

1979

PBI Freight Service and Four Corners Trucking v. Public Service Commission of Utah et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PBI FREIGHT SERVICE and FOUR
CORNERS TRUCKING,

Plaintiffs and
Appellants,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, MILLY O. BERNARD, OLOF
E. ZUNDEL, and KENNETH RIG-
TRUP, Commissioners of the
Public Service Commission of
Utah and RAY BETHERS TRUCKING,
INC.,

Defendants and
Respondents.

CASE NO. 16212

BRIEF OF RESPONDENT
RAY BETHERS TRUCKING, INC.

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Review of a Report and Order
Granting a Certificate of Public Convenience and Necessity
by the Public Service Commission of Utah

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BRIEF OF RESPONDENT
RAY BETHERS TRUCKING, INC.

Respondent will be referred to hereinafter as
"Bethers"; plaintiffs-appellants will be referred to herein-
after as "appellants", "PBI" and "Four Corners"; and the
Public Service Commission of Utah and the individually
named Commissioners will collectively be referred to herein-
after as "the Commission".

STATEMENT OF THE CASE

Bethers sought and obtained a Certificate of Public
and Necessity from the Commission authorizing it to serve as

as a common carrier by motor vehicle transporting gypsum, gypsum products and materials used in the manufacture and distribution thereof over irregular routes from Sevier County, Utah, to all points and places in the State of Utah.

DISPOSITION BY THE PUBLIC
SERVICE COMMISSION OF UTAH

After making the necessary Findings of Fact and the proper Conclusions of Law, the Commission granted a Certificate of Convenience and Necessity No. 1941 to Bethers.

RELIEF SOUGHT ON APPEAL

Bethers seeks to uphold the decision of the Commission.

STATEMENT OF FACTS

Bethers does not agree with the Statement of Facts set forth by appellants. Throughout the Statement of Facts and the Argument, appellants set forth their facts and ignore the facts upon which the Commission relied in granting the application.

For instance, appellants state:

" . . . there has been only one minor complaint concerning the PBI service." (Page 3, Appellants' Brief)

Facts relied upon by the Commission in granting this application (each of which could constitute a complaint

as to the service--or lack of service of the appellants) can be summarized under the following topics:

1. Delays in Appellants' Service.

Appellants argue in their Statement of Facts that PBI performs the one-day service required by the supporting shipper. (Page 4, Appellants' Brief) They are talking about their transit time after they get a truck to the shipper and ignoring how long it takes them to get a truck there.

In fact, the evidence relied upon by the Commission in granting this application and regarding the timeliness of the services of PBI is as follows:

Mr. Roy M. Seim, Assistant Manager, Western Region and Distribution Division Transportation of Georgia-Pacific Corporation, the supporting shipper testified:

"But to fall back on what was said during my conversation with Gerald Hunt, he indicated to me that Palmer Brothers (former name of PBI) is situated--and the way they're doing business--it took 2 to 7 days to receive a truck, once it was ordered at our plant for shipment of wallboard to destinations in Utah. And that when we called for a truck, it was never a situation where we could request a truck on a certain day; it was simply that when we have the truck available."
(Tr. 84)

The impossibility of satisfying customers with the two to seven days service of protestant PBI was exemplified

from the following testimony:

"The customer who we sell the board to really is the person that sets the service standard. And when they say, 'I want it tomorrow afternoon or tomorrow morning,' then that determines when the board is picked up; it determines when it's delivered." (Tr. 87)

The supporting shipper testified that applicant is the only carrier which is currently able to give them the motor carrier service which they require on a consistent basis. (Tr. 90) Mr. Seim described the service of PBI as "unacceptable". (Tr. 105) He stated that PBI service would not meet their needs, because they require equipment from a motor carrier on the day it is requested and not two to seven days from when it is requested. (Tr. 105)

In arguing that their transit time is satisfactory, PBI does not count the day they pick up a shipment in computing their transit time. (Tr. 155) Also PBI ignores the time the shipper must wait for PBI to have equipment ready to serve it. PBI brought shipping documents to the hearing which showed that Georgia-Pacific had called them on one load that was to have been delivered during the week of November 20 but was not delivered by PBI until November 29. (Tr. 151-152)

Bethers is willing to maintain a terminal with trailers stationed at the facilities of Georgia-Pacific in

Sevier County, Utah. (Tr. 23) Bethers already maintains a full-time employee in Sevier County. (Tr. 23)

2. Specialized Services of Bethers.

Bethers is a motor carrier authorized to transport specialized commodities and operate over irregular routes. (Tr. 7) PBI and Four Corners are authorized to transport general commodities over regular routes. (Tr. 138) Differences in the type of motor carrier services performed are:

(a) Flatbeds versus Vans. The gypsum wall-board manufactured in Sevier County, Utah, must move in flatboard trailers as opposed to van-type equipment. (Tr. 63) Bethers owns and operates 95 forty-foot flatbed trailers exclusively. (Tr. 9) PBI operates mainly van-type trailers and only 7 flatbed trailers. (Tr. 137) There is no evidence that Four Corners operates any flatbed trailers.

(b) Specialized Equipment. Bethers operates a 10-wheel boom truck that is useful for delivering gypsum wallboard to job sites. (Tr. 12) Neither PBI nor Four Corners operate such boom-type equipment. (Tr. 157)

Bethers maintains full-box tarps for protection of the gypsum in transit (Tr. 9). Bethers' flatbed trailers are equipped with corner irons and chain softeners in order to prevent any damage to the wallboard in transit. (Tr. 10) The supporting shipper's witness pointed out the fragile

nature of the wallboard and its susceptibility to damage if it is not properly protected. He stated:

" . . . disintegrates with moisture; it just crumbles if the proper tie-down equipment and tarps are not used by the carrier to protect it . . . " (Tr. 63)

3. Avoiding Circuitous Miles and Resultant Savings of Fuel.

By virtue of authority to serve over irregular routes, Bethers is able to travel directly to all destinations in the State of Utah. Under temporary authority, Bethers has performed service from the Sevier County origin to Moab, Utah. Bethers performs this service directly over Interstate Highway 70. For PBI and Four Corners to perform this service, it is necessary for PBI to travel to Springville, Utah, and then back-track over the same Highway to Moab. (Tr. 141)

4. Direct versus Interline Service.

The marketing area of Georgia-Pacific is the entire State of Utah. (Tr. 56) Under temporary authority authorized by the Commission, Bethers has provided transportation services for Georgia-Pacific directly to the cities of Tremonton, Ogden, Tooele and Price. (Tr. 140-141) Neither PBI nor Four Corners is able to serve these cities directly. PBI or Four Corners must interline with unspecified

carriers (who did not appear in opposition to the application - Tr. 143). The supporting shipper described the unsatisfactory nature of such interline service as follows:

"A. Interline service has characteristically posed one significant problem to us, which is delay in transit. And in addition to that, on occasion has resulted in damage to the product. Possibly not directly, but where damage does occur, we're faced--and the people in my charge are faced--with filing that loss and damage claim against the carrier, resolving that claim.

"When two or more carriers are involved in the delivery of the product, it becomes a horrendous job to establish liability, and settle a loss and damage claim. Consequently, it is a very valuable asset to us in terms of prompt delivery, et cetera, that we have direct route service." (Tr. 72-73)

5. Lack of Service to Entire Destination Territory.

Neither PBI nor Four Corners can serve all points and places in the State of Utah. They contend that they can serve all points and places through interline carriers, however, no interline carriers appeared in opposition to the application. (Tr. 143)

Perhaps the most significant fact omitted by appellants in their Statement of Facts is that the supporting shipper, although it prefers to use authorized motor carriers, is presently performing transportation service in Utah with its own proprietary equipment because it has been unable to obtain a responsive service from existing authorized carriers

prior to the granting of temporary authority to applicant by the Commission. (Tr. 65)

Bethers received a temporary certificate on November 29, 1977, to perform the service made permanent by the Commission in this proceeding. (Exhibit 1, pages 1 and 2, at R197) Between November 29, 1977, and February 6, 1978, Bethers transported 93 truckloads representing 4,611,648 lbs. for the supporting shipper, Georgia-Pacific. (R210-213) Under temporary authority issued by the Commission, Bethers has served points in Utah from Tremonton on the north to Moab on the south and from Price on the east to Tootle on the west. (R253) The marketing area of the supporting shipper is the entire State of Utah. (Tr. 56)

The supporting shipper presently produces volumes requiring 50 truckloads per month moving to destinations in the State of Utah from their facilities in Sevier County, Utah. (Tr. 56) They hope to increase this volume in the future. (Tr. 57) There is no presently authorized motor carrier other than Bethers which can serve directly all points and places in the State of Utah from the supporting shipper's facilities in Sevier County, Utah. (Tr. 57) The supporting shipper testified that Bethers' service under temporary authority has been excellent. (Tr. 69)

ARGUMENT

1. The Report and Order of the Commission is supported by the evidence.

The evidence set forth in the foregoing Statement of the Facts is the evidence relied upon by the Commission in granting this application. This evidence refutes appellants' contention that the Report and Order granting Bethers a Certificate was not supported by the evidence. The argument and cases cited by appellants are answered by the foregoing evidence.

Appellants' brief refers to "only one complaint" (Page 6) and "Admittedly, one isolated problem" (Page 10) but contends that a "full analysis shows an exemplary service" (Pages 10 and 11). The foregoing facts show that there is no comparison between the type of service which can be rendered by a specialized motor carrier such as Bethers and the type of service offered by regular route, general commodity carriers such as PBI and Four Corners.

For appellants to argue that they are providing an efficient and adequate service is to ignore the evidence of the supporting shipper and the proposed superior service of Bethers. The evidence relied upon by the Commission was not the self-serving statements of the PBI-Four Corners operating witness. The evidence relied upon was the proposal

of Bethers and the stated needs of the supporting shipper, Georgia-Pacific.

Certainly a shipper should not have to wait 2 to 7 days to get a flatbed trailer from the only motor carrier presently authorized to serve. A shipper should have the boom truck, tarps, corner irons and chain softeners regularly provided by a specialized carrier like Bethers. They should have Bethers large fleet of flatbeds available for their needs.

In these times of critical energy shortage, it is ridiculous to require the circuitous service of appellants as opposed to the direct service of Bethers.

And finally, the shipper wants to ship to points in Utah that neither PBI nor Four Corners can servie. How is the shipper assured of service to these points if the application is denied? The Interstate Commerce Commission has steadfastly held that it cannot accord any weight to interline service when one of the interline carriers does not oppose the application. Glosson Motor Lines, Inc., Extension - Georgia, 106 M.C.C. 147. In the case of Lester C. Newton Trucking Co., Extension - Portland, 102 M.C.C. 13, the Commission said:

"The lack of a representation by this carrier prevents us from analyzing the scope and quality of the service and its ability to meet shippers continuing needs."

While appellants may think that their service is "exemplary", the facts show that Bethers can render a far superior service to the supporting shipper. The Commission correctly concluded that the evidence warrants granting of the application.

Appellants' brief does not specify any of the Commission's Findings which are not supported by the evidence. Appellants' brief does not show that the decision of the Commission is in any way capricious or arbitrary. The Report and Order was based on sufficient competent evidence.

The Supreme Court is bound by the Findings of the Commission where there is evidence to support them. It makes no difference whether the Court's conclusions on evidence would have been the same. Jeremy Fuel & Grain Co. v. Public Utilities Commission, 63 U. 392, 226 P. 456; and Fuller-Toponce Truck Co. v. Public Service Commission, 99 U. 28, 96 P.2d 722.

2. The Report and Order of the Commission is Lawful.

The "convenience and necessity" to be considered is that of the shipping public, not protesting carriers. The Utah Supreme Court has specifically held that this statute does not require that the Commission find that

the present facilities are entirely inadequate. It merely requires that the Commission take into consideration the existing transportation facilities. Ashworth Transfer Co. v. Public Service Commission, 2 Utah 2d 23, 268 P.2d 990.

The Report and Order of the Commission granting Bethers' application shows that existing transportation facilities were taken into consideration. (R293-296)

The discretionary power granted the Commission to grant or withhold certificates negatives the idea that it was intended to grant and maintain a monopoly in any field. PBI is seeking to retain a monopoly, which is not intended by the statute nor upheld by the courts. See Union Pacific R.R. Co. v. Public Service Commission, 103 Utah 459, 135 P.2d 915. No one should have a vested right to be free from competition, as argued for by PBI.

Appellant relies upon several decisions of the Interstate Commerce Commission in its brief. More recent decisions of the Interstate Commerce Commission and the Federal Courts have relied upon competition in aid of the maintenance of the objectives of the National Transportation Policy. See Bowman Transportation, Inc. v. Arkansas Best et al., 419 U.S. 281, 95 Sup. Ct. 438.

Under recent decisions of the Interstate Commerce Commission, a presumption has developed that competition

will aid in the maintenance of the objectives of the National Transportation Policy. Chickasaw Motor Line, Inc., 121 M.C.C. 476 and Darrow Trucking Co., 121 M.C.C. 485. This presumption must be affirmatively refuted by the protestants before an application for authority will be denied. White Truck Line, Inc. v. I.C.C., 1977, F.C.C. ¶ 82, 671 and Trans-American Van Service, Inc. v. United States, 421 F.Supp. 308.

Appellants argue that the grant of a Certificate to Bethers will be detrimental to the best interests of the people of the State of Utah. They base this upon the testimony of their witness who claimed that although the transportation of sheet rock provides PBI with only 5% of its total revenues, it results in as much as 40% of its total profits. (Page 3 and page 13 of plaintiff's brief) In fact, the operating witness from PBI testified:

"If I may add, it's only--this sheet rock is approximately 5% of our total revenue. But it probably contributes to as much as 20 or 30 or 40% of our total profit, * * *"
(Tr. 120)

If 5% of PBI's revenue contributes 20 or 30 or 40% of their total profit, the question arises as to which of the members of the public of the State of Utah are benefitting by a denial of the application. Is it the current customers of PBI who transport other than gypsum wallboard or the members of the public in the State of

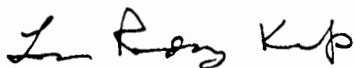
Utah who utilize gypsum wallboard? The Commission considered this question (R295 Finding 19) and concluded that appellants' service "is not 'sufficient for the existing business or its potential'"; and citing this Court's decision in Lake Shore Motor Coach Lines v. Bennett, 8 U.2d 293, 297, 333 P.2d 1061 (1958). (R295-296)

The Commission has acted within the scope of its authority. Its Order has substantial foundation in the evidence. Appellants have not shown that the Report and Order of the Commission is unreasonable or arbitrary. The Report and Order is lawful.

CONCLUSION

In this proceeding, the Commission acted within its statutory powers. Its Report and Order is supported by the evidence. It is reasonable and is not arbitrary. It is lawful and should be upheld by the Court.

Respectfully submitted,



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CERTIFICATE OF MAILING

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In Ray Kp