

1951

The Denver and Rio Grande Western Railroad Company v. Public Service Commission of Utah et al : Brief of Petitioner

Utah Supreme Court

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In the
Supreme Court of the State of Utah

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,
Petitioner,
vs.

PUBLIC SERVICE COMMISSION OF
UTAH and HAL S. BENNETT,
DONALD HACKING and W. R.
McENTIRE, Commissioners of the
Public Service Commission of Utah,
and UNION PACIFIC RAILROAD
COMPANY, a corporation,
Respondents.

Case
No. 7597

FILE
1919

BRIEF OF PETITIONER

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No. 7597

BRIEF OF PETITIONER

STATEMENT OF FACTS

This is a proceeding to review an order and decision of
the Public Service Commission of Utah.

In this brief parties to this proceeding may sometimes be designated as follows: Petitioner, The Denver and Rio Grande Western Railroad Company, as Rio Grande; respondent Public Service Commission of Utah as the Commission; and respondent Union Pacific Railroad Company, as Union Pacific.

Union Pacific conceived a plan to extend railroad industrial spur trackage into an area in Salt Lake City and Salt Lake County, Utah. Under the plan Union Pacific proposed to construct such trackage southerly from Ninth South Street in Salt Lake City along Third West Street (and over private property where Third West Street had not been opened) to Seventeenth South Street in Salt Lake County (R. 1-7).

Between Ninth South Street and the north line of Andrew Avenue, the proposed track would cross certain east and west streets, intersecting Third West Street. At the north line of Andrew Avenue the proposed track would enter private property and extend over private property from that point to Seventeenth South Street (R. 1-7).

The private property proposed to be crossed between Andrew Avenue and Seventeenth South Street embraces a parcel of twenty acres owned by Geary Estates and Rio Grande (R. 74). The ownership of Rio Grande consists of its right of way, 150 feet wide, extending in a north-easterly-southwesterly direction, substantially bisecting the parcel (R. 105-106, 118-119). The remainder of the parcel is owned by Geary Estates (R. 74). At the angle of the proposed Union Pacific crossing its trackage would extend over Rio Grande right of way some 170 feet (R. 172).

Rio Grande acquired the ownership of its right of way at the point of proposed crossing from the Salt Lake and Utah Railroad Corporation (R. 116, 118). Within this right of way Rio Grande has two tracks, one which it operates and maintains for the purpose of serving industries located in the area and for the purpose of interchanging traffic with the Bamberger Railroad Corporation, and the other, an industry track, used by Rio Grande to serve Western Salvage and Supply Company. The proposed track of Union Pacific would cross said right of way of Rio Grande and both of these tracks (R. 117, 127, 152).

A print showing Rio Grande's right of way and trackage at and near the point of Union Pacific's proposed crossing, the proposed track of Union Pacific, and adjacent streets and properties is attached to this brief as Appendix A.

On February 2, 1950, Union Pacific in furtherance of such plan filed its application before the Commission setting out its proposal and praying that:

* * * an order be issued authorizing the applicant to immediately commence the construction of said industry track as hereinbefore referred to, and that said order authorize applicant to construct and operate said track across said Ninth South, Thirteenth South and Fifteenth South Streets, and across Paxton and Lucy Avenues, and across the spur and interchange tracks of the Denver & Rio Grande Western Railroad Company and the Bamberger Railroad Company. Applicant further prays that such order be made effective forthwith.

The application came on regularly for hearing before the Commission. Rio Grande appeared as a protestant. Evidence was introduced by both Union Pacific and Rio Grande.

As shown above, there is but one parcel of land lying between Rio Grande's track and Seventeenth South Street. This is the only parcel of land upon which industries might locate and which could be served by Union Pacific after its proposed crossing of the tracks of Rio Grande. Union Pacific called as a witness to testify with respect to the industrial development of this tract one N. J. Bowman, a real estate broker. Mr. Bowman testified in substance that the parcel (except for Rio Grande's right of way) was owned by Geary Estates. He had been working on the industrial development of the tract for about two years. Although inquiries had been received, no industry had decided to locate upon this tract, and the development of any industry thereon had only advanced to the inquiry stage. He had never contacted Rio Grande with respect to providing trackage to any industry upon the parcel, although the presently existing line of the Rio Grande substantially bisected the entire tract (R. 84, 105, 112).

The matter was taken under advisement by the Commission and under date of August 2, 1950, it issued its report and order whereby the application of Union Pacific was approved and permission granted Union Pacific to construct, operate and maintain a standard gauge railroad spur track over and across the streets in said order designated and the property and tracks of Rio Grande. The order further provided that Union Pacific should provide, at its expense, proper interlocking safety devices at the

point where such trackage shall cross the tracks of Rio Grande (R. 19-27).

Union Pacific has not acquired any easement or right of way over the property or tracks of Rio Grande and has in no manner compensated Rio Grande for the proposed use of this property (R. 30).

On August 17, 1950, Rio Grande filed its application for rehearing, specifying the grounds upon which it considered the order and decision of the Commission to be unlawful, alleging in substance that

(1) In granting the application of Union Pacific for authority to construct and maintain its track across the property and tracks of Rio Grande the Commission acted in excess of and without jurisdiction, and the granting of such authority would authorize the taking of the property of Rio Grande without compensation, in violation of the provisions of the Constitutions of the State of Utah and of the United States;

(2) The Commission failed regularly to pursue the authority conferred upon it by statute in requiring the installation of interlocking safety devices without making provision for the operation, maintenance, use and protection of such facilities; and

(3) There is no substantial evidence that any industry which may locate southerly of the tracks of Rio Grande could not adequately, conveniently and efficiently be served by Rio Grande and no sub-

stantial evidence that public convenience and necessity require the crossing of its tracks (R. 29-31).

On September 6, 1950, the Commission denied Rio Grande's application for rehearing.

On October 5, 1950, Rio Grande filed in this Court its petition for a writ of review, pursuant to which a writ was issued by this Court, and the proceedings before the Commission are now here pursuant to such writ.

STATEMENT OF POINTS RELIED UPON

I.

THE COMMISSION HAS NO JURISDICTION TO AUTHORIZE UNION PACIFIC TO CONSTRUCT, OPERATE AND MAINTAIN A TRACK OVER THE RIGHT OF WAY AND TRACKS OF RIO GRANDE.

II.

THE ORDER OF THE COMMISSION VIOLATES THE CONSTITUTIONAL RIGHT OF RIO GRANDE THAT ITS PROPERTY MAY NOT BE TAKEN WITHOUT JUST COMPENSATION.

III.

THE COMMISSION FAILED REGULARLY TO PURSUE ITS AUTHORITY IN ORDERING THE INSTALLATION OF INTERLOCKING SAFETY DEVICES WITHOUT MAKING PROVISION FOR THE OPERATION, MAINTENANCE, USE AND PROTECTION OF THE SAME.

IV.

THERE IS NO SUBSTANTIAL EVIDENCE THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRE UNION PACIFIC TRACKAGE BEYOND THE POINT OF THE PROPOSED RIO GRANDE CROSSING.

ARGUMENT

I.

THE COMMISSION HAS NO JURISDICTION TO AUTHORIZE UNION PACIFIC TO CONSTRUCT, OPERATE AND MAINTAIN A TRACK OVER THE RIGHT OF WAY AND TRACKS OF RIO GRANDE.

An understanding of the issues presented in this proceeding requires an examination of the nature of the authority sought by Union Pacific in its application before the Commission.

A reading of this application shows that the authority sought by Union Pacific falls into two distinct classifications, viz: (a) authority to cross a public street, and (b) authority to cross the private property of Rio Grande.

In connection with the crossing of a public street by a railroad, no question as to the taking or use of private property is involved. The interested parties in such a proceeding are the applicant railroad company and the public which enjoys the use of the street proposed to be crossed.

Exclusive jurisdiction over public crossings is vested in the Commission by the express provisions of Section 76-4-15, U. C. A. 1943.

This Court has had occasion in several cases to consider the nature of the jurisdiction of the Commission over public crossings and the rule is now firmly established in this State that this jurisdiction is full and complete.

Denver & Rio Grande R. Co. v. Public Utilities Commission, 51 U. 623, 172 P. 479;
Union Pacific R. Co. v. Public Service Commission, 103 U. 186, 134 P. (2d) 469;
Provo City v. Department of Business Regulation et al., 218 P. (2d) 675.

No issue is raised or presented in this proceeding relating to the public crossing phase of the Commission's order and that matter may be laid at rest.

Union Pacific in its application and the Commission in its order granting the same treat the public street crossings and the Rio Grande crossing as being in the same category and a subject upon which the Commission might make an order of identical force and effect. In failing to distinguish the essential differences in the crossings involved, the Commission, we believe, clearly exceeded its jurisdiction.

In this connection it should be borne in mind that Union Pacific did not propose to cross the tracks of Rio Grande within the limits of any street, but rather such crossing was proposed entirely over private property. On either side of the proposed crossing are premises owned by Geary Estates, through which property Rio Grande owns a 150 feet wide right of way. We have, then, squarely presented the question of the jurisdiction of the Commission in connection with the crossing of one railroad over the

private property and tracks of another. In order to ascertain the jurisdiction of the Commission in such connection, we believe an examination of certain statutes is essential.

We turn first to the chapter on eminent domain. Section 104-61-1, U. C. A. 1943, provides that, subject to the provisions of that chapter, the right of eminent domain may be exercised in behalf of the public uses therein specified, one of the public uses being for railroads.

Section 104-61-3, U. C. A. 1943, provides in part as follows:

The private property which may be taken under this chapter includes:

* * * * *

(5) All rights of way for any and all purposes mentioned in section 104-61-1, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvement or structure thereon; they shall also be subject to a limited use in common with the owners thereof, when necessary; but such uses of crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

The above statute, so far as we are able to determine, appears first as Section 3843 of the Compiled Laws of Utah, 1888, and has not been substantially amended since that time. This court has had occasion to construe the above provisions in several cases, and the proposition is now established that, within limitations which have been prescribed

in these cases, a corporation enjoying the power of eminent domain may take for a public use the property of another upon payment of just compensation.

Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 U. 474, 65 P. 735;

Utah Copper Co. v. Stephen Hayes Estate, Inc., 83 U. 545, 31 P. (2d) 624;

Monetaire Min. Co. v. Columbus Rexall Consol. Mines Co., 53 U. 413, 174 P. 172;

Freeman Gulch Min. Co. v. Kennecott Copper Corp., 119 F. (2d) 16.

The Public Utilities Act was brought into our law by Chapter 47, Laws of Utah, 1917. Section 14 of Article IV of that Act deals with the subject of the regulation of grade crossings and confers upon the Commission substantially the power now found in Section 76-4-15, U. C. A. 1943. Section 34 of Article V of the original Act provides that "all acts or parts of acts inconsistent with the provisions of this Act are hereby repealed." The inquiry then arises as to whether the eminent domain provisions above set forth are repealed by the provisions of said Section 14 of the Public Utilities Act. We believe it clear that they were not so repealed, and an examination of the present Section 76-4-15 will so demonstrate.

Section 76-4-15, which confers upon the Commission the power which it undertook to exercise in connection with Union Pacific's application 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.

We are here concerned with subsections (1) and (2) of the above section. Considering first subsection (1), that section, it seems to us, is in the nature of a prohibition. It does not empower the Commission to grant one railroad authority to cross another but imposes as a condition to such crossing the permission of the Commission. In other words, it is necessary, in order to accomplish such a crossing, that the Commission give its consent, but the giving of a consent, in and of itself, does not enable one railroad to cross another.

In examining subsection (2) we find the actual jurisdiction of the Commission. The first clause of that subsection to us is persuasive. It confers upon the Commission *exclusive* power to do certain things, namely, to 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. Nowhere in this section does the Legislature confer upon the Commission authority to grant one railroad the right to cross the right of way, property, or tracks of another. That right must come from another source and that source is, we think, clearly either from voluntary grant or conveyance or by exercise of the power of eminent domain under the provisions of Section 104-61-3, *supra*. This being so, jurisdiction is, we think, in these matters now clearly divided as

follows: The Commission, under said Section 76-4-15, has the power to determine and prescribe the point at which one railroad may cross another at grade and the terms of installation, operation, maintenance, use and protection of such crossing. The courts have the power under said Chapter 61 over the acquisition of the necessary property rights and the compensation which must be paid for these rights in connection with any such crossing.

A brief exploration into the field of eminent domain will demonstrate the underlying reason behind the division of jurisdiction between the courts and the Commission respecting the crossing by one railroad of the property and tracks of another. In the construction of its line, a railroad corporation enjoys for ordinary purposes the right of the determination of the location and route which its tracks will take.

1 *Lewis Eminent Domain* (3rd Ed.), Section 390;

Postal Tel. Cable Co. v. Oregon Short Line R. Co., supra.

This right of location is essential to the practical construction of a railroad, otherwise the builders of a railroad passing through numerous parcels of privately owned land would have no means of effectively controlling the location of their trackage. When it is proposed, however, that one railroad shall be constructed over the property and trackage of another, problems of an entirely different character are presented. These problems relate to matters of public safety, public convenience and necessity, and physical operations of the railroads involved. Consequently the

Legislature saw fit in the crossing of one railroad by another to withdraw from the constructing line the power of location of route which it would otherwise enjoy and to vest that power in the Commission.

The location of route may be a factor which will influence the amount of compensation which a railroad may be required to pay when it crosses the property of a land owner or the property of another railroad, but location of route is a matter wholly distinct from the judicial problem of determining the compensation to be paid for the taking of the property employed. It thus appears clear that the function and jurisdiction of the Commission in cases such as here presented is very limited and restricted. It relates only to the determination of the point at which crossing may be made and the conditions which may be imposed in connection with the installation of safety devices at the crossing. Matters in connection with acquisition of property and the payment of compensation rest, where they have always rested, in the courts.

The solution of the problem here presented is, we believe, readily found in a careful examination of the controlling statutes alone. We have found no case in which this Court has construed Section 76-4-15 in relation to the issues raised on this review. The decision in *Postal Telegraph Cable Co. v. Oregon Short Line R. Co.*, *supra*, is, however, in point. In that case it appears that Congress enacted a measure to aid in the construction of telegraph lines. Under the provisions of the Act corporations organized for the purpose of transmitting messages and conducting a telegraph business, upon acceptance of the pro-

visions of the Act, were given the right to erect their lines upon post roads. Railroads were made post roads by the further provisions of the Act. The telegraph company had duly accepted the provisions of the Act, and the Postmaster General had executed a certificate to this effect. The court points out that the Act is auxiliary to state law and compliance with the Act qualifies the telegraph company to exercise the power to acquire its necessary easements by eminent domain, saying in part:

* * * By accepting the provisions of this act, respondent is given the right to erect its telegraph lines upon all post roads; and by section 3964 of the Revised Statutes of the United States all railroads are made post roads. But, before respondent can exercise the right thus granted by congress, it must have fixed and paid to the appellant just compensation for the easement. This is ascertained by resorting to the state law relative to eminent domain. The state law becomes auxiliary to the act of congress, and provides the method of condemnation and compensation. In other words, a right is given by this act of congress, and the remedy is furnished by the laws of the state.

In principle the situation is no different here. The Public Utilities Act is auxiliary to the eminent domain chapter. In the matter of the crossing proposed by Union Pacific, the order of the Commission affords Union Pacific a clearance which may enable it to then proceed to undertake the acquisition of the necessary property rights.

The Commission is an administrative body, clothed by the Legislature with the power to regulate public utilities of the State.

*Utah Copper Co. v. Public Utilities Commission
of Utah et al.*, 59 U. 191, 203 P. 627.

The Commission's jurisdiction under Section 76-4-15 is incident to that power of regulation. The taking of property under the power of eminent domain is a judicial function, protected by all those carefully enacted and preserved safeguards which time and experience have found to be essential in connection with the taking of private property for a public use. Even if the Legislature had the constitutional power to do so, there is nothing in the statutes involved to indicate an intention to clothe the Commission with such a judicial function.

The Commission in its order makes no distinction between its general jurisdiction over public crossings and its very limited jurisdiction over the private crossing proposed. By the very broad language of its general order, the Commission undertook to grant the prayer of the Union Pacific application in its entirety and without restriction, thereby purporting to clothe Union Pacific with authority to enter upon, take and use the private property of Rio Grande. In so doing the Commission acted unlawfully and exceeded the jurisdiction conferred upon it by law.

II.

THE ORDER OF THE COMMISSION VIOLATES
THE CONSTITUTIONAL RIGHT OF RIO GRANDE
THAT ITS PROPERTY MAY NOT BE TAKEN WITH-
OUT JUST COMPENSATION.

Consideration of this point requires an examination of the application of Union Pacific filed before the Commis-

sion, the order sought by the prayer of this application, and the effect of the Commission's order in granting the application.

In paragraph 7 of its application, Union Pacific describes the center line of its proposed track. The final paragraph of that description delineates the track from the north line of Andrew Avenue to Seventeenth South Street as follows:

From the north line of Andrew Avenue the center line of said proposed track as it extends southerly will leave the limits of Salt Lake City, and between said point and Seventeenth South Street the same will be constructed over and upon private land and right of way therefor will be granted to applicant by private owners. However, in the vicinity of Van Buren Avenue said trackage as projected will cross a spur track and interchange track owned by the Denver & Rio Grande Western Railroad Company, as shown by the print attached hereto.

This paragraph indicates that Union Pacific intended to acquire by grant its right of way over the property of Geary Estates but evidences no such intention with respect to acquiring an easement across the property of Rio Grande, although, as we have pointed out, Union Pacific would not only cross two tracks within Rio Grande's right of way but would extend its proposed track some one hundred seventy feet within the limits of such right of way.

Union Pacific prays for an order authorizing it to immediately commence the construction of the track and to construct and operate the same over the streets designated and the property of Rio Grande and that such order be made

effective forthwith. It seems unreasonable to doubt that Union Pacific intended that the force and effect of the proposed order would empower it immediately to lay its tracks across the public streets involved and over and across the property and tracks of Rio Grande. The Commission orders that

* * * the application of Union Pacific Railroad Company for permission to construct, operate and maintain a standard gauge railroad spur track
* * * is hereby approved and granted.

No limitations or restrictions upon the prayer of the application are here imposed. The further order of the Commission requires the installation of safety devices but does not otherwise restrict the authority or right of Union Pacific.

We have here, then, a case in which the Commission has granted Union Pacific the right immediately to construct and operate a track over the privately owned right of way, tracks and property of Rio Grande, with no suggestion whatever that Rio Grande should or might be entitled in any manner to compensation for the taking of its property. That Rio Grande has neither granted any right or easement to Union Pacific nor in any manner received compensation from Union Pacific is not in dispute.

To further urge upon this Court the argument that the Commission's order would enable Union Pacific to take without compensation the property of Rio Grande, in violation of the provisions of the State and Federal Constitutions, is to labor a point we think wholly unnecessary.

III.

THE COMMISSION FAILED REGULARLY TO PURSUE ITS AUTHORITY IN ORDERING THE INSTALLATION OF INTERLOCKING SAFETY DEVICES WITHOUT MAKING PROVISION FOR THE OPERATION, MAINTENANCE, USE AND PROTECTION OF THE SAME.

A consideration of this point requires a further examination of Section 76-4-15. As our previous discussion has shown, the Commission is by this section vested with exclusive jurisdiction over certain matters.

One subject over which the Commission enjoys exclusive jurisdiction is the facilities incident to railroad crossings. The essential language of the statute relating to that subject is as follows:

The Commission shall have the exclusive power to determine and prescribe the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad.

From the foregoing language it is seen that the terms which the Commission is empowered to prescribe relate to installation, operation, maintenance, use *and* protection. An analysis of this language shows that each of these terms is related to the other and that the duty of the Commission is to prescribe with respect to all of these terms in their entirety and not to each separately; otherwise the language of the statute would have been installation, operation, maintenance, use *or* protection.

The facilities at crossings with which the Commission is essentially concerned are safety devices. The Commission, in connection with the Union Pacific application, assumed jurisdiction with respect to the subject of safety devices, and a portion of its order relates to such devices. This subject, being within the jurisdiction of the Commission, its order cannot be disturbed by this Court unless the Commission failed regularly to pursue its authority or its order is capricious or arbitrary.

Gilmer v. Public Utilities Commission of Utah,
67 U. 222, 247 P. 284.

The order of the Commission on this matter is in substance that Union Pacific shall provide, at its expense, proper interlocking safety devices at the point of its proposed crossing with Rio Grande. In requiring that Union Pacific provide the devices, the Commission has required Union Pacific in effect to install and supply the same and has accordingly dealt with the first term of the language of the statute quoted above, namely, installation. The Commission has in no manner, however, dealt with the other terms of the statute with respect to such devices, namely, operation, maintenance, use and protection.

It is a matter of common knowledge that the installation of interlocking safety devices is but the first and in many ways the least important phase of their entire operation. These devices require the constant employment of energy, man power and technical skill in connection with their operation. They need constant and careful maintenance and repair, and the entire facility must be carefully

preserved and protected. Furthermore the use of such facilities requires an order of a regulatory body or agreement with respect to priority of movement of trains and cars over the crossing and division of expense and charges in connection with the entire facility. To prescribe the terms of installation of such devices, with no provision whatever for operation, maintenance, use and protection, is to force the parties into a relationship which can only lead to uncertainty, confusion and expense.

Judicial experience through the years has developed the sound principle that if a judicial body or tribunal assumes jurisdiction over the subject-matter of an action or proceeding, it should extend its inquiry and jurisdiction to afford complete relief to the parties. This is such a fundamental proposition that no citation in support thereof is necessary.

It may be suggested in defense of the order of the Commission that, if the same be otherwise lawful, it should be sustained, and if the railroads involved cannot, after installation of the safety devices, agree with respect to the matters of operation, maintenance, use and protection of the same, that a further application may be made to this Commission to determine the division of expense with respect to these matters. Such a suggestion, in our opinion, only serves more clearly to demonstrate the impropriety of the Commission's order. Obviously the Commission should not exercise its jurisdiction piecemeal. At the outset the Commission should determine and make an appropriate order with respect to all matters and issues which may be necessary to afford the interested parties complete and proper

relief. Any party deeming itself aggrieved by such an order can then have a full and adequate review of the proceedings of the Commission. Certainly neither of the Railroads here involved can now know what terms or conditions might be imposed at a future date by the Commission in connection with the proposed crossing; and to allow the crossing to be made and one of the parties to install the crossing facilities without knowing what may be the rights and duties of the parties with respect to operation, maintenance, use and protection is only to invite future controversy.

Rio Grande endeavored in good faith in its petition for rehearing in the case before the Commission to have the Commission fully and properly fix and determine all of the rights and duties of the two roads incident to the required safety devices. In failing to properly and completely deal with this subject in its order and in denying Rio Grande's petition for rehearing when the matter was specifically called to the attention of the Commission, it failed regularly to pursue its authority and its orders are arbitrary and capricious.

IV.

THERE IS NO SUBSTANTIAL EVIDENCE THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRE UNION PACIFIC TRACKAGE BEYOND THE POINT OF THE PROPOSED RIO GRANDE CROSSING.

If a decision of the Commission is supported by substantial evidence, then, under the authority of numerous decisions of this Court, such decision will not be disturbed

upon review. Equally well established, however, is the proposition that if a decision of the Commission is not supported by substantial evidence it will be set aside.

Utah Copper Co. v. Public Utilities Commission of Utah et al., 59 U. 191, 203 P. 627;

Union Pacific R. Co. v. Public Service Commission, 103 U. 459, 135 P. (2d) 915;

McCarthy et al. v. Public Service Commission et al., 111 U. 489, 184 P. (2d) 220.

In its application before the Commission Union Pacific sought authority to cross certain streets and the tracks of Rio Grande for the purpose of extending its trackage from Ninth South Street to Seventeenth South Street. There was in the application no proposal to extend trackage beyond the north line of Seventeenth South Street. In order to do so it would have been necessary for Union Pacific to seek authority from the Commission to cross Seventeenth South Street. This it did not do, and the Commission restricted the application to a consideration of the extension of trackage from Ninth South Street to the north line of Seventeenth South Street (R. 72, 78).

The Commission in its report (R. 22) found in part that:

* * * applicant, Union Pacific Railroad Company, has been requested by various property owners and by companies and concerns having industrial property along Third West Street and south of Ninth South Street in Salt Lake City to extend industrial track to such area to serve such industries as are located in that area and to serve additional industries which are in contemplation of construction and location within said area.

That applicant, Union Pacific Railroad Company, heretofore made application to the Salt Lake City Commission and under date of November 1, 1949, was granted a franchise by the Salt Lake City Commission giving to it authority to construct, operate and maintain trackage longitudinally along said Third West Street in Salt Lake City, Utah from Ninth South southerly to Andrew Avenue south of Fifteenth South Street in Salt Lake City, at which point said trackage will leave the limits of Salt Lake City and extend along private property outside of the City limits to the northern boundary of Seventeenth South Street. A copy of said ordinance was submitted as Exhibit I at the time of the hearing upon said application and is on file with the Commission and made a part hereof by reference.

That because of requests that have been made of applicant, Union Pacific Railroad Company, by property owners in said area and because of rapid industrial growth in said area, both with respect to industries located there and others projected for early construction, the convenience and necessity of the public generally, and of business and industry located and to be located in said area require the immediate construction of said industry trackage; that the granting of the application will not be detrimental to the best interests of the public but will tend to serve its interests better.

Witnesses were called by Union Pacific, testifying with respect to the need of railroad trackage between Ninth South Street and the north line of Rio Grande's right of way. The testimony of all these witnesses may be placed to one side in connection with the inquiry under the above designated point. So far as Rio Grande is concerned, Union Pacific may extend its trackage all the way from Ninth

South Street to the north line of Rio Grande's right of way. We are here concerned only with whether public convenience and necessity was shown by the evidence to require the extension of Union Pacific trackage south of Rio Grande's right of way.

Southerly of Rio Grande's right of way and northerly of Seventeenth South Street, there is but one parcel of land, being the south half of the Geary Estates property. This parcel is bounded along its northerly line by the right of way and trackage of Rio Grande. The only pertinent testimony introduced by Union Pacific with respect to the development of this parcel came from the real estate broker Bowman. The substance of his testimony as heretofore pointed out is that he had been working upon the industrial development of the tract for some two years, that inquiries were presently being invited from industries desiring to locate on this parcel. At the time of his testimony no industry had yet determined to locate thereon, the development of the parcel being in the inquiry stage. He knew of the location of Rio Grande trackage abutting upon the parcel but no contact had ever been made by him with Rio Grande looking to the furnishing of trackage facilities to any industry. Wholly without regard to the testimony of the witness Bradford respecting the solicitation by Rio Grande to locate industries along its trackage (R. 133-134), how can it be found from the testimony of Union Pacific that public convenience and necessity require the extension of Union Pacific trackage over the tracks and right of way of Rio Grande and into the south half of the Geary Estates property?

The contention may be made here that the Commission was entitled to look beyond the scope of the Union Pacific application into an area south of Seventeenth South Street in connection with the crossing of Rio Grande's right of way and tracks. If such contention were made, the answer is found in the proceedings here under review. At the outset Rio Grande raised the question as to the scope of the application. Union Pacific was then afforded an opportunity to amend and republish, had it seen fit to do so. It elected, however, to proceed under its application as filed (R. 70-72), and the Commission, as above indicated, properly restricted the scope of the application. It is this application so restricted and the proceedings taken thereunder which are here for review. Whatever Union Pacific may do or intend to do south of the north line of Seventeenth South Street is outside the scope of this review and should not be here considered or drawn upon to support the order and decision of the Commission in this case.

CONCLUSION.

In approving the application of Union Pacific and in granting the authority there sought, the Commission failed to observe the boundaries of its jurisdiction. It undertook to exercise an identical authority with respect to public crossings of streets and the private crossing of one railroad over the property and tracks of another. Its jurisdiction over the private crossing involved is restricted to fixing the point of crossing and the terms of installation, operation, maintenance, use and protection of the crossing facilities. In undertaking to empower Union Pacific immediately

to commence the construction of the proposed track and to construct and maintain the same over the tracks and property of Rio Grande, the Commission attempted to exercise the judicial function of granting to Union Pacific rights in the property of Rio Grande and exceeded the jurisdiction conferred upon it by law.

The Commission's order would enable Union Pacific to enter upon, use and occupy the property of Rio Grande without compensation, in violation of the provisions of the Constitution of the State of Utah and the Constitution of the United States.

The Commission properly assumed jurisdiction of the matter of crossing facilities, but in requiring the installation of safety devices without making any provision for the operation, maintenance, use and protection of the same, it left the parties in doubt and uncertainty as to the rights and duties of each, and the cost and expense which each might be required to bear and thereby failed regularly to pursue its authority and acted arbitrarily and capriciously.

This review relates to the application of Union Pacific to extend its trackage in Third West Street from Ninth South to the north line of Seventeenth South Street, but we are here concerned only with the crossing of Rio Grande's tracks and right of way and the serving of the area southerly of Rio Grande's right of way and northerly of Seventeenth South Street. Within this area there is but one parcel of land, bounded on its north line entirely by the right of way and trackage of Rio Grande. There is no substantial evidence in the record that any public convenience and neces-

sity require the proposed Rio Grande crossing to serve any industry which may locate upon this small parcel of land

The order and decision of the Commission should be set aside.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY,
LEONARD J. LEWIS,

Attorneys for Petitioner.

FOURTH

THIRD

WEST CITY LIMITS

STREET

CALIFORNIA

ALBERMARLE AVE.

HOPE

Ave.

WHITNEY

Ave.

SOUTH

STREET

ANDREW

Ave.

VAN BUREN

Ave.

Western Salvage and Supply Company

Bessie E. Friedman

16th

SOUTH 20

ST.

Henry G. & Anna Holz

Sidney L. & Claire A. Lee (9' Strip)

HANSEN

Ave.

James B. Fitzgerald

Sidney L. & Claire A. Lee 9' Strip

17th SOUTH

STREET

Gerry Estate

Gerry Estate

Lot 2

Block - 9

5 Acre Plat A

D & R. G. W. R. R. Right of Way - Outlined Green.
D & R. G. W. R. R. tracks shown - - - - Yellow.
U. P. R. R. proposed track shown - - - - Red.

LEGEND -

