

1958

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; G. L. Theurer; Harry D. Pugsley; Attorneys for Defendants;

Recommended Citation

Brief of Respondent, *Lake Shore Motor Coach Lines, Inc. v. Public Service Comm. Of Utah*, No. 8861 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3095

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

DEC 19 1958

LAW LIBRARY

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, DON-
ALD HACKING, and JESSE R. S.
BUDGE, Its Commissioners; WY-
COFF COMPANY, INCORPOR-
ATED, a corporation,

Defendants

Case No. 8861

FILED
JUL 12 1958

ORSON LEWIS, doing business as
Lewis Bros. Stages, and BINGHAM
STAGE LINES, a corporation,

Plaintiffs,

vs.

THE PUBLIC SERVICE COMMIS-
SION OF UTAH; HAL S. BEN-
NETT, DONALD HACKING, and
JESSE R. S. BUDGE, its members;
and WYCOFF COMPANY, INCOR-
PORATED, a corporation,

Defendants.

Case No. 8863

Supreme Court, Utah

BRIEF OF DEFENDANTS

E. R. CALLISTER,
Attorney General of the State of Utah
G. L. THEURER, Deputy
HARRY D. PUGSLEY,
Attorneys for Defendants

INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	20
POINT I. THE REPORT AND ORDER ISSUED BY THE COMMISSION IS SUPPORTED BY ADE- QUATE AND COMPETENT EVIDENCE.....	20
POINT II. THE CERTIFICATE ISSUED TO WY- COFF FOR "EXPRESS" SERVICE IS CONSIS- TENT WITH PUBLIC POLICY AND AUTHOR- IZES A NECESSARY SERVICE.	23
POINT III. THE ACTION OF THE COMMISSION IS REASONABLE AND FAIR AND IS IN NO RESPECT ARBITRARY OR CAPRICIOUS.	29
POINT IV. THE COMMISSION ACTED WITHIN THE SCOPE OF ITS STATUTORY AUTHOR- ITY IN RENDERING ITS DECISION AND ISSUING THE CERTIFICATE TO APPLICANT.	29

CASES CITED

Arrowhead Freight Lines v. U. S., 114 F. Supp. 804....	28
Ashworth Transfer Company v. Public Service Com- mission, 2 Ut. (2d) 23; 268 Pac. (2d) 990.....	21, 30
Fuller-Toponce Truck Co. v. Public Service Commis- sion, 99 Ut. 28; 96 Pac. (2d) 722	21
Jeremy Fuel & Grain Co. v. Public Utilities Commis- sion 63 Ut. 392; 226 Pac. 456	21
Ogden City v. Public Service Commission, 122 Utah 260 Pac. (2d) 751	21
Peterson v. Public Service Commission, 1 Ut. (2d) 324 266 Pac. (2d) 497	21
Transportation Activities of Arrowhead Freight Lines, Ltd. 63 M.C.C. 573; 61 M.C.C. 131	27
W. S. Hatch Co. v. Public Service Commission, 3 Ut. (2d) 7; 277 Pac. (2d) 809	21

STATUTES CITED

U.C.A., 1953, 54-6-4	29
U.C.A., 1953, 54-7-16	21

OTHER AUTHORITIES

11 Fed. Car. Cases, 33,329	26
Interstate Motor Car. Act. (Part II) Sec. 203 (9).....	27

IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; HAL S. BENNETT, DON-
ALD HACKING, and JESSE R. S.
BUDGE, Its Commissioners; WY-
COFF COMPANY, INCORPOR-
ATED, a corporation,

Defendants

Case No. 8861

ORSON LEWIS, doing business as
Lewis Bros. Stages, and BINGHAM
STAGE LINES, a corporation,

Plaintiffs,

vs.

THE PUBLIC SERVICE COMMIS-
SION OF UTAH; HAL S. BEN-
NETT, DONALD HACKING, and
JESSE R. S. BUDGE, its members;
and WYCOFF COMPANY, INCOR-
PORATED, a corporation,

Defendants.

Case No. 8863

BRIEF OF DEFENDANTS

STATEMENT OF FACTS

This matter was certified to the Court by the
Public Service Commission upon a single, though
voluminous, record. Two separate appeals have been

presented, being Case No. 8861 by Lake Shore Motor Coach Lines, Inc. and Case No. 8863 by Orson Lewis, d/b/a Lewis Bros. Stages and Bingham Stage Lines. The same defendants are named in both appeals and all matters arise out of an application before the Public Service Commission of Utah, Case No. 4252 Sub. 2.

This P.S.C.U. Case No. 4252 Sub 2 is an application by Wycoff Company, Incorporated, (hereinafter referred to as "Wycoff") for authority to extend its common carrier operations in Utah as a carrier of property for hire. Specifically, Wycoff requested authority to transport "general commodities in express service (100 pounds or less) between all points and places in the state of Utah." (R. 1815)

At the inception of the proceedings, appearances were made by applicant and then by numerous truck lines and bus companies which were in opposition to the application. After presentation of applicant's testimony and its shippers and some witnesses by protestants, a stipulation of a restrictive character was presented to the Commission. Thereupon the numerous truck lines, who had initially opposed the application, withdrew their protests. (R. 1828-29) Then the case continued and the Commission heard the testimony of witnesses on behalf of seven bus lines. Now, three of those

bus lines have appealed from the decision of the Commission.

As the two instant appeals are almost identical, #8861 and #8863, our brief will be directed to both at the same time. Each contends that the evidence is insufficient to support the findings of the Commission and that the Commission's action was arbitrary and capricious in granting a certificate to applicant to perform an express service in Utah. We will therefore outline some of the evidence supporting the action of the Commission in granting to Wycoff its express authority.

Wycoff has shown the existence of public convenience and necessity by numerous public witnesses, including some 42 shipper witnesses who are representative of the various types of merchandise that must move in *express* service between points and places in the State of Utah. Most of said shipper witnesses originate traffic in points such as Salt Lake City, Utah but distribute the same to all points and places within the State of Utah. Typical of such shippers are Strevell-Paterson Hardware Company, Salt Lake Hardware Company, Knudsen Builders Supply, Lauren Burt Company, Smith Faus Wholesale Drug Company, McKesson-Robbins Drug Company, Rocky-Mountain Wholesale Drug, American Red Cross, Physicians Supply Company, Hemingway and Moser Supply Co., California Ink Supply,

Oscar Chytraus Company, Wilby M. Durham and Hercules Powder Company. Such witnesses, combined with the other shippers, have adduced evidence which clearly supports the Report and Order of the Commission issued under date of January 21, 1958 and established the existence of a public need for an *express service* between all points and places within the State of Utah.

Many of the witnesses testified as to limitations on the bus service (only appellants) on several grounds:

- a. Numerous restrictions as to the types of commodities which the bus companies will handle;
- b. Very restricted pickup and delivery service (and where available an additional charge is made);
- c. Absence of 7-day a week service in certain areas;
- d. Difficulty in finding parking spaces convenient in delivering or picking up shipments at bus depots;
- e. Some points in Utah are not even served by the buses.

Wycoff Company, Incorporated has operated throughout Utah for many years. It transports the Salt Lake Tribune and Deseret News to all parts

of the state and likewise has statewide service on motion picture film. In addition applicant handles U. S. Mail and some other commodities to many sections of the state. The evidence shows that applicant operates frequent, fast schedules radiating out of and back to Salt Lake City seven days per week.

None of appellants attack applicant's ability to perform the proposed service. Mr. Wycoff testified that his company was offering to transport packages under 100 pounds in weight in a fast, expedited, express service. Pick-up and delivery service will be provided for all shippers as part of the overall charge for the express shipment. It was made very clear that the proposed service was to supplement, not replace, the existing truck line and bus line services now available to shippers in Utah.

The following are excerpts from the record as to testimony by some of the 42 supporting shipper witnesses who expressed a need for applicant's express service:

Mr. U. J. Kuhre, Vice-President of Strevell-Paterson Hardware Company (R. 221-254). This firm engages in a wholesale hardware business amounting to "several million dollars a year" in Utah. The witness was also chairman of the Wholesale Trades Committee of the Salt Lake Chamber of Commerce. He testified in part:

"Q. Now, the applicant is applying for

authority to transport these express shipments under 100 pounds throughout the state of Utah.

Would that type of service be of any convenience to you in your business?

A. Well, it would be quite a convenience. We feel — in fact, we have a lot of shipments of an emergency nature, small shipments, and that is why we are supporting this application on small shipments. We have no quarrel with our common carrier freight lines, but we do need available to us basically better express service.

Q. And if authorized by the Commission would your company use this service?

A. We definitely would.” (R. 223)

This shipper has a “substantial” volume of traffic to all parts of the state of Utah. He then went on to specify certain commodities shipped by them that the bus lines won’t accept: ammunition, bulky items, no C.O.D.’s, no pick-up and delivery service (R. 239-41). On re-direct he testified:

“Q. Notwithstanding the availability of these other services, does your company still have a need for this proposed express service?

A. Well, I still want to go back to my original premise, that we have no quarrel with the common carrier freight lines. We are not discussing, so far as I am concerned, any problems on freight shipments; we are simply discussing the necessity, so far as I am concerned, of the availability of better

expedited express service on small shipments." (R. 245)

Mr. W. G. Koplin, Traffic Manager of Salt Lake Hardware Company testified. His firm does about ten million dollars of hardware business in Utah annually. He testified as to the needs of his company for an express service statewide such as Wycoff proposes. In part he stated:

"Q. And do you use bus lines to all points in the state of Utah where they are operating?

A. When they can handle the commodity, yes.

Q. Have you had any problems in having these small shipments that your company handles move on the buses?

A. Yes; there are certain restrictions for safety, and under the regulations they don't find it possible to handle all the types of merchandise in small quantities we want to ship.

Q. Perhaps you could explain to the Commission the nature of the commodities you handle, and including those which might be prohibited from movement on the buses.

A. First, there is quite a variety of synthetic paints and thinners and related products of that kind, and, additionally, ammunition, which often moves in smaller quantities. Both of them are restricted in bus service.

Q. Now, from the name of your com-

pany, I presume you handle a wide variety of hardware items?

A. Yes.

Q. Do you have occasion when there is an emergency or rush shipment of these smaller commodities to points in the state of Utah?

A. Yes, that happens on occasion. Additionally, we have reason to ship service parts for some of the mechanical merchandise that we sell, in small quantities, and, of course, we have to keep the costs down as well as to provide a shipping service that is satisfactory.

Q. Have you had some cost problems with the truck lines?

A. Yes; our minimum charges are so high that we can hardly afford them.

COM. BUDGE: That is the bus lines?

MR. PUGSLEY: Truck lines, sir.

COM. BUDGE: Truck lines.

Q. Have the bus lines at any time provided a pickup and delivery service for your commodities?

A. Not generally. I think on occasion we have had Lakeshore Lines pickup a shipment or two, but that has been very limited.”
(R. 793-4)

Mr. Jack Wilson of Lauren Burt, Inc. testified for applicant. He is President of the firm which engages as a contractor in acoustical work, flooring, etc. in all points in Utah. They operate out of Salt

Lake City where a warehouse is maintained (R. 395). The testimony given by him in part was:

“Q. The application before the Commission is for Wycoff Company, Incorporated, to provide an express service between various points in the state of Utah.

I ask you whether or not in your business you have need for that type of service.

A. Yes, definitely.

Q. Could you state the situations under which you would need or use that type of service?

A. It is usually where we put men on to a job and in the initial commencing of the job something has been forgotten, a pound of nails, some adhesive, some material which is going to be used, which necessitates our getting that material to a job in a hurry.

The next place that we use it quite a lot is at the end of a job where we will find that we are short of one or more items to make the completion, and we have again to get it into a job in a hurry.

Now, the reason for this being, since we have crews out of town which are on a per diem basis and which we are paying daily whether they are working or not, if we do not have the material there when they can use it we are held over a day, which runs into a substantial cost for us.

Q. Have you used the bus service in the past for these types of emergency shipments?

A. Yes.

Q. And what problems, if any, have you encountered in using the bus service?

A. We are limited as to weight, of course, size of objects shipped. Inflammable objects we are not allowed to ship, and in size and weight I would like to emphasize too that even though they will take an amount per item we are quite frequently limited because we will have maybe eight or ten items, say 12 by 15 by 25, on which they can't take — in other words, they can only take one or two of them.

Q. Is it convenient in your business to have part of your shipment held over for the next bus schedule?

A. No, generally no." (R. 396-7)

He then explained some of their out of town problems. Crews may work 7 days per week on a basis where rush shipments are vital to completing a job. His firm desired the express service proposed by Wycoff.

Mr. Werner Larson, manager of Diamond Electric testified as to need for express service by Wycoff. They repair various types of electric motors (R. 419-422) and must move the motors into Salt Lake City from all parts of the state and out again as soon as possible. They need an emergency type of service such as Wycoff proposes. He testified that the bus service was "unsatisfactory" and he desires a direct single line express service.

Rather than detail the testimony of each witness relating to hardware and similar commodities we shall list them here with a brief reference. Then we shall turn to the shippers of drugs and drug-store items and following such we shall refer the Court to the shippers of automotive parts. The other hardware and miscellaneous products shippers who supported the application were:

J. Arthur Knudsen, president of Builders Supply Company at Salt Lake City (R. 460-480) ship hardware all over the state:

Norman B. Jones of Logan, Utah represented the Carl E. Nelson Construction Company. (R. 432-452). They desire the express service for procuring repair parts on Caterpillar and other equipment from Salt Lake City. They also need this same type express service to wherever in the state they may operate on road building jobs.

Raymond C. Buck, traffic representative of Marquard Aircraft testified as to his company's need for service between Ogden and Salt Lake City. This is a large new industry situated at Ogden engaged in manufacturing for the U. S. Air Force (R. 59-81). They ship small machined parts and hardware from one to three times per day from metallurgical and plating foundries in Salt Lake City. They supported the need for "fast express

service" (R. 62) to supplant use of their own vehicles.

Roy Winters of California Ink Company, Inc. described their need for the proposed express service (R. 699-720). They have numerous rush orders from Salt Lake City to all of the small communities in the state where there may be a printing shop. These "specials" are usually small and the inks involved are complex chemical compounds. In addition, they must ship corrosive acids and liquid developers containing analine dyes which cannot be handled by the busses.

In the drugstore field, witnesses appeared in support of the application representing not only the major wholesalers in Utah but also some typical receivers of drug store supplies.

Smith-Faus Wholesale Drugs was represented by Mr. George Brundage, Supt. of Operations (R. 616-633). They distribute from Salt Lake City to over 500 drug stores. They use all truck lines and all bus lines coming in and out of Salt Lake City. Nevertheless, he testified that they need applicant's express service. They receive orders from drugstores 24 hours per day, seven days a week.

McKesson-Robbins Wholesale Drug at Ogden, Utah appeared through its Operations Manager, Mr. Joseph C. Madsen (R. 22-59). They use the

truck lines and busses but supported applicant, reciting a "very particular need" for the expedited express service in moving drug items, prescriptions and emergency prescriptions. Such service would save them operating one of their own trucks to meet the need. They are competing with three major drug distributors located in Salt Lake City and expedited service is important to them as they must haul drugs from Ogden to Salt Lake in their own trucks to compete. In addition, they have emergency shipments on prescriptions every day (R. 26)

Rocky Mountain Wholesale Drug at Salt Lake City appeared through its President and General Manager, Mr. Ed Stevenson (R. 379-394). This firm carries prescription items only, no sundries. They use all busses and truck lines but need applicant's express service to meet their needs and produce same-day delivery on the prescription drugs. They ship all four directions from Salt Lake City.

Paul H. Beckstrom of Walgreen Drug Company supported the application for express service (R. 359-77). They would use such service on shipments of express items to their own stores in Ogden, Provo and Price from their warehouse in Salt Lake City. They complained about the inconvenience of the bus service.

The Physicians Supply Company at Salt Lake City was represented by its Vice President, Mr. W.

N. Allen (R. 567-78). They ship in Utah to “anyplace where there is a doctor or a hospital, and occasionally to other places if there is an emergency or an accident.” They strongly supported the proposed express service for small shipments. They must ship ether, chloroform, ethyl chloride, cyclopropane and a lot of chemicals and caustics which the busses cannot handle.

The other drugstore witnesses who related past difficulties and expressed needs for the express service by applicant are as follows. We do not intend to minimize their testimony but are shortening this recital in the brief in the interest of space. We invite the Court to read the transcript if any questions remain:

Wayne L. Smith (R. 602-615) owns and operates two drugstores in Logan, Utah;

Paul F. Potter (R. 593-96) spoke for Skaggs Drug, a retail drugstore chain. They distribute drugs and sundries from Salt Lake City to Ogden and Provo and intermediate;

Alfred V. Bateman (R. 579-591) operates a drugstore at St. George and procures his drugs and sundries from Salt Lake City and Ogden.

Arthur M. Nicholson (R. 278-297) operates a drugstore in Price and procures his supplies from Salt Lake City, Provo and Ogden.

Monte Marshall (R. 326-329) of Panguitch operates a drugstore there. He complained bitterly about their present truck and bus service and said, "To the side of the service we have now, I would accept anything."

The American Red Cross Blood Bank receives and ships blood and plasma. Mr. M. B. Murdock (R. 553-566) testified that the blood comes from all parts of the state to their facility at Salt Lake City. It is perishable and must be delivered within 24 hours. It is packed in iced containers weighing 19, 30 and 50 pounds. They ship it North, South, East and West from the blood center.

A number of shippers and receivers of automotive supplies appeared in support of the need for an express service. These shippers were faced with a number of problems: some items are not handled by busses because of their character or size, though under 100 pounds in weight; some items such as black tires and axles must be specially wrapped to go on busses; lack of pick-up and delivery service troubles the shippers; and there are numerous emergency shipments required to care for breakdowns for which an express service is needed. The supporting shippers in this case are:

General Motors Company — truck division (R. 681-698) — ships from Salt Lake City to "anyplace

one of our trucks happens to breakdown" — three to four times per day.

Automotive Service Company — Salt Lake City (R. 507-518) a wholesale automotive parts distributor "all throughout the state of Utah".

Flinco, Incorporated at Salt Lake City (R. 760-775) — wholesaler of tires, batteries, filters, automotive chemicals, etc. Busses will not take their wet batteries and require that all black tires be wrapped before shipping. They market tires "in almost every town in Utah."

Lambert & Company at Salt Lake City (722-736) — automotive jobber of parts for cars and trucks.

Edway Redd, the Chevrolet, Buick and Oldsmobile dealer at Monticello who also handles International Harvester trucks and farm equipment (R. 331-338).

Samuel E. Allen, Ford dealer at Panguitch (R. 298-307) who also operates a furniture and appliance business there.

John C. Smith (R. 662-680) Service Station Supply Company, Salt Lake City, ships "all over the state".

Williamsons, Inc. of Ogden (R. 803-817) manufacturer's agent on truck bodies, hydraulic hoists

and parts thereof. They ship "most anyplace in the state where dump truck and other equipment is used."

One shipper of explosives supported the need for express shipments from Salt Lake City and from Gomex, Utah to all parts of the state. Mr. B. F. Coday (R. 530-551) of Illinois Powder Manufacturing Company testified concerning their factory at the mouth of Spanish Fork Canyon and their distribution magazines located at North Salt Lake. They also have stocks of explosives from which shipments are made. These magazines are at Richfield, Vernal, Helper, Blanding, Green River and Hurricane. The busses cannot handle explosives and they've had to use their own equipment on small shipments.

A series of other shippers of unrelated commodities within this state requiring express service and supporting the application are as follows:

Mr. L. W. Cracroft of Hemingway and Moser, wholesaler of cigars, cigarettes, candy and other items (R. 518-528) ships from Salt Lake City to "All of Utah";

Mr. Wayne Johnson (R. 775-791) of Oscar Chytraus — wholesale distributor of heating equipment, doors, etc. They need the service for controls, motors and small component parts. They have "deal-

ers all over the state of Utah” and ship from Salt Lake City.

Mr. Chad Barwick (R. 737-759) of Mosaic Tile Company in Salt Lake City. They ship packages under 100 pounds daily to tile contractors all over the state.

Mr. Wilby M. Durham (R. 646-661) of DuMac, Incorporated. They handle mechanized mailing and publicity work. Need service on advertising material, photos, mats, etc.

Mr. Ted R. Brown (R. 480-506) of Refrigeration Distributors Corporation in Salt Lake City, Utah, 65% of their shipments are under 100 pounds. Among other items they ship cylinders of compressed refrigerants which may not be handled by the busses.

Mr. Lee S. Manwill (R. 142-171) distributes radio and television parts and supplies from Provo. His salesmen cover the Southern and Eastern parts of the state and he desires the express service to aid him in competing with the distributors at Salt Lake City.

Mr. Olin Halvorsen (R. 171-220) of Helper, Utah operates a furniture and appliance store. They need the express service for repair parts on electronic and refrigeration equipment.

Mr. W. B. Odendahl (R. 254-277) operates the Carbon Transfer & Supply Co. This firm sells mining supplies in all coal mining areas of the state, such as Carbon, Emery, Wasatch and Iron Counties. Some material is shipped from Helper and some from Salt Lake City.

Mr. Guy C. Tucker (R. 452-465) operates two coal mines near Cedar City, Utah. They buy supplies from Helper and from Salt Lake City and needs the express service.

Mr. Burnett Hendryx (R. 339-345) of Pan-guitch operates a hotel and motel. The express service is needed there for operating supplies and for repair parts on the mechanical (heating and cooling systems).

Following the presentation of such shipper witnesses, the protesting bus lines presented testimony as to their schedules and equipment and then brought in a number of witnesses who testified that for themselves they were satisfied with the service received by them as to the needs of their own businesses.

Upon this record, the Commission took the case under advisement for several months and then on January 21, 1958 entered its Report and Order (R. 1831-1841) reviewing the general evidence and finding that public convenience and necessity requir-

ed the institution of an express service by Wycoff Company between all points in the State. It is this Report and Order which the three appealing bus lines call "arbitrary and capricious" and unfounded upon evidence.

STATEMENT OF POINTS

POINT I

THE REPORT AND ORDER ISSUED BY THE COMMISSION IS SUPPORTED BY ADEQUATE AND COMPETENT EVIDENCE.

POINT II

THE CERTIFICATE ISSUED TO WYCOFF FOR "EXPRESS" SERVICE IS CONSISTENT WITH PUBLIC POLICY AND AUTHORIZES A NECESSARY SERVICE.

POINT III

THE ACTION OF THE COMMISSION IS REASONABLE AND FAIR AND IS IN NO RESPECT ARBITRARY OR CAPRICIOUS.

POINT IV

THE COMMISSION ACTED WITHIN THE SCOPE OF ITS STATUTORY AUTHORITY IN RENDERING ITS DECISION AND ISSUING THE CERTIFICATE TO APPLICANT.

ARGUMENT

POINT I

THE REPORT AND ORDER ISSUED BY THE COMMISSION IS SUPPORTED BY ADEQUATE AND COMPETENT EVIDENCE.

The initial attack of the bus lines is upon the sufficiency of the evidence to sustain the Commis-

sion's findings and Order: We first call to your attention Section 54-7-16 Utah Code Annotated 1953 relating to this Court's function upon review of the Commission's action, which reads in part:

“The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review”.

A multitude of cases decided by this Court have held that you will not delve into the wisdom of the decision of the Commission if there is competent evidence to support the findings.

Jeremy Fuel & Grain Co. vs. Public Utilities Commission, 63 Ut. 392, 226 Pac. 456.

Fuller-Toponce Truck Co. vs. Public Service Commission, 99 Ut. 28, 96 Pac. 2d 722.

Ogden City vs. Public Service Commission 122 Ut., 260 Pac. 2d 751.

Peterson vs. Public Service Commission, 1 Ut. 2d 324, 266 Pac. 2d. 497.

Ashworth Transfer Co. vs. Public Service Commission, 2 Ut. 2d 23, 268 Pac. 2d 990.

W. S. Hatch Co. vs. Public Service Commission, 3 Ut. 2d 7, 277 Pac. 2d 809.

A run-down of the Findings by the Commission shows that the basic facts were well considered by the Commission. In addition to the testimony of employees of the parties, some 82 public witnesses testified. The dispute narrowed down to the bus lines

as the sole protestants. In the Findings the Commission carefully reviewed the contentions of the parties, the deficiencies in the bus service as to commodities, areas, days of the week, type of service, etc. Then in Finding #14 the Commission found in part:

“14. In support of the application the following substantial business concerns regard the proposed service as a necessity because it is a new and better method of expediting transportation which is so vital under present highly competitive conditions, and it will fill a gap which the bus lines thought it necessary to fill only after the present application was filed.” (R. 1875)

It then itemized the business concerns.

We have outlined in our Statement of Facts above the general nature of the testimony and needs of each supporting witness. From such it is clear that there is an overwhelming demand for the new express service and ample competent evidence to support the decision of the Commission.

Appellants generally seem to concede that there may be a need for Wycoff's express service elsewhere in the state but dispute any need as to their own lines. That debate need not concern the Court as the Commission has settled the matter by finding and concluding that the Certificate authorize “express service between all points and places in the State of Utah” . . . (R. 1877). A quick review of

the record shows that many witnesses testified that their firms ship to *all* points in the State. These are substantial shippers such as McKesson-Robbins Wholesale Drugs, Strevell-Paterson Hardware Co., Salt Lake Hardware Co., Rocky Mountain Wholesale Drug, Hemenway & Moser, Illinois Powder, Blood Center of American Red Cross, Smith-Faus Drug Co. Certainly in the face of such substantial competent testimony, the finding and decision of the Commission must stand.

POINT II

THE CERTIFICATE ISSUED TO WYCOFF FOR "EXPRESS" SERVICE IS CONSISTENT WITH PUBLIC POLICY AND AUTHORIZES A NECESSARY SERVICE.

Appellants in their separate briefs have contended that the grant of "express" rights to Wycoff is beyond the scope of the authority of the Commission and is neither a contract or a common carrier type of authority. The plain and simple answer to that vague contention is the Certificate in the Order (R. 1877) which reads in part:

... "is hereby issued Certificate of Convenience, and Necessity No. 1162-Sub Z, to operate as a common carrier by motor vehicles for the transportation of general commodities of 100 pounds or less in weight in express service" ...

Can the Commission be more explicit than saying "as a common carrier"?

The basic difference between a *common* motor carrier and a *contract* motor carrier is set out by the general statement that a *common* carrier must serve any member of the public who tenders to it for transportation freight of the class which that carrier is authorized to transport. Thus we may have *common* carriers of petroleum products in bulk in tank vehicles, *common* carriers of household goods, *common* carriers of passengers, *common* carriers of acids and chemicals in tank vehicles, *common* carriers of general commodities between limited points or between all points in the State, or, as in this case, *common* carriers of "general commodities of 100 pounds or less in express service." A *contract* motor carrier, on the other hand, is obligated to serve only such shippers as have executed contracts with it and which have received the approval of the Public Service Commission. A "permit" is issued to a *contract* carrier while a common carrier receives a certificate.

There is nothing unusual about the type of certificate which the Commission has issued to Wycoff. We are amazed that the three bus lines cannot comprehend what is meant by "general commodities of 100 pounds or less in express service" as each has a somewhat similar provision in its own Certificate.

It was only in 1956 that appellant, Lakeshore

Motor Coach Lines, Inc., applied to the Commission for a Certificate to "operate as a common carrier by motor vehicle for the transportation of general commodities over irregular routes . . . limited to shipments of 150 pounds or less." (R. 2162) and on August 13, 1956 it received its Certificate #1164 so providing for the 150 pound limitation and further restricting it to transportation moving on its busses between Salt Lake City and Ogden, Utah. (R. 2176). Likewise that appellant has in its primary passenger Certificate #288 a restriction and grant to perform express service for "such express and baggage as may be readily carried on its automobile busses without impairment of its proposed passenger service." (R. 2147). Thus restrictions on common carrier certificates are not unusual.

Orson Lewis d/b/a Lewis Bros. Stages in August of 1956 received Certificate No. 753 Sub 4 "to operate as a common motor carrier by motor vehicle for the transportation of passengers and accompanying baggage and express" . . . "The express service hereby authorized shall be limited to shipments carried in the passenger carrying equipment of applicant and shall also be limited to shipments of 100 pounds or less, and the volume of express handled on any bus shall be such as will not interfere with the comfort and safety of passengers." (R. 2228)

Orson Lewis apparently also controls Bingham Stage Lines, a corporation, the other appellant. Its Certificate was issued in 1919 to transport "express and baggage between Salt Lake City and Bingham" as an adjunct to its passenger service. (R. 2271)

With a background of that character wherein each protestant holds a certificate to transport "express" and has limitations imposed, how can they in good faith now assert that the Commission has created a "hybrid" by imposing restrictions upon Wycoff in the performance of the express service. Protestants' own certificates are as "common" carriers and are even more restrictive.

"Express service" has been authorized in conjunction with almost every bus line with varying restrictions. In interstate commerce some carriers of property only have "express" authorities. The Interstate Commerce Commission in the Arrowhead Freight Lines, Ltd. case enumerated the principal aspects of an "express" common motor carrier authority, cited at 11 Federal Carriers Cases 33,329. The basic criteria there noted are a bona fide offering of service to the public to transport and afford such protection as the commodities require, providing expeditious transportation and careful handling on schedules allowing minimum practicable highway transit time and utilizing a relatively simple rate structure.

The term "express" came to have a special meaning in surface transportation starting with the days of the Pony Express, Wells-Fargo Express, etc.

The Interstate Motor Carrier Act (Part II), Sec. 203 (9) defined "express company" to mean any common carrier by express, subject to provisions of Part I and Sec. 208(b) provided that a certificate for the transportation of passengers (by bus) may include authority to transport in the same vehicle with the passengers, newspapers, baggage of passengers, express, or mail, or the transportation of baggage of passengers in separate vehicles.

Under this latter authority, bus companies have obtained generally the right to transport express matter. These authorities or the tariffs issued thereunder may provide limitations as to weight, size of shipment, as to pick-up and delivery, commodities, or in other respects.

The leading case appears to be *Transportation Activities of Arrowhead Freight Lines, Ltd.* 63 M.C.C. 573, May 17, 1955. This is a review, and interpretation, of a prior report, 61, M.C.C. 131. There the Commission found the facts did not warrant a requested change in the certificate by substituting therein the term "express" in lieu of the existing authority of "general commodities moving in express service". The carrier sought and obtained

from the U. S. District Court, Southern District of California, an order enjoining and setting aside the Commission's cease and desist order and remanding the matter to the Commission for further proceedings. (*Arrowhead Freight Lines v. U. S.* 114 F Supp. 804) In its review, 63 M.C.C., the Commission said that the basis for the Court's decision was the indefiniteness as to what the cease and desist order required the carrier to do or not to do. It found that the authority in question was under a grandfather right acquired by purchase from *Rapid Express, Inc.*, and consisted of a rapid delivery service of a wide range of package commodities, utilizing light equipment operated on fixed daily schedules designed to provide faster than usual service at definite delivery times. The rates charged were in excess of the general freight rates maintained in the territory. Over part of the system Arrowhead also had general commodity rights. It got into difficulty by extending this general freight service at ordinary freight rates over its routes limited to express service.

Emphasizing the distinction between express and general freight it referred to findings in its original report, at page 137:

“authority limited to the transportation of “express” or to “general commodities moving in express services” is restricted as to the type of service which may be performed by its very

terms. * * * * Authority to transport general commodities without restriction includes the right to transport express. *Sheetz Common Carrier. Application-Express* 10 M.C.C. 393, 395. General freight carriers, however, are not generally interested in the transportation of express service as that term is generally understood, probably because it tends to involve traffic consisting principally of relatively small shipments which they prefer for the most part, to be handled by the express companies or by parcel post."

and at page 140:

"Because express service is marked by an undertaking to provide transportation services superior to that normally required and furnished for ordinary freight, it is both appropriate and proper that relative higher charges should be established for it."

POINT III

THE ACTION OF THE COMMISSION IS REASONABLE AND FAIR AND IS IN NO RESPECT ARBITRARY OR CAPRICIOUS.

POINT IV

THE COMMISSION ACTED WITHIN THE SCOPE OF ITS STATUTORY AUTHORITY IN RENDERING ITS DECISION AND ISSUING THE CERTIFICATE TO APPLICANT.

The general powers and duties of the Public Service Commission as to common motor carriers are spelled out in Section 54-6-4 U.C.A. 1953. This reads in part:

"The Commission is vested with power and authority, and it shall be its duty, to

supervise and regulate all common motor carriers and to fix, alter, regulate and determine just, fair, reasonable and sufficient rates, fares, charges and classifications; to regulate the facilities, accounts, service and safety of operations of each such common motor carrier, to regulate operating and time schedules so as to meet the needs of any community, and so as to insure adequate transportation service to the territory traversed by such common motor carriers, and so as to prevent unnecessary duplication of service between these common motor carriers, and between them and the lines of competing steam and electric railroads;”

Your Honorable Court in the case of *Ashworth Transfer Company vs. Public Service Commission*, 2 Ut. 2d 23, 268 Pac. 2d 990 considered a situation where the Commission had granted a Certificate to Harry L. Young & Sons, Inc. duplicating on a statewide irregular route basis the authority then held by two protestants, Salt Lake Transfer Company and Ashworth Transfer Company. Nevertheless you affirmed the Commission and stated the applicable standard as being:

“The ‘convenience’ and ‘necessity’ to be considered is that of the public, *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298, and the statute does not require that the Commission find that the present facilities are entirely inadequate. It merely requires that the Commission ‘shall take into consideration * * * * the existing transportation facilities’; it is obvious from

the language of the order granting the application and the order denying the petition for rehearing, as well as the evidence, that the Commission did take these matters into consideration."

A review of the Report and Order of the Commission (R. 1831-1841) makes it apparent that the Commission not only took in consideration the facilities of the existing carriers, but weighted such and found them to be lacking as to the expedited express service needed by the shipping public. The case was submitted to the Commission in June of 1957. The protesting bus lines were granted the privilege of filing a brief and this was done by them. It was not until January 21, 1958 that the Report and Order was issued. It is clear, therefore, that lengthy and mature "consideration" was given to the case by the Commission.

Petitions for Rehearing were filed by the present appellants. Replies thereto were filed and then on February 20, 1958 the Commission denied those petitions for rehearing, reciting, "The Commission having now given careful consideration to said Petition for Rehearing"(R. 1857).

As to the contention that the Commission was "arbitrary" and "capricious", little need be said. If ever an ample opportunity was given to protestants to fully present their case, this is an example

of extreme patience and forbearance by the Commission. Over the objections of applicant, the protestants were permitted to parade a multitude of what we considered to be immaterial and incompetent witnesses. Nevertheless, the Commission heard them all and considered their testimony.

Nothing reckless, arbitrary or capricious is manifested in an Order which permits the shipping public to have available to it an expedited, express service to supplement present transportation facilities which the shippers and in turn, the Commission, found to be inadequate. The testimony of 42 representative shippers as to the need for service (some of the shippers came from as far away as Panguitch to testify) precludes any contention that the Commission acted in an arbitrary or capricious manner.

Defendants therefore pray that the Supreme Court affirm the action of the Commission in granting to Wycoff the certificate to perform an express service as stated.

Respectfully submitted,

E. R. CALLISTER,
Attorney General of the State of Utah

G. L. THEURER,
Deputy

HARRY D. PUGSLEY,
Attorneys for Defendants