

1970

**Lake Shore Motor Coach Lines, Inc., Greyhound Lines, Inc.,
Continental Trailways Bus System, Inc., American Bus Lines, Inc.,
Denver-Salt Lake-Pacific Stages, Inc., and Armored Motors Service
v. Public Service Commission of Utah; Donald Hacking, Hal S.
Bennett And John T. Vernieu, Commissioners of the Public
Service Commission of Utah; And Wycoff Company Incorporated :
Brief of Plaintiffs**

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IN THE SUPREME COURT OF THE STATE OF

LAKE SHORE MOTOR BUS COMPANY,
vs.
GREYHOUND LINES, INC.,
vs.
NATIONAL TRAMWAY COMPANY,
vs.
AMERICAN BUS COMPANY,
vs.
UNIVERSAL TRAMWAY COMPANY,
vs.
and Appellants.

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COMMISSIONER OF
PUBLIC SERVICE,
vs.
LAKE SHORE MOTOR
BUS COMPANY,
vs.
GREYHOUND LINES,
vs.
NATIONAL TRAMWAY
COMPANY,
vs.
AMERICAN BUS
COMPANY,
vs.
UNIVERSAL TRAMWAY
COMPANY,
vs.
and Appellants.

BRIEF

LAKE SHORE MOTOR
BUS COMPANY,
vs.
GREYHOUND LINES,
vs.
NATIONAL TRAMWAY
COMPANY,
vs.
AMERICAN BUS
COMPANY,
vs.
UNIVERSAL TRAMWAY
COMPANY,
vs.
and Appellants.

IN VIEW OF

FRY D. FURBER,
Attorney for Defendant
National Company, Inc.,
vs.
FRANK B. ROMNEY,
Attorney General
Attorney for Defendant
Public Service Commission

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IN THE SUPREME COURT OF THE STATE OF UTAH

LAKE SHORE MOTOR COACH LINES,
INC., GREYHOUND LINES, INC., CON-
TINENTAL TRAILWAYS BUS SYSTEM,
INC., AMERICAN BUS LINES, INC.,
DENVER-SALT LAKE-PACIFIC STAGES,
INC., and ARMORED MOTORS SERVICE,
Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; DONALD HACKING, HAL S. BEN-
NETT, and JOHN T. VERNIEU, COMMIS-
SIONERS OF THE PUBLIC SERVICE
COMMISSION OF UTAH; and WYCOFF
COMPANY INCORPORATED, a corpora-
tion,

Defendants.

Case No.
11945

BRIEF OF PLAINTIFFS

STATEMENT OF KIND OF CASE

This case involves an application to the Public Service Commission of Utah by the defendant Wycoff Company Incorporated for a Certificate of Public Convenience and Necessity which would eliminate certain specified restrictions presently imposed upon Wycoff's general commodities express authority in the State of Utah.

DISPOSITION OF CASE

By its Report and Order issued November 28, 1969, the Public Service Commission of Utah granted to Wy-

Wycoff Company, Incorporated a certificate of public convenience and necessity number 1679 authorizing it to operate as a common carrier by motor vehicle for transportation of general commodities in statewide express service subject to certain restrictions and conditions.

RELIEF SOUGHT ON REVIEW

Plaintiffs seek to have the Order of the Public Service Commission issued November 28, 1969 set aside.

STATEMENT OF FACTS

By its order of February 3, 1959 the defendant Public Service Commission of Utah, hereinafter referred to as "Commission," issued Certificate of Convenience and Necessity No. 1162 Sub 2 to defendant Wycoff Company, Incorporated, hereinafter referred to as "Wycoff," authorizing Wycoff to operate as a common carrier by motor vehicle for the transportation of general commodities of 100 pounds or less in weight, in express service, between all points and places in the state of Utah according to schedules filed except between Salt Lake City and Ogden, between Salt Lake City and Park City, between Salt Lake City and Bingham Canyon, between Salt Lake City and Wendover and between Salt Lake City and Tooele and all intermediate points along said routes and each of them; said authority to be subject to the following restrictions:

- a. Applicant shall be limited to the transportation of shipments not to exceed 100 pounds upon a weight basis. Shipments will not be sep-

arated for the purpose of avoiding this restriction.

b. Applicant shall not transport in excess of 500 pounds on a weight basis of such express items on any one schedule each way operating over the routes and departing at the times set forth in Exhibit 2 in this proceeding.

c. The schedules referred to above shall coincide with the movements of the Deseret News newspapers and the Salt Lake Tribune newspapers as shown in Exhibit 2, and one United States mail schedule moving north from Salt Lake City and the return of all such schedules to Salt Lake City.

d. In determining the maximum weight limitation on any one schedule, all shipments shall be aggregated regardless of point of origin or destination.

e. Applicant shall not carry express shipments of the commodities sought by the application on northbound schedules from Salt Lake City or southbound schedules from points north to Salt Lake City except on those four daily schedules each way designated on said Exhibit 2 as Schedules 2, 3, 4, 5, and 2A, 3A, 4A, and 5A, respectively of Table 8 hereof.

f. "Shipment" as used herein shall refer to commodities moving on a single bill of lading from one consignor to one consignee.

The territorial restrictions in Certificate No. 1162 Sub 2 resulted from this court's ruling in the case of Lake Shore Motor Coach Lines, Inc., et al. v. Hal S. Bennett, et al., 8 Utah 2d 293, 333 P.2d 1061 (1958), by which the court reversed the Commission's grant to

Wycoff of statewide express authority because of Wycoff's failure to show an inadequacy of existing services. However, the reversal applied only to those areas in the state where particular plaintiffs participating in the review proceedings were operating. The weight, schedule and definition restrictions contained in the certificate were a result of a stipulation entered into between Wycoff with other motor carriers who did not participate in the court's review.

Then in 1965 Wycoff again applied to the Commission for statewide unrestricted general commodities express authority in Case No. 4252 Sub 14 and after extensive hearings the Commission granted Wycoff statewide express authority limited only to 250 pounds per shipment with a 100 pound per shipment limit on freight moving between points in Salt Lake County. On review by this court of that proceeding, the Commission's order was again set aside and the Commission was ordered to prepare a transcript of the proceeding, review it and return it to the court. [See *Lewis Bros. Inc. v. Public Service Commission*, 22 Utah 2d 287, 452 P.2d 318 (1969)]

Instead of producing the transcript in Case No. 4252 Sub 14 as instructed by this court, Wycoff moved to dismiss that case and it filed two new applications designated as Case No. 4252 Sub 16. One application sought temporary authority to operate a statewide express service restricted only to 100 pounds per parcel and the other application sought permanent express authority to operate statewide express service limited

only to 100 pounds per package and 200 pounds in the aggregate from one consignor at one location to one consignee at one location during a single day. Although it was on April 30, 1969 that this Court denied Wycoff's Petition for Reconsideration in the Lewis Bros.' case and thereby finally ordered the Commission's order to be set aside, the Commission did not take further action until on June 11, 1969 when it simultaneously ordered the dismissal of the Sub 14 proceeding, issued temporary authority to Wycoff to operate a statewide express service limited only to 100 pounds per shipment and noticed up for hearing the new Wycoff application for permanent authority (R-1217, 1280).

At the commencement of the hearing on Wycoff's new application for permanent authority, plaintiffs, together with other protestants in the proceeding, moved to dismiss the application asserting lack of fitness on the part of Wycoff and evidence was tendered to show that between April 30, 1969 and June 11, 1969, Wycoff had violated the order of this Court by failing to restrict its service back to that which is authorized in its Certificate No. 1162 Sub 2. In response, Wycoff admitted that it had continued its operations as though this Court had never spoken (R-13) and Commissioner Bennett admitted that the Commission had intentionally failed to enforce this Court's order in spite of the fact that it had no evidence to support a need for an expansion of Wycoff's authority (R-17, 18).

After taking evidence in the Sub 16 proceeding, the Commission issued its Report and Order on Novem-

ber 28, 1969 whereby it issued to Wycoff Certificate of Convenience and Necessity No. 1679 authorizing it to operate a general commodities express service between all points and places in the State of Utah except between Salt Lake City and Park City, Grantsville, Tooele and Wendover, Utah, and subject only to a weight restriction of 100 pounds per shipment (R-1231). On December 10, 1969, the Commission issued its Erratum Order Sub 1 making certain corrections in the base order which included restricting Wycoff's express authority against service between Salt Lake City and Bingham Canyon (R-1251). Plaintiffs herein filed their Petition for Rehearing and Reconsideration on December 17, 1969 (R-1254) and that Petition was denied by the Commission on December 24, 1969 (R-1265). The matter comes before this Court on review pursuant to Writ of Certiorari filed on December 31, 1969.

It should be noted that Wycoff has from time to time received intrastate authority to handle special commodities such as newspapers, books, motion picture film, ice cream, bull semen, cut flowers, election supplies, contractor's supplies, etc. which are not subject to the same restrictions as its general commodities' express authority. Such special authorities are not involved in this review proceeding except as they may reflect on the accuracy of evidence presented in the record in this proceeding.

The effect of the Commission's order under review in this proceeding is to (1) allow Wycoff to operate between Salt Lake and Ogden and intermediate points,

(2) allow Wycoff to operate between all points in Salt Lake County and, (3) remove from Wycoff's authority the 500 pound per schedule restriction and the requirement that express only be handled on certain specified newspaper and mail schedules moving between Salt Lake City and other cities and towns in Utah.

The number of shipper witnesses who testified at the Commission proceeding now under review and the voluminous nature of the record prohibits a detailed review of the evidence within the confines of this brief. Plaintiffs will therefore characterize the evidence given by the witnesses as a whole, citing examples where appropriate and making reference to some but not all testimony which supports the plaintiff's representations.

Fifty-seven shipper witnesses were called by Wycoff to testify. All are present customers of Wycoff and each described his particular need for the various types of public carrier service now available. These witnesses generally characterize their shipments as being in two categories: (1) large stock shipments and (2) shipments of individual items of various weights and sizes which require one day and in some instances same day service as between the consignor and the consignee. Most of the said individual items are in the nature of automobile and machinery repair parts or drugs and medicines. Such items are shipped by either the truck lines, including Wycoff, or by the bus lines unless they exceed the weight restrictions imposed upon the bus lines and Wycoff in which case they are necessarily shipped by the general commodity truck carriers.

Evidence presented by the various protesting truck carriers shows that overnight truck service is available from them collectively on a 5 or 6 day per week basis from Salt Lake City to essentially every populated area of the state. Palmer Brothers, Inc. renders service between Salt Lake City and Kanab over U.S. Highways 89 and 91 and between Salt Lake City and Delta via U.S. Highway 6-50 (R-1048). Rio Grande Motorways serves between Salt Lake City and the Utah-Colorado state line over U.S. Highway 6-50 plus over Highway 10 from Price to Emery (R-1163). Garrett Freightlines, Inc. serves between Green River and Monticello, Utah over U.S. Highway 160 and Lyman Trucklines serves points south of Monticello and San Juan County. Both Link Trucklines, Inc. and Uintah Freightways serve between Salt Lake City and the Uintah Basin over U.S. Highway 40 (R-1158 and R-1185) and Barton Trucklines serves from Salt Lake City to the Utah-Nevada state line over U.S. Highway 40 and from Salt Lake City to northern Utah points over U.S. Highways 89, 91 and 30-S (R-845-846). Milne Truck Lines, Inc. serves from Salt Lake City south to the Utah-Arizona state line over U.S. Highway 91 and Magna and Garfield Trucklines serves Salt Lake County (R-1182). All of these carriers serve specified points and areas beyond the designated highways and they all use the new interstate freeway system where available and practical.

In addition to the general truck carrier service available throughout Utah, the public is served statewide by bus service which hauls express shipments up

to 100 and 150 pounds per package. The Trailways Companies which include Continental Trailways Bus System, Inc., American Buslines, Inc., Denver-Salt Lake-Pacific Stages, Inc. and Pacific Trailways provide express service in Utah between the Idaho border on the north and the Arizona border on the south via highways 30-S, 91 and 89 and between the Nevada border on the west and the Wyoming and Colorado borders on the east via U.S. Highways 40, 30-S, 6-50 and 160 (R-940).

In addition to the Trailways' operations, a largely duplicative express service is rendered by Greyhound Lines, Inc. Like the Trailway Companies, Greyhound serves between the northern and southern borders of Utah over U.S. Highways 30-S, 89 and 91 and between the east and west borders over Highways 40 and 30-S. It does not duplicate Trailways in southeastern Utah, nor down Highway 89 south of Spanish Fork, but in addition to Trailways, it serves between Tremonton and Brigham City and the Utah-Idaho border via U.S. Highways 191 and 89 and 91 respectively (R-980).

Lewis Bros. Stages conducts an express service which duplicates Trailways and Greyhound between the Nevada border on the west and Kimball Junction on the east over U.S. Highway 40 and in addition, it serves Park City and from Salt Lake City south over U.S. Highways 91 and 6-50 through Delta to the Nevada border.

Exhibit No. 22 (R-983) is a pictorial description of the area served by bus express service. Such service is

provided 24 hours a day and 7 days per week. No interline between bus carriers is required on shipments moving between most points in the state because the Trailways Companies, whose operations cover nearly the entire state, are integrated so as to operate as a single company, sharing common terminals, agencies, tickets, equipment and personnel (R-610). If interline is required, it is accomplished without delay since the Trailways and Greyhound terminals in Salt Lake City are only one block away from each other and since Lake Shore shares the terminals of Greyhound at Salt Lake City and Ogden. In addition, Trailways and Greyhound have common agencies at several points throughout the state.

Pickup and delivery of express is provided for the bus companies at Salt Lake City by Frank Terry dba Bus Express Pickup and delivery service (R-598-599, 374). In addition, Frank Terry serves all points in Salt Lake County and South Davis County on general express freight. In Ogden, pickup and delivery is provided on bus shipments by an agent of Lake Shore under its own authority (R-1013, 702). In smaller towns throughout the state, the bus express package is picked up or delivered at the bus agency by the consignor or consignee. On incoming shipments, the bus agent immediately notifies the consignee of the shipment's arrival. At non-agency points along the highways, the buses will stop for pickup and delivery upon request (R-628, 674 and 692). The truck lines pick up and deliver all freight at all points they serve.

Armored Motor Service performs an irregular route service on express of 100 pounds or less per package between all points in Salt Lake County (R-1037). It operates small van type trucks, has an office and dispatch service in Salt Lake City and provides transportation of express between any two points in the county within only an hour or two at most (R-718-723).

Other specific factual matters will be referred to in the argument portion of this brief as they become pertinent to matters there under discussion.

ARGUMENT

POINT I. THE ACTION OF THE DEFENDANT COMMISSION IN FINDING THAT PUBLIC CONVENIENCE AND NECESSITY JUSTIFY OR AUTHORIZE A GRANT TO WYCOFF OF EXPANDED OPERATING AUTHORITY IS ARBITRARY AND CAPRICIOUS AND DIRECTLY CONTRARY TO THE EVIDENCE.

(A) THE EVIDENCE SHOWS THAT THE TRANSPORTATION FACILITIES OF EXISTING CARRIERS ARE ADEQUATE TO MEET ALL PUBLIC SHIPPING REQUIREMENTS.

This Court made it clear in the case of *Lake Shore v. Bennett, supra*, that a new duplicating carrier service cannot be authorized by the Public Service Commission without a showing that the services of existing carriers are somehow inadequate to meet the reasonable needs of the public. This Court stated:

“Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require. Our understanding of the statute is that there should be a showing that existing services are in some measures inadequate or that public need as to potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service. For the rule to be otherwise would ignore the provisions of the statute; and also would make meaningless the holding of formal hearings to make such determinations and render futile efforts of existing carriers to defend their operating rights.”

In the *Lake Shore v. Bennett* case, this Court was reviewing the very same type of evidence and was faced with the same issues which are before it in this case. There, the court set aside the Commission order. Plaintiffs urge the same result in this case since the facts have not changed in any appreciable respect.

The evidence shows that every reasonable need of the shipping public is met without granting Wycoff any additional authority. The state is blanketed by regular general commodities truck carriers whom the public can use to ship all types of freight including small packages and larger stock shipments. The truck lines all provide

pickup and delivery service to the door of the shipper and of the consignee and the vast majority of all truck shipments, large and small, are delivered to the consignee either on the same day or the day following their pickup from the shipper.

Almost all of the shippers and consignees who testified at the Commission hearing indicated that next day delivery was sufficient to meet their needs. (For examples see R-267, 459, 469 & 480) They also admitted that this was the same speed of service they were receiving from Wycoff. Yet the evidence of record shows that the other truck carriers are rendering a comparable service. Several exhibits which are abstracts of all of the delivery receipts of all shipments by the protesting truck carriers and by Wycoff on several specified representative days in 1968 and 1969 and summaries of the time in transit on those shipments show no appreciable difference between the service of Wycoff and that of other truck carriers. Palmer Brothers, Inc. had a same day or first day delivery on 86 per cent of its reported shipments compared to 88 per cent for Wycoff (Exhibit 59). It should be noted that Palmer gave same day service on 22 per cent of its shipments while Wycoff only had 17 per cent with the same day delivery. Similar comparisons with other truck carriers give the same results. (See Exhibits 59, 91, 94, 100 & 108)

In addition to the regular truck service, a special bus express service is available to the public at practically every population point in Utah on items weighing less than 100 or 150 pounds (Exhibit 22). Many

areas have two or even three such bus express services in addition to the truck service and in addition to the Wycoff service. Numerous bus schedules run over each of the various main highways in the state each day (Exhibits 5 & 19) and many of the witnesses at the Commission hearing noted that the buses give same day service on their express (R-62, 309).

As to the speed of service on express, witness after witness testified that he resorts to the bus express service in cases where particularly rapid transit is required. For example, Dr. Grover T. Purance of Mountain States Veterinary Medical Supply Company of Provo, Utah testified on cross-examination (R-281):

“Q. Now, do you send as per the customer’s request — use the carrier requested by the customer?

A. Yes.

Q. And is that the reason for these bus shipments?

A. Well, for instance, the other day they had some sheep dying of tetanus, and they wanted the tetanus antitoxin immediately. This was at five o’clock at night. I knew that there was a bus going south at six o’clock. By 7:30 they had the tetanous antitoxin.

Q. So, you got about an hour and a half’s service by using bus in that instance?

A. You bet.”

(See also R-58, 105, 224, 248, 483, 490, 501 & 509-510)

As already noted, bus express shipments are provided a pickup and delivery service in Salt Lake City and Ogden and shipments can be picked up or delivered at intermediate highway points on request. Dr. Purance noted that the shipment of tetanus antitoxin referred to in his above cited testimony was delivered at a point along the highway somewhere near Marble Canyon (R-281). In smaller towns the shipper and consignee are usually quite near the bus agency so that the public has no problem in picking up or delivering their bus express shipments at the local bus agency. Mr. Durrant, owner of Bradshaw Auto Parts Company at Cedar City, St. George and Fillmore, testified (R-552):

“Q. Now, in each of the three communities you have stores in, does the bus line make any deliveries to your store?

A. None.

Q. Is it convenient for you to go to the bus station in each town?

A. Well, we can get that — when we got stuff there, we can go get it, we can do that all right, but they are usually — say St. George is only a block away — that is pretty close there; Cedar City is about three blocks away, and Fillmore is about a block away.”

Thus, fully adequate public transportation service on all types of shipments is available to the shipping public in Utah, even without the duplicating operations of Wycoff. Yet, even if this Court should set aside the

Commission's order now under review, most of the State of Utah will still have Wycoff's service available. It will simply be once again subject to the same restrictions as contained in its Certificate No. 1162 Sub 2 so that some protection against the wholesale diversion of traffic by Wycoff will again be given to the other existing carriers.

The Commission appears to have completely ignored the variety and even present duplication of available existing services in its considerations in these proceedings. For example, the witness for Uintah Freightways noted the service available into the Great Basin area (R-828):

“Q. Now, can you tell us, Mr. Smith, are you familiar with the conditions out in the Uintah Basin?

A. Yes, sir, I am.

Q. Do you know what carriers are presently serving that area?

A. Yes, sir.

Q. Which ones?

A. There is Link, Uintah Express, Salt Lake Transfer, Ashworth, Harry L. Young, Continental Bus, Frontier Airlines and ourselves and Wycoff.

Q. Now —

A. The population, if I might add, of Duchesne and Uintah and Daggett County all combined is approximately 17,000.”

A review of the evidence shows that same day service is being offered by at least four of these named carriers. Certainly it must be concluded that adequate public transportation service is available to the population of the Great Basin without an expansion of the Wycoff authority. Such a conclusion is absolutely compelled by a review of the evidence.

A similar adequacy of service exists to all other points in Utah which Wycoff intends to serve. Between Salt Lake City and Ogden and intermediate points, the public has the service of Barton Truck Lines which gives the same day or next day service on shipments of all sizes and weights (R-1195 & 1196). In addition, Lake Shore Motor Coach Lines has 36 express schedules every day which move between Salt Lake City and Ogden and/or intermediate points (R-1017). Bus express service between points in this area is rendered within a matter of a few hours at most. Many of the shipper witnesses had no use for an express service between Salt Lake City and Ogden because they handled such freight with their own trucks (R-313) and no witness demonstrated a need for public carrier service which could not be adequately accommodated by existing carriers. By no standard can it be said that the area suffers from an inadequacy of public transportation service. Yet the Commission, by its order, has allowed Wycoff to institute a completely new competitive service to all points in the area. Such an action by the Commission is arbitrary and capricious and ignores the rules laid down by this Court in the Lake Shore v. Bennett case.

The Commission has gone so far as to allow Wycoff to institute a new service between all points in Salt Lake County, which is a duplication of the service now rendered by Plaintiff Armored Motors Service, even though it admits that the public is already adequately served in that area. At page 12 of its Report and Order, the Commission concluded (R-1242): "Service between points in Salt Lake County is generally adequate for the short distances involved. Many specialized carriers are available in addition to the regular freight services." The record certainly supports the Commission's conclusion. Plaintiff Armored Motors Service itself conducts a fully adequate transportation service on all freight which could be handled by Wycoff under the Commission's present grant of authority and in addition, service is available from numerous other carriers including Protestants Frank Terry, Magna-Garfield Truck Lines and Redman Moving and Storage Company. There is no legal justification whatever for allowing Wycoff to institute a duplicating and competitive service in Salt Lake County.

(B) THE TESTIMONY OF SHIPPER WITNESSES INDICATES EITHER A COMPLETE SATISFACTION WITH EXISTING TRANSPORTATION SERVICES OR SIMPLY A DESIRE FOR ADDITIONAL SERVICE BASED UPON INDIVIDUAL CONVENIENCE RATHER THAN PUBLIC NEED.

A review of the record as a whole reveals that the shipper witnesses who were called to testify had no com-

plaints concerning the services of existing carriers. As one shipper stated: "In fact, I'm just as well satisfied with the way things are myself—I've got no complaint." (R-553). And as another shipper stated: "We are adequately served by the carriers we are using. We are not soliciting business for anyone, or any other carrier, I should say, at this time." (R-138). When approached about the matter, most witnesses admitted that they were perfectly willing to use the bus express service rather than the Wycoff service providing that the bus service had the next most convenient schedule. The testimony of Jack R. Helston of Western Bearings Incorporated in Orem, Utah typifies testimony of witnesses in this respect (R-301):

"Q. I see. You say you are still using bus in addition to Wycoff service. What would be the purpose of that?"

A. I will clarify just the one — our morning delivery at eight, our twelve o'clock delivery and our two o'clock delivery, there's a bus that leaves from the depot in Salt Lake I believe at 1:30, Continental. We rely on that service for deliveries that would get to us by 3:30 to five o'clock, in that area.

Q. I see. So it is a matter of which schedule leaves next?"

A. Yes — well, it is in this particular case. If we miss the last Wycoff, which would be delivered at our place at two o'clock, we will rely on this one bus service."

(See also R-374 & 550).

Since all of the shipper witnesses were drawn from the customer list of Wycoff, many of them had not attempted to use the bus express service. These witnesses were, of course, not in a position to know whether or not they could just as well use the bus service. It can also be properly concluded that most of the witnesses came to the hearing simply to support a "continuation" of the Wycoff service and nothing more.

Much of the testimony in the record is irrelevant to this proceeding since it centers around Wycoff's attempt to increase its shipments per day limitation to 200 pounds and that request was properly denied by the Commission. Other testimony is irrelevant since it was concerned with shipment of contractor's supplies which is a special commodity for which Wycoff has separate authority unrelated to the present application (R-563, 569).

It is obvious that the testimony of many of the witnesses who supported the application was induced by the promise of Wycoff's lower rates rather than by any deficiency in the services or the facilities of other existing carriers. The witnesses most often paid the cost of transportation out of their own pockets (R-259). Thus, the cost of transportation becomes a significant inducement. Mr. Robert S. Pembroke of A. H. Pembroke Company in Salt Lake City testified (R-172, 174):

"Q. Now you said the reason you used Wycoff so much was mostly expense. You mean the cost of transportation expense itself?

A. We prepay into Ogden and Provo — is our expense, and a lot of our packages are within the 50 to 150 pound range, because of the way we package what we sell.

Q. So, what you're really saying is that through Wycoff and through a lower freight rate you can compete with the manufacturer or distributor who is locally based in an area—

A. Yes.

Q. —Is that what you're telling us? And that's the reason basically, as I understand, you're supporting this application, is because the Wycoff rate is less than the existing common carrier rates; is that correct?

A. Correct."

It is obvious that the Wycoff rates in effect at the time of the hearing were too low, since Wycoff was losing money (R-906). It should also be noted that within a week or two following the Commission hearing, Wycoff made application to the Commission in Case No. 6178 seeking an average increase in its rates of 20 per cent. Since the rates of public motor carriers are subject to control by the Commission so as to bring only a reasonable return to the carrier, the fact that an applicant for motor carrier authority proposes to charge a lower rate than existing carriers is not a fact which can properly be used to show a public need for service. It is, however, a method of inducing shippers to support an application and any testimony of a witness thus induced should be closely scrutinized.

It is submitted that the record is void of any substantial evidence to support the Commission's action in eliminating the 500 pound per schedule limitation contained in the Wycoff authority or in eliminating the requirement that the Wycoff express be carried only on those schedules relating to Wycoff's newspaper and mail hauls. The matter of the 500 pound per schedule restriction was not even discussed with 51 of the 57 shipper witnesses who supported the application. Of the six witnesses with whom it was discussed, two denied having ever had any problem with that restriction (R-68, 447-448) and another witness could not remember having had any problem (R-567). The remaining three witnesses, of course, had other public carrier services available if needed. It is significant to note that not a single witness, including the operating witness for Wycoff, could relate or had other evidence of any specific shipment which was ever delayed or otherwise caused inconvenience to the public because of the 500 pound schedule limitation. Likewise, no evidence of any kind is contained in the record which would support a need to eliminate the requirement that Wycoff confined its express shipments to its newspaper and mail schedules. The matter was simply never discussed.

The only evidence produced by Wycoff's operating witness concerning the 500 pound per schedule weight limitation was a multipage appendix attached to Exhibit 1 and Exhibit 120 which shows the combined weights shipped by Wycoff over particular routings on certain selected days. When properly analyzed, however, the

figures shown are not relevant to the issue since they cover a period of time when Wycoff's Sub 14 authority was on appeal and Wycoff was hauling shipments up to 250 pounds (R-885) and the weights also included the other special commodities for which Wycoff has separate authority and which are not involved in the express authority limitation (R-888). Such special commodities would include the contractors' supplies of which Wycoff hauls a significant amount.

On cross-examination Wycoff's operating witness admitted that it could not be determined from Exhibits 1 and 120 whether any particular Wycoff schedule was loaded with more than 500 pounds of general express shipments (R-887). The appendix can be misleading if not properly read. Whereas each particular page is labeled as a "schedule" it is in reality describing a routing for which Wycoff has several schedules each day (R-885-886). Exhibits 1 and 120 are therefore of little or no value concerning the issue of the per schedule limitations on the Wycoff authority. At most it is an admission on the part of Wycoff that it is capable of diverting significant amounts of traffic away from the other carriers if it is allowed to operate without proper restrictions.

It appears that the Commission's only justification for granting Wycoff authority to institute service in the areas of Salt Lake County and between Salt Lake and Ogden is to provide for a "single line" service throughout the state (R-1243) or to "put the service of Wycoff within said county on a uniform basis" (R-1242). Yet

the record clearly shows that the integrated operation of the Trailways Companies provides a statewide single line carrier on express shipments and that the other bus companies are so operated and located so as to eliminate any delay in interlining traffic between them. The testimony is uncontradicted that the bus express service is just as fast and efficient as the Wycoff express service on shipments which move through the Salt Lake City gateway from and to points beyond Salt Lake City. Mr. Hunter of Roy Auto Parts testified that he gets the same day service with bus express moving from Roy to Orem (R-289).

It seems inconsistent for the Commission to authorize Wycoff to serve between Salt Lake City and Ogden so as to implement its theory of a need for uniform or single line statewide service and yet to still refuse to grant Wycoff authority to serve between Salt Lake City and Park City, Tooele, Grantsville, Wendover and Bingham Canyon.

Plaintiffs submit that there is no evidence of public need for Wycoff's service between Salt Lake City and Ogden and that the Commission cannot grant such authority based on public support for the service in other areas. This argument finds some support in this Court's ruling in the case of *Milne Truck Lines, Inc. v. Public Service Commission*, 11 Utah 2d 365, 359 P.2d 909 (1961). It is not clear to Plaintiff how the public interest is enhanced by placing Wycoff on a "uniform basis" through extending its authority to serve between all points in Salt Lake County. Wycoff's operation is basically one of

schedules between Salt Lake City and other cities located beyond Salt Lake County and its authority to serve Salt Lake City on any routing carries with it the incidental authority to make pickups and deliveries on freight moving on those intercity schedules.

Because Wycoff's general express service in the past has been tied to certain schedules, all of which operate between Salt Lake City and other points beyond Salt Lake County, it has never had authority to serve between two points, both of which are within Salt Lake County, and there is simply no reason why Wycoff should now be granted that authority.

The Commission mentioned in its Report and Order that the bus express service is restricted in its hauling of certain items such as batteries, acids or chemicals in bottles, or long bulky items (R-1237). This finding is not correct. The record shows that the buses can and do transport batteries (R-232). In fact the testimony was that bus express will handle anything that fits into the express compartment of the bus, except explosives (R-650). Of course every carrier is limited by the capacity of its equipment. Wycoff also restricts its service against certain large or bulky commodities (R-476). The fact that Bus Express requires the wrapping of certain express shipments to prevent damage or contamination of other express or baggage being hauled is of no particular consequence since most of the express shipments are packaged anyway (R-527).

It should be kept in mind that the test concerning existing carrier services is one of adequacy, not superiority. It is conceded by the plaintiffs herein that an additional carrier with additional schedules and perhaps a method of operation which adds slightly to the convenience of a few shippers may be desired by certain members of the shipping public but such is certainly not evidence of public convenience and necessity. The term "necessity" implies something far greater than mere "convenience." The ultimate question is whether or not the public interest is best served by the denial or approval of the application. (See *Utah Light and Traction Co. v. Public Service Commission, et al.*, 101 Utah 99, 118 P.2d 683 (1941); *Wycoff Company, Inc. v. Public Service Commission*, 119 Utah 342, 227 P.2d 323 (1951), and *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298 (1941)). Considering all issues, Wycoff has failed to show any public convenience and necessity for an expansion of its express authority.

POINT II. THE ACTION OF THE COMMISSION IN GRANTING EXPANDED AUTHORITY TO WYCOFF WILL RESULT IN SUBSTANTIAL DESTRUCTION OF EXISTING CARRIER SERVICES, THE ULTIMATE REDUCTION OF TRANSPORTATION SERVICE AVAILABLE TO THE SHIPPING PUBLIC, AND IS ARBITRARY, CAPRICIOUS AND AGAINST THE PUBLIC INTEREST.

The Commission erred in failing to conclude that the granting of expanded authority to Wycoff will result in

destructive diversion of traffic from existing carriers. Its conclusion to the contrary is not supported by the record and is entirely at odds with the evidence presented on that issue.

In most cases dealing with an application for new and duplicating motor carrier authority, the diversion which will result to existing carriers is often a matter of conjecture since it is most often impossible to predict the extent to which the public will use a new service or the aggressiveness of the new carrier. Such is not the case here. Since the Commission granted statewide express authority to Wycoff in September 1967 in its Sub 14 proceeding and since that grant of authority was not set aside by this Court until April of 1969, a test period of about one and one-half years has been provided to give a more accurate measure of the amount and effect of the diversion.

Lake Shore Motor Coach Lines placed into evidence Exhibit No. 36 which is a monthly comparison with the prior year of its express revenues beginning in June 1967. This exhibit shows that before September 1967, when Wycoff was not allowed to operate in Lake Shore's area, Lake Shore enjoyed a substantial increase in its express business each month as compared to the same month the year before. However, when Wycoff was allowed to institute its service in the Lake Shore area, the express revenues of Lake Shore immediately started to decline. As diversion continued to increase, the express revenue continued to decline until in August 1968, Lake Shore had lost 42.16 per cent of all of its express revenue

as compared to the prior year. This does not even take into account the loss of increased business which it would probably have enjoyed if the Wycoff authority had not been granted.

The testimony of Alma Johnson, accountant for Lake Shore Motor Coach Lines, confirms the accuracy of Exhibit 36 and explains the drastic effect which the diversion had upon Lake Shore's financial position. He testified as to specific customers which were lost to Wycoff (R-702-704). He also produced Exhibit No. 37 which shows that because of the diversion Lake Shore's operating ratio increased from 93.7 per cent to 96.4 percent for the 12 month period ending April 30, 1969 and he testified that the diversion constituted a loss of 60 per cent of Lake Shore's net income (R-715).

Lewis Bros. Stages placed into evidence Exhibit 3 (R-929) which shows that it lost approximately 25 per cent of its express revenues for the first six months of 1968 as compared to the first six months of 1967. It is also shown that express revenues constitute approximately 26 to 28 per cent of the total revenues for Lewis Bros. which means that the express business for the company is a significant factor.

Greyhound Lines Inc. placed Exhibit No. 29 into evidence (R-1008) which shows that the elimination of the 500 pound per schedule and/or the restriction of Wycoff to handling express on its newspaper and mail schedules had a diversionary effect on its express business. The exhibit shows that for the period between

March and September 1968 as compared to this same period in 1967, Greyhound experienced a decline in express revenues ranging from 4.4 per cent to 13.1 per cent. An increase in express revenues was shown for January and February of 1968 but that increase does not accurately relate to the question of diversion since the January and February, 1968 figures reflect a rate increase which took effect in March, 1967 and the figures for 1967 and 1968 during those two months are not properly comparable.

Representatives of the truck lines also testified as to diversion by Wycoff during that year and one-half test period. Uintah Freightways eliminated its noon schedule to the Uintah Basin because of the competition in that area (R-817). Uintah's Exhibits No. 102 and 103 show that Wycoff's diversion of freight from that carrier was certainly not imaginary.

The Commission's belief that Wycoff would divert only that freight which was of an emergency nature is in no way supported by the evidence. On the contrary, the shipper witnesses testified without exception that they use Wycoff on all shipments within the allowable weight category if the Wycoff schedule is convenient. The testimony of Mr. Farrell Carter of Carter Supply Company in Ogden typifies the attitude of the shipper witnesses (R-503-504):

“Q. And I note on December 27, 1968 from my recap of Wycoff freight bills, that the Carter Supply Company in Ogden had a shipment to Hill Air Force Base weighing 26 pounds and delivered

12-28-68. Would that be the type of service you're in need of and requesting?

A. Well, in this case — I think frequently our shipments to Hill Field do not require overnight or a matter of urgency delivery. We probably used the Wycoff service because of the size of the shipment — it was less expensive and more convenient."

The evidence shows that the bus companies' business on regular route passenger service has been consistently declining over the past several years (R-1036). As Mr. Alma Johnson explained (R-706):

"Q. Now, to what would you attribute the decline in passenger revenue?

A. I think this is a normal trend throughout the bus industry, that — and it is attributable to many factors.

We've made surveys in the passenger rides and find that the opening of the freeways has had a large impact on mobility of people in cars, the fact that people — we have more people have second and third cars, campers, and other automobiles in the family today than they had five years ago, and this trend continues to increase. We find other factors, such as your shopping centers are becoming more decentralized, and they are moving in closer to outlying areas where people live, so people will feel that they have a need to buy cars in order to become more mobile in their shopping habits" (R-706).

The evidence is that the bus lines are operating at substantially less than full capacity with regard to their passenger service (Exhibit 9). Yet the bus passenger

service must remain in operation to accommodate those members of the public who rely thereon. Consequently, the bus companies have placed great emphasis upon the development of their express business to supplement the passenger revenue and thus insure a continuation of the bus service which is so vital to the general public. Mr. Floyd Roberts of the Trailways Companies testified (R-617):

“Q. Now, have you attempted to modify your buses in any way because of this information you have been getting on load factor?”

A. Yes. With these load factors as low as they are, we have taken the Silver Eagle Coach and taken out 14 seats in the rear, moved the restroom forward, put a partition across between the passengers and express, and put a rear door in for the convenience of loading and unloading and we're able to handle passengers and express to a much greater degree on this coach.

* * * *

Q. Has there been any effort on the part of the Continental Companies to increase their express?

A. Yes; we have solicitors out all the time soliciting express and trying to increase our express business whenever possible.

Q. Is there any reason with regard to the volume of passenger revenue over the past few years which would cause you to increase efforts in the express field?

A. Yes; since we're losing passenger business we have got to try to make up the difference in revenue in some manner.”

The continual loss of both passenger and express revenues to the bus companies over the past years combined with the inevitable increases in costs have necessitated periodic increases in the bus rates (R-672). The effect of diversion of express revenue from the bus companies was well summarized by Mr. Ronneberg of Lake Shore Motor Coach Lines when he stated (R-692):

“ . . . because the express is so vital to us. It could stem to this — if we lose a good bulk of our express, we’re going to be forced, through arithmetic, to cut some schedules, passenger schedules. This we wouldn’t like to do.

We need this express business and need it badly.”

As this Court stated in the case of Lake Shore Motor Coach Lines v. Bennett, *supra*:

“The Public Service Commission is charged with the duty of seeing that the public receives the most efficient and economical service possible. This requires consideration of all aspects of the public interest. When a carrier applies to institute a new carrying service, the Commission must take into account, not only the immediate advantage to some members of the public in increased service, and to the applying carrier in permitting him to enlarge the scope of his business, but must plan long range for the protection and conservation of carrier service so that there will be economic stability and continuity of service. This obviously cannot be done unless existing carriers have a reasonable degree of protection in the operations they are maintaining.”

Plaintiffs submit that the Commission has failed to regularly pursue its authority in failing to provide ade-

quate protection to existing carriers so as to promote the establishment of the most efficient and economical combination of services possible and that this Court should therefore set aside the Commission order.

CONCLUSION

The restrictions which were placed upon Wycoff's express operations as contained in its Certificate No. 1162 Sub 2 as a result of the action of this Court and as a result of a stipulation by Wycoff were obviously imposed in order to prevent the wholesale diversion of low weight traffic from the existing motor carrier services. There is no good reason why that protection should not continue.

Wycoff has failed in its burden to show that public convenience and necessity require an expansion of its authority in Utah. It is, therefore, respectfully requested that this Court set aside the Commission's order issued November 28, 1969.

Respectfully submitted,

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