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Uintah Freight Lines, Salt Lake Transfer Co., and Ashworth Transfer Co. v. Public Service Commission of Utah and Guy Prichard : Brief of Defendant

Utah Supreme Court

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In the Supreme Court of the State of Utah

UINTAH FREIGHT LINES, a corporation;
SALT LAKE TRANSFER COMPANY, a co-partnership; and
ASHWORTH TRANSFER COMPANY, a co-partnership,

Plaintiffs,

Case No. 7420

vs.

PUBLIC SERVICE COMMISSION OF
UTAH and GUY PRICHARD,

Defendants.

DEFENDANT'S BRIEF

ILED

MAR 29 1950

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k, Supreme Court, Utah

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STATEMENT OF FACTS

To eliminate duplicity, defendants concede that the statements in plaintiffs' brief to the middle of page 4 are generally true. It is submitted that the balance of plaintiffs' Statement of Facts, constitutes counsel's paraphrasing of facts tending to reflect the case in the best possible light for plaintiffs. It is further submitted that a casual reading of the record indicates that much other pertinent evidence, possibly not so helpful to plaintiffs, has been omitted.

The compelling fact that between July 19, 1948 and July 7, 1949, defendant Prichard had been granted some 17 temporary permits to haul commodities outside of his former authority (R. 43), but inside the authority unanimously granted by the Commission in this case, is discounted with a flourish by plaintiffs on page 8 of their brief, with the somewhat accusatory generalization that the "Protestants have taken the position that these were *wrongfully* issued by the Commission and that such do not constitute any evidence of convenience and necessity." We suggest that the Commission is undeserving of such a sweeping indictment. Particularly is this true in view of the fact that of all the counsel named on plaintiffs' brief, only Mr. Pugsley personally appeared at the hearing of this matter.

In passing, it appears significant to us that of about 40 carriers or interested parties notified of the hearing (R. 7), only 8 entered appearances. Three of these, the Barton Truck Lines, the Union Pacific and Uintah Freight Lines (one of the appellants), were represented at said hearing by neither counsel nor other person. Three are plaintiffs herein, and two, the Carbon Freight Line and Rio Grande Motorways—the only two having offices and terminals along with Prichard in Carbon County—are not appellants here.

Although plaintiffs declare wrongful the issuance of 17 temporary permits to Prichard within a year, we must insist that the Commission did not act wrongfully, but rather in consonance with the exigencies of a general situation, and that approval of these temporary permits is strong evidence

justifying the granting of Prichard's application, and demonstrating convenience and necessity.

Although the Court, in examining the record, will find much evidence omitted in plaintiffs' brief, we beg indulgence to supply some of said omissions here, all of which tend to justify the order of the Commission, which, according to a long line of authority handed down by this Court, should not be disturbed.

Mr. Prichard testified that quite often he was called upon to furnish the service requested in his application (R. 67), and that in many cases he had received temporary permits to do so (R. 68). Once he was requested in the middle of the night to perform such service (R. 71). People would call him for such service most any hour of the night (R. 73). He was called one evening with a request for next day service; that he satisfactorily performed the same, and did so in every case (R. 76). He has aided Carbon Freight Lines, one of the protestants, on occasion in unloading vault doors, and a generator, the facilities of that company being inadequate to perform the service (R. 79). He has also assisted the Rio Grande Motorways, another protestant not appealing here, in hauling casing, the job requiring Prichard's special equipment (R. 80-81). Prichard has an office in Carbon County, maintains a telephone, has his number in the telephone directory, has ads in the directory and newspapers and maintains a warehouse at Thompson, Utah, where some of his equipment is stationed (R. 82). With the exception of the Uintah Freight, none of the appellantes maintains such service in the Eastern Utah area. Prichard also maintains a business contact

in Vernal (R. 83). A temporary permit was granted him within a month before the hearing (R. 84). A Mr. Young called him requesting that he haul cement from Devil's Slide (R. 90-91). He hauled transformers to Salt Lake on Carbon Freight Line's permit (R. 92). Carbon Freight, a protestant, does not have necessary equipment to haul large tanks or caterpillar tractors (R. 98) and did not have necessary equipment to unload vault doors, which required Prichard's assistance (R. 108), and that Prichard has assisted Carbon Freight in other instances (R. 109). A Mr. Gamber requested Prichard to haul some large pipes for him, and upon being advised Prichard had no temporary permit, called long distance to Salt Lake and the Salt Lake Transfer Co., protestant and appellant here, delayed transportation of the commodity from a Thursday to the following Tuesday (R. 112-113, 124, 167). It was necessary for Prichard to unload the commodity because this carrier had no facilities for unloading (R. 114).

Mr. Gamber testified that Eastern Utah was developing (R. 115), that he had witnessed the birth and growth of Horse Canyon, the Kaiser Fuel Co., and the boom of the Sunnyside Mine, dormant before the War (R. 116); that Prichard had hauled a large tank for his company and that his service was satisfactory (R. 117). He further stated that last January was the best month in his company's history (R. 122) and that during shut-down periods, heavy hauling was necessary for revamping the plant (R. 123); that it would be a great convenience if Prichard could render the service requested, particularly since the Salt Lake Transfer, one of the appellants, had not known the destination for delivery in the instance

experienced by Gamber with that company (R. 126, 128), and that he was inclined to give Prichard the haul since he knew the district (R. 127).

Mrs. Leonard, District Representative for Robison Machinery Co., covering Carbon, Emery, Grand, San Juan and Uintah counties, who was well acquainted with Eastern Utah, testified that he believed there was a definite need for someone in that area to do heavy equipment hauling and that his customers frequently inquired about hauling and the cost thereof, and that it would be a matter of convenience to him (R. 130-135).

Mr. Nielson, a contractor, having need for transporting of heavy equipment, has used Prichard and his work was satisfactory, other than the wait involved in obtaining permits (R. 136). He stated there was a need for hauling heavy equipment from Salt Lake to the area (R. 137), that there was new activity in the area in coal (Kaiser Mine) and in the uranium industry, which latter was definitely growing (R. 138); that it was a matter of convenience to have Prichard haul for him, even if he had to wait to obtain a special permit (R. 140-141), and that from his life-long experience in the area he believed it would be a matter of convenience to the people in the area to have Prichard's requested service (R. 141). Also, that the canal company with which he was connected, had had trouble with a shipment of pipe hauled by Ashworth, one of the appellants, requiring the employment of Prichard to pull the Ashworth equipment in, and to complete the haul. Ashworth's equipment also failed to have adequate unloading

equipment (R. 145-146) and had too small a truck for the load (R. 147).

Mr. Larsen, a hardware dealer, stated that on the basis of past experience, it would be a matter of convenience to use Mr. Prichard's service in any hauling from points outside of the area into the area (R. 151), and in his past experience it would have been a matter of considerable inconvenience if he had not been able to use Prichard's service, both from a standpoint of time and expense (R. 153).

Mr. Jackson, a coal dealer, testified as to an instance where Carbon Freight, in delivering heavy equipment, was not equipped to unload it, and dropped a heavy generator, damaging it (R. 187), after which Prichard was called upon with his equipment to load and transport the equipment (R. 188), and that in the future it would be a matter of convenience to him to have Prichard haul for him from Salt Lake to his property (R. 189); that Prichard had heavy equipment available that other carriers in the area did not have (R. 196); that there is an advantage in having such equipment in the area (R. 198); that rail shipment out of the area is too slow (R. 200).

Mr. Campbell of Vernal, testified that he was inconvenienced and lost \$200 because of a shipment delayed by Ashworth, one of the appellants (R. 205); that the deadhead would be smaller with Prichard in hauling from the area to any other place in the State (R. 209) and that it would be a matter of convenience to have Prichard haul heavy equipment from the area to points outside of the area (R. 210).

Mr. Sims, Manager of Salt Lake Transfer, one of the appellants, admitted the bulk of his equipment was in Salt Lake (R. 164); that he had no office in Eastern Utah and that anyone from the area desiring his services would have to write him, wire him, or telephone him (R. 177); that there was increased activity in the area (R. 180); that there was greater activity in Vernal, Monticello and Moab (R. 183).

Mr. Ashworth, one of the appellants, admitted that the Gilsonite industry has developed in Eastern Utah in the past 3 years (R. 218-219) and that oil development in Uintah will increase, and that there will be an increase in hauling there (R. 219).

Mr. Smith, Manager for Rio Grande Motorways, protestant, but not an appellant, admitted that his company loaded only pieces up to 12,000 pounds and that it would have to rent a crane from someone to unload it at its destination (R. 228); that they had loading equipment only at Salt Lake, and none in the area, and that they had no facilities to set up machinery (R. 231); that they could not transport a caterpillar of overall width (R. 232), and that he would have to make extraordinary arrangements for unloading anything over 5 tons out of the Salt Lake area (R. 233).

No one appeared for or testified for Uintah Freight Lines, one of the appellants here.

ARGUMENT

I.

THERE IS ABUNDANT COMPETENT EVIDENCE IN THE RECORD TO SUSTAIN THE COMMISSION'S FINDINGS AND ORDER THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE EXTENSION OF APPLICANT'S AUTHORITY.

We feel that the first four Assignments of Errors reached by the plaintiffs raise but one question; i. e., is there sufficient evidence in the record to sustain the action of the Commission. We will therefore treat plaintiffs' first four points under this one heading.

Regardless of the generalizations of plaintiffs, it is respectfully submitted that on the whole record there is an abundance of substantial evidence to support the Commission's findings and order. The long line of this Court's decisions, the last of which seems to be the Goodrich case, makes useless the citation of authority for the proposition that the Commission's findings will not be disturbed unless not based on any substantial evidence. None of the generalizations mentioned is a substitute for the unanimous findings of a Commission experienced in the matters which are the subject of this case.

At this juncture we wish to point out that plaintiffs indulge in an inconsistency when, on page 12 of their brief they quote the report of the Commission which states public convenience and necessity require transportation between points *in Utah* where the *origin or destination* of the movement is

in Uintah, Duchesne, Grand, Carbon, Emery, Wayne and San Juan counties, basing its order thereon, and then on page 13 state that "the Commission made no finding that any area of the State of Utah other than Wayne County required the service of Guy Prichard outside his original six counties.

Before discussing other parts of plaintiffs' brief and the cases involved, we suggest at this point that the Goodrich case, cited on p. 15 of plaintiffs' brief with approval, is (1) not analgous to our case and (2) does not support plaintiffs' theory that the Commission should give existing carriers first chance to satisfy convenience and necessity. This Court is thoroughly familiar with the case, and we simply point out that a contract carier problem was involved there, not a common carrier problem as here. Furthermore, it was obvious that granting contract carrier permits to serve only four shippers was not in the public interest, which required the broader service supplied by a common carrier. Even though the Uintah Freight Lines offered to furnish additional service *after* the applicants had filed their petition, the Commission sustained the Uintah's protest, and this Hon. Court upheld the Commission's refusal to grant the authority requested, the Court saying:

"The Commission is in a much more favorable position to determine the benefits and detriments of the two competing systems than is this court."

The same Uintah line, which espoused that decision upholding the wisdom of the Commission's decision, now would ignore and discount the quoted passage and prefer to say, as it did in its brief on page 8 that the "Protestants have taken the po-

sition that these (17 temporary permitted granted to Prichard) were *wrongfully* issued by the Commission and that such do not constitute any evidence of convenience and necessity." This is the same sort of inconsistency as heretofore mentioned.

As to the plaintiffs' contention that existing carriers should have first chance to satisfy the requirements of convenience and necessity (p. 16 Brief), our Court has spoken on the subject, not in the Goodrich case, but in *Salt Lake & Utah R. Corp. vs. P.S.C.*, 106 Ut. 403 P(2) 647, 1944, when it said:

"Whether or not the existing common motor carrier should have been given a further opportunity to furnish the required services before allowing a competing motor carrier to enter the field is a matter of policy which is entirely within the province of the Public Service Commission."

On p. 16 of plaintiffs' brief a quotation from *Utah Light & Traction vs. P.S.C.*, 101 Ut. 99, 118 P(2) 683, is set forth, apparently to convince that our Court is committed to a principle that if there is existing adequate service, there should be no duplication thereof by granting new authority. Attention is respectfully called to the language quoted and the significant phraseology that condemns a duplication only that "*unfairly interferes*" with existing carriers. In our case the Commission most obviously found that there would be no unfair interference with existing carriers. We can agree with counsel's own statement on p. 17 of the brief, that factually, the very case they cite with approval presents "not at all the problem which faces the Commission and the Court in the case at bar." Better had counsel quoted other excerpts from the case, such as:

“The paramount consideration is the benefit to the public, the promotion and advancement of its growth,”
and:

“If the Commission’s determination finds justification in the evidence, it is not a law question and we cannot review or modify it or set it aside,”
or:

“True, existing carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service. The public interest is paramount.”

Obviously the Public Service Commission adopted the philosophy of the language last quoted, based upon the evidence before it.

A word must be said about *McCarthy vs. P.S.C.*, 111 Ut. 489, 184 P(2) 220, cited by plaintiffs. We respectfully submit that this case is not in point. All of the evidence conclusively indicated that the applicants wanted to continue as, and intended to hold themselves out as contract carriers, not as common carriers, but made their application for common carrier rights under a mistaken belief that they were required so to do in order to comply with the law and perform the strictly contract carrier duties they had been pursuing. There is no semblance of similarity in fact or fancy to our case, there being a complete absence of evidence to support applicants in the McCarthy case. The language of the Court seemed to indicate that there may have been a different result had the applicants, like Prichard, expressed a willingness and ability to perform the requested service. The Court quoted approvingly from *Fuller-Topance vs. P.S.C.*, 99 Ut. 28, 96 P(2) 723, with respect to necessity and convenience, in apparent disagreement with

plaintiffs' contention that present adequacy of service should eliminate granting of any new authority, when it said:

"But a service is not necessarily adequate because the community can 'get by,' can conduct its business without further or additional service. To be adequate the services must meet the requirements of the public convenience and necessity in such a way that the needs, growth and welfare of the community are reasonably met and supplied."

It is submitted that there is ample evidence in our case upon which the Commission's findings can be sustained, from the standpoint of the needs, growth and development in the Eastern Utah area.

On pp. 23-24 of their brief, plaintiffs have unwittingly made an inaccurate statement not supported by the record. After stating that the protestants introduced testimony that their service had been satisfactory, counsel states that all of the evidendce indicated such protestants were able to render additional services within the area. Attention is directed to the fact that Uintah Freight Lines, appellant here, had neither counsel nor other representation at the hearing, and offered no evidence whatever, except by filing a financial statement and list of equipment.

In passing, reference to language in *Mulcahy vs. P.S.C.*, 101, Ut. 243, 117 P(2) 298, may be apropos in generalizing as to the attitude of this Court toward (1) review of the Commission's findings, (2) convenience and necessity, and (3) whether existing carriers should have any pre-emptive rights:

"It is not required that the facts found by the Commission be conclusively established, nor even that they be shown by a preponderance of the evidence. If there is in the record competent evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such fact finds justification in the evidence and we cannot disturb it.

"The statute should be so construed and applied as to encourage rather than retard mechanical and other improvements in appliances and in the quality of the service rendered the public, and should look to the future as well as the present, providing not only for present urgent need, but such as may be reasonably anticipated from the probable growth of population, industry and community development.

"Having given due consideration to those matters the Commission determines whether the existing carriers or a new one should be permitted to render the proposed service. If the Commission's determination finds justification in the evidence, it is not a law question and we cannot review or modify it or set it aside."

And apropos of plaintiffs' implied contention that Prichard should not be allowed enlarged authority because of interference with plaintiff's rights, our Court in *Union Pacific vs. P.S.C.*, 103 Ut. 459 135 P(2) 915, stated:

"In the exercise of its power to grant or withhold certificates of convenience and necessity, questions of impairment of vested or property rights cannot very well arise. No one can have a vested right to be free from competition, to have a monopoly against the public. And unless some justifiable question arises, unless some point is juridically present, this court will not substitute its judgment for that of an administrative tribunal, charged by law with carrying out matters of non-judicial character."

A point is made in plaintiffs' brief that since no witnesses appeared from many counties in Utah, there is no evidence of need for any service in such counties. Counsel might as well have said that there were no witnesses from the hundreds of cities and towns in Utah and therefore authority to haul to such cities and towns could not be granted because of lack of evidence. The Commission, through its experience and from facts presented to it, is justified in making orders that apply to areas of the State—in this case, the area represented by the counties in which Prichard has heretofore been confined, as related to the area of the State outside the ambit of his former authority. The Commission may authoritatively conclude that service into an area from various points outside the area justifies the granting of authority to cover contiguous or similar points outside the area, to satisfy a public need and convenience. There is testimony in our case, given by competent witnesses, whom the Commission is entitled to believe, that public convenience would be served if Prichard's authority were extended to include movements originating in the Eastern Utah area, destined for points generally situated outside the area, and to include movements originating generally outside of the area, destined for points inside the area. Such testimony, coupled with all other evidence adduced, justifies the Commission in designating the counties within which Prichard may initiate movements, for consignment outside said counties, and in designating all other counties of the State as points where a movement may initiate providing its destination is found in the counties assigned to Prichard. Any other interpretation, as has been suggested, would burden an applicant with the necessity of bringing witnesses not only

from each county, but from each city, town and hamlet in the State.

Plaintiffs refer on p. 14 of their brief, to Sec. 76-5-18, U.C.A 1943, which states what the Commission may do in a given case, included in which is a discretionary authority to issue certificates for less authority than that requested. The Commission exercised such discretionary authority in this very case. Prichard asked to extend the circle of counties in which he could operate to Daggett, Wayne, Piute, Garfield, Sanpete, Kane, Sevier and Wasatch. The Commission denied such request with respect to 7 of the 8 counties requested, granting permission only in Wayne County. It is respectfully submitted that the Commission must have weighed the evidence carefully, and the contention of plaintiffs that the Commission acted arbitrarily and capriciously in this case, has no merit. Had its decision been arbitrary and capricious, there seems to be no logical reason why it should have excluded the seven counties mentioned.

II.

THE COMMISSION DID MAKE A FINDING AS TO THE ADEQUACY OF THE TRANSPORTATION SERVICE PRESENTLY RENDERED AND AVAILABLE TO THE PUBLIC.

We think it should be pointed out that the authority granted to the applicant involves the transportation of commodities requiring special handling and that the record clearly

shows that this service is not furnished by the regular common carriers operating in the territory involved.

Plaintiffs quote a portion of 76-5-18 Utah Code Annotated 1943, and contend that the Commission failed to make a finding that the existing transportation facilities are inadequate. We think it proper to quote more extensively from that section in order to show what is required of the Commission thereunder.

“ * * * Before granting a certificate to a common motor carrier, the commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the travelling public using the same, and also the existing transportation facilities in the territory proposed to be served. If the Commission finds that the applicant is financially unable to properly perform the service sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the people of the state of Utah, the commission shall not grant such certificate.”

The Commission found that there is a considerable demand for the transportation facilities covered by the authority granted to the applicant and that the highways over which applicant proposes to operate are not unduly burdened with traffic and that the granting of the application, as restricted, will not be detrimental to the best interests of the people of the State or the territory affected (R. 22). We submit that these Findings amply satisfy the requirements of Section 76-5-18. That section

does not require an express finding that existing facilities are inadequate. It does require that the Commission take into consideration the adequacy of such facilities, which they obviously did. However, the Finding of the Commission that there is an unsatisfied demand and that the highways are not unduly burdened and that the granting of the application will not be detrimental to the best interests of the public, is in fact a finding that the existing facilities are inadequate. If they were adequate there would be no unsatisfied demand.

CONCLUSION

In conclusion, we respectfully submit that an examination of the record, in light of all the circumstances and evidence, and a review of the authorities our own court has handed down, lead inevitably and unequivocally to the conclusion that the Commission did not err in granting to Prichard the restricted authority reflected in its order in this case.

Respectfully submitted,

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