

1965

# Wycoff Warehouse, Inc. v. Public Service Commission of Utah et al : Appeal from the Order of the Public Service Commission of Utah

Utah Supreme Court

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Harry D. Pugsley; Attorney for Petitioner;

William S. Richards; Wood H. Worsley; Phil L. Hansen; Attorneys for Defendants;

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# In the Supreme Court of the State of Utah

WYCOFF WAREHOUSE, INC.,

*Petitioner,*

vs.

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

*Defendants.*

Case  
No.  
10213

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## BRIEF OF DEFENDANTS

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

Court, Utah

## APPEAL FROM THE ORDER OF THE PUBLIC SERVICE COMMISSION OF UTAH

GUSTIN, RICHARDS & MATTSSON  
WILLIAM S. RICHARDS  
1007 Walker Bank Building  
Salt Lake City, Utah

*Attorneys for*

*Overland Moving Company  
Magna-Garfield Truck Lines  
Barton Truck Line, Inc.*

SKEEN, WORSLEY, SNOW  
& CHRISTENSEN

701 Continental Bank Building  
Salt Lake City, Utah

*Attorneys for*

*Lakeshore Motor Coach Line, Inc.*

PHIL L. HANSEN  
Attorney General of Utah  
Salt Lake City, Utah

*Attorney for*

*Public Service Commission of Utah  
Hal S. Bennett, Donald Hacking  
Raymond W. Gee*

HARRY D. PUGSLEY  
600 El Paso Gas Building  
Salt Lake City, Utah  
*Attorney for Petitioner*

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WYCOFF WAREHOUSE, INC.,  
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vs.

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

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BRIEF OF DEFENDANTS

PUBLIC SERVICE COMMISSION OF UTAH, HAL  
S. BENNETT, DONALD HACKING and RAYMOND  
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LINE, INC. and LAKESHORE MOTOR COACH  
LINE, INC.

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Appeal from the Order of the  
Public Service Commission of Utah

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STATEMENT OF FACTS

The statement of facts in petitioner's brief does not  
properly state the record and, therefore, a further state-  
ment of facts is necessary.

Petitioner acquired its present Certificate of Convenience and Necessity, No. 1352, on the 6th day of December, 1960. Its Certificate reads as follows:

*“Commodities generally which have been stored or which are bona fide intended to be stored in applicant’s warehouses in Salt Lake City, Utah: Between said warehouses on the one hand and on the other hand all points in Salt Lake County and the area of Davis County south of the junction of U.S. Highways 89 and 91 just north of Farmington, Utah, excluding that part of Salt Lake County which lies west of 4800 West and south of 1300 South, but including the town of Kearns, Utah.”* (Emphasis added) (Ex. 1).

By its application, petitioner seeks the following authority:

*“\*\*\*to operate as a common carrier by motor vehicle for the transportation of general commodities to and from its warehouses or other warehouses owned, operated or leased by applicant in the area covered by application as follows: in Davis, Salt Lake and Weber Counties and between each of them and all points in said three counties. On return movements applicant proposes to engage in the same operation.”* (R. 307)

The application of petitioner is broad in its scope and contemplates an extension of authority for the purpose of performing a transportation service from places and establishments not presently in existence. The only warehouse facilities owned, operated or leased by petitioner at the time of the hearing were its warehouses located in Salt Lake City, Utah (R. 114, 116).

The acquisition of additional warehousing facilities was contingent upon the grant of the requested authority (R. 117). The application, as interpreted by petitioner, is in reality a request for authority to perform a transportation service from all warehouses, buildings storing merchandise, and other complexes located within the Counties of Salt Lake, Davis and Weber owned by persons other than petitioner (R. 121, 122).

Witnesses called on behalf of petitioner were individuals and companies using petitioner's warehousing facilities located at approximately 550 South Second West, Salt Lake City, Utah. They consisted of a distributor of hospital and surgical supplies, two candy manufacturers, a general food process distributor, and a manufacturer's representative handling glassware, cast ironware, poly-plastic, and other houseware items.

Petitioner does not own, lease or operate any warehousing facilities at the Freeport Center, Clearfield, Utah, or in any other county outside of Salt Lake City. In an effort to justify the grant of authority to render a transportation service from the Freeport Center, petitioner relies on the testimony of Frank K. Stuart, a paid consultant of the Freeport Center, who has had no experience in public warehousing or in the actual operation of warehouses within Salt Lake, Davis or Weber Counties (R. 36, 42). Mr. Stuart was of the opinion that the present providers of public transportation are doing a fine job, and that the grant of public transportation authority to everyone who rents a ware-



house from the Freeport Center would be a proliferation of service and sometimes detrimental (R. 43-44). In fact, according to Mr. Stuart, at the present time there exists a rate problem because there isn't a sufficient volume of business out of Clearfield into the metropolitan area (R. 46). The survey of tenants purportedly indicating a desire for additional service at the Freeport Center, referred to on Page 6 of petitioner's brief as a factual statement, was ruled out by the Commission (R. 36).

The hospital and surgical supplies requiring delivery to points in Davis and Weber Counties are presently handled by the Barton Truck Line, Inc., Union Pacific and the bus lines (R. 53). The distributor, Don Baxter, Inc., has no plans for establishing any warehouse service outside of the present service which it has at the Wycoff warehouse in Salt Lake City (R. 58). The only complaint he has to existing transportation facilities is an occasional breakage problem, which problem has been adjusted to his satisfaction (R. 56-59). A check of the records of the Barton Truck Line, Inc., and particularly its claim records, fails to disclose a single claim with Don Baxter, Inc. (R. 219). The shipper could not recall any instance where he had experienced a breakage problem with Lakeshore Motor Coach Lines.

Mars, Inc., one of the candy manufacturers, testified that all of its orders for candy are prepared in Chicago, Illinois, and then forwarded to the Wycoff warehouse for subsequent delivery to the customer. The ultimate destination is always predetermined prior to its arrival at



the Wycoff warehouse (R. 70-71). Such transportation involves interstate commerce, and testimony in connection therewith is immaterial to this proceeding. For transportation to points and places in Davis and Weber Counties the services of Barton Truck Line, Inc. are used (R. 72).

Libby, McNeil and Libby is a distributor of food items. Fifty percent of all of its products handled by petitioner is distributed to associations, wholesalers and jobbers located within Salt Lake County (R. 84-85). Petitioner, under its present authority, can render this service PROVIDED the items have been stored or there is a bona fide intent to store the same in petitioner's warehouses in Salt Lake City, Utah. All traffic shipped beyond Salt Lake and into Ogden is handled by Barton Truck Line, Inc. or picked up by the customer in its own trucks (R. 86). Libby, McNeil and Libby does not require a transportation service to the key points of Bountiful, Roy and Clearfield (R. 86). There is very little traffic moving into Garfield or Magna, Utah (R. 87). At the present time, shipper's entire warehousing complex will be centered around the Wycoff warehouse in Salt Lake City (R. 87). Libby, McNeil and Libby indicates a desire to have weekend service into Clearfield. It admits, however, that it has not requested of Wycoff or Barton that either truckline perform a transportation service to Clearfield or Ogden on Saturdays, and that the services presently being rendered by common carriers into Salt Lake, Davis and Weber Counties have been satisfactory (R. 89-91).

The Hershey Chocolate Company uses petitioner's warehousing facilities at Salt Lake City. Weekend deliveries are not necessarily required by it (R. 95). Said company has been using the services of Barton Truck Line, Inc. and the Union Pacific for deliveries to Ogden, Utah (R. 97). The Barton Truck Line, Inc. has received only one complaint from the Hershey Chocolate Company. This complaint was in the year 1962 and was resolved to Hershey Chocolate Company's satisfaction. In addition, it has had two to three damage claims filed by Hershey Chocolate Company in a period of three years, none of which were related to the perishable nature of the commodity, and both of which were resolved to the satisfaction of the customer (R. 19). Barton Truck Line, Inc. performs a Friday pickup service at the Wycoff warehouse for the Hershey Chocolate Company. In the event the merchandise is not to be delivered until the following Monday, the same is held in a cold storage area by Barton Truck Line Inc. (R. 220-221, Ex. 20). Barton Truck Line, Inc. keeps its facilities open by telephone seven days a week and, in the event of an emergency, will perform a transportation service on Saturdays and Sundays (R. 226).

Oscar Norberg is a manufacturer's representative handling tablewares such as glass, frying pans, skillets, etc. The basic reason for his appearance was to get a transportation service capable of handling a pool car distribution (R. 100). In general, the order for merchandise is placed by Mr. Norberg with his company, which is outside the State of Utah, and is loaded on a

railroad car in the foreign state. The car is then dispatched to the Wycoff warehouse, and distribution is made from the car itself. There is no storage involved (R. 104-105). Concerning the need for the proposed service, the witness stated:

“Q. And do you have an opinion as to whether or not you actually need it for your business?”

“A. It’s not of tantamount importance to me — it isn’t that crucial. It is important to me to have these facilities available to use as needed, but, I mean, I can live without it.” (R. 102).

When the witness has a need for service to Davis and Weber Counties, he normally performs the distribution from a car in Ogden with the use of the Ogden City Transfer Company (R. 106). The services performed for Oscar Norberg by petitioner involve interstate commerce and consist of unauthorized transportation (R. 328).

Appearing in protest to the application of Wycoff Warehouse, Inc. were Magna-Garfield Truck Line, Barton Truck Line, Inc., Overland Moving Company and Lakeshore Motor Coach Lines. Said carriers all hold Certificates of Convenience and Necessity issued by the Public Service Commission of Utah and operate in the area covered by the proposed application.

The Magna-Garfield Truck Line renders a transportation service in Salt Lake City, Bacchus, West Jordan, South Jordan, Riverton, Bluffdale, Herriman and Bingham, Utah, and other areas in Salt Lake County (Ex. 7). It is the owner of 14 pickup type trucks, 9 tractors and 9 trailers (Ex. 8). Magna-Garfield Truck Line handles the transportation of all type of commod-

ities, and a bulk of the merchandise handled by it originates in warehouses within the Salt Lake City area. A grant of the authority applied for by petitioner would be detrimental to the ability of Magna-Garfield Truck Line to continue in business (R. 189). Magna-Garfield Truck Line handles freight for all the shipper witnesses appearing at the hearing, which freight originates at the Wycoff warehouse. No complaints have been received concerning its service.

The defendant, Lakeshore Motor Coach Lines, operates between Salt Lake City and Ogden, Utah. It performs an express scheduled service seven days a week. There are thirteen schedules operating between Ogden and Salt Lake City daily, except Sundays, and on Sundays there are nine (R. 196-198). Its terminal is open twenty-four hours daily, seven days a week. It has intermediate express agencies at Bountiful, Farmington, Kaysville, Layton and Clearfield, Utah (R. 200). On request, it drops express shipments at intermediate points between agency stations (R. 201). A loss of the freight, which might be handled by petitioner if the application is granted, would substantially affect the operating ratio of Lakeshore Motor Coach Lines. At the present time, Lakeshore Motor Coach Lines is operating to approximately fifty percent of its capacity (R. 204-205).

The Barton Truck Line, Inc. performs a transportation service in the transportation of general commodities between Salt Lake City, Utah, and the Utah-Idaho border and between Salt Lake City, Utah, and the Utah-Nevada border at Wendover, Nevada (R. 282-306). It is the owner

of approximately 125 trucks, tractors and trailers of all different types (Ex. 17). Within six months prior to the hearing, Barton Truck Line, Inc. acquired ten additional Diesel tractors at a cost of approximately \$150,000.00. It owns a terminal with considerable office, dock, and storage space in Salt Lake City, Utah, employs approximately 150 people, and has terminals at Tooele, Ogden and Logan, Utah. It operates numerous daily schedules in the Counties of Salt Lake, Davis and Weber and gives same-day service (R. 216). During the month of April, 1964, Barton Truck Line, Inc. handled 586,114 pounds of freight from warehousing facilities located in Salt Lake City, Utah, including the Wycoff warehouse (Ex. 18, 19, R. 269-280). A substantial portion of the tonnage was consigned to business establishments in the Counties of Davis and Weber (R. 217). It performs a daily pickup service at the Wycoff warehouse and will perform an additional pickup service upon telephone request (R. 220). Barton Truck Line, Inc. maintains a storage room in its Salt Lake terminal which is cooled and, in addition, has refrigerated and insulated trailers. When required, due to the perishable nature of the commodity, it places the commodity in the cold storage facility and, in a period of four years, has received no claims as a result of the perishable nature of the commodity (R. 221). Barton Truck Line, Inc. has been able to handle all traffic directed to it (R. 222).

The Overland Moving Company is a common motor carrier engaged in the transportation of property within the Counties of Salt Lake, Davis and Weber, Utah. It is

the wholly owned subsidiary of Redman Van and Storage Company (Ex. 6). The Redman Van and Storage Company and its wholly owned subsidiary, Overland Moving Company, own to large warehouse complexes in Salt Lake City, a large warehouse complex in Ogden, and leases substantial warehousing space at Clearfield, Utah (Ex. 6). Within the scope of its authority, Overland Moving Company is authorized to perform the transportation of general commodities to and from all points in Salt Lake County, except the area in said County lying west of 4800 West and south of 1300 South, and all points in Davis County south of the junction north of Farmington, Utah (Ex. 6). In addition, it can perform transportation services to, from and between its warehouses and the warehouses owned by the Redman Van and Storage Company (Ex. 6).

The claim by petitioner, in its brief, that Overland obtained its authority to perform a transportation service between its warehouses in the Counties of Salt Lake, Davis and Weber and all points and places in said Counties in the year 1963, is incorrect. Overland's authority to perform said service was obtained in the year 1959.

In addition to the carriers appearing in protest to the application of petitioner, there exist numerous carriers with cartage authority throughout the area of Salt Lake, Davis and Weber Counties, which carriers are authorized to serve said area and would seriously suffer by the grant of authority sought by petitioner (R. 246).



## ARGUMENT

## POINT I

THE FINDING OF THE COMMISSION THAT A GRANT OF THE AUTHORITY SOUGHT BY PETITIONER WOULD ADVERSELY AFFECT EXISTING CARRIERS AND THE GENERAL PUBLIC INTEREST IS SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE DISTURBED ON APPEAL.

The Commission found that there is no clear showing of public need for the service proposed by petitioner, and that the grant of authority sought by petitioner would adversely affect existing carriers and the general public interest. The Supreme Court of Utah has consistently held that it will not disturb the findings of the Commission if they are supported by substantial evidence and are reasonable in view of the evidence. *Uintah Freighways v. Public Service Commission* 15 Utah 2d 221 (1964) 390 P.2d 238; *Milne Truck Line, Inc. v. Public Service Commission* 11 Utah 2d 365 (1961) 359 P.2d 909; *Salt Lake Transfer Company v. Public Service Commission* 11 Utah 2d 121 (1960) 355 P.2d 706; *Salt Lake-Kanab Freight Lines v. Robinson* 9 Utah 2d 99 (1959) 339 P.2d 99; *Fuller-Toponce Truck Company v. Public Service Commission* 99 Utah 28 (1939) 96 P.2d 722.

The record supports the findings of the Commission. It points to a "scoop shovel" approach on the part of petitioner and the fact that, were the application granted, existing carriers and the general public would be adversely affected. Petitioner owns only one warehouse, which warehouse is located in Salt Lake City. The application



contemplates the grant of an authority from non-existing warehouses and from all buildings and other complexes storing merchandise even though the same are owned by others (R. 121, 122). The broad scope of the application and the detrimental effect of a grant were recognized by the Commission in its findings (R. 330).

The record does not disclose any inadequacy with the existing carrier facilities and, in fact, the evidence is to the contrary.

The shipper witnesses appearing in support of the application did not disclose a need for service in addition to that now presently being furnished them by applicant under its existing authority and by the other carriers now authorized to serve the area involved. The carriers who appeared in protest to the application presented evidence disclosing substantial investments in equipment, facilities and personnel, numerous daily freight schedules to the area covered by the application, presently idle equipment as a result of insufficient volume of traffic, the lack of any complaint by the shipper witnesses concerning their services, and, in general, the fact that they all hold themselves out as ready, able and willing to perform the proposed service, and that they are, in fact, rendering the same.

## POINT II

THE APPLICATION OF PETITIONER IS ONE FOR AUTHORITY TO PERFORM THE TRANSPORTATION OF GENERAL COMMODITIES BY COMMON MOTOR CARRIER AND IS NOT A SERVICE OF A SPECIAL CHARACTER.

## POINT III

A WAREHOUSEMAN DOES NOT HAVE A DUTY TO PERFORM A TRANSPORTATION SERVICE.

The argument to Points II and III will be combined due to their relationship each to the other.

The claim of petitioner that it is engaged solely in the normal function of a warehouseman and that, as such, it has a duty to perform a transportation service on demand is contrary to fact and the law.

The functions of a warehouseman and those of a common motor carrier of property are separate and distinct. Involved in this proceedings is a petition for authority to engage in the transportation of property as a common motor carrier. The legislature recognized the distinction between common motor carrier and warehouseman and, as to the latter, Section 54-2-1(28) *Utah Code Annotated* 1953 provides:

“The term ‘warehouseman’ includes every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any grain elevator or any building or structure in which property is regularly stored for public use within this state, *in connection with or to facilitate the transportation of property by a common carrier* or the loading or unloading of the same. (Emphasis added)

The warehouseman has the duty to facilitate the transportation of property stored with it by the use of common motor carrier. It does not have the duty to perform a transportation service.

Petitioner misstates the meaning and effect of Section 72-1-8 *Utah Code Annotated*, 1953, which section requires a warehouseman to deliver goods upon demand. The delivery contemplated by said section means the voluntary transfer of possession from one person to another. Section 72-3-20 *Utah Code Annotated*, 1953. It does not mean that a warehouseman is obligated to transport by motor vehicle from place to place the property of others who may choose to employ him. The distinction between the word "delivery" and the word "transport" is contained in *Words and Phrases*, Vol. 42, Page 521, as follows:

"According to Webster's International Dict., Century Dict., vol. 2, and Black's Law Dict. 1184, there is a distinction between the words 'transport' and 'deliver'; the words being of entirely different origin and signification. To transport an article it must be received and retained by the person charged with the duty, while to deliver an article the person intrusted with the possession must part with it. The word 'deliver' is compounded of 'de' and 'liverare,' 'to set free; to set at liberty; to give over.'"

Consistent with terms used in Title 54 *Utah Code Annotated*, 1953, the Commission recognizes the distinction between the type of service which a warehouseman is authorized and required to render the public and the type of service required to be rendered by a common motor carrier of property. The record discloses the existence of adequate and efficient common motor service available to petitioner and its warehousing customers

so that petitioner can, and in fact does, facilitate the transportation of property stored with it by the use of common carrier.

#### POINT IV

THE COMMISSION PROPERLY APPLIED THE LAW AND DID NOT ACT IN AN ARBITRARY AND CAPRICIOUS MANNER, AND PETITIONER'S CLAIM TO THE CONTRARY IS BASED ON A FANCIFUL RECORD.

Wycoff, in an effort to support its claim that the Commission acted in an arbitrary and capricious manner, relies on a fanciful record conjured up by it, the specific claim being that the Commission, a year previous to petitioner's hearing, "dished out" a substantially identical authority to the Overland Moving Company. Needless to say, both proceedings are separate matters, and the record in the Overland matter, which is not a part of the proceedings in the instant matter, cannot be used to support petitioner's application. *Utah Power and Light Company v. Public Service Commission of Utah* 107 Utah 155 (1944) 152 P.2d 542.

The statements by petitioner, in its brief, to the effect that Overland Moving Company has no authority to serve the Wycoff warehouse properties; that in the year 1963 Overland, without a single public witness in support of its application, was granted authority between its warehouses in the three counties and all points and places in the three counties; and that Overland warehouses *were* to be in Salt Lake City, Clearfield and Ogden, as *are* the Wycoff warehouses, are untrue (Peti-

tioner's brief, pages 22, 23, 27, 28 and 29). We digress briefly to demonstrate that petitioner not only misstates the record but that, in its digression, it also misstates the facts.

The Overland Moving Company has authority to render a transportation service in the transportation of general commodities to and from all points in Salt Lake County and all points in Davis County south of the junction north of Farmington, save and except the area in Salt Lake County lying west of 4800 West and south of 1300 South (R. 224). Thus, it has authority to serve the Wycoff warehouse properties located in Salt Lake County.

The authority of Overland Moving Company to operate between its warehouses in the three counties and all points and places in the three counties was not granted in the year 1963. This is apparent from the record which discloses as follows:

“Overland Moving Company, a Utah Corporation, is a wholly-owned subsidiary of Redman Van & Storage Company, and is the local transportation unit of Redman. Its present authority includes the right to transport:

“\*\*\* (c) General commodities to and from the warehouses of Overland and Redman located in Salt Lake City on the one hand and points and places in Salt Lake, Davis and Weber Counties on the other hand, excluding places within the limits of Ogden City and from docks and warehouses of either of said companies located in Ogden City on the one hand and points and places in Salt

Lake, Davis and Weber Counties on the other hand, excluding points and places within the corporate limits of Salt Lake City.” (R. 244)

Overland’s authority to perform the above described service was granted to it by the Public Service Commission of Utah on the 20th day of August, 1959, in Case No. 3067-Sub 1. Numerous shipper witnesses appeared in support of the application, and other witnesses were present to testify. The only protestants appearing in opposition to the grant of authority were the Union Pacific Railroad Company and its affiliate Union Pacific Motor Freight Company.

At the time of Overland’s hearing, resulting in the grant of authority on August 20, 1959, Overland owned warehouses in Salt Lake and Weber Counties. The authority granted Overland in the year 1963 removed a restriction in the 1959 authority, which restriction prohibited Overland from performing a transportation service from docks and warehouses located in Ogden to points and places within the corporate limits of Salt Lake City and from docks and warehouses located in Salt Lake City to points and places within the corporate limits of Ogden City (R. 244). Applicant’s only warehouse is located in Salt Lake City, Utah (R. 14).

A comparison between the Overland Moving Company’s situation and petitioner’s application cannot be drawn, and petitioner’s efforts in that regard should be condemned. The broad scope of petitioner’s application, the fact that petitioner does not operate or lease warehousing facilities in Davis or Weber Counties, and the



affirmative showing in the record that the existing transportation facilities are adequate to meet the needs of the shipping public conclusively show that the Commission's decision is not arbitrary or capricious.

### CONCLUSION

The Commission's finding that there is no clear showing of public need for the service proposed by petitioner and that, were the application granted, it would adversely affect existing carriers and the general public interest is supported by substantial evidence and should not be disturbed on appeal. The claimed duty on the part of a warehouseman to perform a transportation service pursuant to our statutes pertaining to warehousemen is an erroneous application of the law and facts. The Commission's decision is not arbitrary and capricious and should be affirmed.

Respectfully submitted,  
GUSTIN, RICHARDS & MATTSSON  
By William S. Richards

*Attorneys for*  
*Overland Moving Company*  
*Magna-Garfield Truck Lines*  
*Barton Truck Line, Inc.*

SKEEN, WORSLEY, SNOW  
& CHRISTENSEN

*Attorneys for*  
*Lakeshore Motor Coach Line, Inc.*

PHIL L. HANSEN

Attorney General of Utah

*Attorney for*  
*Public Service Commission of Utah*  
*Hal S. Bennett, Donald Hacking*  
*Raymond W. Gee*