

1965

Continental Bus System, Inc et al v. Public Service Commission of Utah et al : Petition for Rehearing

Utah Supreme Court

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Wood R. Worsley; Attorney for Plaintiffs;

A. Pratt Kesler; Allen M. Swan; Attorneys for Defendants;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

CONTINENTAL BUS SYSTEM, INC., a Corporation; DENVER-SALT LAKE-PACIFIC STAGES, INC., a Corporation; GARRETT FREIGHT LINES, INC., a Corporation; MILNE TRUCK LINES, INC., a Corporation; PALMER BROTHERS, INCORPORATED, a Corporation; and RIO GRANDE MOTORWAY, INC., a Corporation,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF UTAH and HAL S. BENNETT, DONALD HACKING and RAYMOND W. GEE, Commissioners of the Public Service Commission of Utah, and WYCOFF COMPANY, INCORPORATED, a Corporation,

Defendants.

No. 10107

DEFENDANT,
WYCOFF COMPANY, INCORPORATED'S
PETITION FOR REHEARING

WAYNE C. DURHAM and
GARY L. THEURER
428 American Oil Building
Salt Lake City, Utah
Attorneys for Defendant
WYCOFF COMPANY, INCORPORATED

A. PRATT KESLER
Attorney General

H. WRIGHT VOLKER
Assistant Attorney General

Attorneys for Defendant
PUBLIC SERVICE COMMISSION

WOOD R. WORSLEY
701 Continental Bank Building
Salt Lake City, Utah
Attorney for Plaintiffs

UNIVERSITY OF UTAH

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IN THE
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STATE OF UTAH

CONTINENTAL BUS SYSTEM, INC., a Corporation; DENVER-SALT LAKE-PACIFIC STAGES, INC., a Corporation; GARRETT FREIGHT LINES, INC., a Corporation; MILNE TRUCK LINES, INC., a Corporation; PALMER BROTHERS, INCORPORATED, a Corporation; and RIO GRANDE MOTORWAY, INC., a Corporation,

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Defendants.

DEFENDANT,
WYCOFF COMPANY, INCORPORATED'S
PETITION FOR REHEARING

Defendant Wycoff Company, Incorporated respectfully requests a rehearing of the above cause on the following grounds:

1. The Court erred in setting aside the Public Service Commission's order granting the last temporary permit.
2. The Court erred in awarding costs to plaintiffs.

WAYNE C. DURHAM and
GARY L. THEURER

428 American Oil Building
Salt Lake City, Utah

Attorneys for Defendant

WYCOFF COMPANY, INCORPORATED

POINT I

THE COURT ERRED IN SETTING ASIDE THE PUBLIC SERVICE COMMISSION'S ORDER GRANTING THE LAST TEMPORARY PERMIT.

There are two sections of the Utah Code within Title 54, Public Utilities, upon which the Commission's power to grant temporary authority permits may be based. The first, Section 54-4-1 U.C.A., 1953, grants broad and general jurisdiction to the Commission to supervise and regulate every public utility in the State. The second, Section 54-6-10, U.C.A., 1953, is more specific and grants authority to issue temporary, seasonal and emergency permits or licenses. Section 54-4-1 supra, authorizes the commission to exercise its discretion in the matter of supervising and regulating motor carriers and it is submitted that the Court by its decision has improperly interfered with the proper exercise of discretion by the Commission.

An analysis of Section 54-6-10, supra, reveals that the Commission may issue "temporary, seasonal or emergency permits." The phrase is used four times. Accordingly, a permit may be issued either as (1), a temporary permit, (2), a seasonal permit or (3), an emergency permit. The Court in the decision states that the record fails to disclose any general emergency necessitating the granting of temporary permits. However, as the statute clearly indicates the permit may be issued for reasons other than for an emergency. It is noted that although the section provides that a permit shall not be issued for a period of time greater than sixty days, it does not restrict the Commission, nor does it specify as to the number of permits, temporary, seasonal or emergency, that it may issue. As the Commission pointed out on page 11 of its order "It may be that the legislature should more clearly and definitely define and specify such authority." However, it is not for the Court to read a limitation into the Section which it does not contain.

The real issue in this case is not whether the previous temporary permits granted by the Commission were properly and lawfully granted, (that is a moot question since those permits had already expired), but whether the *last* permit was lawfully granted. Because previous temporary permits may have been improperly granted or granted arbitrarily and capriciously does not mean that the last permit was so granted. Furthermore, the fact that several temporary permits had been issued does not mean that the last permit was arbitrarily or capriciously granted. Plaintiffs filed their complaint and petition before the Commission to vacate the temporary authority. On the hearing on an Order to Show Cause on such complaint and petition, the Commission found that the temporary authority permit was properly granted, and the following portion of the Commissions Order from page 11 is significant in this respect.

"An issue has been made in this case with respect to the reissuing of the temporary authority here under consideration to Wycoff Company, Incorporated, every 60 days without a hearing. This may appear on its face as arbitrary and capricious action on the part of the Commission. However, as set forth above, this particular matter has been before the Commission almost constantly for a long period of time and has got involved with other matters to the point where a full hearing has been difficult to carry forward.

In the meantime, machinery companies, Associated General Contractors, and pipe line contractors have urgently insisted on the need for the expedited, high velocity services of Wycoff Company, Incorporated, on emergency shipments of machinery repair parts, supplies and equipment. The service as rendered by Wycoff Company, Incorporated, as to speed and convenience is not fully available from any other public carrier. This matter, of course, must be determined, brought to a conclusion by formal hearings and any decision here should not be treated as granting or denying any permanent authority, nor as a determination that there will be any reissuing of tempo-

rary authority to Wycoff Company, Incorporated, or anybody else.”

It is submitted that, based upon the findings of the Commission, the Commission did not act arbitrarily or capriciously for the following reasons; first, the matter had been before the Commission over a long period of time and had become involved in other matters where a full hearing was difficult to carry forward; and second, there was a need for expedited, high velocity service of shipments of machinery, repair parts, supplies and equipment and third; that Wycoff could perform the service which was not fully available from other public carriers.

The Court may not extend its review “further than to determine whether the Commission has regularly pursued its authority.” Section 54-7-16 U.C.A. 1953. The Commission considered the evidence and made its findings. With all due deference to the decision of this Court, it is submitted that the Commission pursued its authority within the meaning of the controlling statutes.

POINT II

THE COURT ERRED IN AWARDING COSTS TO PLAINTIFFS.

In its decision, the Court awarded costs to plaintiffs. Identified as defendants in the case were Public Service Commission of Utah and Wycoff Company, Incorporated. Since costs may not be imposed against the State or its agencies, Wycoff Company, Incorporated, would be required to bear the total costs. See *Tracy v. Peterson*, (Utah 1954) 265 P8d 393. Under the circumstances this is manifestly unjust and inequitable.

Rule 54 (d) (1) Utah Rules of Civil Procedure states:

“Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.”

See Rules 54 (d) (3) and (4). But the courts have broad discretion and may award or refuse to award costs as the circumstances require.

The allowance for costs in this court is always a matter of sound discretion, except where the judgment of the lower court is unconditionally affirmed. In all other cases costs are to be awarded or withheld as, in our judgment, justice may require. *Schwab Safe & Lock Co. v. Snow*, 47 Utah 199, 152 P. 171.

Costs are not imposed against a person who is not a party to a proceeding and are not ordinarily imposed against a mere stakeholder. 14 Am Jur., “Costs,” Sections 30 and 31. It is not contended that Wycoff Company, Incorporated, was not a party in the case, however, it is submitted that its participation in the case was incidental and secondary.

This proceeding commenced upon the plaintiffs' complaint and petition filed with the Public Service Commission to vacate temporary authority that had been issued to Wycoff Company. Plaintiffs also obtained from the Commission an Order to Show Cause requiring Wycoff Company's appearance before the Commission.

The matter was heard by the Commission on July 18, 1963. Although Wycoff Company, Incorporated, was represented by counsel as a respondent at the hearing, it filed no pleading with the Commission. On February 7, 1964, the Commission issued its order dismissing the complaint and subsequent thereto plaintiffs filed with the Commission a petition for rehearing and for reconsideration. Defendant Wycoff Company, Incorporated filed no responsive pleading. In all of the proceedings before the Public Service Commission, the case was primarily and substantially handled and argued by attorneys for plaintiffs on the one hand and by the Attorney General's office on the other. Subsequently, plaintiffs filed their appeal with this Court. The defendant, Public Service Commission of Utah, prepared and filed a brief. Wycoff Company filed no brief and did not join in the Public Service Commission's brief. At the hearing before the Supreme Court, although counsel for Wycoff Company was present, he took no part in the argument.

This controversy essentially involved the power of the Public Service Commission of Utah to issue temporary permits. If the Commission was wrong in issuing them to Wycoff Company, that is no reason why costs should be assessed against it in a controversy between the carriers and the Commission. The case was litigated and argued by attorneys for plaintiffs and by the office of the Attorney General, representing the Commission.

Although Wycoff Company could not escape being a party to these proceedings and is affected by the result of the case, its participation in the proceedings was that of an observer. The real parties in interest were plaintiffs and the Commission.

It is respectfully submitted that under the circumstances it would be inequitable and unjust for the Court to award costs to plaintiffs.

CONCLUSION

It is respectfully submitted that the Public Service Commission fully considered the circumstances, made proper findings and lawfully pursued its authority in issuing the temporary authority permit.

Under the circumstances, considering defendant, Wycoff Company, Incorporated's status and participation in this case, as an observer, the Court should revise its decision as to costs, so as to require each party to bear its own costs.

It is requested that this Court grant a rehearing.

Respectfully submitted,

WAYNE C. DURHAM

GARY L. THEURER

Attorneys for Defendant,

Wycoff Company, Incorporated
428 American Oil Building
Salt Lake City, Utah