

1960

# Wycoff Company Inc. v. Public Service Commission of Utah : Brief of Respondents in Opposition of Petition for Writ of Review

Utah Supreme Court

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Walter L. Budge; Raymond W. Gee; Attorneys for Respondents;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

WYCOFF COMPANY,  
INCORPORATED,

*Petitioner,*

— vs. —

PUBLIC SERVICE COMMISSION  
OF UTAH, HAL S. BENNETT,  
DONALD HACKING and JESSE  
R. S. BUDGE, its Commissioners.

*Respondents.*



Case  
No. 9204

Court, Utah

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## Brief of Respondents in Opposition of Petition for Writ of Review

WALTER L. BUDGE  
Attorney General

RAYMOND W. GEE  
Deputy Attorney General  
*Attorneys for Respondents*

## I N D E X

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	5
ARGUMENT .....	6
POINT I.	
THE COMMISSION HAD AUTHORITY TO, AND DID NOT ERR IN, ISSUING ITS NUNC PRO TUNC ORDER IN THIS MATTER.....	6
POINT II.	
THE CONSTITUTIONAL RIGHTS OF THE PETITIONER WERE NOT DENIED THROUGH THE ISSUANCE OF THE NUNC PRO TUNC ORDER IN THIS MATTER .....	13
CONCLUSION .....	15

### Authorities Cited

30A American Jurisprudence, Judgments, p. 581.....	6
42 American Jurisprudence, Public Administrative Law, Sec. 174, p. 537-8 .....	7, 9
14 C.J.S., Clerical, p. 1202.....	10
1 Freeman on Judgments, Fifth Edition, pages 281, 283-284.....	6, 9, 14

### Cases Cited

Bell v. Hearne, 19 Howard 252.....	7
Davis v. Rudolph, et al. (Calif.) 181 P.2d 765.....	7
Hamer, et al. v. Industrial Commission, et al. (Ariz.), 31 P.2d 103....	8
Lake Shore Motor Coach Lines, Inc., et al. v. Hal S. Bennett, et al., 8 Utah 2d 293, 333 P.2d 1061.....	4, 5, 14
School Dist. No. 95 v. Marion County School Reorg. Committee (Kan.) 208 P.2d 226.....	11

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## Brief of Respondents in Opposition of Petition for Writ of Review

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### STATEMENT OF FACTS

Respondents are in general agreement with the Statement of Facts set forth in the brief of petitioner. However, some amplification is necessary.

In Public Service Commission Case 4252 — Sub 2, Applicant Wycoff Company, Incorporated (hereinafter

referred to as Wycoff), stated at the hearing before the Commission that it “would like to propose a restrictive stipulation as to the application before the Commission.” (R. 1099) The proposed stipulation was presented, discussed and agreed to by Wycoff and certain protestants. (R. 1099-1106) The stipulation was reduced to writing by the applicant and the certain protestants (R. 1828-29), filed with, and accepted by, the Commission. (R. 1107)

The stipulation provided in part as follows :

“2. Applicant shall amend its application by restricting the scope thereof in the following particulars :

a. The application shall be limited to the transportation of shipments of not to exceed 100 pounds upon a weight basis. Shipments shall not be separated for the purpose of avoiding this restriction.” (R. 1828)

In the Report and Order of the Public Service Commission, in Case No. 4252 — Sub 2, issued January 21, 1958, the aforementioned stipulation was included in paragraph 4 of the Findings of Fact and reads as follows :

“4. Forty-two witnesses testified on behalf of applicant and one hundred and two on behalf of the protestants. During the hearing and before the bus lines has concluded the presentation of their evidence the following stipulation was entered into between applicant and the protesting truck line carriers :

1. This stipulation is subject to the approval and acceptance by the Public Service Commission of Utah.

2. Applicant shall amend its application by restricting the scope thereof in the following particulars :

a. The applicant shall be limited to the transportation of *shipments* of not to exceed 100 pounds upon a weight basis. Shipments shall not be separated for the purpose of avoiding this restriction.

b. Applicant shall not transport in excess of 500 pounds on a weight basis of such express shipments on any one schedule each way operating over the routes and departing at the times set forth in Exhibit 2 in this proceeding, except that applicant shall be permitted to transport not to exceed 1500 pounds on a weight basis of such express shipments from Ogden to Salt Lake City upon one of its schedules each day.

c. The schedules referred to above shall coincide with the movements of the Deseret News newspapers and The Salt Lake Tribune newspapers as shown in Exhibit 2, and one United States mail schedule moving north from Salt Lake City and the return of all such schedules to Salt Lake City.

d. In determining the maximum weight limitation on any one schedule, all shipments shall be aggregated regardless of point of origin or destination.

e. Applicant shall not carry express shipments of the commodities sought by the application on northbound schedules from Salt Lake City or southbound schedules from points north to Salt Lake City except on those four daily schedules each

way designated on said Exhibit 2 as Schedules 2, 3, 4 and 5 and 2A, 3A, 4A, and 5A respectively of Table 8 thereof.

f. "Shipment" as used herein shall refer to commodities moving on a single bill of lading from one consignor to one consignee.

3. In consideration of the Commission accepting the aforestated restrictive amendment to the application, the named truck line protestants do hereby withdraw their opposition to the application and their protests stated thereon.

Said stipulation was approved by the Commission." (R. 1871) (Emphasis added)

In its Conclusion in the same case, the Commission states:

### "CONCLUSION

From the foregoing facts the Commission concludes that public convenience and necessity justify the granting of the certificate applied for *within the limitations specified in the stipulation set forth in the foregoing findings.*" (R. 1878) (Emphasis added)

In its Order in the same case, restriction "a" reads:

"a. Applicant shall be limited to the transportation of *items* of not to exceed 100 pounds upon a weight basis. Shipments will not be separated for the purpose of avoiding this restriction." (R. 1878) (Emphasis added)

In the 1958 case of *Lake Shore Motor Coach Lines, Inc., et al. v. Hal S. Bennett, et al.*, 8 Utah 2d 293, 333 P.2d

1061, this Court set aside the foregoing order “insofar as it affects the territory served by plaintiffs \* \* \*.”

On February 3, 1959, the Public Service Commission issued an amended order in P. S. C. Case No. 4252 — Sub 2, in conformance with the decision of this Court in the *Lake Shore Motor Coach Lines* case, *supra*.

On December 21, 1959, a nunc pro tunc order was issued by the Public Service Commission correcting the orders of January 21, 1958, and February 3, 1959, in P. S. C. Case No. 4252 — Sub 2, so that the word “items” as used in restriction a. therein should read “shipments” and thus reflect the purpose and intent of the Commission in approving the stipulation referred to herein. (R. 1-2) (R. 19-20). But for the inadvertent use of the word “items” in place of “shipments,” the restrictions set forth in the orders of January 21, 1958, and February 3, 1959, are in all material respects identical with the stipulation referred to herein, although the latter order contains a modification reflecting the opinion of this Court in the *Lake Shore Motor Coach Lines* decision, *supra*.

## STATEMENT OF POINTS

### POINT I.

THE COMMISSION HAD AUTHORITY TO, AND DID NOT ERR IN, ISSUING ITS NUNC PRO TUNC ORDER IN THIS MATTER.



## POINT II.

THE CONSTITUTIONAL RIGHTS OF THE PETITIONER WERE NOT DENIED THROUGH THE ISSUANCE OF THE NUNC PRO TUNC ORDER IN THIS MATTER.

## ARGUMENT

### POINT I.

THE COMMISSION HAD AUTHORITY TO, AND DID NOT ERR IN, ISSUING ITS NUNC PRO TUNC ORDER IN THIS MATTER.

It is a general rule of law that “all courts have inherent power, independent of statute, to correct clerical errors, at any time, and to make the judgment entry correspond with the judgment rendered.” 1 Freeman on Judgments, Fifth Edition, p. 281. This principle serves the ends of essential justice, and is based upon sound public policy.

According to 30A American Jurisprudence, Judgments, p. 581:

“The furtherance of a justice is the principal reason for the correction by a court of clerical errors in the records of its judgments, and for the entry of such correction nunc pro tunc, especially where the failure to make the nunc pro tunc entry would result in injustice arising from an act of the court. In such case, the judgment nunc pro tunc simply consummates what the court adjudged but imperfectly performed. \* \* \*”

*Davis v. Rudolph, et al.* (Calif.) 181 P.2d 765, holds:

“It is well settled that clerical errors in a judgment, where they are shown by the record, may be corrected at any time, so as to make the judgment entry correspond with the judgment rendered. *Swain v. Naglee*, 19 Cal. 127; *Freeman on Judm.*, §§70, 71. And this may be done even after an appeal and affirmance of the judgment. *Rousset v. Boyle*, 45 Cal. 64.”

By analogy administrative tribunals possess inherent power to correct clerical errors at any time and to make the judgment entry correspond with the judgment rendered. A contrary rule would deny agencies of government authority to correct error and injustice and run counter to the public interest. According to 42 *American Jurisprudence*, *Public Administrative Law*, p. 537-8, “\* \* \* administrative authorities have power to correct clerical errors in their determination, and to reconsider or modify them on the ground of fraud or imposition, mistake, surprise, inadvertence, or newly discovered evidence, or to meet changed conditions, whether by reason of express statutory provisions granting the power of revision or by reason of principles applied by the courts.”

Thus in the early case of *Bell v. Hearne*, 19 Howard 252, the Supreme Court of the United States held that the general land office may cancel a patent erroneously issued in the name of one James Bell, and issue one in the name of John Bell. The court stated:

“\* \* \* The question then arises, had the commissioner of the general land office authority to receive from John Bell the patent erroneously issued

in the name of James Bell, and to issue one in the proper name of the purchaser? And the question, in our opinion, is exceedingly clear. The commissioner of the general land office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertance, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is shown plainly by the record, and is a necessary power in the administration of every department. \* \* \*

In *Hamer et al. v. Industrial Commission, et al.*, (Ariz.), 31 P. 2d 103, the court considered the question of whether the State Industrial Commission could issue a nunc pro tunc order, modifying the terms of an award and order, by changing the words “totally dependent” to “partially dependent.” The court held:

“The first question is whether the award of July 6th as amended and corrected on September 18th is properly before us and its effect. Petitioners contend that the Industrial Commission had no power to set aside the award of July 6th and enter a new award except upon the application of an interested party within twenty days after its entry. This contention is perhaps correct, as we understand it, but the order entered on September 18th shows upon its face that it is not an award, but a correction of the record to show the award actually made on July 6th. It recites that the award of July 6th was to the parents as partial dependents, whereas it was erroneously made to read total dependents. In truth it was merely entering now

(September 18th) the award that was actually made (then) July 6th. We know of no reason why the commission should not have the power and right to make its records speak the truth. In *Zagar v. Industrial Commission*, 40 Ariz. 479, 14 P. (2d) 472, we held that the commission had continuing power 'to alter, amend, or rescind its awards,' and this certainly would carry the right to correct its records to make them conform to its actual findings and to speak the truth. The nunc pro tunc order of September 18th, being merely the correction of a record to make it speak the truth as it existed on July 6th, we think is properly before the court and should be considered in the determination of the award as to amount as also duration."

See also 42 American Jurisprudence, Public Administrative Law, Sec. 174, and cases cited therein.

We therefore submit that the Public Service Commission has inherent power to correct clerical errors at any time and to make its orders correspond with the decision rendered, and thus speak the truth.

The question then becomes, What is a clerical error? 1 Freeman on Judgments, Fifth Edition, pages 283-284, defines the term as follows:

“ ‘Clerical errors’ as used in this connection ordinarily relate to the errors or omissions of the clerk in the entry of the judgment and are sometimes defined or treated as though this were the only class of cases to which the term might be properly applied. But ‘clerical’ is employed in a broad sense as contra-distinguished from ‘judicial’ error and covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial func-

tion. In other words, the distinction does not depend so much upon the person making the error as upon whether it was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel or by the judge. Mistakes of the court are not necessarily judicial error. Thus, if the judgment or some provision in it was the result of inadvertence, as where the court was laboring under a mistake or misapprehension as to the state of the record or as to some extrinsic fact, but for which a different judgment would have been rendered, the judgment may be vacated or may be corrected to correspond with what it would have been but for the inadvertence or mistake.”

14 C. J. S., Clerical, p. 1202, sub voce Clerical error, sets forth this definition :

“Clerical error. An error committed in the performance of clerical work, no matter by whom committed; more specifically, a mistake in copying or writing; a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination; an error made by a clerk in transcribing, or otherwise, which must be apparent on the face of the record, and capable of being corrected by reference to the record only. It has been said that a clerical error exists when without evident intention one word is written for another, when the statement of some detail is omitted the lack of which is not a cause of nullity, or when there are mistakes in proper names or amounts made in copying, which do not change the general sense of a record, and that it implies negligence or carelessness.”

*School Dist. No. 95 v. Marion County School Reorg. Committee* (Kan.) 208 P. 2d 226, considers the foregoing definition more narrow in certain respects than courts have held.

Nevertheless, reference to the record will show that the appearance of “items” in restriction a. in the original order of January 21, 1958, and Amendment of February 3, 1959, was a clerical error, the result of inadvertence. This is based upon the following:

(a) The stipulation of Wycoff and its amended application (R. 1828-29) use the word “shipments” in paragraph 2a thereof.

(b) The Commission approved the stipulation and the application of Wycoff was thus restricted, (R. 1871); the word “shipments” appears in the Commission’s Findings of Fact, in paragraph 4, a reproduction of the stipulation. (R. 1871)

(c) The Conclusion of the Commission was that a certificate be granted “*Within the limitations specified in the stipulation set forth in the foregoing findings.*” (Emphas added) (R. 1878) Both the Stipulation and Findings as pointed out use the word “shipments” not “*items.*”

(d) Nothing in the record justifies the use of the word “items” in restriction a. of the January 21, 1958, Order and the February 3, 1959, Amendment.



(e) The Public Service Commission in the nunc pro tunc order in question stated that the use of the words "items" was erroneous and contrary to the purpose and intent of the Commission, and the word should have been "shipments."

In stating that the word "items" in restriction a. of the orders in question was the result of inadvertence is not to concede petitioner's interpretation of the orders. Restriction a. reads:

"a. Applicant shall be limited to the transportation of items of not to exceed 100 pounds upon a weight basis. Shipments shall not be separated for the purpose of avoiding this restriction."

Now what is the restriction referred to in the foregoing paragraph? The only prohibition that gives meaning to the "restriction" of separating shipments is that of restricting an aggregate of items (shipment) to 100 pounds. Petitioner's construction of the foregoing restriction renders the second sentence thereof a nullity, for we understand petitioner argues for a restriction of 100 pounds to a single item. The entire order of January 21, 1958, and the amendment of February 3, 1959, make sense only if "items" as used in restriction a. thereof is synonymous with "shipments."

However, the definition of the word "items" is irrelevant. The word crept into restriction a. of the P. S. C. Order of January 21, 1958, through inadvertence; the amendment of February 3, 1959, erroneously reproduced

the same defect. The error may be corrected, and was corrected, by the nunc pro tunc order.

## POINT II.

### THE CONSTITUTIONAL RIGHTS OF THE PETITIONER WERE NOT DENIED THROUGH THE ISSUANCE OF THE NUNC PRO TUNC ORDER IN THIS MATTER.

We note with some amazement the argument of petitioner that it has been deprived of its constitutional rights and that the Commission is estopped from entering the nunc pro tunc order in question. With equal awe we note the ease with which petitioner sluffs off the question of estoppel on the part of Wycoff. Petitioner cannot press this approach without having tongue in cheek.

Who proposed the stipulation upon which the Commission based its conclusion? Wycoff. (R. 1099)

Who proposed that its application be amended and restricted in accordance with the stipulation? Wycoff. (R. 1099 ; 1828-1829)

Who co-authored, or approved of the use of, the word “shipments” in the stipulation? Wycoff. (R. 1828-1829)

Who agreed that its “*shipments*” would be limited to not to exceed 100 pounds on a weight basis? Wycoff. (R. 1828-1829)



Who had notice of the Findings of Fact and Conclusion of the Commission in P. S. C. Case 4252 — Sub 2? Wycoff.

How can Wycoff in good faith claim that the nunc pro tunc order denies it any property right, when the order in effect answers the prayer of Wycoff, and embraces the agreement of the petitioner? Wycoff was a participant in proposing, and agreeing to, the restricted scope of its application; it knew the Commission had approved the stipulation and it was the intent of the Commission to enter an order in conformity with the stipulation. We submit that Wycoff is not only estopped from pressing a deprivation of due process argument, but that all property rights to which it is entitled and for which it prayed, are secured through the nunc pro tunc order.

Wycoff takes some comfort in the fact that Public Service Commission Order 4252 — Sub 2, has been considered by this Court in *Lake Shore Motor Coach Lines, Inc. et al. v. Hal S. Bennett, et al.*, 8 U.2d 293, 333 P.2d 1061, between the time of the issuance of the original order and the nunc pro tunc entry.

We submit that such review by this Court does not prohibit the Commission from entering its nunc pro tunc order. As set forth herein the correction of clerical errors may be made at any time, 1 Freeman, Judgments, Fifth Edition, p. 281; furthermore, the scope of the review proceedings in the *Lake Shore Motor Coach Lines* decision, supra, involved the P. S. C. order only as it affected the plaintiffs and the areas they serve; this Court did

not consider the order as it related to Wycoff and those protestants who entered into the stipulation. If anything, the Court recognized that the application of Wycoff was “to haul commodities generally in shipments up to 100 pounds” and noted the Wycoff stipulation as filed with the Commission.

To grant the petition of Wycoff in the matter before this Court would make an absolute mockery out of the Wycoff stipulation and the intent of the Public Service Commission in approving the stipulation; it would make the rule permitting the correction of clerical errors a nullity. To allow Wycoff to capitalize on an inadvertent act of the Commission would foster injustice, redound to the disinterest of the public, and strip an administrative agency of the power to do justice and make its orders speak the truth.

## CONCLUSION

The petition of Wycoff Company, Incorporated, should be denied.

Respectfully submitted

WALTER L. BUDGE  
Attorney General

RAYMOND W. GEE  
Deputy Attorney General  
*Attorneys for Respondents*