

1967

Garrett Freightlines, Inc. and Barton F. Lyman, Dba Lyman Truck Lines v. Public Service, Commission of Utah and Hal S. Benne: 'Tt', Donald Hacking, and D. Frank Wilkins, Commissioners of the Public Service Commission of Utah, and Joe C. Hunt, Dba Hunt Truck Lines : Brief of Defendants

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

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GARRETT FREIGHTLINES, INC.
and BARTON F. LYMAN, dba LY-
MAN TRUCK LINES,

Plaintiffs,

- vs. -

PUBLIC SERVICE COMMISSION
OF UTAH and HAL S. BENNETT,
DONALD HACKING, and D. FRANK
WILKINS, Commissioners of the Pub-
lic Service Commission of Utah, and
JOE C. HUNT, dba HUNT TRUCK
LINES,

Defendants.

Clerk, Supreme Court, Utah

Case No.

10618

UNIVERSITY OF UTAH

JUL 10 1967

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BRIEF OF DEFENDANTS

Review of the Order
of the Public Service Commission of Utah

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STATEMENT OF THE KIND OF CASE

Plaintiffs' statement is correct, however it should add that the application sought a transfer of the authority of R. A. Gould, Inc. to Joseph C. Hunt. The Order of the Public Service Commission transferred this authority to Joseph C. Hunt and merged the Hunt and Gould authority in a new certificate. The Order can-

celled authorities previously issued to both R. A. Gould, Inc. and Joseph C. Hunt.

The disposition of case, and relief sought on appeal set forth in plaintiffs' brief is acknowledged as correct and defendants resist the attempt to set aside the Order of the Public Service Commission.

STATEMENT OF FACTS

Plaintiffs' brief is primarily a statement of facts. Defendant agrees with many of the facts set forth. However, many of the facts are stated as conclusions which defendant controverts. Also, many facts supporting the Order of the Commission have been omitted by plaintiffs.

In this statement of facts defendant will restate facts stated by plaintiff which are controverted and will add omitted material facts. Defendant will not attempt to restate any facts set forth in plaintiffs' brief which are not controverted.

Defendant Joe C. Hunt, dba Hunt Truck Lines, (herein Hunt) presently holds intrastate motor carrier operating authority in the territory sought to be served. (R. 15) In 1938 Hunt was authorized by the Public Service Commission to serve as a common carrier of general commodities between Salt Lake City and Blanding, Utah. (Certificate No. 510)

On October 29, 1964, Hunt entered into a sales contract with R. A. Gould, Inc., a Utah corporation, (herein

Gould) wherein Hunt agreed to purchase certain intrastate authority of Gould. (Exhibit No. 4) The Gould authority sought to be purchased by Hunt authorizes transportation as a common carrier of general commodities, with certain exclusions, between all points and places in Grand and San Juan Counties, Utah. (Certificate No. 1082 Sub 1)

By an application filed November 12, 1964 Hunt seeks to have transferred to him this common carrier certificate of Gould. (R. 899) By this application Hunt proposes to combine Gould's authority with his existing authority and to operate on a direct call basis between Salt Lake City and all points and places in Grand and San Juan Counties, Utah. (R. 899-919)

Hearing on the application was held in Salt Lake City, Utah on March 22, 1965 and continued to Moab, Utah from October 19, 1965 to October 22, 1965. The application was opposed by Garrett Freight Lines, Inc. (herein Garrett), Barton F. Lyman, dba Lyman Truck Lines (herein Lyman), Rio Grande Motorway, Inc. and the Denver & Rio Grande Western Railroad Company (herein Rio Grande). (R. 8) Gould appeared in support of the application. (R. 8)

The Commission's Report and Order issued on January 19, 1966 canceled Certificate No. 1082 Sub 1 issued to Gould, canceled Certificate No. 510 issued to Hunt, and issued a new Certificate to Hunt authorizing "operations as a common carrier by motor vehicle over regular and irregular routes, using all necessary highways for the transportation in intrastate commerce, of general

commodities, (excluding petroleum and petroleum products in bulk, in tank vehicles; acids and chemicals in bulk, in tank vehicles; commodities the transportation of which because of size or weight require the use of special equipment; and the movement of explosives except where origin and destination are both in Grand and San Juan Counties), between: (1) all points in Grand and San Juan Counties, and (2) between Salt Lake City, Utah, on the one hand, and all points and places in Grand and San Juan Counties on the other hand. No service to be authorized to and from points in the City of Green River when such points are in Emery County. It is further ordered that said certificate include authority to transport soda water, ice cream, and perishable foods from Price, Utah to Blanding, Utah." (R. 944-945) Garrett and Lyman filed a Petition for Rehearing which was denied by the Commission on March 29, 1966.

Respondent will now set forth specific testimony in the record supporting the Commission's Order.

The first shipper witness, a Mr. Carl D. Wagner, Sales Representative for Western Mine Supply in Monticello, Utah, testified that his company handles hardware, mine supplies, automotive parts and truck parts. (R. 68) They sell in all San Juan County. (R. 68) He testified that the volume of his business has increased 25% out of Salt Lake City over one year ago. (R. 75) He testified that his company presently has the services of Garrett who does not deliver on Saturday and who delivers in Monticello after 1:00 o'clock of each day. (R. 70) Mr. Wagner was asked:

“Q. Do you have any *need for any different service* than you are now enjoying from Salt Lake City?

A. Yes; it would help us a great deal to have somebody to haul over 100 pounds and *overnight shipments*.

Q. Overnight shipments? That means ordering it from Salt Lake and receiving it the next morning?

A. Right.

Q. And this service you are seeking, do you have any present satisfactory service for Saturday morning deliveries?

A. No, not from Salt Lake down, I don't.

Q. Do you have any need for that kind of a service?

A. Yes, we do.

Q. For a Saturday morning?

A. We have Friday orders we need Saturday morning.” (R. 70-71)

Mr. Harold Jacobs, the manager of Three States Supply at Moab, Utah, testified that his business is selling automobile and truck parts and equipment. (R. 77) He testified that his business presently has 175 customers. (R. 77) Mr. Jacobs testified that the *service of Garrett is unsatisfactory* because of having no order

after 3:00 o'clock a day before the next day's delivery and the fact that Garrett does not deliver on Saturdays. (R. 80) He testified that his company has a need for delivery on Saturdays and a need to be able to originate shipments in Salt Lake City after 3:00 o'clock on any particular day. (R. 80) On cross-examination he stated:

“Our business has decreased, but the need for Saturday service has not decreased. We still have emergencies when we would like to have Saturday delivery, and we still have need for emergency material that we aren't aware of until after 3:00 o'clock in the afternoon, and *our suppliers are afraid to call you people after 3:00 o'clock.*” (R. 85)

Mr. Jacobs was recalled at the continued hearing in Moab and stated that Hunt had performed the service under temporary authority which they had represented they would perform and that this was the type of service which was essential to his business. (R. 195)

Mr. James E. Hunt operates the San Juan Trading Post in Mexican Hat, Utah. (R. 90) This is a general merchandise business, hotel, cafe, scenic tours and service station. He stated that it presently *takes two to three days for transportation service coming from Salt Lake to his business.* (R. 91) He stated that he has a need for overnight service from Salt Lake City. (R. 91) He testified that he *has had to return bread because of it being moldy.* (R. 93)

Mr. Tom Holdaway, District Supervisor for Continental Baking Company in Salt Lake City, Utah (R. 98)

testified they had distributors in Moab, Monticello and Blanding. (R. 98) He testified that it is their desire to get the bread to the consumers as fresh as possible. He stated this makes a difference in the sale of a loaf of bread. (R. 101) He testified that authorizing the Hunt service would increase the volume of his business as follows:

“A. Well, it would just about have to increase, because the present rate that we get our merchandise down there, I feel — we have a competitor that gets his merchandise in there fresh everyday, every morning, and he gets fresh merchandise, and like I say, Mrs. Housewife wants fresh merchandise—we are having a hard time competing with 3-day old merchandise against this fresh merchandise.” (R. 105) (His competitor who has fresh bread everyday has a bakery in Grand Junction, Colorado.) (R. 107)

He further testified that Friday and Saturday deliveries are more important than other days of the week as follows:

“A. Yes; Friday and Saturday is the time of the week when the volume is up in grocery stores — I mean, the grocery stores do their biggest volume at the end of the week. Our ads for grocery stores comes out at the end of the week, and, therefore, they do more volume toward the end of the week.” (R. 105-106)

This witness also testified that they need shipments in the morning, not in the afternoon. (R. 110) He testified as to attempting to get service from a non-authorized

carrier to take care of their transportation requirements. (R. 110)

Mr. Tom Holdaway testified at the continued hearing for his employer, Continental Baking Company. (R. 286) *He testified as to an increase in sales for his Monticello distributor over previous years' sales since the institution of the temporary authority operation by Hunt.* (R. 294-295)

Mr. J. W. Holland testified he is in the Holland Upholstering Company business. (R. 197) He handles furniture, carpets, draperies and rebuilt furniture, and that his principal suppliers are in Salt Lake City. (R. 197) He testified that they *frequently need Saturday deliveries which he cannot obtain through Garrett.* (R. 197) He pointed out the need for this service as follows:

“A. Well, to have Saturday delivery — in fact, a lot of jobs that I have — say start on a weekend, if I don't have the necessary — like carpet, if I don't have it sitting there I can't go in and tear somebody's house up Monday morning, you see, so I have to know that I have these goods available, and my business it is one of these things that people may wait three months to tell me to order it, and they want it the next day.”

Q. And how often has this situation, where you have used Hunt's service for Saturday delivery, been used by you in the last six months?

A. I couldn't give you an exact figure, but I have used it several times, for that reason.” (R. 198)

Kenneth Erbs, a partner in Valley Firestone in Moab, Utah, testified that they received shipments from Salt Lake City on Saturdays. (R. 275) He testified:

“A. Well, normally this is the reason that I’m here today — this is the reason that we feel we would like to have two truck lines is because of the fact that we can sell as late as 12:00 o’clock, 1:00 o’clock on Friday afternoon and we can have an appliance, such as a dishwasher or something the woman wants by 9:00 or 10:00 o’clock on Saturday morning.

Q. And is that type of service essential to the success of your business?

A. Well, the way people are now, motorized, if they want something and we don’t have it in stock, *they are just as apt to take Saturday and go buy it somewhere else.*” (R. 276-277)

Marion H. Hazelton doing business as H & W Dairy, a bread and milk distributor in Monticello testified that he has been carrying the products of Continental Baking Company. (R. 298) He testified he has used Hunt since July of 1963. He testified that when he first started *he had to go down to Blanding, a distance of 44 miles round trip, to pick up the bread and bring it back.* (R. 300) Since Hunt was granted temporary authority he has had bread five days a week. (R. 300) It now arrives at his place of business between 5:00 and 6:30 A.M. (R. 300) He was then asked:

“Q. Then, will you state whether or not this method of delivery has expedited at all your merchandising of bread?

A. I think that *my sales* will show that it has had a *very definite affect on my business*.

Q. *Do you attribute that to the transportation?*

A. To the *receiving of fresher bread*, yes, I do. I was trying to compete against a daily delivery against twice a week, and at most three times a week.” (R. 301)

He was cross-examined by plaintiffs’ attorney and answered:

“Q. Do you know anything about *Garrett’s service* into Monticello out of Salt Lake?

A. Unless it has changed, your *trucks were getting into there too late* to suit my business.

Q. Getting in about noon?

A. Noon or 1:00 o’clock, something like that; yes.

Q. And was there some reason why you never attempted to use the Lyman Truck Line in conjunction with Hunt? Did you know there was such a service?

A. Yes, I did. Mr. Lyman contacted me on it.

Q. I see.

A. But I chose to haul it myself.

Q. I see. And I take it if this application is denied, you would go back then to hauling it yourself?

A. I believe I would.

Q. You're not sure though?

A. Well, I did before." (R. 302-303)

Harold Louis Frost has a retail store and wholesale meat business named Blue Mountain Meats in Monticello. (R. 306) They purchase frozen foods in Salt Lake City. (R. 307) They receive deliveries regularly by Hunt since the grant of temporary authority. (R. 308) He testified as to Garrett's service:

"Q. When you received them by Garrett, how did you receive them? Did Garrett's truck come to your establishment?

A. Yes.

Q. And about what time of day were those deliveries?

A. Oh, it varies. In the afternoon.

Q. Sometime in the afternoon?

A. Sometime in the afternoon.

Q. Varies from say what to what?

A. Oh, from 1:00 o'clock until — oh, 3:00 or 4:00 o'clock.

- Q. Were they on a daily basis?
- A. Well, I — I think that we could call — *if we got our orders in soon enough the day before*, we would get it that next afternoon.
- Q. How early would you have to get your orders in to get them the next day?
- A. Oh, by noon or thereabouts.” (R. 308)

By the service of Hunt this shipper is receiving deliveries at 6:30 A.M. (R. 309) This is a necessity to this shipper because they have a delivery truck that leaves at 8:00 A.M. (R. 309) Thus, the customers of Blue Mountain Meats receive shipments one day earlier under the Hunt service. (R. 309) The shipper also saves the use of his storage facilities from the time when Garrett’s trucks arrive in the afternoon until his delivery truck leaves at 8:00 in the morning. This is a significant factor in frozen food storage. He testified:

- “Q. What about storage, is there any advantage in having the early morning delivery for storage?
- A. Right. If we can get it in and out the same day, then we don’t have the problem of storage.” (R. 310)

He testified that Saturday delivery is important to his business so that he can have it ready for trucks to dispatch at 8:00 o’clock A.M. Monday morning. (R. 321) Garrett’s truck does not arrive until Monday afternoon. (R. 308) He testified that he was not satisfied with

Garrett's service from Denver stating "they should have a better way of delivering it." (R. 319)

Bill Dunow testified that he has a 100,000 bushel capacity elevator in Monticello for his grain, bean and feed business. (R. 322-323) He testified that 95% of his wheat is shipped to Salt Lake City via truck. (R. 323-324) He was asked if he had enough trucks available and answered:

"A. No. We — during harvest if we could get 7 or 8 trucks a day why it would be fine. Usually you get 1 or 2 or 3.

This year it was the worst of any. *We lost maybe 50,000 bushels of wheat went into Colorado because we couldn't handle it.*

Q. Was that because of *lack of trucking facilities?*

A. That is correct.

Q. How about the bean crop? Did you have a bean crop this year?

A. Well, we couldn't take any because we were full of wheat.

Q. So you lost the bean crop as well; is that true?

A. Yes." (R. 324)

He testified that he is using Hunt every day of the week and that they have not been able to supply enough trucks during harvest season. (R. 324-325) As to Garrett's service he testified:

“A. We use *Garrett* a lot, we use them as much as we can when harvest season hits, because we use all trucks, but they *pile them up quite a bit before they get them unloaded*.

Q. What do you mean by that?

A. They leave them in the yard for awhile.

Q. In the yard, to get them to point of delivery?

A. We used to be able to draft on loads, your bank draft, when they would leave the elevator, and they would pile up 5 or 6 or 8 trucks in a lot and wouldn't get them unloaded, and the company cut us off on it because they said if we were going to ship wheat they wanted it in their elevators before they paid us.” (R. 327)

He testified Lyman does not have a truck big enough to haul his requirements. (R. 328) He testified as to the need of his business for the service of Hunt as follows:

“Q. If you do not have the *service of Hunt*, does it make it more necessary the purchasing of this additional elevator?

A. Well, this year it *would have really hurt if we did not have them* because one load a day meant taking in 5 more bobtails of wheat, and we lost — I know we lost 50,000 bushel anyway that went to Colorado.” (R. 333)

Forest L. Simpson, partner in Parkland Furniture of Moab, Utah testified that his company buys and sells furniture, appliances, rugs, draperies, etc. (R. 349-350)

Most of their furniture comes from Salt Lake City. (R. 350)

Mr. Simpson testified:

“A. Well, if we have an order that we need in a hurry on Saturday — I mean, we order on Friday. Most of our shipments, say we call in the morning, particularly in appliance or TVs, we would like to get down here — it is on a special order — and if it happens to be on a Friday the *customer would like to have it as quick as he can, so we designate Hunt to bring it down.*

Q. *Have you found that service quicker than on Garrett?*

A. *Well, it saves a couple of days.*

Q. It does.

A. Yes.” (R. 353)

He responded to a question of Garrett’s attorney as follows:

“A. Well, we had — like I say, on a carpet delivery, they get a shipment of carpet in and sometimes they don’t get it unloaded until *it is too late to get in on Garrett. They can put it on Hunt’s and we get it the next day.*

Q. You are talking now about Saturdays?

A. No.

- Q. In other words, you want to save the week-end?
- A. Well, this could be any night in the week, see.”
(R. 356-357)

This witness testified that all of its interstate shipments which amount to about 20% of his business are moved by Garrett. (R. 357) He testified that they are not as concerned with fast delivery on the interstate shipments as they are with those developed from Salt Lake City, Utah. (R. 360) He stated this was because they know that shipments coming from the factory may take six weeks and two or three days' delay in delivery is not significant. (R. 360) Then he said:

- “A. But, it is the stuff that we know we can get from Salt Lake down here that we are concerned about.

But, we order some furniture for somebody, and we say, ‘Now, this delivery might be 30 days or 6 weeks.’ They understand that, see.

- Q. I see.
- A. But, *we sell something and say we can deliver it the next morning, this is what we are concerned with.*” (R. 360)

Donald Plumber Knowles, Jr., Manager of Gamble's Store in Moab, Utah, testified that he sells hardware, furniture, appliances and Honda Motorcycles. (R. 363) He testified that he has need for Hunt as follows:

“A. It satisfies — when I don’t have — what we call an item of stock on the floor, why a special order, many times why *if I can get it overnight for these people I save the sale*, and sometimes if you let a customer go past through the weekend why you might lose them — they get to thinking about the money.” (R. 365)

Darrell Reardon, City Recorder and City Purchasing Agent in Moab, Utah testified that in connection with his duties he orders shipments of supplies for Moab City from Salt Lake City, Utah. (R. 376) He testified they do have motor transportation service from Hunt on Saturdays which they do not have from any other carrier. (R. 380) He explained this as follows:

“A. Particularly where it concerns the water and sewer department ordering supplies for this, which operates on a 24-hour day basis, *it is real advantageous to us to be able to receive a valve or something we need for our emergency repairs*, particularly in the water department — and I would say most of our supplies come from Salt Lake City.” (R. 381)

Mr. Martin Davis, Owner of Moab Lumber Company in Moab, Utah, testified he deals in building materials. (R. 385) He stated with regards to *Hunt’s service* as follows:

“A. If we have to have something on a Saturday and we don’t get it ordered until Friday, that is *the only way we have to get it down here.*” (R. 387)

and

“A. Sometimes it is pretty important. We have our — a lot of do-it-yourself customers in this town, and they usually have Saturdays and Sundays to do their work in, and if they order it on Friday they like to get it on Saturday, so they can work over the weekend.” (R. 388)

Basil Slavens of Slavens Hardware and Lumber Incorporated in Moab testified:

“Q. Yes. Do you specify the carrier on the material that moves from Salt Lake City via common carrier?

A. Not always. If we have a — if we are — have a large enough shipment and *we're in a hurry* for it, *we usually specify Hunt.*

Q. Why do you specify *Hunt*?

A. Well, *they deliver it* in there a little bit *faster*, especially if we have to phone in an order and our company up there gets it out a little later in the day why they can pick it up a little later and they get it in here a little faster for us that way.” (R. 394-395)

He testified that the only way they get truck deliveries on Saturday in his business is when they have the service of Hunt. (R. 396)

This witness described a shipment by Rio Grande Motorway where it was destined to Green River, Utah and was actually unloaded in Price. (R. 402) The wit-

ness had to personally drive to Price and pick it up because of Rio Grande Motorway dropping it off in Price. (R. 402)

Charles Hardison Redd is a stockholder and president of Redd Ranches which owns a ranch and general mercantile business at LaSal, Utah. (R. 424) Mr. Redd testified:

“There is this problem that there is *difficulty in getting* — or, there has been in getting intra-state *shipments* into LaSal *via Garrett*. There has been some occasion when freight has been delayed at Moab because it has been un-economical to take it to LaSal. There has been some *cases when we have called about freight and been told it is not here, and come down immediately and found it has been here.*” (R. 409)

Mr. Kenion Harvey, Terminal Manager for Hunt in Salt Lake City testified that he dispatches equipment to the destination territory five days a week from Salt Lake. (R. 281) The equipment is dispatched Monday night to Friday night. (Tr. 281) He testified that the dispatching time is between 6:00 and 7:30 in the evening. (R. 282) He testified that he has been accepting calls for shipments right up until 5:00 o'clock in the afternoon. (R. 283) The trucks arrive in Blanding at about 3:00 A.M., return north to Monticello at 5:00 A.M. and Moab at 7:30 A.M. (R. 174)

Mr. John L. Hunt, Manager of Hunt, testified that the operations under temporary authority which require taking freight to Blanding from Salt Lake and thence backtracking to Moab to unload and thence back to

Monticello to pick up wheat for return to Salt Lake cost approximately \$6,800 more than if the drop-off could have been made in Moab on the way down instead of requiring the backtracking. (R. 340)

Mr. Hunt explained that there is other transportation business needing development in this area which is not presently being served by Garrett and Lyman. This is primarily in the lumber and grocery business which has been moving its transportation requirements by private transportation. (R. 494) Also the future expansion of the area will enable Hunt to develop transportation business without necessarily adversely affecting plaintiffs. (R. 494) and (Exhibits 6 and 7)

Regarding the interline of traffic with Lyman the operating witness of Hunt was asked:

“Q. Counsel asked you on cross examination why you didn’t turn your freight to Lyman.

I will ask you whether or not the Lyman service is satisfactory to you to interline?

A. We feel we can give a better and faster service by doing it direct.

Q. And does that arise out of any experience? What do you base that upon?

A. I base that upon our previous interline experience with Lyman.

Q. How far back does that extend?

A. Oh —

MR. GREENE: I think the witness can hardly testify any further than when he became manager of the firm.

MR. RICHARDS: I think that is true.

Q. Well, does it go back this year?

A. Yes. I remember of several shipments that —
MR. GREENE: I think he has answered the question.

A. I remember of several shipments we could call Lyman on and it would be usually the next day, if not later, before the shipment was picked up, and sometimes we called several times to get the pick up." (R. 511-512)

He also stated:

"A. One time we had a shipment come in for LaSal, and I interlined it with Lyman, and Lyman gave it to Garrett, and Garrett gave it back to Lyman, and Lyman gave it back to me, at which time I notified LaSal and they had a man come down and pick up the order right at Blanding." (R. 31)

Mr. Hunt stated that one of the purposes of the application was to get back the Monticello freight they lost when Garrett moved into serving this area. (R. 47)

Mr. Glen B. Victor, President and General Manager of R. A. Gould, Inc. since 1954 testified that Gould previously had been dependent on interline shipments with Garrett. This interline business with Garrett dried up when Garrett began delivering their interstate shipments throughout the two county area themselves. (R. 148) He testified that the decision of the Commission in March

19, 1964 took Gould out of the interstate business as it did Hunt, and made a monopoly in favor of Garrett. (R. 147-149)

Wayne S. Green, Director of Commerce Activities for Garrett stated that Garrett does not have any intra-state authority to serve over irregular routes in Grand and San Juan Counties other than a temporary authority within fifteen miles of LaSal. (R. 603-604)

Garrett admitted that their truck does not arrive in Monticello until approximately 12:30 in the afternoon. (R. 639) This is when the truck arrives and then it has to be distributed after that time. (R. 640) The witness from Garrett admitted that their normal procedure is to not accept calls after 3:00 P.M. in Salt Lake for shipments to the destination territory. (R. 640)

Garrett holds the freight from Salt Lake destined to Monticello in Moab from 7:00 o'clock in the morning until 11:00 in the morning. This is so that freight coming from Denver into the Moab-Monticello area can be combined with this freight. (R. 660) Also Garrett is interested in interstate shipments originating at Gallup and Albuquerque, New Mexico and destined to Denver and Grand Junction, Colorado which move through Monticello and Moab. (R. 606)

Garrett's operating witness admitted that 11 out of 13 shipments were in the afternoon for a preferred customer in Moab that wanted his freight the first thing in the morning. (R. 678-679) He admitted that Exhibit No. 34 indicates 11 shipments delivered after 4:00 o'clock

in the afternoon and 17 delivered after 3:00 o'clock to the consignee in Monticello. (R. 682)

A Garrett witness recalls referring calls requesting Saturday delivery to Hunt for service. (R. 718)

Barton F. Lyman, owner and operator of Lyman Truck Line (R. 721) testified that at one time he interlined freight with Hunt. He testified this was later changed to interlining with Garrett rather than Hunt. (R. 768) The interline with Garrett was made at Monticello on a daily basis. (R. 768) Mr. Lyman testified that one of the reasons for changing from Hunt to Garrett is that he prefers to load freight in the evening and not in the morning. Therefore he admitted:

“Q. Now, when you get the freight from Garrett you bring it down from Blanding and it sits overnight, doesn't it, to points south?

A. Yes sir.

Q. So that *one day is lost*, is it not?

A. That's right.” (R. 775)

Mr. Bart Lyman admitted on cross-examination a number of five day, six day and seven day deliveries. (R. 789-790) He further admitted that out of 144 freight bills 40 took three days or more for delivery. (R. 790-791)

ARGUMENT

POINT I.

THE COMMISSION CORRECTLY APPLIED APPROPRIATE STANDARDS IN GRANTING AUTHORITY TO HUNT.

Plaintiffs' point I contends that the Public Service Commission failed to apply appropriate standards of need for the grant of authority. Their brief states that the burden of proof and the considerations of public interest to be applied are the same as applied in *Lake Shore Motor Coach Lines, Inc. v. Bennett*, 8 Utah 2d 293, 333 P 2d 1061. (p. 31 of plaintiffs' brief) This is the standard for any application for new authority. The burden is of proving that public convenience and necessity would be served by granting the authority.

Hunt accepted this burden insofar as any modification of the Hunt (Certificate 510) and Gould (Certificate No. 1082 — Sub 1) is involved. But it is error for the plaintiff to argue that this is a completely new operation. Hunt has been authorized to serve Blanding from Salt Lake City since 1938. Gould has been authorized to serve throughout San Juan and Grand Counties since 1956. To argue as plaintiff does that this is a completely new motor carrier operation overlooks the fact that the order of the Commission cancels both of these outstanding authorities of Gould and Hunt. (R. 944) The only thing new about the service authorized, or what could be said to be different from a straight transfer of authority application, is the authorization to serve all

points in San Juan and Grand Counties, Utah, direct from Salt Lake City *without having to go to Blanding first.*

A simple transfer of the Gould authority to Hunt would allow everything authorized by the Commission. However, it would require Hunt to touch base at Blanding before delivering to any other point in the destination territory.

It is Hunt's position that the previously set forth facts adduced from shipper witnesses at the hearing of this application adequately prove public convenience and necessity for the grant of authority made by the Order of the Commission.

Many decisions of Federal courts in construing the term "public convenience and necessity" in the Federal Motor Carrier Act have held that expedited service justifies a grant of authority.

While it is understood that the decisions of the Interstate Commerce Commission are not binding on either the Public Service Commission of Utah or the Utah Supreme Court these decisions are of assistance in construing "public convenience and necessity." The Interstate Commerce Commission requires a showing of public convenience and necessity before it is authorized by Federal law to grant certificates authorizing transportation service by motor vehicle in interstate commerce. Decisions of the Interstate Commerce Commission have always recognized expedited service and deliveries at a time required by the shipping public as service required by the public convenience and necessity.

The recent case of *Mercury Motor Express, Inc. v. United States of America*, 261 F. Supp. 621, 17 FCC 311, United States District Court, Middle District of Florida, November 5, 1966, dealt with shippers who supported an application on the grounds that the transit times proposed by the applicant were required to retain customers. The Federal court held that the findings of the Interstate Commerce Commission were adequately supported and that the evidence justified the conclusion that the certificate should be issued.

In the case of *Texas Mexican Railway Company v. United States of America*, 250 F. Supp. 946, 17 FCC 51, United States District Court, Southern District of Texas, February 6, 1966, the supporting shippers support was primarily based on their expectation of obtaining faster service and reduction of delays. The Federal court upheld the grant of authority made by the Interstate Commerce Commission in this case.

The United States District Court for the Southern District of Texas upheld a finding of the Interstate Commerce Commission granting a Certificate of Convenience and Necessity in the case of *T. S. C. Motor Freight Lines, et al v. United States of America*, 186 F. Supp. 777, 14 FCC 185, stating:

Here the Commission made its findings of public convenience and necessity requiring the granting of the two applications based largely on its judgment that the existing service was unsatisfactory and that the proposed service was feasible and appropriate. The Commission's basic conclusion — which the plaintiffs here vigorously

contest — is that ‘The existing service of Herrin and TSC between Houston and New Orleans is not reasonably adequate to meet the present and future requirements of the public for expeditious motor service * * *.’ ICC Report, supra, 77 M.C.C. at 677. ‘[Herrin and TSC] have demonstrated

* * * that they *cannot be depended upon to provide the type of service of which they are capable, except when faced with an imminent threat of additional competition.*’ ICC Report, supra, 77 M.C.C. at 666. These conclusions, were based largely on complaints of shippers which complaints the Commission stated ‘characterize the over-all service as undependable.’ Such complaints fall into two general categories, (1) *delay in picking up shipments and delay in making local deliveries* and (2) *excessive and irregular transit times.*” (italics supplied)

Plaintiffs admit that the case of *Collett v. Public Service Commission*, 116 Utah 413, 211 P.2d 185 cited by plaintiff, is a leading case on certificate transfers. They state in their brief that it is not in any sense applicable to the instant proceeding. This assertion overlooks the fact that the instant application is a certificate transfer. Just as in the *Collett* case we have in this case a substitution of certificate holders. In this case just as in the *Collett* case it had been previously found by the Commission that public convenience and necessity required operations which are then sought to be transferred.

In the *Collett* case it was argued that the transfer of Gould’s small operation to a corporation as large as

Lang must be considered to be an increase in carrier service and not a mere substitution. The Supreme Court said:

“As to the matter of competition so emphatically emphasized by counsel for the protestants, we should not overlook the fact that in this case we are not dealing with an application, the granting of which will increase the number of competitors in the field, and thus jeopardize the service to the public. We are dealing with merely a substitution of one carrier for another. The Commission believes, and so found, that the public interest would not be adversely affected by the substitution. This is a matter for them to decide; and we cannot say, merely from the size and success of the new applicant that the Commission was in error.”

In this case just as in the *Collett* case the granting of the application will not increase the number of competitors in the field. Hunt is already operating from Salt Lake City to Blanding. Gould is operating in Grand and San Juan Counties. Hunt is being substituted for Gould's operations in Grand and San Juan Counties. The Commission found there is a continuing need for the services covered by Gould's authority and that the transfer of the authority to Hunt would not adversely affect the general public interest. (R. 943)

Plaintiffs are not faced with a new and successful applicant as feared by the plaintiffs in the *Collett* case. They still have the same competitor in Hunt and have lost the competition of Gould. Ample evidence supports the finding of the Commission that the tacking of au-

thorities held by Hunt and Gould should not be required at Blanding but at any point in Grand or San Juan Counties. If this were a straight transfer case and tacking were required at Blanding it would result in a more expensive operation for Hunt to the detriment of the shipping public. It would unduly burden the highways. It would also hinder the expedited service which Hunt seeks to render to the supporting shippers, and of which the shippers have need.

The only requirement set forth by the Court in the *Collett* case is that the Commission find that the transferor is in all respects qualified to perform the services proposed by the requested transfer. In this respect plaintiffs have not appealed from the Order of the Commission finding that Joseph C. Hunt is in all respects qualified to perform the services proposed. (R. 943)

Garrett predicts dire circumstances because of the Commission's recommended grant of authority. At Page 39 of their brief they state that no carrier can stand the addition of a new, direct competitor in a difficult operation without raising rates or reducing service. Such an argument overlooks the fact that Garrett has substantial interstate authority into this area as well as intrastate authority. (R. 357) Thus, the Moab Terminal Manager for Garrett pointed out how substantial their interstate traffic is at Moab compared with their intrastate traffic. When explaining how expensive it would be for them to introduce service on Saturdays he said they would have to employ two men. On other days of the week they employ 8 men. (R. 720) His testimony

indicates that one of the reasons they would only require two as opposed to eight employees would be that on Saturdays they would only be involved with intrastate shipments and not interstate shipments.

This is a fact which places Garrett at a distinct advantage over Hunt in this area. Garrett has interstate traffic which it can move into this area as well as traffic developed within the State of Utah. Hunt has only traffic which can be developed within the State of Utah.

Another reason that Garrett and Lyman need not feel that the Order of the Commission must make them either raise rates or reduce service is the testimony of Mr. Hunt that he intends to develop business which is presently lost by authorized carriers to private transportation. He noted that the lumber industry and grocery business have been moving their commodities into this territory by private transportation. (R. 494) Mr. Hunt intends to perform a service which will bring this transportation under authorized regulation of the Commission and take it away from the private transportation which is presently being used. This will be no loss for Garrett or Lyman. Mr. Hunt also relies upon the future expansion of this Canyonlands area to enable him to develop transportation business without necessarily adversely affecting Garrett and Lyman. (R. 494) Exhibits 6 and 7 were admitted by the Commission for the purpose of showing an expansion of facilities in the area.

POINT II.

THE EVIDENCE CLEARLY SHOWS THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE REVISION AS ORDERED BY THE COMMISSION.

It is not the prerogative of the Supreme Court to disturb the Commission's findings when supported by competent evidence. *Rudy v. Public Service Commission*, 1 Utah 2d 223, 265 P.2d 400; *Uintah Freight Lines v. Public Service Commission*, 119 Utah 491, 229 P.2d 675. In *Gilmer v. Public Utilities Commission*, 67 Utah 222, 247 P. 284 this Court held that it cannot interfere where orders of the Commission are within its jurisdiction and the bounds of reason, and are not capricious and arbitrary.

Plaintiffs argue in their brief that all witnesses indicated a satisfaction with the existing service. While defendant does not agree with this conclusion it should also be kept in mind that the existing service included the operations of Hunt. Hunt had been operating in the area under temporary authority prior to the time of the continued hearing. This is not the typical case where the existing carriers are attempting to show their services are adequate without the services of applicant. In this case the shippers have had available the transportation services of Hunt. Any expression of satisfaction with existing service would include the services of Hunt which were recommended to be made permanent by the Public Service Commission in this proceeding.

The statement of facts in this brief is the evidence upon which the Public Service Commission of Utah re-

lied in issuing the certificate to Hunt in this matter. The Commission recognized the public need shown by this evidence in granting a certificate of convenience and necessity to Hunt.

Contrast the service actually offered by Hunt under temporary authority compared with the service rendered by Garrett and Lyman. Hunt accepts calls for service from the destination territory right up to the time his trucks leave Salt Lake. (R. 283) Garrett's witness admits that they have a cut off time at 3:00 P.M. the day before. (R. 640) Witness Frost of Blue Mountain Meats testified that he would have to call his orders in to Salt Lake by noon to have any service from Garrett that day. (R. 308) Mr. Jacobs of Three States Supply in Moab, Utah testified that his suppliers in Salt Lake were afraid to call Garrett after 3:00 P.M. (R. 85)

In addition to accommodating the shippers on the pick up end of the shipment in Salt Lake City Hunt's deliveries are made early morning in the destination territory. Mr. Frost of Blue Mountain Meats testified he receives deliveries at 6:30 A.M. from Hunt (R. 309) whereas Garrett would arrive in the afternoon of the day following his requested shipments. (R. 308) Mr. Frost noted that this was important to him in his business for two reasons. First of all, his delivery truck leaves at 8:00 in the morning and the 6:30 A.M. delivery by Hunt allows him to place the shipments by Hunt on this truck and make first day delivery to his customers. (R. 309) Also, having Hunt's truck there early in the morning allows him to avoid having to place his frozen

food commodities in storage which saves his storage space. (R. 310)

Hunt's deliveries on early Saturday morning are both a convenience and a necessity of the shippers supporting this application. At one time Garrett rendered service on Saturdays. Now they no longer do so. (R. 641) The reason they gave for discontinuing the Saturday service was the additional costs because of labor contracts. (R. 642)

The shippers require the more expedited service by Hunt both on the pickup end in Salt Lake City and the delivery end in all of San Juan and Grand Counties, and the service on Saturday. In addition shippers indicated the unsatisfactory nature of the transportation service of Garrett and Lyman. Garrett's attorney asked Mr. Frost about the satisfactory nature of Garrett's service from Denver and Mr. Frost stated they should have a better way of delivering it. (R. 319)

Witness Bill Dunow testified that he lost a large volume of business because of lack of trucking facilities in moving his wheat from the area back to Salt Lake City, Utah. (R. 324) This witness testified that they have used Garrett who piles up trucks quite a bit before they get them unloaded. He stated Garrett would pile up five, six or eight trucks in a lot and wouldn't get them unloaded. (R. 327) This witness also testified that plaintiff Lyman does not have a truck big enough to haul his requirements. (R. 328)

Mr. Basil Slavens described a shipment by Rio Grande Motorway where he had to drive all the way to

Price and personally bring it to the correct destination in Green River. (R. 402)

Witness Redd from LaSal, Utah described the difficulty he has in receiving shipments via Garrett. He noted instances where they called Garrett about freight and had been told it had not yet arrived and where they would go to the Garrett terminal and find it was sitting there in Moab. (R. 409)

The evidence of the supporting shippers at the hearing in this matter is far different than the evidence before the Court in the case of *Lake Shore Motor Coach Lines, Inc. v. Bennett*, 8 Utah 2d 293, 333 P.2d 1061, quoted at pages 32 and 33 of plaintiff's brief. None of the witnesses supporting this application mentioned a need for "cheaper service." Their need was not merely for more "frequent service." The evidence shows that the existing services are inadequate and the public need is such that there is reasonable basis justifying Hunt's service. The evidence shows dissatisfaction with the services presently offered by Garrett and Lyman.

Certainly the Public Service Commission of Utah cannot be said to have been capricious and arbitrary in view of such public need as: My sales have increased due to transportation of Hunt. (R. 301) Need for overnight shipments. (R. 71) Takes two to three days for transportation service from Salt Lake to his business, and then has to return bread because of being moldy. (R. 91 and 93) Frequently needs Saturday deliveries which he cannot obtain through Garrett. (R. 197) Loses customers if he does not have Saturday service. (R. 277)

Sales have increased due to service of Hunt. (R. 301) Garrett's trucks get in too late. (R. 302) Lost sales because of lack of trucking facilities. (R. 324) Garrett's trucks pile up and are not unloaded satisfactorily. (R. 327) Hunt's service saves a couple of days over service of Garrett. (R. 353) If it is too late to get on Garrett we call Hunt's and get it the next day. (R. 357) "We sell something and say we can deliver it the next morning, this is what we are concerned with." (R. 360) "If I can get it overnight for these people I save the sale." (R. 365) "It is real advantageous to us to be able to receive a valve or something we need for our emergency repairs." (R. 381)

"If * * * we're in a hurry for it, we usually specify Hunt." (R. 394)

"Difficulty in getting * * * shipments into LaSal via Garrett." (R. 409)

These are the needs of the supporting shippers. Contrast their needs with the testimony of Mr. Lyman who admitted five, six and seven day deliveries in the two county destination territory. (R. 790) Because Mr. Lyman prefers to load freight in the evening rather than in the morning, all of his deliveries are one day later than the service offered by Hunt. (R. 775) Garrett admits delaying freight in Moab at least four hours every day so as to make connections with their large interstate shipments coming in from Denver, Colorado. (R. 660) The operating witness for Garrett admitted that many of their shipments to a preferred customer in Moab that

wanted his freight the first thing in the morning did not arrive until in the afternoon. (R. 678-679)

Neither Garrett alone nor Lyman alone nor Garrett and Lyman together have authority to serve the complete destination territory. Garrett has admitted a need for service by itself filing an application to serve within a radius of 15 miles of LaSal, Utah. (R. 603-604) Garrett has no irregular route authority in this two county area other than the temporary authority to serve within 15 miles of LaSal. (R. 603-604)

This evidence is the distinguishing feature between this case and the *Lakeshore* and *Collett* cases cited in the brief of plaintiffs.

The previously cited evidence shows that there was sufficient substantial evidence before the Commission to support its findings. It has always been the law of this State that the Supreme Court will not substitute its judgment for that of the Commission by holding that the Commission acted arbitrarily or capriciously when the findings are reasonable in view of the evidence. *Wycoff Warehouse, Inc. v. Public Service Commission*, 16 Utah 2d 431, 403 P.2d 168; *Salt Lake Kanab Freightlines, Inc. v. A. B. Robinson Truck Line*, 9 Utah 2d 99, 339 P.2d 99; *Uintah Freightways v. Public Service Commission*, 15 Utah 2d 221, 390 P.2d 238. In the case of *Milne Truck Lines, Inc. v. Public Service Commission*, 13 Utah 2d 72, 368 P.2d 590 this Court said:

“This Court has repeatedly held that where the Commission has acted within the scope of its authority its order will not be disturbed if it has

any substantial foundation in the evidence and is not unreasonable or arbitrary." citing *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 298; and *Union Pacific R. R. Company v. Public Service Commission*, 102 Utah 465, 132 P.2d 128.

CONCLUSION

1. The Public Service Commission of Utah found after four and one-half days of hearing that the public need requires operations by Hunt as authorized.

2. The findings of the Commission are supported by competent evidence and its order is within its jurisdiction and the bounds of reason.

3. The Public Service Commission did not act arbitrarily, capriciously or contrary to law.

WHEREFORE, the Order of the Public Service Commission should be upheld by the Court.

Respectfully submitted,

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