

1968

Lewis Bros. Stages, Inc. v. The Public Service Commission of Utah; Hal F. Bennett, Donald Hacking, and Donald T. Adams, Its Members and Link Trucking, Inc., Uintah Freightways, et al., v. Public Service Commission of Utah, Donald Hacking, Don T. Adams and Hal S. Bennett : Brief of Plaintiff Lewis Bros. Stages, Inc.

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEWIS BROS. STAGES, INC., a corporation,
Plaintiff,
vs.

THE PUBLIC SERVICE COMMISSION OF
UTAH; HAL F. BENNETT, DONALD HACK-
ING, and DONALD T. ADAMS, its members;
and WYCOFF COMPANY, INCORPORATED,
A Utah corporation,
Defendants,

Case No.
11081

LINK TRUCKING, INC., UINTAH FREIGHT-
WAYS, a corporation, MILNE TRUCK LINES,
INC., PALMER BROTHERS, INCORPORATED,
RIO GRANDE MOTOR WAY, INC., LAKE
SHORE MOTOR COACH LINES, INC., DEN-
VER-SALT LAKE-PACIFIC STAGES, INC.,
and CONTINENTAL BUS SYSTEM, INC.,
Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF UTAH,
DONALD HACKING, DON T. ADAMS and
HAL S. BENNETT, Commissioners of the Public
Service Commission of Utah, and WYCOFF
COMPANY, INCORPORATED,
Defendants,

Case No.
11082

BRIEF OF PLAINTIFF LEWIS BROS. STAGES, INC.

Appeal from the Order of the Public Service Commission of Utah

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Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION OF CASE	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	5
POINT I.	
CONVENIENCE AND NECESSITY DOES NOT REQUIRE THE GRANT OF AN AUTHORITY IN THE AREA TO BE SERVED BY LEWIS BROS. STAGES, INC.	5
CONCLUSION	11

CASES CITED

Lake Shore Motor Coach Lines, Inc. v. Bennett, 8 Utah 2d 293, 333 P.2d 1061 (1958)	5
Worm Extension - Ainsworth and Johnston, Nebr., 32 MCC 641, 3 Fed. Car. Cases Sec. 30,209	6
Jagel, 44 MCC 839, 5 Fed. Car Cases Sec. 30,990..	7
Northern, 53 MCC 577, 8 Fed. Car. Cases Sec. 32,333	7
Consolidated Freightways - Reymers, 36 MCC 623, 2 Fed. Car. Cases Sec. 7729	7

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} Case No.
11082

BRIEF OF PLAINTIFF LEWIS BROS. STAGES, INC.

STATEMENT OF THE KIND OF CASE

This involves the application of Wycoff Company, Inc., for authority to operate as a common carrier by motor vehicle for the transportation of general com-

modities in express service by performing an expedited service on established schedules over irregular routes with guaranteed delivery times, using simplified billing procedures and at premium tariff rates, between all points and places in the State of Utah over established highways.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

On the 12th day of September, 1967, the Public Service Commission of Utah, hereinafter referred to as "Commission", granted to Wycoff common motor carrier authority for the transportation of general commodities in express service between points and places in the State of Utah. Said authority is subject to various restrictions, including weight, rates and schedules.

RELIEF SOUGHT ON APPEAL

Lewis Bros. Stages, Inc., seeks to have set aside the order of the Public Service Commission of Utah dated the 12th day of September, 1967.

STATEMENT OF FACTS

Twenty-two carriers opposed the application of Wycoff. Not all of said carriers have petitioned this court for a Writ of Review and as to those carriers so petitioning, separate briefs will be filed by their counsel.

This brief will be confined to the plaintiff Lewis Bros. Stages, Inc.

Plaintiff Lewis Bros. Stages, Inc., operates bus service for the transportation of passengers, their baggage and express between Salt Lake City and Park City, Utah; Salt Lake City and Bingham Canyon, Utah; Salt Lake City and Ely, Nevada; and Salt Lake City and Tooele, Utah, and intermediate runs. Insofar as this hearing was concerned, the Ely run would be considered to terminate in Wendover, Utah, since the remainder of the run is without the state and not affected by the Wycoff application.

The authority ultimately granted Wycoff and which is pertinent to the instant proceeding is as follows:

“ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Wycoff Company, Incorporated, be and is hereby issued Certificate of Convenience and Necessity No. 1608, to operate as a common carrier by motor vehicle for the transportation of general commodities in express service, as herein defined, between points and places in the State of Utah (except commodities in bulk and those requiring special equipment).

Express service for purposes of this certificate is defined as expedited service, primarily on small shipments, on firmly established schedules, over regular routes, with guaranteed times of delivery, using simplified billing procedures, and at premium tariff rates.

A. Except as provided in Paragraphs B and C, the express service hereby authorized shall be statewide, and shall be subject to the following restrictions and requirements:

1. Applicant shall be limited to the transportation of shipments of not to exceed 250 pounds on a weight basis. 'Shipment' as herein used shall mean commodities moving on a single freight bill from one consignor to one consignee. Shipments shall not be separated to avoid this restriction.

2. Applicant shall file with the Commission its express schedules and any modifications thereof. In accordance with such filed and published schedules, applicant shall provide at least once daily to all points and communities, and a minimum of next-day service between all such points on all established highways within the State of Utah.

3. As part of the express service hereby authorized, applicant shall render pickup and delivery service at all points including Salt Lake City, Ogden and Provo.

4. Applicant shall publish special express tariff rates to be approved by the Commission.

5. The Commission having continued jurisdiction may review the operations hereunder periodically to ascertain whether or not increased weights or volumes have adversely affected Wycoff's ability to render express service.

B. Except as provided in Paragraph C hereof, the express authority of applicant between points in Salt Lake County is limited to shipments, as herein defined, of not more than 100 pounds.
(R. 155-156)

In his conclusion the Examiner found as to the adequacy of existing service the following.

“Utah has available truck and bus service of varying types and frequency to all communities on its highways. General freight service has been adequate. Express service from Salt Lake City has been adequate to some communities and areas.” (R. 115)

Additional facts, law and argument have been set forth in briefs submitted by plaintiff’s attorney, and all of which for brevity’s sake are incorporated herein by reference.

POINT I

CONVENIENCE AND NECESSITY DOES NOT REQUIRE THE GRANT OF AN AUTHORITY IN THE AREA AUTHORIZED TO BE SERVED BY LEWIS BROS. STAGES, INC.

The limited record which this court ordered to be brought before it for review affirmatively discloses that there is no need for the service authorized to be performed by Wycoff in the area served by Lewis Bros. Stages, Inc.

The Report and Recommended Order calls attention to the law as heretofore clearly established by the Utah Supreme Court in *Lake Shore Motor Coach Lines, Inc. v. Bennett*, 8 Utah 2d 293. Emphasis must be placed on the particular portion of the citation in

said Report wherein the Commission is charged to "*plan long-range for the protection and conservation of carrier service so that there will be economic stability and continuity of service. This obviously cannot be done unless existing carriers have a reasonable degree of protection in the operations they are maintaining.*"

This reasoning has long been the primary consideration in the granting or extending of motor carrier authority, and is in keeping with the national transportation policy. The prime element in determining the public interest is the maintenance of adequate transportation facilities for handling general traffic. It may be that some individual shipper may find it more convenient or more economical to have a particular carrier handle for him a particular kind of traffic. This, however, does not constitute a conclusive test. If taking the traffic from the established transportation agencies may so reduce their earnings that they will be unable to maintain adequate and efficient common-carrier for the public, including that individual, then it is not in the public interest. Beyond resulting in the curtailment of service, the diversion of selected traffic may even cause losses so heavy as to necessitate abandonment of the facilities which are depended upon for community life. *Worm Extension - Ainsworth and Johnston, Nebr., 32 MCC 641, 3 Fed.Car. Cases Sec. 30,209.*

The Commission has denied common carrier operations by property carriers on the ground that sound economic conditions in the trucking industry require

the protection of existing motor carriers from added competition. It is implied that sound economic conditions in the motor carrier industry would be impaired by the existence of a new carrier or extension of an existing one whenever existing carriers have sufficient facilities to handle the traffic and their operations are conducted economically and efficiently and adequately. *Jagel*, 44 MCC 839, 5 Fed. Car. Cases Sec. 30,990.

An application to extend service in order to replace existing short-haul inter-change service was denied on the main premise that the continued existence of needed local services of short-haul carriers would be jeopardized. *Northern*, 53 MCC 577, 8 Fed. Car. Cases Sec. 32,333.

Increased competition is considered desirable UNLESS THE TERRITORY OR ROUTE DOES NOT OFFER SUFFICIENT TRAFFIC TO ENABLE THE EXISTING CARRIERS TO OPERATE WITHOUT A LOSS OF REVENUE. In *Consolidated Freightways-Reymers*, 36 MCC 623, 2 Fed. Car. Cases Sec 7729, it was held that there was not enough traffic in the area to support both the existing carriers and an additional operator, and since the additional operator might cause such a loss of traffic as to likely impair the ability of the existing carrier to render adequate service, the application was denied.

The examiner notes in paragraph 12 that the applicant contends its proposed service is not in direct competition with the regular freight carriers. While

there may be a distinction between express and freight, as to this bus company protestant there is in fact *direct competition* because the bus company renders *express* service. To allege that there will be *no substantial diversion of regular freight shipments from the existing carriers* is meaningless as to the bus companies—as the Report concludes to grant authority to transport up to 250 pounds, the direct diversion will be most severe as to the *express* carriers. There can be no question but what this protestant has established how significant express revenue is to the over-all passenger bus service. Without express revenue, operations could not be conducted. As indicated in *Worm Extension* hereinabove, the resulting loss of revenue may necessitate abandonment of the facilities which are depended upon for community life.

The Report states in paragraph 16 that the evidence viewed as a whole shows a need for a single line carrier with statewide express authority to reach the communities and serve the farmers, mines, automotive users, industries, stores and businesses, regardless of origin or destination. The entire history of the transportation systems of this state and the nation is one of fragmented authorities, and to now conclude that the development of the industry in this pattern is no longer appropriate has the effect of determining that the investments made by established carriers over many years of service will no longer be considered and no protection afforded. The Report further generalizes that the buses use commission agents, that customers must pick up

merchandise, etc. As to this plaintiff, the record is not subject to such generalizations—there is specific testimony with respect to the fact that deliveries are made direct to the customer's door.

The examiner concludes that "*express service from Salt Lake City has been adequate to some communities and areas*". There can be no question but what it has been adequate in the areas served by this plaintiff—for there was no evidence to the contrary. Having so concluded, how can the grant of authority proposed then be justified? There is a further conclusion that buses are restricted in many phases of their operations. It should be noted that such restrictions are imposed by the Commission itself, not the carriers. The Report concludes that the 500 pound per schedule limitation should be eliminated and is contrary to good operating practices and results in improper discrimination in services rendered. That restriction was imposed by the Commission in the previous grant of authority. Can we not assume that the same conclusion will be reached in the future with respect to the 250-pound limit now proposed? *Certain limitations and restrictions are imposed upon all carriers* and have been throughout the history of the development of the transportation industry.

It is concluded that a special kind of service is proposed by the applicant. This plaintiff fails to see how the service is any more "special" than that it has rendered to the communities it has served for many years.

One of the specific purposes of the application is

noted to be the desire to eliminate the territorial restrictions which were imposed as a result of the *Lake Shore Motor Coach Lines, Inc. v. Bennett*. Knowing the exact territorial restrictions involved, it would appear to be most significant to establish a change of circumstances in these communities and in the needs of the shipping public there involved. Notwithstanding, counsel for this plaintiff, relying upon hearing notes only and without the aid of a transcript, cannot recall that any witnesses whatsoever appeared from the City of Tooele, a city of some size and population, and one which the applicant was heretofore not permitted to serve, in support of the application of Wycoff, or to present evidence that the Lewis service was unsatisfactory or inadequate. It is alleged that the same is true as to Park City and various areas in Salt Lake County served by this protestant. Furthermore, witness after witness affirmatively stated that they were *not* in fact supporting the application to serve in Salt Lake County. Certainly it cannot be concluded that the generalized testimony of a businessman that he ships "all over the State" is sufficient to support the grant of authority into the areas served by this carrier, absent some more specific evidence of need, inadequacy, or other tests so clearly imposed by the law. The examiner observes that experienced counsel were able to induce lay witnesses to accede to general characterizations of testimony. It is urged that in many instances without such "inducement" the testimony of those witnesses itself was "general" on direct examination as well as cross-examination.

Finally, this protestant wishes to call the court's attention once more to the conclusion that "The grant of this express service limited to not over 250 pounds per shipment will not result in an unreasonable diversion of traffic from the bus or truck lines". *From whence will the traffic come?* If, for instance, Lewis is now providing completely satisfactory service into Tooele County, not operating to capacity, delivering merchandise to the customer's door, running regular schedules, and supplying bus passenger service to the communities involved, **WHERE WILL WYCOFF OBTAIN EXPRESS TRAFFIC TO TOOEELE COUNTY OTHER THAN FROM LEWIS?** There is no evidence of economic growth or development in that area to supply *new* shippers or consignees. Lewis has been able to provide this service to the community heretofore by reason of the fact that the Utah Supreme Court recognized the necessity for protecting its authority to do so, and denied to Wycoff the same authority it now seeks anew, and this protestant urges that the facts now before the Court are no different at this time than they were at the time of the *Lakeshore v. Bennett* hearing.

It is respectfully submitted that the Order of the Public Service Commission so far as it affects this plaintiff, should be set aside.

Respectfully submitted,

IRENE WARR

Attorney for Plaintiff

Lewis Bros. Stages, Inc.