

1958

Lake Shore Motor Coach Lines, Inc. v. Public Service Commission of Utah et al : Plaintiff's Brief

Utah Supreme Court

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UNIVERSITY, UTAH

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

LAKE SHORE MOTOR COACH LINES, JUN 14 1958
INC., a Utah corporation,

Plaintiff, Clerk Supreme Court, Utah

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; HAL S. BENNETT, DONALD
HACKING, and JESSE R. S. BUDGE,
Its Commissioners; WYCOFF COM-
PANY, INCORPORATED, a corpora-
tion,

Case
No. 8861

Defendants.

PLAINTIFF'S BRIEF

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IN THE SUPREME COURT of the STATE OF UTAH

LAKE SHORE MOTOR COACH LINES,
INC., a Utah corporation,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; HAL S. BENNETT, DONALD
HACKING, and JESSE R. S. BUDGE,
Its Commissioners; WYCOFF COM-
PANY, INCORPORATED, a corpora-
tion,

Defendants.

Case
No. 8861

PLAINTIFF'S BRIEF

STATEMENT OF FACTS

This case is before the Supreme Court on a Writ of Review directed to the defendants, and for purposes of reviewing an order of the Public Service Commission of Utah dated January 21, 1958, which granted to defendant Wycoff Company, Incorporated, (hereinafter referred to as defendant Wycoff) Certificate of Con-

venience and Necessity No. 1162-Sub 2, embracing operating rights hereinafter set forth.

By its original application to the Public Service Commission, defendant Wycoff requested authority to operate as a common motor carrier of general commodities in so-called express service (100 pounds or less), over irregular routes, and between all points and places in Utah. It will be noted that this original application was one for irregular route authority. Protests to the application were actively entered by substantially all of the common motor carriers of freight, as well as the principal bus lines in Utah who transport passengers and express, all as listed in said report and order. Among protestant bus lines is plaintiff herein.

Hearing before the Commission commenced on March 26, 1957, and evidence submitted by applicant to and including March 29, 1957. Adjournment was taken until June 10, 1957, when the hearing was resumed and evidence completed on June 14, 1957. By May 3, 1957, defendant Wycoff's testimony in chief had been introduced, and testimony had likewise been introduced by a substantial number of protestants. On such date, however, a stipulation was entered into between defendant Wycoff and the protestant truck lines which not only restricted the extent and scope of the application but changed its basis character (Tr. 1828). Based upon such stipulation, protests were withdrawn by the various truck lines. The bus lines refused to join in the stipulation and continued their testimony to conclusion of the hearing.

Such restriction to the application limited transportation to shipments of not to exceed 100 pounds on a weight basis, and provided that shipments could not be separated for purposes of avoiding the restriction. Further, that applicant (defendant Wycoff) could not transport in excess of 500 pounds on a weight basis of such express shipments on any one schedule, each way, operating over the routes and departing at the times set forth in Exhibit 2, (a printed schedule of operations of the applicant) provided only that applicant would be permitted to transport up to 1500 pounds between Ogden and Salt Lake City on one of its schedules each day. The restriction further provided that the schedules referred to must coincide with movement of newspapers from Salt Lake City and one mail schedule moving north from Salt Lake City. Weight limitations on any one schedule required aggregation of shipments regardless of point of origin or destination. In addition, the stipulation provided that express might be carried on north bound schedules from Salt Lake City or south bound schedules from northern points to Salt Lake City, except as shown on Schedules 2, 3, 4, and 5 and 2 (a), 3 (a), 4 (a) and 5 (a), Table 8 of the schedules (Exhibit 2). Exhibit 2 is a summary of existing schedules of the applicant and indicates times of arrival and departure and specific service routes. It will be noted that such routes are along the principal highways in Utah and do not traverse substantial areas of the State.

The restrictive amendment, and in effect the appli-

cation upon which the order of the Commission was based, not only altered the application in practical effect from one of irregular route authority to one confined to a regular route operation, but restricted such operations from a state-wide basis to certain specifically described routes and existing operating schedules upon such routes.

The transcript of proceedings includes 2284 pages, and this summary of facts is necessarily limited to pertinent portions. The application is predicated upon the theory of a state-wide authority, yet as will be hereinafter noted, the operation of plaintiff herein, extends only between Salt Lake City and Ogden, Utah. Much of the operating testimony of defendant Wycoff is illustrative of the proposed operation but utilizes examples in other parts of the state, which must be considered to properly evaluate the proposals. However, the testimony of the shipper witnesses is necessarily limited to their areas of business within which they require shipping service. It is, however, the position of plaintiff that this appeal necessarily embraces a consideration of the entire order of the Commission, and cannot be completely restricted to that portion of the order wherein authority is granted in conflict with the bus operations of plaintiff.

Milton S. Wycoff appeared for defendant Wycoff as its chief operating witness and testified as to present and proposed operations (Tr. 6-141). Wycoff (Tr. 8)

is a contract carrier transporting motion picture film, newspapers, magazines, periodical, cut flowers and bull semen between certain Utah points. The operation is tied essentially to the transportation of newspapers from Salt Lake City to various Utah points, with departure times for all schedules from Salt Lake City at approximately noon and midnight. Other commodities than newspapers, the controlling one of applicant's operation, are transported in the same truck. There are, however, as indicated in Exhibit 2, a few mail schedules. The transportation movements are on principal highways in Utah, including U.S. Highway 89-91 between Salt Lake City and Ogden. Terminals are maintained at Salt Lake City, and under an arrangement with Arrow Auto Lines, some facilities are available at Price, Utah.

The proposed operation does not contemplate the addition of any equipment, drivers, or other facilities, but is essentially one of adding commodities *as space permits* to trucks on present schedules. Defendant Wycoff proposed to perform pick-up and delivery service both at origin and destination points, presumably by the line-haul truck. It appeared that in some areas of present authority defendant Wycoff is not itself performing transportation service. For example, from Salt Lake City into eastern Utah, including Roosevelt and Vernal, commodities for transportation are picked up by defendant Wycoff at Salt Lake City and delivered at the same point to Link Truck Lines, an independent carrier, which in turn transports to such areas (Tr. 109). The same type

of arrangement (Tr. 90) is existent with the Arrow Auto Lines at Price, Utah, which performs transportation service for defendant Wycoff to such adjacent points as Hiawatha, Dragerton and Huntington.

On cross-examination, the witness refused to specify the manner in which defendant Wycoff proposed to serve off-routes from present operations over main highways, except to state vaguely that arrangements would be made, and this apparently would consist of using other carriers wherever they could be found. There was no explanation as to the manner in which interchange would be accomplished between the line haul trucks and those of other truck operators.

According to Mr. Wycoff, the principal purpose of the application was to secure additional revenues which he claimed were necessary or "we are going broke." (Tr. 17). Such viewpoint is directly contrary to the financial exhibits of Defendant Wycoff. Its income statement (Exhibit 4) indicated net income of \$29,129.31, before taxes, for the period ending December 31, 1956. Moreover, its balance sheet (Exhibit 3) shows a remarkably sound and solvent financial condition, with earned surplus of \$132,036.20 on December 31, 1956.

Lake Shore Motor Coach Lines, plaintiff herein, operates a bus line for the transportation of passengers, baggage and express between Salt Lake City and Ogden, Utah, and in addition to this authority holds Utah Cer-

tificate of Convenience and Necessity No. 1164 permitting it to pick-up and deliver express, i.e. general commodities of 150 pounds or less, between its terminal in Ogden, Utah, and points in the Ogden zone, and similarly between the Salt Lake City terminal and points in the Salt Lake City zone. (Exhibits 97, 98, 99 and 100). Terminal facilities at Salt Lake City include joint use of the Greyhound Bus Terminal, general offices and garage, and a terminal at Ogden with waiting rooms and business offices, all with storage facilities (Tr. 1159). Such plaintiff operates a minimum of 14 daily schedules between Salt Lake City and Ogden, 7 days a week, each way, or a total of 28 daily schedules (Tr. 1161), and in addition thereto a substantial number of stub runs which do not traverse the entire area (Tr. 1161). Agencies are maintained at North Salt Lake, Bountiful, Farmington, Kaysville, Layton, and Clearfield, Utah, which are for the prime purposes of handling express shipments (Tr. 1162). Pick-up and delivery service is performed in the Salt Lake City and Ogden zones as part of the transportation service rendered between Ogden and Salt Lake (Tr. 1164). The buses of plaintiff have a substantial express capacity, being specifically designed for such purpose as well as transportation of passengers.

Shipper witnesses were called by defendant Wycoff as well as protestants, including this plaintiff. In view of the voluminous record, it is believed that consideration of detail of such testimony is more properly one

in specific argument and will be considered later in this brief. Generally, however, the shipper witnesses called by applicant indicated no real need or even concern for additional carrier services, but a conviction that the more carriers the better, and that any additional service would be of advantage irrespective of the consequences to existing carriers. Another principal reason for appearance was that by virtue of the addition of this carrier, a reduction in rates might be secured.

Plaintiff filed a petition for rehearing, which was denied by the Commission.

STATEMENT OF POINTS

POINT I.

THE ACTION OF THE DEFENDANT COMMISSION IN FINDING THAT PUBLIC CONVENIENCE AND NECESSITY JUSTIFY OR AUTHORIZE THE GRANT OF OPERATING AUTHORITY HEREIN IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE EVIDENCE.

(A) THE TESTIMONY OF SHIPPER WITNESSES INDICATES EITHER A COMPLETE SATISFACTION WITH TRANSPORTATION SERVICE OF EXISTING CARRIERS, OR A DESIRE FOR ADDITIONAL SERVICE BASED UPON MERE CONVENIENCE WITHOUT REFERENCE TO NEED.

(B) THE TRANSPORTATION FACILITIES OF EXISTING CARRIERS ARE ADEQUATE TO MEET ALL PUBLIC SHIPPING REQUIREMENTS.

POINT II.

THE ACTION OF THE COMMISSION IN GRANTING AUTHORITY WILL RESULT IN SUBSTANTIAL DESTRUCTION OF EXISTING MOTOR CARRIERS, THE ULTIMATE REDUCTION OF TRANSPORTATION SERVICE AVAILABLE TO THE SHIPPING PUBLIC, AND IS ARBITRARY, CAPRICIOUS AND AGAINST THE PUBLIC INTEREST.

POINT III.

THE GRANT OF AUTHORITY HEREIN BY DEFENDANT COMMISSION IS BEYOND THE SCOPE OF THE APPLICATION, CONTRARY TO LAW AND A HYBRID AUTHORITY WHICH IS NEITHER A COMMON NOR A CONTRACT CARRIER.

ARGUMENT

POINT I.

THE ACTION OF THE DEFENDANT COMMISSION IN FINDING THAT PUBLIC CONVENIENCE AND NECESSITY JUSTIFY OR AUTHORIZE THE GRANT OF OPERATING AUTHORITY HEREIN IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE EVIDENCE.

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The burden of proving the existence of convenience and necessity is clearly placed upon the applicant, and the term "necessity" implies something far greater than

mere "convenience." The ultimate question is as to whether or not the public interest is best served by the denial or approval of the application. See *Wycoff Company vs. Public Service Commission*, 227 P. 2d 323 (1951); *McCarthy vs. Public Service Commission*, 184 P. 2d 220 (1947); *Mulcahy vs. Public Service Commission*, 117 P. 2d 298 (1950). This burden has not been discharged in any way by defendant Wycoff.

A number of shipper witnesses were called by defendant Wycoff in support of the application, some from Salt Lake City and others from other points in Utah. At the time these shippers appeared as witnesses the scope of the application had not been restricted, with the result that they testified upon an assumption of proposed service substantially at variance with the service which could be rendered under the restricted application. There was an assumption, for example, that there would be an unlimited carrying capacity on the trucks of Wycoff, yet this is strictly contrary to the evidence under the restriction, since the operations are limited to existing schedules which must transport commodities which are presently authorized particularly newspaper, magazines, periodicals, and films. There is, therefore, a definite and restrictive limit to the amount of cargo which can be transported by defendant Wycoff.

It is not practical to detail the testimony of all of the shipper witnesses. An examination of their testimony, and it is earnestly assumed that such testimony will be considered in its entirety, shows certain salient concepts

repeatedly asserted by such witnesses, particularly on cross-examination. It is apparent their appearance reflected not so much a real concern or need for additional carrier service, but rather a conviction that the more carriers the better and that their interests would be served by all possible service, irrespective of the consequences and the affect on existing carriers. In most instances, it was clear that the purpose of their testimony was to secure a service at a lower rate than that of the existing carriers, particularly with reference to pick-up and delivery service. Rates are subject to regulation by the Public Service Commission and as such can have no probative value in a convenience and necessity hearing, except as they indicate the basis upon which the witness appears at hearing. An attempt was repeatedly made to suggest that additional service would be desirable in the so-called emergency situations, but examination of these witnesses disclosed that in reality no such emergency existed, and that existing carrier facilities were adequate to meet their needs.

Throughout the course of questioning, great emphasis was placed by defendant Wycoff on the theory that pick-up and delivery service to be rendered directly to the places of businesses of the shippers in Salt Lake City and at destination points was much desired. So far as this plaintiff is concerned, it is authorized to and rendering pick-up and delivery service at both Salt Lake City and Ogden, Utah, for trans-shipment between such cities and intermediate points. Pick-up and delivery

service was also shown to be available for many of the other bus companies at cities of any size, and of course such service is rendered by the various truck lines. Implicit, however, in this aspect of the testimony of witnesses called by defendant Wycoff was the idea that pick-up and delivery service could be obtained without additional charge.

Moreover, the bulk of the testimony was concerned with other points and places in Utah than those with which this plaintiff is concerned, and there is very little testimony relative to shipments between Salt Lake City and Ogden, Utah. This points up one of the basic fallacies of the order itself, in that it has granted state-wide authority when in reality there is not even a remote showing that authority should be granted to all points and places within the state of Utah.

Examples of the foregoing general principles are repeatedly found in the testimony. For example, the witness who appeared in behalf of Salt Lake Hardware Company (Tr. 91) repeatedly stated that he assumed that defendant Wycoff would be able to render a cheaper service than that of existing carriers (Tr. 801, 799, 794), and that this was the reason for his appearance. Moreover, he evidenced a satisfaction with existing motor and bus carriers, and specifically was satisfied with the service rendered by Lake Shore Motor Coach Lines between Salt Lake City and Ogden, Utah.

Among other shippers called by defendant Wycoff, Marquardt Aircraft (Tr. 60) testified as to certain movements of small machine parts between Salt Lake City and Ogden, Utah. This was one of the few witnesses who had any concern whatsoever with traffic movements between these two cities. This company owns seven pick-up trucks which they operate, many between Salt Lake City and Ogden (Tr. 65), and there is nothing to indicate that they have ever attempted to use plaintiff's service. Moreover, the witness assumed (Tr. 74) that trucks would be available at any time of day or night to run an article, however small, to Ogden from Salt Lake City, a basic misconception. This is important because it shows a proffered service which in fact is not available, and that the witness is dealing primarily with convenience, particularly when the extensive and available service of existing carriers is considered. Strevell-Paterson Hardware (Tr. 221, 223) made clear the basis of its appearance, which was that proposed express rates would be cheaper than common carrier minimums and, therefore, it desired additional service. Hemingway and Moser of Salt Lake City distributes tobacco and sundry products to various points in Utah (Tr. 518) and testified they desired pick-up and delivery service to the depot at Salt Lake City. This witness, however, was likewise concerned with cost of pick-up and delivery, and was not aware that this plaintiff provided such service. They testified that if Lake Shore provided the service (and it does), their needs would be met.

Mr. M. B. Murdock of the American Red Cross Blood Center at Salt Lake City, Utah, testified relative to the emergency shipments which such blood center occasionally requires (Tr. 553). This witness was called by defendant Wycoff, and freely admitted that the service from all forms of transportation had been excellent (Tr. 562, 564), and that he had used bus lines frequently. His testimony was summarized at Tr. 565:

“Q. So I suppose when we get it all said and done really is that what you are saying today is that existing service is good and it is satisfactory, but you would like to see additional authority granted; Is that right?

A. This is about the size of it, yes.”

Similarly another witness called by defendant Wycoff was Physicians' Supply Company of Salt Lake City, Utah (Tr. 566). This company stated that the bulk of their shipments move from Salt Lake City to Ogden by mail or Fuller-Toponce Truck Company, and that they very seldom use plaintiff (Tr. 573). Typically, this witness disclosed the basis of appearance at Tr. 578:

“Q. Then the whole thing you are interested in is additional service.

A. That's right, sir.

Q. You don't care who gives it to you?

A. That's right, sir.

Q. And if four more were making application you would still want it.

A. That's right.”

These illustrations can be multiplied indefinitely, but if the testimony of the shipper witnesses called by Wycoff is in any real sense considered, it is abundantly clear that they have no real shipping problems, and that existing transportation services are completely adequate. Repeatedly, however, these various shipper witnesses indicated that if the application were granted they would divert all or a portion of their express traffic from the bus lines.

It is incredible that upon this testimony there could have been any finding by the Commission of public convenience and necessity. Their action is not a matter of the exercise of proper judgment, but a most disturbing abuse of discretion. It would appear that the Commission has utterly failed to grasp the significance of the testimony as presented by defendant Wycoff's own witnesses.

An even greater number of shipper witnesses were called by protestants. Here again it is not practical to detail all of the testimony, which shows that their shipping requirements were substantially identical to those of the witnesses called by Wycoff. They repeatedly testified that existing carrier service was adequate to meet all of their needs, entirely consistent with those shipper witnesses of defendant Wycoff who were concerned basically with convenience alone.

To briefly illustrate, Royal Durrant of Cedar City, Utah, represented an auto parts company, and described

the use of bus lines for all shipments, including emergencies, at the rate of several a day. He emphasized (Tr. 1179) the quality of existing service and that it fully met any reasonable shipping needs. The Cate Equipment Company of Salt Lake City, Utah, (Tr. 1339) has used the bus service and has found it eminently satisfactory for movement of their products to various points in Utah. Similar testimony was given by the Metal Supply Company of Salt Lake City, Utah (Tr. 1832) who testified that they had made at least three bus shipments per day over 7 years, and were completely satisfied with such service and had received no complaints from their customers. Transport Equipment Center of Salt Lake City, Utah, likewise testified in a similar vein (Tr. 1391), as did Wheeler Machinery, the Caterpillar dealer at Salt Lake City, Utah (Tr. 1386). Similar testimony was introduced by substantial shippers such as Mountain States Rubber, Company an industrial rubber distributor at Salt Lake City, Utah (Tr. 1503) and Intermountain Motor Service of Salt Lake City, Utah (Tr. 1588).

When all this testimony is considered, it becomes abundantly clear that defendant Wycoff has completely failed to meet its burden of proof in these proceedings and that there is no basis upon which this Commission could conceivably find that convenience and necessity required the grant of additional authority.

**(B) THE TRANSPORTATION FACILITIES OF
EXISTING CARRIERS ARE ADEQUATE TO MEET ALL
PUBLIC SHIPPING REQUIREMENTS.**

Transportation facilities throughout Utah, and particularly between Ogden and Salt Lake City, are far reaching and substantial. Plaintiff Lake Shore Motor Coach Lines operates 14 daily schedules between Salt Lake City and Ogden each way, seven days per week, and in addition to this 7 stub runs five days per week and 5 additional stub runs on Saturdays (Tr. 1161). It maintains terminal and agency facilities along the relatively short line of operation and performs pick-up and delivery service, where desired, in the Salt Lake City and Ogden areas. Its buses are operated at less-than-capacity, and it is abundantly clear that it has the ability to transport any and all express which is tendered to it. This plaintiff alone provides sufficient service for any reasonable requirement of the shipping public. This, however, is not the only carrier engaged in the transportation of small shipments. The Greyhound Line, likewise a bus operation transporting express, operates nine daily schedules between Salt Lake City and Ogden, and maintains terminals at Salt Lake City, Utah and Ogden, Utah. In addition, a separate division of Greyhound operates 8 additional daily schedules between Salt Lake City and Ogden. These schedules are operated 7 days a week. This carrier alone is likewise capable of fully answering the needs of the shipping public. However, in addition to Lake Shore and Greyhound between Salt Lake City and Ogden, Pacific Trailways operates six bus schedules daily between Salt Lake City and Ogden. All of these schedules range throughout a full 24 hour period.

These are the bus lines which handle express, and whose weight limitations are equal to or higher than those of defendant Wycoff. This is not the only service available, however, as there are numerous common motor carriers likewise transporting between Salt Lake City and Ogden. Among the truck lines which testified was Fuller-Toponce Truck Line, serving, among other points, between Ogden and Salt Lake City, Utah (Tr. 1079). This carrier transports general commodities, including all items that could be transported by defendant Wycoff, and operates a truck from Salt Lake City at noon, northbound Monday through Friday, to Ogden and intermediate points, and likewise a schedule in the southbound direction, leaving Ogden at the same time. In addition, it operates anywhere from 10 to 18 trucks from Salt Lake City through Ogden, Monday through Friday (Tr. 1080). Pick-up and delivery service is offered at all points on the line and it has paid particular attention to problems incidental to rush or emergency shipments (Tr. 1082). Its list of available equipment for this service is impressive, not alone because it indicates its ability to render service, but because it also indicates the extensive amount of service which is currently being rendered. For example, it has 18 pick-up trucks stationed at Salt Lake City, Utah, with 10 tractors for pulling trailers (Tr. 1084). In addition, there are 25 pick-up trucks stationed at Ogden, Utah (Tr. 1084). The witness for this truck line devoted considerable time to an analysis of the extensive trucking facilities which are available, and when this service alone is added to that of the

bus lines it is readily apparent that there is an amazing amount of transportation service available.

An essential part of the findings of the Commission was that existing transportation facilities between Ogden and Salt Lake City are inadequate. To state it briefly, this is an utterly impossible finding upon the record in this proceeding.

POINT II.

THE ACTION OF THE COMMISSION IN GRANTING AUTHORITY WILL RESULT IN SUBSTANTIAL DESTRUCTION OF EXISTING MOTOR CARRIERS, THE ULTIMATE REDUCTION OF TRANSPORTATION SERVICE AVAILABLE TO THE SHIPPING PUBLIC, AND IS ARBITRARY, CAPRICIOUS AND AGAINST THE PUBLIC INTEREST.

One of the most disturbing aspects of the Commission's order is not only that it has seen fit to issue authority without any foundation of convenience and necessity, but that it has totally ignored the impact of such grant of authority on plaintiff. If express operations of the defendant Wycoff succeed, as the testimony indicates they will, in diverting express shipments from Lake Shore Motor Coach Line, it must result in either a substantial increase in passenger fares and express rates of plaintiff, which is neither economically feasible nor possible, a drastic reduction in service, or the ultimate destruction of this carrier.

Mr. Alma Johnson of Lake Shore Motor Coach Lines introduced in evidence a series of financial exhibits

wherein the figures clearly illustrate the basis of concern of this carrier. Its balance sheet, Exhibit 101, as of December 31, 1956, shows a deficit of \$9,139.17 from previous operating loss (Tr. 1157). Further financial analysis is found in Exhibit 105, which shows the volume of express shipments during the year 1956 and indicates the substantial amount handled by this bus line of \$12,357 shipments with total express revenues of \$10,339.04. If this analysis is then considered with Exhibit 106, which is the profit and loss statement on intercity operations, it shows (Tr. 1168) "if you were to take away the revenues from express, as shown on Exhibit 105, amounting to \$10,339.04, then our intercity operation for the year 1956 would show an operating deficit of \$16,494.00."

As this operating witness indicated, the loss of the express revenues would not affect any appreciable reduction in expenses, since express is carried on the same bus schedule which must otherwise be operated for the passenger traffic. The dilemma which faces the bus lines at this time of declining revenues and ever-mounting expenses is shown on Exhibits 107 and 108, which indicate the substantial increase in various labor, supplies and material costs which has occurred. Exhibit 109 includes a profit and loss statement not only for the year 1956, but for the month of March, and the initial three-months' period of 1957. If express revenues are deducted from total revenues, the operating ratio is substantially in excess of 100.

The threat of this order is not based upon generalities, but is detailed in financial exhibits and records maintained in accordance with accounting procedures prescribed by the Commission. The point that no carrier can long continue in business in the face of operational losses requires no elaboration. The arbitrary action of this Commission becomes even more apparent when this aspect of its order is considered. If, as the result of this application, plaintiff is forced to substantially curtail service, or as is entirely possible, to cease operations, it becomes apparent that the public interest is adversely affected. There can be no more perfect illustration of the fact that multiplicity of carriers in the long run dilutes traffic and reduces service to the shipping public. This testimony and the affect of the order on plaintiff have been ignored by the Commission.

POINT III.

THE GRANT OF AUTHORITY HEREIN BY DEFENDANT COMMISSION IS BEYOND THE SCOPE OF THE APPLICATION, CONTRARY TO LAW AND A HYBRID AUTHORITY WHICH IS NEITHER A COMMON NOR A CONTRACT CARRIER.

The order herein, sheet 10, Tr. 1840, grants a specie of hybrid authority, and upon analysis it is neither a contract nor a common carrier authorization. It cannot be a contract carrier since it does not purport to be such, and does not embrace specific contracts with indicate individuals as contemplated by our statute, 54-6-8,

U.C.A., 1953. See *Wycoff Company vs. Public Service Commission*, 227 P. 2d 323, 328, 329 (1951).

In considering the certificate against the concept of a common carrier, which this certificate purports to authorize, one of the essential features is that service must be tendered without restriction to any member of the shipping public desiring to utilize the shipping facilities. As this court stated in *McCarthy vs. Public Service Commission*, 184 P. 2d 220 (1947), at page 222:

“The defendants are rendering a private service to their customers. They are not engaged in a public service inviting an indefinite public generally to hire them; nor does the public have the legal right to the use of their facilities. There being no evidence that they have held themselves out to such a public, the action of the Commission in classifying defendants as common carriers was error in law and without proper foundation.”

Turning then to the order herein, it will be noted that the authority is distinctly limited in a number of ways. The operations must be confined to the schedules (not alone highways, routes or points of service) appearing on Exhibit 2 in the hearing hereof, an obvious limit on the number of trucks and extent of the operation, and it is distinctly not a state-wide authority. To this limitation is also added a limitation of the total pounds which can be transported on any one schedule. While this authority in theory authorizes transportation of general commodities, subject to weight limits, for any shipper, it is obvious that as a practical matter service cannot

be tendered to the public in general because of the limited schedules and capacity of trucks. By the limitations defendant Wycoff cannot, and it was intended that he could not, expand his operations in such a way as to accommodate all shipments tendered by the shipping public within the commodity and weight description of the authority. This limiter destroys the characteristic of this authority as a common carrier and creates a type of authority which it is submitted was never conceived or intended by applicable Utah law.

Moreover, even a casual examination of the testimony of the operating witness, Mr. Milton S. Wycoff, discloses that he, himself, conceived of this application as of a limited scope. He expressed the thought that he sought only to transport express movements in instances where his trucks were not filled to capacity, and expressed the view that because of this the application would be of limited concern to existing carriers. It is, of course, not of limited concern but constitutes a threat of consequence.

This order is not in reality a true grant of authority, but a specie of license or permit allowing defendant Wycoff to add such items to existing schedules as his truck capacity permits, at the same time diverting such traffic from carriers obligated to transport all items tendered by the shipping public, and who are doing so.

The significance of this peculiar order is that it reflects the apparent conclusion of the Commission that the restrictions would have little effect on existing carriers, and that irrespective of any finding of convenience and necessity, the problems are of such limited consequence that they can be ignored. Admittedly, this is not set forth in so many words in the order of the Commission, but plaintiff believes it is inherent in such order when the testimony is considered. Such is obviously an improper basis upon which to issue a certificate of convenience and necessity. If the need for service exists, it must be met by an authority which by its terms would permit transportation of any and all amounts of commodities tendered to the carrier for such service. When the Commission destroyed this ability and removed such concept, it acted beyond the scope of its authority and contrary to applicable statutes.

CONCLUSION

In conclusion it is submitted that the action of the Public Service Commission in issuing said order is arbitrary and capricious, and contrary to the evidence herein relative to public convenience and necessity. Said order and operations conducted under it will seriously jeopardize existing transportation facilities, and creates an operating authority of a type neither authorized nor

contemplated by applicable Utah law. The order of the Commission should be set aside.

Respectfully submitted,

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