

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 Plaintiffs Milne Truck Lines, et al.

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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 PLAINTIFFS

MILNE TRUCK LINES, INC., PALMER BROTHERS, INC.,
RIO GRANDE MOTORWAY, INC., LAKESHORE MOTOR
COACH LINES, INC., DENVER - SALT LAKE - PACIFIC
STAGES, INC. and CONTINENTAL BUS SYSTEM, INC.

REVIEW OF AN ORDER OF THE PUBLIC SERVICE COMMISSION OF UTAH

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RIO GRANDE MOTORWAY, INC., LAKESHORE MOTOR
COACH LINES, INC., DENVER - SALT LAKE - PACIFIC
STAGES, INC. and CONTINENTAL BUS SYSTEM, INC.

STATEMENT OF THE KIND OF CASE

This case involves an application to the Public Service Commission of Utah by the defendant Wycoff Company, Incorporated, for a certificate of convenience and necessity to operate as a common carrier by motor vehicle for the transportation of general commodities in express service between all points and places in the State of Utah over established highways.

DISPOSITION OF THE CASE

By its Order dated September 12, 1967, the Public Service Commission of Utah granted to Wycoff Company Incorporated a certificate of public convenience and necessity No. 1608 authorizing it to operate as a common carrier by motor vehicle for the transportation of general commodities in express service between all points and places in the State of Utah subject to certain restrictions and conditions.

RELIEF SOUGHT ON REVIEW

Plaintiffs seek to have the Order of the Public Service Commission dated September 12, 1967 reversed.

PRELIMINARY MATTERS

This brief is filed on behalf of Milne Truck Lines, Inc., Palmer Brothers Incorporated, Rio Grande Motorway, Inc., Lake Shore Motor Coach Lines, Inc., Denver-Salt Lake-Pacific Stages, Inc. and Continental Bus System, Inc., herein respectively referred to as Milne, Palmer, Rio Grande, Lake Shore, Continental and Denver-Salt Lake, and collectively referred to as these plaintiffs. Other briefs have been filed on behalf of plaintiffs Lewis Bros. Stages, Inc., Link Trucking, Inc. and Uintah Freightways. The defendant Wycoff Company Incorporated will be referred to herein as Wycoff and the de-

fendant Public Service Commission of Utah will be referred to as the Commission.

These plaintiffs have heretofore filed a memorandum with the Commission which contains a detailed outline of the facts and arguments relative to many of the elements and issues of this case upon which these plaintiffs rely to support their positions and said memorandum should be reviewed by this court in coming to its decision herein. (See R-220) In order to avoid unnecessary repetition, these plaintiffs will not restate all of such facts and arguments but rather incorporate said memorandum herein by reference. In addition, certain facts and arguments are contained in the briefs and memoranda of the other plaintiffs herein which these plaintiffs will not duplicate in this brief but which these plaintiffs rely upon to support their positions in this action.

Because this court has ordered that this case should be heard on review without the certification to the court of a transcript of the testimony of witnesses who appeared before the Commission, the facts herein stated are taken from that portion of the record which has been certified to this court and from the personal notes, records and memory of the counsels for these plaintiffs.

STATEMENT OF FACTS

Since February, 1959, Wycoff has been operating a general commodities express service between all points and places in the State of Utah pursuant to its Certificate

of Public Convenience and Necessity No. 1162, Sub 2. Said certificate is restricted against service between Salt Lake City on the one hand and Ogden, Park City, Bingham Canyon, Wendover and Tooele, Utah, on the other hand, and against service to any and all intermediate points along said routes between such points. In addition, it is restricted against the transportation of shipments weighing in excess of 100 pounds and not more than 500 pounds of express shipments may be carried on any one of its schedules. Its authority is further restricted to the transportation of express pursuant to schedules which are tied to the movement of newspapers and mail.

The express authority of Wycoff under its Certificate No. 1162, Sub 2, was not a result of any showing of public convenience and necessity, but rather was a result of a stipulation entered into with Wycoff by various protesting carriers at the Commission hearing on Wycoff's application for statewide general commodities express authority. The territorial restrictions in that certificate came about when this court reversed the Commission's grant of statewide express authority to Wycoff in the case of *Lake Shore Motor Coach Lines, Inc. v. Bennett*, 8 Ut. 2d 293, 333 P.2d 1061 (1958), upon the grounds that there was no showing of public convenience and necessity for the service. The court did not however reverse the Commission with respect to territories other than those served by the particular plaintiffs who appealed to this court.

The application of Wycoff with which we are concerned in this case reads as follows:

“Applicant proposes to operate as a common carrier by motor vehicle for the transportation of property, namely, general commodities in express service, by performing an expedited service on established schedules which will be filed by the Commission, over regular routes with guaranteed delivery times, using simplified billing procedures and at premium tariff rates (excluding commodities in bulk and those requiring special equipment.) Between all points and places in Utah over established highways (R-1).

The application was referred for hearing to hearing examiner, Loren J. Broadbent. Hearings commenced at Salt Lake City, Utah on January 10, 1966, were held on various occasions at Salt Lake City, Logan, Vernal, Moab, Richfield and Cedar City, Utah and ended on September 9, 1966. None of the Commissioners of the Public Service Commission of Utah attended the hearings except sporadically at Salt Lake hearings.

Prior to commencement of the hearings, the protestant Ashworth Transfer, Inc., conditionally withdrew its protest upon Wycoff's amendment to the application restricting the proposed service to shipments weighing 1,000 pounds or less. (R-94)

At the commencement of the hearings, the protestants objected to the admission of the testimony of shipper witnesses until such time as the "premium rates" to be charged by the applicant as a part of its proposed service were placed into evidence. The objections were overruled and the hearing continued. Thereafter, on January 24, 1966, protestants Magna- Garfield Truck Lines, Redman Moving Storage Company, Barton Truck Lines, Uintah Freightways and Link Trucking, Inc. filed a written Motion to Dismiss or in the Alternative to Suspend Proceeding. The motion was joined in by the other protestants and was based upon the contention that the testimony was taken at the hearing at that time revealed that Wycoff did not intend to charge a premium rate as represented in its application and further that the testimony of shipper witnesses was rendered meaningless until such testimony could be related to the "premium rates" to be charged by Wycoff under its proposed operation (R-96). The motion was denied.

At the conclusion of the hearings, the Examiner ordered that parties be allowed to submit memoranda on questions of fact and law, which memoranda were submitted by all plaintiffs in this action and are contained in Volume II of the transcript of record herein. Thereafter, on May 10, 1967, the hearing examiner issued his Report and Recommended Order by which he recommended that Wycoff be authorized to operate as a common carrier by motor vehicle for the transportation of general commodities in shipments of 250 pounds or less

in weight in express service, between all points and places in the state of Utah, subject to the conditions that Wycoff file and publish its schedules, render service at least once daily to all points and communities in the State with a minimum of next-day service between all points on all regular highway routes within the State, and that Wycoff commence rendering pickup and delivery service at all points. (R-101)

Simultaneously with the filing of the Examiner's Report and Recommended Order, the Commission ordered the parties to file their Exceptions, if any, to the Report and Recommended Order within 30 days (R-100). Thereafter, all plaintiffs to this action and certain other protestants filed written motions requesting that a transcript of the proceedings held before the hearing examiner be made available prior to the filing of Exceptions so that a proper analysis of the evidence could be made by the parties and reviewed by the Commission. Said motions were denied by the Commission (R-133) and on September 12, 1967, the Commission, without the aid of a transcript of the testimony taken at the hearings, issued its Report and Order adopting almost verbatim the Findings of Fact and Conclusions contained in the Examiner's Report and Recommended Order and ordering that Wycoff be granted authority 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 service 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 to 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 continuing 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)

On the day following the issuance of the Commission's Report and Order, Wycoff published its tariff rates to be charged pursuant to the express authority it had received. Petitions were then filed on behalf of all plaintiffs in this action and certain other of the protestants requesting that such tariffs be suspended and subject to review by the Commission upon the grounds that they were not "premium rates" and therefore not in conformity with the terms of Wycoff's application or the Order of the Commission granting Wycoff the expanded express authority. Said Petitions were denied by the Commission (R-193). Petitions for rehearing and reconsideration relative to the grant of authority contained in the Commission's Order of September 12, 1967 were filed by all plaintiffs herein and various other protestants and they were denied by Order of the Commission dated October 18, 1967 (R-195).

After the appeal to this court was filed by the plaintiffs, the Commission made motion for and was granted three or four extensions of time within which to prepare and certify the transcript of record in this case, and upon the granting of the next-to-last of such extensions, Justice Crockett indicated that no further extensions of time would be granted. Thereupon, the plaintiffs to this action joined in a motion to this court which was heard pursuant to notice requesting that the court as a whole consider the granting of an extension of such time as may be necessary to prepare the transcript of oral evidence. These plaintiffs are informed that shortly after such hearing the Commission was ordered to appear ex-parte before this court where the matter was discussed further, and on April 4, 1968, this court issued its Order requiring that this case be heard upon review without a transcript of the oral evidence.

Something in excess of 200 shipper witnesses appeared to testify before the Commission relative to this Wycoff application. All of them were customers of Wycoff and were generally solicited to testify by means of a form letter prepared and circulated by Wycoff to its customers (Exhibits 8, 9, 10 and 11).

The shipper witnesses primarily represented businesses of two general types: (1) wholesale supply houses or other suppliers or service businesses located primarily in the Salt Lake City area and occasionally in

the other more densely populated areas of Ogden and Provo and (2) smaller retail stores or service businesses located in towns and communities in the more sparsely populated areas of the State. The need for service expressed by the shipper witnesses primarily involved the transportation of automotive or machinery parts, medicines and drugs, and other miscellaneous inventory items shipped from the Salt Lake City area suppliers in an outbound movement. The alleged need for express service was said by the witnesses to arise out of the breakdown of vehicles or machinery requiring a repair part not contained in the inventory of the business requested to perform the repairs, the emergency requirement for drugs or medicines which a drug store or hospital might run out of and the supplementing of inventories of various commodities sold by the smaller retail stores in the outlying areas. There was occasional reference to inbound shipments to Salt Lake City of items for repair and return.

The vast majority of shipments about which the shipper witnesses testified related to small packages or items weighing less than 100 pounds and most often less than 50 pounds and the request of such witnesses was for a transportation service which would allow the ordering of an item from the supplier on one day and receipt of that item at the witnesses' place of business at the beginning of working hours the following day.

Wycoff commenced its operations as a carrier of mail and newspapers and its present operation is still built around that service. Its schedules are established to accommodate its mail contracts and the distribution of newspapers, leaving Salt Lake City at about noon and midnight in most cases (Exhibit 5). Later it obtained authority to transport newspapers, magazines and periodicals, motion picture film and accessories, newsprint and newspaper machinery and ice cream and in 1957 this authority was amended to include books. In 1956 its authority was extended to include bull semen and cut flowers. Finally, in 1959 certificate No. 1162, Sub 2, was granted Wycoff authorizing its express service with weight and territorial restrictions as discussed above.

Wycoff only serves on the main highways in the state (Exhibit 5) and express packages destined to points in Utah off the main highways and in sparsely populated areas not near or on the particular routes over which Wycoff operates are transferred to either other certificated carriers such as the plaintiffs who regularly serve those areas or to uncertificated persons such as mailmen who complete the transportation to the point of destination.

The vehicles used by Wycoff in its operation are small van type trucks operated without assistance by one driver (Exhibit 25). Since most of the Wycoff schedules leave Salt Lake City in the late evening, the driver is required to make delivery in the middle of the night.

This is done by depositing the packages in locked drop boxes furnished to some of Wycoff's regular customers and located at or near the customer's place of business or the packages are placed inside the business of the customer in cases where Wycoff is furnished a key to the business in advance. Otherwise the packages are carried on through and delivered later that day on a return schedule.

Wycoff has not performed a pickup service on its intrastate express business in Salt Lake City, Ogden or Provo, even though it was authorized and expected to do so under its certificate number 1162 Sub 2. Its transportation rates have been substantially lower than the rates of the other carriers serving the same areas in the state of Utah, even though "premium rates" are understood to be an element of express service.

Lake Shore is a bus line operating between Salt Lake City and Ogden handling passengers, baggage and express. Unlike most other buslines it has pickup and delivery authority between the commercial areas and its terminals at Salt Lake City and Ogden (Ex. 242). Its buses travel several routes between Ogden and Salt Lake City (Ex. 243), and it shares the Ogden and Salt Lake City terminals with Greyhound Lines, Inc., its express being handled with the Greyhound express operation. It also has agencies established at Roy, Clearfield, Layton, Kaysville, Farmington and Bountiful (Ex. 244)

which are open from early morning to late at night and to or from which express shipments are transported. Lake Shore's buses are equipped with large express bays particularly suited to the handling of express packages. Lake Shore operates 11 schedules daily between Salt Lake City and Ogden starting at 6:10 a.m. with the last schedule departing Salt Lake City at 11:20 p.m. In addition, it has 14 sub runs traversing a part of the distance, the first of which leaves Salt Lake City at 5:48 a.m. and the last at 9:30 p.m. (Ex. 246). It operates on Sundays and holidays and supplements its published schedules as the need arises.

Although the agencies and terminals are the usual places for bus stops, special stops are provided upon request at any highway point and specific flag stops have been established to encourage traffic at such points. In the event of emergencies the buses will deviate from their regularly established routes to make direct delivery to off-route points. Express shipments tendered to Lake Shore but destined to or from points beyond the area of its authority are interlined with Greyhound at either the Salt Lake or Ogden terminals.

Wycoff does not hold express authority within the area serviced by Lake Shore as a result of this court's ruling in the case of *Lake Shore Motor Coach Lines, Inc. v. Bennett*, supra.

Continental operates buses in the transportation of passengers, baggage and express over routes which extend from Salt Lake City south via U.S. Highway 91 through Nephi, Beaver and St. George to the Arizona line. At Spanish Fork another route extends to Thistle and thence southeasterly via U.S. Highways 6 and 50 through Price and Crescent Junction to the Colorado state line and also south from Crescent Junction via U.S. Highway 160 to the Colorado line. From Thistle another route extends south via U.S. Highway 89 through Richfield and Kanab to the Arizona border (Ex. 85).

Continental operates 8 schedules per day each way between Salt Lake City and Thistle, 4 schedules between Thistle and Crescent Junction, three schedules between Crescent Junction and the Colorado border via U.S. Highway 6 and one schedule between Crescent Junction and the Colorado border via U.S. Highway 160 and between Thistle and the Utah-Arizona border via U.S. Highway 89. Its principal depot, located at Salt Lake City, is open 24 hours per day, seven days a week. It also operates a terminal at Provo, Utah and maintains agencies in every town of any consequence along its routes. Its buses are the new Silver Eagle model with an extra large express bay especially designed for the efficient handling of express traffic (Ex. 92).

Continental is a party to an agreement with American Bus Lines, Pacific Trailways and Denver-Salt Lake-Pacific Stages which operate over all main highways

within the State of Utah together under a system which is known as Continental Trailways Bus System. The companies operate as though they were a single unit. They share facilities and handle passengers, baggage and express by means of through schedules without the necessity of transferring lading from one bus to another. Thus, express shipments transported from a point upon the route of one participating company to a destination point upon the route of another participating company is shipped and handled as though only a single bus line is involved.

As noted, Denver-Salt Lake is a member of the Continental Trailways Bus System and therefore its buses and methods of operation are similar to those of Continental. It transports passengers, baggage and express from Salt Lake City east via U.S. Highway 40 through Heber City, Duchesne, Roosevelt, and Vernal to the Utah-Colorado state line (Ex. S7) and it has a minimum of two schedules per day in each direction. In the event that the bus designated for a particular schedule becomes filled to capacity either by way of passengers or express, a second bus is dispatched for the same schedule as a "second section."

Bus Express Pickup and Delivery Service Company is an independent carrier which performs a pickup and delivery service of express packages in Salt Lake City moving between the bus terminals and local businesses

to supplement the express service rendered by the bus lines (Ex. 130-140).

Milne is an established truck line which operates in Utah from Salt Lake City south via U.S. Highway 91 through Fillmore, Cedar City, and St. George, to the Utah-Arizona line. It also has some authority and operates on U.S. Highway 89 and it is authorized to serve all points in Beaver County and from Cedar City and St. George to the Utah-Nevada and Utah-Arizona lines. In addition, it operates from Salt Lake City through Ogden over U.S. Highway 30S to the Utah-Wyoming state line with some alternate routes in the area (Ex. 177).

Milne has terminals at Salt Lake City, Fillmore, Beaver, Cedar City and St. George and northeastern Utah is serviced from its terminal located at Evanston, Wyoming (Ex. 179).

Milne's schedules depart Salt Lake City in the early evening about 8:00 p.m. for southern Utah points. Double bottom trailers are used and on one schedule a section is dropped at Beaver with the other moving on to Cedar City and another schedule moves straight south to St. George. These schedules operate five days a week, serve intermediate service points and deliveries are made on six days a week. In addition, there is another local intra-state schedule which Milne operates from Salt Lake City departing Sunday evening, specifically established for

movement of perishables but which carries all types of freight.

The Milne trailers arrive in southern Utah destinations in the early morning and the freight handling commences about 5:00 .m. Local delivery trucks are on the streets by 8:00 a.m. and special attention is given to businesses which desire an early morning delivery. Service to such points as Enterprise in western Washington County is provided by local trucks from the St. George or Cedar City terminals, and the same is true of the Hurricane area. Service to Hurricane is provided five days a week or more if required. Milford is served with trucks stationed at the Beaver terminal and generally the service to points other than those on the principal highways is handled by trucks stationed at the various terminals. In some instances, such as Meadow and Kanosh, 8 and 14 miles south of Fillmore, line haul points are served through the terminals, except in case of emergency. In addition to intrastate schedules, Milne has extensive interstate authority into southern California and it operates numerous interstate schedules departing Salt Lake City at various times throughout the day and such schedules can and are used to transport intrastate express type traffic.

Palmer operates via U.S. Highway 89 and 91 between Salt Lake City, Provo and Nephi and thence to Fillmore and Delta, Utah, serving intermediate points. It also operates down U.S. Highway 89 through Richfield and

Kanab to the Arizona border (Ex. 35). Rio Grande duplicates its authority and service from Salt Lake City south to Payson and Milne duplicates the service between Levan and Fillmore.

Palmer maintains terminals at Salt Lake City, Provo, Nephi, Ephraim, Manti, Richfield, Panguitch, Salinas, Kanab, Fillmore and Delta (Ex. 38). Service to the Delta-Fillmore area is provided six days a week departing Salt Lake City about 8:00 p.m. dropping one double trailer at Delta and carrying the other to Fillmore which it reaches at about 1:00 a.m. In the Manti-Nephi area there is also a schedule providing service five days a week with an operational method using one double trailer at Manti and a movement on to Nephi with the other. Richfield and intermediate points have delivery service six days a week but schedules operate five days a week departing in the evening and arriving at Richfield in the early morning. Another schedule provides service from Salt Lake City to points south of Richfield at least three days a week with needed shipments handled on other days by local trucks stationed at Richfield as required. Other points in Wayne County such as Loa are also serviced out of Richfield (Ex. 39). In addition, there are two schedules operating between Salt Lake City and Provo daily, one departing Salt Lake City at 12:30 noon and the other at 8:00 p.m. and shipments are dropped en route at key intermediate points.

Rio Grande operates between Salt Lake City via U.S. Highway 91 through Provo to Payson and from Spanish Fork easterly via U.S. Highway 50-6 through Price and Green River to the Colorado line. From Price it also operates south on U.S. Highway 10 to the Emery-Sevier County line through such points as Hiawatha, Castledale and Emery. It is also authorized to serve various off-highway points and areas (Ex. 205).

Rio Grande maintains terminals at Salt Lake City, Provo, Price and Green River, Utah (Ex. 209). It has a schedule which departs daily from Salt Lake City at about 12:00 noon for service to Provo and the area served by the Provo terminal which goes as far south as Payson and north to Lehi. The transit time to Provo is about one hour. It also maintains evening schedules departing Salt Lake City at about 10:00 p.m. which move south to Provo and thence easterly through Helper and Green River to the Colorado line (Ex. 210). The trucks arrive at Provo normally before midnight and at Price during the early morning hours and at Green River prior to the opening of businesses. Comparable northbound schedules are also maintained.

As the noon schedules arrive at Provo the freight is shifted to local trucks except as to larger shipments where direct deliveries will be effected by the same truck. One local truck moves south and the other north and deliveries are made that same afternoon. Freight moving to Provo on the evening schedule is unloaded and

prepared for distribution the following morning. The freight is available at the Provo docks throughout the night or it is delivered beginning at 8:00 a.m. or as soon as business houses are open. Special attention is given to shipments marked "same day" or "rush" (Ex. 213).

At Price the freight from Salt Lake City arrives on the evening schedule at about 4:30 or 5:00 a.m. and a crew is on duty at that time to reload delivery trucks for local distribution commencing at 8:00 a.m. Emergency traffic is available at the dock earlier if desired.

As to the truck lines, the practice has been established to request shippers in Salt Lake City to order the pickup of their freight for movement on evening schedules prior to 3:00 p.m. so that local pickup trucks can be properly dispatched, but in the case of rush shipments, local pickup service is provided after 3:00 p.m. or the freight may be delivered to the dock any time prior to the departure of the evening schedules. Likewise, special early morning deliveries are provided at destination points upon request or packages may be picked up at the destination terminals as soon as the line haul trucks are unloaded.

ARGUMENT

POINT I. THE EVIDENCE DOES NOT ESTABLISH A NEED FOR THE REMOVAL OF THE PAST TERRITORIAL AND WEIGHT RESTRICTIONS ON THE WYCOFF AUTHORITY.

The express authority under which Wycoff has operated since 1959 pursuant to its certificate No. 1162, Sub 2, was never supported by showing of public convenience and necessity. This court so found in the case of *Lake Shore Motor Coach Lines, Inc. v. Bennett*, supra. The express authority which Wycoff did receive was only based upon a stipulation entered into between Wycoff and certain protestants relative to the 100 pound per shipment and 500 pound per schedule limitations and this court did not reverse the grant of authority to Wycoff covering areas in the state served by those protestants who did not participate in the appeal.

The application under consideration in this case is nothing more than an attempt by Wycoff to remove the weight restrictions to which it stipulated and to eliminate the area restrictions resulting from this court's decision in the *Lake Shore v. Bennett* case.

At the hearings on Wycoff's original application for express authority it was represented that Wycoff proposed to haul only small packages which constituted rush shipments, and not the general traffic handled by established carriers. Thus, certain protestants were willing to enter into the stipulation of weight restrictions thinking that such restrictions would prohibit undue encroachment by Wycoff upon their own traffic. Once the application was granted, however, the representations and arguments of the proceeding disappeared. Wycoff

immediately solicited any and all traffic within the limits of their authority and promptly embarked upon a program of knowing violations which resulted in complaint proceedings before the Commission and the imposition of a fine. (See *Wycoff Company v. Public Service Commission*, 13 Ut. 2d 123, 369 P. 2d 283). Due to the fact that Wycoff established rates which were lower than the rates of other carriers, it was successful in diverting substantial quantities of traffic within the 100 pound weight limitations from other carriers. Obviously, shippers will use the cheaper method of transportation when faced with a choice between carriers offering substantially the same result with respect to speed of transportation.

The issue relative to a showing of public convenience and necessity in this case is substantially the same as that considered by this court in the case of *Lake Shore Motor Lines, Inc. v. Bennett*, supra, and it is the position of these plaintiffs that the evidence considered by the court in that case is not significantly different than that presented to the Commission in this case. In that case, this court stated:

“... Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will

say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require. Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate, or that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service. For the rule to be otherwise would ignore the provisions of the statute; and also would make meaningless the holding of formal hearings to make such determinations and render futile efforts of existing carriers to defend their operating rights."

... "The import of applicant's witnesses was that it would be convenient and desirable to them to have another carrier available for quick transportation service, including pickup and delivery. It is obvious, as they without exception admitted, that their self-interest would be served by having more carriers with more frequent schedules. In short, the speediest and cheapest transportation possible, which purpose an additional carrier would tend to serve. In other words, from their point of view, the more carriers the better. This is quite understandable because they were in no way concerned with the long-range planning hereinabove referred to, nor with keeping existing carriers solvent and in operation."

These plaintiffs submit that the evidence presented by Wycoff at the hearing of this case fits precisely into the above quoted language of this court in that their

expressed desires were for an additional carrier and cheaper service and there was no evidence of any consequence to show that the service of existing carriers was inadequate to meet the reasonable transportation needs of the public.

These plaintiffs deny the accuracy and completeness of the statement of facts contained in Wycoff's Memorandum and its Summary of Testimony of Shippers contained in the record certified to the court in this case (R-282) and they also deny the accuracy of the facts set out in the Report and Order of the Commission and of the hearing examiner. Wycoff's statement of facts is tainted with Wycoff's self-interest in this case and the facts contained in the Commission's Report and Order are those now under review. Neither can be considered as an accurate representation of facts which this court can adopt in its review of the Commission Order. These plaintiffs submit that since this court has ordered this case to be heard upon review without the benefit of a transcript of the oral evidence and since the absence of such a transcript is due to an omission on the part of the Commission as a defendant in this case, the plaintiffs in this action are entitled to have its representation as to facts adopted by the court where a conflict exists.

The hearing examiner and the Commission were undoubtedly overwhelmed by the over 200 shipper witnesses who appeared at hearings in support of the application.

Such a support is not unexpected, however, since solicitation of witnesses was made in mass by means of a printed request for support prepared and distributed by Wycoff to its customers (Exhs. 8, 9, 10 and 11). In addition, all of the witnesses were present customers of Wycoff who had been receiving service from Wycoff at rates lower than those charged by competing carriers. As the hearing proceeded, it became evident that many of the witnesses did not understand the true purpose of the application. They were under the mistaken impression that the then existing service of Wycoff was in jeopardy and their testimony was to the effect that they were interested in maintaining the then presently established services of both Wycoff and the other carriers. Their testimony was that they were completely satisfied with the service as it was.

Many of the witnesses who appeared in behalf of particular companies were minor employees of the company and in some instances their testimony as to the company's support of the application was contradicted by superior employees of the company who testified an behalf of the protestants later on in the hearings. Also, large number of the shipper witnesses, especially those representing supply houses in Salt Lake City, were unable to state under what circumstances they would ship via Wycoff rather than another carrier since they did not control the routing or pay the cost of the shipment. The only competent evidence from such shippers was to

the effect that many of their customers had designated use of the Wycoff express service in the past.

In his Report and Recommended Order, the hearing examiner concedes that upon cross-examination, the witnesses admitted that their support for the application was based upon philosophy of "the more transportation service the better" (R-107). As noted above, this court has ruled that such testimony does not constitute the type of evidence necessary to prove public convenience and necessity. It is an elementary rule of evidence and this court has often held that testimony of witnesses cannot be deemed to be any stronger than it is left after being subject to cross-examination and these plaintiffs submit that the testimony of those witnesses who admitted upon cross-examination that their support of the application was based upon "the more transportation service the better" without other specific evidence to show a need, cannot be used as evidence to support the granting of the application.

Since by the terms of the Wycoff application its proposed service was to be offered at "premium rates" an exposure of what rates Wycoff intended to charge became fundamental to the proceeding and was a necessary element to be established in order to make the testimony of shippers meaningful. However, Wycoff refused to place into evidence what rates it intended to charge under its proposed service and Mr. Max Young, who

testified in behalf of Wycoff, made it clear at the outset of the hearing that Wycoff did not intend to charge a rate which was premium to those charged by other general carriers. As a consequence, when counsel for these plaintiffs attempted upon cross-examination to tie a witness down to the specific instances when he would use the Wycoff express service in preference to the service of other carriers if Wycoff were to charge a "premium rate" the witness would admit that his use of Wycoff would depend upon the level of the rate to be charged and therefore the testimony as to need for the Wycoff service by the witness became purely speculative and meaningless.

These plaintiffs take particular exception to the finding of the Hearing Examiner contained in his Report and Recommended Order that "numerous shippers expressed a desire for the proposed express service, regardless of premium rates" (R-114). On the contrary, with rare exception, the witnesses admitted and it is further self-evident that there is some rate level at which the cost of any shipment becomes prohibitive depending upon the relative degree of urgency involved and there were only isolated instances where witnesses testified that rates were not a consideration.

The protest of these plaintiffs and presumably of all protestants was maintained in an attempt to protect their operations from further diversion of traffic by

Wycoff and the protests would undoubtedly not have been maintained if Wycoff had been willing to specify a true premium rate. Palmer offered to withdraw its protest if a true premium rate were established, but Wycoff refused to do so (R-85).

At the hearing, the Examiner made statements to the effect that whereas he would not require Wycoff to establish its rates prior to the taking of further testimony at the hearing, he did deem a "premium rate" to be an essential part of the proposed service. However, after the Commission had filed its Report and Order herein and Wycoff filed tariff rates which were considerably lower than those of the protestants, petitions were filed by certain protestants to suspend the Wycoff rates as published until the matter of premium rates could be established. The Commission denied the petitions stating that the matter should be deferred for later hearing but it has still taken no action thereon.

The largest number of the witnesses who testified in support of the application were automobile repair dealers located in communities where large inventories of automotive repairs parts are not maintained. Their alleged need for a fast service arose most often when a repair part has to be ordered by telephone from a parts distributor in Salt Lake City and transported to the repair site where the repair is made as quickly as possible. In such cases, almost without exception the witness was

satisfied with receiving the repair part by the following morning at the beginning of business hours and it was established that he could receive the shipment by that time whether he shipped it by Wycoff or by one of the other established carriers. Although Wycoff does operate seven days a week, so do the bus lines and the five or six day per week service rendered by the truck lines appeared to meet most of the shipper's needs since the shipper's businesses were rarely open on Sunday and more than half a day on Saturday.

There is an abundance of evidence in the record certified to the court for review which shows that next morning and even same day service is available to the public between every point within the State of Utah. Exhibits No. 40 and 41 show the transit time of shipments transported by Palmer. Likewise Exhibits 212 through 227 show that Rio Grande provides same day and next-morning delivery on shipments transported by various of the supporting shippers and Exhibit No. 222 shows the same day service rendered by Rio Grande on shipments marked "rush". The witnesses for each of these plaintiffs testified that they were willing and in fact did give special attention to shipments which were designated to be of an emergency nature. It is further evident from a review of the bus schedules that the transportation time for express sent by bus is only a matter of a few hours both day and night and constitutes a faster express service than that provided by Wycoff (Ex. 89 and 246.) As to the relatively few shipments which witnesses testified

were required to be interlined at Salt Lake City by existing carriers, it is evident from the Wycoff schedules (Ex. 5) that such shipments which it handles must be transferred from one truck to another at Salt Lake City and that such an operation is no more efficient than that provided by the bus lines which likewise simply transfer the lading from one bus schedule to another. Thus, the evidence shows that insofar as time in transit is concerned, the existing carriers and specifically these plaintiffs can generally provide a service which is equally efficient and often more efficient than can Wycoff. Thus, there is no need for an additional express carrier.

As to the weight of shipments, these plaintiffs submit that the evidence was that, with rare exception, all of the express traffic being moved by the supporting shippers was that of small lightweight packages and that there is no need for removal of the 100-lb. weight restriction presently imposed for Wycoff. Throughout the entire proceeding before the Commission there were only isolated examples referred to by shipper witnesses where their express shipments exceeded 100 pounds and in those instances it was usually established upon cross-examination that the existing truck lines or in some cases bus lines were capable of getting the shipment to the consignee within the required time period. For example, some witnesses testified that on occasion the part needed to repair an automobile or piece of machinery was in the nature of an engine block or large transmission which might weigh over 100 pounds, but they also admitted

upon cross-examination that such a repair usually involved more than one and sometimes several days to complete and that delivery by a truck line on the day following the ordering of the part was adequate service.

Plaintiffs further submit that to eliminate the 100 pound per shipment restriction from the Wycoff authority would undoubtedly result in a deterioration of the service now rendered by Wycoff on smaller shipments. Since the Wycoff service involves the use of smaller van type trucks operated by only one driver who often must load and unload shipments without assistance in the middle of the night, the Wycoff service will undoubtedly become bogged down. One man is simply not capable of loading or unloading items or packages weighing 250 pounds, and if, for example, Wycoff should attempt to expand its service to the regular handling of such larger items, as it can be expected to do, a truck leaving Salt Lake City and destined to points in southern Utah, for example, could not be expected to maintain the integrity of its published schedules if the driver is required to make deliveries of large and bulky items at each of the smaller communities along that route. The obvious consequences is that the efficiency of the present Wycoff operation which the witnesses desire will undoubtedly deteriorate.

The Hearing Examiner made reference to particular shippers and receivers which he maintains require a

need for express service on shipments weighing over 100 pounds. (R. 108)) These plaintiffs deny that the said enumerated shippers require such a service. Review of the notes of counsel for these plaintiffs indicates that most of the enumerated shippers were completely satisfied with service by Wycoff and the other existing carriers as it existed at the time of their testimony. It is submitted that most of them did not even request the Wycoff service for shipment over 100 pounds and none of them presented any boni fide need for service relative to such shipments. Even the review of testimony contained in the applicant's memorandum to the Commission does not indicate that there was an expression of significant need for the transportation of such shipments. The notes of counsel for these plaintiffs show that Motor Merc was chiefly concerned with rates, that Brunswick Drug Company wanted to combine his small emergency shipments with larger stock orders, that the testimony of witness from Sweet Candy Company related only to the 500 pound per schedule limitations, and the witness from Eveo House of Hose stated on cross examination that emergency shipments are "rare." The witness from W. H. Bintz specifically testified that he never had express shipments weighing over 100 pounds. In addition, it is evident from Exhibit No. 22 that Van Waters and Rogers is provided with same day service by Rio Grande, and the witness for that shipper testified that most emergencies are less than 100 pounds. It is also notable that each of the shippers referred to by the Examiner as those requiring service over 100 pounds are among that class of

witnesees which testified that they neither controlled the routing nor paid the rates on the express shipments and therefore their testimony as to an actual need for the Wycoff service is of little value.

The Hearing Examiner admits that the grant of authority which he recommended for Wycoff would result in a duplication of authority and service over particular routes within the State and he attempts to justify a grant of state wide authority to Wycoff on the grounds that it is "not in the public interest to perpetuate fragmentation of authority and service in order to prevent such minor duplications." (R-116-117) Such a philosophy is contrary to both the theory and the practice of the Commission with respect to motor transportation in this state since the inception of its regulatory powers over motor carriers. The entire system of motor transportation within the State of Utah consists of fragments of authority possessed by the various existing carriers. Each carrier operates over its particular designated routes and, in the public interest, has been traditionally protected against duplication of its services. Whereas it might be argued that a state wide service to be performed by one carrier might result in certain efficiencies not available under the present system, such is no justification for the granting of a state wide authority where it is shown that existing carriers are operating efficiently and effectively within the area they are authorized to serve. This Court has ruled against the arbitrary granting of such state-

wide authority in the case of *Milne Truck Lines, Inc. v. Public Service Commission*, 11 Utah 2d 365, 359 Pac. 2d 909 (1961).

Not only did the evidence show that express service is available over particular routes within the State of Utah, but there was no evidence to support a need for express service within certain other areas. In addition, the evidence was clear that Wycoff does not serve all communities within the State of Utah on a direct line basis but rather operates only over the main highways within the state, sometimes interlining shipments to off route points with carriers authorized to serve such points and often transferring such shipments to unauthorized individuals such as mailmen for ultimate delivery to such points.

POINT II

THE COMMISSION DID NOT PROPERLY CONSIDER THE EVIDENCE RELATIVE TO THE ADVERSE EFFECT OF THE GRANT OF AUTHORITY TO WYCOFF UPON THE EXISTING OPERATIONS OF THE PLAINTIFFS.

Perhaps the most significant error in the Commission's Report and Order is its 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." (R. 153) The evi-

dence, even as just contained in the exhibits which are a part of the record certified to the Court in this case obviously compels a contrary finding and indicates the Commission's total disregard for the evidence.

Milne presented a series of financial exhibits to show in final result the effect of traffic diversion which will occur. Exhibit 194 provides an allocation table with which expenses are apportioned between inter and intra state traffic, and it also shows how dependent Milne is upon less-than-truck load traffic. The income statement contained in the exhibit shows that in 1965 Milne had an operating ratio of 98.87. In other words, Milne is practically operating at a break-even point relative to intra-state traffic, and any diversion of its business will likely result in a loss ratio.

Exhibits 195 and 196 show the percentage of shipments in various weight categories: 32.12 per cent of total shipments are less than 100 pounds; 55.45 per cent are less than 200 pounds; 66.66 per cent are less than 300 pounds. Thus approximately 60 per cent of all traffic handled by Milne is subject to diversion by Wycoff if the Commission's order is allowed to stand.

Exhibit 199 shows the effect of an estimated 25 per cent loss in intrastate freight in the 0 to 100 pound bracket alone. The first two pages set forth the allocations factors, which are then applied to the express. The result

would be a net profit in intra-state operations for the entire year of 1965 of \$437. In practical reality, if the Commission's order is not reversed, the diversion of traffic would undoubtedly be far greater. There is a particular significance here, since the removal of the Wycoff 500 pound per schedule restriction could well divert more than 25 per cent of these 100 pounds or less shipments.

Where there are two carriers serving the same point, the effect of traffic diversion can be seen. This is true at Fillmore, served by Palmer and Milne. The average per day Milne revenue at Fillmore based on 260 billing days is \$41.72 (Exhibit 201). Mr. Hap Morris testified that the actual out-of-pocket expenses approximate this amount. These include local pickup and delivery trucks and drivers, the terminal cost, and such items as telephone. This makes no allowance for the cost of handling this traffic at other points, primarily Salt Lake City, Utah, or of the line haul from Salt Lake City to Fillmore. Even more serious consequences are in store for the Milne operation should Wycoff be allowed to operate in the Milne area without present restrictions since Wycoff's rates, being lower than Milne's, will result in a much greater diversion of traffic.

Rio Grande faces the same dangers relative to diversion and its effect upon the Rio Grande operation. Exhibit No. 211 shows that 27 per cent of its intra-state

shipments are under 100 pounds, 50 per cent are under 200 pounds and 62 per cent are under 300 pounds. Thus, something between 50 and 62 per cent of all the intra-state traffic presently handled by Rio Grande is subject to diversion to Wycoff unless the 100 pound per shipment and 500 pound per schedule Wycoff limitations are reinstated.

Palmer is likewise subject to the same diversion. Exhibit No. 42 represents a systematic sampling of shipments throughout 1965 showing that about 30 per cent of its intra-state traffic is less than 250 pounds and subject to diversion. Exhibits 44 and 45 show the substantial wage and cost increases which have occurred since 1959 when Palmer rates were increased. It is axiomatic that if the duplicating Wycoff authority is allowed to remain in force, Palmer as well as the other competing carriers will be required to increase their rates which, because of the lower rates of Wycoff, will increase the danger of even further diversion of traffic from the regular carriers. The result is obviously adverse to the public interest.

The practically unrestricted state wide grant of authority which the Commission has granted to Wycoff will probably have its most serious effect upon bus lines. As a result of the decision of the Supreme Court in *Lake Shore Motor Coach Lines, Inc. v. Bennett*, supra. Wycoff holds no express authority between Salt Lake City

and Ogden where Lake Shore operates. This means the extent of diversion from Lake Shore will be substantial. The results of such diversion are detailed in a series of Lake Shore financial exhibits. Exhibit 248 shows the trend of revenues. In 1964 passenger revenues were \$158,386 and declined to \$143,011 in 1965. This decline was attributed in the main to the increasing use of private passenger automobiles fostered in part by completion of the inter-state highway on much of the Ogden to Salt Lake route. The Lake Shore witness anticipated that this decline in passenger revenue would undoubtedly continue. At the same time, however, the express revenues increased from \$35,837 in 1964 to \$36,067 in 1965. Thus, Lake Shore has come more and more to depend upon its express traffic to support its over all operations.

Lake Shore cannot afford to lose any of its express traffic. Exhibit 249 is a profit and loss comparison for 1964-1965. Before payment of taxes Lake Shore's net income in 1964 was \$35,076. In 1965 it decreased to \$8,143 on total revenues of \$331,358. The cause is obviously the decrease in passenger revenues even in the face of increased bus and charter revenues and higher operating costs in many phases of the operation, particularly wages. The problem of increasing costs was discussed by the operating witnesses from all carriers. It permeates the industry.

Exhibit 250 brings the profit and loss figures of Lake Shore to August, 1966, and covers the most favorable

portion of the year from an operating stand point. It shows a continual decline in net income and passenger revenue and a small decline in express revenue. If it were not for the action of the Supreme Court in the former Wycoff express case, there is no question but that Lake Shore service as it exists today would not be available. Should this grant of authority to Wycoff be allowed to stand, Lake Shore will either have to curtail its services upon which many passengers rely to commute daily to Ogden and Salt Lake or it will be required to turn to government subsidy in order to exist.

The same facts are indicated in the financial exhibits presented by Continental and Denver-Salt Lake (Ex. 97-112). A summary of the exhibits showing income and expenses for the State of Utah alone indicates an increase in express revenue between 1961 and 1965 of 80 per cent. Yet, by 1965 the Continental operating ratio has declined to 95.8 per cent, a most dangerous ratio for such a vital public service oriented company.

Exhibit 111 is proforma income and expense statement for Utah prepared to show that the elimination of the express revenue would result in a loss of \$22,029 for a ten month period of 1965 and an operating ratio of 102.2.

The issue of this hearing extends far beyond that of the transportation of express. It relates to the total transportation available to the Utah public. Express revenues

lend vital support to the total bus operations and hence directly affects the only available passenger transportation service in most of the state. Likewise any curtailment of truckline schedules which are likely to result due to diversion of traffic by a duplicating carrier is a far greater detriment to the general public than the occasional convenience to a small shipper which may result from granting this application.

The plaintiffs submit that the Commission has ignored its duty as stated by this court in the case of *Lake Shore Motor Lines, Inc. v. Bennett*, supra.

“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. When a carrier applies to institute a new carrying service, the Commission must take into account, not only the immediate advantage to some members of the public in increased service, and to the applying carrier in permitting him to enlarge the scope of his business, but must 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.”

POINT III.

THE ABSENCE OF A TRANSCRIPT OF THE ORAL EVIDENCE FOR REVIEW BY THE COMMISSION AND BY THIS COURT DENIES THE PLAINTIFFS OF THEIR LAWFUL RIGHTS TO A DECISION BY THE COMMISSION AND TO A REVIEW BY THIS COURT OF THE COMMISSION'S ORDER.

With respect to the granting of certificates of public convenience and necessity to motor carriers, the functions of the Commission are set out at Section 54-6-5, Utah Code Annotated 1953 as follows:

“It shall be unlawful for any common carrier to operate as a carrier in intrastate commerce within this state without first having obtained from the Commission a certificate of convenience and necessity. The Commission, upon the filing of an application for such certificate, shall fix a time and place for hearing thereon. . . . If the Commission finds *from the evidence* that the public convenience and necessity require the proposed service or any part thereof, it may issue the certificate as prayed for or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require, *otherwise, such certificate shall be denied.*” (Emphasis added.)

Thus, a certificate of public convenience and necessity is to be granted only pursuant to a hearing and must be based upon evidence of public convenience and necessity.

Since none of the Commissioners did in fact conduct the hearings in this case, and since they did not have available to them a transcript of the oral evidence presented at the hearings, the Order of the Commission could not possibly have been based upon the evidence. These plaintiffs contend that the evidence does not support a showing of convenience and necessity but without a transcript of the evidence the Commission had no way of judging the validity of such a contention. The plaintiffs' request made by motion prior to the Commission's order that the transcript be made available so that the plaintiffs could prove their contention was denied by the Commission and it is obvious, simply by comparing the form and wording of the Examiner's Report and Recommended Order with the Commission's Report and Order, that the Commission did nothing more than arbitrarily adopt the Findings, Conclusions and Recommended Order of the hearing examiner. Thus, the plaintiffs have been unlawfully deprived of their rights to have the merits of the Wycoff application determined upon the evidence taken at the hearings and Section 54-6-5, Utah Code Annotated, 1953 has been violated.

In addition, proper review of the Commission's Order by this court is impossible without the aid of a

transcript of the oral evidence unless this court determines that evidence contained in the exhibits alone is sufficient to show that a granting of the Wycoff authority is contrary to the public interest due to the adverse effect which it is likely to have upon the existing motor carriers and the transportation industry as a whole. Procedure of having this case reviewed by this court without a transcript of the oral evidence is further in violation of Section 54-7-10, Utah Code Annotated 1953, which reads in part:

“A full and complete record of all proceedings had before the Commission or any Commissioner on any formal hearing had and all testimony, shall be taken down by a reporter appointed by the Commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the Commission, *a transcript of such testimony*, together with all exhibits or copies thereof introduced, and of the pleadings, record and proceedings in the cause, shall constitute the record of the Commission; provided, that on review of an order or decision of the Commission, the interested parties and the Commission may stipulate that a certain question or questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment; whereupon, such stipulation and the question or questions and the evidence therein specified shall constitute the record on review.” (Emphasis added.)

These plaintiffs have not stipulated with any parties or with the Commission on any questions on review in this case and they have consistently insisted that the transcript or oral evidence be made available for review by the Commission and by this Court.

This court has held on numerous occasions that its function in reviewing an Order by the Commission is to determine whether or not the Order is supported by the evidence. How this court can expect to make such a determination without the evidence before it is beyond the comprehension of these plaintiffs.

CONCLUSION

The express authority which Wycoff has had since 1959 and which is subject to certain weight and territorial restrictions is not based upon a showing of public convenience and necessity as determined by this court in the *Lake Shore v. Bennett* case. Rather, it is a result of a stipulation by certain carriers which have relied upon the weight restrictions to insure that Wycoff would remain a true small package express carrier used by the public in cases of bonafide emergencies. However, after Wycoff received its initial express authority it immediately began to transport all shipments within its weight limitations and successfully diverted substantial quantities of traffic from existing carriers by charging lower rates. It even embarked upon an operation of violations of the

weight restrictions for which it has been fined by the Commission. This application is nothing more than an attempt to eliminate those weight and territorial restrictions so as to allow Wycoff to infringe upon the business and territory of the plaintiffs to even a greater degree.

Although numerous witnesses appeared at hearings in support of the application, their testimony as it stood after cross-examination was essentially that Wycoff provided an additional schedule upon which they could rely, or, as many of them put it, "the more service the better." On the other hand, many of the Wycoff witnesses merely supported the present balance of service with Wycoff transporting small emergency packages and items and the other carriers transporting the other types of traffic. There were only isolated instances in which a shipper could use the Wycoff service for shipments weighing over 100 pounds and with rare exception the witnesses testified that they had experienced no problem of delay due to the 500 pound per schedule limitation. On the other hand, the evidence is clear, even just based upon the exhibits subject to review by this court, that the combination of bus and truck service provided by the plaintiffs is just as fast and equally adequate as the Wycoff service.

The Commission's grant of the Wycoff application in this case is based upon its notion that a statewide general commodity service by one carrier will produce certain efficiencies and conveniences to certain members

of the public, even though it has the effect of duplicating the authorities of existing carriers. Even though the entire transportation industry within the State of Utah has been built over the years upon a system of various carriers serving various areas and routes, the Commission has determined that fragmentation of service is not desirable. Such a determination is in utter disregard for the rights of the existing carriers who have diligently served the public in the areas in which they operated and who have looked to the Commission to protect the integrity of such service and of their certificates of public convenience and necessity. The Commission's order is obviously arbitrary and capricious.

The evidence contained in that portion of the record certified to this court for this review is sufficient for this court to determine that the grant of the Wycoff application is not in the public interest since it duplicates the authorities of existing carriers and since it will result in a diversion of traffic from the plaintiffs which will adversely effect their operations and thus the public as a whole. However, such evidence does not show a need for the Wycoff service and this court cannot sustain the order of the Commission based upon the evidence before it. In addition, it is obvious that the Commission was unable to support its order upon evidence of need since it did not have a transcript of the oral evidence upon which to base its findings and conclusions. Its Order is therefore purely arbitrary.

This case is of crucial importance to the public as well as to the plaintiffs in this action, since allowing Wycoff to operate a statewide unrestricted general commodity service will upset the entire transportation industry in Utah which over the years has developed into a balanced system under which the various existing carriers have been able to coordinate their operations to provide a total service. These plaintiffs urge this court to reverse the Order of the Commission.

Respectfully submitted,

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Milne Truck Lines, Inc.,
Palmer Brothers, Inc.
Rio Grande Motorway, Inc.
Lake Shore Motor Coach Lines,
Inc.
Denver-Salt Lake-Pacific Stages,
Inc.
Continental Bus System, Inc.