

1950

Provo City v. Department of Business Regulation,
Public Service Commission of Utah, and The
Denver & Rio Grande Western Railroad Company
: 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.

Dallas H. Young, Sr.; I. E. Brockbank; Attorneys for Petitioner

Recommended Citation

Brief of Appellant, *Provo City v. Dept. of Business Regulation, Public Service Comm. Of Utah*, No. 7416 (Utah Supreme Court, 1950).
https://digitalcommons.law.byu.edu/uofu_sc1/1220

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

PROVO CITY, a municipal corporation,
Petitioner,

vs.

DEPARTMENT OF BUSINESS REGULATION, PUBLIC SERVICE COMMISSION OF UTAH, Hal S. Bennett, Chairman of the said Public Service Commission of Utah; Donald Hacking and W. R. McEntire, members of said Public Service Commission of Utah, and Frank A. Yeamans, Secretary of said Public Service Commission of Utah, and THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Defendants,

FILE

1919

CLERK, SUPREME COURT, UT

CASE
No. 7416

BRIEF OF PETITIONER

DALLAS H. YOUNG, SR.

I. E. BROCKBANK

Attorneys for Petitioner.

TOPICAL INDEX

	Page
STATEMENT OF FACTS.....	1
ARGUMENT:	
I. THE APPLICATION BEFORE THE PUBLIC SERVICE COMMISSION IS A SUBTERFUGE TO AVOID THE ISSUE OF THE JURISDICTION OF THAT COMMISSION TO ORDER THE CLOSING OF A CITY STREET WHERE RAILROAD TRACKS CROSS IT. IT AVOIDS THE REAL ISSUE BY ASSUMING THE RESULTS	5
II. THE PUBLIC UTILITIES ACT DOES NOT GIVE THE PUBLIC SERVICE COMMISSION JURISDICTION TO ORDER THE CLOSING OF A PUBLIC STREET WITHIN A MUNICIPAL CORPORATION	8
III. A CONSTRUCTION OF 76-4-15, UTAH CODE ANNOTATED, 1943, GIVING POWER TO THE PUBLIC SERVICE COMMISSION TO ORDER THE CLOSING OF A CITY STREET WOULD RENDER THAT PORTION OF THE STATUTE UNCONSTITUTIONAL	11
CONCLUSION	14

INDEX OF CASES AND AUTHORITIES

Constitution, Article VI, Section 29.....	11, 12, 13
Article 12, Section 10, Brackets 8.....	12
Citation:	
City of Chicago v. Hastings Express Co., et al., 17 NE 2d 576, 369 Illinois 610.....	10
City of Los Angeles v. Central Trust Co. of N. Y., 159 Pac. 1169, 173 Cal. 323.....	13

INDEX (Continued)

	Page
City of San Jose v. Lynch, 52 P2d 919, 4 Cal. 2d 760..	12
Keyser v. City of Boise, 165 Pac. 1121, 30 Idaho 440..	12
Logan City v. Public Utilities Commission, 72 Utah 536, 271 Pac. 961.....	11
Menderson v. City of Phoenix, 76 2d 321, 51 Ariz. 280..	13
Provo City, et al. v. Denver & Rio Grande Western R. Co., et al., 156 Fed. 2d 710, (Cert. den. 329 US 764 91 L.Ed. 658, 67 S. Ct. 124.....	3, 5
State ex rel Townsend v. Board of Park Commission- ers, 110 NW 1121, 100 Minn. 150.....	13
Union Pacific R. Co. et al., v. Public Service Commis- sion, 103 Utah 186, 134 P. 2d 469.....	8

REFERENCES AND AUTHORITIES:

Annotation, 1 McQuillan, Municipal Corporations, 2d Ed., p. 1102, Section 395.....	13
Utah Code Annotated, 1943: 76-4-15	4, 6, 8, 9, 11, 13
Compiled Laws of Utah, 1917, Chapter 47	

In the Supreme Court of the State of Utah

PROVO CITY, a municipal corporation,
Petitioner,

vs.

DEPARTMENT OF BUSINESS REGULATION, PUBLIC SERVICE COMMISSION OF UTAH, Hal S. Bennett, Chairman of the said Public Service Commission of Utah; Donald Hacking and W. R. McEntire, members of said Public Service Commission of Utah, and Frank A. Yeamans, Secretary of said Public Service Commission of Utah, and THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Defendants,

**CASE
No. 7416**

BRIEF OF PETITIONER

STATEMENT OF FACTS

Ninth South Street in Provo City, Utah, is a street running east and west from University Avenue to Highway No. 91, at approximately 5th East Street. It is the only street south of 6th South Street in Provo City, and has for

over seventy years been a public street, being constantly for that time used as such. The area east of the point where 9th South Street joins Highway No. 91 is densely populated, and the community is growing in that area. In the vicinity of the intersection of 5th East and 9th South Street, the tracks of the Denver and Rio Grande Western Railroad Company, along with those of other railroads, intersect 9th South Street. Approximately five hundred people are employed in the industrial area of Provo City located south of 9th South Street and west of 5th East Street, and a large portion of these employees live in the southeast residential portion of the city above Highway No. 91. These persons have always used 9th South Street as a means of going to and from work, and travel on that street has constantly increased.

In the autumn of 1942 and the spring of 1943, negotiations were conducted by the officials of the Denver and Rio Grande Western Railroad Company, hereinafter called the railroad company, and the city officials regarding the closing of 9th South Street at the point of intersection with the railroad company's right-of-way. These negotiations never culminated in an ordinance effecting the closing of that street. Nevertheless, the railroad company proceeded to barricade and close the street at that point and to enlarge its installation at that intersection. It is to be noted that at no time did the railroad company petition the Public Service Commission of Utah for an order in this matter. In the spring of 1945 the Provo City Commission began removing these barricades on 9th South Street. The railroad company secured a restraining order in the Federal District Court of the State of Utah, and that Court, after hearing the matter, issued a permanent injunction against

the city's removal of the barricades. The city appealed from this decision to the United States Court of Appeals for the Tenth Circuit, and that Court, in the cases of Provo City, et al. v. Denver & Rio Grande Western R. Co., et al., 156 Fed. 2d 710, reversed the District Court and remanded the case with directions to dismiss the action with prejudice. The United States Supreme Court denied certiorari in the same cases, 329 US 764, 91 L. Ed. 658, 67 S.Ct. 124.

Thereafter in January of 1947, the City demanded of the railroad company that it remove the barricade and place the street in condition for travel. The railroad company then for the first time petitioned the Public Service Commission of Utah for an "order that public convenience and necessity does not demand the establishment, creation, or construction of a crossing over applicant's railroad tracks along the line of 9th South Street in Provo Utah." The City answered, denying jurisdiction of the Public Service Commission, and alleging that the matter was *res judicata*. Nevertheless, the Commission assumed jurisdiction, held its hearing, and gave its order as prayed for by the railroad company. Subsequently, on March 1, 1949, the City Commission instructed the commissioner of streets to tear down the barricades and proceed to make 9th South Street passable for public travel. Notice of this action was given to the railroad company. The company again filed its application with the Public Service Commission, praying "for an order that public convenience and necessity does not demand the establishment, creation or construction of a crossing over applicant's railroad tracks along the line of 9th South Street in Provo City, Utah." The City appeared at the hearing specially on the 22nd of April, 1949, and

moved that the application of the railroad company be dismissed on the grounds: (1) that the Public Service Commission had no jurisdiction; (2) that there was no application before the Public Service Commission of Utah for the establishment, creation, or construction of a crossing over the railroad company's tracks along the line of 9th South Street in Provo City, Utah; (3) that the railroad company had unlawfully and illegally barricaded and closed that street; (4) that the street was and still is a public thoroughfare, and that the railroad company by its petition was seeking to have the commission close that street; and (5) that the entire matter was res judicata under the decision of the United States Court of Appeals for the Tenth Circuit, referred to above.

The Public Service Commission of Utah denied this motion and set the matter for hearing on the merits September 30, 1949. Provo City now brings the matter here on an alternative writ of prohibition from this Honorable Court to the Public Service Commission of Utah, restraining it from hearing the matter, and asks that this writ be made permanent.

It is the City's position first, that because 9th South Street has never been legally closed, the Public Service Commission is without jurisdiction to hear an application of this nature; second, that the Commission has no jurisdiction to order the closing of a public street within the limits of an incorporated city; and, third, that if 76-4-15, Utah Code Annotated, 1943, were construed to grant the Commission that power, it would render that portion of the statute unconstitutional.

I.

THE APPLICATION BEFORE THE PUBLIC SERVICE COMMISSION IS A SUBTERFUGE TO AVOID THE ISSUE OF JURISDICTION OF THAT COMMISSION TO ORDER THE CLOSING OF A CITY STREET WHERE RAILROAD TRACKS CROSS IT. IT AVOIDS THE REAL ISSUE BY ASSUMING THE RESULTS.

The railroad company is before the Public Service Commission on the theory that the right-of-way of 9th South Street at the point where the railroad company's tracks cross it no longer exists, and the fee simple has reverted to the railroad company. It is on this theory that it applies to the Public Service Commission "for an order that public convenience and necessity does not demand the establishment, creation, or construction of a crossing over applicant's railroad tracks along the line of Ninth South Street in Provo, Utah."

Ninth South Street is physically barricaded at the point where the railroad company's tracks cross it. However, it is the City's position that the right-of-way for the street where those tracks cross it has existed for over seventy years, still exists, and that the barricading thereof is wrongful, without lawful authority whatsoever.

Moreover, we submit that this question is res judicata. The question of the legal status of that right-of-way was determined in the cases of Provo City et al v. Denver & Rio Grande Western R. Co. et al, supra, when the United States Court of Appeals for the Tenth Circuit reversed the order of the District Court for Utah enjoining the City from removing the barricades and making the street passable,

and the United States Supreme Court denied certiorari.

It is elemental law that where a case is once decided by a court, the matter is *res judicata* as to those facts, and the issue cannot be again raised thereon before another tribunal. The question, therefore, as to the existence of a street right-of-way at the point of intersection of the railroad company's tracks and 9th South Street cannot be properly before the Commission. That right-of-way has been judicially confirmed.

This important fact the railroad company conveniently ignores, and the Public Service Commission has shown itself willing to go along with the company. Having wrongfully barricaded a public street, the railroad company relies on that wrong to seek an order of the Public Service Commission to perpetuate it, and the Commission entertains the application! We submit that the Public Service Commission is lending its office to aid the railroad company in profiting by its own wrongdoing.

It may be argued that the particular theory on which the railroad company is before the Public Service Commission is immaterial, so long as it is clear that the Commission is acting under the grant of authority in 76-4-15, Utah Code Annotated, 1943, and has the problem of a railroad-street crossing before it for determination. This argument is specious for two reasons.

First, by entertaining this application the Public Service Commission places upon the City the burden of showing a need for a change in the legal status of the crossing. This is error, as the present legal status of the crossing, as indicated above, is already legally determined, and the burden of showing the necessity for a change should rest on the railroad company.

The second objection is more serious. By accepting the railroad company's theory that the issue is whether or not public convenience and necessity require the opening of 9th South Street at the point of crossing, the Public Service Commission has assisted the railroad company in accomplishing a piece of legerdemain whereby the jurisdictional question is changed from the power of the Commission to order the **closing** of a city street over a railroad line to the power of the Public Service Commission to decide whether or not a **proposed** crossing shall be **opened** over a railroad line. The importance of this distinction on the jurisdictional question we shall point out hereafter.

Suffice it to say, the City's position is this: 9th South Street exists in point of law where the railroad company's tracks cross it; the railroad company is in fact seeking an order, the effect of which would be to close the street right-of-way across those tracks; and the Public Service Commission is without power to order the **closing** of a city street where railroad tracks cross it.

One other matter bears consideration here. The very fact that the railroad company **now** places its application with the Public Service Commission, after engaging in protracted litigation through the federal courts, shows the transparency of the present subterfuge. Had the railroad company believed that the Public Service Commission had jurisdiction to **close** the 9th South Street crossing, why did it not petition that body initially? Indeed, the matter of jurisdiction of the Public Service Commission was argued to the U. S. Court of Appeals, the railroad company taking the position that the Public Service Commission had power only to determine and prescribe the manner, including the point of crossing and terms of installation, of a railroad over

a public street, and citing as authority therefor the case of *Union Pacific R. Co. et al v. Public Service Commission*, 103 Utah 186, 134 P. 2d 469. Having lost its cause in the form of its first choice, it seeks the aid of a second, and that second is willing to entertain the cause!

II.

THE PUBLIC UTILITIES ACT DOES NOT GIVE THE PUBLIC SERVICE COMMISSION JURISDICTION TO ORDER THE CLOSING OF A PUBLIC STREET WITHIN A MUNICIPAL CORPORATION

We recognize the fact that a municipal corporation derives its powers from legislative grant, and that any power so granted may be removed by the legislature. However, it is our position that the legislature has given power to open, establish, or close streets within cities to those cities by Section 15-8-8, Utah Code Annotated, 1943, which provides as follows:

"They (cities) may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets alleys, avenues, boulevards, sidewalks, parks, airports, and public grounds, and may vacate the same or parts thereof by ordinance." (Emphasis ours).

It is further our position that this section was not repealed or altered by 76-4-15, Utah Code Annotated, 1943.

The Public Service Commission is presumably proceeding on the theory that 76-4-15(2), Utah Code Annotated, 1943, gives that commission exclusive power to abolish **any** crossing. A reading of that statute will disclose that it only gives the Public Service Commission exclusive power to de-

termine and prescribe the manner, including the point of crossing and terms of installation, of a railroad over a public street. The statute is thus construed in *Union Pacific R. Co., et al. v. Public Service Commission*, *supra*, which holds that the power granted to cities by 15-8-8, Utah Code Annotated, 1943, prior to the Public Utilities Act, was not repealed by implication thereby.

An analysis of the Public Utilities Act as passed by the legislature in Chapter 47, Laws of Utah, 1917, will indicate the intention of the legislature in this particular section. The title of the act is quoted herewith:

“An Act Creating a Public Utilities Commission, Defining Public Utilities, Prescribing the Powers and Duties of the Commission and Duties of Public Utilities, Providing Penalties for Violations of Provisions of the Act, Appropriating etc.”

The Act is divided into five articles: Article I is entitled “Creation of the Commission”; Article II, “Definitions”; Article III, “Duties of Public Utilities”; Article IV, “Authority of Commission over Public Utilities”; and Article V, “Procedure.”

76-4-15, Utah Code Annotated, 1943, was, in its original form, Section 14 of Article IV of the Act. The title of that Article is “Authority of Commission **over Public Utilities.**” (emphasis added). Section 14 thereof is entitled “Grade Crossings—Regulations.” From the title of the Act and of Article IV, there is clear intent to give the Public Service Commission control and jurisdiction over public utilities, including railroads; there is absolutely nothing to indicate an intent on the part of the legislature to give the Public Service Commission the jurisdiction and power to *vacate* a city street, or otherwise regulate the use of a city street

by the city. To accomplish the purposes of the Act, it is indispensable that the Commission have jurisdiction over railroad lines, including their crossing of each other and of streets and highways. It is not indispensable, or even necessary, to accomplish the purposes of the Act, that the Commission have jurisdiction over a street sufficient to order its vacation where a railroad track crosses it.

The question of conflicting jurisdiction between such a tribunal and a city arose in the case of *City of Chicago v. Hastings Express Co. et al.*, 17 NE 2d 576, 369 Ill. 610. In that case the defendants were found guilty of violation of a "wheel tax" ordinance whereby a tax was placed on vehicles operating in the plaintiff city. The defendants appealed on the theory that they were a public utility and were therefore under the exclusive jurisdiction of the Commerce Commission by virtue of the Illinois Public Utilities Act. The Illinois Supreme Court held that the city had the power to enact such an ordinance, and in treating of the question of jurisdiction of the Commerce Commission, the Court stated that the line of demarcation between matters within the exclusive jurisdiction of the Commerce Commission and matters subject to the control by municipalities lies between matters which are an intimate part of and of the closest connection with the public utilities service and transportation itself, which matters are within the Commerce Commission's jurisdiction, and matters which in no wise interfere with or overlap such control by the Commerce Commission, which matters are subject to municipal control.

We respectfully submit that, while the crossing of one utility by another, or the crossing by a utility of a street is of the closest connection and an intimate part of the pub-

lic utility service and transportation itself; the fact that a street crosses a utility line is not. Perhaps the Public Service Commission may regulate or forbid a licensed common carrier under its jurisdiction to use a public street where it crosses a railroad line. This may be an intimate part of and of the closest connection with the public utility service and transportation itself. But the regulation and prohibition of general public use of such a crossing is not, and the Utah legislature never intended that it be thus.

III.

A CONSTRUCTION OF 76-4-15, UTAH CODE ANNOTATED, 1943, GIVING POWER TO THE PUBLIC SERVICE COMMISSION TO ORDER THE CLOSING OF A CITY STREET WOULD RENDER THAT PORTION OF THE STATUTE UNCONSTITUTIONAL

If 76-4-15, Utah Code Annotated, 1943, were to be construed as a grant of power to the Commission to close a city street where a railroad line crosses it, then it is the City's position that that portion of the statute would be invalid. Article VI, Section 29, Utah Constitution, provides:

"The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal function."

This Court held in the case of *Logan City v. Public Utilities Commission*, 72 Utah 536, 271 Pac. 961, that the purpose of this section was to preserve broad powers in matters of self-government to municipalities, and hence, if the

delegation of powers mentioned in this section is forbidden to "special commissions," it would most certainly apply also to a body such as the Public Service Commission.

This Court further touched on Article VI, Section 29, Utah Constitution, in the case of Union Pacific R. Co., et al, v. Public Service Commission, *supra*, saying:

"That section of the Constitution, together with section 10[8], of Article XII thereof, above referred to, however, is indicative of an intent on the part of the framers of the Constitution to secure to cities and towns a large degree of self-government."

The question of the power of the Commission to order or forbid the **construction** of a street crossing over a railroad line is not before this Court (See Argument I above) and the City is not here assailing that power. The City's thesis is that where the public street **exists**, with a railroad crossing thereon, and the City has not vacated that portion of the street according to legislative grant of power, the Commission has no power to effect that vacation, and an attempt to grant that power would contravene Article VI, Section 29, of the Constitution. We take the position that a city street such as 9th South Street is a municipal improvement and property, and vacating of a street is a municipal function within that provision. Moreover, it has been held that such a street is held by the city in trust for the use of the public. *Keyser v. City of Boise*, 165 Pac. 1121, 30 Idaho 440.

The Supreme Court of California, in the case of *City of San Jose v. Lynch*, 52 P. 2d 919, 4 Cal. 2d 760, held that the opening, laying out, and improving streets and regulating their use are "municipal affairs." See also *City of Los*

Angeles v. Central Trust Co. of N. Y., 159 Pac. 1169, 1171, 173 Cal 323. It is true that California cities exist under constitutional "home rule" charters, whereas the charter of municipal corporations in Utah is found in acts of the legislature, but this does not affect the authority of those cases for the fact that the creation, regulation, and vacating of city streets are municipal functions as that phrase is used in Article VI, Section 29, of the Utah Constitution. If 76-4-15(2), Utah Code Annotated, 1943, were construed to grant power to the Public Service Commission to vacate a city street where a railroad track crossed it, then that statute would contravene that constitutional provision.

That section so construed would then be unconstitutional in another respect; it would constitute an invalid delegation of legislative power. The rule against legislative delegation of legislative power, with the exception in cases of municipal corporations, is so well established that it requires no re-statement. I McQuillin, Municipal Corporations, 2d Ed., p. 1102, Sec. 395. The power to lay out, open, vacate, or abandon highways and streets is a legislative power, which must be exercised by the legislature itself, or by the municipal corporations to which the power has been delegated, and this rule applies to the legislature itself, prohibiting it from alienating or surrendering this right and duty. State ex rel. Townsend v. Board of Park Commissioners, 110 NW 1121, 100 Minn. 150.

The Arizona Supreme Court, in the case of Menderson v. City of Phoenix, 76 P. 2d 321, 51 Ariz. 280, involving power of such a commission over a utility owned by a municipal corporation, stated the rule thus:

"It is true that the Legislature has very broad powers over municipal corporations, but under the well-

known rule these powers of regulation may not be delegated by the Legislature to any other body, but must be exercised by the Legislature itself in terms which are not reasonably susceptible of any other interpretation."

CONCLUSION

Your petitioner respectfully submits to this Honorable Court that the Denver & Rio Grande Western Railroad Company is enlisting, through subterfuge, the assistance of the Public Service Commission to close an existing city street in the petitioner city, and that the Public Service Commission, by hearing the railroad company's application, is lending that assistance sought; that the legislature did not, in the Public Utilities Act, give power to the Public Service Commission to order the closing of a city street where railroad tracks cross it; and that such a construction of the Public Utilities Act, giving that power to the Public Service Commission, would render that statute unconstitutional as violative of Article VI, Section 29, Utah Constitution.

Respectfully submitted,

DALLAS H. YOUNG, SR.

I. E. BROCKBANK

Attorneys for Petitioner.