

1962

Wycoff Company v. Public Service Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WYCOFF COMPANY, INC.,

Plaintiff,

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 BARTON TRUCK LINE,

INC., BEEHIVE MOTOR LINES

and CARBON MOTORWAY, INC.,

Defendants.

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Clerk, Supreme Court, Utah

Case No.

9717

BRIEF OF PLAINTIFF

Appeal from Order of Public Service Commission
of Utah

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BRIEF OF PLAINTIFF

STATEMENT OF KIND OF CASE

Plaintiff attacks the Report and Order of the Public Service Commission of Utah, herein referred to as the "Commission," in a proceeding wherein four applicants, including plaintiff, herein referred to as "Wycoff,"

sought authority to serve the public on transportation to points in Utah north of Salt Lake City. The Commission authorized one of the four, Barton, and erroneously denied Wycoff's application.

DISPOSITION OF CASE IN COMMISSION

Wycoff applied for authority to perform an express service on commodities generally between Salt Lake City and the Utah-Idaho state line. Four applications for service between Salt Lake City and points north were heard on separate records and on consecutive days, first Barton Truck Lines, then Beehive Motor Lines and Carbon Motorway, and last Wycoff Company, Incorporated. After denying all prior motions in the separate cases to consolidate shipper evidence or incorporate it by reference in the other cases and requiring each separate applicant to rest, the Commission consolidated all of the cases (R. 1037) and then proceeded to deny all but the Barton application, and granted Barton all rights that it requested. Petition for rehearing was duly filed (R. 1343) and denied by the Commission June 12, 1962 (R. 1346).

RELIEF SOUGHT

Wycoff seeks to reverse the Report and Order of the Commission wherein Wycoff's application was denied.

STATEMENT OF FACTS

Wasatch Fast Freight (a division of Consolidated Freightways, Inc.) has operated as a motor carrier between Salt Lake City and the Utah-Idaho state line for several years. It had announced its intention and desire to withdraw from those operations. Thereupon, four applications were filed with the Commission for authority to serve the shippers of Utah between Salt Lake City and points north. These four applicants are Wycoff, Barton Truck Lines, Carbon Motorway and Beehive Truck Line.

The Wycoff hearing was set last, as apparently the Commission elected to proceed alphabetically, Barton, Beehive, Carbon and Wycoff. Procedural difficulties developed at once, as the Commission attempted to hear each case separately and completely. Attempts to cross-examine public shipper witnesses respecting their possible support of other applicants were denied. Motions to consolidate the four cases were denied. Motions to incorporate by reference the testimony of the shipper witnesses in one case into the other cases were denied.

Thus, all three prior cases had been completed and rested before the Wycoff case was permitted to be heard. At the inception it was made clear that Wycoff proposed to transport general commodities in an express service

and excluded any transportation of commodities requiring special equipment and also explosive shipments of 2,000 pounds or more. Due testimony was given by Mr. Max Young, Business Manager of Wycoff (R. 859-865) as to the equipment, personnel, experience, schedules, terminals, insurance, finances (Exhibits 1 to 6). It further produced evidence as to its express type service, both at the present time and as proposed (R. 861, 862, 863, 864)

“Q. Would you describe generally the nature of the operations that you now conduct within Utah on intrastate basis?

A. Yes, Wycoff Company is a special transportation carrier operating on a schedule basis throughout the State of Utah. We operate on published schedules serving as a special section of industry in a sense. What I mean by that is that we have a particular unique operation. We have specially built equipment to provide an express service, constructed generally in our shop whereby we can make route delivery to consignee on a route basis, throughout Utah on a scheduled arrangement. This service is tied in with radio control and dispatch control from Salt Lake City.

Q. What type of service would you propose in the area covered by this application?

A. We propose to offer scheduled service northbound from Salt Lake City, using all the schedules we now have available moving through the area of an express nature handling shipments as tendered from consignor to consignee on a full seven day per week basis.

Q. In the event that additional schedules are required, would you provide those to meet any needs of the shippers?

A. Yes, we would. * * *

Q. How would you propose to handle the transportation of the class of commodities covered by your application?

A. We would propose to handle them on the same basis that we now handle traffic in the area and we now handle traffic in the State of Idaho where we have unrestricted express operation in operation. We would pick up the traffic at the consignor's place of business and would deliver it to the consignee's doorstep on a schedule basis on the schedules as presently operating or desirable schedules as necessary. * * *

Q. Will you state to the Commission why you have made this application covering the territory that it does cover?

A. Yes. We are presently operating through the area with the exception of those points between Salt Lake City and Ogden. We are providing an

express service to customers in the area on a restricted basis. Our application would remove those restrictions and allow us to serve the customers in the area with an express service on an unrestricted basis. We presently have the physical plant established. We presently have the trained personnel on the job and have the equipment to properly service the public. Our application would take the limitations from our present certificate and give us the desirable authority to serve between Salt Lake and Ogden so that we could serve the public on a non-call basis.

Q. Do you propose to put on any new or larger equipment for this service?

A. We will put on any equipment necessary to properly serve the public. However, we have sufficient space at this time in all equipment operated to properly serve the traffic in the area."

By way of testimony as to need for the proposed service, the following evidence in support of this Wycoff application was adduced:

(a) Testimony and exhibits of Dr. Harline given in the Carbon case (R. 713 to 741) relating to population growths, trade expansion, etc., was incorporated by reference into this case (R. 857).

(b) Don Bateson, Logan, Utah, manager of Central Auto Parts Company, Inc. of Logan (R. 899-902). He requires service from Salt Lake City on auto parts.

“Q. Having in mind the discontinuance of the service of Wasatch Fast Freight, do you have a need for a different service to be available to you?

A. Well, of course we need someone to pick up the abandonment that has been made by Wasatch to fill that need, but in addition we have appreciated the service given by Wycoff. I think we have used Wycoff more frequently probably than Mendenhals. I know we have about seven to ten Wycoff shipments per week.

Q. How has that service been from Wycoff?

A. Very excellent. We haven't run into this freight limitations so far. We call Wycoff to have it delivered, and Wycoff comes.

Q. Is that stock delivered directly to your place of business?

A. Directly to our front door, very good.

(c) Dennis Mathew Carlson, owner and manager of Bernina Sewing Machine Company at Logan, ships sewing machines, fabrics, supplies and parts (R. 902-907)

He desires same-day service from Salt Lake City—has used Wycoff on small express shipments—supports the application.

(d) T. W. Thornton, of Salt Lake City, Utah, President of Thornton Plastic Company, Manufacturing. They are engaged in manufacturing drug phials and selling the same in the State of Utah and elsewhere. (R. 907-913) This Company has operated for 15 years and has as its customers drug stores throughout the area. They require prompt, expedited delivery to the drug stores being 15 in number between Salt Lake City and the northern border of Utah. They have used the Wycoff service in certain areas on express basis, and found such to be very satisfactory, and particularly now desire it to be available between the Salt Lake and Ogden area. About one-third of their traffic goes into Ogden and they are here supporting the application.

(e) Mr. Ronald Ray, Traffic Manager of Thiokol Chemical Corporation west of Brigham City, testified as to the location of their plant and their operating facility in building rocket motors and acting as a contractor for the U. S. Air Force at U. S. Air Force Plant 78, also west of Brigham City. (R. 913 to 928). Based on a six-month average, September, 1961 to February 1962, they shipped 252,000 pounds from Salt Lake City to points in northern Utah. They have at Clearfield a receiving

and warehouse facility, at Brigham City offices, at Tremonton office supply storage, and at Thiokol, Utah, which is west of Brigham City, the research and development and production facilities of rocket engines and research work. They have used the Wycoff service and found it to be very satisfactory, and are supporting the need for a "fast, rapid responding express service" (R. 917). He referred to a number of emergencies in their express shipments and the general operations and the fact that they now have 5,600 employees and by the end of July they anticipate having 7,000 employees, and they are anticipating release from the White House of information as to a 5.7 billion dollar contract over a ten-year period, which will increase employment up to 10,000. He stated that the proposed express service would be very beneficial to their company.

(f) Mr. J. Arthur Knudsen, owner and manager of Knudsen Builders and Supply Company of Salt Lake City, Utah, which has operated for 21 years (R. 929 to 940). This company handles a general line of building materials, including hardware, moldings, roofing and lumber sold to contractors and dealers throughout the state. They have used the Wycoff service in the past and found it to be very satisfactory, and desire to have such service, starting in Bountiful right north to the Idaho line, through Brigham City, Tremonton and Garland, as well as in the Cache Valley area. This type service would be very valuable to them in meeting the

deadline dates for contractors on F.H.A. or bank inspections, and they are frequently confronted with the possibility of eight, ten, twelve or fourteen hour-service. They have attempted to use the bus service, but found such was not satisfactory, and state that the commodities which they would send by Wycoff, if authorized, vary from a small lock set approximately $2\frac{1}{2}$ inches by $2\frac{1}{2}$ inches to a window that might be six feet wide and four feet high and three inches thick, or perhaps a door. This express service would be used primarily in the emergency shipments which are required frequently in the operation of their business.

(g) Mr. Owen Madsen, Warehouse Superintendent for McKesson and Robbins, Inc., wholesale druggists here in Salt Lake City, R. 940 to 956). They ship wholesale drugs and supplies to drug stores throughout the area involved in the application, and they have used Wycoff's service for many years and found it "real good." They testified to some experiences that have given them trouble as a result of the restrictions upon the Wycoff authority presently in force, and stated that for their operations such should be eliminated so as to permit them to ship by Wycoff the drugs and supplies to the drug stores north of Salt Lake. At the present time they are shipping to northern Utah in their own equipment, but would use the Wycoff service if authorized and discontinue largely the use of their own equipment except between storage points in Salt Lake City

and Ogden. They are supporting the application proposed by Wycoff for the proposed service.

(h) As the hearing had been proceeding for several days in considering the other cases and there were a number of witnesses on hand available for call in support of the Wycoff application, with the approval of the Commission discussion was had between counsel as to stipulating as to the testimony of the other public witnesses then available and those which would be called that particular day. A stipulation was then proposed and accepted by all counsel as follows:

“MR. PUGSLEY: It is proposed, if called, that the witnesses whom we will enumerate, as to their own businesses would testify first that they have used the Wycoff Company services in the past and at the present time in other areas in Utah and found the service to be satisfactory for their business.

Second, that such companies have frequent shipments to points north of Salt Lake and will itemize the nature of the commodities that they handle and that those commodities have an urgency of delivery. That they would request the Commission provide a service for them by way of Wycoff.

Third, that the abandonment of the Wasatch Fast Freight service in their opinion makes it necessary for an additional carrier to be author-

ized. That for their business there is a need for an additional carrier into the area north of Salt Lake City.

Fourth, that they have used or are familiar with the other carriers that are available to points north of Salt Lake.

Last, that if the Wycoff service is authorized, they will use that service.

We would propose to give a list of the shippers, the nature of their business and the weight range of the commodities which they have represented to us would be desired by way of service by Wycoff." (R. 957)

In pursuance of said stipulation, Mr. Max Young was recalled to the stand, where he testified as to the information which would be presented by each of these shippers if personally called and examined under oath in the proceeding as follows:

Mr. Charles Taylor, Taylor Farm Machinery. He is a John Deere distributor, among other things, in the Tremonton area. His shipments run from a small two-pound replacement part for tractors and machinery to large blades, wheels, tires, etc., of about 150 pounds, that are required in emergencies. (R. 960)

Mr. George Brundage. He is with Smith Faus Wholesale Drug Company. They distribute several items, including medicines, drugs, pharmaceuticals and other drug store items. He ships from small one-pound packages to larger two or three hundred pound shipments and presently uses his own equipment in distribution to some points in northern Utah. (R. 960)

Mr. Clark Bates with California Ink Company, Salt Lake City, Utah. They provide special ink mixes, matrix and printing supplies to print shops, specialty shops, newspapers. Their shipments run between 50 and 70 pounds. (R. 960)

Mr. Don Kennedy, with Rocky Mountain Wholesale Drug, Salt Lake City, Utah. They are a wholesale drug and pharmaceutical firm. Their shipments are in the smaller weight groups, 25 pounds average. They have an occasional large carboy of acid weighing over one hundred pounds. (R. 961)

Mr. LeRoy Peterson, Reznor Heaters, Salt Lake City. He supplies parts, control mechanisms, small unit heaters. His shipments on parts, controls, etc., run from three to twenty five pounds. His single unit heaters run from 50 to 90 pounds. (R. 961)

Mr. Jack Thatcher Wheeler Machinery Company, Salt Lake City, Utah. They are a caterpillar dealer, distributing parts and equipment. Their shipments run between three and one hundred fifty pounds and they occasionally have a large shipment on heavy equipment that exceeds that. (R. 961)

Mr. Roy Hill, Hill Transfer and Storage. His business is a warehouseman, distributing confections, popcorn and general warehouse commodities; shipments weighing between 50 and 150 pounds. (R. 961)

Mr. Al Leick, district manager for Joslyn Pacific Company, a division of Joslyn Manufacturing and Supply Company, Salt Lake City, Utah. Their business is hardware, light hardware, supplying towns, utilities, etc. His shipments run from 30 to 150 pounds. (R. 963)

Mr. Harry Brown, Skyline Office Supply Company, Salt Lake City, Utah. He ships into Hill Field Air Force Base and Thiokol daily on contract with office supplies, special copy paper and related articles. His shipments run from five to eighty or ninety pounds. (R. 963)

Mr. Waldon with Centron Equipment Company. He is in the electronics business supplying replacement parts, etc., for that type of equipment. His shipments—

MR. WORSLEY: Would that be radio or what?

WITNESS: No, it is not radio.

COM. BUDGE: What is his address?

WITNESS: Salt Lake City. The shipments run from one to forty pounds. (R 963)

John R. Koch, Koch Distributing Company, Salt Lake City, Utah. Wholesale distributor of several hundred items.

MR. TUFT: What is the nature of the items?

WITNESS: General Hardware and sundry items, upholstery material. His shipments are in the 40 to 80 pound range. (R. 964)

Mr. Larry Jordine with LaGrande Construction Company, Logan, Utah. They are heavy equipment operators, construction firm, operating at Logan, Utah, where they have their maintenance shops for their business. They operate two hundred pieces of equipment and their shipments are replacement parts and associated items for their equipment and run from ten to two hundred pounds. (R. 964)

Leon Bluhm, Bluhm Electric and Beacon Communications, Salt Lake City, Utah. He is in the electrical supply business and radio service business and his shipments run from one to one hundred pounds. (R. 964)

Fred Tanner, Glen Roberts, Foulger Equipment Company, Salt Lake City, and Mr. Arnold, I don't know his first name, with Arnold Machinery Company.

These people are in the heavy equipment supply business. They are not operators. They sell and supply equipment and parts in the heavy industry field.

Q. You mean tractors?

A. Tractors, backhoes and steamshovels, fork trucks, lift trucks, things of this nature.

Q. What weights?

A. Their shipments run between ten and three hundred pounds. (R. 965)

Mr. Walter Koplin, Salt Lake Hardware Company, Salt Lake City, Utah.

MR. WORSLEY: Did he definitely agree to appear?

WITNESS: Yes, I talked to him yesterday.

Q. He said he would be up?

A. Yes, four o'clock today. He is with Salt Lake Hardware Company, Salt Lake City, Utah. They handle several thousand items with many shipments a day in northern Utah. Their shipments in our service run from ten to one hundred fifty pounds. (R. 965)

Mr. Del Kuhre, K-u-h-r-e, Strevel-Patterson Hardware Company, Salt Lake City, Utah. They are in the general hardware, sporting goods line business, handling over fifty thousand items and their shipments range from ten to two hundred pounds. (R. 966)

Mr. Jim Lane, Intermountain Ford Tractor Company, Salt Lake City, Utah, parts and supplies for tractors and machinery. His shipments run between 30 and 200 pounds. (R. 966)

Mr. Wendell Paxton, Production Tools Company, Salt Lake City, Utah. Their business is industrial tools, motors and associated items and their shipments run between 30 and 70 pounds. (R. 966)

Mr. Niel Parkinson, Williamsen Body & Equipment Company.

MR. TUFT: Have you or can you designate all the people who operate their own equipment?

WITNESS: Yes, I think I have.

Q. Where are they located?

A. Ogden, Utah and Salt Lake City, Utah. They are a body building firm and have need of . . . their shipments run between ten and sixty pounds. (R 967)

Mrs. Snyder, Snyder Distributing Company, Salt Lake City, Utah. They are a wholesale distributor of general sundry items and their shipments will run between ten and one hundred pounds.

Q. Could you help us on general sundry items as to what trade or business they service?

A. Yes, they serve the drug store business and the hardware business. (R. 967)

Mr. Harry Stewart, American Cyanamid Company, Salt Lake City, Utah. They have the government contract for explosive caps in the northern Utah area for 1962, among other things. Their shipments will run between fifty and one hundred and fifty pounds. (R. 968)

Mr. Tom Manos, Jr., with Thompson Tile Company. They have all types of ceramic, asphalt, rubber tile, mastics, and their shipments will run between fifty and one hundred pounds. (R. 967)

Intermountain Trailer Company, Ogden, Utah. They manufacture and distribute special hitches and hardware for vehicle attachment. Their shipments will run between twenty and one hundred twenty pounds. (R. 968)

At the conclusion of the proceedings, motion was made by counsel for applicant Wycoff that the testimony given by the public witnesses and the other witnesses in the other proceedings, namely the Carbon Motorway, Barton Truckline and Beehive Truckline cases, be incorporated by reference by this proceeding. Objections were made and discussion was had on the matter. Then motion was made by Mr. Tuft on behalf of Barton that

such testimony be incorporated, and also by Mr. Richards on behalf of Beehive that the cases be consolidated. After considerable discussion between the parties, counsel for the applicants and for the protestant, both on and off the record, finally a ruling was made (R. 1037)

“COM. BUDGE: I think we can make a ruling on it that the Commission of its own motion and upon motion of Mr. Richards grants the consolidation of all these cases, the records in all cases in a determination of the various applications.”

The report and order of the Commission is just about identical in all four cases, as the same basic language of all the findings was included in each of the four cases. This was issued May 14, 1962, and in this case is found at Record 1322 to 1341. The findings relating to Wycoff are found at pages 1337 to 1338 of the Record. The Commission therein granted to Barton authority to transport all commodities sought by them, including explosives, between Salt Lake City, Utah and all points north of Salt Lake City, and denied the applications completely of Carbon Motorway, Beehive and Wycoff. Its order of denial on the Wycoff case appears at 1341, dated May 14, 1962. Petition for rehearing and reconsideration was filed June 1, 1962, (Record 1343) and was denied June 12, 1962, and the Writ of Review was issued, filing the petition therefor with this court on July 12, 1962.

ARGUMENT

POINT I

THE COMMISSION WRONGFULLY FAILED TO RESPOND TO THE TESTIMONY OF THE PUBLIC AS TO THE NEED FOR SERVICE BY WYCOFF.

POINT II

THE COMMISSION ACTED CONTRARY TO THE PROVISIONS OF SECTION 54-6-5 UTAH CODE ANNOTATED, 1953.

The purpose of conducting hearings to determine whether public convenience and necessity require a proposed motor carrier service is so that the Commission may hear from public shipper witnesses testimony as to the requirements which the businesses represented by them have in the area involved. These witnesses are responsible businessmen who have left their own businesses to come before the Commission and testify as to needs for motor carrier service. It is obvious that these men would not be there unless they felt the existence of such need.

In this proceeding Wycoff Company produced more shipper witnesses than any one of the other three applicants, to-wit, 28. We search in vain in the findings of the Commission to see what determination was made as

to the testimony of these many public spirited businessmen, and see nothing there. Could it be that the Commission has for some reason not disclosed in the record elected to ignore their testimony? There is no evidence to refute the wants or needs of anyone of the 28 shipper witnesses who appeared on behalf of Wycoff. In fact, the testimonies of a subsequent number of them, were stipulated by counsel, which stipulation was duly accepted by the Commission. The stipulation was, as shown by the Statement of Facts above, basically that these witnesses did testify that they had used the Wycoff service in the past and found such to be satisfactory for their particular businesses; that such companies have frequent shipments to points north of Salt Lake City and request the Commission to provide a service for them by Wycoff; that the abandonment of the Wasatch Fast Freight service makes it necessary for the authorization of an additional carrier into the area north of Salt Lake City; that they are familiar with the other carriers now available into the area; and last, if the Wycoff service is authorized they will use that service. We must keep in mind that such testimony was given with the background of knowledge that Barton and Lake Shore Bus Line already had established service between Salt Lake City and Ogden, as well as the Wasatch Fast Freight Service between those points; and that they each testified as to the need for *additional* motor carrier service. There were 28 such witnesses, varying from compara-

tively modest size shippers to such major shippers as Salt Lake Hardware Company, Strevel-Patterson Hardware, etc.

It would seem to us that perhaps the Commission has forgotten the standards established by the Legislature as a guide for them in considering applications for certificates of public convenience and necessity. The basic principles are set forth in Section 54-6-5, Utah Code Annotated 1953, which outlines the procedure for making application and giving notice of such application for a certificate. It then provides that if the Commission finds from the evidence that public convenience and necessary require the proposed service, or any part thereof, it may issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought. Then the standards are set forth for the Commission to consider prior to the granting of the certificate, and these standards are expressed in the following language of the statute:

“ . . . Before granting a certificate to a common motor carrier, the commission shall take into consideration the financial ability of the applicant to properly perform the service sought under the certificate and also the character of the highway over which said common motor carrier proposes to operate and the effect thereon, and upon the traveling public using the same, and also the existing transportation facilities in the territory proposed to be served. If the commission finds

that the applicant is financially unable to properly perform the service sought under the certificate, or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the people of the state of Utah, the commission shall not grant such certificate."

In looking at the evidence before the Commission, which must now be considered by this court, we find undisputed evidence that public convenience and necessity require the authorization and certification of at least one additional motor carrier to perform the transportation services for the shippers to points north of Salt Lake City. The next element is the financial ability of the applicant Wycoff. Such has never been contested and no findings for or against this element are contained in the report and order of the commission. We assume, therefore, that in the absence of any attack, that evidence may be conceded to be adequately established.

The next element vital to the proof of convenience and necessity is the character of the highway over which the carrier proposes to operate and the effect thereon upon the traveling public using the same. The Commission obviously took public notice from the information before it and the testimony in the record of the character of the highway, and there is no finding by the Commission that any of the traveling public would

be adversely affected by the operation of Wycoff Company thereon. In fact, the testimony of the applicant is that its trucks are already moving over the highways and have space therein which could accommodate most of the traffic proposed, and hence there would be no additional burden of any perceptive nature upon either the highways or the traveling public by the granting of this authority.

The Commission then is required to "take into consideration . . . the existing transportation facilities in the territory proposed to be served." Unquestionable findings were made thereon, due to the fact that Wasatch Fast Freight is abandoning its operations and hence the granting of the authority could have no adverse effect upon said carrier. As between Salt Lake City and Ogden, Barton and Lake Shore Bus Line are already operating there, and hence the authorization of Wycoff to transport express between such points in place of the abandoned service of the Wasatch Fast Freight, would have less of an impact upon Barton and Lake Shore than the then established and active operation of Wasatch Fast Freight. Hence there is nothing in the record to show that the granting of the Wycoff application, as between Salt Lake and Ogden for instance, would add to the burden upon the highways or adversely affect the existing transportation facilities. As to the points north of Ogden, Wycoff already has express

operating authority with a 100 pound per shipment limitation thereon, and the authorization of this carrier to transport additional general commodity items along with such express service would be merely responsive to the requests of the shipping public, as shown by the 28 witnesses presented by Wycoff.

The last item in the quoted portion of Section 54-6-5 (supra) refers to whether the granting of the certificate "will be detrimental to the best interests of the people of the State of Utah." There is no finding by the Commission that the granting of this certificate to Wycoff would be detrimental to the best interests of the people of the State of Utah. Obviously, no such finding could be made by the Commission, as there is no evidence in the record that such service would be detrimental to the best interests of the people of the State of Utah. Actually, the converse must be conceded by all to be established by the record, as the 28 shippers who appeared in support of the application all testified that they wanted the Wycoff service, and if authorized by the Commission would use it for their businesses.

The Commission seems to have taken unto itself the province of determining solely and arbitrarily what the public wants and what the public does not want. It is not responsive to the requests of the shippers who would and do know best their own needs for transportation. Thus, without any findings of grounds under the

statute to defeat the Wycoff application, the Commission nevertheless has determined that it would authorize only Barton to extend its service, and ignore whatever requests were made by the public.

POINT III

THE COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN AWARDING AUTHORITY TO ONE CARRIER AND DENYING THIS WYCOFF APPLICATION.

POINT IV

THE COMMISSION'S DENIAL OF THIS APPLICATION IS WRONGFULLY BASED UPON WYCOFF'S FAILURE TO PAY THE PENALTY EARLIER IMPOSED, NOTWITHSTANDING APPEAL PROCEDURES THEN PENDING.

It is sometimes difficult to pinpoint the exact departure of the Commissioners from statutory responsibilities, but in this case there seems to be obvious bases for declaring that their conduct has been arbitrary and capricious. In the first place, they refer to the proposed Wycoff express as being a "hybrid" because of the fact that applicant is willing to transport any commodities tendered to it, with the usual exceptions, and render a fast, direct, expedited service to the shippers. Perhaps

the Commission does not want the public to have a fast, direct, expedited service, but prefers that the old-style, cumbersome general-commodity service, involving numerous transfers of the commodities to and from line-haul vehicles, should be the measure of proper service for the public. The 28 shippers who appeared before the Commission have used the Wycoff express service in other areas in the state, found it to be admirably adapted to the needs and requirements of their businesses, and urge the Commission to make such service available to them to points north of Salt Lake City. These shippers have needs beyond the present prohibitions and restrictions imposed upon the existing Wycoff express service. Particularly they need an express service between Salt Lake City and Ogden, and they need an express service on commodities larger than the 100 pound shipments presently permitted by the Commission via Wycoff.

The Commission has never made a definitive statement as to what constitutes express service. There have been a number of such definitions given by the Interstate Commerce Commission, but the most recent one was given last week (October 25, 1962) by that Commission in the REA case MS 66552, Sub 1515. Therein the Interstate Commerce Commission defined it as follows:

“(3) ‘Express service’ is not susceptible of a precise definition because it is a service ‘whose attributes of expediency, premium rates and spec-

ial handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight.' "

To have the Commission now characterize an express service as being "hybrid" is to ignore the fact that the Commission has in earlier instances issued, and still maintains in force, a number of express authorities for not only Wycoff but also for bus lines service to various portions of the state. There always has been a need for direct, expedited transportation service, and this is what is meant by an express service, as the Commission well knows. As provided by the section of the statute quoted above, the Commission has the power to impose reasonable restrictions upon the proposed service of a motor carrier, but such right must be responsive to the needs and requirements of the shipping public.

Why should the Commission ignore the requests of the shipping public? Why should the Commission, in its own arbitrary manner, strike down the reasonable needs of the shipping public, as represented by these 28 businessmen who have volunteered their testimony, presumably for the guidance of the Commission? Why does the Commission bother to even hold hearings if it has pre-determined that Wycoff shall receive no operating authority from it? One of the keys to this arbitrary and capricious attitude of the Commission is found in paragraph 9 of its report and order, as relating to

Wycoff, being Sheet 7 of the report and order (R. 1338).
This reads:

"The Commission is not unmindful of the failure of Wycoff Company, Incorporated, to discharge its responsibilities under the Order of the Commission entered on the 26th day of September, 1960, which was affirmed by the Supreme Court. The continuing failure of said company permits the Commission to exercise its discretion in passing upon any application said company may make."

This boils down to the issue that the Commission apparently feels some personal affront to it because Wycoff has not knuckled down to what appears to Wycoff to be unreasonable penalties imposed by the Commission, and has elected to take the appellate course to have the matter reviewed by the United States Supreme Court, and required the Commission itself to take the statutory procedures established for the collection of a penalty. We call to the attention of the Court that at the time of this hearing and rendering of the report and order, there was pending before the United States Supreme Court a Petition for a Writ of Certiorari, and all of this was well known to the Commission, as it had been duly served with the papers relating thereto and had certified and delivered its record back to the Clerk of the Supreme Court of this state for transmission to the United States Supreme Court. Also, the Commission has never to this

date taken the steps requisite for the collection of such purported penalty, as required by Section 54-7-29, Utah Code Annotated, 1953. This section requires that the Commission bring a proceeding in the district court in the name of the State of Utah to recover any such penalty. In the absence of such affirmative steps by the Commission, there is no duty upon a motor carrier to make payment of the purported penalty, and certainly the failure of a motor carrier to volunteer such payment could not be construed by the Commission as cause for denial to the shipping public of motor carrier service which it needs.

The sly language of the Commission—"the continued failure of said company permits the Commission to exercise its discretion in passing upon any application said company may make"—is but a subterfuge for saying that, regardless of the public's needs, the Commission will grant no authority to Wycoff until it pays this penalty. It would be unique in the history of administrative bodies for such an attitude to be considered anything less than arbitrary and capricious. The use of the term "vindictive" would seem to be appropriate in characterizing this conduct by the Commission. Certainly it is less than judicial in its character.

When the legislature granted to the Commission quasi-judicial functions, it must have done so with the belief and intent that the Commission would partake of

such judicial temperment as to ignore petty irritants and improper influences. When the Commission becomes overpowered by its own feelings as to personalities, as appears to be the situation in this particular case, and ignores completely in its findings and determination the testimony of 28 public witnesses, one of which—Thiokol Corporation—is a vital defense industry and promises to be one of the state's largest industrial employers and shippers, then we suggest it is time for this court to take over and make a determination that such improper conduct of the Commission has been arbitrary and capricious.

We have referred to the 28 independent shipper witnesses who supported this application, more than supported any one of the other applicants, and feel that we should also call to the attention of the Commission the fact that, notwithstanding its prior declarations of intent to hear each case separately and apart from the others, nevertheless the Commission did at the end of the proceeding consolidate the evidence from all four cases into one record; and thus, in addition to these 28 witnesses as to public convenience and necessity, all the other public witnesses should have been considered by the Commission as supporting the need for motor carrier service.

It is unfortunate that the Commission has taken such a narrow and restricted attitude toward this one

carrier. Perhaps they were fully justified in their findings as to Beehive and Carbon because of Beehive's lack of financial stability and prior experience, and Carbon's limited territorial scope in its application. The Wycoff application for express service extends it to the entire area and also is supplemental to the existing restrictive Wycoff express service with the 100 pound limitation. This proposal would have made available to the shippers north of Salt Lake City—and such of course is the largest area populous-wise and industrially within the State of Utah—not only the cumbersome, yet necessary, five-day-a-week service of Barton, but also the seven-day-per-week rapid, direct expedited express service of Wycoff. The shippers want, and need, this type of service; they have so testified before the Commission without dispute. Yet the Commission has denied such service to the public with no expressed reason therefore except the reference to Wycoff's failure to pay the penalties imposed by the Commission as mentioned above. Such does not constitute temperate judicial determination, but is representative of arbitrary and capricious conduct on the part of the Commission, requiring reversal by this court.

It is not a pleasant task to bring such a matter before this court, because we realize that such may result in further stirring up the already strained relations between the Commission and this carrier. However, one cannot ignore, as the Commission has, the reasonable requests of responsible businessmen who engage in the shipment of commodities in the most populous areas of the State

of Utah between Salt Lake City and points north thereof. One cannot ignore the responsibility to these people who are the life-blood of the growth and development of the State of Utah. One cannot ignore the responsibilities to these shippers who have enjoyed and accepted the Wycoff experience and services in other areas of the state to supplement the slower general-commodity type operation. One must therefore give to the court the opportunity to set straight the Commission on its duties and responsibilities, to assume a judicial attitude in the hearing of evidence and the determination of the needs of the public.

CONCLUSION

We respectfully submit that this Court should reverse the determination of the Commission in this case and direct that the Commission shall issue to Wycoff authority to transport commodities in express service between Salt Lake City and points in Utah north thereof, as prayed for in the application.

Respectfully submitted,

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