

1980

Wells Fargo Armored Service Corporation v. Public Service Commission of Utah, Milly O. Bernard, Chairman, David R. Irvine, and Kenneth Rigtrup, Commissioners of the Public Service Commission of Utah, and Brinks, Inc : Brief of Respondent Brinks, Inc.

Utah Supreme Court

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IN THE SUPREME COURT OF

THE STATE OF UTAH

WELLS FARGO ARMORED
SERVICE CORPORATION,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, MILLY O. BERNARD,
Chairman, DAVID R. IRVINE,
and KENNETH RIGTRUP,
Commissioners of the PUBLIC
SERVICE COMMISSION OF UTAH,
and BRINKS, INC.,

Defendants.

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Case No. 16862

BRIEF OF RESPONDENT BRINKS, INC.

Review, by Writ of Certiorari, of an Order
of the PUBLIC SERVICE COMMISSION OF UTAH

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Case No. 16862

BRIEF OF RESPONDENT BRINKS, INC.

STATEMENT OF CASE

Respondent Brinks, Inc. ("Brinks") applied for a certificate of exemption from regulation by the Public Service Commission of the State of Utah (the "Commission").

DISPOSITION IN LOWER TRIBUNAL

The Commission granted Brinks' application for a certificate of exemption from regulation.

RELIEF SOUGHT ON APPEAL

Brinks respectfully asks this court to uphold the Commission's order granting Brinks' application for a certificate of exemption from regulation.

STATEMENT OF FACTS

Brinks and its predecessors have been engaged for over a century in the business of transporting money and other valuables. Much of this transportation occurs by means of armored vehicles. At the present time, Brinks is the largest carrier by armored vehicle in the United States.

Pursuant to contracts with various individuals and business entities, Brinks has for the last four and one-half years been engaged in the business of transporting money and other valuables by armored vehicle within the State of Utah. Until September, 1978, these services were rendered within fifteen miles of the city limits of Salt Lake City. Beginning at that time, however, Brinks began rendering weekly service for a local bank to and from the bank's Snowbird, Utah branch. Other individuals and business entities have requested and continue to request applicant to render services at points beyond a fifteen mile radius of Salt Lake City.

Section 54-6-12(f), Utah Code Annotated exempts certain vehicles from the regulatory provisions of the Motor Vehicle Transportation Act. A reading of the statute, however, reveals

an ambiguity with respect to the type of vehicles exempted from regulation. To obtain a resolution of this ambiguity, Brinks appeared before the Public Service Commission of the State of Utah seeking an order exempting it from Commission regulation. On January 29, 1979, the Commission heard the arguments of Brinks and of appellant Wells Fargo Armored Service Corporation ("Wells Fargo"), then a protestant to Brinks' application. On October 31, 1979, the Commission issued its report and order granting Brinks a certificate of exemption from regulation. On November 19, 1979, Wells Fargo unsuccessfully sought a rehearing before the Commission. Thereafter, Wells Fargo instituted proceedings in this Court.

In the Statement of Facts set forth in its brief, Wells Fargo states that the "single issue raised in this appeal is the proper construction of Section 54-6-12(f) Utah Code Annotated." Brinks submits that additional issues of administrative agency expertise and discretion are present and should be considered in the review of this matter.

ARGUMENT

Section 54-6-12(f), Utah Code Annotated, exempts certain vehicles from the regulatory provisions of the Motor Vehicle Transportation Act. The Act generally does not apply

[t]o motor vehicles when especially constructed for towing, wrecking, maintenance, or repair purposes, and not otherwise used in transporting goods and merchandise for compensation; or when constructed as armored cars and used for the safe conveyance or delivery of money or other valuables, or when used as hearses, ambulances or licensed taxicabs, operating within a fifteen mile radius of the limits of any city or town; or to motor vehicles used as ambulances or hearses by any person, firm or corporation duly licensed in the state as an embalmer, funeral director, or as a mortuary establishment, provided that use of such motor vehicles as an ambulance shall be incidental to the use of embalming or funeral directing.

Pursuant to Brinks' application and after due consideration, the Public Service Commission ruled that the fifteen-mile limitation set forth in the foregoing provision applied only to "hearses, ambulances or licensed taxicabs" and not to armored cars "used for the safe conveyance or delivery of money or other valuables." Brinks submits that the Commission's ruling was entirely correct, reasonable, and well within the realm of the Commission's permissible discretion. Wells Fargo's opposition to the Commission's determination can only be viewed as an unreasonable fear of the competition newly provided by Brinks in an otherwise monopolistic market.

I. THE COMMISSION CORRECTLY
CONSTRUED THE STATUTORY EXEMPTION

In its Report and Order granting Brinks an exemption from Commission regulation, the Commission noted that an ambiguity existed in the statutory provision. The Commission then relied on the "last antecedent rule" of statutory construction and on reasoned public policy to resolve the ambiguity.

A. RULES OF GRAMMAR AND STATUTORY CONSTRUCTION SUPPORT THE COMMISSION'S DETERMINATION.

The statutory exemption is given in a complex sentence susceptible of grammatical analysis. The sentence may be displayed as follows:

[The Motor Vehicle Transportation Act does not apply to] motor vehicles

when especially constructed for towing, wrecking, maintenance or repair purposes, and not otherwise used in transporting goods and merchandise for compensation; or

when constructed as armored cars and used for the safe conveyance or delivery of money or other valuables, or

when used as hearses, ambulances or licensed taxicabs, operating within a fifteen mile radius of any city or town . . .

(Emphasis added.) The first part of the quoted portion of the statute consists of a subject ("Motor Vehicle Transportation Act"), a verb and adverb ("does not apply"), and a prepositional phrase ("to motor vehicles") which is modified by three adjective

clauses introduced in each case by the relative adverb "when." From a grammatical and logical standpoint, each clause describes a separate and identifiable category of vehicles exempted from regulation by the Act.

As indicated by the foregoing display, however, a fourth clause, the participial phrase "operating within a fifteen mile radius of any city or town," is different in nature and operation from the preceding three. It is a more limited modifier the antecedent of which must be found nearer at hand than the antecedent for the first clauses. Structurally, the antecedent is "hearses, ambulances, or licensed taxicabs." It is grammatically unsound to attempt to carry the fifteen-mile restriction further back in the statutory language.¹ See generally M. SEMMELMEYER & D. BOLANDER, INSTANT ENGLISH HANDBOOK 210-18,

¹The following phraseology would have been closer to expressing such a legislative intent to apply the restriction to armored cars:

To motor vehicles when especially constructed for towing, wrecking, maintenance, or repair purposes, and not otherwise used in transporting goods and merchandise for compensation; or when constructed or used either as armored cars for the safe conveyance of delivery of money or other valuables, or as hearses, ambulances or licensed taxicabs, operating within a fifteen mile radius of the limits of any city or town
.

Here, among other changes, the third "when" is omitted, and the participial phrase "operating within a fifteen mile radius of the limits of any city or town" can at (footnote 1 continued on p. 7)

237-47 (1968). As the Commission noted,

the dependent clause "or when constructed as armored cars and used for the safe conveyance or delivery of money or other valuables", is separated from the next dependent clause by the strong disjunctive "or when". This would strongly suggest that armored cars are in a separate category from "hearses, ambulances, or licensed taxicabs, operating within a fifteen mile radius . . ."

Report and Order of Commission, p. 4.

The Commission's construction is supported by the "last antecedent rule." The rule states that where no contrary intention appears in a statute, relative and qualifying words and phrases refer only to the last antecedent and not to more remote phrases. E.g., Ruthrauff v. Kensinger, 214 Kan. 185, 519 P.2d 661 (1974); Caughey v. Employment Security Department, 81 Wash. 2d 597, 503 P.2d 460 (1972); People v. Baker, 69 Cal. 2d 44, 69 Cal. Rptr. 595, 442 P.2d 675 (1968).

(footnote 1 continued)

least arguably modify the entire preceding adjective clause introduced by the second "when," thereby applying the limitation to armored cars.

Speculation as to what the legislature might have done, however, is of limited use. Indeed, legislative acquiescence, consent, or intent is not to be found in legislative silence. See T.I.M.E., Inc. v. United States, 359 U.S. 464, 3 L. Ed. 2d 952 (1959); Chavez v. Freshpict Foods, Inc., 456 F. 2d 890 (19th Cir. 1972). For this reason, Wells Fargo's discussion of what the Legislature "could have" done to show what the Legislature in fact did, is misleading and incorrect as a matter of law. Brief of Wells Fargo, p. 11-12, quoting dissent from Report and Order of Commission, p. 6.

In Salt Lake City v. Salt Lake County, 568 P.2d 731 (Utah 1977), this Court discussed the last antecedent rule, noting that the rule required that qualifying words and phrases be applied to the immediately preceding words, rather than to more remote ones. The Court did mention that the rule is not absolute; for example, if there are several preceding terms of the same character, the qualifier may modify all of the terms, but only if the natural and sensible meaning of the wording so requires. 568 P.2d at 740-41.

This exception to the last antecedent rule noted by the Court, however, is inapplicable to the instant case. Here, the "terms of the same character" modified by the qualifier "operating within a fifteen mile radius of any city or town" are the "hearses, ambulances or licensed taxicabs." Armored cars are clearly of a different character altogether, both because of their actual function and, as discussed above, because of their grammatical placement in a different category. In addition, as also shown above, the "natural and sensible meaning of the wording" does not require the modification of all the terms by the qualifier; in fact, the natural and sensible meaning of the wording would be perverted by the relation back of the fifteen-mile restriction to armored cars.

B. PUBLIC POLICY AND THE PURPOSE OF THE STATUTE ARE FURTHERED BY THE COMMISSON'S DETERMINATION.

The Commission also analyzed the statutory exemption in terms of its underlying policies. When there is uncertainty as to the meaning and proper application of a statute, it is proper to look both to the purpose for which it was created and to the practical aspects of its operation. Salt Lake City v. Salt Lake County, 568 P.2d 738, 741 (Utah, 1977); State v. Salt Lake City Public Board of Education, 13 Utah 2d 56, 368 P.2d 468, 469 (1962).

Here, the limited exemption of hearses, ambulances, and licensed taxicabs from the Motor Vehicle Transportation Act and Public Service Commission regulation must be based on a set of progressive assumptions: (1) hearses, ambulances, and licensed taxicabs all perform highly visible, important, and personal services to the general public; (2) such services are potentially likely to be carried out in an unsafe or inappropriate manner absent certain standards of performance set by state or local governments; (3) cities and towns may regulate the hearses, ambulances, and taxicabs within their jurisdiction; and (4) because of such city and town regulation, Public Service Commission regulation of hearses, ambulances and licenses taxicabs is unnecessary within a fifteen mile limit of any city or town. Thus, the Public Service Commission may regulate hearses, ambulances, and licensed taxicabs beyond the fifteen-mile limit both because beyond the limit such vehicles are no longer subject

to local regulation and because -- at least in the case of taxicabs -- the vehicles enter competition with carriers already regulated by the Commission.

Armored car services do not fit within the foregoing assumptions. As noted, most of the modes of transportation -- such as hearses, ambulances, and taxicabs -- which are brought within the Public Service Commission jurisdiction by the statute are those which serve the general public. Those modes of transportation, however, are not susceptible to the regulation by the public which they serve. Armored car services are clearly distinguishable in this regard because of the specialized service which they offer. They principally serve financial institutions having sufficient economic power to insist upon safe, efficient, and proper service.

The market which armored cars serve, therefore, may be deemed to more than adequately regulate them. This is the case whether or not their operation is confined to the fifteen-mile limit. With respect to armored cars, then, there is no logical or public policy basis for distinguishing between vehicles operating within a fifteen-mile radius of any city or town and vehicles operating outside such an area. In sum, armored car service is not an area of transportation that needs regulation. The statute, therefore, "should not be extended by construction

beyond the correction of evils sought by it." 73 AM. JUR. 2d
Statutes §157 (1974).

Relying on such reasoning, the Commission noted that the character of the business conducted by applicant is fundamentally different from that operated by the proprietors of hearses, ambulances, or taxicabs. The latter involves transportation of passengers, or human bodies, which likely, in the estimation of surviving relatives, deserve some care and consideration in their transportation. The carriage of money and other valuables involves quite different considerations. Further, as pointed out by Applicant in its memorandum, the potential customers for Applicant's specialized service are financial institutions in a strong bargaining position, vis-à-vis Applicant. The need for regulation by this Commission would, accordingly, appear to be minimal.

Report and Order of Commission, p. 4. This declaration of the Commission relative to the statute's purpose should be given great weight since a "fundamental rule of statutory interpretation" requires a statute to be examined "in accordance with the purpose which was sought to be accomplished." Salt Lake City v. Salt Lake County, 568 P.2d 738, 741 (Utah 1977).

Lastly, in this regard, it is relevant to note that the application of the 15-mile limit has been before this Court on at least one occasion, when the Court quoted the statute as follows:

(f) * * * [wreckers] * * * [armored cars]
* * * hearses, ambulances, or licensed taxicabs,
operating within a fifteen-mile radius of the
limits of any city or town. * * *

Realty Purchasing Co. v. Public Service Commission, 9 Utah 2d 375, 345 P.2d 606, 607-08 (1959) (asterisks, brackets, and emphasis by the Court). Although the case involved only taxicabs, the Court's quotation of the statute in the above manner indicates that in the Court's view armored cars were different in nature from hearses, ambulances, or licensed taxicabs.

C. PRIOR TO THE COMMISSION'S DETERMINATION IN THE INSTANT MATTER, THE CONSTRUCTION OF THE STATUTORY EXEMPTION HAD NEVER BEEN FULLY AND PROPERLY CONSIDERED.

Contrary to the assertion in Wells Fargo's brief, the question of the correct construction of Section 54-6-12(f) with respect to armored cars had never been fully and properly considered prior to the Commission's ruling in the instant matter.

At the outset, it must be noted that the rule of stare decisis, generally followed by courts of law, has no application in the administrative agency context. See Reaveley v. Public Service Commission, 20 Utah 2d 237, 436 P.2d 797, 799-800 (1968), citing 73 C.J.S. Public Administrative Bodies and Procedure § 148 (1951). The rule is not applied for the reason that administrative agencies require great flexibility

in executing their peculiar responsibilities:

Certainly an administrative agency which has a duty to protect the public interest ought not be precluded from improving its collective mind should it find that a prior decision is not now in accordance with its present idea of what the public interest requires.

436 P.2d at 800.

Even if, however, the rule of stare decisis was applicable to the Commission's proceedings, the instant matter is not one in which the rule should - or even could - be employed. The only prior occasion mentioned by Wells Fargo when the Commission even arguably considered the meaning of Section 54-6-12(f) was Wells Fargo's own ex parte application for a certificate of convenience and necessity. But, as the Commission noted, on that occasion, Wells Fargo's application "was unopposed, and there appears nothing in the Report and Order to indicate that the applicability of the exemption was argued by any of the parties." Thus, the instant matter involving Brink's application for a certificate of exemption was, the Commission concluded, "the first time the construction [of the statute] has been argued in an adversary proceeding." Hence, the Commission determined to "examine the question afresh." Report and Order of Commission, p. 3.

Wells Fargo's fear of the competition to be provided by Brinks' services is most evident in this context. For "some

years" Wells Fargo itself operated beyond the 15-mile limit of cities and towns without a certificate of convenience and necessity, thus demonstrating at once its recognition of the ambiguity of the statute and its opinion of how the ambiguity should be resolved. Report and Order of Commission, p. 3. For Wells Fargo now to contest the Commission's order re-creating the conditions under which Wells Fargo operated during prior years is irrational -- unless, of course, one looks for anticompetitive motivations. Given the Commission's Ruling and Order, and the absence of any indication of contrary legislative intent, there is no need to protect a large corporation like Wells Fargo behind the skirts of administrative regulation.

II. THE COMMISSION ACTED WITHIN THE REALM OF ITS EXPERTISE AND DID NOT ABUSE ITS DISCRETION

It is an axiom of administrative law that a reviewing court will not substitute its own judgment for the wisdom of an administrative agency where the agency's power is exercised reasonably and within the scope of the agency's lawful authority. Lewis v. Wycoff Co., 18 Utah 2d 255, 420 P.2d 264, 266 (1966). In fact, this Court has noted the presumption that an agency possesses superior knowledge and expertise within the area of the agency's responsibility, and has emphasized its corresponding reluctance to interfere with the agency's exercise of that responsibility. See Utah Power & Light Co. v. Utah State

Tax Commission, 590 P. 2d 332, 335 (Utah 1979); Greyhound Lines, Inc. v. Public Service Commission, 547 P.2d 199, 201 (Utah 1976); Central Bank & Trust Co. v. Brimhall, 28 Utah 2d 14, 497 P.2d 638, 641 (1972). The Court has stated,

It is not our prerogative to pass upon the wisdom of the Commission's decision. It is charged with the responsibility of general supervision and regulation of the common carriers of this state and of seeing that the public receives the most efficient and economical service possible.

Lewis v. Wycoff Co., 18 Utah 2d 255, 420 P.2d 264, 266 (1966). At the very least, the interpretation of a statute by the administrative agency called to administer it is persuasive and entitled to be given weight. See Salt Lake City v. Salt Lake County, 568 P.2d 738, 741-42 (Utah 1977); Salt Lake Transfer Co. v. Barton Truck Line, Inc., 8 Utah 2d 401, 335 P.2d 829 (1959); 73 C.J.S. Public Administrative Bodies and Procedure §69 (1951); 82 C.J.S. Statutes, §359(a) (1953).

The instant matter shows clearly the wisdom of the foregoing policies. The Public Service Commission is charged with the regulation of certain types of motor carriers. The Commission daily must discharge its responsibilities, taking into account the nature of the services involved and the paramount needs of the public. The Commission is most aware of the operations of the

carriers involved in the instant matter. The Commission is best situated to ascertain the optimum manner of effecting the public policy undergirding Section 54-6-12(f).

Certainly, in the instant matter, the Commission interpreted the statute reasonably. Wells Fargo is not entitled to have the Commission's order reversed merely because Wells Fargo can create an alternative interpretation of the statute. Even if an alternative reasonable interpretation exists, Wells Fargo can point to no arbitrary or capricious action on the part of the Commission. Absent such action, as this Court has recently emphasized, the Commission's decisions will not be reversed. Empire Electric Association, Inc. v. Public Service Commission, 604 P.d 930 (Utah 1979), citing Utah Gas Service Co. v. Mountain Fuel Supply Co., 18 Utah 2d 310, 422 P.2d 530 (1967) and Mulcahy v. Public Service Commission, 101 Utah 245, 117 P.2d 298 (1941); Petty v. Utah State Board of Regents, 595 P.2d 1299, 1302 (1979).

Relevant to such considerations is Section 54-7-16, Utah Code Annotated:

The review [by the Supreme Court of a Commission decision] 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.

This Court has held that such a review is to determine whether the Commission has acted beyond its jurisdiction or in a "capricious, arbitrary, or wholly unreasonable" manner. Lake Shore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339 P.2d 1011 (1959). In the instant matter, the Commission acted well within its jurisdiction and acted in an entirely reasonable manner. The law and public policy of this state will best be served by upholding the Report and Order of the Public Service Commission.

CONCLUSION

For the reasons stated herein, Brinks respectfully urges this Court to uphold the Report and Order of the Public Service Commission in this matter.

DATED this ____ day of April, 1980.

JONES, WALDO, HOLBROOK & McDONOUGH

By: _____
Calvin L. Rampton

By: _____
James S. Lowrie

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MAILING CERTIFICATE

I hereby certify that on this ____ day of April, 1980, I mailed true and correct copies of the foregoing Brief of Respondent Brinks, Inc. upon counsel by placing said copies in the United States mail, postage prepaid, addressed as follows:

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