

1958

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

Utah Supreme Court

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DEC 22 1958

Clk. Supreme Court, Utah

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,

v.

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.

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Case No.
8933

BRIEF OF RESPONDENTS

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ARROW PRESS, SALT LAKE

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The Statement of facts as contained in petitioners' brief is in the main correct. However, there are some addi-

tional facts respondents wish to refer to, and for that purpose, we will make a separate statement.

For the purpose of brevity and convenience, parties to this proceeding and administrative agencies referred to herein will sometimes be designated as follows: Respondent Public Service Commission of Utah as "P.S.C.U.," Respondent Union Pacific Motor Freight Company as "Motor Freight," Union Pacific Railroad Company as "Union Pacific," The Interstate Commerce Commission as "I.C.C.," Fuller-Toponce Truck Company as "Fuller-Toponce," Petitioner Consolidated Freightways, Inc., as "Consolidated," Wasatch Fast Freight as "Fast Freight," and The Denver and Rio Grande Western Railroad Co. as "Rio Grande Railroad." Emphasis has been supplied.

On October 24, 1949, the I.C.C. issued its Certificate of Convenience and Necessity No. MC-110388, authorizing Union Pacific Motor Freight Company (a wholly owned subsidiary of the Union Pacific Railroad) (R. 12) to transport general commodities in interstate commerce over highways in the state of Utah from the Wyoming-Utah border and the Idaho-Utah border southerly as far as Lynndyl, Utah. Service was authorized by such highway vehicles over highways adjoining and paralleling the Union Pacific lines to all points, but only to points which were rail stations on the rail lines of the Union Pacific.

Thereafter, under date of March 1, 1950, the Public Service Commission of Utah issued its report and order in its Case No. 3479, by which it issued Motor Freight interstate license No. 326, authorizing it to operate as a common

motor carrier of general commodities in interstate commerce within the state of Utah, conforming to the I.C.C. order.

After the issuance of the I.C.C. order in Docket No. MC-110388, but prior to the issuance by the P.S.C.U. of its interstate license No. 326, Motor Freight made application to the Utah Commission for intrastate authority to operate as a common motor carrier of general commodities in highway motor carrier service supplemental and auxiliary to, and coordinated with freight service of the Union Pacific, handling LCL shipments for Union Pacific on rail billing at rail rates, serving only stations on the Union Pacific. After hearing, the P.S.C.U. issued its report and order in Case No. 3466, under date of September 28, 1950 (R. 465-469), in which it granted authority to Motor Freight to serve the Ogden-Morgan-Coalville-Park City area and also to serve between Ogden, Utah, and Cache Junction, Newton, Trenton and Cornish, Utah; and granted to Motor Freight Certificate of Convenience and Necessity No. 909 to serve the specified areas, but denied the application otherwise (R. 470-472). There was at the time of such hearing no regular common motor carrier service at all between the Ogden-Morgan-Coalville-Park City area, but there was service being rendered by Fuller Toponce in the Cache Junction-Cornish area in Cache County. The issuance by the Utah Commission of Certificate of Convenience and Necessity No. 909 was not based upon the theory of substitute and auxiliary service, but in granting the certificate, the Commission granted authority only where they may have granted general authority otherwise to a regular com-

mon motor carrier; but the Commission nevertheless still limited such authority to that which would be supplemental of, and auxiliary to, and coordinated with the rail service of the Union Pacific (R. 467, 468). It is the position of applicants and respondents that at the time of such prior hearing the Commission misconceived the purpose and theory of "motor carrier service supplemental and auxiliary to, and coordinated with rail service."

At the time of such prior hearing three of the main protestants who appeared and objected to the granting of such application were Fuller-Toponce Truck Company, Carbon Freight Lines and Rio Grande Motor Way (R. 465). At that time Fuller-Toponce was a locally based, small, independent motor carrier and was the only motor carrier serving the northern part of the state of Utah. Carbon Freight Lines was likewise a small, independent motor carrier, locally based; and Rio Grande Motor Way was a subsidiary of Rio Grande Railroad. Since the time of such prior hearing the Fuller-Toponce Truck Company has been purchased by, and is now wholly owned by the Consolidated Freightways, a large national motor carrier system, and is now designated as Wasatch Fast Freight (one of the protestants herein), a division of, and feeder line for the large interstate and transcontinental system of Consolidated (R. 319, 321).

Since the date of said prior hearing, the Carbon Freight Lines and the Rio Grande Motor Way, Inc., have merged into a new company, now known as Carbon Motorway, Inc., one of the protestants herein. The capital stock of Carbon Motorway, Inc., is now owned 2 per cent by an individual,

Mr. Crossway, 49 per cent by the Rio Grande Motor Way, and 49 per cent by Mr. Galanis and Mr. Hollingsworth, former owners of Carbon Freight Lines. This latter 49 per cent is in escrow, with an agreement to be sold to Rio Grande Motor Way (R. 307) so that upon consummation of such sale Rio Grande Motor Way will own all of Carbon Motorway, Inc., Rio Grande Motor Way is a wholly owned subsidiary of The Rio Grande Railroad (R. 308). Since the merger of Carbon Freight Lines and Rio Grande Motor Way, Inc., Carbon Motorway, Inc., has been, and is now transporting via highway LCL merchandise in substitute service for The Rio Grande Railroad over the entire Carbon Motorway system (R. 310)—exactly the same type of service which applicant is proposing to handle for Union Pacific Railroad under the application herein (R. 311). By virtue of this arrangement The Rio Grande Railroad has been able to discontinue over the Carbon Motorway territory in the state of Utah boxcars heretofore used in intrastate peddler service. Rio Grande Motor Way performs a similar service for The Rio Grande Railroad in Colorado.

In spite of the denial by the P.S.C.U. of the prior application by Motor Freight to transport intrastate traffic in substitute service over the highways and upon the issuance of interstate license No. 326 by the P.S.C.U. in March of 1950, Motor Freight established service over the highways in the state of Utah pursuant to the I.C.C. authority given in MC-110388, and so recognized by the P.S.C.U. in License No. 326. Since said time Motor Freight has been operating vehicles over the highways in the state of Utah paralleling Union Pacific rail lines and transporting in

such highway vehicles interstate LCL traffic. It has been necessary in such auxiliary and supplemental service to coordinate the operation of such motor vehicles with the arrival of Union Pacific trains, and such motor vehicles are coordinated with the arrival of trains so as to give expedited handling to interstate mail and interstate LCL traffic handled from those trains (R. 188, 189).

Although Motor Freight has been handling this interstate LCL traffic for the Union Pacific in substitute highway service, the Union Pacific has nevertheless been compelled to continue the transportation of intrastate LCL traffic in high-class boxcars which have been loaded only to a small fraction of their capacity. This has been a very expensive and uneconomic way of handling such freight, and it has added to the chronic shortage of boxcars needed to transport carload traffic for other shippers and the public generally. Peddling of LCL freight in rail boxcars "has become an obsolete and most expensive way of peddling freight" (R. 96-97).

Motor Freight Co. transports LCL freight in substitute service for Union Pacific Railroad *interstate* over most of the entire railroad system and *intrastate* in Nebraska, Kansas, Colorado, Wyoming and Idaho, and portions of Utah and Oregon (R. 180). In Utah, Motor Freight transports interstate traffic by motorvehicle over all of the highways involved herein, but up to date, except for the two areas heretofore mentioned, Union Pacific has been compelled to still operate a full line of merchandise boxcars on the various local trains to take care of a very small amount of intrastate traffic (R. 97). For instance, during the

month of December 1956, as shown by Exhibit 2, there was a total of only 48,100 pounds both forwarded and received at Provo *for the entire month*, and yet one boxcar is tied up in daily service for this Provo traffic alone and the total tonnage for the entire month, both forwarded and received, could have been forwarded in one boxcar.

The cars necessary to be used in this service are high-class, or what are designated as A- or B-class, boxcars. These are cars which normally could move such commodities as grain, flour, sugar, etc., in carload service (R. 99, 195, 226). They are capable of carrying up to 120,000 pounds, or 60 tons (R. 98). Yet, as shown by Exhibit 5, Column 5, the largest average weight loaded in any car so used during the month of December 1957 was 5800 pounds, and the loads ranged from that weight down to an average of only 1300 pounds per car.

These merchandise peddler boxcars are moved in local trains. Such trains are manned by a crew of five (R. 48). At any station where a shipment must be dropped, the time of the entire 5-man train crew is consumed in stopping the train—at some points switching to a siding—, sending a flagman back along the track for a distance as much as a mile and a half (R. 46), opening the car, transferring the shipment to the warehouse, switching back to the main line where necessary, calling in and waiting for the flagman, and then getting the train up to traveling speed again. This in many instances for a single, small minimum-charge shipment. If this peddler service were not required, the train could move right through a lot of the stations without even stopping (R. 48). At least an hour and a half delay each

day on the run to Provo (R. 49) and a similar time loss on the Nephi run (R. 49) could be saved, with comparable savings in other areas. The straight time pay of the 5-man crew is \$18.22 per hour (R. 48). The Provo and Nephi runs are on overtime each day (R. 53-54), adding to this cost, and not even considering the cost of starting and stopping the trains—stops which could be eliminated at many stations (R. 48), thereby enabling carload service to be expedited if this boxcar peddling could be discontinued. The actual money saving to the railroad would amount to approximately \$22,500 per annum (R. 55). This traffic could all be handled in Union Pacific Motor Freight vehicles now operated throughout the area carrying only partial loads of interstate traffic, and no new equipment would be needed (R. 183, 153). No additional vehicles would be put upon the highway, and there would be no increase in the expense of operations as now maintained by Motor Freight (R. 186).

A three-month check was made as to shipments carried to various stations (R. 112, 113), and during the three months there were three separate shipments received at Lehi, two of which carried the minimum charge. The total revenue on these three was \$8.04, for which the time of the 5-man crew was required to make the necessary stops to peddle such freight (R. 114). American Fork had 15 shipments, 10 carrying only a minimum charge, with a total gross revenue of \$34.40. Pleasant Grove received 27 shipments, 23 of which carried the minimum charge, with a total gross revenue of \$38.47 (R. 115). Woods Cross had a total of four shipments, three of which carried the mini-

imum charge, with a total gross revenue of \$5.73. Layton received five shipments, all minimum-charge shipments, with a total gross revenue of only \$6.00 (R. 115). With each of these many small shipments the time of a 5-man crew was taken in making numerous expensive stops, with insignificant revenue being received.

By discontinuing the peddler rail cars and putting this small amount of LCL merchandise on highway vehicles presently being operated over the highways, not only will considerable expense be saved to the Union Pacific Railroad Company, enabling it to render a more economic transportation service to the public, but the handling of the traffic will be expedited. Much of the area gets overnight service now even by rail, but the motor vehicles can improve this service, and south of Provo, in the Payson-to-Nephi area, earlier delivery will be accomplished, giving better service to the railroad's present customers (R. 204-205, 245-246, Exhibit 7).

In addition, and of major importance as far as this application is concerned, use of 126 boxcars for approximately four days each month could be saved, or a total of 426 car days per month could be saved and high-class boxcars would thus be released to serve an urgent public need for moving other rail traffic (R. 100-101) (Exhibit 5).

For the past five years, as well as prior to that, there has been a continual shortage of cars needed for grain movement (R. 191, 192). There is a continuous shortage of high-class boxcars in one area or another over the entire Union Pacific system (R. 107, 272). With such car short-

ages, many farmers have to pile their grain on the ground because of insufficient boxcars to move it to market or storage elevators (R. 192). The saving of such high-class boxcars, or the equivalent of 426 boxcar days per month, as above referred to, would enable such cars to be used to move other more necessary traffic for carload shippers (Exhibit 5, R. 119-120). This is very much in the public interest and is in line with the very purpose of the organization and existence of such groups as the Central Western Shippers Advisory Board, which has been organized for, and is very active in the Utah area, seeking to develop and maintain an adequate car supply for the movement of carload commodities (R. 196, 197, 288, 290). The sugar people experience difficulty with car shortages which causes them inconvenience during the same times and in the same manner as the grain people do (R. 196). It is sufficiently in the public interest to seek to maintain an adequate car supply and relieve and avoid shortages, that Utah shippers have so organized themselves, along with shippers of other areas, in Shippers Advisory Boards (R. 196-197, 288-291).

There are already applications before the Commission for increases in freight rates (R. 295), and it is in the public interest that economies be allowed to help prevent increases. Anything that would help to hold freight rates at the same level, or reduce freight rates, would be to the interest of the shipping public (R. 193).

The traffic sought to be moved by motor vehicle in this case is traffic which the Union Pacific is handling and protestants are not handling. It is not the purpose of the

application to take the traffic from protestants, but to take this rail traffic from expensive and inefficient rail boxcars and to continue to handle the traffic from rail stations at rail rates, at rail billings. Rail personnel and rail terminal facilities would continue to be used (R. 438). There would be no interchange with other motor carriers. The applicant would not be authorized or allowed to move any traffic on all motor rates nor to establish through routes or through rates with other motor carriers or to take or interchange traffic with such carriers (R. 211). It could not serve any point not a station on the Union Pacific Railroad. The motor vehicles would be coordinated with the arrival and departure of trains so as to handle intrastate and interstate traffic in the same vehicle. It is much more costly to handle the traffic where the two types are not handled in the same vehicle (R. 309, 328).

The Commission found and concluded that public convenience and necessity would be served by allowing the substitute service and granted the application with one exception. That exception was between Salt Lake and Park City over Highway 40—the only point where Motor Freight does not operate its interstate trucks and the only place where there is no parallel rail line.

STATEMENT OF POINTS

Respondents will, for purpose of argument, combine Points II and III as stated by petitioners.

POINT I.

UNION PACIFIC MOTOR FREIGHT CO. BY ITS APPLICATION BEFORE THE COMMISSION DID SEEK AUTHORITY FOR A DIFFERENT METHOD OF PERFORMING A TRANSPORTATION SERVICE WHICH ITS PARENT COMPANY HAS ALWAYS PERFORMED.

POINT II.

IT WAS NECESSARY TO SHOW, AND FOR THE COMMISSION TO FIND, PUBLIC CONVENIENCE AND NECESSITY BEFORE AUTHORIZING THE SERVICE, AND THE COMMISSION DID FIND THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRED AUTHORIZATION OF THE SERVICE.

ARGUMENT

POINT I.

UNION PACIFIC MOTOR FREIGHT CO. BY ITS APPLICATION BEFORE THE COMMISSION DID SEEK AUTHORITY FOR A DIFFERENT METHOD OF PERFORMING A TRANSPORTATION SERVICE WHICH ITS PARENT COMPANY HAS ALWAYS PERFORMED.

It cannot be disputed that Union Pacific Railroad Company has been performing transportation service through-

out the area involved for many, many years in the movement and transporting of LCL commodities intrastate. It is true that such intrastate transportation has been by rail boxcars and not by motor vehicle, and to this extent the new service proposed is a different type of service and is a type of service for which applicants concluded authority was necessary from the P.S.C.U.; otherwise no application would have been made to the Commission for authority to render such service. However, while such service is a different type of service, it is also a different type of service than that rendered by protestants, the general common motor carriers. This substitute and auxiliary service is not a general common motor carrier service. The applicant, under the authority granted, cannot pick up and discharge commodities generally throughout the entire area but can only pick up and discharge at points which are rail stations on the Union Pacific. It cannot join in or transport commodities on all motor rates. It cannot enter into any interchange agreements, or set up any through rates or establish through routes, with any common motor carrier. It cannot set up its own personnel for handling any of such traffic, but the traffic must be handled by rail personnel, at rail billings and only at rail stations (R. 453). While this is a different type of service from the existing rail boxcar service, it is also different from the general motor common carrier service and is by no means as extensive or as flexible as the general common carrier motor service. Likewise, because of the necessity to coordinate with train service, the schedules must be set up to be compatible with, and to meet, train schedules.

Recent holdings are numerous to the effect that this is a different type of service from general common motor carrier service and that under the facts shown in this record such service is authorized by public convenience and necessity.

The United States Supreme Court in the case of *United States v. Rock Island*, 340 U. S. 419, a rail-truck auxiliary case, referred to these differences as distinguishing the type of service from that rendered by general common motor carriers; and in sustaining the grant of authority for this substitute service, said that these conditions "are of a character that aids rail operation and minimizes competition with over-the-road motor carriers."

In the case of *Columbia Motor Transportation Extension*—Texas, No. MC-105146 (Sub. No. 4), 10 F.C.C. 32896 (which case was affirmed in *Central Freight Lines, Inc. v. United States of America* (April 1958), 159 F. Supp. 71), the Interstate Commerce Commission stated P. 116:

"After carefully weighing applicant's evidence, on the one hand, against the opposing carriers' evidence, on the other, we conclude in the light of the long-established line of precedent cases, *that the proposed motor-vehicle service is of a different character from that of the protesting motor carriers*; that the proposed service would not be directly competitive with their services or unduly prejudicial to them; that the useful public purpose to be served thereby could not be achieved as well by the use of existing motor carriers as under the proposed plan; that this purpose can be served by applicant without endangering or impairing the operations of existing motor carriers contrary to the public interest;

and that the proposed operations will serve a useful public purpose, responsive to a public demand or need."

The Supreme Court of Iowa in *Thomson v. Iowa State Commerce Commission*, 15 N. W. (2d) 603, in a similar substitute service case, citing with approval a number of earlier cases, and quoting and adopting the following from the oft cited and followed case of *Kansas City Southern Transport* 10 M.C.C. 222, 237 said P. 609:

"Protestants now meet with the competition of the railway, but, in the case of the merchandise traffic handled in less-than-carload lots, that competition has not been particularly formidable. The railway now proposes to improve the handling of that traffic by establishing a coordinated truck-rail service in connection with applicant. As we have seen, the conclusion is warranted that there is a public need for this coordinated service, that *it is a new and different character of service which neither the railroads nor the trucks alone can supply*, and that it cannot be furnished effectively and well except through the use of applicant's facilities. We do not believe that the development of this new form of service will seriously endanger the operations of protestants, but, in any event, the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers. *If that principle had been followed, indeed, no motor-carrier service could have been developed.*"

POINT II.

IT WAS NECESSARY TO SHOW, AND FOR
THE COMMISSION TO FIND, PUBLIC CON-

VENIENCE AND NECESSITY BEFORE AUTHORIZING THE SERVICE, AND THE COMMISSION DID FIND THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRED AUTHORIZATION OF THE SERVICE.

Petitioners and protestants, at the beginning of and throughout their brief, have proceeded from an erroneous premise. On page 2 of petitioner's brief, in the statement of the case, the question before the Public Service Commission is stated as being whether a certificate may be issued "without proof of public need for such additional transportation or the inadequacy of existing motor carrier service," and the brief proceeds throughout on the theory that the statute requires that a showing be made that *additional transportation service* over the highway is necessary. THE LAW DOES NOT SO READ. The statute, referring to certificates of public convenience and necessity, Utah Code Annotated, 1953, Section 54-6-5, does not base the requirement on a showing as to whether "additional highway transportation" is necessary nor require a showing of "inadequacy of existing motor carrier service." The statute reads:

"* * * 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 * * *."

It is true that the statute goes on to say not *that existing service must be found to be inadequate but that* "* * * the Commission *shall take into consideration* * * * the existing transportation facilities in the territory proposed to be served * * *." The rail transportation of this

peddler merchandise in expensive boxcars is a part of that “existing transportation facilities,” which the Commission should take into consideration, as well as other matters referred to in the statute.

This Court recently held in *Lake Shore Motor Coach Line, et al. v. Bennett, et al.*, ... Utah ..., ... P. 2d ..., that “The Public Service Commission is charged with the duty of seeing that the public receives the most efficient and economical service possible. This requires consideration of all aspects of the public interest * * *.”

More than once in the past this Court has concluded, as have other courts, that in public transportation it is the public which “in the long run must pay for expensive and uneconomic services and facilities.”

In view of the provisions of the statute, the only question is: “Was there sufficient evidence before the P.S.C.U. from which it could conclude that public convenience and necessity required the proposed service?”

Counsel argues on page 7 and again under his Statement of Points, No. III, that the P.S.C.U. made no finding with respect to public convenience and necessity. The Commission’s findings and conclusions must be considered as a whole and not just particular parts thereof, and after detailing the facts, including the possible effect on or prejudice to competitors, the Commission stated in paragraph 7, beginning at the bottom of the page at R. 453:

“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 the public convenience and necessity with which the Commission is primarily concerned * * *."

The Commission then goes on to state that improved methods of transportation by an existing carrier already operating in the area are to be encouraged and such carrier should not be prevented from using improved methods. That paragraph concludes:

"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."

Counsel quoted this part of the findings but did not quote the following in paragraph 8 (R. 454):

"As heretofore stated the above named competitors may be prejudiced to a degree by the service proposed, but weighing all factors the Commission considers that the benefits to flow primarily to the public, from an improved method of transportation and improved efficiency and economy of operation, outweigh any detriment that competitors may suffer and will not, in the opinion of the Commission, affect their ability to continue to serve the public along the routes over which they operate."

The Commission immediately thereafter concluded (R. 455):

"* * * that in view of the purposes to be accomplished, it is deemed to be in the public interest to grant the application except as to the proposed service on Highway 40 between Salt Lake City and Park City."

Then followed the order by which the Commission directed that the certificate issue.

There is no magic in words, and we confidently urge that counsel for petitioners is quibbling over words and entirely disregarding the content of what the Commission says by even attempting to assert as they did on page 7 of the brief "that the Commission made no finding that there was public need for the proposed service." We insist that the foregoing is an ample finding, sufficient to comply with the statutory requirement.

Counsel argues that the only benefit shown by the evidence is a benefit to the Union Pacific Railroad Company. It is very definitely in the public interest that all forms of transportation be operated economically so that the public will not be required to pay for wasteful and uneconomic transportation through higher rates and inefficient service. More than one of the witnesses testified that they were interested in maintaining freight rates at a low level (R. 193, 295), and if economies could not be effected, increased freight rates might result, and the fact that requests were already pending before the Commission for increase of freight rates, was referred to (R. 295).

Also, the release of boxcars sorely needed to relieve continual car shortages, and which could be used in a better service for moving carload commodities is very much in the public interest and sufficient in and of itself to be considered evidence of public convenience and necessity (R. 191-192, 196-197, 288-290).

The I.C.C. has repeatedly held such to be a sufficient basis for a finding that public convenience and necessity will be served. In *New York Central RR. Co.—Extension—Lines East*, MC-67916 (Sub. No. 14), decided October 21, 1956, 12 F.C.C. 33,751, 68 M.C.C. 459, the I.C.C. stated in one of these rail auxiliary cases:

“* * * we have consistently found in cases too numerous to cite that public convenience and necessity require the issuance of substituted service authority to the railroads for the purpose of replacing uneconomical peddler cars in which LCL freight is required to be handled in volumes and on schedules insufficient to warrant a profitable and reasonably satisfactory service by rail. The reduction in railway operating costs and the increase in efficiency of the resulting transportation service inure to the benefit of the public and the carrier and are responsive to the public demand and need. The release of the inefficiently used box cars likewise makes its contribution toward alleviating the persistent box car shortage.”

We wish to point out that the Utah statute does not give the Commission any formula by which it is bound in its finding of public convenience and necessity, but the Commission is left to use its own discretion and what has been called its “expertise” gained over years of experience in determining what will be in the public interest and serve public convenience and necessity. This Court on numerous occasions has held:

“* * * We are limited in our review to ascertaining whether or not the Commission had before it substantial evidence on which to base its decision. Only in the event that we find the Com-

mission acted arbitrarily, capriciously or unreasonably * * * can we set aside the order.”—*Goodrich v. P.S.C.U.* (1948), 198 P. 2d 975, 114 Utah 296.

One of the earliest cases in which authority for trucking service auxiliary to rail service was granted, was *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M.C.C. 101.

In connection with a later application by the Pennsylvania Lines the matter reached the Supreme Court of the United States, where the case is reported as *I.C.C. v. Parker*, 326 U. S. 60. Since its decision, that case has come to be pretty much of a landmark case, being followed by the I.C.C. in various other hearings and being referred to, cited with approval, and followed by numerous other courts. In order to show the background of that case, we will first refer to its original proceedings before the I.C.C., where it is reported as *Willett Company of Indiana, Inc.—Extension*, 42 M.C.C. 721.

The applicant, a wholly owned subsidiary of the Pennsylvania Railroad Company, sought a certificate of public convenience and necessity to extend its operations over seven connecting routes between Indiana and Michigan points “serving intermediate and off-route points which are stations on the rail line of the Pennsylvania Railroad Company.” Motor carriers operating in the territory opposed the application. The applicant already operated in an area paralleling the Pennsylvania Railroad through Ohio, Illinois and Indiana, and this extension followed the “Grand Rapids Division” of the Pennsylvania Railroad. The railroad

proposed to continue to transport carload freight but to discontinue the operation of "peddler-cars" in local freight trains. It was urged that the substitution of motor for rail service over the considered routes would release freight cars for use in through freight trains and would result in the elimination of approximately 860 car days per month. "For every freight car eliminated, the necessity for switching that car in the yards will also be eliminated, as well as the attendant expense."

Several protesting motor carriers insisted that they had unused equipment and available space and could and would like to handle the traffic and could give overnight service.

The I.C.C. examiner recommended that the authority be granted. On exceptions, protestants contended that public convenience and necessity did not require the authority sought and that existing motor carriers had facilities and could perform the operation in question. Two of the protesting motor carriers were already performing substitute service for other railroads. In granting the authority sought, the Commission referred to the fact that the protesting motor carriers said they could and would handle the traffic in question, but the Commission said P. 725:

"* * * It must be borne in mind that the railroad has been, and is transporting the traffic in question and is under an obligation to continue to do so. Applicant's service will be of a different character from that performed by motor carriers generally. It will be limited to the handling of merchandise traffic to and from points on the lines of the railroad in substitution for train service. To utilize

the facilities of protestant motor carriers, the railroad would be required to make arrangements with several of them, each performing a more or less disjointed part of the service. The railroad, through its subsidiary, merely seeks the substitution of a more efficient for a less efficient means of service.

“* * *

“The motor carrier service proposed by applicant, operated in close coordination with the railroad’s service, will effectuate a reduction in cost, and will result in an increase in efficiency in the transportation over the routes herein considered, which will inure to the benefit of the general public. Furthermore, it does not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carrier. We are not impressed by protestants’ contentions and are of the opinion that the proposed coordinated service will serve a useful public purpose, and that such useful public purpose cannot be served as well by existing motor carriers. * * *”

The protesting motor carriers brought the matter before a special three-judge federal court. Such Federal District Court, without a written opinion, granted an injunction against the I.C.C. order. The matter was then appealed to the United States Supreme Court, where it is designated as “*I.C.C. v. Parker*,” 326 U. S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051. The United States Supreme Court reversed the three-judge District Court and affirmed the Commission’s grant of a certificate. In referring to proceedings before the Commission, the Supreme Court stated at page 63:

“The operation of the order of the Commission was enjoined by the district court because there was no substantial evidence to support the order of the

Commission that public convenience and necessity required the issuance of a certificate to Willett. The district court said in the findings of fact that *there was no proof that the present highway, common motor carrier transportation service by certificated carriers was or would be inadequate to serve the public need.* * * *

The Supreme Court referred to the federal statute giving the I.C.C. authority to regulate motor carriers, which provides:

“* * * No motor vehicle subject to the Act may operate on the highways without a certificate of public convenience and necessity. * * *

Such statute provides for the issuance of the certificate on application “*if the proposed service ‘is or will be required by the present or future public convenience and necessity.’*”

With respect to this the Supreme Court stated P. 65:

“Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half century experience of government in the regulation of transportation. * * * The disputants, here, do not clash over the power of the Commission to determine the need for the new service or that it will serve the public convenience and necessity. *The evidence is ample and uncontradicted that delivery by motor of less than carload freight to way stations is a more adequate, efficient and economical method for railroads than by ‘peddler’ car. They join issue on the Commission’s determination as to the carrier which will render that service. Shall it be by the railroad*

through the use of its trucking subsidiary or by the existing common carriers by motor?"

The Court refers to Senate Committee hearings leading up to the amendment of the Transportation Act to its 1940 terms, and quotes as authority statements made in such committee hearings by Chairman Eastman of the I.C.C. approving and recommending the granting of this substitute and auxiliary authority for the handling of local L.C.L. rail traffic.

The court's opinion continues P. 68:

"* * * 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. (Cases cited.) 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.

*"The contention of appellees, protestant motor carriers, is that since no evidence was offered as to the inadequacy of the present duly certificated motor carriers to serve the railroad's need, there was a failure of proof as to convenience of and necessity for a new motor truck operation in the territory. * * **
In protestants' view a certificate of convenience and necessity should not be granted to railroads for motor truck operation when existing motor carriers are capable of rendering the same service. Appellants

take the position that this precise issue need not be decided in this case. They look upon the application as asking for authority to improve 'an existing service.' *We think that it was for a motor service to improve an existing rail service.* Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. *Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M.C.C. 725-26, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. The public is entitled to the benefits of improved transportation. Where that improvement depends in the Commission's judgment upon a unified and limited rail-truck operation which is found not 'unduly prejudicial' to motor carrier operations, the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service."*

P. 72:

"* * *

"Administrative discretion rests with the Commission to further improvements in transportation. The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers. *When in railroad applications for coordinated motor service the Commission finds public convenience and necessity for such motor service on evidence of transportation advantages to shippers and economy to the rail carriers, cf. Texas v. United States, 292 U. S. 522, 530,*

it is in a position to determine by its administrative discretion whether the projected service may be better rendered by the railroad or existing motor carriers. In the absence of power to compel coordination between the modes of transportation and in the presence of the probable gains in operative efficiency from unified management, we think the Commission, in view of the limitations on the railroad's motor service, is entitled to conclude that the public will be better served by the rail operation than by use of the available motor carrier facilities. * * *

The major premise upon which the I.C.C. and the courts have found public convenience and necessity in connection with rail-truck operations is not that there was or was not already adequate motor carrier service in the field but that the railroad companies were already in the field performing LCL merchandise service and were entitled—in fact, required—to continue this merchandise service, but were not required to continue it in a wasteful or expensive manner by the handling of only partially filled rail cars on way trains, with expensive crews, but in order to release needed boxcars and to improve such transportation in the public interest must be allowed to handle the traffic in trucks. The Commission has held many times that the “reduction in the cars and increase in the efficiency of transportation service inures to the benefit of the general public and is required by public convenience and necessity.” See *Kansas City Southern Transport, Inc.—Common Carrier Application*, 28 M.C.C. 5 at page 9. In this Kansas City case the Commission stated:

“The traffic under consideration, which is chiefly so-called package or merchandise freight in

less-than-carload quantities, is, of course, traffic which the railroads are and have been under an obligation to transport and which they will continue to transport whether we grant or deny the applications. So far as such traffic can be moved in well-loaded cars on through trains which serve only the larger points, it can be handled efficiently by rail, and the railroads have no need to substitute truck service for such rail service. The way-freight train service which is used in serving the smaller stations is, however, uneconomical and inefficient, and trucks can be used in substitution therefor to much advantage both to the railroads and to the public served."

In that case the Commission further stated, at page 10:

"* * * In both its direct and its indirect effect such substitution is in the public interest
* * * *one competitive carrier has no vested right in the continuation by another of an inefficient method of operation, and we believe it to be neither the policy of Congress nor the proper function of this Commission to retard any form of progress in transportation which will serve the public interest.*"

See also the case of *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, 5 F.C.C. 31,125. *Missouri Pac. R. R. Co. Extension—Illinois and Missouri*, 41 M.C.C. 241.

In the case of *Chesapeake & O. R. Co. v. Public Service Commission* (W. Va.-1953), 81 S. E. 2d 700, a similar application for authority to move intrastate traffic by motor service auxiliary to, and supplementary of train service, came before the Supreme Court of West Virginia.

In that case a large number of regularly certificated motor carriers protested the application. No one of them could serve the entire area, but, as in the *Parker Case*, one or more could serve all of the various parts of the area involved. It appeared that the I.C.C. a short time before had granted authority to applicant to transport interstate traffic by motor vehicle in substitute service and that interstate traffic constituted the large majority of LCL traffic handled by the railway. The court referred to some of the conclusions of the state commission, including the following P. 704:

“* * * Applicant has not abandoned less-than-carload service and it should not be denied the right to improve such service when it elects to do so * * *. The proposed operation is designed solely to improve applicant’s present less-than-truckload service in the territory. The present service is slow, inefficient, and expensive, and it is not satisfactory to applicant and the shipping public. The authority sought will not enable applicant to enter a new field, but will permit it to substitute for the present service a new efficient form of service which will be faster and more economical in the transportation of less-than-carload rail traffic which applicant has been and is obligated to transport * * *.”

Some of the other pertinent facts as referred to by the Supreme Court of Appeals of West Virginia, are as follows:

“Applicant has operated as a railway common carrier of property throughout the Kanawha District for approximately fifty years, and within parts of that district for more than three-fourths of a century. About 1920 it was transporting by rail, within Kanawha District, approximately one hundred fifty

million pounds of less than carload freight per year. In 1952 it was transporting less than six million pounds of less than carload freight per year. * * *

“* * * Applicant contends that such method of handling the less than carload freight transported by it necessarily results in much inefficiency and delay in its overall operations, in that the stopping of its trains for the delivery of single or small shipments necessarily delays the whole train, blocks the use of the tracks as to other trains, engages the time of whole train crews, and requires the use of an unreasonable number of railroad cars. * * * It is also clearly proved, and not denied, that the proposed substitute truck service will result in a much better service for that part of the public now using the facilities of applicant, both as to less than carload freight and carload freight, and both as to intra-state and interstate shipments. *Applicant, however, offered no evidence tending to show that the service being furnished within the Kanawha District by the protestants is inadequate or insufficient.* * * *”

The application was denied by the West Virginia Commission “*for the reason that the evidence failed to ‘show that the motor vehicle service of the protestants is inadequate or insufficient’.*”

The West Virginia statute with respect to issuance of such certificates is very similar to the Utah statute. It requires a finding of public convenience and necessity but, like the Utah statute, does not spell out what is necessary to show public convenience and necessity but leaves that to the “expertise” and discretion of the Commission. In fact, referring to the power so granted to the Commission the court said at 706:

“* * * Indeed, it may be questioned whether this Court has jurisdiction to disturb a finding of

fact by the Public Service Commission where it is supported by substantial evidence. * * *”

Nevertheless, the West Virginia Supreme Court of Appeals reversed its state commission and remanded the matter to the Commission “with directions that such certificate be granted. * * *”

We quote from the court’s opinion P. 707:

“* * * Here there is no question that the evidence establishes that the proposed supplementary service would result in a better service to that part of the public electing to use the railway common carrier service. It is no answer to say that such service may be otherwise available. Applicant operates under proper authority, is one of the present operators in the Kanawha District, and is entitled, in fact should be required, to furnish services commensurate with modern day demands. * * * *Moreover, the facts detailed above establish that the applicant seeks not authority for a new or extended service, but for a different method only of rendering a specialized and limited service it is already authorized and required to render, and which is rendered by no other carrier.*”

Referring to some Ohio cases, the court quoted as follows P. 708:

“* * * In both cases testimony * * * shows * * * that the services will release railroad equipment for other uses; and that operating economies will be afforded to the railroads. In the opinion of this court, the commission had adequate

evidence warranting the granting of the certificates of public convenience and necessity."

"* * *

"* * * 'It should be remembered that the applicant was serving all the communities concerned in the instant cases years before there was any such thing as motor transport service, and, although motor transport service is highly desirable and beneficial when carried on in the public interest, the benefits of it should be enjoyed by railroads when those benefits can be ordered without violating the law and where they are in the public interest. *It is to the public interest that railroads be afforded reasonable and lawful opportunities to effect economies and to improve service to shippers and receivers along railroad lines.*' "

After referring to a number of cases, including the case of *I.C.C. v. Parker*, 326 U. S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051, the opinion continued P. 709:

"The Interstate Commerce Commission consistently grants such authority, as to interstate less than carload freight, in situations where the facts are comparable to the facts in the instant case. * * *

"While it is true that the Public Service Commission of West Virginia must look to the statutes of this State, not to the Acts of Congress relating to interstate commerce, as the Interstate Commerce Commission and Federal Courts do, cooperation in handling problems arising in connection with transportation of interstate and intrastate freight is desirable, in the best interests of the public. To require duplication of essential services would incur unnecessary expense that would necessarily be reflected in tariff rates, paid by the public and, in some cases, at least, would probably stifle commerce. If the statutes of the State relating to transportation

of freight by common carriers are not in conflict with Acts of Congress, they should be considered together in determining what constitutes the best interests of the public in the regulation and supervision of such businesses. * * *

The court further said that the State "*should not assist in the economic strangulation of one of the public servants by refusing to permit improvement in methods of performing the very business it was authorized to do.*"

Counsel for petitioners repeatedly complain of the fact that evidence was not offered to show, and the Commission did not make any finding with respect to "the inadequacy of existing motor carrier service". We wish to emphasize that that was the main point of attack in both the United States Supreme Court case of *I.C.C. v. Parker*, supra, and the Wyoming Supreme Court case referred to later in this brief.

This Court held in *Ashworth Transfer Co. v. Public Service Commission*, 2 Utah 2d 23, 268 P. 2d 990, at 995:

"* * * 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'. * * *"

Application of Union Pacific Motor Freight Co.
(Wyo.-1953), 264 P. 2d 771.

This case involved an application identical with the one in the case at bar wherein the Supreme Court of Wyoming on the authority of *I.C.C. v. Parker* sustained the Wy-

oming Commission in granting substitute authority to Motor Freight intrastate in Wyoming.

The Wyoming decision quotes with approval the following facts found by, and conclusions of, the Wyoming Commission P. 775:

“* * * The evidence also shows that this proposed motor service would be without any additional cost to the shipping public. * * * The Union Pacific Motor Freight Company is at present operating motor vehicles over the same route under authority granted to them by the Interstate Commerce Commission. * * * Said proposed activity by applicant would not result in any additional investment outlay of capital for new vehicles.”

P. 775:

“* * * it would make it unnecessary to engage in the uneconomic operation of partially filled rail or box cars.”

“* * * The present motor carriers seek to prevent the Union Pacific from competing effectively with them for less carload traffic. Their position in this respect is understandable, but such self-interest should not be confused with the general public interest. * * *”

P. 776:

“* * * The finding of public convenience and necessity, of course, includes elements, one of which is the public interest, but *the ultimate is public convenience and necessity, and the law prescribes no further requirements or standard, after finding applicant qualified.* * * *”

Before the Supreme Court of Wyoming the protesting motor carriers argued that the Commission's order was contrary to law and "unsupported by substantial evidence," that protesting motor carriers were "already furnishing motor carrier service over all other routes sought by the applicant," and they stated that they could and would contract to handle the LCL business for the railroad. Concerning the offer of protesting carriers to handle this business for the railroad, the Wyoming Supreme Court said P. 782:

"* * * *It is easy to see that no contract between parties who have been in sharp competition for years could be drawn so as to obviate differences as to the manner of handling L.C.L. shipments; differences which could easily become so violent as to totally disrupt such an arrangement and render it a mere 'scrap of paper.'*"

The Court quoted the following with approval from *Thomson v. Iowa State Commerce Commission*, 15 N. W. 2d 603, *supra* :

"* * * For the service to be satisfactory and yield the benefits it is capable of in full measure a high degree of coordination is essential. This can only be brought about where it is completely under the control of the railway management in every respect."

A large number of I.C.C. decisions were referred to, after which the Wyoming Court quoted further with approval the following from the Iowa case:

"Of course, the decisions of the Interstate Commerce Commission are not binding precedents upon this court. However, the principles, announced and

applied in the foregoing decisions, are so eminently fair, sound, just and reasonable that we have no hesitancy in adopting them as tenets which should be applied in determining whether the commission should have issued a certificate of public convenience and necessity under the facts herein. * * *

With respect to the claim that the Wyoming Commission exceeded its authority, the Supreme Court referred to the Wyoming statute giving authority to the Commission and said P. 786:

“* * * Broader statutory authority in the premises vested in the Commission to regulate and control common motor carriers could hardly be conceived.”

The Wyoming statute, Section 60-1305, as quoted therein, is very similar to the Utah statute and provides that before any motor carrier may operate on any highway it must first obtain “from the Commission a certificate declaring that the present or future public convenience and necessity require such operation. * * *” No specific basis or stereotyped formula is given for determining that public convenience and necessity, but just as under the Utah statute, the Commission is given a broad discretion in the matter.

In addition to discussing the Iowa case of *Thomson v. Commission*, supra, and other court decisions, as well as numerous motor carrier decisions from the Interstate Commerce Commission, the Wyoming Supreme Court referred to and quoted rather copiously from the United States Su-

preme Court case of *I.C.C. v. Parker*, 326 U. S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051.

We wish to point out here that with respect to substitute and auxiliary service not only is a "high degree of coordination" necessary as referred to by the Wyoming Court but shippers who deal with the railroad with respect to carload business also expect the railroad to handle LCL shipments for them. Rail LCL traffic "is closely bound up with carload traffic, and in order to control and keep your volume of carload traffic, you must keep the service * * * " " * * * If you said on the one hand 'we don't want your LCL but we want your carload,' it is very evident they are going to penalize you with your carload traffic * * * " (R. 266-267). There is a further consideration which the Commission was entitled to keep in mind, and that is that there are some shippers who still wish to deal with the railroad company for various reasons regardless of the way the traffic might be handled (R. 209). These shippers likewise are entitled to improvements in that service where possible.

Another recent case which quotes and follows the United States Supreme Court case of *I.C.C. v. Parker* as well as *Kansas City Southern* and several other I.C.C. cases, is *Columbia Motor Transportation Extension—Texas*, No. MC-105146 (Sub. No. 4), 10 F.C.C. 32896. The Columbia Motor Transport is a wholly owned subsidiary of the Missouri Kansas Texas Railroad Company. We quote the following from the I.C.C. decision as reported in 10 F.C.C., page 114:

"Although it is true that in exercising its discretion to grant substituted motor-for-rail authority,

the Commission must consider the disadvantage to the public of a serious impairment of independent motor carrier service, the showing that such a result will develop must be clear. In other words, before an application for a *true* substituted service may be denied, there must be established that the independent motor carrier service will be endangered or impaired to an appreciable extent. The mere fact that some traffic might be attracted to the substituted service is not controlling. This is in keeping with the many cases, starting with the *Kansas City Southern* case, which have held that notwithstanding the existence of motor carriers in the territory served by the proposed routes and the fact that they could and are willing to perform some of the proposed operations, denial of the application is not warranted without establishment of a real danger to the effective operation of existing motor carriers. * * *

Counsel for petitioners refer to the fact that a prior application by Motor Freight was denied. Conditions have changed considerably since the time of that prior hearing. As referred to in the Statement of Facts, at that time Fuller-Toponce was the operator in northern Utah and was a small, independent, locally based truck line. Carbon Freight Lines, another protestant, was likewise a small, independent, locally based truck line. Since such time Fuller-Toponce has gone out of existence, and its authority is now operated by Fast Freight, a wholly owned subsidiary of Consolidated, which parent company had a gross income for 1957 of \$60,000,000, and Fast Freight itself had a gross income of approximately \$800,000 (R. 328). Carbon Freight Lines, as consolidated with Rio Grande Motor Way to form the present protestant Carbon Motorway, is under contract

to be purchased by (R. 307) and thereafter held as a wholly owned subsidiary of The Rio Grande Railroad and is at present being operated by (R. 454) and performing an exactly similar substitute service for the Rio Grande Railroad (R. 310). Thus the competitive conditions affecting these main protestants have changed and there was not the same basis for the P.S.C.U. to conclude that such carriers might be endangered or impaired or in any way seriously affected to any appreciable extent by the granting of the present application.

The Commission found (R. 454) that south of Salt Lake City the principal competitors affected were the Rio Grande Railroad "and Carbon Motorway, Inc., which The Denver and Rio Grande Western Railroad is in the process of acquiring and which it now operates. * * *" North of Salt Lake the principal competitors are "Consolidated Freighways, Inc., and its wholly owned subsidiary, Wasatch Fast Freight * * *" (R. 454).

The Commission found that:

"* * * the above named competitors may be prejudiced to a degree by the service proposed, but weighing all factors, the Commission considers that the benefits to flow primarily to the public from an improved method of transportation and improved efficiency and economy of operation, outweigh any detriment that competitors may suffer and will not, in the opinion of the Commission, affect their ability to continue to serve the public along the routes over which they operate."

It is interesting to note that petitioners have not attacked this finding that the competition of the proposed

service will not seriously affect operations of existing carriers. The only evidence in the record amply sustains such finding.

The witness Ingman testified that he made a survey of traffic handled, from which he prepared Exhibit 6. Lines 6 to 9 on Exhibit 6 show traffic in the area covered by Fuller-Toponce and Fast Freight. Fuller-Toponce has been a strong competitor all along, and Fast Freight continues to be such. In December 1949, prior to the granting of intrastate rights in this area shown on Exhibit 6, Union Pacific transported a total of 60,500 pounds of intrastate traffic. After seven years of competition the exhibit shows that in December 1956, in the same area, Union Pacific, including Motor Freight, transported a total of only 21,400 pounds of intrastate traffic, including both that forwarded and received.

As a result of the survey made by him, the witness Ingman testified that in his opinion the granting of the authority requested would not cause any significant change in the amount or flow of traffic (R. 105-106, 151).

One of the main arguments of petitioners herein is that existing motor carriers should be entitled to perform the proposed service. Such question was likewise raised in the *Columbia Transport Company* case, and with respect thereto the I.C.C. stated 10 F.C.C. 32,896 P. 115:

“The general proposition that railroads proposing to establish coordinated rail and truck service should be required to use the service of existing motor carriers so far as available, was discussed at length by the Commission in the report on oral

argument and reconsideration in the *Kansas City Southern* case and related cases, and a conclusion was reached contrary to that proposed by protestants herein. *Since the decision in the last cited case we have generally declined to compel a railroad against its will to look to independent motor carriers for any needed substituted service.* THIS POLICY HAS BEEN PREDICATED ON THE THEORY THAT THE INDEPENDENT CARRIER, HAVING ITS OWN TRAFFIC AND SHIPPERS, WOULD FIRST BE A COMPETITOR AND SECONDARILY A SERVANT."

The Commission goes on (page 116) :

"* * *

"* * * *Actually, the instant application, the same as most substituted motor-for-rail cases, is not founded upon a theory that there is a material deficiency in the service provided by the existing motor carriers.* The proposed operations are designed solely to improve the railroad's present less-than-carload service to and from the 138 points it serves in Texas. The present rail service is admittedly slow, inefficient, expensive, and unsatisfactory to both the railroad and the shipping public. The authority sought will not enable the railroad through applicant to enter a new field, but, rather, will merely permit it to substitute for the present inefficient service a new form of service which will provide a faster, more economical, and more efficient means for handling the less-than-carload traffic it is transporting and which, despite protestant's view, it is obligated to continue to transport."

"Opposing carriers express a willingness to provide the desired service for the Katy Railroad but it is clear that this Commission has no power to require the carriers to enter into agreements and

arrangements that would be necessary. Moreover, to a large degree such use of independent motor carriers appears to be impracticable. *The railroad would be required to enter into separate arrangements with a number of carriers with whom it would be in competition for traffic moving to and from common points. Where the motor carrier serves the same points as the Katy Railroad, a basic conflict of interest between them is inevitable. What the railroad desires and needs is a motor service that is exclusively in its custody and control.*"

After the Commission's decision in this *Columbia* case, a three-judge federal court was convened, and protesting carriers sought to enjoin and set aside the order of the Commission. The federal court in the Western District of Texas affirmed the Commission in a case entitled "*Central Freight Lines, Inc. v. United States of America*," 159 F. Supp. 71 (April 1958). We commend that case to the Court's consideration because the protestant's brought up every argument urged by petitioners herein in addition to others; and after referring to the United States case of *I.C.C. v. Parker*, the federal court sustained the Commission's grant of authority to the M.K.T. Railroad subsidiary.

See also *Sites Freight Lines v. United States*, 158 F. Supp. 909; *West Brothers, Inc., v. Illinois Cen. R. Co.* (Miss.), 75 So. 2d 723; *Norwalk Truck Lines Co. v. Public Utilities Com. of Ohio*, 74 N. E. 2d 328; *Texas v. United States*, 292 U. S. 522, 54 S. Ct. 819, 78 L. Ed. 1402.

ANSWER TO PETITIONERS' CASES

It is interesting to note and to read the cases cited by petitioners in support of the position taken by them in this case.

Mulcahy v. Public Service Commission of Utah, 101 Utah 245, 117 P. 2d 298, was the case wherein Fuller-Toponce, predecessor of Fast Freight, now protesting, was given general authority to operate between Salt Lake and Logan, Utah, affecting traffic theretofore handled by Union Pacific, Bamberger and Utah Idaho Central Railroads. A prior application on behalf of Fuller-Toponce had been denied a short while before.

Salt Lake & Utah R. Corp. v. Public Service Commission, 106 Utah 403, 149 P. 2d 647, was the case wherein Carbon Freight Lines during the stress of war times was allowed to extend its authority in the Utah County area at a time when an O.D.T. order prevented the railroads from moving a rail car carrying less than 10,000 pounds of freight.

In both of these cases the traffic involved was traffic theretofore moving mainly by railroad. The protests of the railroads were strongly and vehemently urged but to no avail.

At the time these cases were heard, the Utah Idaho Central Railroad, the Salt Lake & Utah Railroad and the Bamberger Railroad were all operating and depending to a great extent on the involved traffic. Their inability to give better service and their losing of such traffic to trucks with other concurring conditions, has now finally resulted

in their complete annihilation. Bamberger Railroad Company was the last, and it ceased operations as of the end of December 1958.

In spite of counsels' urgings the cases referred to do not support the position taken by petitioners. On page 16 the *Mulcahy* case is quoted, and the words italicized, with respect to "putting a new competitor in the field." As yet we hardly feel it necessary to state that Union Pacific is still a competitor and is now in the field. A new competitor is not being put into the field but the same competitor is asking that it be allowed to move in a different way traffic which it already handles and which it has handled for many years.

We wish to call the court's and counsel's attention to the following statements from the *Mulcahy* case P. 300:

"The statute should be so construed and applied as to encourage rather than retard mechanical and other improvements in appliances *and in the quality of the service rendered the public* * * * *to the end that both the quality and quantity of that which is offered to the public for its necessity, convenience and pleasure may be improved and increased, and community development and life enriched and encouraged.* * * * *Any service or improvement which is desirable for the public welfare and highly important to the public convenience may properly be regarded as necessary.* 'If it is of sufficient importance to warrant the expense of making it, it is a public necessity. * * * A thing which is expedient is a necessity. * * * A strong or urgent reason why a thing should be done creates a necessity for doing it. * * *'"

P. 301:

“* * * Whatever may be our opinion as to whether the commission found well or wisely, or whether our conclusions on the evidence would have been the same, we are bound by the findings, when there is evidence to support them.’”

In the *Mulcahy* case the Court said that the Commission first decided that some new or additional kind of service aside from the rail LCL service was justified; and after having so decided, the question was posed (page 305): “* * * Should such new service be rendered by existing carrier or by the new applicant?” In answering that question, this Court said:

“This question poses for the commission, not the finding of a factual answer, but the determination of a matter of policy. * * *”

The Court discusses the matter further and then concludes:

“* * * Having given due consideration to those matters the commission determines whether the existing carriers or a new one should be permitted to render the proposed service. If the commission’s determination finds justification in the evidence, it is not a law question and we cannot review or modify it or set it aside. * * *”

On page 12 of their brief petitioners refer to the case of *Salt Lake & Utah R. Corp. v. Public Service Comm.*, 106 Utah 403, 149 P. 2d 647. The record in that case was that there were existing carriers in the field who might possibly

have bettered their service, and with respect to that this Court said (649) :

“Whether or not the existing common motor carrier should have been given a further opportunity to furnish the required services before allowing a competing motor carrier to enter the field is a matter of policy which is entirely within the province of the Public Service Commission, especially where there was no evidence that the additional competition would so impair the revenues of the Utah Central Truck Line as to impair its ability to serve the public. It is the public good and convenience which is the yardstick to be used in determining the advisability of granting or denying a certificate of necessity and convenience. * * *”

Just so in the case at bar. Union Pacific is a competitor of long standing in the field and is asking only to be allowed to improve service on traffic it has been handling for many years and which traffic admittedly needs an improved service. The question as to whether or not applicant is entitled to give this improved service “is a matter of policy which is entirely within the province of the Public Service Commission, especially where there is no evidence that the additional competition” would impair the ability of existing carriers to serve the public. See to the same effect *I.C.C. v. Parker* as herein quoted P. 27, supra.

The case of *Union Pacific R. Co. v. Public Service Commission*, 103 Utah 459, 135 P. 2d 915, referred to on pages 15 and 16 of petitioners’ brief, is direct authority in favor of applicant here rather than one which can give any comfort to petitioners. That case involved a similar but

exactly opposite situation to what is involved in the case at bar. There the Interstate Motor Lines was trying to improve the handling of traffic which it was already moving and the railroads were the ones protesting the extension of authority. It already had authority to serve Wendover in interstate commerce; and although the railroad had its depot right in the center of this small town, there were people who wanted to deal with trucks rather than the rails. Shipments would be routed from Utah points to Wendover, Nevada—in interstate commerce—there they would be unloaded and then backhauled by separate truck five miles from Wendover, Nevada, into Wendover, Utah. This caused some delay and was much more costly to the truck company, so they asked authority to serve Wendover, Utah, directly in intrastate commerce, thereby saving time and reducing their cost. There as here the applicant carrier was already handling the traffic involved and merely wanted to handle it in a more efficient and more expeditious way at less cost, at the same time giving better service. That was all that was involved in that case, and the Commission found that public convenience and necessity would be served by granting the application, and this Court affirmed such holding.

We quote from this Court's opinion P. 917:

“* * * The question is therefore whether the elimination of the back haul from Wendover, Nevada, to Wendover, Utah, and the store-door pick-up and delivery constitute such new, added, further or better service as to justify a finding of public convenience and necessity.”

P. 918:

"The Railroads assert that there is no evidence that the service now rendered by them is not adequate, and therefore another certificate could not be granted. * * * Certainly it would not always be wise to require a railroad company to put on additional trains, or to stop other trains at all small towns to meet the general transportation needs and convenience under present conditions. Convenience and necessity are found, and consist largely, in the changing conditions and demands of the times.
* * *

Just as it would not be wise to require the railroads to "put on additional trains or to stop other trains at all small towns," by the same token it is not wise in the public interest to require these trains to continue their expensive stops at such small towns or to continue their wasteful use of boxcars loaded to only a fraction of their capacity for such service, when that service can be performed more efficiently and economically with motor vehicles in substitute service; and protesting carriers have no right nor justification in saying, "You cannot improve this service except by turning your traffic over to us to handle."

This Court concluded in that case P. 918:

"The policy as declared by the statute, * * * is not one of granting monopoly in all cases, but is one that at all times deems the public interest of paramount importance. * * * The discretionary power granted the Commission by the act, to grant or withhold certificates, negatives the idea that it was intended to grant and maintain a monopoly in any field. * * * In the exercise of its powers to grant or withhold certificate of conven-

ience and necessity, questions of impairment of vested or property rights cannot very well arise. No one can have a vested right to be free from competition, to have a monopoly against the public. And unless some justiciable question arises, unless some point is juridically present, this court will not substitute its judgment for that of an administrative tribunal, charged by law with carrying out matters of non-judicial character. * * *”

The case of *Ashworth Transfer Co. v. Public Service Commission*, 2 Utah 2d 23, 268 P. 2d 990, referred to on page 17 of petitioners’ brief, rather than support any position taken by petitioners herein, in fact gives support to the position of respondents. Therein this Court stated P. 995:

“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’. * * *”

CONCLUSION

The applicant, Union Pacific Motor Freight Company, in this case merely seeks authority from the Utah Commission to perform a transportation service for its parent company, Union Pacific, which will improve an existing service. No new competitor is being put into the field. Union Pacific is now a competitor and has been in the field transporting this LCL merchandise for a much longer period of time than any protestant appearing in the case. The transporting of intrastate LCL “peddler freight” in high-class

rail boxcars has become an obsolete and inefficient as well as a costly way of transporting such freight. By approving the authority as granted by the Commission, not only will Union Pacific be able to effect economies in its operations which will directly as well as indirectly be to the benefit of the general public as it affects freight rates, but at the same time 126 boxcars, with the availability of 426 boxcar days, per month will be released in the area involved to help supply carload traffic and relieve continuing car shortages experienced by carload traffic shippers. At the same time those shippers who have still manifested their desire to deal with railroads and railroad personnel will be given a more expedited and more satisfactory service on such LCL shipments. The Public Service Commission of Utah found that there was a public need for this improved service with respect to this railway traffic and that public convenience and necessity required the granting of authority for the proposed service. It found further that protestants would not be unduly prejudiced by the granting of such authority and that such grant would not impair their ability to serve the public. There is ample competent evidence in the record to sustain the Commission's action, and the Commission did not act arbitrarily or unreasonable in any way, but acted well within the scope of its authority. Therefore, the order of the Commission should be affirmed.

Respectfully submitted,

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Received 4 copies of the foregoing brief
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