

1949

George A. Sims, M. K. Sims, Elmer L. Sims and G.
Grant Sims dba Salt Lake Transfer Company v.
Public Service Commission of Utah and Magna-
Garfield Truck Line : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiffs,

vs.

**PUBLIC SERVICE COMMISSION
OF UTAH and MAGNA-GAR-
FIELD TRUCK LINE, a corpora-
tion,**

Defendants.

CASE No.
7377

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CLERK, SUPREME COURT, U

BRIEF OF PLAINTIFFS

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Defendants.

CASE No. 7377

BRIEF OF PLAINTIFFS

STATEMENT OF FACTS

The plaintiffs above named are partners doing business under the style of Salt Lake Transfer Company and having a principal place of business at Salt Lake City, Utah and being engaged in transportation of commodities for hire over irregular routes within the State of Utah, both as a contract motor carrier and as a common motor carrier under authority issued by the Public Service Commission of Utah.

The defendant, Public Service Commission of Utah,

is now and at all times herein stated was a body corporate created and existing by virtue of the laws of the State of Utah. The defendant Magna-Garfield Truck Line is a Utah corporation operating as a regular route common carrier between Salt Lake City, Utah, on the one hand, and on the other the communities of Magna and Garfield, serving certain intermediate points.

On or about the 10th day of November, 1947 the plaintiffs above named filed an application (R. 1) with the Public Service Commission of Utah for a contract motor carrier permit to transport sugar in intrastate commerce between West Jordan, Utah and Salt Lake City, Utah. After due and legal notice of such hearing was given pursuant to the regulations of the Commission the matter came on regularly for hearing before the Commission on February 5, 1948 at which time evidence was adduced on behalf of the plaintiffs, as applicants, of a contract between applicants and the Utah-Idaho Sugar Company of Salt Lake City, Utah to transport sugar as a contract motor carrier between West Jordan, Utah and Salt Lake City, Utah (R. 3) and the evidence therein adduced by witnesses representing the applicants and the said Sugar Company established, without contradiction, that the applicants had been engaged continuously in the transportation of such sugar between said points as a contract carrier for more than ten years next preceding the time of said hearing, (R. 66, 80, 92) and that the said West Jordan, Utah plant is within a ten mile radius of Salt Lake City, Utah. (R. 141)

In opposition thereto the defendant, Magna-Garfield Truck Line, as protestant, adduced evidence to show it was regularly operating between Salt Lake City and the said point of West Jordan and that it endeavored to serve in the transportation of the said sugar. However, the representative of the Utah-Idaho Sugar Company testified that additional service such as that provided by the applicants was needed for the demands of their business in transporting sugar. (R. 92)

The applicants further testified that they had on file the necessary insurance, (R. 79) complied with the regulations of the Commission (R. 80) had adequate trucks and equipment (R. 82) for rendering the proposed service and that the addition or continuation of their service would not unduly burden the highway (R. 68) nor unduly interfere with the traveling public and that the granting of the application would not be detrimental to the best interests of the people of the State of Utah.

Notwithstanding the foregoing, the defendant, Public Service Commission of Utah, under date of July 19, 1948 issued its Report and Order (R. 41) wherein it failed to make any finding whatsoever as to the established period of service by the applicants to the Utah-Idaho Sugar Company and denied the said application to operate as a contract motor carrier of sugar.

On July 21, 1948 the plaintiffs herein, as applicants, executed and made a motion and application for rehearing in said Case No. 3195, a copy of which has been separately filed herein, serving a copy thereof July 26,

1948 upon the defendant Magna-Garfield Truck Line, by mailing it to its attorney, and on the 27th day of July 1948 filed the original and two copies of said application and motion for rehearing with the Public Service Commission of Utah. Said motion is not made a part of the record filed by the Public Service Commission of Utah.

Under date of July 31, 1948 the defendant, Magna-Garfield Truck Line, through its attorney of record, executed, mailed and filed its "brief in opposition to applicants' petition for rehearing and reconsideration" wherein it opposed the granting of the requested rehearing. On or about the 15th day of April, 1949 the plaintiffs were advised by a representative of the Commission that the motion for rehearing was not in their files and could not after diligent search be located or found by them and thereupon on the 22d day of April, 1949 the plaintiffs re-filed with the Commission a duplicate copy of the said application and motion for rehearing, attached hereto, said duplicate is a part of this record. (R. 45)

On the 29th day of July, 1949 the defendant, Public Service Commission of Utah in said Case No. 3195 issued its Order (R. 48) denying the motion for rehearing and reconsideration and mailed a copy thereof to the plaintiffs' attorney.

The plaintiffs then filed with this court a Petition for Writ of Review on August 12, 1949 and a Writ was issued and a return made thereon.

STATEMENT OF ERRORS

1. The Public Service Commission of Utah erred in its failure to make any findings regarding the contract motor carrier service being rendered by the plaintiffs to the Utah Idaho Sugar Company on January 1, 1940.

2. The Public Service Commission of Utah erred in failing to grant to the plaintiffs authority to transport, as a contract motor carrier, sugar between West Jordan and Salt Lake City, Utah for the Utah Idaho Sugar Company as a "grandfather" right.

3. The Public Service Commission of Utah erred in finding that applicants failed to show that existing transportation facilities do not provide adequate or reasonable service as required by title 76-5-21, Laws of Utah, 1945.

4. The Public Service Commission of Utah erred in finding that the granting of this application would be detrimental to the best interests of the people in the area covered by the application.

5. The Public Service Commission of Utah erred in finding that the granting of the authority to the plaintiffs would detract from the business of existing carriers which would eventually impair rather than improve transportation service and that there is sufficient service already available in the area proposed to be served by plaintiffs.

6. The Public Service Commission of Utah erred in denying the plaintiffs' application to so operate as a

contract motor carrier of sugar between West Jordan and Salt Lake City, Utah for and in behalf of Utah Idaho Sugar Company.

STATEMENT OF ARGUMENTS

POINT 1.

THE EVIDENCE ESTABLISHED THAT PLAINTIFFS WERE CONDUCTING A LEGAL, EXEMPT CONTRACT CARRIER OPERATION ON JANUARY 1, 1940 AND ARE ENTITLED TO A PERMIT UNDER THE 1945 AMENDMENT TO TRANSPORT SUGAR BETWEEN WEST JORDAN AND SALT LAKE CITY.

The Commission erred in failing to recognize or make a finding on the fact that the applicants were conducting a contract motor carrier service for transporting sugar between West Jordan and Salt Lake City, Utah for the Utah Idaho Sugar Company on and prior to January 1, 1940. The present law relating to contract motor carrier's authority is Section 76-5-21 Utah Code Annotated as amended by Laws of Utah 1945, Chapter 105, to-wit:

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

“The Commission upon the filing of an application for a contract motor carrier's permit shall

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

The first paragraph is the "grandfather" provision enacted to give recognition to existing legal operations which were altered by this 1945 amendment. The law prior to such amendment contained the following exception from the requirement of a certificate or permit from the Commission, to-wit:

76-5-25 (a)

"No portion of this act shall apply:

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

Thus, prior to the amendment of the statute, applicants served the Utah Idaho Sugar Company plant as a contract motor carrier under the exemption, said plant at West Jordan being approximately 10 miles from Salt Lake City, Utah (R. 81). The evidence before the Commission was that the applicants proposed to carry on the same type of service as a contract carrier for sugar as they had been conducting for a number of years past. (R. 80, 92, 67).

It is to be observed that in the wisdom of the Legislature and in order to conform with the constitutional requirements, the "grandfather" provision referred to above was essential in the existing statutes so as to afford the shipping public a continuation of the services which they have utilized and found necessary or desirable for the conduct of their business. It was not contemplated that the transporters of commodities only during an emergency war period should be continued in force, but the Legislature looked back to the first day of January 1940 considering such to be a normal year of operation and said that those carriers who were then operating as contract motor carriers should, upon application, be granted a permit to operate as a contract motor carrier on the same highways and to carry on the same type of motor service as was being performed on that date. The applicants in this proceeding come squarely within the purview of that statutory provision.

This court in construing an earlier similar "grandfather" statute, held in the case of McCarthy et al. vs. P.S.C.U. et al., 77 Pac. (2nd) 331, 94 Ut. 304 that com-

peting common carriers would be entitled to notice of the time of hearing and permitted to appear in the proceedings. In full compliance with this ruling the Commission gave notice to the protestant, Magna-Garfield Truck Line, and a number of other carriers, as shown by the Affidavit of Mailing (R. 6), and it was in pursuance of such notice that the Magna-Garfield Truck Line appeared in opposition at the time of the hearing. Since the enactment of the 1945 statute, your Court had occasion to construe the language thereof in the case of Rowley vs. Public Service Commission of Utah et al., 185 Pac. (2nd) 514, Utah In that case, the applicant sought rather wide-spread authority to transport a variety of commodities within the State of Utah. It was contended by the applicant in that matter that because he was conducting wide-spread service as of January 1, 1940, that the Commission was bound to grant to him a permit to operate as a contract motor carrier over the named highways of this state. The record showed, apparently without dispute, that the applicant, Rowley, had been carrying on said operations, not within any exemption under the statute, but by way of unlawful operation on the highways of Utah. Your Court in the Rowley case affirmed the order of the P.S.C.U. denying to Mr. Rowley authority under the "grandfather" provision of Section 76-5-21 referred to above because his operations as of January 1, 1940 were illegal operations. We shall quote from pages 519 and 520 of the said decision the following portions:

Page 519:

“(3) To interpret this act as contended for

by applicant would not only disregard sound public policy; it would further disregard the ordinary concept of not permitting rights to be acquired by committing criminal acts against the state, and in the final analysis, it would result in the unique doctrine of the more flagrant the violation, the greater the rights acquired."

Page 520:

"If the legislature did not intend to place a stamp of approval on illegal operations, then what was the necessity or reason for the court's extending "grandfather" rights under the 1945 act to legally operating carriers without extending them to operators not complying with the law? The reason was that the deletion of sub-sections (a) and (i) of Section 76-5-25 broadened the statute and brought within the provisions of the act every contract carrier operating within cities and towns and also casual contract carriers, which necessarily included a great many legally-operating carriers.

"Many of these operators had substantial investments in the business and had acquired the privilege to operate with consent of the State. Considering the date used in the act, they had been operating on the roads for at least five years, and it is reasonable to assume that there would be no necessity for them to establish the following facts: That their vehicles would not unduly burden the highways over which they had been operating; that their operations would not be detrimental to the best interests of the people of the state or the people of the localities served; that their trucks would not unduly interfere with the traveling public; and that their employment would not subject shippers to the hazards of dealing with irresponsible carriers. It is further reasonable to assume that their services were needed

and desired. Had they not been, it is doubtful that the operations would have continued over a period of five years.

“Were it necessary for this court to determine why the legislature selected the year 1940, it could be determined logically and reasonably. Undoubtedly many operators were on the road in 1945 due to the large movement of war supplies. The record indicates a major portion of the hauling done by the applicant was in transporting these items. Conditions did not lend themselves to adequate checking and supervising of vehicles on the highways. To grant privileges to those operators who, because of movements incidental to war, had established themselves in business after 1940 might be founding rights on false and temporary conditions that would not be fair and reasonable to the carrier who had established permanency and stability. It would not be an unreasonable classification to prefer those operators who had established themselves during normal times, and who had been in business long enough to indicate their capacity to operate and their ability to satisfy and protect the public.”

The applicants, Salt Lake Transfer Company, were already operating over the highways of Utah as of January 1, 1940 within the non-exempt areas as both a common carrier of commodities for hire pursuant to a Certificate of Convenience and Necessity issued by the Commission and affirmed by your court (R. 135) and as a contract motor carrier pursuant to a permit from the Commission (R. 71). As pointed out by Commissioner Hacking (R. 75) the Salt Lake Transfer Company could have served West Jordan without any authority under the old law. The application before the

Commission was on a regular printed form which was utilized by the Commission both before and since the inception of the 1945 amendment whereby carriers applied to the Commission for contract carrier authority. It must be clearly held in mind that this is not a new movement of commodities which is being covered by this application, but rather it is merely a request that the Commission, pursuant to the 1945 statute, grant the contract motor carrier permit to carry on the same type of motor service on the same highways as the applicant was conducting, so far as the transportation of sugar is concerned, on and before January 1, 1940.

The defendant herein and protestant before the Commission, Magna-Garfield Truck Lines, through its counsel, has attempted to press for a construction of said 1945 statute so that the first paragraph referring to the "grandfather" rights is completely modified, limited and restricted by the second paragraph, which, according to the interpretation, logically placed upon it, refers to the procedure when a new applicant for contract carrier service not heretofore provided to the public or to a contracting party has been submitted for consideration. Perhaps it is unfortunate that the legislature has embodied all of the procedure relating to contract carriers into a single section of the 1948 amendment. The legislature did take the precaution of segregating the "grandfather" rights by incorporating the same in a separate paragraph. Then by the second paragraph of the said section the procedure was set forth for the Commission to follow in the event that a new contract carrier service is being proposed before the Commission.

To hold otherwise would in essence nullify the purposes and the concept of the "grandfather" rights under a motor carrier or a public utility regulation statute.

The applicants herein in good faith carried on their operations as a contract motor carrier with the Utah Idaho Sugar Company and though such operation was well known to the Commission, no steps were ever taken by the Commission to modify or change their operation until sometime subsequent to the enactment of the 1945 amendment to the motor carrier act, (R. 84, 85); though temporary authority had been obtained from the Commission for hauling sugar for this Company to points outside of the exempt 15 mile radius, none has been requested or required within the said 15 mile radius of Salt Lake City, Utah (R. 85, 86).

POINT 2.

THE COMMISSION WAS BOUND BY THE UNDISPUTED EVIDENCE TO GRANT TO THE PLAINTIFFS THEIR "GRANDFATHER" RIGHTS TO CONDUCT THE REQUESTED CONTRACT CARRIER OPERATION.

For the reason set forth in the preceding argument No. 1, it is strenuously contended that the P.S.C.U. erred in failing to grant to the plaintiffs the requested authority to transport sugar between West Jordan and Salt Lake City, Utah as a contract motor carrier with the Utah Idaho Sugar Company under the said "grandfather" right. We urge that all that was required of the applicant in said matter, under the 1945 amendment, was that they file an application with the Commission that proper notice thereof be given and that they show the contract relationship which existed as of January

1, 1940, under which, service has been continuously rendered since said date. The ancillary evidence of ability to perform adequate equipment and proper insurance as well as compliance with the regulations of the Commission have been clearly adduced in the record (R. 79, 80, 82).

May we point out the fallacy of modifying the "grandfather" rights paragraph of Section 76-5-21, as amended, by the second paragraph which requires the Commission to determine, among other things, that the highways are not unduly burdened and that the granting of the application will not unduly interfere with the traveling public, etc. The fact that the applicants are entitled to the "grandfather" authority is by virtue of the fact that they are already rendering to the public, over these same highways, the very service which they are seeking to be confirmed. Thus, the issue of unduly burdening the highway, interfering with the traveling public, etc. can not be properly considered as no additional burden or interference will result from the granting of the right to perform the same service as a contract motor carrier on the same highways. See: *Rowley vs. Public Service Commission of Utah*, supra.

The record is replete with evidence that the applicants have, pursuant to an oral contract with the Utah Idaho Sugar Co., conducted this same type of contract motor carrier service prior to and on January 1, 1940 and continuously since then over the same highways. Thus, the granting of a permit at this time to confirm the heretofore exempt operation, conducted in good faith by the applicants, could not possibly increase or change

the burden upon the highways. Likewise the issue of whether the existing transportation facilities provide adequate or reasonable service is not material to the determination of "grandfather" rights as it is self evident that the continued service over the same highways for the same shipper for over ten years proves that the existing transportation facilities do not provide adequate or reasonable service and hence such issue is not a proper part of the "grandfather" rights section of the 1945 motor carrier act amendment.

We therefore respectfully urge that as to the "grandfather" rights of the applicants there is absolutely no conflicting or contrary evidence adduced by the protestant or in any way a part of the record now before this court that would in any way deny that the applicants herein have for more than ten years last past continuously served in the transportation of sugar between West Jordan and Salt Lake City, Utah for the Utah Idaho Sugar Company under a contractual agreement between the parties. The recent reduction of said contract to writing upon a form provided by the P.S.C.U. (R. 4), dated November 10, 1947, does not minimize in any way the existence of an oral continuous contractual relationship prior thereto. The existence of such relationship is confirmed in the record by the testimony of the applicants as well as the testimony of Mr. H. W. Ansell, general traffic manager for the Utah Idaho Sugar Co. (R. 92).

POINT 3.

IN ADDITION TO "GRANDFATHER" RIGHTS, PLAINTIFFS PROVED ALL ESSENTIALS FOR GRANTING OF

THE REQUESTED CONTRACT CARRIER PERMIT TO TRANSPORT SUGAR.

It is the position of the plaintiffs that the first two errors set forth above are such that your court should reverse the Public Service Commission and order the granting of the requested authority by the plaintiffs. Without waiving the basis for such a reversal predicated upon the "grandfather" rights of the plaintiffs as set forth in the brief thus far, we shall discuss at this time errors No. 3, 4, 5 and 6 under this present argument.

The plaintiffs, in addition to proving the "grandfather" rights heretofore discussed, put in evidence the testimony of the shipper whose interest is vitally concerned in this matter. This is a contract carrier application and it must be kept in mind that the element of public convenience and necessity which is an essential of a common carrier application, is not at issue herein. It is true that the 1945 amendment to the law, and particularly under the second paragraph thereof, refers to the requirement that the Commission determine that the existing transportation facilities do not provide adequate or reasonable service. Mr. H. W. Ansell, general traffic manager for Utah Idaho Sugar Company, testified (R. 87 to 112) and a review of his testimony clearly affirms that the plaintiffs were rendering a supplementary service not provided by the existing transportation facilities.

The plant at West Jordan was served by the railroad but the shortage of freight cars and the difficulty of procuring the same and having them moved from one location to another wholly eliminated the rail facilities for the movement of emergency shipments of sugar.

Mr. Ansell testified that the defendant, Magna-Garfield Truck Lines and the plaintiffs have had in force the same that they used the services of Magna-Garfield Truck Lines at frequent intervals, however his testimony was very clear that those existing facilities were inadequate. To quote in part (R. 90) "We have found that when some excitement occurs in the sugar business, which happens quite frequently, either through some rumor in the paper, or increase in price, or removing of rationing, or some other purpose, why there is a sudden demand for sugar, and in that case, we have found that the Magna-Garfield Truck Lines can not meet our requirements." The record clearly indicates that the plaintiffs have been and will be called upon to transport loads of 100 bags or more being a 10,000 lb. or more truck load. Also the testimony was that the Magna-Garfield Truck Lines and the plaintiff have had in force the same rate of 10c per 100 for the moving of such loads. A higher rate exists on l. t. l. movements by Magna-Garfield but a much lower rail rate exists for moving the sugar. (R. 100) Despite vigorous cross-examination, Mr. Ansell did not deviate from his position that the service of the plaintiffs was very essential to their business as the sugar business is highly competitive and any delays from whatever cause would result in the loss of a sale or other prospective business. The evidence was further that no additional use of the facilities of Salt Lake Transfer Company would be made different from that utilized during the past ten years and that said movements would be restricted to a 10,000 lb. minimum. (R. 111)

We find absolutely nothing in the record upon which the Commission could have based a finding that the granting of the application would be detrimental to the best interests of the people in the area covered by the application. The only shipper involved and the only public witness present was Mr. Ansell who strongly urged the granting of the requested authority. There is nothing in the record that would show that the service of the Magna-Garfield Truck Lines was in danger of diminution in the event that this authority should be granted. In fact, notwithstanding the use of the plaintiffs' trucks in emergencies from time to time during the past years, the Magna-Garfield Truck Line has increased in the number of schedules and the number of truck units.

The Magna-Garfield Truck Lines operates a scheduled service and use a limited number of trucks. The plaintiffs, Salt Lake Transfer, have over 100 trucks available and the testimony was that immediate service could be rendered and provided in the movement of loads of sugar from the West Jordan plant. We have spoken of "emergency" hauls for the Utah Idaho Sugar Company. Though such phrase has been used the testimony is clear that the so-called emergencies were frequent enough so as to constitute a continued, though not daily demand for occasional service. Mr. Ansell affirmed the intention of the Utah Idaho Sugar Company to continue to utilize the services of the Magna-Garfield Truck Lines in approximately the same volume in the future as had been used in the past and hence there is absolutely no basis for the Public Service Commission of Utah to

make a finding that the granting of the authority would detract from the business of the existing carrier or that it would eventually impair rather than improve transportation service, or that there is sufficient service already available.

The right of parties to contract in good faith is a sacred right which should not be lightly cast aside. We recognize that in the interest of orderly procedure the Public Service Commission of Utah has been granted certain powers over contractual relationships between a carrier of property for hire and citizens of the state. We submit that such powers must be used judicially to the end that the needs of a large shipper of goods such as the Utah Idaho Sugar Company may be reasonably provided. We desire to reaffirm to the court the reasoning set forth in the case of Rowley vs. Public Service Commission of Utah (Supra) wherein it was stated by your court that:

“Considering the date used in the act, they had been operating on the roads for at least five years, and it is reasonable to assume that there would be no necessity for them to establish the following facts: That their vehicles would not unduly burden the highways over which they had been operating; that their operations would not be detrimental to the best interests of the people of the state or the people of the localities served; that their trucks would not unduly interfere with the traveling public; and that their employment would not subject shippers to the hazards of dealing with irresponsible carriers. It is further reasonable to assume that their services were needed and desired. Had they not been, it is

doubtful that the operations would have continued over a period of five years.”

WHEREFORE, plaintiffs respectfully submit that your Honorable Court should enter an order directing that the Public Service Commission of Utah reverse its decision in the subject case and that the Commission be ordered to grant to the plaintiffs authority to transport sugar for the Utah Idaho Sugar Company between West Jordan and Salt Lake City, Utah as a contract motor carrier for hire and that a proper permit thereon be issued.

Respectfully submitted,

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