

1986

In the Matter of the Investigation of Duane Hall Trucking Inc. v. Public Service Commission : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Duane Hall Trucking Inc. v. Public Service Commission*, No. 860128.00 (Utah Supreme Court, 1986).
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860128

IN THE SUPREME COURT, STATE OF UTAH

In the Matter of the)
Investigation of DUANE HALL)
TRUCKING, INC.,)

Plaintiff,)

vs.)

PUBLIC SERVICE COMMISSION,)

Defendant.)

Case No. 860128

CATEGORY #6

APPELLANT'S BRIEF

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FILED
AUG 27 1986

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STATEMENT OF ISSUES PRESENTED ON APPEAL

- I. Does the Report and Order of the Public Service Commission violate the appellant's freedom of contract as set forth in Article I, Section 10 of the United States Constitution.
- II. Is revocation of the appellant's contract carrier permit and issuance of a common carrier certificate an unreasonable procedure.
- III. What kinds of restrictions can be placed on an open-ended contract carrier.
- IV. What kinds of distinctions are there between an open-ended contract carrier and a common carrier.
- V. Does converting a contract carrier to a common carrier without a showing of the violation of any law constitute a denial of due process.
- VI. Has the Public Service Commission assumed an unreasonable legislative function by eliminating contract carriers from this particular area of transportation.
- VII. Is the order of the Public Service Commission supportable by evidence received, or is the order of an arbitrary nature.

STATEMENT OF FACTS

On December 7, 1983, P.W. Martin Water Services, Inc., Sunco Trucking Company and Target Trucking, Inc. initiated this proceeding by filing a Petition with the Public Service Commission (Tr. 1). The Petition was later amended on January 26, 1984 (Tr. 11).

On March 7, 1985, the Public Service Commission (hereinafter referred to as "Commission") issued an Order to Show Cause requiring Duane Hall Trucking, Inc. (hereinafter referred to as "DHT") to show why its permit should not be rescinded or converted to a common carrier certificate, why it should not receive penalties for violations of law, or why the Commission should not, in the alternative, issue rules and regulations governing contract carriers such as DHT (Tr. 318).

Following hearings on the matter on May 6, 1985, review of briefs submitted by the parties and having been fully advised in the premises, the Administrative Law Judge issued a Report and Order dated November 5, 1985, that was approved and confirmed by the Commission (Tr. 477). Through the Report and Order, the Commission revoked and rescinded DHT's contract carrier permit No. 557 and issued DHT a new Certificate of Authority No. 2169 to operate as a common carrier. The Report and Order required that DHT comply with all rules and regulations governing common carriers and operate in all respects as a common carrier, specifically

filing with the Commission tariffs and maintaining books and records in accordance with Commission regulations.

On November 21, 1985, DHT filed a Petition for Rehearing of the Commission's Order on the grounds that the Findings of Fact and Conclusions of Law contained in the Commission's Report and Order were contrary to the preponderance of the evidence and the existing Utah law (Tr. 506). Therefore, DHT alleged, the Commission's Order was unlawfully founded.

On February 5, 1986, the Commission issued an Order Denying Petition for Rehearing (Tr. 542).

DHT filed a Petition for Writ of Certiorari (Tr. 554) and a Motion for Stay of Order (Tr. 550) and requested the Supreme Court to review the lawfulness of the Commission's Report and Order and its Order Denying Petition for Rehearing. DHT also moved the Court for an Order staying and/or suspending operation of the Commission's Report and Order. The Supreme Court issued an Order on May 1, 1986, staying the Order of the Public Service Commission pending appeal. It is the position of DHT that the Commission's Order is contrary to the facts presented and the existing Utah law.

SUMMARY OF ARGUMENT

I. As a contract carrier appellant DHT has entered into numerous contracts with different shippers. By forcing DHT to convert to a common carrier, DHT cannot abide by the contracts already entered into. The contracts each contain different rates not subject to conversion to a common carrier tariff rate. Thus, DHT's contracts have been impaired contract to Article I, § 10, of the United States Constitution. Similarly, DHT's expectation of its own contract carrier permit which was purchased has been impaired.

II. Converting DHT to a common carrier is an unreasonable procedure. There was no showing of violation of any rule or statute by DHT justifying the conversion. It would appear that the conversion was done solely for the convenience of the Public Service Commission. The Public Service Commission is trying to eliminate a class of carriers known as "open-ended contract carriers" without any justification.

III. The Public Service Commission has never adopted rules and regulations pertaining to open-ended contract carriers. By their actions they are attempting to restrict these activities without first adopting applicable rules and regulations.

IV. The Public Service Commission has failed to adopt regulations making a distinction between an open-ended contract carrier and a common carrier. By not adopting rules

and regulations proscribing certain activities, ambiguities exist between the classification of these two carriers. The Public Service Commission cannot impose sanctions without first showing that a rule or regulation was violated.

V. The appellant's due process rights have been violated by being punished without first having violated a rule or regulation. The Public Service Commission should adopt rules and regulations for open-ended contract carriers. Otherwise there is no standard upon which to base a judgment as to what constitutes proper conduct.

VI. The Public Service Commission has attempted to eliminate a class of carriers by this action. The legislature intended that open-ended contract carriers exist. Allowing the Report and Order of the Public Service Commission to stand would provide precedent to abolish all open-ended contract carriers.

VII. There is no evidence to support the conversion of the appellant to a common carrier. There was no showing of a violation of any rule or regulation. There was no showing of price cutting or any other unethical behavior. The Public Service Commission felt that the potential for harm existed and felt this justified their action. It is much more realistic to suggest that rules and regulations be adopted to avoid the potential for harm rather than simply abolish this class of carrier.

ARGUMENT

I. THE COMMISSION'S ORDER AND ITS EFFECTIVE IMPLEMENTATION WOULD VIOLATE THE APPELLANT DHT'S FREEDOM OF CONTRACT AS PROTECTED BY THE UNITED STATES CONSITUTION

Article 1, Section 10 of the United States Constitution provides that, "No state shall pass any law impairing the obligation of contracts." The Commission's Order violates DHT's rights under the contracts clause with respect to the initial contract whereby DHT acquired its permit.

Contract carrier permit number 368 was originally issued on September 18, 1949, to B & M Service Company (see Addendum). It was transferred pursuant to a stock and certificate purchase on December 18, 1963, to B & M Service Incorporated (see Addendum). DHT purchased the authority on March 3, 1976, from B & M Service Incorporated (see Addendum). The contract carrier authority under this permit was expanded in 1977 when the Commission amended the certificate by deleting the restriction of DHT's contract carrier authority, limiting it to just one shipper, Shell Oil Company (see Addendum). DHT purchased the carrier operating authority:

"To operate as a contract motor carrier transporting oil base muds in fluid form, water and other fluids used in the drilling of oil wells and of water, oils and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields or within areas being prospected by oil

drilling operations, over irregular routes, to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk in tank vehicles."

In a Report & Order issued in Case No. 78-188-02 issued December 20, 1978 (see Addendum), the above language was interpreted by the Commission to include the following:

"Now, therefore, it is hereby ordered that the permit number 557 of Duane Hall Trucking, Inc. is construed to include any and all types of liquid fluids in bulk, in tank trucks, used in connection with drilling, completion and working over oil, gas and geothermal wells over irregular routes to and from all points and places within the State of Utah where such drilling or producing operations are being carried on."

The Report issued November 5, 1985 fails to consider this language and denies the right and privilege to conduct its business in accordance with the previous ruling of the Commission issued December 20, 1978. There was no finding or evidence presented to thus restrict the authority issued to DHT.

It was the expectation of DHT that this authority, together with the refinements thereafter added, would be the consideration it would receive by virtue of the contract entered into for the purchase of the permit. The Order by the Commission substantially alters this expectation. This original contract, whereby DHT purchased its contract carrier

authority, has been impaired by the Order issued by the Commission.

DHT is currently bound by contracts it has entered into to transport oil field fluids. The effective implementation of the Commission's Order would necessitate DHT breaching all of these contracts. These contracts were entered into and the parties were bound prior to the Commission's Report & Order. Therefore, the effect of the Order would be a retro-active impairment of DHT's existing contracts with third parties, and thereby a violation of DHT's rights under the contracts clause.

In interpreting the contracts clause, the United States Supreme Court has found it necessary to uphold individual's expectations regarding contracts. It has been the expectation of the parties, both DHT and the third parties to which it is bound, that these contracts for the transport of oil field fluids be honored. The Commission's Order directly and substantially impairs the contractual obligations entered into by DHT. The public interest relied upon by the Commission warranting its actions is insufficient to justify this impairment.

II. REVOCATION BY THE COMMISSION OF
DUANE HALL TRUCKING, INC.'S CONTRACT CARRIER PERMIT AND
ISSUANCE OF A COMMON CARRIER CERTIFICATE
IS AN UNREASONABLE PROCEDURE

The Commission has attempted to revoke DHT's existing contract carrier permit and reissue a common carrier certificate without a showing of justification for doing so. Section 54-6-20, Utah Code Annotated, 1953 (as amended) provides that to revoke an existing permit the Commission must show good cause for the revocation. Rule 6(b) dealing with permits in the Motor Carrier Rules and Regulations states:

"Permits heretofore issued and in good standing shall remain in effect subject to all rules and regulations pertaining thereto."

In order to revoke Duane Hall's existing contract carrier permit, the Commission should have shown a violation of the rules and regulations. The Commission should have shown that Duane Hall Trucking is not in good standing. This is reinforced in the statute §64-6-20, Utah Code Annotated, 1953 (as amended), where it states that revocation or suspension by the Commission is possible at any time for good cause. The Commission admitted in the Report and Order of November 5, 1985, that Duane Hall is not in violation of any rules or regulations.

Commissions similar to the Public Service Commission have revoked licenses of motor carriers for various reasons.

The North Carolina Utilities Commission revoked a company's license when a transfer was made from one individual to another of the control of a company without the prior approval of the Commission. State ex. rel. Utilities Commission v. United Tank Lines, Inc., 239 S.E.2d 266, 34 N.C. App. 543, certiorari allowed 242 S.E.2d 633 (N.C. App. 1977). The same commission revoked another's license when there was a merger of two trucking companies creating an irregular route authority. State ex. rel. Utilities Commission v. Estes Express Lines, 234 S.E.2d 628 (N.C. App. 1977). Abandonment of a special common motor carrier certificate is grounds for revocation of that certificate. Dan Dugan Transport co. v. Maas Transport, Inc., 275 N.W.2d 855 (N.D. 1979). A permit, certificate or license can be revoked for improper movement of goods. Cleveland Freight Lines, Inc. v. Public Utilities Commission, 402 N.E.2d 1192, 62 Ohio St. 2d 50, 16 O.O. 3d 38 (Ohio 1980). DHT has not participated in any of the above activities which would justify revocation of its contract carrier permit, nor did the Commission make any finding of such. The language of DHT's permit specifically explains that failure to comply with the Commission's rules and regulations would be grounds for revocation of that permit. However, DHT has continually complied with the rules and regulations set forth by the Commission pertaining to contract carrier permits.

In the Order to Show Cause issued by the Commission, the Commission alleges that penalties should be imposed upon DHT for violation of the Commission's rules and regulations. The rule violations alluded to are for an excessive number of contracts engaged in by DHT and holding itself out for hire through solicitation by advertising. The Commission has no specific rules or regulations dealing with these alleged violations. In fact, DHT requested clarification of the Commission's position on advertising (Coleman Tr. 28). An agent of the Commission verified that there are no rules or regulations prohibiting advertising by carriers such as DHT.

Suspension of DHT's operating privileges or revocation of its existing contract carrier permit because of the number of active contracts the trucking company currently holds or because of advertising activities is unreasonable. The Commission has not promulgated rules defining, authorizing or prohibiting advertising or restricting the number of contracts held by an open-ended contract carrier.

In Duff Truck Line, Inc. v. Public Utilities Commission, 364 N.E.2d 856, 51 Ohio St. 2d 4, 5 O.O. 3d 2 (Ohio 1977), the Public Utilities Commission suspended the truck line's operating privileges for three days because of cross-hauling, interlining and tacking. The court ruled the suspension unreasonable because the Commission had not promulgated rules defining, authorizing or prohibiting cross-

hauling, tacking or interlining. The court relied on their previous decision in Commercial Motor Freight v. Public Utilities Commission, 46 Ohio St. 2d 195, 348 N.E.2d 132. In both cases, the parties had stipulated that the Commission had not promulgated any rules regarding the alleged violations. Under these circumstances, the court explained, "The suspension penalty was unreasonable." The Supreme Court of Ohio restated its position in Cleveland Freight Lines, Inc. v. Public Utilities Commission, 402 N.E.2d 1192, 62 Ohio St. 2d 50, 16 O.O. 3d 38 (Ohio 1980), when it said,

"When there is not a definite Commission rule, order, or decision forbidding a particular practice, the imposition of a substantial penalty is unreasonable."

The court further indicated that,

"A carrier should not be subjected to a substantial penalty when the carrier could not knowingly be in violation of a definite rule, order, or decision of the Commission or the court since there were no such definite rules, orders, or decisions in existence."

Revocation of DHT's existing contract carrier permit is a substantial penalty. This penalty is harshly unreasonable in view of the fact that the Commission has not issued any rules, orders, or decisions dealing with the practice of advertising by one holding an open-ended contract carrier permit. Additionally, decisions rendered by the Utah Supreme Court indicate that there is to be no limit to the number of active contracts held by an open-ended contract carrier.

III. UNDER UTAH LAW, THERE IS TO BE NO RESTRICTION
ON THE NUMBER OF ACTIVE CONTRACTS HELD UNDER AN
OPEN-END CONTRACT CARRIER AUTHORITY UNLESS
THE RESTRICTION CAN BE FOUND WITHIN
THE FOUR CORNERS OF THE PERMIT

The validity of an open-end contract carrier authority was upheld by the Utah Supreme Court in Murphy v. Public Service Commission, 514 P.2d 804 (Utah 1973). In Murphy, the existence of open-end contract authority was found within the language of the permit. The court interpreted the authority to be such because the permit was not limited to a particular contract for hauling for a particular person. It is the same with the DHT permit. The court explained,

"The extent of plaintiff's authority must be found within the four corners of the permit, and the rights thereunder must be such as are fairly understood from the import of its language. Unless there be some ambiguity or uncertainty, there is no basis for interpretation or clarification of the permit. It is impermissible to go behind the language of the permit and contradict its plain terms."

There was no language in the permit that could be interpreted as restricting the number of contracts that the open-end contract carrier could hold. Similarly, there is no language within the DHT permit which would indicate a restriction on the number of contracts that can be actively held by DHT. Looking within the four corners of the DHT permit, there is no restriction stated on the number of active contracts

allowable. To impose penalties on DHT for the number of active contracts would be unreasonable.

The court's position was affirmed in the second Murphy case, Murphy v. Public Service Commission Of Utah, 539 P.2d 367 (Utah 1975), when the court stated,

"We said her permit was not limited as to number of contracts."

Just as with DHT, the trucking company in question in this case also had an open-end contract carrier authority permit. The Utah Supreme Court has stated that with an open-end contract carrier permit, there can be no restriction as to the number of active contracts held unless the restriction can be found within the four corners of the permit. The Commission stated in its Report and Order, "Under the permit, DHT may enter into any number of contracts . . ."

IV. DUANE HALL TRUCKING HAS RECOGNIZED AND ABIDED
BY ANY DISTINCTIONS BETWEEN CONTRACT AND COMMON
CARRIERS RECOGNIZED BY THE COMMISSION OR THE UTAH
SUPREME COURT AND HAS COMPLIED WITH ALL COMMISSION
RULES AND REGULATIONS REGARDING CONTRACT CARRIERS

The Commission has defined both common and contract motor carriers in its Motor Carrier Rules and Regulations. In the Rules and Regulations, the Commission has defined a common motor carrier of property as,

"Any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him." Motor Carrier Rules and Regulations, Dl.1.

The Commission has defined a contract motor carrier of property as,

"Any person engaged in the transportation by motor vehicle of property for hire and not included in the term 'common motor carrier of property' as hereinbefore defined." Motor Carrier Rules and Regulations, Dl.1.

The distinction between a common carrier and a contract carrier as set forth by the Commission is that a common carrier holds himself out to the public. Within the Motor Carrier Rules and Regulations, the Commission gives no further explanation of what it means to "hold himself out to the public." Yet, the fact or not of a public holding out has remained the final or ultimate test of common carriage vs. contract carriage. N.S. Craig Contract Carrier Application, MC-5724 (1941).

It is difficult to establish what is meant by "a public holding out." It has been explained to be evidenced by such things as general solicitation and offers of service, by general repute, advertising, and personal correspondence. Transportation Activities of Midwest Transfer Co. of Illinois, et al., MC-C-07 (1948). However, none of these considerations are conclusive. The major distinction between contract and common carriers appears to be specialization. A contract

carrier performs a specialized service, either in the nature of his physical operation or with respect to the shippers he serves. While a common carrier will transport all persons who request his services, a contract carrier "renders a transportation service only to specific parties with whom it has contracts to do so." Realty Purchasing Company v. Public Service Commission, 345 P.2d 606 (Utah 1959).

The Utah Supreme Court gave light to the distinction in explaining what might be necessary to show one has held himself out to the public. The court stated,

"The fact that each of them engages in transportation for hire is not sufficient evidence that they hold themselves out to the public to do so. Such a holding would make it possible to convert all contract carriers into common carriers, a result which obviously is not intended by our code. McCarthy v. Public Service Commission, 116 U. 376, 210 P.2d 558 (Utah 1947).

A showing that DHT engages in transportation for hire is not enough to show that it engages in a holding out to the public. The court found that the trucking authority in the McCarthy case had not held itself out to the public. Thus, the court explained that the Commission's actions in classifying the trucking authority as a common carrier was an error in law because it lacked proper foundation. The court's decision was supported by the fact that the "trend of the testimony is all toward individually negotiated contracts." The court cited language by the New York court in dealing with a similar case, stating:

"The uncontradicted and undisputed testimony is that applicant has always negotiated an agreement for even individual shipments and has never undertaken to handle any freight if unable to arrive at some mutually satisfactory agreement to make the transportation. Applicant has never held itself out to carry for anybody that might call upon it to transport goods. An agreement is made for each individual movement." Motor Haulage Co. v. Maltbie, 293 N.Y. 338, 57 N.E.2d 41.

DHT does not now and does not intend to hold itself out as performing transportation for the public generally. Its business structure and equipment has been designed to provide a specific, direct, tailored service for those with whom it contracts. Advertising done by DHT is mostly in the nature of public service announcements. None of its advertising directly calls to the public soliciting its business. DHT continues to recognize the distinction between its contract carrier permit and the common carrier certificates held by others.

V. THE DEPRIVATION OF DHT'S CONTRACT CARRIER AUTHORITY
DUE TO THE COMMISSION'S ORDER REPRESENTS A
SUBSTANTIAL DENIAL OF ITS DUE PROCESS RIGHTS

The Fourteenth Amendment to the United States Constitution protects individuals against the deprivation of life, liberty or property without due process of law. Due process requires that individuals be given notice and a fair hearing prior to the taking of property. It is axiomatic that the due process right includes the right to a fair hearing.

Within the permit issued to DHT, it is clearly stated that failure to comply with its provisions will be grounds for revocation. DHT has continually complied with all of the provisions contained therein. However, by the Commission's Order, DHT will suffer a substantial penalty while there has been no showing of wrongdoing. The Report & Order issued by the Commission repeatedly states throughout that there is no evidence, beyond mere opportunity, of any wrongdoing by DHT. At best, it alludes to the existence of a potential for wrongdoing. Notions of fair play and substantial justice are certainly denied when DHT is punished because of the existence of a possibility for wrongdoing, a possibility which has never been taken advantage of.

The Commission in its report explains that a balancing test is the proper approach to be taken by the Commission in determining whether its action is in the public interest. It is explained:

"This requires a balancing of the public benefits, resulting from the continued existence of the permit as written against the detriment to the public and its common carriers, and against the benefits to the public, should the conversion to common carrier remain."

The Commission fails to state the source of this balancing test or its supporting authority.

Nowhere in the Commission's balancing test are the rights or privileges of DHT considered or weighed. DHT holds

a valid property right in the motor carrier permit as purchased and refined. DHT's valid property right certainly deserves protection in this instance, and this interest should at minimum be given consideration in the determination of the continued existence of the DHT contract carrier permit. The public interest is not substantial enough to justify the action taken by the Commission. The Commission's balancing test, as applied, is contrary to the law.

VI. BY ITS ORDER, THE COMMISSION ELIMINATES
ALL CONTRACT CARRIERS FROM THIS AREA OF TRANSPORTATION
SERVICES AND THEREBY EFFECTIVELY ATTEMPTS
TO ASSUME A LEGISLATIVE ROLE WITHOUT POSSESSING
PROPER LEGISLATIVE AUTHORITY

It is clear from the provisions of Title 54, Chapter 6, Utah Code Annotated, 1953 (as amended) that the Legislature had the specific intent that there be two classes of motor carriers of property, both a common and a contract. Throughout Chapter 6, frequent reference is made both to common and contract motor carriers. Provisions and regulations were drafted and passed with respect to both classes.

Prior to this Order by the Commission, there existed in the area of transportation of oil field fluids motor carriers in both classifications. By its Order, the Commission attempts to remove the contract carrier classifica-

tion from this motor vehicle transportation area. By taking away the DHT contract carrier permit, one of the two classifications is abolished. Even the Commission notes within its report that, "It (DHT) is the only contract carrier permit of its type involving the transportation of oil field fluids." By revoking the DHT contract carrier permit, the Commission is abolishing the designation set forth by the Legislature. Only one class of motor carrier remains, that of common motor carrier.

By so doing, the Commission is trespassing into law-making area reserved for legislative bodies. The Commission does not have the authority to pass legislation, though here it attempts to do so.

The Legislature perceived a public benefit to be had by the designation of both common and contract motor carriers. DHT, as the only contract carrier of its kind providing this transportation service, is a necessary part of the entire regulatory scheme set forth by the Legislature. DHT acts as a market regulator, keeping rates low. Without the existence of a contract motor carrier in this market, the possibility exists that the common carriers could more easily enter into a price fixing scheme. It is because of the competition that DHT offers to the common motor carriers that the rates in the existing structure are kept at a reasonable rate, while the service is efficient.

The Commission explains in its Report and Order that common motor carriers are required to submit tariffs in order to assure that the rates are not unreasonably excessive for the shipping public. However, it appears that the Petitioner's complaint against DHT is that its rates are too low. Competition is a market factor that assures low rates and high service. By withdrawing the only contract carrier providing this type of motor carrier services, the Commission has removed the mechanism set forth by the Legislature to keep prices down and service high. In McCarthy, Mulcahey and PBI, cases cited in the Division of Public Utilities brief submitted in this matter, the court found that there must be a finding of an increase of public welfare before conversion can be had of an existing permit (Tr. 368). Rather than an increase of public benefit, a definite decrease would take place if the only contract motor carrier designation were removed from this segment of the transportation marketplace.

As quoted previously, the Utah Supreme Court explained in McCarthy v. Public Service Commission, 116 U. 376, 210 P.2d 558 (Utah 1947) what is required before a carrier can be found to have held himself out to the public. The Court clarified that merely engaging in transportation for hire is not sufficient evidence.

"Such a holding would make it possible to convert all contract carriers into common carriers, a result which obviously is not intended by our code." McCarthy.

The Legislature did not intend that all contract carriers should be converted to common carriers because they engage in transportation for hire. It is less likely that the Legislature intended all contract carriers be converted to common carriers because of an unexercised potential for wrongdoing. It is axiomatic that the Legislature intended two classes of motor carriers.

VII. DHT TAKES EXCEPTION TO MANY OF THE
SPECIFIC FINDINGS OF FACT INCLUDED BY THE
COMMISSION IN ITS ORDER IN THAT THEY ARE CONTRARY
TO THE PREPONDERANCE OF THE EVIDENCE

In general, it is the position of the appellant DHT that there is a substantial lack of evidence on which to base the Findings of Fact made by the Commission. The Findings of Fact made by the Commission include statements that, "They (protestants) felt the DHT operation . . . had caused them harm" (Tr. 483); "All of the common carriers expressed concern over the potential of additional damage that can be done under the DHT permit" (Tr. 484); "The common carriers generally believed that this pricing ability has been used on numerous occasions to defeat their competition efforts" (Tr. 479). None of these generalized factual allegations have any supportive evidence nor are they stated with sufficient certainty upon which to base any conclusions of law.

The appellant DHT further challenges specific findings allegedly made on evidence presented to the Commission. In paragraph 19 of the Commission's Findings of Fact, the Commission explains that Billy Hass testified that a job had been "taken over" by DHT. The explanation given for the takeover is that DHT offered a lower price. In actuality, DHT had negotiated this contract substantially prior thereto, and there was no takeover (Coleman Tr. 167). Additionally, the allegation that DHT took over the job because it offered a lower price is unfounded in fact. Sunco had offered to do the job at the rate of \$41.00 per hour (Coleman Tr. 165). The DHT rate for the job was \$42.00 per hour (Tr. 20). Therefore, it is clear that DHT was not awarded the job because of its lower price.

Though the existence and formation of Blue Eagle Energy, Inc. was not an issue in this proceeding and clearly beyond its scope, Findings of Fact were made by the Commission in this regard. The Findings of Fact with respect to Blue Eagle Energy, Inc. are flawed in several respects. First, Blue Eagle Energy, Inc. was originally formed in early 1985, rather than 1984 as the Commission states. Many of the factual allegations with respect to Blue Eagle Energy, Inc. are based upon the testimony given by Mr. Del Womac. It is interesting to note that Mr. Womac was given the same opportunity to enter into a similar contractual arrangement with

the Ute Indians (Coleman Tr. 108). DHT was thereafter approached by the same individuals with respect to the formation of Blue Eagle Energy, Inc. DHT did not solicit this investment opportunity. In paragraph 24 of the Commission's Findings of Fact, it is stated that Blue Eagle Energy, Inc. sent a circular to oil companies "demanding that the companies contract their business for service with Blue Eagle Energy." The letters distributed by Blue Eagle Energy, Inc. were not demand letters, but rather letters of explanation describing the existence and function of Blue Eagle Energy, Inc. The most glaring factual error is the finding by the Commission that DHT is paying a 10% kickback to Blue Eagle Energy, Inc. This is a totally unfounded conclusion and based on testimony of another arrangement proposed by another party (Coleman Tr. 116). DHT does not pay a kickback to Blue Eagle Energy, Inc. Rather, sales commissions are paid to those procuring the contracts, just as sales commissions are paid in many other sales situations. This finding is inaccurate, improper, and clearly not founded upon the preponderance of the evidence.

The Commission alleges as a factual finding that over 50% of the DHT freight bills audited by the Division of Auditors were not rated in accordance with the contracts on file and were substantially out of date. It is the position of DHT that it has continually provided timely contracts to maintain its file with the Commission in proper order.

Following the audit, DHT was made aware of the unorganized state of the file as maintained by the Regulated Carrier Section. At this time, in an attempt to put the contract filings in order, DHT refiled a large number of contracts and cancelled a large number of contracts then on file with the Regulated Carrier Section in an attempt to assist the RCS in setting its own file in order.

The Findings of Fact with regard to advertising made by the Commission serve little, if any, purpose. There are no regulations published by the PSC with respect to advertising, and therefore any advertising participated in by DHT could not be found violative of PSC rules and regulations.

In the testimony received by the PSC, only one shipper witness was called. It is significant that the PSC fails to make any Finding of Fact with respect to a shipper witness. This particular shipper had experience in using DHT's service and in using the protestant's service (Coleman Tr. 43-44). He testified unqualifiedly that the service provided by DHT was superior to that provided by the protestants. He also testified that the equipment used by DHT was of a superior quality than that provided by the protestants. He further testified unqualifiedly that as far as his company was concerned, service was the overriding consideration and not price (Coleman Tr. 44-45). Yet for reasons that seem unclear, the PSC has failed to make any mention of testimony given by

this witness. Inasmuch as no other shippers were called to testify, his testimony should be indicative and supportive of what all other shipping witnesses would have said.

CONCLUSION

Appellant requests that the Report and Order of November 5, 1985, be reversed. Appellant requests that the Public Service Commission be ordered to adopt Rules and Regulations pertaining to open-ended contract carriers as a means of regulating this class of carriers.

DATED this 25th day of August, 1986.

HINTZE, BROWN, FAUST,
BLAKESLEY & McPHIE



C. REED BROWN
3450 Highland Drive, Suite 301
Salt Lake City, Utah 84106
Telephone: (801) 484-7632
Attorney for Appellant
Duane Hall Trucking, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 1986, four copies of Appellant's Brief were mailed, postage prepaid, to the following

Public Service Commission
160 East 300 South
P. O. Box 5801
Salt Lake City, Utah 84110

Robert L. Stevens
RICHARDS, BRANDT, MILLER
& NELSON
Attorneys for P.W. Martin,
Target Trucking and
Sunco Trucking
P. O. Box 2465
CSB Tower, 50 S. Main Street
Salt Lake City, Utah 84110

A handwritten signature in cursive script, reading "Linda Bauer", is written over a horizontal line.

ADDENDUM

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of)
D. & M. Service Company for a)
permit to operate as a contract) Case No. 3399
motor carrier of property in intra-)
state commerce.) O R D E R
(From Vernal, Escalante, Roosevelt,) Contract Carrier Permit
Greenriver, etc. to any active oil) No. 368
field in Utah))

This case being at issue upon the application on file and
having been duly heard and submitted by the parties hereto and full
investigation of the matters and things involved having been had,
and the Commission on the date hereof having made and filed its
report containing its findings and conclusions, which report is
hereby referred to and made a part hereof,

IT IS ORDERED, That Contract Carrier Permit No. 368 is
hereby issued to Henry Carnes and Lessie Walton, doing business as
D. & M. Service Company, to transport property of others consist-
ing of oil base muds in fluid form, water and other fluids used
in the drilling of oil wells, and of water, oils and other fluids
to be used or consumed in connection with oil drilling or producing
operations upon privately owned or controlled property within pro-
ducing fields or within areas being prospected by oil drilling
operations over irregular routes to and from all points and places
within the State of Utah where such drilling or producing opera-
tions are being carried on. The transportation authorized is
limited to the described commodities transported in bulk by tank
trucks.

IT IS FURTHER ORDERED, That because of the unusual and
specialized nature of the services to be performed by the applicant,
the list of parties with whom said applicant has or may obtain
contracts for the performance of said service is omitted in this
instance and that the schedule of rates and regulations to be
filed with the Commission shall be supplemented from time to time
with reports of contracts, and copies thereof if written, entered
into by the applicant, such reports to be made when and in the form

required by the Commission; provided that this permit shall authorize only on-call service under contract and shall not be construed to permit applicant to establish property transportation on regular routes or schedules.

IT IS FURTHER ORDERED, That applicant shall maintain on file with the Commission the necessary insurance as required by law and a copy of schedules showing rates, rules and regulations and shall comply with such schedule of rates in all contracts entered into and shall operate at all times in accordance with the laws of the State of Utah and the rules and regulations now or hereafter prescribed by the Public Service Commission of Utah governing the operation of contract motor carriers of property over the public highways of the State of Utah.

Dated at Salt Lake City, Utah this 18th day of November, 1949.

H. S. Bennett
Chairman

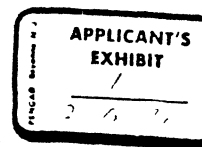
Donald Fickling
Commissioner

W. R. M. S. Enline
Commissioner

Attest:

J. V. Farrar
Secretary

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -



In the Matter of the Application of)
B & M SERVICE, INC.,)
for a Permit to operate as a Contract)
Motor Carrier of property in intrastate)
commerce. (To assume operating rights)
issued November 18, 1949, to B & M)
Service Company, a partnership, as evi-)
denced in Contract Carrier Permit No.)
368, in Case No. 3399.))

CASE NO. 5345

REPORT AND ORDER

Contract Carrier Permit Number 511

(Cancels Permit No. 368)

Submitted: November 8, 1963

Issued: December 18, 1963

Appearances:

Truman A. Stockton, Jr. for Applicant

By the Commission:

On August 26, 1963, a joint application was filed with the Commission by Henry B. Carnes and Bessie M. Walton, doing business as B & M Service Company, a partnership, and B & M Service, Inc., requesting the authorization of the Commission for the partnership to discontinue operation as a motor carrier in intrastate commerce within the State of Utah and permit said B & M Service, Inc., to assume and take over said operations.

On August 26, 1963, B & M Service, Inc., filed its application seeking a permit as a contract carrier by motor vehicle for the transportation of oil base muds, in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils, and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields or within areas being prospected by oil drilling operations.

The matters set forth in said applications came on regularly for hearing before the Commission on November 8, 1963, pursuant to notice duly given by mail and by publication. At the close of the hearing certain information with respect to incorporation of applicant, revised financial statements, equipment lists, etc., were to be furnished

by applicant, B & M Service, Inc., which information has now been furnished.

The Commission having fully investigated the matter and considered the evidence and records herein, and being now advised makes this report containing its findings, conclusions, and its order based thereon.

FINDINGS OF FACT

Henry Carnes and Bessie Walton, doing business as B & M Service Company, a partnership, with principal place of business at Rangely, Colorado, are holders of Contract Carrier Permit No. 368, issued in Case No. 3399, on November 18, 1949, authorizing transportation of oil base muds in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields or within areas being prospected by oil drilling operations, over irregular routes to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk by tank trucks.

The partnership in pursuance of said authority has consistently and continuously performed transportation service under said authority, and the operations of the partnership are presently in good standing upon the records of the Commission.

Bessie M. Hubble (formerly Bessie M. Walton or Bessie Walton) and Henry B. Carnes have organized and established a Colorado Corporation, entitled B & M Service, Inc., with Bessie M. Hubble and Henry B. Carnes, the principal stockholders. Of the shares issued to Mr. Carnes he has entered into a contract of sale with Russell B. Hubble to sell his stock to Mr. Hubble. The total consideration for the stock issued was the transfer of the assets of the partnership to the corporation in exchange for the stock. As of September 30, 1963, the corporation showed a net worth of approximately \$134,000. B & M Service, Inc., has qualified as a foreign corporation to do business in the State of Utah.

The Interstate Commerce Commission authority and the intrastate authority

In Colorado held by B & M Service Company has been transferred to B & M Service, Inc. B & M Service, Inc., has furnished the Commission with a list of equipment which it proposes to register and use in Utah in the performance of the transportation service covered by the application. The equipment appears to be especially equipped and entirely suitable for the service to be performed. There is a continuing need for the services covered by Contract Carrier Permit No. 368, and B & M Service, Inc., is in all respects qualified to render said service. There will be no material change in the use of the public highways of the State of Utah, and the granting of the application will in no way be detrimental to other carriers or the best interests of the people of the State of Utah.

CONCLUSION

From the foregoing findings the Commission concludes that Contract Carrier Permit No. 368 should be canceled and annulled and permit containing the exact same authority issued to B & M Service, Inc.

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED, That Contract Carrier Permit No. 368, issued in Case No. 3399 to Henry Carnes and Bessie Walton doing business as B & M Service Company, be and the same is hereby canceled and annulled, and a copy of this order filed and made effective in said case.

IT IS FURTHER ORDERED, That Contract Motor Carrier Permit No. 511 be and the same is hereby issued to B & M Service, Inc., authorizing transportation by motor vehicle of oil base muds in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils, and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields or within areas being prospected by oil drilling operations, over irregular routes, to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk by tank trucks.

IT IS FURTHER ORDERED, That B & M Service, Inc., file its schedules

of rates and regulations, and from time to time make such reports in the form and manner as the Commission may require respecting hauling contracts and other matters. The authority herein granted shall not be construed to permit applicant to establish property transportation over regular routes.

IT IS FURTHER ORDERED, That B & M Service, Inc. shall maintain on file with the Commission the required insurance policies, or certificates, schedules showing rates, rules and regulations, and shall comply with such schedule of rates in all contracts entered into and shall operate at all times in accordance with the laws of the State of Utah and the rules and regulations now or hereafter prescribed by the Public Service Commission of Utah, governing the operations of contract motor carriers of property over the public highways of the State of Utah.

Dated at Salt Lake City, Utah, this 18th day of December, 1963.

/s/ Hal S. Bennett, Chairman

(SEAL)

/s/ Donald Hacking, Commissioner

/s/ Raymond W. Gee, Commissioner

Attest:

/s/ C. R. Openshaw, Jr., Secretary

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of)
DUANE HALL TRUCKING,)
INCORPORATED for a permit to)
operate as a contract motor carrier)
of property in intrastate commerce.)
(To assume the operating rights)
issued October 16, 1970, to)
B & M Service, Inc., as evidenced)
in Contract Carrier Permit No. 511)
in Case No. 6257.))

CASE NO. 7062

REPORT AND ORDER

Contract Carrier Permit No. 557

DOCKETED

Submitted: December 11, 1974

Issued: January 6, 1975

Appearances:

Mark K. Boyle	For	Applicant
William S. Richards	"	Bowen Trucking, Inc., Dalbo, Inc., Northwest Carriers, Inc., Phillip W. Martin, D. E. Casada Construction, Protestants
G. Blaine Davis, Chief Assistant Attorney General	"	Public Service Commission

By the Commission:

This is an application by Duane Hall Trucking, Incorporated to purchase and assume the operating rights owned by B & M Service, Inc., as evidenced in Contract Carrier Permit No. 511 issued in Case No. 6257.

The application was heard before the Commission on December 11, 1974, pursuant to notice duly given by mail and by publication. The Commission, having considered the facts and the circumstances respecting the application, and being fully advised in the premises, makes this Report containing its Findings and Conclusions, and its Order based thereon.

FINDINGS OF FACT

1. Duane Hall Trucking, Incorporated is a Utah corporation incorporated on September 13, 1974. Duane Hall is the President and principal stockholder of said corporation. Mr. Hall has had considerable experience in the transportation of oilfield commodities and is seeking by this application to assume the operating rights held by B & M Service, Inc., as evidenced by Contract Carrier Permit No. 511 issued to B & M

Service, Inc. on October 16, 1970.

2. Upon stipulation between counsel for applicant and for protestants that any authority which would be issued pursuant to this proceeding would consist of a contract carrier permit for and on behalf of Shell Oil Company the protestants withdrew their protests.

3. Mr. Hall testified on behalf of the applicant as to his experience in the transportation of oilfield commodities of the type covered by Contract Carrier Permit No. 511.

4. Evidence was presented as to the financial fitness of the applicant and an equipment list was received showing that the applicant has three new tank trucks especially designed and suitable for the transportation of the commodities involved.

5. A witness for Shell Oil Company testified in connection with a contract hauling agreement between the applicant and Shell Oil Company. He further testified as to the applicant's satisfactory service performed under temporary authority issued by this Commission and testified as to a need for a continuation of such service and the desire and intention of his company to continue utilizing the services offered by the applicant.

6. The evidence indicates that the highways over which the applicant desires to operate are not unduly burdened and 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 interest of the people of the State of Utah.

CONCLUSIONS

From the foregoing findings the Commission concludes that Contract Carrier Permit No. 511 issued to B & M Service, Inc. in Case No. 6257 on October 16, 1970, should be canceled.

The Commission further concludes that a new contract carrier permit should be issued to the applicant authorizing it to operate as a contract motor carrier transporting oil base muds in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils, and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within

producing fields or within areas being prospected by oil drilling operations, over irregular routes, to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk in tank vehicles under a continuing contract for and on behalf of Shell Oil Company.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Contract Carrier Permit No. 511 issued to B & M Service, Inc. in Case No. 6257 be, and the same is hereby canceled.

IT IS FURTHER ORDERED, That Contract Carrier Permit No. 557 shall be issued to the applicant authorizing it to operate as a contract motor carrier transporting oil base muds in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields or within areas being prospected by oil drilling operations, over irregular routes, to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk in tank vehicles under a continuing contract for and on behalf of Shell Oil Company.

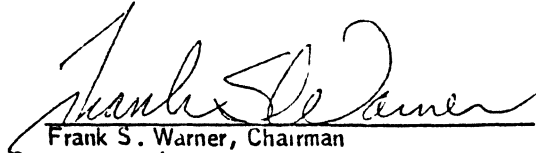
IT IS FURTHER ORDERED, That a copy of this Report and Order be filed, docketed and made effective in Case No. 6257 covering Contract Carrier Permit No. 511 issued to B & M Service, Inc.

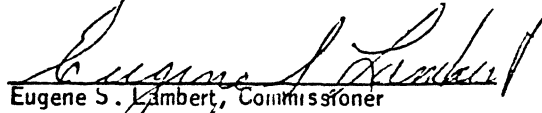
IT IS FURTHER ORDERED, That Duane Hall Trucking, Incorporated shall continue to maintain on file with the Commission insurance required by law and a schedule of rates and charges covering the subject operation; and shall maintain records and accounts in conformity with the system of accounts prescribed by the Commission for motor carriers; and shall operate at all times in accordance with the statutes of the State of Utah and the rules and regulations which now exist or which hereafter may be prescribed by the Public Service Commission of Utah, governing the operations of contract motor carriers over the public highways of the State of Utah.

IT IS FURTHER ORDERED, That Duane Hall Trucking, Incorporated shall render reasonable, adequate and continuous service in pursuance of the authority herein granted and that it shall comply with the requirements of the preceding paragraph and that failure to do so shall constitute sufficient grounds for suspension or revocation of the permit herein involved.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date set forth below.

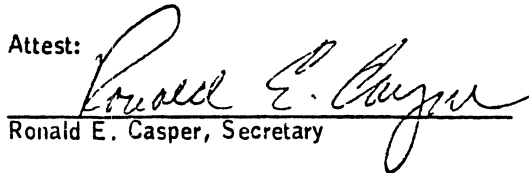
Dated at Salt Lake City, Utah, this 6th day of January, 1975.


Frank S. Warner, Chairman


Eugene S. Lambert, Commissioner


Olof E. Zundel, Commissioner

Attest:


Ronald E. Casper, Secretary

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investi-)
gation of DUANE HALL TRUCKING,)
INCORPORATED.)

CASE NO. 78-188-02

REPORT AND ORDER

Submitted: July 25, 1978

Issued: December 20, 1978

Appearances:

C. Reed Brown	For	Respondent
Rick J. Hall and William S. Richards	"	R.W. Jones Trucking Company, P.W. Martin Water Services, Inc., and D.E. Casada, dba Rig and Construction Contrac- tor, Complainants
Arthur A. Allen, Jr. Assistant Attorney General	"	Division of Public Utilities, Dept. of Business Regulation, State of Utah

By the Commission:

Pursuant to notice duly served by certified mail, this matter came on regularly for hearing on July 25, 1978, before A. Robert Thurman, Hearing Examiner, at the Commission offices, 330 East 400 South, Salt Lake City, Utah.

Evidence was offered and was received. At the conclusion of said hearing, the Hearing Examiner asked for memoranda from the parties, which memoranda were filed simultaneously on September 5, 1978. The Hearing Examiner, having considered the evidence submitted, together with the memoranda of counsel, now makes the following Report containing the following recommended Findings of Fact and Conclusions of Law, together with the Order based thereon.

FINDINGS OF FACT

1. Duane Hall Trucking, Incorporated (hereafter "Hall" or "Respondent") is a corporation organized and existing under the statutes of the State of Utah. It holds Contract Carrier Permit No. 557 from this Commission authorizing it to:

Operate as a Contract Motor Carrier transporting oil base muds in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils, and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields or within areas being prospected by oil drilling

operations, over irregular routes, to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk in tank vehicles.

2. The authority represented by the above certificate was originally created in 1949 and was embodied in contract permit No. 368, using substantially the same language so far as relevant to the issues presented in the instant case.

3. Complainants offered evidence tending to show that during calendar year 1978, Respondent has transported water and mud to both gas well drilling sites and geothermal well drilling sites. Respondent did not dispute any of this evidence.

4. In leasing state owned lands for mineral development purposes, the State of Utah has two general types of leases - one for oil, gas and hydrocarbons, and the other for other mineral resources, including geothermal. A geothermal lessee must also apply to the State Division of Water Rights for a certificate of appropriation before it is legally authorized to drill.

5. There are certain differences in the techniques and apparatus needed to drill the three types of wells. Oil wells require greater storage facilities than do either gas or geothermal. Gas wells require more stringent blowout protection. Geothermal wells, since they involve higher temperatures and increased pressures, also require stringent blowout protection. No evidence presented, however, indicated that any well drillers in the State of Utah specialize in one type of operation as opposed to another, nor was any evidence presented indicating that so far as the duties of the water hauler is concerned, (except possibly for quantities of material required) there is any difference among the three types of well.

6. Since oil and gas both occur in the same types of geologic formations, there is a substantial possibility that a well originally intended to discover oil may instead produce gas and vice versa. Recognizing this, the state hydro-

product or the other.

7. Geothermal resources do appear generally to occur in volcanic formation, as opposed to the sedimentary formations in which hydrocarbons occur. Therefore, it is less likely that a well intended to produce geothermal steam would encounter oil or gas, and vice versa. It is, however, not impossible, and in that event the owner of the well could apply for, and most likely would receive, a lease for the other resource from the state.

CONCLUSIONS OF LAW

This case presents the issue of how to interpret the language in the permit now held by the Respondent. This Commission has had occasion once before to consider the construction of common carrier certificates of convenience and necessity for water hauling issued to Respondents competitors, including two of the complainants herein. In that case, which was consolidated under Nos. 6150-Sub 2, 4822-Sub 5, 4283-Sub 1, 4277-Sub 1, 6403-Sub 1, 5217-Sub 1, and 4282, the Commission found it expedient to promulgate a common and consistent construction of all the carriers' certificates, despite some variation in the language. As a result, we have held that the certificates of all of the carriers concerned in that case carry with them the authority to transport all fluids connected with well drilling operations.

It is also to be noted in connection with the above cited case, that one complainant, Phillip W. Martin, was initially limited in its Certificate of Convenience and Necessity, No. 1159, to the "transportation of water in tank trucks from and to ... any oil field drilling operation, mine site, highway construction site, or to any other person desiring said service...." It is at least arguable, under the doctrine of ejusdem generis, that said complainant was thereby excluded from serving gas wells. Nevertheless, the Commission, in its construction of said authority, authorized said complainant to transport "all types of liquid fluids in bulk, in tank trucks, used in connection with drilling, completion and working over oil and gas wells between all points and places within the State of Utah to oil and gas drilling operations in said state and to return the same types

of liquid fluids in bulk, to the source of supply...."

This Commission made no distinction between oil and gas wells in construing the certificate of Complainant Phillip W. Martin, and we can see no rational reason for making such a distinction in this case. There is no evidence of record that any of the shippers utilizing either the Respondent's services or those of the Complainants', specializes exclusively in drilling either oil or gas wells, or for that matter geothermal wells. From all that appears, the drilling contractors will drill whatever kind of well is asked for, and the duties of the water haulers do not vary significantly according to the type of well. To hold that the Respondent could only serve oil, as opposed to gas wells, would mean that the shipper who wishes to use Respondent's services would have to forego taking on contracts validly aimed at discovering gas; designate each well as an oil well, regardless of what the geologist expects to find; or forego Respondent's services. We do not find that the third option would be consistent with this Commission's initial issuance of the Respondent's permit. If there is need for a shipper to enter into a contract with Respondent, that need does not depend on what type of well the shipper intends to drill.

We conclude that this same argument is equally applicable to Complainants points raised concerning re-working operations and geothermal wells. Again there is nothing in the record to indicate that any of the shippers used by Respondent or its competitors specialize exclusively in these two types of operation. The duties of water haulers in connection with such operations appear to be the same. If a shipper has reason to enter into a contract with Respondent, that need does not cease when the shipper engages in such operations. We therefore conclude that Respondent's permit should be construed as authorizing it to transport any and all types of liquid fluids in bulk, in tank trucks, used in connection with drilling, completion and working over oil, gas, and geothermal wells over irregular routes, to and from all points and places within

the State of Utah where such drilling or producing operations are being carried on.

We conclude further that the complaint of R.W. Jones, P.W. Martin Water Service, Inc., and D.E. Casada, dba Rig and Construction Contractor, should be dismissed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the Permit No. 557 of Duane Hall Trucking, Inc., is construed to include any and all types of liquid fluids in bulk, in tank trucks, used in connection with drilling, completion and working over oil, gas, and geothermal wells over irregular routes, to and from all points and places within the State of Utah where such drilling or producing operations are being carried on.

IT IS FURTHER ORDERED, That the complaint of R.W. Jones, P.W. Martin Water Service, Inc., and D.E. Casada, dba Rig and Construction Contractor, is hereby dismissed.

DATED at Salt Lake City, Utah this 20th day of December, 1978.

/s/ A. Robert Thurman, Hearing Examiner

Approved and confirmed this 20th day of December, 1978,
as the Report and Order of the Commission.

/s/ Milly O. Bernard, Chairman

(SEAL)

/s/ Olof E. Zundel, Commissioner

Attest:

/s/ Victor N. Gibb, Secretary

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investiga-) CASE NO. 83-188-01
tion of DUANE HALL TRUCKING,)
INC.) REPORT & ORDER

ISSUED: November 5, 1985

Appearances:

Robert L. Stevens	For	P.W. Martin Water Services, Inc., Sunco Trucking Company and Target Trucking, Inc., Petitioners
C. Reed Brown	"	Duane Hall Trucking, Inc., Respondent
Brian Burnett Assistant Attorney General	"	Division of Public Utilities Department of Business Regulation, State of Utah, Intervenor

By the Commission:

This proceeding was initiated by a Petition filed December 7, 1983. The Petition was amended January 26, 1984. On March 7, 1985, the Commission issued its Order to Show Cause requiring Respondent, Duane Hall Trucking (DHT) to come forward and show why its permit should not be rescinded or converted to a common carrier certificate, why it should not receive penalties for violations of law, or why the Commission should not, in the alternative, issue rules and regulations governing contract carriers such as Respondent.

Pursuant to the Order to Show Cause, the matter came on regularly for hearing May 6, 1985 before Peter Grundfossen, Administrative Law Judge for the Commission, at the Commission

offices, Heber M. Wells Building, 160 East 300 South, Salt Lake City, Utah. Evidence was offered and received. Thereafter, the matter was fully briefed by the parties. The Administrative Law Judge, having been fully advised in the premises, now enters this Report, containing Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. Petitioners are common carriers who hold certificates of authority from this Commission authorizing, among other things, the transportation of oil field drilling fluids throughout the state of Utah.

2. Matador Service is another common carrier which holds authority from this Commission for the transportation of oil field fluid in the state of Utah. Matador did not join in the Petition or intervene in the proceeding, but did appear as a witness in the case voicing its support for the Petition and the relief sought.

3. Respondent, DHT, holds Contract Carrier Permit No. 557, issued from this Commission March 3, 1976. This permit provides carrier operating authority as follows:

. . . To operate as a contract motor carrier transporting oil base muds in fluid form, water and other fluids used in the drilling of oil wells and of water, oils and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately-owned or controlled property within producing fields or within areas being prospected by oil-drilling operations, over irregular routes, to and from all points and

places within the state of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk in tank vehicles.

DHT purchased this permit from B&M Service, Inc., which purchase was approved in a transfer proceeding before this Commission.

4. The DHT permit contains no restrictions as to the number of shippers that the holder may serve or the identity of those shippers. Under the permit, DHT may enter into any number of contracts and a structure different fee schedules for each of its customers, preferring one customer over another. It is the only contract carrier permit of its type involving the transportation of oil field fluids. It is often called an "open-ended" contract carrier permit, in reference to the freedom of the holder to serve any shipper who might desire the service. This type of permit is rare. Almost all contract carrier permits restrict the holder on their face to serving specified shippers.

5. The essence of Petitioners' complaint is that the DHT contract carrier permit allows DHT to operate as a common carrier while it avoids the regulation and pricing controls of the Commission. Petitioners contend that this permit gives DHT an unfair competitive advantage in that it can negotiate prices on the spot with shippers, can undercut the common carriers selectively, can charge different rates to different customers, and can turn away undesirable jobs.

6. Petitioners claim that this competitive power has

caused them harm in that they compete with DHT but are restricted to operating under their tariffs, cannot quickly change their prices, cannot charge different prices to different customers, and cannot turn away undesirable work.

7. Acting on the Petition the Commission directed that the Division of Public Utilities (Division) investigate. The Division did so and on April 19, 1984, filed a report with the Commission determining as follows:

The authority granted Duane Hall Trucking, Inc. is expansive. In reality, there is no significant difference between that authority and the authority granted to Respondent's competitors holding common carrier authority, except that Respondent can respond more expeditiously and certainly to competition. The ability to execute innumerable "open-ended" contracts means that respondent can execute a new contract at will, beating his competition, whereas all his competitors must abide by their filed tariffs, this leads to a situation recently highlighted in the Salt Lake Tribune where Respondent's competitors must act outside their tariff in order to survive.

This determination summarizes the position of Petitioners.

8. In its report to the Commission, the Division recommended the institution of a rule-making proceeding regarding contract carriers. This proceeding was bifurcated for consideration of the rule proposed. Petitioners did not support the rule change. A hearing was held on August 27, 1984 and the proposed rule was rejected as a result of a Motion for Voluntary Dismissal by the Division.

9. At the time of the filing of the Amended Petition in January, 1984, DHT was operating approximately thirty tank-mounted trucks in the oil field fluid business in Utah. These trucks are what is normally referred to in the industry as "hundred-barrel" trucks. They are equipped with tanks and pumping equipment. DHT had twenty-five to thirty contracts with shippers which it considered active regarding transportation of oil field fluid.

10. DHT has offered its customers transportation of all types of oil field drilling fluids as well as ancillary services such as cleaning of heater treaters, service of line heaters, loading of pipeline for pressure tests, loading of liquids into treaters under pressure, recovery of oil from pits, removal of water from production tanks, pumping of hot water down wells to clean perforations, extinguishing fires, and removal of acid from heater treaters.

11. All of the petitioners and Matador operate the same type of hundred-barrel trucks with pumps. All of them offer the same transportation services as well as the same ancillary services to the oil field industry. Like DHT, all of them tailor their operations to the convenience of their customers, including the installation of camps where truck operators will be camped at well sites and production facilities so as to be available when needed to the customer.

12. The evidence demonstrated no distinction in service or equipment offered between the operations of DHT and those of

the common carriers.

13. The evidence demonstrated that DHT competes for the same customers as are served by the common carriers. The companies are directly competitive on all of their work within the state of Utah.

14. Under the scheme of regulations established by Utah Code Ann., Section 54-4-1 et seq. and the rules and regulations of the Commission, the Petitioners, as common carriers, are required to file and publish tariffs for their transportation services. These tariffs must be adhered to at all times; services and charges cannot be varied between customers. In order to change their tariffs, Petitioners must apply to the Commission and undergo either a hearing or a summary proceeding to justify the change. The time required for making a tariff change, including the printing, varies greatly but is rarely less than 30 days and frequently substantially longer.

15. Under the rules and regulations of the Commission, DHT as a contract carrier is not required to publish tariffs. DHT may provide transportation service for any shipper with whom it has a written contract which has been filed with the Commission. Transportation may be conducted immediately upon filing of such contracts. DHT may charge any rate to its shipper on which the two can agree and is not required to charge the same rate for all shippers. DHT has no obligation to serve all customers.

16. The difference in regulation as applied to DHT when compared to Petitioners gives DHT a competitive advantage. DHT

has the power to vary its prices on the spot in order to beat its competition, while its competitors are unable to do so. DHT can offer special deals and enter into special arrangements with selected shippers. DHT can make firm bids for specific jobs, while its competition cannot.

17. DHT as a contract carrier is not required to pay the regulatory fee charged to the common carriers pursuant to Section 54-4-1.5 et seq., Utah Code Ann. (1953).

18. Protestants all testified generally that they felt the DHT operation, utilizing its pricing flexibility advantage, had caused them harm. Several of the witnesses stated they had been told by shippers that they had lost jobs because DHT had been able to undercut their price on the spot. Mr. Hall denied recollection of any such price cutting and the audit of selected freight bills by the Division did not disclose any.

19. Billy Hass, a lessor for Sunco, testified that in September of 1982, he had been assured of a job near Hanksville by a company representative for Exxon. Substantial expense and time was incurred in traveling to the job site, locating and arranging for water supplies and camp equipment. On the day before the job was to begin, Mr. Hass went to the job site and discovered DHT trucks had taken over the job. He was told by the company representative that DHT had offered a lower price.

20. On numerous occasions DHT trucks and drivers have operated side-by-side with those of the common carriers, each carrier performing the same service for the customer.

21. All of the common carriers expressed concern over the (potential) of additional damage that could be done under the DHT permit.

22. DHT has recently entered into a contractual arrangement with Blue Eagle Energy, Inc. Blue Eagle Energy is a company formed by the principal of DHT, Mr. Duane Hall, and three others who are Ute Indians. Mr. Hall owns 25 percent. It was formed in early 1984, to take advantage of a lease provision in those leases involving Ute tribal lands. The lease provides for a preference in employment for Indian-owned and operated businesses.

23. Mr. Del Womac of Matador testified that from 50 to 80 percent of his company's work involves well sites located on Ute tribal lands.

24. Blue Eagle Energy has sent a circular to various oil companies calling Section 13 of their oil and gas leases involving Ute tribal land to their attention and demanding that the companies contract their business for service with Blue Eagle Energy. Blue Eagle Energy neither operates nor offers any service on its own at this time and contracts for all its oil field fluid transportation service. This service has all been performed by DHT pursuant to a contract between Blue Eagle Energy and DHT. No other carrier has been utilized by Blue Eagle Energy and DHT. The contract calls for an hourly rate on the DHT trucks of \$45.00 per hour.

25. Mr. Hall testified that under his arrangement with

Blue Eagle Energy, Blue Eagle Energy contacts the oil companies and obtains their business regarding oil field transportation. It charges the companies \$45.00 per hour of operation of a hundred-barrel truck. The service is carried out by DHT pursuant to its contract with Blue Eagle Energy. Blue Eagle Energy pays DHT \$45.00 per hour as is specified in the contract. Upon receipt of this payment, DHT then makes a payment back to Blue Eagle Energy, which Mr. Hall described as a commission and which Petitioners have characterized as a kickback. In cross-examination Mr. Hall declined to state the amount of the payment back to Blue Eagle Energy. Mr. Del Womac of Matador testified that the had been contracted by the same individuals who were involved in the Blue Eagle Energy Company with DHT. These individuals offered a similar arrangement to Matador and required a 10 percent commission or kickback in order to enter into the arrangement. In the absence of other evidence regarding the amount of the payment, the Commission concludes that DHT is paying 10 percent back to Blue Eagle Energy, Inc.

26. The issue of whether or not the Blue Eagle Energy operation is legal in its nature is beyond the scope of this proceeding. The Commission makes no finding in this regard. The Commission does determine, however, that the contract filed by DHT with the Commission relative to Blue Eagle Energy is inaccurate and improper in that it does not disclose the payment back to the shipper, but merely recites the \$45.00 per hour rate. There was no evidence one way or the other to indicate whether

DHT has entered into other commission or kickback arrangements with its other customers.

27. The evidence demonstrated that upon the filing of the original Petition in this matter, an audit was performed by the Department of Public Utilities which demonstrated that DHT's contract filings with the Commission were substantially out-of-date. The Division auditors found that over 50 percent of the freight bills audited were not rated in accordance with the contracts on file. Immediately following the audit, DHT filed a large number of new contracts and cancelled a large number of existing contracts. No audit has been made since the filing of the new contracts.

28. The evidence demonstrated that DHT carries on extensive advertising to the public. Over the past two years, DHT has spent approximately \$24,000 a year for advertising. The advertising has included regular newspaper ads, yellow pages advertising, radio advertising, and distribution of hats, pins, jackets, mugs, etc. None of this advertising identified DHT as a contract carrier as opposed to a common carrier. None of the advertising indicates any restriction as to whom the service is offered. DHT has used a slogan for many years which states, "You Call. We Hall. You All."

29. Mr. Hall testified that none of this advertising is intended to solicit business. Rather, he characterized it as public service announcements. He testified that many of the radio advertisements involved congratulations for local sports

teams, civic groups, and other worthwhile causes.

30. At the time of the filing of the Petition herein, DHT had six sales persons. These included Mr. Duane Hall and two of his sons, two persons who were half-time truck drivers and half-time salesmen, and one full-time sales person. All of the sales people solicited new work from new customers. They were issued pickup trucks for making sales calls. Additionally, Mr. Hall testified that every employee is instructed to solicit work if he sees it is available.

31. A number of the customers for oil field fluid transportation service have solicited Petitioners and DHT for the submission of bids regarding particular hauling jobs. Under the rules and regulations, DHT is empowered to submit a firm bid for a job. Under the rules and regulations the common carriers are precluded from bidding. Approximately 20 percent of the shipper customers are now requiring bidding.

32. The common carriers have taken different approaches to dealing with those companies which request them to bid. P.W. Martin has elected to eliminate those customers from its customer list, considering that it cannot offer a firm bid legally. Target Trucking has attempted to comply with the bidding requirement by estimating the number of hours involved in a particular job and multiplying it by their tariff rate. Target has submitted these estimates as non-binding estimates in an attempt to satisfy the shippers involved.

33. The division took no position and made no

recommendation to the Commission in this proceeding.

CONCLUSIONS OF LAW

1. The Commission concludes that DHT's contract carrier permit necessarily permits operations which are unfairly competitive with the common carriers that provide the same or similar services, that it is not in the public interest, and that the DHT permit should be revoked.

2. The Commission concludes that it is empowered by two Utah statutes to revoke a permit held by a contract carrier and issue a common carrier certificate of authority to that carrier if it finds such action to be in the public interest.

Section 54-6-20 Utah Code Ann. provides as follows:

The Commission may at any time for good cause, and after notice and hearing, suspend, alter, amend or revoke any certificate, permit or license issued by it hereunder.

Section 54-7-13 provides:

The Commission may at any time, upon notice to the public utility affected and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall when served upon the public utility affected have the same effect as is herein provided for original orders of decisions.

The parties, by their briefs, have concurred that this Commission has legal authority to rescind DHT's truck carrier permit and replace it with a common carrier authority.

In the case of Bowen Trucking, Inc. v. Public Service

Comm'n., 559 P.2d 954 (Utah 1977), the Utah Supreme Court upheld this Commission's continuing power to review and amend or rescind its orders pursuant to Section 54-7-13, Utah Code Ann. (1953). This case involved the transfer of the same contract carrier permit which is at issue in this proceeding when it was purchased by DHT from B&M Services, Inc. The Commission had issued an order, based upon stipulation, pursuant to which DHT's contract carrier authority was limited to just one shipper, Shell Oil Company. On reopening the proceeding, the Commission, in reliance on the case of Murphy vs. Public Service Comm'n, 514 P.2d 804 (Utah 1973) had amended the certificate by deleting the restriction to Shell Oil Company, thereby establishing the open-ended character of the certificate. This action was appealed by many of the common carriers holding similar authority who claimed that the Commission's prior decision imposing the restriction to one customer only, was res adjudicata and that the Commission could not change its order more than 90 days after its entry. On appeal, the Supreme Court disagreed and supported the Commission's action on the basis of Section 54-7-13 granting the Commission continuing power to review and amend its orders.

In view of the fact that the Bowen Trucking case, supra, involves the same permit at issue herein, the Commission determines that it is controlling authority.

DHT contends that Section 54-7-13 is not appropriately applicable to this permit, notwithstanding the Bowen Trucking case, because Section 54-7-13 refers to public utilities, and as

a contract carrier, DHT is not defined as a public utility. Nevertheless, DHT concurs that the Commission has the power to rescind or alter the DHT permit, but finds support for that power under Section 54-6-20, Utah Code Ann.

The Commission determines that it has jurisdiction and authority to amend, alter or revoke the DHT permit under both statutes. Each statute requires notice and hearing which has been duly given and held in this case. Section 54-6-20 specifically requires "good cause" for any action on the permit while Section 54-7-13 makes no such specific requirement. The Commission determines that under either statute, the overriding standard for determining whether action should be taken is in the public interest. This requires a balancing of the public benefits, resulting from the continued existence of the permit as written, against the detriment to the public and its common carriers, and against the benefits to the public, should the conversion to common carrier be made.

DHT, in its briefs on file herein, has strongly argued that its actions pursuant to its permit have not been illegal or in contravention of existing rules and regulations of the Commission, that there is not "good cause," and that therefore the Commission is precluded from taking action on the permit. No such preclusion exists. The Commission holds continuing jurisdiction over all of its issued authorities. Bowen v. Public Service Comm'n., supra. DHT vigorously points out that under its existing permit, it has full authority to solicit and work for as

many shippers in the state of Utah as it desires, and further, that there are no limitations whatsoever on its advertising and business solicitation activities.

DHT is correct in this regard. However, its argument points out the problem propounded by its continuing operations as an open-ended contract carrier. By virtue of its permit, it has had no significant limitation on its activity within the market.

3. In determining that it has the power to alter, amend or revoke the DHT permit, the Commission is mindful of the cases of Murphy v. Public Service Comm'n., 514 P.2d 804 (Utah 1973) and Murphy v. Public Service Comm'n., 539 P.2d 367 (Utah 1975), generally referred to as the Pickering I and Pickering II cases respectively. These cases involved one of the two other open-ended contract carrier permits that have been issued in Utah. The cases involved attempts by competing common carriers to restrict the open-ended scope of the permit.

Neither one of the Pickering cases, however, addressed the precise issue which is raised in this case. In Pickering I, the Commission restricted the scope of authority granted by the permit only. There was no motion or action by the Commission calling for a revision of the permit. Rather, the posture of the case was merely an analysis of the existing language and an attempted clarification of its existing terms. In Pickering II, the issue involved the scope of factors to be considered by the Commission with regard to the transfer of the contract carrier permit at issue. Again, there was no direct consideration by the

Commission of the possibility of revising the existing permit based upon public interest considerations. Thus, the Commission determines that the Pickering I and II cases, while involving related issues on a similar contract carrier permit, do not supplant the Commission's power to amend, alter or revoke the DHT permit in the instant proceeding which is brought directly for this purpose.

4. A contract carrier is distinguished from a common carrier in that it does not hold its service open to the public at large but only to those with whom it has specific contracts and it offers a service which, due to the equipment involved, special ancillary service requirements or special timing, cannot or is not offered by existing common carriers.

Utah statute defines common carriers of property and contract carriers of property as follows:

"Common motor carrier of property" means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him.

* * *

"Contract motor carrier of property" means any person engaged in the transportation by motor vehicle of property for hire and not included in the term "common motor carrier of property" as herein before defined.

Section 54-6-1, Utah Code Ann. (1953).

One of the primary distinctions between a common and contract carrier is the nature of the "carrier's holding out" to

the public. A common carrier holds its service out to the public at large; to whomever may choose to employ him. A contract carrier serves only those "specific parties with whom it has contracts to do so." Realty Purchasing Company v. Public Service Comm'n., 345 P.2d 606 (Utah 1959). The distinction becomes meaningless if a contract carrier offers, to the public at large, to enter into a contract with any of them. The holding out becomes identical and the distinction is lost.

Both parties in this case have argued that a further distinction between contract and common carriers is the specialized nature of the contract carriers' service. This element of specialization is supported by Section 54-6-8, Utah Code Ann., regarding the issuance of contract carrier permits. Section 54-6-8 provides that an additional factor to be considered by the Commission in the evaluation of a contract carrier application is "if the existing transportation facilities do not provide adequate or reasonable service."

This rule has also been recognized in Interstate Commerce Commission cases Transportation Activities of Midwest Transport Co. of Illinois, et al., 49 M.C.C. 383 (ICC 1949) and Craig Contract Carrier Application, 31 M.C.C. 705 (ICC 1941), cited by both sides in this case.

The essence of this rule is that a contract carrier must provide a specialized service which is not available from the existing common carriers. The specialization in service may relate to the type of equipment offered, special services offered

in an ancillary form to the transportation, or special scheduling which is not available from common carriers, which is necessary to the shipper's business, or other special service.

In the instant case, DHT offers no service relevant to its authority which is not offered by the common carriers. In fact, the evidence demonstrated that DHT and the common carriers offer the same services. On a number of occasions, the service of DHT has been substituted for that of the common carriers and vice versa.

Furthermore, the evidence demonstrated that through DHT's advertising program and sales activities, its holding out to the public was no different from that of the common carriers. DHT has not restricted itself to dealing with a certain group of shippers and indeed, its permit does not restrict it to such a group. DHT has vigorously argued that it is unrestricted in any way in soliciting any new customer it chooses. In this respect, the Commission finds that it is correct as its permit is currently issued, and this reaches the very heart of the problem with the DHT permit in this case. It offers the same service as common carriers in the field, but without rate regulation. The Commission determines that DHT is operating as a common carrier as defined by Utah statute even though it is not violating the express terms of its contract carrier permit.

5. The public interest will be served by converting the DHT operation to that of a common carrier.

Having determined that the DHT operation is no

different from that of the common carriers, and that DHT is essentially operating as a common carrier, the Commission now turns to the issue as to whether the facts presented show that the contract carrier permit should be revoked and replaced by a common carrier certificate.

The evidence has demonstrated very little, if any, benefit to the public resulting from the maintenance of the DHT operation as a contract carrier operation rather than a common carrier operation. As noted above, there is no evidence of any increased service, convenience or other such public benefit. The only benefit indicated by the evidence was that some portion of DHT's customers were able to negotiate a lower transportation price than that offered by the common carriers. The Commission notes that even if DHT were to operate as a common carrier, it would not be restricted from offering a lower rate than that offered by other common carriers, so long as such rate was appropriately justified in accordance with the applicable statutes and regulations.

While it would certainly be true that the particular shippers with DHT who enjoy lower rates than some of the other shippers with DHT would find a benefit in DHT's continued existence as a contract carrier, the Commission does not believe that such a differential pricing scheme is in the public interest. Such a scheme by which a common carrier service is offered on a flexible and preferential pricing basis to individual customers has been determined by the legislature to be contrary to public

interest. Indeed, this is the entire foundation of common carrier regulation and tariff publication. While there are some winners who achieve lower rates from the DHT operation, these clearly must be offset by the losers who will either pay artificially high rates or rates which subsidize the service to others.

The Commission concludes that there is no public benefit arising from a continuance of the DHT operation as a contract carrier.

The Commission also finds significant detriment resulting from the existence of the DHT contract carrier authority. First and most clear is the basic unfairness to the common carriers. It is clear from the evidence that DHT, as a contract carrier, has a significant advantage over the common carriers in its ability to execute numerous contracts with various shippers, on the spot, and to adjust pricing in any way it chooses. DHT enters into contracts at different prices with different customers and has the power to beat its competitors' price at any time. Furthermore, DHT can enter into special pricing arrangements such as that reflected in the Blue Eagle Energy situation where commissions or kickbacks are paid to the shipper. Such pricing arrangements are not legal for common carriers.

This advantage in pricing ability for DHT has created considerable distrust and strain in the market. The common carriers generally believe that this pricing ability has been used on numerous occasions to defeat their competitive efforts.

DHT denies this. Although the actual evidence of undercutting is scant, there is some. Since DHT has the power to out bid its competitors at will, the potential for undercutting exists.

The Commission cannot ignore the specter of such pricing activities encouraging the common carriers to violate their tariffs and enter into cut-rate bidding. The common carriers who testified denied that they have entered into such practices. However, all testified that they have shippers who request bids from them outside their tariffs.

The existence of this special authority held by DHT puts a cloud over the market and promotes distrust among the competitors. In view of the fact that customers are requesting illegal bids, it is apparent to the Commission that either the shipping public is confused by the existence of the two types of authority without meaningful distinction in service, or is attempting to utilize this inequity to encourage illegal conduct. In either event, the stability of motor carrier regulation is negatively effected to the detriment of the overall public interest.

DHT may not be exploiting fully its competitive advantage, but the mere existence of the advantage has created serious questions as to fairness in competition in the industry. It is in the public's interest to remove the cloud so that carriers can work on improving and providing the lowest cost and best service available, rather than criticizing and distrusting their competitors and customers.

The Commission concludes that it is appropriate that the DHT Contract Carrier Permit No. 557 be rescinded and revoked.

6. The Commission further determines that the factual elements necessary for the issuance of a certificate of convenience and necessity for a common motor carrier of property pursuant to Section 54-6-5 Utah Code Ann. have been met by the evidence. Specifically, the Commission determines that the granting of such a certificate shall not effect the use of the state's highways in view of the fact that DHT has previously operated in the same manner as a common carrier. Furthermore, DHT, having acted as a contract carrier has demonstrated itself to be financially fit and able to perform oil field fluid service under a common carrier certificate. The Commission determines that in view of DHT's long-standing availability to the public-at-large as an "open-ended" contract carrier, that the granting of the certificate will be in the public interest and not detrimental thereto and is required by the public convenience and necessity.

One matter not addressed by the parties regarding the issuance of the certificate of authority is the notice requirement found in Section 54-6-5 Utah Code Ann. This section specifically requires notice of a hearing regarding the issuance of a certificate of convenience and necessity to be given to every common carrier that is operating or has applied for a certificate to operate in the territory proposed to be served by the Applicant. In the instant case, it is evident from the

2. Duane Hall Trucking, Inc. is issued Certificate of Authority No. 2169 as follows:

To operate as a common carrier by motor vehicle for the carriage of oil-base muds in fluid form, water and other fluids used in the drilling of oil wells, and of water, oils, and other fluids to be used or consumed in connection with oil drilling or producing operations upon privately owned or controlled property within producing fields, or within areas being prospected by oil drilling operations, over irregular routes, to and from all points and places within the State of Utah where such oil drilling or producing operations are being carried on. The transportation authorized is limited to the described commodities transported in bulk in tank vehicles.

3. IT IS FURTHER ORDERED, that Duane Hall Trucking Inc. shall maintain on file with this Commission, the insurance required by law and tariffs naming rates, rules and regulations, and shall maintain books and records in accordance with the Uniform System of Accounts as prescribed by this Commission, and shall operate at all times in accordance with the laws of the State of Utah, and the rules and regulations which now, or which may hereafter be prescribed by the Public Service Commission of Utah governing the operation of common carriers over the public highways of the state of Utah.

4. IT IS FURTHER ORDERED, and made a condition of this Certificate herein issued, that Duane Hall Trucking, Inc. shall render reasonable, adequate and continuous service in pursuance of the authority herein granted, and failure to do so shall constitute sufficient grounds for termination or suspension of said Certificate.

record that five of the oil field fluid-hauling carriers, D. E. Casada, Matador, P. W. Martin, Target and Sunco have had notice in fact of the hearing, in view of their appearance therein, or their initial participation in the petition. Each of these carriers have expressed their support for the conversion and the grant of the common carrier authority. There is no evidence on the record, however, that the other oil field fluid-hauling common carriers in the state received notice of the hearing. Accordingly, the Commission's order herein shall be tentatively issued, a synopsis of it shall be published, and the Commission shall mail a copy of this Report and Order to all oil field fluid-hauling common carriers in the state of Utah. Should any of those carriers not listed above object to the issuance of a common carrier authority, they shall have twenty days from the date of last publication in which to file written objection with the Commission. Upon receipt of such objection, the Commission shall reopen the hearing to allow such common carriers to put in evidence in opposition to this order.

7. The Commission concludes that while the contract filings of DHT have not been carried out in accordance with the rules and regulations of the Commission, the infractions are not of sufficient degree or severity to justify penalties or fines.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That:

1. The contract carrier permit issued to Duane Hall Trucking, Inc. as Permit No. 557 is hereby revoked and rescinded.

5. The Commission shall mail a copy of this Order to all common carriers in the state of Utah holding authority for the transportation in bulk of oil field drilling fluids.

6. A synopsis of the Order section of this Report and Order shall be published in a newspaper of general circulation in the state of Utah in two consecutive issues.

7. Any common carrier holding a certificate of authority from this Commission and not participating in this proceeding may file an objection to this Order and request a hearing in writing with the Commission within twenty (20) days of last publication of the synopsis of the Order. In the event such written objection is received, the Commission shall schedule further hearings in this matter, at which time such objecting common carriers may come forward and put on such evidence as they may have in opposition to the grant of common carrier authority contained herein.

DATED at Salt Lake City, Utah, this 5th day of November, 1985.

/s/ Peter Grundfossen
Administrative Law Judge

Approved and confirmed this 5th day of November, 1985,
as the Report and Order of the Commission.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ James M. Byrne, Commissioner

/s/ Brian T. Stewart, Commissioner

Attest:

/s/ Georgia B. Peterson
Executive Secretary

COMMISSION COMMENTS

The Commission believes that, under the present regulatory scheme, Duane Hall Trucking has an unfair and unjustifiable competitive advantage. We are also aware that the Utah Legislature is now, and has been for the past few years, studying common carrier regulation in Utah. The adoption of a lawful Zone of Rate Freedom (ZORF) (which is supported by the Commission) or an expansion of the contract carrier provisions in the law or some form of common carrier deregulation may eliminate this competitive advantage. This Commission desires that all regulated parties similarly situated be treated as uniformly as possible. Therefore, until the law is changed, Duane Hall Trucking should be subject to the same treatment as any other regulated carrier with the same or similar services.

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investiga-) CASE NO. 83-188-01
))
tion of DUANE HALL TRUCKING, INC.) ORDER DENYING PETITION
) FOR REHEARING

ISSUED: February 5, 1986

BY THE COMMISSION:

In this matter the respondent, Duane Hall Trucking, Inc. ("Hall") has filed with the Commission a petition seeking rehearing of the Commission's Report and Order issued November 5, 1985. In support of its petition, Hall proposes that said Report and Order is contrary to the preponderance of the evidence on the record and existing Utah case law. We respond to that proposal hereafter.

Hall further requests that the Order be stayed because the petition for rehearing was made ten or more days prior to the effective date of the Order. We do not agree. The issuance date of the Order is November 5, 1985 and a pertinent statute (Section 54-7-10, Utah Code Annot., 1953) dictates that Commission orders take effect and become operative twenty days after service on a respondent, in this case Duane Hall Trucking, Inc. Allowing three days for receipt of the Order, Hall would still not meet the requirement of ten days or more, since respondent filed its petition for rehearing on November 21, 1985.

Respondent argues specifically that the Commission's Order would interfere with respondent's contractual obligations to its shippers. We fail to see how respondent's new status as a common carrier and the attendant duty to file tariffs for Commission approval will prove to be a detriment to its shippers. Beyond that we cannot believe that the Legislature intended the Commission's express power to revoke, rescind and modify authorities to be meaningless. Hall's position, if adopted, would eliminate that power in all contract carrier cases.

Hall takes the position that its Permit may not be altered unless it violates the Commission's rules and regulations. We know of no authority to support that proposition. Section 54-6-20, Utah Code Annot., 1953, states quite clearly that the Commission may alter or amend a certificate for good cause. The Commission believes the difficulties caused by and the inequity of respondent's open-ended permit are good cause and sufficient to warrant amending the Permit.

Respondent also maintains that it was not afforded administrative due process. We disagree strongly. Hall has had adequate notice of all proceedings, has been represented by legal counsel

throughout and has had full opportunity to present its side of the case.

Hall suggests that by converting respondent to common carrier status the Commission has assumed the authority of the Legislature. It is certainly true that we act in behalf of the Legislature--the Commission was created for that purpose. If respondent is arguing that we have assumed authority not delegated to us by the Legislature, we disagree. The Commission clearly has the authority to amend an operating authority in the public's interest, as we determine that interest, and we find no legislative restriction in the ratio of common to contract carriers. We further disagree with Hall's proposition that its contract status is necessary in order to insure proper regulation of rates. There is nothing to suggest that the Legislature intended one carrier to have both hands free while all the rest operated with one hand tied behind their respective backs. The only thing that that will ensure is that the carrier with the open-ended permit will have no effective competition. We firmly believe that the playing field should be level for all carriers.

Hall raises several other minor issues which are equally without merit and we will not take space to specifically respond to those.

We conclude that the petition for rehearing should be forthwith denied:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Hall's petition for rehearing in this matter be and the same is hereby denied.

DATED at Salt Lake City, Utah, this 5th day of February, 1986.

/s/ Brent H. Cameron, Chairman

(SEAL) /s/ James M. Byrne, Commissioner

/s/ Brian T. Stewart, Commissioner

Attest:

/s/ Georgia B. Peterson
Executive Secretary

In the Matter of the Investi-) CASE NO. 83-188-01
gation of DUANE HALL TRUCKING,)
INC.) ORDER TO SHOW CAUSE

ISSUED: March 7, 1985

By the Commission:

Philip W. Martin Water Services, Inc., Sunco Trucking Company, and Target Trucking, Inc. (Petitioners), by and through their counsel, Robert L. Stevens, have petitioned the Commission for an Order requiring Duane Hall Trucking, Inc. (Respondent), to appear before the Commission and show cause why Respondent's existing contract carrier Permit No. 557 should not be converted by the Commission to a common carrier certificate; or in the alternative, why the Commission should not issue rules and regulations covering contract carriers such as Respondent, limiting the scope of their activity and their rate making procedures.

In support of their Petition, Petitioners represent the following:

1. The Commission has the authority under Section 54-7-13 Utah Code Annotated 1953 as amended, after notice and hearing, to rescind, alter or amend any order or decision previously made by it.

2. The Commission has the authority under Section 54-6-11 Utah Code Annotated 1953 as amended to supervise and regulate every contract motor carrier in this state and to fix

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rates, fares, charges, and classifications.

3. No regulations now exist as to contract carriers which adequately restrain Respondent from unfair competition with Petitioners. Petitioners represent further:

Current regulation by this Commission of Respondent allows it to solicit its customers selectively, to provide only the service Respondent chooses to perform, to select its own rates and charges, to give rebates for prompt payment on its rates and charges, and to take business away from Petitioners by soliciting the customers of Petitioners and offering reduced rates.

On the other side of the coin, Petitioners are required to serve the public generally and cannot select the customers they choose to serve. Petitioners must act as common carriers and serve the public generally as demand is made upon them for service. Petitioners cannot select the customers who represent the cream but rather must fulfill the full public need. Petitioners are not allowed to arbitrarily adjust the level of their rates and charges and must seek Commission approval of any rate and/or service charge.

Notwithstanding these differences in regulatory requirements, Petitioners and Respondent provide the same type of service for the same type of accounts within the same territory. The absence of regulation of Respondent by the Commission has worked an unfair hardship on Petitioners.

Respondent has been put in the position in which it can undercut any of Petitioners without fear because of the restraints placed upon Petitioners as regulated common carriers. Respondent thus is operating as a common carrier without having to adhere to the regulatory requirements incumbent on such an operation.

4. Petitioners further allege that the sheer number of contracts engaged in by Respondent - 63 on August 28, 1983 when Petitioners began their investigation into this matter - show it

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to be holding itself out for hire.

5. Petitioners repeatedly allege that Respondent solicits for customers, which is to say it holds itself out for hire through solicitation.

In addition to the powers cited in paragraphs 1 and 2 above, the Commission, pursuant to the provisions of Section 54-7-25, Utah Code Annotated 1953 as amended, may impose a penalty of not less than \$500 or more than \$2000 for each violation by a utility of the Commission's rules and regulations.

Based upon the foregoing, the Commission now makes the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Respondent, Duane Hall Trucking, Inc., appear before this Commission on Monday, the 6th day of May, 1985, at 10:00 a.m., and each day thereafter as necessary, at the Commission hearing room, Fourth Floor, Heber M. Wells State Office Building, 160 East 300 South, Salt Lake City, Utah to then and there show cause why penalties should not be imposed upon Respondent for violations of this Commission's rules and regulations and the laws of the State of Utah, and why its contract carrier Permit No. 557 should not be rescinded or converted to a common carrier certificate, or why the Commission should not, in the alternative, issue rules and regulations covering contract carriers such as Respondent, limiting the scope of their activity and their rate making procedures.

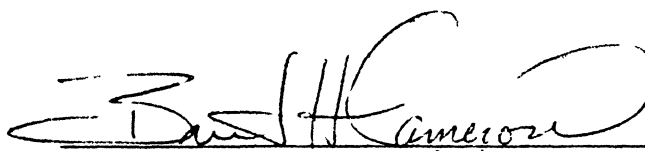
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March, 1985.



Peter Grundfossen
Administrative Law Judge

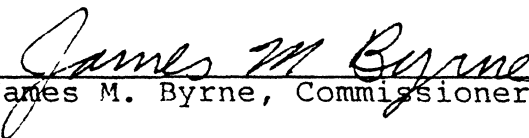
Approved and confirmed this 7th day of March, 1985, as
the Report and Order of the Commission.



Brent H. Cameron, Chairman




David R. Irvine, Commissioner



James M. Byrne, Commissioner

Attest:


Georgia B. Peterson
Executive Secretary

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