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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 Respondents

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. BEN-
NETT, DONALD HACKING and
W. R. McENTIRE, Commissioners
of the Public Service Commission
of Utah,**

Respondents.

BRIEF OF RESPONDENTS

**ARTHUR H. NIELSEN,
NIELSEN and CONDER,**

Attorneys for Respondents.

FILED
OCT 5 1951
Clerk, Supreme Court, Utah

Case No. 7654

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

This proceeding has been brought by the Los Angeles and Salt Lake Railroad Company and Union Pacific Railroad Company, hereinafter referred to as the Railroad Company, for the purpose of reviewing an order of the Public Service Commission of Utah which order

authorized the closing of the Railroad Company's agency at Black Rock, Utah, during the period of June 1 to November 30 in each year. Petitioners' statement, on page 3 of their brief, to the effect that the amended report and order of the Commission authorized the closing of the station between December 1 of each year and May 31 of each year is incorrect. The period of December 1 of each year to May 31 of the succeeding year was referred to in the Amended order of the Commission as "the winter sheep ranging season" in the Black Rock area and it was during this period that the Commission said the Railroad Company would be required to maintain an agent at its station.

This review is requested on the theory that the Commission acted arbitrarily and unreasonably in that its Findings are not supported by the evidence. In this connection we wish to point out that this court has many times announced the rule that if there is any competent evidence to support the findings of the Commission and the order made that such order will be sustained. For convenience, respondent will refer to the various parties in the same manner as indicated in petitioners' brief: The Railroad Company will designate the petitioner; respondent Public Service Commission of Utah will be referred to as the Commission; and the various other parties who appear in the matter and protested the closing of the Black Rock station will be referred to as protestants unless otherwise specifically named.

STATEMENT OF FACTS

The Black Rock station is located, as described in Petitioners' brief, approximately 57 miles south of Delta, Utah (being the closest agency station to the north) and approximately 23 miles north of Milford, Utah (being the closest agency station to the south). (R. 427) The only roads leading into Black Rock are what are known as "fair-weather" roads which are sometimes closed during the winter season because of snow and bad weather. There is a road leading from Black Rock eastwardly to Cove Fort, connecting with U. S. Highway 91 approximately 28 miles away, but this also is a "fair-weather" road and sometimes impassable. The station has been operated since 1906 when the main line of petitioners' railroad was opened between Salt Lake and Los Angeles. Through the years it has become the central point through which the sheep that are wintered on the west desert are brought in the spring and fall and from which all matters of business are transacted by the sheepmen with respect to their winter herds during the winter months. (R. 428, 434)

Black Rock was described as being the center for a large area of sheep and cattle operations. (R. 428, 434) It serves an area of approximately 500,000 acres (R. 449); and approximately 30 to 35 different sheep outfits (having a total number of permitted sheep of approximately 97,000) use Black Rock as their winter headquarters. (R. 454, 455) These sheepmen were described as shippers who made use of the railroad in shipping

their sheep (Exhibit 20, R. 450-453, 457-462) Recently the Railroad has engaged in improvements in enlarging its corral facilities for handling sheep at Black Rock. (R. 432) The Bureau of Land Management, which has charge of supervising the sheep and cattle operations on the west desert, recently has opened up trails leading in to Black Rock from areas to the north as well as other areas thus permitting sheep to come into Black Rock which have formerly been routed over other trails. Some of these sheep have to trail as far as 80 miles from an area around Garrison, Utah, before they reach the railroad at Black Rock. (R. 453) Other units have to go as far as 60 miles to obtain supplies and materials or to make contact with the outside world from the station at Black Rock. (R. 483, 435) During recent years the use of the railroad facilities at Black Rock has increased. (R. 453, 495) In addition to the sheep operations there are potential operations in connection with the development of mines in the area as well as new development in searching for oil and gas in and about the area of Black Rock. (R. 437) These operations are described in petitioners' brief.

The sheep operations on the west desert area extend for a period of 6 months during the winter season, commencing in November and continuing until sometime in May. However, the record shows that prior to the actual time that the sheep are taken out west in the fall, the operators are required to go out and check over the country. At that time contact is frequently made with the Black Rock station agent with reference to

shipping sheep out in the fall; and the necessary arrangements in connection with the use of the railroad facilities there are then made. (R. 562) During the winter months weather conditions become very severe, sometimes resulting in the closing of the roads. Temperatures drop to as low as 20 below zero and persons coming into Black Rock to make use of the railroad facilities have in the past found it advantageous to have a heated room in which to carry on their negotiations with the agent and to await contact with the outside through the use of the telegraph. (R. 522, 523, 557)

During the winter months the Black Rock station is used primarily by sheep operators for the purpose of sending communications to the outside, receiving communications from the outside, sending for emergency supplies and receiving supplies, including feed and other commodities for the sheep. On occasion sheep are shipped either in or out of Black Rock. (R. 494, 557, 558, 560, 654) In addition, the sheep men are requested by the railroad to make their arrangements for spring shipping as early as March and even before that time in order to make sure that the necessary cars are available, and that there will be no conflicts between the shippers as to available dates. Thereafter it is necessary to have frequent contact with the agent to make any corrections or obtain further information concerning shipping prior to the spring months when the actual shipping takes place. (R. 493, 559, 562)

In connection with the evidence as to the operations

around Black Rock during the winter months, the Commission found in its amended order and report that when all such shipping is considered, in conjunction with the increased shipping activity during the winter sheep ranging season, "the aggregate is sufficient to warrant the conclusion that public convenience and necessity require the maintenance by applicant railroad of an open-agency station at said Black Rock, Utah during the aforesaid winter sheep ranging season extending from December 1st to the succeeding May 31st of each year." Petitioners point out that the evidence discloses the actual sheep winter season commences during the month of November instead of December and continues to the following May. This would be a further argument that the station should be open seven months out of the year commencing November 1st instead of December 1st, rather than an argument that the station should be closed during such period. Petitioners point out on page 7 of their brief that during 1948 there were 24 cars shipped in November and 16 in December, but in spite of such testimony the Commission required the station to be opened only commencing December 1st.

It will be noted at this point that some of the protestants filed a petition for rehearing in this matter after the original order of the Commission upon the ground that the Commission erred in not requiring the Railroad Company to keep its agency station open from the 1st of October to the following May, based upon the fact that during the month of October many contacts were

made with the agent at Black Rock with reference to shipping sheep into the area and during the month of November the actual shipping began which required the presence of an agent. Two shippers, Aldon Barton and Carl Nielsen, both testified that it was necessary to have an agent at the point of destination when sheep were shipped out in the fall in order to make settlement with him, file any claim for damages, and to obtain information with respect to any failure on the part of the railroad to deliver the sheep promptly to their proper destination. (R. 512, 566, 587, 588)

In petitioners' statement of facts, exception is taken to that part of the Commission's Finding (above referred to) with respect to "increased shipping activity during the winter sheep ranging season." It is asserted that "the Commission was grasping at something to support itself." However, petitioners' Exhibits 1 and 2, filed in the case and appearing at pages 115-117 of the Record, show that there is considerable increasing shipping during the winter period from November to May; that the periods of inactivity each year, except for shipments of volcanic ash, occur during June, July, August and September. However, as indicated by Petitioners, the Commission found that shipping of the volcanic ash alone would not be sufficient to justify the maintenance of an agency station at Black Rock, notwithstanding the testimony on the part of the shippers of such minerals that it was considerably more convenient to conduct their operations through an agent at Black Rock rather than

by railroad telephone. (R. 477) Petitioners submitted various exhibits tending to show the actual volume of business done through the Black Rock Station during the years 1946 through the first three months of the year of 1950. However, such records, although showing the actual records of the Railroad Company at its office in Omaha were disputed with respect to shipments made from the siding known as Cruz where some lime had been shipped which did not appear on the exhibit. (R. 541) Too, Carl Nielsen and others testified that many times the shipments of express packages would be prepaid or paid at some other point than Black Rock which would, therefore, not show as a part of the receipts of the Black Rock station. (R. 597, 654) Telegrams sent or received and paid for at some other point than Black Rock would not show as a part of the receipts of that station so that as to the actual volume of work done, the number of telegrams sent or received or express shipments received, the exhibits of the Railroad Company are not accurate. As a matter of fact, Beneta Burke who is the postmistress at Black Rock, testified the station agent always seemed to be busy, even in the summer months. (R. 518) Mr. Larkin testified on cross examination that Exhibit 15 indicated the station agent at Black Rock was required to put in overtime during some of the winter months. (R. 371, 372) While the Railroad Company attempted to show by the oral testimony of Mr. Larkin that he had examined the files of the Black Rock station and counted the number of express shipments as well as the number of telegrams which were sent or

received during a given period, this evidence, which was oral, was disputed by Carl Nielsen who likewise, from memory, testified that over a certain period of time express shipments were received by him which did not appear from the testimony of Mr. Larkin. (R. 654)

On page 15 of their brief, petitioners state that protestants desire to maintain the station at Black Rock for the purpose of keeping "contact with their families, employers, or others in connection with matters having nothing to do with shipping over the Railroad but as a matter of purely personal convenience in connection with their personal or business affairs." While it is true that contact with the outside world is not only desirable but is absolutely necessary during the winter operations of the sheepmen in that area, nevertheless, the basis upon which an agent is necessary at Black Rock is to serve the public and offer full use of the railroad facilities, including service in sending and receiving telegrams, receiving items of express or parcel post as well as other shipments from the outside and for the purpose of contacting and making arrangements for shipping.

There is no means of immediate communication with the "outside world" from Black Rock except through the communication system afforded by the Railroad Company, by way of its telegraphic system which has been available to the public since the station was opened. Protestants are naturally desirous of continuing that means of communication to aid them in their winter

operations in the west area around and west of Black Rock.

In the first hearing held on this matter, the Railroad Company agreed to put in a conversation phone whereby any prospective shipper or other person desiring to communicate with the Railroad could call the agent at Milford. And in its original order, the Commission directed the Railroad Company to make available such facilities at Black Rock. It was admitted at the subsequent hearing that the telephone facilities were not installed at Black Rock. However, prior to the time that the order was issued by the Public Service Commission a telephone communication system was actually installed at the Pumice siding some five or six miles north of Black Rock. This telephone remained in service until sometime after the rehearing was granted by the Public Service Commission. Fortunately, the Black Rock station was closed only during the month of September and the first part of October, 1949, so that no serious harm was done, although, the testimony shows that while the station was closed inconvenience resulted to the people of Pumice. (R. 477) Boneta Burke, who is the postmistress at Black Rock, testified that during the five weeks approximately in which the Black Rock station was closed there was no accessibility to any telephone (R. 517) nor did she ever see any section man around the station from whom any inquiry might be made as to the use of the telephone. (R. 529) Mr. Larkin, on cross examination, testified that the telephone at Pumice was installed in July, 1949 (R. 636); that the

reason the telephone was installed at Pumice was that he had received orders from the Railroad Company to install it there. (R. 637) The telephone thus installed was for the convenience of the people at Pumice and had nothing to do with the opening or closing or keeping open of the Black Rock station. (R. 637)

At the first hearing the Railroad Company further offered to provide a caretaker—some responsible person who would be available during the daytime at Black Rock when the station was closed so that the telephone and other station facilities would be available to prospective shippers. The original order of the Commission in accepting this offer provided:

“IT IS FURTHER ORDERED, That during the six months period May 16 to November 14 when no agent will be in charge, the Union Pacific Railroad Company shall appoint some responsible person at Black Rock as caretaker and furnish such caretaker with a key to the freight storage room in the depot building at Black Rock so that at any time and all reasonable hours of any and every secular day, shippers and consignees may, by arrangement with said caretaker, secure access to said freight room to receive less than carload freight which may have been received at said station by such consignee or may deliver to such freight room for shipment any less than carload merchandise to be received and shipped over said line of railroad;” (R. 20)

Mr. Larkin admitted on cross-examination that during the time that the station was closed he had no knowledge of the whereabouts of the station attendants who

might presumably have had a key to allow persons access to the station. (R. 643, 644) He further testified that the section foreman who was supposed to have been given a key worked from 7:00 in the morning until 3:30 in the afternoon and would not have been available to anyone who called at the station; that there were no notices posted around the Railroad Station giving information as to the whereabouts of any responsible person having a key to the premises. (R. 644, 645) In the face of the testimony of protestants, as well as the testimony of Mr. Larkin, it appears very apparent that the Railroad Company did not and would not furnish reasonable or adequate service to any persons at Black Rock during such time as the station remains closed.

It is true as stated by petitioners on page 16 of their brief that protestants did not, and do not, desire merely to use a telephone. This is brought out by the testimony of Carl Nielsen who testified (R. 566, 583-590) that if he could not do his business with the Railroad Company on a person to person basis so that he would know who was responsible for any service agreed to be furnished or who would be able to negotiate with him or check for damages or inspect cars when they arrived he would rather contact truckers and deal with the latter on a person to person basis.

Generally, contact with the outside world or with the families of sheepmen during the winter months is not dependent upon an agent at Black Rock since there is a postoffice and persons in the area can send or receive

letters. But when an emergency arises requiring immediate use of railroad facilities to order supplies, request shipment of parts, supplies, feed, or obtain assistance, it is imperative that an agent be present. (R. 494, 522, 557, 566) These situations frequently occur in the winter and, are in addition to the usual and normal requirements of the use of a station agent when the extreme weather conditions makes it impossible or difficult to proceed to Milford or Delta considerable distances away.

The fact that one witness testified the primary problem at Pumice is one of communication, does not necessarily mean that communication is the primary problem of the area. As testified to by the sheepmen protestants, the primary problem is obtaining supplies, materials, making contact for shipping and otherwise sending and receiving messages during the winter months when travel is so difficult. In line with this evidence the Commission found that although "the tonnage alone taken from said mining operations in said area and the occasional shipments billed to and from cattle ranches might not warrant the maintenance of an open agency station at Black Rock," nevertheless, when such business is combined with the activities of the winter months or during the season when the sheep are ranged on the west desert, an open agency station was warranted and required.

STATEMENT OF ISSUES

Although several points are raised by petitioners in their brief, it would appear that the principal issue,

if not the only one, involved is whether the evidence is sufficient to sustain the findings and order of the Commission. Other questions such as whether the Commission failed regularly to pursue its authority, whether adequate and reasonable service as required by the laws of the State of Utah will be provided by a non-agency station except during the period of April and May of each year by the establishment of a phone or whether the original order of August 12, 1949, or the Amended Order of January 9, 1951, or either of them is arbitrary or unreasonable, all depend upon whether the evidence will support the Commission's findings and order. Respondents will, therefore, answer the arguments appearing in petitioners' brief on the sufficiency of the evidence to support the Commission's order.

ARGUMENT

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE FINDING AND ORDER OF THE COMMISSION THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE MAINTENANCE OF AN AGENT AT BLACK ROCK DURING THE PERIOD OF DECEMBER 1ST OF EACH YEAR TO MAY 31ST OF THE SUCCEEDING YEAR.

As stated hereinbefore, it has long been established as a rule of law by the Supreme Court of this state that where there is any competent evidence to support the findings and conclusions of the Public Service Commission, its determination will not be disturbed upon appeal. As a matter of fact Section 76-6-16, U. C. A. 1943, provides:

“The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review.”

In the case of *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298, the court held:

“It is not required that the facts found by the Commission be conclusively established, nor even that they be shown by a preponderance of the evidence if there is in the record competent evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such fact finds justification in the evidence and we cannot disturb it.” (Italics add.)

Again in the case of *Goodrich v. Public Service Commission*, (Utah) 198 P. 2d 975, the court held:

“We have repeatedly held that in reviewing cases certified to this court from the Public Service Commission on a statement of error that the Commission’s report, findings, conclusions and order are unlawful, we are limited in our review to ascertaining whether or not the Commission had before it substantial evidence upon which to base its decision. Only in the event that we find the Commission acted arbitrarily, capriciously or unreasonably in denying applicant’s petition can we set aside the order.”

In the case of *Union Pacific Railroad Company v. Public Service Commission*, 103 Utah 459, 135 P. 2d.

915, the court determined that whether the desired service was a matter of public convenience and necessity within the meaning of the statute, was for the Public Service Commission to determine and the Supreme Court could not consider the expediency or wisdom of the order or whether or not on the evidence produced the court would have made a similar ruling.

“In a proceeding to review an order of the Commission, judicial action cannot supplant discretionary authority of that body.” *Utah Light and Traction Company v. Public Service Commission*, 101 Utah 99, 118 P. 2d. 683.

In discussing the sufficiency of the evidence in the light of cases decided by this court in the past, as well as by courts of other jurisdictions, we heartily agree with the statement contained in the case of *Los Angeles and Salt Lake Railroad Company v. Public Utilities Commission*, 80 Utah 455, 15 P. 2d 358, to the effect that “each situation must stand on its own legs. It is impossible to lay down a rule which would fit each case.” For that reason we feel that the cases cited in petitioners’ brief are not at all persuasive of the position taken by them. A careful reading of such cases will convince the court that they are readily distinguishable on the facts with respect to matters which we believe are determinative of the instant case.

In the case of *State v. Chicago and N. W. Railway Company* (Minnesota) 297 N.W. 715, the Chicago and

N.W. Railway sought to close a station from an agency service to a custodian service, but in that case the company proposed to maintain the present station "with an agent available at all times but actively on duty only when business requires. The principal change will be the discontinuance of money transactions." The court also stated that "under the proposed plan the depot would be heated and lighted when necessary for convenience of passengers." Again "in case of emergency or necessity twenty-four hour agency stations at Waseco, 6 miles west, and Owatonna, 9 miles east can be reached by highway and telephone." These facts alone would remove the *Chicago and Northwestern Railway Company* case from being comperable in any way with the instant case for the reason that in the matter now before the court the Black Rock station is located at a point some 28 miles from the nearest highway, is without telephone communication with the outside world, and under the proposed plan the custodian would not be on duty at all times and available to the public. Because of this fact and because of the peculiar conditions incident to the operation of the Black Rock station the Public Service Commission was justified in requiring it to be left open during the winter season.

We also desire to call attention to the quotation appearing on page 32 of petitioners' brief in which they purport to sum up the decision of the Minnesota court in the following language:

"In some 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 car loads at destination, the meridan carload business will be served as well by custodian as by the present full-time agency service."

The court went on to say in the next sentence that, "Placing with the custodian, orders for cars to be procured through the agent at Owatonna will but continue present practice." The present practice in respect to ordering cars at Black Rock is to place all orders with the agent at Black Rock and, therefore, to continue said practice would be to require the Railroad Company to continue its agency service. It might further be noted that in the *Chicago and Northwestern Railway Company* case the decision of the Minnesota Supreme Court was by a divided court, the Chief Justice and two other justices dissenting on the grounds that the evidence supporting the finding of the Railroad Commission.

Again in the case of *Thompson v. Nebraska State Railway Commission*, 8 N.W. 2d 552, the court pointed out that the gross assigned revenue from the station was only \$1851.31 in an entire year's operation. Compared to the revenue, the court indicated, the expenses amounted to \$95.19 for every \$100.00 of total revenue. The court further pointed out that the community of Oak, Nebraska, was adjacent to gravel and black-surface highways; that eleven trucking operators were serving the village and approximately two-thirds of the less than carload inbound shipments and a part of the out-

bound shipments were carried by truck. The court then went on to state:

"The proposed change from agency to caretaker service contemplates no alteration of train service and schedules, abandonment of property facilities or discontinuance of essential service, although there will undoubtedly be some inconvenience. The station is equipped with living quarters where the caretaker will reside, he will keep the station lighted, clean and warm, and be available when his services are required. *Free-toll telephone service will be maintained to Davenport and Nora, adjacent stations. When requested the careaker will secure information relating to car service or rates; order cars spotted for shippers, or forward and receive telegrams. He will not register complaints, handle money, or do any paper work. All shipments received must be prepaid, but the caretaker will protect and release them to consignees. All shipments forwarded will be waybilled by the the next agent in line of traffic. Shipments of cream and baggage will be handled as usual but will be way-billed and checked by the baggage man. Passengers will buy tickets from the conductor on the train at no higher rate.*" (Italics added.)

This is entirely different from the service proposed by the Railroad Company in the instant case since the evidence shows that it will not maintain constant service during the business hours of the day nor will it keep its station warm and lighted and available to individuals who desire to make use of it. Nor is it contemplated that petitioners will furnish a person to check on cars,

to spot them or to make other person-to-person dealings with prospective shippers. In view of such circumstances, we cannot see how the ruling of the Nebraska Supreme Court in the *Thompson* case in any way aids petitioners' position here.

In the case of *In re: Thompson* (Nebraska) 6 N.W. 2d 607 (quoted from by petitioners on page 34 and 35 of their brief) the court stated that the town of Emmet was on a main highway; that the trade territory of the town extended only 5 miles to the east, 6 miles to the west, 25 miles to the north and 25 miles to the south; that it was only 8.2 miles west of O'Neill and 9.8 miles east of Atkinson, both of which communities are open agency stations. There was no indication in the Nebraska case that weather conditions or otherwise would make it undesirable or impracticable for persons to transact their business with the open-agency stations at the towns indicated. Again we believe that there is no proper basis for comparison of a case with the one here involved where the territory served by the Black Rock station extends approximately 80 miles westwardly over rough territory where roads are at the most passable only and where prospective shippers and persons expecting to receive shipments must travel hours before they can reach the station to transact business with the railroad. The Nebraska court also stated in the *Emmet* case that abandonment would not change any essential service. "The important inconvenience will be that no paper work would be done at the station." Petitioners' in

this case claimed before the Commission that there is no paper work for the station agent now to perform at Black Rock so that his continuance there would not be affected in any way by the amount of paper work to be done. On the other hand, the testimony does disclose that the agent is kept busy during the day and, therefore, that his services are of considerable value to the Railroad Company as well as the shipping public.

In *Louden v. State* (Oklahoma) 78 P. 2d 1059 (cited by petitioners on page 41 of their brief) the court pointed out:

“It is to be observed that while appearances were noted on the part of persons or interests served by the railroad in the town, no effort was made to support the formal objections noted at the beginning of the hearing. *It is a fair statement to say there was no legal objections to the granting of the application.*” (Italics added.)

So, the court in conclusion stated:

“Having in mind the lack of objection to the application, and the showing actually made, we think the corporation commission erred when it denied the application.”

With reference to the quotation appearing on page 42 of petitioners' brief to the effect that the Supreme Court of Oklahoma authorized the transfer of the paper work which had formerly been done at the Lima office to some other office, the petitioners failed again to note that the court stated “that no objection to a change was made by the shippers served” and therefore determined

that it was possible for the Railroad Company to change its billing practice and paper work from one station to another. However, in the instant case the shippers at Pumice and Cruz have appeared and protested the change and have requested the Commission to continue the agency station at Black Rock where the work is now being handled for the non-agency sidings of Pumice and Cruz.

In the later case of *Louden v. State*, 100 P. 2d 890, the court pointed out that the revenue from the operation of the station at Holmstead, Oklahoma, amounted to \$2,067.53 per year. This may be compared to Exhibit 12 of the Railroad Company introduced in evidence in the instant matter which indicates that the total revenue received through the Black Rock station, *not including the revenue from business done at the non-agency sidings of Cruz or Pumice*, amounted to \$19,975.90 for the calendar year 1949. The Oklahoma Supreme Court also stated that the Company proposed to substitute a caretaker who "would be available every day during business hours, would keep the station open, heat it when necessary, place incoming LCL shipments in the freight room and make delivery to the consignee, receiving outgoing LCL shipments and place them in the freight room for pickup by the train crew. 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." The nearest open station, however, was only 5.6 miles to the south.

In the last Oklahoma case cited on page 43 of petitioners' brief (*Louden v. State*, 118 P. 2d 238) the court stated that the town of Isabella was only 8.9 miles from the nearest open station. It was further pointed out that the town was located one-half a mile from the arterial highway, had access to all forms of communication, and "the principal difference that the proposed change would effect in the Railway Company's service to the traveling public is that passengers imbarking on said company's trains at Isablella would pay their fares to the conductors of those trains rather than purchasing a ticket at the station." In the instant case we are not concerned primarily with the matter of convenience to passengers in obtaining tickets before boarding the train although that itself would be one of the factors to be considered—especially when passengers attempt to make use of the station facilities during the severe winter months while waiting for the train which is frequently late. But we are concerned with the attempt on the part of prospective shippers and those intending or expecting to receive shipments of any kind to have available an agent at the station who can serve their needs during the business hours of the day. Is it fair to require a party who may have to travel a distance from 28 to 60 miles over very poor roads in severe winter weather upon arriving at the station to wait until a section foreman should return from his work at 4:00 in the evening or be required

to travel an additional distance of 23 miles to reach a station where an agent is in attendance?

In the case of *Thompson v. Nebraska State Railway Commission* (Nebraska) 4 N.W. 755, cited by petitioners on page 44 of their brief, the Nebraska Supreme Court, although reversing the State Railway Commission denying the right of the Chicago and Northwestern Railway Company to discontinue an agent at Nenzel, Nebraska, did set forth the criteria to be followed by the Railway Commission in determining whether an agency station was authorized. We believe that the criteria set forth by the court in that case when applied to the evidence adequately justifies the order in the instant case requiring an agent at the Black Rock station during the winter months. In quoting from the case of *New York Central Railroad Company v. Public Utilities Commission*, 123 Ohio State 560, 176 N.E. 219, the court stated:

“In determining the question whether a railroad company may change one of its stations from an agency to a non-agency or prepaid station, each case must be determined upon the peculiar facts attendant thereon. The volume of business done at each station, its proximity to other stations, the accessibility thereof, the cost of maintaining such agency station, the financial loss, if any, to the railroad company, due regard for the welfare of the public, and the cost of operating such service, and of probabilities of future development are all circumstances to be taken into consideration.”

The court in the *Thompson* Case, in reviewing the exhibits, indicated that the revenues assigned to the

Nenzel station for the year 1940 amounted to \$4600.09, whereas in the instant case the revenues assignable to Black Rock station amounted to over \$19,000.00 for the year 1949. The testimony further disclosed that Nenzel is on a paved highway which runs across the state, that railroad facilities are available at the towns of Cody and Cilgore, which stations already handled all Western Union messages and phoned them to the ranchers. There was no indication that it would be difficult for persons attempting to use the facilities of the railroad to do so if the agent was terminated at the station.

In the case of *In re: Union Pacific Railroad Company*, a corporation, applicant for leave to discontinue Agency at Montour, Idaho, 64, Ida. 529, 134 P. 2d 599, (referred to by petitioners on page 51 of their brief) the Supreme Court of Idaho stated:

“We doubt, however, whether the items of income from business done at a single country station, on a great transportation system like the Union Pacific Railroad Company, is entitled to a major consideration, for the reason that the system is constructed and the franchises are granted and acquired for service to the whole public; and the more prosperous and remunerative communities are bound to pay some revenue to equalize the burdens of service to the more remote and less prosperous communities through which the system operates. Application of Thompson, Neb., 6 N.W. 2d 607, 609; see, also, Southern Ry. Co. v. Pub. Service Comm., 195 S.C. 247, 10 S.E. 2d 769.”

Therefore, although the Supreme Court of Idaho reversed the State Public Utilities Commission in denying the application to vacate the station, the court nevertheless laid down a principal of law which when applied to the facts and circumstances in the instant case would not only justify but in our opinion would require the Public Service Commission of Utah to order the Railroad Company to maintain an agency station at Black Rock, at least during the winter season.

Petitioners did not refer the court to the later decision of the Supreme Court of Idaho in the case of *Application of the Union Pacific Railroad Company*, 65 Ida. 221, 142 P. 2d 575, where the Railroad Company attempted to close its station at Franklin, Idaho. In that case the Commission found that public convenience and necessity required the service of an agent at Franklin, and that the expenses of maintaining an agent was not an undue burden upon the other revenue. In reaching the conclusion that the Commission's decision should be affirmed, the court stated:

“Viewing the entire situation, considering the increase of business at Franklin, the age of the community, this being the first railroad built in Idaho, completed through Franklin in 1874, and the widespread influence and effect of the California Packing Company, even though it is only one shipper, by reason of the fact that it is a purchaser from many people in the community, and the dileterious effect which must necessarily follow the closing of the station, there being nothing more discouraging to a passer-by in a com-

munity than to see a boarded-up railroad station, *and in view of the fact that certain and necessarily rather wide digression is lodged in the Commission in the determination of questions of this kind*, we cannot say that the Record presents such a situation that we are justified in saying that there is not sufficient evidence to support and justify the conclusions reached by the Commission." (Italics added.)

Two Utah cases involving the closing of agency stations have been cited and quoted from extensively by Petitioners. As far as we have been able to ascertain these cases are the only ones decided by our Supreme Court on this subject. Commonly identified as the *St. Johns and Faust* cases, they are reported as *Los Angeles & Salt Lake R. Co. v. Public Utilities Commission*, 80 Utah 455, 15 P. 2d 358; and *Los Angeles & Salt Lake R. Co. v. Public Utilities Commission*, 81 Utah 286, 17 P. 2d 287. Both cases were decided at approximately the same time, the first cited one being known as the *St. Johns* Case. In that case the Railroad Company sought to close the agency station at St. Johns, Utah, relying primarily on the proposition presented by petitioners in the instant matter, that the revenue derived from the station did not justify its continuance. Upon the first hearing the petition to close the station was denied, whereupon the Railroad Company petitioned for a rehearing—offering to establish caretaker service and telephone service to prospective shippers. The Commission refused to rehear the matter and an appeal was taken from *both* the order denying the petition to close

the station and refusing to grant a rehearing. In an opinion which we feel thoroughly analyzed the problem before the Commission, the Supreme Court made several determinations which we believe sustains the position taken by the Public Service Commission in the instant case.

As has already been stated, the Court held that "if there was any substantial evidence to justify a finding that an agent was needed to give that sort of service, the court would have to affirm the decision of the commission. Each situation must stand on its own legs. It is impossible to lay down a rule which would fit each case."

In discussing the two factors which the court said were necessary to consider—the cost revenue factor, and the reasonable service factor—the court finally repudiated the cost revenue factor as being determinative. We quote:

"As to the cost revenue factor, therefore, it is not apparent from the evidence, as stated above, that the railroad was actually losing money in maintaining a day agency station at St. John, and, as stated above, even if it were we would not be prepared to say that that fact alone should have, as a matter of law, controlled the minds of the commission to the extent of making it inexorable upon them to grant the application. Even then the case would have to be decided upon all the facts and circumstances. If it should transpire that by subtracting from each dollar of accredited revenue at St. John Station that portion used for station expenses the remainder of each dollar

would be insufficient to bear its proportion of the railroad's operating expenses and taxes without being wholly or more than wholly consumed, the commission might still be justified in refusing the application, if such circumstances appeared as would require the continuance of the services in order to reasonably satisfy the requirements of subsection 2 of section 4783 and provided, of course, that there was substantial evidence to support that judgment."

In considering the factor of reasonable service the court specified several objections to the discontinuance of the agent "*in reference to this carload business*" (emphasis added), as follows:

"First, difficulty and inconvenience in obtaining information * * *; (2) the manner of preparing freight when carload or less than carload lots were shipped from a nonagency station to St. John or from St. John to a nonagency station; and (3) miscellaneous matters, such as telegraph services not pertaining to transportation, and such accommodations as friendly humans give other humans when dealing face to face."

After reviewing the evidence on behalf of both the railroad and the protestants in that case the court finally determined:

"At least, laying aside all that the shipper could expect by way of courtesy or friendly accommodation of an agent that they personally know 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."

And the court continued by determining that the original order of the Commission denying the railroad the right to close station could not be set aside on the evidence before it. The case was reversed so that the Commission might make a determination whether during some portion of the year the telephone service offered by the railroad would be sufficient. But the evidence in that case did not disclose, as it does here, how the use of a telephone or caretaker service would work out. Experience even during the summer months would indicate that such service would be wholly inadequate for the "winter season." The opinion in the *St. Johns Case* further discloses that the railroad proposed to "keep the station warm in winter for passengers." It appears that there was telephonic communication which could be used—other than for railroad business. On the other hand, it does not appear in that case that the problem of severe winter conditions, necessity for traveling long distances to reach the station, and the policy of the railroad to have the shippers make contacts with the station agent as much as six weeks in advance of prospective shipping dates, was raised or considered. When these factors are taken into consideration with the other facts and circumstances we feel that the Commission was well justified in classifying the "winter season"

as that period of time during which the station should remain open at Black Rock.

In the Faust case the Railroad attempted to discontinue its agency station at Faust, located on the main line of its railroad running through Tooele County, approximately 12.8 miles west of St. John. At the beginning of its opinion in that case the Court pointed out:

“No objections by livestock raisers, as was the case of the application or the discontinuance of St. John as an agency station, were made, although the evidence shows that there were in and outbound shipments of sheep to and from Faust, mostly range to range movement.”

The court then went on to say that because there were no objections made by the cattle and sheep raisers and further because there was no evidence with respect to their operations and how such operations would be effected by the removal of the agent at Faust an entirely different picture was presented from the one in the St. John station case. Although the question was raised whether the Commission could consider the testimony presented in the St. John station case in determining the issues in the Faust station case, the court stated, “The evidence adduced in the St. John station case in this regard cannot be considered as evidence adduced in this case.”

Because evidence of the inconvenience to cattle and sheep raisers was lacking, there being no testimony with respect to such operations, the court concluded:

“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. In fact, the only evidence of any inconvenience which could be suffered by taking away the agent at Faust would be to shippers who used the Dunbar station and they would only be inconvenienced, if at all, because they would not be able to continue the practice of having the agent at Faust sign the bills of lading before the cars were picked up, which practice was irregular and might be stopped by the railroad.”

In view of the Court's analysis of facts in the two cases just discussed, in which it was determined that where the evidence indicated that the closing of the agency station would result in inconvenience to shippers who were comprised of cattle and sheep operators and where the testimony further showed that there were reasons for maintaining an open agency station because of the location of that station with respect to other means of communication and access to the main highways, the Commission was justified in making a reasonable classification for requiring the station to remain open during certain parts of the year, we maintain in the instant case, where the Commission has made such a classification of the winter sheep grazing season as compared to the summer months, such classification should be affirmed.

Referring to the criteria set out in the case of *Thompson vs. Nebraska State Railway Commission*, supra, we submit that the evidence in this case in respect to each of such categories supports the findings and order of the Commission. For convenience we set forth the following points designated by the Nebraska Supreme Court in the Thompson case as being the determining factors in a case where an agency station is sought to be closed:

1. Volume of business done at the station;
2. Proximity to other stations;
3. The accessibility of the station;
4. Cost of maintenance;
5. Financial loss, if any, in operation of the station;
6. Due regard to the public welfare;
7. Cost of operating service;
8. Probabilities of future development.

As to the volume of business done at the Black Rock station we find that Exhibit 12 indicates the total revenues received from the Black Rock station during the year 1947 was \$22,397.34, for the year 1948, \$21,785.26 and for the year 1949, \$19,975.90. In addition to the revenue directly assigned to the Black Rock station from goods shipped in and out of such station there was also testimony as to the volume of business done at the non-agency sidings of Cruz, Bloom, Oasis and Pumice, the work for which was done at Black Rock. In our opinion, the revenue derived from these activities should also be attributable to the Black Rock station in determining the volume of business done. The fact

that there was testimony that the paper work for these non-agency sidings might be done at some other station does not necessarily require that the Commission to disregard the evidence of the volume of such shipping in determining the volume of business actually done at Black Rock, particularly where the shippers from two of these sidings protested the closing of the Black Rock station.

At the first hearing the Railroad Company failed at all to furnish any exhibits with respect to the volume of business done at these non-agency sidings. However, at the second hearing Exhibits 7 to 11 were introduced to indicate the number of cars and L C 1 shipments which were forwarded or received at the particular sidings involved. The exhibits do not show the two cars which Mr. Warren Alsop of the Cricket Lime and Dolomite Company testified were shipped from Cruz in the year 1949. (R. 541) In the year 1947 seventy-two cars of volcanic ash were forwarded from and one car of cement received at Pumice; in the year 1948 one hundred sixty-six cars were forwarded and one less than carload consignment was received; and in the year 1949 eighty-three cars were forwarded from Pumice. If the revenue from this operation would be credited to the Black Rock station it would be apparent that the volume of business done would justify an agent, not only during the winter months but throughout the entire year.

As far as proximity to other stations or accessibility of the Black Rock station is concerned, the evidence

is uncontroverted that it is located so far from the main highway or from other agency stations that it would not be only impracticable but sometimes impossible to make use of such other facilities for shipping purposes.

On the cost of maintenance of the station at Black Rock, Exhibit 15 breaks down the items of expense over the period of years. We do not believe that the expense shown in the exhibit for the years 1946, 1947 and 1948 would be at all determinative because in those years it was necessary for the Railroad Company to maintain 24-hour a day dispatcher service at the station before its central train control system was installed. Beginning, however, with the year 1949 expenses at the station for salary and other related expenses dropped appreciably so that for the entire year of 1949 the total allocated expense for operation of the station amounted to \$3841.00. Included in this expense was the amount paid for fuel which Mr. Nelson testified would probably be used not only at the station but at the section houses as well by those who worked in the section gang from out of Black Rock. Also, the item of expense for "miscellaneous" was estimated for each month as approximately \$8.34, being apparently the amount charged as the pro rata expense for this station in comparison to all other stations which the Railroad Company maintained. It did not, therefore, actually reflect the actual cost of other items used at the station. At the time of the second hearing it was disclosed that the agent then operating the Black Rock station was

receiving approximately \$238.00 per month, but that because of the necessity to work over time (January and March of 1951), he sometimes received as much as \$290.00 per month (Exhibit 15). We submit that if the volume of business was sufficient to require the station agent to work over time, it should be sufficient to require the agent to be on duty during the business hours of each day.

Under the Commission's order, the station will remain open six months out of each year so that the total operating costs for such period of time, assuming the station agent to receive his minimum salary of approximately \$240.00 per month, would amount to a total of approximately \$1600.00 for the six months period, including miscellaneous costs and costs for fuel. These expenses compared with the total revenues assignable to the Black Rock station during the same period would certainly justify the Commission's order requiring the station to remain open during the period indicated.

Certainly such operations would not be a financial loss to the Railroad Company, although as indicated by the Supreme Court in the St. John's case whether a financial loss would in fact result is not determinative of the matter. In the case of *Southern Pacific Railway Company vs. Public Service Commission*, 195 S.C. 247, 10 S.E. 2d. 769, the court held that the Railroad Company may be required to continue an agency station even though the revenues are less than the cost of the operation where it is shown that the entire operation of

the Railroad Company is a profitable one. See, also, *Atlantic Coastline Railroad Company vs. N. C. Corp. Comm.*, 206 U.S. 1, 27 Sup. Ct. 585, 81 L. Ed. 933.

When we come to consider the public welfare in connection with the operation of the station, we find that the evidence clearly supports the proposition that the welfare of those persons who are operating in the Black Rock area is dependent to a great extent on the station remaining open during the winter months. Not only does the public welfare require the station to be operated at the present time, but the evidence with respect to the probabilities of future developments in the territory also justifies the Commission in determining that the station agent should be on duty at least six months out of each year. As stated in the case of *Thompson vs. Nebraska State Railway Commission*, 8 N.W. 2d. 552, *supra*, the Court must consider the agent's usefulness to the public as well as to the Company in determining whether an open-agency station should be maintained.

CONCLUSION

Respondents respectfully request the court to review the record carefully in this case and from the evidence to affirm the order of the Commission requiring the Railroad Company to maintain a station at Black Rock during the "winter sheep ranging season." It would appear to us that the Railroad Company would of its own initiative desire to keep the station open during

the winter months in order to secure the good will of the livestock operators and to promote and increase their railroad business out of this shipping point. If an agent were maintained the year round at the Black Rock station public relations might be improved so as in the future to develop more business to the Railroad rather than to lose business by attempting to restrict its service and discourage people from patronizing it.

Respectfully submitted,

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