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Wycoff Warehouse, Inc. v. Public Service Commission of Utah et al : Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WYCOFF WAREHOUSE, INC.,

Petitioner,

FILED
JAN 22 1965

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT,
DONALD HACKING and RAYMOND
W. GEE, its Commissioners; OVER-
LAND MOVING COMPANY;
MAGNA-GARFIELD TRUCK LINES;
BARTON TRUCK LINES, INC.,
LAKESHORE MOTOR COACH
LINE, INC.,

Defendants.

Clerk Supreme Court, Utah

Case No.
10213

BRIEF OF PETITIONER
WYCOFF WAREHOUSE, INC.
UNIVERSITY OF UTAH

APR 29 1965

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BRIEF OF PETITIONER
WYCOFF WAREHOUSE, INC.

STATEMENT OF KIND OF CASE

This is an action brought to review the action of the Public Service Commission of Utah, wherein it denied the application of Wycoff Warehouse, Inc., a warehouseman-carrier, for authority to transport commodities between warehouses in Salt Lake, Davis and Weber Counties, owned, operated or leased by it, and points within said counties.

DISPOSITION BY COMMISSION

The application was supported by public witnesses and no warehouseman-carrier testified in opposition, yet the Commission denied this application for limited, specialized service to and from its warehouses in the three counties.

RELIEF SOUGHT ON APPEAL

Petitioner seeks to have the Commission's denial reversed and the case remanded for an order granting the requested application.

STATEMENT OF FACTS

Application was filed January 22, 1963, and heard May 19, 1964. Wycoff Warehouse, Inc., herein referred to as "Warehouse," presently holds authority from the Commission to transport commodities between its warehouses in Salt Lake County and points generally in Salt Lake County and the southern portion of Davis County. (Certificate No. 1352, Exh. 1).

By this application it seeks to extend similar warehouseman-carrier service to the new Freeport Center at Clearfield and to a leased warehouse in Ogden, with service between the warehouse in Salt Lake City, Clear-

field and Ogden and points in the three counties. This is a limited and specialized service to and from warehouses and transporting only commodities bona fide stored or to be stored therein.

Mr. Max Young, Vice President of Warehouses, testified as to the type services rendered and that proposed as follows:

“Q. What facilities are maintained in that office?

A. We maintain, of course, the regular telephone communication, individual drop-in contact communication, teletype communication, and we provide a complete service for our customer, including the taking of orders, either through mail, over the phone, or by teletype. We process the order through, either on their forms provided to us by them, or our own developed forms provided by us for their use. We process those orders through to order picking, completion of the order and delivery to the customer in the Salt Lake County and South Davis County area, and to many of the truck lines, if they are going to designate consignees out of the Salt Lake County area but within the intermountain market place, and at times back on rail cars for delivery to customers outside the intermountain market place.” (Tr. 12)

“Q. Will you describe the type of service you render to your storage customers at the present time?

A. Yes; we provide a complete warehousing service. We accept their merchandise by rail car or by motor truck at our truck dock or at our rail siding, which is a warehouse location. We provide both a bonded storage and a general warehousing storage. We, of course, develop warehouse receipt at the time of receipt, receiving the merchandise. We pull the merchandise at their order or direction and deliver to customers in the Salt Lake County and South Davis County area.

Q. How many rail cars per week do you handle at the present time?

A. We are handling 25 cars a week at this time.

Q. Do you have capacity to handle more should the storage requirements develop?

A. Yes; we have in the process now the development of a Western States distribution center for Libby, McNeil, and Libby, and we at this time will have to handle that product through our present facilities. They are presently developing an initial order of 54 car loads of material to establish the basic stock for this program.” (Tr. 16)

“Q. Now, calling your attention to the areas of Davis County, Weber County, and those in Salt Lake County beyond the scope of your present authority, what proposed service would you render in those areas if authorized?

A. We would render the same service we are now rendering in the Salt Lake County area that we can serve and South Davis County. Our service at this time is orders received in the a.m. are delivered the same day in the p.m. Orders delivered on an emergency basis, of course, are pulled and delivered immediately. Orders received in the p.m. are pulled in the p.m., and either delivered early the following morning or turned to — if it is within this area, orders received in the p.m. are turned to the line carriers. We deliver 90 per cent of the material we handle from our warehouse to the line carriers, and much of this delivery is done after 5:00 in the evening. We would turn it to the line carrier for delivery on their schedule.” (Tr. 17)

Exhibits 1, 2, 3 and 4 were introduced to show Warehouse's present authority to and from its Salt Lake City warehouses, its financial ability, its specialized warehouse and delivery equipment and photographs of its facilities. Testimony was adduced by Mr. Young and Mr. Frank K. Stuart relative to the availability for lease of 30,000 square feet warehouse space at Clearfield in the Freeport Center, and that Mr. Wycoff owns a warehouse in Ogden with 10,000 square feet space available to applicant. (R. 15)

Equipment will be stationed at Clearfield as well as Ogden and the same type warehouse facilities will be operated at these locations as are now being employed at the Salt Lake City warehouses. The warehouses are sprinklered and provided with temperature and humidity control.

In addition to identifying the warehouse space at Clearfield available to Warehouse, Mr. Frank K. Stuart presented Exhibit 5, which is a "Utah Freeport for Western Distribution" study consisting of 66 pages, plus extensive appendices. He expressed the position of Freeport Center Inc. and of the Davis County Industrial Bureau, of which he is the Director. He pointed out the tremendous impact of the Freeport Center at Clearfield, its huge 10,000,000 square feet of warehouse space and the adoption of freeport legislation.

This Court can take judicial notice of the adoption of the "freeport" constitutional amendment by the voters in November, 1964 and that implementing legislation is pending before the 1965 session of the Utah Legislature. Mr. Stuart testified in part:

"A. the advantages to granting the proposed application I think would be — and I am acting now as a spokesman for Davis County — it would be in the best interests of the county and the State of Utah. I have taken a brief survey of the tenants of the facility, other than the Redman Van and Storage, the major tenants, and they have indicated it would be desirable.

"The first benefit to Davis County and the State, we feel, would be competition from another public warehouseman. We feel that the center needs two public warehousemen because it has been my experience that competition always brings better service, and we also feel without the ability

to transport goods and services — goods from the warehouse, a public warehouseman would be at a particular disadvantage.” (Tr. 36)

“BY MR. RICHARDS:

Q. Now, Mr. Stuart, you comment that in claiming a need for additional transportation service from warehouse within the Clearfield area — are you referring to all warehouses, whether they be owned by Wycoff or Industrial Box-board or by Westinghouse or some other warehousing unit?

A. No. If a public warehouseman located on our facilities is seeking tenants for warehousing, if he doesn't have the service of transportation from that warehouse to the surrounding area, he's at a disadvantage.” (Tr. 45)

Several warehousing shipper witnesses appeared to support the application. The first was Mr. De Wayne Hobbs, Traffic Manager of Don Baxter, Inc., which sells and distributes hospital and surgical supplies in the area. They have four manufacturing plants and distribute throughout the United States and Canada, with 27 years experience in Utah. (R. 48) They use public warehouses in major areas, including Wycoff Warehouse in Salt Lake City. His testimony in part was:

“Q. Would you give to the Commission a statement as to the number and types of commodities that you store with Wycoff Warehouse?

A. I would say approximately 350 separate individual items, and the nature of those items generally are intervenous solutions, which go into the bloodstream of a patient, administration equipment for the injection of this solution, along with that, various plastic disposable items used in the hospital, such as syringes, trays, disposable units in general.

Q. And what form are they presented to Wycoff for storage?

A. We ship to Wycoff generally in truckload quantities, and are presented in full case lots and sold in full case lots.

Q. Now, do you have enough experience in this to tell the Commission what type service you have from Wycoff Warehouse?

A. They provide a receipt, warehousing and shipping service, along with the processing — receipt and processing of orders from our direct customers.

Q. And has this service been satisfactory for your requirements?

A. Yes, it has.

Q. Now, do you have any customers in the Davis County or Weber County areas?

A. Yes, we do.

Q. And are you acquainted with the general nature of the application that is here before the Commission?

A. Yes.

Q. What advantage to your company would the granting of this application have, if any?

A. It would give us complete control of the customers' order from receipt at the warehouse to delivery at destination." (Tr. 49-50)

Their volume in the Salt Lake City area is 80,000 pounds per month. Warehouse stores the surgical and hospital supplies, selects items as orders are received and arranges for delivery. Some items are glass and they've experienced breakages on movements by protestant Barton in the Davis and Weber County areas between the warehouse and hospitals. (R. 56)

Mr. Tony Zanivovich testified on behalf of Mars, Inc., the candy manufacturer (Milky Way, Snickers, Musketeers, etc.) They market their products nationwide and use Warehouse at Salt Lake City to store and distribute their chocolate bars in the area (R. 67) These are perishables. Would use the applicant's warehouse in Ogden if authorized — would give a day or two quicker service. (R. 69) They have about 300 stores in the general area and of these about 75-100 are Associated Food stores.

Mr. Gerald Cahoon, office manager of Libby, McNeil and Libby, testified. They distribute about 23,000 cases of foodstuff per month through Warehouse at Salt Lake City presently. (R. 77) A substantial increase of volume is being made now.

“Q. Now, could you tell us how that type would be of advantage to your company?

A. We're in a business, as you all know, a very competitive business, and the only thing we have to offer over our competition is service, and in the business today the man who can supply the merchandise when the customer wants it is the man who is going to get the business, and when we want merchandise delivered at a certain time, then it has to be delivered at that particular time.

Q. Have you been able to obtain that type service from Wycoff Company in the areas they are presently authorized to serve?

A. Yes, sir.” (Tr. 78-79)

“Q. Should the Wycoff Company obtain warehouse facilities in the Clearfield area, at the Freeport Center, or in Ogden, would a direct service by their own vehicles from the points be of an advantage to you on your products?

A. Yes, it would.

Q. And how could that aid your company?

A. For the same reasons I stated before.

Q. How many different varieties of food products do you have stored there at the Wycoff Warehouse?

A. At the present time we have approximately 140 items. We will have over 200.

Q. This new program will expand the number of the items you will have?

A. Yes sir; all items that we pack will be available out of this warehouse.

Q. Now, when you hand an order to Wycoff for distribution what physical steps must they go forward to fill that order for you?

A. They take the order, and would just put up what we call put up the order. Our merchandise is stored there in the warehouse, and they would then pull off the cases, the number of cases that would then be required." (Tr. 79-80)

"Q. You were about to make some explanation to Mr. Worsley. Would you proceed?

A. I would like to clarify. He was speaking of points in Clearfield, which I said we had very little requirement. The requirement that we would have in those situations are week-end requirements, Saturdays particularly when we hold our sales. At the time the sales are held, there is many occasions where the customer hasn't purchased enough merchandise, and the wholesaler or the direct account cannot supply it on that particular day. So, we in turn, would request,

and we have requested Wycoff here in the City to do this for us, to deliver the merchandise on a Saturday which is not available through the jobber's warehouse.

Now, this is a specialty service as I call it which we need." (Tr. 88-89)

Mr. G. Almon Robison, a district manager of Hershey Chocolate Corporation, next testified in support of the application:

"Q. Does your company employ any public warehouse facilities in the Salt Lake area?

A. Yes.

Q. Whereabouts?

A. At Wycoff Warehouse.

Q. And does your product require any special temperature controls in that warehousing?

A. Yes.

Q. Would you state the nature and type of products that you actually have warehoused here?

A. Well, we have all Hershey Chocolate products. This includes our candy bars of four different sizes, kisses, miniatures which are very susceptible to heat damage and humidity, then our cocoa and grocery products that are not too susceptible to this type of damage." (Tr. 92)

“Q. Let me ask you, do you have occasion to ship your products into the Salt Lake, Davis and Weber County areas?

A. Yes.

Q. And have you used the Wycoff service in the Salt Lake County area in the past?

A. Yes, sir.

Q. How have you found that service to be?

A. It is just really excellent, especially after the companies that we were with before then, and our customers after approximately four years still comment on the good service they get. Sometimes I get an order and two hours later it is at their door — they can hardly believe it.

Q. Now, extending this service into Davis and Weber Counties is part of the nature of this application.

Would that type of service be of any advantage to your company in your products?

A. It certainly would, because, as I have mentioned, our products are highly perishable. I should have brought a chocolate bar up here today to show you, because this type of weather, a few minutes in warm weather and a chocolate bar is ruined, it is no good after a few minutes of heat damage, and so fast service is very valuable to our method of operation.

Q. Has Wycoff been able to deliver your products in the areas now served by them without this damage?

A. Yes, sir.

Q. Could you give us any estimate as to the number of customers that you have in the Davis and Weber County territory?

A. It is a rough estimate, but I would guess, oh, three to four hundred — but that is a real rough guess. I wouldn't want to have to have that stand up in court.

Q. Do you have both what have been referred to as direct and indirect customers?

A. Yes, sir.

Q. Now, as to Davis and Weber County, do you have any deliveries required to the stores within that area?

A. Yes, we do." (Tr. 93-94)

In conclusion he testified that their annual volume in the Davis and Weber County areas amounts to "approximately a million to a million and a half pounds." (R. 98)

The final public warehousing shipped was Mr. Oscar Norberg, representative of Anchor-Hocking Glassware Corporation, the number one manufacturer of tableware. (R. 99) That product and a line of frying pans, skillets, patio furniture, etc. are warehoused with applicant at Salt Lake City.

“Q. Do you have any estimate as to the volume of these two varieties of merchandise that go into the Davis and Weber County areas?

A. Well, at the moment my basic reason for being here is that I have a pool car distribution set up in Ogden as well as in Salt Lake City. The pool car frequency into Salt Lake City is 50 to 60 cars a year, and into Ogden there are between eight and twelve cars per year.

When I receive a small important order that is necessary to get to the Ogden area immediately, I sometimes have to wait for quite some time before I can get additional weight to get the car into Ogden.

Q. Would it then be of any advantage to have a service that could operate from the Wycoff Warehouse directly to Ogden on those less than carload shipments?

A. Yes.

Q. And would that be of any consequence or assistance to you in your own business?

A. Oh, very definitely.

Q. Do you have any competitive problems in these lines that you represent?

A. Lots of competition.

Q. And could you explain to the Commission how this proposed service of Wycoff Warehouse, Inc., would help your business?

A. Well, it would help my business, briefly. For example, on cast iron ware, most of the Army and Navy type stores, the surplus type operations, plus the drug stores and people like that use pretty fair quantities of this merchandise.

Now, I know that it's possible, it is being done where other truck lines carry this merchandise on up to these other locations, but it facilitates things when I know that I can pick up the telephone and find out whether so and so's operation received the merchandise or it has been delivered. The question is there without having to call additional people or look into things to a great extent, or spending a lot of time doing this.

Q. Have you been able to get that type of service from Wycoff Warehouse?

A. Yes.

Q. I don't know whether I asked you, how many customers you might have in these two areas?

A. Oh, I would estimate that there are about twenty or thirty customers in that area.

Q. Now, on your glassware, are there any problems of breakage or special handling that you require of your warehouseman?

A. Yes. Glassware, by its nature, is difficult to handle, and of course, minimum handling and banging around is advantageous to me and to my customers.

Q. Over what period of time have you used Wycoff Warehouse facilities?

A. Well, I have been here for three and one-half years and I think they had the Wycoff services for about a year and a half before that, if I remember correctly, so that would be about five years." (Tr. 100, 101, 102)

On cross examination of Mr. Young counsel sought to make a major issue in differentiating between warehouses owned or leased by Warehouse and those referred to in the application as being "operated" by it. In each instance it was made clear that a bona fide warehouse operation was intended and no subterfuge was to be implied. Only commodities bona fide stored or intended to be stored in such a warehouse would be transported. Whether the warehouse is owned or leased seems of no importance. The responsibility of the warehousing and caring for the goods with the concurrent duty of delivery appeared from his testimony.

Protestants were of three classes :

(a) Overland Moving Company (a related company to the warehousing concern known as Redman Van & Storage). This protestant appeared but presented no testimony as to warehousing, transportation, motor vehicles, personnel or otherwise. It does not own or operate any warehouses itself.

(b) Lakeshore Motor Coach Lines (a bus line between Salt Lake City and Ogden over restricted routes and having express authority limited to the baggage area of the busses it operates.)

(c) Two general commodity carriers not engaged in any warehouse operations and not "warehousemen" under the Utah statutes, namely :

Magna-Garfield Truck Line
and
Barton Truck Lines

Magna-Garfield serves the Garfield and Bingham area out of Salt Lake City and Barton, so far as here pertinent, serves between Salt Lake City and Ogden, including intermediate points. Both have trucks operating in their prescribed areas but do not provide the seven day per week service to warehousing-shippers available at Warehouse nor can they give the direct service required by shippers from the warehouses.

Magna-Garfield has handled only a minimum quantity of freight from the warehouse in Salt Lake City. Though Barton handles more, it has not established warehouse facilities at Ogden, Clearfield or Salt Lake City for shippers of the type appearing at the hearing.

ARGUMENT

POINT I

THE COMMISSION ERRED IN NOT CONSIDERING THE PROPOSED WAREHOUSEMAN-CARRIER SERVICE OF SUCH SPECIAL CHARACTER AS TO REQUIRE CERTIFICATE. THE ACTIVE PROTESTANTS PROVIDE NO WAREHOUSE SERVICE.

POINT II

NO WAREHOUSEMAN HAS OPPOSED THIS APPLICATION BY ADDUCING EVIDENCE OF ABILITY TO PERFORM ANY OF THE SERVICE PROPOSED BY APPLICANT FOR PUBLIC STORAGE SHIPPERS.

Wycoff Warehouse, Inc. is engaged solely in the normal functions of a warehouseman, storage and safe-keeping, coupled with delivery upon request. This service is not provided by the motor carrier protestants.

Large, fireproof, sprinklered warehouses are established on rail sidings. Merchandise is received in rail cars, unloaded, stacked according to the needs and requirements of the owner and then held safely awaiting a delivery order. Exhibit 4 contains photographs illustrating the open area and rack type storage facilities. A specially designed mechanical lift permits the operator to "pick" merchandise rapidly to fill orders for delivery. Pallet stacking by this fork lift allows efficient spacing and procurement of the merchandise.

Inventory information is made available for the customer. Humidity controls and temperature controls for protection of sensitive and perishable commodities are now established in the Salt Lake City warehouses which it operates. These same facilities and services will be provided in the Clearfield Freeport Center under leases to be executed and at Ogden, where Mr. Wycoff presently owns the warehouse, and it will be made available to applicant.

As indicated by several witnesses for customers, they are in very competitive businesses, foodstuffs, candies, surgical supplies, etc. Hence, immediate delivery by the warehouseman, whether it be in Salt Lake County, Davis County or Weber County, is vital to their operations. The continuation of the warehouseman's responsibility of storage and safekeeping right to the door of the hospital, surgeon or food market is needed. Ware-

house can and will provide such service on a three-county basis, as it is now doing in the Salt Lake County and the south portion of Davis County.

The busline, Lakeshore, does not operate its busses except on a direct, limited-route basis, and is not in fact a competitor in any sense of the word on warehoused merchandise. The restricted areas of the baggage bays in the belly of the bus do not lend themselves to this type service. No intermediate point deliveries are made except at bus stops.

The two motor carriers who opposed the application by testimony of their operations are Magna-Garfield Truck Line and Barton Truck Line. Magna-Garfield has no warehouse facilities and serves the Garfield and Bingham areas. It cannot pick up or deliver in the Davis and Weber County areas affected by the application. No direct service could be rendered by it to or from the Freeport area or warehouses in Ogden. It has had no experience in warehousing.

Barton's truck service extends into Davis and Weber Counties. Its only pretense at warehousing is a small refrigerated area on its dock at Salt Lake City, where it can hold perishables over night. Though it may serve the Freeport Center, it has no warehouse space there, does not intend to acquire any, and stations no motor vehicle equipment there.

Warehousing is a distinct and different combination service — storage and delivery. No ordinary carrier performs such a combination. Even Overland Moving Company, which appeared as a protestant but did not present any witnesses, has limited authority, as shown by Exhibit 6, to serve “from either its warehouses or those of Redman Van & Storage Company, in Salt Lake, Davis and Weber Counties,” and between its said warehouses and points in the three counties. Thus it has no authority to serve the Wycoff Warehouse properties, either leased or owned.

This Overland certificate highlights the different and specialized character of the warehouse-carrier service. Properly, Overland was restricted to service to and from its warehouses in the three counties (and those of its subsidiary, Redman Van & Storage). The Commission recognized in that case that inhibitions against warehouseman transporting to and from its own warehouse creates “an awkward condition.” Its language (sheet 2 of Exhibit 6) is:

“Applicant cannot transport from its warehouse in Salt Lake City to its warehouse in Ogden, nor from its warehouse in Ogden to its warehouse in Salt Lake City, nor to or from points and places in Davis County north of the Farmington Junction to points and places in Salt Lake or Weber Counties, other than to or from said company’s warehouses in said counties.

“These inhibitions create an awkward condition. Not to be able to transport from its warehouses in Ogden to its warehouses in Salt Lake City seems quite unreasonable when on other carrier could possibly be benefited by such restriction or harmed by its removal, for it is obvious no other carrier would be solicited to perform a haul which is incidental to applicant’s warehouse business. The same is true as to the lack of authority to transport from its warehouses in Salt Lake City to its warehouses in Ogden.”
(R. 244)

With out a single public witness supporting this phase of the application, the Commission deemed the warehouse-carrier service so vital and paramount that it granted to Overland authority between its warehouses in the three counties and all points and places in the three counties. This was in 1963 and more will be said relative to this later under Points V and VI.

We sincerely urge that this court recognize the apparent difference in the proposed service from that offered by any protestant, that no prejudice will result to protestants and that public convenience and necessity do require Warehouse to be able to serve between its warehouses in Salt Lake, Davis and Weber Counties and all points and places in said counties.

POINT III

WAREHOUSEMAN HAS STATUTORY DUTY TO DELIVER GOODS STORED (SECT. 72-1-8, U.C.A. 1953) AND COMMISSION HAS PREVENTED THAT BY DENYING CERTIFICATE.

POINT IV

WAREHOUSEMEN ARE SEPARATE AND DIFFERENT FROM ORDINARY MOTOR CARRIERS AND ARE "PUBLIC UTILITIES" SPECIALLY DESIGNATED BY SECTION 54-2-1 (29) U.C.A. 1953.

The Legislature of Utah has adopted in substance the Uniform Warehouse Receipts Act. Section 72-1-8 U.C.A. 1953 imposes upon the warehouseman the duty "to deliver the goods upon a demand" if an offer is made to pay for the warehouse services. The point of delivery is not stated but the clear logic implies that such shall be under the responsibility of the warehouseman until delivery is complete.

Relating this duty to a typical customer, Don Baxter, Inc., Warehouse has received and stored surgical supplies for distribution in the area. An emergency develops at the Dee Hospital in Ogden for a volume or single item of such surgical supplies. There is no one

of the Don Baxter, Inc. to receive delivery at the warehouse door. They and the hospital want the supplies rushed to the hospital in Ogden where delivery will be made.

If the doctor or hospital is in Salt Lake City or southern Davis County, Warehouse can presently effectuate delivery of the stored surgical supplies on its own vehicles directly to hospital or surgeon for Don Baxter, Inc. That same type delivery duty appears to be enjoined upon Warehouse by the section of the statutes referred to above. Special liability is imposed upon a warehouseman by Section 72-1-10 for misdelivery. This concurrent duty of delivery and liability for misdelivery makes logical and proper an integrated transportation service from warehouse to customer.

Not only have the public witnesses testified as to the convenience and necessity of such warehouse transportation service, but that seems inherent in the relationship.

Attention of the Commission was directed to the statutes which declare a warehouseman to be a "public utility." (Sec. 54-2-1(29) U.C.A. 1953). In declaring such to be public utilities, the Legislature said that they are "subject to the jurisdiction and regulation of the Commission and to the provisions of this title." This is a clear legislative classification and recognition that a warehouseman is in a class apart from the ordinary mo-

tor carrier. The Commission seems to have closed its eyes to this and passed judgment solely upon the carrier aspect of the warehouseman's duties.

This Court should recognize that the unique specialized service of a warehouseman is different and more comprehensive than that offered by the bus line and the two protesting ordinary carriers. The Commission has ignored its responsibility of regulating warehousemen, but may not ignore the different type service performed by a warehouseman and required by the customers, as demonstrated by this record.

POINT V

THE COMMISSION HAS ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN DENYING THE APPLICATION.

POINT VI

THE COMMISSION HAS ERRED IN APPLYING THE LAW IN THAT IT HAS FAILED TO RECOGNIZE AND CERTIFICATE A WAREHOUSEMAN AS REQUIRED OF IT BY STATUTE.

This Court has stated in prior decisions that it will not reverse the Public Service Commission unless it has

erred in applying the law or acted in an arbitrary and capricious manner. Both said grounds for reversal are present in this case. Heretofore we have demonstrated that the Commission has ignored the different and special services of a warehouseman as distinguished from an ordinary motor carrier, has ignored the statutory obligations of a carrier and the statutory duties of the Commission.

The arbitrary and capricious nature of the Commission's denial of the application for complete service by Warehouse between the warehouses owned or leased by it in Salt Lake, Davis and Weber Counties and points in said three counties is shown as follows :

First, the services as presently rendered and proposed are different from that presently offered by either the bus line or the two protestant motor carriers.

Second, the Commission in the Overland Moving Company decision cited *supra* (R. 244) has enunciated the evident fact that the service proposed is "a haul which is incidental to applicant's warehouse business."

Third, in the Overland case *supra* the Commission recognized that the combination warehouseman-carrier service is so essential to persons storing that not a single public witness was required to support the same three-county certificate there granted.

As shown by Exhibit 6 (R. 243-249) in the Overland case three things were sought, a warehouseman-carrier authority between its warehouses and all points in the three counties, Salt Lake, Davis and Weber; general commodity cartage authority between all points in the three counties; and a contract carrier service to deliver and set up appliances for Westinghouse Appliance Sales. A witness from Westinghouse appeared and that contract carrier authority was authorized. No other witnesses appeared for applicant except Mr. Dilworth Wooley, its President and Manager. The Commission denied the general commodity cartage segment. However, based only on Mr. Wooley's testimony as President of Overland, and its findings of the "awkward condition" for the warehouseman not to be allowed to deliver to all points in the three counties, the Commission granted the warehouseman-carrier application.

We must be mindful that the same three protestants opposed Overland's application — Lakeshore bus line, Magna-Garfield and Barton. No public shipper witnesses supported the warehouseman-carrier segment, but none was needed, apparently, as the Commission limited service to and from the warehouses owned or leased by Overland and its subsidiary, Redman Van and Storage, in the three counties.

Applicant here seeks the same treatment. The shipping public is entitled to the same service to and from its warehouses as was accorded to Overland. Not only

is Warehouse in the same position as was Overland, but our position is much stronger, as we also produced very substantial, nationally prominent warehouse customers who testified in support of the application. Overland did not testify in opposition to the present application, as its authority is limited to warehouses operated by it or its subsidiary, and hence could not serve the Wycoff warehouses. Overland's president was present to lend such influence as he might and that apparently did the trick.

The action of the Commission in this case was arbitrary and capricious as measured by its only prior warehouse-carrier case decision just a year earlier. Overland's warehouses were to be in Salt Lake City, Clearfield and Ogden, as are the Wycoff warehouses.

The only distinction, without it being a difference, between the cases is that the Wycoff application covered its present warehouses in Salt Lake City, plus those to be leased and operated at the Freeport Center in Clearfield and the present Wycoff warehouse in Ogden. Some evidence was had as to future additional warehouses and authority was sought for those. The Overland decision found no problem on this. Its order did not limit Overland to the warehouses already operated by it. It was also extended authority on warehouses operated by Redman Van & Storage Company and is broad enough to encompass future warehouses of both Redman and Overland.

This appears to be rank discrimination on the part of the Commission, without any basis in law or justice. Administrative bodies may not dish out authority to their favorites and deny such to those not so well liked. When this happens, as is the case here, this Court can and must call a halt to such arbitrary and capricious action. If this Court does not, then the basic precepts of administrative law will be flaunted.

The public interest, as manifested by the shipper witnesses whose products are stored by Warehouse, must be considered also. This Court can be a bulwark when the rights of an applicant and the public are both ignored by the Commission, as in this case.

CONCLUSION

The public needs of the warehouse customers require a service specialized above and beyond that tendered by either a bus line or an ordinary carrier. The legislature has recognized the special and different nature of a warehouseman from an ordinary carrier. Adequate proof of public convenience and necessity for the warehouseman-carrier service was presented. With no public evidence the Commission granted similar authority to Overland and has been arbitrary and capricious in denying this application.

WHEREFORE, Wycoff Warehouse, Inc. urges the Court to reverse the Commission's denial of authority and remand this case with direction to issue to applicant authority between warehouses owned or leased by it in Salt Lake, Davis and Weber Counties to all points and places in said counties.

Respectfully submitted,

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