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Union Pacific Railroad Co et al v. Public Service Commission of Utah et al : Brief of Petitioners

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

UNION PACIFIC RAILROAD COMPANY, a corporation, UNION-PACIFIC MOTOR FREIGHT COMPANY, a corporation, and CONSOLIDATED FREIGHTWAYS, INC., a corporation, *Petitioners,*

vs.

PUBLIC SERVICE COMMISSION OF UTAH, and HAL S. BENNETT, DONALD R. HACKING and JESSE R. S. BUDGE, Commissioners of the Public Service Commission of Utah, and BARTON TRUCK LINE, INC., *Respondents.*

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Case No.
9095

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
STATEMENT OF POINTS	8
POINT I. THE COMMISSION ARBITRARILY, UN- NECESSARILY AND WITHOUT SUFFICIENT COM- PETENT EVIDENCE, DUPLICATED COMMON CARRIER SERVICE FOR GENERAL COMMODITIES IN THE AREA INVOLVED.....	8
POINT II. IN ISSUING ITS ORDER IN THIS CASE BASED UPON THE RETIREMENT OF BAMBERGER RAILROAD COMPANY, THE COMMISSION ARBI- TRARILY IGNORED THE ACQUISITION OF BAM- BERGER'S INTERESTS BY THE UNION PACIFIC RAILROAD COMPANY	8
ARGUMENT	9
CONCLUSION	15

TABLE OF CASES CITED

Jones vs. California Packing Co., 121 Utah 612, 244 P. 2d 640	15
Lake Shore Motor Coach Lines, Inc. vs. Bennett, 8 Utah 2d. . 293, 333 P. 2d 1061	10, 11
Lake Shore Motor Coach Lines, Inc. vs. Welling, Utah 2d, 339 P. 2d 1011	9, 15
Los Angels & Salt Lake Railroad Company vs. Public Utili- ties Commission, 81 Utah 286, 17 P. 2d 287	15
Milne Truck Line, Inc. vs. Public Service Commission, Utah 2d, 337 P. 2d 412	14
Mulcahy vs. Public Service Commission, 101 Utah 245, 117 P. 2d 298	9

STATUTES CITED

Utah Code Annotated 1953, 54-6-4	9
Utah Code Annotated 1953, 54-6-5	9

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BRIEF OF PETITIONERS

STATEMENT OF THE CASE

On December 31, 1958, Barton Truck Line, Inc., made application to the Public Service Commission of Utah seeking authority to transport commodities generally, with certain

exceptions, over regular routes between Ogden and Salt Lake City, Utah, and to render local service to all intermediate points and places, including but not limited to, Hill Field, Ogden Arsenal and Clearfield Naval Supply Depot. Hearing was had and the Commission, under date of April 16, 1959, issued its order granting said authority. Applications for rehearing, filed by Union Pacific Railroad Company, Union Pacific Motor Freight Company and Consolidated Freightways, Inc., were denied, and upon petition of said carriers on June 26, 1959, a writ of review was issued and is now before this Court for review of the proceedings and order of the Commission as entered on April 16, 1959.

For purposes of brevity, the Public Service Commission of Utah will be referred to as "Commission," Union Pacific Railroad Company as "Union Pacific," Union Pacific Motor Freight Company as "Motor Freight," Consolidated Freightways, Inc., as "Consolidated," Wasatch Fast Freight as "Wasatch" and Barton Truck Line, Inc., as "Barton."

STATEMENT OF FACTS

Prior to the Commission's order of April 16, 1959, general commodity transportation service for intrastate traffic between Salt Lake City and Ogden, was being handled by Union Pacific, by its wholly owned subsidiary truck line, Motor Freight, and by Wasatch, a division of Consolidated.

Union Pacific has offered rail service between Salt Lake and Ogden for many years. Rail stations are located at Ogden, Clearfield, Layton, Kaysville, Woods Cross, North Salt Lake

and Salt Lake City (R. 690, 695). Through its truck line, Motor Freight, it provides pick-up and delivery service to each of these communities. Service at Clearfield includes the Naval Supply Depot, Hill Air Force Base and Ogden Arsenal; at Woods Cross it includes the business district of Bountiful (R. 691). Local service for general commodities is offered each direction daily except Sunday on a schedule out of Ogden at 5:30 a.m. and out of Salt Lake City at 12 noon, with set outs at all stations (R. 449, 454). Each evening two north-bound schedules from Salt Lake City provide LCL box car service for Ogden Traffic (R. 451).

On or about June 3, 1958, the Commission granted authority to Motor Freight for the transportation of LCL general commodity freight in coordination with Union Pacific on all highways paralleling the rails in the state. Traffic is handled by rail personnel, on rail billing, and pick-up and discharge of freight is limited to points constituting rail stations of the Union Pacific. There was, however, no restriction in the volume of traffic Motor Freight could move thereunder. Motor Freight operates two schedules per day each way between Salt Lake City and Ogden. Under normal circumstances the schedule calls for next morning delivery; however, same day service can be arranged through the dispatcher (R. 703, 706). Equipment is seldom used to full capacity (R. 702).

Bamberger Railroad Company, which provided rail service for general commodities between Salt Lake City and Ogden for many years, terminated business on December 31, 1958 (R. 446). Effective January 1, 1959, Union Pacific purchased Bamberger's northern transportation facilities from Ogden to

Arsenal, Utah, where connection is made with Union Pacific's main line. Service on the trackage acquired from Bamberger, called the Hill Field Branch Line, is daily, except Sunday (R. 447, 454).

On December 12, 1957, Consolidated acquired the Utah intrastate rights and equipment of Fuller-Toponce Truck Company (R. 583). Operation thereof was placed under Wasatch, a division of Consolidated, and service under all certificates transferred from Fuller-Toponce including local service for general commodities between Salt Lake City and Ogden and all intermediate points commenced at that time (R. 584).

Promptly upon acquisition of this authority Consolidated entered into an extensive study regarding the method by which adequate and proper service could best be performed (R. 615). As a result, and to improve service, Consolidated caused a new terminal building to be erected at Ogden at a cost of \$186,000. Construction commenced in April of 1958, and was completed and placed in use on August 23, 1958 (R. 594). An equipment study and reappraisal commenced in July, 1958, and was completed the following November. It was concluded that the equipment being employed was not suitable for the most expeditious service. Therefore, the purchase of an entirely new and more versatile fleet of road equipment was approved as a part of the budget in January, 1959, and the actual purchase was made on February 6, 1959. This acquisition, involving 30 new tractors and 50 trailers, committed an expenditure of \$310.00 (R. 617-622, 677). The new equipment is designed for use in both pick-up and road

haul. Two loaded pick-up trailers will be hooked directly to a road unit for the line haul without unloading and transfer at the origin terminal (R. 622). This will allow the retirement of the present double fleet and will lessen operating expenses (R. 618).

Revenues and expenses of the Wasatch division are segregated and the results for the operation of the year 1958 showed a loss of \$92,582 due primarily to an average increase in hourly wages of a contractual employees of 23.7 per cent over the year 1957 (R. 589).

Wasatch maintains a pick-up and delivery fleet at Salt Lake City and Ogden, each consisting of 15 truck van units, 15 trailers and 6 to 8 tractors. It operates an average of 12 to 16 trailers daily each direction between Salt Lake City and Ogden together with 2 peddle schedules daily from Salt Lake City to Layton and 1 daily from Ogden to Clearfield (R. 597-599). If a call is received by 11:00 a.m. and pick-up is made before 12 noon, the shipment goes out on a daily noon schedule for afternoon delivery in Ogden in 95 per cent of said shipments (R. 600, 601). A complete dock cleanup takes place each evening for shipments picked up that day (R. 604).

There is no conflict on the foregoing facts in the record.

Barton's case to justify duplication of the common carrier authority in the area involved was primarily an attack upon the service offered by Wasatch. Testimony was carefully elicited from 16 of the 17 shipper witnesses called by Barton tending in one way or another to discredit Wasatch. From an examination of the record, it appears that the majority of the

complaints were without real substance or were characterized as occasional (R. 57-58, 65; 148-149, 155, 159-160; 185-189, 192-196, 201-205; 242-247, 249; 257-259, 264-265; 280-281, 285; 290-295, 298, 304, 305, 308-9, 312; 315, 325-326; 382-384, 389; 398-400, 407-409), or were immaterial or hearsay (R. 137-141; 168-169, 171-172). It is conceded that there was room for improvement in the Wasatch service. However, to place the matter in proper perspective, Wasatch presented an analysis of its 1958 claim experience. It handled 144,881 shipments and received 1063 claims, for a 99.27 per cent claim free record for the year's operation (R. 611, Ex. 49). The Wasatch manager, who was uncontroverted, testified that 50 per cent of the claims filed were for concealed damage which could have occurred on the inbound movement, and that the record was a good one for a short haul carrier (R. 614).

STATEMENT OF POINTS

POINT I

THE COMMISSION ARBITRARILY, UNNECESSARILY AND WITHOUT SUFFICIENT COMPETENT EVIDENCE, DUPLICATED COMMON CARRIER SERVICE FOR GENERAL COMMODITIES IN THE AREA INVOLVED.

POINT II

IN ISSUING ITS ORDER IN THIS CASE BASED UPON THE RETIREMENT OF BAMBERGER RAILROAD COMPANY, THE COMMISSION ARBITRARILY IGNORED THE ACQUISITION OF BAMBERGER'S INTERESTS BY THE UNION PACIFIC RAILROAD COMPANY.

ARGUMENT

POINT I

THE COMMISSION ARBITRARILY, UNNECESSARILY AND WITHOUT SUFFICIENT COMPETENT EVIDENCE, DUPLICATED COMMON CARRIER SERVICE FOR GENERAL COMMODITIES IN THE AREA INVOLVED.

It is fully appreciated by petitioners that the Commission "is vested with broad powers and its decisions and orders are endowed with considerable verity." *Lake Shore Motor Coach Lines, Inc., vs. Welling*, Utah 2d., 339 P. 2d 1011, 1013 (1959). Nevertheless, it is required to pay heed to certain recognized principles in its determination of whether a carrier should be allowed to enter the area served by existing carriers. Section 54-6-4 Utah Code Annotated, 1953, imposes the duty upon the Commission to prevent unnecessary duplication of common carrier service. Section 54-6-5, Utah Code Annotated, 1953, requires that the Commission take into consideration the existing transportation facilities in the territory proposed to be served.

The duty of the Commission on this question is clearly enunciated in *Mulcahy vs. Public Service Commission*, 101 Utah 245, 117 P. 2d. 298 (1941). At page 305 the court states:

" * * * the commission under the statute may and should take into consideration the existing transportation facilities, their investment, the taxes they pay, 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 obligation to serve; the effect upon such services of a new competitor in the transportation field; the effect of a new competitor or

carrier upon the economic, industrial, social and intellectual life of the territory, and other matters which may effect the public welfare, and the growth and development of the life in, and resources of the state. * * * existing carriers engaged in transportation to and from a certain field or territory, rendering the service it is permitted or ordered to do, reasonably, adequately and efficiently, is not lightly or ruthlessly to be interfered with, or subjected to needless competition * * *

The Commission must also provide existing carriers with a reasonable degree of protection in the operations they are maintaining. *Lake Shore Motor Coach Lines, Inc. vs. Bennett*, 8 Utah 2d 293, 333 P. 2d 1061 (1958).

It is our position that the Commission failed to abide by the foregoing principles in granting the certificate in this case.

The main thrust of applicant's case and upon which the Commission relied in granting the authority was a mass attempt to discredit the services offered by Wasatch. Barton carefully combed the heavily populated area served by Wasatch to produce shipper witnesses who would complain about its service. This is amply demonstrated by the record which shows that the basic theme of the testimony of every shipper witness Barton called was an elicitation of dissatisfaction with Wasatch operations.

It would be utterly impossible to handle the volume of traffic transported by Wasatch, which in 1958 amounted to 144,881 shipments, without some complaint from the public. Moreover, it is a matter of common knowledge that diligent probing as was done in this case, can readily develop shipper complaint.

In *Lake Shore Motor Coach Lines, Inc. vs. Bennett, supra*, the court points out that in any populated area it is easy enough for an applicant to procure witnesses who will testify that they would like to have more frequent and cheaper service. It is just as easy to procure witnesses to complain as Barton has done in this case. It is our view that such testimony when considered in the light of the volume of shipments handled by Wasatch failed to provide the substance necessary to support the finding of need for additional public service, and that in so doing the Commission acted arbitrarily and capriciously.

The Commission also found that Wasatch's claim experience for the year 1958 indicated a somewhat unsatisfactory or inadequate service (R. 818). This finding was based upon the fact that over 1,000 claims were filed during that year. In doing so, the Commission failed to recognize and evaluate the volume of traffic moved and the relationship between total volume and total claims. It is this relationship which is vital and controlling. The evidence shows that 144,881 shipments were handled in 1958 and 1063 claims were filed. This resulted in a 99.27 per cent claim free record for 1958. Unrefuted evidence showed that this was a satisfactory claim experience. The Commission's finding to the contrary was therefore arbitrary and capricious.

Although Consolidated has been doing business between Salt Lake City and Ogden for many years, it was not until December 12, 1957, that it commenced the performance of intrastate service under the operating rights acquired from Fuller-Toponce. Immediately upon the acquisition of that authority Consolidated commenced an investigation of the method by which said service could best be performed.

Pursuant to such investigation and as a means of improving service, Consolidated constructed a new terminal building at Ogden at a cost of \$186,000. It determined, after an intensive study, that the equipment it had acquired from Fuller-Toponce, was unsuitable for the most expeditious service and, therefore, ordered an entirely new and more versatile replacement fleet. This improvement committed Consolidated to an expenditure of \$310,000. Revenues and expenses for the first year of operation showed a loss of \$95,582. Under these circumstances, the Commission authorized an additional carrier in the field in direct competition with the Wasatch operation without permitting it to place in effect its program for more expeditious service. In so doing, the Commission failed to provide such existing authority a reasonable degree of protection in the operations it was maintaining and improving at considerable expense.

Taking into consideration all of the foregoing facts and circumstances, we believe the Commission failed to regularly pursue its authority and the record as a whole will not support the order duplicating common carrier service in the area involved.

POINT II

IN ISSUING ITS ORDER IN THIS CASE BASED UPON THE RETIREMENT OF BAMBERGER RAILROAD COMPANY, THE COMMISSION ARBITRARILY IGNORED THE ACQUISITION OF BAMBERGER'S INTERESTS BY THE UNION PACIFIC RAILROAD COMPANY.

The Commission placed substantial weight upon the retirement of Bamberger Railroad Company on December 31, 1958, as proof of need for additional motor carrier service between Salt Lake City and Ogden (R. 817, 820). It also recognized that Union Pacific purchased the northern portion of the Bamberger Railroad Company and offered continuing rail service to former Bamberger shippers commencing on January 1, 1959. However, the Commission refused to consider this undisputed evidence in conjunction with the fact of termination, on the ground that Union Pacific acquired no transportation rights from Bamberger (R. 816).

It is conceded that Union Pacific has no vested right to serve shippers formerly using Bamberger facilities. They may ship by any carrier they please. However, Union Pacific stood ready, willing and able to handle any traffic so tendered without depriving those shippers of a single day of service. It is not a question of transportation rights but whether a void in service to the public was created by Bamberger's retirement. At considerable expense Union Pacific maintained existing rail facilities to the entire area with no loss of service resulting. Thus there was no need for an additional motor carrier to handle the freight of Bamberger's shippers, and there is no evidence in the file showing that Union Pacific could not handle any freight tendered by said shippers.

In addition to providing a rail service similar in nature to that which Bamberger had offered, Union Pacific also had in operation an improved supplemental and coordinated service over the highways in the area involved, under the Motor Freight's authority. The Commission also refused to consider

this undisputed fact in conjunction with Bamberger's termination, on the ground that it was solely a rail service which had no effect upon the adequacy or inadequacy of highway motor transportation service between Salt Lake City and Ogden (R. 816, 817). The Commission then stated that this fact justified the conclusion that traffic formerly handled by Bamberger required additional motor carrier service (R. 817).

From this statement of the Commission and the record (R. 820), it appears that it is under the impression Bamberger was engaged in highway transportation of property. This, of course, is not the fact; Bamberger was exclusively in rail transportation. Thus, assuming the Commission is correct in its view concerning the nature of the Motor Freight's authority as being strictly a rail service, such a fact was of substantial importance in determining the question of whether the retirement of Bamberger affected the adequacy or inadequacy of rail transportation service to the public.

Regardless of the nature of the Motor Freight authority, the Commission was not entitled to disregard it in making its determination of need for additional common carrier service. Certainly this is so where such service is an improvement in the transportation methods of an operating carrier and thus is a vital element in considering public convenience and necessity. *Milne Truck Line, Inc. vs. Public Service Commission*, Utah 2d, 337 P.2d 412 (1959).

In disregarding Union Pacific's acquisition of the Bamberger Railroad Company with its continuing and improved service which was available to former Bamberger shippers, the Commission acted in an arbitrary and capricious manner.

It is not vested with power to arbitrarily disregard or disbelieve uncontradicted, competent, credible evidence. *Lake Shore Motor Coach Lines, Inc. vs. Welling, supra*; *Jones vs. California Packing Co.*, 121 Utah 612, 244 P. 2d 640 (1952); *Los Angeles & Salt Lake Railroad Company vs. Public Utilities Commission*, 81 Utah 286; 17 P.2d 287 (1932).

CONCLUSION

Based upon Commission error adduced in the foregoing argument, Petitioners urge that the order dated April 16, 1959, be set aside.

Respectfully submitted,

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