

1959

# Salt Lake Transfer Co. and Ashworth Transfer Inc. v. Public Service Commission of Utah et al : Brief of Plaintiffs

Utah Supreme Court

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Pugsley, Hayes, Rampton & Watkiss; Attorneys for Plaintiffs;

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## Recommended Citation

Brief of Appellant, *Salt Lake Transfer Co. v. Public Service Comm. Of Utah*, No. 9082 (Utah Supreme Court, 1959).  
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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**FILED**

SALT LAKE TRANSFER COMPANY  
and ASHWORTH TRANSFER, INC.

*Plaintiffs,*

vs.

THE PUBLIC SERVICE COMMISSION  
OF UTAH; HAL S. BENNETT,  
DONALD HACKING and JESSIE R.  
S. BUDGE, its Commissioners, and  
BARTON TRUCK LINE, INC.,

*Defendants.*

Case No.  
9082

**BRIEF OF PLAINTIFFS**

PUGSLEY, HAYES, RAMPTON & WATKISS  
*Attorneys for Plaintiffs,*

Salt Lake Transfer Company and  
Ashworth Transfer, Inc.  
721 Continental Bank Bldg.  
Salt Lake City, Utah

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## BRIEF OF PLAINTIFFS

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### STATEMENT OF FACTS

Barton Truck Line, Inc. has operated for several years between Salt Lake City and Tooele, Utah and in the present matter made application for authority to extend its services between Salt Lake City and Ogden, Utah operating over regular routes for the transportation of commodities generally with

certain exceptions. Several carriers opposed the application and the two plaintiffs here represented, Salt Lake Transfer Company and Ashworth Transfer, Inc. appeared in opposition thereto primarily upon the question of the movement of *explosives*. The questions of the adequacy of the evidence as to other commodities involved in the matter will be taken up by the other parties to the appeal on separate briefs.

The court is somewhat familiar already with the certificates held by Salt Lake Transfer Company and Ashworth Transfer, Inc., both of which provide for the transportation of specified commodities related to those requiring special equipment or service by reason of the size, shape, weight, origin or destination of the commodity. In addition thereto, each certificate of the two plaintiffs contain in it a specific authorization for the transportation of *explosives*. The evidence shows that both of these carriers have engaged in the transportation of explosives for many years, serving both the commercial shippers of explosives, as well as the government in the transportation of its explosives.

At the inception of the hearing, counsel for the applicant Barton Truck Line, Inc., made a statement excluding from the requested general commodities those commodities which because of size, shape or weight require the use of special equipment, but refused to make any exclusion as to the transportation of explosives. At that time he assured us that there would be witnesses to support their request for the movement of explosives. Notwithstanding this assurance and the continued participation of Salt Lake Transfer Company and Ashworth Transfer, Inc. throughout the entire proceedings, not one single

public shipper witness appeared to testify as to the need for the transportation of explosives. No shipper or receiver of commercial explosives not any shipper or receiver of government explosives appeared in support of the application. At the conclusion of the applicant's evidence, these two plaintiffs as protestants in the proceeding before the Public Service Commission of Utah made motions to dismiss as to the transportation of explosives, but these motions were summarily denied by the Commissioners there at the hearing. These two plaintiffs then proceeded to put on evidence as to the operations which they have conducted in the transportation of explosives. Some of that testimony is reflected in the evidence given by Mr. Elmer L. Sims, a managing partner of Salt Lake Transfer Company and by Mr. Rulon Clyde Ashworth Jr., general manager of Ashworth Transfer, Inc. Part of this testimony is as follows:

(R. 551)—Elmer L. Sims is testifying:

Mr. Sims was asked as to the service provided by Salt Lake Transfer Company as to the area between Salt Lake and Ogden. He testified that the Company had been serving regularly and then was asked as to service on the specific commodities authorized by the Company certificate and particularly as to explosives.

"Q. Tell us what experience you are presently having in serving the military installations between Salt Lake and Ogden?

A. Well, this is a continuing thing—we are into all these installations on a daily basis, and to many of them on an hourly basis."

(R. 554-556)—Mr. Sims was asked as to the service for

commercial shippers of explosives and testified that at North Salt Lake there is a company known as Western Powder Company which they have served for the past fourteen years and also that they have served the plant at Baccus, Utah, which is the plant of the Hercules Powder Company for a similar period of time.

"Q. Is your service available to the Hercules Powder Plant from their plant and storage facilities at Baccus, Utah?

A. It is.

Q. And is your service available to move from that point on explosives to any point within the area now served by Barton Truck Line and that which would be covered by this application?

A. It is.

Q. Now, have you had any requests or are you available to move explosives between the government installations in the area between Salt Lake and Ogden on the one hand and points in Tooele County on the other hand?

Mr. Tuft: You are referring, of course, only to explosives?

Mr. Pugsley: At this point, yes.

A. We have had requests and we are available on call ready to serve these requests from military installations to points in Tooele County and all points in the State of Utah.

Q. Are you acquainted with any government storage facility between Salt Lake and Ogden for handling of explosives?



A. Well, at the present time located at Hill Field there is an enormous storage dump for all types of explosives and ammunition peculiar to the Air Force, and this storage area services the Air Force world wide, for all types of explosives peculiar to them. In addition, they have a missile program and at the present time they have been assigned the world wide project of servicing three types of missiles, namely the Snark, the Bomarc and the Minute Man.

Q. Have you had any experience in serving the point of Hill Field which was formerly known as the Arsenal?

A. We certainly have.

Q. Now, in the area served by Barton Truck Line over there in the general vicinity of Tooele, is there any point of origin or destination of explosives that you know of and have served?

A. The service of hauling explosives from the military installation formerly called Arsenal, now called Hill Field, to points in Tooele County is a continuing thing, and we stand ready on call to move to or from these two points all types of explosives peculiar to the armed services."

Mr. Rulon C. Ashworth Jr. testified on behalf of Ashworth Transfer, Inc., starting at page 565 of the record. The exhibits identified their equipment and authority, the authority being identical intra-state with that of Salt Lake Transfer Company. As to the movement of explosives, he testified that they have actual terminal facilities with equipment stationed at both Baccus, Utah, which is the plant of the Hercules Powder Company and at Gomex, Utah, which is in the mouth of the Spanish

Fork Canyon, the site of the manufacturing of explosives of the American Cyanamid Company. They provide daily service for those points and at R. 569 he testified, "We have equipment as indicated both at that place that could provide the service immediately to the the destination. We have power units that are stationed there that, of course, move the trailers to the various igloos for the companies and, of course, they are available to use on movement beyond the location of the plant." At R. 571, he was asked as to any experience they have had in the transportation between the military installations north of Salt Lake on the one hand and the military installations in Tooele on the other hand. His answer was given:

"A. We have made regular movements of both explosives and other commodities that would be covered under our certificate between Ogden Arsenal, Hill Field and Tooele Depot, also Deseret Chemical Depot and Dugway Proving Grounds.

Q. Are you and Salt Lake Transfer generally competitive for this traffic in Utah?

A. Very competitive.

Q. Both as to the explosives and the other authorized commodities?

A. Yes, sir.

Q. And do both of you have solicitors in the field seeking transportation of these commodities?

A. Yes, sir.

Q. Would you state to the Commission why you are opposing this application.

A. Well, first of all, we don't feel that additional service is needed. At the present time we have between fifty and sixty-five per cent of our equipment that is being used. We have trailer equipment that is used primarily in the movement of explosives and building materials that hasn't moved for over a year, which is available for immediate movement insofar as explosives is concerned, and the other commodities, of course, which you could transport in van-type equipment, and we are seeking additional business to keep what equipment we have available busy, and we certainly—as of last year we certainly never run into any peak periods where we didn't have equipment available to handle the demands as we were called upon to do.”

Both Mr. Sims and Mr. Ashworth testified that the drivers of Salt Lake Transfer Company and Ashworth Transfer Company are experienced in the handling of explosives and the equipment is maintained in conformance with the safety requirements of the Public Service Commission as well as the Interstate Commerce Commission.

It is to be noted that there is nothing in the testimony of any of the witnesses for and on behalf of the applicant which testified as to any need for movement of explosives. Neither were there any commercial shippers or receivers of explosives who testified, nor were there any representatives of the Government who appeared on behalf of the applicant. The granting of the application as it now stands without any exception for *explosives* would accord to the applicant the right to move explosives directly from the military installations north of Salt Lake such as the large explosive storage facilities at Hill

Field, Utah to the large explosive storage facilities at the Tooele Ordnance Depot near Tooele, Utah. It would be without precedent for the Commission to grant and for this Court to affirm a certificate for the transportation of specialized commodities such as explosives without a single word of testimony in support of the application as to those matters.

The testimony in the case showed that between Salt Lake City and Ogden are several military installations and particularly in connection with Hill Field there is now situated what used to be Arsenal where explosives are received and from which point explosives are shipped for and on behalf of the government. The testimony in the record also shows that at Tooele Ordnance Depot just outside Tooele, Utah is situated a substantial military base to which explosives are shipped and from which explosives are transported. The effect of the granting of this application in form as recommended by the Commission is to give to Barton Truck Line a right to perform a through service between these military installations without any testimony for or on behalf of the shippers of the commodities involved and particularly nothing whatsoever on the movement of explosives. The special character of the transportation of explosives is such that there is available to the government as well as to other shippers and receivers of explosives, not only the through direct service provided by Salt Lake Transfer Company and by Ashworth Transfer, Inc. between all points and places in the State of Utah and particularly between the military installations involved, but also there presently exists and has been in operation for a number of years, a combination service involving an interline between two motor carriers or rail carriers

for the transportation of explosives between the military installations in the area sought by this application between Salt Lake City and Ogden on the one hand, and the Tooele area on the other hand.

The evidence also shows in this case that there is situated at Bacchus, Utah, just east of Magna, Utah, the manufacturing plant of the Hercules Powder Company where substantial quantities of explosives are manufactured and from which point such are shipped to points within the State of Utah and elsewhere, and also that at the mouth of Spanish Fork Canyon is the plant of the American Cyanamid Company at the point designated as Gomex where substantial quantities of explosives are manufactured and shipped. Ashworth Transfer, Inc. stations equipment at both of these manufacturing points so that such is readily available for transportation to all points covered by this application on a direct single line service. Salt Lake Transfer Company does not station equipment at such points, but provides direct single line service from such manufacturing points, on call, to the points involved in this application. In addition there is a storage and magazine facility of the Western Powder Company situated at North Salt Lake which is within the area covered by the application, which point is served by both the Salt Lake Transfer Company and Ashworth Transfer, Inc. on direct single line service to all points involved in the application as well as to all points served by the Barton Truck Line, Inc.

## STATEMENT OF POINTS

### POINT ONE

THE COMMISSION ERRED IN NOT EXCLUDING EXPLOSIVES FROM THE GRANT OF AUTHORITY TO THE APPLICANT AS THERE IS NO EVIDENCE IN THE RECORD OF THE NEED FOR ANY TRANSPORTATION OF SUCH EXPLOSIVES .

### POINT TWO

THE GRANTING OF THE APPLICATION WILL ADVERSELY AFFECT THE OPERATIONS OF PROTESTANTS AND BE DETRIMENTAL TO THE PUBLIC AS NO PUBLIC CONVENIENCE AND NECESSITY EXISTS REQUIRING TRANSPORTATION OF EXPLOSIVES BY APPLICANT.

### POINT THREE

THE COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN DENYING PROTESTANTS' MOTION TO DISMISS THE APPLICATION AS TO THE TRANSPORTATION OF EXPLOSIVES.

### POINT FOUR

THE ORDER OF THE COMMISSION IS CONTRARY TO LAW AND NOT SUPPORTED BY ANY COMPETENT EVIDENCE AS TO THE MOVEMENT OF EXPLOSIVES.

## ARGUMENT

### POINT ONE

THE COMMISSION ERRED IN NOT EXCLUDING EXPLOSIVES FROM THE GRANT OF AUTHORITY TO THE APPLICANT AS THERE IS NO EVIDENCE IN THE RECORD OF THE NEED FOR ANY TRANSPORTATION OF SUCH EXPLOSIVES .

Protestants in this matter are greatly disturbed by the action of the Commission in granting to the applicant a certificate which would permit it to transport explosives not only between the very substantial government installations, but also between all commercial shippers and users of explosives in the areas involved in the application. The complete absence of any evidence showing or tending to show public convenience or public necessity for the transportation of explosives makes the order unlawful and contrary to the established principles of public transportation. A precedent of unfortunate consequences will be established if this type of a grant of authority is permitted to stand.

It has always been the position of the Supreme Court that at least some competent evidence must exist in the record to support a grant of operating authority to an applicant seeking a certificate of public convenience and necessity. Notwithstanding the language of Section 54-7-16, U.C.A., 1953 which says that the findings and conclusions of the Commission on questions of fact shall be final and shall not be subjected to review, nevertheless the court has always reviewed these matters and has set forth the measure of consideration to determine

"whether there was any substantial evidence to support the decision of the Commission," *Los Angeles & Salt Lake Railroad Company v. Public Utilities Commission*, 80 U. 455, 15 P. 2d. 358. Later the court expressed it this way:

"The Supreme Court's power of review is limited to questions as to whether the Commission, in the exercise of its authority, proceeded in the manner required by law, and whether the findings of the Commission are justified by the evidence." *Mulcaby v. Public Service Commission*, 101 U. 245, 117 P. 2d 298.

The matter was stated similarly but more forcefully in a yet more recent decision, *Ashworth Transfer Company v. Public Service Commission*, 2 U. (2d) 23, 268 P. 2d 990 at 994.

"On review of an order of the Public Service Commission of Utah granting a certificate of convenience and necessity, it is not required that facts found by the commission be conclusively established or shown by a preponderance of the evidence. The scope of review is limited to an ascertainment of whether the commission had before it *competent evidence* upon which to base its decision." (Underlining added.)

We anticipate that applicant in this case will attempt to shrug off this complete absence of evidence in support of the transportation of explosives on the basis that it had no duty to prove the existence of a need for transportation of every conceivable type of commodity when it is seeking authority to transport commodities generally. This has no force or effect in our present case particularly in light of the fact that both Salt Lake Transfer and Ashworth have specific authority to transport explosives by certificates naming the commodity as such and particularly because both of these carriers announced



their opposition as to the transportation of explosives by applicant at the inception of the hearing, were reassured by the applicant that there would be witnesses to testify as to a need for such service in the transportation of "dynamite" as counsel for applicant referred to the matter, and by reason of the fact that protestants remained in the proceeding continuously waiting for the appearance of some witness to show the need for such service and then made a motion for dismissal of the application as to such specialized commodity at the conclusion of the applicant's case. Then protestants proceeded to present evidence as to the equipment, authority and service provided for the transportation of explosives, both governmental and commercial, throughout the area involved and showed beyond any question of a doubt that there was no need whatsoever for the authority requested by the applicant as to explosives. In some occasions where there would be only a nominal amount of traffic of this character involved perhaps the matter would not be so serious, but here we have major governmental military installations in the Salt Lake to Ogden area where vast quantities of explosives are magazined and on the other hand, we have a major source of storage of explosives in the Tooele area, both points of which can be served by the applicant under the authority granted by the Commission in this proceeding.

The Commission should have made an affirmative finding that there was no evidence as to the transportation of explosives presented by the applicant, and then should have entered its order excluding any transportation of explosives from the certificate which has been prescribed.

Some statements were made by counsel in the course of

the proceeding that it was almost impossible to get any government witnesses to sustain a request for transportation service between military installations. This may or may not be true, but obviously when there is adequate competent truck transportation service as well as rail transportation service between the military installations involved, the government and no other shipper would appear at a hearing and testify that there was a need for the establishment of an additional truck service. Counsel for the applicant by smooth talk has attempted to minimize this whole matter by stating that this is merely an extension between Salt Lake and Ogden and we should not worry about the fact that they can now serve between these major military bases in the Salt Lake to Ogden area on the one hand and the Tooele on the other hand. Such unrealistic talk does not negative the stark facts that the applicant, under this grant of authority, can and is taking the traffic away from the two plaintiffs herein, Salt Lake Transfer Company and Ashworth Transfer, Inc.

If government shipper witnesses are difficult to procure, then perhaps if there is a need for authority to transport explosives, applicant could or should have procured shipper witnesses from the two manufacturing companies of explosives in the Utah area, Hercules Powder Company at Bacchus, Utah, or American Cyanamid Company at Gomex, Utah, or even from the explosives storage and wholesale company, Western Powder Company at North Salt Lake. However, not a single one of those witnesses appeared. Then if it was difficult to get such witnesses, perhaps if there was a need for the service applicant could have procured some of the purchasers of explosives, such as the contractors, miners, etc. to testify that there was a need

for the transportation of explosives from the points of origin to the points sought by the application, but absolutely no testimony was produced by any such witnesses at the hearing. Only one conclusion can arise, and that is that there is no need whatsoever for the authorization of applicant to transport explosives between the areas involved.

A further specious justification is presented by the applicant through its counsel that no harm has been done in this case because already applicant could transport these explosives part way between the two major military explosives storage facilities in the Tooele area and the Davis County area, and has already established an interline service between itself, operating from Tooele to Salt Lake, and then via Wasatch Fast Freight from Salt Lake to the military installations. The existence of such service is right and proper and it should be permitted to continue, but the grant of authority does two things which are very serious:

- (a) It takes the traffic away from the Wasatch Fast Freight completely; and
- (b) It provides to applicant the right to furnish a single line service such as is already provided by Salt Lake Transfer Company and Ashworth Transfer, Inc.

The government installations have a wide variety of service to choose from at the present time:

- (a) Rail service between the installations,
- (b) Interline service by Barton and Wasatch Fast Freight,  
or

- (c) Direct single line service between the installations via Salt Lake Transfer Company and Ashworth Transfer, Inc.

This very surplusage of transportation facilities available to the government and to commercial shippers of explosives completely negatives any public convenience or public necessity for the transportation of explosives by applicant.

## POINT TWO

THE GRANTING OF THE APPLICATION WILL ADVERSELY AFFECT THE OPERATIONS OF PROTESTANTS AND BE DETRIMENTAL TO THE PUBLIC AS NO PUBLIC CONVENIENCE AND NECESSITY EXISTS REQUIRING TRANSPORTATION OF EXPLOSIVES BY APPLICANT.

## POINT THREE

THE COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN DENYING PROTESTANTS' MOTION TO DISMISS THE APPLICATION AS TO THE TRANSPORTATION OF EXPLOSIVES.

## POINT FOUR

THE ORDER OF THE COMMISSION IS CONTRARY TO LAW AND NOT SUPPORTED BY ANY COMPETENT EVIDENCE AS TO THE MOVEMENT OF EXPLOSIVES.

The recitation of these three points in light of the statement of facts and the argument on the first point, calls for little separate argument. The Public Service Commission on September 30, 1959 in a different case, involving a general commodity application, expressed the principles this way:

"There can be no fast rule or clear line of demarcation between the convenience and necessity of individuals and the convenience and necessity of the public, because the public is made up of a collection of individuals. But a thing may be a convenience or a necessity for many individuals and yet not be a public convenience or necessity. The 'convenience' and 'necessity' required to support an application for a certificate are those of the public, not those of a comparatively few individuals. Public Convenience and Necessity is a definite need of the general public for such service where no reasonably adequate service exists. When a carrier 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 the service sought to be given is really a public necessity; and in determining whether or not the convenience and necessity of the public will be best subserved by the proposed service, the needs and welfare of the people of the territory or community affected should be considered as a whole. The mere matter of convenience to certain shippers does not establish public necessity or convenience. Considering in its entirety the evidence introduced in this case, we cannot find that the needs and welfare of the people as a whole, in the territory affected, presently require the proposed service.

"Assuming, however, that we may now reasonably expect and foresee that the economic development of Grand and San Juan Counties will, in the near future, require improved methods of common carrier truck transportation, the question is presented as to whether

such service should be rendered by existing carriers or by the applicant. The applicant stresses the proposition that the service proposed will be rendered by a single line carrier, without interchange with other lines. There are well recognized advantages of single line movements of commodities. Carried to its logical conclusion, however, such a development would result in the elimination of most of the truck lines which have developed in this state and for many years provided the public with a vital means of transportation.

"This question poses for the Commission not only a specific factual answer but the determination of a matter of policy, namely: Which particular character of service, in the opinion of the Commission, will best subserve the public convenience, necessity and welfare. In determining this matter, the Commission under the statute will take into consideration the existing transportation facilities, the investment of existing carriers; the services they have rendered and are now rendering; the need of a continuation of such services; the effect upon such services of a new competitor in the transportation field and the effect of a new competitor or carrier upon the economic and industrial development of the territory involved. The rights and duties of existing carriers engaged in transportation to and from a certain field or territory, rendering the service they are permitted or ordered to do, reasonably, adequately and efficiently, are not lightly or ruthlessly to be interfered with or subjected to needless competition.

"An applicant desiring to enter a new territory or to enlarge the nature or type of the service he is permitted to render must therefore show that from the standpoint of public convenience and necessity there is a need for such service, that the existing service is not adequate or convenient and that his operation would eliminate such inadequacy and inconvenience. He must also show

that the public welfare would be better subserved if he rendered the service than if the existing carrier were permitted to do so. The paramount consideration is the benefit to the public, the promotion and advancement of its growth and welfare.

"We are charged with the duty of seeing that the public receives efficient and economical transportation service. This requires consideration of all aspects of the public interest. When a carrier applies to institute a new service we 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 it to enlarge the scope of its 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 operation they are maintaining." See: Garrett Freightlines, Inc. No. 4001, Sub. 2.

Salt Lake Transfer and Ashworth Transfer have served the explosives shippers well and faithfully for many years, both commercial and governmental. They will each and both be prejudiced by this unbridled grant of explosives rights to applicant. This grant of rights to Barton results, in the language of the Commission, adversely to protestants rights and operations being "lightly or ruthlessly to be interfered with or subjected to needless competition."

No accurate measure exists for saying when the Commission acts in an "arbitrary or capricious manner" but beyond question the Order in this instant case qualifies as one granted in an arbitrary or capricious manner as to explosives. Not one scintilla of shipper evidence for movement of explosives is in the record.

WHEREFORE, we respectfully submit that the Report and Order of the Commission must be modified so as to preclude the transportation of explosives by the applicant.

PUGSLEY, HAYES, RAMPTON & WATKISS  
*Attorneys for Plaintiffs*

Salt Lake Transfer Company and  
Ashworth Transfer, Inc.