1967

Prichard Transfer, Inc. v. W. S. Hatch Co., a Utah Corporation; Public Service Commission of Utah; Donald Hacking, Hal S. Bennett and Donald T. Adams, Commissioners of Said Commission : Brief of Defendants and Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

PRICHARD TRANSFER, INC.,
Plaintiff and Appellant,

—vs.—

W. S. HATCH CO., a Utah corporation; PUBLIC SERVICE COMMISSION OF UTAH; DONALD HACKING, HAL S. BENNETT and DONALD T. ADAMS, Commissioners of said Commission,
Defendants and Respondents.

Case No.
10761

BRIEF OF DEFENDANTS AND RESPONDENTS

APPEAL FROM ORDERS REVERSING DENIAL OF APPLICATION AND GRANTING CERTIFICATE TO W. S. HATCH COMPANY

MARK K. BOYLE
345 South State Street
Salt Lake City, Utah

PHIL L. HANSEN
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah
Attorneys for Defendants

HARRY D. PUGSLEY
Attorney for Plaintiff
Prichard Transfer, Inc.
600 El Paso Gas Building
Salt Lake City, Utah

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

PRICHARD TRANSFER, INC.,
Plaintiff and Appellant,
—vs.—
W. S. HATCH CO., a Utah corporation; PUBLIC SERVICE COMMISSION OF UTAH; DONALD HACKING, HAL S. BENNETT and DONALD T. ADAMS, Commissioners of said Commission,
Defendants and Respondents.

Case No. 10761

BRIEF OF DEFENDANTS AND RESPONDENTS

STATEMENT OF FACTS

Defendant and respondent, W. S. Hatch Co., (hereinafter sometimes referred to as "Hatch") agrees with plaintiff's statement of facts with two exceptions. Prichard states "no new evidence was tendered or received" at the August 16 hearing. While it is true that no reporter was present, evidence was introduced by both parties as to the results of their efforts to work together in an attempt to reduce operating costs and correspondingly reduce rates

pursuant to the Commision's order of July 6, 1966. Such fact was affirmatively found by the Commission in its order of August 25, 1966 (R. 119).

As part of its statement of facts, appellant concludes "Prichard's evidence demonstrates that the diversion of this sulphuric acid haul will require it to close down its Moab terminal and will adversely affect its operations" (p. 7). Hatch denies that the granting of the application will have any such results. This matter will be developed in the argument under point VI.

ARGUMENT

POINT I

HATCH ADEQUATELY PROVED THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE GRANTING OF THE APPLICATION.

POINT II

THE EXISTING SERVICE OF PRICHARD IS NOT ADEQUATE.

POINT III

ECONOMIES TO THE SHIPPER ARE A PROPER ELEMENT OF PUBLIC CONVENIENCE AND NECESSITY.

Prichard's brief contains nine points. Argument of these points is broken down into three categories. Points I, II, III and IV are covered in the first category; points V, VI and VII in the second; and points VIII and IX in

the third. Respondent's points I, II and III are in answer to appellant's first grouping. Point IV is in answer to appellant's points V, VI and VII and respondent's points V and VI are in answer to appellant's points VIII and IX.

The first portion of appellant's arguments presents but a single question to the court. Is the Commission compelled by law to protect Prichard's monopolistic one-way haul at an annual cost to the shipping public of $68,-500.00?

Prichard has a complete monopoly on the authority to transport sulphuric acid from Mexican Hat to Moab (R. 62, 63).

This court has repeatedly held that it will not substitute its judgment for that of the Commission if there is sufficient evidence to support the Commission's findings.

Rudy v. Public Service Commission, et al, 1 Utah 2d 223, 265 P. 2d 400, *Mulcahy v. Public Service Commission,* 101 Utah 245, 117 P. 2d 298, *Milne Truck Lines, Inc. v. Public Service Commission, et al,* 13 Utah 2d 72, 368 P. 2d 590. Therefore, unless the Commission is compelled by law to protect the one-way service of Prichard under the circumstances existing in this case, the Commission's order must be affirmed.

Section 54-6-5, U.C.A. provides in part

> "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".

The statute does not provide, as appellant contends, that the existing monopoly must be protected regardless of the consequences to the public. In the case of *Union Pacific Railroad Company, et al v. Public Service Commiission, et al,* 103 Utah 459, 135 P. 2d 915, this Court, in construing the above quoted statute, held:

> "The discretionary power granted the Commission by the act, to grant or withhold certificates, negatives the idea that it was intended to grant and maintain a monopoly in any field. The fact that the act provides that the Commission may grant a certificate when it determines that public convenience and necessity requires such services recognizes that regulated competition is as much within the provisions of the act as is regulated monopoly. In the exercise of its powers to grant or withhold certificate of convenience and necessity, questions of impairment of vested or property rights cannot very well arise. No one can have a vested right to be free from competition, to have a monopoly against the public."

In *Lakeshore Motor Coach Lines, Inc. v. Bennett, et al,* 8 Utah 2d 293, 333 P. 2d 1061, this Court held:

> "The Public Service Commission is charged with the duty of seeing that the public receives the most efficient and economical service possible. This requires consideration of all aspects of the public's interest. ***** and existing carriers, although rendering good service, may not be sufficient for the existing business or its potential."

An examination of the service provided by Prichard will show that it does not adequately or satisfactorily serve the shipper's reasonable needs.

The supporting shipper requested Hatch to file this appplication with the Public Service Commission authorizing the northbound movement of sulphuric acid and also requested Prichard to file an application with the Interstate Commerce Commission authorizing transportation of sulphur southbound from the rail head near Potash to Mexican Hat (R. 32, 33). This was done in order to have two carriers available to provide an efficient operation in place of the inefficient, cumbersome and expensive service being provided by the same two carriers on separate one-way movements at the present time. The new rate was discussed with both Prichard and Hatch (R. 40). Prichard himself had quoted the new sulphuric acid rate of $2.90 a ton which could thus be put into effect, compared to the present rate of $5.60 (R. 63, 64). Prichard admitted that he couldn't reduce the existing $5.60 per ton rate to anywhere near $2.90 without authority to perform a two-way haul (R. 64). Nevertheless, Prichard refused to file an application with the Interstate Commerce Commission for authority to transport sulphur southbound (R. 63). Having had full opportunity to obtain authority which would enable him to provide a parallel and sufficient service with that proposed by Hatch and having refused such opportunity, he now takes the position that the shipper must use his inefficient one-way service regardless of the economic consequences.

We admit that under ordinary circumstances rates are not a proper subject of inquiry in an application for a certificate of public convenience and necessity. This is for the obvious reason that shippers would support the application of any carrier who would promise a lower rate

regardless of the adequacy of the existing service. However, this case presents an unusual situation as was recognized by the Commission in its August 25, 1966 order (R. 119):

> "While the applicant Hatch provide satisfactory service on the southbound transportation of molten sulphur and the protestant Prichard provides satisfactory transportation on the northbound movement of sulphuric acid, there is no existing service available which can be performed by one carrier in the same vehicle which is necessary to effect the economies herein mentioned" (R. 118).

The present transportation cost to the Atlas Mineral Corporation using the inefficient services of both Hatch and Prichard is $159,720 annually (R. 39) which can be reduced by 43 percent, or $68,500 per year, if this application is granted (R. 43). Certainly the "consideration of existing transportation facilities" required by the statute does not compel the Commission to perpetuate such an enormous inefficiency. Furthermore, the shipper testified that if an efficient and adequate two-way service could not be provided for him he would be forced to buy his own equipment and perform both services in private carriage (R. 43). Here we have a situation in which the supporting shipper does not want to be in the transportation business (R. 43) and for that reason requested both Prichard and Hatch to provide an efficient and economic service which it desperately needs in order to enable it to continue to use common carriers.

The cost of the two inefficient one-way hauls is so high that continued use thereof is prohibitcd. Prichard refused to attempt to provide an efficient two-way service and

preferred to sit back and prevent Hatch from providing such service in the hope that he can somehow force the shipper to continue to waste $68,500 a year. Of course, his attempts will be unsuccessful. Even if the Hatch application is denied, he will lose the haul to the private transportation of the shipper. In such event Hatch would, of course, also lose the southbound sulphur haul. Certainly it is not sound economic regulation for the Commission to force a shipper to enter private carriage against his will and take business away from two common carriers, one of whom is attempting to provide an efficient and economic service.

We take offense to appellant's charge that Hatch is "chiseling" rates to get new business. The proposed rates were discussed with both Hatch and Prichard by the shipper and Prichard was given equal opportunity to obtain two-way authority.

The services provided by Prichard *are not satisfactory.* The Commission cannot in the exercise of its functions put on "blinders" and look at mere segments of the overall service proposed. It must look at the entire transportation problem and see that common carriers do provide, to the best of their ability, a sound, economic and adequate service.

The fact that the continued well-being of existing carriers is taken into account does *not* mean that once a carrier 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. See *Lakeshore Motor Coach Lines v. Welling, et al,* 9 Utah 2d 114, 339 P. 2d 1011.

POINT IV

THE EVIDENCE FULLY JUSTIFIES THE COMMISSION'S ORDER OF AUGUST 25, 1966.

In the second portion of its argument the appellant contends that the Commission acted in an arbitrary and capricious manner in reversing its order of July 12, 1966 based upon what it chooses to call "a round table discussion".

The Commission's initial order of July 12, 1966 was by its very terms a conditional order. The Commission denied the application and ordered:

> "That W. S. Hatch Co. and Prichard Transfer, Inc. jointly and in combination, make and employ every legal means of reducing operating costs and correspondingly reduce the rates on the transportation of molten sulphur from Potash to Mexican Hat, and sulphuric acid from Mexican Hat to Moab, as those movements and transportation services are set out and described in the findings in this case, and that these carriers report to the Commission on their accomplishments in this regard" (R. 109, 110).

There can be no question about the conditional nature of the order inasmuch as both parties were ordered to report back to the Commission after attempting to work out a joint arrangement whereby the rates could be reduced.

Hatch filed a timely petition for rehearing (R. 112) pursuant to which the Commission gave notice of oral argument and in said notice specifically provided that the

hearing was for the purpose of having the parties report on their joint efforts. The hearing notice provided, in part:

> "The purpose of the hearing to which this notice applies is to allow the W. S. Hatch Co. and Prichard Transfer, Inc. to report to the Commission on the results of their joint efforts to attempt to reduce operating costs and correspondingly reduce the rates above-mentioned; to hear argument on the W. S. Hatch Co. petition for rehearing and reconsideration, and to give the parties an opportunity to introduce additional evidence, if they desire" (R. 114).

Hearing pursuant to said notice was had on July 12, 1966. There was no "round table discussion" as indicated by appellant. Both the appellant and respondent through their respective counsel agreed that it would be unnecessary to have a reporter. However, evidence was introduced by both parties concerning their attempt to reduce rates on a joint basis and both parties advised the Commission that although they had made every effort in good faith to effect such economies it could not be done in the absence of additional operating authority.

Section 54-7-15, Utah Code Annotated 1953, sets forth the mechanical procedure for an appeal. It provides in part:

> "No cause of action arising out of any order or decision of the Commission shall accrue in any court to any corporation or person unless such corporation or person shall have made application to the Commission for a rehearing before the effective date of such order or decision, *****. If, after such rehearing and consideration of all the facts in-

> cluding those arising since the making of the order or decision, the Commission shall be of the opinion that the original order or decision or any part thereof, is in any respect unjust and unwarranted or should be changed, the Commission may abrogate, change or modify the same."

The statute does not provide for a trial de novo. It merely provides the machinery by which a dissatisfied party may urge the Commission to reconsider its actions and sets forth the procedural steps necessary to effect an appeal to this Court.

At the rehearing the parties did introduce evidence as found by the Commission in its order of August 25 (R. 118) as to their inability to make a joint rate reduction. Based upon this report and upon the arguments presented by counsel the Commission reversed its conditional order of July 12. Such action is fully supported and justified by the evidence.

POINT V

THE COMMISSION DID NOT ERR IN DENYING PRICHARD'S PETITION FOR REHEARING.

POINT VI

GRANTING OF THE HATCH APPLICATION WILL NOT RESULT IN A DIVERSION OF TRAFFIC FROM PRICHARD.

Appellant apparently lays great stress on the fact that the Commission reversed its prior order. There is nothing unusual about this. However, in the instant case it was not a reversal as such because the original order of July

12, 1966 was conditioned upon the ability of the carriers to work together. After finding that they could not, the Commission under the circumstances then confronting it, granted the Hatch application and subsequently denied Prichard's petition for rehearing.

Prichard contends that the granting of the application will result in the wrongful diversion of traffic which it now enjoys and will consequently have an adverse affect upon its operations.

As heretofore stated, the evidence is uncontroverted that if an efficient two-way service such as that proposed by Hatch is not made available to the shipper it will take all the traffic involved from both Prichard and Hatch and perform the service in its own equipment (R. 43). Therefore, the action of the Commission has no bearing whatever upon Prichard's ability to retain the traffic. The existing rates are not realistic and Prichard will lose the traffic for this reason even if the application is denied.

The Commission properly granted the application and thereby provided the shipper an economic and efficient service which it does not have at the present time. This is the only action the Commission could take to keep the traffic under regulation and allow certificated common carriers to perform the service under its watchful eye and jurisdiction, rather than blindly deny the application and have the traffic move to private carriage.

CONCLUSION

Respondent Hatch respectfully submits that the order of the Public Service Commission is fully justified by

the evidence. In no other way can an efficient and economic transportation service be made available to the shipping public.

Respectfully submitted,

MARK K. BOYLE
Attorney for Defendant and Respondent
W. S. Hatch Co.
345 South State Street
Salt Lake City, Utah

PHIL L. HANSEN
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah
Attorney for Defendant
Public Service Commission