

1979

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

Utah Supreme Court

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FBI

Review of  
Public Service

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# TABLE OF CASES AND AUTHORITIES

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IN THE SUPREME COURT OF THE STATE OF UTAH

PBI FREIGHT SERVICE and FOUR  
CORNERS TRUCKING,

Plaintiffs,

v.

CASE NO. 16212

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 TRUCK-  
ING,

Defendants.

-----  
BRIEF OF PLAINTIFFS  
PBI FREIGHT SERVICE and FOUR CORNERS TRUCKING  
-----

Plaintiffs PBI Freight Service and Four Corners  
Trucking will collectively be referred to herein as "the  
Plaintiffs" and occasionally as "Protestants" or "protesting  
carriers," the latter designation having been used during  
the course of proceedings before the Utah Public Service  
Commission.

The Defendants Public Service Commission of Utah and  
the individually named Commissioners will collectively be  
referred to as the "Commission."

The Defendant Ray Bethers Trucking, Inc. will be re-  
ferred to as "Defendant Bethers" or "Bethers" or "Applicant,"  
the latter term having been used during the course of pro-  
ceedings before the Utah Public Service Commission.

## STATEMENT OF THE CASE

This proceeding involves an application before the Commission in which Defendant Bethers seeks operating authority as a common motor carrier for the transportation of gypsum, gypsum products and materials used in the manufacture and distribution thereof from Sevier County, Utah to all points and places within the state of Utah.

## DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

The Commission, without any evidence demonstrating a need and necessity for the proposed service, granted the application of Bethers. Plaintiffs filed a Petition for Reconsideration and Rehearing with the Commission and Defendant Bethers replied. The Commission denied the Petition for Rehearing and Reconsideration.

## RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the Supreme Court set aside and nullify the Orders of the Defendant Public Service Commission dated June 8, 1978 and December 4, 1978.

## STATEMENT OF FACTS

By application filed November 25, 1977 and heard February 1978, Defendant Bethers, a Utah corporation, seeks authority to transport:

"gypsum, gypsum products and materials used in the manufacture and distribution thereof from Sevier County, Utah to all points and places in the State of Utah." (R. pp. 5 and 6)

The application was opposed by Plaintiffs. Plaintiff

PBI holds authority from the Commission to originate all of

the traffic Defendant Bethers seeks to transport by its application. (R. p. 114) Only two shippers have facilities and ship from the involved territory. At the time of hearing, PBI was providing a transportation service for both shippers. (R. p. 116) Directly and by expedited interline with Plaintiff Four Corners (a carrier controlled by PBI) and with other carriers, a service is provided by plaintiffs throughout the territory sought to be served by Defendant Bethers. (R. pp. 117 and 121)

PBI has the capacity to transport 12 to 15 loads of wallboard per week; however, was being tendered only 3. (R. 131) The transportation of gypsum is required by PBI in order to balance its operations and economically serve the shipping public in Southern Utah. (R. 119-121, 133) The transportation of sheet rock provides PBI with 5% of its total revenue and as much as 40% of its total profits (R. 119-121), and has historically helped PBI keep costs down for its shipping customers. (R. 133)

Only one shipper, George Pacific, supports the application. PBI has never damaged any wallboard shipments handled for George Pacific (R. 134), and in eight years of transporting gypsum wallboard for Georgia Pacific, there has been only one minor complaint concerning the PBI service. (R. 126-128)

A grant of authority to applicant and the resulting loss of traffic to PBI affects the ability to provide service to the small communities in Southern Utah. (R. 143)

PBI operates seven flat-bed trailers suitable for transporting wallboard, at the time of hearing, it was being tendered only enough wallboard to use two of the trailers. (R. 115)

Although statewide authority is sought by Bethers, almost all loads terminate in northern and central Utah, with the majority terminating in Salt Lake City. (R. 28) Bethers was unable to demonstrate the operational feasibility for its proposal in terms of costs compared to tariff levels and could only estimate the same on an intrastate basis. (R. 24-25, 36)

The supporting shipper has need for the transportation of approximately 50 truck loads per month moving to points within the state of Utah. (R. 57) Many of these loads are transported by Georgia Pacific Trucks and trucks of its customers. (R. 57) PBI has the capacity to transport 60 loads per month. (R. 131) Production and the requirements for transportation have not increased recently, but have remained steady. (R. 78 and 79) This supporting shipper's use of Bethers was not precipitated by any increase in production at the Sigurd, Utah (Sevier County) location. (R. 85)

—

The witness indicated acceptable service to be pickup in Sevier County one day and delivery at any point in Utah the following day. (R. 87) PBI directly and through interline performs such a service. (R. 263 and 125-126) The supporting witness has contacted PBI but has never indicated to PBI that its service was lacking in any way. (R. 100)



The actions taken by the Commission are unsupported by both the facts and the law, exceed the authority of said Defendant Commission and are contrary to the evidence and thereby unlawful, all of which requires this honorable Court to set them aside.

#### ARGUMENT

##### POINT I:

THE REPORT AND ORDER AND ERRATUM ORDER OF THE COMMISSION ARE NOT SUPPORTED BY THE EVIDENCE AND THE LAW.

In considering applications for certificates of convenience and necessity, the Commission must take into account the criteria set out in Section 54-6-5, Utah Code Annotated, 1953, which provides in pertinent part:

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

An analysis of the facts in the instant matter shows that only one supporting shipper appeared on behalf of

Applicant Bethers, representing the Georgia Pacific Corporation. No testimony was offered by the other shipper of gypsum wallboard and related materials located in Sevier County, Utah, nor was any testimony offered by any consignee located at any point in the state of Utah. The service of Plaintiffs for the supporting shipper and for the other shipper of gypsum wallboard in Sevier County, Utah has consistently been same day or overnight to all points in Utah, either directly, or through interline. It must be concluded that Plaintiffs have met the needs of the supporting shipper and of the shipping public in all respects. At the time of hearing, the equipment of Plaintiffs was not being used to its capacity, and if it were, more equipment could be obtained.

During eight years of service to the supporting shipper and to United States Gypsum, only one complaint has been lodged with Protestant PBI, and even then the service was provided. No claims for damage to merchandise transported have ever been filed against Plaintiffs. The revenue derived from transporting gypsum wallboard from Sevier County, Utah provides Protestants with 5% of their gross revenue and as much as 40% of their net profit through operational advantages, all of which results in an improved and more economical service to the shipping public.

Applicant Bethers made no showing for the transportation of products related to gypsum wallboard, nor any showing for the transportation of rejected shipments. Likewise

neither type of shipment was transported by Bethers pursuant to its temporary authority.

It is patently clear from the record and the pleadings contained therein that the Defendant Commission has failed to give adequate consideration to the existing transportation facilities of the protestants in the territory proposed to be served.

This Court has previously interpreted Section 54-6-5, Utah Code Annotated, 1953, regarding the burden of proof to be met by an applicant seeking a certificate of convenience and necessity. In Lake Shore Motor Coach Lines v. Bennett, 8 Ut. 2d 293, 333 P 2d 1061 (1958) the Court had before it a Commission Report and Order in which the Commission had granted a motor carrier additional operating authority by expanding the scope of an outstanding certificate. Following review, the Court set aside the modification in the certificate for the reason that the applicant there had not shown the existing transportation facilities to be inadequate. In reaching its conclusion, the Court stated at 8 Ut. 2d 297:

"Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require. Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate, or that public need

as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service. For the rule to be otherwise would ignore the provisions of the statute; and also would make meaningless the holding of formal hearings to make such determinations and render futile efforts of existing carriers to defend their operating rights." (Emphasis added)

In specifically addressing itself to the evidence before it, the Court said at 8 Ut. 2d 298:

"... we make this generalization: there is ample specific evidence of the adequacy of carrier service in those areas and there is no specific affirmative showing of either lack or inadequacy of service in such areas by anyone who knew of and had attempted to use the services which were available." (Emphasis added)

The Court also found in the Lake Shore case that the shippers knew of the carrier service available but failed to use those services or found the services to be adequate when used. At 8 Ut. 2d 298, the Court said:

"Nevertheless, upon a survey of the record, we find no witness that made showing for the defendant (applicant): that he (shipper witnesses) was aware of the extent of the services presently available; that he had attempted to make use of them and found the services wanting; nor did the witnesses express actual dissatisfaction with the services presently offered. There being no such evidence, we see no basis for a finding that public convenience and necessity require additional service. The finding to that effect was therefore capricious and arbitrary." (Clarification supplied)

The concurring opinion in Lake Shore, supra, is to similar effect at 8 Ut. 2d 299 as follows:

"HENRIOD, Justice (concurring):

"I concur for the sole reason that no one has shown from the record any evidence reflecting any inadequacy of service resulting from the operations of plaintiffs in their respective spheres, while on the contrary the service affirmatively was shown to have been satisfactory.

"Existing carriers that have expended risk capital, and have complied with tariff and other Commission requirements, ordinarily are entitled to protection against competition until a proposed competitor or someone else establishes by substantial evidence a failure to perform the service which the Commission has authorized and ordered them to perform." (Emphasis added)

It is respectfully submitted that Plaintiffs have affirmatively shown, through documentary evidence, that the service provided has been adequate to meet the needs of the shipping public. This fact was further borne out by the supporting shipper himself. (R. 102, 134-135)

The Interstate Commerce Commission in deciding corresponding interstate applications, and pursuant to like statutory criteria, has reached the same conclusions.

In Ashworth Transfer, Inc.--Ext.--Colorado and New Mexico, 111 MCC 56 (1970) the Interstate Commerce Commission stated at page 65 as follows:

"A prime factor in determining the public need for a proposed service is the inadequacy of existing carriers. This does not mean that an existing carrier will suffer a determination that its service is inadequate unless it satisfies completely every shipping problem that may arise. Rather, applicants are required to make an affirmative showing of a need for service based upon evidence of a consistent or recurring inability to secure adequate and satisfactory service from the existing carriers. Infrequent or isolated instances of delays in furnishing equipment in circumstances other than ordinary do not

demonstrate a general pattern of equipment failures or shortages on the part of authorized carriers. Until the existing carriers' services are shown to be inadequate, a new service will not ordinarily be authorized because normally existing carriers have the right to transport all traffic that they can handle adequately, efficiently, and economically in the territories they serve without the added competition of a new operation. On this record, the existing carriers' services cannot be condemned as inadequate." (Emphasis added)

A similar finding was made by the Commission in Truck Transport, Inc.--Ext.--Branson, Missouri, 114 MCC 489 (1971) at page 491 as follows:

"It is well established that existing motor carriers normally should have the right to transport all the traffic that they can handle adequately, efficiently, and economically in the territories they serve without the added competition of a new operation, unless it is shown that existing carriers are unwilling or unable to meet the shipping public's reasonable transportation requirements. No such showing has been made here."

See also Motor Service, Inc.--Ext. Motor Homes, 123 MCC 518 (1975).

The evidence in this matter discloses the service of the existing Plaintiff carriers to be adequate. When the shipper actually used the available service, in the shipper's own words, "I don't recall of any instance in that situation, no." when asked if he had ever in any way suggested to PBI that its service was lacking in any way. (R. 102) The applicant failed to demonstrate that existing transportation facilities were inadequate. Admittedly, one isolated problem was mentioned, but a full analysis shows

exemplary service provided by Plaintiffs for over eight years for both shippers of gypsum in Sevier County.

This honorable Court, in the case of Mulcahy et al. v. Public Service Commission, et al., 101 Ut. 245 (1941) at 262, had this to say:

"An applicant desiring to enter a new territory, or to enlarge the nature or the type of the service he is permitted to render must therefore show that from the standpoint of public convenience and necessity there is a need for such service; that the existing service is not adequate and convenient, and that his operation would eliminate such inadequacy and inconvenience. He must also show that the public welfare would be better served if he rendered the the service than if the existing carrier were permitted to do so. The paramount consideration is the benefit to the public, the promotion and advancement of its growth and welfare. Yet the interests of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development, and advancement." (Emphasis Added)

The Utah Supreme Court also addressed itself to this issue in the case of Utah Light and Traction Co. v. Public Service Commission, 101 Ut. 99 (1941) at 114, when it held:

"If a need for new or additional service exists, it is the duty of the Commission to grant certificates of convenience and necessity to qualified applicants, but when a territory is satisfactorily served, and its transportation facilities are ample, a duplication of such service which unfairly interferes with the existing carriers may undermine and weaken the transportation set up generally and thus deprive the public of an efficient permanent service. True, existing carriers benefit from the restricted competition, but this is merely incidental in the solution of

the problem of securing adequate and permanent service. The public interest is paramount." (Emphasis Added)

The record in the instant matter demonstrates that the availability of gypsum wallboard traffic has enabled the Plaintiffs to balance their operations, maintain rate levels, and keep costs down, more efficiently utilize equipment, and maintain a more flexible operation. The ability to continue to do so is vital to Plaintiffs and to the shipping public.

Contrary to the directive of this Court in the case of Wycoff Co. v. Public Service Commission, 119 Ut. 342 (1951) at 351, the Commission has failed to take into careful consideration the record of the carriers existing within the scope of the application, the amount of business available in the area, and the number and type of carriers necessary to service the area adequately. Plaintiff's have and can continue to adequately provide for the needs of the shipping public within the scope of the instant application.

Bethers seeks authority as a common carrier from all points in Sevier County to all points in the state of Utah. No need for such service can be demonstrated by the record. The only supporting shipper was from Portland, Oregon and represented a manufacturer of gypsum products that maintains a facility located at Sigurd, Utah. The other manufacturer, also located at Sigurd, United States Gypsum did not appear. Likewise, no consignees appeared. By applicant's own admission, service has not been performed "statewide" pursuant to temporary authority, but rather has been confined also



exclusively to the populated areas of Utah, chiefly between Provo on the south and Ogden on the north. It is thus clear that the record in this proceeding cannot support a grant of the authority sought, especially in light of the pronouncements of this honorable Court in the case of Milne Truck Lines, Inc. v. Public Service Commission, 11 Ut. 2d 365 (1961) at 368 where the Order of the Commission was set aside and the Court held:

"The evidence before the Commission showed a need for the service proposed by the defendant, Clark Tank Lines, Inc., within a restricted area, and by a small number of shippers. Such evidence is insufficient to support the order as made by the Commission, granting to Clark Tank Lines authority to render the proposed service between all points and places within the state of Utah."

Section 54-6-5, Utah Code Annotated, 1953, cited above, also requires that the Commission not grant a certificate if such a grant will be detrimental to the best interests of the people of the state of Utah. The revenue derived from transporting gypsum products provides Plaintiffs with as much as 40% of their net profit, which in turn benefits the shipping public by allowing plaintiff to keep transportation costs as low as possible. Thus, Plaintiff's wallboard revenue and wallboard operations provide many economic and operational advantages both to Plaintiffs and to the shipping public, which must be continued without diversion by Applicant Bethers. Such diversion is not only detrimental to Plaintiff but will result in detriment to the people of the state of Utah in the form of reduced service and/or

Bethers is not in the best interest of the people of the state of Utah.

Thus, it is clear that the Commission's Findings and Conclusions in its Report and Order dated June 8, 1978 and in its Erratum Order dated December 4, 1978 are not in accordance with the evidence, are unlawful, and must be set aside by this Court.

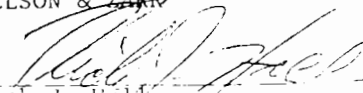
#### CONCLUSION

Defendant Bethers seeks to institute a new motor carrier service at a time when the Plaintiffs are providing an efficient and adequate service. Plaintiffs rely upon the revenues derived from the transportation to allow them to continue to adequately and economically serve the shipping public and thereby the best interests of the people of the state of Utah. In granting the application, the Commission ignored the failure of Bethers to adequately demonstrate that the public convenience and necessity require the proposed operation and likewise ignored the detrimental effects upon Plaintiffs and in turn upon the shipping public. The Report and Order as well as the Erratum Order of the Commission are unreasonable and are not supported by the evidence or the law and should be set aside.

Respectfully submitted,


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By

  
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## CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief to each of the following parties: Lon Rodney Kump, Attorney for Defendant Bethers, 333 East Fourth South No. 200, Salt Lake City, Utah 84111 and upon Mr. Donald K. Hales, Division of Public Utilities, Department of Business Regulation, State of Utah, 330 East Fourth South, Salt Lake City, Utah 84111 and Mr. Arthur A. Allen, Jr., Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 by first-class mail, postage prepaid this 12 day of February, 1979.

  
Rick J. Hall