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Milne Truck Lines et al v. Public Service Commission of Utah et al : Plaintiffs' Reply to Defendant's Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MILNE TRUCK LINES, INC., a
corporation, CARBON MOTOR
WAY, INC., a corporation, and
SALT LAKE-KANAB FREIGHT
LINES, INC., a corporation,
Plaintiffs,

- vs -

PUBLIC SERVICE COMMISSION
OF UTAH and HAL S. BEN-
NETT, DONALD HACKING and
JESSE R. S. BUDGE, Commis-
sioners of the Public Service Com-
mission of Utah, and CLARK
TANK LINES, INC., a corpora-
tion,
Defendants.

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Clerk, Supreme Court, Utah

Case No.
9293

PLAINTIFFS' REPLY TO
DEFENDANT'S PETITION FOR REHEARING

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PLAINTIFFS' REPLY TO
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PRELIMINARY STATEMENT

The Petition for Rehearing and Brief filed by de-
fendant Clark Tank Lines basically presents matters
which were previously urged and considered by the
Court in this case. Except as necessary to directly answer
the Petition for Rehearing and Brief, this Brief will not
reconsider material previously argued to the Court.

Defendant's Petition for Rehearing and Brief set forth two points; first, that the court exceeded its powers of review, and second, that the court should not have set aside the entire Order of the Commission. Plaintiffs will answer each point separately.

STATEMENT OF POINTS

POINT I

THE COURT PROPERLY EXERCISED ITS POWERS OF JUDICIAL REVIEW.

POINT II

THE COURT CORRECTLY CONCLUDED THAT THE ENTIRE ORDER OF THE PUBLIC SERVICE COMMISSION BE SET ASIDE.

ARGUMENT

POINT I

THE COURT PROPERLY EXERCISED ITS POWERS OF JUDICIAL REVIEW.

Point I of defendant's Brief argues in effect that the Supreme Court cannot review the evidence in an appeal from an order of the Public Service Commission. Although this proposition was argued by defendant and considered by the court previously (defendant's Brief, Pages 52-56) it is again presented in the Petition for Rehearing.

Section 54-7-16, U.C.A. (1953) provides that there shall be a right of appeal to the Supreme Court to determine the lawfulness of an order of the Public Service Commission. Upon such appeal, the court must determine whether the Commission properly pursued its authority. Implicit in the power of review is the power to reverse and set aside an order made by the Commission. The nature of such review was stated by this court in *Lake Shore Motor Coach Lines, Inc., v. Bennett*, 8 Utah 2d 293, 333 P. 2d 1061 (1958):

“However, a review by this Court is provided for, and it is undoubtedly intended to amount to something more than a mere rubber stamping of any action the Commission might take by placing some control upon extremes of arbitrary action by the Commission. It 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. To do so would constitute the Commission as an autocratic authority with arbitrary power which would render the foundations of the business of existing carriers so insecure as to make operations and planning hazardous and render all attempts to defend their authority futile.”

The law is clear in Utah that where the action of the Commission is arbitrary and capricious and not based upon sufficient evidence, the court will set such action aside. As stated in *Union Pacific Railroad Company v. Public Service Commission*, 102 Utah 465, 132 P. 2d 128 (1942):

“It is a well established rule that this Court will not disturb a decision of the Commission *unless such decision is capricious or arbitrary or is not based on sufficient competent evidence.*” (Emphasis added).

It is obvious that to determine whether the Commission’s action was, in fact, arbitrary or capricious and based upon sufficient competent evidence, the evidence itself must be reviewed. To preclude an analysis of the evidence by the Court would render the right of appeal meaningless. The Court must review the evidence and if, as a matter of law, the action of the Commission is arbitrary and capricious or not supported by sufficient evidence, the Court must set such action aside.

Defendant also argues that the Court cannot require the Commission to take into consideration a long range plan for the protection of existing carriers. In this argument, defendant ignores the provisions of Section 54-6-5, U.C.A. (1953) which provides:

“... Before granting a certificate to a common motor carrier, the Commission shall take into consideration . . . the existing transportation facilities in the territory proposed to be served.”

In *Lake Shore Motor Coach Lines, Inc., v. Bennett*, supra, the Court said:

“The Public Service Commission is charged with the duty of seeing that the public receive the most efficient and economical service possible. This requires consideration of all aspects of the public interest. 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 applying carrier in permitting him to enlarge the scope of his business, *but must plan long range for the 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.*" (Emphasis added).

POINT II

THE COURT CORRECTLY CONCLUDED THAT THE ENTIRE ORDER OF THE PUBLIC SERVICE COMMISSION BE SET ASIDE.

The Order in this case granted to defendant authority to transport commodities involved between all points and places within the State of Utah. As a matter of law the evidence was not sufficient to justify this broad grant and consequently the action of the Commission was arbitrary and capricious. Defendant takes inconsistent positions in its Petition, asserting first that the Court cannot analyze the evidence, and next that the Court erred in not analyzing the evidence in accordance with defendant's contentions. In fact, defendant's own argument that the Court should have set aside only a portion of the Order clearly establishes that the Court did not attempt to substitute its judgment in place of the Commission's. The Court treated the Order as a whole, as it must, and found the broad grant of author-

ity to all points and places within the state to be unsupported by the evidence and contrary to law. The Court did not attempt to weigh the evidence to determine what it would have done in place of the Commission. While conceding that the scope of review will not permit such an evaluation, defendant insists that the Court erred in failing to set aside a portion of the Order and allow the remainder to stand. This inconsistency in defendant's position is demonstrated by comparing the Brief supporting the Petition for Rehearing with defendant's original Brief. On page 15 of the Brief in support of rehearing, defendant states that the Court should not have set aside the Commission's decision insofar as it authorized defendant to transport various commodities between various points. However, on page 46 of defendant's original Brief, it said:

“The delineation of the territory is clearly a policy matter left to the experienced judgment of the administrative tribunal and will not be tampered with by the judiciary.”

In effect, defendant now asserts that the Court cannot substitute its judgment for that of the Commission, and then complains that the Court failed to so substitute its judgment.

Defendant further contends that since the opinion refers to the needs of certain individuals, the Order should have been affirmed. However, defendant ignores the well established rule that to support a grant of authority the need must be public rather than private.

As stated in *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298 (1941):

“But a thing may be a convenience or a necessity for many individuals and yet not be a public convenience and necessity. The ‘convenience’ and ‘necessity’ required to support an application for a certificate are those of the public, not those of individuals.

* * *

“The mere matter of convenience to certain shippers does not establish public convenience and necessity. If existing utilities are rendering adequate service, ordinarily a certificate will not be granted putting a new competitor in the field.”

CONCLUSION

The contentions presented by defendant in its Petition for Rehearing have been previously considered by the Court and the Court properly concluded that such contentions were without merit. The decision of the Court setting aside the Order of the Public Service Commission was proper and defendant's Petition for Rehearing should be denied.

Respectfully submitted,

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