1979

David R. Williams dba Industrial Communications v. Hyrum Gibbons & Sons Co. et al : Brief of Cross Respondent

Utah Supreme Court

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Watkis & Faber; Attorneys for Plaintiff-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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DAVID R. WILLIAMS, dba INDUSTRIAL COMMUNICATIONS, Plaintiff-Appellant, Cross Respondent,	:	
vs.	:	
HYRUM GIBBONS & SONS CO., a Utah corporation, Defendant-Respondent, Cross Appellant,	:	Case No. 16,024
and	:	
NORTH UTAH COMMUNITY T.V., a Utah corporation Intervenor-Respondent, Cross Appellant.	:	

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BRIEF OF CROSS RESPONDENT

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An Appeal from the Judgment of the First Judicial District Court in and for the County of Cache, Utah

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BRIEF OF CROSS RESPONDENT

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NATURE OF THE CASE

This is an action to condemn one-tenth of an acre of unimproved real property in the Logan foothills for use as a radio-telephone transmitting and receiving base station to provide mobile telephone and paging service to the general public in the Logan, Utah, area.

DISPOSITION IN THE LOWER COURT

The lower court held that appellant had the statutory

power of eminent domain, but denied appellant's right to have the particular site condemned for the reason that there might be some radio wave interference from appellant's telephone equipment if it were improperly tuned on some occasions.

THE NATURE OF RELIEF SOUGHT ON APPEAL

Appellant requests this Court to affirm the lower court's ruling that appellant has the right to exercise eminent domain powers, and reverse the lower court's ruling and hold that Appellant is entitled to have the site selected herein condemned and that technical matters of radio wave considerations be deferred to the Federal Communications Commission.

STATEMENT OF FACTS REGARDING CROSS APPEAL

Appellant has stated its facts in Appellant's Brief as relate to appellant's appeal. The following statement of facts, in numbered paragraphs to aid in referencing, is in response to issues raised by the Cross-Appellant's Brief.

1. The particular site sought in this action is for the installation of a telephone pole, on which is located a metal antenna, and a small building at the base of the pole in which is located equipment to repeat, by electronic

transmitters and receivers, telephone signals originating on Mountain Bell Telephone equipment and transmitted to the building on telephone cables, or telephone signals orginating on mobile telephones within the signal area of the site. (Finding No. 2, 3, Record p. 129; Transcript, p. 42, lines 7-9; p. 207, lines 4-15; p. 161, lines 12-25; p. 124, lines 14-25, p. 125, lines 1-25.)

2. All of the equipment is automatic, and is activated by conventional, wired telephones in the Bell system from any origination point in the world, or from telephones located in motor vehicles or hand held portable telephones within the service area. The equipment is standard telephone equipment, and is similar to equipment operated by Bell system mobile telephone divisions. No signals originate at the repeater sites. (Transcript, pp. 124-25, 158. The transcript from the first hearing regarding the telephone equipment was not ordered by Cross Appellants. Record p. 41.)

ARGUMENT

THE TRIAL COURT PROPERLY CONCLUDED THAT "TELEPHONE LINES" IN THE EMINENT DOMAIN STATUTE INCLUDES A RADIO-TELEPHONE SIGNAL RELAY TOWER OPERATED IN ACCORDANCE WITH PLAINTIFF'S CERTIFICATE.

Eminent domain may be exercised by public utilities

for certain public uses as indicated in Section 78-34-1(8), Utah Code Ann. (1953) as follows:

> Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:
>
> . . .
>
> (8) Telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

The public use "telephone lines" has not been specifically defined by the eminent domain statute or by decisions of this Court. That phrase has been defined by the Legislature in the chapter of the Code governing public utilities, Section 51-2-1(21) as follows:

> The term "telephone line" includes all conduits, ducts, poles, wires, cables, instrument and appliances, and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires. (Emphasis supplied.)

In reviewing the question of whether a telephone company may exercise condemnation powers for a microwave relay radio tower, the Tennessee Supreme Court stated, in Brannan v. American Telephone and Telegraph Co., 362 S.W.2d 236, 239 (Tenn. 1962):

> This section, they argue, permits condemnation only for telephone or telegraph lines and grants no power to condemn land for the purpose of erecting a

radio microwave relay tower. Therefore, they conclude that the Court had no power to render the condemnation judgment in 1953.

This argument is without merit. First, the land could properly be condemned under the authority of Section 65-2101 et seq. T.C.A. Section 65-2105 T.C.A. was originally enacted in 1885 and was modified to its present form in 1932. Microwave radio communication was perhaps unknown then, but the facilities for such are includible in this statute by the language, "or other system of transmitting intelligence the equivalent thereof, which may be invented or discovered * * *" Clearly the intent of this statute is to allow the taking of property for a public use, the construction of facilities for speedy communications. Towers like the one in the instant case make it unnecessary to have a row of poles carrying wires from one point to another. They transmit by means of electronically induced waves in the air rather than physical lines, but the result is the same. If a right of way for poles and cables or wires can be condemned under the statute, then so also should small plots for microwave relay towers be condemnable.

The use of the word "lines" in this statute might also mean lines of communication in a sense that would include radio-telephone communications. Obviously it means more than just wires, for it includes poles and supports, etc., or in other words, a transmission system.

In construing mobile telephone companies as telephone companies for purposes of regulation under public utilities statutes, Calvert v. Wilson Communications, Inc., 443 S.W.2d 419 (Texas, 1969), discusses a number of various state court decisions so holding, citing State v. Two Way Radio Service, Inc., 272 N.C. 591, 158 S.E.2d 885, 863, as follows:

> [C]ourts may take judicial notice of the well known fact that telephone companies today habitually transmit conversations by electrical impulses traveling through part of the intervening space without proceeding upon wires.

In Algonquin Gas Trans. Co. v. Zoning Bd of Appeals, 162 Conn. 50, 291 A.2d 204 (1971), the Connecticut Supreme Court held that a natural gas utility could condemn property for the installation of a microwave transmitting tower and instrument building for a communications systems to monitor the flow of natural gas.

The general public purpose of telegraph communications was discussed in this Court in Postal Tel. Cable Co. of Utah v. Oregon S.L.R. Co., 23 Utah 474, 65 P. 735, 90 Am. St. Rep. 705 (1901), and is applicable to telephone service:

> That the telegraph is a public use, and the business of telegraphy is obviously a public business, is well established. It is a quasi-public employment—one not merely exercised for the purpose of private gain, but for the general benefit and welfare of the community. A telegraph company is a public servant, which must serve all alike who make demands upon it, and its right to exercise the power of eminent domain is recognized by our statutes and by numerous decisions of the courts.

The public need for the service provided by plaintiff is indicated in the Certificate of Convenience and Necessity (Record 04-07), as well as in the testimony at trial. Among those needing service include physicians and hospital emergency personnel (Tr. p. 201), real estate brokers and developers, contractors, morticians, and business persons. (Tr. p. 82, lines 2-18).

Appellant replies to matters raised in Respondents' Brief as follows:

1. Appellant consistently opposed the intervention of North Utah Community T.V. as a party to this condemnation action where it has no interest in the real property. Appellant again raised the issue at the commencement of the trial, objecting to any testimony on radio inteference from Intervenor (Tr. pp. 3-6), but the trial court ruled that Intervenor may proceed on that issue. Appellant was not required to take a formal exception to the Court's ruling. Respondents' claim at pages 4 and 30 of their Brief that appellant has not objected to the interference or intervention issue is not well taken. In addition, appellant repeatedly objected to the testimony of Professor Humphreys and Professor Fletcher on the interference issue.

2. Appellant's expert appraiser, William R. Lang, testified that the highest and best use of the general area was residential in the future, but that in his opinion, the high knoll, presently not in any use, except for the three antennaes of Intervenor on the north side of the knoll, could not be economically developed because of the prohibitive cost of off-site improvements. (Tr. pp. 180-184.) He gave his opinion that the site was worth $1,255.00. (Tr. p. 183.

3. Appellant repeatedly objected to the opinions of respondents' witnesses concerning site locations and possibilities of interference. None of the respondents' witnesses had run any tests of appellant's operating equipment located throughtout northern Utah to determine whether any of the interference problems which they theorized might exist in fact existed in the strengths or at the frequencies concerned. None of these witnesses had any actual experience with the kinds of equipment presently in use as a matter of course at existing repeater sites throughout the major population areas of Utah. On the other hand, appellant's engineers testified there is no interference at any existing sites using the same equipment and performing the same functions as proposed for the Logan site as postulated by Professors Humphrey and Fletcher. Appellant also operates identical repeater sites in several areas of Utah having "fringe" television reception without interference. Appellant operates identical repeater sites within large residential areas at other Utah sites without causing interference to residential television or radio receivers.

Respondents' witnesses theorized about general radio interference, but could not relate their general knowledge to the specific equipment in appellant's installations. When pressed on examination regarding

the actual strength of possible interference and the distance in feet that possible interference could actually travel, both of respondents' expert witnesses admitted they did not know enough about the equipment to know.

Crossexamination of Professor Humphreys, TR. p. 325, lines 15-18; p. 326, lines 3-10:

> Mr. Lloyd. Q. What strength will it (harmonic or spurious radiation) have after it travels ten feet?
>
> Mr. Humphreys. A. In that case I'd have to have you give me the figure on the antenna, the impedance figure on that antenna.
>
> . . .
>
> Mr. Humphreys. A. But I need to know, before I can give you an answer on how efficient that is going to be at the harmonic energy, I need the impedance and the electrical characteristic of that antenna at the harmonic frequency.
>
> Q. So you don't know whether or not it will interfere at all?
>
> A. That interjects the great question on how far it's going to travel.

Examination of Professor Fletcher, TR. p. 337, lines 16-24; p. 338, lines 7-11:

> Mr. Hoggan. Q. And on the scale I gave you from an engineering point of view what would you rate the probability of that interference occuring.
>
> Mr. Fletcher. A. That one I'll have to qualify. Again I have to fall back on---I don't know what their antenna looks like, you know, impedance and

the radiation capability at the second harmonic, . . .

Mr. Lloyd. Q. Isn't it a fact that whatever harmonics that might be used at that level that's already shielded can be shielded very cheaply to a much higher level so that there's no radiation of harmonics whatever that are discernible to that television station?

A. I have to fall back on---I don't know what the qualifications are of your equipment. You know, all I see is the spec sheet. I don't know whether its possible to shield that transmitter or not.

. . .

Q. As a matter of fact those are easily filtered; isn't that true?

A. I cannot say that absolutely, because I don't know and I've never seen the piece of gear, I don't know how its physically laid out.

4. Appellant's site selection process was thorough, was based upon an examination of the physical construction of existing and projected buildings in the service area for attenuation (loss) of signal strength, a physical review of the topographical terrain, a signal test in existing service areas under comparable conditions anticipated for the Cache County service area, and considerable experience with the particular equipment under field conditions. Appellant cannot provide service in the Cache County area without a repeater antenna on this particular knoll, notwithstanding the speculation of respondents' witnesses. A combination of three sites could afford the same service coverage, but the extreme cost of obtaining and equipping

each separate site with identical equipment to the one proposed site would prohibit offering the service.

Each site suggested by Professors Fletcher and Humphreys was eliminated in testimony from appellant's engineers because the other sites proposed failed to provide adequate coverage of the service area within the restrictions imposed by the F.C.C., and such sites had been considered, but rejected by appellant's engineers during the initial site selection process. Alternate sites proposed either blocked off major portions of the area because of the terrain, or were too far from the major buildings for the signal strength to be sufficient to penetrate to activate paging devices. Respondents assert in paragraph 7 of their Brief that appellant did not explore alternative sites and did not run any tests. That is incorrect. Appellants' engineers ran all applicable tests authorized by the F.C.C. without a special broadcast license. (TR. p. 360, lines 2-15.) Appellant did not locate alternate sites to fall back on in the event eminent domain was denied because the engineers had already considered all possible sites raised by Respondents and had rejected them. (TR. pp. 92-122; pp. 126-156; p. 354, lines 7-11.)

5. Respondents' assert fringe television reception in Cache valley creates additional problems, at p. 32 of their Brief. However, the quality of television reception in Cache valley is similar to the quality of television reception in a number of areas currently serviced by appellant, including Morgan, Wasatch, Rich, Uintah, Summit and Duchesne Counties, and appellant's equipment is in the same building with television repeater equipment on Lewis Peak in Summit County, with no interference at all. (TR. p. 19; p. 101, lines 3-20.) Intervenor's engineer saw no problem with interference when the site was originally proposed, and did not indicate any changes in that position at the trial. (TR. p. 99, lines 1-12; pp. 308-314.)

CONCLUSION

The trial court correctly concluded appellant operates a public utility which may utilize eminent domain for purposes of establishing a microwave or radio signal repeating site to transmit telephone conversations under the general purpose "telephone line" in the statute. As indicated by appellant's engineer at Tr. p. 161, few wire telephone lines are left between Salt Lake City and Logan, the wires being replaced by microwave links. The

only wire "line" in the system is between appellant's main switching offices and the Mountain Bell central offices in Salt Lake City. All other connections between the two systems are radio wave transmissions. The antenna site requested herein will be an integral part of the telephone communication transmission system providing an important public service, especially when used by medical or emergency personnel, of benefit to all of the people of Utah.

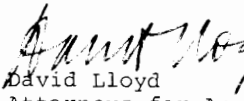
The trial court erred in permitting improper speculation about possible radio interference which could conceivably occur, but in practical operation does not in fact occur. Among evidence considered by the trial court is the fact that F.C.C. licensed transmitters for commercial radio stations are scattered throughout the residential areas of Logan City, broadcasting at many thousands of watts of power, while appellant is limited to 500 watts. The speculation on interference should have been rejected for a lack of relevancy to the issue of taking the otherwise unused real property requested, and further because it was not within the province of the trial court to second guess radio wave problems required to be submitted to the F.C.C. Both appellant and intervenor are closely regulated by the F.C.C. who must approve the specific site and assign the specific radio frequencies.

Intervenor may request the F.C.C. to deny the application for frequency assignment, or request an alternate frequency be assigned if it is concerned about a specific frequency. Further, once in operation, if there are any conflicts at all from radio transmissions, the F.C.C. has jursidiction to require corrections. In addition to the relevancy problem, the witnesses who testified for respondents on alternate sites did not offer competent testimony. None of the witnesses had any practical experience in radio telephone communications, and their testimony was strictly speculation based upon academic experience. Appellant's need for this particular site, and the lack of any other economically feasible sites, is indicated in his testimony near the close of the trial, ". . . if there was another site we felt would do it, we'd have done it a long time ago." (TR. p. 354, lines 7-8.) The trial court should be reversed and a hearing set to take evidence on damages for the taking.

DATED this 11th day of April, 1979.

Respectfully submitted,

WATKINS & FABER



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CERTIFICATE OF SERVICE

I hereby certify that I mailed three copies each of the within Brief to the below attorneys for Respondents, postage prepaid, this 11th day of April, 1979.

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