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Los Angeles and Salt Lake Railroad Company and Union Pacific Railroad Company v. Public Service Commission of Utah et al : Brief of Petitioners

Utah Supreme Court

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In the
Supreme Court of the State of Utah

LOS ANGELES AND SALT LAKE
RAILROAD COMPANY and UNION
PACIFIC RAILROAD COMPANY,
Petitioners,

vs.

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

Case No.
7654

BRIEF OF PETITIONERS

FILED

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BRIEF OF PETITIONERS

STATEMENT OF THE CASE

This is a proceeding to review an original order and decision and an amended order and decision, as entered after rehearing, by the Public Service Commission of Utah.

In this brief parties to the proceedings may sometimes be designated as follows: Petitioners as the Railroad or the Railroad Company, respondent Public Service Commis-

sion of Utah as the Commission, and various parties appearing in opposition to the application will be referred to as protestants where not specifically named otherwise.

On May 4, 1948, the Railroad Company filed its application with the Commission asking permission and authority from the Commission to discontinue its station at Black Rock, Utah, as an agency station and to maintain the same as a non-agency station, except during the months of April and May of each year during which two months a regular agent would be maintained. The application alleged as a basis for the relief sought that except for the months of April and May the volume of railroad business and the revenue received therefrom through the station of Black Rock was less than the cost of maintaining an agent there at the station; that the business transacted at the station of Black Rock during the remaining ten months of the year did not justify, warrant, or render profitable or advisable the further maintenance or operation of such agency during the period of June to March, inclusive, of each year; and that the public convenience and necessity and the economical operation of the line of railroad operated by petitioners required the discontinuance of said agency during the ten months in question.

For some reason the matter was not set for hearing for six months but the application was finally noticed and hearing was held at Fillmore, Utah, on November 10, 1948. The original report and order was not issued by the Commission until August 12, 1949 (R. 16), the bad winter of 1948-1949 having passed in the meantime and there having

been some contact and discussion between the county commissioners of Millard County and the members of the Public Service Commission during the intervening period (R. 13, 14-15). The Railroad Company objected to the original order and filed a petition for rehearing (R. 23-28), and one of the protestants likewise being dissatisfied also filed petition for rehearing (R. 30), whereupon the Commission granted a rehearing (R. 32). The rehearing commenced at Fillmore, Utah, on May 15, 1950 (R. 297), and was continued at Salt Lake City on June 9, 1950, and thereafter, upon request of counsel for protestants, was orally argued before the Commission on December 7, 1950. The Commission issued its amended report and order on January 9, 1951 (R. 53).

In the original order the Commission authorized the discontinuance of an agent at the station during the period of May 16 to November 14 (R. 20). By the amended report and order the Commission authorized the closing of the station between December 1 and May 31 of each year, designating such period of time as "the winter sheep ranging season" in the Black Rock area (R. 55).

The Railroad on February 8, 1951, filed its petition in this court and had issued a writ of certiorari and seeks to review the entire proceedings had before the Public Service Commission, and in connection therewith seeks a reversal of the orders as issued by the Commission and a direction that the Commission authorize the closing of said station pursuant to the application and in accordance with the evidence produced at said hearings.

STATEMENT OF FACTS

The station of Black Rock is located on the Los Angeles main line of the Railroad Company, approximately 45 miles south of Delta and 28 miles north from Milford, Utah, said two stations being the nearest open agency stations in the area (R. 228). There is no organized settlement at Black Rock, the only regularly established residences or places of habitation, other than quarters occupied by the Railroad section employes, in the vicinity of the station being the ranch residence buildings of the James Ranch, or what is known as the Black Rock Ranch, located 1 miles east of the Black Rock station. The nearest ranch house or other house elsewhere in the vicinity is 14 miles to the south of Black Rock in the direction of Milford (R. 528), and the nearest ranch house or residence to the north is at Oasis in the vicinity of Delta and approximately 40 miles north from Black Rock. The area surrounding Black Rock is for the most part arid, desert land and in the main is used for the grazing of various herds of sheep, most of which sheep have their summer ranges in the mountains east of Sanpete valley and north and south therefrom (R. 434-435, 253-255, 571, 554). No sheep are shipped out from Black Rock as fat sheep or on a market basis, the shipping of such sheep in and out of Black Rock being purely range to range movements. The owners of the Black Rock Ranch raise and operate cattle the year round. Some hay and grain is raised on the ranch but all such is fed to livestock or otherwise used at the ranch (R. 282-283), the only products being sold and shipped from the Black Rock Ranch being market cattle in connection with sales which are made only

once each year (R. 284). A shipment of one or two cars of cattle is sent from the Black Rock Ranch to market once each year (R. 608).

Sheep men who winter their sheep on this western desert in the Black Rock area, including both north and south thereof and west to the Nevada line, have permits to winter approximately 55,000 head of sheep. These various owners have not had on the desert recently the full numbers authorized by their permits (R. 453). The Commission correctly found in its original report and order that "Most of the sheep which winter in the area of Black Rock are trailed in the fall rather than being shipped, although some sheep are shipped into Black Rock for the winter season." The majority of the sheep herds wintered in the area are shipped out in the spring by rail, some of the sheep wintering in the western areas going north and being shipped out from Jericho and a considerable number being shipped out from Black Rock. Some of the sheep are sheared at Black Rock before shipping, as is also true at Jericho, but not as many are sheared at Black Rock now as in past years (R. 456). All of the sheep shipped out from Black Rock in these range to range movements are shipped out in April or May, and all of the wool taken from such sheep as are sheared at Black Rock is likewise shipped out in April or May. Since the discontinuance of the branch line formerly operated by The Denver and Rio Grande Western Railroad Company from Manti to Fountain Green and through Salt Creek Canyon to Nephi, some of the men shipping sheep out from Black Rock have turned to the use of trucks (R. 514), and others who formerly shipped either to Nephi or

by way of Nephi on into Sanpete now ship only from Black Rock to Juab, Utah, and then trail over into the Sanpete valley by way of Gunnison and Manti (R. 499-501, 503).

In addition to the Black Rock station and the livestock shipping there affected, there is a nonagency siding slightly more than 5 miles to the north of Black Rock known as Pumice (R. 227), which serves a deposit of perlite and pumice stone, known and designated insofar as shipping is concerned as volcanic ash. Some substantial amounts of this pumice aggregate or volcanic ash has been shipped from the nonagency point of Pumice and has been billed through Black Rock, although such shipments have not recently been as anticipated nor as promised by the people mining and shipping the same (R. 229).

Approximately 10 miles north of Black Rock there is a nonagency point designated as Cruz (R. 539), near which there is a limestone deposit. Shipments from this point are still prospective although there have been up to date 2 cars of raw limestone shipped out from Cruz and billed through Black Rock (R. 541). There has been none of such products shipped out from either Pumice or Cruz other than in carload lots and no shipment of less than carload lots is intended as far as the testimony at either hearing is concerned. In its original report and order the Commission found with respect to the need of the agent at Black Rock, "That the shipment of pumice stone, lime rock and other products of mines and other commodities as may be shipped in and out from such station in carload lots can be handled as conveniently without an agent as with one at said station" (R. 18).

In its amended report and order the Commission did not repeat this finding, although it made no finding that an agent was necessary to handle these mine shipments from either Pumice or Cruz but the Commission did attempt to use these shipments to bolster its conclusion to keep the agent at the station, saying that such shipping when considered "with the increased shipping activity during the winter sheep ranging season" was sufficient to warrant requiring keeping the station open during the "winter sheep ranging season." *There is no "increased shipping activity during the winter sheep ranging season."* That the Commission was grasping at something to support itself is clearly shown by the fact that the largest shipments of volcanic ash from Pumice move during the summer months of the year, during April and May when an agent will be maintained at the station, anyway, and the months following. It will be seen from Exhibit 10, as introduced at the hearing (R. 134-136), except for 1946 when they first started shipping this volcanic ash, that such shipments are rather light during the months of November and December, January, February and March. In 1947 there were a total of only 7 cars of volcanic ash shipped in the first 3 months and none during the last three months, whereas in April there were 22 cars, May 21, and July 15. During 1948 there were no shipments in January, 9 cars in February, and 4 in March. That year there were 24 cars in November and 16 in December, but the Commission by its amended order did not require the station to be kept open during November. The other shipments in 1948 showed a total of 113 cars of this volcanic ash being shipped during the months, April to September, inclusive. During the year 1949, 5 cars of

volcanic ash were shipped in January, none in February, 5 in November, and none during the months of September, October and December, the heaviest months during 1949 being May to August, inclusive, during which 4 months 56 cars were shipped from Pumice. In 1950, during the first 3 months, only 2 cars were shipped, 1 in February and 1 in March. Thus, it is clear that if any assistance from an agent would be needed for shipments from Pumice it would be during the summer months, and not during the months when the agent would be present pursuant to the Commission's order, other than April and May when the railroad voluntarily agreed to maintain the agent there. With respect to Cruz, there has been no shipping at all from Cruz which would warrant any services of an agent in connection therewith during any portion of the year.

As already referred to, the Black Rock Ranch makes only 1 shipment per year. The last such shipment being by Wayne Robinson in November 1949 (R. 122). Therefore, if there is any evidence warranting retention of an agent at Black Rock, it would have to be in connection with the sheep operations carried on during the so-called "winter sheep ranging season."

The Commission in its amended report and order (R. 54) found "that the railroad station at said Black Rock is now used principally as a shipping and receiving point for the seasonal handling of sheep, to wit: Between December 1 and May 31 of each year, known as the winter sheep ranging season." Mr. Pratt Allred, the regional grazer and range manager who gave the number of permitted sheep and then stated that the actual number of sheep

run have been less than the permitted number when asked how these sheep go out to Black Rock in the fall, answered, "Most of them trail, some of them ship" (R. 463). Even Carl Nielson, upon whose petition the Commission granted a rehearing, stated that his employer, L. L. Peterson, preferred to trail the sheep, but he preferred to ship them, and stated that they had shipped their sheep into Black Rock in 1948 but not in 1949, that they shipped them in in 1947, in 1942, and in 1928 (R. 574). He mentioned no other years when they had shipped their sheep into Black Rock in the fall but said they always shipped out in the spring. However, in that connection, he said that they do not ship any out from Black Rock at any time during the year other than April and May (R. 590). There was no other sheep man who testified at either the original or the rehearing who did any shipping of sheep into Black Rock in the fall, or who shipped out other than in April or May. A. K. Barton, one sheep owner who testified at both hearings, stated, "We usually trail from the summer range to winter range" (R. 259, 501). In connection with his operations, however, even in shipping out from Black Rock in the spring, he ships only to Juab, some distance southwest from Nephi, and stated that because of increased mileage over The Denver and Rio Grande via Provo from Sanpete to Black Rock there are a number of persons at the present time who are not using railroad facilities who previously did use them (R. 500), and a number of the sheep men are now turning to trucks instead of patronizing the railroad. Mr. Barton stated with respect to sheep moving out of Black Rock in 1950, "There has been 5 or 6 herds of sheep that are usually shipped that were trucked this year" (R.

499), and Mr. Barton, himself, the year before—in May of 1949—shipped about 1200 head by truck from Black Rock to the summer range rather than shipping by rail (R. 503). This, even in spite of the fact that the shipping out from Black Rock is done every year in April and May, during which time the Railroad agreed to maintain an agent at the station.

These facts show very definitely the extent to which these sheep men have been using rail facilities and the extent to which they continue to use or are discontinuing using such rail facilities.

The exhibits introduced both at the original hearing and the rehearing conclusively showed the actual amount of shipping done. With respect to these figures, protestants had no evidence to dispute them and, in fact, at the original hearing counsel who appeared for all protestants stated, and was confirmed by the range manager “We have no dispute with your total figures on your railroad figures” (R. 256, 253).

With respect to the facts concerning the shipping, we wish to refer specifically to the exhibits and will first make reference to carload shipments. It will be noted from Exhibit 1 (R. 115-117) that during the year 1946 there were only 9 carloads of freight shipped out from Black Rock other than during April and May. None of this moved during December or January. In 1947 the bulk of the carload shipment was in April and May but there was considerable during the months following April and May. This, however, is reflected in the shipments of volcanic ash, of which, as shown on Exhibit 2 (R. 118), there were a total

of 61 cars during the year 1947. During 1948 there were 18 cars which moved out in January but, again, this was made up principally of the volcanic ash movement from Pumice, and except for that January movement and the shipments out in April and May, there were only 13 cars which moved out during the rest of the year, 6 cars of which were water (R. 122) which did not originate at Black Rock, anyway (R. 221-222). In 1949, other than in April and May, there were only 9 cars moved out as billed from Black Rock during the whole year, and none whatsoever in the first 3 months of 1950 (R. 117). With respect to carload merchandise shipped in to Black Rock in 1946, there were 81 cars during the last 3 months of the year, all of which were sheep (R. 118) ; in 1947, 50 cars, all sheep, during the last 4 months of the year ; in 1948, 174 cars, all sheep, during the last 3 months ; in 1949, 127 cars, which included 8 cars of feed, early in the year and the others, all sheep, in October and November ; and in the first 3 months of 1950 there were 6 cars of sheep moved into Black Rock. In this connection, we wish to point out to the Court that by its amended order the Commission referred to the station of Black Rock as a shipping and receiving point for the seasonal handling of sheep, "to wit: Between December 1st and May 31st of each year" (R. 54), whereas, the evidence shows that very little shipping of sheep into Black Rock is done during the month of December, and except for December there is no shipment of sheep whatsoever during said period, either in or out of Black Rock, except upon some isolated occurrence, other than during April and May. As is shown by Exhibit 1 (R. 115-117), out of 81 cars of sheep coming into Black Rock in 1946 only 2 came in December, 78 in

November, and 1 in October. In 1947, only 2 came in in December, and 48 during November and the 2 months previous. In 1948, there were 21 cars of sheep which came into Black Rock in December but, as is shown by Exhibit 5 (R. 123), this was a shipment from Jericho to Black Rock, which in and of itself was an unusual movement and not a normal movement and one that did not occur during any of the other years, Jericho itself being a point for receiving and departure of sheep for range to range movement similar to Black Rock, as well as a shearing point for sheep from the winter range. In 1949, there were no sheep moved into Black Rock in December, all the sheep which came in by rail moving in in October and November. Thus, the evidence in the case conclusively shows that the normal season for shipping of sheep into Black Rock, if that is a basis upon which the Commission intends to grant its order, is not December 1st to May 31, but the season for shipping of sheep into Black Rock is generally October and November, and primarily November (R. 1), and the only season in normal years for shipping sheep out is April and May. With respect to other shipments, listed as moving in and out of Black Rock, other than sheep, the only carload shipments there have been were shipments of hay during the bad winters of 1948 and 1949 and some shipment of water, which, while supposedly originating at Black Rock to go out to other points for watering sheep, is actually shipped from Milford, Salt Lake, and other points (R. 221). With respect to the shipping of hay into the area, during the bad winter of 1948 and 1949 the State of Utah helped to carry out what was termed as a "hay lift operation," and the hay lift operation carried on by the State of Utah was in the

main handled by the railroads although airplane service was also used. Except that handled in connection with the State of Utah, however, and in connection with the movement of hay into the area, the witness Barton testified, "We shipped a lot of it in by truck last year" (R. 508), also a substantial amount of it came from Milford and was flown out by plane. In addition to that, hay was hauled by railroad to various points in the areas and dropped off at the side of the track and at blind sidings in the area, in any of which instances there was no necessity for an agent to be present, in any event (R. 442).

The facts as hereinabove referred to contain substantially all of the evidence, except such as will be cumulative thereto, with reference to carload shipments in and out of Black Rock, and it is the position of the Railroad Company that with respect to carload shipments there is no necessity of an agent; particularly, with respect to the movements of livestock into Black Rock an agent would not be necessary and was so determined as to livestock generally by the Railroad Brotherhoods in setting up the 40-hour week (R. 627), and the Commission evidently concluded the same in ordering that the station may be closed during the summer months and until December 1st, prior to which time the majority of sheep moving by rail are shipped in.

The facts with respect to less than carload shipments of freight are very important and definitely show that there is no justification for maintaining an agent at Black Rock for such less than carload shipments. Exhibit 6 (R. 124), gives a list of the movement of less than carload shipments, either coming into or out of Black Rock over a period

of 21 months from July 1, 1948, to March 31, 1950. Over that entire period of time there was but one less than carload consignment which moved out from Black Rock. That was shipped by K. V. McKay from Black Rock to Provo, Utah, during October 1948. With respect to shipments moving into Black Rock on a less than carload basis during the 21 months specified, there were only 14 months out of the 21 when any LCL shipment moved into Black Rock and never during any one of those 14 months was there more than 1 such LCL consignment which came into Black Rock.

There was some discussion in the case with respect to express shipments in and out of Black Rock, Carl Nielson testifying that he had some of his supplies come to him by express. With respect to actual express shipments, the evidence shows that during October 1948 there were no express shipments which came into Black Rock, in November there were 5, December none, January 1949 there was 1; February, 2; March, 1; and April and May, none (R. 653). During late 1949, including January 1950, the express business was discontinued but after its re-establishment, in February 1950 there were 2 shipments; in March, none; in April, none; and in May of 1950 there were 4 express shipments (R. 624). Thus, even with the express shipments, there would only be 2 or 3 times per month that the agent would have to handle any such shipment, and with all shipments coming on a prepaid basis such shipments could be handled by placing the same in the freight warehouse where they could be secured by any consignee by getting a key from the caretaker and taking delivery of the same. The express messenger on the train under such

circumstances would put such express shipments directly into the freight warehouse. This is confirmed by direct communication from the express company to the Public Service Commission, as is shown by correspondence with the Commission (R. 36).

The main thing for which protestants desire the Railroad Company to maintain an agent at the Black Rock station is to provide a source of communication between the sheep herders and others around Black Rock with the "outside world," to keep in contact with their families, employers, or others in connection with matters having nothing to do with shipping over the Railroad but as a matter purely of personal convenience in connection with their personal or business affairs.

There is no Bell telephone or similar telephone system anywhere in the vicinity of Black Rock, the nearest telephone companies being at Delta on the north and Milford on the south. However, prior to the middle of 1948, the Railroad company had maintained 3 shifts per day with agents and operators at the Black Rock station, such agents and operators having use of a railroad dispatcher's telephone. These employes and the dispatcher's telephone were all necessary in the handling of orders for meeting and passing of trains (R. 208-209). During 1948 centralized train control was put through between Los Angeles and Salt Lake, including the Black Rock area, and by such centralized train control the location and movement of all such trains, including meeting and passing of other trains, was handled under an electrically operated system, which as the name suggests, is centralized and there is no neces-

sity for maintaining an employe at all at Black Rock for train orders and dispatching duties (R. 206-208). Because of lack of Bell or similar phone service in the area, the Railroad agreed to maintain a phone at Black Rock. The dispatcher's telephone, of necessity, would have to be changed but the Railroad Company agreed to change and put in a conversation phone (R. 209-210, 641-642), whereby any prospective shipper or other person desiring to communicate with the railroad could call the agent at Milford, which is the same as they could do over a Bell system phone. Protestants, however, did not and do not want to use a telephone. They want to compel the Railroad to maintain an agent at the station, although the major purpose in doing so would be to have the agent available at the station to use a phone for them for the purpose of communicating personal matters with the outside world. The evidence is overwhelming, showing that the main concern of all protestants is this telephone or communication service, not communications required by their business with the railroad but communication on matters not pertaining to railroad business at all. One of the first questions asked at the original hearing by counsel appearing for all protestants there was, "If this station is closed (will) these people having business in these nonagency stations * * * have the benefit of telephone service?" (R. 216). The witness, Byron Ray of the Pumice Company, was concerned over "emergency telegraph for purposes other than just primarily intercommunications between us and the railroad and that is one of the things that we want to protect * * *. The mere fact that we have a telephone or telegram communication that will allow us to order a car or

disburse it doesn't always answer all the problems that arise" (R. 233). Again, he asked, "Can I use telegraphic communication from Pumice or Black Rock in the event the agency is removed to send personal telegrams and business telegrams relative to our personal business relation between the mine and the office?" (R. 244). The witness Miller from Black Rock Ranch stated, "The Railroad wire service is our only fast communication" (R. 280). The witness Wakefield, representing Christensen Construction Company, which does the mining and shipping for the Pumice Company, stated that the difficulty was not so much the ordering and getting of cars as it was the advising of their men at the mine as to when and where the cars are to be shipped and that a contact must be made with such men to let them know where to ship the cars after the cars were loaded and waiting on the track (R. 479). "The problem at Black Rock and Pumice is not one of actual shipping but is one of communicating with your men, isn't it?

"A. Primarily" (R. 481).

Mr. Ray of the Pumice Company, when assured that he could send Western Union telegrams by using a phone installed at Black Rock to call the agent at Milford, said that with such provision his company would not be seriously inconvenienced (R. 247).

With respect to the sheep men, not only was their concern mainly one of communication, but such question of communication was with them a question of emergency use, which they wanted available even though they may use it only on rare occasions. The witness Barton testified upon direct examination,

"And what requirements of the herd are usually met with the telegrams? Is it usually an emergency, or normal activities?"

"A. Usually emergencies. * * * Sometimes a man gets sick or we are out a bunch of sheep or occasionally they are going to run short of feed" (R. 494).

He said the most usual instance of the use of the telegram showing the emergency nature was that if a man got sick someone would come into the station and send a telegram to him (R. 511). The most important use of the telegram, as far as the witness Carl Nielson was concerned, or at least the one that stood out definitely in his mind and was emphasized by him, was,

"About the most serious, I guess, was the last winter, the winter of 1948-1949. I made trips in there and sent telegrams in to Mr. Hooper, the secretary of the Utah Wool Growers, for hay out there, also sent telegrams home to L. L. Peterson, whose sheep I was operating, for hay and feed" (R. 557) (See also R. 270).

In connection with this question of communication, it is interesting to note the amount of use that was actually made with respect to such telegrams. The assistant superintendent of the railroad testified that by actual count the telegrams forwarded or received during the first portion of the year 1950 were as follows: In March, 2; in April, 5; and in May, 3 telegrams were received at Black Rock; in March there were 4; in April, 7; and in May, 6, telegrams forwarded from Black Rock (R. 624). In this connection the revenue received from telegrams is very enlightening.

Exhibit 13 (R. 140-141) shows all income received from telegrams at said station. That exhibit shows if we exclude the months of April and May, during which an agent would be retained at the station, that for the other 10 months of each year the revenue from telegrams was inconsequential. In fact, even during April and May the amount received on telegrams is not much greater than during other months, but for the 10 months of the year 1946, excluding April and May, the total revenue from telegrams was \$15.73, or an average of \$1.57 per month. For 1947 the total revenue for the 10 months was \$10.68, or an average of \$1.06 per month. For the same 10 months during 1948 the total revenue was \$17.27, or an average of \$1.72 per month. During the same 10 months in 1949 the total revenue was \$23.90, or an average of \$2.39 per month. During the first 3 months of 1950 the total revenue was \$2.83, or an average of 95¢ per month. Yet, protestants request that an agent be maintained at the station to handle telegrams for them during the months of December to March, inclusive, in none of which months has telegraph revenue ever amounted to as much as \$2.00 per month, except during January and February 1949, during the time of the bad winter. In connection with that bad winter, it is important to note that the witness and main protestant, Carl Nielson, who has spent nearly all of the past 50 winters on the Black Rock desert (R. 551, 572), stated that the winter of 1948 and 1949 was the only time in all that 50 years experience when they had been blockaded with snow in that area (R. 573-574).

With respect to matters which the agent has actually handled at Black Rock, the amount of actual items of work

done by the agent as well as the revenue received therefrom reveals the absurdity of the requirement of maintaining the agent. By a study of Exhibits 12 and 13 (R. 138-141), it will be shown that during the 10 months, excluding April and May, in 1946 there were 9 cars of freight forwarded, on which the Railroad Company received revenue of \$478.00. During those same 10 months there were 2 less-than-carload shipments received, producing a revenue of \$2.00. During the same 10 months of 1947 there were 72 cars of freight forwarded, producing \$58.91 in revenue. Of these 72, however, 61 cars were volcanic ash shipped from Pumice, accounting for \$53.19 of this revenue. During said 10 months of 1947 there were 2 less-than-carload shipments forwarded and 4 received, with revenue of \$40.00. During the same 10 months of 1948 there were 31 carloads forwarded, producing \$2,627.00, of which 17 were volcanic ash coming from Pumice accounting for \$1,909.00 of such revenue and leaving approximately \$1,700 for car load traffic otherwise allocable to Black Rock for the 10 months. During the same 10 months of 1948 there was 1 less-than-carload forwarded and 1 received, producing revenue of \$18.00. During the same 10 months of 1949, 9 carloads were forwarded, no volcanic ash, and revenue of \$1,208.00 produced. During the same 10 months of 1949 there were 10 less-than-carload shipments received, 5 of which were in January and February, accountable to the bad winter, and a total revenue of \$146.00 was produced, but \$84.00 of this was produced on 1 shipment of heavy machinery to the Christensen Construction Company in December (R. 124), which in fact went to Pumice in connection with the work of the volcanic ash deposit there. Exhibit 6 shows that

during the last 6 months of 1948 an average of $\frac{2}{3}$ of 1 LCL shipment per month was handled by the agent. During 1949 for the whole year there was less than an average of 1 shipment per month handled, and during the first 3 months of 1950 no LCL shipment moved, either in or out of Black Rock (R. 124). These LCL shipments are the things that normally would require an agent and show that over recent months the agent would not have even 1 such shipment to handle in a month.

It is applicants' position that the carload traffic moving during the 10 months wherein the station is sought to be closed can be handled as conveniently and expeditiously without an agent as with one. It has come to be generally accepted in railroad business that for ordinary carload traffic an agent is not necessary. The main thing to be concerned with such carload traffic is the ordering and placing of cars and the billing of the cars after they are loaded, and it is easy and modernday practice to order the cars by phone or mail, and after the cars are loaded most shipping concerns keep in their own files copies of bills of lading which they make out and such bills of lading can be handed direct to a conductor or even placed in a box for a conductor to pick up.

It is usually considered that only matters aside from carload traffic are the matters which require the presence of an agent, and in this connection Exhibit 13, as introduced at the second hearing, is very enlightening (R. 140-141). By that exhibit it will be seen that during the year 1946 for the 10 months, excluding April and May, everything done through the Black Rock agency, including tickets,

telegraph, LCL and all other sources of revenue brought a total revenue of only \$172.73, while the station expense during the 10 months (Exhibit 15, R. 143) was \$9,540.09. During 1947 for the 10 months everything except carload traffic brought a total revenue of only \$258.56, as against station expense of \$10,204.42. During 1948 for the 10 months everything except carload traffic brought a total revenue of only \$401.99, as against expense for the 10 months of \$6,068.22. It will be noted that the expense of the station, as shown hereinabove, was higher than it would be with merely one agent because during all of 1946 and 1947 and part of 1948 additional men were maintained at the station to handle railroad and dispatching orders. It also appears that a substantial amount of the revenue accounted for during the 10 months period in 1947 and 1948 accrued as a result of demurrage. This demurrage was chargeable against carload traffic and should be considered along with carload traffic, and an agent would not be necessary to take care of such demurrage. The train crews under the circumstances would keep a record of the time the cars were spotted and the time released. The year 1949 and since would give a more correct picture, and during 1949 for the 10 months everything handled through the station except carload traffic brought a total revenue of only \$382.28, as against station expenses for the 10 months of \$3,135.53. During the first 3 months of 1950 everything except carload traffic brought a total revenue of only \$84.03, as against station expense for the 3 months of \$997.08. Thus discounting the extra expense when men were required at the station for railroad business and considering only 1949 and 1950 figures, it will be seen that matters

necessitating the presence of an agent produced during the 10 months when the station would be without an agent only approximately 10 per cent of what the cost would be for maintaining an agent at the station.

Ticket sales at the station are inconsequential. Exhibit 11 (R. 137), shows that if we exclude April and May for each of the years that for the other 10 months of 1946 there would be an average of a little less than 8 tickets per month, bringing a revenue of slightly over \$15 per month. For 1947 the tickets would average less than 5 per month, with a revenue of less than \$10 per month. For 1948, during the same 10 months, tickets would average less than 6 per month, with revenue of just slightly over \$6 per month. During 1949, during the 10 months, the tickets would average less than 4 per month; however, that year the revenue was higher and such tickets would average \$20 per month. During the 3 months of 1950, ticket sales would average 6 per month, with a revenue of \$14 per month. The railroad's passenger trains, running under the designation of "Pony Express," being trains No. 37 and 38, serve Black Rock (R. 211), and these trains are two of the best passenger trains operated over the route and provide service once a day each way, and with respect to passenger service any intended passenger can board the train at Black Rock and buy a ticket on the train. Even with an agent at Black Rock, long complicated tickets for transcontinental travel are not maintained by the agent, and if a complicated ticket is required when the passenger boards the train the conductor can arrange for some station ahead down the line to make out the ticket and it can be picked up when that

station is reached (R. 215). No difficulty at all could be encountered in handling of such passenger traffic as there is at Black Rock without an agent.

STATEMENT OF POINTS RELIED UPON

I.

THERE IS NO SUBSTANTIAL EVIDENCE THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRES THE MAINTAINING OF AN AGENT AT THE BLACK ROCK STATION DURING THE PERIOD OF DECEMBER 1ST TO THE SUCCEEDING MARCH 31ST OF EACH YEAR, AND THE COMMISSION FAILED REGULARLY TO PURSUE ITS AUTHORITY IN ORDERING THE RAILROAD TO MAINTAIN AN AGENT AT SAID STATION DURING SAID PERIOD OF DECEMBER 1ST TO MARCH 31ST.

II.

ADEQUATE AND REASONABLE SERVICE AS IS REQUIRED BY THE LAWS AND STATUTES OF THE STATE OF UTAH WILL BE PROVIDED BY THE RAILROAD BY MAINTAINING AN AGENT AT BLACK ROCK DURING APRIL AND MAY OF EACH YEAR; BY PROVIDING AT THE DEPOT A CONVERSATION PHONE WITH CONNECTION TO THE MILFORD STATION AND PROVIDING FOR THE 10 MONTHS, JUNE 1ST TO THE NEXT MARCH 31ST A RESPONSIBLE PERSON AS A CARETAKER, WITH A KEY TO THE FREIGHT WAREHOUSE AND TO THE DEPOT BUILDING WHERE THE PHONE IS LOCATED.

III.

BOTH THE ORIGINAL ORDER OF AUGUST 12, 1949, AND THE AMENDED ORDER OF JANUARY 9, 1951, DENYING TO THE RAILROAD THE RIGHT TO CLOSE THE BLACK ROCK STATION FROM DECEMBER 1ST TO MARCH 31ST, ARE ARBITRARY AND UNREASONABLE AND DENY TO PETITIONERS THE EQUAL PROTECTION OF THE LAWS AND AMOUNT TO THE TAKING OF PROPERTY WITHOUT COMPENSATION, CONTRARY TO LAW.

IV.

THE COMMISSION ACTED ARBITRARILY AND UNREASONABLY AND UNLAWFULLY AND ERRED IN ISSUING ITS SAID ORDERS REQUIRING THE MAINTAINING OF AN AGENT AT BLACK ROCK FROM DECEMBER 1ST TO MARCH 31ST, FOR THE REASON THAT THE EVIDENCE CLEARLY SHOWS THAT DURING SAID MONTHS THE EXPENSES OF SAID STATION ARE GREATLY IN EXCESS OF AND GREATLY DISPROPORTIONATE TO THE REVENUE RECEIVED AT SAID STATION, AND SAID EXPENSES ARE NOT JUSTIFIABLY OR REASONABLY REQUIRED FOR THE PATRONAGE GIVEN AND THE RAILROAD BUSINESS DONE AT SAID STATION DURING SAID MONTHS.

V.

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S CONCLUSION, "* * *"

THAT THE RAILROAD STATION AT BLACK ROCK IS NOW USED PRINCIPALLY AS A SHIPPING AND RECEIVING POINT FOR THE SEASONAL HANDLING OF SHEEP, TO WIT: BETWEEN DECEMBER 1ST AND MAY 31ST EACH YEAR * * *." AND THE COMMISSION ERRED IN SO CONCLUDING.

VI.

THE RAILROAD IS NOT REQUIRED TO MAINTAIN AN AGENT AT BLACK ROCK FOR THE SOLE PURPOSE OF HANDLING PERSONAL COMMUNICATIONS FOR SHEEP MEN OR OTHERS IN THE AREA, NOR FOR OTHER INCIDENTAL OR COURTESY SERVICES NOT CONNECTED WITH RAILROAD BUSINESS.

The first four points are in effect different facets of the same question, and for convenience in argument will all be considered under one heading.

ARGUMENT

I.

THE COMMISSION FAILED REGULARLY TO PURSUE ITS AUTHORITY BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRES THE MAINTENANCE OF AN AGENT AT BLACK ROCK EXCEPT DURING APRIL AND MAY OF EACH YEAR, THE EVIDENCE CLEARLY SHOWING THAT DURING THE REMAIN-

ING 10 MONTHS THE EXPENSES OF SAID STATION ARE GREATLY IN EXCESS OF AND GREATLY DISPROPORTIONATE TO THE REVENUE RECEIVED AT SAID STATION AND SAID EXPENSES ARE NOT JUSTIFIABLY OR REASONABLY REQUIRED FOR THE PATRONAGE GIVEN AND THE RAILROAD BUSINESS DONE AT BLACK ROCK; DURING THE 10 MONTHS ADEQUATE AND REASONABLE SERVICE WILL BE PROVIDED BY THE RAILROAD COMPANY BY PROVIDING A PHONE AT BLACK ROCK AND A CARE-TAKER WITH A KEY TO THE DEPOT AND THE FREIGHT WAREHOUSE, AND THE ORDERS OF THE COMMISSION PROVIDING OTHERWISE ARE ARBITRARY AND UNREASONABLE AND DENY TO PETITIONERS THE EQUAL PROTECTION OF THE LAWS AND AMOUNT TO THE TAKING OF PROPERTY WITHOUT COMPENSATION, CONTRARY TO LAW.

This Court in the case of *Los Angeles & Salt Lake R. Co. v. Public Utilities Commission*, 80 Utah 455, 15 P. 2d 358, had an application before it wherein the railroad sought to discontinue the agency at St. John, Utah. The circumstances in that case were somewhat similar to those at Black Rock but there was no request for or proposal to keep the station open for the months when the seasonal range shipping of sheep out from St. John would be carried on. In that case this Court reviewed cases from various other jurisdictions and very definitely detailed the authority of this court in reviewing an order of the Public Service Commission and stated that the question at issue was whether, in view of the cost revenue factor, adequate and

reasonable service as required by the statutes could be furnished by the maintaining of a non-agency station. In that case it was stated that:

“* * * this court can only determine whether the commission has regularly pursued its authority or whether its order or decision violates any right of the petitioner under the Constitution of the United States or of this state, and, further, which is not part of section 4834, but which this court by virtue of its inherent power has the right to determine, whether the findings of fact and conclusions of the commission are supported by any substantial evidence, and whether, if the findings and conclusions are not so supported, there is substantial evidence to support its decision.”

We have heretofore in the statement of facts referred to various phases of revenue produced at the Black Rock station during the various months of the year, and in connection therewith we would like to call the Court's attention, not only to what has heretofore been stated with respect to revenues from the Black Rock station as referred to in the exhibits, but we would like to refer the Court to the testimony of Mr. Nelson the statistician for the Railroad Company, appearing at R. 354 and continuing to R. 361, wherein the statistician analyzes the revenues and expenses and states that aside from expenses directly allocable to Black Rock, the general expenses over the whole Union Pacific system, other than these specific allocable expenses, consume 77 per cent of the total system revenues (R. 355). Also, that from the revenues allocated to the Black Rock station there should be a deduction of 50 per cent because in any shipment there is an origin station and a destination

station involved, and therefore half of the revenue should be allocated to each of said stations, whereas in the exhibits introduced in evidence all the revenue on traffic, both originating and terminating at Black Rock, had been credited to the Black Rock station. By properly allocating the revenue and expenses as analyzed by the witness Nelson, it can be clearly seen that with carload revenue during the 10 months, which would include primarily shipments of volcanic ash from the non-agency station at Pumice, the expenses of the station would be greatly in excess of the revenues properly allocable to the Black Rock station during said 10-month period. If we consider the fact that carload traffic from Pumice, and the carload shipment of sheep in the fall would not require an agent, and if we disregard such carload traffic, all other revenues are so far out of line when compared with expenses that there should be no question whatsoever in drawing conclusions with respect to revenue and expenses during the period of time in which it was sought to close the station. Of course, we realize, as the court stated in the St. John case, that the relation of cost to revenue is a very important factor but is not the only thing to be considered and that in every case "both the public convenience to be served and the increased cost of the service are to be considered." In that case this court further stated:

"Each situation must stand on its own legs. It is impossible to lay down a rule which would fit each case. Certainly, if it appeared that the revenue was greatly incommensurate with the service or facility which the community demanded, and further appeared that what might be called the quantum of

necessity was such as to make the continuance of the service unquestionably an incommensurate burden upon the railroad, then it might be that if the commission denied the application to discontinue the service it would be considered unjust, arbitrary, and unreasonable, and a denial to the applicant of due process of law because it resulted in the confiscation of property.” (Italics ours.)

Also:

“The question is not how much greater are the station costs at St. John than some other station costs per dollar of revenue, or how far from conforming to a norm the costs of St. John are, but can the station costs at St. John be reduced and still give the services required by subsection 2 of section 4783. *In fact, there is no reason why a railroad should spend for services at any station, regardless of how much revenue was accredited to that station, any more than was needed to furnish the required reasonable and adequate services to the public.* As suggested by the plaintiff, any more expenditure than was necessary to furnish the required services might, in the end, lay a burden on the shipper and the public, and especially in these times which call for every economy.” (Italics ours.)

In the *St. John* case the court refers to numerous cases including cases from the State of New Mexico and points out a distinction in the powers of review given to the New Mexico court and to those held by this court. We would like to refer to a few cases from other States which have statutory provisions similar to those in force in Utah.

In *State v. Chicago & N. W. Ry. Co.* (Minn.), 297 N. W. 715, the C&NW sought to close a station “as a railroad

express and telegraph agency service" and to conduct it "as a prepaid non-agency station with custodian service." The Minnesota Railroad Commission denied the petition and was affirmed by the district court. The statute in that state provided that the commission's "findings of fact shall be prima facie evidence of the matters therein stated and the order shall be prima facie reasonable * * *." It also provided that the order should be affirmed or vacated, depending upon the courts determination of whether it was "lawful and reasonable" and that the order should be vacated "if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment." This in effect would be similar to the powers of review of our Utah court, which, as stated in the St. John case, go to the point of determining whether the commission has regularly pursued its authority, whether the findings and conclusions of the commission are supported by substantial evidence, or whether reasonable men could conclude as the commission did. That in effect is merely stating the same as the Minnesota law, which says the order will be vacated if "it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment."

The Minnesota Supreme Court reversed the commission and the district court, stating that the petition should have been granted. In that case the court referred to the fact that the commission in the trial court had ignored the fact that over 78 per cent of the gross revenue of 1938 was from carload shipments. By comparison with facts in the case at bar, it will be seen from Exhibits 12 and 13 (R.

138, 140), that at Black Rock during the year 1946 carload shipments amounted to 98.6 per cent of the total year's revenue; in 1947 carload shipments amounted to 98.7 per cent; in 1948, 97.5 percent; and in 1949 carload shipments amounted to 97.4 per cent of the total revenue produced at the Black Rock station. These percentages include the large majority of carload traffic moving out from Black Rock during April and May, when an agent would be at the station. In the Minnesota case, during 1938 there were 30 less-than-carload shipments handled per month, whereas in the case at bar there was an average of less than 1 handled per month. In the Minnesota case there was an average of 12 passengers per month arriving or leaving from the station, whereas the highest average during any year from the Black Rock station is less than 8. The court in the Minnesota case referred to the fact that with the substituted service, "incoming freight and express will have to be prepaid, charges on outgoing shipments will be paid at destination. Departing passengers will purchase tickets after boarding trains." That is identical with the situation which will be presented at Black Rock. But in the Minnesota case the court concluded:

"In sum and on this record the following propositions are beyond controversy. Except that freight on incoming shipments must be paid at point of origin and that on outgoing carloads at destination, the Meriden carload business will be served as well by custodian as by the present full-time agency service."

In reversing the commission and the district court, the Minnesota court held that the commission had acted arbi-

trarily in denying authority to close the station and concluded:

"If such an unnecessary imposition is not unreasonable, it is difficult to conceive of one that will be. The petition should have been granted. We find in the record no support for the order denying it." (Italics ours.)

A similar application was before the Nebraska Supreme Court in the application of Thomson against the Nebraska State Railway Commission, 8 N. W. 2d 552. The powers of review of the Nebraska Supreme Court under its statutes are very similar to those of this Court. Thomson, as trustee of the Chicago & Northwestern Railway, sought to discontinue the agent and substitute a caretaker at Oak, Nebraska. Oak was a village of 177 population, and the service of the agent had been excellent and accommodating, but in spite of the agent's efforts the court found that "business had declined during the past 5 years until the agent would be able to do all of a year's required work in not to exceed one week." We are definitely certain that, except for the two months of April and May and considering all business done at Black Rock during the other 10 months, it would not require the equivalent of a week's work on the part of an agent at Black Rock. The Nebraska Supreme Court in reversing the order of the State Railway Commission stated:

"In the performance of an absolute duty imposed upon a railroad company the question of expense is not considered, but when the duty sought is convenience rather than necessity the questions of expense to the company, the volume of business done, service required in meeting community needs, rev-

enue returned therefrom, and relative benefit to the public served, are factors which cannot be disregarded. * * *

“Permission should be authorized to change from agency to caretaker service where the cost of agency service and the time necessarily devoted by the agent to performance of duty required is *substantially out of proportion to revenue derived from that portion of the public benefited, especially when the proposed substitution although less convenient affords the same essential service without abandonment of physical facilities.* * * *” (Italics ours.)

“Carload station business consists of fuel and lumber inbound, with grain and livestock outbound and going beyond appellant’s line. In the last five years only 94 carloads were outbound and 110 received, and less than carload shipments both received and forwarded, were less than 2 a day. There were only 98 less than carload shipments outbound during this whole period.”

“After giving careful consideration to all the evidence and applicable precedent, we conclude that the order of the Nebraska state railway commission is unreasonable and arbitrary. It should be, and hereby is, reversed and the cause remanded, with directions to such commission that an order be entered by it as provided by law allowing a discontinuance of the agency at Oak, Nebraska, and the substitution of a caretaker as prayed in the application.”

A similar application by the same railroad was involved in Application of Thomson (Neb.), 6 N. W. 2d 607. This case shows the Nebraska law with respect to the powers of the Supreme Court on review, and with respect thereto the court stated:

“On an appeal to the Supreme Court from an order of the railway commission administrative or

legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Where the action of the railway commission is not unreasonable or arbitrary and does not exceed its powers or violate a rule of law, this court will not interfere with its findings of fact for the reason that they involve administrative and legislative rather than judicial questions."

In that case it was sought to close a station at Emmet, a village of 89 inhabitants. With respect to the facts, the court stated:

"The important products forwarded from the station at Emmet have been hay, grain, grass seed, cattle and hogs. The important products received have been coal, feed, gasoline, fuel oil, oil, potatoes, kerosene, cottonseed cake, asphalt, cattle, sheep, oil meal, agricultural implements and flour. The major portion of the shipments have been carload lots.
* * *"

The court then detailed the number of carloads which had been forwarded and received each year, and with respect to less than carload shipments the evidence showed that shipments forwarded were light, there being forwarded from Emmet only 15 in 1937, 7 in 1938, 2 in 1939, 16 in 1940, and 4 during the first 4 months of 1941. By comparison with Black Rock, the evidence shows that in a 21-month period prior to the rehearing there was only 1 less than carload shipment moving out from Black Rock (R. 124). In this same Nebraska case less than carload shipments received at Emmet were 236 in 1937, 176 in 1938,

202 in 1939, 176 in 1940, and 75 during the first 4 months of 1941. By comparison with Black Rock, Exhibit 6 shows that during the 21 months preceding the rehearing there was a total of only 14 less than carload shipments received at Black Rock, and no more than 1 in any one month during said period. With respect to the Emmet station, the Nebraska Supreme Court stated:

“It will readily be observed that in no full year set forth in the analysis, except 1937 and 1938, was the agent called on to perform service in connection with forwarding and receiving freight as often as once per working day even assuming that each carload represented a separate shipment, and this application must be considered in its relation to freight shipments since the matter of passenger service was neither presented nor considered.”

By comparison with Exhibits 4, 5 and 6 (R. 121 to 124), it will be seen that at Black Rock, if each carload should be considered as representing a separate shipment, the agent at Black Rock would not be called upon to perform any service in connection with forwarding or receiving of freight as often as once per working day, even including all of the carloads shipped during April and May; and if we exclude the carload shipments during April and May, as well as the shipments of sheep into Black Rock, which as heretofore stated would be moved in in the majority of instances prior to December 1st, we would find that at Black Rock, considering all other carloads or other items as separate items of work during the 21-month period from July 1, 1948 to March 31, 1950, the agent at Black Rock would have handled only 42 separate items, or an average of slight-

ly in excess of 2 per month, during a period of 19 months (cutting out April and May shipments). With respect to such services, the Nebraska Supreme Court stated:

“While it is not conclusive, we think the matter of time necessary to be devoted to the performance of duties by the agent is of very considerable importance in determining whether or not the commission acted arbitrarily and unreasonably in denying the application to discontinue the agency at Emmet. If this were the only consideration we could not hesitate to say that there was no justification for the retention of this agency. It would not be reasonable to require the carrier to pay the prevailing wage for an agent for the small amount of service required.”

In reversing the case and entering an order directing that commission to allow discontinuance of an agency at Emmet, the Nebraska Supreme Court stated:

“The evidence is conclusive on the proposition that all of the essential service now furnished by an agent may be supplied by a caretaker, however, with a degree of inconvenience.

“If abandonment is allowed, no physical facility will be abandoned or changed and no essential service discontinued. The important inconveniences will be that no paper work may be done at Emmet, no freight bills for either incoming or outgoing freight may be paid there, registration of complaints will have to be made elsewhere, incoming freight bills will have to be either prepaid or received at an adjacent station where there is an agent, and cars for loading will have to be ordered direct by the shipper or through the caretaker by telephone. There are perhaps other inconveniences, but these are the most important ones. Subject to these inconveniences business would continue as usual at this station.

“Taking into consideration the amount of service required of an agent, the saving to be effected by substitution of a caretaker, the limited amount of shipping, the fact that no essential shipping service is discontinued, and the prospective inconvenience to the few shippers concerned, we conclude that the railway commission acted arbitrarily and unreasonably in denying the application to discontinue the employment of an agent at Emmet and to substitute a caretaker.

“It is substantially urged that the income of the station for freight charges results in profit to the carrier and therefore the agency ought not to be discontinued. Of course, this is an element to be considered along with all other elements, but assuming that the station is highly profitable to the carrier we know of no rule of law or reason which requires the expenditure of earnings from a particular community in that community contrary to the requirements of reasonable service.”

We assume that counsel for protestants will urge in this Court, the same as he did before the Commission, that because of the revenue received by the Railroad during and as a result of shipments of sheep out in April and May, the railroad is well repaid and should be compelled to maintain the station open for the remainder of the year. Here, again, as not only this court stated in the St. John case but as others have stated, the revenue factor is only one of the things to be considered, but when it is so definitely shown that the service sought and used by the public in the area during the 10 months is not sufficient to justify the retention of the services of the agent, the statement of the Nebraska Court becomes directly applicable and we repeat:

“Assuming that the station is highly profitable to the carrier, we know of no rule of law or

reason which requires the expenditure of earnings from a particular community in that community *contrary to the requirements of reasonable service.*" (Italics ours.)

And reasonable service does not require that an agent be maintained during the 10 months, even though substantial shipping is done during April and May and substantial revenue received therefrom.

Lowden v. State (Okla.), 100 P. 2d 890. The plaintiff, as trustee of the Rock Island Railroad, filed an application before the corporation commission of Oklahoma for permission to discontinue its agency at Homestead, Oklahoma, for 10 months out of the year, leaving a regular agent at the station for June and July and a caretaker for the other 10 months. After a hearing the corporation commission denied the application. The Supreme Court of Oklahoma reversed the commission's order. Homestead was an agricultural community, having a population of 250 persons. It had a grocery store, a general store, lumber yard, filling station, two grain elevators, and a post office. Train service consisted of a mixed train in one direction one day and back the next.

"The transportation of wheat accounts for the major portion of appellant's revenues at Homestead. The major portion of such business occurs during the months of June and July of each year. The June and July revenues in 1937 amounted to 83.07 per cent of the gross revenues for that year, and in 1936 amounted to 55 per cent thereof."

"The substitution of a caretaker would require passengers to pay their fare to the conductor, would

require that inbound freight be prepaid and outbound freight to be sent collect and that bills of lading be issued by and cars ordered through the nearest open station. Freight and passenger tariffs would not be available. The nearest open stations are Okeene, 5.6 miles to the South and Cleo Springs 19.2 miles to the North."

The Oklahoma court which had prior to this case had before it a number of similar cases, referred to those cases, then stated:

"In the instant case, as in the cases cited, the appellant is not seeking to avoid or escape the performance of an absolute duty. It does not seek to remove any of its facilities now provided at the Homestead station. The question of expense to the company and benefit to the public is the deciding factor and may not be disregarded. *The facilities to be furnished need only be adequate to the requirements of the station and commensurate with the patronage and receipts from that portion of the public to whom the service is rendered.*" (Italics ours.)

The court then concluded:

"In view of the volume of business and receipts of the company at Homestead station for that period of the year for which it is sought to substitute a caretaker in lieu of the regular station agent, we are of the opinion that the order of the Commission is unreasonable and must be reversed."

In that case the court referred to the fact that if the months of June and July, when the wheat shipments were made, should be considered, the railroad would have a net revenue over and above expenses, but by segregating the

revenues and expenses for the 10 months it was found that there was a substantial net loss to the company each year that was discussed in the evidence. The same is true in a much larger proportion in the case at bar, and by comparison the evidence in this case shows that in 1946 the April and May business at Black Rock was 78 per cent of the total for 12 months. In 1947 the April and May business was 63 per cent of the 12 months' total, in spite of the fact that there was a substantial amount of volcanic ash shipped from Pumice and included in the Black Rock accounting. In 1948 the April and May business was 53 per cent of the 12 month total, and again a substantial amount of volcanic ash was shipped, 1948 being the largest year as far as volcanic ash shipments were concerned. In 1949 at Black Rock the April and May business was 59 per cent of the 12 months total, and that included hay and feed which was shipped into Black Rock during the bad winter.

One of the cases referred to in the last case cited from Oklahoma was the case of *Lowden v. State* (Okla.), 78 P. 2d 1059. There again, the Rock Island sought permission to discontinue an agent at Lima, Oklahoma. The corporation commission denied the application and the Oklahoma Supreme Court reversed the commission.

Lima was a small town on the main line containing approximately 300 people. For a period of over a year involved in the hearing, the total freight and passenger revenue at Lima totaled \$1,806.22, as against expense of \$2,-300.87. However, there was a refinery at "Bowlegs," some little distance south of the main line, which was served by a spur taking off just west of Lima. No agent was main-

tained at Bowlegs and all of the billings and business at Bowlegs, amounting to \$29,679.89 in the same years' period, had been handled by the agent at Lima. The railroad insisted that it could handle these billings and business through its agency at Seminole and that the agent at Lima should be discontinued; that there was no justification in requiring the agency to be kept open at Lima to handle the Bowlegs business. With respect to this and in reversing the commission, the Oklahoma Supreme Court said:

“* * * the company is at liberty to transfer such business to Seminole at its pleasure without regard to whether it intends to maintain the Lima office or abolish it. The corporation commission is without authority to force the handling of this business through the Lima office simply as a device to enhance its revenues and use this as a reason for refusing to abolish such agency.”

We think such a statement is very apropos in the case at bar. The commission in its first order found that all of the business of shipping of volcanic ash from Pumice and limestone from Cruz could be handled without an agent (R. 18). In its amended order, however, it used this business in an attempt to bolster its conclusion that the agent should be maintained at Black Rock from December 1st to March 31st. The evidence was not disputed that all of the carload shipments, which included all business originating at Pumice and Cruz, could be billed at either Delta or Milford as easily as at Black Rock, and representatives of the Christensen Construction Company, doing the mining, as well as Mr. Ray, an officer of the pumice company, stated that with a phone at Black Rock which would assist

them with their personal business there shipments could be handled without serious inconvenience to them. We think that the conclusion is inescapable in this case that the commission is without authority to force the handling of the billing of the shipments from Pumice and Cruz through the Black Rock office simply as a device to build up business and in an attempt to justify the retention of an agent there during the winter months, and particularly is this true under the evidence showing that the heavy shipments from Pumice are during the summer months and not during the months when the Commission ordered the station to remain open. In the Oklahoma case last cited it was shown that at Lima there were 152 small or less than carload shipments handled in 365 days, or one every other day. At Black Rock there has been less than one per month. At Lima there was an average of one passenger ticket per day. At Black Rock during the months other than April and May there was an average of only 5 to 8 tickets per month. With respect to less than carload and passenger traffic, the Oklahoma court stated:

“* * * in addition to the small revenue to be derived therefrom, it is obvious that very little time is required in which to perform the duties connected with the handling of such traffic.”

Similar Oklahoma cases are as follows: *Lowden v. State*, 118 P. 2d 238, wherein it was sought to discontinue an agent at Isabella, Oklahoma, for 10 months, retaining an agent in June and July when heavy wheat shipments were made. There were some shipments made during the rest of the year but all by one elevator company to one destination,

which was Enid, Oklahoma. The corporation commission denied the application, and the supreme court again reversed it. In the Black Rock case there is one regular shipper who ships out once every year other than the normal movements of sheep out in April and May and the mining shipments from Pumice. That one is the Black Rock Ranch and would not be seriously inconvenienced by the lack of the agent. See, also, *Lowden v. State*, 118 P. 2d 242, *Lowden vs. State*, 106 P. 801, *Lowden v. State*, 113 P. 2d 991, *Lowden v. State*, 119 P. 2d 835, *Lowden v. State*, 119 P. 2d 840.

In re Thomson (Neb.), 4 N. W. 2d 756. This was another case where the Chicago & Northwestern sought to close a station in Nebraska. The state railway commission denied the application and the Supreme Court reversed the commission. The station of Nenzel was in a village of 125 people. There was a general store, another grocery, a poultry and egg concern, and a filling station. “* * * The patrons are mostly ranchmen, * * * farming in the community is negligible, * * * cattle constitute the only livestock shipped.” Shipments included road building gravel and asphalt, corn, coal, posts, cottonseed cake, cattle, and feed. Outbound shipments consisted mainly of cattle and hay. The evidence showed that less than carload shipments averaged less than one shipment per day received and one shipment every 4 days forwarded. Over a 20-year period the total revenue at the station averaged \$12,600.00 per year, and the cost of the agent was \$1,400 per year. The Nebraska Supreme Court referred to division of revenue between stations as follows:

“Due to the fact that there are two stations involved in every shipment it is necessary that each

station be credited with one-half the gross revenue; the interline revenue assigned on the basis of 75 per cent for the reason that 25 per cent should be assigned to the junction point, since that requires work in handling the shipment."

In our Black Rock case we assigned 100 per cent of the interline revenue to Black Rock.

In reversing the commission the Nebraska Supreme Court stated:

"If the agent's services are terminated and a caretaker substituted, freight will be received prepaid; patrons will communicate with the station agent at either Cody or Kilgore; telephone communications will remain from Nenzel to such other stations, and the agents thereof, depending upon the direction of the movement, will sign the bill of lading or livestock contract as the case may be. Most business is inbound and in carloads. *The cars could be spotted by a caretaker as well as by an agent.* Road-building material is usually handled on spur tracks, where there is no agent or station; the train crews spot the cars each day when loading is desired, and in the evening they pull the cars away. * * * *As to the express, the train crew would put it in the warehouse which is kept locked, and it would be delivered to the customer by the caretaker.*" (Italics ours.)

* * * * *

"It is apparent that the volume of business transacted at Nenzel is such that the agent may be readily dispensed with; * * *."

* * * * *

"It is not reasonable to require the maintenance of a full-time agency station when the cost of such service is out of proportion to the revenue derived

from that portion of the * * * public benefited thereby, especially where a substitute service may be provided which will afford the same essential service but is less convenient."

* * * * *

"Where upon consideration of all the pertinent circumstances there appears to be no necessity for the maintenance of a regular agent at a particular railroad station and the cost thereof is so great as compared with the additional convenience thereby afforded the public and the revenue derived therefrom that it clearly appears unreasonable to require the railroad to continue the agent's services, an order of the Corporation Commission making such a requirement will be vacated."

In some of the cases hereinabove cited, main highways served the towns involved, and there was evidence of service by trucks. In fact, the court in the Minnesota case, *State v. Chicago & N. W. Ry. Co.*, 297 N. W. 715, found:

"There is testimony and it is common knowledge that retail food stores in such a community receive most of their goods by truck from supply houses in the territory."

On this point we wish to refer to the evidence with respect to securing of supplies at Black Rock. The witness Allred, district grazer, testified pursuant to counsel's questioning that Black Rock was a "focal point" to service the area for operations carried on by the various sheep men, and with respect thereto upon cross examination testified as follows:

"Q. Now what do you mean by focal point to service the area?

"A. Well it is a point where they come to for mail and the headquarters for supplies.

"Q. Is there a store there?

"A. No, but they make arrangements to have supplies brought in there quite frequently.

"Q. How are they brought in?

"A. Usually by the owner.

"Q. By truck?

"A. I imagine, yes" (R. 463).

The witness Barton, one of the men owning sheep ranged in the area, when asked what sort of supplies he got at Black Rock, testified:

"A. All gasoline and some groceries.

"Q. Where does that come from?

"A. Through Mr. Miller. We have him get it for us.

"Q. Through Mr. Miller?

"A. Yes, sir.

"Q. You don't have it shipped in over the railroad there?

"A. No, sir. I think he gets some of his supplies over the railroad and then we get them from him as an accommodation" (R. 509).

However, with respect to where Mr. Miller secured his groceries, his sister-in-law, Mrs. Burke, postmistress at Black Rock, testified that the only groceries they received over the railroad came by parcel post (R. 526). Then on cross examination she testified:

"Q. Most of your groceries come in how? Does Mr. Miller go get them or do you have it come parcel post?

"A. Unless we make a business trip some place, other than that, we have it come by parcel post.

"Q. And where do they come from?

"A. Milford, Delta, or Salt Lake.

"Q. Milford, Delta, or Salt Lake. Quite often, however, Mr. Miller or some of the rest of you, may go to Milford or Delta, don't you?

"A. Yes, it is usually in the evening.

"Q. And where do you go, mostly Milford?

"A. Perhaps, about fifty-fifty" (R. 532).

With respect to similar supplies, the witness Carl Nielson testified:

"Q. During the last several years how have you received your supplies for your camp operations west of Black Rock?

"A. Well, for the last 15 years we have got our supplies entirely from Milford. Some of the time we would go after them by truck and some of the time we would have them fetched down.

"Q. Is it difficult to travel between Black Rock and Milford on many occasions during the winter months?

"A. Yes, it is.

"Q. And on those occasions how do you bring your supplies in from Milford?

"A. We have it sent in by express" (R. 556-557).

Thus, it appears that the only time the witness Nielson and his men secured supplies over the railroad, even by way of express, would be during times when the road was blocked or travel to Milford difficult. In this connection we wish to point out that this same witness said that in his fifty years of experience in the western desert the year

1948-1949 was the only year when the road had ever been blocked by snow although it had been blocked on occasions by mud (R. 573-574), but the County Commissioner Mark S. Johnson testified that in recent years the road from Lynndyl to Milford by way of Black Rock had been improved (R. 423-424, 438). It very definitely appears from this testimony that rail service, even by way of express, is, like the telephone and telegraph service, wanted by these sheep men only for emergency occasions and not to be used or patronized as a general proposition. Carl Nielson and the men with the sheep operated by him had a truck with them continuously in which they could go to Milford and back (R. 572-573, 566), in addition to a separate truck used for hauling water. This same witness testified that some meats and all breads and pastries he secured from Mt. Pleasant or from his home at Fairview by express or parcel post, and he usually knew when they would arrive and was at the station to get them (R. 576-577, 565). Such items could still be sent by express, prepaid, or by parcel post as in the past.

In this connection and at this juncture we would like to point out to the court that even during the bad winter of 1948 and 1949 and after that bad winter, the sheep men and others in the area did not concern themselves with giving business to the railroad in an attempt to try and retain the agent's services but right at the time turned to the use of trucks, Mr. Barton stating that in May 1949 he trucked about 1200 sheep from Black Rock rather than shipping them out by rail (R. 503) ; also that a number of the sheep men have started to ship their sheep out from Black Rock

by truck, 5 or 6 herds of them that in the past had been shipped, being trucked out "this year," or in 1950 (R. 499). And he gave as the reason the fact that a lot of men from Sanpete are trucking their sheep because of the discontinuance of The Denver and Rio Grande Railroad Company branch through Salt Creek Canyon. With respect to others than the sheep men, Mr. Alsop, who testified on behalf of the prospective limestone shipping from Cruz, stated that new crusher equipment that they have had put in to develop their operations at Cruz had been transported there by truck (R. 546). Mr. Wakefield of the Christensen Construction Company, which company does the mining of the volcanic ash at Pumice, testified that new machinery and equipment, screens, crushers, conveyors, bins, etc., had been brought into Pumice to increase their output and assist in their operations at the mine, and with respect thereto one heavy machine was shipped in by rail from Los Angeles late in December of 1949 and all of the rest used there came in either on its own power or on large trucks and transports—not by the railroad (R. 483-484). Mr. Miller of the Black Rock Ranch seemed to be quite enthused over prospects of oil development in the area of Black Rock and had acquired substantial acreage which had been cleared, roads made and other work done preparatory to drilling for oil; yet all equipment and tools that had been brought in, mainly tractors for road clearing and early development work, was brought in on lowboy truck and trailer setups (R. 609). THESE ARE THE ONES WHO PROTESTED THE CLOSING OF THE STATION OR DISCONTINUING OF THE AGENT, BUT IT IS HARD TO SEE WHAT SERVICES THEY DESIRE FROM OR REQUIRE FROM AN

AGENT OTHER THAN COMPANIONSHIP OR SOME-
ONE TO USE A TELEPHONE FOR THEM.

Application of Union Pacific for leave to discontinue agency at Montour, Idaho, 134 P. 2d 599. The village of Montour and immediate surrounding territory had about 800 voters. There was one general store, one garage, a telephone office, one service station, a blacksmith shop, and a school. The principal industries of the area were farming and grazing. The railroad company sought to discontinue the agency and the Public Utilities Commission of Idaho denied the application. The Idaho Supreme Court reversed the commission's order. Substantial income was received from carload traffic, and the court went into some detail in giving the items of revenue from both carload and less than carload traffic. After detailing the figures, the court stated:

"Eliminating from consideration CL lot shipments, leaves only \$563.62 received for 1940 for LCL shipments and \$583 for 1941 for LCL shipments, as against \$1,778.16, expense of maintaining agency in excess of expense of a caretaker."

With respect to passenger, express, and telegraph, the court stated:

"It is plain, from the table of receipts herein set out, that the income from passenger fares, telegraph and express service, all together, is inconsequential, (\$336.99 for 1940 and \$320.24 for 1941); and of this, only the telegraph tolls would be affected by the proposed change of service. Messages can readily be phoned to Emmett (18 miles South) or Horseshoe Bend (8½ miles North) where agencies will still be maintained."

We think the facts in connection with the agency at Black Rock are very comparable with respect to passenger, telegraph, and express and that, likewise, as far as Black Rock is concerned, they are "inconsequential." Also, with the conversation phone to be installed at Black Rock, telegraph messages can readily be phoned to Milford where an agency will still be maintained 24 hours per day (R. 632). With respect to carload traffic the Idaho court concluded:

"It seems to be generally admitted that *'The principal need of an agent is occasioned by less than carload business'*. * * * and that in agency discontinuance cases, *'carload freight is not to be considered, because an agent is not needed for carload freight.'* * * * (Italics ours.)

"It appears that a caretaker can furnish all the service reasonably necessary for CL lots at such stations as Montour."

In reversing the order of the commission, the Idaho court stated:

"In arriving at a conclusion as to what constitutes 'adequate, efficient, just and reasonable' service in any particular case, the relative rights of the utility and the public must be taken into consideration, for, under some circumstances, each may have to suffer some inconvenience or loss. A particular service by a public utility may be *reasonable* in a small, noncommercial community which would be wholly inadequate and inefficient in a commercial or manufacturing community. * * *

"We feel satisfied by the record before us, that the substitution of a caretaker, or nonagency, for the agency service, which has heretofore been maintained by the company at Montour, will be no mater-

ial or substantial detriment or loss to the people of the community served and, at the same time, will slightly lessen the expense of maintaining that station and will release a telegraph operator for a more urgent and necessary service at this time of public emergency, when experienced operators are much needed. Under the statute, the agency service may be restored whenever changed conditions and circumstances will justify the requirement. Sec. 59-629, I. C. A.”

See, also, *State v. Union Pacific R. R. Co.* (Idaho), 89 P. 2d 1005, wherein the Idaho Supreme Court reversed a commission order which required the railroad company to build a new depot at Soda Springs and wherein the Supreme Court stated :

“While the commission has the jurisdiction, right and authority to require adequate facilities and, if necessary, to order a new depot, the test of such order is its reasonableness and whether it is confiscatory. Regulation may not extend to management and control, and though facilities must be commensurate with business done and progress of the community such required facilities must be consistent with and restrained by economy of operation within the realm of businesslike principles of income and expenditures.”

With respect to other than carload traffic and passenger business, we think that the statement of this Court in the St. John case, 15 P. 2d at 367, is very directly applicable here. We quote :

“There was no substantial evidence which would justify the commission in refusing the application of plaintiff to discontinue the agency because of the

passenger business or on account of less than car-load shipments moving in or out of St. John, so we do not need to consider the evidence or the effect nonagency would have on such services. We can say that the manner in which such business would be handled without an agent, would, as a matter of law, satisfy the requirements of the statute. It appears to us no reasonable minds could differ that such service would be reasonable service as required by the statute."

Last, but by no means least, in importance upon this phase of the matter, we want to call the Court's attention to the case of *Los Angeles & S. L. R. R. Co. v. Public Utilities Commission*, 81 Utah 286, 17 P. 2d 287. In that case the railroad company sought to discontinue its agency station at Faust, Utah. Originally, the railroad company had not offered to install a phone at Faust but upon the rehearing it did offer to install the phone. In the Black Rock case the original application did not make an offer of installation of a phone but because of contacts made with people who the railroad felt were interested in the Black Rock station, an offer to install a phone was made at the original hearing and between the time of filing the application and the time of such hearing permission had been secured from the Federal Communications Commission (R. 620) to install such conversation phone in connection with the complicated telephone, telegraph, and teletype circuits used over the wires paralleling the railroad line in the vicinity of Black Rock (R. 618-620). In connection with the Faust application this court stated:

"We assume that the commission took into consideration in denying the petition for rehearing the

offer of the railroad company to install a telephone at Faust."

Faust was in many ways comparable to St. John and to Black Rock, in that there were range to range movements of sheep shipped over the railroad, although at Faust there was also shipment in carload lots of agricultural products, calcite, and clay. The commission denied permission to close the agency at Faust but, in view of the offer of installation of the phone, this court reversed and set aside the order of the commission, including its order on rehearing. With respect to less than carload shipments at the Faust station, this court stated:

"In view of the very small amount of revenue derived from less than carload lots forwarded and received, and in view of the comparatively small inconvenience attached to the handling of such freight without an agent as compared with that which would not have to be suffered were there an agent present, we do not believe that any reasonable mind can say that an agent should be kept at Faust for the purpose of handling less than carload lots forwarded and received; nor do we believe, under the evidence, in view of the small passenger revenue from passengers arriving at or leaving Faust station, could it be said that any reasonable mind could justify the continuance of the agency for taking care of the passenger business."

Concerning carload shipments the court referred to the fact that the freight would have to be prepaid on movements coming into Faust and also referred to the manner of handling of ordering cars and billing cars of shipments out from Faust. By way of comparison, we wish to point out to

the court that with respect to Black Rock the main shipments out from Black Rock are sheep, and except on isolated occasions they are all moved out from Black Rock during April and May and the wool as is sheared at Black Rock likewise moves out during April and May, when an agent will be present. The only other evidence of actual shipment from Black Rock that is regular each year or that may be considered other than an occasional or isolated instance is the shipment of cattle once a year from the Black Rock Ranch (R. 608, 284). With respect to this shipment of cattle, as well as the shipment of volcanic ash from Pumice or limestone from Cruz, pads of bills of lading will be furnished to the shippers in advance and pads of bills of lading will also be in the possession of the conductors on the freight trains (R. 629-630). These bills can be made out by the shippers, picked up by the conductor and billed at either Delta or Milford, depending upon the direction the shipment moves.

The main shipments coming into Black Rock are sheep coming in in the fall, usually October and November (R. 576). Some feed is shipped in but Mr. Barton testified that prior to the winter of 1948 and 1949 the last feed he had shipped into Black Rock was 4 years previously (R. 266). Such feed, as was the case during the bad winter, may be shipped into any blind siding and spotted by the crew members. With respect to the shipment of sheep coming into Black Rock, usually a man travels with the sheep as they are being shipped in (R. 272, 587), but whether such man comes with them or not, upon arrival of the sheep at Black Rock the section crew, and if they are not available the

train crew itself, will unload and this of necessity to avoid violation of the 36-hour law (R. 626). With other shipments, such as feed the caretaker can notify the consignee of the arrival of the car. As was stated by the court in the Faust case:

“This is no less than an agent at Faust would do.”

After considering the amount of business done and revenue received and other factors involved, this court stated in the Faust case at 291:

“This case therefore must stand upon the evidence actually introduced in the case. From the evidence so introduced we are forced to the conclusion that, in view of the high cost of maintenance of an agency at Faust as compared with the present system revenue credited to the Faust station, and in view of the services which could be given if telephones were installed at Dunbar and Faust stations accessible to patrons of the road, the commission erred in not holding that such services would be adequate, efficient, just, and reasonable. We can say in this case what we could not say in the St. John Case that by all reasonable judgment, under the evidence of this case, such substituted services would be adequate and reasonable in view of the high cost of maintaining an agent as compared with the revenue chargeable to the Faust station.”

And the court then concluded:

“The upshot of the matter is that we decide that, as a matter of law, the commission should have found that, with the installation of telephones at Dunbar and Faust, the shippers who had formerly depended upon the Faust station, whether shippers from Dun-

bar or from Faust, would be adequately, efficiently, and reasonably served in compliance with the requirements of subsection 2, Sec. 4783, Comp. Laws Utah 1917. In accordance with the power given this court by section 4834, Comp. Laws Utah 1917, judgment is hereby entered setting aside the decision of the commission denying the application and the decision of the commission denying the rehearing."

We are certain that from the evidence in this case, in the light of the foregoing authorities, no reasonable person could justifiably conclude that railroad business done through the station at Black Rock during the 10 months of each year, excluding April and May, warranted or required the maintaining of an agent at such station and that the commission erred in finding and concluding that public convenience and necessity required the presence of such agent during the period from December 1st to March 31st.

II.

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S CONCLUSION, "* * * THAT THE RAILROAD STATION AT BLACK ROCK IS NOW USED PRINCIPALLY AS A SHIPPING AND RECEIVING POINT FOR THE SEASONAL HANDLING OF SHEEP, TO WIT: BETWEEN DECEMBER 1ST AND MAY 31ST EACH YEAR * * *" (Point V.).

To show that there was absolutely no evidence to justify such a conclusion on the part of the Commission we would like to refer specifically to Exhibits 1 (R. 115-117), 2 (R. 118-118A), 4 (R. 122), and 5 (R. 123). If a station is

shown to be a shipping point at any time during any year it is because there are shipments moving out from such station during the time in question, and if such a station is shown to be a receiving point for sheep at any time or during any year or portion of a year it could only be because sheep are received over the railroad during the time in question. The Commission includes as a part of its conclusion that this station was a shipping and receiving point for the "seasonal handling of sheep." The evidence is conclusive to the effect that all sheep moving in or out of Black Rock by rail move in carload lots. We first wish to consider the exhibits and the evidence shown thereby from the standpoint of Black Rock being a "shipping point."

In 1946 there were 462 carloads of freight which moved out from Black Rock, or was at least billed from Black Rock (R. 115). Exhibit 2 shows that these 462 cars were made up of 445 cars of sheep, both single and double deck cars, 5 cars of wool, 10 cars of water, 1 car of cattle, and 1 car of volcanic ash. From Exhibit 1 (R. 115) no other possible conclusion can be reached but that the 445 cars of sheep and 5 cars of wool all moved out from Black Rock during April and May, there being a total of 453 cars which moved out during that month. This would have to include three cars of water moving out in either April or May because cattle shipments ordinarily did not move from Black Rock during April and May, and shipments of volcanic ash were not started until the fall of 1946. Thus, there is no possibility of any evidence from which the Commission could conclude that Black Rock was a shipping point for sheep at any time during the period from December 1st to March 31st during

1946. The evidence shows that water, as a matter of fact, was shipped from other points rather than Black Rock (R. 221-222), and except for water, sheep, and wool there was only 1 car of cattle and 1 car of volcanic ash that moved out from Black Rock during the year 1946. During 1947, 582 cars of freight moved out. Here, again, in accordance with the testimony, we must conclude that all normal movements of sheep and wool go out from Black Rock in April and May. Because of the substantial movement of volcanic ash we cannot determine from Exhibit I (R. 115) just what months the other commodities may have moved, but except for sheep and wool, as shown by Exhibit 2 (R. 118), there were 61 cars of volcanic ash which of necessity would have to move from Pumice, and other than this there were only 2 cars of cattle and 1 car of water. Here, again, no one could conclude that Black Rock was a shipping point for sheep during the period of December 1st to March 31st. In 1948, 301 cars moved as billed from Black Rock (R. 116). Exhibit 2 shows that of these there were 271 cars of sheep, 4 cars of wool, and 17 cars of volcanic ash (which would move from Pumice). This would leave 8 cars of water, (not actually shipped from Black Rock), and 1 car of cattle. Again, there is no evidence that would warrant any conclusion that any sheep were shipped out during the early months of the year, other than in April and May, and the evidence is also conclusive that all wool is shipped in April or May. Exhibit 4 (R. 122) shows that of the 8 cars of water 6 of such cars moved in October and November to Cruz and Bloom. In 1949, 283 cars were billed as moving out from Black Rock. These included 273 cars of sheep and 5 of wool. Again, the evidence is conclus-

ive (R. 122) and without dispute that at least in the early months of the year the sheep move out in April and May and the wool, also. Except for sheep and wool, that leaves only 4 cars of cattle and 1 car of hay (See Exhibit 2).

With respect to whether or not Black Rock is a "receiving" point for handling of sheep, we would like to refer to the same exhibits. Exhibit 1 shows that 81 cars of freight came into Black Rock in 1946. As shown by Exhibit 2, all of these were sheep and all but 2 carloads of them came into Black Rock in October and November. In 1947 Black Rock was a receiving point for 50 carloads (R. 115), and according to Exhibit 2 all of these were sheep, of which all but 2 cars went into Black Rock in September, October and November. In 1948 Black Rock was a receiving point for 174 cars (R. 116). Exhibit 2 shows that all of these were sheep and all of such sheep moved in October and November, except 21 cars from Jericho in December (R. 123) which in and of itself is an unusual movement and the only such shipment of any kind made in recent years, Jericho itself being a winter desert point similar to Black Rock. In 1949, 127 cars were received at Black Rock (R. 116). Of these, 119 were sheep, all of which moved in during October and November. In 1949, there were 8 cars of feed shipped in. In 1950, there were 6 cars of sheep moved into Black Rock in January. This was an isolated instance and the only one of its kind in the record. Under normal circumstances, all sheep moving into Black Rock are there prior to December 1st. Exhibit 4 (R. 122) shows that in October 1948 there were 5 cars, and in October 4 cars of sheep shipped out from Black Rock, but these are incidental

and not regular or normal sheep movements and not within the period of December 1st to May 31st, as included in the Commission's order.

We think that with what is shown by Exhibits 1 and 2 (R. 115-118-A), with the additional detail shown for the last 21 months in Exhibits 4 and 5 (R. 122, 123), the evidence is conclusive and shows directly and without dispute that there was no evidence from which the Commission could conclude that Black Rock was either a shipping or a receiving point for handling of sheep during the period from December 1st to March 31st during any regular or normal year. With respect to matters other than sheep, the evidence shows that the only freight shipped into Black Rock in carload lots other than sheep is hay and feed, and there was some such shipped in during January, February and March of 1949 (R. 123). But, as already explained, the shipment in of such feed needs no agent and is not regular each season, the witness and sheep owner Barton saying that prior to 1949 he had not shipped feed into Black Rock over a period of 4 years (R. 266).

There was no evidence substantial or otherwise from which the Commission could conclude, and the Commission erred in concluding, that Black Rock was a shipping or receiving point for the handling of sheep during the period of December 1st to March 31st.

III.

THE RAILROAD IS NOT REQUIRED TO MAINTAIN AN AGENT AT BLACK ROCK FOR THE SOLE

PURPOSE OF HANDLING PERSONAL COMMUNICATIONS FOR SHEEP MEN OR OTHERS IN THE AREA NOR FOR OTHER INCIDENTAL OR COURTESY SERVICES NOT CONNECTED WITH RAILROAD BUSINESS (Point VI).

We have already referred to the fact that one of the main services desired by protestants at Black Rock is with respect to communication—not communication on railroad business but mainly for personal affairs and personal business—and that, in most instances, usually only at times of emergency (R. 494, 511, 557). In addition to the question of communication, there was one other phase of the agent's presence at Black Rock that was stressed by protestants and that was that they desired the agent there to be available to extend assistance and "extra-curricular" services to the sheep herders and others in the area, services having no connection whatsoever with railroad business in any way. The witness Carl Nielson, when he was questioned as to matters for which an agent was needed, referred to matters done by the agent such as checking the condition of the sheep when they arrive, finding when they were fed last, how far they were trailed, how many dead ones, and the value of such sheep as may have died enroute (R. 563). Such matters are not matters that affect the transportation or handling of the sheep but are things checked by an agent, it is true, after the transportation is completed but for the sole purpose of protecting the railroad company against claims that may be filed against the railroad company. If there is no agent present at a station, the train crew or section men who unload the sheep are re-

quired to keep a check on dead sheep, and the question as to how far the sheep may have been trailed or when fed last is a matter which does not affect the transportation in any way after the transportation is complete but the train crew themselves are required to know how long the sheep have been on the cars so that they can be unloaded for feed, water and rest before the 36-hour period expires. It is not necessary that an agent be maintained at the station for the purposes mentioned except from a standpoint of protection to the railroad company and protection such as would enable the railroad company to defeat claims against it which might otherwise be unjust, but with respect to that, if the train crews and section men do not do as good a job as the agent might, it is the railroad that would suffer in not having proper evidence to refute unjust claims. These matters were rather incidental and urged only by the one witness.

Other witnesses appearing for protestants had still a different slant. We have already referred to the testimony of the regional grazer, Mr. Allred, who, after referring to Black Rock as a focal point, admitted that supplies are brought into the various herds by the owners, usually in trucks. In addition, one of the most emphatic protestants at the hearing was Mark S. Johnson, Chairman of the Millard County Commission. After the testimony showing that the various supplies, and particularly feed, had been brought in by trucks was referred to him, he was asked (R. 441) :

“Q. If trucks brought it in you wouldn't need an agent at Black Rock for it, would you? * * *

“A. Yes, you would need an agent at Black Rock.

“Q. To keep company with the people there?

“A. No, sir; to have an agent there, that he might help those truckers. Those men would have froze to death if it hadn't been for the station a year ago this winter.”

Thus, they even had the effrontery to suggest that we maintain an agent at the station to assist the truckers who bring the freight in in trucks that should be shipped over the railroad to warrant the maintenance of an agent at the station. When Mr. Miller of the Black Rock Ranch was asked concerning the services performed by an agent, he answered (R. 594-595) :

“He is informative as to railroad conditions, and to methods, the best methods of purchasing transportation; he is vital in his assistance to all of us, as a matter of communication, and especially in times of distress or in times of unusual conditions, such as we have had related here before.

“He also furnishes the public a service that cannot be obtained in the area, of protection from the weather, and, in some instances, has shared his circumstances to (with) people who have been without food, or circumstances for more than two days, to my knowledge.”

The same witness also added:

“That in the bad winter that we have spoken of, * * *, we had both our house and our bunk house filled with friends, and we also had the railroad station filled with livestock people” (R. 595).

The foregoing matters when considered with the matter of telephone or telegraph communication, as stressed

by the protestants, show very definitely that the protestants desire the presence of the agent during the winter months, not for transportation purposes or matters pertaining to railroad business but for other incidental services which a railroad company is not required to furnish, separate and apart from such as would otherwise require the presence of an agent. In the St. John case heretofore referred to, 15 P. 2d 358, which involved a station similar to Black Rock where range to range movement of sheep was involved, the railroad had not offered to install a phone at the original hearing and had asked to close the station for the full year, including the months of heavy shipment. In that case this court held:

“At least, laying aside all that the shipper could expect by way of courtesy or friendly accommodation of an agent that they personally knew or through telegraph service for their own business purposes that an agent might be able to give them, *which we hardly believe that the railroad would be required to furnish*, there appears to be substantial evidence upon which the commission could come to the conclusion that at least during the months of heavy shipments an agent is required to give the type of service required by the statute.” (Italics ours.)

The court finally concluded in that case:

“For the reason above mentioned, the order denying the petition for rehearing will be set aside with instructions to the commission to hold a hearing upon the question of whether the installation of the telephone at St. John would satisfy the requirements of the statute as to reasonable and adequate service, and as to whether at all events the petitioner should not be allowed to discontinue the agent for certain

months of the year, and to make its findings and render judgment upon those questions.”

In the case at bar the Railroad offers to install a phone at Black Rock not just for the convenience of shippers or people having business with the railroad but for purposes of communication with the outside world by sending of telegrams through Milford station, as well as for the purpose of ordering cars where such cars need to be ordered in advance of the presence of the agent on the 1st of April of each year. In addition, different from what was true in the St. John case the railroad Company has agreed to maintain the agent at the station during the two months when heavy shipments are made from the station. When we consider these matters, all we have left which the protestants desire from the agent are the services “by way of courtesy or friendly accommodation of an agent that they personally knew or through telegraph service for their own business purposes that an agent might be able to give them WHICH WE HARDLY BELIEVE THAT THE RAILROAD WOULD BE REQUIRED TO FURNISH * * *.” (Emphasis ours.)

A railroad company is not required to maintain telephone or telegraph communication services for matters not connected with railroad business.

9 Am. Jur., Sec. 83, page 486, CARRIERS.

“A railroad or other carrier may be required to provide telegraph or telephone facilities at its stations when, but only when, such service is reasonably necessary for the convenience of shippers or passengers or for the efficient discharge of the carrier’s

duties, subject to reasonable limitations as to cost. It cannot, however, independently of its duties as a common carrier, be required to furnish telegraph facilities so that the public may commercially derive conveniences therefrom."

Woody v. Denver & R. G. W. R. R. Co. (N. M.), 132 P. 250. The state corporation commission ordered the railroad company to maintain at a certain station an agent "who shall be a telegraph operator." Upon review of the commission's action, the Supreme Court of New Mexico refused to enforce the order. We quote the following from the court's opinion:

"There is no evidence in the record tending to show that the railroad company is engaged in the commercial telegraph business. While it is true that the railway company may be required to provide and maintain 'adequate depots, stock pens, station buildings, agents and facilities for the accommodation of passengers, and for receiving and delivering freight and express,' and might, upon a proper showing, be required to maintain a telegraph station and agent, for the accommodation of passengers and for receiving and delivering freight and express, it could not, independent of its duties as a common carrier, be required to furnish telegraph facilities so that the public might commercially derive convenience therefrom."

See, also, *Seward v. Denver & R. G. W. R. Co.* (N. M.), 131 P. 980. The Seward case was discussed by this court in the St. John case, 15 P. 2d at 361, 364, and this court goes on to point out that the Supreme Court of New Mexico has broader powers of review than our Utah court has. Nevertheless, a comparison of the facts is enlightening, as is also the New Mexico court's statements with respect to

what should be considered reasonable and adequate service. Therein the New Mexico Court stated:

“It would not be fair and just to arbitrarily require a railroad company to maintain a station and facilities which the business did not justify or the requirements of the people demand.”

Atchison, T. & S. F. Ry. Co. vs. State (Okla.), 100 P. 16. A complaint was filed with the corporation commission by certain residents of Payson, Oklahoma, because the railroad had withdrawn its telegraph operator and moved its telegraph equipment from the station at Payson. The defendant answered and produced evidence that the telegraph office “was closed because it was not needed in the handling of the business of the appellant, it having sufficient facilities for taking care of its business from that station; that on account of the reduction of business it was necessary to curtail expenses as much as possible, and, as the telegraph office at said station was not needed, it was accordingly closed; that as to its commercial business that fall, for the past four months preceding the date of said response, the earnings averaged \$1.93 per month; that in the month of February, 1908, the commercial earnings of the telegraph service for said month were 90 cents.” The evidence also showed that if the residents of the town wanted to send a telegram they had to phone it in to the closest open station in either direction from Payson. After hearing, the commission ordered the telegraph office reopened. The Oklahoma Supreme Court reversed the commission’s order. We quote the following from the court’s opinion:

“The undisputed proof shows that said railway company was not engaged in the telegraph business

for commercial purposes, but only for the transacting of its business as a transportation company.

“In the case of *People’s Telephone Co. v. Eastern Railroad Co. of Minnesota et al.* (decided by the Railroad Commission of Wisconsin on October 12, A. D. 1908), the Commission in its opinion said: ‘The only telephone facilities that must be furnished by a railroad are such as are necessary to a proper discharge of its duties as a common carrier. With the transaction of its own affairs with its employes or others, when acting in its private capacity, the public is not concerned. In all such matters it possesses the same rights and enjoys the same privileges that are accorded to private corporations and individuals. The regulation of the public service of such a corporation does not extend to or include the management of its purely private affairs. The distinction between the acts of a public service corporation when acting in its public capacity, and those when acting in its private capacity, is often lost sight of, and as a result, not infrequently, erroneous conclusions are reached as to the scope of laws designed to regulate such corporations.’

“Following the rule laid down by the Wisconsin Commission, the only telegraph facilities that a railway company must furnish are such as are necessary to a proper discharge of its duties as a common carrier, for the moving of trains, etc.

“Now, if it were to be insisted that it was necessary to maintain a telegraph station for the purpose of keeping the traveling public advised of the arrival and departure of trains, in determining whether or not such order would be just, reasonable, and correct, the passenger receipts from said station would be relevant. If it were further insisted that, on account of the car lots of freight shipped from said station, it was necessary to have such tele-

graph station maintained in order to have cars expeditiously furnished at said station, it would follow that the freight receipts from such shipments should be considered. Evidence on these points would be necessary to be introduced and considered in determining the reasonableness, justness, and correctness of such order. The order of the Commission does not, however, appear to have been based upon the theory that the telegraph office should be established as a facility for the transaction of the business of the transportation company, but as a telegraph office for the general use of the public. Nor does it appear to have been tried upon the theory of requiring the railway company to re-establish telegraph service as a facility in its transportation business. It follows that any order made requiring it to maintain a telegraph station for commercial purposes under the record is erroneous."

Chicago, R. I. & P. Ry. Co. vs. State (Okla.), 103 P. 617. Both the railroad company and the Western Union Telegraph Company were parties to this proceeding. The corporation commission ordered them to maintain telegraph service for commercial and other purposes at Ferguson, Oklahoma. It appeared in that case that for the 5 or 6 months prior to the hearing, telegraph receipts had averaged less than \$2 per month. The Supreme Court of Oklahoma, in reversing the corporation Commission, discussed questions of due process of law and taking of property without compensation.

As we have already stated, the evidence at Black Rock shows that except when January and February 1949 are included—which was during the state hay lift operations and the bad winter storms of that year—the telegraph rev-

enue for the months during which the Black Rock station would be closed do not average \$2 per month in any year from 1946 to the present.

See, also, *St. Louis & S. F. Ry. Co. vs. Newell* (Okla.), 106 P. 818, where the corporation commission ordered telegraph service at a station and the Supreme Court of Oklahoma again reversed the commission. In that case it appeared that the telegraph service would increase the expenses of the station only \$20 per month and was desired for bulletining of trains for the benefit of people purportedly wanting to travel. The Supreme Court, however, stated:

“* * * the facilities afforded at any station to the general public must in a measure be commensurate with the patronage and receipts from that portion of the public to whom the service is rendered.”

The court held that the amount of patronage did not justify the increase of \$20 per month in the expenses. How much more would that be true in a case like Black Rock, where the telegraph service is not wanted for train information or shipping but solely for personal communications aside from railroad business.

See, also, *Kansas City Southern Ry. Co. v. State* (Okla.), 117 P. 207;

State ex rel. Postal Telegraph Cable Co. v. Wells (Railroad Commissioners) (Fla.), 118 S. 731. The Postal Telegraph Company and numerous individuals by application to the State Railroad Commission sought to compel the Jacksonville Terminal Company to admit the Postal Tele-

graph Company to the terminal building for engaging in the telegraph business. The Western Union was operating in the terminal, and Postal and its friends contended that the carrier (Terminal Company) was or should be compelled to admit Postal to the terminal facilities. The Railroad Commission denied the application by refusing to take jurisdiction, and an original proceeding in mandamus was filed in the Supreme Court to compel the action sought. The Florida Supreme Court granted a motion to quash the writ of mandamus, holding that the defendant Terminal Company could not be compelled to admit the Postal Company to the facilities of the terminal. We quote the following from the court's opinion:

"For purposes of public regulation, there is a fundamental distinction between the acts of a common carrier in the performance of its public duties as such, and those done in the exercise of its purely private right to manage and control its own property in matters not embraced within its public duties. * * *

"The right of the state to regulate transportation by common carriers within the state extends to every phase of its service as a common carrier and to every act that affects such service * * * But while the public business of the carrier is subject to regulation in the public interest, the property itself belongs to the carrier and, as against those not desiring to use it for the purpose for which it is devoted to the public use, it is private property. There is no public duty upon the carrier to so use its property that others who have no business with it as a common carrier may make profit for themselves. Under the guise of regulation, the state cannot require the property of the carrier to be devoted to a

public service the carrier is under no duty to furnish.
 * * * (Cases.)

“The Terminal Company is not engaged in the commercial telegraph business. Its public business and duties are those of a common carrier of passengers and freight. It is under a duty to furnish all facilities and conveniences reasonably necessary to the discharge of the latter duties, amongst which are adequate telephone and telegraph facilities so that the public may conveniently communicate with it concerning the transaction of its public business as a common carrier. * * * But neither by statute nor by custom having the force of law at this time is the Terminal Co. required, as a part of its public duty as a common carrier, to afford the Postal Co., as the operator of a distinctly commercial telegraph system, facilities for plying its own business on the premises of the Terminal Co., even though the Terminal Co. by special contract grants such a privilege to another company. Nor is the Terminal Co. under a public duty to afford to patrons of the Postal Co. facilities for carrying on their business with the latter company upon matters unconnected with the public duties of the Terminal Company as a common carrier, even though the public might derive incidental convenience therefrom.

* * * * *

“Neither under Chapter 8469, *supra*, nor any other statute or existing custom to which our attention has been directed is the Terminal Co. compelled to share the use of its union station with commercial telegraph companies seeking to use such station only to solicit custom for themselves, nor to furnish patrons of such telegraph companies with facilities for carrying on their business with such telegraph companies upon matters unconnected with the performance of the public duties of the Terminal Company

as a common carrier. The Railroad Commissioners are therefore without power to compel the Terminal Company to permit its premises to be used for that purpose."

To require an agent to be maintained at Black Rock to handle personal communications for protestants would in effect be taking private property for what is not even a public use but solely for other private use without due compensation and would violate due process of law and deny to petitioners the equal protection of the laws. We wish to refer again to the St. John case, wherein this court said at 363:

"Certainly, if it appeared that the revenue was greatly incommensurate with the service or facility which the community demanded, and further appeared that what might be called the quantum of necessity was such as to make the continuance of the service unquestionably an incommensurate burden upon the railroad, then it might be that if the commission denied the application to discontinue the service it would be considered unjust, arbitrary, and unreasonable and a denial to the applicant of due process of law because it resulted in the confiscation of property."

We think such statement is directly applicable to the case at bar, even with respect to what is actually railroad business at Black Rock during the 10 month period, and magnifies the error of the commission requiring an agent to be maintained to handle matters not affecting railroad business but purely personal to protestants.

The foregoing authorities conclusively show that, as a matter of law, a railroad company cannot be required to maintain an agent at a station for the purpose of handling telephone or telegraph communications. Nor, in fact, can the railroad company be required even to maintain telegraph facilities, much less telephone facilities, in absence of an agent, where such facilities are desired just for personal communications or communications on matters of business affecting only the person using such facility and not otherwise connected with railroad business. In spite of this, the railroad company here has agreed to install a conversation phone at Black Rock to enable protestants and those having necessity therefor to handle Western Union telegrams through the Milford agency for personal matters and for business other than railroad business. The protestants are not satisfied with this and say, in effect, "We want an agent there to do our phoning for us."

There is one other matter that we would like to call to the Court's attention in connection with the orders of the Commission, and that is something that is shown by the file with respect to contact had between the members of the Millard County Commission and the Public Service Commission. We refer to the letters as appear in the file and bear record numbers, pages 13, 14, and 15, and call specific attention to the letter of May 5, 1949, wherein the County Commission stated;

"We are of the opinion that the best interest to all of the people would be serviced if an agent would be maintained at the Black Rock station during the operation of the livestock season on the western desert."

We think the Commission was influenced by the acts of and discussions with the Millard County Commission aside from the record and evidence produced, either at the original or rehearing of the case. This Court in the Faust case stated that the Commission may take notice of facts generally known throughout the field of railroad transportation, "but it cannot take its special knowledge which it may have gained from experience or from other hearings and base any findings or conclusions upon such knowledge. That is fundamental." The court then quotes with approval from an Illinois case, as follows, 17 P. 2d at 291:

" 'The commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.' "

We assume that the county commission's discussions with the Public Service Commission followed lines similar to the testimony given by Mark S. Johnson, Chairman of the county commission at the rehearing (R. 421ff, 423, 427, 433, 440ff), wherein he requested an agent at Black Rock even though it may only be for the purpose of providing shelter or assisting truckers bringing things to the sheep men. We see in the letter (R. 14) the use of the phrase, "livestock season on the western desert", and we recall the phrase used in the Commission's orders, "winter sheep ranging season", and we feel sure that the county commissioners' "out of court" discussions with the Commission

had considerable influence on the orders as issued, and we call it to the court's attention because we think it was improper.

CONCLUSION

We confidently assert that there was no substantial evidence upon which the Commission or any reasonable body or any reasonable person could justifiably conclude that public convenience and necessity required the maintaining of an agent at Black Rock during the period from December 1st to March 31st each year. There was no evidence whatsoever to warrant the Commission's conclusion that during the period from December 1st to March 31st of each year Black Rock was a shipping and receiving point for sheep.

There was no substantial evidence which would justify the Commission in refusing the application to discontinue the agency because of the passenger business or on account of less than carload shipments or express shipments moving in or out of Black Rock. So, the effect nonagency would have on such services need not be further considered.

The main reason why protestants want an agent at Black Rock during the "winter sheep ranging season" is not for railroad business nor for any purposes connected with railroad business but solely to handle communications of a personal nature between the sheep herders and their homes or their employers who want that means of contact, not for any transportation purpose or business with the railroad but solely for the purpose of maintaining contact

between the sheep herders on the desert and their employers or owners of the sheep in connection with the operations of their herds while on the desert or winter range. Also, they desire to have the agent maintained at Black Rock to maintain a haven of shelter in case of storm or other unusual emergency so that such agent, being present, can assist truckers and others having no business with the railroad—the railroad's competitors, who take the railroad's business away from it—so that if another bad year like the winter of 1948-1949 occurs—even though there has been none like it in fifty years—the agent can be there as a good samaritan to perform courtesies and humanitarian deeds for the few people in the area, even though those deeds are not in any way connected with railroad business. The railroad is not required by law to maintain an agent for these purposes and if we "lay aside all that the shipper (or other person in the area) could expect by way of courtesy or friendly accommodation of an agent, that they personally knew or through telegraph service for their own business purposes, that an agent might be able to give them, which we hardly believe that the railroad would be required to furnish," there is no substantial evidence of any kind, nor is there any reasonable or rational basis upon which the Commission or anyone else could come to the conclusion that public convenience and necessity requires the presence of an agent at Black Rock during the period from December 1st to March 31st.

During the entire 10 months of the year, other than April and May, adequate and reasonable service will be provided by the Railroad Company by providing a phone

at Black Rock over which any person having business with the railroad may converse freely with the agent at Milford, either for ordering cars or for other railroad business, and over which any person can, through the Milford station, send or receive any Western Union telegraph message desired. Adequate and reasonable service for shippers during said 10 months will be provided as proposed by the Railroad by employing at Black Rock a caretaker with a key to the freight warehouse to enable consignees of LCL freight or express to receive shipments prepaid to them.

In view of all the evidence in the case and the law applicable thereto, we strenuously insist that both the original order, as entered and issued on August 12, 1949, and the amended report and order, as issued January 9, 1951, denying the application to discontinue the agency at Black Rock during the months of December to March, inclusive, are arbitrary and unreasonable and deny to applicants and petitioners herein due process of law and the equal protection of the laws and amount to the taking of property without compensation, contrary to the provisions of the Constitution of the State of Utah and the Constitution of the United States, and that in the making and issuing of said orders the Commission did not regularly pursue its authority under the laws of the State of Utah.

We respectfully insist therefore that the orders of Commission should be reversed and the Commission directed to enter an order authorizing the closing of the Black Rock agency for 10 months of each year and maintaining it as a nonagency station, with a caretaker with a key to give

access to the phone and the freight warehouse during the entire period from June 1st of each year to March 31st of each succeeding year.

Respectfully Submitted,

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