

1951

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

Utah Supreme Court

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Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Appellant;

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## Recommended Citation

Reply Brief, *Oregon Short Line Railroad Co. v. Denver and Rio Grande Western Railroad Co.*, No. 7701 (Utah Supreme Court, 1951).  
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In the  
**Supreme Court of the State of Utah**

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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

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**REPLY BRIEF OF APPELLANT**

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**FILED**

SEP 4 1981

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Clerk, Supreme Court, Utah

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REPLY BRIEF OF APPELLANT

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COMMENTS ON RESPONDENT'S STATEMENT  
OF FACTS

Respondent makes sweeping charges that appellant has misstated the record, and in doing so itself glaringly misstates the record. On page 3 of the opening brief, appellant stated that F. C. Paulsen's sole function as general manager

was the signing of leases for the Oregon Short Line Railroad Company. On page 5 of its brief respondent makes the following accusations and statements:

“\* \* \* Counsel does not state the facts or the record properly. The evidence concerning Mr. Paulsen is that he is General Manager of the Union Pacific, as well as the Oregon Short Line, properties within the State of Utah and the designation as general manager in and of itself *would indicate that he would have such rights and duties as normally would be exercised by any general manager.* Counsel for appellant attempted to infer by his questionings of the witnesses that as general manager he had nothing to do, but the only testimony with respect thereto was that of Mr. Bachman, who stated with respect to his duties, ‘*Primarily it is to execute leases and contracts on behalf of the corporate property, the corporate company, the Short Line*’ (R. 87). *This testimony, in spite of what counsel made an attempt to infer from it, does not say that that was his ‘sole function’.*”

The record shows the respondent’s charge to be groundless and his statements to be entirely incorrect. On cross-examination Lester C. Bachman, assistant to the President of the Union Pacific Railroad Company, testified as follows (R. 87-89):

“Q. What duties does he have as General Manager of the Oregon Short Line?

“A. Primarily it is to execute leases and contracts on behalf of the corporate property, the corporate company, the Short Line.

"Q. You say, 'primarily,' does he have any other duties?

"A. Those are the ones with which I am familiar.

"Q. As Assistant to the President the only duties that you know that Mr. Paulsen has as General Manager of the Oregon Short Line is to execute leases—and what else?

"A. Contracts.

"Q. Contracts?

"A. Yes.

"Q. What kind of contracts?

"A. May I say leases.

"Q. You strike out contracts?

"A. Strike the contracts. There are some service contracts that he can sign.

"Q. Well, tell us what they are?

"A. Contracts with draymen.

"Q. With draymen?

"A. For pickup and delivery service.

"Q. What draymen?

"A. Operators of trucks that handle our pickup and delivery services.

"Q. What do you mean 'our'?

"A. That is for the railroad company.

"Q. Which railroad company?

"A. Union Pacific.

"Q. Oh! Well, I am asking you about the Oregon Short Line.

"A. Beg your pardon. You have me a little confused.

"Q. You have me a little confused. Let us clear the record about these truckers and deliverymen. You don't mean that the Oregon Short Line has any contracts with truckmen to haul and deliver anything? They don't deliver any freight, do they?

"A. No.

"Q. Well, what leases does Mr. Paulsen sign in behalf of the Oregon Short Line?

"A. Leases to industries of sites on our Oregon Short Line property."

Counsel's statements on page 5 "that the rights and duties normally attributable to the office of general manager would be exercised by Paulsen as General Manager of the Oregon Short Line," and that Paulsen's duties were primarily to execute leases and the assertion that this was not his sole function are contrary to the undisputed evidence in the case.

Counsel asserts that there are other officers and employees available for operation as a common carrier in Utah. What does the record show? Bachman, testified as follows:

(R. 89, 90.)

"Q. What employees, other than Mr. Paulsen, does the Oregon Short Line Railroad Company have in the State of Utah.

\* \* \* \* \*

(R. 90.)

"A. I know of none.

"Q. You know of none? Well, might there be any, do you suppose?

"A. There could be.



"Q. But you don't know of them?

"A. I don't know of them.

\* \* \* \* \*

(R. 96.)

"A. I know of no Officer that has ever been appointed to act in a corporate capacity for the Oregon Short Line in Utah except Mr. Paulsen.

\* \* \* \* \*

(R. 96.)

"Q. Does the Oregon Short Line have any trainmasters?

"A. No.

"Q. Superintendents? Does it?

"A. No.

"Q. In Utah? And all of this is in Utah. Does it have any agents?

\* \* \* \* \*

(R. 96, 97.)

"Q. Are there any agents in the State of Utah for the Oregon Short Line Railroad?

"A. Statutory agents?

"Q. Any kind of agents?

"A. Well, to the extent that we have Mr. Paulsen as an agent of the corporation.

"Q. Do you know of any other?

"A. I know of no others.

"Q. Any locomotive engineers?

"A. I know of no locomotive engineers.

"Q. Or firemen?

"A. Or fireman.

“Q. Or brakemen?

“A. Or brakemen.

“Q. Or conductors?

“A. No.”

D. F. Wengert, Superintendent of the Union Pacific Railroad Company lines within the State of Utah, testified as follows:

(R. 166.)

“Q. And what is your employment?

“A. General Superintendent, South Central District.

“Q. For what company or companies?

“A. Union Pacific.

\* \* \* \* \*

(R. 167.)

“THE COURT: I had one question, Mr. Wengert. Is it of the Union Pacific or of these companies that you are General Superintendent?

“A. I am General Superintendent of the Union Pacific for which I cover the properties of the OSL and the LA&SL from McCammon, Idaho to Los Angeles, California.”

\* \* \* \* \*

(R. 178.)

“Q. In your opening testimony, Mr. Wengert, you testified that you were employed by the Union Pacific Railroad?

“A. Right.

“Q. And not by the Oregon Short Line Railroad?

“A. That’s right.

“Q. And when you testified that you operated for the Union Pacific over the properties of the Oregon Short Line and the Los Angeles and Salt Lake did you mean anything more than train operations?

“A. That is my jurisdiction, is train operation.

“Q. Train operation?

“A. Yes sir.

“Q. You didn’t mean that you operate the properties of the Oregon Short Line in the sense that you leased them and collect rents or anything like that?

“A. No sir.”

Again on page 6 respondent challenges the statement by appellant to the effect that the only employee of the Oregon Short Line within the State of Utah is F. C. Paulsen, and emphasizes that Arthur E. Stoddard is President, Ambrose J. Seitz Vice President and E. G. Smith Secretary. He might have added that George S. Eccles of Ogden, Utah, is a Director. Stoddard lives in Omaha, Nebraska; Seitz lives in Omaha, Nebraska; E. G. Smith lives in New York City (R. 101). As is shown under II this is hardly appropriate personnel to operate trains and maintain trackage.

Again on page 6 counsel charges appellant with attempting to confuse the issue of the case by asserting that the Oregon Short Line has not operated as a common carrier in any particular since January 1, 1936. The evidence shows without conflict that appellant’s statement is entirely accurate.

The very trackage in question here was built and paid for by the Union Pacific, not the Oregon Short Line. The

witness Gini, a Civil Engineer in the office of the Division Engineer of Union Pacific, testified as follows:

(R. 151, 152).

“Q. Now Mr. Gini, do you know who built the track down to where it is now?

“A. Well, the grading has been done by the Morrison-Knudsen contractors and the trackage was constructed by our own forces.

“MR. VAN COTT: What does he mean by his ‘own forces’?

“Q. First, I will ask—whose jurisdiction are the section men under in jobs of this nature?

“A. The Division Engineer.

“Q. Now what do you mean by ‘our own forces’ in constructing the track?

“A. Well, forces has been employed by the Union Pacific to construct the tracks.

“Q. And by that do you mean the section men?

“A. Section extra gang, which is a section foreman usually in charge of an extra gang.

\* \* \* \* \*

(R. 158, 159).

“Q. Now you say that the fill for this industry lead was constructed by Morrison-Knudsen?

“A. Yes.

“Q. They are contractors, aren’t they?

“A. Yes sir.

“Q. Did they enter into a contract with the Union Pacific for it?

“A. Yes sir.

“Q. And the Union Pacific paid for it?

“A. Yes sir.”

Exhibit “R” is the check in payment to the contractor who built the grade for this track. It is a check of the Union Pacific Railroad Company.

Appellant on page 2 of its opening brief made the statement that the lease from the Short Line to Union Pacific is for one hundred years. Mr. Miner at pretrial said it was (R. 19). He should have known. The lease is from year to year. However, reference to *Union Pacific Unification*, 189 I. C. C. 359, will disclose that Union Pacific not only has precisely the same officers and directors as the Short Line, but also that it owns one hundred per cent of the capital stock of the Short Line. The Short Line, on page 3 of its brief, asserts that the Short Line could terminate the lease on three months’ notice. Nevertheless it could not resume operation of the railroad at any time by giving notice as required by the lease. It would have to file an application with the I. C. C. permitting it to do so, and the I. C. C. would have to find that it was in the public interest to do so, exactly the opposite of what it held in 189 I. C. C. 359.

# I.

IN ORDER FOR A RAILROAD CORPORATION  
TO HAVE THE RIGHT OF EMINENT DOMAIN  
UNDER THE UTAH STATUTE IT MUST BE A  
COMMON CARRIER.

Appellant asserted in the opening brief P. 5 that the true meaning of Paragraph (4) of Section 104-61-1, U. C.

A. 1943, insofar as it relates to condemnation by railroads is “\* \* \* railroads \* \* \* for public transportation.” This construction is conceded by respondent. On page 23 respondent states: “A public use for which eminent domain may be exercised under that statute as specified is ‘\* \* \* railroads \* \* \* for public transportation.’”

As asserted by appellant and conceded by respondent, therefore, power of eminent domain is given to “railroads for public transportation.” “Public transportation” can mean nothing other than carriage as a common carrier.

But respondent contends that the statute means that a corporation which is not a common carrier can nevertheless exercise the power of eminent domain if, after it acquires the property, it intends to lease it to another corporation that is a common carrier. It is submitted that this is a very strained construction, not justified by anything in the language of the statute and contrary to the philosophy of the law justifying constitutionally the delegation of the power of eminent domain, concededly one of the high attributes of sovereignty, only if the condemnor is engaged in the public service. It is not enough that the condemnor proposes to be a landlord and lease the property to a common carrier.

The Utah Constitution clearly contemplates that railroad companies are, within the meaning of the law, common carriers of passengers and freight. On page 13 respondent quotes only so much of Section 12, Article XII as serves his purpose. The section in its entirety reads:

“All railroad and other transportation companies are declared to be common carriers, and subject to legislative control; and such companies shall

receive and transport each other's passengers and freight, without discrimination or unnecessary delay."

The reference to railroad companies in the last clause clearly contemplates that they shall receive and transport passengers and freight. It is under this section that the Supreme Court of Utah held in *Public Utilities Commission v. Nelson*, 65 Utah 457, 238 P. 237, that the state may not by mere legislative fiat convert a private business into a public utility. So in the case at bar. Even if the legislature had by legislative fiat attempted to designate a corporation as a common carrier although it is not, has not and cannot operate as such, it would be unconstitutional.

Respondent relies upon and quotes extensively from Elliott on Railroads. That author justifies the delegation of this attribute of sovereignty upon the ground that a railroad corporation is a public utility. Elliott on Railroads, Second Edition, Volume 2, Section 954, reads as follows:

"Since railroads are regarded as of public utility, the delegation to a railroad corporation of the power to take, by proceedings in invitum, the necessary lands upon which to build its road, is upheld by all the courts."

None of the cases cited by respondent hold that the power of eminent domain may be exercised by a corporation which is not a common carrier.

In *Whitman v. Northern Central Railway Company*, cited by respondent on page 13 of its brief, the only question was whether the Northern Central Railway Company could



issue capital stock to pay for improvement and maintenance of its property. The question was concededly controlled by the meaning of the Transportation Act of 1920 which defined a common carrier by railroad to mean “—any corporation organized for the purpose of engaging in transportation by railroad subject to this act.” Obviously the Northern Central Railway Company was “organized for the purpose of engaging in transportation by railroad” and according to the Maryland court was still so engaged. On page 115 the Maryland court stated:

“\* \* \* But we think that contention involves too narrow a construction of the word ‘carrier’; for while the lessee does perform the actual work of transportation over the leased system of railroads, *the lessor still has important duties and functions to perform in connection with that transportation in which the public has a vital and immediate interest and which are necessarily predicated upon and assume its continued status as a carrier.* \* \* \* It was originally chartered as a carrier, it was organized as a carrier, until the lease referred to, it operated a railroad system as a carrier, *it is still required to discharge many duties as a carrier, it is now organized to act as a carrier,* and in the event of default on the part of its lessee it must again actively operate its railroad system as a carrier. Under those circumstances, it remains now, as it originally was, a common carrier” (Italics added).

None of the things relied upon by the Maryland court as constituting the Northern Central Railway Company a common carrier is true of the Oregon Short Line. To be sure it was originally organized as a carrier and was a carrier until January 1, 1936. It is not required to discharge any



duties as a carrier now and in fact does not discharge any duties as a carrier and could not do so unless and until it secured a certificate from the Interstate Commerce Commission and the Public Service Commission certifying that it was in the public interest for the Short Line to operate separately from the Union Pacific.

On page 15 respondent relies on *North Carolina Railroad Company v. Zachary* from the Supreme Court of the United States, arising under the Federal Employers' Liability Act. Respondent's statement of this case fails to show the basis of the court's decision, which was that inasmuch as the lessor, under the North Carolina law, was responsible for all acts of negligence of its lessee, therefore the injured employee had a direct right of action against the lessor corporation. On page 254 the court said:

“\* \* \* Under the local law, as laid down in *Logan v. Railroad*, 116 Nor. Car. 940, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employees of the lessee, injured through the negligence of the latter.

\* \* \* \* \*

“The court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad—its tracks and property lying wholly within the State—and that the corporation itself is not, although its lessee is, engaged in interstate commerce;

the lessor's activities being confined to receiving annual rents and distributing them among its stockholders. \* \* \*

\* \* \* \* \*

“\* \* \* This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a ‘common carrier by railroad engaging in commerce between the States,’ and that the deceased was ‘employed by such carrier in such commerce,’ within the meaning of the Federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed.”

It is difficult to see how *Lake Superior & Mississippi Railroad Company v. United States*, cited on page 17 of respondent's brief, is in point. Congress, in making a land grant to railroads, provided that the United States should have free use of the railroad as a public highway. The court held, in view of the history of railroads, that this meant the roadbed and railroad track alone and did not include transportation. The case does not hold that a railroad corporation not engaged as a common carrier is entitled to be regarded in any way as if it were a common carrier.

*United States v. Union Stockyards Company*, cited by respondent on page 19 merely holds that a belt stockyards railroad operator was within the Safety Appliance Act and liable for transporting a car in violation of that act. The defendant was an actual operator of a railroad, held itself out as such and collected regularly established rates therefor.

The weakness of respondent's contention in this regard is well exemplified by its going outside the record and discussing the operations of the American Express Company. This company files tariffs and schedules for its operations with the I. C. C. and the P. S. C. U. It maintains offices in various cities of the United States, including Salt Lake City, where it receives shipments to be moved by railway and air transportation. It is true that it does not itself operate railways and airways but that, of course, is of no importance in view of its other elements.

*Denver R. L. & C. Co. v. Union Pacific Railroad Company*, cited by respondent on page 24, arose on plaintiff's motion to strike from defendant's answer. On page 387 the court said:

“\* \* \* The third answer is that ‘the defendant, further answering, respectfully shows to the court and alleges that the said company was organized and is a private corporation for the purpose of constructing and operating a railroad from certain coal lands owned, as alleged by the petition, to Denver, and for the purpose of hauling its coal from said lands to the city of Denver, as private enterprise, and not for the accommodation of the public in any way or manner whatever.’ This answer appears to be intended to present the question that the road built by the petitioner is a private road, and not for public use. It is, however, rather indistinctly stated. The averment is that the company was organized for this purpose, and as a private corporation, without a distinct statement as to what the road will be if built. The inquiry is not as to what the company was organized for, or whether it will be a private or public corporation, but what the road will be,—the structure itself,—if any such thing shall be made.”

This case merely supports appellant's contention that the true character of an alleged railroad company must be determined from its actual characteristics and not by what it was organized for.

Respondent seems to concede the authority of *In Re Niagara Falls Whirlpool Railway Company*, 108 N. Y. 375, 15 N. E. 429. Respondent relies upon its authority on pages 28, 29 and 35 and quotes from it on pages 28 and 29. Both the appellant and respondent rely on the case although they differ as to its significance in the case at bar. Clearly it holds that whether or not a railroad corporation can exercise the power of eminent domain is not to be determined by what its articles of incorporation recite. The court said:

“\* \* \* 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.* \* \* \*

Respondent concedes this to be the law. On page 35 of its brief the respondent says:

“\* \* \* and we admit, and will reiterate, as was true in the case of *Niagara Falls Whirlpool Ry. Co.*, if the use proposed is not a public use, nothing contained in the articles or charter of a company can aid the corporation in taking the property sought.”

This concedes not only that the proposed use must be public, but that in coming to that conclusion the actual business to be conducted by the putative condemnor must be scrutinized, and that the activities of the putative condemnor must be those of a common carrier? That is precisely what the *Niagara* case holds. That is elementary and completely settled, so much so that it is not much discussed in the cases latterly.

In reasoning about the case at bar one is apt to become confused by the circumstance that the Short Line was for many years a common carrier, unquestionably with the right of eminent domain and that it is closely linked to the Union



Pacific, which now is a common carrier and undoubtedly has the power of eminent domain. This gives the Short Line something of a railroadlike flavor and aroma. Yet it is clear and even conceded by respondent that the situation is no different than as if the Oregon Short Line had been organized in 1950 and was now seeking to condemn a right of way not for its own building of a railroad, not for its own operation of a railroad, but solely for the purpose of leasing it to another common carrier.

The case is no different than this supposition case. Suppose that a railroad called the XYZ Railway Company projects a railroad between two points in Utah to run through a narrow canyon, indispensable to the line unless very expensive tunneling is resorted to. An individual sensed this difficulty and sought to buy from the owner the only economical, natural right of way through that canyon. The owner refused to sell. The individual then created a Utah corporation, named it the Salt Lake Short Line. To give it something of a railroad flavor it named Stoddard of Omaha as President, Seitz of Omaha as Vice President, Smith of New York as Secretary and Paulsen of Salt Lake as General Manager, with the sole purpose of signing the lease, and Eccles of Ogden as a director. This Short Line also filed no tariffs, had no trains to carry passengers or freight, had no train crew and had no present intention of ever doing any of the things which characterize a common carrier.

Would anyone have the temerity to contend that the Salt Lake Short Line could do this? Yes, that is precisely

what respondent contends in the case at bar. That is precisely what the Short Line in the case at bar is attempting to do. It is merely a prospective and potential landlord as to the property sought to be condemned.

The *Niagara* case is square authority against the Salt Lake Short Line. Delegation of the power of eminent domain to such a corporation would be clearly unconstitutional. In the *Niagara Falls* case, 15 N. E. 429, the court said on page 431:

“\* \* \* Soon after the passage of the general railroad act of 1850, the question was raised as to the validity of the act in so far as it attempted to confer upon any corporation which might thereafter be created under its provisions the power to determine when and what private property might be compulsorily taken for the purposes of its road, and it was held that the act was a constitutional delegation of the power of eminent domain. *Railroad Co. v. Brainard*, 9 N. Y. 100. The expediency of this legislation has been questioned. In the infancy of railroad enterprises there was little danger that railroads would be projected, not required by public necessity, or where the public interests would not be subserved by their construction; but the plan of permitting any persons who might deem it for their interest to do so, to unite and organize a railroad corporation and to fix the route, subject practically to no supervision or control by any public authority, and to invade and take private property for the purposes of the road wherever the company should see fit to locate it, is attended with some unquestionable evils. It is probably true that many speculative railroad enterprises have been initiated and carried on under this liberal legislation, which would not have been authorized if a special charter in each instance

had been required, or if the power of determining as to the necessity of the road had been lodged with some disinterested public body. 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 case of *Railroad Company v. Brainard*, 9 N. Y. 100, referred to in the *Niagara* case, as cited in 1853, justified constitutionality of the delegation of the power of eminent domain to a railroad corporation upon the ground that it was a *delegation to a common carrier of property and passengers* (although the statute merely called them railroad corporations) and that, therefore, the interest of the public and of the railroad were sufficiently identical. On page 108 the court said:

"It is very evident from the whole scope of the act under consideration that the Legislature designed to make these corporations common carriers of persons and property, and to require them to be constantly engaged in such public employment (*Story*



on *Bailments*, §§ 495, 496); and it was decided as long ago as 1837, in the case of *Bloodgood v. The Mohawk and Hudson River Railroad Company* (18 Wend. 9), in the court of last resort in this State, that lands taken for the construction of such a road were taken for public use.

\* \* \* \* \*

“But the particular ground of objection relied upon to show that the act in question is unconstitutional, if I correctly understand it, is that the act itself does not appropriate the specific land taken for public use, but delegates to the corporation the power in each particular case to make the location and selection.

\* \* \* \* \*

“The objection raised to the validity of this act is certainly of a very grave character, and I have found much difficulty in answering it satisfactorily to my own mind. I am, however, after the best consideration which I have been able to bestow upon the subject, of opinion that this act is not invalid for the reasons stated. The Legislature has the undoubted authority to provide for the incorporation of railroad companies by a general act (*Const., art. 8, § 1*), and it may by legislative enactment give to them powers, and impose duties almost exclusively of a public character and in such cases it may without doubt lawfully declare that all lands taken for the construction of their roads shall be deemed taken for public use.”

In the *Brainard* case the New York Court of Appeals referred to the decision by the Supreme Court of Massachusetts in the case of *The Boston Water-Power Co. v. The Boston & Worcester R. R. Co.*, 23 Pick. 360. That case the Supreme Judicial Court of Massachusetts gave considera-

tion to whether the delegation of power of eminent domain to a railroad corporation was constitutional and its reasoning is based upon the fact that the railroad in question was being built for use by the condemnor as a common carrier. On page 395 the court said :

“\* \* \* In the present case we think that the interests of the corporation and those of the public, were so nearly coincident, it being plainly for the advantage of both that the shortest, safest and cheapest route should be chosen, that the power might be safely intrusted to a corporation thus constituted. This mode of exercising the right of eminent domain, is warranted by numerous precedents, both in our own Commonwealth and in most of the other States of the Union.”

One hundred years after those decisions it has sometimes been lost sight of, as by the respondent in the case at bar, that constitutional delegation of power of eminent domain to a railroad corporation is upheld because the railroad corporation is engaged in the public service of carrying passengers and freight and, therefore, the public interest would probably be protected. So construed, private ownership of property in the suppositious case and in the case at bar would be protected against the taking of property for use merely by a landlord or lessor.

## II.

### THE OREGON SHORT LINE IS NOT A COMMON CARRIER.

Respondent's contention that the Short Line is a common carrier reduces itself to an absurdity. The Short Line

has not had any tariffs on file either with the Public Service Commission of Utah or the Interstate Commerce Commission since January 1, 1936 (R. 129). If it undertook to perform any service as a common carrier it would violate the laws both of the State of Utah and of the United States and be subject to criminal penalties.

Section 76-3-2, ppg. (1), U. C. A. 1943, provides in part as follows:

“Every common carrier shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges and classifications for the transportation between termini within this state of persons and property from each point upon its route to all other points upon any route owned, leased, operated or controlled by it, and from each point on its route or upon any route leased, operated or controlled by it to all points upon the route of any other common carrier whenever a through route and a joint rate shall have been established or ordered between any two such points.”

Section 76-6-25, ppgs. (1) and (2), provides as follows:

“(1) Any public utility which violates or fails to comply with any provision of the constitution of this state or this title, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than \$500 nor more than \$2,000 for each and every offense.

“(2) Every violation of the provisions of this title or of any order, decision, decree, rule, direction,

demand or requirement, or any part or provision thereof, of the commission, by any corporation or person is a separate and distinct offense, and, in case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense."

49 U. S. C. A., Sec. 6, ppg. (1) provides as follows:

"Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established."

49 U. S. C. A., Sec. 6, ppg. (7) provides in part as follows:

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter."

49 U. S. C. A., Sec. 6, ppg. (1), provides as follows:

"In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense, which shall accrue to the United

States and may be recovered in a civil action brought by the United States.”

Rules to govern the Construction and Filing of Freight-Rate Publications were revised and promulgated by the I. C. C. in Tariff Circular No. 20 effective Oct. 1, 1928 and supplemented by the I. C. C. effective Dec. 1, 1937. Respondent has no tariffs filed in conformity thereto (R. 129).

The Short Line has not carried either freight or passengers since January 1, 1936 (R. 85, 90, 96, 97, Ex. C). If it attempted to do so it would violate the laws of Utah and the United States.

Moreover, the Short Line has no employees such as are necessary to operate as a common carrier (R. 90, 96, 97). It has no engineers, firemen, conductors, brakemen, trainmasters, etc., etc. (R. 90, 96, 97, 166, 167).

Respondent on pages 5 and 6 emphasizes that it not only has a General Manager, Mr. Paulsen, in the State of Utah, but that it also has other officers, to wit, Arthur E. Stoddard, President; Ambrose J. Seitz, Vice-President; E. G. Smith, Secretary. In addition it might be mentioned that it also has George S. Eccles in Ogden, Utah, as a Director. Seitz, Stoddard and Smith occasionally come to Utah, although they live elsewhere. Would it be possible for these five men to operate a freight or passenger train? Would Paulsen be the engineer, Stoddard the fireman, Seitz a brakeman, Smith a brakeman, and Eccles conductor? If they did so and carried either a passenger or as much as a pound of freight, they would be guilty of unlawful acts under the laws of Utah and the United States.

A common carrier must maintain its railroad. Would Eccles be roadmaster; Smith section foreman; Paulsen, Stoddard and Seitz section laborers? The latter are somewhat old and infirm for the assignment.

On page 10 of its brief respondent makes a concession which destroys its contention that it is a common carrier. It says:

“We will agree that neither a corporation nor an individual can be either in law or in fact a common carrier unless such corporation or individual holds itself or himself out to the public as being willing to undertake for hire to transport persons or commodities generally for the entire public, or has been so engaged in transporting and holding out to transport for the public generally.”

The Utah Statute and United States Statute say what must be done to hold oneself out as a common carrier. Respondent has not done so. The Short Line's concession destroys its contention.

Despite all of the squirming by respondent, the record shows without any contradiction that the Oregon Short Line, since January 1, 1936, has not operated in any particular as a common carrier. It has operated no trains whatever, it has carried no passengers or freight whatever, it has not published any tariffs setting forth its rates for carriage as a common carrier, it has had no personnel available for the operation of trains and the carriage of freight or passengers, it has had no personnel available for the construction or maintenance of any railroad trackage. Respondent cannot escape from the undisputed record which clearly

demonstrates that the Oregon Short Line is not and has not been and could not be since January 1, 1936, engaged in any particular whatever as a common carrier.

### III.

#### RESPONDENT'S CONTENTION THAT IT CAN CONDEMN EVEN THOUGH IT HAS LEASED ITS PROPERTY TO THE UNION PACIFIC IS ITS OWN MAN OF STRAW.

In Section 4, pages 43 to 63, respondent creates a man of straw and attempts to destroy it by contending that even though it has leased all of its property to the Union Pacific it can nevertheless condemn. Respondent admits that this question is posed by the respondent and not by the appellant. In spite of the fact that the appellant has not suggested the question, counsel contends that it is the principal point in issue. Appellant has never contended that a railroad corporation which leases its property is thereby automatically prohibited from condemnation. Appellant's contention is that the Short Line is not a common carrier and therefore cannot condemn property. Appellant so stated at pretrial when respondent first cited these cases. At R. 20 counsel for appellant made the following statement:

“MR. VAN COTT: Well, I haven't had a chance to read these cases. Of course I will, but so far as anything he read is concerned it didn't get to the point we have because *there is nothing to show in any one of those cases that those plaintiffs in the condemnation proceedings were not common carriers for hire.* They could well have leased their property



and remain common carriers. I will read the cases and analyze them and give the Court the benefit of my views when that question comes up at the trial.

“But in this State even if a statute, we will say a statute undertook to give a corporation the power of eminent domain and that corporation was not a public use, was not a common carrier, as long as we are dealing with railroads, it would be unconstitutional. Even the legislature cannot give the power of eminent domain to a person or a corporation which is not engaged in public service except in certain isolated examples. We have a lot of authority on this subject in this State without going outside of it.”

It might have leased its property and yet be a common carrier by holding itself out as such for the carriage of passengers and freight pursuant to tariffs filed with the I. C. C. and the P. S. C. U. as does the Railway Express Company. None of the cases cited by counsel on this point holds that a railroad company can condemn property even though it is not a common carrier nor does any case in respondent's brief so hold.

#### IV.

### APPELLANT'S STATEMENT OF POINTS CLEARLY DISCLOSES THAT APPELLANT CONTENDED THAT THE PURPOSE OF CON- DEMNATION MUST BE PUBLIC.

On pages 31 and 32 respondent argues that no attack was made by appellant in its Statement of Points upon which appellant will rely upon Finding No. 22 and Conclusion No. 3 and that therefore appellant cannot argue or



contend before this Court that the purpose for which respondent seeks to condemn is not a public purpose. This misconceives the entire nature of the Statement of Points upon which appellant will rely provided for in Rule 75, paragraph (d). This rule states that no assignment of errors is necessary. Moreover, no statement of points is necessary unless the appellant does not designate for inclusion the complete record. If a statement of points is necessary, it is only necessary to inform the respondents of the contentions to be made, so that the respondent may form his opinion as to what portions of the record should be included. Appellant's statement of points fully advised respondent of the contention which appellant has made in this record. In paragraphs 3 and 4 of the statement it is clearly set up that appellant will contend that the respondent is not engaged in the rendition of any public service.

On page 31 respondent states that appellant did not request that there be included in the record any evidence given by public witnesses owning property in the area involved to the effect that they needed trackage, wanted trackage, and requested trackage. That evidence has nothing whatever to do with the contention made by appellant in this record. Appellant's contention is that the Short Line is not a common carrier and that therefore the purpose is not public. It is entirely immaterial whether individual members of the public wants this spur built or not, so far as appellant's contention is concerned. Everybody in Salt Lake County might desire to have Sears Roebuck build an addition on its building. That would not make it a public purpose. Everybody in Salt Lake County might desire to

have landlord Oregon Short Line Railroad Company condemn a right of way. That would not make it a public purpose.

Respectfully submitted,

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