

1969

**Armored Motors Service v. Public Service Commission of Utah,
Donald Hacking, Hals. Bennett and Donald T. Adams,
Commissioners of the Public Service Commission of Utah, and
Frank J. Terry, Dba Bus Express Pickup and Delivery Service Co.:
Brief of Defendants**

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Recommended Citation

Brief of Respondent, *Armored Motors v. Public Service Comm'n*, No. 11672 (1969).
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IN THE SUPREME COURT OF THE STATE OF UTAH

ARMORED MOTORS SERVICE,

vs.

Plaintiff,

PUBLIC SERVICE COMMISSION
OF UTAH, DONALD HACKING,
HAL S. BENNETT AND DONALD
T. ADAMS, ITS COMMISSION-
ERS; AND FRANK J. TERRY,
DBA BUS EXPRESS PICKUP
AND DELIVERY SERVICE CO.,

Defendants.

Case No.
11672

BRIEF OF DEFENDANTS

REVIEW OF AN ORDER OF THE PUBLIC SERVICE COMMISSION OF UTAH

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BRIEF OF DEFENDANTS

STATEMENT OF KIND OF CASE

Frank J. Terry, dba Bus Express Pickup and Delivery Service Co., filed an application with the Public Service Commission of Utah for authority to serve as a common motor carrier in interstate and intrastate commerce for the transportation of packages not to exceed fifty pounds per package between all points and places within Salt Lake, Davis, Utah, and Weber Counties, State of Utah.

DISPOSITION OF THE CASE

By Order dated March 7, 1969, the Commission granted to the applicant defendant a Certificate of Public Convenience and Necessity authorizing service as follows:

Transportation of general commodities by motor vehicle over irregular routes between all points and places in Salt Lake County, and all points and places in the area of Davis County South of the Junction of U. S. Highways 89 and 91, just North of Farmington, Utah, save and except that there is excluded from said area that part of Salt Lake County which lies West of 4800 West and South of 1300 South but the area to be served shall include the town of Kearns, Utah; provided further that no service shall be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, and each package or article shall be considered as a separate and distinct shipment; and provided further, that no service shall be provided in the transportation of packages or articles weighing in the aggregate more than 100 pounds from one consigner at one location to one consignee at one location on any one day; and

Restricted against the transportation of: (1) Commercial papers, documents, and written instruments as are used in the conduct and operation of banks and banking institutions; (2) of papers used in the processing of data by computing machines, punch cards, magnetic encoded documents and office records, and (3) of eye glasses, frames, lenses, optical, camera, and hearing aid supplies.

RELIEF SOUGHT ON APPEAL

Defendants pray the Order of the Public Service Commission be affirmed.

STATEMENT OF FACTS

Defendants do not agree with the Statement of Facts in plaintiff's brief, in that it does not recognize that the application involved a new service not now being rendered by any carrier. The unique element of the proposed service remained paramount throughout the proceeding, notwithstanding various restrictive amendments made in the course of the hearing to conform to the evidence, and amendments made at the commencement of the hearing based upon the applicant's preparation for hearing and study of need within the proposed area to be served.

Defendant correctly states that at the time of the hearing applicant Frank J. Terry was a full time bus driver for Continental Bus Company, in addition to his business known as Bus Express Pickup & Delivery Co., which holds authority from the Public Service Commission. (R 35). He thus had extensive experience in the transportation business, and affirmed to the Commission his ability to provide additional capital and equipment to perform the service the application contemplated. (R 37.) The proposal as indicated was unique to the Wasatch front area, including a direct pick-up and delivery service between consignor and

consignee ,a pick-up and delivery to connecting motor carriers, and a collection and re-distribution (R 40) of packages, with a regular daily stop or stops at a consignor's place of busines, without the necessity of consignor calling the carrier to pickup packages (R 41).

The proposal further would call for the use of radio dispatched equipment (R 42), and a United Parcel-type program where the consignor could use stamps purchased from applicant (R 43). Terry testified that he had obtained facilities from which to render the proposed service and plaintiff complains that he had no written or binding lease or purchase agreement for such facility, but overlooks the fact that the landlord-owner of the building testified and confirmed the commitment (R 351-352).

The evidence shows that the applicant had carefully studied the costs of his operation on an hourly basas (R 98) and the traffic potential assisted in this study by his Small Business Administration counselor Mr. Rees (R 89) although plaintiff complains that the cost factor was not computed on a per mile or per trip basis).

Plaintiff assaults the financial position of the defendant, but the financial weakness of the defendant, if any, was fully explored by the Commission and the defendant candidly admitted (R 87) his current position; he testified that he was working with the Small Business Administration to obtain financing (R 86-87) (which financing was made available after the

Certificate was obtained). The Commission undoubtedly carefully considered the extensive experience of the applicant in the transportation business, coupled with the potential of the new service proffered, when it found "It does not appear as an absolute certainty from the evidence in the record either that the proposed service is financially feasible or that the applicant at the present time has sufficient economic resources to meet all the requirements that may develop. It does appear that such service is needed, that a substantial volume of traffic is presently available, and that substantial additional volume may be generated after such service has been instituted. Taking these factors into consideration, and in view of all of the evidence in the record, the Commission finds that there is a real and substantial probability that the needed service can and will be afforded and that the applicant will be successful. *As with any new and different transportation service, it may involve substantial risks, but the public need justifies the attempt.*" (R 494-495) (Emphasis added)

When substantial evidence had been received by the Commission, able counsel for other protesting carriers recognized that the applicant had met its burden of proof (R 375) within the Salt Lake County and South Davis County area, and withdrew from the proceeding, leaving only the plaintiff protesting the grant of authority. It should be noted that the plaintiff holds no authority to serve in South Davis County (R 427e-427f).

Plaintiff states that when it obtained its package authority it went to great length to solicit business, employing a traffic solicitor distributing advertising material and contacting businesses. Such efforts, however, must have at best been limited, for its efforts did not include major shippers who supported this application, such as Regional Sign Co., Western Electric, Salt Lake Hardware (R 427b), IPCO Hospital Supply, Sperry Utah, Professional Pharmacies, Rocky Mountain Machinery, Wheeler Machinery (R 427b, c, d). The plaintiff admitted its principal business is the transportation of valuables (R 411).

ARGUMENT

POINT I

THE EVIDENCE SUPPORTS THE COMMISSION'S FINDINGS THAT THERE IS A NEED FOR DEFENDANT'S PROPOSED SERVICE, AND THAT THE PUBLIC CONVENIENCE AND NECESSITY REQUIRES GRANTING THE DEFENDANT'S APPLICATION.

It has been repeatedly held that the Findings and Orders of the Public Service Commission of Utah are presumed correct and valid and will not be reversed unless there is no reasonable basis to support them, and the burden is upon the plaintiff to show that the findings are in error. *Lewis v. Wycoff Company*, 18 Utah 2d, 255.

The testimony of shipper witnesses as presented at the hearing does support the need for the service applicant proposes—a unique type of service, different and better than the service presently available, involving both a collection and distribution system and direct delivery service on small packages within the Wasatch front area. The unique service contemplates daily calls on a regular basis at business houses, implemented by direct service from a consignor to a consignee when desired. There was clear and convincing testimony that there is a voluminous amount of traffic to be tendered in the small package field; that the applicant has the ability to perform this type of service, has had experience in comparable handling, pick-up and delivery of small packages and that the impact of such service on the plaintiff weighed as against the public needs and the adverse effect, if any, would be minimum, especially since Armored Motors Service does not operate in Davis County.

Plaintiff complains that some witnesses contemplated a better rate through this proposed service, but overlooks that this Court in *Lakeshore Coach Line, Inc. vs. Welling*, 9 Utah 2d, 114, charged the Commission to consider among other things, providing the public with “the most frequent, *economical* and convenient service possible, not only presently but in the long run.” (Emphasis added).

It is apparent that the grant of this application will be responsive to shipper requirements, and will

not result in a material diversion of traffic from the plaintiff. Plaintiff in its brief proposes an abstract of shipper witness testimony, but defendant will review such testimony as a principal part of this brief:

Martin Gladowski, Regional Sign Company, Plastic Fabricating and Supply and American Label: Mr. Gladowski testified that the proposed service "would be an additional type of service, one that our customers can rely on. It would necessitate—or eliminate the necessity of having to call a common carrier by 3 o'clock in the afternoon for a specified pickup." (R 122) To the knowledge of defendant, there is no common carrier along the Wasatch front presently rendering a pick-up service to deliver commodities to connecting carriers.

Jay Winger, Univac: Mr. Winger testified as to the inadequacy of existing service. (R 131, 145) His company strongly supported Salt Lake County service: "We have many many local vendors whom we procure material from, and because of the high-tolerance and quality of material that's required in making precision equipment such as we manufacture, many shipments that are brought to our place of business are rejected. We would use this service in order to return a lot of this rejected material." (R 133). Mr. Winger also testified as to a need for delivery to connecting carriers (R 142). He cited an instance where he was unable to obtain service from the plaintiff for more than 24 hours (R. 145).

Neil B. Peterson, Homelite, Division of Textron. The principal place of business of this shipper is North Salt Lake, Davis County (R. 149) He testified with respect to the need for transportation of small packages from his company's place of business to the busses (R. 152) and that no other carrier had offered such a service to Homelite (R. 153). Plaintiff could not render such a service inasmuch as it does not serve Davis County.

Richard Wesley Crouch, Carr Printing. Here again, the principal place of business of this shipper is in Bountiful, Davis County, where the plaintiff does not serve. He stated what his company needs (R. 159) "Actually, what I would like is for someone to stop at the plant and pick them up rather than for us to have to break somebody loose to carry them in to either a bus line or into the post office. Everytime we do this, we have to break someone loose from the equipment where they could be earning us money and have them take the time to be a delivery boy."

A. C. Dodge, Western Electric Company. Mr. Dodge stated that the proposed Terry service would be of benefit to his company because "Within Salt Lake City area it would replace parcel post, and it would also replace private carriage insofar as same day service is concerned." (A. 169) He also stated that he had experienced difficulty getting same day service from common carriers on emergency shipments. (R. 170)

W. G. Koplín, Salt Lake Hardware Company. Mr. Koplín testified that his company needed a daily pickup and delivery service on small packages, at a reasonable rate (R. 181) He called the Commission's attention to the nation-wide problems of the small package shipper. (R. 181)

Edward L. Evans, Strevell-Paterson Hardware and Motor Mercantile Company. Mr. Evans testified that his companies needed a service to compete mostly with parcel post. (R. 199).

Bobby Lee Foster, The Distribution and Translation Department of the Church of Jesus Christ of Latter Day Saints. Mr. Foster stated that his department required a fast service and a pick-up and delivery, and indicated that the LDS Church ships voluminously with parcel post, on which commodities they would like common carrier service. (R. 211). He affirmatively stated that traffic would not be diverted from other trucking companies. (R. 211).

Boyd Openshaw, Fed A. Carleson Pontiac. Mr. Openshaw testified as to a need for the proposed direct delivery service in the Salt Lake County area. (R. 230). He further stated that the proposed service would fill a gap in the services offered (R. 226) and that parcel post was slow (R. 227).

John Italasano, Professional Pharmacies. Mr. Italasano testified that he had been in the pharmacy business for over 20 years, and that since the late 1940's

no common carrier had solicited his traffic in a pickup and delivery service. (R. 237) His companies ship approximately 50 packages a day (R. 235), mostly within Salt Lake City (R. 237). He stated that he would like to eliminate buying and maintaining his own equipment and hiring drivers (R. 239).

Arthur Holmgren, IPCO Hospital Supply. Mr. Holmgren indicated to the Commission that "this picking up in the afternoon and delivering in the morning or for the morning and afternoon delivery, that's a large—that would be something that would really help when we could be sure of that being done." He also stated that "it could help on a lot of things to relieve our truck, by using one for small shipments for around Salt Lake City and probably Granger and Murray and places like that. (R. 252). He had had difficulty in using the plaintiff's service. (R. 254).

L. A. Marshall, Atex, Inc. Mr. Marshall stated that his company has traffic moving to points within Salt Lake County that require common carrier service (R. 265).

Roger E. Mellor, Westinghouse Electric Supply. Mr. Mellor testified that his company would expect to divert parcel post to the defendant (R. 275) and also testified that they did not operate their own equipment into South Davis County (R. 276). He stated, "Our biggest problem is service. We have a lot of competition in this field, and also in the nature of a break-

down—with a breakdown on something it is really important we have fast service.” (R. 273).

Raymond Peterson, Billinis Distributing Company. Mr. Peterson rightly compared the proposed service to United Parcel Service in other cities. (R. 281) He stated the difficulties his company had with parcel post (R. 284) and the need to have a service the customer could depend on. He also stated that it would be a convenience to his company to have the proposed service for after-hours delivery to connecting carriers. (R. 287)

Woodrow W. Marshall, Pembroke's. Pembroke's has approximately 150 deliveries a day. Mr. Marshall stated that they required reliability of service and speed of delivery (R. 292), and that the two proposals of service involving collection and re-distribution as well as direct delivery would be excellent. (R. 292). He stated that such a service into the Davis County area was most important. “I believe that there is business there that we could have that we aren't getting now, without increasing our delivery service ourselves. I think this could mean expanded business for us.” (R. 295).

Adrian H. Pembroke, A. H. Pembroke Company. Mr. Pembroke stated that his company needed such a delivery service as applicant proposes and stated that his company had gone so far as to use taxi-cabs in order to meet the need. (R. 300). He stated, “This is our

critical point right here, is the local delivery, the package delivery." (R. 303) His company had made numerous efforts to obtain service. (R. 300, 306).

Douglas L. Elton, Stevens and Brown Sporting Goods. Mr. Elton stated that his company had had difficulty with parcel post, and would like to divert their parcel post to the defendant (R. 312). He stated that there was a need for service in the "Salt Lake County area, especially a little bit South and out into the Sandy vicinity, because we ship a lot of packages that—well, the one and two pound variety that now is parcel post and we will ship it on a Monday, and they won't get it until Wednesday or Thursday, and they would like it on a Tuesday, and it is either that we have to deliver it out to 7700 South and 26th East, this type of thing." (R. 316-317).

Gordon W. Snow, ZCMI. Mr. Snow testified that ZCMI would like to have a service to supplement their own fleet of delivery trucks during the holiday season and during sales (R. 325). He further stated that "if it were economically feasible for us, we would be glad to have someone else carry this extra load * * * that, plus, as we get into five stores, we would just as soon not be in the transportation business, but as I say, once again, that is a problem of economics, and we could make no commitment until we studied our costs and rates and so forth." (R. 325). Mr. Snow stated that during his employment with ZCMI he had never been contacted by any local delivery service. (R. 329).

Chris Dokos, Stewart-Warner Alemita Sales. Mr. Dokos stated, "I am primarily interested in getting a little better service locally than we have been getting or that has been available, you might say." (R. 350) And further testified with respect to delays with parcel post (R. 350). He also stated that there was a need for transportation to connecting carriers who did not make pickups after 3 o'clock. (R. 355-356). He also stated that he had never been solicited by any carrier providing a pickup and delivery service (R. 358).

The Commission could fairly conclude upon the basis of this witness' testimony and similar testimony that services of other carriers allegedly interested in small package traffic "were not sufficiently promoted and publicized to accomplish the necessary and desired purpose." *Lakeshore Motor Coach Lines v. Salt Lake Transp. Co.*, 21 Utah 2d 423.

Other witnesses testified, and stipulations were entered into regarding still additional witnesses whose testimony would be comparable to those who appeared at the hearing.

The Public Service Commission at one time in another matter before it (and subsequently before this Court) found that experienced counsel, represented both the applicant and the protestants in this proceeding. On the basis of prior experience and with the practice afforded by the length of the proceedings herein, counsel were particularly adept at inducing lay wit-

nesses on cross-examination to accede to counsel's general characterization of their testimony in the above terms. For this reason, greater weight must be given to factual presentations regarding shipping problems than to such general characterizations." The same was very true in the instant proceeding now before this Court. On cross-examination many agreeable shipper witnesses answered the protestants' hypothetical questions favorably.

POINT II

THE PROPOSED SERVICE IS ECONOMICALLY FEASIBLE AND THE APPLICANT IS FINANCIALLY ABLE TO RENDER SUCH SERVICE.

When plaintiff complains that the proposed service is not economically feasible it overlooks several factors. One is the volume of traffic obviously available as indicated by the shipper support and by applicant's study. (R. 84) Another factor is that although the per package rate might be lower than some carriers, there is an additional stop-charge proposed to be in effect for regular calls at business houses (R. 60). Still an additional factor is the reduction in overhead achieved by the stamp plan referred to hereinabove, and the lower overhead available to the applicant in the leasing of his facilities as testified to by applicant and by the landlord, Chris Dokos (R. 351-352). It would seem a matter of common sense to conclude that one

of the basic factors in support of common carriage or transportation for hire is that individual business houses cannot afford to be in the transportation business. The testimony cited by plaintiff regarding the testimony of Mr. Italasano (R. 239-241) to the effect that it cost him \$1.00 per delivery shows exactly that—that Mr. Italasano could not afford to transport fifty packages at such a cost. It does not in any way purport to show that a service transporting hundreds of packages a day would not be economically feasible. In any event, as plaintiff's counsel repeatedly urged during the course of the hearing, compensable rates are a matter for the determination of the Commission.

Plaintiff complains that the witnesses who testified did not know the ultimate restriction of the application, but fails to state that such amendment could only result in lesser costs of operation.

It should be urged that the Commission in making its decision was dealing with a carrier already certificated by the Commission who has performed commendably in the past and to the satisfaction of both the Commission and the shipping public.

The Commission's careful consideration of the economic feasibility of the proposed service and the applicant's financial ability to perform is readily reflected in its finding hereinabove set forth, concluding "As with any new and different transportation service, it may involve substantial risks, but the public need

justifies the attempt.” (R. 494-495). The exact role of the Commission is to make such determination carefully balancing the public convenience and necessity.

POINT III

THE PUBLIC SERVICE COMMISSION ORDER WAS BASED UPON A PROPER AND LAWFUL CONSIDERATION OF THE EVIDENCE.

Plaintiff in its brief draws an analogy to the recent matter of *Lewis Bros. Stages, Inc. vs. Public Service Commission, et al.*, 22 Utah 2d 287, wherein this Court set aside an order pending a transcript of the evidence. There is, of course, a transcript of the Record before the Court in the instant matter, and it is urged that the circumstances are significantly different in the instant case. First of all, Commissioner Adams participated in the hearing, together with the hearing examiner. He, thus, was in a position to review the evidence with the other Commissioners from time to time during the course of the hearing. As provided by Section 54-1-3, Utah Code Annotated 1953, as amended,

“ * * * Any investigation, inquiry, or hearing which the Commission has power to undertake or to hold may be undertaken or held by or before any Commissioner or an examiner appointed by the Commission. All investigations, inquiries, and hearings by a commissioner or an examiner appointed by the commission shall be deemed the investigations, inquiries and hearings of the com-

mission; and all findings, orders or decisions made by a commissioner or an examiner appointed by the commission when approved and confirmed by the commission and filed in its office, shall be deemed the findings, orders, or decisions of the commission and shall have the same effect as of originally made by the commission."

The commission approved and confirmed the findings of Commissioner Adams and the hearing examiner. The Court is well aware that over the course of the years the Commission has always assigned one or more commissioners to hear matters, issued Reports and Orders thereon, and had such matters then reviewed by the Court when a transcript has been prepared on appeal. The caseload of the Commission and the manpower shortage has been such that absent such procedure the Commission would be wholly unable to function if it had to await the transcription of all testimony. Oral review among the Commissioners of evidence heard by a particular Commissioner certainly satisfies the statutory requirements and enables the Commission to determine matters before it without undue delay which would work a hardship both upon applicants and the public.

CONCLUSION

Defendant respectfully submits that the decision of the Commission is supported by substantial evidence and should be affirmed.

“Under well established rules the findings and decisions of the Commission are endowed with a presumption of verity; and they should not be reversed unless it is shown that there is no reasonable basis in the evidence to support them . . .” *Lakeshore Motor Coach Lines vs. Salt Lake Trans. Co., supra.*

Respectfully submitted,

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