

1958

Milne Truck Line, Inc. et al v. Public Service Commission of Utah et al : Brief of Petitioners

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.

Recommended Citation

Brief of Appellant, *Milne Truck Line, Inc. v. Public Service Comm. Of Utah*, No. 8933 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3161

This Brief of Appellant 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.

In the
Supreme Court of the State of Utah

MILNE TRUCK LINE, INC., a corporation, SALT LAKE-KANAB FREIGHT LINES, INC., a corporation, PALMER BROS., INC., a corporation, GRANT CROCKETT, doing business as MURRAY AND MIDVALE TRUCK LINE, CONSOLIDATED FREIGHTWAYS, INC., a corporation, and CARBON MOTORWAY, INC., a corporation,

Petitioners,

—vs.—

PUBLIC SERVICE COMMISSION OF UTAH and HAL S. BENNETT, DONALD HACKING and JESSE R. S. BUDGE, Commissioners of the Public Service Commission of Utah, and UNION PACIFIC MOTOR FREIGHT COMPANY, a corporation,

Respondents.

Case No.
8933

BRIEF OF PETITIONERS

STATEMENT OF THE CASE

This case arises on a writ to review the action of respondent Public Service Commission of Utah in granting to respondent Union Pacific Motor Freight Company

a certificate of convenience and necessity to operate as a common motor carrier of property in intrastate commerce within the State of Utah.

The question presented is whether the Public Service Commission of Utah may lawfully issue to a wholly owned subsidiary of a common carrier by rail a certificate of convenience and necessity to engage in highway motor carrier transportation supplemental to the operations of the parent company, without proof of public need for such additional transportation or the inadequacy of existing motor carrier service. Petitioners assert that such an order is beyond the power of the respondent Public Service Commission of Utah and unlawful.

For the purpose of convenience, parties to this proceeding or referred to herein will sometimes be designated as follows: Respondent Public Service Commission of Utah as the "Commission," Respondent Union Pacific Motor Freight Company as "Union Pacific," Union Pacific Railroad Company as the "Railroad Company," Petitioner Milne Truck Line, Inc., as "Milne," Petitioner Salt Lake-Kanab Freight Lines, Inc., as "Salt Lake-Kanab," Petitioner Palmer Bros., Inc., as "Palmer," Petitioner Grant Crockett, doing business as Murray and Midvale Truck Line as "Murray and Midvale," Petitioner Consolidated Freightways, Inc., as "Consolidated," and Petitioner Carbon Motorway, Inc., as "Carbon." Emphasis has been supplied.

STATEMENT OF FACTS

Union Pacific Motor Freight Company is a wholly owned subsidiary of Union Pacific Railroad Company. In December, 1949, under Case No. 3466, Union Pacific filed with the Commission its application to operate as a motor common carrier of property for hire in intrastate commerce, seeking authority to transport general commodities in less-than-carload shipments, with certain exceptions not material here, in highway motor carrier service supplemental and auxiliary to and coordinated with freight service of the Railroad Company over regular routes between points and places within the State of Utah served by the Railroad Company. Under date of September 28, 1950, the Commission issued its report and order, pursuant to which it granted Union Pacific limited operating rights in the State of Utah. The Commission found, however, that the existing transportation services by motor common carriers in all other parts of the state, between points and places therein where applicant corporation had proposed its transportation service, were then adequate. Accordingly, the Commission while granting Union Pacific limited authority, in all other respects denied the application. (R. 465-472)

On January 28, 1958, Union Pacific filed its further application in Case 3466-Sub 1, seeking in substance to obtain the authority which was denied by the Commission in said Case 3466. By the application in this Case 3466-Sub 1 here under review, the Railroad Company, through the instrumentality of its wholly owned subsidiary Union Pacific, seeks to institute a service whereby it will trans-

fer from rail movement all less-than-carload traffic and engage in the movement of such traffic over the highways of the State of Utah between stations which are now served by the Railroad Company. (R. 433-442)

Under the application Union Pacific proposed that the traffic will move on rail rates and under rail billing. It will not be limited by a prior or subsequent rail movement. It is proposed that such traffic will largely originate by being picked up at the shipper's place of business either by Union Pacific or a contract drayman and delivered to the dock or freight house of the Railroad Company. It will then be loaded on over-the-road trucks which will be operated by Union Pacific and delivered to the depot of the Railroad Company at various points within the State and from such point delivered to the consignee by contract draymen or the delivery will be made by Union Pacific directly to the consignee at such points as the Railroad Company has no delivery service. So far as the public is concerned this is essentially the same kind of service that is now being performed by petitioners. (R. 433-438, 7-19)

The interest of petitioners herein is as follows: Milne is not engaged in any direct service to the points which Union Pacific proposes to serve, however, Milne is engaged in interlining traffic with Consolidated and Carbon and is apprehensive that if the authority granted to Union Pacific is sustained such interchange traffic would be impaired and it is also apprehensive that Union Pacific may extend its operations to Cedar City, where Milne now serves. Salt Lake-Kanab serves the point of

Nephi which the Commission authorized Union Pacific to serve. Palmer does not serve the points authorized to be served by Union Pacific. However, one of the principal points served by Palmer is Delta and it is apprehensive that Union Pacific may extend its service from Lynndyl to Delta. Murray and Midvale serves points in Salt Lake County which Union Pacific is authorized to serve. Consolidated operates from Salt Lake City to Weber, Box Elder and Cache County points and the service authorized by Union Pacific would largely duplicate the operating authority of Consolidated. Carbon serves Utah County points and the service of Union Pacific would also largely duplicate that authority. (R. 298-354)

By paragraph 17 of its application, Union Pacific alleges that:

“17. The granting of the certificate applied for will not be detrimental to the best interests of the people of the State of Utah, but on the contrary, public convenience and necessity require the proposed service in order that rail service over the Union Pacific Railroad lines in the territory may be operated more efficiently and economically, and in order that additional boxcars may be available to serve the public generally in boxcar service.” (R. 437)

Mr. Burchell, counsel for Union Pacific, in response to a question of Commissioner Budge, stated the purpose of the application as follows:

“The purpose of the application, I might state, and the evidence will show is to save freight and passenger train expense, to save high-class

boxcars, and enable us to operate more efficiently the service which we are now operating by railroad and by motor carrier in interstate commerce." (R. 9)

On the theory and basis of these allegations and representations, hearing was had on said application in Case 3466-Sub 1. No evidence of any substance whatever was introduced indicating that there was any public need for the proposed service, nor that the protesting carriers were in any way deficient in discharging their duties to the public. Moreover, the evidence shows that Consolidated and Carbon, the two motor carriers most vitally affected by the Union Pacific application, had idle equipment and had laid off employees because of the shrinkage in traffic during the current year. (R. 305, 325-26)

Upon the hearing being closed, the Commission on June 3, 1958, issued the report and order here under review. By paragraph 7 of the report of June 3, 1958, the Commission found as follows:

"7. The granting of said application will undoubtedly benefit the railroad company in saving expense in the operation of its train service over said routes and in the release to it for carload shipments of a large number of box cars now used on said routes for LCL traffic. The applicant will likewise benefit by way of an increase of commodities for transportation in its presently partially loaded trucks. These benefits may to a degree prejudice competitors of the applicant because of inroads upon their business. However, there is a larger aspect of this matter to which benefits or disadvantages resulting to the parties concerned

must be subordinated, and that is the public interest. It is public convenience and necessity with which the Commission is primarily concerned. Improved methods of transportation by an already operating carrier are to be encouraged and regrettable as it may be that some other carrier may suffer, that fact is not a sufficient reason for preventing the use of improved methods; and this is so even though present service by present methods may in one sense be adequate. In one case wherein the same applicant was before the Wyoming Commission (*Union Pacific Motor Freight Company v. Gallagher Transfer & Storage Co.*, 264 Pac. (2) 771) the granting of a similar application was approved by the Supreme Court of Wyoming, even though the railroad company, as in the case before us, was not a party to the proceeding. *Although there is in this case no evidence that the routes in question are not adequately served*, we hold with the Wyoming court and the Supreme Court of the United States (*ICC v. Parker*, 326 US 60) that such evidence is not necessary as a condition to granting a certificate for a different and improved method of operation by an already certificated carrier. If the proposed service will result in a better and more economical service the railroad company should be permitted, in the public interest, to adopt the improved method."

It is thus seen that the Commission made no finding that there was any public need for the proposed service, or that the protesting carriers were in any way deficient in the discharge of their duties to the public, or that any type or kind of service would be rendered by Union Pacific which is not now provided by the protesting motor

carriers. The Commission in effect concludes that neither evidence nor a finding of public convenience and necessity are necessary where a rail carrier is instituting highway transportation service.

The question is therefore squarely presented as to whether a rail carrier which seeks in effect to terminate its L.C.L. operations by rail and undertakes to move such traffic over the highways may engage in such operations simply on a showing that such operations will be advantageous to the rail carrier regardless of whether there is any public need for the new transportation proposed and regardless of whether the existing carriers who have developed their business over a period of years are fully and adequately discharging their duty to the public.

STATEMENT OF POINTS

I.

UNION PACIFIC BY ITS APPLICATION BEFORE THE COMMISSION SOUGHT TO INITIATE A NEW AND DIFFERENT SYSTEM OF TRANSPORTATION SERVICE.

II.

THE SERVICE PROPOSED BY UNION PACIFIC COULD BE LAWFULLY AUTHORIZED ONLY UPON A FINDING OF PUBLIC CONVENIENCE AND NECESSITY.

III.

NO FINDING OF PUBLIC CONVENIENCE AND NECESSITY AS REQUIRED BY THE STATUTE WAS MADE BY THE COMMISSION.

ARGUMENT

I.

UNION PACIFIC BY ITS APPLICATION BEFORE
THE COMMISSION SOUGHT TO INITIATE A NEW
AND DIFFERENT SYSTEM OF TRANSPORTATION
SERVICE.

Argument is hardly necessary to demonstrate the fact that the service proposed by Union Pacific is a new and different system of transportation. The Railroad Company, through its subsidiary Union Pacific, proposes without giving up its authority to transport L.C.L. shipments by rail, to largely terminate the practice of doing so and to transfer all of such traffic to the highways. In other words, it proposes to engage in truck transportation in lieu of rail transportation for substantially all L.C.L. traffic.

With the rise of the motor truck and the development of modern highways there has arisen over the nation a system of truck transportation. That system is now in competition with and in contrast to the system of rail transportation which developed during the last half of the Nineteenth Century. The essential features of the two systems of transportation are a matter of common knowledge. As the truck transportation system developed, it became necessary to regulate that transportation both in interstate commerce and within the several states. As a part of such regulation statutes have been passed prescribing the conditions under which the authority to engage in such transportation might be granted. Pursuant to such statutes a great many applications for cer-

tificates of convenience and necessity have been made to the Commission. These applications have been opposed in many instances by the rail carriers which gave rise to a whole series of cases which have been before this Court. The Railroad Company, through the instrumentality of its wholly owned subsidiary Union Pacific, by this application, proposes largely to abandon its traditional method of moving L.C.L. traffic and to embrace the system of highway transportation for such movement. In other words, it proposes, as to this traffic, to move from one system of transportation to the other. That this is a new and different service is quite obvious. The Commission well recognized that fact when Commissioner Hacking after hearing the statements of counsel as to the purpose of the application made the following observation :

“COM. HACKING: I think this is certainly true, that in spite of Mr. Miner’s statement, if you have correctly quoted him that it is not an enlargement of authority, it certainly would be an enlargement of authority to add two authorities where there is only one now existing. That is, both rail and highway authority would certainly be an enlargement of authority.

“On the question of — in your case, Mr. Peterson, of changed route, that is another situation of perhaps enlargement of authority, and those matters, of course, must all be considered by the Commission on the basis of the evidence that is adduced here.

“Now, under their petition they are asking for a substitute — or an additional way of serving their shippers. I think that the understandings of all of us are the same, that what would be the

result of a grant of this authority would be a high-way service that would be maybe something different, vastly different than the railroad service now furnished.

“The fact of the business is, the whole purpose of the application is to substitute what by the railroad must be considered a more economical and a more efficient way of serving the public, or they wouldn’t file the application.” (R. 65-66)

It is well recognized, that truck transportation for short distances is more flexible, more speedy and generally more satisfactory than rail transportation. These facts are illustrated by the testimony of the witness Koplin, Traffic Manager of Salt Lake Hardware Company called by Union Pacific, who in response to questions on that subject, testified as follows :

“Q. Mr. Koplin, as I understand your view on these l.c.l. shipments moving on short hauls, that you prefer truck to rail.

A. I think that’s right. I can see a conservation of equipment in using trucks for short hauls as compared to cars, which seems to average only about 4,000 pounds. I think a car was never designed for that kind of service.

Q. What about flexibility by truck?

A. It is far greater.

Q. Generally speaking, it is more speedy, is it not?

A. Oh, yes; we have found it that way. As a general rule, a truck will deliver from the truck without having to go into the terminal, and in the case of a car, of course, it has to go into a

terminal to be unloaded on l.c.l. freight I am speaking of, of course." (R. 292-293)

The courts have recognized that truck transportation affords a service to the public different from rail transportation. This Court had occasion to do so in *Salt Lake & Utah R. Corp., et al. v. Public Service Commission of Utah, et al.*, 106 Utah 403, 149 P. 2d 647, where at page 407 of the Utah Report the following statement is made:

"... It may be that if the grant of a certificate of necessity and convenience had been made to another railroad company, that under the facts of this case the order of the commission might have been arbitrary and capricious. But the grant was not made to another railroad line, but to a motor carrier, which gives a different kind of service to the public..."

There would seem to be no doubt that the service proposed by Union Pacific is certainly a new and different service.

II.

THE SERVICE PROPOSED BY UNION PACIFIC
COULD BE LAWFULLY AUTHORIZED ONLY UPON
A FINDING OF PUBLIC CONVENIENCE AND
NECESSITY.

The Commission has no common law authority. Its power and jurisdiction arises entirely from the statutes. In enacting Chapter 65, Laws of Utah, 1935, the legislature undertook to deal with the subject of transportation by motor vehicle. That Act with certain amendments is now embodied in Chapter 6 of Title 54, Utah Code Annotated, 1953.

Under Section 1 of that Chapter, common motor carriers of property are defined, by Section 2 all common motor carriers of property are declared to be common carriers and subject to the Act, under Section 3 common carriers of property must operate in accordance with the provisions of the Act, and by Section 5 it is made unlawful for any common motor carrier to operate in intrastate commerce without first obtaining a certificate of convenience and necessity. Section 5 further provides the circumstances under which a certificate of convenience and necessity may be issued as follows:

“54-6-5. . . If the commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof it may issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, otherwise such certificate shall be denied. . . .”

Union Pacific in its application to the Commission (R. 433-448) sets forth in paragraph 4 thereof that it proposes to operate as a common carrier by motor vehicle for the transportation of general commodities, with certain exceptions, in highway motor service supplemental and auxiliary to and coordinated with the freight service of the Union Pacific Railroad Company. It sets forth its operating authority then held and how it proposed to conduct its operations under the application. Its application in other respects sets out the matters which are

necessary to procure a certificate of convenience and necessity, namely, its financial responsibility, that the highways would not be overcrowded by the granting of the certificate, and that it would comply with all of the requirements of law and the orders of the Commission.

It seems clear from the allegations of the application and the presentation of the same to the Commission that Union Pacific recognizes that it stands in precisely the same position as any other applicant seeking motor carrier authority, and like any other applicant it is controlled by the power and jurisdiction of the Commission.

This Court has recognized that a utility which is already rendering a public service, if it seeks to enter a new field or render a new or different service, must comply with the requirements of convenience and necessity. In *Mulcahy, et al. v. Public Service Commission of Utah, et al.*, 101 Utah 245, 117 P. 2d 298, this Court gave careful consideration to this entire problem, and at page 252 of the Utah Report pointed out that:

“When a utility *desires to enter a new field or to render a new or different service*, it must, as a condition to receiving a certificate to so perform, show that service sought to be given is one of ‘public convenience and necessity’ *Fuller-Toponce Truck Co. v. Public Service Comm. of Utah*, 99 Utah 28, 96 P. 2d 722, 724. . . .”

In pointing out the procedure to be followed this Court at page 260 of the Utah Report further observed that:

“. . . While evidence pertinent to any question involved in the application may be presented

on the hearing, the commission's determinations would proceed as follows: *Does the public convenience and necessity require further, new or additional common carrier service in the territory proposed to be served?* If not, the application should be denied. . . ."

We can find nothing in our statutes which would justify the contention or position that a rail carrier, seeking, through a wholly owned subsidiary, to change its form of transportation on L.C.L. traffic from rail to highway, is relieved of the burden, imposed by our statute, of proving public convenience and necessity. A wholly owned subsidiary of a rail carrier seeking to engage in motor carrier transportation stands in the same position as any other applicant.

III.

NO FINDING OF PUBLIC CONVENIENCE AND NECESSITY AS REQUIRED BY THE STATUTE WAS MADE BY THE COMMISSION.

This Court has, in several cases, had occasion to consider the question of the elements involved in the statutory requirement of "public convenience and necessity." This whole subject was carefully explored in *Mulcahy, et al. v. Public Service Commission, et al., supra*, where at page 252 of the Utah Report the rule is stated as follows:

" . . . And in determining whether or not the convenience and necessity of the public will be best subserved by the proposed service, the needs and welfare of the people of the territory or commun-

ity affected should be considered as a whole. *Fornarotto v. Board of Public Utility Com'rs*, 105 N.J.L. 28, 143 A. 450. The mere matter of convenience to certain shippers does not establish public necessity or convenience. *If existing utilities are rendering adequate service ordinarily a certificate will not be granted putting a new competitor in the field.* But a service is not necessarily adequate because the community can 'get by,' can conduct its business without further or additional service. To be adequate the services must meet the requirements of the public's convenience and necessities in such a way that the needs, growth, and welfare of the community are reasonably met and supplied. To be adequate they must safeguard the people generally from appreciable inconvenience in the pursuit of their business, their wholesome pleasure, and their opportunities for growth and development. And if a new or enlarged service will enhance the public welfare, increase its opportunities, or stimulate its economic, social, intellectual or spiritual life to the extent that the patronage received will justify the expense of rendering it, the old service is not adequate."

In *Union Pacific Railroad Co., et al., v. Public Service Commission, et al.*, 103 Utah 459, 135 P. 2d 915, this Court had occasion again to consider the subject of public convenience and necessity. In following its decision in the *Mulcahy* case, *supra*, the Court quotes with approval from a decision of the New York Public Service Commission in *Re Troy Auto Car Co.*, (P.U.R. Ann. p. 707), where the rule is stated as follows:

"It is dangerous to undertake to formulate abstract definitions in deciding a concrete case, but we take it that for such purposes as are in-

volved in this and similar applications, a *public convenience and necessity exists when the proposed facility will meet a reasonable want of the public and supply a need, if existing facilities, while in a sense sufficient, do not supply that need.*' "

See also *Ashworth Transfer Co., et al. v. Public Service Commission, et al.*, 2 Utah 2d 23, 268 P. 2d 990, at page 30 of the Utah Report.

Prior to the order in the case under review the Commission consistently followed the rule prescribed by our statute and set forth in the decisions of this Court cited above. This was the position which the Commission took in the prior Union Pacific Case 3466, decided on September 28, 1950. In that case, as we have previously pointed out, the Commission considered the service being rendered by existing carriers, it found such service, except for a limited territory, to be adequate. Based on that finding, the Commission granted the authority in the limited territory and in all other respects denied the application.

The Commission now departs entirely from the mandate of the statute, the decisions of this Court, and the practice which it has consistently followed for many years, and takes the position that if the proposed new or additional service of a carrier is for the advantage and benefit of that carrier, such fact satisfies the convenience and necessity requirement of the statute, even though there has been no showing whatever that the service being rendered by competing motor carriers is in any manner insufficient, inadequate, or unsatisfactory. This is indeed

a new concept in carrier regulation. It means in effect that even though highway transportation in this state may have been developed over a period of years and a pattern formed for the conduct of highway transportation based on the adequacy of service and necessity for that transportation, if a rail transportation system finds it advantageous or convenient to change its system of operation to the highways it can do so regardless of whether the public needs the new transportation service and regardless of how detrimental this change may be to the competing motor carriers and to the transportation system which had been developed by such carriers.

The conception of public convenience and necessity as developed in this jurisdiction is a conception that it is the convenience and necessity of those who use the service which controls. Thus the question presented in any case has been whether those who are providing the service are discharging their duty to the public. Is the service adequate; is it sufficient; is it rendered in a proper manner? Is sufficient equipment being provided; are the operating schedules suitable to the public needs? These are the subjects of inquiry which for more than twenty years have been the basis of determining convenience and necessity. The test which the Commission seeks to employ in the case under review is whether it is to the convenience and advantage of the carrier itself to provide a different type of service.

The case under review was presented essentially on the theory that if it can be shown that the carrier can by rendering a new and different type of service effect eco-

nomies in manpower and in the use of equipment and thereby release its equipment and manpower for other purposes, this is an advantage to the public and as such satisfies the requirement of convenience and necessity. While it may be true that any benefit or advantage to a carrier should in the end result in some measure of improved service to the public generally, the concept of convenience and necessity previously employed in this jurisdiction involves an inquiry not of the advantage and benefit to the carrier, but essentially an inquiry of the advantage and benefit to the users of the service.

The Commission in the case under review frankly concedes that there is no evidence here of any lack of service on the part of the existing highway carriers and no showing was made by the applicant of any deficiencies in such service. The Commission says:

“ . . . such evidence is not necessary as a condition to granting a certificate for a different and improved method of operation by an already certificated carrier . . . ” (R. 454)

The commission seems to have departed from the rule long followed in this jurisdiction because of the decision of the Wyoming Supreme Court in the case of *Union Pacific Motor Freight Company vs. Gallagher Transfer & Storage Co., et al.*, 264 P. 2d 771, and the decision of the United States Supreme Court in *I.C.C. v. Parker*, 326 U.S. 60, 65 S. Ct. 1490.

We have carefully examined the decision in the *Gallagher* case, *supra*. That case is material here only

insofar as it deals with the question of convenience and necessity. Our statute as we have seen specifically requires that unless public convenience and necessity is found the application shall be denied. The Wyoming statute then in force provided as follows:

“In acting upon all applications for such certificates, the Commission shall take into consideration, in addition to the question of public convenience and necessity, the question of the applicant’s qualifications, for rendering, and his financial ability to render the necessary and proper services required to be performed.”

In the Wyoming case it appears clear that the Commission did take into consideration the matter of public convenience and necessity. At page 775 of the Pacific Report the Court quotes from the decision of the Commission as follows:

“... The applicant submitted testimony of fifteen witnesses from all sections of the state along their proposed route of operation, who testified that the proposed service would be of substantial benefit to the public, and that there was a demand for such service. . . .”

The Wyoming Court had occasion to review the testimony and in concluding that investigation at page 789 of the Pacific Report stated:

“... It is quite obvious, we think, that there is ample substantial evidence to authorize the Commission to make the findings and the orders it did. It would seem to be idle to contend otherwise for where there was testimony which con-

flicted with the testimony submitted by the successful applicant the Commission was at liberty to disbelieve it."

It therefore appears that this is an ordinary case where there was substantial evidence in support of the application and in support of the contention that the service of protesting carrier Gallagher was unsatisfactory. The case invokes the rule long followed by this Court that if there is substantial evidence to support a finding of the Commission its order will not be disturbed. We find nothing in the Wyoming decision which supports the view now expressed by the Commission here that adequacy of the present transportation service is not an issue where an already certificated carrier proposes to enter a new field of transportation.

We have also considered the *Parker* case, *supra*. This case was decided by the United States Supreme Court in the light of the Motor Carrier Act of 1935, which contains provisions substantially the same as our statute with respect to the requirement of convenience and necessity, and in the light of the mandate of Congress as set forth in its National Transportation Policy embodied in the Act of September 18, 1940, 54 Stat. 899, 49 U.S.C.A., preceding Section 301. Under that Act, Congress declared it to be the national transportation policy

"... to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and

efficient service and foster sound economic conditions in the transportation and among the several carriers; . . . —all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. . . .”

Acting pursuant to the said Motor Carrier Act of 1935, and the Act of September 18, 1940, the Interstate Commerce Commission in the *Parker* case found that public convenience and necessity required the transportation service proposed, being service in substitution for rail service substantially along the same lines as proposed by Union Pacific here. The Interstate Commerce Commission in its decision found as set forth at page 1494 of the Supreme Court Reports, in part as follows:

“ . . . The existing schedules of protestants do not fit into the needs of the projected service. Common management of railroad and trucks gave promise of better cooperation than would be obtained by arm's-length contracts or agreements. While the evidence shows that there were operating truck lines in the area which individually could serve all the way-stations by securing extensions to their present routes, it also shows that no motor carrier is now in a position to render this complete service. . . . The Commission on this evidence had a basis to conclude that a railroad subsidiary offered the most satisfactory facilities for making less-than-carload deliveries to way-stations.”

It is thus seen that there was substantial evidence before the Interstate Commerce Commission to the effect

that there were deficiencies in the motor carrier service and which justified the Commission in making its finding of public convenience and necessity. So far as we are able to observe, the Interstate Commerce Commission announced no rule contrary to the accepted conceptions of public convenience and necessity such as the Commission adopted in the case under review.

Needless to say, the decision of the Wyoming Court in construing its statute and the decision of the United States Supreme Court in construing the Acts of Congress are in no way binding upon this Court. We have in this jurisdiction a clearly expressed grant of authority to the Commission, a well-defined body of case law and a long established practice of the Commission, all requiring proof of public convenience and necessity as defined by the decisions of this Court. We have no mandate from the legislature which either requires or justifies any departure from this well defined and long established rule.

CONCLUSION

Union Pacific proposes to engage in a form of transportation in intrastate commerce within the State of Utah new and different from that previously employed. In order to do so, our statute expressly requires that it must establish that public convenience and necessity require the new service. In order to prove public convenience and necessity, it must be shown that those carriers who are presently authorized to perform the service of the kind proposed are not rendering adequate service of

such character to the public. No proof of the inadequacy of the present motor carrier service was made by Union Pacific or in any manner shown in this case. The Commission holds that such proof is not necessary as a condition to granting the certificate to Union Pacific. The Commission in effect concludes that in a case such as that here under review it is the convenience and necessity of the carrier and not the convenience and necessity of the user of the service which controls. In doing so, the Commission has amended the statute and written into the same an exception in favor of Union Pacific and other carriers in a like position. In so holding and deciding the Commission has failed regularly to pursue its authority and has acted unlawfully. Its order should therefore be set aside.

Respectfully submitted,

S. N. CORNWALL,
WOOD R. WORSLEY,
HAROLD N. WILKINSON,
Attorneys for Petitioners.