

1961

Milne Truck Lines et al v. Public Service
Commission of Utah et al : Petition of Defendant
Clark Tank Lines, Inc, for Rehearing and Brief in
Support Thereof

Utah Supreme Court

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In the Supreme Court

OF THE
State of Utah

MILNE TRUCK LINES, INC., a corporation,
CARBON MOTORWAY, INC., a corporation,
and SALT LAKE-KANAB FREIGHT LINES
Inc., a corporation,

FILED

MAR 22 1961

~~Plaintiffs~~ Court, Utah

vs.

PUBLIC SERVICE COMMISSION OF UTAH and
HAL S. BENNETT, DONALD HACKING and
JESSE R. S. BUDGE, Commissioners of the
Public Service Commission of Utah, and
CLARK TANK LINES, INC., a corporation,
Defendants.

Case No.
9293

PETITION OF DEFENDANT CLARK TANK LINES, INC. FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court

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MILNE TRUCK LINES, INC., a corporation,
CARBON MOTORWAY, INC., a corporation,
and SALT LAKE-KANAB FREIGHT LINES,
INC., a corporation,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF UTAH and
HAL S. BENNETT, DONALD HACKING and
JESSE R. S. BUDGE, Commissioners of the
Public Service Commission of Utah, and
CLARK TANK LINES, INC., a corporation,

Defendants.

Case No.
9293

PETITION FOR REHEARING

The defendant, Clark Tank Lines, Inc., a corporation, respectfully petitions the Court for a rehearing and re-argument of the above entitled matter, upon the following grounds:

I

THE COURT IN ITS DECISION ERRED BY EXCEEDING THE LIMITED SCOPE OF ITS REVIEW OF DECISIONS OF THE PUBLIC SERVICE COMMISSION AS PRESCRIBED BY STATUTE, IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION.

II

THE COURT, IN ITS DECISION, ERRED BY SETTING ASIDE THE ENTIRE COMMISSION DECISION RATHER THAN ONLY THAT PORTION WHICH THE COURT FOUND WAS NOT SUPPORTED BY THE EVIDENCE.

WHEREFORE, the petitioner prays that the judgment and opinion of the Court be recalled and a reargument be permitted of the entire case.

A brief in support of this petition is filed herewith.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

I

PRELIMINARY STATEMENT.

In filing this petition for rehearing, the defendant recognizes that a court will not generally overturn its own decisions. However, the defendant feels that this decision is of extreme importance, in that, if allowed to stand, it constitutes such a radical departure from previously established precedents concerning its jurisdiction to review decisions of the Public Service Commission as to lead, however unwittingly, to the usurpation by it of the functions presently delegated exclusively to that Commission. The significance of such a departure upon the economic welfare of the consuming public within the state can not be over-emphasized.

An extensive restatement of the facts in this matter and the evidence contained in the record does not appear necessary at this time, inasmuch as such facts and evidence were thoroughly outlined and discussed in the original briefs filed with the Court and at the time of oral argument. However, inasmuch as the Court's decision was based upon an alleged insufficiency of evidence in the record to support the Commission's decision, a very brief resume of the case itself appears warranted.

On January 25, 1960, defendant, Clark Tank Lines, Inc., filed its application before the Public Service Commission of Utah, seeking a certificate of convenience and necessity as a common motor carrier for the transporta-

tion of special bulk commodities. Full hearing was had on this application during which oral and documentary evidence was offered by the applicant and by protestants. On April 28, 1960, the Public Service Commission issued its report and order finding that a need existed for the applicant's service, and granting the applicant a certificate of public convenience and necessity authorizing operation as a common motor carrier, as follows:

“* * * for the transportation of flour, sugar, powdered milk and salt used or suitable for human consumption, in bulk, in dry form, between all points and places in the State of Utah and on return movements to transport rejected shipments; also, the transportation of non-edible salt in bulk, in dry form, from Saline, Utah to all points in Utah north of, but not including Tooele, Salt Lake, Wasatch, Duchesne and Uintah Counties, Utah.”

A petition for rehearing before the Commission was filed by the plaintiffs in this matter, which petition was denied. On June 17, 1960, the matter was brought within the jurisdiction of this Court by way of Writ of Review. On March 3, 1961, this Court issued its decision, setting aside, in its entirety, the decision of the Commission.

At the time of the hearing held before the Commission, the defendant presented various witnesses representing shippers located at points throughout the State of Utah, who testified as to the need of their respective companies for a common motor carrier which could provide for the transportation of certain edible and non-edible commodities in bulk. These witnesses also testified to the fact that there was a trend toward increasing the use of bulk commodities. It was further

testified that this defendant had made arrangements to obtain a specialized unit of equipment for handling such edible and non-edible commodities in bulk. Further, the evidence showed that the various protestants to the application, including the plaintiffs in this matter, did not presently have such equipment, and did not intend to obtain such equipment on the basis of the present need for such service.

II

THE COURT, IN ITS DECISION, ERRED BY EXCEEDING THE LIMITED SCOPE OF ITS REVIEW OF DECISIONS OF THE PUBLIC SERVICE COMMISSION AS PRESCRIBED BY STATUTE, IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION.

The statutes and previous decisions of this Court set forth clearly and succinctly the scope of this Court's authority to review decisions of the Public Service Commission. These decisions, extending over a period of many years, have firmly established the limited authority with which this Court may review decisions of the Commission. These decisions have likewise recognized and affirmed, and correctly so, the plan of the Legislature in giving to the Commission broad discretionary powers to effectively meet the transportation and other public service problems encountered within the State of Utah. In furtherance of this Legislative plan to give the Commission these broad discretionary powers, Section 54-7-16 of the Utah Code Annotated 1953 was enacted prescribing the limited jurisdiction of this Court to

review decisions of the Commission. The significant portion of this section provides:

“The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.”
(Emphasis added.)

This Court, through its decisions, has acknowledged the limitation imposed by this section on its authority to review Commission decisions. In a relatively early decision, the Court held that it is bound by the findings of the Commission when there is evidence to support such findings, *notwithstanding the wisdom of the decision, or whether the Court’s conclusions on the evidence would have been the same as that of the Commission. Jeremy Fuel & Grain Co. v. Public Utilities Commission*, 63 U. 392, 226 Pac. 456; see also *Fuller-Toponce Truck Company v. Public Service Commission*, 99 U. 28, 96 Pac. 2d 722. The Court went on in the *Jeremy Fuel* case to hold that it could not review mere errors of judgment by the Commission. In a more recent decision the Court reiterated this principle when it held that it can not substitute its judgment for the judgment of the Commission. *Los Angeles and S. L. R. Co. v. Public Utilities Commission*, 80 U. 455, 15 Pac. 2d 358. It is respectfully submitted that this is precisely what the Court

did in the present decision, notwithstanding that it gave lip service to this principle in its opinion.

In order to insure that it would not inadvertently pass upon the wisdom of the Commission's decision or substitute its judgment for that of the Commission when reviewing one of the latter's orders, this Court has, by its decisions, set forth a strict test to be applied by it on such review. In its decision in the *Los Angeles and S. L. R. Co.* case, hereinabove referred to, the Court held that its power of review goes to the extent of determining whether there was *any* substantial evidence to support the decision of the Commission.

In a more recent decision in *Utah Light and Traction Company v. Public Service Commission*, 101 U. 99, 118 Pac. 2d 683, this Court again stated:

“This Court has held that it can not substitute its judgment for that of the Commission and disturb its findings where there is *any* substantial basis in the evidence for the finding, or where the order of the Commission is not unreasonable or arbitrary.”
(Emphasis added.)

In the leading case on this point, *Mulcahy v. Public Service Commission*, 101 U. 245, 117 Pac. 2d 298, the Court reaffirmed this principle when it stated:

“It has been repeatedly held that a review of the Commission's order is limited to a determination of 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.”
(Emphasis added.)

and at page 253,

“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.)

Likewise, in the early decision of *Gilmer v. Public Utilities Commission*, 67 U. 222, 247 Pac. 284, the Court held that where the orders of the Commission are within its jurisdiction, and within reason, and are not capricious or arbitrary, this Court can not interfere.

It is readily apparent from these decisions that this Court, in complying with the Legislative mandate granting broad discretionary powers to the Commission, has essentially limited its review to a determination of whether the Commission's order is capricious or arbitrary, and whether there is *any* substantial evidence to support the findings of the Commission.

An examination of its opinion clearly shows that the Court has in this matter departed from these established principles of limited review, and has, in fact, substituted its judgment for that of the Commission in an area reserved exclusively to the broad discretion of the Commission.

The first indication that the Court is departing from its previously established precedents occurs at that point in its opinion where the Court specifically points out that the record in this matter shows that there is a present need for the service in question, at least, with respect to some shippers located throughout the state, and that in the future there may be a trend to bulk

handling of edible food products by other manufacturers. (Court's opinion, page 2.)

It follows necessarily that in making such statements, the Court acknowledges that *there is some competent evidence in the record* of a present and future need for the service in question in support of the Commission's decision. Under its existing tests of limited review, this conclusion would have terminated the Court's inquiry into the validity of the Commission's decision, and the Court would have been compelled to affirm the decision. The fact that, in the instant proceeding, the Court went further and set aside the Commission's decision shows that it is departing from these previously established principles of limited review.

A second and more striking illustration that the Court, in its opinion, passed upon the wisdom of the Commission's decision and substituted its judgment for that of the Commission, is shown by the following statement set forth at page 2 of the opinion:

"The Commission must take into account the long range plans for the protection of existing carriers, as well as the immediate convenience of certain members of the public. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to it from all points or specialized routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling special commodities on an irregular route basis."

The extent to which the Commission must take into account long range plans for the protection of existing

carriers is a policy matter *delegated by the Legislature to the sole discretion of the Commission itself*. Further, the extent to which existing common motor carriers would be damaged economically by allowing other carriers to operate is also *a matter reserved to the sole discretion of the Commission*. In considering such matters when passing upon the Commission's decision, the Court quite obviously went far beyond the test of determining whether any evidence supported the decision. It is again respectfully submitted that in doing so the Court in fact substituted its judgment for that of the Commission.

Further examination of the Court's opinion again points out that in this proceeding it has exceeded the strict tests previously set forth by it for reviewing Commission decisions. This is illustrated also at page 2 of the Court's opinion wherein it is stated:

"Such evidence is *insufficient* to support the order as made by the Commission granting to Clark Tank Lines, Inc. authority to render the proposed service between all points and places within the State of Utah." (Emphasis added.)

This statement shows that the Court, in this instance, abandoned its test of determining whether there was *any* evidence to support the Commission's decisions, and rather, passed upon the sufficiency of the evidence in the record. By reverting to a test passing upon the sufficiency of the evidence, the Court has departed from the limited review required by the statute in question, and has in its stead used the tests normally applied by it in reviewing ordinary civil actions. It is respectfully submitted that by so doing, the Court committed error.

In this regard it is respectfully pointed out that in the opinion in the *Mulcahy* case, previously referred to, at page 253, there was quoted an excerpt from the opinion of the California Supreme Court in *Oro Electric Corp. v. Railroad Commission*, 169 Cal. 466, 147 Pac. 118. This quotation as set forth in the *Mulcahy* case is as follows:

“Here the Commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, *and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered in this proceeding.*” (Emphasis added.)

(Note that this Court has held that the Act creating the Public Utilities Commission of Utah was patterned after the Public Utilities Act of California. *Fuller-Tompson Truck Co. v. Public Service Commission, supra.*)

A final and conclusive indication that the Court has departed from its previous decisions and exceeded the limit of review authorized by the statute, is shown by the absence from the opinion of any statement that the Commission’s decision was arbitrary or capricious, or a statement that there was not any substantial evidence to support the Commission’s decision. The absence of either of these statements from the Court’s opinion, reinforces the conclusion that it has in this instance abandoned these two long established tests used in reviewing Commission decisions.

It is apparent from a reading of the Court’s opinion that it recognizes there was evidence of public need to

support a portion of the Commission's decision, but felt that the evidence of public need was insufficient to support the complete action taken by the Commission to satisfy that public need. (In this regard, it is again respectfully pointed out that the Court, in its opinion, acknowledged that there was evidence of future need for the service in question in the form of a possible trend by manufacturers to bulk.) In making this determination, the Court, *of necessity*, substituted its judgment for that of the Commission, as to what action must be taken in the form of the granting of additional operating authority to properly meet this present and future need found by the Commission. There can be no question, however, that the determination as to what action must be taken to properly meet a present or future public need is a matter which the Legislature intended to rest solely within the broad discretionary powers of the Commission. Obviously it was to protect against the infringement of this power that the Legislature restricted the power of this Court to review Commission decisions. In substituting its judgment for that of the Commission in this regard, it is submitted that the Court exceeded its authority and for this reason its action constituted **error**.

It is respectfully submitted that the impact of this decision, where as indicated, the Court departs from its previously established principles of limited review and substitutes its judgment for that of the Commission, transcends by far the specific point as to what authority this defendant should be granted. For, if allowed to stand, this decision would open the door to a continued substitution by this Court, however unwittingly, of its

judgment for that of the Commission with the ultimate result of a complete usurping by the Court of the Commission's function.

To recapitulate then concerning this first ground for rehearing, it is respectfully submitted that the statute prescribing the authority of this Court to review decisions of the Commission limits the scope of such review; that this Court, through a long line of decisions, has adhered strictly to these limited review provisions; that in its opinion in this matter, the Court substituted its judgment for that of the Commission and in so doing radically departed from these previous decisions; and that in adopting a new standard for reviewing Commission decisions, it exceeded its jurisdiction, thereby committing error.

III

THE COURT IN ITS DECISION ERRED BY SETTING ASIDE THE ENTIRE COMMISSION DECISION RATHER THAN SETTING ASIDE ONLY THAT PORTION WHICH THE COURT FOUND WAS NOT SUPPORTED BY THE EVIDENCE.

It is apparent that the Court, in its decision, considered the Commission's decision not as a single grant of authority, but as a combination of grants of authority of individual commodities into various geographical areas. This can be seen by the fact that the Court, in its decision, recognized that there was evidence supporting portions of the grant but not all of the grant. In view of this approach to the Commission's decision, it is respectfully submitted that the Court erred by setting

aside the entire Commission decision rather than only that portion which the Court found was not supported by the evidence.

While the defendant cannot depart in any respect from its conclusion set forth in the major point above, as a practical matter the Court, even if it affirms its new approach, should not, and cannot, set the entire order of the Commission aside.

As was hereinabove indicated in the preliminary statement, the Commission authorized the defendant to transport non-edible salt, in bulk, in dry form from Saline, Utah, to various other points in Utah. The plaintiffs in this matter did not challenge the grant of this authority. This was pointed out at page 2 of plaintiffs' opening brief, where they stated:

"Plaintiffs are not contesting that portion of the order permitting service on non-edible salt from Saline to points north of the indicated counties."

There can be no question but that there is ample evidence in the record to support this grant of authority. However, the Court, in setting aside the entire order, likewise overruled the Commission with respect to this particular authority. In doing this, it is submitted, the Court erred.

With respect to the grant of authority to transport the edible commodities in question, in bulk, it is apparent from the Court's decision that it felt that the evidence supported the grant into certain limited geographical areas. However, again the Court, in setting aside the entire Commission's decision, likewise set

aside that portion which it concedes was supported by the evidence in the record. Again, in this regard, it is respectfully submitted, the Court erred.

Based upon the evidence which it concedes exists in the record, it is clear that the Court should *not* have set aside the Commission's decision insofar as it authorized the defendant to transport the following commodities:

- (a) Non-edible salt in bulk, in dry form, from Saline, Utah, to all points in Utah north of, but not including, Tooele, Salt Lake, Wasatch, Duchesne and Uintah Counties, Utah;
- (b) Sugar used or suitable for human consumption in bulk, in dry form, from West Jordan and Garland, Utah, on the one hand, to Salt Lake City, Utah, on the other hand;
- (c) Powdered milk used or suitable for human consumption, in bulk, in dry form, from Beaver, Utah, to Salt Lake City, Utah;
- (d) Salt used or suitable for human consumption, in bulk, in dry form, from Saltair Junction, Utah, to Salt Lake City, Utah;
- (e) Flour used or suitable for human consumption, in bulk, in dry form, from Ogden, Utah, to Salt Lake City, Utah.

CONCLUSION

Defendant, Clark Tank Lines, Inc. sincerely urges that on the basis of the foregoing argument, and in view of the importance of this decision in establishing as it does a new and broader scope of review of Commission decisions, the Court should grant a rehearing and re-argument, and that the Court should thereupon re-view and reconsider the entire matter.

Respectfully submitted,
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