

1959

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

S. N. Cornwall; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Defendants;

Recommended Citation

Brief of Respondent, *Utah Freightways, Inc. v. Public Service Comm. Of Utah*, No. 9078 (Utah Supreme Court, 1959).
https://digitalcommons.law.byu.edu/uofu_sc1/3386

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

NOV 3 1959

LAW LIBRARY

In the

Supreme Court of the State of Utah

FILED

14 1959

UTAH FREIGHTWAYS, INC.

Plaintiff and Appellant,

vs.

THE PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING, and JESSIE R. S. BUDGE, its Commissioners; CARBON MOTORWAYS, INC.,
Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No.
9078

BRIEF OF DEFENDANTS

S. N. CORNWALL,
VAN COTT, BAGLEY,
CORNWALL & McCARTHY,

Attorneys for Defendants.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS	9
ARGUMENT	10
I. FREIGHTWAYS BY ITS APPLICATION BEFORE THE COMMISSION SOUGHT TO INITIATE A NEW AND DIFFERENT SERVICE	9, 10
(a) Decision in this Case Requires Consideration of the Background of the Freightways Authority	9, 10
(b) Freightways is not Actually Seeking an Alternate Route	9, 11
(c) The Granting of the Application Would Confer Upon Freightways a Competitive Advantage not Theretofore Enjoyed	9, 12
II. THE INITIATION OF THE NEW SERVICE PROPOSED BY FREIGHTWAYS REQUIRES PROOF OF CONVENIENCE AND NECESSITY	9, 13
(a) The Authority of the Commission is Prescribed by Statute	9, 13
(b) The Statute and Decisions Thereunder Require Proof of Convenience and Necessity	9, 13
(c) The Action of the Commission was not Arbitrary or Capricious	9, 17
III. AN ISSUE MAY NOT NOW BE RAISED ON THE INTERPRETATION OF THE FREIGHTWAYS AUTHORITY	10, 19
CONCLUSION	20

TABLE OF CONTENTS—Continued

AUTHORITIES CITED	Page
Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. v. Illinois Commerce Commission, 315 Ill. 461, 146 N. E. 606, 54 A. L. R. 45	13
Milne Truck Line, Inc., et al. v. Public Service Com- mission, 9 Utah 2d 28, 337 P. 2d 412	15, 16, 17
Monroe v. Railroad Commission, 170 Wis. 180, 174 N. W. 450, 9 A. L. R. 1007	13
Mulcahy, et al. v. Public Service Commission of Utah, et al., 101 Utah 245, 117 P. 2d 298	14
Peterson v. Public Service Commission, 1 Utah 2d 324, 266 P. 2d 497	2, 10
Provo Transfer & Storage Co. v. Commission, 3 Utah 2d 86, 278 P. 2d 985	3

STATUTES

Laws of Utah, 1935, Chapter 65	14
Utah Code Annotated, 1953, Chapter 6, Title 54, Section 5	14
Section 54-7-15	20

In the
Supreme Court of the State of Utah

UTAH FREIGHTWAYS, INC.

Plaintiff and Appellant,

vs.

THE PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING, and JESSIE R. S. BUDGE, its Commissioners; CARBON MOTORWAYS, INC.,
Defendants and Respondents.

Case No.
9078

BRIEF OF DEFENDANTS

PRELIMINARY STATEMENT

The parties will be designated in this brief as follows: Plaintiff Utah Freightways, Inc. as "Freightways," defendant Public Service Commission of Utah and its Commissioners as "the Commission," and defendant Carbon Motorway, Inc. as "Carbon." Emphasis has been supplied.

STATEMENT OF FACTS

In the opinion of counsel for defendants the statement as presented by plaintiff does not sufficiently apprise the court of the essential facts of this case. For this reason, defendants present the following Statement of Facts.

There is no issue of fact in this case. The question presented is simply whether Freightways, under the facts involved, may by the device of an application for an alternate route initiate a new or different service.

Under date of June 30, 1952, in Case No. 4419, the Commission issued to Wallace A. Peterson, doing business as Wally's Motor Line, Certificate of Convenience and Necessity No. 1001, authorizing Peterson to transport general commodities:

(a) Between Salt Lake City and Heber City over U. S. Highway 40;

(b) Between Heber City and Provo over U. S. Highway 189;

(c) Serving all points except Olmstead intermediate between Salt Lake City and Provo over said highways and serving the off-route points of Park City, Midway, Hot Pots, Daniel, Center Creek and Wallsburg, with permission to use for convenience of travel only U. S. Highway 91 between Provo and Salt Lake City and the Orem cutoff over Utah Highway 52, but excluding local service between Salt Lake City and Provo over U. S. Highway 91.

This court in *Peterson v. Public Service Commission*, 1 Utah 2d 324, 266 P. 2d 497, held that the foregoing authority authorized Peterson to move general commodities be-

tween Salt Lake City and Provo over said Highways 40 and 189.

Shortly after the issuance of said Certificate No. 1001, Peterson engaged in a series of transactions which had the effect of emasculating the authority granted to him under said Certificate No. 1001 and largely defeating the public purpose for which this certificate was issued.

In 1953 Peterson assumed control of Provo Transfer & Storage Co., which held certain carrier rights in and around Provo, and in effect undertook through this corporation to exercise the authority theretofore issued to him under said Certificate 1001. The Commission pursuant to proceedings had before it, revoked the authority of Provo Transfer & Storage Co., which revocation was sustained by this court in *Provo Transfer & Storage Co. v. Commission*, 3 Utah 2d 86, 278 P. 2d 985.

In January, 1957, Peterson and others organized Freightways and about the same time he entered into two contracts, one by which he undertook to sell to Lacohn Riding the Heber City portion of his operating rights and the other by which he undertook to sell to Freightways the Salt Lake City to Provo portion of his operating rights under such Certificate No. 1001. Under the latter agreement Peterson was to receive 6260 shares of stock in Freightways, and was to manage its operations at a salary of One Hundred Dollars (\$100.00) per week for five (5) years, and to rent dock facilities in Salt Lake City to Freightways for five (5) years at \$50.00 per month (R. 178-194). Application for approval of these agreements and for authority of Freight-

ways to operate over U. S. Highway 91 was filed with the Commission on January 22, 1957, and was heard in Case 4419. On May 29, 1957, the Commission issued its report and order denying the proposed transfer from Peterson to Riding, approving the transfer from Peterson to Freightways, but denying the application of Freightways to operate over Highway 91. The following Findings of the Commission demonstrate the reasons for its decision:

"12. As herein indicated Freightways seeks authority in this proceeding to conduct its operations between Salt Lake City and Provo over U. S. Highway No. 91. If such authority is granted, Freightways would terminate operations over the Heber City route and its operations would be conducted entirely over U. S. Highway 91. Such a proposal raises two inquiries, namely, the effect on the communities and the public along the Heber City route and the public need for service between Salt Lake City and Provo over U. S. Highway 91. Peterson in the performance of service under his Certificate No. 1001 moves his equipment over U. S. Highway 40 between Salt Lake City and Heber, and over U. S. Highway 189 between Heber City and Provo. In the performance of service along this route he moves a substantial volume of traffic between Salt Lake City and Provo. He also affords regular transportation to Park City, Heber City and other intermediate and off-route points along and adjacent to this route. Upon a consideration of all of the evidence in this case we find that the withdrawal of the schedules between Salt Lake City and Provo over the Heber City route, now operated by Peterson, and the termination of the regular transportation service thereunder would remove now and in the future any opportunity to operate the through schedules and the local intermediate service as coordinated services.

"13. We are fully cognizant of the fact that under the views expressed here there would be a division in the operating authority over the Heber City route, a portion of such authority being retained by Peterson alone. However, under the contract of January 21, 1957, Peterson continues as manager of Freightways for a period of five years. We would expect that under such circumstances appropriate arrangements should be made whereby operations, under the two authorities could be coordinated with economy and efficiency and to the mutual advantage of Peterson and Freightways. We would also expect that consideration should be given to the acquisition by Freightways of the operating authority now proposed to be transferred by Peterson to Riding. Were we to permit the Salt Lake City-Provo operations of Freightways to be conducted over U. S. Highway 91, such a consolidation of operations would no longer be feasible.

"14. Although we have found that public interest of the communities along the Heber City route, requires the retention of the through schedules operated under the authority of Certificate No. 1001, consideration should be given, we believe to the question of whether public convenience and necessity may nevertheless require the termination of that service in favor of service between Salt Lake City, and Provo over U. S. Highway 91. *The conduct by Freightways of transportation service between Salt Lake City and Provo over U. S. Highway 91 is tantamount to the institution of a new service.* Protestant Carbon is engaged in the movement of property in intra-state commerce along this route. Evidence oral and documentary was introduced by Carbon showing its equipment, terminal facilities, schedules and service for the transportation of property between Salt Lake City and Provo over this route. Evidence was also introduced by Peterson on this issue. Upon a care-

ful consideration of all of the evidence in this case we find that the present service of Carbon between said points and along said route is adequate and satisfactory and that public convenience and necessity do not require further service of such character" (R. 221-222).

Accordingly, there was issued to Freightways Certificate 1193 authorizing it to engage in operations as follows:

"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" (R. 223),

and to Peterson Certificate No. 1194 authorizing the following operations:

"Commodities generally: Between Salt Lake City and Heber City, Utah over U. S. Highway 40 and between Provo and Heber City, Utah over U. S. Highway 189, serving all intermediate points except Olmstead and serving the off-route points of Park City, Midway, Hot Pots, Daniels, Center Creek and Wallsburg, but providing no through service between Salt Lake City and Provo, Utah" (R. 223).

No objection was made to the Order of May 29, 1957, and the same is a final Order of the Commission.

Notwithstanding the clearly expressed intent and purpose of the decision of May 29, 1957, Freightways undertook to operate between Salt Lake City and Provo over U. S. Highway 91, and pursuant to complaint in Case No. 4542 the Commission, on June 30, 1958, expressly held that Freightways had no authority to so operate and entered an order to cease and desist from doing so (R. 274-278). Petition for rehearing was filed in this case by Freightways, which was denied. No review was sought and this order is now final (R. 278-280).

Meanwhile, Peterson proceeded to split up his Certificate No. 1194 by undertaking to sell off a portion to Virgel Bryan Vernon under a contract dated January 24, 1958, pursuant to application filed with the Commission in Case No. 4548 (R. 232-233). Under this application the Commission, under date of February 8, 1958, transferred from Peterson to Vernon authority to serve the points of Cement Quarry, Skyline Gorgoza, Kimballs, Snyderville and Park City, which left Peterson with authority under a new Certificate No. 1265 to serve Heber City by way of Salt Lake City and Provo and points between Keetley and Olmstead (R. 243-247).

L. W. Palmer, his brother R. A. Palmer, and their wives, are the owners of all the stock in Palmer Brothers, Incorporated, a common motor carrier, operating between Salt Lake City and Millard County points through Provo. At about the time of the order of February 8, 1958, L. W. Palmer and his brother acquired from Peterson and his associates all of the stock of Freightways for One Dollar (\$1.00). By some means, not disclosed, the contract between

Freightways and Peterson, whereby the latter was to manage the Freightways operations was terminated and the Palmer brothers undertook to operate Freightways. No over-the-road equipment was purchased by Freightways, the operation being conducted with Palmer Brothers, Inc., equipment. At the date of hearing, which was some eight (8) months after its acquisition, no balance sheet had ever been prepared by Freightways and the witness Luther W. Palmer seems to have had only a nebulous idea of its assets (R. 13-22).

Under date of July 1, 1958, in Case 4419-Sub 1, Freightways, through L. W. Palmer, filed an application for a so-called alternate route, seeking authority to transport commodities generally between Salt Lake City and Provo over U. S. Highway 91. If the application had been granted, Freightways intended to abandon entirely any pretext of performing service over the Heber City route and to conduct its operations entirely over U. S. Highway 91 (R. 25-26).

Under these facts the Commission, one Commissioner dissenting, held that the application of Freightways required proof of convenience and necessity which was not shown and that accordingly the application should be denied.

STATEMENT OF POINTS

I.

FREIGHTWAYS BY ITS APPLICATION BEFORE THE COMMISSION SOUGHT TO INITIATE A NEW AND DIFFERENT SERVICE.

- (a) Decision in this Case Requires Consideration of the Background of the Freightways Authority.
- (b) Freightways is not Actually Seeking an Alternate Route.
- (c) The Granting of the Application Would Confer upon Freightways a Competitive Advantage not Theretofore Enjoyed.

II.

THE INITIATION OF THE NEW SERVICE PROPOSED BY FREIGHTWAYS REQUIRES PROOF OF CONVENIENCE AND NECESSITY.

- (a) The Authority of the Commission is Prescribed by Statute.
- (b) The Statute and Decisions Thereunder Require Proof of Convenience and Necessity.
- (c) The Action of the Commission was not Arbitrary or Capricious.

III.

AN ISSUE MAY NOT NOW BE RAISED ON THE INTERPRETATION OF THE FREIGHTWAYS AUTHORITY.

ARGUMENT

I.

FREIGHTWAYS BY ITS APPLICATION BEFORE THE COMMISSION SOUGHT TO INITIATE A NEW AND DIFFERENT SERVICE.

- (a) Decision in this Case Requires Consideration of the Background of the Freightways Authority.

Plaintiff seeks to avoid recognition of the historical background of the authority here under review. That background cannot be ignored. As indicated in the statement of facts, there has been a step by step emasculation of the authority which Peterson received under his original Certificate 1001, which was before this court in *Peterson v. Commission, supra*. That authority, as carefully pointed out by the Commission in its order of May 29, 1957, Case No. 4419 (R. 214-224) was designed to afford transportation service to the people located along U. S. Highways 40 and 189 between Salt Lake City and Provo, by way of Heber City. What occurred, however, was a piecemeal breaking up and manipulation of the initial authority in steps as follows: (1) Peterson and his associates organized Freightways (2) Peterson transferred the Salt Lake City-Provo

authority to Freightways, retaining the remainder of the authority in himself (3) Peterson transferred to Vernon a further portion of the authority (4) Peterson and his associates purportedly sold all of the outstanding stock of Freightways to the Palmer Brothers for One Dollar (\$1.00) (5) the Palmer brothers, then in control of Freightways seek to get rid of the operations over Heber City and integrate Freightways into their other operations by the device of an alternate route.

In the face of these developments is there little wonder that plaintiff seeks to avoid any consideration of these manipulations, and is there any doubt that a proper disposition of this case requires a consideration of this background.

(b) Freightways is not Actually Seeking an Alternate Route.

An alternate route application and an alternate route authority contemplate and must necessarily involve a situation in which a carrier in connection with its over-all operations seeks the right to deviate from some portion of its authorized route. It does not contemplate a situation in which a carrier seeks to abandon completely a course of operations theretofore employed for another course of operations. Nor does it contemplate a situation such as found here where Freightways is actually only a nominal operator. It apparently has no separate financial standing of its own, it operates no equipment of any kind on the highways, it has no separate officers, dock space or terminal facilities. It is in fact only a shell, a mere agency of Palmer Brothers,

Inc. The granting of the so-called alternate route would in substance be nothing more than the granting of a certificate to Palmer Brothers, Inc., to operate on U. S. Highway 91 between Salt Lake City and Provo in direct competition with Carbon.

The cases cited by plaintiff do not meet the essential facts of the case at Bar. No case has been cited under similar facts, and we think none can be found, for the argument that we have here a good-faith application for an alternate route does not meet the test of common sense.

(c) **The Granting of the Application Would Confer upon Freightways a Competitive Advantage not Theretofore Enjoyed.**

It is difficult to understand the contentions of plaintiff that if this application is granted it would not have a competitive advantage not now enjoyed. All of the facts in this case fly in the face of such a contention. The record is clear that operations over the Heber City route are more circuitous, involve greater mileage, are more expensive, require more transit time, and are essentially different than the operations directly down U. S. Highway 91. However, the statement of plaintiff clearly disposes of any such contention. Palmer, at the inception of the application, stated the purpose as follows:

"We wish to secure an alternate authority down Highway 91 to Provo so that we may receive the added benefits of savings that will be incurred to this operation over 91. The expenses up, over and around through Heber is well known. It makes the operation of Utah Freightways a marginal operation,

whereas as going down 91 it can be operated at a profit."

Here is a definite statement that the operation of Freightways, to be profitable, must be conducted down U. S. Highway 91. How can it be seriously contended that Freightways under such an operation would not have a competitive advantage not enjoyed by operating over the Heber City route.

Substantially the same issues considered under this point were before the Commission in said Cases 4419 and 4542 and determined contrary to the contentions made by plaintiff here. The decisions in those cases are now final.

It therefore appears clear that the operation proposed under plaintiff's application is a new and different service.

II.

THE INITIATION OF THE NEW SERVICE PROPOSED BY FREIGHTWAYS REQUIRES PROOF OF CONVENIENCE AND NECESSITY.

(a) The Authority of the Commission is Prescribed by Statute.

The Commission has no common law authority. Its power and jurisdiction arises entirely from statute. *Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. v. Illinois Commerce Commission*, 315 Ill. 461, 146 N. E. 606, 54 A. L. R. 45; *Monroe v. Railroad Commission*, 170 Wis. 180, 174 N. W. 450, 9 A. L. R. 1007.

(b) The Statute and Decisions Thereunder Require Proof of Convenience and Necessity.

In enacting Chapter 65, Laws of Utah, 1935, the legislature undertook to deal with the subject of transportation by motor vehicle. That Act with certain amendments is now embodied in Chapter 6, of Title 54, Utah Code Annotated, 1953.

Under Section 5 of that chapter, it is made unlawful for any common motor carrier to operate in intrastate commerce without first obtaining a certificate of convenience and necessity. Section 5 further provides the circumstances under which a certificate of convenience and necessity may be issued, as follows:

“54-6-5 * * * 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. * * *”

This Court has expressly held that a carrier already rendering a public service and seeking to enter a new field or render a new or different service must comply with the requirements of convenience and necessity. In *Mulcahy, et al. v. Public Service Commission of Utah, et al.*, 101 Utah 245, 117 P. 2d 298, this Court gave careful consideration to this entire problem and at page 252 of the Utah report pointed out that:

“When a utility *desires to enter a new field or to render a new or different service*, it must, as a

condition to receiving a certificate to so perform, show that service sought to be given is one of 'public convenience and necessity' *Fuller-Toponce Truck Co. v. Public Service Comm. of Utah*, 99 Utah 28, 96 P. 2d 722, 724. * * *

In pointing out the procedure to be followed this Court at page 260 of the Utah Report further observed that:

"* * * While evidence pertinent to any question involved in the application may be presented on the hearing, the commission's determinations would proceed as follows: *Does the public convenience and necessity require further, new or additional common carrier service in the territory proposed to be served?* If not, the application should be denied. * * *

We can find nothing in our statutes which would justify the contention or position that a motor carrier seeking to initiate a new or different type of service through the subterfuge of an application for an alternate route is relieved of the burden imposed by our statute of proving public convenience and necessity.

It appears from the brief of plaintiff that substantial reliance for its entire position in this case is based on the recent decision of this Court in *Milne Truck Line, Inc., et al. v. Public Service Commission*, 9 Utah 2d 28, 337 P. 2d 412. Plaintiff appears to contend that the decision in the *Milne* case completely overturns all of the authority heretofore laid down by this Court on the requirements of convenience and necessity and now enables a motor carrier to completely change its method of operation without being obligated to meet the requirements of public convenience and necessity.

We do not so understand the decision in the *Milne* case. That case rests upon the peculiar circumstances of a rail carrier seeking to render supplementary and auxiliary service by truck for the transportation of property moving on rail billing between rail stations. This Court found ample and sufficient evidence of the proof of public convenience and necessity but in considering the matter of the rendering of a new service held that the service proposed by Union Pacific Motor Freight was different from the service which the objecting motor carriers were authorized to render. This is clearly demonstrated by the language of the Court at page 417 of the Pacific Report as follows:

“* * * Not only is it different from the present peddling system in operation on the Union Pacific Railroad Company, but it is also different from the service which plaintiffs are authorized to render. Motor Freight may not go outside the limits of rendering auxiliary and supplementary service coordinated with the freight service of the Union Pacific Railroad Company. This removes it from competition with plaintiffs. It is circumscribed by being required to carry its freight auxiliary and coordinated with the railroad freight service. Likewise the service sought here could not well be performed by plaintiffs without extending to them the privilege of going into the railroad depot and taking freight from each freight house shown on the map herein and with the help of the freight handling personnel of the Union Pacific Railroad Company. As we view the case, Motor Freight will not be competing with plaintiffs. It renders a service which plaintiffs could not perform if Motor Freight did not perform it.”

Thus there is nothing in the *Milne* case which disturbs the basic decisions cited above and which are controlling here, namely, that before Freightways could initiate its new service in direct competition with Carbon it must prove convenience and necessity.

(c) The Action of the Commission was not Arbitrary or Capricious.

It is asserted in the brief of plaintiff that the action of the Commission in refusing to grant Freightways a certificate of convenience and necessity to operate on Highway 91 and to abandon its operations over the route authorized in its certificate was arbitrary and capricious. Exactly the opposite is true. We have presented here nothing more than an attempt on the part of Freightways to obtain a certificate of convenience and necessity for a new operation by the device of an alternate route application. The mandate of the statute and the decisions of this court construing the same require that before a carrier may initiate a new or different service the requirement of public convenience and necessity must be satisfied. No proof was made or undertaken by Freightways that public convenience and necessity required the service proposed by Freightways. In the absence of such proof the Commission was required under the statute and decisions of this Court to deny the application. In doing so its acts were not arbitrary or capricious but were in regular pursuit of its authority.

Freightways and its predecessors have endeavored through a series of applications before this Commission and by conduct independent of any proceeding to circumvent and

avoid the requirement of law that in order to initiate a new or different type of service, public convenience and necessity must be proved. All these maneuverings have been in an effort to come in through the back door of the Commission rather than to file an application in good faith pursuant to the statute for a certificate based on public convenience and necessity. Neither Freightways or any of its predecessors have been deprived of any right or remedy whatever to which they may be entitled. The statute has laid down the plan and procedure for the procuring of a certificate of convenience and necessity. That plan and procedure requires that proof shall be made that public convenience and necessity require the service proposed. If convenience and necessity does require the service, all Freightways has to do is to file its application, bring forward its proof in an orderly way and establish the facts. If public convenience and necessity do not require the service which Freightways proposes, it should not be entitled to enter upon the performance of that service by the device of an alternate route.

The essential error in the views expressed by Commissioner Hacking lies in a failure to recognize the limitations imposed upon the powers of the Commission by statute and the requirement of law that convenience and necessity must be established by one seeking to initiate a new or different type of service. The Commission having determined in Case 4419 by its decision of May 29, 1957, that the conduct of transportation service by Freightways over U. S. Highway 91 was tantamount to the institution of a new service (R. 222) and nothing appearing in the case under review to

alter that determination, the Commission, if it regularly pursued its authority, had no alternative but to require proof of convenience and necessity. After all the maneuvering which has gone on by parties who have bandied about the operating authority originally granted to Peterson, it would have been most easy for the Commission in effect to have thrown up its arms and said that it would no longer struggle with this matter and grant Freightways authority to conduct operations over Highway 91. The position taken by the majority of the Commission in this case is a position against permitting an operating authority to be so emasculated and maneuvered that a certificate of convenience and necessity can be obtained without compliance with procedure. The order and decision based upon such a position is not only in compliance with the power and authority of the Commission, but is commendable under the record of this case.

III.

AN ISSUE MAY NOT NOW BE RAISED ON THE INTERPRETATION OF THE FREIGHTWAYS AUTHORITY.

Plaintiff in its third point seeks to present for determination a question as to the construction of Certificate of Convenience and Necessity No. 1193. This contention is without merit. This question was passed upon in said Cases 4419 and 4542. No review was sought of those decisions and the same are both final. Moreover, the application for rehearing and reconsideration in Case 4419-Sub 1, from which the present review is taken, did not assert as a ground

of invalidity, an erroneous construction of the Freightways authority. Section 54-7-15, Utah Code Annotated, 1953, expressly provides that no corporation or person shall in any court urge or rely on any ground not set forth in the application for rehearing. Plaintiff is precluded from now making any contention with respect to the construction of said certificate.

CONCLUSION

Plaintiff, all of whose stock was acquired for \$1.00, without an apparent independent financial structure, without any over-the-road equipment, dock or terminal facilities of its own, and without separate management and control seeks to abandon entirely its authorized route and the service intended to be provided by the Commission and to integrate its operations with another carrier. This is a new and different service. If it is to be instituted, then public convenience and necessity must be shown. No such proof having been undertaken, the order and decision of the Commission denying the application was properly entered and should be affirmed.

Respectfully submitted,

S. N. CORNWALL,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,

Attorneys for Defendants.