

1950

# Wycoff Company, Inc. v. Public Service Commission of Utah and Roy Hill dba Seamons Truck Line : Brief of Plaintiff

Utah Supreme Court

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Wayne C. Durham; Attorney for Plaintiff;

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7409

7410

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

WYCOFF COMPANY, INCORPOR-  
ATED

*Plaintiff,*

VS.

PUBLIC SERVICE COMMISSION  
OF UTAH AND ROY HILL d/b/a  
SEAMONS TRUCK LINE

*Defendants.*

Cases No.  
7409 and 7410

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BRIEF OF PLAINTIFF

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MAR 31 1950

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## BRIEF OF PLAINTIFF

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### STATEMENT OF THE CASES

These matters are before the Supreme Court on writs of review from the Public Service Commission of Utah for the purpose of reviewing three reports and orders of the Commission issued under the date of August 8, 1949, following a consolidated hearing of the Commission's Cases No. 3273, No. 3409 and No. 3413,

held at Salt Lake City, Utah on June 29, 1949. Case No. 3273 involved the application of Roy Hill dba Seamons Truck Line (the defendant) for a certificate of convenience and necessity as a common motor carrier of property over regular routes. Cases No. 3409 and 3413 dealt with the applications of Wycoff Company, Incorporated (the plaintiff), (1) for a permit to operate as a contract motor carrier of property, and (2) for a certificate of convenience and necessity as a common motor carrier of property over regular routes respectively. The applicants applied only for intrastate rights principally to transport motion picture film, theater supplies and accessories, and newspapers to points north of Salt Lake City.

The Commission granted the application of the defendant, Hill, and denied both applications of the plaintiff, Wycoff Company, Incorporated. A petition for rehearing was filed in each case on August 13, 1949. Two of them were denied September 20, 1949 and the third, which involved the plaintiff's application for common motor carrier authority, was denied October 13, 1949. The petitions for rehearing were all filed by this plaintiff and alleged as error all matters which are before this Court for review.

Case No. 7409 now before the Supreme Court deals with the contract motor carrier application (the Commission's Case No. 3409), and the record of this case is hereinafter referred to as "R". Supreme Court No. 7410 contains two volumes of record and involves the two common motor carrier applications, first of defend-

ant (the Commission's Case No. 3273, which record hereinafter referred to as "Rec. II."), and second, of plaintiff, Wycoff Company, Incorporated (the Commission's Case No. 3413, which record is hereinafter designated as "Rec. I.").

The general issues before this Court are the following: (1) whether the Commission regularly pursued its authority; (2) whether there was substantial evidence to support the reports and orders of the Commission.

### STATEMENT OF FACTS

On October 4, 1939 the Public Service Commission granted Northwestern Express, Inc. Contract Motor Carrier Permit No. 241 in Case No. 2308 which authorized hauling of motion picture film and related materials from Salt Lake City to the two theaters at Tremonton and the one at Garland (both in Utah), and return. The three contractees under this permit were Orpheum Theater of Tremonton (C. J. Shultz), Liberty Theater also of Tremonton (B. F. Winzler), and Garland Theater at Garland (G. R. Lawrence).

Northwestern Express, Inc., a Utah corporation has had continuous corporate existence since 1939. By the sole amendment to its articles of incorporation, the name of the corporation was changed to Wycoff Company, Incorporated in December, 1947 (Rec. I, 159), and the change of name was the only purpose of the amendment.

This Contract Motor Carrier Permit No. 241 (as well as its Utah Interstate Carrier Permit No. 146)

was ordered suspended on January 27, 1944 by the Commission due to difficulties incident to wartime regulations of the Office of Defense Transportation (Rec. I, 120).

The present principal stockholder of Wycoff Company, Incorporated, purchased the outstanding stock of Northwestern Express, Inc. in March, 1947 when all of its operating rights referred to were under the suspension order. In April, 1947, Northwestern Express, Inc. petitioned the Commission to reinstate its operating authority, and on April 24, 1947 the Commission ordered the previous suspension order cancelled and reinstated the operating rights under Permit No. 241 and Interstate Carrier Permit No. 146. (The latter authorized common carrier service in interstate commerce between Salt Lake City and the Utah-Idaho state line.) The order reinstating Permit No. 241 read, in part, as follows:

“The Northwestern Express is hereby authorized to operate upon and over the highways of the State of Utah in intrastate commerce over the same routes and under the same restrictions as specified in the Commission’s Report and Order dated October 4, 1939.” (Rec. I, 163).

The caption of the reinstatement order in the Commission’s Case No. 2308 contained the individual names of the three contractees, but the body of the order made no reference to the individual contractees who signed the contracts under the permit for the three theaters.

Pursuant to the reinstatement order, the North-



western Express, Inc. secured a new contract with the Orpheum Theater of Tremonton which was signed by D. W. Harris, its new manager. This contract was dated April 7, 1947 and was filed with the Commission May 16, 1947. (Rec. I, 119).

On March 21, 1947, the defendant Hill had made application to the Commission to serve the Orpheum and Liberty Theaters at Tremonton, and the hearing on the application was conducted April 16, 1947. No other contract carrier had been granted a contract motor carrier permit to serve these theaters since the Suspension Order of January 27, 1944. The defendant Hill did secure temporary emergency permits to serve the two theaters pending its hearing, the first having been obtained March 24, 1947 (Rec. I, 76). The principal stockholder of the plaintiff, Wycoff Company, Incorporated, formerly known as Northwestern Express, Inc. testified that he had no personal knowledge of the hearing on defendant Hill's application held April 16, 1947, and none was directed to the corporation. (Rec. I, 121). By its report and order dated July 9, 1947, the Commission authorized defendant Hill to serve the Orpheum Theater of Tremonton (D. W. Harris), and the Liberty Theater of Tremonton (Dorian Toland). The same theater buildings were involved and the identical commodities were to be transported over the same highways, but the theaters had changed ownership since Permit No. 241 was first issued in 1939 to the plaintiff, but this change had occurred prior to the reinstatement of Permit No. 241.

The defendant Hill made further application to the Commission to serve the only theater at Garland, now called the Main instead of the Garland Theater, and was also under different ownership from the individuals who signed the contracts filed under plaintiff's Permit No. 241. Again the plaintiff company was not given notice of the hearing. The Commission's Report and Order of January 9, 1948 authorized service by the defendant Hill to the Main Theater of Garland (Reed D. Wood).

All of the operating rights of defendant Hill, prior to the Commission's Report and Order of August 8, 1949 (one of the orders now before this Court for review), were held in the name of Melva H. Seamons. She received Contract Carrier Permit No. 266 by the Commission's Order of January 31, 1941, by which order the rights of her former husband, Ray T. Seamons, were transferred to her and his Contract Carrier Permit No. 29 was cancelled. On April 15, 1947 the Commission approved a lease arrangement between Melva H. Seamons, lessor, and Roy Hill, lessee, wherein the contract carrier rights of the lessor in Utah, Idaho and interstate commerce, were leased to the lessee. This lease was for five years' duration, subject to termination on 30 days' advance written notice (Rec. I, 88), and was to expire February 1, 1951. (Rec. I, 82). No mention is made therein of any rights other than those as a contract motor carrier. All contracts then existing, or future, were to be made by mutual agreement of the

lessor and lessee, and were to be in the name of the lessor (Mrs. Seamons) only.

On May 21, 1948 the defendant Hill made application in his own name for common motor carrier authority from Salt Lake City to Lewiston and Garland, serving all the theaters covered by the Utah contract carrier permit that was leased from Melva H. Seamons, including various off-route points. (Rec. II, 1). By this application the defendant sought to change his operation as lessee of Contract Motor Carrier Permit No. 266 to common motor carrier authority. The plaintiff, Wycoff Company, Incorporated was a protestant at the hearing held June 29, 1949 before the Commission, which also heard two applications of the plaintiff. All three applications were consolidated for purposes of the hearing by express consent of all concerned (Rec. I, 35).

On August 8, 1949 the Commission issued its report and order concerning the defendant's application and thereby granted the defendant Hill, in his own right, Certificate of Convenience and Necessity No. 874 (Rec. II, 14 to 18) which enlarged his operating rights to the same territory he formerly operated only as a lessee of Contract Motor Carrier Permit No. 266, issued to Melva H. Seamons, which was cancelled by the order. The report and order of the Commission makes no reference to Melva H. Seamons or the lease arrangement under which defendant Hill operated.

Wycoff Company, Incorporated filed its application for a permit to operate as a contract motor carrier to serve the Orpheum Theater at Tremonton and the Main

Theater at Garland on May 25, 1949 (R. 1 to 3). These two theaters were under the management of Allied Theatres Company. This application was filed only after the Commission advised the plaintiff, Wycoff Company, Incorporated that it had no authority to serve any theaters in either Tremonton or Garland, and that any service rendered to that area would be in violation of the Commission's orders. A contract had been secured by the Wycoff Company, Incorporated with Allied Theatres Company, operators of Orpheum Theater at Tremonton and the Main Theater at Garland (Hugo Jorgenson) which was dated May 1, 1949 and was filed May 6, 1949 (R. 14, 15). A contract dated June 24, 1949 (five days before the hearing) between defendant Hill and the Orpheum Theater at Tremonton and Main Theater at Garland (Allied Theatres Company, by Hugo Jorgenson) was brought into the hearing but was never approved by the Commission, nor was an application for authority in addition to the contract itself filed by defendant Hill (Rec. I, 51, 52; 165).

On June 13, 1949, Wycoff Company, Incorporated made application for authority to serve as a common motor carrier over regular routes from Salt Lake City to the Utah-Idaho line over U. S. Highways 91 and 89, serving the off-route points of Lewiston and Hyrum (Rec. I, 1). This application did not duplicate the area to be served by the plaintiff's contract motor carrier application.

Since the reinstatement of Northwestern Express, Inc.'s interstate operating rights in 1947 and subsequent additions thereto, that corporation has operated daily

schedules, seven days a week over the highways in Utah through the areas involved by its applications, transporting the identical commodities to points in Idaho under authority from the Interstate Commerce Commission and the Public Utilities Commission of Idaho. Common motor carrier authority was also held in the plaintiff company's name from the Utah Commission to transport ice cream and newspapers in intrastate commerce over these same highways and through Tremonton and Garland (Rec. I, 140-1). For this reason there can be no question that the highways over which the Wycoff Company, Incorporated desires to operate are not unduly burdened and that the granting of the application will not unduly interfere with the traveling public.

Wycoff Company, Incorporated operates five daily schedules going north, four of which are bound for points in Idaho, leaving Salt Lake City as follows:

1. Leaves at 12:15 o'clock A.M. via Tremonton to Burley, Idaho;
2. Leaves at 11:30 o'clock A.M. via Tremonton and Pocatello to St. Anthony, Idaho;
3. Leaves at 1:30 o'clock P.M. via Brigham City and Logan, Utah to Preston, Idaho;
4. Leaves at about midnight via Tremonton and Pocatello to St. Anthony, Idaho;
5. Leaves at 2:30 o'clock P.M. to Ogden, Utah. (Rec. I, 111).

Defendant Hill operates one schedule daily of two trucks going north from Salt Lake City, both leaving at

approximately 2:00 o'clock A.M. (Rec. I, 74).

Insofar as it could be considered pertinent to a need for a change of service from a contract carrier to a common carrier by defendant Hill, the following evidence or lack of evidence is pointed out:

Only one public witness appeared in the proceedings, and he appeared to support the applications of plaintiff, Wycoff Company, Incorporated to serve the Tremonton-Garland area, and to serve as a carrier in emergencies when the defendant Hill could not provide the needed service due to his limited one-schedule-a-day operation.

(Testimony of defendant Hill, on cross-examination):

“Q. Now, what is the need of a common carrier authority up there (in the area covered by your application)?

“A. Oh, you don't have to bother with these contracts. It keeps somebody else from coming in without your being called into a hearing, just a hearing without us knowing anything about it. That is about all.

“Q. Is there any need for the public, so far as they are concerned, for a common carrier authority?

“A. No. I wouldn't say that there was.

“COMMISSIONER HACKING: Well, the fact of the business is, according to his evidence, all the public is using his contracts.

“MR. HANSON (Attorney for Hill): In fact, he is a common carrier now, but he doesn't have the rights.” (Rec. I, 70, 71)

Mr. McMahon, the public witness, is manager of Republic Pictures in Salt Lake City, which is one of the dozen film distributing companies which serve the theaters in Utah, Idaho, Montana, Wyoming and Nevada. He testified on behalf of plaintiff that all of the other film distributing companies operate on substantially the same basis as his company, and that he had worked for three of them. His testimony was that there was no speedy service readily available to Tremonton and Garland (Rec. I, 131), and to Logan (Rec. I, 125) except by the defendant Hill who operated only once each day. He stated that no other carrier is authorized by the Commission to render the personalized, specialized, speedy service the industry requires into that area. (Rec. I, 126; 131; also see 167).

(Testimony of Mr. McMahon, direct examination):

“Q. Are you here to support the application of Wycoff Company?

“A. Yes sir.

“Q. And do you feel that an additional carrier is to the advantage of the industry?

“A. I do, because I have explained before it is necessary to get the (motion picture) print there.

“Q. Have you used the services of Wycoff in the state otherwise

“A. Yes. We used him when he started down to Price and Helper.

“Q. Is this service now satisfactory

“A. Very satisfactory. I believe every ex-

change manager and booker will say it is satisfactory.” (Rec. I, 131, 132)

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“Q. Now, will you state whether or not one service a day leaving Salt Lake at approximately 2:00 A.M. is adequate for your business?

“A. Well, it depends — I mean, emergencies come up, and that is something we can’t foresee.

“Q. Do you need an extra service to take care of these emergencies?

“A. I think something adequate should be set up for that. \* \* \*” (Rec. I, 127)

The Court should be advised that there is not a single word from a public witness showing any need for a change from contract carrier to common carrier service. There is not even any evidence from the defendant-applicant Hill himself showing any necessity for common carrier service. The evidence is undisputed that the theaters in the communities of Tremonton and Garland desire to be served by a contract carrier, and no evidence of any kind was presented to show the need for the defendant to change his type of service. The defendant Hill himself even had the owner of theaters in these communities sign on a contract to obtain contract carrier service five days before the date of the hearing.

## STATEMENT OF POINTS

### A. Plaintiff’s Contract Motor Carrier Application

1. The Commission did not regularly pursue its



authority but acted contrary to statute by denying the plaintiff permission to serve the two theaters involved.

2. The Commission did not regularly pursue its authority but acted arbitrarily or capriciously by denying the plaintiff permission to serve the two theaters involved.

3. The Commission did not regularly pursue its authority but acted contrary to its own rules and regulations by denying the plaintiff permission to serve the two theaters involved.

#### **B. Defendant's Common Motor Carrier Application**

4. The Commission did not regularly pursue its authority but acted without statutory authority in granting unlimited common carrier rights to the lessee of a contract carrier permit.

5. There is no competent evidence to sustain the finding that public convenience and necessity require that the defendant's truck line be authorized to operate as a common motor carrier.

#### **C. Plaintiff's Common Motor Carrier Application**

6. The finding of the Commission that public convenience and necessity does not require the service proposed to be rendered by the plaintiff is not supported by substantial evidence.

7. The findings of the Commission that there is already sufficient service available and that the granting of a certificate to plaintiff would be detrimental to existing transportation service and contrary to the best interests of the people in the area, are not supported by substantial evidence.

## ARGUMENT

**A. Plaintiff's Contract Motor Carrier Application**

THE COMMISSION DID NOT REGULARLY PURSUE ITS AUTHORITY BUT ACTED CONTRARY TO STATUTE BY DENYING THE PLAINTIFF PERMISSION TO SERVE THE TWO THEATERS INVOLVED.

The plaintiff, Wycoff Company, Incorporated, contends that after the Commission granted it a statutory contract motor carrier permit which has never been revoked, or cancelled, that the benefits contemplated by the legislature under the permit were withheld by the Commission.

The legislature has never defined the term "contract motor carrier permit" although it is used several times in Title 76, Chapter 5, U.C.A. 1943 as amended.

It is clear that it shall be unlawful for any contract carrier to operate in either interstate or intrastate commerce without having first obtained this "permit" after proper application has been made and certain facts determined. (76-5-21, 76-5-22, U.C.A. 1943, as amended). It is also apparent that the Commission is given certain powers to "suspend, alter, amend or revoke any \* \* \* permit \* \* \* issued" (76-5-33, U.C.A. 1943).

Without question a "permit" is a thing of value, for under 76-5-40, U.C.A. 1943, the legislature provided that upon the death of a holder it "shall be transferable the same as any other right or interest of the person's estate," subject to enumerated conditions.

The Federal Motor Carrier Act of 1935, as amended, is more specific than the Utah enactment in specifying the nature of a contract motor carrier permit and the rights it confers:

“The (Interstate Commerce) Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission \* \* \* : *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, as the development of the business and the demands of the public may require.” (49 U.S.C. 309 (b)).

It is apparent that the federal statute clearly states that the Interstate Commerce Commission shall not restrict the freedom to contract of the holder of a permit by limiting to a specific shipper the authority granted under said permit.

The plaintiff contends that the Utah Motor Carrier Act, grants to the holder of a “permit”, by implication, some of the same rights clearly specified in detail under the federal act. One of these rights is for the holder of a “permit” to serve the new management of any of the industries authorized to be served by its “permit” when there is no other change in the transportation service — i.e., when the same commodities are to be shipped

over the same highways between the same points of origin and destination, but instead of going to, say, the Orpheum Theater at Tremonton, with C. J. Shultz as manager or owner, they are directed to the same Orpheum Theater at Tremonton with D. W. Harris or Allied Theatres Company as owner. (See statement of facts).

The Commission, by its actions, has taken the position that nothing was reinstated by its Reinstatement Order of April 24, 1947, which reactivated Plaintiff's Contract Motor Carrier Permit No. 241. It has never permitted the plaintiff to serve anyone under this permit although Wycoff Company, Incorporated, (formerly named Northwestern Express, Inc.) has secured several contracts with the parties who currently managed or owned the theaters which were covered by the original contracts filed in 1939 under Permit No. 241. These new contracts covered the identical commodities to be shipped over the same highways and routes, with the same physical, geographic location (i.e., the same theater buildings) for a destination, and were signed by the theater management currently in existence after Permit No. 241 was reinstated.

The Commission has taken the position that the parties who signed the original contracts in 1939 under Permit No. 241 were the only parties authorized to be served thereunder, and that in order for the plaintiff to serve the new owners it would have to proceed as in the first instance for a new permit with a complete new hearing of evidence.

It should be borne in mind that Permit No. 241 was not reinstated without knowledge that the management of these theaters had changed. Still the Commission recognized its duty to reinstate the plaintiff's permit, but after the reinstatement rendered it valueless by limiting its use to individuals who no longer existed.

Contract Motor Carrier Permit No. 241 has never been revoked by the Commission and the plaintiff has tried every method it knows to utilize it without violating instructions from the Commission, and now Wycoff Company, Incorporated, asks this Court to determine what its rights are under it. The plaintiff contends that the "permit" referred to in the statute is broader than the persons named as contractees (i.e., the particular manager or owner of a business — here, theaters). This is because the power of the Commission does not include the power to regulate a contract carrier to this degree. The interest of the public, for whom the Commission acts in regulating contract carriers, is not to control with *whom* they may contract but to guard against "unduly burdening" the highways; to see that there is not "undue interference" with the traveling public, and to protect the best interests of the general public in the state as a whole, and in the local communities to be served (76-5-21, U.C.A. 1943, as amended by the laws of Utah, 1943, Chap. 105.) (Also compare the nature of the findings the Commission is to make as conditions precedent to granting an interstate "permit" and a temporary "permit" which are similar to those

required for an intrastate "permit" — 76-5-22 and 76-5-23.)

In determining the nature of a "permit", it is to be remembered that the legislature has drawn a distinction between the amount of regulation to which a contract motor carrier, which operates under a "permit," and a common carrier, which must secure a certificate of convenience and necessity, are to be subjected. Mr. Justice Wolfe, in *McCarthy v. Public Service Commission*, (Utah Supreme Court, August 25, 1947), 184 P. 2d 220, 227, treats this matter very clearly:

"Although the legislature gave the commission power to control contract motor carriers it did not require the commission to exercise the close control over contract carriers as it must exercise over common carriers. For example, as to common motor carriers the commission 'is vested with power and authority, *and it shall be its duty*, to supervise and regulate all common motor carriers and fix, alter, regulate and determine just, fair, reasonable and sufficient rates, fares, charges, etc.' (Italics added) Sec. 76-5-17.

"However, as to contract motor carriers, while they must obtain a permit, the legislature said: 'The commission is hereby vested with power and authority and it *may* supervise and regulate every contract motor carrier in this state and fix and approve reasonable maximum or minimum rates, fares, charges and *classifications*, and to adopt *reasonable* rules and regulations pertaining to all such motor carriers' (Italics added) Sec. 76-5-24, U.C.A., 1943." (Italics by the Court)

The opinion continues by pointing out that this discre-

tionary power of the Commission exists to regulate contract motor carriers —

“\* \* \* to practically the same extent as is authorized for common motor carriers — provided the commission determines that such close control is reasonably required. However, merely because the power and authority to regulate contract motor carriers is given, that power and authority need not be exercised unless required for the benefit of the public and then only to the extent required” (*Ibid*, 227).

The plaintiff knows of no determination having been made in this case why such regulation is required for the benefit of the public, and states that this Court has held the Commission does not have power to change a contract carrier into a common carrier even when the contract carrier makes application for the change without substantial evidence to show a public need for the change (*McCarthy v. Public Service Commission*, 184 P. 2d 220; also see Point V of this brief, *infra*.)

The most apparent distinction between the rights conferred upon a common motor carrier under a certificate of convenience and necessity and a contract motor carrier under a permit is this: in the former *the public chooses the carrier*, while in contract carrier service, *the carrier reserves the right to choose whom of the public it will serve*. The statutory definitions are as follows (76-5-13, U.C.A. 1943):

“ ‘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 hereinbefore defined.”

The plaintiff had the right under its statutory permit to choose to serve the new owners of the theatres involved. By denying plaintiff this right the Commission did not recognize the statutory rights it bestowed upon the plaintiff under Permit No. 241.

Even if the Commission could conceivably be said to have had power to rule that plaintiff could not serve the new theatre owners from whom it secured valid contracts, such power must be used, in the language of 76-5-24, U.C.A. 1943, “to adopt reasonable rules and regulations pertaining to all such motor carriers.” In this event the statute was still violated in that it was not reasonable to reinstate Permit No. 241 to the plaintiff and then arbitrarily withhold any possible benefits it might afford.

## II.

THE COMMISSION DID NOT REGULARLY PURSUE ITS AUTHORITY BUT ACTED ARBITRARY OR CAPRICIOUSLY BY DENYING THE PLAINTIFF PERMISSION TO SERVE THE TWO THEATRES INVOLVED.

If the actions of the Commission which are described immediately above under “Point I” of this brief are



not in violation of existing statutes, it is contended that such actions at least were arbitrary or capricious. The issuance of an order which reinstated the plaintiff's suspended Permit No. 241 followed by refusal of the Commission to allow the plaintiff to utilize the permit in any manner, was arbitrary or capricious. If the Commission intended to deprive the plaintiff of Permit No. 241 it could have done so in accordance with 76-5-33, U.C.A. 1943 which sets down the procedure for such action:

“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.”

There are other instances of arbitrary or capricious action.

After the plaintiff's Permit No. 241 was reinstated in April, 1947, the Commission indicated that no operating rights were conferred upon the plaintiff Wycoff Company, Incorporated (formerly known as Northwestern Express, Inc.) because the contracts filed under the permit were signed by owners who no longer operated the three theaters in Tremonton and Garland. However, some of the findings of the Commission regarding the application of the defendant Hill which is before the Court read as follows:

“That for some time past, applicant (Hill) has been operating under contract carrier permit No. 266 and all supplements thereto, transporting motion picture films, theatre accessories,

magazines and periodicals, from Salt Lake City to Lewiston and *Garland*, Utah over U. S. 91, Utah 101, Utah 163, Utah 61, U.S. 191 and U.S. 30-S serving the theatres of the various towns enroute from Salt Lake City to Lewiston and *Garland*, Utah.

“That the Seamons Truck Line has been conducting continuous and satisfactory service as a contract carrier under the jurisdiction of this Commission, for the past 10 or 12 years. (Italics ours.) (Rec. II., 15).

There is only one theatre in *Garland*, and the Commission, by its report and subsequent order which granted defendant Hill's application, recognized either the contract of the defendant with the old management of the Main Theater at *Garland* (Reed D. Wood) at a time when its ownership had changed to Allied Theatres Company, a corporation, or it recognized the new contract secured by the defendant only five days before the hearing of defendant Hill's application for *common* motor carrier rights, which contract was not covered by the defendant's permit any more than was plaintiff's contract (according to the contention of the Commission), with the new management of the Orpheum Theater of Tremonton (D. W. Harris) which was filed within one month of the Reinstatement Order of April 24, 1947. Nor was the latter contract of the defendant before the Commission on a Contract Motor Carrier application.

The Commission does not regularly pursue its authority when it treats one carrier in one manner, and another in contrary fashion when the fact situations

are the same. It apparently recognized that the defendant Hill's operation under a contract with a non-owner was not illegal but refused the plaintiff the right to conduct such an operation.

### III.

THE COMMISSION DID NOT REGULARLY PURSUE ITS AUTHORITY BUT ACTED CONTRARY TO ITS OWN RULES AND REGULATIONS BY DENYING THE PLAINTIFF PERMISSION TO SERVE THE TWO THEATRES INVOLVED.

Rule No. VII of the Commission's *Motor Carrier Rules and Regulations No. 3*, (effective since June 1, 1937) states the only promulgated regulations regarding filing of contracts by contract carriers of property:

“Each contract carrier of property by motor vehicle subject to the Act, namely,

“1. Carriers of general commodities \* \* \*

“4. Carriers of moving picture films, accessories and theatre supplies;

“5. \* \* \*

shall on or before July 1, 1937, file with the Commission one copy of each and every contract existing and in force on said date \* \* \*, and that the contracts so filed by any such contract carrier shall be in lieu of any schedule or schedules theretofore filed by such contract carrier, and the filing of such contracts shall cancel any such schedule or schedules.

“A copy of each and every contract of any such contract carrier, *entered into or effective on or after* July 1, 1937, shall be filed with the Commission in the same manner as required in

relation to existing contracts in the form and manner prescribed in Tariff Rule VI (which deals with filing Common Carrier Freight Tariffs) \* \* \* so far as the provisions of said Rule is applicable.

“ \* \* \*

“Contracts filed on or before July 1, 1937 shall become effective when filed with the Commission: contracts reducing charges specified in prior contracts and filed subsequent to July 1, 1937, shall provide thirty days' notice of their effective date unless otherwise authorized by the Commission; and contracts renewing or establishing increases in charges specified in prior contracts, or establishing charges for new services, may become effective when filed.” (Italics ours).

Every contract secured by the plaintiff after Contract Carrier Permit No. 241 was reinstated by the Commission was filed in the manner contemplated by the above. These regulations were in effect at all times mentioned herein. There is nothing contained therein that would require the plaintiff to make application for authority to serve new management of theaters it was already authorized to serve.

## **B. Defendant's Common Motor Carrier Application**

### **IV.**

THE COMMISSION DID NOT REGULARLY PURSUE ITS AUTHORITY BUT ACTED WITHOUT STATUTORY AUTHORITY IN GRANTING UNLIMITED COMMON CARRIER RIGHTS TO THE LESSEE OF A CONTRACT CARRIER PERMIT.

The defendant Hill leased Contract Carrier Permit

No. 266 and other contract carrier rights in interstate commerce from Melva H. Seamons on February 1, 1946. The lease was to expire in five years (Rec. I, 82), and as to intrastate rights was approved by the Commission on April 15, 1947.

It is the contention of the plaintiff, Wycoff Company, Incorporated, that the Commission is a creature created by statute with limited powers. Nowhere has the Commission been granted the power to permit a lessee of contract carrier rights to make application in his own name for a certificate of convenience and necessity as a common carrier, using as a basis his operations only as a lessee, and in violation of the terms of the lease on file with the Commission.

A common carrier differs from a contract carrier in that it is a public utility, while a contract carrier is not. (76-5-15 U.C.A. 1943.) Hence the public, for whose protection the Commission was created, has a greater need to be protected when common carrier rights are granted than when contract carrier rights are granted. The much greater responsibility, then, rests upon the common carrier.

There is much testimony which reflects confusion in the minds of the Commission, the lessee and the lessor. There are statements by them that the certificate, if granted, should issue in the name of the lessor; that the rights were to be granted to the lessor and to be operated by the lessee; that the lease covered the (unmentioned) common carrier rights as well as the contract carrier rights; that the lessee's interest in the

common carrier's rights, if granted, would pass to the lessor at the expiration of the lease on February 1, 1951. The order of the Commission gives the defendant Hill unlimited common carrier rights and makes no mention of the lease or of the lessor, Mrs. Seamons. It is to be remembered that the lease was terminable at will on thirty days' notice by the parties thereto.

The plaintiff cannot find any authority or precedent for the lessee of a contract carrier rights to make application for common carrier rights in his own right solely on the basis of his services as a lessee of those rights, particularly when the terms of the lease approved by the regulatory body forbid any rights be obtained except in the name of the lessor.

It is true that Mrs. Seamons, the lessor, was present at the hearing and appeared in behalf of the defendant Hill; but her final statement on cross examination was that she wished the rights to be granted in her name, as follows:

"Q. May I ask her again whether or not it is her intention in appearing here that the rights be issued in her name,

MR. HANSON (Attorney for defendant Hill):

Well, now, that question . . .

"COMMISSIONER HACKING: She may answer "yes" or "no".

"A. Yes." (Rec. I., 110).

## V.

THERE IS NO COMPETENT EVIDENCE TO SUSTAIN THE FINDING THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRES THAT THE DEFENDANT'S TRUCK LINE BE AUTHORIZED TO OPERATE AS A COMMON MOTOR CARRIER.

There is no substantial evidence to support the change of service from a contract carrier to common carrier ordered by the Commission.

The Commission's report as to statements which are apparently intended to support the order of the Commission are as follows:

"That for some time past, applicant has been operating under contract carrier permit No. 266 and all supplements thereto, transporting motion picture films, theatre accessories magazines and periodicals from Salt Lake City to Lewiston and Garland, Utah, over U. S. 91, Utah 101, Utah 163, Utah 61, U. S. 191 and U.S. 30-S, serving the theatres of the various towns enroute from Salt Lake City to Lewiston and Garland, Utah.

That the Seamons Truck Line has been conducting continuous and satisfactory service as a contract carrier under the jurisdiction of this Commission, for the past 10 or 12 years.

That the evidence submitted at said hearing establishes that public convenience and necessity requires that applicant be authorized to operate as a common motor carrier of: \* \* \* " (Rec. II, 15)

It therefore appears that the Commission made no finding that the *public* desired or needed the change in

type of service, but only states that the defendant had rendered satisfactory service as a contract carrier for a number of years. (The defendant had been the approved lessee for a little more than two years, or since April 15, 1947.)

Section 76-5-18, U.C.A., 1943, sets forth the following requirements for issuance of certificates of convenience and necessity to common carriers and provides:

“It shall be unlawful for any common motor carrier to operate as a carrier in intrastate commerce within this state without first having obtained from the commission a certificate of convenience and necessity. \* \* \* If the commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof it may issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought \* \* \*. Otherwise such certificate shall be denied.”

This court has construed this section in *McCarthy, et al vs. Public Service Commission, et al* (184 P. 2d 220, 1947), which is a case very similar to the matter before the court. In it some contract carriers sought to change their services to common motor carriers, and after quoting Section 76-5-18, U.C.A., 1943, as set out above, Justice Pratt stated:

“To comply with the above quoted provision the Public Service Commission must deny the carrier-defendant’s applications for certificates of convenience and necessity unless presented with evidence from which it could find that there



is a public need for the services of a common carrier of sand and gravel, etc.” (Ibid, 223)

In this *McCarthy* case (supra) the plaintiff was the Denver and Rio Grande Western Railroad Company. The defendants were eight trucking concerns which sought to change from contract to common carrier service. The Public Service Commission issued them certificates of convenience and necessity to operate as common carriers of sand, gravel, cement, etc. The plaintiff railroad also possessed a certificate of convenience and necessity to operate as a common carrier of these commodities. There was a great deal of testimony showing the need for the services of the eight truckers. These defendants, however, presented testimony at the hearing that they had no intention of changing the way they carried on their business. All the public witnesses whom these eight truckers served testified that they were satisfied with the service rendered. There was no evidence for a need to change from contract to common carrier service.

The Court wrote three opinions in setting aside the orders of the Commission. Mr. Justice Wade wrote the only dissent. The majority opinions are in agreement that there must be evidence presented to the Commission of a *need* to change from contract to common carrier service before the Commission has power to order such a change.

The opinion of Mr. Justice Pratt on this subject states:

“... that despite the testimony of public witnesses offered in support of the sand and gravel truckers’ applications there was no evidence of a need to change these contract carriers into common carriers. (*Ibid*, 223)

And, the opinion concluded that—

“The legislature has distinguished between contract motor carriers and common motor carriers. When there is evidence which tends to prove that the public need is for the service of a common carrier, *then the commission under Sec. 76-518, UCA, 1943 has the power to issue certificates of convenience and necessity and not until then.* If the need is for contract carriers, that is not a foundation for action such as was taken by the commission in this case.” (*Italics ours*).

The opinion of Mr. Justice Wolfe concurred in the result reached by the court, and Mr. Chief Justice McDonough concurred in his opinion which found there was no evidence that past services rendered as a contract carrier had not been adequate and that there was no evidence that the proposed common carrier services would enhance the public.

“Indeed there is no evidence that the convenience or necessity of the public to have sand, gravel and cement hauled will in any way be better served by common carriers’ service than it has been in the past ten or twenty or more years by contract carrier service. \* \* \*

As there is no substantial evidence to support the decision of the commission that public

convenience and necessity require the proposed services that decision must be set aside.” (*Ibid*, 224.)

There is even less evidence in the case before the Court to support the finding of the Commission. The defendant Hill presented no public witnesses to support his application, and showed no need for changing his service from a contract carrier to a common carrier. The testimony of the defendant himself was to the effect that there was no need as far as the *public* was concerned for common carrier authority and that his sole reason was that, in his opinion, operating as a common carrier would be to his personal advantage. (Rec. I, 70-71).

In line with previous decisions on the matter of public convenience and necessity, your Court will agree that it is not the mere convenience of the defendant-applicant, but a genuine requirement that must be shown. (*Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298; *O’Keefe v. Chicago Railways Co.*, 354 Ill. 645, 188 N.E. 815.

The plaintiff knows it is the duty of the Commission to hear the evidence and adduce certain determinations and an order based upon the *facts* shown by such evidence. However, the Commission is a limited creature of law and may not arbitrarily substitute its own opinions, likes or dislikes for the evidence, or lack of it, produced at a hearing of an application. “Public convenience and necessity” must be found, not private

advantage to an isolated carrier. It is, of course, impossible to bring in all of the public at a hearing of this kind, but the applicant at least has the duty to present to the Commission some representative witnesses from the public he proposes to serve to produce *some* substantial evidence to support his application.

### C. Plaintiff's Common Motor Carrier Application

#### VI.

THE FINDING OF THE COMMISSION THAT PUBLIC CONVENIENCE AND NECESSITY DOES NOT REQUIRE THE SERVICE PROPOSED TO BE RENDERED BY THE PLAINTIFF IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The public witness appearing in behalf of the application of the Wycoff Company, Incorporated stated that he was the manager of one of the twelve or thirteen film distributing companies located in Salt Lake City which serve all of the motion picture theaters in Utah, Idaho, Montana, Wyoming and Nevada. (Rec. I, 124). When asked whether it was true that the distributors in Salt Lake all operate on substantially the same basis he stated that they did and that he was familiar with all of them (Rec. I, 131).

His testimony follows:

“Q. Now, I ask you whether or not there are occasions when you need the service of more than one carrier into this north area?

“A. Yes; that has come up many a time, due to the fact that Wycoff I believe runs two or three trips a day out of here and Roy (Hill) I believe operates one trip a day out of here.

“Q. Now, have you had in emergencies had to call upon Wycoff to haul film for you?

“A. Several times; and we are very thankful we are able to call on him. Because if we didn't have the service we would have missed the theatre out entirely on their business.

“Q. That service has been rendered gratuitously, has it?

“A. Strictly gratuitous; no charge to us, no charge to the exhibitor.” (Rec. I, 126).

Mr. McMahon also testified that emergencies occur in the film industry at irregular intervals varying from two or three days in a row to a month or more (Rec. I, 127), which requires an extra motor carrier service.

The testimony of M. S. Wycoff is that these emergencies requiring additional service into the contemplated area is more than once a week. (Rec. I, 136) This is the type of service contemplated by the application of plaintiff to serve the public as a common motor carrier.

(Testimony of M. S. Wycoff, president of plaintiff company):

“Q. Now is it your desire to continue to deliver gratuitously in these emergencies, or do you think that you should be authorized so you can charge for it?

“A. We think that it has grown into such

proportions now that we should be compensated for it.

“Q. Do you feel there is a need for this additional service?

A. There certainly is.” (Rec. I, 136, 137).

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“Commissioner Hacking: \* \* Assume for the purpose of my question that the Commission should grant you your common carrier application and also Roy Hill’s application.

“A. Well, that would be entirely —

“Commissioner Hacking: Then, how would this business of getting film be handled?

“A. Roy (Hill), in my opinion, would continue to handle the bulk of the film up there, probably all of it.” (Rec. I, 168)

It is clearly the intention of the plaintiff to render a service that the public needs and wants, and to be compensated for it instead of being forced to render it gratuitously in order to comply with the law. This type of service requires common motor carrier authority because the plaintiff has no possible way to choose whom it will serve in cases of emergency, as a contract carrier must do, and the public convenience and necessity requires that additional service should be available.

The fact that one representative of the film distributing companies testified on cross-examination that the defendant Hill had never refused to make a special trip for that witness (Rec. I, 132, 133) is not substantial evidence on which to base the finding of the Commission, because he had already indicated that the gratuitous

emergency services of the plaintiff had been used in times of need when the defendant could not render the service. (Previous testimony of Mr. McMahon, set forth above).

## VII.

THE FINDINGS OF THE COMMISSION THAT THERE IS ALREADY SUFFICIENT SERVICE AVAILABLE AND THAT THE GRANTING OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PLAINTIFF WOULD BE DETRIMENTAL TO EXISTING TRANSPORTATION SERVICE AND CONTRARY TO THE BEST INTERESTS OF THE PEOPLE IN THE AREA, ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The evidence is uncontradicted that plaintiff desires authority only to serve the public in times of emergency when other carriers, because of limited schedules and equipment, are physically unable to serve the public. The effect of a "dark house" (i.e., a theatre without motion picture film to show the public) is disastrous both to the distributor of the film which is presented with a claim for damages (Rec. I, 126, 127), and to the theater itself which loses the good will of the community it serves. The only public witness testified that there was need of additional service by the plaintiff, that the present service was not always adequate, and stated that the plaintiff had several times saved his company and the public from having a "dark house." (Rec. I, 126).

The plaintiff is already operating the necessary equipment needed to serve the proposed area through these communities in *interstate* commerce, transporting motion picture films and related commodities, and also in *intrastate* commerce, carrying other commodities as a common carrier. This limited service proposed by the plaintiff will be beneficial to everyone concerned — to the defendant Hill whose limited equipment (2 trucks) (Rec. II, 4) will not enable him to make special trips when they are required by the industry; to the plaintiff who should be compensated for its frequent hauls into this area in times of emergency; and most of all, to the public, for whose protection the Commission was established.

The Commission has adequate power to issue such a limited certificate of convenience and necessity to render service in times of emergency, etc. to adequately protect “existing transportation facilities” and to foster “the best interests of the people in the area” to be served. The legislature gave the Commission ample power and latitude to cope with this situation, as follows:

“If the commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof it may issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, otherwise such certificate shall be denied.” (76-5-18, UCA 1943).



## CONCLUSION

The Public Service Commission has acted improvidently in these cases by withholding the benefits of a statutory contract carrier permit after granting the plaintiff, Wycoff Company, Incorporated such a permit to serve the theatres in the Tremonton-Garland area. The Commission has also made findings regarding public convenience and necessity which are not supported by substantial evidence as is required by our law.

Plaintiff respectfully submits, therefore, that the Court should enter its order directing that the Public Service Commission of Utah grant to the plaintiff the authority requested for service as a contract motor carrier to the points in Tremonton and Garland, and authority to establish emergency service proposed by plaintiff's application for common carrier authority. In addition plaintiff submits that the Court should reverse the action of the Commissions in Case No. 3273 wherein common motor carrier service was authorized, and direct that the Commission enter an order denying such authority to the defendant Roy Hill.

Respectfully submitted,

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