

1949

Union Pacific Railroad Company v. Public Service
Commission of Utah, Donald Hacking, W. R.
McEntire, Oscar W. Carlson, Deseret Live Stock
Company, Ira P. Sharp, Joseph H. Francis, J. C.
Stauffer, W. L. Hatch, Bountiful Live Stock
Company, Max L. Cowan, and Cowan Brothers :
Brief of Petitioner

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Bryan P. Leverich; M. J. Bronson; A. U. Miner; Howard F. Coray; Counsel for Petitioners;

Recommended Citation

Brief of Appellant, *Union Pacific Railroad Co. v. Public Service Comm. Of Utah*, No. 7219 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/950

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COM-
PANY, a corporation,

Petitioner.

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, DONALD HACKING, W. R.
McENTIRE, and OSCAR W. CARL-
SON, the members thereof; DES-
ERET LIVE STOCK COMPANY, a
corporation; IRA P. SHARP, doing
business as Sharp Livestock Company;
JOSEPH H. FRANCIS; J. C. STAUF-
FER; W. L. HATCH; BOUNTIFUL
LIVE STOCK COMPANY, a corpora-
tion; MAX L. COWAN, and COWAN
BROTHERS, a partnership.

Defendants.

Case
No. 7219

BRIEF OF PETITIONER

FILED

DEC 2 1949

BRYAN P. LEVERICH
M. J. BRONSON
A. U. MINER
HOWARD F. CORAY

Counsel for Petitioner

CLERK, SUPREME COURT, UTAH
Howard F. Coray
of Counsel
Salt Lake City, Utah

INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	3
ASSIGNMENT OF ERRORS	13
ARGUMENT	14

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN FIND- ING THAT THE PRESENT STOCK LOADING FACILITIES ARE NOT REASONABLE OR ADEQUATE	14
-------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN MAK- ING THE ORDER REQUIRING THE RAIL- ROAD COMPANY TO CONSTRUCT THE NEW FACILITIES THEREIN MENTIONED, IN THAT COMPLIANCE WITH THE SAME BY THE RAILROAD COMPANY WILL RE- QUIRE THE RAILROAD COMPANY TO VIOLATE THE INTERSTATE COMMERCE ACT, AND CONSEQUENTLY, SAID ORDER OF THE P. S. C. U. IS UNLAWFUL	28
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN RE- QUIRING THE RAILROAD COMPANY TO CONSTRUCT NEW FACILITIES IN THAT NO EVIDENCE IN THE RECORD JUSTIFIES THE MAGNITUDE OF THE PROGRAM RE- QUIRED BY THE COMMISSION'S ORDER ...	35
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN DENYING THE RAILROAD COMPANY'S PETITION FOR REHEARING	44
-----------------------------------------------------------------------------------------------------------------------------------	----

CONCLUSION	44
------------------	----

STATUTES CITED

U. C. A. 1943, 76-4-7	14, 15, 40
U. C. A. 1943, 76-4-4	40

INDEX—Continued

	Page
U. S. C. A., Title 49, Sec. 3, Subsec. (1) Cumulative Annual Pocket Part	32

CASES CITED

Atchison, Topeka & Santa Fe Ry. Co., et al. v. United States, et al., 295 U. S. 193, 55 Sup. Ct. 748, 79 L. Ed. 1382	17, 18
Central Stockyards Co. v. Louisville & Nashville Ry. Co., 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339 ..	24, 25
Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461	26
Farmers' Market Co. v. R. R. Co., 142 Pa. 580, 21 A. 902, 989, 990	31
Garkane Power Co., Inc. v. Public Service Commission, 98 Ut. 466, 100 P. (2) 571	31
Great Northern Ry. Co. v. State of Minnesota ex rel. State Railroad & Warehouse Commission, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. Ed. 1337	21, 22, 23
Interstate Stockyards Co. v. Indianapolis Union Ry. Co., 99 Fed. 472	35
Lehigh Valley R. R. Co. v. United Lead Co., 133 A. 290 ..	35
Logan City v. Public Utilities Commission of Utah, 77 Ut. 442, 296 P. 100	44, 45
Los Angeles & Salt Lake R. R. Co. v. Public Utilities Commission of Utah, et al., 80 Ut. 455, 15 P. (2) 358	41, 42
Mountain States Telephone & Telegraph Co. v. Public Service Commission, et al., 105 Ut. 230, 142 P. (2) 873	36, 39, 40
Sioux City Terminal Railway Switching, 241 I. C. C. 53	35
State ex rel. Railroad Com'rs. v. Florida East Coast Ry. Co., 68 So. 761	27
Thayer v. California Development Board, 164 Cal. 117, 127, 128 P. 21, 25	31
United States v. Pennsylvania Railroad Co. 266 U. S. 191, 45 Sup. Ct. 43, 69 L. Ed. 243	35

In the Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COM-
PANY, a corporation,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, DONALD HACKING, W. R.
McENTIRE, and OSCAR W. CARL-
SON, the members thereof; DES-
ERET LIVE STOCK COMPANY, a
corporation; IRA P. SHARP, doing
business as Sharp Livestock Company;
JOSEPH H. FRANCIS; J. C. STAUF-
FER; W. L. HATCH; BOUNTIFUL
LIVE STOCK COMPANY, a corpora-
tion; MAX L. COWAN, and COWAN
BROTHERS, a partnership.

Defendants.

Case
No. 7219

BRIEF OF PETITIONER

PRELIMINARY STATEMENT

This is a proceeding in certiorari pursuant to the provisions of 76-6-16, Utah Code Annotated, 1943, for review of an order of the Public Service Commission of Utah. For convenience the Public Service Commission of Utah will

sometimes hereafter be referred to as P.S.C.U. or as the Commission. The petitioner, Union Pacific Railroad Company, will sometimes hereafter be referred to as the railroad or the railroad company.

Procedurally, this case originated when the P.S.C.U., on its own motion, set for hearing informal complaints concerning the stock loading facilities of the railroad company at Wahsatch, Utah. Pursuant to notice, such hearing was commenced on the 18th day of August, 1947 before the P.S.C.U. at the State Capitol (Tr. 5) with several interested parties appearing. At that time it became apparent to the Commission that the party really interested in this matter as the adversary of the railroad company was Deseret Live Stock Company, a corporation engaged in fairly substantial livestock operations in Utah (Tr. 16 through 23). Thereupon the P. S. C. U. continued the hearing and required Deseret Live Stock Company to file a formal application showing what relief was sought in this proceeding by Deseret Live Stock Company (Tr. 23, 25, 26). In accordance with these instructions issued by the Commission, Deseret Live Stock Company, which will for convenience sometimes hereafter be referred to as the livestock company, filed a written petition seeking an order of the P.S.C.U. requiring the railroad company to construct a complete stock loading unit, including pens and trackage, on the north side of the railroad company's tracks between Wahsatch, Utah and the Wyoming state line.

Upon such petition the matter was then heard by the Commission commencing on the 25th day of August, 1947.

After hearing a great deal of testimony and receiving numerous exhibits, the Commission took the matter under advisement and on the 10th day of May, 1948 entered its order requiring the Union Pacific Railroad Company to construct certain stock loading facilities at a certain location near Wahsatch, Utah. The expense of constructing these facilities would be approximately \$25,000.00 on present construction prices.

On June 1, 1948, within the time allowed by law, the railroad company filed with the Commission its petition for rehearing. This petition was denied by the Commission on July 14, 1948 and the railroad company, petitioner in these certiorari proceedings, perfected said certiorari proceedings. At the hearing commenced by the Commission on August 25, 1947 numerous parties appeared before the Commission and some pleadings were filed by other business organizations than the Deseret Live Stock Company, so that the defendants named above in the title of this proceeding, all of whom apparently had an interest in this matter, were joined as defendants along with the P.S.C.U. and the Deseret Live Stock Company in this certiorari proceeding.

STATEMENT OF FACTS

The Union Pacific Railroad Company is, and for many years has been, a common carrier of freight and passengers by rail, engaged in interstate commerce. As a part of its system it maintains a double main line track between eastern points and western points, which said double track in the

vicinity of Wahsatch, Utah runs approximately east and west. The southerly track of these two tracks handles east-bound trains and the northerly track handles westbound trains (Ex. 10, Tr. 40).

For approximately forty years the Union Pacific has maintained certain stock loading facilities at Wahsatch, Utah, which are located on the south side of these double tracks. These stock loading facilities, consisting of pens, loading chutes and suitable trackage for the storage of empty cars, are adequate in size to accommodate all business which is presently handled by the railroad company at Wahsatch, Utah, except in exceptional emergencies where all shippers in that area desire to use the loading facilities at the same time. Mr. Dansie, manager of the Deseret Live Stock Company and its principal witness, stated that his company could use about four more pens in the present facilities (Tr. 92); but he admitted that the present facilities, as to size at least, were adequate in normal situations (Tr. 104).

In substantiation of this fact the railroad company showed by its records of all shipments from Wahsatch, either in or out, that the loading facilities now in existence there are used to less than five per cent of capacity computed on a year-round basis. These figures were based on 1946 usage, which was the last full year before the hearing (Tr. 419). The evidence also shows that during 1946 the loading facilities were actually used upon only 58 separate days. Considering 58 days as the time of each year during which the loading facilities are used—still only 28 per cent of the capacity of the loading facilities at Wahsatch, Utah present-

ly maintained by the railroad was required for all loading or unloading of livestock at that spot (Tr. 419). These figures were computed on shipments of all shippers using the facilities at Wahsatch, whether in shipments from or to this particular point. Admittedly these figures are based upon the assumption that all parties concerned in the loading or unloading of any livestock perform their varied functions efficiently (Tr. 425, 426). Nevertheless, it remains abundantly clear that with a margin of 72 per cent of unused capacity on the days when the loading yards are used, reasonable cooperation between the shippers and the railroad company, together with reasonable efficiency, renders the present facilities absolutely adequate in size to handle such business as is now transacted by the railroad at Wahsatch, Utah.

Mr. David E. Howard, manager of the Bountiful Live Stock Company and a witness for Deseret Live Stock Company, suggested that two more loading chutes be installed in the present facilities, that there be some reconditioning of these facilities; that a few cinders be dumped in some mud-hole, and that some lighter boards be supplied for runway boards into the cars (Tr. 187, 188). Otherwise, in his opinion, the stockyards were fully adequate, at least as to size (Tr. 188, 189).

We parenthetically here observe that the railroad company has always been, and still is, willing to make such minor repairs and alterations as are suggested above or as may from time to time become necessary for maintaining the adequacy of the loading facilities.

It is significant to note that the P. S. C. U. did not find that the present facilities for loading and unloading stock at Wahsatch were inadequate in size (Report of Commission); rather, the Commission after finding dangers in driving livestock across the track, said in paragraph No. 10 of its Report: "That for the shippers from the north the present stock loading facilities of said railroad at Wahsatch, Utah are not reasonable or adequate." It is therefore clear that the Commission based its order upon a determination that the facilities were not adequate because of their location. The basic complaint of the Deseret Live Stock Company and the sole basis upon which the P. S. C. U. made the order complained of, is that the present stock loading facilities at Wahsatch are inadequate in that they require Deseret Live Stock Company to move its livestock across the tracks either before loading or after unloading. This problem was the focal point of most of the evidence adduced; and the evidence concerning the same requires some detail in stating.

The present facilities for stock loading and unloading at Wahsatch, which have been in existence for about forty years (Rep. of Com., par. 5), were originally located on the single main line track of the railroad. Since that time, however, the railroad company has constructed the present double track main line and the old main line track is now a spur which is part of the trackage used by the railroad in servicing the loading facilities at Wahsatch (Rep. of Com., par. 5, Ex. 1). These stockyards have been used for many years by shippers in this area. At the present time all of these shippers, except Deseret Live Stock Company and the Francis interests, ship to or from the south side of the tracks

and the south side of the stockyards so that there is no necessity for other shippers to trail any livestock across the tracks of the railroad company for shipping purposes (Tr. 469). The Francis interests ship very moderate amounts of livestock (Tr. 467, Ex. 12), which in 1946 consisted in total of three car-loads. It therefore becomes plainly apparent that the only problem presented in this case centers around the operations of the Deseret Live Stock Company. The livestock company owns large areas of land north of Wahsatch, which constitute its summer range. Some distance away in Tooele County, Deseret Livestock Company also owns other land and federal grazing permits, which it uses as winter range. In the spring of each year the livestock company ships several thousand sheep and cattle to Wahsatch by rail and in the fall it ships back from Wahsatch to Tooele County to take advantage of the different grazing seasons, all of this traffic going through the present loading facilities (Tr. 31, 32, 33). We here call to the court's attention, however, the statement made by Mr. Dansie that there is no guarantee that such shipments will continue in the future and that the same may, in the discretion of the livestock company, be discontinued at any time, without any notice, if other means of transportation appear more favorable to the livestock company (Tr. 151). In reality, of course, this fact needs no testimony from Mr. Dansie or anyone else for support since it is obvious that any shipper may at any time decide to use some other means of transportation than railroad for the shipment of its products and its livestock.

In addition to the above mentioned shipments between winter and summer ranges, there are also some shipments of

livestock made by Deseret Live Stock Company to various markets, which shipments are made from Wahsatch, and there are also shipments of wool from Wahsatch to various eastern markets. The shipments of livestock to market places throughout the nation usually take place in the fall (Tr. 38), at approximately the same time as the shipments from the summer range at Wahsatch to the winter range in Tooele County.

Thus the use of the Wahsatch facilities by the Deseret Live Stock Company, which seeks to require a very large expenditure on the part of the railroad company for additional facilities, is clearly confined to a relatively short percentage of each year.

The present means by which Deseret Live Stock Company reaches the loading facilities now in existence when shipping from Wahsatch is as follows, — the livestock, whether sheep or cattle, are trailed to a track crossing about one-quarter mile east from the present loading facilities; there the trains are flagged and the livestock are driven across the tracks. They are then driven west about one-quarter mile to the present loading equipment. While thus traveling west on the south side of the tracks the stock is between the railroad tracks and U. S. Highway 30. U. S. Highway 30 is roughly parallel to the tracks in this area and is approximately 200 feet south of the tracks as they now exist (Ex. 1). When shipping livestock to Wahsatch an exactly reverse procedure is used in unloading. Deseret Live Stock Company complains that this crossing, together with the necessity of driving stock one-quarter of a mile between the tracks and U. S. 30, is so dangerous that it renders

the whole present facility inadequate. In support of the proposition Deseret offered evidence that sheep and cattle were on occasion frightened by trains and tracks, that on occasion they tended to stampede when near railroad facilities, that loss of weight was sometimes thus caused due to stampeding, that sometimes sheep ran onto U. S. 30 in their fright, and that in the opinion of the Deseret's witnesses the lives of their employes and of travelers on the highway were endangered by this manner of handling what were claimed to be uncontrollable animals.

We wish at this point to call to the court's attention the obvious fact that it is impossible to ship living livestock by rail without having said livestock at railroad tracks where engines and cars must be present; that even if a loading yard and chutes were constructed on the north side of the track it would still be necessary to have this range stock near tracks, engines and cars when such livestock were shipped from Wahsatch or to Wahsatch; and that Deseret Live Stock Company's witness admitted that even under the most favorable circumstances there is a tendency of livestock to stampede when close to railroad equipment (Tr. 94).

The crossing itself and the stockyards now being used may best be described by referring the court to the photographs introduced at the hearing and the maps also introduced. Exhibit 2 is a photograph which shows a view to the north from the crossing of the approach to the crossing which is used in trailing livestock from the north side of the tracks across the railroad tracks (Tr. 108, 109). Exhibit

3 is a photograph showing another view of the same location. Exhibit 4 shows the terrain and the road westwardly from the crossing which is now used in trailing livestock from the crossing westwardly to the stockyards. U. S. Highway 30 appears at the left of this photograph (Tr. 110, 113). Exhibit 5 is a photograph taken from a position a short distance east of the place from which Exhibit 4 was taken. In Exhibit 5 the camera was facing west and this photograph shows some of the buildings complained of by the livestock company as constituting an unusual hazard (Tr. 111). Exhibit 6 is a photograph taken from a point still farther east looking west and showing the "metropolis" which it is claimed is so dangerous in trailing livestock. Exhibit 6 was taken from a point east of the crossing and south of the same so that by examining Exhibits 4, 5, 6 and 9 (hereinafter referred to) it is possible to visualize every hazard presented by the terrain in driving the stock westwardly from the crossing to the stock loading facilities (Tr. 114). That this is not a labyrinth along which it should be impossible to trail even range livestock seems too clear to require further comment. Exhibit 7 is a photograph taken from approximately the center of the crossing looking westwardly showing the railroad tracks of the Union Pacific main line; Exhibit 8 is a different view of the approach to the crossing looking northward from the tracks, and Exhibit 9 shows the station at Wahsatch which is west of the crossing and east of the stockyards themselves (Tr. 119).

A fair summary of the facts revealed by these pictures is that the crossing and the terrain where livestock must move between the tracks and Highway U. S. 30 is relatively

open country distinctly rural in character; that the crossing presents no unusual hazards in its approach; that there is ample room between the tracks and U. S. 30 to move livestock west to the stockyards after making the crossing; that the terrain is reasonably level so far as the path of the livestock is concerned; and that the hazard complained of in the way of building structures consists of a few scattered sheds, small dwellings, a tank, and a station.

The witnesses for the livestock company in an attempt to exaggerate the situation there present describe various alleged obstacles in the terrain which in their judgment increased the difficulty of the crossing. For example, Mr. Dansie described a twenty-foot high embankment allegedly immediately west of the crossing on the north side of the tracks. This embankment appears clearly in Exhibit 7 but as is also clear from Exhibits 2, 3, 4 and 8, said embankment does not interfere with the crossing itself. We call the court's attention to the fact that the photographs were identified as fairly descriptive of the situation by the manager of the Deseret Live Stock Company and we respectfully submit that said photographs do not fairly allow any other description of the physical terrain than is set forth above.

As to the layout of the present stock loading facilities themselves, we refer the court to Exhibit 1 and the testimony concerning the same at pages 133, 134 and 135 of the Transcript.

The evidence before the Commission also disclosed that in order for the public to have a practical means of using the stockyards ordered by the Commission to be constructed

on the north side of the tracks, it would be necessary for the public to cross land of the Deseret Live Stock Company (Tr. 144). Therefore, the Commission required Deseret to give an easement across its land sufficient for the construction of the stockyards and also an easement 600 feet in width running east from the railroad crossing to the proposed stockyards. This 600 foot easement as ordered by the Commission runs parallel with the tracks and immediately north of the railroad right of way (Order of the Commission). Thus the inconsistency of the Commission's order clearly appears. In effect, the Commission has said by its order in this cause that in order for the new stockyards to constitute a true public facility it is necessary for the public to have a right of way over the Deseret lands. The Commission has further said that this use of the new stockyards requires the trailing of livestock along this 600 foot easement east from the crossing to the proposed stockyards. It is therefore significant to observe that use of the new facilities by anyone other than the Deseret Live Stock Company people involves the following movement: "Crossing a double track and then trailing livestock eastwardly down a corridor of land to loading facilities." At most, any distinction between this proposed facility as it would be furnished to the general public and the present facility as furnished to the Deseret Live Stock Company is one of very slight degree.

It is also petitioner's contention that the evidence discloses the following facts which will be of consequence in the argument herein contained. The evidence thereon will be discussed at appropriate places in the argument.

1. The present crossing over the tracks is a private crossing and not a public crossing.

2. The railroad has adopted a policy which has governed its conduct for many years, pursuant to what is known as General Order 15, of requiring all shippers to pay for all trackage and facilities off the railroad right of way which are private in nature. This is important if it be determined that the new stockyards will in fact be a private facility, because in such event compliance with the order of the P.S.C.U. will constitute the giving of a preference to Deseret Live Stock Company in absolute violation of the Interstate Commerce Act.

3. There is absolutely no evidence in the record made before the Commission as to the minimum requirements of the shippers from the north of the tracks in the way of loading facilities; and certainly there is no evidence that the facilities shown in Exhibit 10, which were ordered constructed by the Commission, constitute the minimum requirements for reasonable facilities on the north side of the tracks at Wahsatch, Utah.

ASSIGNMENT OF ERRORS

1. The Commission acted arbitrarily and unlawfully and erred in finding that the present stock loading facilities are not reasonable or adequate.

2. The Commission acted arbitrarily and unlawfully and erred in making the order requiring the railroad company to construct the new facilities therein mentioned, in that compliance with the same by the railroad company will require the railroad company to violate the Interstate Commerce Act, and consequently, said order of the P.S.C.U. is unlawful.

3. The Commission acted arbitrarily and unlawfully and erred in finding that the proposed facilities will be public in nature.

4. The Commission acted arbitrarily and unlawfully and erred in requiring the railroad company to construct said new facilities in that no evidence in the record supports the conclusion that a program of the magnitude required by the Commission's order is necessary for the north side of the tracks and shippers located thereon at Wahsatch, Utah, to correct any alleged inadequacy which may exist, said alleged inadequacy being specifically denied by petitioner.

5. The Commission acted arbitrarily and unlawfully and erred in issuing its order requiring the construction of additional loading facilities without making sufficient findings relative to the facts relied on in support thereof.

6. The Commission acted arbitrarily and unlawfully and erred in denying the railroad company's petition for rehearing.

ARGUMENT

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN FINDING THAT THE PRESENT STOCK LOADING FACILITIES ARE NOT REASONABLE OR ADEQUATE.

The first contention made by the railroad company as presented by the first assignment of error above is that the Commission acted arbitrarily and unlawfully and erred in finding the present stockyards inadequate and unreasonable. We state at the outset that the jurisdiction of the Commission to enter any order on the subject of increased facilities must be grounded on the provisions of 76-4-7, Utah Code Annotated, 1943. This section provides as follows:

"76-4-7. Rules, Equipment, Service — Regulation After Hearing.

Whenever the commission shall find, after a hearing, that the rules, regulations, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation. The commission, after a hearing, shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and on proper demand and tender of rates such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

No other statute which we are able to discover would warrant any action by the Commission of the character such as the order complained of in these proceedings. Apparently in realization of this fact the Commission found that the present facilities of the railroad company at Wahsatch were inadequate and unreasonable. (Report of Commission, par. 10).

We respectfully urge that if the Commission erred in making such finding the whole basis for its order fails and that the Commission was completely without jurisdiction to enter the order made. This must be so since the legislature which created the jurisdiction of the Commission to make

such orders as the one complained of also provided the qualifications which justified the same in 76-4-7, Utah Code Annotated, 1943.

It is apparent from the record made before the Commission as pointed out in the foregoing statement of facts and also from the findings of the Commission as contained in its report, that the sole factor in the present stock loading facilities which can even be argued as inadequate or unreasonable is their location. Every stock loading facility has to be built on one side of the tracks or the other and the record shows that as to shippers from the south of the tracks the present location is advantageous. Certainly from the evidence produced at the hearing it cannot be said that the choice of the south side of the tracks for the present stock loading facilities by the railroad was an unreasonable one since the majority of the shippers, with nearly one-half the transportation business, are located on that side of the track. Therefore, the problem resolves itself into a determination as to whether or not the present stockyards are inadequate or unreasonable merely because the location of the same requires shippers from the north side of the tracks to trail their livestock across the tracks.

The Union Pacific Railroad Company is a common carrier of livestock. As such we concede that it has a duty to the public to furnish reasonably adequate loading and unloading facilities at Wahsatch, Utah with reasonable means of ingress and egress; but the railroad is in the transportation business and the duty to furnish reasonable and adequate facilities extends only so far as transporta-

tion is concerned. In the case of *Atchison, Topeka & Santa Fe Railway Co., et al. v. United States, et al.*, 295 U. S. 193, 55 Sup. Ct. 748, 79 L. Ed. 1382, suit was brought by several railroad carriers against the United States and the Interstate Commerce Commission to enjoin enforcement of an order of the I.C.C. A three judge district court dismissed the suit and appeal was taken to the Supreme Court of the United States. By a complaint before the I.C.C. a company called the Hygrade Company had attacked as unreasonable and in violation of the Interstate Commerce Act the carrier's tariff charges applicable to switching livestock to the packing plant of the Hygrade Company. The complaint before the Commission also assailed yardage charges collected by a livestock company on livestock delivered at the stockyards. It appeared that the railroad carriers delivered stock to the stockyards company who then turned the same over to the Hygrade Company. The railroad charged a small sum for each car for unloading as part of its tariff and in addition the stockyards company, in accordance with tariffs filed with the Secretary of Agriculture by it, collected a charge on all livestock received in the yards. The complaint of the Hygrade Company was to the effect that it being a part of the duty of a common carrier to provide reasonable unloading facilities no charges should have been made other than the charges for transportation. The Commission found in favor of the Hygrade Company. In passing upon this proposition the Supreme Court of the United States made the following observations:

“Transportation of ordinary live stock in car-load lots from and to points other than public stock-

yards has always been deemed to include furnishing of facilities at the place of shipment for loading and at destination for unloading and suitable ways for convenient ingress and egress."

However, it appeared in this case that part of the service rendered by the stockyards company was the furnishing of a special route from the stockyards company to the plant of the Hygrade Company. In passing upon this matter it therefore became important to determine whether or not a special means of ingress or egress was an additional service furnished by the carrier or by the stockyards company of such a nature as to entitle the carrier or the stockyards company to make an extra charge therefor, and in determining this issue the Supreme Court of the United States said:

"Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways. Transportation does not include delivery within the Hygrade plant or the furnishing of the properties, overhead runway and all, that are used for that purpose. Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by Section 15(5). (Interstate Commerce Act.)"

This case represents a square holding by the Supreme Court of the United States that the duty of the carrier to furnish reasonable loading and unloading facilities ends when the carrier has furnished suitable chutes and pens for this process, together with a convenient way for the shipper to reach a public highway to and from such pens

and chutes. In other words, the transportation of livestock ends at the time when the same have been unloaded and a suitable means of access to a public highway has been furnished. To require a railroad company to go further and to provide a means by which the livestock may be moved from the unloading facilities to the lands of the consignee goes beyond the duty of transportation imposed upon a railroad carrier. We therefore assert that the facilities, equipment, service or appliances mentioned in 76-4-7, Utah Code Annotated, 1943, must refer only to such additional facilities, equipment, service or appliances as are concerned in the transportation of livestock and that the same are in no way connected with additional facilities not a part of the transportation. Consequently, the Public Service Commission of Utah may not require additional facilities, equipment, service or appliances in no way connected with the actual transportation of livestock. Any other rule results in a practical absurdity. If a carrier provides suitable loading and unloading facilities and a suitable means of ingress from and egress to a public highway, it will have done all that it is possible for a railroad to do as to most shippers of livestock, for the reason that most shippers do not own land which abuts a railroad track. For example, as to an individual owning land upon which livestock was grazed north of the lands of the Deseret Live Stock Company at Wahsatch, Utah, the railroad company would be absolutely incapable of providing a direct means of approach to any stock loading facilities without condemning large portions of the Deseret Company's lands. Consequently, the only rational rule, compliance with which can be ex-

pected of any common carrier, is that the carrier be required to furnish adequate stock loading and unloading facilities, together with a reasonable means of ingress and egress to a public highway. Certainly that has been done in the instant case both as to Deseret Live Stock Company and all other shippers in the Wahsatch area. Indeed, in the instant case the railroad company has made available facilities which not only afford reasonable access to a public highway so far as Deseret Live Stock is concerned, but also a crossing over its tracks with flag protection against trains, which permits the livestock to be driven directly onto the property of the livestock company. Under these circumstances, we are unable to comprehend how it can be said that the railroad company has failed to furnish adequate and reasonable loading and unloading facilities at Wahsatch, Utah.

Unless this court is prepared to hold that it is the duty of the railroad company to provide means of ingress to and egress from its stock loading facilities directly upon the lands of any and all shippers of livestock, then it cannot fairly be said that the present facilities at Wahsatch, Utah are inadequate. Although no complaint has been made by shippers from the south of Wahsatch as to the means of ingress and egress to the present loading yards, nevertheless, if the reasoning which the Commission adopted in making the order complained of is sound, then even as to such shippers from the south the present facilities are inadequate. This is inevitably true because it is impossible for all of these shippers to own land immediately adjacent to the present stock loading facilities at Wahsatch, and it is also unques-

tionably the fact that the railroad does not furnish any particular route by which said shippers may trail their live-stock either to or from the lands upon which they are grazed by their owners.

That the scope of the carrier's duty is to supply reasonable facilities for transportation purposes and no other has heretofore been determined by the Supreme Court of the United States in the case of *Great Northern Railway Co. v. State of Minnesota ex rel. State Railroad & Warehouse Commission*, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. Ed. 1337. In that case the Public Service Commission of the State of Minnesota had ordered the Great Northern Railway Company to construct a stock scales at a particular point along its line. The railroad company asserted, as does the railroad company in this case, that such order constituted a violation of the Fourteenth Amendment to the United States Constitution in that it constituted the taking of the railroad company's property without due process of law. In passing upon this proposition the Supreme Court made the following statements:

“Manifestly, if the order is enforced plaintiff in error's property will be taken. * * * The business of a railroad is transportation and to supply the public with conveniences not connected therewith is no part of its ordinary duty. The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt and dedicated to same use. Under admitted facts, unless justified by alleged unlawful discrimination, we think this was an arbitrary and unreasonable exercise of power. It is no answer to say, as counsel do, that the Commission has ‘general

authority to require railroad companies to supply the necessary demands of the public along transportation lines; that it has a right to require the company to build and maintain such facilities as are necessary for the public needs.' The demands upon a carrier which lawfully may be made are limited by its duty, and the present record conclusively shows the required structure had no direct relation thereto."

More simply stated, perhaps, our argument in this particular is as follows: The route from the present loading facilities to Deseret's land is not part of the facilities of the railroad for the transportation of livestock and is therefore no basis for determining the facilities themselves to be inadequate or unreasonable.

We submit that in view of the holding of the Great Northern case cited above, the Commission's order not only is unlawful because it is contrary to the provisions of 76-4-7, Utah Code Annotated, 1943, but it also constitutes a violation of the XIV Amendment to the United States Constitution.

We therefore respectfully urge that transportation of livestock requires of the carrier only that it furnish adequate loading and unloading facilities with reasonable means of ingress and egress to a public highway as distinguished from a convenient route direct to the lands of the consignee. The evidence before the Commission absolutely demonstrated that the present facilities do furnish adequate means for the loading and unloading of such livestock as is handled at Wahsatch, Utah, together with reasonable means of access to said facilities from a public high-

way. In fact, the evidence of the Deseret Live Stock Company shows that U. S. 30 is so close to the facilities that sometimes livestock get onto the highway without any desire therefor upon the part of the herders. These factors should make it plainly evident that the Commission arbitrarily and unlawfully erred in finding the present facilities at Wahsatch to be inadequate and unreasonable. But aside from this proposition, we respectfully urge that the Commission arbitrarily and unlawfully erred in such finding in that the requirement imposed by law to furnish adequate facilities does not contemplate duplication of facilities on both sides of a track in order to avoid inconvenience to shippers. Neither the federal law nor the state statutes administered by the Public Service Commission of Utah may impose upon a common carrier an expenditure in excess of \$20,000.00 unless the same constitutes a reasonable regulation of the carrier's business. To impose such expense upon any other basis is to deprive the carrier of its property without due process of law in violation of the Utah Constitution and the Constitution of the United States. See the Great Northern Railway Co. case, *supra*.

The uncontradicted testimony of Mr. Phelps, a witness for the railroad company, shows that there are no rural shipping facilities for stock on the whole Union Pacific system with which he is acquainted where some shippers do not have to cross a main line track (Tr. 420). If the railroad must duplicate the present facilities at Wahsatch on the north side of the tracks, there seems no good reason why the railroad should not also be required in proper proceedings to duplicate any stock loading facilities on both sides

of its tracks at every rural shipping point throughout its whole railroad system. We cannot conceive that this is reasonable. It is as though the residents on the east side of Main Street in Salt Lake City requested an additional passenger depot at some east side location because they disliked the danger of crossing Main Street to reach the present passenger depot at Third West and South Temple Streets.

In the case of *Central Stockyards Co. v. Louisville & Nashville Railway Co.*, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339, the Supreme Court of the United States was called upon to consider a somewhat similar problem. In that case the Louisville & Nashville Railway Company had refused to receive livestock tendered to it outside the State of Kentucky for delivery to certain stockyards known as the Central Stockyards. These yards were located on the line of the Southern Railway Company in Louisville, Kentucky. The defendant, Louisville & Nashville Railway Company, maintained a similar stockyard setup known as the Bourbon Stockyard in Louisville and declined to receive livestock billed to the Central Stockyards or to deliver livestock destined to Louisville, Kentucky at any other place than the Bourbon yards. This refusal was despite the fact that there were railroad connections between the Louisville & Nashville Railway Company and the Southern Railway Company so that it was physically possible to make delivery of livestock at the Central Stockyards without the construction of any new facilities. The plaintiff claimed the right to compel delivery of livestock by the defendant railway company at the Central Stockyards under the Interstate Com-

merce Act of February 4, 1887, Chapter 104, Section 3, which made it unlawful for common carriers to give unreasonable preferences and required them to afford all reasonable, proper and equal facilities for the interchange of traffic between the lines of such carrier and other carriers in interstate commerce. In discussing the right of the plaintiff to the relief requested the court removed from its consideration all procedural matters and went on to discuss the merits of the proposition contended for by the plaintiff. In holding that the plaintiff was not entitled to the relief prayed for Mr. Justice Holmes, speaking for the Supreme Court of the United States, said:

“If the cattle are to be unloaded, then, as was said in *Covington Stock-Yards Company v. Keith*, the defendant has a right to unload them where its appliances for unloading are and cannot be required to establish another set hard by.”

The court further specifically held that the fact that the Central Stockyards were public stockyards did not in any manner affect the case. While we concede that the court in the Central Stockyards Company case was primarily concerned with the question as to whether the failure of the defendant railroad to deliver stock at the Central Stockyards constituted an unreasonable preference, we respectfully submit that the reasoning is applicable to the case at bar. Unless the facilities presently located at Wahsatch, Utah constitute a discrimination as against the Deseret Live Stock Company in its shipping, we are unable to perceive how the same can be said to be unreasonable or inadequate.

In the case of *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461, the Supreme Court of the United States recognized the duty of a railroad company holding itself out as a common carrier to provide suitable means and facilities for receiving livestock offered to it for shipment in the following language:

"The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public."

The question involved in that case was one of charges for use of certain stockyards but the court went on to say, at page 136 of the U. S. Reports, as follows:

"We must not be understood as holding that the railroad company, in this case, was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling or shipping live stock, chose to establish stock yards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city."

In the case of *State ex rel. Railroad Com'rs. v. Florida East Coast Ry. Co.*, 68 So. 761, the Supreme Court of Florida was concerned with the situation where the Railroad Commissioners of Florida had ordered the defendant railroad company to perform certain switching operations on side tracks without charge. The court said at the very outset, as the basic premise upon which it made the final determination, that the charges could be lawfully collected :

“The railroad company has a right to load or unload its cars where its facilities or appliances for such work are, and it would be unreasonable to require it to establish other facilities to accommodate each patron. (Citing Cases).” * * * “So in *Missouri Pacific R. R. Co. v. State of Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, it was held that the carrier could not be required to build more private connections because the obligation was not involved in the carrier's public duty, and the requirement went beyond the reasonableness of the state's protective power.”

In conclusion we submit that the finding of the Commission that the present facilities are inadequate is erroneous, arbitrary and unlawful for the following reasons :

1. That the law does not impose upon the carrier the duty to furnish facilities for loading or unloading of livestock which include a direct and convenient route to the lands of the consignee or of the shipper, but only requires the furnishing of reasonable facilities with access to a public highway.

2. That it is unreasonable to find that the present facilities are inadequate when the only complaint which

may fairly be made with reference to the same is that it would be more convenient for the Deseret Live Stock Company to have an additional facility on the other side of the tracks.

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN MAKING THE ORDER REQUIRING THE RAILROAD COMPANY TO CONSTRUCT THE NEW FACILITIES THEREIN MENTIONED, IN THAT COMPLIANCE WITH THE SAME BY THE RAILROAD COMPANY WILL REQUIRE THE RAILROAD COMPANY TO VIOLATE THE INTER-STATE COMMERCE ACT AND CONSEQUENTLY, SAID ORDER OF THE P.S.C.U. IS UNLAWFUL.

The second contention which we wish to urge for the court's consideration logically raises the matters presented by our assignments of error 2 and 3. In support of this argument we now assert to the court that the new facilities required by the Commission will not be public in nature but will instead be private. We have heretofore, in the statement of facts contained in this brief, discussed some of the evidence relative to this matter but it now appears necessary to call to the court's attention certain other portions of the evidence dealing with this particular problem. As heretofore pointed out, the new facilities will be available to shippers from the south side of the tracks only if said shippers follow a route across the main line double track of the Union Pacific Railroad and thence eastwardly along a corridor of land 600 feet wide to the new stockyards. In

view of the fact that the shippers from the south concede the present facilities on the south side of the tracks to be adequate for their needs, as shown by the evidence, it is a practical absurdity to suppose that these shippers will ever use the new loading and unloading pens if the same are constructed pursuant to the Commission's order. There is no reason to expect any shipper from the south to undertake what we concede is an inconvenience of crossing the double main line tracks. Consequently, common sense requires the conclusion that the only shippers who ever will use the facilities to be constructed pursuant to the Commission's order will be shippers from the north side of the tracks. Under present conditions there are only two business entities using the railroad facilities who ship either to or from the north side of the track. These shippers are Deseret Live Stock Company and the Francis interests. As was heretofore pointed out, the Francis interests shipped three carloads of livestock in 1946, the last full year before the hearing conducted by the Commission, and consequently, the last year upon which figures were available. This amount of transportation business is so relatively insignificant that for all practical purposes the sole shipper from the contemplated loading and unloading facilities will be Deseret Live Stock Company. This is the practical view of the fact situation presented before the Commission.

In addition, there is the legal matter as to who is entitled to the use of the proposed facilities. The evidence discloses that the only means of reaching these new facilities for shippers from the south is by use of the railroad crossing

now used by Deseret in approaching or leaving the present facilities. This crossing is not a public crossing. There is no evidence before the Commission of any nature which we are able to discover in the transcript which justifies the conclusion that this crossing is available to the public generally. To the contrary, the evidence is that there is a gate across the roadway approaching this crossing (and this gate is plainly visible in the photographs introduced as exhibits) which is locked as to the general public and is not available as a means of crossing the railroad's right of way. Mr. Palmer, a witness for the railroad, so testified (Tr. 501). Mr. Dansie conceded that at least during a part of each year the gate was locked (Tr. 666, 667). Certainly it cannot be said that the evidence discloses that the present crossing is a public crossing in light of this testimony and it is significant that nowhere in its report did the Commission find that the present railroad crossing was a public crossing.

Such being the situation, we are unable to perceive how it is possible to contend that as to shippers from the south of the tracks there is any legal right to the use of the present crossing. Consequently, it is difficult for us to see how it fairly can be argued that the shippers from the south have a right to use the proposed new stockyard facilities. As to shippers from the north, the only legal basis upon which those shippers could get their livestock to the stockyards is by use of the 600 foot strip ordered made into a public easement by the Public Service Commission of Utah in the order complained of; but this affords no legal means by which shippers from the north could arrive at the 600 foot strip with their livestock. Such shippers would have to

cross vast areas of Deseret Live Stock land if they desired to approach from the north and there is no legal requirement that the Deseret Live Stock Company furnish any such approach shown by the evidence. If it be the thought of the Commission that shippers from the north could arrive at the crossing on the south side of the tracks by the use of some public highway, then we respectfully urge that there is no legal right of any such shippers to the use of the crossing. Consequently, whether the situation be viewed from a practical or from a legal standpoint, the proposed facilities are private in nature.

Heretofore the Supreme Court of the State of Utah had occasion to pass upon the public character of a utility service in the case of *Garkane Power Co., Inc. v. Public Service Commission*, 98 Ut. 466, 100 P. (2) 571. In that case the court was concerned with a determination as to whether the Garkane Power Co., Inc., which was a nonprofit membership corporation, was a public utility and thus within the control and regulation of the Public Service Commission of Utah. In determining whether this company was a public utility the court quoted with approval from two other cases as follows:

“The test * * * is * * * whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner.’” *Farmers’ Market Co. v. R. R. Co.*, 142 Pa. 580, 21 A. 902, 989, 990.

“The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness

or unrestricted quality that gives it its public character.' " Thayer v. California Development Board, 164 Cal. 117, 127, 128 P. 21, 25.

Under this definition the facilities which are to be constructed, if the order of the Public Service Commission of Utah is sustained, are not public in nature because there will be no right in the public generally to secure admittance to the same, and as has been heretofore said, if the matter be viewed from a practical standpoint the conclusion is inescapable that the new stockyards are for the sole benefit of Deseret Live Stock Company.

Title 49, Section 3, Subsection (1), United States Code Annotated, as contained in the 1947 Cumulative Annual Pocket Part, provides as follows:

"Sec. 3. Preferences; interchange of traffic; terminal facilities—Undue preferences or prejudices prohibited

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

This paragraph of the Interstate Commerce Act thus clearly prohibits a common carrier engaged in interstate commerce by rail, as is the Union Pacific Railroad Company, from giving unreasonable preference to any corporation including Deseret Live Stock Company.

The uncontradicted testimony before the Commission given by the witness Pidcock for the railroad company is to the following effect: In 1918 when the railroads were under the control of the government an order known as General Order 15 provided in effect that the railroad companies would build spur trackage facilities and other facilities of a similar character at their own expense to the clearance point and that from the clearance point the shipper would be required to incur all other expense. Thereafter, of course, the government relinquished control of the railroads but in order to have a uniform policy, so that it might not be said that preference or discrimination existed, the railroad company has consistently followed said General Order 15. In this manner uniformity of policy has been afforded to all shippers over the Union Pacific Railroad Company. Certainly, if the railroad company promiscuously ignored the policy of complying with General Order 15 by building spur tracks for one shipper and refusing to build spur tracks or facilities for another shipper, it could not fairly be said that the railroad was supplying facilities to all and discrimination or preference as to none. Since the proposed stockyards are off the right of way of the railroad company in the instant case and therefore fall within the class of spur trackage and facilities which ordinarily would only be constructed at the expense of the shipper, it is our contention that the

order of the Public Service Commission of Utah requires the Union Pacific Railroad Company to violate the provisions of the Interstate Commerce Act quoted above. We concede that this contention must be based upon a conclusion that the proposed stock loading facilities are not public in nature but are, in fact, of a private character for the benefit of the Deseret Live Stock Company. This is true because General Order 15 and the policy of the railroad has never forbidden the railroad to pay the expense of truly public facilities, whether within the clearance point or not. The evidence with reference to the railroad's policy as created by General Order 15 is to be found at pages 548 to 569, inclusive, of the Transcript, together with Exhibit 19 which is a copy of what is known in the railroad world as General Order 15.

It is our further contention, as shown by our assignment of error No. 3, that the Commission acted unlawfully and arbitrarily in finding that the new facilities would be public in nature. We have examined the transcript of all the testimony carefully and we are able to find nothing to support any such conclusion with the exception of the testimony of Mr. Dansie, which is found in the Transcript at page 661 through 662. However, it is noted that Mr. Dansie conceded the crossing gate was locked during a portion of each year. He ventured as his opinion that it was locked to keep the cattle from getting on the railroad but there is no necessity for locking a gate to keep cattle from getting through so long as the gate is properly fastened and we would be interested in seeing any authority to support the proposition that a crossing which may be kept locked dur-

ing any substantial period of time each year is in fact a public crossing available as a matter of right to the public at all times.

The cases discussing unlawful preferences as given to various shippers by railroad carriers are of course legion in number. Suffice it to say that the following cases have all held that the furnishing of additional facilities or services of a nature generally similar to the facilities in question in this case constituted unlawful preferences or discriminations in violation of the Interstate Commerce Act quoted above:

United States v. Pennsylvania Railroad Co.,
266 U. S. 191, 45 Sup. Ct. 43, 69 L. Ed. 243;
*Interstate Stockyards Co. v. Indianapolis Union
Ry. Co.*, 99 Fed. 472;
Sioux City Terminal Railway Switching, 241
I. C. C. 53; decided July 8, 1940;
Lehigh Valley Railroad Co. v. United Lead Co.,
133 A. 290.

Since the court's conclusion on this matter will have to rest upon a determination as to whether the proposed facilities are in fact public or whether they are private in nature, we feel there is no use in belaboring the matter further and we submit the contention for the court's determination.

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN REQUIRING THE RAILROAD COMPANY TO CONSTRUCT NEW FACILITIES IN THAT NO EVIDENCE IN THE RECORD JUSTIFIES THE MAGNITUDE OF THE PROGRAM REQUIRED BY THE COMMISSION'S ORDER.

The next portion of the argument which we submit for the court's consideration is based upon assignments of error Nos. 4 and 5 heretofore set forth. The basic premise upon which we rely in submission of this phase of the brief may simply be stated as follows: Even if it be determined that the railroad failed to furnish adequate and reasonable facilities at Wahsatch, Utah, nevertheless the jurisdiction of the Commission is limited to a determination of the minimum reasonable requirements for adequacy of said facilities and then an order based upon such finding requiring the construction of the same. In other words, we submit that inadequacy or unreasonableness of the present facilities can never justify the Public Service Commission in requiring the railroad to do more than to make the facilities reasonable and adequate and can never justify the Commission requiring the ultimate in perfection as to said facilities. In the case of *Mountain States Telephone & Telegraph Co. v. Public Service Commission, et al.*, 105 Utah 230, 142 P. (2d) 873, this principle was clearly presented to the court. In that case the Public Service Commission had made a determination that the intrastate rates of the telephone company constituted discrimination against intrastate telephone users as compared with the interstate rates then in effect. It was also shown that the interstate rates had been accepted by the telephone company as reasonable and upon such facts the Public Service Commission ordered the telephone company to cause its intrastate rates to be made uniform with its interstate rates. When this matter was presented to the Supreme Court of Utah Mr. Justice Wolfe, speaking for the court, denied the authority of the Public

Service Commission of Utah to so rule. It is clear that the reason for the overruling of the Commission's decision in that case was the failure of the Commission to take adequate evidence as to the reasonability of the interstate rates when applied to intrastate calls and to have made a fair determination as to whether or not said interstate rates were reasonable when applied to intrastate calls. The court pointed out that upon a showing that the interstate rates had been accepted as reasonable by the utility it then became incumbent upon the utility to explain any difference which it might seek between the interstate rates and the intrastate rates to be ordered by the Commission. However, the utility demonstrated by its evidence that there was a justification for some differential between interstate rates and intrastate rates. The Supreme Court of this State pronounced the rule that in those circumstances the Commission's order fixing the intrastate rates at the same prices as the interstate rates was therefore unlawful. We submit that the same reasoning applies to the case at bar. Even though this court be of the opinion that the Public Service Commission of Utah is correct in its finding that the present facilities of the railroad at Wahsatch are inadequate, nevertheless, it is our contention that before the order of the Commission requiring the construction of the loading facilities shown in Exhibit 10 can be sustained there must be sufficient evidence in the record made before the Commission, together with a finding of the Commission, to justify the conclusion that said proposed facilities constitute the minimum reasonable facilities at said location as distinguished from the ultimate in facilities at Wahsatch. There is an

absolute dearth of any evidence in the record to show that the expenditure in excess of \$20,000.00 to be required in the construction of the proposed stockyards is the minimum necessary to render the present facilities adequate.

The only reference which is made throughout the Transcript to the facilities ordered constructed by the Commission is by railroad witnesses. The diagram offered in evidence by the railroad was produced for the purpose of showing that in order to comply with Mr. Dansie's requests a very substantial sum of money would have to be expended. The evidence reveals that this diagram was prepared by the Engineering Department of the railroad company upon orders of the officials of the railroad when Mr. Dansie requested additional facilities at Wahsatch. The evidence shows that this diagram was made pursuant to the policy of the railroad to ascertain the cost of the requested improvements and the general situation which would be encountered by the railroad in attempting to comply with the shipper's request. Not one word of evidence from the railroad's witnesses or others describes these facilities as the minimum necessary to render the present facilities adequate. As a matter of fact, there is not one word of evidence which we are able to discover in the transcript dealing with the requirements of the Deseret Live Stock Company or other shippers from the north of the tracks in the way of railroad facilities. It is true that the size of the shipments to be made by the Deseret Live Stock and the nature thereof is outlined in a general way by the testimony of Mr. Dansie and others, but as to the requirements of the Deseret people in the way of facilities no shred of evidence was produced.

If the law of Utah requires the Public Service Commission to determine the reasonableness of the proposed facilities from evidence, there can be no justification for the order complained of in these proceedings. Certainly, such is and must be the law of this State. In the first place, the provisions of 76-4-7, Utah Code Annotated, 1943, heretofore referred to, require that the Commission conduct a hearing before making an order such as the order made in this case. There can be no purpose for such hearing except to entitle the railroad or other utility to offer evidence as to the adequacy or inadequacy of the existing facilities, and further, for the shipper to offer evidence as to what shall constitute reasonable, proper, and adequate facilities. This section of our statutes also provides that the Commission shall determine the just, reasonable, proper and adequate equipment, facilities, appliances and service. Certainly in view of such provision it must have been contemplated by the legislature that the Commission base its determination upon evidence to be offered at the hearing. The Supreme Court of Utah required such action on the part of the Commission in the Mountain States Telephone & Telegraph Company case referred to above.

It may be contended that a different rule applies under 76-4-7, Utah Code Annotated, 1943, than under the statute in question in the telephone company case because the provisions of the statute in the telephone company case specifically provided that the Commission was required to make a finding as to what would be just, reasonable and sufficient rates (see 76-4-4 U. C. A. 1943) ; but the language used in the two statutes is so nearly identical that no fair distinction

may be drawn. In 76-4-4 the statute provides that "the Commission shall determine the just, reasonable or sufficient rates," and in 76-4-7 the statute provides that "the Commission shall determine the just, reasonable, safe, proper, adequate or sufficient equipment, appliances, facilities or service." There being no valid distinction which we are able to perceive between the wording of these two statutes we feel that the opinion of the Supreme Court of the State of Utah in the Mountain States Telephone & Telegraph Company case absolutely required of the Commission in the instant case that it take evidence as to what would be a reasonable improvement in the present facilities to make them adequate. Such simply was not done at the time of the hearing. The only place where the reasonability or adequacy of the proposed facilities is even discussed lies in the testimony of Mr. Terwilliger and in the testimony of Mr. Pidcock, both witnesses for the railroad, and those gentlemen were concerned with and testified concerning the difficulties the new stockyards would present—not with reference to their adequacy. In its report the Commission makes the following statement in paragraph 10 thereof: "Such a structure will cost an estimated \$20,000.00, which is a reasonable expenditure considering the convenience of the public, economy of operation of the railroad, and convenience of shippers and amount of track at Wahsatch, Utah."

To blandly state that an expenditure in excess of \$20,000.00 will create a reasonable facility without exploring in any manner the possibility of remedying any defect in the facilities at a lesser price is so inherently unlawful as

to appear almost ridiculous. For example, one of the primary objections urged by the Deseret Live Stock people as to the adequacy of the present facilities was the danger presented by U. S. Highway 30 as it paralleled the tracks of the railroad company. Common sense tells us that this danger could be almost eliminated, if not entirely so, by fencing between the railroad right of way and U. S. 30. Complaint is also made as to the nature of the crossing but no evidence was presented by the Deseret people, nor requested by the Commission, which shows that the crossing could not be improved at a substantially less expensive price than \$20,000.00 so as to render the facilities now in existence absolutely reasonable to all shippers. Complaint was made by the Deseret people that the engines and cars of the railroad company frightened the stock which are shipped to and from Wahsatch but there is no finding and no evidence which suggests that the proposed facilities will eliminate this danger and inconvenience or will even substantially improve the same. Mr. Dansie stated that there would be improvement because the sheep or cattle could be confined in corrals rather than being at large as the locomotives or trains proceeded in the vicinity; but it would still be necessary to approach any new stockyards with the cattle or sheep and there is no evidence in the record as to the improvement in the stampeding damage which might be expected by the construction of other and additional stockyards on the north side of the tracks. Certainly there is no finding by the Commission as to any of these matters other than as is quoted above.

In the case of *Los Angeles & Salt Lake Railroad Co. v. Public Utilities Commission of Utah, et al.*, 80 Ut. 455, 15

P. (2) 358, the Supreme Court of Utah had occasion to pass upon a somewhat similar matter. In that case the Public Utilities Commission of Utah had ordered that an agency be maintained by the railroad company at St. John, Utah to facilitate the business of shippers upon the grounds that without said agency the facilities of the railroad were not reasonable and adequate. At the time of the petition for rehearing the railroad company offered to install a telephone at St. John, which would apparently obviate any difficulty theretofore existing. Mr. Justice Wolfe, then a District Court judge, sitting with the Supreme Court, and speaking for the court, said in his opinion as follows:

“There is nothing in the evidence adduced at the hearing on the application for rehearing or the other testimony (from) which the Commission could conclude that the installation of this telephone together with all the other means available to the shippers would not be reasonable and adequate service required by the statute. We cannot say that it would or would not. That is not our province. It may be that the installation of a telephone would still leave the situation such that the shipper could not obtain the reasonable and adequate service required by the statute. * * * We do not believe that the Commission sufficiently explored the possibilities which the installation of a telephone would accomplish.”

The court goes on to say in overruling the order of the Commission and remanding the same to the Commission for further hearing:

“Whether the commission makes an order requiring a service on insufficient evidence or whether

it makes an order denying an application without sufficient evidence to support the denial can make no difference in principle."

Certainly this case may be said to stand for two propositions—(1), that it is improper and unlawful for the Commission to order the alteration of presently inadequate or unreasonable facilities in such a manner as to cause large expense when there is a more simple and cheaper method of making the facilities reasonable and adequate, and (2), that the Commission should explore the possibilities of cheaper means of improving the facilities before requiring expenditures of large sums of money to create a facility in exact accordance with the demands of the various shippers.

As applied to the case at bar, we submit that before ordering the railroad company to build a stock loading facility costing in excess of \$20,000.00 at the whim of the Deseret Live Stock Company, the Commission should have taken evidence as to the minimum requirements of adequacy and reasonability at Wahsatch and should have explored the possibility of rendering the present facilities adequate by other means than the contemplated stockyards. Failure of the Commission to take such evidence should render its decision unlawful; and failure of the Commission to make a finding with reference to other possible solutions to the problem which Deseret encounters in its shipping makes it impossible for the Supreme Court to determine whether or not the Commission was guided by such evidence as may be discovered in the record concerning the necessity for additional stockyards on the north side of the tracks at Wahsatch, Utah.

THE COMMISSION ACTED ARBITRARILY AND UNLAWFULLY AND ERRED IN DENYING THE RAILROAD COMPANY'S PETITION FOR REHEARING.

All of the matters discussed in the foregoing argument with reference to this proceeding were properly raised before the Public Service Commission of Utah by the railroad company's petition for rehearing, which was denied; consequently, if we be correct in any one of the arguments which we have heretofore advanced as to any of the matters therein discussed, the Commission acted unlawfully and arbitrarily in denying said petition for rehearing. We further contend that by its order requiring the construction of the stockyards and by its denial of the railroad company's petition for rehearing, for the reasons hereinabove set forth, the Public Service Commission of Utah will be depriving the petitioner in these proceedings of its property without due process of law, in violation of the XIV Amendment of the United States Constitution and also of the Constitution of the State of Utah, if the order made by the Commission is affirmed.

CONCLUSION

In final summation of our position with reference to this whole matter we paraphrase the statement of Mr. Justice Folland in the case of *Logan City v. Public Utilities Commission of Utah*, 77 Ut. 442, 296 P. 100. Mr. Justice Folland's statement has nothing to do, legally speaking, with the problem presented by these certiorari proceedings but his language states more aptly than we may conceive our-

selves the principles which should be controlling in the final determination of this case:

“The location and manner of placing stockyards and stock loading facilities is essentially a matter of business management of the railroad which should not be interfered with by the Public Service Commission of Utah, unless it is made to appear that the place chosen by the management for said stockyards or stock loading facilities was chosen in bad faith or involved gross inefficiency or presented an unreasonable choice. It is well settled that the Public Service Commission of Utah cannot, under the guise of regulating the reasonability and adequacy of the facilities of a railroad, take into its hands the management of a railroad’s property and thus interfere with the rights of such management.”

We respectfully urge the court to determine that the order of the Public Service Commission of Utah, together with its denial of the railroad company’s petition for rehearing, is unlawful as in violation of the statutes of Utah, the Constitution of the United States, and the Constitution of the State of Utah, and that said order be declared null and void.

Respectfully submitted,

BRYAN P. LEVERICH
M. J. BRONSON
A. U. MINER
HOWARD F. CORAY

Counsel for Petitioner

Howard F. Coray
of Counsel
Salt Lake City, Utah