

1960

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH

MAR 3 1960

SALT LAKE TRANSFER
COMPANY and ASHWORTH
TRANSFER, INC.,

Plaintiffs,

vs.

THE PUBLIC SERVICE COM-
MISSION OF UTAH: HAL S.
BENNETT, DONALD HACK-
ING and JESSIE R. S. BUDGE,
its Commissioners, and BAR-
TON TRUCK LINE, INC.,

Defendants.

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Cast No. 9082

REPLY BRIEF OF APPELLANTS AND
PLAINTIFFS, SALT LAKE TRANSFER
COMPANY AND ASHWORTH TRANSFER, INC.

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Cast No. 9082

REPLY BRIEF OF APPELLANTS AND
PLAINTIFFS, SALT LAKE TRANSFER
COMPANY AND ASHWORTH TRANSFER, INC.

COME NOW the plaintiffs, Salt Lake Trans-
befer Company and Ashworth Transfer, Inc. and
make the following reply to a portion of the brief
of defendants and respondents filed in the above
matter. This reply will be limited to that part which
refers to the matter of the transportation of ex-
plosives, and the other issues in the brief will be
considered by the briefs of plaintiffs and appellants,
Union Pacific Railroad Company and Consolidated
Freightways.

SUMMARY OF FACTS

In confirmation of the statements set forth in the brief of plaintiffs in this matter, on page 10 the defendant Barton Truck Line, Inc. states among other things: "It is true defendant produced no shipper testimony demonstrating a need for the transportation of explosives."

An attempt is made to circumvent this obvious absence of testimony as to explosives by the suggestion that Barton Truck Line, Inc. already has authority to transport general commodities as to other territories within the state of Utah. This is an unfounded attempt to shift the burden of proof from the applicant, Barton Truck Line, Inc. to someone else, to show the *absence* of public convenience and necessity. On page 11 of the brief filed by the defendants there is the statement: "Plaintiff has complained of the lack of shipper evidence in the record with respect to explosives. Yet plaintiffs produced no shipper witnesses either, but only an officer from each of the plaintiff companies."

Affirmative proof was made by the protestants of the frequency of service, the type and volume of equipment, the experience in handling explosives and their safety procedures in respect to this dangerous commodity. The attack by defendant upon the service with respect to certain tariff minimums for explosives is not a valid basis, particularly in

the complete absence of any proof that any person whatsoever desired to ship explosives in any quantity. Both protestants testified as to their willingness and ability to transport *any* quantity of explosives between the points involved and any point in Utah. Tariff publication bases are not a proper issue in applications for convenience and necessity.

One other very salient fact in this case is that the Commission failed to make any finding as to the authority, equipment, service, experience or personnel of these two protestants. Further, it made absolutely no findings as to explosives.

The burden of proof is upon the applicant in a case to show the necessity for the service involved. Explosives are a specialized type of commodity, and normally move under different sets of circumstances than the ordinary movement of general commodities, such as were sought by the applicant. Obviously, the applicant would be more than happy to have the Commission grant the certificate which permits it to transport explosives along with general commodities, but the burden of proof was upon the applicant to prove that there was a genuine need for such services.

The applicant has sought almost unlimited authority to serve the richest area of Utah, Salt Lake City to Ogden including three major governmental military installations. No witness appeared

from any of the military installations. No *shippers*, or *receivers* of explosives testified either as to any inadequacy of the existing facilities or service of Salt Lake Transfer Company, Ashworth Transfer, Inc. or the Wasatch Fast Freight Division of Consolidated Freightways.

STATEMENT OF POINTS IN REPLY

POINT I

IN THE ABSENCE OF AFFIRMATIVE PROOF OF A NEED FOR SERVICE IN TRANSPORTING EXPLOSIVES, THE ORDER MUST BE REVERSED AS TO SUCH COMMODITY.

POINT II

THE COMMISSION MADE NO FINDINGS AS TO THE SCOPE OF AUTHORITY AND SERVICE OF EITHER OF THESE TWO PLAINTIFFS AS PROTESTANTS.

POINT III

THE COMMISSION MADE NO FINDINGS WHATSOEVER AS TO THE TRANSPORTATION OF EXPLOSIVES NOR AS TO THE NEED OR LACK OF NEED FOR SERVICE THEREON.

ARGUMENT

POINT I

IN THE ABSENCE OF AFFIRMATIVE PROOF OF A NEED FOR SERVICE IN TRANSPORTING EXPLOSIVES, THE ORDER MUST BE REVERSED AS TO SUCH COMMODITY.

Section 54-6-5, UCA 1953 requires the applicant to prove the existence of public convenience

and necessity. In the case of *Union Pacific Railroad Company v. Public Service Commission*, 103 Utah, 459, 135 P. 2d. 915, this court said that "we have repeatedly stated that 'convenience' and 'necessity' are not segregable and to be considered as separate terms, but must be construed together and constitute a joint concept which must be construed and considered according to the whole concept of the act."

In the more current case, that of *Lake Shore Motor Coach Lines, Inc. v. Hal S. Bennett, et al.*, 8 Utah 2d. 293, 333 Pac. 2d. 1061, this court considered the issue of proof of public convenience and necessity and reversed the Public Service Commission, saying in part:

"Nevertheless, upon a survey of the record, we find no witness that made showing for the defendant; that he was aware of the extent of the services presently available; that he had attempted to make use of them and found the services wanting; nor did the witnesses express actual dissatisfaction with the services presently offered. There being no such evidence, we see no basis for a finding that public and convenience and necessity require additional service. The finding to that effect was therefore capricious and arbitrary."

Then, in the concurring opinion of Justice Henriod, in the same case, he said:

"I concur for the sole reason that no one

has shown from the record any evidence reflecting any inadequacy of service resulting from the operations of plaintiffs in their respective spheres, while on the contrary the service affirmatively was shown to have been satisfactory.

“Existing carriers that have expended risk capital, and have complied with tariff and other Commission requirement, ordinarily are entitled to protection against competition until a proposed competitor or someone else establishes by substantial evidence a failure to perform the service which the Commission has authorized and ordered them to perform.”

It is crystal clear, therefore, that the applicant Barton Truck Line, Inc. has wholly failed in its burden of proof as to the transportation of explosives, and that the action of the Commission in granting a certificate to the Barton Truck Line, Inc., which permits the transportation of explosives, in face of the proof by two protestants, Salt Lake Transfer Company and Ashworth Transfer, Inc., that each has authority to perform such service and is presently engaged in the same, and that they have no complaints from the shippers, is wholly arbitrary and capricious.

We reassert the position of the original brief that the court should to that extent reverse the order of the Public Service Commission and exclude

from the certificate any grant of authority for the transportation of explosives.

POINT II

THE COMMISSION MADE NO FINDINGS AS TO THE SCOPE OF AUTHORITY AND SERVICE OF EITHER OF THESE TWO PLAINTIFFS AS PROTESTANTS.

POINT III

THE COMMISSION MADE NO FINDINGS WHATSOEVER AS TO THE TRANSPORTATION OF EXPLOSIVES NOR AS TO THE NEED OR LACK OF NEED FOR SERVICE THEREON.

Defendant Barton Truck Line cites in its brief cases which seem to support the sanctity of determinations by the Public Service Commission of Utah. A review of these and the statute upon which such are predicated is that the court will support that determination if convenience and necessity has been *found* from competent evidence in the record.

The statute, 54-6-5 U.C.A. 1953, reads in part. . . . "If the commission finds from the evidence that public convenience and necessity require the proposed service . . ." The reference to *finding* also occurs later in the section. Rule 18, *Decisions of Commission*, of the Rules of Practice of the Public Service Commission of Utah, Section 18.1 reads:

"After the Commission shall have made final determination upon any proceeding, it shall prepare its report and order containing its findings, conclusions and order with respect to such proceedings."

Once again, *findings* are considered vital. Certainly explosives became a material issue when the applicant announced, in response to inquiry at the very inception of the hearing:

“Mr. Tuft: We want explosives, and will contend for them.” (R-8) (p. 9 of Defendant’s brief). This was later followed by detailed testimony by representatives of Salt Lake Transfer Company and Ashworth Transfer, Inc. as to the authority, equipment, volume and experience in handling explosives.

The parties hereto and the Commission knew that the transportation of *explosives* was a very important issue in the hearing. As no proof of need for service to transport explosives was presented by applicant, no finding of need could be made. The issue should not be ignored and the grant of explosives authority issued to applicant by mere use of the expression, “general commodities” to applicant.

Just as the certificate excludes transportation of household goods, commodities in bulk, commodities requiring special equipment, etc., so too the certificate should exclude *explosives*.

Now some play for sympathy is sought by the applicant in its brief by asserting that it already could serve most of the area involved and the same

commodities. This is particularly misleading, as Barton's Exhibit #1 shows, for instance:

(a) At unnumbered page 7 thereof, relating to the Certificate No. 1074 in subparagraph (d) relating to service to Dugway Proving Grounds the commodity description reads . . . "commodities generally, including explosives" . . .

(b) Its Certificate No. 1127 reads as to the commodity description on points West of Grantsville, . . . "commodities generally, except livestock, including airplane parts, supplies and equipment" . . .

(c) Applicant stipulated in this case to the exclusion from its application and certificate of, "household goods, commodities in bulk and commodities in connection with the transportation of which because of size or weight require the use of special equipment or special service in preparing said commodities for shipment, or in setting up after delivery" . . .

No logical plea can thus be advanced to the court that the Commission's action should be approved merely in the interest of uniformity of certificates, as none of the applicant's certificates have the same descriptions. More logical is the fact that

as the Commission several years ago recognized that a need was apparently proven in another hearing for explosives rights to Dugway from Salt Lake City (see Certificate No. 1074 supra) and spelled out such right, so here, in the absence of any proof, such explosives rights must be excluded.

On the other issues of public convenience and necessity, the discussion set forth in the original brief and those of the briefs in Case No. 9095, which is filed as a part of this same record by the Union Pacific Railroad Company, et al., are reasserted by this reference thereto.

WHEREFORE, these plaintiffs pray that the court review the order of the Commission and reverse the same, either wholly or in part, as requested in the preceding briefs, and particularly require the imposition of a restriction against the transportation of explosives by applicant.

Respectfully submitted.

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