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W. S. Hatch Co. v. Public Service Commission of Utah et al : Brief of Respondents

Utah Supreme Court

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RECEIVED

IN THE SUPREME COURT
of the
STATE OF UTAH

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W. S. HATCH CO., a Utah corporation,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT,
DONALD HACKING, STEWART
M. HANSON, its Commissioners;
THE DENVER AND RIO GRANDE
WESTERN RAILROAD CO., a Delaware
corporation; THE UNION
PACIFIC RAILROAD COMPANY,
a Utah corporation; and GUY PRICH-
ARD, dba Guy Prichard Transfer,

Respondents.

Case No. 8182

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Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS,
PUBLIC SERVICE COMMISSION AND
GUY PRICHARD

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BRIEF OF RESPONDENTS,
PUBLIC SERVICE COMMISSION AND
GUY PRICHARD

STATEMENT OF THE CASE

Petitioner correctly states the case.

STATEMENT OF FACTS

The facts, as to protestant, Guy Prichard d/b/a Guy Prichard Transfer, hereinafter referred to as Prichard are:

(1) Prichard holds Certificate of Convenience and Necessity, No. 741, which provides, as amended, in part as follows:

To operate as a common motor carrier by motor vehicle for the transportation of:

1. *Commodities which by reason of their size, shape, weight, origin, or destination require equipment or service of a character not regularly furnished by regular common carriers at the regular line rates, which commodities shall be such as, but shall not be limited to the following: Gasoline tanks, Boilers, Pipes, and Tubing to be used in connection therewith; Cable, Bridge, or Structural Iron or Steel; Concrete Mixers, Culverts, Explosives, Grading and Road Equipment, Harvesters and Threshers; Locomotives, Machinery and Drag-line outfits; Piling, Pipe, Pole Line Construction Material; Telephone or Telegraph Poles; Rails, Smokestacks; and Heavy Timbers; Machinery, Materials, Supplies and Equipment incidental to, or used in, the construction, development, operation, and maintenance of facilities for the discovery, development, and production of natural gas and petroleum or minerals.* (Emphasis added)
2. Commodities in connection with the transporting of which is rendered a special service in preparing such commodities for shipment or setting up after delivery or otherwise rendering a needed service not a part of the ordinary act of transporting and not now regularly furnished by other regular common carriers for the regular line rates.
3. Campsite equipment, camp supplies, fixtures and accessories which shall be transported to camps or to construction sites or locations.

4. All parts, supplies, equipment and appurtenances necessarily connected or to be connected or used with any of the articles described in paragraphs one and two, whenever such parts, supplies, equipment and appurtenances are a part of the same movement.

To perform the services defined between points in Utah where the origin or destination of the movement is in Uintah, Duchesne, Carbon, Emery, Wayne, Grand, or San Juan Counties, on call, over irregular routes.

and in all other respects, application is denied
(R. 20)

(2) Prichard has operated under this and prior authority granted him since the year 1934; and, has been engaged in hauling sulphuric acid, the controversial commodity here, since the year 1946. (R. 259)

(3) Sulphuric acid is a "supply * * * used in, the * * * operation * * * of facilities for the * * * development, and production of * * * minerals," (uranium) and as such, is a commodity Prichard is authorized to transport. That the acid is so used is established by petitioner. (R. 213)

(4) Prichard has special equipment for the handling and hauling of sulphuric acid, i.e., a tractor, (R. 257) an acid tank, (R. 257) a storage tank, (R. 258) and an air compressor for loading and unloading acid into container tanks. (R. 258) Prichard has considerable invested in acid equipment. (R. 265)

(5) Prichard opposes the application of petitioner

because it would take business away from him in the area in which he is licensed to operate. (R. 265)

(6) Prichard has the facilities to supply the present need for acid at the Monticello mill, (R. 258, 260) and is prepared to furnish the equipment to supply the Vanadium Corporation of America at the Hite mill; (R. 260) He could secure additional equipment to handle any increased demand from the Monticello mill, (R. 260) and could take care of any increased demand for acid from the Vanadium Corporation of America even up to 400 tons per month, (R. 261) and, he now holds himself out to the public as being able, ready and willing to transport acid in the area where his authority exists. (R. 260, 261) Prichard could supply acid for the Utah Power and Light Company for its proposed Castle Dale project; (R. 264, 265) the fact is, and the record shows, that Prichard is willing and can transport all the sulphuric acid on demand or to be demanded in his territory as well as all of some thirty different muds and chemicals now being hauled by his equipment.

In this brief we are not concerned with the Commission's grant of authority to petitioner for the transportation of acid between Salt Lake County and Davis County, and between Salt Lake County and Weber County. In those areas Prichard has no authority. The Commission did find that public convenience and necessity required truck transportation of acid to Carbon County (R. 23) and to the southeastern part of the State. (R. 25) It necessarily follows that the Commission found

also that such convenience and necessity did not require the services of the W. S. Hatch Co., a Utah corporation, the petitioner here, in addition to that of Prichard whose facilities and equipment are for the present and foreseeable future adequate therefor.

STATEMENT OF POINTS

POINT I

THE COMMISSION DID NOT ERR IN CONSTRUING THE RIGHTS OF PRICHARD TO INCLUDE AUTHORITY TO TRANSPORT ACID IN BULK IN TANK TRUCKS.

POINT II

THE COMMISSION DID NOT ERR IN DENYING PETITIONER'S APPLICATION AS TO THE AREA SERVED BY PRICHARD; i.e., THE COUNTIES OF Uintah, Duchesne, Carbon, Emery, Wayne, Grand, and San Juan, STATE OF UTAH.

ARGUMENT

POINT I

THE COMMISSION DID NOT ERR IN CONSTRUING THE RIGHTS OF PRICHARD TO INCLUDE AUTHORITY TO TRANSPORT ACID IN BULK IN TANK TRUCKS.

The pertinent parts of the authority under which Prichard operates are set out in the Statement of Facts herein, and for that reason they are not here restated.

Whatever pre-existing contract carrier permit Prichard had or did not have is here immaterial since his present authority includes the transportation of acid in the designated areas. We so contend. In the very recent decision of this Honorable Court, *Ashworth Transfer Co.*

v. *Public Service Commission*,Utah....., 268 P. 2d 990, the court, speaking through Mr. Chief Justice McDonough, unanimously resolved that question in Prichard's favor. The certificate of convenience and necessity issued in that case to Young cannot be distinguished in substance from the one here. For all practical purposes both are identical. The controversial commodity in the one case is "explosives." That here is "sulphuric acid" as this court said these items "would be an included item under the general heading of "supplies * * * incidental to * * * operation * * * (of facilities) for the * * * (development, and) production of natural gas and petroleum (or minerals)." Our court having adopted the rulings of the Interstate Commerce Commission as to the classification of "limited-commodity certificates" and as to "general classifications" as determined in *Ex Parte No. M C 45* and *In re Application of T. C. Mercer and G. E. Mercer*, No. M C-74595 by that commission, there is no reason why the order of the Public Service Commission in this cause should not be sustained. There can be no such "tortured construction of the language itself" of which petitioner complains.

POINT II

THE COMMISSION DID NOT ERR IN DENYING PETITIONER'S APPLICATION AS TO THE AREA SERVED BY PRICHARD; i.e., THE COUNTIES OF UINTAH, DUCHESNE, CARBON, EMERY, WAYNE, GRAND, AND SAN JUAN, STATE OF UTAH.

Petitioner complains of the sufficiency of the equipment maintained by Prichard to satisfy the acid trans-

portation needs in this State. We submit that such claim is based entirely upon a speculated need not now existent nor determinable. (See the testimony of John A. Riddle, R. 208 through 229.) Therefore, the only question presented to the court for determination in this action is whether there was any competent evidence adduced at the hearing which supports the order of the Commission. *Uintah Freight Lines, et al. v. Public Service Commission, et al.*, 118 Utah 544, 223 P. 2d 408. The record speaks for itself and there is not one scintilla of evidence to indicate that the service in the area is not now satisfactory and adequate. The testimony of Mr. John W. Blackburn of the Vanadium Corporation of America is to the effect that his company has chosen not to avail itself of the services of Prichard; (R. 242, 243) and, that he had no information as to whether Prichard's facilities were ample to take care of its needs. (R. 244) This is not proof that Prichard either refused or was not able to transport. This court has repeatedly held, (*Rudy v. Public Service Commission, et al.*,Utah....., 265 P. 2d 400) that:

It is well settled that this court cannot substitute its judgment for that of the commission if there is sufficient evidence to support the commission's findings.

Citing, *Fuller-Toponce Truck Co. v. Public Service Commission*, 99 Utah 28, 96 P. 2d 722; *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298; *Uintah Freight Lines v. Public Service Commission*, *supra*.

Petitioner relies upon *Mulcahy, et al. v. Public Serv-*

ice Commission, et al., supra, for the proposition that the Commission should look to future requirements as well as present ones. With this we have no quarrel. However, we contend that case also stands for the sound proposition that the interests of existing certificate holders should be protected fully. As to this the court said:

An applicant desiring to enter a new territory, or to enlarge the nature or 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 subserved if he rendered 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.* Corporation Comm. v. Pacific Greyhound Lines, 54 Ariz. 159, 94 P. 2d 443; Chicago R. R. Co. v. Commerce Comm., 326 Ill. 51, 167 N.E. 840. Having given due consideration to those matters the commission determines whether the existing carriers or a new one should be permitted to render the proposed service. *If the commission's determination finds justification in the evidence, it is not a law question and we cannot review or modify it or set it aside.* Regardless of what our own views on the matters may be, the determination of the

commission on this matter finds support or justification in the evidence. We cannot say it acted arbitrarily or capriciously, and the findings thereon must stand. (Emphasis added)

Also,

* * * The commission evidently felt that since the railroads, even upon this hearing were contesting the need for the added service, although expressing a willingness to render it if the commission found it necessary, *the party anxious, able, ready and willing to serve should be protected in the business it had built up with approval of the commission.* With regard to such business, the commission evidently felt that the Truck Company was in the position of being the existing utility and therefore had the position of advantage. (Emphasis added)

This court too has said:

The very purpose of the Utilities Act is to prevent one public utility from destroying another.

Gilmer v. Public Utilities Commission, 67 Utah 222, 247 P. 284, 289.

Generally, petitioner complains of the findings and conclusions of the Commission and claims that the Commission enlarged Prichard's rights in an application and on a showing made by petitioner. We submit that such is not the case. It is certainly not consistent so to claim and then to add, "Even if Prichard's rights specifically included acid, he does not maintain sufficient equipment to satisfy the acid transportation needs in this State," as does petitioner in his brief (page 24). In the matter of *Wycoff Co. v. Public Service Commission*,

.....Utah....., 227 P. 2d 323, our court said:

In its consideration of applications for either contract or common motor carrier rights, the Commission can take into account the record of the carriers then in the field, the amount of business available in the area and the number and type of carriers necessary to service the area adequately. Its conclusion that one common carrier can properly service an area and that another carrier competing for the same service in the same area would be detrimental to the best interest of the public can not be held to be arbitrary by this court, if there is evidence which reasonably tends to establish that the volume of business permits only one profitable operation.

In the case at bar, we respectfully contend, there has been no showing that the convenience and necessity of the public require two common motor carriers of acid in the area served by Prichard. This being so, the scope of review by this court is to be governed by the rule sustained in *Goodrich v. Public Service Commission of Utah*, 114 Utah 296, 198 P. 2d 975, there stated to be as follows:

We have repeatedly held that in reviewing cases certified to this court from the Public Service Commission on a statement of error that the Commission's report, findings, conclusions and order are unlawful, we are limited in our review to ascertaining whether or not the Commission had before it substantial evidence upon which to base its decision. Only in the event that we find the Commission acted arbitrarily, capriciously or unreasonably in denying applicant's petition can we set aside the order.

Petitioner alleges here and states in his brief (page 19) that:

The Commission's action in the case at bar parallels its action in the Peterson case. It is an attempt to vary the plain, unambiguous language of Prichard's certificate in a collateral proceeding without justification whatever.

Peterson v. Public Service Commission,Utah
....., 266 P. 2d 497.

We think that such a statement does an injustice to the words of Mr. Justice Crockett in that case and to the decision therein. The Commission in the instant case did not *attempt* a conclusion of law based upon its interpretation of Prichard's authority. It defined Prichard's authority based upon it's, the Commission's, interpretation of the certificate issued. What Mr. Justice Crockett said in *Peterson v. Public Service Commission*, *supra*, was, as we interpret it:

Unless there is some uncertainty or ambiguity there is no basis for interpretation or clarification of the certificate.

Mr. Justice Crockett did not say, nor does that case hold, that the Commission could not interpret its certificates where the language is plain and unambiguous as in Prichard's authority.

CONCLUSION

We respectfully conclude that petitioner is laboring under the false impression that Pritchard has no authority to transport acid. This removed, the order of the Commission should be sustained.

Respectfully submitted,

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Received copy of the foregoing Brief of Respondent
Guy Prichard, this day of July, 1954.

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