

1979

PBI Freight Service and Four Corners Trucking v. Public Service Commission of Utah et al : Petition for Rehearing

Utah Supreme Court

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Clerk, Supreme Court, U. S.

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IN THE SUPREME COURT OF
THE STATE OF UTAH

PBI FREIGHT SERVICE and FOUR
CORNERS TRUCKING,

Plaintiffs,

vs.

PETITION FOR REHEARING

RAY BETHERS TRUCKING, INC. and
THE PUBLIC SERVICE COMMISSION OF
UTAH, et. al.,

Defendants.

NO. 16212

TO: THE SUPREME COURT OF THE STATE OF UTAH AND THE HONORABLE
CHIEF JUSTICE AND ASSOCIATE JUSTICES THEREOF:

PBI Freight Service ("PBI") and Four Corners Trucking
("Four Corners"), herein jointly referred to as plaintiffs, by and
through their counsel, represent to the court as follows:

That the Decision of this Honorable Court in the above-
referenced matter, filed August 14, 1979 is in error in the follow-
ing regards:

1. The last paragraph of page 1 of said Decision,
speaking of Bethers, indicates "Its interstate authority extends
to all points in Utah." The correct statement is that the tempor-
ary authority issued to Bethers for intrastate transportation of
gypsum products from Sigurd, Utah extends to all points in Utah.

2. The court has erred in its statement in the first
paragraph of page 2 because PBI does hold authority to serve Salt

Lake City, Utah, and thereby holds authority to serve the commercial zone of Salt Lake City, which includes authority to serve nearly all of the populated area of Salt Lake County, over irregular routes, within the commercial zone. Consistent with the defendant Commission's General Order 81 providing for commercial zones, PBI has irregular route authority to serve Salt Lake City and all points and places within five and one-half miles of Salt Lake City as the crow flies, over irregular routes. Also consistent with said Order, PBI has irregular route authority to serve all points in all municipalities, that have any part of them within the five and one-half mile radius.

3. Paragraph 1 on page 2 of the court's Decision is likewise in error because as of the time of hearing, PBI operated 42 tractors, all of which could be used to transport gypsum products.

4. The second paragraph of page 2 of the court's Decision misstates the record in that Wycoff also holds authority to transport general commodities from Sigurd, Utah.

5. Paragraph 3 on page 2 of the court's Decision is in error because the testimony of the operating witness for PBI and Four Corners was that said interchange could take place at either Thistle or Springville. Likewise, the paragraph is in error in indicating that the use of Interstate Highway 70 between Salina and Green River is not available to PBI or Four Corners under existing authority. Four Corners is authorized to serve between Price, Utah and Blanding, Utah over irregular routes and between all points in Grand County and points in San Juan County over irregular routes as well as between Salt Lake City and Blanding over irregular routes. Thus, Four Corners is authorized to transport shipments between Salt Lake City and Blanding, Utah via Salina, Interstate 70, and Green River, should operations ever require. Additionally, if the volume of traffic ever requires,

PBI, Four Corners, or both of them could apply to the Public Service Commission for direct authority in order to conserve fuel. To date, the miniscule volume of such shipments has not justified such an action.

6. The last paragraph on page 2 of the court's Decision, citing case law, indicates that "* * * Existing carriers have a reasonable degree of protection in the operations they are maintaining.* * *" The Commission and the court have nonetheless denied the reasonable degree of protection to PBI and Four Corners.

7. The first full paragraph on page 3 of the court's Decision, citing case law, indicates that "* * * The Commission and its findings will not be disturbed when they are supported by competent evidence. * * *" The court has erred in concluding that the findings of the Commission recited in the court's Decision are supported by such competent evidence.

8. The second full paragraph on page 3 of the court's Decision, citing case law, indicates that an applicant must demonstrate to the Commission 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. " (Emphasis added). The court has erred in ignoring that the Commission found no material inadequacies in the existing service and that the supporting shipper has already realized the potential of its business as it is and has been for some time operating at capacity production.

9. The partial paragraph at the bottom of page 3 of the court's Decision correctly cites the law in Utah to be "If there is in the record competent evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such fact finds justification in the evidence, and this court cannot disturb it." There is no such competent evidence in

this record upon which to base facts giving rise to such a belief or conclusion to support the Commission's Decision.

10. The first full paragraph on page 4 of the court's Decision is in error because as indicated previously, Wycoff has such authority, and on an interstate basis, there is a large number of carriers having authority to originate shipments at Sigurd.

11. The same paragraph also fails to indicate that the Commission found that PBI's interline provides same day and next day service in almost every case.

12. The second paragraph on page 4 of the court's Decision again speaks of granting authority "sufficient for the existing business or its potential." It was proved on the Record that the existing business had already reached its maximum potential volume. The paragraph further indicates that Bethers has several times the equipment of PBI and that PBI's general commodity operations are liable to conflict with the supporting shipper's needs. In over eight years of transporting gypsum wallboard from Sigurd, Utah, only one complaint has ever been lodged with PBI and even in that case, the service requested was provided. PBI proved that the gypsum transportation complemented its general commodities operations and was vital to its operations.

The paragraph further indicates that Bethers has hauled much more wallboard under temporary authority than PBI during the same time period. This is because the traffic handled by Bethers has been diverted from PBI. Bethers offered hearsay testimony concerning delays in obtaining equipment for loading from PBI but Bethers could not offer documentary proof to substantiate the claim. The court erred in not considering that PBI did offer documentary proof that such delays have not occurred.

13. The last paragraph on page 4, continued on page 5, of the court's Decision is in error because Georgia Pacific is

very much in the business of transporting its products. Footnote 10 on page 4 indicates that PBI has only three tractors while in fact they have 42. The portion of the paragraph at the top of page 5 indicates that Bethers has hauled 40,500 truckloads, the true figure being 4,500.

14. The second paragraph on page 5 of the court's Decision is in error because it fails to indicate that PBI maintains the proper trailers, tarps, and tie-down equipment for transporting gypsum wallboard and that in eight years of transporting the same for the supporting shipper and the other shipper located at Sigurd, no instances of damage have occurred. The paragraph also omits the fact that PBI can and has stationed equipment for loading at the Georgia Pacific plant as requested.

15. The second full paragraph on page 5 of the court's Decision is in error by failing to indicate that there are only four to six shipments per year moving between Sigurd, Utah and points in southeastern Utah. It also overlooks the fact that the operations of PBI are well-suited for transporting sheet rock from Sigurd on flatbed equipment after transporting oversized loads to southern Utah on flatbeds, thus avoiding dead-head mileage.

16. The third full paragraph on page 5 of the court's Decision is in error because PBI's authority in Salt Lake County is not limited to regular routes and PBI is not precluded from providing direct delivery to customers located throughout the populated area of the county.

17. The last paragraph on page 5 of the court's Decision which concludes at the top of page 6 fails to indicate that transportation of wallboard from Sigurd, Utah provides PBI with as much as 40% of its net profit. The paragraph also fails to indicate that PBI has present capacity for transporting 48 to 60 loads of wallboard per month which is more than adequate to transport the 50 loads per month Georgia Pacific ships. PBI can borrow, lease, and purchase additional equipment as the needs arise.

18. The first full paragraph on page 6 of the court's Decision mis-characterizes the testimony of the President of PBI. Concerning his reluctance to misrepresent facts to the Commission, Mr. Roberts testified:

"* * * and I gave Mr. Hales the same answer that I've given Mr. Seim, which was that I thought the present service was more than adequate; that I don't feel that I could go in and be a witness against anybody, and lose. Why does PBI need authority when the interline carriers we were working with - at least 90% - were letting us interline with them, running over their lines. Which-I may use that word - but it's what we do, run over their authority.

And in fact single-line haul, even those service lines, it's technically - it's a two-line haul in view of that. And in view of the fact, I couldn't testify to service needing to be changed, when I knew the service was good and excellent; and I just didn't feel that we wanted to spend the legal money and time and trouble to come in and make an application. I'm spending it now. (Emphasis added).

The paragraph further is in error by failing to indicate that the supporting shipper agreed with the President of PBI that the present service does meet his needs and is, in fact, good and excellent.

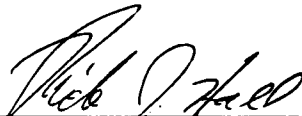
WHEREFORE, it is respectfully submitted by plaintiffs that the Record before the court demonstrates that the Commission's Findings are not supported by competent evidence; that there has been no showing that existing services are in some measure inadequate; and that no public need as to the potential of business has been shown to be such that from the evidence there can be, by any stretch of the imagination, a reasonable basis to believe that the public convenience and necessity justifies the additional service of defendant Bethers.

It is therefore respectfully requested that the court reconsider its Decision filed August 14, 1979; and upon reconsideration and rehearing, and upon consideration of the Brief of Plaintiffs in support of this Petition, and upon consideration of

the Record and all prior pleadings herein; that this Honorable Court set aside its Decision filed August 14, 1979, and thereby enter its Order setting aside and nullifying the Orders of the defendant Public Service Commission dated June 8, 1978, and December 4, 1978, in its Case No. 77-427-01.


DATED this 30 day of August, 1979.

RICHARDS, BRANDT, MILLER,
NELSON & ZARR


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CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered two copies of the foregoing Petition to each of the following parties: Lon Rodney Kump, Attorney for Defendant Bethers, 333 East Fourth South #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 30th day of August, 1979.


Rick J. Hall