1964

Continental Bus System, Inc et al v. Public Service Commission of Utah et al : Brief of Plaintiffs

Utah Supreme Court

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A. Pratt Kesler; Allen M. Swan; Attorneys for Defendants;

In the Supreme Court of the State of Utah

CONTINENTAL BUS SYSTEM, INC., a Corporation, DENVER-SALT LAKE-PACIFIC STAGES, INC., a Corporation, GARRETT FREIGHT LINES, INC., a Corporation, MILNE TRUCK LINES, INC., a Corporation, PALMER BROTHERS, INCORPORATED, a Corporation, and RIO GRANDE MOTORWAY, INC., a Corporation,

Plaintiffs,

- vs. -

PUBLIC SERVICE COMMISSION OF UTAH and HAL S. BENNETT, DONALD HACKING and RAYMOND W. GEE, Commissioners of the Public Service Commission of Utah, and WYCOFF COMPANY INCORPORATED, a Corporation,

Defendants.

Case No. 10107

BRIEF OF PLAINTIFFS

APPEAL FROM ORDER OF THE PUBLIC SERVICE COMMISSION OF UTAH

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

TEXT AUTHORITIES CITED

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STATEMENT OF THE KIND OF CASE

This an appeal from an order of the Public Service Commission of Utah dismissing the complaint of plain-

tiffs and the order to show cause issued thereon. Such complaint prayed for an order vacating bi-monthly temporary permits which had been issued by the Commission to Wycoff Company, Incorporated, and determining that the same should not be issued in the future since the Commission has no jurisdiction to issue temporary authority to common, as distinguished from contract, carriers.

DISPOSITION OF CASE BEFORE THE PUBLIC SERVICE COMMISSION

The complaint of Continental Bus System, Inc., and Denver-Salt Lake-Pacific Stages, Inc. prayed for an order vacating the temporary permit issued to Wycoff Company, Incorporated, hereinafter called Wycoff, authorizing it to transport contractors' and machinery dealers' repair parts, supplies and equipment between all points and places in the State of Utah. Upon hearing, in which other common carriers joined as intervenors and complainants, the Public Service Commission dismissed the complaint and declared its order to show cause satisfied. This appeal relates to such order.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to set aside the Commission order dismissing said complaint and vacating the Commission's order to show cause, and a decision of this Court declar-

ing that the Commission has no jurisdiction to issue a temporary permit authorizing common carrier service without hearing or notice, and directing the Commission to cancel any such permit issued to Wycoff.

STATEMENT OF FACTS

The record consists of stipulations of the parties on hearing and Commission declarations, including Commission orders and temporary permits included in the record. The complaint of Continental Bus System, Inc. and Denver-Salt Lake-Pacific Stages, Inc. was filed January 22, 1963 (R. 87). At that time, the Commission had issued a series of successive sixty day temporary permits to Wycoff, the first of which was issued on May 31, 1961, and the lat on November 21, 1962 (R. 88). In fact, the Commission continued to consecutively issue the sixty day temporary authority permits to the date of the Commission order on February 7, 1964 (R. 96) and continued to do so to the date of the filing of the record with the Supreme Court and to date hereof. (Envelope adjacent R. 28.)

Each of such permits is for a sixty day period, and there is thus a continuous grant of temporary authority from May 31, 1961 to March 18, 1964, as the record shows. This is a total period of almost three years. Each permit authorized Wycoff to transport contractors'

and machinery dealers' repair parts, supplies and equipment for contractor and equipment dealers between all points and places in the State of Utah. On most of the permits, the following notation appears:

> "Item Six. Contractors' repair parts, supplies and equipment, in emergency shipments to repair or job locations. This temporary emergency authority shall not be additional to but merely supplemental of express authority (Certificate No. 1162-Sub 2) held by Wycoff, restricted to movements of said contractors' items to and from highway construction jobs and to items which may occasionally exceed the 100 pounds per shipment limitation and/or total express which by reason of said emergency shipment may occasionally exceed 500 pounds of express on one authorized schedule. This temporary authority shall not be used as a basis to support permanent authority."

The temporary permits were generally issued pursuant to a form letter addressed to Wycoff, one of which is in the record, reading as follows (italics supplied):

> "Wycoff Company, Incorporated
> P. O. Box 366
> Salt Lake City 10, Utah
>
> Attn: Max Young, Vice President
>
> Re: Utah Form A-29, Application for a temporary permit to operate as a motor carrier of contractors' and machinery dealers'

repair parts, supplies and equipment in emergency shipments to repair or job locations between all points and places in the state.

Dear Sir:

In connection with the above-captioned matter, you are advised that the Commission has issued the enclosed Utah Form BR-136, Temporary Permit No. A-515, granting temporary authority as applied for.

The instant temporary permit is issued under the provisions of Title 54-6-10, Utah Code Annotated 1953, as amended, and the rules and regulations of the Commission prescribed thereunder, for a period of sixty (60) days, effective September 22, 1963, and expiring November 19, 1963, and the same shall remain in full force and effect for such period unless otherwise canceled by the Commission for cause.

Should additional temporary authority be required, *you are directed to make application for extension in ample time to assure continuance of your transportation service.*

Very truly yours,

PUBLIC SERVICE COMMISSION"

During this period, Wycoff was operating under Certificate of Convenience and Necessity No. 1162, Sub 2 (R. 72) authorizing transportation as a common carrier of general commodities in express service, subject to certain conditions and restrictions, including a limita-

tion on each shipment of 100 pounds, with total limit of 500 pounds on any one schedule, which schedules are to coincide with newspaper movements. The proceeding in which this common carrier certificate was issued was reviewed by this Court in *Lakeshore Motor Coach Lines, Inc. vs. Bennett,* (1958) 8 U.2d 293, 333 P.2d 1061.

Not withstanding the fact that there were numerous interested carriers within Utah, no notice of any kind was even given by the Commission prior to or subsequent to the issuance of the line of temporary authorities for the three year period (R. 8). Where permanent contract authority is issued, the Commission practice requires the contract between carrier and shipper to be filed with the Commission (R. 12). The contract, among other things, sets forth the charge for the transportation movement and is thus a substitute for a tariff (R. 13). In this case, no such contract was ever filed with the Commission in connection with the temporary authorities issued (R. 14).

The major regular route common carriers operating within Utah appeared as either complainants or intervenors in support of the complaint. They had also appeared in protest to the express authority proceeding in *Lakeshore Motor Coach Lines, Inc. vs. Bennett, supra.* Their routes extend throughout the state, and their common carrier operating authorities are set forth in Volume 2 of the record. All of such carriers are currently conducting transportation operations pursuant to

their authorities and during all of the period involved they handled the type of traffic which the temporary authority authorized Wycoff to transport (R. 12). The operations of Milne Truck Lines, Inc. (R. 48-50) generally extend from Salt Lake City through Fillmore, Cedar City, and St. George via U. S. Highway 91, as well as to numerous other points in the southwestern portion of Utah. Palmer Brothers, Inc. (R. 51-52) operates between Salt Lake City and Fillmore via U. S Highway 91, and it serves Delta and the central and western area of Utah. It also serves central and southern Utah, generally between Salt Lake City through Richfield and Kanab to the Arizona border, generally via U. S. Highway 89. Rio Grande Motorway, Inc. (R.53-59) generally operates between Salt Lake City and Provo, and through Price to the Colorado border via U. S. Highway 50, including numerous off-route points in Emery, Carbon and Utah Counties. Garrett Freight Lines, Inc. (R. 33-47) operates between Salt Lake City and points in Grand and San Juan Counties, via U. S. Highways 91, 50 and 160, serving the southeastern portion of Utah. Uintah Freightways (R. 60) as well as Link Trucking, Inc. (R. 59) operate generally between Salt Lake and Utah Counties and Uintah Basin points via U. S. Highway 40 and other pertinent routes.

The bus lines offer an express service. Continental Bus System, Inc. (R. 28-30) operates between Salt Lake

City and the Utah-Colorado state line over U. S. Highways 91 and 50, between Salt Lake City and Payson and indicated intermediate points, and through the Moab and Monticello areas via U. S. Highways 50 and 160. Also, it serves between Marysvale, Utah and Kanab, principally via U. S. Highway 89. Denver-Salt Lake-Pacific Stages, Inc. (R. 31-32) generally operates between Salt Lake City and the Utah-Colorado state line over U. S. Highway 40. Greyhound Lines, Inc. generally operates over the principal Utah highways in all parts of the state, although its operating authority is not included in the actual authority exhibits. The bus lines in their express operation, and all of the truck lines named, are authorized to and are transporting the specific commodities for which temporary authority has been granted to Wycoff.

Based upon the Complaint, the Commission issued its order to show cause, which came on for hearing on July 18, 1963. The report and order dismissing the Complaint and order to show cause was not issued until February 7, 1964 (R. 129). During such interim, as noted above, the Commission continued its policy of issuing temporary authority to Wycoff. The order was based upon the decision of Commissioners Bennett and Hacking, to which Commissioner Gee dissented. His dissent is attached as an appendix since it contains a summation of applicable law as applied to the facts

of record. Petition for rehearing (R. 116) was filed February 25, 1964, and order denying the same issued March 3, 1964 (R. 120).

ARGUMENT

POINT I.

THE ISSUANCE BY THE COMMISSION OF COMMON CARRIER TEMPORARY AUTHORITY IS CONTRARY TO APPLICABLE STATUTES, AND BEYOND THE JURISDICTION OF THE COMMISSION.

The basic concern in this proceeding is whether the motor carrier industry in Utah shall be regulated by the Public Service Commission in a manner consistent with specific statutory authorization and accepted principles of lawful administration, or whether it shall be regulated by a process of expediency, however well intentioned, which ignores the jurisdiction of the Commission as established by specific legislative enactments and violates the most rudimentary concepts of due process. The keystone of this industry, which has invested millions of dollars in plants and facilities, is the operating authority of the various truck and bus lines. The system of utility regulation, which restricts existing carriers in their conduct of the truck and bus operations, contemplates that if additional authority is to be issued, it is essential that it be done in a manner consistent with the statutory regulatory method established by the

legislature and in accord with the power conferred upon the Commission. In its actions here, the Commission thwarted the spirit and intent of the legislative method of regulation.

In 1935, the legislature enacted the Motor Vehicle Transportation Act as Chapter Six of Title 54. That act remain substantially unchanged. Section 54-6-1, U.C.A. 1953, defines a common motor carrier of property, as "any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him," and defines a contract motor carrier of property as "any person engaged in transportation by motor vehicle of property for hire and not included in the term common motor carrier of property as hereinbefore defined."

Section 54-6-5, U.C.A. 1953, provides for the issuance of a certificate of convenience and necessity to operate as a common motor carrier, and Section 54-6-8, U.C.A. 1953, for permit to operate as a contract carrier. In both instances, the statutes provide for a hearing on the application, after notice, which permits interested carriers to appear and present testimony on the issues. After hearing, the certificate or permit may be issued upon a finding that public convenience and necessity require the proposed service as to a common carrier, or upon the fulfillment of specific criteria of need as to a contract carrier.

The statutory method of issuance of authority is completed by Section 54-6-10, U.C.A. 1953, which provides:

> "54-6-10. Temporary, seasonal and emergency permits or licenses. The Commission shall have power, without a hearing, to issue temporary, seasonal or emergency permits *to contract motor carriers* in intrastate commerce, and temporary, seasonal or emergency licenses to *contract motor carriers* in interstate commerce. Such permits and licenses may be issued upon such information, application or request therefor, as the commission may prescribe. Temporary, seasonal or emergency permits and licenses shall specify the commodity or number of passengers to be transported thereunder, together with the point of origin and point of origin and point of destination; but in no event shall any temporary, seasonal or emergency permit or license be issued for a period of time greater than sixty days in length. No fee shall be required by the Commission for the issuance of a temporary, seasonal or emergency permit or license under the provisions of this section." (Italics added)

The terms of this section are unambigious, and limit the grant of temporary authority to contract motor carriers for a duration of not to exceed sixty days.

The temporary authority issued to Wycoff is clearly that of a common carrier. It authorizes transportation of a class of commodities throughout the State of Utah,

and clearly imposes the obligation upon the carrier to provide such transportation upon the request of any shipper who offers the commodity for transport. There is no contract or specific arrangement between Wycoff and the shipper as is contemplated under a contract carrier operation.

As is shown on the face of the application, these permits were issued "under Title 54-6-10, Utah Code Annotated, 1953." Moreover, the permits are issued as supplements to the express common carrier authority of Wycoff under Certificate No. 1162-Sub 2, and by the terms of the permits themselves are specifically designed to remove the restrictions of the express transportation on so-called "contractors' items." It is inconceivable that a contract permit can be supplemental to a common carrier certificate under the established distinctions between the two types of for hire carriers.

Under applicable legal definitions, there is no question as to the common carrier nature of the permit issued to Wycoff.

In 13 Am. Jur. 2d, Carriers, Section 2, a common carrier is defined as follows:

> "A common carrier may be defined, very generally, as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for com-

> pensation, offering his services to the public generally. The dominant and controlling factor in determining the status as one of a common carrier is his public profession or holding out, by words or by a course of conduct, as to the service offered or performed, with the result that he may be held liable for refusal, if there is no valid excuse, to carry for all who apply . . ."

In 13 Am. Jur. 2d, Carriers, Section 4, the definition is refined:

> "A common carrier has the right to determine what particular line of business he will follow, and his obligation to carry is co-extensive with, and limited by, his holding out as to the subjects of carriage. Thus, it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him. If he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed. . ."

Similar concepts are found in 13 C.J.S. Carriers, Sections 3 b(1) and (2).

In *Realty Purchasing Company vs. Public Servic Com'n*, 9 U.2d 375, 345 P.2d 606, 608 (1959), the court summarizes the general rule in defining a common carrier as follows:

> "A more basic question is presented by the contention that defendant's operation is that of a common carrier and not a contract carrier. The distinguishing characteristic of the former is that it transports all persons who request such service; whereas the latter renders the transportation service only to specific parties with whom it has contracts to do so."

The conclusion of Commisioner Gee in his dissent recognizes the attributes of a common carrier, and the fact that the Wycoff permit should be classified as a common, not a contract, carrier. He states, R. 142:

> "The conclusion is therefore inescapable that this Commission was in error in granting the temporary permits in question, since the statute, Section 54-6-10, *supra,* limits the issuance of said permits to contract motor carriers, a status to which the respondent in this hearing has made no claim; which the certificates of convenience and necessity held by such carrier would negative; and which is not established by the temporary authorities sought and received, the same being by their terms inherently common authorities."

In contrast to the dissent of Commissioner Gee, the order is not so much a consideration of the facts of the case against the background of the authority and jurisdiction of the Commission, as an attempt to justify the action of the Commission by one means or another. It is based upon two principal conceptions: the first,

that it is difficult to determine the distinction between common and contract carriers; the second, that since there are occasions when temporary common carrier authority should be issued, the Commission should have such authority either by finding it elsewhere in the statutes or in the claimed confusion of definition.

The first concept seems to stem from this Court's opinion in *McCarthy vs. Public Service Comm'n*, 111 Ut. 489, 184 P.2d 220 (1947), at least this appears from the extensive reference to the decision at page 8 of the order (R. 136). It is difficult to follow this reasoning. That case involved sand and gravel haulers, transporting generally within 30 miles of the pits. The decision points out the vital importance of the contracts between the haulers and the shippers, and the specific and unique arrangement which controlled the transportation. The court commented, page 221,

> "They enter into an individual contract for each job . . ."

> "The defendants have all been *engaged* in the transportation of property for hire. But we can find no evidence in the record which tends to prove that they *have held themselves out "to the public as willing to undertake for hire to transport."* The fact that each of them engages in transportation for hire is not sufficient evidence that they hold themselves out to the public to do so. Such a holding would make it possible

> to convert all contract carriers into common carriers, a result which obviously is not intended by our code."

Again, page 222:

> "The trend of the testimony is all toward individually negotiated contracts."

In holding the transportation to be that of a contract carrier, the decision followed the general rule. It was the specific agreement or contract between the carrier and shipper which provided the key to the classification.

In *Realty Purchasing Company vs. Public Service Comm'n, supra,* Salt Lake Transportation Company operated under contracts with four major airlines in the transportation of passangers to and from the Salt Lake Airport. Again, upon the same reasoning, the court found existence of contract carriage. The decision is consistent and clear, there is no ambiguity or uncertainty in its meaning.

The Utah decisions, and others, are cited in the above cases, and are in accord with general authority on the classification as between common and control carriers. There appears no confusion, and no doubt that the Wycoff temporary authority here is that of a common carrier. It had no contracts or special arrangements and served a class of the general public without discrimination.

The second concept of the Order is that the Commission's authority to issue temporary common carrier permits or certificates is found in 54-4-1, U.C.A. 1953, or somehow in the other general sections which do not relate specifically to motor carriers but apply to all types of utilities. Section 54-4-1 reads as follows:

> "54-4-1. General jurisdiction. The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specificially designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction."

Where a specific power is conferred upon a Commission it is fundamental that this limits the extent of a geneal grant of authority. *Bamberger Electric Company vs. Public Utilities Comm'n,* 59 Ut. 351, 204 Pac. 314 (1922). Moreover, if 54-4-1 could grant so fundamental a power as the right to issue a type of operating authority, it would clearly be an unlawful delegation of power as there is not the slightest standard or criteria set forth in the staute pursuant to which the power is to be exercised. Section 54-6-2, U.C.A. 1953, of the Motor Vehicle Transportation Chapter provides that the general utility laws shall be applicable *only when not in conflict with the Motor Vehicle Chapter.* To authorize issuance of common carrier authority under a

general utility act power, where Section 54-6-10 specifically limits the delegation, would be in direct conflict with the Section, a result specifically prohibited.

Another facet of the second concept of the Order is that the Commission has the power to issue common carrier temporary authority because it requires such authority. Apart from the fact that such matters are for the legislature to determine, and it has determined otherwise, plaintiffs cannot accept the premises of the claim.

At page 9 (R. 137) the order states that situations arise where some form of temporary authority must be issued to meet the public need. Reference is made to petroleum transportation during World War II. There is no record on this, and it involves matters impossible to anticipate on hearing. Transportation in this period was controlled by the National Defense Transportation Act enacted by Congress pursuant to its war powers. This matter is completely irrelevant to this proceeding.

At page 9 also, the order attempts justification on the theory that it is necessary to determine in advance the financial feasibility of a carrier operation. This cannot justify a grant of operating authority without hearing, and the question of financial success exists to an extent in every common or contract carrier application. The Commission has an adequate staff to process

through hearing and order any emergency application in well under sixty days. Moreover, under 54-6-20, U.C.A. 1953, the Commission may at any time for cause, such as financial considerations, suspend, alter, amend, or revoke any certificate, permit or license issued by it. It has ample authority which can be properly exercised to fully meet any conceivable requirements if the operation does not develop, from a financial standpoint, as planned.

The order stresses, page 10 (R. 138), the temporary authority provisions of the Interstate Commerce Act under Section 210a(a). In the issuance of its regulations and interpretive decisions, the Utah Commission has on occasion referred to the decisions of the Interstate Commerce Commission as helpful analogy to its process of decision. Here, however, the concern is with specific statutes which are not persuasive but controlling on each Commission. If Utah is to follow the Federal acts, it is a matter of legislative concern. In any event, the Federal and Utah statutes are quite different in concept.

Section 210a(a) of the Interstate Commerce Act (49 U.S.C.A., Sec. 310a) provides for issuance of temporary authority for service by a *common or contract carrier* for a period not to exceed 180 days. Under applicable I.C.C. regulations, two types of temporary authority may be issued. The first is for an emergency temporary

authority of not to exceed 30 days, which is issued without any prior notice. Thereafter, when regular temporary authority is involved, prior to its issuance a notice detailing the application is forwarded to the interested carrers. There is no hearing, but such carriers can and do submit written summaries of their operations and are permitted to show the nature and extent of the available carrier service. In this way the Commission is reasonably informed before it acts. Moreover, there is the immediate right of appeal within the Commission structure from decisions of the Temporary Authorities Board.

The order then refers, page 10 (R. 138), to issuance of temporary authority under the Federal statute relative to applications involving mergers or the purchase or lease of carrier authorities or properties. This is controlled by Section 210a(b) of the Interstate Commerce Act (49 U.S.C.A., Sec. 310a). This subsection does not contemplate the creation of new authority, but the grant of temporary approval, not to exceed 180 days, of the operation of the motor carrier properties sought to be acquired, pending disposition of the application for approval of acquisition under Section 5 of the Act (49 U.S.C.A., Sec. 5). It does not contemplate temporary operating authority in the sense of that here involved, as suggested by the order

In short, the claimed reasons why the clear intent of the statute must be ignored are not persuasive, and cannot in any event be used to create a Commission power which is not intended or authorized by statute.

POINT II.

THE ISSUANCE BY THE COMMISSION OF TEMPORARY SIXTY DAY PERMITS IN CONSECUTIVE ORDER OVER A PERIOD OF APPROXIMATELY THREE YEARS WAS ARBITRARY AND CAPRICIOUS, AND TANTAMOUNT TO ISSUANCE OF PERMANENT AUTHORITY WITHOUT HEARING, CONTRARY TO LAW.

One of the most disturbing aspects of this proceeding is the action of the Commission in issuing successive temporary authorities of sixty days' duration during a period of over three years, without hearing or notice to interested carriers. The plaintiffs collectively provide transportation service throughout most of Utah, and are not aware of any transportation emergency on tractors' and machinery dealers' repair parts, supplies and equipment between all points and places in the State. The reasons for the three year grant are not fully known to plaintiffs, and there is no way they can be determined under the administrative process followed in this case.

Page 5 of the Commission order (R. 133) refers to an application of Wycoff for general commodities in express service between Salt Lake City and points in Grand and San Juan Counties, hearing on which was concluded March 9, 1962. That application, in Case No. 4252-Sub 9, was denied by the Commission in its order of June 13, 1962, for failure of proof of convenience and necessity. Yet apparently this case is deemed to provide some justification for grant of temporary authority here, since the order states that the witnesses expressed a desire for express service. On page 11 (R. 139) the order refers to transportation need claims of contractors' and machinery companies as justification for grant of temporary authority to Wycoff. Presumably, the emergency need extended over a three year period. It is believed that a number of the companies who presumably supported the requests for temporary authority are among those who appeared in Case 4252-Sub 9 on hearing.

The order then states at the same page that the Wycoff service is not fully available from any other carrier, a fact vigorously denied by plaintiffs. Upon what evidence does the Commission rule? There is no way in which this can be determined, since there has been no hearing or opportunity for the protesting carriers to consider the statements of shippers and to present their own evidence and views on the matter.

Page 4 of the order (R. 132) refers to certain applications of Wycoff for operating authority which are pending before the Commission. Of these, subsection (b) would appear to seek authority to transport commodities here involved throughout Utah in express service without restriction. The application was filed on August 5, 1960, and has never been called for hearing. The order then points out (R. 132) that the processing and hearing of the various pending applications of Wycoff has been complicated, if not in fact made impossible, by reason of various other proceedings involving Wycoff which are or have been before the Commission. Plaintiffs cannot agree.

Here again, is an example in these proceedings of administrative expediency. Certainly Wycoff or any carrier is entitled to have its application heard within a reasonable time after filing. To postpone the application is not in accord with the powers granted to the Commission. It certainly cannot justify issuance of temporary authority during a delay period of three years.

In short, it is clear that the Commission exceeded its jurisdiction in the issuance of the temporary authorities in this case, and that such issuance for all practical purposes constituted grant of permanent authority without hearing or notice.

CONCLUSION

The implications of this proceeding extend far beyond the matters here involved. They affect every Utah administrative board and agency, since they involve the simple issue as to whether or not the powers conferred by the legislature are to be observed in their limitations or ignored on the basis of expediency, however well intentioned.

There is no justification for the grant of temporary common carrier authority to Wycoff in view of the powers, with specific limitation, granted to the Commission to deal with the emergency transportation requirements of the public under Section 54-6-10, U.C.A. 1953. Such Section provides the Commission with ample authority to meet any transportation emergency of the shipping public through grant of contract carrier permits. There is no reason why the Commission cannot within the sixty day period process an application for permanent authority to meet any such need, and it does not matter whether the application be for contract or common carrier authority.

The Commission should be compelled to exercise its powers in accordance with legislative delegation. The temporary authority permit of Wycoff Company, Incorporated should be vacated, and in this and all proceed-

ings the Commission should be restricted to issuance of temporary emergency grants of authority for contract carriers.

Respectfully submitted,

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DATED: June 4, 1964

APPENDIX

BEFORE THE PUBLIC SERVICE COMMISION OF UTAH

In the Matter of the Application of WYCOFF COMPANY, INCORPORATED Temporary Permit to haul emergency contractor's supplies.	Case No. 5242 REPORT AND ORDER

COMMISSIONER RAYMOND W. GEE, DISSENTING:

I disagree with the Report and Order of the Commission.

Wycoff Company, Incorporated, respondent in this proceeding, is a common motor carrier operating under Certificate of Convenience and Necessity No. 1162 and subs thereunder. On or about May 31, 1961, and subsequent thereto this Commission issued to said carrier bimonthly temporary permits to haul contractor's and machinery dealer's repair parts, supplies and equipment in emergency shipments to repair on job locations. The

hauls were for contractors and equipment dealers between all places in Utah. The series of temporary permits thus issued successfully cover the period from May 31, 1961, to the present, there being outstanding temporary authority covering the aforementioned commodities through the 18th day of March, 1964. No notice to interested parties was given prior to the issuance of the temporary permits referred to above.

The complainants, Continental Bus System, Inc., and Denver-Salt Lake-Pacific Stages, Inc., operate as common motor carriers of passengers and property under Certificates of Convenience and Necessity Numbers 846 and subs thereunder, and 447 and subs thereunder, respectively; that as a result of the issuance of the temporary permits, complainants allege that traffic has been diverted from them.

Wycoff Company, Incorporated, has held itself out to transport, and has transported the commodities, and within the geographical area, as set forth in the temporary authorities aforementioned.

According to the terms of the applications for the permits aforementioned, the temporary authority was sought pursuant to Section 54-6-10, U.C.A., 1953.

The complainants ask by way of relief that any outstanding temporary permit embracing the commodities set forth above be vacated and declared void, and

that the same be not issued or reissued in the future in the manner complained of, or in a manner contrary to law.

Of the several legal issues raised by the complainants, I am of the opinion that the issue of Commission authority to be decisive.

Section 54-6-5, U.C.A., 1953, provides in part:

> "It shall be unlawful for any common motor carrier to operate as a carrier in intrastate commerce within this state without first having obtained from the commission a certificate of convenience and necessity. The commission, upon the filing of an application for such certificate, shall fix a time and place for hearing thereon, which shall be not less than ten days after such filing. * * * *"

The requirement of a hearing under the foregoing statute, and as a precedent to the issuance of authority to operate as a common carrier in intrastate commerce is unequivocal, and has not been obviated by any other Utah statute.

That *contract* carriers, as distinguished from common carriers, may be issued temporary, seasonal, or emergency permits, without a hearing, is indicated in Section 54-6-10, U.C.A., 1953, which provides:

"The commission shall have power, without a hearing, to issue temporary, seasonal, or emergency permits to contract motor carriers in intrastate commerce, and temporary, seasonal or emergency licenses to contract motor carriers in interstate commerce. Such permits and licenses may be issued upon such information, application or request therefor, as the commission may prescribe. Temporary, seasonal, or emergency permits and licenses shall specify the commodity or number of passengers to be transported thereunder, together with the point of origin and point of destination; but in no event shall any temporary, seasonal or emergency permit or license be issued for a period of time greater than sixty days in length. No fee shall be required by the Commission for the issuance of a temporary, seasonal, or emergency permit or license under the provisions of this section."

The applications for temporary permits in question indicate the authorities were sought under Section 54-6-10, U.C.A., 1953, and the temporary permits issued pursuant to that statute.

The terms of Section 54-6-10, supra, allow the issuance of temporary seasonal, or emergency permits to "contract motor carriers." Wycoff Company, Incorporated, is a "common motor carrier," and not a "contract motor carrier," as those terms are defined under Chapter 6, Title 54, U.C.A., 1953, and the temporary authority requested[1] and granted was and is in the nature of a common motor carrier authority rather than that of a contract motor carrier.

[1]Cf. Section 11.3, Rules of Practice and Procedure of the Public Service Commission.

The conclusion is therefore inescapable that this commission was in error in granting the temporary permits in question, since the statute, Section 54-6-10, supra, limits the issuance of said permits to contract motor carriers, a status to which the respondent in this hearing has made no claim; which the certificates of convenience and necessity held by such carrier would negative; and which is not established by the temporary authorities sought and received, the same being by their terms inherently common authorities.

I am not in accord with the argument that this commission has implied authority to issue temporary or emergency permits under its broad statutory powers, specifically those set forth in Section 54-4-1, U.C.A., 1953. That section provides:

> "The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction."

Even were one to ignore the form of the applications and permits in question, i.e., that the authority was sought and granted under Section 54-6-10, supra, and consider the substance of the authority sought and granted, the conclusion would be the same.

According to 3 Sutherland, Statutory Construction, §6603, at page 268:

> "Administrative agencies are purely creatures of legislation without inherent or common law powers. The general rule applies to statutes granting powers to administrative boards, agencies or tribunals is that only those powers are granted which are expressly or by necessary implication conferred, and the effect usually has been to accomplish a rather strict interpretation against the exercise of the power claimed by the administrative body. The rule has been variously phrased, including language to the effect that a power must be 'plainly' expressed; that a power is not to be 'inferred' or taken by 'implication'; or that the jurisdiction of an administrative agency is not to be 'presumed.'"

While a more liberal construction than that set forth above has been applied in some cases involving public utility agencies, it is my conviction that the more restrictive interpretation is applicable, especially in the situation at hand where property rights of the applicant and competing carriers are affected by the grant or denial of the temporary common carrier authority without a hearing.

In *Bamberger Electric Company vs. Public Utilities Commision,* 59 Utah 351, 204 Pac. 314, the Supreme Court of Utah held:

> "* * * * It needs no citation of authorities that where a specific power is conferred by statute upon a tribunal, board, or commission with limited powers, the powers are limited to such as are specifically mentioned. Any other rule would make an autocrat of a utilities commission. * * * *"

While Section 54-4-1, U.C.A., 1953, as amended, vests general jurisdiction in the commission to supervise and regulate public utilities and "* * * * to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction," I interpret this statute to grant authority expressly set forth or necessarily implied, and not to constitute a carte blanche, or grant of full discretionary power.

The Utah legislature has expressly provided for two types of temporary carrier authority: (1) The permits of a temporary, seasonal, or emergency nature issued to *contract* motor carriers under Section 54-6-10, U.C.A., 1953, to which reference has been made heretofore; (2) the temporary continuance of motor carrier operations following the death of one who holds authority for such operation. Such interim rights are expressly set forth in detail in Section 54-6-24, U.C.A., 1953. If Section 54-4-1, U.C.A., 1953, delegates the sweeping authority claimed by the commission, then there would be no need whatsoever, to enact Section 54-6-24.

Two familiar rules of statutory construction[2] dictate that with enactment of Sections 54-6-10 and 54-6-24, U.C.A., 1953, and the specific provisions thereunder, no additional authority to issue temporary permits can be implied from statutes conferring general powers.

Further attendant difficulty with any construction of Section 54-4-1, supra, which would allow the grant of temporary carrier authority, is the total absence of legislative guides relating to the duration of that authority, conditions precedent to its issuance, and whether successive grants are permitted. This lack of legislative standards suggests difficult administration, if not questionable constitutionality of the contended for statutory interpretation.

The Utah Legislature can articulate explicitly on the subject of temporary motor carrier authority, and has done so in respect to contract carriers (Section 54-6-10, supra), and the temporary continuance of common and contract motor carrier authority in the event of the death of the holder (Section 54-6-24, supra). For this commission to indulge in any generous statutory interpretations which result in the grant of temporary common motor carrier authority otherwise than as set forth in Sections 54-6-10 and 54-6-24, supra, is error,

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[2]Expresio units exclusio alterius est (The expression of one thing is (implies) the exclusion of another); Expressium facit cessure tacitum (that which is expressed puts an end to that which is implied.)

even though, as is the case here, the issuance of such permits was done in good faith, and premised in the public interest.

Nor does the apparent long standing policy and practice of this commission in granting temporary authorities to common motor carriers, upon proper showing, justify the conclusion that the commission has authority to issue the type permit in question. A contemporaneous or practical construction of a statute by an administrative agency for a long period of time is of great weight and persuasive influence in the interpretation of that legislation, only if the statute is ambiguous. Alexander vs. Bennett, 5 Utah 2d 163, 298 P.2d 823; Murdock vs. Mabey, 59 Utah 346, 203 P. 651; 50 Am. Jur., Statutes, pp. 309-312. The statutes in question here are neither ambiguous nor of doubtful meaning, the only conflict arising from the administrative practice itself. Therefore, the contemporaneous or practical construction of Sections 54-4-1 and 54-6-10, indulged in by this commission cannot be permitted to control, modify or enlarge the plain meaning of these statutes.

The critical result of any legal analysis of the question at issue is whether or not a hearing, upon due notice, and specific findings are required before this commission may grant common motor carrier authority to an applicant. The jist of my disagreement is that such a hearing, notice and proof is required before *any* authori-

ty can be granted to a common motor carrier to operate in intrastate commerce. I am of the conviction that Section 54-6-5, U.C.A., 1953, sets forth the only procedural and substantive basis upon which a common motor carrier may operate in intrastate commerce, which statute by its terms is clear and void of ambiguity.

But assume for the sake of argument either or both of the following:

(a) That this commission has authority to issue a *common* motor carrier authority, of temporary duration, without a hearing,

(b) That the temporary grants here involved are in the nature of *contract* motor carrier permits — and issued pursuant to Section 54-6-10, supra.

There still remains unresolved the question of whether this commission has authority to issue seventeen successive temporary permits to the same carrier, embracing the same commodities, and covering a period from May 31, 1961 through March 18, 1964, without a hearing, a showing of proof, or opportunity for any protestant to be heard.

Although the permits in question were issued in good faith, the commission being motivated by a concern for the public welfare, this action in my opinion

was in excess of the powers of this agency, the tacking of the permits having in fact the effect of a grant of permanent authority. The requirements of a hearing under both Section 54-6-5, supra, (for a common carrier) and Section 54-6-8, U.C.A., 1953, (for a contract carrier), and the resulting protection to the public and existing transportation facilities have been totally frustrated in this instance by the issuance of consecutive permits.

In my opinion all doubts should be resolved in favor of due notice and adequate opportunity for all interested parties to be heard; the temporary permit now held by Wycoff Company, Incorporated, expiring on the 18th day of March, 1964, relating to the transportation of contractor's and machinery dealer's repair parts, supplies and equipment, should be vacated forthwith.

Date dat Salt Lake City, Utah, this 7th day of February, 1964.

/s/ Raymond W. Gee, Commissioner

Appendix 11