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

Utah Supreme Court

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UNIVERSITY UTAH
IN THE SUPREME COURT

of the

STATE OF UTAH

AUG 6 1959

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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
LINES,

Defendants.

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Clerk, Supreme Court, Utah

No. 8941

PLAINTIFF'S BRIEF IN SUPPORT OF
PETITION FOR REHEARING

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PLAINTIFF'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF THE CASE

This brief is before the Supreme Court in support of a Petition for Rehearing upon the decision of this Court filed May 13, 1959, affirming an order of the Public Service Commission of Utah, which granted to defendant A. B. Robinson, dba A. B. Robinson Truck Line, contract carrier permit No. 475. This rehearing is urged upon the court not in consideration of the economic ef-

fects as to Plaintiff of the of the Public Service Commission which was affirmed by the decision of this Court, but rather because of the far-reaching and disastrous effect of the unprecedented legal theory announced in the decision.

STATEMENT OF POINT AND ARGUMENT

POINT I

THE SUPREME COURT ERRED IN AFFIRMING THE ORDER OF THE PUBLIC SERVICE COMMISSION UPON THE UNPRECEDENTED LEGAL THEORY THAT CONTRACT CARRIER AUTHORITY WILL BE GRANTED IN A SITUATION WHERE SUCH GRANT WILL NOT DEPRIVE AUTHORIZED COMMON CARRIERS OF TRAFFIC THEY ARE NOT AT THE TIME OF THE APPLICATION TRANSPORTING. SUCH A PROPOSITION IS CONTRARY TO THE LAW AND COMPLETELY ABANDONS THE CONCEPT OF PUBLIC CONVENIENCE AND NECESSITY AND ADEQUACY OF EXISTING SERVICES AS PREREQUISITES TO A GRANT OF AUTHORITY AS PROVIDED IN SECTION 54-6-8, U.C.A. 1953.

In its opinion affirming the decision of the Public Service Commission, the court said:

“Here the evidence indicates that the granting of this contract carrier authority will not deprive the common carrier of any business, but the contract carrier will only haul freight which the contractees have in the past hauled in their own trucks and which they claim they will haul in the future if the contract carrier authority is not granted, because they claim they can haul this freight in their own trucks for less than the plaintiff common carrier rates.”

The implications of this language extend far beyond the economic considerations involved in this case. In effect the court has abandoned the requirements of convenience and necessity and a showing of inadequacy of the service currently supplied by common carriers, which have long been established in the law of this State. (See *Wycoff Co. v. Public Service Commission*, 227 P. (2d) 323 (1951); *Rudy v. Public Service Commission*, 265 P. (2d) 401 (1954); *Goodrich v. Public Service Commission*, 198 P.(2d) 975, (1948); *McCarthy v. Public Service Commission*, 198 P. (2d) 220, (1947). All a contract carrier applicant need show under the decision of this Court is that the commodity for which he seeks authorization is not at that time being transported by a protesting common carrier for the shipper for whom he proposes to transport. Such a holding will restrict the common carriers of this State to the commodities and volume of traffic they are transporting as of the date of this opinion. As a practical matter the flow of traffic to and from any common carrier is in a constant state of flux. Shippers, for one reason or another, may cease the use of common carriers or have no further need for their services, yet at the same time other shippers may commence the use of such transportation service. If the theory of motor carrier regulation is to be logically followed, it must adhere to the concept that an existing carrier shall be permitted to transport commodities for the shipping public where it has the facilities and the express willingness and ability to do so. The mere fact that a contract carrier may, by virtue of its limited operations, be able

to initially tender service at a slightly reduced rate has uniformly been rejected as the basis upon which a grant of authority might be allowed. The reasons for such concept are obvious. As of the date of any hearing on an application for contract carrier authority, the parties have presumably entered into a contract providing, among other things, for the rate which will be charged for the transportation service. This is, however, nothing more than a proposal, and such rates are subject to adjustment at any time in the event that they prove inadequate. The granting of a contract carrier permit is not one necessarily authorizing service under the peculiar circumstances which exist at the moment of its issuance, but is a continuing authorization subject to change during future operations under its terms.

In the instant case the shipper has attempted to support the application upon the premise that it will utilize its own trucks in the transportation movement unless the authority is granted, and the argument is then advanced that this can have no real effect upon protesting common carriers. The intent of any shipper witness today, the length to which he may go in testimony of this type, constitutes no obligation as to the method of transportation in the future. The decision in this case is extremely dangerous in its concept that the mere threat of a shipper to utilize his own equipment if the contract carrier authority is not granted, is sufficient to justify a grant of authority. If this case were considered as an isolated instance, the economic impact on the plaintiff

herein is admittedly of a limited extent. If, however, the rule of this case is accepted as sound regulatory practice, it will open the door to a flood of cases based upon the above concept. There would appear no limit to the grants of contract carrier permits which may be issued. This traffic moves primarily in truckload lots and is clearly the most desirable traffic. Such a diversion, if allowed to expand, will mean that the common carriers who are by law compelled to transport any commodities tendered to them by the shipping public, will find themselves in a declining economic situation which can only result in a substantial reduction in service offered to the public or total cessation of common carrier service. In a State such as Utah wherein substantial areas are served exclusively by truck, and rail facilities are not available, the detriment to the shipping public is obvious.

The Interstate Commerce Commission has for many years administered the Interstate Commerce Act in which is found a declaration of the National Transportation Policy. The basic concept of utility regulation as embodied in such Act is essentially the same as that found in the statutes and in the decisions interpreting the same in the various states, including Utah. While it is recognized that the decisions of such Commission are not binding upon this court, it is nevertheless believed that in view of the extensive experience of the Commission and its specialization in this particular field its decisions should be of substantial persuasive force. Such Commission has frequently had occasion to consider cases

factually similar to the case before the court, and has held that the mere fact that the protesting common carrier is not at the time of application transporting commodity for the shipper involved cannot sustain a grant of contract carrier authority. Rather, the Commission has held that such traffic must be first tendered to the common carrier to determine whether or not the services rendered by it are adequate. The decided cases of the Commission are numerous and consistent, and a few will suffice to show the regulatory concepts.

The case of Arthur B. Jarrell—Norfolk, Virginia; No. BC 19917 (Sub. No. 1); 11 FCC 33, 615, involved a situation similar to that in the instant case. The shipper had not utilized the available facilities of protestant common carrier and was supporting the contract application. In denying the application, the Interstate Commerce Commission said:

“The evidence establishes that there is available motor common carrier service from Pittsburgh to Norfolk which has not been used or otherwise shown to be inadequate in any material respect. * * * we would not be fostering a sound transportation system by refusing to allow an existing carrier to obtain additional traffic.”

Again in Monterrey Freight Forwarding Corporation Contract Carrier Application; No. MC 115437; 12 FCC 33, 757, where as in this case, the shipper had used proprietary equipment rather than ship with the available common carriers, the Commission denied the contract application and said:

“As seen, the record clearly indicates that an abundance of service is available to meet the needs of the sole supporting witness. Instead of using these services, the supporting witness has turned to the operation of proprietary equipment. It is our opinion that if afforded the opportunity the opposing carriers could and would provide adequate service to handle the traffic here involved.”

Citing again from the Interstate Commerce Commission, in C & E Trucking Corporation, Extension—Whole Condensed Milk; No. MC 111435 (Sub. No. 13); 12 FCC 34, 024, where the protestant motor common carrier was not transporting the milk involved, the Commission denied the contract application and said:

“Since we have found that protestants hold appropriate authority, and since no deficiency or disability has been shown in their service, we believe that they should be afforded an opportunity to transport the considered traffic before a new service is authorized in competition with them.”

Many other cases could be cited supporting this well established principle of law. It is inherent in the concept of regulation of the motor carrier industry that the requirement that a carrier provide adequate service contemplates that the shipping public must use such service so long as it is adequate and that a single shipper cannot obtain for himself additional services because he does not choose to use that provided. Monopolistic rights are granted and rates regulated by the State on the pre-

mise that the carriers granted these rights will be protected in their exercise of them. The motor carrier industry does not purport to operate under a theory of completely independent competition. Protestant herein has expended considerable sums of money in equipping itself to meet the needs of the entire shipping public in the area in which it is authorized to serve. It has supplied services which are fully adequate to meet the needs of the shipper here involved. That the shipper may be dissatisfied with the rates offered is a matter which he should take up with the Public Service Commission, the rate regulating body of the State. This is the remedy the law has established for such complaints.

A stable transportation system is an important requisite to a sound economy of this State. The rule of this case can only promote confusion and strife in the transportation industry in Utah. Common carriers will be deprived of a sound policy of regulation which has allowed them to provide at great expense the facilities and service now available to the public. Such a rule will needlessly stunt the growth of the common carrier industry and will induce many speculative and unwarranted entries into the contract carrier field.

While the amount of traffic at issue in this particular case is insignificant in the transportation picture of the entire State, the implications of the rule of the case

extend far beyond the interests of the parties hereto. Such a decision should not be permitted to stand.

CONCLUSION

In conclusion, it is submitted that this Court should reconsider this case in light of the unprecedented rule of law which, without citation or authority, was dropped, off hand, into the decision. Such a rule is completely contrary to the general rule of law and the rule which has pertained in Utah from the inception of motor carrier decisions and legislation.

Respectfully submitted,

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