

1958

Orson Lewis v. Public Service Comm. Of Utah et al : Brief of Plaintiffs

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Lewis v. Public Service Comm. Of Utah*, No. 8863 (Utah Supreme Court, 1958).
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IN THE SUPREME COURT OF THE STATE OF UTAH

ORSON LEWIS, doing business as
Lewis Bros. Stages, and BING-
HAM STAGE LINES, a corpora-
tion,

Plaintiffs,

— vs. —

THE PUBLIC SERVICE COMMIS-
SION OF UTAH; HAL S. BEN-
NETT, DONALD HACKING, and
JESSE R. S. BUDGE, its mem-
bers; and WYCOFF COMPANY,
INCORPORATED, a corporation,
Defendants.

BRIEF OF PLAINTIFFS

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Defendants.

Case No. 8863

BRIEF OF PLAINTIFFS

THE FACTS

Defendant Wycoff Company, Incorporated, applied to the Public Service Commission for a certificate of convenience and necessity to transport express between all points and places within the state of Utah. Plaintiffs

are holders of certificates of convenience and necessity as set forth in the pleadings and more fully discussed hereafter, and together with numerous other common carriers, protested the granting of the certificate requested by defendant Wycoff Company, Incorporated.

Plaintiffs operate bus services for the transportation of passengers, their baggage, and express between Salt Lake City and Park City, Utah; Salt Lake City and Bingham Canyon, Utah; Salt Lake City and Ely, Nevada; and Salt Lake City and Tooele, Utah, and all intermediate points. Insofar as this hearing was concerned, the Ely run would be considered to terminate in Wendover, Utah, since the remainder of the run is without the state and not affected by the Wycoff application.

After extensive hearings, the Commission entered its Order on January 21, 1958, which in substance granted the application of Wycoff, subject to various restrictions, including a stipulation made between Wycoff and protesting trucklines which limited Wycoff's transportation to shipments not exceeding 100 pounds on a weight basis, and which prohibited reduction of a normal shipment into two or more shipments in order to avoid such restrictions. The Order is before this Court as one of plaintiffs' exhibits.

Plaintiffs concede the necessity of service by an express carrier to certain areas of the state presently without scheduled common carrier service, or areas

where the service is so infrequent that the needs of the public are not met. However, these later circumstances do not exist in the territories served by plaintiffs.

Plaintiffs filed a Petition for Re-Hearing which was denied by the Commission, and the case comes before this Court for review.

THE ARGUMENT

I. The basic position of plaintiffs is that the evidence submitted to the Public Service Commission is insufficient and inadequate and does not support the Commission's findings and order that a necessity exists for such a service within the territories already served by plaintiffs.

II. The action of the Commission is capricious and arbitrary insofar as it affects these plaintiffs, and the Order will permit the destruction of plaintiffs' businesses, since plaintiffs rely very heavily upon express revenues to maintain their operations; and these revenues should not be diverted to other carriers when there has been no showing of a necessity for such additional service in the territories covered by plaintiffs.

III. The type of authority conferred upon Wycoff is something new and different from any other type of carrier which the Commission has heretofore created, being neither a common carrier nor a contract carrier in

the normal sense of the term. Rather, the Commission has, without authority, bestowed upon a carrier a right to accept and transport items at its discretion, with no obligation to provide service, as that carrier may elect.

POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS OF THE COMMISSION.

It is important at the outset to review the testimony of Milton S. Wycoff, who is the president of the applicant and a stockholder in related enterprises. The record discloses (T. 8) that the applicant is a contract carrier, transporting motion picture film, newspapers, magazines, periodicals, cut flowers and bull semen, on schedules leaving Salt Lake City for the convenience of the Salt Lake newspapers, with departure times at approximately noon and midnight; and that its traffic moves in practically all directions from Salt Lake City. Aside from mail, deliveries are apparently normally made to the door of the recipient of the commodities (T. 9). The application was understood to cover express service on items of 100 pounds or less in intra-state commerce between all points in the state of Utah, and the applicant proposed to maintain a pick-up and delivery service at Salt Lake City from 6 o'clock a.m. until 1 o'clock a.m. After being picked up, express would be placed on trucks in which there was sufficient room to handle such express as applicant anticipated transporting (T. 11). The express would be delivered directly from the trucks where possible, or by sub-agents after receipt (T. 12).

• Mr. Wycoff indicated that revenues had declined in motion picture traffic, and “that the express which we will attract will probably no more than take up the slack of where we have lost out on our film traffic” (T. 13). Mr. Wycoff further testified “We are asking the Commission to remove the restrictions on the permit we now have which limits us to specified commodities, and allow us to handle commodities for anyone who wishes our service in the same service we are now rendering to the people we now serve” (T. 16). He stated that it was necessary for the company to obtain additional revenues, or “we are going broke.” (Tr. 17) The record would indicate (T. 19) that the applicant had some previous experience in transporting general commodities in express service, but that the Commission had directed the applicant to desist from such operations.

As a further illustration of the type of authority sought, Mr. Wycoff testified (T. 134) that the applicant wanted the right to move any type of commodity tendered, so long as the individual pieces did not exceed 100 pounds each, and to engage generally in transportation operations in the state of Utah over regular routes (T. 135). The economic motivation on the part of applicant again appears in the transcript at pages 136 through 138 and page 220. Additional revenues appear to be necessary to the applicant to sustain contract operations in which currently engaged, and the express service proposed would bolster income.

The applicant indicated a willingness to accept any shipment tendered, and would actively solicit “limited”

business (T. 137). The witness was of the belief (T. 138) that something over 50% of the express business anticipated would be items presently shipped parcel post; that "We would probably get some from the bus lines. That would be my opinion, that the bus lines would be losing some of the business that they now have. The common carrier I don't think would suffer. The over the road common carrier would continue to carry what he is now carrying — that is my opinion." Mr. Wycoff indicated that the applicant was "not trying to work this thing into a common carrier, and we don't want to buy any bigger equipment than we have anywhere. We don't think it will be necessary." (T. 141)

In support of the application of defendant Wycoff Company, Incorporated, there appeared before the Commission numerous witnesses from Salt Lake City and other points within the state who testified generally that they could use the type of service proposed by Wycoff as a supplement to existing service and in order to have more services available from which to select a carrier. Many of these witnesses emphasized the desirability of a pick-up and delivery service not now provided by bus companies, and others complained of the bus lines lack of authority to transport commodities such as acids, inflammables, corrosives and explosives, and to the limitations on size of items due to the inherent construction of express compartments on buses. Some witnesses appeared to substantiate the need for service in areas now without express service of any kind, or with infrequent service.

Very few of the witnesses who testified in behalf of the applicant had had any dealings in the territories covered by plaintiffs. Virtually all who had, conceded that service of plaintiffs insofar as their territories extended was adequate and dependable, and the single criticism of those who had dealt with plaintiffs related to inconvenience in taking express shipments from business houses in Salt Lake City to the bus depot. Obviously many of the witnesses were under the impression that the applicant would pick up shipments immediately upon request and promptly dispatch such shipments to their destination.

No witness appeared in behalf of the applicant with affirmative testimony showing necessity of additional express service in the territories served by plaintiffs. Many of applicant's witnesses testified that they had received good service from plaintiffs, and that they frequently used these services. (George Brundage, T. 632; U. J. Kuhre, T. 246; Roy Winter, T. 720; Richard A. Lambert, T. 735; W. J. Koplin, T. 802-803.) The majority of the witnesses who testified in behalf of applicant conceded that they would like to have available a multiplicity of service for express shipments, so that they could pick whatever carrier might be most convenient at a particular moment; and many of such witnesses did not seem to recognize the economic consequences of unlimited competition between carriers.

Plaintiffs and other bus operators similarly situated produced a large number of witnesses who testified as

to their satisfaction with available service. Many witnesses also appeared to show what service was available in particular areas.

Not only did the applicant fail to establish the necessity for any additional express service in the territories served by plaintiffs, but on the contrary plaintiffs' numerous witnesses from every territory served indicated good, dependable service, regular schedules, and delivery to the consignee in many cases, with service being rendered by plaintiffs for the transportation of all commodities tendered, except those expressly prohibited; and that such service had been provided by plaintiffs and their predecessors for many, many years.

It would seem pointless to recite the testimony of these witnesses, and in lieu thereof citation is made to the transcript for the convenience of the Court: Cliff Parkin, T. 1268, et seq.; J. L. Love, T. 1347; Morris D. Stark, T. 1355; Theodore J. Sargeant, T. 1368; Norman Clyde Barnes, T. 1388; Eldon C. Jorgensen, T. 1397; Frank H. Zenger, Sr., T. 1399; George Evans, T. 1439; Nelson Lamus, T. 1447-1448; Russell Lewis, T. 1451; Jess V. Ecton, T. 1458; Harold A. Chase, T. 1469; Mark F. Squires, T. 1474; J. Ward Willis, T. 1479; Arnold Eves, T. 1509; Mary Adondakis, T. 1519; Bryant Jacobs, T. 1640-1641; Donald R. Koch, T. 1660-1661; Scott Stalker, T. 1692-1693, and 1700-1702; Paul Ketterer, T. 1710-1712.

The Utah law with respect to administrative review is well settled and perhaps most completely stated in the case of *Mulcahy v. Public Service Commission*, 101 Utah 245, where this Court stated, at Page 249:

“It has been repeatedly held that a review of the Commission’s order is limited to a determination of whether the Commission acted within the scope of its authority, whether the order has any substantial foundation in the evidence, and whether any substantial right has been infringed by such order.”

As heretofore noted, the basic position of these plaintiffs is that the evidence submitted to the Public Service Commission is totally insufficient and inadequate and does not support the findings and order that a necessity exists for such a service within the territories already served by plaintiffs. This position could perhaps be more simply stated to be that not only was the evidence insufficient and inadequate to support the findings and order, but rather, *no evidence of any type was introduced* to establish the requisite necessity as to the territories served by plaintiffs. Plaintiffs are certain the Court is aware of the necessity for a careful study of the record to appreciate plaintiffs’ position and the objections to the Commission’s order as it affects plaintiffs.

The Court further stated in the *Mulcahy* case, *supra*, at page 262:

“An applicant desiring to enter a new territory, or to enlarge the nature or type of the service he is permitted to render must therefore show that from the standpoint of public convenience and necessity there is a need for such service; that the existing service is not adequate and convenient, and that his operation would eliminate such inadequacy and inconvenience. He must also show that the public welfare would be better subserved if he rendered the service than if the existing carrier were permitted to do so. The paramount consideration is the benefit to the public, the promotion and advancement of its growth and welfare. Yet the interests of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development, and advancement.” (Emphasis supplied)

The law in this respect was reiterated and approved in *Utah Light & Traction Company v. Public Service Commission*, 101 Utah 99, wherein the Court, after quoting extensively from the *Mulcahy* case, said (Page 114):

“If the need for new or additional service exists, it is the duty of the commission to grant certificates of convenience and necessity to qualified applicants, but 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. True, existing carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service. The public interest is paramount.”

POINT II.

THE ACTION OF THE COMMISSION IS CAPRICIOUS AND ARBITRARY AND WILL PERMIT THE DESTRUCTION OF PLAINTIFFS' BUSINESSES.

Joseph M. Lewis, manager, appeared in behalf of plaintiffs, and testified generally with respect to operating authority, scheduled runs and service provided, express capacity, and similar matters tending to show the ability and practice of plaintiffs in handling and transporting any and all express items tendered for the territories served. (T. 1230 et seq.) His testimony established the importance of express revenues to the continued operation of plaintiffs' bus lines to the small communities which have been served for so many years. The testimony shows clearly that express has been one of the major stable income-producing factors making possible plaintiffs' passenger service into the areas involved, and that without such revenue it would be extremely doubtful if plaintiffs could continue to operate. (T. 1245) It becomes obvious that if plaintiffs are forced to discontinue passenger operations because of the loss of express revenue, several of the territories served could well be isolated without public passenger transportation of any type. It follows from the Wycoff testimony that there will be an active solicitation of express business within plaintiffs' territories, as well as all over the state, and such solicitation will undoubtedly result in a loss of business and subsequent revenue to plaintiffs. The defendant Commission, through its decision, has reduced or eliminated sources of revenue, which in turn reduces or eliminates plaintiffs' ability to serve the public, even though the

Commission was well advised that passenger transportation in and of itself would not support the operations of plaintiffs. Notwithstanding these facts, the Commission has disregarded and failed to consider its duties and obligations to supervise and regulate intra-state passenger and express transportation, having in mind the convenience, necessity, welfare and needs of the public, as well as the interests of the small common carrier who must look to the Commission for the protection and consideration necessary to allow it to compete for and provide service in the communities now served.

Further, the Commission failed to recognize a distinction between a slight or limited loss of revenue and the extensive loss that would be suffered if plaintiffs were not protected in their express carriage rights. Joseph M. Lewis testified with respect to the operating ratios of plaintiffs as follows (T. 1244) :

“A. *** Let’s see—the operating ratio with express over these routes is 125.25. In other words, we put in \$25.25 for every one that the passenger or express person puts in. Without express, it goes up to 162.77, which is staggering.

COM. BUDGE: Well, according to that you should have quit operating long ago.

A. Well, yes *** But these are the facts in connection with the service supplied into these areas, and from those facts it is reasonably obvious that the loss of any revenue would be a very serious thing.

COM. BUDGE: According to these operating ratios, you are out of business long ago.

- A. We know it. We are improving; we have also charter service that we provide, and that provides the service to these communities, the revenue from the charters."

In spite of this evidence substantiating the importance of express revenue, the Commission ignored the pronouncement of the Mulcahy case that "**** the interests of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development, and advancement."

Certainly to deprive the public of plaintiffs' passenger and express service, and to grant in lieu thereof a "hybrid" certificate providing only for discretionary express service in connection with contract haulage, as the Commission did in this case, can not be said to protect either the existing certificate holder or the public.

The capricious and arbitrary action of the Commission in entering the order here complained of will permit defendant Wycoff, not a common carrier, to raid express revenue of plaintiffs, to the disadvantage of the public, inasmuch as without such express revenue, or with a serious curtailment of revenue, passenger service now provided by plaintiffs can not continue. Thus, the order of the Commission will permit the destruction of a

common carrier in order that a private carrier may gain supplemental revenue, which Milton S. Wycoff testified was essential to his contract haulage.

POINT III.
**THE ORDER OF THE COMMISSION IS WITH-
OUT AUTHORITY.**

The Commission in this case has, without authority, bestowed upon a carrier a right to accept and transport items at its discretion, with no obligation to provide service, as that carrier may elect. Under the order, defendant Wycoff is neither a common carrier which must accept express items for transport from any member of the public, so long as the item is properly packaged and its carriage not restricted, nor a contract carrier in the normal sense. The type of authority conferred upon Wycoff is something new and different from any other type of carrier which the Commission has heretofore created. Further, on the basis of the order, this carrier would supplement income presently derived as a contract carrier of newspapers, mail, film and similar items in order to make complete use of available space on its trucks on a particular schedule. This carrier could lose any or all of its contracts, or routes and schedules could be substantially altered on demand of the contracting party. In this respect there is no regard to the requirements or needs of the public, and nothing to guarantee that service will be provided. Certainly the defendant Wycoff company can not be said to have established that such a "hybrid" service would better subserve public welfare than the existing service provided by plaintiffs.

By its own testimony applicant has stated that it does not wish to serve as a common carrier (T. 141), subject to the restrictions and control of the Commission, as is required of plaintiffs and others similarly situated. Yet by its order, here objected to, the Commission has granted a privilege, to which there are attached no duties or obligations to provide service to the public, but with an unlimited right to solicit express at the expense of a Commission-controlled common carrier. The Commission's action in so doing would appear to be completely without its authority.

IT IS RESPECTFULLY SUBMITTED that the order of the Public Service Commission, so far as it affects these plaintiffs, should be set aside.

Respectfully submitted,

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