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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE DENVER AND RIO GRANDE
WESTERN RAILROAD
COMPANY, a corporation,

Plaintiff, Supreme Court, Utah

— vs. —

PUBLIC SERVICE COMMISSION
OF UTAH and STATE ROAD
COMMISSION OF UTAH,

Defendants.

23 1962

Case
No. 9727

DEFENDANTS' BRIEF

ANSWER TO PETITION TO REVIEW AN ORDER
OF THE PUBLIC SERVICE COMMISSION OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff,

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OF UTAH and STATE ROAD
COMMISSION OF UTAH,

Defendants.

Case
No. 9727

DEFENDANTS' BRIEF

STATEMENT OF FACTS

Defendant, State Road Commission of Utah, on March 6, 1962, filed its petition with the Public Service Commission of Utah requesting the issuance of an Order:

1. Authorizing the elimination of the grade crossing where the Rio Grande railroad spur track crosses U. S. Highways 50-6 in Utah County by separation of the highway and railroad grades.

2. Authorizing the construction of an overpass over the tracks and right of way of this spur track known as

Gomex spur of the Rio Grande railroad in Utah County, Utah.

3. Directing the Rio Grande Railroad Co. to pay its commensurate share of the costs and concurrent railroad liability for the construction of this portion of Project F-028-1, using as a criteria for establishing a fair and equitable portion of these costs, Highway Laws Public Law 85-767, 85th Congress dated August 27, 1958, Title 23, Sec. 1, Chap. 1, Sec. 130(b), which provides that 10 per cent of the total costs be assessed against the Railroad as consideration for the benefits derived by the Railroad.

This Public Law, *supra*, has been clarified by the United States Department of Commerce, Bureau of Public Roads, Policy and Procedure memo 21-10(3) dated July 21, 1960, Par. 5b (1) (a) states (in connection with Federal-aid Highways under the National System) "All crossings of railroads and highways at grade are to be eliminated, where there is full control of access regardless of the volume of railway or highway traffic."

Paragraph 5b (1) (c) states: "A project for the elimination of an existing intersection of a railway and highway at grade shall be considered of *no cognizable benefit to the railroad* and the railroad shall not be held liable for any part of the cost of the project, *when all of the following conditions* exist at the time the project is undertaken:

1. The project is undertaken as part of the conversion of an existing highway to a freeway with full access." (This highway is not being constructed as a freeway.)

2. "Freeway" — not applicable.

3. "The railway-highway crossing involves only a spur track . . ."

4. "There is not inforce either an agreement between the State Highway Department and the railroad or any order rendered by the State Public Utilities Commission . . . providing for the elimination of the railway-highway crossing." (There is no agreement, but there is an order of the Public Service Commission of Utah, dated May 23, 1962.)

5. "Automatic signal devices"—not applicable.

The above clearly sets forth that *all five of the above conditions must exist* in order that there may be *no cognizable* benefit to the railroad. It is clear that in the matter at Bar, conditions 1, 2, 4, and 5 do not exist. (emphasis added)

The Public Service Commission of Utah and the State Road Commission of Utah, hereinafter referred to as defendants, admit and agree with the Statement of Facts set forth in plaintiff's brief, with the following specific exceptions and additions.

The testimony at the hearing before the Public Service Commission developed a definite controversy over the location of the 40-acre line bounding the property plaintiff allegedly conveyed to the Illinois Powder Company in 1940; the line to which plaintiff alleges its property extends at present. Testimony offered by defendant State Road Commission of Utah that the said line was accurately located on maps furnished by the Utah Railway Company was equally strong as that offered by plaintiff. This indicated the line to be somewhat south of that shown on the maps presented by plaintiff. Therefore, the assump-

tion by plaintiff that its current maps accurately reflect the proper location of the line is without foundation and plaintiff's allegation as to the correct location of this 40-acre line is specifically denied. The point made by plaintiff as to the location of this line is immaterial under the law concerning the main issue at bar. However, the testimony at (R. 65) does show that the conveyance to the Illinois Powder Company by plaintiff conveyed all ownership to this land, *except* a two hundred foot (200 ft.) right of way reserved to plaintiff.

Witness Johnson of the Bureau of Public Roads was qualified with respect to knowledge of the Bureau of Public Roads regulations which would enable him to render professional testimony regarding the existence of and interpretation of Bureau of Public Roads Policy and Procedure Memoranda. He was not called or qualified as an expert on tract lands, ownership rights, railroad operation over a spur track, or to guess as to who might receive benefits from an overpass built over and in the vicinity of a disputed boundary line. His testimony that "it seemed to him that the Powder Company might benefit" (R. 42) is of no significance.

ARGUMENT

POINT I.

THE POWER AND JURISDICTION OF THE PUBLIC SERVICE COMMISSION OF UTAH IS COMPREHENSIVE AND EXTENDS TO THE APPORTIONMENT OF COSTS OF A GRADE SEPARATION OVER THE RAIL-

ROAD SPUR TRACK INVOLVED IN THIS
CASE AS WELL AS ANY OTHER SPUR
TRACK OR SEGMENT OF ANY RAILROAD.

It has been generally held that a railroad company may be required, without any violation of its constitutional rights to reconstruct, relocate or eliminate a highway crossing, or to bear or contribute to the expense thereof; at least where such action is not arbitrary or unreasonable. (109 ALR 769 citing dozens of cases in support thereof.)

It is admitted that the power of the Public Service Commission is derived from statute and not inherent. We agree that Subsection 2 of Section 54-4-15 Utah Code Annotated, 1953, provides for jurisdiction of the Public Service Commission over subject highway grade separations, and empowers the Public Service Commission, where in its judgment it would be practical, to require a separation of grades of a highway over a railroad and to apportion the expense of such separation between the railroad and the governmental subdivision involved.

“Sec. 54-4-15(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 . . . a public road or highway by a railroad . . . and to alter or abolish any such crossing . . . and to require where in its judgment it would be practicable, a separation of grades at any such crossing . . . 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 . . . and the state, county, municipality or other public authority in interest.

“Sec. 54-4-15(13). 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.”

It is further submitted that whether or not the plaintiff had entered into a conveyance of land and trackage agreement, the Public Service Commission upon application of the Powder Company could, under the authority vested in said commission under Section 54-4-11 Utah Code Annotated, 1953, have ordered the plaintiff to provide such a spur. Moreover, Section 54-4-1 provides:

“The commission is hereby vested with the *power and jurisdiction* to supervise and regulate every public utility in this state . . . and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.” (Emphasis added)

The aforementioned jurisdiction and power delegated by statute to the Public Service Commission is expanded and clarified in 54-4-8 Utah Code Annotated, 1953, which states with reference to apportioning of costs that —

“Whenever the commission shall find that additions, extensions, repairs or improvements to or

changes in the existing . . . facilities of any public utility . . . ought reasonably to be made, or that new structures ought to be erected to promote the security or convenience of its employees or the public . . . the commission shall make and serve an order directing that such . . . structures be erected in the manner and within the time specified in said order. If any . . . structures which the commission has ordered to be erected require joint action . . . same shall be made at their joint cost . . . If such public utilities shall fail to file with the commission a statement that agreement has been made for division or apportionment of the costs or expense of such . . . structures, the commission shall have authority after further hearing, to make an order fixing the proportion of such cost . . .”

The foregoing clearly shows the intent of the legislature to empower the Public Service Commission, after fair and reasonable consideration of the facts, to apportion the costs of this over-crossing of plaintiff's operation in any manner which appears just and equitable. Since this Utah law considerably predates the Policy and Procedure memos of the Bureau of Public Roads, U. S. Department of Commerce, the Public Service Commission of Utah has had the power since the enactment of our first Utah statute on this subject, and now has the power to apportion such costs in any manner which is fair, even if this results in requiring the plaintiff railroad to pay 100% of the cost of the overpass. The Bureau criteria was adopted by the Public Service Commission in the spirit of genuine consideration and fairness to the Railroad.

In one of the cases cited in plaintiff's brief, *Denver & Rio Grande Western Railroad v. City and County of Denver*, 250 U.S. 241, the court stated:

"The scope of power (of a utilities commission, etc.) and instances of its application are shown in the decisions sustaining regulations (a) requiring railway companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting bridges or viaducts at public crossings, *Northern Pacific Railroad Co. v. Duluth*, 208 U.S. 583; *Chicago Milwaukee & St. Paul Railroad v. Minneapolis*, 232 U.S. 430, etc.; (b) requiring a railroad company at its own expense to change the location of a track and also elevate it as a means of making travel on a highway safe, *New York, etc., Railroad Co. v. Bristol*, 151 U.S. 556; *Atlantic Coast Line Railroad Co. v. City of Goldsboro* 232 U.S. 548; *Chicago, Milwaukee & St. Paul Railroad v. City of Minneapolis* 232 U.S. 430." (Emphasis added)

Many cases involving Public Service and Public Utilities Commissions have held that the Board or Commission has the jurisdiction to fix the cost, (*Lehigh Valley Railroad Co. v. Board of Public Utilities Commission*, 278 U.S. 24) and they do not differentiate between a spur track and other railroad tracks.

There are many definitions of railroads, some of which appear to be constructed as a matter of convenience and interpreted likewise. Subsection (9) of Sec. 54-2-1, U.C.A., 1953, quoted in plaintiff's brief, is a definition when the section is construed as a whole, not merely taking therefrom those words which are convenient. A

more adequate and pure definition may be found in Black's Legal Dictionary at page 1424 —

“Railroad, a road or way on which iron or steel rails are laid for wheels to run on, for the conveyance of heavy loads in cars or carriages or carriages propelled by steam or other motive power . . . incident to the possession and ownership of which important franchises and rights affecting the public are attached. (*Muskogee Electric Traction Co. v. Doering*, 70 Okla. 21.)

“In a strictly accurate sense, it is a generic term, and includes all kinds of railroads, whether street railways, horse car lines, electric trolley lines, suburban lines, or steam railroads engaged in general transportation. *Columbia Ry., Gas and Electric Co.* D.C.S.C. 24 Fed. 2d 831.”

It would appear reasonably certain that plaintiff's railroad and spur track would fall into one of the above categories, particularly since Black's Law Dictionary at page 1574 further defines “Spur track. A short track leading from a line of railway and connected with it at one end . . . *Simons Brick Co. v. City of Los Angeles*, 182 Cal. 230.”

Irrespective of the conveyance of land to and the trackage agreement with the American Cyanamid Corporation entered into by plaintiff railroad twenty years ago, there was no testimony entered, nor is there any evidence to the effect, that the Cyanamid Corporation ever intended to own or operate a railroad; apply for or secure a franchise for such an operation, or purchase any railroad rolling equipment. Consequently, the said Cyanamid Corporation has not secured any rights affecting the pub-

lic which plaintiff railroad has in connection with the operation of this spur track to the same degree as it has in connection with the operation of its main line.

A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require. That right on the part of the state attaches by implication of law to the franchise of the railroad company and imposes upon it an obligation to construct and maintain at its own expense suitable crossings. (See *Chicago, Milwaukee & St. Paul Railroad v. Minneapolis*, 232 U.S. 430, *supra*; *People v. Williamson County*, 286 Ill. 44.)

There would appear to be no question whatsoever as to the intent of the pertinent sections of our Utah Statutes, construed as a whole, with respect to the Public Service Commission having complete jurisdiction and power to investigate a situation such as the one outlined herein, and, after a fair and impartial hearing, render the ruling made herein in the interest of the public betterment and safety; and giving full credence to the actual benefits to the railroad in avoiding the possible tragedies which might occur at this grade crossing. Plaintiff's technical point with reference to the Public Service Commission's jurisdiction over activities which are carried on in the *public* service avoids the general rule which provides in effect that should other industries locate in the general area in question with the growth of Utah, and desire to use this spur track, they would be granted the

right under the laws and precedents established in practically all of our states. Moreover, this private *trackage agreement* (not private track) would most likely be set aside in a court of competent jurisdiction, should the situation warrant so doing. (Sec. 54-3-20 U.C.A.).

Testimony to the effect that there has been no recorded accident at this grade crossing in twenty-two years reflects a good record. However, there was further testimony introduced showing that while flagging and flares may have been adequate in the past, conditions have changed to a point where traffic has now increased to as many as 4127 vehicles per day, or an average of 2,855 per day for the entire year of 1960, passing over this crossing, many of them at a high rate of speed. (R. 9-10,34.)

The project of overpassing plaintiff's railroad spur track was proposed by defendant, State Road Commission, after a careful engineering study on how to most effectively and efficiently to improve U. S. Highway 50-6; accommodate a greatly increased amount of high-speed traffic, and while so doing adopt the method which would provide the greatest protection and safety of the public. Testimony and exhibits were offered to show how the road crosses the railroad track at the bottom of a valley which enhances the danger of traffic coming down a hill in either direction to the point of crossing. (R. 8, Exhibit 1.)

Consideration was given to the major benefits which would accrue to plaintiff by the elimination of a hazard of increasing magnitude, and to other benefits accruing

to plaintiff in the form of savings in time and money derived through eliminating a railroad guard (R. 18), who walks this area periodically and the work of the flagmen. When the proposal was submitted to plaintiff, it refused to enter into an agreement embodying a provision under which plaintiff would contribute a small percentage of the costs of this overpass project.

When the proposal was submitted to defendant, Public Service Commission, and set down for a hearing, plaintiff made no objection to the jurisdiction of the Public Service Commission knowing very well that the petition prayed for an order requiring plaintiff to pay a percentage of the costs of the overpass, and that the Public Service Commission acting under its statutory power had, on previous occasions apportioned such costs.

Defendant, Public Service Commission, carefully considered all of the evidence, including testimony of Mr. Jim West, District Engineer, District No. 2, for the Utah State Highway Department. Mr. West testified that the only alternative to constructing the overpass was the lowering of the high places on the highway on both sides of the depression, which would be excessively expensive. (R. 10) Such a change in the road surface, particularly at the east end, would require excavation of the highway to a depth of twenty-five feet, mostly through solid rock formation.

The construction of the overpass will dispense with the necessity of stopping the train before crossing the highway, and of stationing flagmen to warn approaching highway traffic.

Defendant, Public Service Commission, having full jurisdiction of this matter, and being fully advised in the premises, after due and careful consideration, and in the spirit of fairness and reasonableness, issued its Order requiring plaintiff to contribute to the cost of the construction of the overpass.

The Order of the Public Service Commission dated May 23, 1962, should be affirmed by the Honorable Supreme Court of Utah.

Under a statute providing for actions against the State Public Service Commission to set aside or modify an order of the Commission on the ground that it is unreasonable or unlawful, the decisions of the Commission, while subject to review, are prima facie correct. (*Hessey v. Capitol Transit Co.*, 193 Md. 265.)

In the case of *Chicago & Northwestern Railway Co. v. Illinois Commerce Commission*, 326 Ill. 625, the court held:

“A railroad is a public utility, and in accepting its franchise from the state, agrees to submit to all burdens, conditions and regulations imposed by the state with reference to its tracks and their intersections with highways necessary to promote and secure safety of the traveling public.

“Reviewing courts will examine facts on which an order of the Commerce Commission relocating a highway at a railroad crossing is based and will sustain such order, if there is substantial evidence to support it.”

The great weight of authority shown in cases of a similar nature in all jurisdictions in the United States

clearly establish that the Supreme Court of the state will uphold the ruling of Public Service and Utilities Commissions, unless such rulings are capricious, arbitrary and unreasonable. The Utah Code Annotated, 1953, Title 54-7-16 states :

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

In *Fuller-Toponce Truck Co. v. Public Service Commission*, 99 Utah 28, and *Los Angeles & Salt Lake Railroad Co. v. Public Utilities Commission*, 80 Ut. 455, it was held that the Supreme Court is bound by findings of the commission, when there is evidence to support them, notwithstanding the wisdom of decision or whether the court's conclusions on the evidence would have been the same.

In *Union Pacific Railroad Co. v. Public Service Commission*, 142 Ut. 465, it was held that the Supreme Court will not disturb a decision of the Public Utilities Commission unless such decision is capricious or arbitrary or is not based on sufficient competent evidence.

POINT II.

THERE IS SUBSTANTIAL EVIDENCE TO
SUPPORT THE FINDING THAT PLAINTIFF

WILL BENEFIT FROM THE CONSTRUCTION OF THE HIGHWAY OVERPASS.

The Public Service Commission has given full and fair consideration to all aspects of this proposed overpass. After making an examination, hearing all testimony presented and carefully weighing the evidence the right, proper and equitable decision was reached that plaintiff railroad does benefit principally by the elimination of an ever increasing hazard. One serious accident could cost the plaintiff far more money than the relatively nominal amount which the Public Service Commission has directed plaintiff to pay as a small percentage of the construction costs of the overpass.

With the exact location of the 40-acre line admittedly in doubt, the Public Service Commission could not determine whose land the structure would pass over, but the point is immaterial. Likewise, it is of no effect that an inadequate trackage agreement was entered into by the plaintiff railroad, nor that the public will benefit by better and safer roads. Further, the point of whether the industry benefits by the structure is not at issue. Whether or not the American Cyanamid Corporation owns the trackage, a point which plaintiff persistently presses, does not alter the fact that the Company does not own or operate a railroad. The Corporation does not own an engine and has no franchise to operate a small railroad or any part of one. The operation, of the hauling of cars over this spur track, which is an off-shoot of plaintiff's main line, limited as it may be, is, without a question of

doubt, an operation by plaintiff with all of its attendant duties and responsibilities to the public.

There is nothing unusual or out of the ordinary about this part of the plaintiff's railroad known as a spur. The fact that there happens to be only one industry in this particular area does not make this a unique situation nor prove that it will always remain this way. There is nothing to indicate that the Corporation will not continue to purchase this transportation service from the plaintiff as it has for the past 20 years. There is, on the other hand, positive evidence from common knowledge, of which this Honorable Court is requested to take judicial notice, that there is ever increasing, faster-moving traffic over this highway. This fact alone validates the finding of the Public Service Commission, which in its wisdom is acting strictly within its jurisdictional rights and power to negate the possibility of tragedy at this crossing, rather than wait until fatalities have occurred before taking the proper action.

A railroad may be required, without any violation of its constitutional rights, to reconstruct, relocate or eliminate a highway crossing, or to bear or to contribute to the expense thereof. (109 ALR 660.) Also see 342 Ill. 646; 356 Ill. 501; 264 N. Y. 195; 174 N. Y. 852; 190 N. E. 896 and 190 N. E. 344.

The exercise of power by the Public Service Commission to order the separation of grades at a crossing and apportion the costs thereof is a valid exercise of police power by the state. A state may lawfully require an interstate railroad to abolish at its own expense high-

way grade crossings *without regard to financial ability*, if reasonably required by public safety without violating the due process of law, the commerce, or contract clauses of the Federal Constitution or the provision of the State constitution forbidding the taking of property for public use without first making compensation therefor. (*Evansville I. & T. H. R. Co. v. Gibson County Indiana* 199 N.E. 583.)

Where the Public Service Commission exercised police power to determine the necessity of a viaduct and apportioned percentage of costs, the order of the Commission, made after full hearing, was held to be reasonable and lawful, and not in violation of any provision of the Federal Constitution. (*State ex rel Kansas City S. R. Com. v. Public Service Commission*, 325 Mo. 852, 30 S.W. 2d 112.)

Also, where the Public Service Commission, upon application of the State Highway Commission, ordered a separate crossing of concrete to accommodate 2500 to 4000 vehicles daily, the court upheld the Commission order; as courts have in many other cases universally upheld the Public Service Commission orders. (330 Mo. 729.)

Although the actual payroll savings realized from the time saved by the flagman and the roving guard in the area may be relatively inconsequential (or may not be so small, if this results in the elimination of some feather-bedding) these are added benefits which do result for the plaintiff.

It is respectfully submitted to the learned members of this Honorable Court that while the regulation of the Bureau of Public Roads is not a part of the substantive law, it is one of the reasonable and fair portions of the great body of Administrative law which has been developed in recent years, and should be given cognizance in the interest of progress in our great State and Nation, and for the protection of the public. The Public Service Commission of Utah has displayed maximum fairness and consideration for the plaintiff in utilizing this minimal criteria, when the power and authority of this Commission is far more extensive.

Summarization of the multitude of cases in point clearly shows that the Public Service Commission was fully within its jurisdictional authority in hearing this matter; that it has the power to order the separation of grades at a crossing and apportion the costs thereof; and the only cases in which the rulings of the various Commissions have not been sustained are those in which the ruling has been clearly proven to be arbitrary, grossly unfair and unreasonable by ordering a large amount to be contributed, when it was shown that the project could have been accomplished less expensively.

Defendant Road Commission has acted in accordance with its duly constituted statutory authority; made every effort to obtain agreement with the plaintiff prior to bringing this matter to the proper Administrative body, the Public Service Commission, under the statutes of Utah.

CONCLUSION

The Order of the Public Service Commission should
be sustained.

Respectfully submitted,

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