

1966

Joseph M. Lewis, Executor of the Estate of Orson Lewis dba, Lewis Bros Stages and Bingham Stage Lines v. Public Service Commission of Utah: Hal S. Bennett, Donald Hacking and Raymond W. Gee, Its Members; and Wycoff Company, Barton Truck Line, Inc., Uintah Freightways, Magna Garfield Truck Line, and Link Trucking, Inc. v. Public Service Commission of Utah Hal S. Bennett, Donald Hacking and Raymond W. Gee, Its Members, and Wycoff Company, Garrett Freightlines, Inc., Lake Shore Motor Coach Lines, Inc., Continental Bus System, Inc., American Bus Lines. Inc .. Denver-Salt Lake Pacific Stage. Rio

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Grande Motorway, Milne Truck Lines, Inc., Palmer Bros. Incorporated, Mt. Hood Stages, Dba Pacific Trailways v. Public Service Commission of Utah: University of Utah Hal S. Bennett, et al., Its Members: and Wycoff Company, Incorporated : Brief of Plaintiffs Joseph M. Lewis, Executor of the Estate of Orson Lewis, Dba Lewis Bros. Stages and Bingham Stage Lines

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JOSEPH M. LEWIS, Executor of the Estate of OR-  
SON LEWIS, dba LEWIS BROS. STAGES and  
BINGHAM STAGE LINES, a corporation,  
Plaintiffs,

-vs-

PUBLIC SERVICE COMMISSION OF UTAH;  
HAL S. BENNETT, DONALD HACKING and  
RAYMOND W. GEE, its Members; and  
WYCOFF COMPANY, INCORPORATED,  
Defendants.

Case No.  
10351

BARTON TRUCK LINE, INC.; UINTAH  
FREIGHTWAYS, a corporation; MAGNA-  
GARFIELD TRUCK LINE, a corporation,  
and LINK TRUCKING, INC.,  
Plaintiffs,

-vs-

PUBLIC SERVICE COMMISSION OF UTAH;  
HAL S. BENNETT, DONALD HACKING and  
RAYMOND W. GEE, its Members; and  
WYCOFF COMPANY, INCORPORATED,  
Defendants.

Case No.  
10357

UNIVERSITY OF UTAH

GARRETT FREIGHLINES, INC., LAKE  
SHORE MOTOR COACH LINES, INC.,  
CONTINENTAL BUS SYSTEM, INC.,  
AMERICAN BUS LINES, INC., DENVER-  
SALT LAKE-PACIFIC STAGES, RIO GRANDE  
MOTORWAY, INC., MILNE TRUCK LINES,  
INC. PALMER BROS. INCORPORATED, MT.  
HOOD STAGES, dba PACIFIC TRAILWAYS,  
Plaintiffs,

-vs-

PUBLIC SERVICE COMMISSION OF UTAH;  
HAL S. BENNETT, DONALD HACKING and  
RAYMOND W. GEE, its Members; and  
WYCOFF COMPANY, INCORPORATED,  
Defendants.

Case No.  
10360

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BRIEF OF PLAINTIFFS JOSEPH M. LEWIS, EXECUTOR OF  
THE ESTATE OF ORSON LEWIS, dba LEWIS BROS.  
STAGES and BINGHAM STAGE LINES

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# IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH M. LEWIS, Executor of the Estate of ORSON  
LEWIS, dba LEWIS BROS. STAGES and  
BINGHAM STAGE LINES, a corporation,  
Plaintiffs,

-vs-

PUBLIC SERVICE COMMISSION OF UTAH;  
JAMES BENNETT, DONALD HACKING and  
RAYMOND W. GEE, its Members; and  
WYOFF COMPANY, INCORPORATED,  
Defendants.

Case No.  
10351

MARTON TRUCK LINE, INC.; UINTAH  
FREIGHTWAYS, a corporation; MAGNA-  
FIELD TRUCK LINE, a corporation,  
MILNE TRUCKING, INC.,  
Plaintiffs,

-vs-

PUBLIC SERVICE COMMISSION OF UTAH;  
JAMES BENNETT, DONALD HACKING and  
RAYMOND W. GEE, its Members; and  
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Defendants.

Case No.  
10357

GARRETT FREIGHLINES, INC., LAKE  
SHORE MOTOR COACH LINES, INC.,  
CONTINENTAL BUS SYSTEM, INC.,  
AMERICAN BUS LINES, INC., DENVER-  
SALT LAKE-PACIFIC STAGES, RIO GRANDE  
WATERWAY, INC., MILNE TRUCK LINES,  
INC. PALMER BROS. INCORPORATED, MT.  
ROOD STAGES, dba PACIFIC TRAILWAYS,  
Plaintiffs,

-vs-

PUBLIC SERVICE COMMISSION OF UTAH;  
JAMES BENNETT, DONALD HACKING and  
RAYMOND W. GEE, its Members; and  
WYOFF COMPANY, INCORPORATED,  
Defendants.

Case No.  
10360

BRIEF OF PLAINTIFFS JOSEPH M. LEWIS, EXECUTOR OF  
THE ESTATE OF ORSON LEWIS, dba LEWIS BROS.  
STAGES and BINGHAM STAGE LINES

## STATEMENT OF THE KIND OF CASE

This matter comes before this Court for review of a  
Report and Order issued by the Public Service Commission,

after plaintiffs filed a Petition for Re-Hearing which was denied by that Commission. Cases numbered 10352, 10353 and 10360 all seek to review the same Report and Order and are consolidated for Appeal before the above entitled Court.

### DISPOSITION IN PUBLIC SERVICE COMMISSION

The Public Service Commission granted defendant Wycoff Company, Incorporated authority to serve as a common carrier under Certificate of Convenience and Necessity No. 1162-Sub 5 "in the transportation of emergency shipments of contractor's supplies, contractor's equipment, or parts thereof" as more fully set forth hereinafter.

### RELIEF SOUGHT ON APPEAL

Plaintiffs submit that the Order of the Public Service Commission, so far as it affect these plaintiffs, should be set aside.

### THE FACTS

Defendant Wycoff Company, Incorporated, applied to the Public Service Commission for a certificate of convenience and necessity to operate as a common motor carrier of contractor's equipment, equipment parts and supplies in a scheduled service, excluding, however, commodities in bulk and commodities which because of size or weight re-

...special equipment, and any shipment weighing in excess of one thousand pounds, the territorial scope of the transportation to be statewide over all highways within the State of Utah.

Plaintiffs are holders of certificates of convenience and necessity as set forth in the abstract (P. 32-33) and more fully discussed hereafter, and together with numerous other common carriers, protested the granting of the certificate requested by defendant Wycoff Company, Incorporated.

Plaintiffs operate bus services for the transportation of passengers, their baggage and express between Salt Lake City and Park City, Utah; Salt Lake City and Bingham Canyon, Utah; Salt Lake City and Ely, Nevada; and Salt Lake City and Tooele, Utah, and intermediate points. Insofar as this hearing was concerned, the Ely run would be considered to terminate in Wendover, Utah, since the remainder of the run is without the state and not affected by the Wycoff application.

After extensive hearings, the Commission entered its Order January 14, 1965, which in substance granted the application of Wycoff, subject to a definition "The phrase, contractor's supplies, contractor's equipment, or parts thereof as used in this order shall be construed as meaning the supplies and equipment, and parts thereof, which a contractor utilizes in the performance of his work; it does not include materials or supplies which the contractor might use or consume in the course of his work or which

become a part of any construction. At the time of an agreement the ultimate user must have been identified, the contractor, or the intended use of the commodities of the contractor fixed, in order to fall within the phrase herebefore defined, and the transportation herein authorized. The complete Order is before this Court as one of plaintiffs' exhibits.

## THE ARGUMENT

I. The basic position of plaintiffs is that the evidence submitted to the Public Service Commission is insufficient and inadequate and does not support the Commission's findings and order that a necessity exists for such a service within the territories already served by plaintiffs.

II. The action of the Commission is capricious and arbitrary insofar as it affects these plaintiffs, and the Order will permit the destruction of plaintiffs' businesses, since plaintiffs rely heavily upon express revenues to maintain their operations; and these revenues should not be diverted to other carriers when there has been no showing of a necessity for such additional service in the territories covered by plaintiffs.

III. The Commission's definition of "contractor's supplies, contractor's equipment or parts thereof" is so ambiguous and uninterpretable as to make enforcement impractical if not impossible.



## POINT I

EVIDENCE IS INSUFFICIENT TO SUPPORT THE  
CLAIMS OF THE COMMISSION.

In support of the application of defendant Wycoff Company, Incorporated, there appeared before the Commission numerous witnesses from Salt Lake City and other parts within the state of Utah who testified generally that they would use the type of service proposed by Wycoff as a supplement to existing service and in order to have more services available from which to select a carrier. Indeed several of these witnesses if not all testified that they were not already using the services of Wycoff. However, very few of the witnesses who testified in behalf of the application of Wycoff had had any dealings in the territories covered by plaintiffs. Virtually all who had conceded that the service of plaintiffs insofar as their territories extended was satisfactory, adequate and dependable. No witness appeared in behalf of the applicant with affirmative testimony showing necessity for additional express service in the territories served by plaintiffs. The majority of the witnesses who testified in behalf of applicant conceded that they would like to have available a multiplicity of service for their shipments, so that they could pick whatever carrier might be most convenient at a particular moment; and many of such witnesses did not seem to recognize the economic consequences of unlimited competition between carriers.

The evidence submitted to the Public Service Com-

mission is totally insufficient and inadequate and does not support the findings and order that a necessity exists for such a service within the territories already served by the plaintiffs. This position could perhaps be more fully stated to be that not only was the evidence insufficient and inadequate to support the findings and order but that no evidence of any type was introduced to establish the requisite necessity as to the territories served by the plaintiffs. Plaintiffs are certain the Court is aware of the need for a careful study of the abstract to appreciate the position and the objections to the Commission's order which it affects plaintiffs. The task of this Court is well set as stated in the case of *Mulcahy v. Public Service Commission*, 101 Utah 245, Page 249:

"It has been repeatedly held that a review of the Commission's Order is limited to a determination whether the Commission acted within the scope of its authority, whether the order has any substantial foundation in the evidence, and whether any substantial right has been infringed by such order."

The Court further stated in the *Mulcahy* case, supra at page 262:

"An applicant desiring to enter a new territory or to enlarge the nature or type of the service here 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 and 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. Yet the interests of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development and advancement."

The law in this respect was reiterated and approved in *High Light & Traction Company v. Public Service Commission*, 191 Utah 99 wherein the Court, after quoting extensively from the Mulcahy case, said (Page 114):

"If the need for new or additional service exists, it is the duty of the commission to grant certificates of convenience and necessity to qualified applicants, but when a territory is satisfactorily serviced and its transportation facilities are ample, a duplication of such service which unfairly interferes with the existing carriers may undermine and weaken the transportation setup generally and thus deprive the public of an efficient permanent service. True, existing carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service. The public interest is paramount."

This Court considered a Commission order involving many of the same parties under highly similar facts in *Rocke Shore Motor Coach Lines, Inc. v. Bennett*, 8 Utah 26, 293. At page 296 it stated:

"When a carrier applies to institute a new carrying service, the Commission must take into account,

not only the immediate advantage to some members of the public in increased service, and to the existing carrier in permitting him to enlarge the scope of his business, but must plan long-range 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 operations they are maintaining.

Further, at page 297:

"Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing to mere generality that some members of the public would like and on occasion use such type of transportation service. \* \* Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate or that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service."

At page 297:

"The import of applicant's witnesses was that it would be convenient and desirable to them to have another carrier available for quick transportation service, including pickup and delivery. It is obvious, as they without exception admitted, that their self interest would be served by having more carriers with more frequent schedules. In short, the speediest and cheapest transportation possible which purpose an additional carrier would tend to serve. In other words, from their point of view, the more carriers the better. This is quite understandable."

... because they were in no way concerned with the long range planning hereinabove referred to, nor with keeping existing carriers solvent and in operation."

The Court is urged to note that the precise same facts are in the instant case. W. W. Clyde and Company is not known to using the services of Lewis and Bingham from Tumble to Tooele, Park City, Bingham, Delta and Wendover if their services were convenient. (Abstract p. 10). Heiner Equipment Company representative Paul Orten stated that insofar as the witness is concerned the services of Lewis and Bingham have been satisfactory. (Abstract p. 11). Leo A. Crandall of Strong Company stated that his company has had no work in the areas served by Lewis and Bingham. Reg Crane of Rocky Mountain Machinery Company stated that the services of Lewis have been completely satisfactory. (Abstract p. 18). Tiago Construction Company has had no occasion to use the services of Lewis. (Abstract p. 20), nor has Fife Construction Company (Abstract p. 22). Arnold Machinery Company's witness was generally acquainted with the services of Lewis and Bingham and the services appear to have been satisfactory. (Abstract p. 23). Heiner Equipment & Supply has used Lewis and Bingham without complaint (Abstract p. 25). Wasatch Electric has never used the services of Bingham or Lewis (Abstract p. 26). Amco Equipment Company has used the services of Lewis and has found it satisfactory. (Abstract p. 28). Bailey, Inc.'s witness stated that Lewis and Bingham have been handling shipments, and that shipments handled by Lewis to Wendover have been sat-

isfactory (Abstract p. 32). Wherein has the defendant Wycoff Company, Incorporated met its burden of proof?

Referring again to *Lake Shore Motor Coach Lines, Inc. v. Bennett*, supra, at page 298:

"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 convenience and necessity require additional service."

## POINT II.

**THE ACTION OF THE COMMISSION IS CAPRICIOUS AND ARBITRARY AND WILL PERMIT THE DESTRUCTION OF PLAINTIFFS' BUSINESSES.**

Joseph M. Lewis, Executor of the Estate of Orson Lewis, doing business as Lewis Bros. Stages, and Secretary of Bingham Stage Lines, a Utah corporation, testified with respect to the transportation services of these carriers. These plaintiffs hold authority for the transportation of passengers, their baggage and express in intrastate commerce between Salt Lake City and Park City, Utah; Salt Lake City and Bingham Canyon, Utah; Salt Lake City and Wendover; and Salt Lake City and Tooele, Utah, serving

intermediate points. Mr. Lewis testified that all passenger coaches have facilities for handling express; that the coaches in fact have capacity to transport more express than is presently tendered. For the year 1963 on the run from Salt Lake City to Tooele 30.007 per cent of revenue was express; from Salt Lake City to Delta, 60.03 per cent was express; to Wendover, Utah, 12.96 per cent was express; and on the run from Salt Lake City to Bingham Canyon, 100 per cent was express. Lewis Bros. Stages' operating ratio for 1963 was 97.909. Of the total income from all sources express represented 9.18 per cent (Abstract p. 33-34). Mr. Lewis similarly testified with respect to the breakdown of passenger and express revenue to March 31, 1964 as follows: Tooele, 33.822 per cent express; Delta, 60.03 per cent express; Wendover, Utah, 15.577 per cent express; Bingham, 4.10 per cent express; Park City, 6.317 per cent express. Express is transported on all schedules and included in that express are contractor's equipment and supplies, tires, repair parts and similar objects (Abstract p. 34).

The testimony shows clearly that express has been of vital importance to the continued operation of plaintiffs' bus lines to the small communities which they have served for so many years. Transportation of express has been one of the major stable income producing factors making possible plaintiffs' passenger service, and without such revenue it would be extremely doubtful if plaintiffs could continue to operate (Note Lewis operating ratio of 97.909, with 9.18 per cent of income from all sources being express

revenue). It becomes obvious that if plaintiffs are forced to discontinue passenger operations because of the loss of express revenue several of the territories served could be isolated without public passenger transportation of any type. The defendant Commission, through its Report and Order, has reduced or eliminated sources of revenue which in turn reduces or eliminates plaintiffs' ability to serve the public.

The Commission has disregarded and failed to consider its duties and obligations to supervise and regulate interstate passenger and express transportation, having in mind the convenience, necessity, welfare and needs of the public as well as the interests of the small common carrier who must look to the Commission for the protection and consideration necessary to allow it to compete for and provide service in the communities now served.

### POINT III.

THE COMMISSION'S DEFINITION OF "CONTRACTOR'S SUPPLIES, CONTRACTOR'S EQUIPMENT OR PARTS THEREOF" IS SO AMBIGUOUS AND UNINTERPRETABLE AS TO MAKE ENFORCEMENT IMPRACTICAL IF NOT IMPOSSIBLE.

The Commission defined the commodities to be transported as follows: "The phrase 'contractor's supplies, contractor's equipment, or parts thereof' as used in this order shall be construed as meaning the supplies and equipment



parts thereof, which a contractor utilizes in the performance of his work; it does not include materials or supplies which the contractor might use or consume in the course of his work or which become a part of any construction. At the time of any shipment the ultimate user must have been identified as a contractor, or the intended use of the commodities by a contractor fixed, in order to fall within the phrase heretofore defined, and the transportation herein authorized."

Defendant Wycoff moves mail, newspapers, film, magazines and express all in the same vehicle at the same time (Abstract p. 6). Witness Young for defendant indicated that if the shipment was to go to a construction site or was in some way associated with a contract situation, and provided it involved parts and supplies (whatever that means!) Wycoff would conclude that it has the authority to handle the movement. Exhibit No. 5, which exhibit consists of freight bills supporting Exhibit No. 4, discloses boxes, cartons, crates, etc. (Abstract p. 7). There is no indication that the defendant Wycoff actually knows or endeavors to find out what specific item is tendered for carriage, nor that under the authority the Commission here granted it would attempt to discern the contents of a shipment tendered. Plaintiffs respectfully submit that it would be all but impossible for the Public Service Commission to police such traffic, or in the investigation thereof in fact to determine (or have any means by which it could determine) what is contained in "boxes, cartons or crates." It would appear that the defendant is

virtually given the discretion to provide what general commodities service it cares to provide in connection with its contract haulage, and thus obtain additional revenue at the expense of regulated common carriers.

It is respectfully submitted that the Order of the Public Service Commission, so far as it affects these plaintiffs should be set aside.

Respectfully submitted  
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JOSEPH P. McCARTHY  
IRENE WARR  
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