

1954

## W. S. Hatch Co. v. Public Service Commission of Utah et al : Petitioner's Reply Brief

Utah Supreme Court

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Marr, Wilkins & Cannon; Mark K. Boyle; Attorneys for Petitioner;

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Case No. 8182

**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 COM-  
PANY, a Utah corporation; and GUY  
PRICHARD, dba Guy Prichard Transfer,

*Respondents*

PETITIONER'S REPLY BRIEF

**FILED**  
SEP 23 1954

MARR, WILKINS & CANNON  
MARK K. BOYLE

*Attorneys for Petitioner*  
Clerk, Supreme Court, Utah

# INDEX

## CASES CITED

	<i>Page</i>
Ashworth Transfer Co. et al. v. Public Service Commission, et al., 268 P. 2d 990, ..... Utah .....	1
Blewett v. Hoyt, 103 N.Y.S. 451, 457; 118 App. Div. 227.....	6
Charlton v. Kelly, 166 F. 433, 84 CCA 295.....	7
Hanover Co. v. Hines, 11 S.W. 2d 621.....	7
Lacer v. Sumpter, 249 S. W. 1026, 198 Ky. 752 .....	7
Miller v. Peruvian Consolidated Mining Company, 11 P. 2d 291, 294, 79 Utah 401.....	7
In Re Sinclair Prairie Co., 53 P. 2d 221, 223; 175 Okla. 289.....	8
So. Penn Oil Co. v. Snodgrass, 76 S.E. 961, 965; 71 W. Va. 438	8
Tedrow v. Shaffer, 155 N.E. 510, 511; 23 Ohio App. 343.....	7
CONCLUSION .....	9

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PETITIONER'S REPLY BRIEF

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In their brief the respondents, Public Service Commission and Guy Prichard, cite the case of *Ashworth Transfer Co. et al. v. Public Service Commission, et al.*, 268 P. 2d 990, ..... Utah ....., as one which “cannot be distinguished in substance from the one here” and as a case which “unanimously resolved that question (the right of Prichard to transport acid) in Prichard’s favor.”

We submit that the case is not in point, does not resolve any question in Prichard's favor, but does in fact specifically indicate the evils which result from a construction such as that contended for by respondents. In that case the court was considering whether "explosives" were "supplies . . . incidental to . . . operation (of facilities) . . . for the . . . production of natural gas and petroleum." The court so held, being aided by the fact that the term "explosives" was *specifically* mentioned as one of the products which the carrier in that case was authorized to haul. Furthermore, explosives are used in the *development* and *production* of natural gas and petroleum. Acids are not.

The following quotations from the case are, we think, significant and helpful in determining the type of commodities which Prichard is authorized to haul. The authority being construed therein is, for all practical purposes, identical to Prichard's.

"The transporters of heavy and bulky articles are frequently referred to in the industry as heavy haulers and riggers, terminology which in large measure describes the service performed by them. . . . The commodities transported by this group of carriers are of such size or weight as to require special devices for their loading and unloading and the use of special equipment for their movement over the road."

The court quoted the Interstate Commerce Commission as follows in pointing out some of the infirmities connected with a grant of authority in the language under consideration :

“On the other hand, a broad grant of authority under a generic heading often leads to abuses through *‘weird theories of interpretation and construction’* to justify hauling commodities not contemplated by the grant.” (Emphasis added.)

The court further described the commodities covered by the authority as those that “may vary from a heavy piece of machinery to a huge girder.”

We urge the court to consider the apparent difficulty encountered by the Commission and by the respondent Prichard in arriving at a theory which will support the Commission’s order and Prichard’s contention that he has authority to transport acid in bulk in tank truck vehicles. No less than four such theories have been advanced—some of which have been rejected by the respondents themselves. They are as follows :

1. The Commission chose to justify its action on the basis of a previously existing contract carrier permit which was not put in evidence and about which we know nothing. See pages 9 to 14 of petitioner’s brief.

2. During the hearing counsel for respondent Prichard advanced the theory that he could haul acid because it required “special equipment,” (see R. 106) :

“MR. FINLINSON: Well, our position is that under our authority we can haul acid, in that acid requires special equipment and under our authority we can haul it.”

3. Later in the hearing counsel chose to base his contention on the theory that acid required a “special service” in preparing it for shipment or setting it up after delivery (see R. 109, 110):

“MR. FINLINSON: Gentlemen, I call your attention to paragraph 2 of his authority:

‘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.’

“Now, Gentlemen, I submit that that covers the hauling of acid, . . .”

These first three theories have been covered in petitioner’s original brief to which we invite the court’s attention.

4. At page 5 of respondents’ brief respondents rejected the theory adopted by the Commission in the following language:

“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.” (Emphasis added.)

5. On page 3 of respondents' brief they adopt still another and we suppose a final theory to sustain their position, by stating:

"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."

To sustain this theory the court must find that a uranium processing mill is a facility used for the "discovery, development and production of natural gas and petroleum or minerals." The terms "*discovery*," "*development*" and "*production*" have a very definite and well defined meaning in the oil and gas and mining industries. A miner or prospector discovers a mineral in place. He then does what is commonly called "development work" to determine the existence of the mineral or of the oil and gas field. After the ground is sufficiently *developed* to warrant the expenditure of additional time, effort and money the oil, gas or mineral is *produced*, that is to say, it is extracted from the earth. If the operation is successful we have what is commonly known as a "producing well" or a "producing mine." Once the oil, gas or mineral is separated from the earth the production thereof is at an end. The subsequent step of refining, milling, smelting or processing is entirely separate and distinct from the discovery, development and production. We submit that Prichard's contention is one of the "weird constructions" referred to in the Ashworth case. If he is able



to haul acid to uranium processing mills under his present authority he is likewise able to haul any "supply" to any oil refinery or to any smelter. Furthermore, under his contention the "supply" need not "be such as" those specifically mentioned in his authority. Certainly acid has no more relation to the heavy commodities mentioned in Prichard's authority than would office supplies, office furniture, oil, gasoline, or any other of the hundreds of different types of supplies used by smelting companies and oil refineries.

Counsel has conceded that sulphuric acid is not a supply used in a facility for the *discovery* of minerals so we have limited our authorities to those defining the terms "development" and "production."

The cases clearly show that the terms "development" and "production" apply only to the processes of locating the oil, gas or mineral and extracting it from the ground. In the case of *Blewett v. Hoyt*, 103 N.Y.S. 451, 457; 118 App. Div. 227, the court defined the term "develop" as follows:

"To 'develop' is defined by Webster to be 'to free from that which enfolds or envelopes; to lay open by degrees or in detail, to disclose, to produce or give forth,' and, by the Standard Dictionary 'to uncover or unfold; to bring to light by degree, work out in detail.' Thus to develop a mining claim is to uncover or bring forth that which it produces or can produce."

In the Utah case of *Miller v. Peruvian Consolidated Mining Company*, 11 P. 2d 291, 294, 79 Utah 401, this court stated:

“The incorporators use the terms ‘working’ and ‘developing’ which ordinarily have application to the mines or claims for the purpose of *getting* the ores.” (Emphasis added.)

In the case of *Hanover Co. v. Hines*, 11 S.W. 2d 621, the court held that there was a plain distinction between an obligation to *develop* land in order to determine number, location and value of oil-bearing sands, if any, and an obligation to bring the oil and gas to the surface or to preserve such minerals thereafter.

In the case of *Charlton v. Kelly*, 166 F. 433, 84 CCA 295, the court held that the term “development” as used in an instruction regarding the necessity of a discovery in a lode mining claim, was the equivalent of “exploration.”

In the case of *Lacer v. Sumpter*, 249 S.W. 1026; 198 Ky. 752, the court held that in the oil industry a provision in a lease requiring the lessee to continue “development” of the property must be construed as a continuation of the work in hand in a manner that would *discover* oil if it existed and promote its “production.”

The following cases construe the term “production”:

*Tedrow v. Shaffer*, 155 N.E. 510, 511; 23 Ohio App. 343.

Under oil and gas lease for ten years and as much longer as oil is "found" in paying quantities the word "found" is synonymous with the word "produced" which refers to oil when brought to the surface.

*In Re Sinclair Prairie Co.*, 53 P. 2d 221, 223; 175 Okla. 289.

Oil may be said to be "produced" for gross production taxation purposes *when it is brought to surface* and confined in such a manner as to permit its measurement as to quantity and its testing as to value.

*So. Penn Oil Co. v. Snodgrass*, 76 S.E. 961, 965; 71 W. Va. 438.

The terms "produced" and "produced in paying quantities" and "found in paying quantities" as used in an oil and gas lease are synonymous.

We submit that the terms discovery, development and production cannot fairly be construed to mean refining, milling, smelting or processing. Witness Riddle clearly explained the processing which takes place at a uranium mill. The uranium is extracted from the ore by a carbonate or soda ash leaching process which consists of roasting or baking the ore at temperatures to 800°C. in a solution in which sulphuric acid is used. (R. 212.)

Furthermore, the "supplies" to which respondent refers must be read in light of the specific commodities

mentioned in paragraph 1 of Prichard's authority and cannot be of a type wholly different from those designated. We cannot completely disregard the rule of *ejusdem generis*.

There is still another factor which points up the fallacy in respondents' theory. If Prichard's authority to haul acid is dependent upon his authority to haul supplies used in the operation of a facility for the discovery, development and production of minerals, how then does he justify the Commission's action in giving him authority to transport acid to the Utah Power & Light *steam electric generating plant* in Castle Gate? The sulphuric acid is used at this generating plant as a water softener and the plant itself has no other purpose than to generate electricity. Does Prichard contend that this, too, is the development or production of oil, gas or minerals? Furthermore, the Commission's order does not restrict Prichard in any way as to what customers he can serve; hence, it is apparent that the Commission does not adopt Prichard's theory and Prichard (and we suppose the Attorney General) have expressly denounced the Commission's theory.

## CONCLUSION

Prichard's authority covers the transportation of heavy, bulky, solid commodities and cannot be interpreted to include transportation of acid in bulk in tank truck vehicles.

We further contend that the Commission's finding as to the area needing truck transportation is too restrictive in light of the evidence which clearly showed many and varied sources of new and spent acid as well as many and varied uses therefor. Since no other truck carrier is authorized to transport acid the Commission abused its discretion in not granting the application in its entirety.

Respectfully submitted,

MARR, WILKINS & CANNON  
MARK K. BOYLE

*Attorneys for Petitioner*