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Uintah Freight Lines and Eastern Utah Transportation Co v. Public Service Commission of Utah and Ashton's, Inc. : Brief of Respondents

Utah Supreme Court

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L. C. Montgomery; Skeen, Thurman & Worsley; Attorneys for Defendant; Clinton D. Vernon;
Question L. R. Alston; Attorneys for Defendant;

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IN THE SUPREME COURT

of the

STATE OF UTAH

UINTAH FREIGHT LINES and
EASTERN UTAH TRANSPORTATION COMPANY,

Plaintiffs (Appellants),

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, and ASHTON'S,
INCORPORATED,

Defendants (Respondents).

DEFENDANTS' (RESPONDENTS') BRIEF

L. C. MONTGOMERY and
SKEEN, THURMAN &
WORSLEY,

*Attorneys for Defendant
(Respondent),*

Ashton's, Incorporated.

CLINTON D. VERNON,
Attorney General,

and

QUENTIN L. R. ALSTON,
*Assistant Attorney General,
Attorneys for Defendant
(Respondent),
Public Service Commission.*

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DEFENDANTS' (RESPONDENTS') BRIEF

STATEMENT OF FACTS

The opposition (appellants), in their brief, have designated themselves as "plaintiffs", and the Public Service Commission and Ashton's Inc. (respondents), as "defendants." In order to avoid confusion, respondents, in their brief, will use the same designations.

Plaintiffs' statement of facts, except for a few inaccuracies and inadequacies, is substantially correct and sufficient for a review of the action of the Public Service Commission of Utah in granting defendant, Ashton's, Incorporated, a corporation, a contract motor carrier permit, against the protest of the two named plaintiffs in this proceeding.

At the outset of their brief, plaintiffs state that they obtained a writ of certiorari to review the action of the Public Service Commission in granting the contract motor carrier permit involved herein, over the objections of plaintiffs *and others*. But the writ, it will be noted, was applied for by and in behalf of, and was granted to, the Uintah Freight Lines and Eastern Utah Transportation Company only. None of the other protestants joined in, or was a party to, plaintiffs' petition, or was included in the writ granted plaintiffs by this court. (R. 119-121; 122.) Hence, any reference to the other protestants, including Ashworth Transfer Company, a partnership, and Salt Lake Transfer Company, a partnership (who, at one stage of the instant proceedings, objected to the granting of the application involved herein, were also protestants), or to the stipulation entered into that those two partnerships were (to quote from page 4 of plaintiffs' brief) "common carriers with operating authority and adequate equipment at all times to transport required commodities, including cement, between Devil's Slide and Heber City, Roosevelt, and Vernal, Utah," is wholly immaterial to the issue now before this Court. Neither they nor any other protest-

ants, except only Uintah Freight Lines and Eastern Utah Transportation Company, now complain of the granting of the contract motor carrier permit under consideration.

On page 5 of their brief, counsel, presumably with the intention of showing generally the nature and scope of the mercantile interests of the Ashton family in Heber City and the Uintah Basin, quote part of one paragraph (without indicating its incompleteness) and the whole of another paragraph of the findings of the Public Service Commission herein. (R. 105.) The language quoted, however, is too limited to adequately reflect the full nature and scope of the Ashton interests and their methods of transporting merchandise into eastern Utah, and particularly the Uintah Basin, one of the largest areas located in any of the western states not served by rail. Accordingly, for the convenience of all concerned, we again quote from the Commission's findings the whole of the language quoted by the opposition (which language we italicize), and also the language immediately preceding, as far back as the last paragraph on page 103 (Commission's Findings, R. 103-105):

“That the said Mrs. Leslie Ashton is the surviving wife of Leslie Ashton, deceased, and that she and said deceased are the mother and father, respectively, of the said Clarence L. Ashton, Rae Ashton and Lowe Ashton; that in about the year 1898, said deceased as an individual, established a mercantile business in Vernal, Utah, and continued to operate said business, as an individual or as a partnership with one or more of

his said sons, until the time of deceased's death in about the year 1930, and, in said operations, said deceased and his said sons also established mercantile stores in Roosevelt and Heber City, and a gasoline service station in Vernal, Utah; that between the time of the death of said deceased, in about the year 1930, and the year 1943, said mercantile stores and said gasoline service station were owned and operated by said three sons and the said Mrs. Leslie Ashton, as partnerships or as corporations; that in the year 1943 said joint holdings were partitioned between said individuals, said mercantile store in Vernal being taken over by the said Rae Ashton, said gasoline service station in Vernal, by said individuals, in equal shares, said mercantile store in Roosevelt, by the said Clarence L. Ashton, and said mercantile store in Heber City, by the said Lowe Ashton. That no carrier service was available during all the period of the early growth and development of these enterprises.

“That at all times since the establishment of said mercantile business in Vernal, Utah, by the said Leslie Ashton, in about the year 1898, and the subsequent establishment of the mercantile stores in Roosevelt and Heber City, and the gasoline service station in Vernal, Utah, by said deceased and members of his immediate family, said deceased or one or more of his said three sons, as individuals, or as partnerships, or as corporations, by means of a team and wagon, or by motor vehicle, have hauled, and applicant is now hauling, from points outside of the Uintah Basin and Heber City to Heber City, Roosevelt and Vernal, Utah, practically the whole of the merchandise and commodities sold and handled at said Ashton mercantile stores, located at Heber City, Roosevelt and Vernal, Utah, and at said

gasoline service station located at Vernal, Utah, and that none of the protestants in this case has ever hauled, or is now hauling, any of said merchandise or commodities, except in very small and minor quantities. That the business practices and success of the various Ashton enterprises have been established under this method. *That applicant proposes to perform said contract motor carrier service in substantially the same manner and to the same extent, and for the same interested parties located in Roosevelt and Vernal, as said service has been performed, and is now being performed, by applicant and other members of the Ashton family, as individuals, or as partnerships or corporations wholly owned by members of said family, during the past fifty years. That even now, despite the various corporate interests, these Ashton mercantile stores are operated more or less as one large enterprise — purchase jointly, advertise jointly, and ship by railroad and motor vehicle jointly.*

“That there is no evidence of willful intent to violate the law during the many years that Leslie Ashton, deceased, or one or more of his said three sons, as individuals, or as partnerships, or as corporations, have transported merchandise from Salt Lake City to Heber City, Roosevelt and Vernal, Utah, serving the Ashton mercantile stores and gasoline service station, located in said cities, and the commission has treated the operations as private hauls.”

ARGUMENT

The three points relied upon by plaintiffs as error, will be discussed in the order in which they are considered in plaintiffs' brief. (Plaintiffs' Brief, p. 8.)

POINT I.

ALL THE EVIDENCE ESTABLISHES THE ADEQUACY
AND REASONABLENESS OF EXISTING SERVICE.

As stated by plaintiffs (p. 6, their brief), the Commission, in its report herein, found (R. 108):

“that existing transportation facilities do not provide adequate or reasonable service to meet the requirements of the three shippers (Leslie Ashton & Sons in Roosevelt, Utah, Ashton Oil & Gas Company and Ashton Brothers Company in Vernal, Utah) for which applicant proposes to serve as a contract carrier,”

and, presumably, supported such general finding by the three specific findings quoted on pages 6, 7 and 8 of plaintiffs' brief, and found in the Record herein at pages 106 and 107.

It is interesting to note that plaintiffs did not attack, or make any complaint whatsoever against, the three specific findings made by the Commission; nor did they point to a single word or line of the three specific findings as not being supported by the evidence introduced at the hearing before the Commission. Plaintiffs contented themselves with breaking up Point I into three categories, identifying them as (a), (b) and (c), and considering them separately, each category with extreme brevity. We earnestly assert that within the first two of the three findings, quoted in plaintiffs' brief, sufficient facts are found, affirmatively estab-

lishing that the service rendered and made available by *plaintiffs* to the three shippers (which service did not include the hauling of cement from Devil's Slide to Roosevelt and Vernal) was not reasonably adequate to meet the shippers' requirements. It would indeed have been an easy matter for plaintiffs to have pointed out any finding not supported by the evidence, had there been no evidence to support such finding.

For the convenience of the Court, we quote the first two of the three findings in question, omitting the third finding which deals wholly with the hauling of cement from Devil's Slide, a point not served by either of the two plaintiffs and not an issue in this proceeding:

“That applicant, in the conduct of its general hardware store and lumber yard at Heber City, maintains a warehouse, and keeps on hand therein quantities of hardware, and cement, lumber and other building materials, sufficient to meet its own needs, and the emergency demands made by customers upon said three shippers, located at Roosevelt and Vernal; that said emergency demands frequently arise and are phoned in to applicant by said shippers, and that applicant is able to and does transport to said Roosevelt and Vernal, within a matter of three to four hours, the merchandise necessary to meet said emergency demands.

“That said two Ashton mercantile shippers, located at Roosevelt and Vernal, sell large quantities of fresh meats, fruits and vegetables, which are highly perishable; that applicant, in the transportation of said commodities from Salt Lake City to Roosevelt and Vernal, has made,

and is now making, three trips weekly, leaving Salt Lake City in mid afternoon, and arriving in Heber City in the early evening, and in Roosevelt and Vernal at approximately 8 and 9 o'clock P.M., respectively, on the same day; that upon arriving at destination, applicant unloads said merchandise and places the same after business hours, in refrigerators and coolers located in the stores of said two Ashton mercantile shippers, and that by such means said merchandise is adequately preserved and can be made ready for display and sale at the time of the opening of the stores on the following morning. This practice has continued for a long period, and the business methods of the parties have been built upon this system."

(a)

In the first category considered, identified as (a), it is asserted that no authority was needed from the Public Service Commission for applicant to haul hardware, cement, lumber and other materials to Roosevelt and Vernal, Utah, from applicant's yard at Heber City, and this for the reason that when making such hauls, applicant was moving its own merchandise. That very issue, plaintiffs state on page 11 of their brief, was argued by their counsel during the progress of the hearing. They quoted the following language of counsel, found in the Record at page 629:

" * * * If Ashton's, Inc., as witness is testifying (referring to testimony of C. L. Ashton) is a distributor of merchandise and is distributing its own merchandise that it buys and pays for,

there is no need of this application. He would be carrying his own goods over the highway.”

The above quoted argument of counsel, appearing in plaintiffs’ cross-examination of C. L. Ashton, the principal owner of the corporate stock of the shipper at Roosevelt, Utah, and relating to an objection made by applicant to plaintiffs’ asking the witness to whom he would look for payment if loss occurred to merchandise while being hauled en route from Heber City to Roosevelt, is followed by an attempt on the part of plaintiffs to interpret the testimony of that witness. In making such attempt, they state, again on page 11 of their brief:

“And immediately thereafter that witness (C. L. Ashton) testified that in the event of loss in transit he would expect Ashton’s, Inc., to pay for the material because it wouldn’t be his (C. L. Ashton’s) material yet.”

An examination of the whole of the Record, as made during the cross-examination of C. L. Ashton, permits of no such interpretation. Rather than give our own views as to what the witness said or meant, we quote at some length from the Record, beginning on page 629, and immediately following the above quoted argument of plaintiffs’ counsel:

“MR. THURMAN (Counsel for applicant):

“And it is very obvious, and positively testified to in this case that Ashton’s, Inc. is a mercantile institution, and it also seeks an application to haul as a contract carrier. It may do both

if this application is granted. It may sell its own merchandise, retail or wholesale or in any way it sees fit. And it may also, if this application is granted, of course, haul for other shippers."

"COM. HACKING:

"The objection will be overruled. Do you recall the question, Mr. Ashton?"

"THE WITNESS:

"About who would pay for the freight?"

"MR. RICHARDS:

"No."

"COM. HACKING:

"In the event of the fire."

"THE WITNESS:

"Yes."

"A. I would expect Ashton's, Inc. to pay for it, — they are hauling it."

"BY MR. RICHARDS (Counsel for plaintiffs):

"Q. That is, it would be— Well, let's put it this way: That is, you would not expect to pay for it?"

"A. No."

"Q. You didn't get it, did you?"

"A. That's right."

"Q. And inasmuch as you are paying Ashton's, Inc. for the material, you would expect them to deliver it at your place, and if they didn't deliver it, why, it wouldn't be your material?"

“A. That’s right.”

“MR. RICHARDS:

“That’s all.”

Plaintiffs’ interpretation of the effect to be given to the cross-examination of the witness, C. L. Ashton, on the point in question, is grounded on the last question of plaintiffs’ counsel and the witness’ answer thereto, quoted above. The answer simply meant that if Ashton’s, Inc., the applicant, lost the merchandise en route and failed to make delivery of it in Roosevelt, the witness would not expect to pay for the merchandise. He might well have added that neither would he have expected to pay applicant any of the hauling charge between Heber and Roosevelt. No layman could be expected to reach any other conclusion.

The subject matter of the remarks of counsel and the testimony, above quoted, had to do with the method of handling pooled railroad car shipments at Heber City by the Ashton brothers, for their respective corporations. The several corporations, one (applicant) at Heber City, another at Roosevelt and two at Vernal, would join together and buy in carload lots, paying their pro rata share of the freight expenses when the material was not billed f.o.b. Heber. Reference was made in the testimony to a shipment received from Morrison - Merrill, originating, the witness supposed, somewhere out of the state. Each of the several shippers, including applicant, was invoiced direct by Morrison-Merrill for its share of the merchandise. The following

questions put by plaintiffs' counsel, and the answers made thereto by the witness on cross-examination, beginning on page 624 of the Record, make very certain that applicant, in hauling to Roosevelt a portion of the merchandise received by it in a pooled railroad car at Heber City, was acting as a carrier of freight for hire and not as one moving its own merchandise:

"Q. How did you pay for your portion, on invoice to you or to Lowe?

"A. On invoice to me.

"Q. Lowe is Ashton's, Inc.

"A. That's right.

"Q. And the invoice to you was direct to you from Morrison-Merrill?

"A. That's right.

"Q. Did you see a bill of lading

"A. No.

"Q. And yet the invoice was to you?

"A. That's right.

"Q. Did you pay the freight?

"A. I did not.

MR. THURMAN (Counsel for applicant):
You mean to Heber?

"A. *I paid the freight from Heber to Roosevelt.*

"Q. But you did not pay any freight on the pooled car?

"A. I haven't up to date I know of.

“Q. Well, is the price — is Morrison-Merrill’s price f.o.b. Heber?”

“A. That is my understanding on that particular shipment. I would have to assume that until such time as I had freight bills showing it was f.o.b. some other point.”

Applicant not only operates a large mercantile business in Heber City, but also hauls merchandise for hire for the Ashton interests located at Roosevelt and Vernal, Utah, the merchandise handled originating at Salt Lake City and Provo as well as Heber City. The nature of applicant’s operations is shown throughout the testimony of Lowe Ashton, the principal owner of the corporate stock of applicant. As to the merchandise received by applicant from the railroad at Heber City, Mr. Ashton testified at considerable length. On page 202 of the Record, we find this question and answer:

“Q. In any event, you distribute that merchandise yourself, that portion of it that belongs to your company in Heber, and that portion that belongs to Leslie Ashton and Sons Company at Roosevelt, — you carry — that is, your corporation carries to Roosevelt, and likewise you give the same service to Vernal for the Ashton Brothers, Inc.?”

“A. We do.”

The number of carloads of freight handled by applicant at Heber City in the year 1948, the last full year prior to the hearing, was 137 (R. 200).

On page 217 of the Record, we find the following testimony of the witness, Lowe Ashton:

“Q. Now, do you, in order to accommodate the demands of the two merchants — or, that is, the one corporation in Roosevelt and the two corporations in Vernal, — does your company carry some fill-in orders?

“A. Stock in Heber?

“Q. Yes.

“A. Oh, yes, we carry a large jobbing stock in Heber.

“Q. And does that enable you to make prompt and quick shipments to Roosevelt and Vernal when the demand is made?

“A. It saves us as much as a day.

“Q. And does a day mean something occasionally?

“A. Yes sir.

“Q. Do you maintain a supply of building material here (Heber City) on hand?

“A. Yes sir.

“Q. For that very purpose?

“A. Yes sir.

“Q. And is there a common carrier that could expeditiously handle that building material and put it over in Roosevelt and Vernal as you are able to handle it?

“A. Well, I am sure there isn't, because the common carrier's schedule goes through here in the night after we would be closed.”

Again quoting from the testimony of Lowe Ashton, beginning on page 335 of the Record, as follows:

“BY MR. THURMAN:

“Q. Now, you have referred to maintaining certain quantities of merchandise stocks on hand at Heber. That, I think you said, was purchased by you and kept there. Is that correct?

“A. It is on hand by Ashton’s, Incorporated.

“Q. Yes. Now, do you ever have calls for the sale of that merchandise from your brothers’ store at Roosevelt and your brothers’ store at Vernal?”

(This question was objected to on the ground that it was repetitious, Commissioner Hacking remarking, “I think he testified from the outset that he did warehouse goods at Heber, and that he loaded goods from that warehouse.”)

Continuing, from page 336 of the Record:

“Q. Now, if merchandise is ordered from you by noon or early afternoon, on a given day, from Roosevelt, when do you get that into Roosevelt?

“A. Well, if he needs it he will have it that night. If he needs it today, he will have it that night.

“Q. And is that true with Vernal, also?

“A. Yes sir.”

There is ample testimony, we submit, to establish the existence of a definite need for a certificated contract carrier service from Heber City to Roosevelt and Vernal, for the transportation of merchandise arriving by rail at Heber City and invoiced for immediate distribution to the three shippers in the Uintah Basin, or to be held in stock by applicant for sale and distribution to them as and when call is made.

(b)

The second category under Point I of plaintiffs' brief, indentified as (b), is directed to the finding of the Commission that Ashton Brothers, Inc. (at Vernal), and Leslie Ashton and Sons Company (at Roosevelt), require the particular service made available by applicant in order to transport fresh meats, fruits and vegetables. The finding, dealing with this matter, is the second of the two special findings heretofore quoted. As a matter of convenience, we again quote that finding:

“That said two Ashton mercantile shippers, located at Roosevelt and Vernal, sell large quantities of fresh meats, fruits and vegetables, which are highly perishable; that applicant, in the transportation of said commodities from Salt Lake to Roosevelt and Vernal, has made, and is now making, three trips weekly, leaving Salt Lake City in mid afternoon, and arriving in Heber City in the early evening, and in Roosevelt and Vernal at approximately 8 and 9 o'clock P.M., respectively, on the same day; that upon arriving at destination, applicant unloads said merchandise and places the same after business hours, in

refrigerators and coolers located in the stores of said two Ashton mercantile shippers, and that by such means said merchandise is adequately preserved and can be made ready for display and sale at the time of the opening of the stores on the following morning. This practice has continued for a long period, and the business methods of the parties have been built upon this system."

A brief reference to the testimony will disclose that there was ample evidence to support that finding.

The element of time, in transporting merchandise from point of origin to point of destination in the Uintah Basin, it was testified, is an important factor in enabling the two mercantile institutions at Roosevelt and Vernal to serve the public. We quote the following redirect testimony of Lowe Ashton, the principal corporate stock owner of applicant, beginning on page 322 of the Record:

BY MR. THURMAN:

"Q. Now, Mr. Ashton, do you haul any meat, do you propose to haul any meat, and have you been hauling meat for the Vernal store and the Roosevelt store from Salt Lake City?

"A. We do.

"Q. Fresh meats?

"A. Fresh and cured, both.

"Q. Now, where do you pick that meat up at in Salt Lake City?

"A. From Cudahy's delivery truck.

"Q. Where would that truck be?

“A. Well, he has, I believe, a set delivery that meets our truck about one o’clock.

“Q. One o’clock about three times a week?

“A. Yes sir.

“Q. And the meat which you carry to Roosevelt, how do you handle that?

“A. Well, we load all of the meat on approximately the last item we do load, and we carry it through on the regular freight truck, and unload it in Roosevelt or Vernal.

“Q. Now, when do you reach Vernal with that truck?

“A. Oh, between nine and ten p.m., average.

“Q. That is Vernal?

“A. Yes sir.

“Q. Between nine and ten of the day you pick up, up around some time after noon?

“A. About one.

“Q. And then is the Vernal store open at that time?

“A. Well, they have a night man at each of the stores.

“Q. Vernal and Roosevelt?

“A. Yes sir.

“Q. And what is done with that meat upon its arrival in Vernal?

“A. It requires refrigeration immediately, in the refrigerator.

“Q. Of course, meat is a perishable article, isn’t it?

“A. It is.

“Q. And if it were left in a truck over night, what would be the result?

“A. Well, in the summer it would have a good chance to spoil.

“Q. So you put it right in the refrigerator the night it gets to Vernal; is that correct?

“A. Yes sir.

“Q. And just as soon as it gets there?

“A. Yes sir.

“Q. Now, what time does your truck reach Roosevelt?

“A. About eight to nine.

“Q. In the evening?

“A. Yes sir.

“Q. Between eight and nine in the evening; and does the store at Roosevelt handle a considerable quantity of meat?

“A. Yes; they handle more fresh meat than Vernal by truck.

“Q. And how do you take care of that upon arrival in Roosevelt between eight and nine at night?

“A. Put it in the refrigerator.

“Q. Right at the store?

“A. Yes sir.

“Q. Is there a night man there to assist in that work?

“A. Yes sir.

“Q. And you have already stated that the common carrier truck arriving in Vernal and Roosevelt is on the day following pick-up in Salt Lake City?

“A. Yes sir.

“Q. Now, what portion of the merchandise that you contemplate hauling for the three corporations, two in Vernal, one in Roosevelt—what portion of that, based on your experience, will be made up of the heavier materials such as cement and lumber?

“A. About fifty per cent.

“Q. About fifty per cent would be lumber and cement; is that correct?

“A. Of our total freight we haul.

“Q. Yes?

“A. Between fifty and sixty per cent.

“Q. I see. And what would the percentage be on the balance, say forty or fifty per cent of the balance, would be made up of groceries and other merchandise, wouldn't it?

“A. Yes.

“Q. And what per cent of that forty or fifty per cent would be made up of groceries?

“A. Well, maybe I could answer better by giving you one specific truck that we run on Monday, Wednesday and Friday.

“Q. All right, go ahead.

“A. That truck hauls the intrastate freight. That would include hardware and dry goods and some building materials, groceries, and fruit and

vegetables, and I usually figure that that load is going to run from seventy—from sixty-five to seventy-five per cent groceries and perishable fruit and vegetables. Is that what—?

“Q. Yes. Sixty-five to seventy-five per cent groceries and perishable fruits and vegetables; is that correct?

“A. Yes, that is.”

Again, from the direct testimony of C. L. Ashton, beginning on page 583 of the Record:

“Q. Now, where do you purchase your meats?

“A. Some of our meats locally, in and about Roosevelt; but beef and cured meats are all purchased, practically exclusively, from Cudahy’s, with some small fraction coming from American Packing Company.

“Q. And how is it hauled to you at Roosevelt from Cudahy and the American Packing Company?

“A. By Ashtons, Inc.

“Q. When is that merchandise picked up in Salt Lake City or in Ogden?

“A. Well, today is a typical example—this is the day they pick it up. I would say it would be picked up here around one or two o’clock today, or in that neighborhood, just before the truck would leave.

“Q. That would be on Monday?

“A. Yes sir, that is today.

“Q. And when will that merchandise be delivered to you at Roosevelt?

"A. Approximately eight o'clock tonight.

"Q. Approximately eight o'clock tonight?

"A. Yes sir.

"Q. What is done with it when it reaches Roosevelt?

"A. We have a night man, and it is taken off the truck and put in the cooler.

"Q. Is your store closed at that time to the general public?

"A. Closed at six o'clock.

"Q. But upon its arrival around eight o'clock it is taken off by the night man?

"A. All of our meat is taken off by the night man.

"Q. And what is done with that by the night man?

"A. Placed in refrigeration.

"Q. In your place of business?

"A. Yes sir.

"Q. If it were allowed to remain on the truck over night, would that be detrimental to your meat business?

"A. If it was warm weather or extremely cold, either one, would be hazardous for the spoilage of meat.

"Q. What would the effect of extremely cold weather have on it?

"A. Meat shouldn't be frozen and then thawed.

“Q. This meat you purchase, when you get it from Cudahy, has it been frozen?

“A. No sir, it is just well chilled.

“Q. So it should not be frozen thereafter?

“A. Meat can't be frozen and then thawed out and placed back in refrigeration and have good meat.

“Q. And of course, what effect would extremely warm weather, or summer weather, have on meat carried on a truck through the night?

“A. You would get a sweaty, slimy condition in the meat, which would cause it soon to decay and rot,—spoil.

“Q. Could you remain in business and compete with your competitor if you didn't have this type of service for your meat?”

“MR. RICHARDS: I will object on the ground there is no showing that he has tried any other type of service.

“MR. THURMAN: Well, he has shown quite a bit of qualification.

“A. Well, I can answer that. I have, and I have had it delivered at five o'clock in the afternoon.—

“COM. HACKING: Just a minute, Mr. Ashton.

“MR. THURMAN: We will submit the question.

“COM. HACKING: The objection will be overruled.

“MR. THURMAN: Overruled?

“COM. HACKING: Overruled.

“MR. THURMAN: Now, just state—

“COM. HACKING: Answer the question.

“MR. THURMAN: Read the question, Mr. Johnson, if you will, please.

(Thereupon the last question was read by the reporter, as follows:)

“Q. Could you remain in business and compete with your competitor if you didn't have this type of service for your meat?

“A. Well, I guess if a person—if we went back to handling just home-grown and slaughtered meat, that it would be possible to stay in business, but we couldn't serve the public with Grade A beef that we could get out of Cudahy's unless it could be bought there and kept in a Grade A condition.

BY MR. THURMAN:

“Q. Now, after you receive meat at your place of business at Roosevelt, does it take some time to put the merchandise into your store and have it all ready for the public, your customers?

“A. Yes. Naturally you would have to unpack it and check it and mark it.

“Q. And is your night man able to put that in stock and have it ready for the public by the following morning?

“A. He doesn't do that, no sir.

“Q. He doesn't do that?

“A. No sir.

“Q. Your employees who come in the morning do that, is that correct?

“A. Yes sir.

“Q. Now, do you have other perishable shipments besides meat that you sell at your place of business in Roosevelt?

“A. Well, we don't have—we get our vegetables a little differently than Vernal, so that part doesn't affect us the same as it does Vernal.

“Q. I see.

“A. We have other perishable items, but—

“Q. What other perishable items do you have?

“A. We handle frozen foods in our locker business, and we also have the ice cream products that come in.

“Q. Do you handle vegetables?

“A. Yes.

“Q. And where do you get your vegetables from?

“A. We get most of ours from Perry Harper that come into Salt Lake, and Norton's that come into Provo. They come out there and sell it to us.

“Q. From peddlers, so to speak?

“A. Right.

“Q. So, Ashton's, Inc. doesn't haul vegetables from Salt Lake to Roosevelt for you?

“A. They haul some, but not like—

“Q. Not like they do in Vernal?

“A. No, not like they do in Vernal.”

And again, from the redirect testimony of the witness, C. L. Ashton, beginning on page 631 of the Record:

“Q. Now, you said in answer to Mr. Richards that you bought the majority of your green stuff from peddlers coming through there two or three times a week?

“A. That’s right.

“Q. Now, green stuff, of course you mean by that vegetables and perishables?

“A. Yes. Well, in food, except vegetables and fruit, I would say in the main.

“Q. From whom or how do you get the balance of your green stuff?

“A. We order the same as he does in Vernal. Things that we can’t get from these peddlers, we send in an order to the Pacific people and get it.

“Q. At Salt Lake City?

“A. And the same procedure.

“Q. And I take it Ashton’s, Inc. brings that on to you?

“A. That’s right.

“Q. And is that green stuff brought in by Ashton’s, Inc. handled in the same manner as your meats?

“A. We have a refrigerator for both vegetables and meats, separate.

“Q. So that the green stuff reaches you the night before you put it on the market in Roosevelt, is that correct?”

“A. Yes, that’s right.”

All of the witnesses called by applicant gave testimony showing the need of a type of service offered by applicant to meet the requirements of the three shippers, one located at Roosevelt, and two at Vernal, and some of those witnesses gave testimony sufficient to definitely establish that the common carrier service made available to the public by plaintiffs was inadequate to meet said shippers’ requirements.

Contrast the type of service which the record shows applicant offered to perform and which the record shows the three shippers required, with the common carrier service rendered by plaintiffs into Roosevelt and Vernal. We quote from the redirect testimony of the witness, C. L. Ashton, beginning on page 639 of the Record:

“Q. Now, are you familiar with Uintah Freight Line trucks, that is, the appearance of them as you see them on the road?”

“A. I am.

“Q. Are they identified with any lettering?”

“A. Yes.

“Q. And what is that lettering?”

“A. Well, in most instances it is “Uintah Freight Lines”, and a lot of the operations that come out there are marked “Inland.”

“Q. “Inland” or “Uintah Freight Lines”?

“A. That’s right.

“Q. Now, have you seen them operate leaving Roosevelt going easterly toward Vernal?

“A. I have.

“Q. In the early morning hours?

“A. Yes sir.

“Q. The morning hours?

“A. Yes sir.

“Q. And what time have you seen them operate leaving Roosevelt?

MR. RICHARDS: Objection; no time and place being stated,—indefinite and uncertain.

BY MR. THURMAN:

“Q. During the last few months.

MR. RICHARDS: Immaterial.

BY MR. THURMAN:

“Q. During the last few months.

COM. HACKING: What do you want to show by this?

MR. THURMAN: I want to show they leave Roosevelt late.

MR. RICHARDS: He doesn’t even know whether there is any cargo in them.

MR. THURMAN: That is all right.

MR. RICHARDS: I object to it as incompetent, irrelevant and immaterial,—and no showing as to the time and place.

MR. THURMAN: I am trying to get the time and place.

COM. HACKING: Well, the witness may answer.

MR. THURMAN: Go ahead.

“A. I see the trucks pass our place of business after I go down to work in the morning.

“Q. Have you kept any exact time as to when you saw them?

“A. I have not.

“Q. Do you see them always at the same time leaving Roosevelt?

“A. I don't. Sometimes I don't see them at all.

“Q. Well, what hours have you seen them, we will say during this year?

“A. Well, I ordinarily — I go down to work approximately somewhere in the neighborhood of seven o'clock in the morning, and I have seen the trucks go by going east after I have arrived at the store.

“Q. Do you know how late you have seen them pass your place on the way going east?

“A. No. I know that they pass after—I have seen them pass after I get to work.

“Q. And you say it is thirty miles between Roosevelt and Vernal?

“A. That's right.”

Nowhere in the testimony of plaintiffs' witnesses do we find any claim that plaintiffs' trucks could or did reach Roosevelt and Vernal before the morning of the day following the loading of the merchandise in Salt Lake City. This, applicant's shipper witnesses testified, did not enable them to meet the needs of the buying

public at Roosevelt and Vernal. And the shipper witnesses, in their testimony hereinbefore quoted, gave the particulars in which, and the reasons why, the service offered by plaintiffs was not adequate to meet the needs in question.

(c)

The third and last category under Point I of plaintiffs' brief, identified as (c), is directed to the finding of the Commission relating to emergency calls for cement in truckload quantities from Devil's Slide, Utah. The finding in question is the third of the three specific findings, to which reference has heretofore been made in this brief, and, for convenience, it is again quoted:

“That said three shippers have emergency rush calls, arising particularly from the oil drilling, and the building construction incident thereto, in the Roosevelt and Vernal areas, for cement in truck load quantities; that said commodity is highly competitive and is available, at Devil's Slide, Utah, at a slightly lower price than in the Salt Lake City market; that protestant, Uintah Freight Lines, does not operate between Devil's Slide and the Uintah Basin, and that none of the other protestants has offered to perform said transportation service between Devil's Slide and the Uintah Basin or do they have equipment stationed at any point along the route, or has stated that it was able to perform the kind of service required by said three shippers.”

We have heretofore stated that the hauling of cement from Devil's Slide to Roosevelt and Vernal, Utah, was wholly immaterial to any issue involved in the matters now under consideration. The only testimony in the record relating to carrier service available between Devil's Slide and points within the Uintah Basin has to do with the service performed by Ashworth Transfer Company, a partnership, and Salt Lake Transfer Company, a partnership, both of which had common carrier rights over practically all the highways of the State of Utah, including the highways between Devil's Slide and the Uintah Basin. Plaintiffs made reference to these rights on page 4 of their brief, stating that after the hearing had been under way for some time, "These carriers joined in the protest insofar as it involved transportation of cement from Devil's Slide, Utah, to Heber City, Roosevelt, and Vernal, Utah, and it was stipulated that these two carriers are common carriers with operating authority and adequate equipment at all times to transport required commodities, including cement, between Devil's Slide and Heber City, Roosevelt, and Vernal, Utah." While the record shows that such a stipulation was in fact entered into (R. 879-880), it is nevertheless apparent that the permit issued by the Public Service Commission, here under consideration, insofar as the granting of the right to operate between Devil's Slide and the two points in the Uintah Basin is concerned, is not now a subject for review by this Court. The two partnership carriers (Ashworth Transfer Company and Salt Lake Transfer Company)

alone had the right to complain, but neither filed a petition nor joined with plaintiffs in their petition for a writ of review. Following the granting of the permit by the Commission, none of the required statutory steps was taken to invoke the jurisdiction of this Court to review the legality of that portion of the Commission's order granting applicant a permit between Devil's Slide and the Uintah Basin.

At the outset of their discussion under this heading (plaintiffs' brief, page 17), category (c), plaintiffs state that "The transportation of cement from Devil's Slide to Heber City, Roosevelt and Vernal, is the most important item involved in the hearing." In support of this statement, they refer to the testimony of Lowe Ashton, principal owner of the corporate stock of applicant (R. 299), wherein the witness testified that the hauling of cement during the year 1948 constituted about one-half of the tonnage handled by applicant. "* * * But, despite this," plaintiffs further state on page 18 of their brief, "no request was ever made upon Uintah Freight Lines to transport cement." (R. 425.)

Presumably, plaintiffs felt that they should have had the business. The shippers, however, it is reasonable to assume, desired to make their purchases of cement at Devil's Slide, and neither of the plaintiffs had operating rights to or from that point, the Uintah Freight Lines having rights between Salt Lake City and the Uintah Basin only (R. 67, 68, 69 and 70), and Eastern Utah Transportation Company between Price

and the Uintah Basin only (R. 67 and 70). The shippers, we submit, were not limited, in purchasing their cement, to points in the territory covered by plaintiffs' certificate of convenience and necessity, one of which points was Salt Lake City. And this is so despite the inference implicit in the complaint of the plaintiff, Uintah Freight Lines, appearing at the top of page 19 of their brief. The haul which that plaintiff had in mind was from Salt Lake City—not Devil's Slide—to the destination points in question. This is made clear by the cross-examination of Ray Lilenquist, the principal owner of the corporate stock of the two plaintiff companies, in explaining why the Uintah Freight Lines got no cement haul at all in 1948. We quote from the Record, beginning on page 814:

“BY MR. THURMAN:

“Q. Did I understand you to say, Mr. Lilenquist, that in 1948 Ashtons carried cement, a large quantity of cement, and that was one of the reasons why you lost—or dropped in your tonnage in 1948 over 1947?

“A. You understood me to say that '47 we hauled quite a sizeable quantity of cement, and we didn't haul any in 1948, the reason being that the account was lost to Ashton brothers and that they hauled the cement.

“Q. In other words, it was taken by Ashton Brothers, Inc. at Vernal, where theretofore some one of your shippers had furnished it?

“A. No, I understood that Ashton Brothers, Inc. was at Heber City. It was taken by Rae Ashton at Vernal.

“Q. Ashton Brothers, Inc. is at Vernal.

“A. Well, if that is correct, why that’s right.

“Q. Now, who was the owner and seller of that cement that you handled in 1947?

“A. Well, the biggest supplier of it was the Ketchum Builders.

“Q. Ketchum Builders in Salt Lake City?

“A. Yes sir.”

It is quite impossible to understand any basis for plaintiffs’ position that upon their protest, the Commission had no right to grant a contract carrier permit to an applicant seeking to operate between Devil’s Slide and the Uintah Basin, a route not covered by plaintiffs’ operating rights, or that shippers located within the Uintah Basin were limited, in buying their cement, to Salt Lake City, Utah, simply because Uintah Freight Lines was authorized to serve the Uintah Basin from that point, but not from Devil’s Slide.

We might also add that the evidence shows that Ashworth Transfer Company and Salt Lake Transfer Company have their principal and sole places of business in Salt Lake City, Utah; therefore, by reason of that fact, those carriers could not give the expeditious service required at times by the Ashton Mercantile establishments located at Roosevelt and Vernal, Utah, for the handling of emergency shipments from Devil’s Slide to Uintah Basin. The distance from Salt Lake City to Devil’s Slide is approximately one hundred

miles, and both factors of time and expense involved in this additional mileage might make unavailable or prohibitive any dependable service from Devil's Slide.

POINT II.

THE FINDING THAT ASHTON'S, INC., DID NOT WILFULLY TRANSPORT COMMODITIES WITHOUT AUTHORITY, CAN NOT BE SUPPORTED.

At the outset of their discussion under this heading (page 19, their brief), plaintiffs state that "The report of the Commission rather gives the impression that the transportation service of Ashton's at Heber City was lawful until Ashton's, Inc., was formed in 1946," and then add, "There is no basis for this impression, as it is plain that for twenty years or so the businesses in the three towns have been separate and the fact that they were owned as stockholders or partners by the same three persons, would not identify their interests and obviate the obtaining of certificates from the Public Service Commission."

We agree with plaintiffs that whenever members of the Ashton family operated their business interests as corporations, after the enactment of Chapter 53, Laws of Utah, 1933, the transportation of their merchandise into the Uintah Basin by some member of the family, to whom the corporations paid the hauling charge, was a technical violation of the Utah Public Utility law. But we deny that in so transporting said merchandise there

was any *wilful intent* on the part of the hauler, applicant in the instant proceeding, to violate the law.

Prior to the Legislative Act of 1933, a motor vehicle acting as a carrier of freight, was identified in our law as a "motor transportation corporation", and was defined as a carrier engaged in or transacting the business of transporting freight, merchandise or other property, *for more than one person*, under contract or otherwise (Section 76-5-1, Revised Statutes of Utah, 1933), and in that year the Legislature eliminated the "for more than one person" provision and defined a contract motor carrier as any person engaged in the transportation by motor vehicle of property for hire and not included in the definition of a common motor carrier of property.

In nearly every session of the Utah Legislature since the enactment of the Public Utility law in 1917, the laws relating to the control of motor vehicles for hire, and the definitions as to what constitutes a motor vehicle for hire, have undergone changes. Little wonder that on the part of the general public, there has been more or less uncertainty as to just what this changing law was at any particular time.

Since the establishment of the mercantile institutions by Leslie Ashton in the Uintah Basin, beginning as far back as 1898, one or more members of his family (now consisting of his widow, Mrs. Leslie Ashton, and their three sons) have acted as the hauling agent for the Ashton interests. Mercantile institutions were estab-

lished at both Roosevelt and Vernal, and later at Heber City, a point outside the Uintah Basin. The kind and type of entity owning the separate institutions changed from time to time, back and forth, but the members of the Ashton family always retained proprietary control.

The right to so operate, in serving the Ashtons, without a permit so to do from the Commission, was never challenged, nor was complaint made, to or by the Commission, until shortly prior to the filing of applicant's instant application for a permit to operate as a contract motor carrier of property for the Ashton corporations at Roosevelt and Vernal, Utah. Complying with the request of a representative of the Commission, applicant filed such an application on January 30, 1948. (R. 1 and 2.)

Throughout their testimony the three sons of Leslie Ashton stated that they at all times regarded and looked upon the three mercantile institutions as a family affair. No other persons at any time had any interest whatsoever in any of the institutions operated by them in Roosevelt, Vernal and Heber City. They apparently knew, following the enactment of the 1933 Public Utility law, relating to the operation of motor vehicles for hire, if the member of the family who was hauling the merchandise at any particular time desired to haul merchandise for some outside interest, not a member of the family, that the law required the securing of a contract carrier permit from the Public Service Commission. And they complied with that law when, in 1938, after entering into

a contract with the Shell Oil Company for the transportation of that company's products from Salt Lake City to Heber City and Roosevelt, applicant filed an application for a contract carriers' permit, and, after a hearing before the Commission, permit No. 206 was granted to haul the products of the Shell Oil Company. (R. 175-176.)

But the point now under consideration in this brief is whether applicant, under all the circumstances disclosed by the record, was guilty of wilful intent to violate the Utah law. The Commission, in its report, after an extended hearing of the case, both in Heber City and Salt Lake City, made detailed findings of the manner in which the family operated and changed its operations in the towns of Roosevelt and Vernal. The findings as to such operations are contained within the two paragraphs heretofore quoted in this brief, and are followed by the paragraph in which the Commission found—

“That there is no evidence of wilful intent to violate the law during the many years that Leslie Ashton, deceased, or one or more of his said three sons, as individuals, or as partners, or as corporations, have transported merchandise from Salt Lake City to Heber City, Roosevelt and Vernal, Utah, serving Ashton mercantile stores and gasoline service station located in said cities, and the Commission *has treated* the operations as private hauls.” (R. 105.)

The finding of the Commission as to the manner in which it, the Commission itself, looked upon and regarded the transportation operations in question, with which operations it had been familiar over a long period of time, is of itself sufficient to show that there was no wilful intent to violate the law. What more could the Commission do to make clear its own attitude on the issue of wilful intent, than to find that the "Commission *has treated* the operations as *private hauls*"? Because of the practice that had been developed and followed by the members of the Ashton family in establishing and developing mercantile institutions in the Uintah Basin, and in supplying those institutions with all necessary transportation facilities, the Ashton family, quite the same as the Commission, looked upon its transportation operations as "private hauls". If the Commission so regarded such transportation operations, then how can it be said that applicant was guilty of wilful intent, if it entertained the same view?

In concluding their discussion of the question of wilful violation, beginning on page 21 of their brief, plaintiffs state "There is not one word of testimony in this very lengthy record which says that any one of the three Ashton brothers was ignorant of the requirements of the law, and that he believed that their operation complied with the law, and that a certificate was unnecessary because of the family relationship. * * *"

The record discloses that our opponents err in making such statement.

At one point in his testimony, Lowe Ashton, while under cross examination by plaintiffs, was interrogated relative to applicant's filing annual reports with the Public Service Commission. Beginning on page 280 of the Record, we quote the following:

"Q. What year is the report you have in your hand?

"A. '48.

"Q. It is '48?

"A. This only covers the equipment that is under 206 (referring to Permit No. 206, granting authority to haul Shell Oil Company products), too.

"Q. Will you show us in the exhibit—in your Ashton's, Inc. report, annual report for 1948, that you have in your hand, the profit and loss statement or operating statement that appears therein?

"A. This does not cover Ashton's, Inc., and we were requested by telephone by Mr. Stringham to not put into this report anything that pertained to the operation other than the hauling of Shell petroleum products.

"Q. Who made that request of you?

"A. Mr. Stringham.

"Q. What Stringham?

"A. Well, I believe he was secretary here, or something.

"Q. And how long ago?

"A. About three months ago.

"Q. So that the report that you filed in 1948 does not contain any account of your operations for 1948 for transportation to Leslie Ashton and Sons Company and Ashton Brothers, Inc.?

"A. No sir.

"Q. Have you made any report of that operation?

"A. No sir.

"Q. I am talking, to the Public Service Commission. You have made none to the Public Service Commission?

"A. We have made all reports the Public Service Commission has asked us to make.

"Q. Yes. That is based on Mr. Stringham's statement to you?

"A. That's right.

"Q. Was that statement in writing?

"A. No. It was over the telephone.

"Q. You called him, or did he call you?

"A. I believe he called me, but I am not sure.

"Q. Well, you would know, wouldn't you, whether you had occasion to call him on the subject?

"A. I have called and talked to the Commission at different times, and to Mr. Slaughter, but I wouldn't remember whether he called me or I called him.

"Q. When did you call Mr. Slaughter last about this subject of including the operations?

“A. I didn’t talk to Mr. Slaughter about this.

“Q. Oh, you did not?

“A. No sir.

“Q. Just talked to Mr. Slaughter about your operations?

“A. Yes.

“Q. And did Mr. Slaughter tell you whether or not it was lawful—

“A. Mr. Slaughter told us the Commission’s attitude, he thought, would be for us to go on and continue until such time as the hearing was held. We have operated that way for over a year.

“Q. And you have been operating for the last year under that arrangement. Did he tell you why a hearing was necessary?

“A. No. We just received — You mean originally?

“Q. Yes, over a year ago.

“A. Well, they were going to have a hearing on this entire case, but it would normally have been called, I guess, the first part of 1948.

“Q. Did he tell you why it was necessary to have a hearing?

“A. We presumed it was necessary because of the change in the — apparently in the change of operation, is all.

“Q. Why didn’t you file your application when you changed your operation in 1945?

“A. *We didn’t think we needed to. We were operating as we always had,* in so far as our feel-

ings toward each other were concerned, and we just didn't make a new application.

"Q. By that, Mr. Ashton, you mean that you had the same financial arrangements?

"A. I said "feelings".

"Q. Well, what do you mean by "feelings"?

"A. Well, brotherly interest, I guess.

"Q. That is, of helping each other?

"A. No, it was just going on the same way and doing—

"Q. How was it going on?

"A. We were buying together, and those things have never changed.

"Q. Your practices of buying together were the same?

"A. Yes.

"Q. And continued to be the same. What other practices continued to be the same?

"A. The practice of hauling the freight continued the same, and we continued to distribute the same type of gasoline with the same type of arrangement with the supplier. There were no changes except the financial change in our structure and our businesses."

The finding by the Commission of the absence of evidence of wilful intent to violate the law, we submit, is amply supported by the record.

POINT III.

THE COMMISSION ERRONEOUSLY HELD THAT ONLY WILFUL VIOLATIONS PRECLUDE THE GRANTING OF CERTIFICATES.

While the Commission did not expressly find, conclude or hold, as contended for by plaintiffs, that "only wilful violations preclude the granting of certificates," it is nevertheless reasonable to assume that the Commission was acting on the concept that such rule of procedure was the proper one to pursue, when it included within its Report the finding—

"That there is no evidence of *wilful intent* to violate the law during the many years that Leslie Ashton, deceased, or one or more of his said three sons, as individuals, or as partnerships, or as corporations, have transported merchandise from Salt Lake City to Heber City, Roosevelt and Vernal, Utah, serving the Ashton Mercantile Stores and gasoline service station, located in said cities, and the Commission has treated the operations as private hauls."

Nowhere in the Utah statute, relating to the granting of a permit to a contract motor carrier, is it expressly said that one who may have operated in violation of the law, even wilfully, is not entitled to and cannot receive a permit. The law itself is silent respecting past operations. The statutory requirements for the granting of a contract motor carrier permit are

set forth in the second paragraph of Section 76-5-21, Chapter 105, Laws of Utah, 1945. The paragraph reads:

**“CONTRACT CARRIER — INTRASTATE
COMMERCE — PERMIT.**

“* * *

“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.”

Each and all of those statutory requirements, the Commission found, had been met by applicant.

For use by prospective applicants the Commission maintains a supply of printed forms of application. Paragraph 9 of the form reads:

“9. That applicant will comply with all provisions and requirements of the laws of the State of Utah relative to the operation of motor vehicles for hire, and will comply with all the rules and regulations promulgated by the Public Service Commission of Utah.”

Such a form was used and sworn to by applicant in the instant proceeding when it filed its application with the Commission on January 30, 1948. (R. 2.) And upon the hearing of the application, and before ruling thereon, it was proper for the commission to inquire into and determine, and it was its inherent right so to do, whether applicant would, if granted a permit, comply with the law, and the Commission's rules and regulations. Having, from the testimony introduced at the hearing, resolved the question of "intent", the Commission found there was no evidence of wilful intent, and, obviously based upon its own experience with the Ashton operations, significantly added to that finding, that the "commission *has treated* the operations as private hauls."

Certainly, where a clear case of wilful intent to violate the law is shown, the Commission, in the exercise of its discretion, would be justified in denying an application. But the same logic that suggests such a ruling also suggests that where there is shown no wilful intent to violate the law, and where all of the specified requirements of the statute have been met, the application should be granted.

From a review of the cases and of the Commission Reports, cited and quoted from by plaintiffs (pages 22 to 29, their brief), the most that can be said is that certain regulatory commissions, including the Utah Commission, have at times, in passing on applications for certificates of convenience and necessity and for contract

carrier permits, denied the application when it was shown that applicant had operated contrary to law. All of the cases and reports cited, however, deal either (1) with an application where a wilful violation of the law is affirmatively and expressly found, or (2) with one showing prior violations with no express finding as to whether the operation was or was not carried on with wilful intent to violate the law, but always where there was, from the evidence, an inescapable inference of a wilful violation.

Only two of the Utah cases and reports cited (D. & R. G. W. R. R. v. Linck, 56 F. 2d 957, and Rowley v. P. S. C., 112 Utah 116, 185 P. 2d 514), reached the courts. None of the other Utah cases and reports proceeded beyond the Public Service Commission.

Brief reference to the cases and reports will establish that they are not in any sense in conflict with the ruling of the Commission in the instant proceeding. They will be referred to in the order of their appearance in plaintiff's brief.

Denver & Rio Grande Western Railroad Company vs. Linck, 56 F. 2d 957; Case No. 1000 before Public Utilities Commission of Utah, Commission's report dated December 26, 1928:

Plaintiffs refer to the Denver and Rio Grande case, decided by the Circuit Court of Appeals of the Tenth Circuit, and to Case No. 1000 before the Public Utilities Commission of Utah, as being the "same case." This

statement, however, is not in complete accord with the facts.

One Linck and his associates, in Case No. 1000, made application before the Public Utilities Commission of Utah for a certificate of convenience and necessity, and, on December 26, 1928, the application was denied, the Commission finding that "applicants have been operating for hire, transporting freight and express for numerous persons, firms and corporations and appear to be in violation of *Chapter 42, Session Laws of Utah, 1927*, and that such operators who violate the provisions of the State law should not be rewarded with certificates of convenience and necessity." The report of the Commission, an examination will disclose, is extremely brief, and, while it did not *specifically find* that the applicants had, prior to the filing of the application, wilfully operated in violation of the law, it did find that they transported freight for "numerous persons, firms and corporations." Had applicants' operations, prior to the filing of the application, not been in wilful violation of the law, and had all statutory requirements been met by applicants, the application, we submit, would have been granted.

Notwithstanding the refusal of the Utah Commission to grant the application, Linck himself undertook to circumvent the law, which, the case clearly shows, he intended to do, by restricting his operations to 117 consignees, who were customers of Scowcroft & Sons Company, wholesale grocers. The Railroad operated under a certificate of convenience and necessity into the ter-

ritory sought to be served by Linck, and, in an action filed by it in the Federal Court, prayed for an injunction. The trial court granted a preliminary injunction, and this determination was reaffirmed at the final hearing, with the exception that the trial court refused to enjoin the defendant Linck from operating under the Scowcroft contract. The Railroad appealed to the Circuit Court. We quote two paragraphs of the Court's opinion, affirming the granting of the injunction: (p. 960.)

"The Linck operations, subsequent to the preliminary injunction, had been restricted to 117 consignees, who were customers of Scowcroft & Sons Company. This alone is the only element which differentiates his operations from those prior to the issuance of the preliminary injunction. In all other respects his operations are similar. The fact that he ceased to be associated in interest in the operation of trucks with other defendants who purported to transport freight under private contracts is not material. The fact that there has been a restriction in the number of consignees he serves, or the limitation of the consignees to those that are customers of a particular concern, does not change Linck's operations from those of a common carrier. See Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765.

"In our opinion, the Scowcroft contract is a subterfuge employed by Linck for the continuation of the business that he was doing illegally. Had there been a bona fide contract and an operation thereunder, Linck's operations may not have fallen under those of a common carrier. It is ap-

parent that the Scowcroft contract, while in form a contract for delivery of goods to the customers of Scowcroft & Sons Company, is in substance a subterfuge by which Linck is to be permitted to continue in the operation of autotrucks for the transportation of freight in competition with appellants, who are the holders of the legal right to operate in the particular territory.”

Nothing further need be said, we feel, concerning the Linck matters. Obviously, both the Commission and the Court were dealing with a case of wilful intent to violate the law, conclusively established by the evidence.

In the Matter of the Application of M. C. West and R. A. Nielsen, and the Application of R. A. Nielsen, M. C. West and Jack Miller, Cases Nos. 975 and 985, Public Utilities Commission of Utah (June 13, 1928), 11 Utah P.U.C.R. 27:

Here again the Commission found that “applicants have been operating for hire, transporting freight and express for *numerous firms, persons and corporations*”, and again the Commission’s report is very brief. It is fair to assume, however, in view of the finding that applicants had been operating for numerous firms, persons and corporations, a wilful violation was shown.

In the Matter of the Application of J. L. Coons, Case No. 1354, Public Utilities Commission of Utah (August 16, 1933), 16 Utah P.U.C.R. 205:

The application in this case was denied for the reason “That applicant had for the prior four years operated in violation of Chapter 42, Session Laws of

Utah, 1929, in that he failed to procure a permit before commencing operations for more than one person, firm or corporation; that he failed to comply with the provisions of Chapter 17, Session Laws of Utah 1925, in that he had not filed report covering his operations for hire over the highways and paid the taxes thereon." On the question of failing to pay the taxes, assessable against his operation, the Commission's report shows that applicant stated "He would be willing to pay the tax on his operations provided other operators are required to do so." While there is no express finding as to whether applicant was or was not guilty of wilful intent to violate the law, still, we feel it is fair to assume that the Commission was of the opinion that there was evidence of that fact. It is hardly believable that had applicant's operations been bona fide, that that matter would not have been brought to the attention of the Commission. It was not for the Commission to prove that applicant's operations were bona fide; the burden was on applicant so to do.

In the Matter of the Application of Don H. Anderson, Case No. 2150, Public Service Commission of Utah (October 21, 1938):

In this case, in that portion of the report quoted by plaintiffs in their brief (page 25), the Commission stated that the applicant had testified that he had been hauling for some time without authority; that he was arrested and fined for such violation in 1937, one year prior to the hearing before the Commission; that he was

again apprehended by inspectors of the Public Service Commission on August 3, 1938, which was prior to the Commission's hearing, "but that he had not operated in violation of the law since August 3, 1938." In its findings, the Commission also found that—

"It is somewhat doubtful if there is any particular need for the service. It also appears from the evidence that the applicant has persisted knowingly on numerous occasions, both before and since August 3, 1938, in transporting commodities for hire in violation of the laws of this state and of the rules and regulations of the Commission. * * *"

Little wonder the Commission held that it was not consistent with the Motor Vehicle Act to grant authority to a person under such conditions, even though the need of the service proposed, and the other determining factors, were favorable to the granting of the application.

Decision of Public Service Commission of New York in case of in re Unauthorized Bus Operations (1941) 40 P. U. R. (NS) 40:

The portion of the holding of this case, quoted by plaintiffs (page 26, their brief), should be sufficient to bring it within the category of the other cases and reports above discussed. The Commission decided that "Hereafter no authority will be granted to an operator guilty of illegal operation at the time. That all illegal operation must cease and that every applicant must come before the Commission *with clean hands* and secure full legal authority to operate before proceeding."

Motor Truck Transfer, Inc., v. Southwestern Transportation Company (Dec. 1938) 122 S.W. 2d 471:

Plaintiffs' reference to this case is difficult to understand.

Applicant sought to secure renewal of a general license to carry on the same type of transportation business that it had carried on for several years past. Competing carriers intervened, protesting the granting of the license. The Commission denied the application, and applicant took an appeal. The fourth syllabus of the opinion is quite sufficient to show the sufficiency of the facts established to justify the Court in affirming the judgment:

“Where motor vehicle, which had been operating for several years under special permit, had not confined hauling to class of commodities which it was licensed to haul, had failed to supply bond or insurance contract required by Corporation Commission, had failed to file required tariff and had offered no excuse for its conduct, Commission did not act arbitrarily or abuse its discretion in denying license to operate to carrier, notwithstanding that carrier had made rather heavy investments.”

If under the circumstances, the Corporation Commission in the Arkansas case had in fact granted the license, and the point had been raised that, in so doing, it was guilty of an abuse of discretion, we would be unable to see any escape from a holding by the Appellate Court that the point was well taken.

Rowley vs. Public Service Commission, 112 Utah 116, 185 P. 2d 514:

Here again it is difficult to understand why reference to this case should be made by plaintiffs. The applicant filed an application for a contract carrier permit, to operate over all the highways of the State of Utah, predicated his right to a permit on the so-called "grandfather" clause contained in the first paragraph of Section 76-5-21, Chapter 105, Laws of Utah 1945. The law in question, among other things, provides that—

“* * * 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 application was denied and applicant appealed. The operations on which applicant predicated his right to a permit were found to be wholly illegal and this Court affirmed the order of denial of the Commission. We quote the following language, beginning at the bottom of page 128 of the Utah report, which language strongly indicates, we venture to say, the evidence of sufficient facts to justify a finding of wilful intent to violate the law:

“* * * Consider the operator who had complied with the law from March 15, 1933, to the 1st day of January, 1940. His rights, if any, could rise

no higher than those included in his original permit. These permits, of course, require loading and discharge points, and limits as to highways. All highways were not available for his movements, and all cargo not movable by him. The legal operator was restricted by the law, but lack of detection apparently permitted the applicant to roam the state at large. To permit the applicant to carry over all highways, and at the same time to restrict legally operating carriers to designated routes would be to grant a premium for illegality. We are convinced the legislature never intended such a result."

In the instant proceeding, applicant did not ground its application or right to a contract carrier permit on the grandfather clause, found in the legislative act of 1945 (first paragraph, Sec. 76-5-21, Chapter 105). Such reference as was made throughout the testimony at the hearing before the Commission, to the fact that Leslie Ashton and his three sons, as individuals, partnerships or corporations, had, for a great many years prior to the filing of the instant application, transported merchandise for the Ashton Mercantile institutions in the Uintah Basin, was done to show the needs, nature and extent of the Ashton operations and also for the very purpose of showing the absence of any wilful intent to violate the law on the part of those receiving, as well as those hauling, the merchandise. Applicant grounded its application on the second paragraph of the section

identified above, requiring applicant to show four specified things:

1. That the highways over which applicant desires to operate are not unduly burdened.
2. That the granting of the application will not unduly interfere with the travelling public.
3. That the granting of the application will not be detrimental to the best interests of the people of the State of Utah and/or the localities to be served.
4. That the existing transportation facilities do not provide adequate or reasonable service.

Each and all of these requirements, as well as the absence of wilful intent to violate the law, the Commission found, had been met by applicant. And the evidence on the question of lack of wilful intent, we submit, was ample to justify the affirmative finding of the Commission and to negative any basis for the contention made by counsel for plaintiffs that the Commission acted arbitrarily in granting a contract carrier permit to applicant.

Counsel for plaintiffs, after stating their belief that there was no showing of inadequacy or unreasonableness in the existing transportation facilities, nevertheless conceded that the facts of the instant proceeding presented a "borderline case", and recognized that a case had been made, but characterized it as "very weak." From page 30 of their brief, we quote the following:

"In this case, plaintiffs believe there is no showing that existing facilities are inadequate or

unreasonable, and, certainly, the facts here present a *borderline case*. Under a correct understanding and application of the law, the Commission acted arbitrarily in granting the certificate applied for in the face of the wrongful operations of the applicant, and the *very weak case* made on adequacy and reasonableness.”

Both under the Utah statutes and decisions, if, on the question of inadequacy and unreasonableness of existing facilities, defendants made or presented even a *borderline* or a *very weak case*, still, we submit, the action of the Commission, in granting applicant’s permit, must stand.

The scope of a review of an order or decision made by the Public Service Commission is set forth in Section 76-6-16, Utah Code Annotated 1943, from which we quote the following:

“* * * The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of Utah. The findings and conclusions of the Commission on questions of fact shall be final, and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination. * * *”

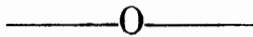
This Court held, in *Utah Light & Traction Co. v. Public Service Commission*, 101 U. 99, 118 P. 2d. 683, that—

“The review by this Court, exercising judicial functions only, cannot extend beyond the questions as to whether the Commission acted within its Constitutional and statutory powers, and whether its determination and order is supported by the evidence and is reasonable and not arbitrary.”

Also, in *Mulcahy v. Public Service Commission*, 101 U. 245, 117 P. 2d 298, this Court held:

“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 facts finds justification in the evidence, and we cannot disturb it.”

The same doctrine was followed in *Union Pacific R. Co. v. Public Service Commission*, 102 U. 465, 132 P. 2d 128.



We submit that the evidence was sufficient to negative each of the three points advanced and relied upon by plaintiffs in their appeal from the order of the Commission granting the defendant, Ashton's, Inc., a permit to operate, as a contract motor carrier of property for

hire, from Salt Lake City, Utah, to Roosevelt and Vernal, Utah, and also from Devil's Slide to Roosevelt and Vernal, Utah, serving Leslie Ashton & Sons Company at Roosevelt, and Ashton Bros., Inc., and Ashton Oil & Gas Company at Vernal.

Respectfully submitted,

L. C. MONTGOMERY and
SKEEN, THURMAN &
WORSLEY,

*Attorneys for Defendant
(Respondent),
Ashton's, Incorporated.*

CLINTON D. VERNON,
Attorney General,

and

QUENTIN L. R. ALSTON,
*Assistant Attorney General,
Attorneys for Defendant
(Respondent),
Public Service Commission.*

Dated August 31, 1950