

1958

Utah Freightways, Inc. v. Public Service Comm. Of Utah et al ; Brief of Plaintiff

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILE

SEP 10 1959

UTAH FREIGHTWAYS, INC.

Plaintiff and Appellant,

vs.

Clerk, Supreme Court,

THE PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT, DON-
ALD HACKING, and JESSIE R. S.
BUDGE its Commissioners; CARBON
MOTORWAYS, INC.

Case No.
9078

Defendants and Respondents.

BRIEF OF PLAINTIFF, UTAH FREIGHTWAYS, INC.

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BRIEF OF PLAINTIFF, UTAH FREIGHTWAYS, INC.

STATEMENT OF FACTS

UTAH FREIGHTWAYS, INC., plaintiff, is a Utah common carrier of general commodities operating only between Salt Lake City and Provo and serving only those two communities—no intermediate points. It applied to the Public Service Commission for authority to use U. H. Highway 91 as an alternate route between Salt Lake City and Provo. Upon this single issue the matter was heard.

By a divided decision the Public Service Commission of Utah on March 31, 1959 denied the application. This appeal is taken from that report and order (R. 129). A petition for rehearing was duly made and then denied May 26, 1959 by the same two commissioners.

The sole authority of Utah Freightways is contained in its Certificate No. 1193 issued by the Commission which authorizes it to transport:

Commodities generally: between Salt Lake City, Utah, and Provo, Utah; via U. S. Highway 40 between Salt Lake City and Heber City, and between Heber City and Provo, Utah, via U. S. Highway 189; with permission to use the convenience of travel only U. S. Highway 91 between Provo and Salt Lake City and the Orem Cut-off over Utah Highway 52, but excluding local service between Salt Lake City and Provo over U. S. Highway 91, and excluding service to any and all intermediate and off route points between Salt Lake City and Provo via U. S. Highways 40 and 189.

Utah Freightways, Inc., has no connection with Wallace A. Peterson as shown by Finding No. 5, but nevertheless the majority of the Commission tied their basis for denying the application to that former relationship and to the "historical" background. It is to be noted that this authority was once held by Mr. Peterson in conjunction with his then and present service between Salt Lake City and Heber City, but now they have been completely divorced.

Factually, the Commission found,

"7. The distance between Salt Lake City and Provo via Heber City is 79 miles, whereas, the distance between Salt Lake City and Provo via U. S. Highway 91

is 44 miles. The route via Heber City is over mountainous terrain whereas the route via U. S. 91 is practically a water level route."

Under the Certificate No. 1193, Utah Freightways, Inc., serves both Salt Lake City and Provo, but the Commission requires use of the circuitous route around Heber City when the trucks are loaded, but permits direct movement between Salt Lake City and Provo over U. S. Highway 91, when the trucks are empty.

Commissioner Donald Hacking wrote a strong, carefully considered dissent to the majority Report and Order. After reviewing the background of this operating authority, he said in part:

"It is wholly impracticable, uneconomical and against the public interest to require Freightways, Inc., in serving solely between the two termini, Salt Lake City and Provo, to travel the long, mountainous route via Heber City. An interpretation of the language above set forth to restrict travel on U. S. Highway 91 to empty equipment only is hollow and unrealistic under the present circumstances of the operation. Generally speaking an alternate route is one that the carrier may travel but on which it may perform no service to any intermediate or off route points. A carrier may not transport commodities over an alternate route which it may not transport over the main route. If the effect of granting of alternate route authority is only to effect operating economies in an established competitive service the applicant for the alternate route authority need not show convenience and necessity to serve the same points contained in the regular route authority, particularly where both termini of the proposed alternate route are presently being served and the present route is competitively feasible." (R. 136-137).

Your attention is also directed to the balance of the said dissenting opinion.

STATEMENT OF POINTS

POINT I

THE ACTION OF THE MAJORITY OF THE COMMISSION IN DENYING THE ALTERNATE ROUTE AUTHORITY IS ARBITRARY AND CAPRICIOUS.

POINT II

AS APPLICANT WAS ALREADY SERVING THE ONLY TWO POINTS AND TRANSPORTING A SUBSTANTIAL QUANTITY OF TRAFFIC BETWEEN SAID POINTS, ECONOMIC OPERATION REQUIRES AUTHORIZATION TO PERMIT USE OF THE SHORTER AND MORE PRACTICAL ALTERNATE ROUTE VIA U. S. HIGHWAY 91.

POINT III

THE COMMISSION ERRED IN ITS ACTION IN INTERPRETING APPLICANT'S PRESENT CERTIFICATE NO. 1193 SO AS TO PROHIBIT MOVEMENT OF LOADED VEHICLES OVER U. S. HIGHWAY 91.

POINT IV

THE COMMISSION ERRED IN CONCLUDING THAT THE AUTHORIZATION OF THE PROPOSED ALTERNATE ROUTE WOULD GIVE APPLICANT A "COMPETI-

TIVE ADVANTAGE" OVER THE MOTOR CARRIER ALREADY OPERATING OVER U. S. HIGHWAY 91 BETWEEN SALT LAKE CITY AND PROVO.

ARGUMENT

POINT I

THE ACTION OF THE MAJORITY OF THE COMMISSION IN DENYING THE ALTERNATE ROUTE AUTHORITY IS ARBITRARY AND CAPRICIOUS.

POINT II

AS APPLICANT WAS ALREADY SERVING THE ONLY TWO POINTS AND TRANSPORTING A SUBSTANTIAL QUANTITY OF TRAFFIC BETWEEN SAID POINTS, ECONOMIC OPERATION REQUIRES AUTHORIZATION TO PERMIT USE OF THE SHORTER AND MORE PRACTICAL ALTERNATE ROUTE VIA U. S. HIGHWAY 91.

The very simple proposal before the Commission was to permit applicant to operate along U. S. Highway 91 between Salt Lake City and Provo (serving no intermediate points) in lieu of serving the same two cities by a circuitous route via Heber City. As the Commission found "Applicant does not ask to transport any commodity or serve any shipper which its authority does not now permit, and it is not proposing a new service, but only a shorter, safer, more expeditious and economic manner of operation from Salt Lake City to Provo.

The Heber City route is 91 miles long as compared with

44 miles over U. S. Highway 91. Applicant's comparison of costs via the Heber City route and U. S. Highway 91 reflect:

	<i>52 Weeks via Heber City</i>	<i>52 Weeks via U. S. Highway 91</i>
Drivers:	\$2,457.00	\$1,209.00
Fuel:	2,515.76	1,213.68
Depreciation:	936.00	572.00
	<hr/>	<hr/>
	\$5,908.76	\$2,994.68
		(R. 133)

The report and order of the majority of the Commission is in direct opposition to the position unanimously taken by the same Commission under date of January 3, 1958 in Union Pacific Motor Freight Company application wherein the following policy was declared:

"7. The granting of said application will undoubtedly benefit the railroad company in saving expense in the operation of its train service over said routes and in the release to it for carload shipments of a large number of box cars now used on said routes for LCL traffic. The applicant will likewise benefit by way of an increase of commodities for transportation in its presently partially loaded trucks. These benefits may to a degree prejudice competitors of the applicant because of inroads upon their business. However there is a larger aspect of this matter to which benefits or disadvantages resulting to the parties concerned must be subordinated, and that is the public interest. It is public convenience and necessity with which the Commission is primarily concerned. Improved methods of transportation by an already operating carrier are to be encouraged and regrettable as it may be that some other carrier may suffer, that fact is not a sufficient

reason for preventing the use of improved methods; and this is so even though present service by present methods may in one sense be adequate. In one case wherein the same applicant was before the Wyoming Commission (Union Pacific Motor Freight Company v. Gallagher Transfer & Storage Co., 264 P.2d 771) the granting of a similar application was approved by the Supreme Court of Wyoming even though the railroad company, as in the case before us, was not a party to the proceeding. Although there is in this case no evidence that the routes in question are not adequately served, we hold with the Wyoming Court and the Supreme Court of the United States (ICC v. Parker, 326 U. S. 60) that such evidence is not necessary as a condition to granting a certificate for a different and improved method of operation by an already certificated carrier. If the proposed service will result in a better and more economical service the railroad company should be permitted, in the public interest, to adopt the improved method.

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

Your court recently affirmed that action by the Commission and quoted the Commission in part: Milne Truck Line, Inc., et al, 9 Ut .(2d) 28, 337 Pac. (2d) 412 at p. 417:

"The applicant will likewise benefit by way of an increase of commodities for transportation in its pres-

ently partially loaded trucks. These benefits may to a degree prejudice competitors of the applicant because of inroads upon their business. However, there is a larger aspect of this matter to which benefits or disadvantages resulting to the parties concerned must be subordinated, *and that is the public interest*. It is public convenience and necessity with which the Commission is primarily concerned. *Improved methods of transportation by an already operating carrier are to be encouraged*, and regrettable as it may be that some other carrier may suffer, that fact is not a sufficient reason for preventing the use of improved methods; and this is so even though present service by present methods may in one sense be adequate. In one case wherein the same applicant was before the Wyoming Commission (Union Pacific Motor Freight Company v. Gallagher Transfer & Storage Co., 72 Wyo. 298, 264 P2d. 771) the granting of a similar application was approved by the Supreme Court of Wyoming even though the railroad company, as in the case before us, was not a party to the proceeding. Although there is in this case no evidence that the routes in question are not adequately served we hold with the Wyoming Court and the Supreme Court of the United States (I.C.C. v. Parker, 326 U. S. 60; 65 S. Ct. 1490; 89 L. Ed. 2051) that such evidence is not necessary as a condition to granting a certificate *for a different and improved method of operation by an already certificated carrier*. If the proposed service will result in a better and more economical service, the railroad company should be permitted in the public interest to adopt the improved method."

(Page 418)

"The Commission in its finding 7 observed:

* * * Improved methods of transportation by an already operating carrier are to be encouraged. * * *
If the proposed service will result in a better and more

economical service the railroad company should be permitted, in the public interest, to adopt the improved method."

"We are in accord with the above statement of the Commission. Order affirmed. No costs awarded."

The general policy of motor carrier regulation adopted by the Interstate Commerce Commission has been consistent with authorization of transportation via shorter and more economic routes when the competitive situation will be relatively unchanged and the points involved are already served in a substantial manner by the applicant. The Utah Commission in a recent Interstate Commerce Commission hearing, No. MC-623 (Sub-No. 72) Garrett Freightlines, Inc.—Alternate Route, concurred as participants in a Joint Board in the recommending of an order whereby applicant sought an alternate route for operating convenience only between Salt Lake City and Wells, Nevada over U. S. Highway 40. This alternate route would save Garrett the mileage by its pre-existing route from Salt Lake City into Idaho and back down to Wells, Nevada, a saving of 167 miles. In concurring in the granting of the alternate route the following language was used:

"As seen, applicant is authorized to operate between Salt Lake City and Wells over a route that is 167 miles longer than the proposed alternate route. Use of the alternate route would enable applicant to effect a saving of four to five hours in transit time, resulting in a more economical operation, and reduce the hazard of movements through more populated areas. The type of service which it has been performing will remain relatively unchanged, and the saving in transit time will have little, if any, effect upon the operations of existing carriers, considering the distance and time involved in transportation to west coast points."

The denial of the alternate route authority to Utah Freightways, Inc., will result in an economic hardship wholly unjustified in law and in equity and contrary to the spirit of sound transportation principles. However, the Commission has left Utah Freightways with the responsibility of continuing the service between Salt Lake City and Provo in competition with a carrier having a shorter and more feasible route, to-wit, via U. S. Highway 91. Such a position is detrimental to the best interests and advantage of the public, in that the shippers of the state are entitled to have their traffic handled by the most reasonable and logical means of service between the two termini involved.

The majority opinion of the Commission erred in finding that the granting to applicant "full use of Highway 91 would give it a competitive advantage which it does not now have." The testimony at the hearing showed that the primary volume of freight from Salt Lake City to Provo is transported either during the night hours or early in the morning, so that the freight is available at Provo for distribution at 8 a.m. The requirement that Utah Freightways continue to operate over the Heber City route will not change the situation, except that the truck will be required to leave Salt Lake City at an earlier hour and still arrive in Provo in time for the morning distribution of freight at the same time. No actual competitive advantage could possibly arise by the granting of the requested alternate, as the shippers and receivers of freight will enjoy the same pickup and delivery service, and the most that could result would be an *equalization* of rights rather than any *advantage*, to Utah Freightways.

We recognize that the former decisions of the Public Service Commission are not *res judicata* and apparently the Commission has no responsibility to be consistent in its position respecting the desirability of economic operations by regulated public utilities such as motor carriers. However, if the principles most recently enunciated by it in the *Union Pacific Motor Freight* case (and affirmed by your Court in the *Milne* case, *supra*) mean anything, then the same "improved method of transportation and improved efficiency and economy of operation, outweigh any detriment that competitors may suffer" principles should apply here. The flagrant reversal of principles in our present case by the two Commissioners is arbitrary and capricious in its character.

Commissioner Donald Hacking's dissent recited above is evidence of the arbitrary and capricious nature of the majority's action when he said in part, "It is wholly impracticable, uneconomical and against the public interest to require Utah Freightways, Inc., in serving solely between the two termini, Salt Lake City and Provo, to travel the long mountainous route via Heber City."

A rather ridiculous situation exists under the present status of the operating authority. The Commission would permit applicant to run along U. S. Highway 91 when its trucks are empty, but require it to go over the hill some 34 miles longer whenever any freight is loaded into the trucks. We say that it is arbitrary and capricious for any regulated, public utility to be required by the Commission to perform a useless, unreasonable, unrealistic, "wholly impracticable and uneconomic" function when a shorter, direct route is available.

No new commodities are involved. No new shippers are involved. No new points of service are possible by this proposal of an alternate route.

The majority of the Commissioners cited with apparent approval (Finding 11) the sole protestant's position that "there has never been a showing that public convenience and necessity require the operations of applicant over U. S. Highway 91." These same Commissioners in the Union Pacific Motor Freight Company case decision issued less than a year before took an entirely opposite position and held that though all areas were adequately served by other carriers, nevertheless, the Union Pacific Motor Freight, without proof of public convenience and necessity, could establish the proposed substituted service. The Commission unanimously said in its Report and Order:

"Although there is in this case no evidence that the routes in question are not adequately served, we hold with the Wyoming Court and the Supreme Court of the United States (*ICC v. Parker*, 326 U. S. 60) that such evidence is not necessary as a condition to granting a certificate for a different and improved method of operation by an already certificated carrier. If the proposed service will result in a better and more economical service the railroad company should be permitted, in the public interest, to adopt the improved method."

The reversal of position by these two commissioners now is arbitrary and capricious. Proof of public convenience and necessity by shipper witnesses is not required in this type case. Your court in affirming and quoting the above noted language in the Milne case has settled that.

The historical background of the operating authority is of no present consequences to the issues. The facts show and the Commission has found that there is no legal or other connection between Wallace A. Peterson d/b/a Wally's Motor Line and applicant. The fact that historically the Provo-Salt Lake operations were at one time tied in with Peterson's operations to Heber City, is now immaterial. Utah Freightways must and does stand on its own feet. Its operation problems and this application are to be considered apart from any personalities or animosities which may relate to Mr. Peterson's former connection.

The proof shows that applicant has been and is a substantial competitor for freight traffic between Salt Lake City and Provo:

October 1, 1957, through September 30, 1958 3,626,-176 lbs. were transported between these two cities by applicant. One daily scheduled trip is made plus extra trips on occasion.

The problem of considering alternate route authority for motor carriers has been weighed most frequently by the Interstate Commerce Commission. After years of trial and error in formulating principles, that Commission has reached a basis that an alternate route authority will be granted to any motor carrier if all of the three following factors are present:

- (a) Carrier is already serving the two points but by a more circuitous route;
- (b) Carrier is already a substantial competitor for traffic between those points over a feasible route; and

- (c) No new points of service or types of commodities are added so as to give carrier an undue competitive advantage over existing carriers serving the same points.

Illustrative of the position taken by the Interstate Commerce Commission is the case of Atlanta, Albany Motor Lines, Inc.—extension—alternate route; No. MC 106 466 (Sub. No. 6) 11 Fed. Car. Cases 33,390. Alternate route authority was sought between Atlanta and Americus, Georgia. The protesting carrier already serving the points contended that the application should be denied as a grant of alternate route would result in a more competitive service by applicant. The Commission said in part:

"The argument as to a grant of authority changing the competitive situation is indeed novel in that it is premised solely upon the assertion that the use of the proposed alternate route will result in substantial operating economies, thus placing applicant in a better financial position to compete for traffic. There is no claim that any new or improved service will result. Operating economies are the basis of almost every grant of alternate-route authority made beginning with Dixie Ohio Express Company Extension—Bristol, 30 M. C. C. 291 (2 Federal Carriers Cases §7815). Applicant has clearly established that it has been moving a substantial volume of freight between Atlanta and Americus over a practical and feasible route; that it is competing with existing carriers operating over more direct routes; and that no change in the competitive situation would result from the grant of authority to operate over the proposed route. These three factors, together with a showing of operating economies resulting from operation over the proposed route, are sufficient to establish public convenience and necessity."

Your Honorable Court has varied somewhat recently in its position in affirming or reversing the action of the Public Service Commission of Utah. However, no problem should exist now as the action of the majority of the Commission in denying the alternate route rights to applicant is an action involving arbitrary and capricious conclusions. No substantial factual issue is in dispute. The so-called Findings of Fact by the Commission involves some conclusions such as in paragraph 11 wherein they say that the alternate route proposal would place applicant "in a position to deprive Carbon of business which it has heretofore enjoyed and which it is adequately equipped to handle." This is a conclusion only, and immaterial at that, as the evidence does not show that applicant can or will handle any more freight than it does under the more circuitous route.

As indicated above, applicant is already a substantial competitor between Salt Lake City and Provo (531,761 lbs. in September, 1958). It can handle such under its present authority via Heber City by gathering freight here in Salt Lake City in the afternoon and transporting it to Provo over night and then delivering the next day in Provo. This same pattern would be followed using the alternate route, but saving the mileage and hazards of the Heber City route. No competitive advantage results therefrom and no new shippers are thereby made available and no diversion of traffic will result. Competitively, Utah Freightways, Inc., can solicit the same traffic as Carbon Motorways now.

POINT III

THE COMMISSION ERRED IN ITS ACTION IN INTERPRETING APPLICANT'S PRESENT CERTIFICATE NO. 1193 SO AS TO PROHIBIT MOVEMENT OF LOADED VEHICLES OVER U. S. HIGHWAY 91.

POINT IV

THE COMMISSION ERRED IN CONCLUDING THAT THE AUTHORIZATION OF THE PROPOSED ALTERNATE ROUTE WOULD GIVE APPLICANT A "COMPETITIVE ADVANTAGE" OVER THE MOTOR CARRIER ALREADY OPERATING OVER U. S. HIGHWAY 91 BETWEEN SALT LAKE CITY AND PROVO.

Consider with us the language of the existing Certificate No. 1193 held by the Utah Freightways,

"Commodities generally: between Salt Lake City, Utah and Provo, Utah; via U. S. Highway 40 between Salt Lake City and Heber City, and between Heber City and Provo, Utah, via U. S. Highway 189; with permission to use for convenience of travel only U. S. Highway 91 between Provo and Salt Lake City and the Orem Cut-off over Utah Highway 52, but excluding local service between Salt Lake City and Provo over U. S. Highway 91, and excluding service to any and all intermediate and off route points between Salt Lake City and Provo via U. S. Highways 40 and 189."

The language "... with permission to use for convenience of travel only U. S. Highway 91 between Provo and Salt Lake City . . . but excluding local service between Salt Lake City and Provo over U. S. Highway 91 . . . " It is our contention

that applicant already has authority to travel said U. S. Highway 91 as an alternate route. This position was clearly stated in the application:

"Applicant is advised that the Commission has some question as to the propriety of applicant's use of U. S. Highway 91 in the transportation of commodities between Salt Lake City and Provo and desires now to eliminate any such possible question in the future as to the use of such route.

"3. Applicant fully believes that it has authority to transport loaded vehicles between Salt Lake City and Provo in the performance of its authorized and required transportation service (without performing any local service to intermediate points) and makes this application without waiving its rights under the said certificate and without admission of any present inability to use said highway by virtue of the terms of said certificate."

We have noted that the Commission majority has construed such language of the certificate to permit movement of empty vehicles by applicant via U. S. Highway 91, but prohibit movement of loaded vehicles over that route. Applicant has at all times contended that the words "to use for convenience of travel only" cannot be logically tortured to prohibit such convenience merely when the vehicle is loaded. The further proviso "but excluding local service between Salt Lake City and Provo over U. S. Highway 91" can mean no more or less than prohibiting service to local intermediate communities. Applicant has never sought and does not now seek to serve such intermediate points.

The action of the commission was arbitrary and capricious

in its conclusion that the present certificate prohibits the movement of loaded trailers and if such were otherwise certainly the mere statement of the proposition would make it clear to the court that a rank injustice is being imposed upon this carrier as well as upon the shipping public. There is nothing in the verbage of the certificate which would give a factual basis to the conclusion that a loaded vehicle is prohibited by the words "to use for convenience of travel only."

WHEREFORE, plaintiff prays that the court review the record in this matter and that the court do one of two things. First, interpret the present language of the certificate so as to permit the movement of loaded vehicles between Salt Lake City and Provo under the language thereof without any service to any intermediate points, or Second, reverse the ruling of the two members of the Public Service Commission and direct that the Commission grant to applicant a certificate for use of U. S. Highway 91 as an alternate route for convenience of travel only between Salt Lake City and Provo, without service to any intermediate point.

Respectfully submitted,

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