

1963

Union Pacific Railroad Co et al v. Public Service Commission of Utah et al : Brief of Defendants and Respondents

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.

Walter L. Budge; Raymond W. Gee; J. Reed Tuft; John G. Marshall;

Recommended Citation

Brief of Respondent, *Union Pacific Railroad Co. v. Public Service Comm. Of Utah*, No. 9095 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/3417

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.

**IN THE SUPREME COURT
of the
STATE OF UTAH**

UNIVERSITY UTAH

MAK 3 1960

LAW LIBRARY

SALT LAKE TRANSFER COMPANY,
et al.,

Plaintiffs

-v-

Case No.
9082

THE PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Defendants.

FILED

FEB 10 1960

UNION PACIFIC RAILROAD
COMPANY, et al.,

Petitioners,

Supreme Court, Utah

-v-

Case No.
9095

PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Respondents.

BRIEF OF DEFENDANTS AND RESPONDENTS

WALTER L. BUDGE

Attorney General of Utah

RAYMOND W. GEE

Deputy Attorney General

*Attorneys for Public Service
Commission of Utah;*

Hal S. Bennett, Donald R. Hacking,
and Jesse R. S. Budge,
Commissioners

J. REED TUFT

JOHN G. MARSHALL

Attorneys for

Barton Truck Line, Inc.

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS	3
STATEMENT OF POINTS:	
POINT I — THE GRANTING OF THE CERTIFICATE OF CONVENIENCE AND NECESSITY IN ACCORDANCE WITH DEFENDANT'S APPLICATION WAS NOT ARBITRARY OR CAPRICIOUS, BUT WAS WITHIN THE PROPER AUTHORITY OF THE COMMISSION	7
ARGUMENT	7
CONCLUSION	25

CASES CITED

Lake Shore Motor Coach Lines, Inc. v. Bennett, 8 U (2d) 293, 333 P (2d) 1061	20
Lake Shore Motor Coach Lines, Inc. v. Welling, U (2d), 339 P (2d) 1011	24
Milne Truck Lines v. Public Service Commission of Utah, 9 U (2d) 28, 337 P (2d) 412 (1959)	12, 13
Mulcahy v. Public Service Commission of Utah, 101 Utah 245, 117 P (2d) 298	15, 16, 17, 22-3

**IN THE SUPREME COURT
of the
STATE OF UTAH**

SALT LAKE TRANSFER COMPANY,
et al.,

Plaintiffs

-v-

THE PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Defendants.

Case No.
9082

UNION PACIFIC RAILROAD
COMPANY, et al.,

Petitioners,

-v-

PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Respondents.

Case No.
9095

BRIEF OF DEFENDANTS AND RESPONDENTS

STATEMENT OF FACTS

This case arose upon the following facts:

For years prior to December 31, 1958, Barton Truck Line, Inc. had operated as a common motor carrier basical-

ly of general commodities with certain exceptions. The specific points of service and the commodities excepted are more fully set out in Exhibit 1 found on page 714 of the transcript of record.

Generally defendant's authority originally provided that it could haul between Salt Lake and Tooele and certain other points in Tooele County. In 1955, defendant purchased a portion of the operating authority of Interstate Motor Lines, Inc. which were then transferred to defendant by order of the Public Service Commission of Utah. These subsequently acquired rights added to defendant's authority the right to haul general commodities between Ogden and Salt Lake City and intermediate points on the one hand and points west of Grantsville to and including Wendover on the other hand. It specifically included Hill Field and adjacent military projects near Ogden Arsenal and Wendover Bombing Range as off route points to be served. These authorities are not in dispute. Local service between Salt Lake City and Ogden and intermediate points was specifically excluded.

On December 31, 1958, defendant filed with the Public Service Commission of Utah an application proposing to haul between Salt Lake City and Ogden and intermediate points the same commodities as previously it was authorized, so as to allow defendant to render local service between such points. At the hearing, defendant amended its application to exclude certain commodities not here material.

Defendant's application was opposed by Union Pacific Railroad Company, Union Pacific Motor Freight Company, Consolidated Freightways, Inc., Carbon Motorways,

Inc., Salt Lake Transfer Co., Ashworth Transfer, Inc., and Wycoff Co., Inc. which will be referred to herein both collectively and singly as "plaintiffs" or "plaintiff".

At the hearing defendant produced 17 shipper witnesses and one witness from an interline carrier who testified as to the character of service being rendered by the carriers (principally Union Pacific and Consolidated) presently in the area. The shipper witnesses represented a cross section of business in the area in question, including manufacturing, construction, wholesale and retail businesses handling various commodities, constituting both shippers and receivers having business locations in both Salt Lake, Ogden, and intermediate points as follows: Bountiful, Centerville, Clearfield, Syracuse and Roy. One witness was also produced from Delta, who testified in conjunction with the witness from an interline carrier.

Uniformly these witnesses expressed dissatisfaction with the service being rendered in the area involved herein. *None of the witnesses expressed a desire for lower rates.* One complained of excessive damage to items being shipped by Consolidated Freightways, Inc. The main complaint seemed to be related to delays of various types in shipments. Some were delays which inconvenienced the shippers such as waiting until the shipper's closing time to pick up shipments, requiring the shippers to pay employees time and a half for overtime to stay while the shipments were being loaded (R. 119, 246). Others were delays which inconvenienced customers in that deliveries were delayed sometimes for several days (R. 103, 111, 281-2). Numerous other types of inconvenience were put in evidence, some of which motivated the shippers to purchase delivery equipment of their own rather than rely

on the public transportation services being rendered by existing carriers (R. 81, 99, 111, 222, 294-5, 383). Some shippers had experienced such unsatisfactory service from the existing carriers that their customers began refusing to ship by Consolidated (R. 106). The nature of the various complaints will be more fully covered later.

Some of the plaintiffs produced from one to three witnesses each, who were officers or employees of the plaintiff companies, and who testified concerning their financial structure, equipment schedules, and generally as to their shipping schedules.

After hearing all the evidence the Commission made findings of facts which when generally summarized indicate that defendant is financially able and has the facilities to perform the service applied for, that by reason of defendant's former certificates its application did not involve a new or additional area of service, but rather a broadening of former authority to include local service in an area already being served by defendant, that the withdrawal of Bamberger Railroad from the highway transportation field together with the numerous and excessive complaints against the service rendered by Wasatch (herein referred to as Consolidated) indicated that there is traffic formerly handled by Bamberger in excess of that which other carriers handled, and that the increase of population and probable business in the Salt Lake-Ogden Area persuaded the Commission that the public interest necessitated additional motor carrier service in the area and that public convenience and necessity justify the issuance of the authority applied for by defendant. Accordingly, the Commission concluded the application should be granted,

and ordered that a certificate of convenience and necessity be issued to defendant according to its application.

All plaintiffs filed motions for a rehearing, which after due consideration were denied by the Commission, and this appeal ensued.

STATEMENT OF POINTS

POINT I

THE GRANTING OF THE CERTIFICATE OF CONVENIENCE AND NECESSITY IN ACCORDANCE WITH DEFENDANT'S APPLICATION WAS NOT ARBITRARY OR CAPRICIOUS, BUT WAS WITHIN THE PROPER AUTHORITY OF THE COMMISSION.

ARGUMENT

POINT I

THE GRANTING OF THE CERTIFICATE OF CONVENIENCE AND NECESSITY IN ACCORDANCE WITH DEFENDANT'S APPLICATION WAS NOT ARBITRARY OR CAPRICIOUS, BUT WAS WITHIN THE PROPER AUTHORITY OF THE COMMISSION.

There is really only one point in issue between the parties here. That is whether the Public Service Commission acting arbitrarily in granting defendant's application. Because the contentions of the various plaintiffs are somewhat different defendant's argument will be subdivided to meet each of them.

(A) *As to Salt Lake Transfer Co. and Ashworth Transfer, Inc.:*

These two plaintiffs apparently do not feel that the action of the Commission in granting defendant's application was improper. Their arguments are limited to the point that the Commission should have excluded explosives from the commodities which defendant should be allowed to handle under the authority granted.

Their arguments seem to fall into two main categories. The first seems to set forth some idea of estoppel. The reasoning runs somewhat as follows (see p. 14 of plaintiff's brief):

1. Salt Lake Transfer and Ashworth both have specific authority to transport explosives.

2. Both companies announced their opposition to the transportation of explosives by defendant.

3. Defendant reassured plaintiffs at the inception of the hearing it would produce witnesses to testify as to explosives.

4. Plaintiffs remained at hearing waiting for such witness to appear.

5. Plaintiffs made a motion for dismissal as to explosives.

6. Plaintiffs then presented evidence which showed there was "no need whatever" for the requested authority as to explosives.

The second type of argument advanced by plaintiffs is that there is "not one scintilla of shipper evidence for movement of explosives" in the record.

These arguments will be answered in the same order.

As to the argument set forth first above, defendant submits that there is no legal justification for such argument, particularly since it does not accurately summarize the record. Nowhere in the record did defendant or counsel for defendant "reassure" plaintiff that it would produce witnesses to testify as to explosives. The alleged reassurance occurred in the opening remarks of defendant's counsel, and are found on pages 6-9 of the record. It will be noted that defendant's counsel amended the application to exclude commodities (including commodities in bulk) requiring special equipment and household goods. Respecting explosives, the following occurred:

"MR. TUFT: Now explosives, I think that — may I ask Mr. Pugsley, I think your company does not publish rates on less than 50 pound shipments.

MR. PUGSLEY: They have authority without restrictions, but they have tariff minimums.

"MR TUFT: Of what?

MR. PUGSLEY: I am not just sure what that is.

MR. TUFT: It will be our feeling that we will contend for explosives on these smaller shipments, on dynamite, or for any large shipments. I think we will have to have that because I think it is a necessary service between these points.

COM. BUDGE: You say on the larger shipments . . .

MR. TUFT: We want explosives, and will contend for them" (R. 7-8).

Nowhere in the foregoing was any promise made to

produce any witness with respect to explosives. The fact that plaintiffs remained at the hearing waiting for a witness to appear whether in reliance on a promise of counsel or not and thereafter made a motion to dismiss should have no bearing on the propriety of the Commission's findings or order.

In its second type of argument plaintiffs claim that there is no shipper evidence in the record to justify the Commission's refusal to exclude explosives from commodities defendant is allowed to transport.

It is true defendant produced no shipper testimony demonstrating a need for the transportation of explosives. However, this does not mean that the record does not contain evidence which justifies the Commission's order.

Defendant applied for authority to transport the same commodities it was previously authorized to transport under its certificate No. 1127 (R. 800). There can be no serious contention that this did not include explosives. Certificate Number 1127 is set out in Exhibit 1 at R. 714, and gives defendant authority to transport general commodities, except livestock to the points mentioned herein. On page 17 of their brief, even plaintiffs apparently concede that defendant's former authority permitted the transporting of explosives.

By this application defendant did not seek to transport any different type of commodities than those it could transport formerly. Neither did defendant seek to serve any new area or territory. It merely sought to render a local service in an area it was already serving and as to commodities already being transported. Accordingly, defend-

ant submits that there was evidence before the Commission to justify defendant's right to transport explosives.

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. Mr. Sims, of Salt Lake Transfer Co., admitted that they have a minimum of 8,000 pounds or more (R. 555). Mr. Ashworth, vice president of Ashworth Transfer testified that his company's lowest minimum is 4,000 pounds on explosives (R. 573).

In view of the limitations upon the service rendered by these two plaintiffs and in view of the existing authority of defendant to transport explosives between the Ogden-Hill Field area and the Tooele County area west of Grantsville, it is difficult to understand how the refusal of the Commission to exclude explosives from defendant's application could be characterized as arbitrary and capricious.

In their brief plaintiffs complain that by reason of the local service defendant was granted between Salt Lake and Ogden, defendant can now service points in Tooele County east of Grantsville from points of origin in Davis and Weber Counties, and similarly can transport commodities in the reverse direction without interlining with Wasatch Fast Freight (herein referred to as Consolidated) neither of which defendant could formerly do. It is correct that the grant of authority between Salt Lake and Ogden has this effect, as was pointed out at the hearing and in the Commission's findings of fact (R. 52-4, §20). However, this is a benefit which is merely incidental to the authority granted herein and arises only because of the former authority held by defendant.

Furthermore, although the interline carrier, Consolidated, is a party to this appeal, its brief discloses no complaint of the nature asserted by plaintiffs, e.g. that it will lose interline business it formerly handled with defendant with respect to explosives or any other commodity (for the same considerations apply not just to explosives, but to all commodities handled by defendant).

(B) *As to Union Pacific Railroad Company and Union Pacific Motor Freight Company:*

Although Union Pacific Motor Freight Company (hereinafter referred to as "Motor Freight") has joined in this appeal, it would seem that it has no transportation rights independent of the rights granted to Union Pacific Railroad Company (hereinafter referred to as "Union Pacific"). Such seems to be the holding of this court in the case of *Milne Truck Lines v. Public Service Commission of Utah*, 9 U(2d) 28, 337 P(2d) 412 (1959), which interpreted the rights granted Motor Freight.

In that case the court pointed out that the entry into the public transportation field by Motor Freight would not increase competition as to other motor carriers "for the reason that the service applicant [Motor Freight] seeks to render is now rendered by Union Pacific Railroad Company, and the proposed service will be auxiliary and supplemental to the rail service of the said railroad." The reason for the grant of authority was to release badly needed box cars for other service by moving l.c.l. shipments by truck. However, all shipments thus handled move at rail rates, on rail billing, and between rail stations.

In effect Motor Freight is servicing the convenience

and necessity of Union Pacific rather than that of the public. As the court put it:

"As we view the matter Motor Freight will not be competing with plaintiffs. It renders a service which plaintiffs could not perform if Motor Freight did not perform it."

The finding of the Commission in this respect was consistent with the holding above of this court (R. 816-17).

Plaintiffs argue (on page 13 of their brief):

"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. (Emphasis added.)

Defendant agrees that the primary question presented is not of existing rights but of service to the public. However, it should be obvious that no public carrier is able legally to render any service except in accordance with the rights granted it by the proper authorities. In this respect it should be pointed out that Union Pacific, while acquiring some of the property of Bamberger in the Ogden to Clearfield area, did not succeed to any of the transportation rights exercised by Bamberger.

Furthermore, the evidence does not sustain Union Pacific's claim that it has maintained existing rail facili-

ties to the entire area "with no loss of service resulting" or that its "improved service was available to former Bamberger shippers." Many of the shipper witnesses testified that they had used Bamberger's services before it went out of business. (R. 160-1, 168, 256, 280, 315, 438). However, most of these witnesses and many others testified they were not aware of or were not familiar with the trucking service being performed in the area by Motor Freight (123-4, 143, 161, 180, 207, 233, 250, 268, 328, 390, 439). Much might be explained by the testimony of many of the witnesses that Union Pacific or Motor Freight did not solicit their business (R. 110, 143, 161, 251, 332).

At least two witnesses complained of delays in the service being rendered by Union Pacific (R. 180, 367-8). The latter witness, though out of the area involved herein was concerned with interline shipments from the area concerned. He testified that the normal shipping time from Ogden to Delta by rail was 7 to 10 days, as compared with next day service by motor carrier from Salt Lake. (R. 366-8.)

With respect to the shipper witnesses produced by applicant from points intermediate to Salt Lake and Ogden, Union Pacific did not even question them at all, except to ask one such witness his exact business address (R. 285).

In view of the foregoing, it is submitted that the Commission did not arbitrarily or capriciously ignore the rights or service of Union Pacific or its adjunct Motor Freight whether considered from the standpoint of either rail or highway transportation. It is further submitted that the finding of the Commission that the retirement of Bamber-

ger from the field of public transportation left a void in the service rendered to the public is properly supported by the evidence.

(C) *As To Consolidated Freightways:*

In view of the testimony presented at the hearing the arguments of Consolidated are interesting and unusual to say the least. They are approximately as follows:

1. The decision of the Commission failed to provide existing carriers with a "reasonable degree of protection" in that it "*unnecessarily*" duplicated common carrier service for the area involved. (Emphasis added.)

2. Defendant diligently combed a populated area to find witnesses to testify they would like more frequent and cheaper service; that in view of the volume of shipments handled by Consolidated such witnesses "failed to provide the substance necessary to support the finding of need for additional public service."

3. Unrefuted evidence showed Consolidated's claim experience was satisfactory and the Commission's finding to the contrary was arbitrary and capricious.

4. At a time when Consolidated had experienced a loss of \$95,582, it constructed a new terminal at a cost of \$186,000 and committed itself to an additional expenditure of \$310,000 for new equipment and the Commission by allowing a competitor to come in failed to protect Consolidated in its operations.

The first two arguments will be considered together.

The case of *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P (2d) 298 is of particular interest because of its factual similarity to the present case and

the wide range of legal considerations it announces which should control this case.

In that case, Fuller-Toponce Trucking Co. (the predecessor of Consolidated) applied for highway transportation authority between Salt Lake and Logan. The application was opposed by Union Pacific Railroad as well as the other established carriers (both rail and highway) in the area. The Commission found that public convenience and necessity required the issuance of a certificate to the applicant. The receiver of one of the protestants appealed. Among other things it was alleged that there was no showing in the evidence of convenience and necessity. The court set forth the standards for judicial review of a finding of convenience and necessity as follows:

"It is not required that the facts found by the Commission be conclusively established, nor even that they be shown by a preponderance of the evidence. *If there is in the record competent evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such fact finds justification in the evidence, and we cannot disturb it.*

"There is vested in the Public Service Commission, by the law of its creation and existence, the right and power to issue certificates of convenience and necessity for motor transport service as common carriers when it 'finds from the evidence that the public convenience and necessity require the proposed service.' What should be pursued, or what conclusions should be drawn from disputed facts is not a law question for the judiciary to decide. Such questions must be determined by the person or body whose action depends upon the determination thereof. But the question as to

whether there is competent evidence to justify the action taken, or to be taken, is a legal question. . . .

* * * * *

“If existing utilities are rendering adequate service ordinarily a certificate will not be granted putting a new competitor in the field. *But a service is not necessarily adequate because the community can ‘get by,’* can conduct its business without further or additional service. To be adequate the services must meet the requirements of the public’s convenience and necessities in such a way that the needs, growth, and welfare of the community are reasonably met and supplied. *To be adequate they must safeguard the people generally from appreciable inconvenience* in the pursuit of their business, their wholesome pleasure and their opportunities for growth and development. And if a new or enlarged service will enhance the public’s welfare, increase its opportunities, or stimulate its economic, social, intellectual or spiritual life to the extent that the patronage received will justify the expense of rendering it, the old service is not adequate.

* * * * *

“It is not the province of the reviewing tribunal to weigh the evidence offered as shown by the record. Its province is to determine if there is any evidence to justify a finding of convenience and necessity.” (Emphasis added.) 117 P (2d) 299-301.

Judged by these legal standards the record clearly sets forth ample evidence upon which to justify a finding of convenience and necessity.

The only witness produced by Consolidated was Henry O. Lundberg, General Manager of Wasatch Fast Freight Division of Consolidated Freightways, Inc. He testified that Consolidated advised their customers that same day service was available between Salt Lake and Ogden and

intermediate points (R. 665). Shipper testimony evidenced an increasing need for same day service between Salt Lake and Ogden (R. 182, 195). Yet numerous witnesses complained of an inability to obtain same day service (R. 80, 382, 420, 435, 598-9). Many witnesses also testified that with respect to service to points intermediate to Salt Lake and Ogden the shipments are carried past the destination to either Ogden or Salt Lake, and delivered the next day on pick up and delivery equipment (R. 107, 384, 410, 599). Even Mr. Lundberg admitted this was so. (R. 633, 670).

Some witnesses testified to delays of one to two days on shipments from Salt Lake to Ogden and intermediate points (R. 103, 111, 187-8, 195, 281-2). The testimony showed that customer complaints were more frequent since Bamberger went out of business (R. 159, 171, 257, 269, 315, 325).

Some shippers testified Consolidated's service was so poor they were receiving excessive complaints from customers (R. 22, 294-5, 383), and some customers were refusing to authorize shipments via Consolidated (R. 106).

Some witnesses complained that pick up or deliveries were frequently delayed until after closing hours or later (R. 80-86, 103, 246, 290-93). In other instances the delay was one day (R. 242-4, 281), in others it was two days (R. 257, 265), another of a delay of several days (R. 325), and yet others that goods were never picked up (R. 105, 231).

The service offered by the existing carriers was so poor that some shippers had given up trying to ship by means of public transportation, and had recently purchased their

own equipment with which to deliver between Salt Lake and Ogden (R. 81, 111, 222, 294-5, 383). Others were thinking of doing the same thing (R. 96-99, 391).

Some shippers complained that although they have a daily volume of shipments they still have to call for every pick up (R. 270, 432). Others found it easier to pick up or deliver shipments directly to Consolidated's dock than to wait for pick up or delivery by the company, even though this meant unloading the shipment or searching through the truck to find it themselves (R. 78, 280-1, 293-4).

Some witnesses testified that the representatives of Consolidated did not solicit their business (R. 221, 270, 279), another complained of deliveries to wrong consignees an excessive number of times. (R. 419-24). One witness complained of excessive damage to shipments and of poor service on claims for damage (R. 425, 437, 440).

One carrier witness testified for applicant. He stated that he interlined with Consolidated at Salt Lake on shipments to Delta. He also complained of delays on the part of Consolidated in delivering interline shipments to him (R. 338-9, 345). He stated this delay was causing him to lose customers to a competing railroad (R. 340).

As against this array of complaints plaintiff failed to produce a single public witness to state he was receiving adequate service.

There is nothing in the record which demonstrates any effort on the part of defendant to "develop shipper complaint" against any existing carrier, and that implication by plaintiff is unjustified. Neither did any witness testify

they "would like to have more frequent and cheaper service," as asserted in plaintiff's brief.

That language came from the case of *Lake Shore Motor Coach Lines, Inc. v. Bennett*, 8 U (2d) 293, 333 P (2d) 1061, which case is important here because of its factual contrasts with the present case.

In that case the court said:

"[The Commission] cannot go so far as to base an order creating new carrier authority, which in effect takes business away from existing carriers, upon a showing which under scrutiny is so ephemeral as to practically vanish."

In addition the court pointed out that the protestants presented 102 witnesses who testified to the adequacy of the service.

Defendant submits the proof here is just the reverse of that presented in the *Lake Shore case*, *supra*, and that the substantial evidence demonstrates the inadequacy of plaintiff's service.

Plaintiff's third argument is to the effect that unfuted evidence showed that Consolidated's claim experience was satisfactory. No reference is made in plaintiff's brief to any particular point in the record to substantiate this claim but it must find its basis in testimony of Mr. Lundberg on page 614 of the transcript.

Mr. Lundberg was identifying Exhibit 49 which purports to be a claim analysis for the year 1958. It shows total shipments handled of 144, 881 as against total claims received in the amount of 1,063 and asserts a claim-free percentage of 99.27%.

It is this percentage which plaintiff claims is "vital and controlling". If this were true it would reduce public convenience and necessity to a statistic, and there would be no need for any Public Service Commission at all.

Even with respect to this percentage showing the record discloses that the figure includes interstate shipments and claims as well as intrastate (R. 614-5).

Furthermore, Mr. Lundberg estimated that about 50% of the 1,063 claims were for concealed damage (R. 614), whereas of all the witnesses and the variety of complaints introduced in evidence, only one witness made any complaint with respect to concealed damage and that was for *excessive* damage.

Realistically, the complaints of the witnesses who testified could not be included in the 1,063 figure presented by Mr. Lundberg unless the complainants could prove some monetary damage. The claim experience demonstrated by plaintiff does not relate to the type of claim which should control the Commission in the exercise of its discretion with respect to public convenience and necessity. And how can it reasonably be said, as plaintiffs assert, that the Commission's opinion which was contrary to Mr. Lundberg's self-serving opinion, was arbitrary and capricious in view of the testimony?

Consolidated's last argument relates to its loss during 1958, its capital improvements and the protection to be afforded an existing carrier.

Mr. Lundberg testified to the fact that during its first year of operation, Wasatch Fast Freight Division of Consolidated Freightways, Inc. lost \$95,582. He attributed this

loss to the fact that Wasatch had been paying substandard wages, which they were forced to increase. He also testified that upon the acquisition by Consolidated of Fuller-Toponce there was a re-division of freight between Wasatch and Consolidated by which the tonnage of Wasatch declined (R. 638).

Undoubtedly, the second factor also had something to do with the loss shown by Wasatch.

He also testified that Consolidated (as contrasted with the Wasatch Division) had built a new terminal at a cost of \$186,000. However, this was sold to a life insurance company for \$182,000, and leased back (R. 594, 652). This arrangement will allow the company to occupy a new building at small initial expense and charge the "rental" off against profits each year.

In addition four days before the hearing Consolidated ordered \$310,000 worth of new equipment. Mr. Lundberg testified that Consolidated arranged for the financing and Wasatch Division would be charged annually to cover the depreciation (R. 657-8). Mr. Lundberg testified that this equipment was ordered to reduce operating expenses of the company. This could be done because the company then had a road fleet and a pick up fleet. With the new equipment the same units could be used for pick up and delivery as well as for road work. (R. 618).

The rules for the judicial determination of the propriety of the Commission's rule were set forth in the *Mulcahy* case, *supra*. At 117 Pac.(2d) 305, the court stated as follows:

"Having found now that the convenience and necessity of the public in the territory proposed to

be served, require additional service; that such service will not be detrimental to the people of the state as a whole; that applicant is financially able to render the service; that the service will not unduly injure the highway or unduly interfere with the public traveling thereon, the question is: Should such new service be rendered by existing carriers or by the new applicant? This question poses for the Commission, not the finding of a factual answer, but the determination of a matter of policy. Which in the opinion of the Commission will best subserve the public convenience, necessity and welfare?

Having given due consideration to those matters the Commission determines whether the existing carriers or a new one should be permitted to render the proposed service. If the Commission's determination finds justification in the evidence, it is not a law question and we cannot review or modify it or set it aside.

From the foregoing it would seem that the Commission's order should be sustained if there is any evidence in the record to support it. From the foregoing evidence of Mr. Lundberg it is submitted that the Commission would be justified in believing that the loss shown by Wasatch Division was a book figure which was subject to adjustment within a system dominated and controlled by Consolidated, rather than a true picture of the financial position of Consolidated. From the testimony the Commission would have to conclude that the \$310,000 was committed for new equipment with knowledge of the pending hearing, but without regard to its possible outcome. In view of Mr. Lundberg's statement that the new equipment is designed to reduced operating expenses by eliminating

one fleet it would seem that the company would have made the same decision regardless of the disposition of defendant's application, and that it was not prejudiced thereby.

These considerations coupled with the obvious and uncontroverted lack of service indicated by the testimony would amply justify the Commission's order.

(D) *With respect to all existing carriers:*

As was stated by this court in *Lake Shore Motor Coach Lines, Inc. v. Welling*, — U (2d) —, 339 P (2d) 1011:

"The Commission is charged with the responsibility of over-all planning so that the public will be furnished with the most frequent, economical and convenient service possible, not only presently, but in the long run. . . . The fact that the continued well-being of existing carriers must be taken into account does not mean that once a carrier such as plaintiff is granted a franchise it acquires an inviolable and exclusive right to render a public service merely because it meets its own standard of adequacy."

CONCLUSION

It is submitted that the only question before the court is whether there is competent evidence in the record to support the order of the Commission. Defendant asserts that it has demonstrated such evidence and that the order of the Commission should be affirmed.

Respectfully Submitted,

WALTER L. BUDGE
Attorney General of Utah

RAYMOND W. GEE
*Deputy Attorney General
Attorneys for Public Service Com-
mission of Utah; Hal S. Bennett,
Donald R. Hacking, and Jesse R.
S. Budge, Commissioners*

J. REED TUFT,
JOHN G. MARSHALL
*Attorneys for
Barton Truck Line, Inc.*