

1962

Wycoff Co. v. Public Service Commission of Utah et al : Brief of Defendant

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Wycoff Co. v. Public Service Comm. Of Utah*, No. 9717 (Utah Supreme Court, 1962).
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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, CAR-
BON MOTORWAY, INC. and LAKE
SHORE MOTOR COACH LINES,
INC.,

FILED
DEC 21 1962
Clerk, Supreme Court, Utah

Defendants.

BRIEF OF DEFENDANT
LAKE SHORE MOTOR COACH LINES, INC.

ON APPEAL FROM ORDER OF
THE PUBLIC SERVICE COMMISSION OF UTAH

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Case No.
9717

BRIEF OF DEFENDANT

STATEMENT OF KIND OF CASE

This is an appeal from an order of the Public Service Commission of Utah denying the application of Wycoff Company, Inc., (herein called Wycoff) for a Certificate of Convenience and Necessity authorizing transportation in express service between Salt Lake City and points north to the Utah-Idaho line.

DISPOSITION OF CASE BEFORE THE PUBLIC SERVICE COMMISSION

Four applications, including that of Wycoff, were filed with the Commission seeking authority to serve all or part of the area between Salt Lake City and the Utah-Idaho line as follows:

1. Barton Truck Line, Inc., Case No. 4009-Sub 7;
2. Beehive Motor Lines, Case No. 5102;
3. Carbon Motorway, Inc., Case No. 3815-Sub 8;
4. Wycoff Company, Incorporated, Case No. 4252-Sub 10.

Hearings were consecutively held on each application in the above order. The Order of the Commission issued May 14, 1962 consolidated the records in all four cases and denied the application of Wycoff herein. This appeal relates to the denial of the Wycoff application.

RELIEF SOUGHT ON APPEAL

Wycoff seeks reversal of the Commission Order denying its application. Lake Shore Motor Coach Lines, Inc., (herein called Lake Shore) operates between Salt Lake City and Ogden, Utah, and its concern is therefore

limited to this portion of the area of the Wycoff application. Of the four applications noted above, it protested only that of Wycoff.

STATEMENT OF FACTS

Lake Shore concurs with the Statement of Facts of plaintiff so far as it goes. Such statement does not sufficiently describe Wycoff's operations, omits significant shipper witnesses' testimony, and is silent as to the operations of Lake Shore. It requires amplification in these matters.

The Wycoff application seeks authority as a common carrier transporting general commodities, excluding commodities in bulk, household goods and those requiring special equipment by reason of size or weight, over the principal highways between Salt Lake City, Utah and the Utah-Idaho State line, including service to the Thiokol Chemical Corporation Plant and U. S. Air Force Plant No. 78 located about 20 miles west of Corinne, Utah. It also seeks intermediate and off-route point service within 10 miles of such highways.

Under Certificate No. 1162-Sub 2, Wycoff holds authority to transport in express service general commodities in shipments of 100 pounds or less with certain restrictions, including a limitation of 500 pounds on a single schedule. The original Certificate granted broad

Utah authority. As the result of this Court's decision in *Lake Shore Motor Coach Lines, Inc. v. Bennett, et al*, 8 Utah 2d 293, 333 P.2d 1061 (1958), authority between Salt Lake City and Ogden, as here pertinent, was excluded by subsequent order of the Commission on February 3, 1959. In addition, Wycoff holds authority within Utah to transport miscellaneous specified commodities, such as newspapers, books, periodicals, films, cut flowers and bull semen.

The Wycoff operations were described by Mr. Max Young, its Business Manager (R. 859-865). It operates an express service, a term not defined by the Commission, but vaguely conceived as one handling small shipments, particularly of an emergency nature, and which the witness attempted to define (Tr. 866) as "the expedited movement of material on a schedule basis without delay due to dock handling or paper work involved". Exhibit 1 lists the Wycoff equipment, which consists of trucks ranging from $\frac{3}{4}$ to 2 ton capacity, and which are similar to the pickup and delivery equipment employed by the common carriers. It has terminals at Salt Lake City and Ogden, and rents such facilities at Brigham City and Logan (Tr. 860). It operates schedules through the involved territory at the present time and it is prepared to add additional schedules, as well as equipment, if the traffic justifies such action (Tr. 862). It is presently conducting operations in express service, with restrictions noted, between Salt Lake City and points north of Ogden.

The purpose of its application (Tr. 865) is to remove the various restrictions imposed on its express service, such as the 100 pound per shipment limitation and the 500 pounds per schedule limitation, and to obtain authority which it has heretofore been denied between Salt Lake City and Ogden, an area served by Lake Shore.

Plaintiff's brief summarizes the testimony of some of its shipper witnesses, although not all are included. A shipper omitted was Clifford H. Hansen, a wholesale beauty supply distributor of Salt Lake City, Utah (Tr. 883). This shipper uses Wycoff at the present time to points in Utah north of Ogden, but has never used Lake Shore between Salt Lake City and Ogden or intermediate points, nor is he aware of its pickup and delivery service which is available (Tr. 886). Moreover, the Company is using and has for two years used its own trucks between Salt Lake City and Ogden. The witness made clear that his interest was in the Utah territory north of Ogden (Tr. 891).

Don Bateson, Manager of Central Auto Parts, Inc. of Logan (Tr. 899) testified as to shipments to and from Logan, as did Dennis Mathews Carlson of the Logan Bernina Sewing Machine Company (Tr. 902). The testimony does not relate to service between Salt Lake City and Ogden.

T. W. Thornton, President of Thornton Plastic

Company of Salt Lake City has never had occasion to use Lake Shore service, and is not aware of its available pickup and delivery (Tr. 910).

Mr. J. R. Knudsen, Manager of Knudsen Builders and Supply Company of Salt Lake City, Utah, in testifying as to the use of Lake Shore stated (Tr. 931):

“Q. The Lake Shore Bus Line between Salt Lake and Ogden advertises that they have a pickup and delivery service. What has been your experience with that, if any?

“A. I haven’t used them at all.”

Moreover, he stated that he had no objection to using Lake Shore when he found that it performs pickup and delivery (Tr. 934). Between Salt Lake City and Ogden, Knudsen uses its own trucks daily and, in addition, small shipments are dropped off by its salesmen. Notwithstanding the present availability of Wycoff express service to points north of Ogden, the witness has never had occasion to use Wycoff in this area but does use its service to Southern and Eastern Utah (Tr. 933, 934).

Mr. Owen Madsen, Warehouse Superintendent for McKesson & Robbins, Inc. of Salt Lake City, Utah (Tr. 940) stated that it moved its principal warehouse operations from Ogden to Salt Lake City in September, 1961, and presently uses its own trucks in Northern Utah. While

it had used Lake Shore to an extent prior to the move, it had not used it since (Tr. 952). On cross-examination, the witness stated that it had not availed itself of the services of either Barton between Salt Lake City and Ogden, or Wasatch Fast Freight into Northern Utah (Tr. 954).

Pursuant to stipulation of the parties, limited testimony of a number of other witnesses was included in the record. The stipulation in essence confines the testimony to statements (Tr. 959) that where used the Wycoff services were satisfactory, that the companies are shipping to northern Utah, that the abandonment of the Wasatch Fast Freight service makes it necessary to have an additional carrier in the North Utah area, and if Wycoff is authorized, its services will be used. No attempt was made to in any way state that the service of existing carriers is inadequate or unsatisfactory.

Alma C. Johnson testified as the operating witness of Lake Shore (Tr. 1037). Its authority (Ex. 8) authorizes the transportation of passengers, express and baggage between Salt Lake City and Ogden, and unlike most bus lines, it also is authorized to perform pickup and delivery service in the Ogden and Salt Lake City areas for transportation of shipments of 150 pounds or less between its terminal and the various shipper and consignee places of business. It maintains terminal facilities at both Salt Lake and Ogden, and has stationed at these

points pickup and delivery trucks, as well as its regular buses. Such buses are specifically designed with large bays for transportation of express, it ships little, if any, baggage, and over the years the bus body designs have consistently increased express capacity (Ex. 9-10). It operates 13 schedules daily between Salt Lake and Ogden, with 9 on Sunday, which are spaced at periodic intervals throughout each day and evening. All of its buses are transporting express and where a shipper requests a pickup at his place of business, it immediately dispatches a local pickup truck which then takes it to the terminal and puts it on the next schedule (Tr. 1042). The terminal at Salt Lake City is open 24 hours a day, 7 days a week, and the Ogden terminal from 5:30 A.M. until midnight 7 days a week. It maintains agents at Bountiful, Farmington, Kaysville, Layton and Clearfield. It actively seeks the express traffic, has solicitors and advertises this service, including the use of radio broadcasts.

The importance of express to Lake Shore is shown in Exhibit 12, a revenue study for the years 1956 through 1961. This study shows a steady decline in passenger revenues during the period, and a substantial increase in express and newspaper revenues from \$11,677 in 1956 to \$28,608 in 1961. During March, 1962, shortly before hearing, it handled 2,958 express shipments including 390 pickups at Salt Lake City and 289 deliveries at Ogden (Ex. 13). Exhibit 14 is a financial analysis showing the

importance to it of express revenues and service. It shows that during the year 1961, had the express business been diverted, it would have sustained an operating loss based upon operating ratio accounting of \$1,888, and that had interest on mortgage equipment payments been included, the loss would have been increased by \$6,267. The witness testified that the express business had permitted Lake Shore to maintain its operations without impairment and to substantially improve the quality of service to the public by the acquisition of four new air-conditioned buses (Ex. 10), with additional buses contemplated. He also testified that reduction in express revenues would result in decreased schedules and endanger its ability to replace and maintain equipment (Tr. 1051).

ARGUMENT

POINTS AS STATED BY PLAINTIFF

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.

Under this argument, the plaintiff cites the Utah Statute authorizing grant of common carrier authority. The premise upon which a Certificate of Convenience and Necessity may be issued has been frequently considered by the Courts, and one of the most comprehensive expressions is found in *Lake Shore Motor Coach Lines, Inc. vs. Public Service Commission of Utah and Wycoff Company, Incorporated*, 8 Utah 2d 293, 333 P.2d 1061, 1063 (1958):

“ . . . 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.”

* * *

“ . . . Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require.

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. For the rule to be otherwise would ignore the provisions of the statute; and also would make meaningless the holding of formal hearings to make such determinations and render futile efforts of existing carriers to defend their operating rights."

A comparison of the evidence in the Lake Shore case, supra, with that of the instant proceeding makes it abundantly clear that the evidence here is far less persuasive to grant of authority. Plaintiff claims it has produced 28 shipper witnesses. Of these, 21 did not testify but their testimony was stipulated by Lake Shore. The testimony consisted essentially of statements that the shippers had traffic moving and had found Wycoff service satisfactory, and were aware of the Wasatch East Freight abandonment. There is no evidence on this stipulation relating to the attempted use of existing transportation facilities, of complaint, or that such facilities do not fully and adequately meet the needs of the shippers. It was for these reasons that Lake Shore stipulated as it did. This type of testimony is basically meaningless in determining whether convenience and necessity require grant of authority.

Of the remaining witnesses who testified, not all of

whom have been set out in the brief of plaintiff, it is apparent that their testimony amounted to nothing more than that of the stipulated witnesses. Moreover, as has been pointed out, the witnesses repeatedly admitted that they were not familiar with the services of Lake Shore, did not know that it provided pickup and delivery service for the shippers and consignees. In many instances the testimony showed that the shippers are using their own trucks between Salt Lake City and Ogden. Lake Shore is not here concerned as to transportation movements north of Ogden to the Utah-Idaho line. The witnesses, moreover, made reference to the abandonment of the Wasatch Fast Freight operations, and expressed a desire for replacement of this common carrier operation in these northern Utah areas. It is apparent that their appearance was in large measure to evidence such concern.

In granting authority to Barton Truck Line, Inc., the Commission provided for a replacement carrier service north of Ogden. It had no choice as between Barton and Wycoff in any event, because Wycoff did not propose to provide a complete common carrier service in the area. The simple fact is that Wycoff viewed this situation as an opportunistic attempt to try and remove its express restrictions and in the process acquire added authority in the Lake Shore area.

No mention is made in the plaintiff's brief of the operations of Lake Shore, nor of the obviously drastic

impact the grant of Wycoff authority between Salt Lake City and Ogden would have on such carrier.

On the Wycoff case, *supra*, this Court went to some length to point out the necessity of long range planning, of the necessary consideration of total service available to the shipping public, and, within reason, of keeping "existing carriers solvent and in operation." Lake Shore detailed an operation expressly tailored to small shipment express service in conjunction with its passenger operation, and with separately conducted truck pick up and delivery. It is obvious that its service is more than adequate to fulfill the shipping requirements of the public on express, and this is confirmed by the statements of the witnesses themselves. Its detailed financial exhibits showed that any real diversion of express service would result in a loss operation, and it pointed out that at this date, in the face of declining passenger revenues, the express is necessary to sustain operations.

Moreover, the testimony indicates the beneficial results from the denial of the former Wycoff attempt to invade the Lake Shore area. In the face of constantly rising costs, the Lake Shore service has substantially improved. It operates more schedules per day. It has recently placed in operation four new air conditioned buses, far superior in every way to its older equipment. Its witnesses stated that if its operations were permitted to continue without diversion of express traffic, it con-

grant of authority which will be without restriction as to size or volume of shipments, and which will permit it to pick and choose the traffic it desires. This means that it would fill its trucks to capacity and the excess would be left to some other carrier or form of transportation. It refuses to assume the duties of a common carrier, and then complains of the Commission's action in denying its application. The Commission was compelled to reject such contention and its failure to do so would have been error. Moreover, Wycoff presently holds authority to serve shippers north of Ogden, under restrictions which are consistent with the general concept of express traffic, but which prohibit unrestricted operations equivalent to general common carrier services.

The plaintiff further complains about the reference in the order of the Commission to Wycoff violations of its authority. The intendment of the report is obvious.

In considering whether a new certificate should be issued, the Commission is required to determine that the applicant is financially and otherwise qualified to act as a carrier. *Utah Light & Traction Company vs. Public Service Commission*, 118 P.2d 638, (1941). There is no question as to the financial ability of Wycoff. There exists a serious question as to its willingness to abide by Commission regulations, particularly where, as here, the requested authority is in express service. Persistent and defiant violation of express service restrictions under its

present Certificate were considered by this Court in *Wycoff Company, Inc. vs. Public Service Commission*, 13 Utah 2d 123, 369 P.2d 283 (1962). Petition for Certiorari to the Supreme Court of the United States was filed shortly after issuance of this decision, and has now been denied. This case was made part of the record herein (Tr. 1029).

Moreover, on cross-examination of the operating witness, Mr. Young, a question was raised as whether or not Wycoff is presently observing Commission regulations. For example, he testified that Wycoff is engaged in the distribution of explosives, and its Supplies Division does that work (Tr. 987). Movements occur from North Salt Lake to anywhere in the State of Utah. As a carrier, the applicant has no authority to transport shipments of this type above express weights. It absorbs the transportation costs as a so called distributor, and yet moves the explosives on the same trucks used in its other transportation activities (Tr. 988). This is transportation, in fact, without operating authority.

Wycoff then asserts that since it established a shipper need for its service, and since the Commission refers to its violations, the denial of its application establishes a "vindictive" attitude as the basis of decision. This is nonsense. Under any view of its testimony it failed to establish convenience and necessity, which would justify grant of authority, and consideration of violations of

authority were directly related to its qualification as a carrier.

CONCLUSION

Wycoff has failed to show convenience and necessity, to establish a need for additional grant of authority which is not fully and adequately met by existing carriers, and to show its fitness as a carrier. The order of the Commission in this case was fully sustained by the record and should be affirmed.

Respectfully submitted,

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