

1951

Oregon Short Line Railroad Co. v. The Denver and Rio Grande Western Railroad Co. : Brief for Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

OREGON SHORT LINE RAILROAD
COMPANY, a corporation,
Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,
Defendant and Appellant.

Case No.
7701

BRIEF FOR APPELLANT

FILED—

JUL 12 1951

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BRIEF FOR APPELLANT

STATEMENT OF FACTS

Oregon Short Line Railroad Company brought this action to condemn a right of way over the track and right of way of The Denver and Rio Grande Western Railroad Company at the point fixed by order of Public Service Commission of Utah, which order was upheld by this Court

in *The Denver and Rio Grande Western Railroad Company v. Public Service Commission of Utah and Union Pacific Railroad Company*, 230 P. (2) 557 (not officially reported).

Oregon Short Line Railroad Company alleged in paragraph 1 of its complaint that it was engaged as a common carrier for hire in the public transportation of persons and commodities of all kinds within the State of Utah and all other States (R. 1). This was denied (R. 8). Also at pretrial it insisted that it was at that time a common carrier (R. 22).

The undisputed evidence shows that Oregon Short Line Railroad Company is a Utah corporation organized before 1900 as a railroad corporation but that it has not operated as a common carrier in any particular since January 1, 1936 (R. 85, 90, 96, 97, Ex. C). On that date it leased its entire property, both real and personal, to Union Pacific Railroad Company for one hundred years, with provisions for extensions of such lease for an indefinite period thereafter (R. 85, Ex. C). On that day also Union Pacific Railroad Company assumed all Oregon Short Line Railroad Company rates (R. 129, Ex. L). Since that date Oregon Short Line Railroad Company has had no tariffs or schedules establishing any rates for the carriage of passengers or freight in interstate or intrastate commerce filed with Interstate Commerce Commission or Public Service Commission of Utah (R. 129) and therefore could not and cannot haul passengers or freight as a common carrier without violating the provisions of Sec. 6, paragraphs 1 and 7, of the Transportation Act of 1920, 49 U. S. C. A., pp. 236-238,

and Sec. 76-3-2, U. C. A. 1943, and being subjected to criminal penalties under those laws (R. 128).

Since January 1, 1936, Oregon Short Line Railroad Company has not carried any freight or passengers or engaged in any activities whatever as a common carrier (R. 85, 90, 96, 97, Ex. C). It has no superintendent, trainmasters, roadmasters, section foremen, engineers, firemen, conductors, brakemen, sectionmen, or any other officers, agents or employees (R. 90, 96, 97), excepting only F. C. Paulsen (General Manager of Union Pacific Railroad Company at Salt Lake City), who is also General Manager of Oregon Short Line Railroad Company but whose sole function as such has been and is the signing of leases for Oregon Short Line Railroad Company (R. 87, 88).

In this state of the record the court should have found, concluded and adjudged as set forth in the Statement of Points upon which appellant intends to rely for reversal of the judgment.

1. The District Court should have found in accordance with the uncontradicted evidence that plaintiff and respondent is not and has not been since January 1, 1936, engaged as a common carrier for hire in any transportation of either persons or commodities in Utah or elsewhere.

2. The District Court should have found in accordance with the uncontradicted evidence that plaintiff and respondent is not engaged in rendering any public service at this time and has not been since January 1, 1936, and that there is no reasonable prospect that it will be so engaged at any time in the future.

3. The District Court should have concluded that plaintiff and respondent is not entitled to condemn a crossing over the property of defendant and appellant because plaintiff and respondent is not engaged in the rendition of any public service.

4. The judgment is against law because plaintiff and respondent is not engaged in the rendition of any public service and therefore has no right of condemnation.

These four points involve a single question of law.
STATEMENT OF POINT UPON WHICH APPELLANT RELIES FOR REVERSAL OF JUDGMENT.

A CORPORATION DOES NOT HAVE THE POWER OF EMINENT DOMAIN AS A RAILROAD CORPORATION UNDER UTAH LAW UNLESS IT IS ENGAGED AS A COMMON CARRIER AND THE CONTEMPLATED USE IS PUBLIC.

ARGUMENT

1. A CORPORATION DOES NOT BECOME A COMMON CARRIER BY LEGISLATIVE FIAT, PUBLIC SERVICE COMMISSION ORDER OR BY PROVISIONS OF ITS CHARTER. IT MUST HAVE THE ATTRIBUTES WHICH, IN LAW, ARE ESSENTIAL FOR THE STATUS OF COMMON CARRIER.

2. UNDER THE UTAH STATUTES AND CASES THE TAKING MUST BE FOR A PUBLIC PURPOSE.

3. A RAILROAD COMPANY CANNOT CONDEMN LAND FOR USES NOT CONNECTED WITH THE CONDUCT OF ITS BUSINESS AS A COMMON CARRIER.

The Utah statutes in regard to eminent domain provide as follows:

“77-0-5. Every railroad corporation organized under the laws of this state * * * shall have the following powers:

* * * * *

““(3) * * * to condemn in the manner provided by law a right of way * * *.’

“‘104-61-1. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following *public uses*:

* * * * *

““(4) * * * railroads and street railways for public transportation.’”

The Constitutional justification for delegating the power of Eminent Domain to Railroads is that they are engaged in the public service as common carriers and therefore the property taken would be used for the public.

In re Niagara Falls and Whirlpool Ry. Co., 108
N. Y. 375, 15 N. E. 429;

Elliott on Railroads, 2nd Ed., Sec. 954.

But if the Railroad Company is not a common carrier or if the particular use for which the property is taken

is not a public use, that railroad company cannot exercise the power of eminent domain. And a railroad company does not become a common carrier merely because its articles of incorporation so state.

1. A CORPORATION DOES NOT BECOME A COMMON CARRIER BY LEGISLATIVE FIAT, PUBLIC SERVICE COMMISSION ORDER OR BY PROVISIONS OF ITS CHARTER. IT MUST HAVE THE ATTRIBUTES WHICH, IN LAW, ARE ESSENTIAL FOR THE STATUS OF COMMON CARRIER.

McCarthy v. Public Service Commission, 111 Utah 481, 184 P. (2d) 220, (1947). The Public Service Commission by its order purported to make common carriers of truckers whose activities were not those of a common carrier. It was held that the order was illegal. On page 493 the court said:

“The defendants are rendering a private service to their customers. They are not engaged in a public service inviting an indefinite public generally to hire them; nor does the public have a legal right to the use of their facilities. There being no evidence that they have held themselves out to such a public, the action of the commission in classifying defendants as common carriers was error in law and without proper foundation.”

State v. Nelson, 65 Utah 457, 238 P. 237.

This case has become a leading case having been cited by many courts of the country. Nelson had a contract to carry passengers and baggage between Salt Lake City and

Utah Out-Door Association at Brighton. The State attempted to enjoin his operation because he had no certificate of convenience and necessity. The court held that he was not operating as a common carrier. On pages 461-462 the court said:

“* * * They all recognize that a common or public carrier is one who, by virtue of his business or calling or holding out, undertakes for compensation to transport persons or property, or both, from one place to another for all such as may choose to employ him. *Running through the cases is a recognition of the dominant element of public service, serving and carrying all persons indifferently who apply for passage or for shipment of goods or freight.* To constitute a common carrier such element is also requisite under the Utilities Act. It defines a ‘common carrier,’ as the term is used therein, to include among others every automobile corporation engaged in the transportation of persons or property for public service over regular routes between points within the state and an automobile corporation to include every corporation or person engaged in or transacting business of transporting passengers or freight, merchandise, or other property, for compensation by means of automobiles or automobile stages on public streets, roads, or highways along established routes within the state. *Public service, as distinguished from mere private service, is thus a necessary factor to constitute a common carrier.* * * * In other words, *the state may not, by mere legislative fiat or edict or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier.* * * * So, if the business or concern is not public service, where the public has not a legal right to the use of it, *where the business*

or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission."

The *Nelson* case has received approval in the recent case of *Garkane Power Co. v. Public Service Commission*, 98 Utah 466, 100 P. (2d) 571. Referring to the *Nelson* case the court on page 572 said:

"The distinction there made is valid, and is conclusive of this case. Garkane does not propose to hold itself out to serve all who apply and live near its lines; its very charter which gives it existence restricts its service to a certain group (members). *It does not propose to serve 'the public generally,' but only to serve its members.*"

The *Nelson* case has been cited with approval by the Supreme Court of the United States in *Frost v. Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605, such citation appearing on page 607.

The Court of Appeals of New York has held that a railroad corporation must be a common carrier and that it does not become such merely by so stating in its articles of incorporation. In *In re Niagara Falls and Whirlpool Ry. Co.*, 108 N. Y. 375, 15 N. E. 429, the New York statute authorized condemnation for a right of way by this railway which proposed to build along the shore of the Niagara River to be used for sight-seers during four months of the year. The court said:

"* * * The right of the state to authorize the condemnation of private property for the construction of railroads, and to delegate the power to

take proceedings for that purpose to railroad corporations, has become an accepted doctrine of constitutional law, and is not open to debate. *But the power is dormant until the legislature authorizes its exercise; and the particular corporation which claims the right to exercise the power must be able to show a legislative warrant, and, that being shown, it must be able, further, to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes; or that the business which it is organized to carry on is public; and that the taking of private property for the purposes of the corporation is a taking for public use.* The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government; while, on the other hand, the question whether the uses are, in fact, public, so as to justify the taking *in invitum* of private property therefor, is a judicial question to be determined by the courts. *Beekman v. Railroad Co.*, 3 Paige, 45; *In re Cemetery Ass'n*, 66 N. Y. 569; *In re Ferry*, 98 N. Y. 139-153.

“If the question whether the purposes and objects for which the petitioner, the Niagara Falls & Whirlpool Railway Company, is organized, are public, so as to justify the exercise in its behalf of the right of eminent domain, is controlled and *is to be tested exclusively by the description of those objects and purposes as they are set forth in its articles of association, there could be no hesitation in concluding that the company is entitled to take the proceed-*

ings now in question, unless the particular property now sought to be taken, is, on special grounds, exempt from condemnation. Looking at the articles of association alone, it appears that the company is a railroad corporation organized under the general railroad act for 'public use in transporting persons and property' by a railroad to be constructed between certain *termini*. The papers, on their face, show that the corporation has undertaken an ordinary railroad enterprise within the purview of the act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But, when we look beyond the formal documents, and the actual business proposed to be conducted is considered, we find that the proposed railroad has no proper *termini*; that it is not a highway in any just or proper sense; that it cannot, by reason of necessary limitations, perform one part of the duty it has undertaken, viz., the transportation of freight; that, at most, it can be operated but a portion of the year; and that the sole object of its construction is to enable the corporation, for a compensation to be received, to provide for the portion of the public who may visit Niagara Falls better opportunities for seeing the natural attractions of the locality. We feel constrained to say that, in our judgment, this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise. The right of the company being challenged on this ground, the court is compelled to consider it, and it is manifest that *the inquiry is not precluded because the petitioner has organized itself under the general railroad act, and has assumed in its articles of association the character of an ordinary railroad corporation.* * * * It is especially necessary that the question of what constitutes a public use should not be dealt with in a critical or illiberal spirit, or made to depend upon a close con-

struction adverse to the public; but, having these considerations in mind, we are nevertheless constrained to conclude that the enterprise in question is essentially private and not public, and that private property cannot be taken against the will of the owners for the construction of the road of the petitioner."

Elliott on Railroads, 3rd Edition, Sec. 1204, states the rule in accordance with the New York case. The author states:

"Accordingly it has been held that the corporation which claims the right to exercise the power of eminent domain must not only show a legislative warrant, but it must be able, further, to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes; and that the taking of private property for the purpose to which the corporation proposes to devote, is a taking for a public purpose."

It is to be observed that the foregoing language is taken literally from the *Niagara* case.

2. UNDER THE UTAH STATUTES AND CASES THE TAKING MUST BE FOR A PUBLIC PURPOSE.

The Utah statute on eminent domain, Sec. 104-61-1, authorizes the right of eminent domain "in behalf of the following *public uses*." In subparagraph (4) appear the words "and railroads—for public transportation." In Sec. 77-0-5, subparagraph (3), the railroad corporation is given

the right “* * * to condemn in the manner provided by law”—this, of course, refers to the general provisions of the statute relating to eminent domain.

In *Stockdale v. Rio Grande Western Ry. Co.*, 28 Utah 201, 77 P. 849, the Supreme Court of Utah made the following statement on page 851:

“* * * The test is, will any and all persons and business institutions who may have occasion to do so be permitted to use it? That is, will the track be open to public use generally? If so, then it is a public utility. * * *”

In the *Stockdale* case the Salt Lake Council granted a franchise permitting the Rio Grande Western to build a spur from its main line track across the city street and sidewalk and on to the property of a brewing company which according to plaintiff would cause vibration and in general make his property less valuable.

Cereghino v. Oregon Short Line R. Co., 26 Utah 467, 73 P. 634. The Oregon Short Line proposed to build a spur across city property to serve the Con. Wagon & Machine Company. It was for purely private purposes. On page 637 the court said:

“* * * The public at large have an interest in the construction and successful operation of railroads designed for the transportation of passengers and freight, and because of this interest the defendant railroad company, in common with all others, is given the right to invoke the law of eminent domain, and subject private property to its necessary public uses; *but it has no right, either under the law of eminent domain or a pretended franchise from a*

municipality, to directly or indirectly take private property for the purpose of building a line of railway or a switch track designed and intended to be used exclusively for the convenience and accommodation of a private business. And as stated by counsel for the appellant in their brief, 'Neither can it subject the streets and sidewalks of a municipality, dedicated to public uses of the people, to additional servitudes or burdens in aid of private undertakings and enterprises.' * * *

The above is a good statement of the law as is shown in 18 American Jurisprudence, Section 62 of Eminent Domain, page 691, where the text reads:

“* * * If a short spur is intended to increase the general terminal facilities of the railroad, the fact that it is also to be used for the benefit of a manufacturing establishment does not prevent its being for a public use. On the other hand, a spur track leading from the main line of the railroad to the establishment or place of business of an enterprise that is wholly private for the exclusive use of such enterprise is clearly not a public use, notwithstanding the railroad company has the right to use the spur for general traffic but only to such extent as will not interfere with the business of the manufacturer. When, however, the branch or spur is open to public use in the same manner as the rest of the railroad, the fact that when constructed it will lead to the works of a single establishment and will probably be used almost wholly by that establishment is no bar to the acquisition of the necessary land by eminent domain. * * *

Nash v. Clark, 27 Utah 158, 75 P. 371.

The Supreme Court of Utah held that a statute giving a property owner the right to condemn water for the irrigation of a farm is constitutional because it is a public use.

The Court said:

“* * * The question before us not only involves the right of the farmer to invoke the law of eminent domain, when necessary, to enable him to convey water to his farm, but that of the miner, manufacturer, and persons engaged in other industrial pursuits to build canals, flumes, and lay pipe lines over adjoining and intervening lands, when necessary for the purpose of conveying water necessary for the successful prosecution of their respective enterprises. The future growth, prosperity, up-building, and industrial expansion of the state not only depend upon the storing and holding back the high and surplus water so they can be used in times of scarcity, but also in a careful and judicious husbandry of the supply now available; and it is entirely within the province of the Legislature to enact such laws respecting the appropriation and distribution thereof as will tend to prevent unnecessary loss and waste, so long as vested rights are upheld and maintained. * * * In view of the physical and climatic conditions in this state, and in the light of the history of the arid West, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the state would be giving to the term ‘public use’ altogether too strict and narrow an interpretation, and one we do not think is contemplated by the Constitution.”

In *Highland Boy Gold Mining Company v. Strickley*, 28 Utah 215, 78 P. 296, the Supreme Court of Utah held that a statute granting the right of eminent domain for

the construction of aerial tramways is not unconstitutional because it is a public use. On page 297 the court said:

“The reason for the rule, when applied to the law of eminent domain, is very apparent, as there are some uses for which private property may be condemned, the public character of which is so plain that there is no room for argument; and, on the other hand, there are innumerable uses for which property may be and is used, the private character of which is equally clear and plain. As stated by counsel for respondent, in their brief: ‘Between these two extremes, however, courts can approach a dividing line which is so shadowy that it leaves room for argument as to whether or not a statute is constitutional. A short distance on either side of the line the decision is plain, but on the line, and for a short distance on each side, it is doubtful.’ And, as hereinbefore stated, whenever the court is in doubt, it holds the statute constitutional. Therefore, unless it clearly appears that the use made of the right of way in question is private and in no sense public, the validity of the statute must be upheld. Some general rules by which the question as to what constitutes a public use may be determined were declared by this court in the case of *Nash v. Clark*, 27 Utah 158, 75 Pac. 371. In that case it was in effect held that when the taking is for a use that will promote the public interest, and which tends to develop the great natural resources of the state, such taking is for a public use.”

And on page 298:

“* * * The mining industry in this state, and in others similarly situated, not only produces a home market for the products of the farm, and furnishes thousands of men with steady employment at liberal and remunerative wages, but also produces

wealth which has enabled other industries to be created and to flourish, which, without the stimulus thus furnished, would languish. * * *

For certain purposes such as mining and irrigation the legislature may grant the right of eminent domain without the public retaining any right to use the facilities to be built. That is on account of a high public policy to develop resources in the state fundamentally necessary to its welfare. It does not follow at all that a railroad is given the right to condemn property to be used solely by the railroad or by certain private persons.

Thus in Oregon an easement for a skid road to transport lumber is held not a public use.

Apex Transportation Company v. Garbade, 32 Ore. 582, 52 P. 573. On page 574 the court said:

“* * * Under these circumstances, we think it is manifest that the use to which the plaintiff proposes to put the land sought to be taken is private, and not public; and *no declaration of the objects and purposes of the company in its charter or of the legislature in the act under which it is proceeding, can give it that character, so as to entitle it to exercise the high prerogative of sovereignty invoked in aid of its enterprise.* The necessity and expediency of taking private property for public use is a legislative question; but whether the proposed use is in fact public is always a judicial question, to be determined by the courts. * * *

So also in Washington a logging road was held not a public use.

Healy Lumber Company v. Morris, 33 Wash. 490, 74 P. 681.

In both of the Oregon and Washington cases, statutes expressly provided that lumbering was a public use and expressly gave the right of eminent domain to persons and corporations engaged in that industry. California has also so held in regard to public use.

Amador Queen Mining Company v. Dewitt, 73 Cal. 482, 15 P. 74;

Hercules Water Company v. Fernandez, 5 Cal. App. 726, 91 P. 401;

Sutter v. Nicols, 93 P. 872, 152 Cal. 688;

Stratford Irrigation District v. Empire Water Company, 111 P. (2d) 957, 44 Cal. App. 61.

3. A RAILROAD COMPANY CANNOT CONDEMN LAND FOR USES NOT CONNECTED WITH THE CONDUCT OF ITS BUSINESS AS A COMMON CARRIER.

Elliott on Railroads, 3rd Edition, Sec. 1205, contains the following statement of the law:

“* * * a railroad company cannot condemn lands for uses not connected with the conduct of *its business as a common carrier* such as the erection of dwellings for its employees, or the erection of a manufacturing establishment to supply the road with rolling stock and other necessary equipment * * *.”

Cereghino v. Oregon Short Line R. Co., 26 Utah 467, 73 P. 634;

Eldridge v. Smith, 34 Vt. 484. At page 494, the court said:

“Although railroad companies must have engines and cars, iron, lumber, wood, and many other

things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids to their successful development. The companies must have shops for the repairs of cars and engines, as they are so often needed, and as they cannot well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity, so that the company could properly condemn land on which to erect one.

* * * * *

“We are of the opinion that the erection of dwelling houses to rent to their employees, is not so for the use and accommodations of the railroad, as to authorize the seizure of land upon which to erect them, under any circumstances.”

Rensselaer and Saratoga R. Co. v. Davis, 43 N. Y. 137.

On page 146, the court said:

“The construction of dwellings for employees or officers, and the construction of slips for the accommodation of vessels bringing freight to, or taking it from the railroad company, are not, we think, upon the proofs before us, necessary corporate purposes within the statute.

* * * * *

“It is difficult, as a matter of law, to define by general statement what purposes are corporate pur-

poses, or what are the necessary purposes for which lands may, under this act, be taken; and probably the subject is incapable of exact limitation.

“It may however be safely asserted that the acquisition of lands for the purpose of speculation or sale, or to prevent interference by competing lines, or methods of transportation, or in aid of collateral enterprises remotely connected with the running or operating of the road, although they may increase its revenue and business, are not such purposes as authorize the condemnation of private property.”

Great Falls Power Co. v. G. F. & O. D. R. Co.,
104 Va. 416, 52 S. E. 172.

The court refused eminent domain of property for a park at a terminal. On page 173 the court said:

“It clearly appears that this land is sought by appellee as a terminal point on account of the rare scenic features it affords, and because of the attractions it would hold out to pleasure seekers from the city of Washington. In other respects the location possesses none of the advantages ordinarily accruing to a railroad, and but for the beauty of the scene would most likely have been avoided as offering no inducements to such an enterprise. It is further clear from the record that the quantity of land sought to be condemned is far beyond any necessity for mere terminal purposes of an electric railway extending a distance of 14 miles from the city of Washington. It is manifest from the evidence that the location was selected with no reference to the public use of the road in the matter of freight or the accommodation of the traveling public along the route, but that the real purpose of the condemnation is to establish a park overlooking the Great Falls of the Potomac, for the comfort and pleasure of sight-seers and cur-

iosity seekers, and to thereby add to the revenues of appellee by making the point an attractive place of resort."

In re Niagara Falls and Whirlpool Ry. Co., 108
N. Y. 375, 15 N. E. 429.

Respectfully submitted,

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