

1982

Harry L. Young and Sons, Inc. and Ashworth Transfer, Inc. v. Public Service Commission of Utah et al : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

HARRY L. YOUNG AND SONS, INC., :
and ASHWORTH TRANSFER, INC., :

Plaintiffs, :

vs. :

CASE NO. 18351

PUBLIC SERVICE COMMISSION OF :
UTAH, and STEEL TRANSPORTERS :
OF CALIFORNIA, dba KEEP ON :
TRUCKING, :

Defendants. :

BRIEF OF PLAINTIFFS

APPEAL FROM ORDERS OF THE
PUBLIC SERVICE COMMISSION OF UTAH

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Defendants. :

BRIEF OF PLAINTIFFS

NATURE OF THE CASE AND DISPOSITION BY
PUBLIC SERVICE COMMISSION OF UTAH

Harry L. Young and Sons, Inc. (herein "Young") and Ashworth Transfer, Inc. (herein "Ashworth") are motor carriers presently authorized to serve all points in Utah.

This is an appeal from an Order of the Public Service Commission of Utah (herein "Commission") granting a Certificate of Public Convenience and Necessity to the defendant Steel Transporters of California, dba Keep On Trucking (herein "Steel Transporters"). This is also an appeal from the Commission's denying plaintiffs' Application for Review.

A Writ of Certiorari was issued by the Clerk of this Court on March 31, 1982.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a setting aside of the Order granting a Certificate of Public Convenience and Necessity to Steel Transporters.

FACTS

Ashworth and Young are motor common carriers holding Certificates of Public Convenience and Necessity from the Public Service Commission of Utah authorizing the transportation sought to be performed by Steel Transporters in this proceeding (Tr. 181-185).

WITNESSES APPEARING IN SUPPORT OF
STEEL TRANSPORTERS APPLICATION

1. Nucor Steel.

Nucor Steel Mill intends to serve all of the western states, both by rail and by motor carrier. Any amount that will require transportation in intrastate Utah is speculation (Tr. 64-65).

Insofar as Nucor's shipments of iron and steel made within the State of Utah, the witness answered:

"A We have shipped them so far by Ashworth.

"Q Have you had satisfactory equipment provided by Ashworth?

"A Yes.

"Q Did they provide timely service?

"A Yes.

"Q Was the service satisfactory in every respect?

"A I have not heard anything to the contrary.

"Q Have you called upon my client, Harry L. Young & Sons, yet to move any shipments within the State of Utah?

"A Not yet.

"Q Do you have any objections to calling on Harry L. Young & Sons for providing service in Utah?

"A I haven't yet. I haven't used him, so I have no --

"Q Have you used them on any interstate movement?

"A They have been used bringing construction equipment in, yes. We have not used any product out."
(Tr. 66)

2. A. & M. Castle & Co.

A. & M. Castle & Co. is a steel distributor with warehouses located throughout the country.

This company operates 4 to 5 of its own trucks for servicing its business within the State of Utah, which is primarily from its warehouse in Salt Lake to the Metropolitan Salt Lake City area (Tr. 77).

The witness had not called upon Young for service within the last three or four years (Tr. 77). The witness stated that they had discontinued using Young two or three years ago because of an unfortunate service problem on freight originating in California. The witness was asked:

"Q Have you ever used my client, Harry L. Young & Sons, within the State of Utah?

"A Oh, yes.

"Q Can you tell me specifically the time or--by date-- or the origin, or destination of any unfortunate service problem within the State of Utah by Harry L. Young?

"A No; not within the state." (Tr. 79-80)

Regarding its current transportation requirements within the State of Utah, the witness was asked:

"Q Do you know whether any is moving from Utah?

"A I would say yes.

"Q What trucking company is presently moving that?

"A At the present, I don't know. At the present, I honestly don't know.

"Q Is there any problems with that current movement?

"A No." (Tr. 79)

Regarding protestant Ashworth, the witness was asked:

"Q Has your company, within the past two or three years, ever called upon Ashworth to perform service within the State of Utah?

"A I'm sure we have.

"Q Have they performed service within the State of Utah for your company?

"A To my knowledge.

"Q Have you ever had any problems with their service?

"A Not to my knowledge." (Tr. 81-82)

3. Thyssen Metal Service.

Thyssen Metal Service is a division of Thyssen Steel, which is a German steel mill. They have been in Utah one year. All of their transportation is now moving by the processor's truck.

The witness has never had need to call upon a motor carrier for service within the State of Utah:

"I take it from your testimony you've never used the service of a local Utah carrier for service within the State of Utah.

"A I've never had to." (Tr. 94)

The witness is willing to use Ashworth Transfer if he ever has need for transportation service within the State of Utah (Tr. 96).

4. Azcon Corporation.

The witness' only origin is Plymouth, Utah, and the witness was asked:

"Q So a Plymouth, Utah origin would be satisfactory for your purposes?

"A Yes, it would.

"Q Have you ever called upon an existing motor carrier for service from Plymouth, Utah?

"A No, I have not." (Tr. 112-113)

5. Syro Steel.

The witness admitted that it presently has service available from Ashworth, Young, and Salt Lake Transfer together with other motor carriers authorized by the PSC-Utah (Tr. 121).

The witness was asked:

"Q Have you ever had an instance where you couldn't get equipment from some authorized motor carrier within the State?

"A No.

"Q If you ever did have such an instance, would this one example that you've talked about preclude

you from calling on Harry L. Young, if you couldn't get it from anyone else?

"A No. I'd probably call them, try them, sure."
(Tr. 125-126)

6. Rutt Steel.

The witness has never had occasion to seek transportation service within the State of Utah:

"Q I think I understand that. But the answer to my question would be: Up to now you've never had occasion to call upon a motor carrier for services between points within the State of Utah?

"A True. That's very true.

"Q And the only origin that you would have would be the warehouse that applicant, Steel Transporters, is going to maintain in Ogden, Utah?

"A Yes." (Tr. 143-144)

The witness has never made any investigation as to the present availability of motor carrier service within the State of Utah (Tr. 145).

7. Natural Gas Company.

This witness was asked:

"Q Sir, have you ever called upon a motor carrier in the State of Utah for any service within the State of Utah?

"A Not myself. Our field personnel has, and he--

"Let's see. The two that he recommended, or has always recommended, was Black Hills and--I'm trying to think of the other one.

"Mr. Boyle: Jones.

"The witness: Jones, yes; were the two that he uses quite a bit out of the Vernal area where he's located.

"Mr. Kump: Q Would you have any objections to using the services of my client, Harry L. Young or Ashworth Transfer?

"A No.

"Q You'd be willing to give them a try if you had need?

"A Sure." (Tr. 161-162)

ORIGINS IDENTIFIED BY SUPPORTING WITNESSES

1. Nucor Steel.

Origin is a steel mill located at Plymouth, Utah, which is approximately 28 miles south of Malad, Idaho, on U. S. Highway 89 in Box Elder County (Tr. 53).

2. A. & M. Castle & Co.

Origin is the Nucor plant at Plymouth, Utah and warehouse in Salt Lake City, Utah (Tr. 73).

3. Thyssen Metal Service.

Rents warehouse space at K. D. J. Custom Steel in Salt Lake City (Tr. 90).

4. Azcon Corporation.

Will originate traffic at Plymouth, Utah, destined to their distribution firm in Lyndon, Utah (Tr. 106-108).

Applicant is unable to serve their Lyndon, Utah, origin because the application does not seek authority to originate shipments in Utah County. Azcon intends to have a storage facility located approximately one mile from Plymouth, Utah,

where they will originate traffic (Tr. 109). The witness admitted that a Plymouth, Utah, origin would be all that was required for his purposes (Tr. 112).

5. Syro Steel.

Supports the applicant for service from Plymouth, Utah, (Tr. 118) and from their facility at Centerville, Utah (Tr. 115).

6. Rutt Steel.

This company has no facilities in Utah but would like to use the Ogden yard of applicant Steel Transporters (Tr. 138).

7. Natural Gas Company.

This witness was from California and did not name any specific Utah origins (Tr. 155). The witness stated that they were a customer of the prior witness Rutt Steel and, therefore, may have occasion to use applicant's proposed warehouse facilities in Ogden, Utah (Tr. 157).

EVIDENCE OF ASHWORTH

Ashworth operates equipment with the same capabilities as Steel Transporters (Tr. 185-187 and Ex. 14 at R. 315).

The witness from Nucor admitted that Ashworth has performed satisfactory transportation for his company to date and the witness from Ashworth stated:

"Q Do you believe that Ashworth Transfer is equipped to take care of the transportation needs for that new facility?"

"A There is absolutely no doubt in my mind that Ashworth Transfer, as an independent carrier, can take care of the needs of the Nucor facility at Plymouth.

"We have talked to those people for over a year; we have indicated that to them; we solicited the business. And all we're doing now is waiting to see what traffic develops. And as soon as it develops we stand ready, willing, and able to haul it for them.

"Q Do you have sufficient equipment to take care of their needs at the present time?

"A Yes, sir.

"Q Is Ashworth Transfer in a position to acquire additional equipment if they should require more equipment?

"A We are in a very strong financial position. Our company files an annual report with the Public Service Commission of Utah which states our financial condition. And I'm sure that a research of those records will indicate that we're in a strong financial condition, and we can obtain any amount of equipment necessary to take care of the needs of Nucor or any other shipper in the State of Utah.

"Q Is Ashworth willing to add additional equipment if there is an increased need for transportation need within the State?

"A Yes, sir.

"Q Is your equipment presently being utilized solely [completely]?

"A No, sir.

"Q Has it been utilized less during this past year from the previous year?

"A Yes, sir." (Tr. 187-188)

Ashworth is seriously concerned about diversion of their existing iron and steel traffic to applicant Steel

Transporters (Tr. 190).

The witness from Ashworth explained the importance of the traffic which applicant would be in a position to divert if this application is granted as follows:

"This steel traffic in Salt Lake County, Weber County, Davis County is very, very, very important to our operations. Because what little we are able to generate in those counties helps to offset a lot of these empty miles that we generate going down to pick up steel at Geneva.

"Let me give you an example: Recently, we were fortunate enough to generate some outbound steel from a good shipper of ours in Salt Lake City headed down into the Huntington, Utah area. We transported those loads down there, delivered those loads. And then the beauty of the situation is: We are then able to come back, travel empty as far as perhaps Ironton, Utah or Geneva, Utah, pick up a load of steel, bring it back up to the Salt Lake, Ogden area.

"So therefore, it better utilizes our equipment by eliminating a lot of empty miles that we would normally have to run empty down to Geneva to pick those loads up and bring them back." (Tr. 193)

"It's interesting to note that with the restriction that Mr. Boyle has presented with eliminating Utah County, I think it would be very interesting to note that if some of this traffic--whatever little traffic we are able to generate out of this list of shippers, out of the Salt Lake, Davis, Weber County area--if some of that traffic were diverted, and if, for example, some of the trucks for the applicant handled shipments in a southbound direction, elimination of hauling steel in a northbound direction out of Utah County would result in their trucks--from my judgment, my point of view--would result in their trucks traveling empty in a northern direction probably at the same time that a lot of my trucks would be traveling south to pick up loads coming back in a northern direction.

"I don't think that is in the best interest of the shippers in the State of Utah." (Tr. 197-198)

EVIDENCE OF YOUNG

Young operates equipment with the same capabilities as applicant (Tr. 221 and Ex. 20 at R. 295). Young experienced idle equipment in its yard that could have been utilized in transporting iron and steel articles within the State (Tr. 223). Young is presently experiencing competition from Ashworth, Uintah Freightways, Salt Lake Transfer, and contract carriers (Tr. 225-226). More than one-third of Young's traffic within the State of Utah is iron and steel (Tr. 227). More than 50 percent of their iron and steel revenue is derived from origins which applicant Steel Transporters desires to serve by this application (Tr. 227). Young's concern with this application is because:

"We have a list here of 79 customers which we presently serve. The applicant has presented support from only five of these shippers. And we feel this is a very important showing percentage wise of support for the application.

"And with the number of customers that we presently serve on iron and steel articles, and iron and steel articles comprising such a large portion of our revenues, we feel it's--we have great concern about losing these customers." (Tr. 228)

SUMMARY OF ARGUMENT

1. The Commission erred in finding applicant fit to perform the service proposed.
2. The Commission erred in finding that public convenience and necessity require granting of the application.

3. The Commission erred in failing to find that the granting of the certificate to Steel Transporters will be detrimental to the best interests of the people of the State of Utah.

4. The Commission erred in granting the application in its entirety rather than analyzing the evidence.

ARGUMENT

POINT I

THE COMMISSION ERRED IN FINDING APPLICANT FIT TO PERFORM THE SERVICE PROPOSED

Section 54-6-5 of Utah Code Annotated provides:

"Before granting a certificate to a common carrier, the commission shall take into consideration the financial ability of the applicant to properly perform the service sought . . ."

Defendant Steel Transporters owns no tractors, trucks or motor vehicle equipment (Ex. 2 at R. 324 and Tr. 20). Steel Transporters intends to use equipment owned by Keep On Trucking Co., Inc., a California corporation, which is the parent company of Steel Transporters (Tr. 7).

Steel Transporters is a separate and distinct California corporation which Keep On Trucking Co., Inc. formed in order to avoid any national master freight agreement which Keep On Trucking Co., Inc. has with the Teamsters Union (Tr. 19). Whether or not respondent Steel Transporters has any equipment to perform service depends upon another California corporation over which the Public Service Commission of Utah has no jurisdiction.

The Commission should have recognized the distinctness of the different corporate entities. In the recent Decision of David R. Williams, dba Industrial Communications v. Public Service Commission of Utah, et al., Case No. 17410 filed Feb. 9, 1982, the Supreme Court affirmed the Order of the Commission and upheld the Commission's ruling that the acts of one corporation were not material to a proceeding involving another corporation because of the distinctness of the corporate entities involved. In this proceeding the principal stockholder of the applicant Mobile Telephone, Inc. was also the principal stockholder of Mobile Radio Telephone of Southern Utah, Inc., a separate regulated carrier. Industrial Communications attempted to present evidence at the hearing that the principal stockholder of both Mobile corporations misrepresented certain equipment capacity of the Southern Utah corporation to the Federal Communications Commission. The Commission ruled that the acts of the Southern Utah corporation were not material to the proceeding because of the distinctness of the corporate entities involved. The Supreme Court affirmed this decision.

In this proceeding the Commission should have found Steel Transporters unfit to perform the service based upon its lack of any equipment to perform motor vehicle service. Keep On Trucking Co., Inc. is a distinct corporate entity. Under the principle of the Williams case, its motor vehicle equipment should not have been taken into consideration by the

Commission.

Applicant's failure to own any operating equipment (Tr. 31) precludes it from performing transportation service within the State of Utah under the provisions of General Order 90 of the Public Service Commission of Utah. This Order pertains to rules and regulations governing the leasing of motor vehicles by common carriers in the State of Utah. Paragraph 4(4) specifically provides a percentage limitation on use of lessor operated equipment by the authorized carrier. The rule specifically provides:

"The total number of lessor operated power units shall not exceed 25 percent of the number of power units owned by the authorized carrier, unless otherwise authorized by written application to the Commission and by the Commission's written exception to this rule."

The Commission has not made exception to this rule for Steel Transporters. The income statement of Steel Transporters shows that out of total expenses of \$1,314,219.89 (R. 323), they paid out \$974,059.51 (R. 322) for "vehicle rents with driver" (Ex. 1).

This is payments to owner operators. This income statement shows their operations to be substantially lessor operated equipment. Steel Transporters can obviously not comply with General Order 90 because it does not own any equipment.

Under the provisions of General Order 90, the applicant cannot legally operate equipment in the State of Utah. The Commission should have found applicant failed to meet its burden of establishing its fitness for the operation proposed.

POINT II

THE COMMISSION ERRED IN FINDING THAT
PUBLIC CONVENIENCE AND NECESSITY
REQUIRE GRANTING OF THE APPLICATION

The Commission found in Finding of Fact No. 7 that public convenience and necessity require the granting of the application as sought by Steel Transporters.

Prior decisions of the Commission and of the Supreme Court of Utah have interpreted public convenience and necessity as set forth in § 54-6-5 of Utah Code Annotated (1953). They have universally held that there must be a public need for applicant's services before applicant has met its burden of proof. A mere preference for the applicant is not a public need.

In construing this statute, the Supreme Court of Utah has stated:

"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." Lake Shore Motor Coach Lines, Inc. v. Bennett, et al., 333 P.2d 1061, 1063, 8 Utah 2d 293 (1958)

In attempting to meet its burden of proving public convenience and necessity, applicant called seven (7) witnesses. The following is a summary of the testimony of these witnesses:

(a) Nucor Steel, Plymouth, Utah.

All of the transportation requirements of this shipper

to date have been satisfied by Ashworth.

(b) A. M. Castle & Co.

Uses private transportation performed with its own trucks and has no problem with Ashworth. Its only problem with Young was two or three years ago on an interstate movement from California. Has no problems currently with intrastate movements in Utah.

(c) Thyssen Metal Service.

Has never used a motor carrier within the State of Utah and is willing to use Ashworth if ever has need for service in Utah.

(d) Azcon Corporation.

Has never had a need to call on any authorized carriers to date from Plymouth, Utah origin.

(e) Syro Steel.

Has never had an instance where it could not obtain service from an existing authorized carrier and would use Young if required.

(f) Rutt Steel.

Has never called upon a motor carrier for service within the State of Utah. Witness had no idea of what service is now available.

(g) Natural Gas Company.

Witness has no objection to using Young or Ashworth.

There was not a single, solitary complaint or any evidence of inadequacy in the entire record pertaining to

Ashworth. Ashworth is either serving each of these shippers satisfactorily or they are willing to use Ashworth if they have need for service.

There were three complaints as to Young. However, each was remote in time and concerned service outside the jurisdiction of the State of Utah. Young explained each of the three complaints. Interstate transportation is governed by the Interstate Commerce Commission and is not a basis for finding a need for service within the State of Utah.

Remote, isolated instances of a service failure by one motor carrier beyond the State of Utah is not sufficient to meet applicant's burden of proof under § 54-6-5 of Utah Code Annotated (1953). Especially is this true when Ashworth's service is complaint free. An applicant for a Certificate is required to make an affirmative showing of a need for service based upon evidence of a consistent or reoccurring inability of shippers to secure adequate and satisfactory service from existing transportation facilities in the territory proposed to be served. Scott Moore, dba Circle X Trucking & Livestock, Decision of Public Service Commission of Utah in Case No. 77-421-01 issued February 27, 1978, and affirmed by the Supreme Court of Utah in Scott Moore v. PSC of Utah, Decision No. 15827 dated April 10, 1979.

Additional service must be denied when there is evidence of the adequacy of an existing carrier. Utah Light and Traction

v. Public Service Commission, 118 P.2d 683, 101 Utah 99,
Rudy v. Public Service Commission, 265 P.2d 400, 1 Utah 2d 223;
Goodrich v. Public Service Commission, 198 P.2d 975, 114 Utah
296.

In Utah Light and Traction, this Court said:

". . . when a territory is satisfactorily serviced and its transportation facilities are ample a duplication of such service which unfairly interferes with the existing carriers may undermine and weaken the transportation setup generally and thus deprive the public of an efficient, permanent service. Utah Light and Traction v. Public Service Commission, supra at 690.

There is no evidence in this proceeding of any inadequacy in service of existing carriers in Utah. The Commission in this proceeding should have found that Steel Transporters failed to meet its burden of establishing an inadequacy in existing transportation services within the State of Utah.

POINT III

THE COMMISSION ERRED IN FAILING TO FIND THAT
THE GRANTING OF THE CERTIFICATE TO STEEL TRANSPORTERS
WILL BE DETRIMENTAL TO THE BEST INTERESTS
OF THE PEOPLE OF THE STATE OF UTAH

Section 54-6-4 of Utah Code Annotated specifies that
the Commission shall regulate all common motor carriers

". . . so as to prevent unnecessary duplication
of service between these common motor
carriers, . . ."

Section 54-6-5 of Utah Code Annotated provides that

"If the Commission finds . . . 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."

This Court has stated:

". . . but must plan long range for the protection and conservation of carrier service so that there will be economic stability and continuity of service. This obviously cannot be done unless existing carriers have a reasonable degree of protection in the operations they are maintaining." Lake Shore Motor Coach Lines v. Bennett, supra at 1063.

In granting a new certificate to Steel Transporters the Commission ignored this principle. Young and Ashworth are now presently serving 90 shippers of iron and steel articles in the involved territory. See Exhibit 16 (R. 312) of Ashworth and Exhibit 22 (R. 285) of Young. Contrast this 90 shippers who are presently being satisfactorily served with the 7 witnesses produced by applicant. Several of the witnesses called by applicant have never had need for transportation service in Utah. No witness had ever failed to receive service within the State of Utah when requested.

Young's total intrastate gross revenues for 1980 were \$333,700 (Tr. 226). Iron and steel traffic accounted for \$118,230 of these revenues. More than 50 percent of this iron and steel revenue was derived from origins in which applicant seeks to serve by this application (Tr. 227).

Protestant Ashworth's revenues from iron and steel articles transported from origins in Utah other than Geneva

Steel have declined 30.4 percent comparing 1981 with 1980 (Ex. 18 at R. 297).

Ashworth and Young have expended substantial sums equipping their operations to take care of iron and steel traffic moving in Utah (Exhibits 14 at R. 315 and 20 at R. 295).

After consideration of the substantial service being performed by Young and Ashworth contrasted with the lack of need shown by the witnesses produced by applicant, it was arbitrary and capricious for the Commission to grant the application of Steel Transporters.

POINT IV

THE COMMISSION ERRED IN GRANTING THE APPLICATION IN ITS ENTIRETY RATHER THAN ANALYZING THE EVIDENCE

The Commission granted the application as applied for. The Certificate of Convenience and Necessity authorizes Steel Transporters to transport iron and steel articles from 10 enumerated counties to all points in Utah and between all points in the 10 enumerated counties (R. 332). There was no witness even appearing at the proceeding who indicated any need for service from 6 of these counties. See origins identified summarized under Facts portion of this Brief. The record does not show any evidence of a need to originate iron and steel from any point in Cache, Rich, Morgan, Tooele, Wasatch and Summit Counties. Nevertheless, the Commission granted this authority. The witnesses appearing in support of this appli-

cation showed 5 origins, all located in Salt Lake, Box Elder, Davis and Weber Counties, Utah.

This Court set aside an order of the Commission in Milne Truck Lines, Inc., et al. v. Public Service Commission, et al., 359 P.2d 909, 11 Utah 2d 365 (1961), stating:

"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." 359 P.2d at 910.

With no evidence in support for 6 of the 10 counties, the Commission granted the application in its entirety. No attempt was made by the Commission to analyze the evidence and to grant the application in accordance with the evidence. This rubber stamping of the requested grant of authority is not regulation. This is the reason the order of the Commission was set aside in the Milne Truck Lines, supra, proceeding.

The blanket grant of authority was capricious and arbitrary. In the Lake Shore Motor Coach Lines, supra, proceeding, the Supreme Court of Utah set aside an order of the Public Service Commission where there was no evidence in support of a finding of public convenience and necessity requiring additional service. Not a single, solitary witness mentioned any iron and steel traffic originating in Cache, Rich, Morgan, Tooele, Wasatch and Summit Counties, Utah. It was, therefore,

arbitrary and capricious for the Commission to grant applicant authority originating in those counties.

The authority granted in this proceeding is not based upon evidence of record and is, therefore, arbitrary and capricious within the guidelines of Lake Shore Motor Coach Lines, supra. As stated by the Supreme Court, the Commission

". . . cannot go so far as to base an order creating new carrier authority, which in effect takes business away from existing carriers, upon a showing which under scrutiny is so ephemeral as to practically vanish. To do so would constitute the Commission as an autocratic authority with arbitrary power which would render the foundations of the business of existing carriers so insecure as to make operations and planning hazardous and render all attempts to defend their authority futile." Lake Shore Motor Coach Lines, supra at 1063.

The evidence in this proceeding shows substantial volumes of iron and steel traffic now moving within the State of Utah by protestants Ashworth and Young without complaint (Exhibits 15 at R. 314, 17 at R. 298, 18 at R. 297 and 21 at R. 287). Contrast this with the speculative need of the 7 witnesses produced by applicant. The evidence of record shows 90 different shippers of iron and steel traffic now being served by Ashworth and Young without complaint (Exhibits 16 at R. 312 and 22 at R. 285). Young listed 79 customers and Ashworth listed 27 customers (eleven of whom were not listed as customers of Young). In order to provide economic stability and continuity of service, Young and Ashworth are entitled to a reasonable degree of pro-

tection in the operations they are maintaining without complaint in the State of Utah.

It was arbitrary and capricious for the Commission to grant authority to an applicant to serve to and from points in 6 different counties where there was absolutely no evidence of record of a need for service.

CONCLUSION

The Report and Order of the Commission and the Commission's Order Denying Reconsideration in this proceeding are contrary to the evidence of record and constitute arbitrary and capricious action.

WHEREFORE, it is respectfully requested that this Court set aside these orders of the Commission in this proceeding.

DATED this 21st day of May, 1982.

Respectfully submitted,

RICHARDS, BIRD & KUMP

By 
Lon Rodney Kump

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Harry L. Young and Sons, Inc.
and Ashworth Transfer, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 1982, I mailed two (2) true and correct copies of the foregoing Brief, postage prepaid, to Mark K. Boyle, Esquire, 10 West Broadway, Salt Lake City, Utah 84101, and to Arthur A. Allen, Jr., Esquire and David L. Wilkinson, Esquire, Office of the Attorney General, 114 State Capitol Building, Salt Lake City, Utah 84114.


