner presently travels takes it over Utah Highway 33, which goes through Indian Canyon. Indian Canyon involves a very steep grade and a 9,000-foot pass, and a highway which is not at all times cleared of snow and ice by the Highway Department. It is dangerous and sometimes totally impassable. (R-9, 10.) In summary, an analysis of the actual situation in the Palmer Brothers case

and the instant case shows an almost identical state of th facts. In light of the decision in Palmer Brothers and th Commission's findings in the instant case, the criteria of Palmer and the criteria of the Public Service Commission o the State of Utah have been met and the Public Service Commission properly granted the instant application.

III.

THE COMMISSION CORRECTLY APPLIED BOTH THE STATUTORY AND CASE LAW IN GRANTING THE INSTANT APPLICATION.

Before the Commission, as noted above, the Appel Protestant urged that the Commission adopt the rule of the Interstate Commerce Commission which allowed route deviati only if they are less than 10% of the mileage incurred und the present operation. Additionally, the Appellant conten that in the event that the route deviation was greater tha 10% of the current mileage, then the applicant had to prov public convenience and necessity.

We would respectfully draw the Court's attention once again to the Palmer Brothers case, supra. In that ca the Public Service Commission laid down the guidelines for granting of route deviation applications. That case invol a proposed deviation which was 45% of the old circuitous r substantially less than the 90% rule required by the Inter Commerce Commission rules. The instant application involv deviation which is only 30% less than the mileage traveled under the old route. As noted above, the Public Service C mission may establish its own guidelines and need not be b by the rules and regulations of the Interstate Commerce

Commission. Lewis Bros. Stages, Inc. v. Public Service Commission, supra.

The Appellant-Protestant next argues that if the applicant failed to meet the guidelines set down in Palmer Brothers case, it is required to prove public convenience and necessity in the alternative. It is respectfully submitted that this is contrary to the position taken by the Legislature in the statutes. In 54-4-25, Utah Code Annotated, 1953, it states:

> "Certificate of Convenience and Necessity prerequisite to construction and operation -- (1) No railroad corporation, street railroad corporation, aerial bucket tramway corporation, gas corporation, electric corporation, telephone corporation, telegraph corporation, heat corporation, automobile corporation, water corporation, or sewage corporation shall henceforth establish or begin construction or operation of a railroad, street railroad, aerial bucket tramway, line, route, plant or system, or any extension of such railroad, street railroad, aerial bucket tramway line, route, plant or system, without having first obtained from the Commission a certificate that present or future public convenience and necessity does or will require such construction; 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 have heretofore lawfully commenced operations or for an extension into territory either within or without a city or town contiguous with its railroad, street railroad, aerial bucket tramway, line, plant or system not theretofore served by the public utility of like character or for an extension within or to territory already served by it necessary in the ordinary course of business; ...".

Section 54-2-1 (12), Utah Code Annotated, 1953, defines the term "automobile corporation" as follows:

> "(12) The term 'automobile corporation' includes every corporation and person, their lessees, trustees, and receivers, or trustees appointed by any court whatsoever, engaged in or transacting the business of transporting passengers or freight, merchandise, or other property for public service by means of automobiles or motor stages on public streets, roads or highways along established routes within this state."

It is respectfully submitted that the establishment of a "route" as noted in 54-4-25 (1) requires no physical facilities. A reading of 54-6-5, Utah Code Annotated, indicates only that a common carrier is required to have a Certificate of Convenience and Necessity to operate in this state. It is respectfully submitted that the Uintah Freightways does have a Certificate of Convenience and Necessity from the Public Service Commission and is operating as a common carrier over the route described in its authority under Certificate No. 1288. It is, therefore, respectfully submitted that the Commission correctly found that 54-4-25 specifically covered route deviations and, therefore, is controlling in this case.

Appellant-Protestant next argues that the Commission misconceived the burden of proof in a route deviation case. The Appellant-Protestant fails to take note that the Commission found all of the facts necessary under the Palmer Brothers case to make out a prima facie case for the route deviation. At page 1 and 2 of its order, it found: (1) the fact that the applicant was currently hauling freight from Salt Lake City, Utah, to Provo, Utah and was therefore in active competition for the freight to and from said cities; (2) the substantial savings in miles operated and hours of operation on the new route as opposed to the old, and the resultant economy in the new route; and (3) the increase of safety of the new route as opposed to the old. It is respectfully submitted that the applicant established a prima facie case for route deviation. The burden of proof thereafter shifted to the Protestant, Rio Grande Motor Ways, to go forward with the evidence and show

that the applicant was not in effective competition with it or that there would be an adverse affect or decrease in revenue as a result of destructive competition from the route deviation. It is respectfully submitted that the Protestants failed to meet this burden of going forward with the proof in that they failed to demonstrate that the applicant was not in effective competition with, nor did they demonstrate that there had been any adverse or decreased revenues, or any other evidence of destructive competition by reason of the performance of the services of the Uintah Freightways.

In attempting to demonstrate that the applicant was not an effective competitor with them, the Protestant, Rio Grande, put on evidence as to the operating ratio of its company and the minimal amount of revenue that that Protestant had received from operations over that route. It is respectfully submitted that this is certainly not evidence as to the ability of Uintah Freightways to make a profit, since there was no evidence of the costs of operations of Uintah Freightways. Merely because the Protestant, Rio Grande, could not operate at a profit does not indicate that the Petitioner-Respondent could not operate at a profit. As a matter of fact, the testimony from Mr. Smith indicates that he is making money on the instant operation from Salt Lake using the present route. (T-24.) Moreover, Mr. Smith's uncontested testimony indicates that he is regularly competing with the instant Protestants. (T-24.)

Additionally, the Protestants in this case have failed to introduce any evidence to show that there has been any adverse or decreased revenues, or any other evidence of destructive competition by reason of the performance of the service by Uintah Freightways.

In summary, therefore, it is respectfully submitted that the Commission certainly had substantial evidence from which to make its findings of fact, and, further, that it correctly applied the law to the instant situation in this case.

CONCLUSION

The Commission has found that the instant route deviation would be in the public interest. The Commission decision was based upon substantial evidence of record. The Commission found that, based upon the record and argument of counsel, (1) Uintah Freightways had the authority to operate from Salt Lake City to Price via Duchesne; (2) That the petitioner had operated between Salt Lake City and Price and had been operating on a regular-route, daily basis, since May of 1976; (3) that the grant of the instant deviation petition would result in substantial economies; and (4) that the grant of the instant petition would result in significant safety improvement. In short, there was substantial evidence supporting the finding of the Commission that the Petitioner-Respondent had met its burden of proof under the Palmer case, supra.

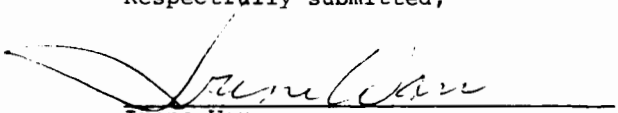
Appellant-Protestant has based its appeal upon cases and regulations of the Interstate Commerce Commission. The

Public Service Commission has, however, in the case of route deviations, developed different standards for proceedings before it. The I.C.C. cases and regulations cited by Appellant are thereby inapposite and cannot serve as a basis for altering the Commission's decision.

Because the Commission's decision is based upon substantial evidence, it should be affirmed.

WHEREFORE, Respondent respectfully prays that the Court affirm the decision of the Public Service Commission and dismiss the appeal.

Respectfully submitted,



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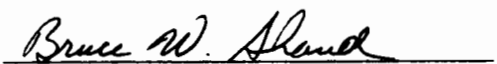

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