

1962

# The Denver and Rio Grande Western Railroad Co. v. Public Service Commission of Utah and State Road Commission of Utah : Plaintiff's Brief

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COM-  
PANY, a corporation,

*Plaintiff,*

v.

PUBLIC SERVICE COMMISSION  
OF UTAH and STATE ROAD COM-  
MISSION OF UTAH,

*Defendants.*

Case No.  
9727

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## PLAINTIFF'S BRIEF

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Petition to Review an  
Order of the  
Public Service Commission of Utah

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MISSION OF UTAH,

*Defendants.*

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## PLAINTIFF'S BRIEF

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### STATEMENT OF THE KIND OF CASE

This is an action to review an order of the defendant Public Service Commission of Utah requiring plaintiff The Denver and Rio Grande Western Railroad Company to contribute ten per cent of the cost of erecting a highway structure on U. S. Highway 6-50, overpassing a railroad industry spur designated as Gomex Spur in Utah County, Utah.

### DISPOSITION BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

The proceeding was heard before defendant Public Service Commission of Utah on the petition of defendant

State Road Commission of Utah in which proceeding defendant Public Service Commission of Utah ordered plaintiff to contribute ten per cent of the cost of the overpass structure. Plaintiff brings the matter before this Court on petition to review said order.

### RELIEF SOUGHT ON REVIEW

Plaintiff seeks to have the order of defendant Public Service Commission of Utah set aside.

### STATEMENT OF FACTS

In this brief the parties will for convenience be designated as follows: Plaintiff as "Rio Grande;" defendant Public Service Commission of Utah as "Public Service Commission;" and defendant State Road Commission of Utah as "State Road Commission."

State Road Commission is engaged in a project for the widening of U. S. Highway 6-50 in Utah County, Utah. A portion of such project includes the area where said highway departs from the confines of Spanish Fork Canyon and running in a northwesterly direction enters the Utah Valley. In this area the main line of Rio Grande is located southerly of said highway and roughly parallel thereto (R. 1-11, 86). In 1940, Illinois Powder Company established a plant near the base of the Wasatch Mountains northerly of both said highway and Rio Grande's main line. This plant, together with its appurtenant rail facilities, is now owned by American Cyanamid Company. The plant established by Illinois Powder Company

and presently owned by American Cyanamid Company is located in Section 34, Township 8 South, Range 3 East, Salt Lake Meridian. At the time of the establishment of this plant, Rio Grande conveyed to the Powder Company all of its interest in the northeast quarter of the southeast quarter of said Section 34, except for the ownership of the right of way for its main line, (R. 64-71) and under date of March 20, 1940, entered into a trackage agreement with the Powder Company (R. 92-95, Ex. 6). This agreement provides for the construction at the expense of the Powder Company of certain spur trackage connecting into the main line of Rio Grande in the southeast quarter of the southeast quarter of said Section 34 and extending northwesterly a distance of 3,873 feet. Trackage northerly of the forty-acre line running east and west through the center of the southeast quarter of said Section 34, under said agreement, became the property of the Powder Company and trackage south of such forty-acre line became the property of Rio Grande. In its portion of the trackage the Powder Company owned the roadbed, the ties, rails and fastenings, bridge and building material, and Rio Grande had no right, title or interest in said trackage or the materials constituting the same. Rio Grande was denied any right of way over the property of the Powder Company and also denied the right to use the trackage on the Powder Company property for its own business or for the business of any other shipper and prevented from extending such trackage to serve any other industry. The agreement further provides that the trackage should be operated only so long as the business of the Powder Company justified

such operation, and that trackage owned by the Powder Company should be maintained at its expense, and should it fail to do so, Rio Grande might disconnect such trackage from its rails (R. 92-95, Ex. 6).

The spur track in question was constructed and is now operated pursuant to this agreement. As shown by R. 86, Ex. 2, there is doubt as to the true location of said forty-acre line, two lines being shown, one designated as "40 acre line," the other as "40 acre line as located by Utah Railway Company." No evidence being introduced showing how Utah Railway Company undertook to establish the line, it is assumed for the purpose of this brief that the other line is accurately located.

Movements of traffic into and out from the American Cyanamid plant are handled by Rio Grande switch crews operating out of Provo. No regular schedules are employed but the traffic is moved on an "on call" basis. About two trips each week or about eight trips each month are made to the plant. No other industries whatever are served over this spur and none may be served under the provisions of the trackage agreement (R. 52-59, R. 91, Ex. 5, R. 92-95, Ex. 6).

By reference to the print attached to the trackage agreement (R. 95, Ex. 6) and the State Road Commission Map (R. 86, Ex. 2) it is seen that the ownership of Rio Grande terminates at said forty-acre line, that the spur track in question intersects the center line of the existing highway approximately at the point where said track crosses said forty-acre line, and that the proposed structure (outlined in pencil) will be located astride said



forty-acre line, being partly on the property of Rio Grande and partly on the property of American Cyanamid Company, the extent to which such structure occupies the property of either company depending upon the true location of said forty-acre line.

Trains moving cars into and out from the Cyanamid Plant are stopped prior to entering the crossing and the train is flagged over the crossing by members of the train crew. There has never been a recorded accident at the crossing (R. 52-59).

The usual practice of Rio Grande under its operating rules in the Salt Lake District, in the absence of other crossing protection, is to protect movements across highways on industry spurs by train crews flagging the movement across the highway (R. 62).

## ARGUMENT

### POINT I.

#### THE POWER AND JURISDICTION OF THE PUBLIC SERVICE COMMISSION OF UTAH DOES NOT EXTEND TO THE APPORTIONMENT OF THE COSTS OF A GRADE SEPARATION OVER THE RAILROAD SPUR TRACK INVOLVED IN THIS CASE.

The Public Service Commission is a statutory creature of the State of Utah, deriving its power from the legislature. It has no inherent power, and the source of such power as it undertakes to exercise must be found in some statute. *Bamberger Electric R.R., et al. v. Public Utilities Commission of Utah*, 59 Utah 351, 204 Pac. 314;

*State v. Nelson*, 65 Utah 457, 238 Pac. 237; *Logan City v. Public Utilities Commission*, 77 Utah 442, 296 Pac. 1006; *Garkane Power Co. v. Public Service Commission*, 98 Utah 466, 100 P. 2d 571; *County Water System, et al. v. Salt Lake City, et al.*, 3 Utah 2d 46, 278 P. 2d 285.

The jurisdiction of the Public Service Commission over the subject of highway grade separations is found in Section 54-4-15, Utah Code Annotated, 1953, which provides as follows:

“54-4-15. Grade crossings—Regulation.—(1) No track of any railroad shall be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without the permission of the commission having first been secured; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

(2) The commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such

crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety and is vested with power and it shall be its duty to designate the railroad crossings to be traversed by school busses and motor vehicles carrying passengers for hire, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest.

(3) Whenever the commission shall find that public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway over, under or upon the tracks or lines of any public utility, the commission may by order, decision, rule or decree require the establishment, construction or creation of such crossing, and such crossing shall thereupon become a public highway and crossing.

Subsection 2 of the foregoing Section 54-4-15 is controlling. It empowers the Public Service Commission where in its judgment it would be practical to require a separation of grades of a railroad over a highway and to apportion the expense of such separation between the railroad and the governmental subdivision involved.

The foregoing section does not undertake to define what shall constitute a "railroad."

Subsection (9) of Section 54-2-1 defines the term "railroad" as follows:

"(9) The term 'railroad' includes every commercial, interurban and other railway, other than a street railway, and each and every branch or extension thereof, by whatsoever power operated, together with all tracks, bridges, trestles, rights-of-way, subways, tunnels, stations, depots, union depots, yards, grounds, terminals, terminal facilities, structures and equipment, and all other real estate, fixtures and personal property of every kind used in connection therewith, owned, controlled, operated or managed for public service in the transportation of persons or property."

Casting aside language not applicable to the case at bar the controlling provisions appear to be that "The term 'railroad' includes . . . all tracks . . . owned, controlled, operated or managed for public service in the transportation of persons or property."

Does the trackage at the point of crossing fall within this definition? We think not. Illinois Powder Company in the agreement of March 29, 1940, was very careful to strip Rio Grande of every vestige of ownership or control of the trackage north of the forty-acre line. Clearly this trackage was not owned or controlled by Rio Grande. Nor was this trackage operated or managed for public service. The Powder Company was careful to prevent such use. It will be observed that the form of trackage agreement employed contains a subdivision entitled "Use, Operation and Extension of Trackage." Under this subdivision the form prior to signature made provision for the use by Rio Grande of the trackage for

its own business and the business of other shippers, and for the extension of the trackage to serve other shippers. Provision was also made under another subdivision for grant of right of way to Rio Grande over the property of the Powder Company. All these provisions were stricken out in the instrument as signed by the parties. Thus the Powder Company made secure its ownership in the trackage and precluded the use of this trackage by any other person. By the express limitations of the agreement, trackage within the boundaries of the Powder Company property became its own plant facility, to be operated and managed for its exclusive benefit.

Nor is the portion of the spur from Rio Grande's main line to the forty-acre line a railroad within the meaning of the foregoing statute. The clause "tracks . . . owned, controlled, operated or managed for public service in the transportation of persons or property" is conjunctive.

The essential proposition is that any trackage to be part of a railroad within the meaning of the statute must be devoted to public service whether by ownership, control, operation or management. Had the Powder Company been willing to sign the trackage agreement in the standard form the entire spur in question might thus have been a part of a railroad within the statutory definition, for then Rio Grande could have used the spur for its own business or for that of other shippers, or could have extended the same to serve others; being deprived of these possible rights the entire spur, including the portion thereof within Rio Grande's ownership, is

available only for the use of a single industry, it is not available for public service.

In reaching this result, Rio Grande is by no means seeking to escape Public Service Commission jurisdiction by a device of technical statutory construction. The rule invoked here is fundamental, namely, that Public Service Commission jurisdiction extends only to activities which are carried on in *public service* and to facilities which are devoted to rendering that service. Such jurisdiction does not extend to services and facilities of a private nature. See *State v. Nelson, supra*, and *Bamberger Electric R.R. v. Public Utilities Commission, supra*.

## POINT II.

THERE IS NO SUBSTANTIAL EVIDENCE  
TO SUPPORT A FINDING THAT PLAIN-  
TIF WILL BENEFIT FROM THE  
CONSTRUCTION OF THE HIGHWAY  
OVERPASS.

This review, in the judgment of plaintiff, should be disposed of under the jurisdictional point considered above. In urging consideration of the second point, plaintiff does not in any way admit the jurisdiction of the Public Service Commission and consideration of this second point is urged upon the assumption of jurisdiction without in any manner admitting the same.

The Public Service Commission gives no consideration whatever to the peculiar facts, hereinabove considered, surrounding the ownership and operation of the spur track involved. This Commission treats the case as though the spur were under the ownership and control of

Rio Grande. Suppose the crossing were all located slightly north of its present position, and clearly within the exclusive ownership of American Cyanamid; could an administrative body then properly find that a railroad company, which switched cars into and out of that property was benefited by the separation of a grade crossing. Would not any benefit under such circumstances be enjoyed by the public and the industry. The Witness Johnson, called by the Road Commission, expressed the view that benefit should follow ownership of trackage (R. 42). If that view were followed it would be necessary for the Public Service Commission to determine who owned the trackage over which the structure would be built. This the Public Service Commission did not undertake to do, and because of the uncertainty of the true location of the forty-acre line, it could not do under the evidence presented.

The real answer to this problem, however, is to be found in another approach. The entire spur track, whether within railroad or industry ownership, is devoted and necessarily devoted to the use of American Cyanamid Company. It is not a usual or ordinary industry spur. Because of these peculiar facts and circumstances, the spur and its crossing over the highway are not such as to authorize or require railroad participation in the cost of the structure.

The rule is now, of course, well established by a great many decisions that a railroad company may, by statute, municipal ordinance, or the order of a regulatory body having jurisdiction, be required to participate in the erection of grade separation structures. There are,

however, definite limitations upon the power of the State or one of its agencies, to impose such obligation upon a railroad company. The imposition of such burden must be fair and it must be imposed pursuant to proceedings which are not arbitrary or unreasonable. Moreover, the promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. See *Denver & Rio Grande R.R. v. City and County of Denver, et al.*, 250 U.S. 241, and *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, and many cases there cited.

Each case depends upon its own facts and circumstances. What may be fair and reasonable under one set of circumstances would not be fair and reasonable under another set of circumstances.

Reviewing again the case involved here, these facts are pertinent: As shown from the evidence, the movements into and out of the plant in question are conducted by tramp or switch crews operating out of Provo. The uniform practice pursuant to rule of Rio Grande is that such trains are stopped before entering the crossing. The speed of the trains over the crossing is therefore at a minimum. The volume of traffic across the intersection is light, being shown to be about eight movements into and out from the plant each month. The crossing is protected by members of the train crew, who flag the train across the intersection. This practice has been employed for some twenty-two years and has never resulted in an accident at the crossing. Moreover, this practice of



flagging switch movements over highways to serve industries is one which in the absence of other crossing protection is regularly and usually employed by Rio Grande in the Salt Lake District. The crossing involved is not in a congested municipal area but is in open country located outside any city or town. If circumstances have now arisen which in any manner require the separation of grade at the crossing, these circumstances have arisen not because of any activity whatever on the part of Rio Grande but because of the increased burden upon the highway arising from the use thereof by persons engaged in the movement of persons and property over the highway. There is no assurance whatever that the traffic into and out of the single industrial plant served by this spur may continue for any length of time.

The findings of the Public Service Commission appear to base railroad benefit on two grounds, namely, saving in time and removal of hazard. On the subject of hazard, the record is against the finding. After twenty-two years of traffic over the crossing, no accident has occurred. The practice employed in protecting movements over the crossing is in accordance with standard procedure employed by plaintiff under like crossings in the Salt Lake District. Moreover, if any hazard has developed at the crossing, such hazard arises solely because of public use of the crossing and not because of any activity or conduct on the part of Rio Grande. With respect to the saving of time, the most that can be said is that some momentary time is saved. There is no evidence that such saving of time would result in any financial or other benefit to Rio Grande. The Public Service

Commission itself observes that it would be difficult to measure in dollars and cents any benefits which Rio Grande would enjoy by elimination of the grade crossing.

Rio Grande under the order of the Public Service Commission will be required to pay something in excess of \$10,000 as its portion of cost of the structure. We submit that the benefit enjoyed by Rio Grande should be more than trivial, it should be substantial and cognizable. The evidence does not disclose such benefit.

The State Road Commission introduced a copy of a Policy and Procedure Memorandum of the Bureau of Public Roads, making provision, under certain circumstances, to relieve railroads from the obligation of contributing to the cost of grade separations over spur tracks. This memorandum appears not to be applicable here because the highway is technically not a freeway, nor is the memorandum binding upon the Public Service Commission. Nevertheless, it demonstrates the view that in case of certain spur tracks a railroad may enjoy no cognizable benefit. This we believe is the circumstance here.

## CONCLUSION

The order of the Public Service Commission should be set aside.

Respectfully submitted,

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