

1958

Salt Lake - Kanab Freight Lines, Inc. v. Public Service Commission of Utah et al : Plaintiff's Brief

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.

Wood R. Worsley; Skeen, Worsley, Snow & Christensen;

Recommended Citation

Brief of Appellant, *Salt Lake Kanab Freight Lines Inc. v. Public Service Comm. Of Utah*, No. 8941 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3174

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

SALT LAKE - KANAB FREIGHT
LINES, INC., a corporation,

Plaintiff,

—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 A. B. ROBINSON, doing business
as A. B. ROBINSON TRUCK LINE,

Defendants.

FILED

APR 15 1958

Clk. Supreme Ct.

Case No.
8941

PLAINTIFF'S BRIEF

WOOD R. WORSLEY and SKEEN,
WORSLEY, SNOW & CHRISTENSEN
701 Continental Bank Building
Salt Lake City, Utah
Attorneys for Plaintiff

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACT.....	1
STATEMENT OF POINTS.....	10
ARGUMENT	11
 <i>POINT I. THE ACTION OF THE COMMISSION IN FINDING THERE IS A NEED FOR GRANT OF AUTHORITY HEREIN IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE EVIDENCE.</i>	 11
(A) THE TRANSPORTATION FACILITIES OF PLAINTIFF ARE ADEQUATE TO MEET ALL PUBLIC SHIPPING REQUIREMENTS IN THE AREA.	11
(B) THE TESTIMONY OF SHIPPER WITNESSES INDICATES SATISFACTION WITH PLAINTIFF'S SERVICE, THAT ANY DESIRE FOR A NEW SERVICE IS PREDICATED SOLELY UPON A PROMISE OF CHEAPER SERVICE, AND FAILS TO ESTABLISH A NEED FOR ADDITIONAL SERVICE.	14
(C) THE FINDINGS OF FACT MADE BY THE COMMISSION ARE BASED UPON THE PREMISE THAT THE RATES PROPOSED ARE CHEAPER THAN THOSE OF PLAINTIFF, WHICH BASIS OF ISSUANCE OF AUTHORITY IS CONTRARY TO LAW WHICH REQUIRES A FINDING BASED ON COMPETENT EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY.	17
 <i>POINT II. THE ACTION OF THE COMMISSION WILL DIRECTLY AND ADVERSELY AFFECT PLAINTIFF BY PERMITTING THE TRANSPORTATION OF</i>	

TABLE OF CONTENTS

(Continued)

COMMODITIES WHICH COULD AND SHOULD PROPERLY BE TRANSPORTED BY PLAINTIFF.....	20
<i>POINT III. THE AUTHORITY GRANTED BY THE COMMISSION EXCEEDS THAT REQUESTED BY THE APPLICATION AS SET FORTH IN THE NO- TICE OF HEARING, AND IS CONTRARY TO LAW, THE EVIDENCE AND THE FACT FINDINGS OF THE COMMISSION.</i>	<i>22</i>
CONCLUSION	24

CASES CITED

Cantlay and Tanzola v. Public Service Commission, 233 P. (2d) 344 (1951)	18
Goodrich v. Public Service Commission, 198 P. (2d) 975 (1948)	19
Rudy v. Public Service Commission, 265 P. (2d) 401 (1954)....	19
McCarthy v. Public Service Commission, 198 P. (2d) 220 (1947)	19
Wycoff Co. v. Public Service Commission, 227 P. (2d) 323 (1951)	11, 19

STATUTES CITED

Section 54-6-8, U.C.A. (1953)	23
Section 54-6-5, U.C.A. (1953)	23

IN THE SUPREME COURT
of the
STATE OF UTAH

SALT LAKE - KANAB FREIGHT
LINES, INC., a corporation,

Plaintiff,

—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 A. B. ROBINSON, doing business
as A. B. ROBINSON TRUCK LINE,

Defendants.

Case No.
8941

PLAINTIFF'S BRIEF

STATEMENT OF FACTS

This case is before the Supreme Court on a Writ of Review directed to the defendants, and for purposes of reviewing an order of the Public Service Commission of Utah dated June 30, 1958, which granted to defendant A. B. Robinson, doing business as A. B. Robinson Truck Line (hereinafter referred to as defendant Robinson) Contract Carrier Permit No. 475, embracing operating

rights hereinafter set forth. Contract Carrier Permit No. 475 reissues previous contract carrier authority held by defendant Robinson, and adds new authority granted in this proceeding, thus consolidating all authority in one permit (Tr. 139).

Contract Carrier Permit No. 475 includes the following contract carrier authority in intrastate commerce previously held by defendant Robinson: for Safeway Stores, Inc., Salt Lake City, for the transportation of groceries, produce, meats and grocery supplies between Salt Lake City and Richfield, serving the off-route point of Mt. Pleasant; for Western Creamery Company of Salt Lake City, for the transportation of creamery products and supplies between Monroe and Salt Lake City; and for John Christensen Hardware Co. of Richfield, for the transportation of general hardware and machinery between Salt Lake City and Richfield. New and additional contract carrier authority was granted in Permit No. 475 to transport for Bill Winkel Distributing Co. of Richfield, beer, candy, grocery items and general commodities between Richfield and Salt Lake City; and to transport for Richfield Auto Parts Company of Richfield oxygen and acetylene cylinders and general auto parts from Salt Lake City to all points between Salt Lake City and Richfield serving the off-route "town" of Gunnison, Utah.

The application (Tr. 109) sought a permit as a contract carrier to transport general commodities from Salt Lake City to Monroe, Utah, serving the off-route points

of Richfield and Gunnison. Notice of hearing on the application (Tr. 113) generally conforms to the application. The Report and Order of the Commission (Tr. 136) in its conclusion, paragraph (e), grants to Richfield Auto Parts Co., authority to transport oxygen, acetylene cylinders and general auto parts to *all points between Richfield and Salt Lake City, serving the off-route town of Gunnison* (Tr. 139). Also the Report and Order (Tr. 137) found that there was no contract existing between applicant and Brooklawn Creamery Company and cancelled the previous permit authorizing service for such shipper. That part of the application which sought authority to transport commodities for Nielson Furniture and Hardware Company of Monroe was denied, and no testimony was offered in support of a contract carrier permit for this shipper.

Hearing before the Commission was held on May 23, 1958, upon the application filed April 23, 1958, and the report and order was issued June 30, 1958.

Mr. A. B. Robinson appeared as the operating witness for defendant and testified as to the present and proposed operation (Tr. 6 to 42). While defendant Robinson holds authority as hereinabove indicated, the basic contract carrier operation now conducted by him involves a weekly haul from Monroe to Salt Lake City for the Western Creamery Company, with an occasional haul for that company in addition to the weekly schedule. His transportation for Safeways, Inc., from Salt Lake City to Richfield appears uncertain and unscheduled. No

transportation for Safeways, Inc., was performed during the first five months of 1958, and during 1957 the average move was about one trip per month, producing a gross revenue for the year 1957 of approximately \$3,000.00 (Tr. 24). Transportation for John Christensen's Hardware Co. of Richfield is of the same nature, and during 1957 only eight to ten tons, equivalent to one full load, were hauled for this store (Tr. 26). The cancellation of Permit No. 365, which authorized Robinson to transport for Brooklawn Creamery Company, was based upon the fact that the contract between Brooklawn Creamery and defendant Robinson was no longer in effect (Tr. 137). It also appeared that sometime prior to hearing, although defendant could not recall the precise date, he had ceased to haul for Brooklawn Creamery Company (Tr. 21, 22) and that the reason the transportation had stopped was because defendant would not transport except at an increased rate, which Brooklawn Creamery refused to pay (Tr. 22, 24). The Commission at about the same time issued contract carrier authority for such transportation movement to one Charles Taylor (Tr. 21).

Defendant Robinson does not propose to add any equipment, drivers or other trucking facilities in the event the application is granted, but simply seeks to secure for himself a back haul from Salt Lake City to Richfield for his trucks, following completion of a transportation haul to Salt Lake City from Richfield for Western Creamery Company. The evidence made clear that the transportation for Richfield Auto Parts Co. would con-

sist almost exclusively of oxygen and acetylene containers with some welding equipment (Tr. 52) and such company proposed to continue the use of Salt Lake-Kanab Freight Lines, plaintiff herein. Transportation for Bill Winkel Distributing Company will consist principally of candy and confectionary items (Tr. 16). These two commodities would be transported from Salt Lake City to Richfield following delivery at Salt Lake City from Richfield of the Western Creamery Company shipment. Defendant proposes to provide new service in a backhaul continuation of his schedule of one trip per week, with vaguely described additional transportation on an on-call basis. He estimated that 90 per cent of the transportation under the authority requested would be fulfilled by the backhaul to Richfield of the present scheduled weekly trip (Tr. 18). This schedule leaves Monroe on Mondays for Salt Lake City and returns from that point to Richfield on Tuesday, and is established to meet the needs of Western Creamery Company. It appeared, however, that promises had been made to both Winkel Distributing Company and Richfield Auto Parts Company that this weekly schedule would be adjusted to meet each of their needs (Tr. 49, 66), although it is not clear as to what would happen to the Western Creamery Company schedule if adjustments were so made. Moreover, it should be noted that the transportation for all of the requested shippers, for example Winkel Distributing Company, is contingent upon the continuing northbound movement of milk products for Brooklawn Creamery Company (Tr. 38). The witness stated his position would be the same

as to Nielson Furniture Company and Richfield Auto Parts Company (Tr. 38).

Only two shipper witnesses appeared in behalf of applicant. Richfield Auto Parts Company, a dealer in wholesale auto parts at Richfield, was represented by Mr. C. G. Spencer (Tr. 42). It appeared that they desired transportation primarily for oxygen and acetylene tanks (Tr. 42) hauled in loads of around 20,000 pounds (Tr. 46). This witness stated that he had been assured that defendant would change his schedule from Salt Lake City to Richfield from Tuesday to a week-end operation (Tr. 49). This auto supply company operates two large trucks which are used once each week or two for transportation of its supplies from Salt Lake City to Richfield, and proposes to use defendant's services only for acetylene and oxygen and some welding supplies (Tr. 52). It is shipping all other commodities by plaintiff Salt Lake-Kanab Freight Lines, Inc., and finds their service is entirely satisfactory, except it would like an additional service on Saturday night (Tr. 53). The witness of plaintiff testified that its local agent had handled emergencies over such weekends, however, and that the service has consistently provided pick up in the evening at Salt Lake City for delivery the following morning at Richfield. It is apparent from testimony of Mr. Spencer that this company supported the application only for limited commodities, not general auto parts as authorized by the Commission, and that the basis of such support was to secure a cheaper rate. (Tr. 54, 55).

Mr. William Winkel testified on behalf of Bill Winkel Distributing Company of Richfield, a wholesaler of beer and confectionary items (Tr. 59). He distributes into southern Utah south of Gunnison from Richfield, Utah, and owns and operates four trucks, some of which are occasionally used to transport his own merchandise from Salt Lake City to Richfield (Tr. 60). He has been using the services of defendant to supplement his trucks, and transports his beer on leased equipment, which he would continue to do (Tr. 63). He stated that his company shipped small six or seven ton shipments of candy, potato chips and other such items from Salt Lake to Richfield, and that they have no complaint with the service of plaintiff (Tr. 60). Mention was made of minor difficulties in leaving confections in his home-store driveway when no one was there to receive them, but this was specifically denied (Tr. 65) by the Richfield agent of defendant, and is further detailed in the argument.

The operating testimony of the plaintiff herein shows that it operates a common carrier between Salt Lake City and Richfield, among other points, serving intermediate points under Certificate and Convenience and Necessity No. 1169 (Exhibit 1). It maintains extensive terminal facilities at Salt Lake City, including general offices, warehouse and dock with garage facilities at 350 South 1st West Street, with telephone and teletype facilities to its various other terminals (Tr. 74). Pick up trucks and tractors and trailers are stationed at all terminals for performance of pick up and de-

livery service. The terminal facilities at Richfield include a covered dock, 80 by 80 feet with access to two locked rooms (Tr. 95, 96). There are four pick up trucks and a tractor stationed at Richfield for local delivery service, and a telephone, agents and other personnel are there maintained. Plaintiff operates several daily schedules, with additional special schedules, between Salt Lake City and Richfield, all more fully detailed hereinafter.

The operating witness for plaintiff, Dale Belts, testified that this carrier has transported and is now transporting substantial amounts of freight for the Winkel Distributing Company and Richfield Auto Parts Company and that no complaints relative to existing service have been received from either of these companies (Tr. 82). He pointed out (Tr. 82) that the Kanab rates are somewhat higher on volume movements than those of defendant, for example, on 20,000 pounds the defendant's rate is 50 cents per one hundred from Salt Lake City to Richfield, whereas it appears that the plaintiff contracted at a 59 cents rate (Tr. 82).

Based upon past experience, the witness stated that when contract carrier authority had been granted and transportation performed at lower rates, the contract carrier had received the freight and diverted traffic, except when improved and more constant service was

desired, when the shippers continued using the common carrier (Tr. 83, 84). He further testified that the loss of revenue in this area of Utah by such traffic diversion would adversely and seriously affect the revenues of plaintiff, and could impair its ability to continue rendering appropriate common carrier service (Tr. 84).

Mr. Joe H. Fry, the plaintiff's agent at Richfield, also appeared (Tr. 95). He described in further detail the terminal facilities at Richfield and the means by which freight is handled at that point. The Richfield terminal is open normally between 6:00 in the morning and 6:00 at night on five days a week, and on Saturday until 1:00 or 2:00 p.m. This agent is listed in the telephone book, lives within five blocks from the terminal, and Saturday or Sunday delivery is available if desired, although he pointed out that the shippers generally refuse freight on Saturday (Tr. 99). He has never had any complaint from Bill Winkel Distributing Company about the service. Their shipment are usually small, and are set forth on Exhibit No. 4. The agent had offered to set the candy shipments in the basement or in the Winkel garage if desired (Tr. 101), and frequently shipments have been held in the warehouse pending notification to deliver. As to Richfield Auto Parts Company, no complaints have ever been received on the service of plaintiff (Tr. 103).

Following issuance of order herein, plaintiff filed a detailed Petition for Rehearing (Tr. 142), which was denied by the Commission on July 23, 1958, (Tr. 145).

STATEMENT OF POINTS

POINT I.

THE ACTION OF THE COMMISSION IN FINDING THERE IS A NEED FOR GRANT OF AUTHORITY HEREIN IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE EVIDENCE.

- (A) THE TRANSPORTATION FACILITIES OF PLAINTIFF ARE ADEQUATE TO MEET ALL PUBLIC SHIPPING REQUIREMENTS IN THE AREA.
- (B) THE TESTIMONY OF SHIPPER WITNESSES INDICATES SATISFACTION WITH PLAINTIFF'S SERVICE, THAT ANY DESIRE FOR A NEW SERVICE IS PREDICATED SOLELY UPON A PROMISE OF CHEAPER SERVICE, AND FAILS ESTABLISH A NEED FOR ADDITIONAL SERVICE.
- (C) THE FINDINGS OF FACT MADE BY THE COMMISSION ARE BASED UPON THE PREMISE THAT THE RATES PROPOSED ARE CHEAPER THAN THOSE OF PLAINTIFF, WHICH BASIS OF ISSUANCE OF AUTHORITY IS CONTRARY TO LAW WHICH REQUIRES A FINDING BASED ON COMPETENT EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY.

POINT II.

THE ACTION OF THE COMMISSION WILL DIRECTLY AND ADVERSELY AFFECT PLAINTIFF BY PERMITTING THE TRANSPORTATION OF COMMODITIES WHICH COULD AND SHOULD PROPERLY BE TRANSPORTED BY PLAINTIFF.

POINT III.

THE AUTHORITY GRANTED BY THE COMMISSION EXCEEDS THAT REQUESTED BY THE APPLICATION AS SET FORTH IN THE NOTICE OF HEARING, AND IS CONTRARY TO LAW, THE EVIDENCE AND THAT THE FACT FINDINGS OF THE COMMISSION.

ARGUMENT

POINT I.

THE ACTION OF THE COMMISSION IN FINDING THERE IS A NEED FOR GRANT OF AUTHORITY HEREIN IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE EVIDENCE.

- (A) THE TRANSPORTATION FACILITIES OF PLAINTIFF ARE ADEQUATE TO MEET ALL PUBLIC SHIPPING REQUIREMENTS IN THE AREA.

In any proceeding seeking a permit to operate as a contract carrier, the burden of proving that existing transportation facilities do not provide adequate and reasonable service is placed upon the applicant, and a mere showing of convenience or benefit to the applicant or to a few shippers is not sufficient basis for the granting of a permit. See *Wycoff Company v. Public Service Commission*, 227 P. (2d) 323 (1951). In this proceeding before the Commission the applicant totally failed to discharge such burden.

The evidence adduced at hearing discloses not only the fact that the facilities provided by plaintiff are adequate to meet the shipping requirements of the area,

but affirmatively shows the efficiency and regularity of plaintiff's services. The facilities operated by plaintiff include everything needed for a complete carrier service. Adequate docking and storage facilities both in Salt Lake City and Richfield are provided, with pickup and delivery service available and utilized at both terminals. Agents are available, and teletype and telephone lines are maintained between Salt Lake and all agency stops, including Richfield (Tr. 74, 77, 95, 96).

A daily local schedule originating in Salt Lake and terminating in Richfield is operated by plaintiff five days a week. This schedule leaves Salt Lake City between 8 and 9 p.m. and arrives in Richfield some six hours later, generally between 2:00 and 3:00 a.m., providing Richfield with overnight service from Salt Lake City (Tr. 72). These schedules are normally run at less than capacity load, but when freight in excess of capacity is tendered an extra van is dispatched to Richfield or the excess placed upon another schedule passing through Richfield that night (Tr. 73, 104). Additional schedules on which Richfield freight can be transported leave Salt Lake City and pass through Richfield daily, leaving freight at the Richfield terminal. These include a daily run to Kanab five days a week and two or three daily schedules to Phoenix, Arizona. The same daily schedules operate northbound to Salt Lake out of Richfield, Kanab and Phoenix (Tr. 73, 74). Saturday service to Richfield is regularly provided every week by a "cleanup" schedule which picks up freight in Salt Lake City on Saturday

and delivers this freight to various towns, including Richfield, Saturday night. Freight delivered on this shipment is available for Sunday delivery if necessary (Tr. 73).

All equipment necessary for an efficient pick up and delivery service is maintained at each terminal point. At Richfield this includes four pick up trucks and a tractor. The Salt Lake terminal has twelve pick up trucks and a number of tractors and trailers (Ex. 1, Tr. 77). To provide the most rapid service possible, the Salt Lake terminal picks up freight at late as 8:00 p.m. for shipment out to Richfield that night, and the Richfield station is open until 6:00 p.m. (Tr. 75). An effective procedure is in use to handle emergency deliveries and to insure Saturday delivery on freight leaving Salt Lake City Friday night when required, and weekend or holiday shipments are regularly accomodated by plaintiff in its operation. Saturday morning the trailers are each opened and checked for perishables and rush items (Tr. 97).

The facilities offered and now operated by plaintiff are more than adequate to meet the needs of any and all shippers in the Richfield area. It is difficult to see how faster, more dependable, regular service could be obtained. Yet an essential part of the findings of the Commission was that the available facilities from Salt Lake City to Richfield are not adequate. In paragraph 4 of its findings the commision in effect says this, where it states “. . . there is a need for the type of service applicant can provide . . .” Applicant offers only

to provide a weekly return haul service on an unspecified day with other trips on call from Salt Lake City to Richfield. Clearly the finding that this service is needed has no basis in the evidence and is completely contrary thereto.

(B) THE TESTIMONY OF SHIPPER WITNESSES INDICATES SATISFACTION WITH PLAINTIFF'S SERVICE, THAT ANY DESIRE FOR A NEW SERVICE IS PREDICATED SOLELY UPON A PROMISE OF CHEAPER SERVICE, AND FAILS ESTABLISH A NEED FOR ADDITIONAL SERVICE.

The testimony of defendant's shipper witness C. G. Spencer, operator of the Richfield Auto Parts Co., conclusively demonstrates both the adequacy of and satisfaction with plaintiff's operation and the motive for requesting the additional service. Spencer testified that plaintiff now hauls 80% of the freight handled by the Richfield Auto Parts Co. (Tr. 44). His testimony that the delay over the weekend when shipping with plaintiff requires him to run his own trucks for oxygen and acetylene (Tr. 49) is totally negated by his own later admission that he makes this trip only once every week or two (Tr. 50). Such a schedule cannot be reconciled with any urgent need for rush delivery. In addition, the evidence totally failed to disclose any request by Spencer for any Saturday or emergency deliveries which had been refused by plaintiff (Tr. 53). As has been shown, plaintiff regularly makes a Saturday delivery to the terminal at Richfield and upon request

the agent there makes delivery to the consignee. In light of his own testimony, the witness' statement that such service is needed must be discounted. The real reason for Spencer's concern was made evident upon cross examination. At pages 50 and 51 of the transcript the following appears:

"Q. And the reason, as I understand, that you would use the services of Mr. Robinson is because of the fact that you feel fifty cents a hundred would be cheap enough so that you could use a carrier?

A. That's right."

No request has been made of plaintiff by Spencer for a commodity rate, which is available, on oxygen and acetylene tanks for the past year and a half (Tr. 56). Further, on cross examination Spencer demonstrated that any convenience promised by defendant Robinson was no different from service now made available by plaintiff. Spencer said defendant Robinson would, under the changed schedule, pick up his merchandise in Salt Lake on Saturday and deliver it to Richfield Saturday night (Tr. 51). As indicated, this service is already provided by plaintiff (Tr. 89).

The same conclusions are evident from an examination of the testimony of William Winkel, defendant's shipper witness representing Bill Winkel Distributing Company. The Bill Winkel Distributing Company is now using plaintiff's trucks for shipping freight into Rich-

field and the service provided by plaintiff, by Winkel's own admission, has been satisfactory (Tr. 63). Some testimony was offered by the witness indicating candy had been left in the sun by plaintiff and had spoiled (Tr. 67). But Winkel then testified that when the candy spoils he files a claim with plaintiff and no claim had been filed by him for that reason during the years 1957 and 1958 (Tr. 68). Winkel also testified that when requested plaintiff has stored shipments for him while he was out of town (Tr. 65), demonstrating plaintiff's ability to accomodate the needs of this shipper. Winkel's testimony concerning the service Robinson proposes to perform for him discloses that Robinson will bring his freight directly to his house (Tr. 66). That this service is already provided for Winkel by plaintiff is apparent from the testimony given by plaintiff's Richfeld agent, Joe H. Fry. At page 101 of the transcript Fry testified as to his service for Winkel:

“ . . . He has requested that we hold freight there, him being out of town, which we have done, and delivered at his convenience, nor ours—and most of his candy when he isn't there goes through the window. I pass it through the window to his wife and she sits it in the basement. He gets quite a few neon signs and that, and that goes out to his garage.”

Winkel's own description of his operation demonstrates that his shipments are generally not of an urgent nature, and when they are, the service provided

by plaintiff is used. At page 61 of the transcript he testified:

“The way I work when I come in with a truck, I order my merchandise to hit Salt Lake at about the time I figure my truck will be there. Sometimes it doesn’t quite hit there, and if it doesn’t, then I give the orders to ship Salt Lake-Kanab, or I have it come in open, with the instructions that when I leave from these freight houses that if it comes in specific shipments to shoot it on down. But, it is marked “will call” a lot of that, and if I need it before I come back in, then I instruct them to ship it Salt Lake-Kanab.”

With the service proposed by Robinson already being provided by plaintiff one must look elsewhere for Winkel’s motive in appearing in support of the application. Wnkel testified that the rate proposed by Robinson is less than that charged by plaintiff (Tr. 65), and this rate is what would induce him to ship with Robinson (Tr. 68). He further stated if the Robinson rates were the same as those of plaintiff he would go back to using his own trucks (Tr. 68).

In short, there is total failure to show any inadequacy of existing service, and not a scintilla of evidence upon which the Commission could have justified its grant of authority.

(C) THE FINDINGS OF FACT MADE BY THE COMMISSION ARE BASED UPON THE PREMISE THAT THE RATES PROPOSED ARE CHEAPER THAN THOSE OF PLAINTIFF, WHICH BASIS

OF ISSUANCE OF AUTHORITY IS CONTRARY TO
LAW WHICH REQUIRES A FINDING BASED ON
COMPETENT EVIDENCE OF PUBLIC CONVEN-
IENCE AND NECESSITY.

It is readily apparent that the Commission has granted authority solely upon the premise that cheaper rates would thus be available to shippers, notwithstanding the power and obligation of the Commission to regulate rates, and upon the further premise hereinafter noted that such grant is of no consequence in any event since it will not affect existing carriers. Such concept is not only novel, but if followed to any extent will destroy the motor carrier industry under the system of regulation contemplated by Utah statutes.

Four elements are required to be found as conditions precedent to the granting of a permit to operate as a contract carrier. 54-6-8 U.C.A. (1953). These include (1) a finding that the roads of the state will not be unduly burdened; (2) that the proposed operation will not interfere with the traveling public; (3) the granting of a permit would not be detrimental to the public interest; and (4) a finding that the existing transportation facilities do not provide adequate or reasonable services. Here the third and fourth elements are entirely lacking. While it is true that this court said in the case of *Cantlay and Tanzola v. P.S.C.*, 233 P. (2d) 344 (1951) that the Commission was not required in every instance to find all four elements or deny the permit, that case is easily distinguishable on its facts. In every case involving a fact situation analagous to that in this case,

the court has found that a showing of adequate service by an existing carrier is sufficient to bar the permit. See *Rudy v. Public Service Commission*, 265 P. (2d) 401 (1954); *Wycoff Co. v. Public Service Commission*, 227 P. (2d) 323 (1951). Even where the existing common carrier proposed to increase its service to render it adequate, the contract permit was denied. See *Goodrich v. Public Service Commission*, 198 P. (2d) 975 (1948).

Certainly it would not be contended that under a showing as made by defendant here that a Certificate of Convenience and Necessity could issue. Yet as stated by Justice Wade in the case of *McCarthy v. Public Service Commission*, 198 P. (2d) 220 (1947), the showing under our statute which a common carrier must make in order to obtain a Certificate of Convenience and Necessity is almost identical with the showing required of a contract motor carrier in order to obtain a permit to so operate. The only difference, Justice Wade stated, is that in an application for a Certificate of Convenience and Necessity a showing of financial ability is required. As pointed out in *Wycoff Co. v. Public Service Commission*, *supra*, a burden rests upon the applicant to establish that public convenience and necessity require the proposed services in the area. The transcript discloses no evidence tending to show that the proposed service is required.

By granting this permit to Robinson, the Public Service Commission has departed completely from the statute and has created and applied a new test for

issuing authority. This new test, that a contract carrier permit will be granted to any carrier in need of a back haul to sustain his operations regardless of existing carrier facilities, is entirely without foundation in the statute or the cases. Such arbitrary action by the Commission is a startling abuse of discretion.

In the findings of fact made by the Commission, paragraph two (Tr. 137) indicates that the proposed contractees will dispense with their own operations and use Robinson for these operations if the permit is granted. As shown above, the only reason the shippers would do so is Robinson offers cheaper rates. No other evidence offered would justify this finding. The need referred to in paragraph four of the findings (Tr. 137) has no basis whatsoever in the evidence. The findings of fact are devoid of any finding based on evidence of inadequacy of present service or public need for the proposed service as required by law.

The fact that applicant's operation is in need of the business (Tr. 16) is no reason for granting a permit. The justification of the issuance of the first permit is not at issue. That applicant cannot sustain his operation by the contracts he has (Tr. 40) is of no import in determining whether he should be granted a new permit.

POINT II.

THE ACTION OF THE COMMISSION WILL DIRECTLY AND ADVERSELY AFFECT PLAINTIFF BY PERMITTING THE TRANSPORTATION OF COMMODITIES WHICH COULD

AND SHOULD PROPERLY BE TRANSPORTED BY PLAINTIFF.

The granting of this permit will obviously have a serious affect upon plaintiff by the diversion of freight plaintiff is now carrying (Tr. 84). Plaintiff's general manager testified that in his experience with contract carriers whose rates are lower the freight is taken to the contract carrier (Tr. 84). As shown in Exhibit 4, a considerable volume of freight is now moved by plaintiff for the shippers now proposing to contract with Robinson. The loss of these accounts would obviously have an adverse affect on plaintiff's business. It is clear that with the rate differential offered by Robinson much of the freight of these shippers will be diverted to the contract carrier. The common carrier service supplied by plaintiff is a costly operation and a loss of revenue in an area would demand a reconsideration of the schedules and rates in that area.

Plaintiff now carries a considerable amount of goods for Richfield Auto Parts Co. Under the permit, the contract carrier will be allowed to carry, in addition to oxygen and acetylene tanks, general auto parts, and will be allowed to serve all points between Salt Lake and Richfield. Again it must be pointed out that no application was made to serve all points between Salt Lake and Richfield and absolutely no evidence was offered on which to base the grant. By offering lower rates, defendant will soon ship the largest part of Richfield Auto Parts Company freight, and the same situation

will occur with the Bill Winkel Distributing Co. No other reasonable conclusion is possible. Plaintiff would then provide service only if the contract carrier were not available.

The common carrier authority held by plaintiff contemplates transportation by plaintiff of the type of materials here involved in this type of situation. The finding of the Commission that the granting of this application will not result in any substantial detriment to any other carrier (Tr. 137) is directly contrary to the evidence.

POINT III.

THE AUTHORITY GRANTED BY THE COMMISSION EXCEEDS THAT REQUESTED BY THE APPLICATION AS SET FORTH IN THE NOTICE OF HEARING, AND IS CONTRARY TO LAW, THE EVIDENCE AND THAT THE FACT FINDINGS OF THE COMMISSION.

Under the application herein (Tr. 109) defendant seeks authority to transport general commodities over regular routes from Salt Lake City to Monroe, Utah, serving the off route points of Richfield and Gunnison (Tr. 109). The notice of hearing (Tr. 113) similarly shows the scope of the application. However, in section (e) of the Commission's order (Tr. 139) authority is granted to transport general commodities for Richfield Auto Parts Co., "*to all points between Richfield and Salt Lake City, using the off route town of Gunnison.*"

The complete indifference of the Commission to applicable decisions of this court and requirements of the Utah statutes in this proceeding, is clearly evidenced in its action in thus granting authority substantially in excess of that requested in the application and as set forth in the notice. Under section 54-6-8 and 54-6-5 U.C.A. (1953), notice is required of the scope and extent of requested authority. Obviously the grant exceeds both the application and the notice, and it is clear that not only this plaintiff but other common carriers could not anticipate the issues gratuitously established by the Commission in its order. Other common carriers serving such intermediate points between Salt Lake City and Richfield as Provo received no notice of hearing, and may not to this date be aware of the issuance of such authority since presumably they would not have received a copy of the order issued by the Commission.

The action of the Commission in granting authority neither requested nor noticed would appear so clearly erroneous that plaintiff believes no useful purpose would be served by further argument. The decisions of this court are numerous on such matters and the statutes seem more than adequately clear.

Equally disturbing, however, is the fact that there is not a scintilla of evidence upon which a grant of authority could be based in any event. As has been noted, the evidence shows that Richfield Auto Parts Company proposes to use the facilities of defendant only in the transportation of cylinders of oxygen and acetylene and

small welding supplies (Tr. 52), between its store in Richfield and Salt Lake City, Utah. This evidentiary aspect of the matter has been found by the Commission in its paragraph 2 of Findings of Fact (Tr. 137). It must be also noted that the grant of authority is not supported by the evidence since it is clear that Richfield Auto Parts Co. has no complaint against existing transportation service, is satisfied with the same and proposes to continue its use whether the application be granted or not. The sole basis of appearance was that cheaper rates could be secured for the transportation of oxygen and acetylene cylinders. In addition to granting points of service not requested by defendant, the Commission found need where none exists. Further, it has granted general commodity authority where the shipper only proposed to use applicant's service because of cheaper rates on oxygen and acetylene cylinders and occasional welding supplies.

The action of the Commission is incredible, and indicates a callous indifference to applicable case and statutory law and the evidence. The order of the Commission in granting authority herein is arbitrary and capricious and contrary to law.

CONCLUSION

In conclusion, it is submitted that the action of the Public Service Commission in granting the contract carrier permit to defendant Robinson is arbitrary and

capricious and directly contrary to the evidence, and will adversely affect the operation of plaintiff in this area. The authority allowed exceeds that requested and of which notice was given and is contrary to the evidence. The order of the Commission should be set aside.

Respectfully submitted,

WOOD R. WORSLEY,

Attorney for Plaintiff

701 Continental Bank Building

Salt Lake City, Utah