

1949

George A. Lowe Co., The Salt Lake Hardware Co.,
and Strevell Paterson Hardware Co. v. Public
Service Commission of Utah, Donald Hacking, W.
R. McIntyre, and Oscar W. Carleson : Brief of
Petitioners

Utah Supreme Court

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In the Supreme Court of the State of Utah

GEORGE A. LOWE COMPANY a
corporation, THE SALT LAKE
HARDWARE COMPANY, a corpora-
tion, and STREVELL PATERSON
HARDWARE COMPANY, a cor-
poration,

Petitioners,

vs.

Case No. 7283

PUBLIC SERVICE COMMISSION
OF UTAH, DONALD HACKING
Chairman, W. R. McINTYRE and
OSCAR W. CARLESON, Commis-
sioners,

Respondents.

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BRIEF OF PETITIONERS

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BRIEF OF PETITIONERS

INTRODUCTION

This case results from an application by the petitioners for a writ of prohibition against the Public Service Commission of Utah prohibiting it from attempting to assume jurisdiction over the petitioners and forbidding them the use of the public highways of the State of Utah in the transportation by the petitioners of the goods, wares and merchandise of the petitioners by motor vehicle upon the public highways of the state. Respondents replied asserting that petitioners were contract carriers by motor vehicle and, as such, subject to the jurisdiction of the commission. All facts in the case have been stipulated and, in the broad sense, the only question in the case is whether or not the Public Service Commission may legally and constitutionally exercise jurisdiction over the petitioners in their operations of transporting their merchandise by motor vehicle.

FACTS

I.

During the month of October, 1948, the petitioners herein entered into the following agreement:

AGREEMENT

This Agreement entered into this.....day
of October, 1948, by and between the GEORGE

A. LOWE COMPANY of Ogden, Utah; THE SALT LAKE HARDWARE COMPANY of Salt Lake City, Utah; and STREVELL-PATERSON HARDWARE COMPANY of Salt Lake City, Utah.

WHEREAS, the parties hereto and each of them have goods of their own which from time to time they desire to transport between Salt Lake City and Ogden, Utah, and

WHEREAS, the parties hereto have agreed to rent automotive equipment, to-wit, a truck or trucks, to transport the said goods.

IT IS HEREBY MUTUALLY AGREED as follows:

1. That the parties hereto each agree to employ a supervisor and a person or persons to drive said truck, and

2. That each of the parties hereto hereby agrees to pay the supervisor his salary for the separate time he is employed by it and to pay the truck driver the salary for the pro rata time he operates for it, and

3. Each of the parties hereto hereby agrees to pay his separate pro rata share of any rentals and expenses of said automotive equipment, and

4. That each of the parties hereto is to direct the operation of the said employees as to its separate use of said equipment and said employees.

Signed THE SALT LAKE HARDWARE
COMPANY
GEORGE A. LOWE COMPANY
STREVELL - PATERSON HARD-
WARE COMPANY

II.

Pursuant to said agreement the petitioners rented a truck and employed a driver therefor, and have hauled and will continue to haul over the highways of the state products belonging to the petitioners and the products of no one else.

III.

Each of the petitioners pay the expenses of such operation according to the pro rata share of use of each petitioner of the truck facilities so employed and in accordance with the terms of the agreement hereinbefore set forth.

IV.

The petitioners have never applied for and have never been granted a permit to operate as a contract carrier in intra-state commerce.

V.

The Public Service Commission of Utah has informed the petitioners it will take necessary legal

steps to prevent the continued operation in accordance with the plan being carried on by the petitioners.

VI.

Pursuant to said agreement hereinbefore set forth, each of your petitioners herein pays the owner of the truck for each petitioner's share of the rental thereof. Each petitioner herein pays the truck driver for each petitioner's share of the salary of the truck driver. Each of your petitioners severally pays his pro rata share of the gasoline, oil and other incidental expenses of the said truck.

QUESTIONS

In the opinion of your petitioners there are three questions involved.

I.

DO THE OPERATIONS OF THE PETITIONERS
HEREIN CONSTITUTE A PARTNERSHIP?

II.

DO THE TRANSACTIONS CONDUCTED BY
THE PETITIONERS COME WITHIN THE MEAN-
ING OF THE STATUTES OF UTAH, TO-WIT:
SECTION 76-5-13, U.C.A., 1943, AS AMENDED. " * * *
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 AS HEREIN-BEFORE DEFINED. * * *''?

III.

DOES THE INTERPRETATION OF THE COMMISSION CONTRAVENE THE CONSTITUTIONS OF THE STATE OF UTAH AND THE UNITED STATES?

ARGUMENT

I.

DO THE OPERATIONS OF THE PETITIONERS HEREIN CONSTITUTE A PARTNERSHIP?

Petitioners herein claim that this question is immaterial, but since the commission is insistent that it has a bearing on the case the petitioners herewith answer it.

Section 69-1-3, U.C.A., 1943, reads as follows:

“A partnership is an association of two or more persons to carry on as co-owners a business for profit.
* * *''

The uniform partnership act, Section 6, is identical.

It is obvious that this is not an association "to carry on as co-owners a business for profit" or at all. First, this is not a business. Second, the petitioners herein are not co-owners of anything. Third, there is no profit, but all out-go from the petitioners herein; the transactions engaged herein by the petitioners cannot conceivably result in a profit.

Bentley v. Brossard, 33 U 396; 94 P 736, 741, states:

"As to the general principles involved, and particularly applicable to the case, we find no better statement of the rule than that of Mr. Justice Gray in the case of Meehan v. Valentine, 145 U. S. 611, 12 Supreme Court 972, 36 L. Ed. 835, as follows: 'The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits.' After reviewing the authorities it was further observed by him: 'In the present state of the law upon this subject it may perhaps be doubted whether any more precise general rule can be laid down than as indicated at the beginning of this opinion, that those partners are persons who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as pro-

fits, and takes part of the fund to which the creditors of a partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.' ”

The Agreement entered into by and between your petitioners does not provide for the essential requisites of partnership. There is no joint ownership of property, no profits in which your petitioners can participate, no sharing of expenses on the same basis as in a partnership. There is no agency of one petitioner for another for any purpose whatsoever. There is no carrying on of a trade, adventure or business for the petitioners *common* benefit. The adventure herein, if any such there be, is for their *several* benefits as stated in the agreement. No one of the petitioners contributes any services or property to the others, whatsoever, as clearly designated in the agreement. They do not have any community of interest in profits because the very nature of the transaction precludes any profits. The only agreement, either written or oral, or expressed or implied, in existence by and between the petitioners is the agreement herein above set forth, insofar as transporting property by motor vehicle is concerned.

40 American Jurisprudence 127, states :

“While it is sometimes difficult * * * to distinguish in particular cases between joint adventures and partnerships, since the relations of the parties to a joint adventure and the nature of their association are so similar and closely akin to a partnership, yet the two relationships are not identical. The outstanding difference is that a joint adventure relates to a single transaction, although it may comprehend a business to be continued over several years, while a partnership relates to a general and continuing business of a particular kind.”

The Agreement by and between the petitioners does not provide for any business whatever being carried on separate and distinct from their several businesses and that the functions under the said agreement are incidental and relate only to their several principal business endeavors. That, as a matter of fact, none of the several businesses of the petitioners is transportation or common carrier or private carrier business. Each of the petitioners is in the wholesale hardware business and the transportation of their merchandise is merely incidental and essential to their several principal businesses, and the transportation facilities and transactions under the agreement by and between the parties are several and distinct and not a community of interest whatever.

II.

DO THE TRANSACTIONS CONDUCTED BY

THE PETITIONERS COME WITHIN THE MEANING OF THE STATUTES OF UTAH DEFINING CONTRACT CARRIERS?

It is agreed by and between the parties hereto that the petitioners herein are not common motor carriers of property. The sole question is whether or not they are contract carriers. The definition is given in the statute as “* * * 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 as hereinbefore defined. * * *” The contention of your petitioners herein is that they are neither individually or jointly hauling any property whatsoever *for hire* by motor vehicle. *Holmes v. Railroad Commission of California*, 242 P 486, 490; (A California case) states:

“One, who transports merely his own goods, is of necessity engaged in some business other than transportation, and the transportation of such goods is no more than an incident to such business. So, also, one, who transports the goods of another as a servant or agent of such other, is not engaged in the business of transportation, but in so doing is engaged in the business of his master or principal, whatever that business may be. But one, who engages as an independent calling in the transportation of goods for another or for others under contract and for compensation, is engaged in the business of transportation and is a carrier.”

The above quotation in the above case was quoted and approved in the case of Board of Railroad Commissioners, et al, against Gamble-Robinson Company, et al, Sup. Ct. of Montana, 111 Pac 2nd 307, at page 309. In the above Montana case the court stated:

“Thus the question is whether in enacting the statute the legislature meant merely to supervise and regulate those engaged in the business of transporting persons and property for hire, or also to supervise and regulate all those engaged in other businesses and using motor vehicles purely for the incidental purpose of delivering their own goods in the course of such businesses. The former would seem to be the clear intent, since the title of the Act expressed an intention to supervise, regulate and control ‘Motor Carriers Engaged in the Transportation by Motor Vehicles of Persons and Property for Hire,’ etc. ‘To engage’ is ‘to embark in a business.’ Webster’s New International Dictionary, Merriam Webster, 2d Ed. The defendants are engaged in wholesaling just as ranchers are engaged in ranching. They are not ordinarily understood to be ‘engaged in’ every occupation or activity purely incidental to their business. One engaged in either of those businesses and using motor vehicles for purposes incidental thereto cannot properly be said to be engaged in the transportation of goods, and the title of the Act cannot logically be said to have given notice to the public or legislature of an intent to regulate their use of the highways.”

A full reading of the opinion in this case is very enlightning on the subject here in issue.

In *Christy Transfer and Storage Company v. Hatch* (Thompson et al, Interveners) Supreme court of Montana 28 P 2d 470, an action was brought by a common carrier to enjoin Defendant Hatch from using the highways of the state as a motor carrier. In this case the interveners entered into an agreement with Defendant Hatch, whereby the interveners agreed to purchase a described motor truck from the defendant. The truck was to be used exclusively for hauling and transporting merchandise sold or purchased by interveners and for delivery to each other or to the customers of each other. The expenses of upkeep, including wages for necessary help, management and use of the truck and the purchase price thereof were paid monthly on the basis and ratio of the rate of merchandise carried for each per mile. By its terms Hatch was employed as Transportation Manager at not less than \$6.00 per day together with a bonus for good service whenever a majority of the interveners so determined. The question presented in this case was virtually identical with the question at bar. The facts of the case at bar are more strongly for the petitioners than in the case cited. The court stated on page 471:

“The act as disclosed by its title affects only motor carriers engaged in the transportation of persons and property for hire. It defines a ‘Motor Carrier’ as a ‘person or corporation, their lessees, trustees, or receivers appointed by any court whatsoever, operating motor vehicles upon any public highway in the State of Montana for the transportation of persons and/or property for

hire, on a commercial basis either as a common carrier or under private contract, agreement, charter, or undertaking.' ”

At page 472 the court states “*for hire*” is defined in the act as follows :

“The words ‘for hire’ mean for remuneration of any kind, paid or promised, either directly or indirectly.”

The court held in this case that the Defendant and Interveners are not motor carriers engaged in the business “for hire” within the meaning of the Montana Act. The court further stated :

“Interveners are simply using their own truck to transport their own merchandise; They do not operate for hire. Defendant is merely the employee of interveners and is likewise not operating for hire, within the meaning of the act.”

For hire means a payment to another for services rendered. One of the questions in the case at bar is: *Who paid whom and for what?* The only payments made by any of the several petitioners are payments directly as salary to its employee, the truck driver, payments of its several pro rata share of the truck rental, for the gas, oil and maintenance used in the truck hauling its several goods. At no place in the operation is there any payment by any of these petitioners to any other petitioner or to the petitioners as a group for the transportation of its several goods.

To further illustrate, counsel quotes from the case of Board of Railroad Commissioner v. Gamble-Robinson, et al, supra, which at page 311 states:

“It necessarily follows from what has been said that the defendants are not within the statute and cannot be denied the use of Montana streets and highways as an incident to the conduct of their lawful business, nor be required to apply to plaintiffs for a certificate of public convenience or necessity as a prerequisite to such use.”

III.

DOES THE INTERPRETATION OF THE COMMISSION CONTRAVENE THE CONSTITUTIONS OF THE STATE OF UTAH AND THE UNITED STATES?

The commission, it is believed by petitioners, will agree that if any of the several petitioners had individually rented a truck and hired a truck driver and hauled its goods that he would not be subject to the motor vehicle transportation act and if he was so subject, the act would be unconstitutional. Therefore, in the above arguments to the first question, it is contended and argued, and the petitioners have shown that the acts under the agreement by and between the petitioners in this matter were several and individual. If the contentions, in the first two questions, of the petitioners are well taken then for the commission to proceed with

its intended actions would be a violation of the individual petitioner's constitutional rights as guaranteed by the Constitution of the State of Utah and the Fourteenth Amendment to the United States Constitution. If the act may be interpreted as the commission desires to interpret it said act would be unconstitutional under the Constitution of the State of Utah in that it would be unreasonable classification. There is no more reason at law for holding that a company may not haul its own goods at its own expense upon the highways of the State of Utah for its own benefit than that a doctor could not haul his medical kit, or a farmer could not haul his produce to market, or a grocer could not deliver his groceries, or a plumber could not haul his supplies from his shop to the place where he is to do the work, or a carpenter could not haul his tools and lumber, or a lawyer his brief case, supplies and books from his office to the court house, or a Justice of the Supreme Court take his books home from the library for study and bring them back. Each is transporting goods for his benefit. This was brought out in the well reasoned dissenting opinion in *Holmes v. Railroad Commission*, supra. On page 493, the court stated:

“In determining the persons by whom the highways may be used, the state has no power, in my judgment, under the guise of prohibiting competition, to deny to its citizens the right to use the public highways for their own private purposes, whether for business or pleasure.”

On page 492, it was stated:

“By the same reasoning the Legislature could vest the commission with power to prohibit the use of private passenger automobiles operating on the public highway because such use would be in competition with regulated common carriers of passengers with possible destruction of the business of the latter. Such a result may not be contemplated as within the power of the state * * * ”.

In the case of Michigan Public Utilities Commission v. Duke, 266 U.S. 570, 69 L. Ed. 445 Duke had employed 45 men and 47 motor trucks as a motor carrier under 3 private contracts for the transportation of automobile bodies from Detroit to Toledo. The United States Supreme Court on page 450 states:

“Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment.”

CONCLUSIONS

Your petitioners maintain that they do not consti-

tute a partnership, that they do not haul any goods for hire and hence are not subject to the jurisdiction of the Public Service Commission of Utah.

Your petitioners pray that the temporary writ of prohibition be made permanent.

Respectfully submitted,
MUSSEY AND GIBSON
Attorneys for Petitioners