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Greyhound Lines, Continental Bus System, American Bus Lines, Denver-Salt Lake-Pacific Stages and Lewis Bros. Stages, Inc. v. Public Service Commission of Utah : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

STATE OF UTAH

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BUS SYSTEM, INC., AMERICAN BUS LINES,
INC., and DENVER-SALT LAKE-PACIFIC
STAGES, INC.,

Case No. 14210

Plaintiffs,

and

LEWIS BROS. STAGES, INC., a
corporation,

Case No. 14210

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF UTAH,
FRANK S. WARNER, EUGENE S. LAMBERT
and OLOF E. ZUNDEL, Commissioners of
the Public Service Commission of Utah;
and UTAH VALLEY TRANSIT, COOK
TRANSPORTATION COMPANY and LAKE SHORE
MOTOR COACH LINES, INC.,

Defendants.

BRIEF OF PLAINTIFFS GREYHOUND LINES, INC.,
CONTINENTAL BUS SYSTEM, INC., AMERICAN BUS LINES,
INC., and DENVER-SALT LAKE-PACIFIC STAGES, INC.

Review of an Order of the
Public Service Commission of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

GREYHOUND LINES, INC., CONTINENTAL
BUS SYSTEM, INC., AMERICAN BUS LINES,
INC., and DENVER-SALT LAKE-PACIFIC
STAGES, INC.,

Case No. 14187

Plaintiffs,

and

LEWIS BROS. STAGES, INC., a
corporation,

Case No. 14210

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF UTAH,
FRANK S. WARNER, EUGENE S. LAMBERT
and OLOF E. ZUNDEL, Commissioners of
the Public Service Commission of
Utah; and UTAH VALLEY TRANSIT, COOK
TRANSPORTATION COMPANY and LAKE SHORE
MOTOR COACH LINES, INC.,

Defendants.

BRIEF OF PLAINTIFFS GREYHOUND LINES, INC.,
CONTINENTAL BUS SYSTEM, INC., AMERICAN BUS LINES,
INC., and DENVER-SALT LAKE-PACIFIC STAGES, INC.

NATURE OF CASE

This case involves an application to the Public Service
Commission of Utah for its approval of the purchase by two

passenger motor carriers of the stock of a third passenger motor carrier.

DISPOSITION BY PUBLIC SERVICE COMMISSION

The Public Service Commission approved the stock purchase and granted the application.

RELIEF SOUGHT ON REVIEW

Plaintiffs seek to have the findings and order of the Public Service Commission set aside on the grounds that they are unlawful, arbitrary and capricious.

STATEMENT OF FACTS

For simplification, herein the Public Service Commission of Utah shall be referred to as "Commission", the defendants Utah Valley Transit, Cook Transportation Company and Lake Shore Motor Coach Lines, Inc. shall be respectively referred to as "Valley", "Cook" and "Lake Shore", and the plaintiffs Greyhound Lines, Inc., Continental Bus System, Inc., American Bus Lines, Inc., Denver-Salt Lake-Pacific Stages, Inc. and Lewis Bros. Stages, Inc. shall be respectively referred to as "Greyhound", "Continental", "American", "Denver-Salt Lake"

and "Lewis." The Utah Transit Authority shall be referred to herein as "UTA."

As pertinent to this proceeding, Valley holds authority from the Commission to originate charter operations at Provo and at points between Santaquin and Springville, Utah, all in Utah County (T. 295). It has no interstate charter authority. Cook has intrastate authority to originate charter trips at points in Cache County and it has interstate authority to originate charters at Logan, Brigham City and Ogden with destinations restricted to specific areas in the western United States (T. 298). Lake Shore holds both intrastate and interstate authority to operate charter round trips "originating on the routes now served by applicant in its regular common carrier operations within the state of Utah." Lake Shore's regular route operations extend between Salt Lake City and Ogden (T. 299).

Greyhound and American hold intrastate and interstate authority to originate charters at Salt Lake City, Ogden and intermediate points and Continental, Denver-Salt Lake and Lewis each hold authority to originate charters at Salt Lake City (T. 384).

By their Petition filed with the Commission, Valley and Cook each sought to acquire fifty percent (50%) of the stock of Lake Shore (T. 106). Such approval is required by Section 54-4-29, Utah Code Annotated, 1954. The Petition was assigned to hearing as Investigation and Suspension Docket No. 172 inasmuch as Cook, Valley and Lake Shore had entered into other contracts with UTA by which certain authority of Lake Shore had been sold to UTA (T. 12-13).

Following the death in 1972 of John Yeaman, owner of all of the Lake Shore stock, the administrator of his estate entered into an agreement to sell to UTA the bulk of the assets, including the regular route operating rights, of Lake Shore (Exhibit 13, T. 275). Since UTA would not pay anything for the Lake Shore charter rights, the sale was made subject to the following provision (T. 159-160):

11. Buyer agrees that it will cooperate with the seller in preserving the seller's right to operate minimal regular route operations necessary to retain the charter rights of Lake Shore Motor Coach Lines, Inc. and in transferring same to a third purchaser. Regular route service necessary to retain said charter rights shall be performed by the seller or its successor in interest at a time and date not to compete with buyer's operation and service. (Emphasis added.) (T. 278.)

Schedule VII attached to the agreement listed as
"rights to be retained by sellers":

* * *

2. Intrastate charter rights of Lake Shore
(originating in Salt Lake, Davis and Weber Counties).

3. Interstate charter rights of Lake Shore
(ICC charter rights).

4. Right to operate minimal regular route
operations to a degree necessary to retain charter
rights under Section 208(c). (Estimated at one
route per month. Service to be performed at a
time and date not to compete with buyer's operation
and service.) (T. 281.)

* * *

After the sale to UTA was consummated, Mr. Yeaman's
administrator then sought to sell Lake Shore charter rights
to Valley and Cook. Negotiations resulted in an agreement
of terms between Valley, Cook and UTA which were set forth
in a letter dated April 15, 1974 and signed by the parties
(Exhibit 12, T. 53-54, 273). Among those terms were the
following:

3. UTA, Cook and Valley agree that they shall
make a joint application to the Public Service
Commission of Utah seeking approval of the
following:

(a) Permission for Cook and Valley to
purchase the stock of Lake Shore.

(b) Revision of Public Service Commission Certificate No. 288 to provide that Lake Shore will operate only one bus on one route between Salt Lake and Ogden and return trip to Ogden, with services limited to Sunday only.

(c) UTA acknowledges and agrees that because of the service which UTA will render between Ogden and Salt Lake City, that the operation only on Sunday by Lake Shore will constitute adequate service to the public on a continuous basis.

Nothing in the above shall be construed as limiting the rights of UTA to operate between Ogden and Salt Lake City on Sunday or on any other day. (T. 274.)

By their Petition to the Commission for approval of their purchase of the Lake Shore stock, Valley and Cook represented:

4. That Cook and Valley have entered into an agreement with the Utah Transit Authority, hereafter, referred to as U.T.A., which would require the revision of Certificate #288 to limit the regular route authority to one round trip on Sunday which would be scheduled to serve the students at the Ogden School for the Blind, and the Ogden School for the Deaf and that the U.T.A. would serve the remaining part of Certificate #288. (T. 358.)

Following hearings on said Petitions and submissions of legal memoranda by the parties, the Commission issued its Report and Order wherein it failed to address itself to the legal issues raised by the parties in their memoranda except to simply state "'splitting' of the Lake Shore authority in the manner proposed in the instant application will not

result in the creation of any new transportation authority. . ."

The Commission simply concluded that approval of the application would be in the public interest and it ordered that the purchase of Lake Shore stock by Valley and Cook be approved (T. 385).

ARGUMENT

POINT I: THE COMMISSION'S ORDER IS UNLAWFUL, ARBITRARY AND CAPRICIOUS SINCE IT IN EFFECT ALLOWS THREE CARRIERS TO CONDUCT CERTAIN CHARTER OPERATIONS WHILE ONLY ONE CARRIER HAS APPLIED FOR AND RECEIVED A CERTIFICATE AUTHORIZING SUCH OPERATIONS.

The scheme of governmental regulation of public motor carriers in Utah established by statute prohibits entry of a new carrier into a competitive market without first applying for and receiving a certificate based upon proof of public convenience and necessity. Such a requirement is established by Section 54-6-5, Utah Code Annotated, 1953.

It provides in part:

It shall be unlawful for any common motor carrier to operate as a carrier in intrastate commerce within this state without first having obtained from the Commission a certificate of convenience and necessity. * * * If the Commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof, it may issue the certificate as prayed for or issue

it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, otherwise such certificate shall be denied.

In the instant case, the Commission order was not based upon any showing of public convenience and necessity. In fact, the Commission accepted the position taken by the applicants that approval of the application did not require a showing of public convenience and necessity (T. 34, 101). However, the effect of the Commission's order in this case, which allows Valley and Cook to purchase and control Lake Shore, is to create in all three of those carriers the ability to do and profit from what only Lake Shore was authorized to do before. Such has the practical effect of bypassing the mandate of the statute by establishing new authority and new competition without requiring a showing of public convenience and necessity.

If the Commission's order is allowed to stand, Valley, Cook and Lake Shore will each be in a position to solicit, conduct and profit from the intrastate and interstate charter operations which originate at Salt Lake City, Ogden and all

intermediate points. Such will be accomplished through a combination of (1) control of Lake Shore by both Valley and Cook, (2) the practice of conducting Lake Shore charters with Valley and Cook buses and drivers through the use of trip leases, and (3) the distribution of Lake Shore profits resulting from those leases to Valley and Cook.

By way of example, if the Commission order is affirmed, Valley, a carrier which has no authority to originate charters in Salt Lake City, Ogden and intermediate points, is placed in a position whereby it can solicit such charters. When such a charter is obtained, it is registered under the name of Lake Shore. Then Valley and Lake Shore (through Mr. Hardman who is president of both companies) execute a lease under which Valley leases its bus and driver to Lake Shore and the charter is then operated in Valley equipment, driven by Valley's driver and conducted under Valley's complete control. Revenue from the charter is then funneled through Lake Shore's books but paid to Valley, less a commission paid to Lake Shore. The Lake Shore commission, however, as a Lake Shore profit, is then distributed back to Valley in the form of a dividend. Of course, the same manipulation

of equipment and authority is available to Cook.

The actual control of all of Lake Shore's operations by both Valley and Cook is not in question. Besides each having fifty percent (50%) of the Lake Shore stock, Harry T. Hardman, the president of Valley, is also to be the president of Lake Shore (T. 16) and J. Vernon Cook, president and general manager of Cook, is to be Lake Shore's chairman of the board (T. 104, 106).

The above-cited example of an operation of charters by Valley and Cook in the Lake Shore territory through the use of equipment-driver leases is not just theoretical. It is and has been a common practice. The details of that practice were explained in the testimony of Mr. Hardman under cross-examination (T. 59-67). Under such lease arrangements, revenue from leases using Valley equipment and drivers has been collected by Lake Shore and then remitted to Valley after deducting a commission. Mr. Hardman admitted that such charters were under Valley's full control and that he intended to continue that same method of operation after approval of this application by the Commission (T. 62, 66-67).

This effective creation of new authority by contract rather than by the presentation of evidence of a need for new authority is an activity which has already been determined by the Interstate Commerce Commission to be absolutely prohibited. In fact, the practice of disallowing such transactions has now been codified in the ICC regulations involving "Transfer Of Motor Operating Rights." Section 1132.5(a) states, in part:

Division of Rights.

An application for transfer for part of an operating right as to routes or commodities will be denied if it is found that [it] (1) would create duplicating rights as defined in Section 1132.1(c)¹ . . . [and] (2) would divide the rights at a point other than along clearly defined geographical or political lines, or permit a minute and multiple division of operating rights so that numerous carriers might ultimately operate under rights initially granted as a unit . . . (Emphasis added.)
49 C.F.R. 1132.5(a).

Exhaustive research has revealed absolutely no instance in which the Interstate Commerce Commission or the courts have allowed two carriers to acquire the control of the

¹Section 1132.1(c): Duplicating Rights.

"Operating rights which authorize the transportation of passengers, or of the same commodities, from and to, or between the same points."

49 C.F.R. 1132.1(c).

separate and different operating rights of a third carrier without additional proof of public convenience and necessity. There is no Utah law on the subject.

The reason for the above firmly-established rule relating to carrier combinations is obvious. It is designed to avoid the creation of new authority by contract (i.e., stock purchase) rather than by proof of need since the creation of new and duplicating authority increases the competitive effect on existing carriers and can only be deemed to be in the public interest if a need for additional competition is shown through proof of the inadequacy of the other existing services. A discussion of this rationale is found in the leading case of H. P. Welch Co. - Purchase - E. J. Scannell, Inc., 25 M.C.C. 558, 1 F.C.C. ¶7385 (1939). Other cases cited at C.C.H. Federal Carriers Reporter, Volume 1, ¶204.

POINT II: THE COMMISSION'S ORDER SHOULD BE SET ASIDE SINCE IT APPROVES AN UNLAWFUL DIVISION AND SALE OF A PORTION OF THE OPERATIONS AUTHORIZED BY LAKE SHORE'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

The agreement between Lake Shore and UTA pursuant to which Valley and Cook intend to conduct Lake Shore operations is unlawful and against public policy for at least four

reasons: (1) it attempts to illegally sever Lake Shore's incidental charter rights from its basic regular route authority; (2) it attempts to unlawfully split Lake Shore's regular route authority between Lake Shore and UTA; (3) it constitutes an agreement by Lake Shore to limit its services to the public; and (4) it, together with the evidence of record, demonstrates an intent by Lake Shore not to engage in a bona fide regular route service.

It is clear from the record that the real purpose behind the terms of the various agreements between Lake Shore, UTA, Valley and Cook is to allow Lake Shore to sever its regular route authority from its charter authority and then sell the regular route authority to UTA and sell its charter authority to Valley and Cook. Mr. Peterson, representing the estate of John Yeaman, explained that the terms of the administrator's agreement with UTA (Exhibit 13, T. 275) arose because UTA would not pay anything for the Lake Shore charter rights (T. 159-160). Likewise, Mr. Hardman's testimony shows that the real purpose of the purchase of Lake Shore stock by Valley and Cook, in light of the contract with UTA, was to obtain the Lake Shore charter rights (T. 32-33). Thus,

the parties agreed that Lake Shore would perform "minimal regular route operations necessary to retain the charter rights of Lake Shore. . . ." (Exhibit 13, T. 278).

However, charter operations by regular route bus lines have been traditionally authorized as incidental to the regular route service, without requiring proof of convenience and necessity. Such incidental charter authorities issued to regular route passenger carriers are traditionally described as authorizing charters originating at points on the route served by the carrier in its regular route operations. Thus, as in this case, Lake Shore's charter authority is described as "charter round trips originating on the routes now served by applicant in its regular common carrier operations within the state of Utah" (T. 299). Lake Shore recognized the incidental nature of its charter authority as evidenced by its agreement with UTA which provides for Lake Shore to retain sufficient scheduled service so as to retain the charter authority.

The granting of incidental charter authority has obviously been for the purpose of providing regular route carriers with the opportunity to more efficiently use their bus equipment

and as a source of additional revenue so as to enhance the stability and economy of the regular route services. It was never intended that the incidental charter operations should be primary and the regular route service secondary, as Lake Shore now attempts to treat them.

It was established early in the history of motor carrier regulations that, when charter authority is issued as incidental to regular route service, such charter authority may not be severed from the regular route authority in an attempt to sell one or the other. Such was established by the Interstate Commerce Commission in 1942 in the case of Menzo M. Liederbach, 41 M.C.C. 595, 3 F.C.C. ¶30,500. There the Commission explained:

In Regulations, Special or Chartered Party Service, 29 M.C.C. 25, Division 5 also found that Section 208(c) of the Act is not a limitation upon any rights authorized by Sections 206(a) or 207 of the Act, but confers an additional right, without proof, which is not severable, to carriers operating over a regular route or routes and between fixed termini, except carriers performing, either exclusively or in connection with other certified rights, special or charter operations under a certificate authorizing such operations over regular or irregular routes within a fixed territory. Clearly, therefore, since the chartered party operations conducted by applicant, within the territory served by his regular route operation,

are not severable from the latter operation, that part of the above-described agreement on June 25, 1936, which purports to reserve for applicant the special or chartered party operations, and the so-called Quit-Claim Deed from Northland to applicant are without legal effect. We conclude, therefore that the transfer and sale by applicant of his regular-route passenger operation to Northland, despite the reservations above quoted, carried with it all rights applicant held by virtue of Section 208(c) of the Act. (Emphasis added.) Pages 601-602.

It should be noted that the principles established by the Liederbach case have never been changed. In essence, it has been consistently required that any carrier wishing to compete on charter service with regular route carriers holding incidental charter authority must either hold and operate such authority as an incident to their own bona fide regular route service or must apply for and prove that that public convenience and necessity requires the issuance of additional charter authority.

In the recent case of Estacada - Molalla Stages, Inc. v. United States, ____ F. Supp. ____, 1974 F.C.C. ¶82, 475, the court reviewed and affirmed a decision by the Interstate Commerce Commission involving a fact situation very similar to that of the instant case. There, as here, a bus line which was authorized to operate both interstate

and intrastate bus passenger service over a particular regular route sold the intrastate operations to a public transit authority, ceased operation of the interstate regular route service and then sought to transfer its charter operation to a separate company. The Interstate Commerce Commission had found that the incidental charter rights were not severable from the regular route authority and it then cancelled the carrier's regular route authority for failure to operate it, thus nullifying the carrier's charter authority. In affirming the Commission's action, the court agreed that the carrier's incidental charter rights were "not to be severable from the underlying regular route certificate and to be viable only when regular service is maintained."

Lake Shore's sale of its regular route authority to UTA also involved an unlawful split of its regular route authority. Lake Shore sold to UTA its regular route authority to the extent of any and all schedules which UTA wishes to operate. While initially it was contemplated that UTA would only operate schedules Monday through Saturday, it was understood and provided that UTA would have the right to operate on "Sunday or on any other day" and that any schedules to be operated

by Lake Shore would be done at "a time and date not to compete with [UTA's] operation and service" (T. 274, 278; Exhibits 12 and 13). Mr. Oswald, the witness for UTA, made it clear that UTA does intend to provide Sunday service in the future. He testified:

At the present time the reason we don't operate on Sundays and holidays is that we don't have the funds to do it. If the voters approve the referendum in November I assure you that the future plans provide for Sunday service. (T. 183.)

On the other hand, Lake Shore also attempted to reserve to itself an indeterminable quantity of regular route authority . . . just enough to enable it to retain its charter rights . . . whatever that is. Such, however, is an attempted splitting and manipulation of rights which has consistently been prohibited. The leading case in this respect is H. P. Welch Company - Purchase - E. J. Scannell, Inc., 25 M.C.C. 558, 1 F.C.C. ¶7385 (1939), in which the Interstate Commerce Commission specifically addressed itself to an attempted splitting of bus authority by a dividing of bus schedules. The Interstate Commerce Commission, in disallowing such a split, concluded:

. . . If we should permit such splitting under Section 213, and hence without regard to convenience

and necessity, we would be thereby failing to properly perform one of our duties under the act, and, in lieu thereof, in effect would be permitting the creation by the direct parties to the transaction of new rights by contract and without regard to public convenience and necessity. (Emphasis added.)
Page 564.

The Welch case has been cited by the ICC and the courts more than a hundred times in subsequent cases involving the attempted split of authority in one way or another, but the doctrine prohibiting such a splitting of authority without proof of convenience and necessity still stands. Thus, Lake Shore's attempt to sell to UTA a quantity of its regular route schedules operating between Salt Lake City and Ogden and yet, at the same time, to retain to itself another quantity of said schedules, constitutes what has always been viewed as a transaction which is in violation of the regulatory scheme and thus illegal and against public policy. In this instance, the transaction is even more repugnant to public policy inasmuch as the schedules to be sold and to be retained are not determinable.

The limitations contained in the agreement between Lake Shore and UTA are also illegal and against public policy, since Lake Shore thereby agrees to limit its schedules operated pursuant to the regular route authority

to times and places not to conflict with schedules which UTA may, in its discretion, operate. Lake Shore has agreed to conduct ". . . minimal regular route operations . . ." (T. 278). Agreements to refrain from or limit services authorized by a grant of authority are unenforceable since carriers are obliged to provide all of the services which they are authorized to render and cannot agree among themselves to cease or limit such services. See Glendenning Motor Ways, Inc., 65 M.C.C. 614 (1956).

Finally, it is obvious from the record that the one Sunday schedule which Valley and Cook intend to have Lake Shore operate in an effort to retain incidental charter rights is only a device conceived by the carriers so as to retain those charter rights and as Sunday service is instituted by UTA as promised by Mr. Oswald, there will simply be no need for any schedule to be operated by Lake Shore. Thus, the proposed Lake Shore Sunday schedule is not a bona fide operation of the regular route authority and it is clear under federal regulatory law that Lake Shore's authority cannot be transferred to Valley and Cook under those circumstances. 49 C.F.R., Section 1132.5(c) provides:

Purpose of Transfer.

A proposed transfer of operating rights will not be approved if the Commission finds that the transferee does not intend to, or would not, engage in bona fide motor carrier operations under such operating rights . . .

CONCLUSION

The scheme of regulation for motor carriers as adopted by the Utah Legislature clearly contemplates that carriers shall only be allowed to operate particular services which are assigned to them by their respective certificates of convenience and necessity and that any competitive operation outside the assigned authority is prohibited. New competitive operations may only be instituted by application and by proof of public convenience and necessity. Section 54-6-5, Utah Code Annotated, 1953.

To facilitate enforcement of such regulation, the Legislature has wisely granted the Commission various powers which include, in part, the authority to scrutinize mergers, stock transfers and asset purchases, leases, etc., as between the certified utilities so as to prohibit a manipulation of authorities and operations which would violate the scope of the authorities granted and the competitive balance

established thereby. Section 54-4-28, 29 and 30, Utah Code Annotated, 1953.

Over many years of similar carrier regulation by the Interstate Commerce Commission, certain principles have been carefully established concerning the types of inter-carrier business transactions which are acceptable or prohibited so as to properly maintain the regulatory plan. Among those practices which have become firmly prohibited, at least without proof of a need for additional service, are: (1) control through stock transfer of one regulated carrier by two or more other regulated carriers in those cases where such control would, in effect, result in a split of an authority; (2) the splitting of an authority through sale or lease on a basis other than along clearly defined geographical lines, i.e., splitting of bus service by schedule; (3) the separation of charter authority from the regular route authority to which the charter authority was granted as an incidental privilege; (4) agreements by carriers to limit the service which they will offer to the public; and (5) transfers of authority by sale of stock or otherwise when the transferee does not intend to engage in a bona fide operation of such authority to the full extent authorized.

In the instant case, each of the above five practices are contemplated and if this court were to affirm the order of the Commission the whole purpose and concept of carrier regulation would be undermined and Utah would find itself at complete odds with well-reasoned and firmly-established principles of carrier regulation as established by the Interstate Commerce Commission and adopted by the various states. Plaintiff urges the court to carefully review the action of the Commission in this case and then set aside the Commission order as being unlawful, arbitrary and capricious.

Respectfully Submitted,

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Denver-Salt Lake-Pacific
Stages, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing
BRIEF OF PLAINTIFFS GREYHOUND LINES, INC., CONTINENTAL BUS
SYSTEM, INC., AMERICAN BUS LINES, INC., and DENVER-SALT LAKE-
PACIFIC STAGES, INC. upon all parties of record by mail,
postage prepaid, this 2nd day of October, 1975.

Stuart L. Poelman

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