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Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

1 - 1959

STATE OF UTAH, by and through its
ROAD COMMISSION,
Plaintiff and Respondent,

VS.

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

Clark, Supreme Court, Utah

Case No.
9079

BRIEF OF APPELLANT

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Defendant and Appellant.

Case No.
9079

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The parties will sometimes be designated in this brief as follows: Defendant and Appellant, The Denver and Rio Grande Western Railroad Company as the "Rio Grande," Plaintiff and Respondent, State of Utah, by and through its Road Commission, as the "Road Commission." Emphasis has been supplied.

STATEMENT OF THE CASE

This appeal presents the question of whether the Road Commission may lawfully condemn the entire Little Cottonwood Branch of railroad of Rio Grande.

STATEMENT OF FACTS

There is no issue of the adequacy of compensation or any substantial question of fact in this case. A proper presentation of the questions of law, however, requires an understanding of the facts.

Rio Grande is a common carrier of persons and property by rail in intrastate and interstate commerce. Its main line of railroad from Salt Lake City to Colorado points runs in a north and south direction generally along the center of the Salt Lake Valley. In the City of Midvale this main line crosses at grade an east and west street known as Center Street. Near the point of this crossing two branch lines of Rio Grande's railroad are taken out from its main line (Exhibit P-1).

One of these branches known as the "Little Cottonwood Branch" is taken out of the main line immediately south of Center Street and runs in an easterly direction abutting the south side of Center Street on premises owned in fee by Rio Grande a distance of some 3,000 feet and then extends southerly crossing State Street and serving industries on the east side of State Street. This branch line extends approximately 1.75 miles and has approximately .43 miles of side tracks. It had for the year 1957 an assessed valuation

of \$6,525.00. This branch line presently serves directly an oil company and a coal company, and through a team track a rock wool company, a builders supply company, and other consignees (R. 25, 33, 80-83).

During the calendar year 1956 the gross revenues of the Little Cottonwood Branch were \$21,566.86 (Exhibit D-13). During the calendar years 1957 and 1958 and for the first two months of 1959 the carload traffic moving over the said branch was as follows (Exhibit D-14, 15 and 16) :

<i>Period</i>	<i>Number of Cars</i>	<i>Cars Moving in Interstate Commerce</i>
1957	120	20
1958	142	61
First Two Months 1959	48	29

Taking out of said main line immediately north of Center Street, Rio Grande has another branch line known as the "Bingham and Garfield Branch," which runs west-erly down Center Street of Midvale and serves mines and industries in the Bingham and Garfield area (R. 74).

Center Street is a road designated by statutes as a part of the State Road System and is under the jurisdiction of the State Road Commission. The right of way owned in fee by Rio Grande for its Little Cottonwood Branch is approximately 27 feet in width and abuts along and runs parallel to the south side of Center Street for a distance of approximately 3,000 feet. Abutting upon the south side of such right of way are residential properties owned by residents of the City of Midvale (Exhibit P-1). The tracks of

Rio Grande on its Little Cottonwood Branch are elevated above the street level of Center Street some 6 to 13 inches (R. 43). The Road Commission, Midvale City and Rio Grande have since 1954 been considering a plan for the improvement of Center Street from the point where it crosses Rio Grande's main line easterly to State Street, whereby the tracks of Rio Grande on this branch would be lowered, and the entire area paved over and used as part of Center Street. After considerable negotiation the form of agreement for carrying out such plan was approved by the Road Commission and on January 10, 1957, transmitted to Rio Grande for execution. Rio Grande executed the same and transmitted it to the Road Commission on July 19, 1957. The Road Commission never signed the agreement (Exhibits D-3 through D-11). Prior to transmitting the form of agreement to Rio Grande for the lowering and paving over of its tracks on Center Street, the Road Commission in October or November, 1956, entered into a contract for the improvement of Center Street under Project 1580. The construction under this contract has now been completed. The project for lowering Rio Grande's tracks and paving over has never been carried out although it could be completed in about thirty days time (R. 24, 82).

After having arrived at a basis of agreement with Rio Grande for the lowering of its tracks and the paving over of the track area the Road Commission changed its mind about completing the street project and asserted that the Little Cottonwood Branch should be removed and destroyed in its entirety. This Rio Grande was unwilling to do, and the Road Commission brought this action to condemn the

entire branch. The reason assigned for such change of position on the part of the Road Commission is the future construction of the Valley Freeway Project No. 1-01-7(3) (R. 38-40).

Project 1-01-7(3) involves the construction of a freeway which will be a part of the interstate road system under the Highway Act of 1956. This freeway will enter Salt Lake City at a point known generally as the Beck's Overpass near the Davis County line and will extend southerly through Salt Lake County. The tentative proposal for location contemplates that this freeway will be easterly of and near Rio Grande's main line at the point where the freeway crosses Center Street (R. 27-28, Exhibit P-1). Three problems require solution in connection with the crossing of the freeway at this point. (a) The nature of the grade separation between Center Street and the freeway must be determined. The present proposal is that Center Street will underpass the freeway (R. 28). (b) The connection of the Bingham and Garfield Branch into Rio Grande's main line must be relocated. Rio Grande and the Road Commission have not yet agreed upon such relocation (R. 75-76, 84-85). (c) A determination must be made respecting the connection of the Little Cottonwood Branch into Rio Grande's main line. The Commission proposes that this connection should be destroyed and the entire branch condemned (R. 28).

On September 24, 1957, hearing was had before the Court below on the motion of the Road Commission for an order of immediate occupancy. The motion was denied which order of denial was affirmed by this Court on inter-

mediate appeal. *State v. Denver and Rio Grande Western Railroad Company*, 8 Utah 2d 236, 332 P. 2d 926.

The cause again came on for hearing before the Court below on April 6, 1959. On May 9, 1959, judgment was entered vesting in the Road Commission fee simple title to the entire right of way of the Little Cottonwood Branch of Rio Grande (R. 108). From such judgment this appeal is taken.

STATEMENT OF POINTS

POINT I

THE ROAD COMMISSION IS NOT EMPOWERED TO CONDEMN THE ENTIRE BRANCH OF RIO GRANDE'S RAILROAD.

POINT II

THE ROAD COMMISSION IS NOT EMPOWERED TO CONDEMN RIO GRANDE'S BRANCH OF RAILROAD FOR A POSSIBLE FUTURE USE.

POINT III

THE TAKING OF RIO GRANDE'S BRANCH OF RAILROAD IS NOT NECESSARY FOR THE USE OF THE ROAD COMMISSION.

POINT IV

THE TAKING OF RIO GRANDE'S BRANCH OF RAILROAD IS AN UNLAWFUL INTERFERENCE WITH COMMERCE.

POINT V

INDISPENSIBLE PARTIES DEFENDANT
WERE NOT JOINED IN THE ACTION.

ARGUMENT

POINT I

THE ROAD COMMISSION IS NOT EMPOW-
ERED TO CONDEMN THE ENTIRE BRANCH
OF RIO GRANDE'S RAILROAD.

This case involves fundamental questions on the subject of eminent domain. They have not heretofore been passed upon by this Court.

In order to determine the legal questions involved it is necessary at the outset to understand the actual effect of the decree of condemnation. The Road Commission in this case is seeking essentially to obtain a crossing of Rio Grande's Little Cottonwood Branch by the Valley Freeway. This crossing will be made near the point where such branch takes out of Rio Grande's main line, and about one hundred feet east of such main line. The crossing will require a tract about two hundred feet in width. In order to accomplish this crossing the decree not only destroys Rio Grande's branch at the point of crossing but vests the fee title to the entire branch a mile and three fourths long with all side tracks in the State Road Commission.

It is elementary that the power of eminent domain rests in the people. They have vested the exercise of the power in the legislature. Subject to constitutional limitations the

legislature has conferred the power upon certain private corporations, municipal corporations and governmental agencies. Lewis, *Eminent Domain*, Third Edition, Vol. 1, Section 9.

The rule has been recognized in this jurisdiction that where the right of eminent domain is granted for a particular purpose, the statute must be given a liberal construction in furtherance of such purpose. *Monetaire Mining Co. v. Columbus Rexall Consolidated Mines Co., et al.*, 53 Utah 413, 174 Pac. 172, *Freeman Gulch Mining Co., et al. v. Kennecott Copper Corporation*, 119 F. 2d 16. It is equally clear, however, that the right sought to be exercised must be granted in terms or by necessary implication and if not so granted it cannot be exercised. This is clearly recognized in the *Monetaire* case, *supra*, where Mr. Justice Frick at page 421 of the Utah report said:

"If the right is granted, the court has but one duty to perform and that is to enforce it and make it effective. Upon the other hand, if the right is not granted, either in terms or by necessary implication, then the courts are powerless to grant the relief appellant seeks."

To the same effect is Lewis, *Eminent Domain*, Third Edition, Vol. I, Section 388, where the rule is stated as follows:

"All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory, in its exercise and operation than any other. 'An act of this sort,' says Bland, J., 'deserves no favor; to construe it liberally

would be sinning against the rights of property.' But, as in other cases, such a construction will, if possible, be given to an act as will carry into effect the chief and manifest purpose for which it was passed, and such as will give effect to all its words. It will be so construed as to support its validity rather than otherwise. 'Statutes granting these powers are not to be construed so literally, or so strictly as to defeat the evident purpose of the legislature. They are to receive a reasonably strict and guarded construction, and the powers granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purpose of the grant. If there remains a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt should be solved adversely to the claim of power.' "

Consideration must therefore be given to the Utah constitutional limitations and the powers conferred upon the Road Commission by the Legislature.

Section 22, Article I of the Constitution of Utah, provides that

"Private property shall not be taken or damaged for public use without just compensation."

Section 27-9-4, Utah Code Annotated, 1953, under which the Road Commission purported to acquire the fee title to the entire Little Cottonwood Branch of Rio Grande provides that

"For the purposes of this act, the highway authorities of the state, counties, cities, and towns may acquire private or public property and property rights for limited-access facilities and service roads,

including rights of access, air, view, and light, by gift, devise, purchase or condemnation in the same manner as such authorities are now or hereafter may be authorized by law to acquire such property or property rights in connection with highways and streets within their respective jurisdiction. All property rights acquired under the provisions of this act shall be in fee simple. In connection with the acquisition of property or property rights for any limited-access facility or portion thereof, or service road in connection therewith, the state, county, city, or town highway authority may, in its discretion, acquire an entire lot, block, or tract of land, if by so doing, the interests of the public will be best served, even though said entire lot, block, or tract is not immediately needed for the right-of-way proper."

The power of the Road Commission to exercise the right of eminent domain is granted by Section 27-2-9, Utah Code Annotated, 1953, which as amended by Chapter 43, Laws of Utah, 1955, provides that

"The county commissioners or the state road commission are authorized to acquire by purchase, condemnation or otherwise, real property, or interests therein, to be used in the construction, maintenance, or operation of state roads, and are authorized to purchase, or otherwise acquire, from any county, city or other political subdivision of the state, real property, or interests therein, which may be exchanged for, or used in the purchase of other real property, or interests therein, to be used in connection with the construction, maintenance, or operation of state roads, and are authorized to lease, sell or otherwise dispose of real property acquired by it for road purposes when such property is no longer needed for such purposes. Any such sale may be made at private or public sale and the proceeds

thereof shall be turned over to the state treasurer and credited to the state road operating fund. In the disposition of land at any such private sale, first consideration shall be given to the original grantor or his successor in interest. Nothing in this section shall be held to prohibit any county or city from contributing to the state road commission real or personal property for state road purposes."

The validity of the judgment of condemnation must therefore be tested in the light of the foregoing constitutional limitation and the statutory requirements.

The constitutional provision requires that property must be taken for a public use. In the construction of these words two lines of decisions have developed. One line of decisions holds that public use means use by the public—that is, public employment—and consequently that to make a use public, a duty must devolve on the corporation or body holding property by right of eminent domain to furnish the public with the use intended, and that there must be a right on the part of the public, or some portion of it, to use the property after it is condemned. The other line of decisions has announced the so-called "Public Benefit Doctrine" and has arisen in certain states where it was considered a matter of general community welfare to develop such resources as water, minerals or utility of land, and finds its expression in such cases as *Strickley v. Highland Boy Gold Mining Co.*, 28 Utah 215, 78 Pac. 296, 200 U. S. 527, and *Clark v. Nash*, 27 Utah 158, 75 Pac. 371, 198 U. S. 361. See 18 Am. Jur., Eminent Domain, Section 36, and Lewis, Eminent Domain, Third Edition, Volume I, Section 257.

This difference of point of view is of no importance in the case at bar, however, for no better example of a public use can be found than that of a highway, where the easement or title vests in the public for the common and equal use of all. Lewis, Eminent Domain, Third Edition, Volume I, Section 259.

If the Valley Freeway were to occupy only the portion of Rio Grande's Little Cottonwood Branch at the point of crossing and the condemnation were limited to this area, there could be no doubt that there would be public use of the property so occupied. Is it not equally clear that there will be no public use of Rio Grande's branch of railroad a mile and three-fourths away. There is not the slightest suggestion or contention here that any part of Rio Grande's property, except that occupied by the proposed freeway and that abutting upon Center Street ever will or can be used for highway purposes. Manifestly, it seems to us that the condemnation of this entire branch of railroad is not the taking of property for public use and is in direct violation of the constitutional limitation.

Turning to a consideration of the statutory provisions set forth above, the said Section 27-9-4, provides that the Road Commission may acquire an entire lot, block, or tract of land, if by so doing, the interests of the public will be best served, even though said entire lot, block, or tract of land is not immediately needed for the right-of-way proper. These provisions must be read in connection with the foregoing constitutional limitation, for obviously the legislature has the power and only the power to permit property to be taken for a public use. The legislature cannot author-

ize the Road Commission or any other body to take private property which will not be devoted to a public use. This proposition is stated by Lewis, Eminent Domain, Third Edition, Volume 2, Section 600, as follows:

“If we consider all the statutes now in force or which ever have been in force in this country, providing for the exercise of the eminent domain power, undoubtedly the great majority have not limited the taking to what is necessary for the purpose in question. But we think that the constitution impliedly forbids the taking for public use of what is not necessary for such use and, therefore, though the constitution and statute are silent on the subject of necessity, that the power to take is, in every case, limited to such and so much property as is necessary for the public use in question, and that the owner is entitled, either in the proceedings to condemn or otherwise, to be heard upon this question.”

See also 18 Am. Jur., Eminent Domain, Section 110.

Under the said Section 27-9-4, the Road Commission may therefore take only what is reasonably necessary to accomplish the intended public use. Lewis, Eminent Domain, Third Edition, Volume 2, Section 453.

The proper principle on this subject is, we believe, stated by the Supreme Court of Iowa in *Bennett, et al. v. City of Marion*, 76 N. W. 844, at page 846 as follows:

“If the land sought to be taken will to some extent conduce to the public use for which it is to be devoted, the decision of the municipality that it is necessary therefor should not be interfered with; otherwise it should be set aside.”

Applying this rule to the facts in the case at bar, how can it reasonably be said that a branch of railway right-of-way more than a mile away from the crossing desired can possibly be devoted to the public use of the Valley Freeway. Upon this principle the judgment of the Court condemning in fee this entire branch of railroad must be set aside.

POINT II

THE ROAD COMMISSION IS NOT EMPOWERED TO CONDEMN RIO GRANDE'S BRANCH OF RAILROAD FOR A POSSIBLE FUTURE USE.

It should be observed in this case that the judgment of the court below is not entered under the provisions of Section 78-34-2, Utah Code Annotated, 1953, which authorizes only the taking of an easement in the case of highways, but purports to be entered under said Section 27-9-4, which authorizes the taking of a fee. The taking of a fee is authorized only in the case of limited access highways. The only limited access highway involved here is the Valley Freeway, which will occupy a parcel some two hundred feet in width at the crossing of the Little Cottonwood Branch. To accommodate this crossing the Road Commission is seeking to take the fee to the entire branch of railroad.

Moreover, as the evidence shows (Exhibit D-12) if Center Street underpasses the Valley Freeway and the main line of Rio Grande, the Bingham and Garfield Branch of Rio Grande must be relocated. However, no solution has been reached regarding such relocation. If relocation is

not feasible then the plan of underpassing the freeway and Rio Grande's main line must be revised. Such revision may obviate entirely the necessity of the destruction of Rio Grande's Little Cottonwood Branch. Accordingly, the judgment vesting fee title in the Road Commission to that branch may very well be futile and premature. The Road Commission should not be permitted to accomplish such a harsh and destructive taking unless the necessity therefor is clearly established. To do so is an abuse of its power.

POINT III

THE TAKING OF RIO GRANDE'S BRANCH OF RAILROAD IS NOT NECESSARY FOR THE USE OF THE ROAD COMMISSION.

In this brief we have thus far considered an attempted taking by the Road Commission which we conceive to be unlawful. It should not be assumed therefrom that appellant is engaged in tactics of obstruction. We well recognize the importance of highways, particularly the interstate system now in the course of construction. We recognize also the responsibilities of the Road Commission in connection therewith. Our concern here is simply that in the haste to facilitate this highway program fundamental rights should be recognized and adhered to.

In our view the Road Commission is clothed with ample power to construct without difficulty all its required facilities in the area involved. The power is found in Subsection (5) of Section 78-34-3, Utah Code Annotated, 1953, which provides as follows:

“(5) All rights-of-way for any and all purposes mentioned in section 78-34-1 hereof, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right-of-way or improvement or structure thereon; they shall also be subject to a limited use in common with the owners thereof, when necessary; but such uses of crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.”

The foregoing provisions were designed expressly for a situation such as that involved here. Appellant recognizes the right of the Road Commission to cross its branch. A separation of grade will be necessary, but that is being done at railroad crossings throughout the whole country. It may require that the freeway be elevated, but that likewise is being done in many places, and particularly right in the heart of Salt Lake City. It may require a greater expenditure than the destruction of Rio Grande's Little Cottonwood Branch. But we have never understood the law to be that increased cost justifies an unlawful taking.

The Road Commission has contended in this cause that it may take Rio Grande's Little Cottonwood Branch under the provisions of Subsection (3) of said Section 78-34-3. The answer to this contention, however, lies in the proposition that the Road Commission is firmly bound under Subsection (3) by the constitutional limitations and statutes here considered. Whatever may be shown with respect to more necessary public use does not enlarge the power of the Road Commission to take appellant's property. As we have shown

the attempted taking here is unlawful. It is no less unlawful even though a greater public use may be involved.

POINT IV

THE TAKING OF RIO GRANDE'S BRANCH OF RAILROAD IS AN UNLAWFUL INTERFERENCE WITH COMMERCE.

Ever since the decision of the Supreme Court of the United States in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the principle has been firmly established that the states are without power or authority to impede substantially the flow of commerce from state to state. See *Southern Pacific Company v. State of Arizona*, 325 U. S. 761, 65 S. Ct. 1515, and collection of cases at pages 1519-20 of S. Ct. Reporter. Compare *Denver & Rio Grande Railroad Company v. City and County of Denver, et al.*, 250 U. S. 241.

In the case at bar the judgment of the trial court does not regulate or interfere with interstate traffic on the branch in question, it absolutely terminates that traffic. The volume of such traffic for 1957, 1958, and the first two months of 1959 is shown on defendant's Exhibits 14, 15 and 16, and summarized in the statement of facts above. While the volume of such traffic is not large in comparison with that moving on appellant's main line, it is nevertheless substantial and appears to be increasing.

The Road Commission by destroying the connection of the branch into the main line destroys the branch itself and terminates all traffic moving over the branch. In principle

this case is like that of *Kansas City Southern Railway Company v. Kaw Valley Drainage District*, 233 U. S. 75, where the action of the state agency destroyed a bridge on the line of the railroad, which was held by the Supreme Court to be an unlawful interference with commerce.

POINT V

INDISPENSIBLE PARTIES DEFENDANT WERE NOT JOINED IN THE ACTION.

We recognize the general rule that a party who is joined may not complain of the non-joinder of a necessary or indispensable party. It is clearly established, however, that the proceedings are nugatory as to parties who have not been joined. Lewis, *Eminent Domain*, Third Edition, Volume 2, Section 538.

The case at bar does not present the ordinary situation of the condemnation of a tract of land. The branch in question is a highway. *Oregon Short Line Railroad Co. v. Murray City*, 2 Utah 2d 427, 277 P. 2d 798. Connections to this highway by industries and individuals using the branch are valuable property rights. The condemnation of the branch destroys these rights. Without joinder of these parties the proceedings are nugatory as to them. Their property cannot be taken in this proceeding. These propositions only serve to further demonstrate the invalidity of the taking in question, and the wisdom of invoking the provisions of Subsection (5) of said Section 78-34-3.

CONCLUSION

The judgment of condemnation of the Court below
ould be reversed.

Respectfully submitted,

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