

1950

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

Utah Supreme Court

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In the

Supreme Court of the State of Utah

PROVO CITY, a municipal corporation,
Petitioner,
 vs.

DEPARTMENT OF BUSINESS REG-
 ULATION, PUBLIC SERVICE COM-
 MISSION 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,

CASE
 No. 7416

Defendants.

BRIEF OF DEFENDANT THE DENVER AND
 RIO GRANDE WESTERN RAILROAD COMPANY

VAN COTT, BAGLEY,
 CORNWALL & McCARTHY,

*Attorneys for Defendant The Denver and
 Rio Grande Western Railroad Company.*

FILED

LOW PRESS, SALT LAKE

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Clerk, Supreme Court, Utah

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BRIEF OF DEFENDANT THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

PRELIMINARY STATEMENT

In this brief parties to this action may sometimes be designated as follows: petitioner, Provo City, as "the City," defendant Public Service Commission of Utah as "the Commission," and defendant The Denver and Rio Grande Western Railroad Company as "the Rio Grande."

Subsequent to the filing of the brief of the City in this case, a stipulation was entered into between the parties to the effect that copies of certain instruments on file in the action in the United States District Court for the District of Utah wherein the City and the Rio Grande or its Trustees were parties and on file in proceedings before the Commission wherein Rio Grande is applicant might be made a part of the record in this case with the same effect as if incorporated in a petition, answer or other pleading of a party herein. Copies of these instruments are now before this Court pursuant to said stipulation. The pages of these instruments are numbered 1 to 54, inclusive, and will be referred to by such page numbers in this brief as part of the record herein.

STATEMENT OF FACTS

We believe the following facts, in addition to those set forth in the brief of the City, are necessary to a complete understanding of the issues presented in this case.

The negotiations between the City and the Rio Grande covering the whole problem here involved, conducted in 1943, had two aspects, the first being that the street area crossed by the railroad tracks then existing and to be constructed would be vacated, the second being that in lieu of the Ninth South Street area to be so vacated, there should be established, at the cost and expense of the Rio Grande, another public street, which would have the effect of taking the place of the Ninth South Street crossing. This substituted street or cut-off would extend from Ninth South Street northwesterly to Fifth East Street. By this shift in roadway, west-bound traffic on Ninth South Street would be diverted

through the cut-off into Fifth East Street and by way of University Avenue around the crossing, entering Ninth South Street at a point west of the crossing. Eastbound traffic on Ninth South Street would proceed in the reverse direction. In this way the same end result was achieved as though some other means of crossing, such as a grade separation, had been constructed. Although this road was circuitous, it had the distinct advantage of saving the traveling public from the danger to life and limb which would result from public use of the Ninth South crossing. The Rio Grande performed its part of the proposal by acquiring and laying out the cut-off road. This road in lieu of the Ninth South crossing has been used by the traveling public since 1943 (R. 3-4, 31-32).

Prior to construction of the railroad tracks which were built in 1943, there were four main line tracks across Ninth South Street in Provo, being from east to west those of the Salt Lake & Utah railroad, Denver and Rio Grande Western railroad, Utah railway, and Union Pacific railroad, and also four additional tracks crossing said street, one of the Denver and Rio Grande Western railroad, two of Utah railway, and one of the Union Pacific railroad. When the additional railroad construction of 1943 had been completed, there were a total of twenty-one railroad tracks in or across said street, eight of which had been constructed by the Trustees of Rio Grande (R. 5). The tracks of Rio Grande across Ninth South Street form a part of its Provo freight yards and are used and employed by it in the movement of freight traffic passing through, destined to, and originating in the Provo area (R. 5).

The railroad tracks in question do not extend *along* Ninth South Street but *cross* the street, some at approximately right angles and others on a bearing of approximately north 54° west. The street area crossed by the railroad tracks in question was not within the original townsite area of Provo City. The fee to this street area is in the abutting property owners, and the right of public travel over this street area arose from user. Railroad companies are the owners in fee of the abutting property (R. 9).

The area of said street crossed and occupied by said railroad tracks was physically closed to travel by the erection of barricades in May, 1943 (R. 30). The crossing has not been opened since that date and remains closed at this time.

The location of the tracks, the street area which is now closed, and surrounding streets and areas are graphically shown upon the print attached to this brief and made a part thereof as Appendix A.

ARGUMENT

The City here seeks a permanent writ, prohibiting the Commission from conducting a proceeding upon the application of the Rio Grande (R. 35-38) now before it.

The City's petition for an alternative writ of prohibition sets forth substantially the same facts as those contained in its brief. The defendants, by demurrer interposed herein, raise the issue of the sufficiency in law of the City's petition.

The office of the writ of prohibition has been defined by this Court as being a process by which a superior court

prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been invested by law and to arrest it from exercising a want or an excess of legal jurisdiction and not to prevent or correct an erroneous exercise of jurisdiction. *Campbell et al. v. Durand*, 39 Utah 118, 115 P. 986.

No question of fact is or properly can be involved. The facts are presented here as a means of determining the issue of law. That issue, as we see it, is simply the single question as to whether the Commission has jurisdiction to entertain and act upon the application of the Rio Grande now before it.

The City attacks the jurisdiction of the Commission upon three grounds, namely: (1) that the application before the Commission is a subterfuge to avoid the issue of jurisdiction of the Commission to order the closing of a city street where railroad tracks cross it; (2) that the Public Utilities Act does not give the Commission jurisdiction to order the closing of a public street within a municipality; and (3) that there is a constitutional restraint upon the jurisdiction of the Commission. We shall consider the contentions of the City in the same order as presented by it.

POINT I

As we analyze the contentions of the City under this point, two propositions are advanced by it, namely: (1) the Rio Grande, by its application, has assumed that the Ninth South crossing is closed, whereas, in legal contemplation, it is now open; and (2) the Commission cannot assume jurisdiction because the issues which Rio Grande seeks to bring before it are *res judicata*.

It is recognized by all parties to this action that the United States Circuit Court of Appeals of the Tenth Circuit determined that the City was not estopped to deny that the street area of Ninth South occupied by railroad tracks had been vacated. No dispute does or can exist as to the determination of that court.

Equally clear, however, is the fact that the Ninth South Street crossing has been physically closed for more than six years. The public has not used the street area occupied by railroad tracks since May, 1943. In fact the public never has used the crossing which now exists. When the public last used this street area there were but eight tracks across the street. Now there are some twenty-one tracks, in or across said street, constituting a part of a busy freight yard, accommodating a large volume of railroad traffic. The public has never experienced the hazard and the danger to life and limb which would necessarily flow from the public use of this crossing, nor have the railroads experienced the effect on their operations of forcing this crossing open.

The Rio Grande, in its application now pending before the Commission and in exhibits attached thereto, fully set forth the pertinent facts and the contentions of the City theretofore made (R. 35-54). The Rio Grande has not intended anywhere in this long and difficult controversy to engage in subterfuge or sophistry. The form of the application seems to it not to be material as two propositions must be admitted by all: First, that the City has not vacated the street area in question, and, second, that the present street area has never been opened to a crossing of the railroad tracks and facilities which are now located therein. It seems

also to be equally clear that if the Commission grants relief as prayed for by the Rio Grande, the Commission will refuse to open for public travel a street crossing now physically closed, and the Commission will by its order close a crossing now open in contemplation of law.

If it be said that the Commission's order in granting the relief sought by the Rio Grande would have the effect of closing a street crossing now open in contemplation of law, then one of the essential elements which the Commission must necessarily consider in such a determination will be the fact that no public travel has ever been conducted over such crossing and that the public has never been subjected to the hazard and danger incident to the use of such crossing.

The test of jurisdiction after all is the power lawfully to deal with the general subject involved in the proceeding. The general subject here involved is railroad track crossings of a city street. The Commission is undertaking to deal with the subject by ordering the crossing opened or closed.

The form in which Rio Grande set forth the facts and in which it couched its prayer for relief before the Commission cannot seriously be contended to bear upon the jurisdiction of the Commission. The Commission's inquiry will be dedicated to a consideration as to whether from all the facts and circumstances surrounding the controversy public convenience and necessity require that the Ninth South Street crossing be made available for public travel. The manner in which the inquiry is instituted is a matter of form. The substance of the Commission's jurisdiction is found in the subject matter of the inquiry and what the Commission under-

takes to do. All parties are here earnestly endeavoring to determine the jurisdiction of the Commission in such a matter. If the City believes that question of jurisdiction may be more simply stated in a proposition which inquires whether the Commission has power and jurisdiction to order closed the street crossing in question, defendants are willing that the question be so posed and are not inclined to quibble over the form in which the application was presented to the Commission by the Rio Grande. Certainly the jurisdiction of the Commission will not depend upon the form of the petition or application brought before it but rather upon the substance of what the Commission undertakes to do.

The second proposition advanced by the City under this point requires more detailed consideration. The Rio Grande brought suit against the City in the United States District Court of Utah upon the theory that the acts of the City complained of by it estopped the City from denying that the street area in question had been vacated, the contention of the Rio Grande being in substance that the acts of the City were such that its position was the same as though the street area had been vacated by ordinance. The trial court in its findings so concluded. On the appeal to the United States Circuit Court of Appeals, Tenth Circuit, the same issues were presented. Judge Bratton who wrote the majority opinion stated the problem thus:

... The company filed proceedings to enjoin the city, the mayor, and the commissioners from proceeding further in that direction. Issues were joined, and the causes were tried to the court upon stipulated facts, documentary evidence, and oral testimony. Concluding that the defendants and all citizens and resi-

dents of Provo were estopped from alleging or contending that the street had not been closed, vacated, and abandoned as required by law, the court entered judgments enjoining the defendants from interfering with the barricades and from reopening the street. The defendants appealed (R. 16).

Judge Phillips, who dissented, in viewing the case in the same way observed :

It seems to me that the instant case is one where right and justice require a holding that the city is estopped to reopen Ninth South Street across the yards at the ground level (R. 22).

The result of the litigation in the federal court was therefore a determination that Provo City was not estopped by its acts to deny that the street area had been vacated.

What is the issue before the Commission on the Rio Grande's pending application? The issue thus presented, as we see it, is whether public convenience and necessity require the Ninth South Street crossing to be closed. Thus it is seen that while public rights were incidentally involved in the action before the federal court, the real issue there involved private rights between the City on the one hand and the railroad companies on the other, while the issue before the Commission, although touching private rights, is primarily concerned with questions of public policy.

The division of jurisdiction between the court and the Commission is therefore sharply defined and of peculiar importance in the case now before this Court. The jurisdiction of the Commission is in a measure much broader than that of the court. In proceedings before the Commission the

questions are primarily and essentially public questions. An examination of Section 76-4-15, U. C. A. 1943, which will be considered in further detail hereafter, demonstrates legislative intent that the Commission in acting thereunder should engage in considerations of a public character. It is therefore seen that not the rights of the railroad companies alone or of the City as such are essentially involved in the application now pending before the Commission but rather the rights of the public generally, which rights embrace not only those of residents of Provo City and Utah County but those of all persons who may be affected by the determinations which are made by the Commission with respect to the crossing involved.

Both the court and the Commission have been careful to recognize the jurisdiction of the other in the proceedings which have already been taken. Thus the federal court in its judgment concluded that:

4. Under the provisions of Section 76-4-15, subsection 3, Utah Code Annotated 1943, the Public Service Commission of Utah has jurisdiction, if it finds that public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway above or under the railroad tracks of the Denver and Rio Grande Western Railroad, to require the establishment of such a crossing and such crossing may thereupon become a public highway and crossing. This Court is not disposed to interfere with the exercise of such jurisdiction and power of the Public Service Commission either as to the Trustees or The Denver and Rio Grande Western Railroad Company, but on the contrary is disposed and will use its good offices to aid in the elimination of inconvenience to the public caused by barricading

of Ninth South Street, at the earliest possible time consistent with the war effort, by construction at or near Ninth South Street or University Avenue of some divided grade crossing when labor and materials become available therefor (R. 12).

and in its decree further ordered that:

. . . provided, however, that neither Provo City nor any of its officers, agents, residents or persons is enjoined from petitioning the Public Service Commission of Utah to exercise its jurisdiction, under Section 76-4-15, subsection 3, Utah Code Annotated 1943, by finding that public convenience and necessity require, and by ordering the establishment of a crossing of a street or highway above or under the tracks of the Denver and Rio Grande Western Railroad at or in the vicinity of Ninth South Street or University Avenue . . . (R. 14).

The Commission in its report in the first proceeding before it is careful to point out the area of its jurisdiction and that of the court where it observes that:

Provo City alleges that it is inequitable and unjust for this Commission to overrule a decision by a United States Court. This Commission does not assume to have any such power or jurisdiction. This Commission, however, is charged by statute with the duty of determining whether public convenience and necessity demand the opening of a road or highway across the railroad tracks of Applicants and is exercising that jurisdiction in this Report and the Order to be made pursuant thereto. Neither the United States District Court nor the Tenth Circuit Court of Appeals has passed upon the jurisdiction of this Commission in this matter (R. 32-3).

The rules of law which control the problem here presented are, we believe, these: Where issues of law are presented in controversies which are of an essentially private character, courts of law are vested with a primary jurisdiction for the determination of such issues. Where, on the other hand, issues which are of a public character and relate to questions primarily of fact, arising from some activity of a public utility, and are by statute vested in a regulatory body, such as the Commission, are for the determination of the Commission. A concurrent jurisdiction may thus exist in which courts are entitled to pass upon questions of law involving private rights and regulatory bodies, such as the Commission, are entitled to pass upon questions of public right involving matters of fact relating to utilities under their control. There are and may be certain cases lying in between the fields here suggested in which a court may have the right to take original jurisdiction but in which the jurisdiction of a commission, when once assumed, is complete and determinative of all issues involved.

An examination of the cases and text authority will, we believe, fully sustain the rules above announced.

The general proposition is announced in 42 Am. Jur., Public Administrative Law, Sec. 252, as follows:

In some circumstances, two remedies may be available to the same party for the enforcement of the same right, one in the judicial and the other in the administrative forum, one by virtue of statute and the other under the common law . . . There may exist a dual remedy, one in the judicial and another in the administrative forum, in a sense other than that just described. Some administrative agencies exist only

for the enforcement and protection of public, as distinguished from private, rights, and where an act constitutes a violation of both a public and a private right, the administrative forum may present the proper remedy for the former and the judicial forum the proper remedy for the latter.

The cases sustain this statement of law. Typical of several of such cases is that of *City of Oakland v. Key System*, 149 P. (2d) 195 (Cal.), where the court announces the principles as follows:

As previously stated, based upon the findings of fact, the court as a conclusion of law found that the use of the property described in the first cause of action "is a matter primarily within the jurisdiction of the Railroad Commission." Ordinarily this statement is correct. However, the jurisdiction is not exclusively with the commission. Questions of public convenience and necessity, and matters directly relating thereto, in connection with the operation of public utility franchises, are the concern of the commission; legal disputes pertaining to a continuance or cancellation of a franchise at the end of its designated period are solely within the jurisdiction of the courts. The cancellation of a franchise during the term of its existence for a cause specified therein is primarily a legal question and must be decided by the courts, but if convenience of the public is involved and continued operation is necessary, such interest may be paramount to the rights of the parties to the franchise, in which case the jurisdiction of the Railroad Commission is dominant and controlling. A restriction or limitation in one case may not apply under the facts of another.

Thus, in certain cases and as to certain problems relating to public utilities the jurisdiction of the commission is exclusive. As to other matters the regular

law courts have jurisdiction. In between these two well defined fields there is a somewhat ill defined field in which the law courts have jurisdiction unless the commission has elected to act as to the particular subject matter. If it has elected to so act the exercise of such jurisdiction ousts the law courts of any jurisdiction assumed by them. (p. 199.)

A further California case of particular interest is that of *Miller v. Railroad Commission*, 70 P. (2d) 164. In this case an injunction was secured in a state court and thereafter proceedings were taken before the California Railroad Commission. As in the case at bar, the contention was made that the action before the court was *res judicata*. The California Supreme Court held otherwise, citing in support of the jurisdiction of the commission Section 31 of the California Public Utilities Act, which is identical with Section 76-4-1 of our Code. The view of the California court under the issues presented to it is that the assumption of jurisdiction by the California commission had the effect of rendering nugatory the judgment of the court theretofore entered, which prior to the proceeding before the commission was binding upon the parties. It is the position of defendants that the issues before the Court and the Commission in this case are of such a distinct character that the determination of the law point in the Court is not abrogated by a decision which the Commission might make closing the street crossing which is now in contemplation of law open. If, however, the contention of the City in this case is valid that such an order of the Commission would have the effect of abrogating the decision of the federal court, then the decision of the California Supreme Court in the *Miller* case is direct author-

ity that such result is entirely immaterial once jurisdiction of the Commission has attached. The California court in reaching its decision says in part:

Applying the principles of law announced above, we conclude that the superior court of the county of Modoc had jurisdiction to render the judgment in the case brought by petitioners and others against the C. W. Clarke Company, in which it was adjudged that the company was a public utility and that the plaintiffs in said action were the beneficiaries in the use of the water devoted to public use by said utility. We further hold that said judgment was valid and binding upon the parties to said action until the Railroad Commission assumed jurisdiction of said utility for the purpose of regulating its operations, and, upon its assumption of jurisdiction over the activities of said utility, any order or judgment of the superior court in conflict with the orders of the commission is to that extent ineffective and of no binding effect upon the parties thereto. This conclusion must necessarily follow from the provisions of the Constitution and the Public Utilities Act, and particularly from section 31 thereof, which provides that:

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

The judgment of the superior court of Modoc county was not therefore *res judicata* as to any right of the plaintiffs as beneficiaries in the use of the water devoted to a public use by the defendant in said action as against the future consideration of said right by the commission. When the Railroad Commission assumed jurisdiction over said public utility, as it

did at the time of the hearing of the application of the Clarke Company to increase the rates for water delivered to petitioners, which resulted in the order of September 17, 1934, its jurisdiction over the activities of said utility was exclusive and plenary, except by the proceedings in review to this court, unhampered and unrestrained by the previous judgment of the superior court of the county of Modoc. (p. 169.)

As illustrative of many other cases supporting the rule announced above is that of *Steele v. Clinton Electric Light & Power Co.*, 193 Atl. 613 (Conn.) wherein the court held that:

The fact that a public service commission has jurisdiction to hear and determine disputes over charges for service does not deprive equity of jurisdiction to enjoin the shutting off of service to coerce payment of a disputed bill. (p. 616.)

The contention that the issues raised before the Commission by the application of Rio Grande are *res judicata* is without merit.

POINT II

The contention of the City under this point is stated to be that the Public Utilities Act does not give the Public Service Commission jurisdiction to order the closing of a public street within a municipality. The statement of this proposition tends to raise an issue which is not actually presented. The question, as we see it, is whether the Public Utilities Act confers jurisdiction on the Commission to close the area of this city street which is crossed by railroad tracks here involved.

As indicated in the City's brief, both the City and the Commission derive their powers from the same source, namely, the Legislature, and in the absence of a constitutional limitation, the Legislature has the clear power to confer upon the Commission the jurisdiction here questioned. The statute under which the Commission undertakes to act (Section 76-4-15) is broad and comprehensive. It provides as follows:

(1) No track of any railroad shall be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without the permission of the commission having first been secured; *provided*, that this subsection shall not apply to the replacement of lawfully existing tracks. The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

(2) The Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety and is vested with power and it shall be its duty to designate the railroad crossings to be traversed by school busses and motor vehicles carrying passengers for hire, and to require, where

in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest.

(3) Whenever the commission shall find that public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway over, under or upon the tracks or lines of any public utility, the commission may by order, decision, rule or decree require the establishment, construction or creation of such crossing, and such crossing shall thereupon become a public highway and crossing.

Examining subparagraph (2) of said section and deleting unnecessary language, it seems clearly to read as follows:

(2) The Commission shall have the exclusive power to determine and prescribe the manner . . . of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa, and to alter or abolish any such crossing.

The abolition of the crossing of a street by a railroad or of a railroad by a street certainly can mean nothing more than the closing of such crossing. The language of the statute could hardly be more clear or comprehensive.

The foregoing Section 76-4-15 was Section 14 of the original Public Utilities Act of 1917, and has not been sub-

stantially amended since its original enactment. By the provisions of Section 34 of the original act, all acts or parts of acts inconsistent therewith are repealed.

The City relies upon the provisions of Section 15-8-8, U. C. A. 1943, which are that,

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.

This section is of long standing. It runs back at least to the Revised Statutes of 1898, where it substantially appears as Subsections 8 and 88 of Section 206. Having been in force at the time of the passage of the Public Utilities Act, the latter section was, to the extent that it was inconsistent with that act, repealed. A careful analysis will demonstrate, however, that the conflict between Sections 76-4-15 and 15-8-8 relates only to a particular problem, namely, crossings, and only to the extent of the areas involved in crossings does the Legislature withdraw from cities a power over streets enjoyed by them prior to the passage of the Public Utilities Act.

The solution to any conflict between these sections and the course of judicial determination with respect thereto has been laid out and prescribed by two decisions of this Court.

The first of such decisions is that of *Denver and Rio Grande Railroad Company v. Public Utilities Commission of Utah*, 51 Utah 623, 172 P. 479, which will hereafter be

referred to as “the *Rio Grande* case”. The other and later decision is that of *Union Pacific Railroad Company et al. v. Public Service Commission*, 103 Utah 186, 134 P. (2d) 469, hereafter referred to as “the *Union Pacific* case”.

In the *Rio Grande* case the facts were that application had been made to the Commission by the railroad for a crossing over a street within a municipality without the railroad's having first obtained a franchise or authority from Salt Lake City or Salt Lake County so to do. The Court held that the statute conferring power upon the Commission, which is Section 76-4-15 above quoted, was capable of only one construction and that all acts and parts of acts in conflict with the statute were repealed, the language of the Court being as follows:

. . . Not only are the sections of the statute specifically mentioned in the act repealed, but “all acts and parts of acts inconsistent with the provisions of this act” are repealed. Since the act, in language so plain that it will admit of but one construction, confers on the commission the exclusive power to determine and prescribe the manner, and the terms upon which railroad companies may construct, maintain, and operate railroad tracks across public roads, highways, and streets within the state and repeals all acts and parts of acts inconsistent with the provisions conferring such power, but little need or can be said on the subject, except that the commission erred in declining to act on the application made by the petitioner for crossing permits. (p. 480.)

The facts in the *Union Pacific* case were that Ogden City had granted a franchise to Union Pacific to construct tracks along a street for a distance of some 1.5 miles. The provi-

sions of the franchise had not been complied with by the railroad, and Ogden City revoked the franchise, whereupon the railroad undertook to remove the tracks and the Commission assumed jurisdiction to prevent it from doing so. This Court held that the matter of the *crossing* of railroad tracks over city streets was exclusively within the jurisdiction of the Commission, whereas the matter of the construction or maintenance of railroad tracks *along* city streets under franchise was not granted to the Commission but remained in the city. Consequently the city, having the control of the granting of such franchises and such tracks, must necessarily have like control over the revocation of such franchises and the Commission was without jurisdiction in the premises, the meat of the Court's decision being found in its language as follows:

... As we view the matter, therefore, said Section 76-4-15, while it was intended to give to the Commission power over street crossings within cities and towns, and did give it such power, nevertheless, did not repeal the general powers theretofore conferred upon municipalities to control the use and occupancy of their streets by railroads. Such power was originally conferred by the Legislature upon municipalities; it has not been expressly repealed, and we do not find anything in subsequent legislation which is clearly and manifestly repugnant to that power. It therefore remains in municipalities where it was originally placed. (p. 198.)

From these decisions these propositions therefore appear to be established: the control of railroad crossings over streets or streets over railroads is exclusively within the jurisdiction of the Commission; the control of railroad fran-

chises to operate upon and along streets has not been taken from the cities by the Legislature and still remains in the municipality.

The control of crossings, by the express provision of the statute above quoted, clothes the Commission with power not only to regulate but to close such crossings. Here, then, is a grant of power as clear in its terms as could be expressed; and that power may be exercised by the Commission unless a constitutional restraint exists.

POINT III

The position of the City under this point appears to be that if said Section 76-4-15 grants power in the Commission to close a street, such grant of power is unconstitutional.

The statement of the City under this point is broader than the problem presented. The problem presented is actually whether the power granted by the Legislature to the Commission under said section to close a street area occupied by rail crossings is constitutional. Stated in its simplest form, as we see it, the problem is whether the Commission may constitutionally close the crossing here involved. The determination of this question requires a consideration of certain basic problems.

The City assumes that but one public highway is here involved, namely, Ninth South Street in Provo. The fact is that several public highways are involved. That railroads are public highways of commerce is now so firmly established by numerous decisions that no citation is here necessary. It is upon the fundamental proposition that railroads

are public highways of commerce that the power of public regulation of railroads rests. We are not inclined to minimize the importance of city streets as public highways. However, it should also be recognized that railroads are likewise highways of the greatest importance, not only to local communities and the several states but also to the nation as well. We therefore have here involved not a question of a street highway alone but actually a question of conflict in use of a portion of space between a street highway and rail highways.

With the development of rail highways in our national economy, it became inevitable that these highways should cross street highways and vice versa. These crossings necessarily precipitated conflicts and contests for the use of space at the points of intersection. The controversies involving as they did broad questions of state and national concern, and necessitating the balancing and weighing of convenience and necessity to the users of both street and rail highways, it was essential that these controversies be withdrawn from municipalities or other local bodies and that they be vested in tribunals especially created for their consideration. The tribunals thus created were regulatory bodies such as the Commission.

The statute (Section 76-4-15) here assailed on constitutional grounds by the City grants the Commission broad powers with respect to rail and highway crossings. Under the powers so granted, this Court has held that the Commission may require a city to share its street space with a rail highway at the point of crossing. (*D. & R. G. R. R. Co. v. Public Utilities Commission of Utah*, supra.) The City con-

cedes the power of the Commission in this respect. In this concession it seems to this defendant that the City actually concedes the power of the Commission to close a crossing. It is elementary that a railroad may not actually enjoy joint use with others of the intersecting space between its rails and a street. A vehicle may not use street space at the same time as does a railroad without loss of life and property to both users. The rails necessarily require exclusive use of the space at such time, and for the times of such use the street is closed to vehicles and pedestrians. We would suppose, also, that no contention would be made by the City that the Commission would not have the power to barricade or otherwise effectively enforce the closing of the crossing during the periods of railroad use. It is but an extension in degree of this power of withdrawal of use to conclude that the Commission shall have the power to withdraw use of the contested space entirely from vehicles and pedestrians and order that such space shall be devoted entirely to rail highway use—in short, that the crossing shall be closed.

The City contends that the Commission has power to compel rail highways to share crossing space with street highways. There would seem to be no doubt of the power of the Commission in this respect. The City, while admitting the power of the Commission to open a crossing, strenuously denies the power of the Commission to close a crossing. A brief exploration will, we believe, demonstrate the fallacy of the City's position in this respect. Assume that the Commission orders the opening of a crossing. Thereafter rail traffic at the point of crossing increases ten fold in volume. At the same time, through construction of other highway

facilities, street traffic dwindles to a mere trickle. The considerations of public convenience and necessity which required the crossing to be opened no longer exist. Is the Commission without power to control what it has done and restore the crossing space to the exclusive use of the rail highway?

In the case at bar, by public user a street highway existed over an area crossed by a rail highway. Now, through the industrialization of certain Utah communities, twenty-one tracks cross the street where in 1943 but eight tracks existed. The volume of railroad traffic has expanded tremendously. The City and the Rio Grande have through their own acts altered the crossing and provided the public with another street for use in lieu of and in extension of the street area now physically closed. Is the Commission, in the light of these facts, without power to say that this crossing space shall be devoted exclusively to rail highways?

These considerations, we believe, enable us to determine the constitutional problem here presented.

We have not one but two constitutional provisions to be considered. The City has cited Article VI, Section 29, which provides that:

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.

Consideration should, however, also be given to Section 12 of Article XII, which provides that:

All railroad and other transportation companies are declared to be common carriers, and subject to legislative control; and such companies shall receive and transport each other's passengers and freight, without discrimination or unnecessary delay.

The City contends that the reference to municipal function in the first article above relates to the laying out, establishment, opening and vacating of streets. Assuming that such authority over streets is a municipal function, we believe it clear that this power of a municipality over streets is a power which relates in a general way to the control of the municipality over its streets. It is such a power as was referred to and considered by this Court in *Union Pacific Railroad Co. et al. v. Public Service Commission*, supra. Quite distinct, however, from this general power of cities over streets is the special problem of rail and street crossings. This, as we have shown, is not a problem of local government but essentially a problem in which broad state and national considerations are involved. The problem of crossings, because of the state and national considerations involved, is in its final analysis a problem of the control and regulation of rail highways. Because of this nature of the problem, the framers of the Constitution saw fit to vest control of that problem in the Legislature by the provisions of Section 12 of Article XII above quoted. This solution is the logical result of the underlying philosophy which distinguishes the *Union Pacific* case from the *Rio Grande* case cited supra.

The City's brief serves to confuse rather than clarify the problem. The City asserts that the control of streets is a municipal function, not to be exercised by the Commission. At the same time the City contends that the Commission may lay out, establish, or open streets over rail highways, which, by its own reasoning, would obviously be a municipal function.

This confusion on the part of the City demonstrates to this defendant that the problem of rail crossings as such is not a municipal problem and was never intended by the framers of the Constitution to be such. The problem of rail crossings is entirely distinct from the general powers of cities over streets and is a special problem, bound up with considerations of railroad transportation over which the Legislature, by the provisions of Section 12 of Article XII, very properly retained control.

We have examined the cases cited by the City in its brief. The case of *City of Chicago v. Hastings Express Co. et al.*, 17 N. E. (2d) 576, 369 Ill. 610, was cited by City under its Point II. We believe the case is not authority under that point but is of importance in connection with the consideration of Point III. The Illinois Supreme Court holds that the city license there sustained is not a regulatory ordinance but merely a revenue ordinance. The court further points out that the Public Utilities Act of Illinois was designed to vest in the Commerce Commission of that state exclusive jurisdiction over those matters which are an intimate part of and of the closest connection with the public utility service and with transportation itself. That the matter of rail crossings is closely connected with and bears directly upon

rail transportation should admit of no doubt. The federal court, in the action before it, found that the opening and continuation of Ninth South Street across the railroad yards and tracks here involved would make necessary much slower handling of trains and parts of trains in said yards and would reduce the usefulness and efficiency of the same to the extent of approximately fifty per cent, and would greatly increase the cost of operation of the railroads, in addition to causing a serious danger to the public (R. 6-7). This serves to demonstrate that the problems here presented bear directly and intimately upon the movement of commerce over rail highways and are therefore problems directly within the jurisdiction of the Commission.

The decision in *Logan City v. Public Utilities Commission*, 72 Utah 536, 271 P. 961, is, in our opinion, not in point. The question there presented was one of the jurisdiction of the Commission over municipal power plants. This Court found upon careful analysis that such jurisdiction would necessarily have a direct bearing upon money, property and taxes of the municipality. No problem such as here presented was involved.

We have considered the remaining cases cited by the City from other jurisdictions. They do not seem to us to be controlling or of particular assistance in the solution of our problem. We shall therefore not extend this brief to cover an analysis of these decisions.

CONCLUSION

It is therefore concluded that the contentions of the City are without merit; that the Commission has lawful juris-

diction of the issues raised by the application of the Rio Grande now before it; and that the demurrer of the Rio Grande to the City's petition for a permanent writ of prohibition should be sustained and this action dismissed.

Respectfully submitted,

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