1970

Ewell & Son, Inc. v. Salt Lake City Corporation, The Denver And Rio Grande Western Railroad Company, And Union Pacific Railroad Company : Brief of Respondent Ewell & Son, Inc.

In the Supreme Court of the State of Utah

EWELL & SON, INC., a corporation,
Plaintiff and Respondent,
vs.
SALT LAKE CITY CORPORATION, a corporation,
Defendant and Respondent.
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation; UNION PACIFIC RAILROAD COMPANY, a corporation,
Defendants and Appellants.

Case No. 12166

BRIEF OF RESPONDENT EWELL & SON, INC.

Appeal from the District Court of Salt Lake County, Utah,
the Honorable Marcellus K. Snow, Judge.

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NATURE OF THE CASE

This is an action to recover for services rendered by plaintiff to the defendant railroads and for damages for unreasonable delays caused by the railroads to plaintiff's pipeline construction activities.

DISPOSITION IN THE LOWER COURT

At the conclusion of a six-day trial the trial court entered judgment on a jury verdict in favor of the plaintiff against each of the defendant railroads and in favor of defendant Salt Lake City

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmance of the judgment and its costs of this appeal.

PRELIMINARY STATEMENT

Appellants' briefs disregard many of the basic rules of appellate procedure as developed in the decisions of this Court. Not only have they disregarded clear and substantial evidence which contradicts in every important respect the position they take, but they repeatedly quote testimony out of context and in excerpts which distort its true meaning and effect.

For example, although it was clearly established that plaintiff was asked for a price at which he would guarantee that each track would be out of service no more than 10 hours, see excerpted testimony of Byran D. Ewell at page 43 of D. & R.G.W.'s brief and the surprising statement at page 46 that "the ten hour guarantee, whether applicable to all tracks or one, was *for the benefit of Ewell.*" (Emphasis added.) Similarly in Union Pacific's brief, for example, whereas the evidence showed a customary and proper inquiry by two of the four bidders of Commissioner Catmull to obtain needed clarification of the city's position as it had been set forth in a letter to the railroads, a copy of which was furnished to all bidders, at page 25-27 of the brief is found the

wholly improper and unsupportable statements that "these two (bidders) were therefore given an *undue advantage* over other potential bidders in violation of the competitive bidding statute," that it cannot "be doubted that the *understanding* plaintiff had with Commissioner Catmull . . . lowered plaintiff's bid and gave a competitive advantage over other bidders," and at page 26 that "plaintiff's *reliance* on the city officials was not misplaced for they did help plaintiff obtain a favorable verdict," and finally, that there was a violation of the statute against "collusive and noncompetitive bidding" all suggesting, of course, collusion or, at least, improperly favorable testimony for plaintiff from witnesses presently or formerly employed by the city who would have no interest except to see justice done between the parties.

The facts relied upon in many important instances contain clear misstatements of the evidence. In many other instances facts are assumed without any support whatever, except, perhaps in the imagination of defendants' witnesses and agents. Many of these discrepancies are noted in the argument below. Throughout the briefs appellants seem to have real difficulty viewing the facts in evidence and inferences therefrom objectively. In fact, it seems difficult in an over-all view to understand that appellants were even involved in the same trial disclosed by the record on appeal.

STATEMENT OF FACTS

Because appellants have failed to accurately state the evidence or to view the evidence and all inferences therefrom in a light most favorable to the verdict and judgment as they are obliged by the decisions of this Court to do on appeal, their statement of the facts is not accepted. Because of the numerous violations of this rule by both appellants it is not possible in this brief to point out each such violation. Instead, plaintiff-respondent submits the following summary which it believes fairly sets forth the facts clearly shown in the record.

On July 26, 1965 the Salt Lake City Engineer wrote letters to the D. & R.G.W. Railroad (hereinafter D. & R.G.W.) and Union Pacific Railroad (hereinafter Union Pacific) advising them that a sanitary sewer line which would cross their tracks would be let for bid in the near future, and requesting that they furnish their requirements and suggestions (Exhibits 2-P and 3-P), which they did (Exhibit 11-P).

On September 21, 1965 letters were again sent by the city engineer to the respective railroad superintendents (Exhibits 6-P and 7-P). Those letters stated:

> May I remind you with this letter that *upon the advice of the Salt Lake City Attorney*, we are to notify you that upon starting the above

subject project, that this sanitary sewer line is to be laid within the city street boundaries. Further, that the railroad is operating on and over these same streets under a franchise agreement, and that this franchise was granted railroad tracks in this vicinity and contained a provision that *the railrod company would at its own expense, underpin and protect its tracks* while a utility sewer water line et cetera, is being placed under the tracks. The right granted the railroad company to occupy a street with its tracks is subject to the superior right of the City to install utilities in the street as it desires and *without additional expense resulting from the presence of said tracks.*

Under the specifications for the above construction, we have provided for the *contractor to use all precautions in making these crossings* and to notify you prior to starting the work, and the crossings will be made to your requirements and under your supervision. However, the City intends to open cut at these crossings, and we will instruct the *contractor* to *cooperate in every way* to make these crossings with dispatch and safety, and *we expect the same consideration from your company to avoid any unnecessary delays.*

It is the City's intention to advertise for the construction of this sewer extension in the very near future, and we wish *to notify you* by this letter of our intention and responsibilities that we have in this construction, as well as the *responsibilities that it is our understanding that you must accept.* This *letter is meant to clarify any*

> *misunderstanding that might arise in the future* regarding responsibilities between the City and the railroad.
>
> If you have any further questions in this matter, please feel free to contact us. (Emphasis added.)

Soon thereafter prospective bidders were given notice of the project and bids were invited. Prospective bidders were provided with a copy of the project specifications (Exhibit 1-P) together with a copy of the city's letters to the railroads (Exhibits 6-P and 7-P). Included within the specifications were General Instructions to bidders which advised in paragraph 2, page 2 that "Bidders are warned that they must inform themselves of the character of the work to be performed under this contract. . . ."

Four contractors submitted bids on the project and the bids were opened in a City Commission meeting on October 20, 1965. Because he felt clarification was necessary regarding the precise responsibility of the railroads referred to in the city's letters (Exhibits 6-P and 7-P) Mr. Ewell made inquiry of the city engineer's office (R. 464) and both he and another bidder made inquiry of Commissioner Catmull before the bids were opened. In response he advised them that on the city attorney's advice the city would insist that additional costs resulting from the presence of railroad tracks would have to

be arranged for and paid by the railroads (R. 870). Thereafter at the bid opening he made the same statement in open session immediately before the bids were opened (R. 872).

The following day, October 21, 1965 a meeting was held in the offices of the city engineer attended by a representative and legal counsel from each railroad, the city attorney, the city engineer, the assistant city engineer and a member of the city engineering staff (R. 894). That meeting was called for the specific purpose of delineating the responsibility for costs as between the railroads, the city and the contractor (R. 894). The city attorney advised those present of the city's position as previously given by Mr. Catmull to Mr. Ewell and furnished legal citations to railroads' counsel (R. 896). At the end of the meeting it was agreed that the contractor would be contacted for the purpose of making an agreement between the railroads and the contractor (R. 897).

A third letter sent to the superintendent for each railroad on October 22, 1965 (Exhibits 4-P and 9-P) reconfirmed the city's position as follows:

> The City Attorney advises me to refer you to our letter of September 21, 1965 in regard to the City's intent to construct a sewer line under your tracks on 9th South Street. As stated in said letter we intend to open cut, and *it is your responsibility to protect your tracks to your own satisfaction.*

> Please be advised that *any tunneling, jacking, underpinning, etc. is between you and whomever you contract with* and does not involve the City other than to see that our Contractor does our contract to City specifications.
>
> Said Contractor has been notified to cooperate fully with the railroads in the execution of this City contract—48 hours notice etc.
>
> We intend to have the Contractor start construction soon and will notify you of the starting date. (Emphasis added.)

On the same day, October 22, 1965, a second meeting was held in the city engineer's offices at which the city engineer, assistant city engineer and Mr. Keytting represented the city, Mr. Byran D. Ewell represented the plaintiff, a Mr. Robert C. Oatman represented the D. & R.G.W. and a Mr. Myron W. Gustin represented the Union Pacific (R. 466). At that meeting the relative costs to the railroads of jacking or tunneling and open cutting were discussed and a bid on jacking was obtained which the railroad representatives thought was unreasonably high (R. 468). Ewell was then asked what the additional cost to the railroads would be for open cut crossing, assuming a distance of 22 feet for each set of tracks (R. 468-469), and a guaranteed crossing time at each set of tracks of 10 hours or less (R. 469). Ewell gave a price of $34.21 per foot for a 22-foot span at each set of tracks (R. 470).

The basis of Ewell's price of $34.21 per foot at crossings was that, in order to guarantee to the railroads that any given track would not be out of service for more than 10 hours, it was necessary to dig as close to the tracks as possible before interrupting rail service, then concentrate his entire crew of 18 men, including drivers, and all of his equipment, including eight trucks, two loaders, and two shovels (R. 471) in order to make each crossing in the required time (R. 470, 475-81). This concentration of men and equipment greatly slowed his progress and substantially increased his cost.

Due to lapse of time those present at the October 22nd meeting could not recall specific conversation by the respective railroad representatives following his quotation to them of the $34.21 per foot price. All except the railroad agents, however, recalled that no objection to or disagreement with the quoted price was raised by anyone at the meeting, nor did the agents deny to plaintiff that the railroads had a responsibility to pay this price either at this meeting or at any other time (R. 481-82). Both the city's representatives and Ewell reasonably understood that an agreement had been reached on the matter of the railroads' responsibility (R. 482).

On October 28, 1965 the city gave plaintiff notice to begin construction (Exhibit 8-P). Construction work started within four or five days thereafter. During the progress of construction the railroads' representatives

were on the job (R. 709, 717, 750, 786) as the "eyes and ears" of their employers (R. 759). As requested by the city, Ewell kept those representatives advised as to his working schedule to permit coordination of their activities.

Soon after work was commenced the D. & R.G.W. agents discussed with Ewell the feasibility of jacking or tunneling under the tracks near 5th West Street rather than employing an open cut. After considerable delay resulting from the indecision of D. & R.G.W. as to how to proceed (R. 484, 514), a contract, prepared by D. & R.G.W. was presented to Ewell for signature (Exhibit 37-P). Ewell declined to sign, however, because that contract provided for jacking only 40 feet whereas he had advised them that at least 90 feet would be required to reach a point where open cutting could be resumed (R. 489, 493). After further discussion and delay a second contract was tendered to Ewell in which the "length of casing (was) to be determined by the Railroad's Division Engineer or his authorized representative." (Exhibit 38-P). This contract also provided in paragraph 6 that:

> "This contract may be terminated by the Railroad upon one (1) day's written notice, in which event the Railroad shall not be liable to Contractor beyond payment for work performed and material furnished to effective date of termination."

Following execution of this contract by Ewell he was delayed even further because the D. & R.G.W. agents still could not decide whether to open cut or jack under the tracks (R. 499). Finally, on November 10, 1965 being unable to wait further he instructed his jacking subcontractor to proceed even though a final go-ahead had not been given by the railroad (R. 499).

On November 11, 1965 Ewell explored along the east side of the railroad tracks which were being jacked under, and, upon digging down with a backhoe, discovered that a large 4-foot storm sewer which was not indicated on the city's plans, intersected his line of progress. He advised the D. & R.G.W. representatives shortly after noon and was immediately told to stop tunneling (R. 495). Ewell insisted than any notice to terminate be put in writing and a letter was delivered to him at about 4:30 p.m. (R. 496). That letter from the Division Engineer (Exhibit 39-P) provided:

> "Please be advised that our contract terminates after 40 lin. ft. of casing has been pushed, tunneled or jacked in place and centered on the westerly track."

At the time the notice was delivered more than 40 feet of casing had already been jacked (R. 497) and within 24 hours thereafter the jacking had been finished (R. 500).

Because the storm sewer had not been accurately platted Salt Lake City assumed responsibility and paid for 30 feet of jacking (Exhibits 20-D and 21-D), but D. & R.G.W. refused to pay for anything beyond 40 feet, notwithstanding Ewell's refusal to sign a contract for only 40 feet (Exhibit 38-P).

During the balance of construction plaintiff encountered further delays to its progress, with attendant idleness of men and equipment, because the respective railroads failed to have their signal lines uncovered and exposed (R. 811-12), a task which they insisted on doing themselves (R. 664-66).

In this suit plaintiff claimed the agreed price of open cutting, the contract price for jacking from which had been subtracted the city's payment of $3750.00, and, finally damages for unreasonable delay as disclosed in the evidence. At the conclusion of the evidence the matter was submitted to the jury and it returned its verdict in favor of plaintiff.

ARGUMENT

POINT I

THE LOWER COURT CORRECTLY RULED THAT SECTION 54-4-15, UTAH CODE ANNOTATED, 1953, DID NOT VEST EXCLUSIVE JURISDICTION OF THIS CONTROVERSY IN THE PUBLIC SERVICE COMMISSION TO THE EXCLUSION OF THE LOWER COURT.

It is argued on behalf of defendant D. & R.G.W. that by virtue of Section 54-4-15, U.C.A., 1953 only the Public Service Commission could have jurisdiction to hear and determine the present controversy. Such contention not only misinterprets the clear language of the statute, but disregards the context under which this technical defense was raised in the present case.

Section 54-4-15, Utah Code Annotated 1953, provides as follows:

> "(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 buses 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."

It will be readily noted that, although this section refers to "the maintenance . . . of each crossing . . . of a street by a railroad" as the brief of D. & R.G.W. states, at no point does it refer to the installation *under* a railroad of a city utility line. The statute refers to (1) the crossing of one railroad by another railroad, (2) the crossing of a public road or highway by a railroad, or vice versa, (3) the abolition of any such crossing, (4) restriction on use of such crossings to certain types of traffic, and (5) the separation of grades at such crossings and allocation of expenses related thereto. The scope of the statute is limited to very specific situations. Under no proper interpretation of the statutory language could it be applied to the city's natural and reasonable extension of its sewer facilities.

No explanation is offered as to why the Public Service Commission would or should have an interest in the activity involved here. The obvious purpose of this statute is to vest jurisdiction in the Public Service Commission over *surface* rail and highway traffic facilities which by their location necessarily involve a continuing potential interference or conflict with other *surface* facilities for traffic and travel. The sewer line in

the present case as installed could not involve such a hazard to or interference with rail or highway traffic or the facilities related thereto.

Section 54-4-25, U.C.A., 1953, as amended, cited in the brief of D. & R.G.W., does not apply to the present situation. That section provides in part pertinent here as follows:

> "No . . . sewerage corporation shall henceforth establish or begin construction or operation . . . or . . . extension of such . . . line . . . without having first obtained from the Commission a certificate that present or future public convenience and necessity does or will require such construction; provided, that *this section shall not be construed to require any such corporation to secure such certificate for an extension within any city or town within which it shall have heretofore lawfully commenced operations,* . . . provided further, that if any public utility . . . shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, the Commission, *on complaint of the public utility claiming to be injuriously affected* may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable." (Emphasis added.)

Therefore, even if Ewell & Son, Inc. is deemed under the above statute to be possibly subject to the jurisdiction of the Public Service Commission, that jurisdiction must

be invoked by the public utility whose operations are interrupted—in this case the railroads.

It will also be noted that the Complaint was filed February 28, 1966 (R. 11), the Answer of D. & R.G.W. was filed March 16, 1966 (R. 21), and a Pretrial Hearing was held April 4, 1968 (R. 34-35). Discovery was thereafter completed and in February, 1970 the case was given a trial setting on May 12, 1970. An Amended Complaint was filed April 13, 1970 and D. & R.G.W.'s Answer thereto was filed April 27, 1970 (R. 38) in which, for the first time the lower court's jurisdiction was challenged. By its failure to file a complaint with the Public Service Commission as provided in Section 54-4-25, and its failure to raise the jurisdictional defense until two weeks before trial after the discovery and pretrial phases of the case had been completed, the D. & R.G.W. waived any such jurisdictional defense it might otherwise have had.

The case of *Provo City* vs. *Department of Business Regulation,* 118 Utah 1, 218 P.2d 675 (1950) relied upon by defendants, involved a conflict between Provo City and the D. & R.G.W. over the permanent blocking of a public street. The decision there was limited in scope as the opinion states:

> "We have before us the single question: does the Public Service Commission have jurisdiction to hear and determine controversies over the opening, closing or maintenance of railroad crossing(s) within municipal limits?"

That case, which involved a permanent blocking of surface traffic, is not authority for the contention that the lower court had no jurisdiction to settle the present case involving contractual rights and damages from tortious delay of plaintiff's construction activities. The lower court, therefore, had jurisdiction under Article VIII, Section 7 of the Constitution of the State of Utah which provides that "the District Courts shall have original jurisdiction in all matters civil and criminal not excepted in this Constitution and not prohibited by law."

POINT II

PLAINTIFF'S CONTRACT WITH UNION PACIFIC DOES NOT VIOLATE PUBLIC POLICY.

Union Pacific argues in its brief that the work undertaken by plaintiff for Union Pacific was required by Section 10-7-20, U.C.A., 1953 to be placed upon competitive bidding. Further it is argued that because Commissioner Catmull "told those two potential contractors that the railroads would pay any extra cost involved . . . each of those two were therefore given an undue advantage over other potential bidders in violation of the competitive bidding statute." It is then argued that since the contract is "illegal" or "is based upon a consideration which is illegal" and because "plaintiff did no labor and furnished no materials not already covered by the . . . contract with Salt Lake City," that to "allow relief herein would allow Salt Lake City and plaintiff to violate with impunity (the competitive bidding statute)."

This rather remarkable argument not only misconstrues section 10-7-20 but misstates the evidence and draws conclusions which are without any justification whatsoever.

To begin with, section 10-7-20 requires competitive bidding only as to costs which are to be paid out of public funds. That section provides:

> "10-7-20. Necessity for contract—Call for bids—Acceptance or rejection. Whenever the board of commissioners or city council of any city or the board of trustees of any town shall contemplate making any new improvement *to be paid for out of the general funds of the city or town,* such governing body shall cause plans and specifications for, and an estimate of the cost of, such improvement to be made. . . ." (Emphasis added.)

By contrast, the contract found by the jury to have been present between the Union Pacific and plaintiff here involved services and materials furnished in meeting Union Pacific's special time requirements. These time requirements did not involve the city so were not made a part of the plans and specifications, and could not have been paid for from public funds.

This argument also disregards the fact that in order to give his lowest reliable bid to the city a contractor is obliged to make full inquiry into all facets of the

project. Since a project of this type often affects the properties and operations of others, it is imperative that the contractor determine beforehand the full scope of the city's requirements and responsibility for payment.

In the present case the contractor was furnished with a copy of the city's letters dated September 21, 1965 (Exhibits 6-P and 7-P) in which the railroads were advised that the city expected them to arrange for and pay any expenses incident to their own requirements. Further, the contract itself (Exhibit 1-P) at Page 2 under "General Instructions to Bidders" specifically cautioned bidders as follows:

> "2. *Bidders are warned that they must inform themselves of the character of work to be performed under this contract. . . .*" (Emphasis added.)

Thus, to suggest, as the brief of Union Pacific does, that the inquiry made of Commissioner Catmull by two of the four bidders, as to the division of responsibility between the city and the railroad, was illegal or improper and a subversion of the bidding statute is totally unrealistic and without merit. The city was correct in its consistent position that arrangements would have to be made with the railroads for payment of extra costs incident to satisfying their special requirements (R. 872). The information asked of Commissioner Catmull was available to any interested persons, as it should be and to

suggest that it was secretly and improperly obtained overlooks not only the fact that it was conveyed to the railroads several weeks before the bid opening (Exhibits 6-P and 7-P) but also that it was publicly announced in commission meeting and was discussed fully with the railroads and their counsel the following day.

Union Pacific's careless and unfounded contention that by virtue of an inferred "collusive" promise obtained from Commissioner Catmull plaintiff and one other bidder were able to greatly underbid the job is unsupported by any evidence that the second low bidder was even the one who talked to the Commissioner. Mr. Catmull offered to furnish the name of the other contractor who talked to him (R. 878) but this offer was never followed up by the defendants.

POINT III

THE EVIDENCE AMPLY SUPPORTS THE FINDING OF A CONTRACT WITH EACH OF THE RAILROAD DEFENDANTS.

Both of the railroad defendants argue that, as a matter of law, no contract, express or implied, could have arisen between plaintiff and either of the railroads under the evidence in this case. Both rely upon the testimony of Mr. Ewell that he never "demanded" that the railroads pay his offered price and his further testi-

mony that he could not recall a specific promise on their part to pay at the October 22nd meeting. To support this position the brief of D. & R.G.W. quotes extensively from portions of Ewell's testimony and from the seriously contradicted and discredited testimony of their own witnesses Oatman and Gustin. Both contend that silence on their part cannot be construed as an acceptance of Ewell's offer.

The evidence, however, as pointed out in the statement of facts above, shows, in summary, that the railroads were told by the city several weeks before bids were let that they must pay costs incident to their special requirements and that the meetings on October 21 and 22, 1965 dealt specifically with the delineation of the railroads' responsibility and the making of arrangements to satisfy their special requirements. There was strong evidence at the trial, moreover, that at the meeting with Mr. Ewell on October 22, 1965 he was asked not only to guarantee that each crossing would be made in 10 hours or less to minimize interruption of service on defendants' tracks, but the cost of tunneling and jacking was explored then rejected and Ewell was asked to quote a price at which he could meet the 10-hour time guarantee by using the open-cut method. Although Mr. Ewell could not recall a specific acceptance of his offer of $34.21 per foot for a 22-foot length at each crossing, the circumstances of that meeting and the course of the discussion, as related by at least four participants, justified the jury's finding that the railroads had agreed to that offer.

Moreover, Mr. Carter's letter to the Union Pacific in December, 1965 (Exhibit 14-P) states that Mr. Ewell's prices quoted at the October meeting were "verbally agreed to."

Furthermore, following that meeting the railroads' respective representatives were on the job on a daily basis observing plaintiff's operations. It is not disputed that each of the railroad crossings was accomplished by plaintiff in 10 hours or less as was agreed. Thus, even if assent had not been expressly given at the meeting on October 22, 1965, and there is evidence to the contrary (Exhibit 14-P), the jury could have properly found, as it probably did, that by its conduct thereafter in permitting the work to continue according to Mr. Ewell's offer, without disclaiming responsibility, amounted to a waiver of the right to disclaim thereafter.

Equally significant on the question of waiver is the fact that on November 16, 1965 Mr. Ewell hand-delivered to each of the railroads a letter setting forth his claims for delays and his version of the agreement reached at the October 22, 1965 meeting regarding extra charges at each crossing (Exhibits 44-P and 45-P). At that time the construction work was in progress and only a few of the crossings had been made (R. 509). The first reply to either of those letters, however, was not given until more than a month later by a letter dated December 21, 1965 (Exhibit 41-P) which, incidentally was also sent after a

second billing from plaintiff dated December 10, 1965 (Exhibit 43-P). No reply was given by D. & R.G.W. until December 28, 1965 (Exhibit 40-P) following a second billing from plaintiff dated December 9, 1965 (Exhibit 42-P). Even the letter of D. & R.G.W. dated December 28, 1965 did not dispute the charges for specified crossings, the plaintiff being merely advised to charge all "CMP tunnel liner" to the city.

Particularly interesting at this point is the explanation of Mr. Michael Kenyon, D. & R.G.W.'s assistant division engineer, who testified that the November 16, 1965 letter was brought to his attention soon after it was received but he never bothered to discuss it with Mr. Ewell "because *the job was not finished* and I assumed . . . that there would probably be another letter coming in because that thing seemed completely erroneous." (Emphasis added.) (R. 717). Yet knowing the job was continuing and that plaintiff claimed the right to extra pay at each crossing Mr. Kenyon said nothing and no denial of responsibility was made until some five weeks later when the job was finished.

In this regard, it is interesting to note that the case of *Trueson Steel Company* v. *Cooke,* 98 F.2d 905 (10th Cir. 1938) upon which D. & R.G.W. relies for the proposition that silence cannot be construed as an acceptance, does not actually so hold. There it is stated:

> "Under certain circumstances the offeree may authorize or cause the offeror to regard silence as an acceptance of his offer, such as by conduct in past dealings. Williston on Contracts, Rev. Ed., Vol. 1, page 228, says; A further extension of this doctrine is developed in the cases—that, where an offeree solicits the offer, this, in the light of the relations of the parties or other surrounding circumstances, may justify the offeror as a reasonable man in interpreting the offeree's silence after receiving the offer as acceptance."

That Ewell reasonably interpreted the silence as acceptance was the proof in the present case and such was the jury's finding.

Union Pacific places heavy reliance upon the case of *McCollum* v. *Clothier,* 121 Utah 311, 241 P.2d 468 (1952) to support its claim that it had no implied contract with plaintiff. That case, however, gives strong support to plaintiff, because the test for implied contract is there stated to be:

> "Under all the evidence, were the circumstances such that the plaintiff could reasonably assume he was to be paid and that the defendant should have reasonably expected to pay for such services."

This court there made it clear that one is not free from an obligation to pay for benefits knowingly rendered to him except where there is basis to believe the benefit is conferred gratuitously:

> "It is appreciated that this rule should not be applied to bind one under implied contract who merely permits services to be rendered him, or accepts benefits from another, under such circumstances that he may reasonably assume they are given gratuitously."

Although defendants' own witnesses disputed having agreed to pay the price they admitted having obtained from Ewell, there was strong evidence presented that the circumstances prior to and during the meetings in October, 1965 were such as to create a question of fact as to whether Ewell could reasonably have expected to be paid on the basis of the price he quoted to the railroads. The conduct of the railroads thereafter in permitting the work to progress without objection on their part not only supports the inference that they actually agreed to the terms but is strong evidence as well of waiver of any objection they may have had. Having knowingly had the benefit of the ten-hour maximum time limit at each crossing the railroads cannot then decline payment of the agreed price upon the ground they did not formally agree in writing. The jury properly so found from the great weight of the evidence.

POINT IV

THE LOWER COURT PROPERLY SUBMITTED THE QUESTION OF THE RAILROAD AGENTS' AUTHORITY TO THE JURY.

Incredibly, both railroad defendants contend that there was no basis in the evidence from which the jury could have found that the railroads' respective agents had authority to bind them to any contract with plaintiff. Union Pacific blandly states contrary to strong evidence in the case that "the evidence established that there was no actual authority . . . to bind U.P.," and that the court failed to instruct on "the established fact of lack of authority."

Although the railroad representatives denied at the trial that they had authority, the jury was not bound to believe their testimony on this point in view of their obvious interest, their strongly discredited testimony on every other material point and their actions in purporting to represent the railroads not only at the pre-construction October meetings (with the railroads' respective legal counsel at the first meeting) but throughout the progress of construction thereafter. They attended the meetings for the respective railroads after formal letters had been sent by the city engineer to the railroad superintendents indicating the city's position. They asked Ewell for his price to them for proceeding by the open cut method. They were on the job as it progressed in accordance with the discussions that had been held.

As for the railroads' conduct after the October meetings, it is important not only that Ewell's letters (Exhibits 44-P and 45-P), outlining his understanding of the

agreement reached at the meetings in October, went unanswered until more than a month later but that contact with the railroads, whose representatives were at the construction site on a daily basis, was maintained through the same agents whose authority is now denied (R. 754-756, 758). Also, that those same agents normally negotiated for work to be done by contractors and the D. & R.G.W. agent would present the railroad's contract to be signed by the contractor before it would be signed by the railroad (R. 756, Exhibit 37-P). The contractor was not advised as to the identity of the railroad agent who would sign the contract or what his authority was (R. 758). He never told Ewell his authority was limited (R. 758, 759, 793).

To claim as the defendants do that, as a matter of law, "reasonable minds could not differ that (Ewell's reliance upon their agents' representations and their apparent authority) was unreasonable" is absurd under the evidence in this case. Having attended the meetings called by the city engineer to settle the railroads' responsibility, having asked Ewell to give a price, having seen him make each crossing within 10 hours on the jobsite without objection, having conferred with him on the jobsite as the railroads' representative on coordination of schedules and locating signal lines and having negotiated and delivered the D. & R.G.W.'s contract for jacking on behalf of the railroad it is ridiculous to claim Ewell could not help but know he was dealing with men who had no authority to speak for the respective railroads.

On the contrary, the circumstances show overwhelmingly that Ewell and the city both had every right and reason to deal with and rely upon these agents who came into the discussions and onto the jobsite apparently representing their employers at each step. The jury properly found that the agents were authorized and/or that their employers failed to properly disclaim their acts.

A corporation acts through its employees and agents. These defendants acted on this construction project through the same agents whose acts they now disclaim. These men made contacts and commitments on their behalf as would be expected. Must persons dealing with them obtain approval of the defendant's corporate officers in writing in order to bind them? Such a position is not realistic in today's business community. As is stated in the case *O. S. Stapley Company* v. *Logan,* 6 Ariz. App. 269, 431 P.2d 910, 913 (1967):

> "[W]ell established in the law is the proposition that a principal cannot escape liability by leaving his business in the hands of agents, then denying their authority to act for him."

POINT V

THERE WAS NO PREJUDICIAL ERROR IN PERMITTING WITNESSES AT THE TRIAL TO STATE WHAT THEIR UNDERSTANDING WAS OF THE DISCUSSIONS WITH RAILROAD REPRESENTATIVES.

Both railroad defendants complain that witnesses who attended the October, 1965 meetings with railroad representatives were permitted to state that railroad representatives did not object to the price Ewell gave to them at their solicitation. Complaint is also made that those in attendance at the October meetings were permitted to state their understanding as to what had been resolved.

In overruling the railroads' objection to this testimony, the lower court stated:

> "I believe he can state what he thought was the understanding, but he can't testify what the other people thought." (R. 367)

Many cases have involved objections to testimony of the kind referred to above upon the basis that it goes to the facts in issue. That fact alone, however, does not make such testimony objectionable as this Court pointed out in *Joseph* v. *W. H. Groves L.D.S. Hospital,* 7 Utah 2d 39, 318 P.2d 330 (1957), which states:

> "If the opinion evidence was such that it will aid the jury in understanding their problems and lead them to the truth as to the disputed issues of fact, it is competent and admissible, irrespective of whether it bears directly upon the ultimate fact the jury is to determine. And *the trial judge is allowed wide discretion in regard to the allowance of such testimony.* (Emphasis added.)

In the present case it will be noted that the trial took place some four and one-half years after the events in question occurred with consequent dimming of memory of specific words and acts. As a result the witnesses could not recall specific conversations although their memories were clear as to general matters discussed and as to what they had understood from the discussions as a whole. Thus their testimony was admitted as an aid to the jury in making its determination as to whether Ewell had reasonably assumed that there was an agreement and that he would be paid for his extra services in meeting the railroads' special requirements.

In *Howard* v. *Missman,* 81 Idaho 82, 337 P.2d 592 (1959), appellant complained of the trial court's allowing a witness to respond to the question: "What impression did you gain from the fact that he had slowed down?" The court held such testimony admissible where the witness is in a position to know the facts upon which the conclusion is based and has testified to such facts.

In the present case the lower court not only limited the basis for admission of the challenged testimony, as noted above, but in addition, in the court's instruction to the jury No. 6 (R. 102) the jury was told not to consider as evidence any impressions or conclusions drawn from statements made by representatives of the parties. Further, in instruction No. 35 (R. 132) the jury was told the test for an implied contract is "whether a person

in plaintiff's position could under all of the circumstances then existing, reasonably have assumed that it would be paid for services, if any, rendered."

POINT VI

PLAINTIFF'S CONTRACT WITH EACH OF THE DEFENDANT RAILROADS WAS SUPPORTED BY AMPLE CONSIDERATION.

Both of the defendant railroads argue naively that any contract with them was invalid for lack of consideration. Ignoring clear, substantial and credible testimony from at least six witnesses and extensive documentary evidence to the contrary, both flatly state that plaintiff performed no task and provided no service not already included in its contract with Salt Lake City, as to which they claim to be third party beneficiaries.

That the railroads were advised in writing they must arrange and pay for their own special requirements cannot be disputed. That special meetings were held to discuss specifically the railroads' responsibility to the contractor for their requirements not included in the city's contract was clearly established in the evidence. That the special time guarantee cost the contractor substantial extra cost is not to be denied. That the railroad representatives asked for a price to them from Ewell is conceded even by the railroad representatives

themselves. That the railroad representatives agreed to Ewell's proposal, although unconvincingly disputed by the railroads' witnesses, was strongly attested to not only by witnesses and documents but, significantly, by the fact that at no time until after the work was done did the railroads claim they were not responsible.

It is submitted that to claim Salt Lake City should pay for extra costs made necessary to meet the 10-hour minimum time requirement of the railroads is nonsensical. The time requirement was not imposed in the contract because it concerned only the railroads. It was imposed by the railroads for their own benefit. If they truly thought they had no responsibility for the crossings *why did they ask for* and receive Ewell's offer of $34.21 per foot for 22 feet at each crossing.

POINT VII

THE AWARD OF DAMAGES FOR UNREASONABLE DELAYS TO PLAINTIFF'S CONSTRUCTION ACTIVITIES WAS PROPER.

Both railroads claim that the award of damages for delay as to each of them was erroneous and improper. First, it is argued that because the contract with the city, to which neither of them was a party, precludes "any claim from or damage on account of hindrance or delay from any cause whatsoever" (Exhibit 1-P, p. 19) that

the railroads, and apparently the whole world, are protected. This argument runs contrary to the purpose and spirit of the pre-job meetings and correspondence with the railroads' representatives, in which they were advised that extra costs caused by them were to be paid by them, and as to which they did not object. In addition, such a contention, if accepted, would either place an unreasonable and unlimited risk of delays and interference upon the contractor or vastly increase the cost to the city to allow for a rather nebulous "public cooperation" or "level of anticipated interference" factor. If the railroads' contention were accepted they would have an unlimited license under the city's contract, to which they were not parties, to delay or hinder the contractor with impunity, however, whenever and wherever they felt like it. So would anyone else. The contract was between the city and the plaintiff. Its provisions relating to scope of work and delay did not, and could not, govern plaintiff's duties and rights as against the rest of the world.

The railroads both point to provisions in plaintiff's contract with the city which outline its duty to cooperate with other utilities in scheduling its work so as to minimize interference with their activities and avoid damage to their facilities. Apparently both railroads view these provisions as a one-way street since they now deny any reciprocal duty of cooperation in scheduling to avoid unnecessary expense and delay to the contractor. This contention is untenable.

The evidence showed that, although plaintiff would willingly have uncovered the signal lines well in advance of its pipe laying crew, the railroads insisted that they should be permitted to handle this themselves. The evidence also showed that Ewell gave notice to the respective railroads of his progress well in advance of the 48-hour period required by the city's contract. Notwithstanding this notice the railroads, because of indecision and failure to schedule their work, caused plaintiff's entire crew and equipment, including laborers, trucks, tractors, shovels and operators to sit idle for substantial periods. Plaintiff was delayed first by D. & R.G.W. representatives' indecision as to whether its tracks should be open cut or jacked. Delays were caused thereafter because the railroad signal lines had not been exposed.

Another basis of complaint against the award of delay damages is the railroads' wholly unsupported claim that the jury's award gave plaintiff an unjustifiable double recovery. Here again the railroads resort to misstatement of the evidence and they disregard substantial, credible and persuasive testimony and documentary evidence in pressing this position.

In summary, the evidence showed that the extra costs charged by plaintiff did not result from requirements for more or different materials than those required by the city's contract. His offer to cross each set of tracks within 10 hours or less by open cutting for $34.21 per

foot for 22 feet took into account only the estimated additional time involved in concentrating all men, equipment and effort in the area of a single crossing to meet the 10-hour guarantee rather than spreading the equipment and activity to a normal or customary interval as to both distance and time.

The evidence showed clearly that Ewell's quoted price was in addition to and not in lieu of prices provided in the city's contract. The railroads' contention that plaintiff is seeking a double recovery is without support in the record.

POINT VIII

THE JURY PROPERLY FOUND THAT D. & R.G.W. WAS LIABLE TO PLAINTIFF FOR 70 FEET OF JACKING.

The inability or unwillingness of the defendant railroads to view the evidence in this case with any degree of objectivity is nowhere more apparent than in the claim of D. & R.G.W. that, as a matter of law, it is not responsible for jacking under its written contract with plaintiff. This claim not only overlooks the strong evidence of bad faith and deliberate harassment on the part of D. & R.G.W.'s representatives, but it disregards the express provisions of *its own contract* as well.

Without going into detail, it is sufficient to say that Ewell refused to sign the first contract tendered to him by D. & R.G.W. agents (Exhibit 37-P) because, as he

advised them, it was impossible to resume open cut laying of the pipe after only 40 feet of jack. (R. 489, 493). The second contract (Exhibit 38-P) was signed only after he had insisted without objection from the agents, that no less than 90 feet of jacking would be required (R. 631, 637). The claimed right of D. & R.G.W. to terminate the jacking and require commencement of open cutting at any given point, even after 5 or 10 feet evidences a complete disregard for plaintiff's burden as the contractor. It is from an engineering standpoint completely nonsensical (R. 629, 641, 657). It would have actually increased the expense to D. & R.G.W. and interrupted its traffic (R. 657). Even the Union Pacific's division engineer had never heard of such a thing (R. 794).

On the whole, the D. & R.G.W.'s claim in this regard was wholly discredited and no doubt rejected by the jury as it should have been.

Even more important, however, in support of the award for jacking was the specific contract provision (Exhibit 38-P, paragraph 6), not mentioned in D. & R.G.W.'s brief, which required "*one* (1) *day's* written notice to Contractor" of termination. In this regard the evidence clearly established that at the time written notice of termination was given (Exhibit 39-P), and even so in improper form, more than 40 feet had already been jacked. Within one day after notice of termination was received all of the jacking claimed against the rail-

road had been completed. Thus it is difficult to understand how D. & R.G.W. could seriously contend that it is not responsible for this jacking expense, part of which was voluntarily paid for by the city because of its error in failing to plat a large storm drain located in the same vicinity.

POINT IX

SUBMISSION OF THIS CASE TO THE JURY ON A GENERAL VERDICT WAS NOT AN ABUSE OF DISCRETION.

D. & R.G.W. argues that the trial court abused its discretion and committed reversible error by refusing to submit the case to the jury on interrogatories or a special verdict. The basis for this alleged error is supposed to be the jury's inability to separate liability of the three defendants to plaintiff.

In *Baker* v. *Cook,* 6 Utah 2d 161, 308 P.2d 264 (1957), this Court stated:

> "As heretofore observed, great care should be taken to submit questions to the jury so that they are clear as possible. When a general verdict will best settle the issues, it should be used. When specific issues cannot be reached by a general verdict, the trial court should take advantage of special verdicts or special interrogatories."

It is clear that the jury understood the issues involved and were able to separate the liabilities of the parties. The jury was specifically instructed in Instruction No. 45 that each defendant was entitled to fair and independent consideration of its defenses and was not to be prejudiced by a finding against any other defendant. The verdict in favor of Salt Lake City is clear evidence that the jury was able to distinguish between the acts and liabilities of the several defendants.

The law in this case was neither complicated nor confusing. The contested issues of fact, although several in number, were rather clear-cut and easily susceptible of determination from the evidence. That they were resolved by the jury favorably to plaintiff is not surprising in view of the rather compelling evidence produced at the trial on plaintiff's behalf.

As to the amount of the verdict, this also was a basically simple calculation. The gist of the railroads' defense was not directed to the amount owed but to the proposition that *no amount* at all was owed. The amount awarded by the jury was the amount asked in the Complaint and the amount proved at the trial by detailed testimony. D. & R.G.W.'s claim that the jury must necessarily have been confused because it rendered its verdict in accordance with the Complaint and instructions simply does not bear close examination. This was an action in contract. The amounts asked for were precisely calculated and explained; under the evidence there was

little room for adjusting the amounts. The money amounts the jury had to deal with were greatly simplified as compared to, for example, personal injury cases which juries decide every day by use of the general verdict.

POINT X

THE INSTRUCTIONS WERE NOT PREJUDICIAL TO APPELLANTS.

Several objections are made in appellants' briefs to the lower court's instructions to the jury. The objection common to both appellants that the jury should not have been allowed to consider the issue of express contract is treated above in the discussion dealing with implied contract.

The claim that the issue of express contract was improper by Union Pacific is inconsistent with its requested Instruction No. 2 which provided:

> "You are instructed that a condition precedent to the enforcement of *any contract* is that there be a meeting of the minds of the parties which must be spelled out either *expressly or impliedly* with sufficient definiteness to be enforced." (R. 175) (Emphasis added.)

It will also be noted that Union Pacific's requested Instructions 3, 4, 9 (R. 176, 177, 182) all also deal with

oral contract. Similarly, the objection of D. & R.G.W. to submission to the jury of the issue of express contract is inconsistent with its requested Instructions 5, 11 and 13 (R. 161, 167, 169) all of which present the issue of express contract as compared to implied contract.

Union Pacific's requested Instructions 3 and 9 were given; D. & R.G.W.'s requested Instructions 5, 11 and 13 were given either verbatim or in substance. These requested instructions reflect a recognition that under the evidence the jury could properly have found that the railroads expressly agreed to Ewell's offer. The letter of Mr. Carter, city engineer, to Union Pacific (Exhibit 14-P) refers to a verbal agreement. The testimony regarding the meeting on October 22, 1965 lends itself to such a finding notwithstanding the fact that a lapse of time precluded a recollection of specific conversation to that effect.

Union Pacific asserts that the instructions as a whole precluded a fair trial because they were contradictory, confusing and misleading. It argues that the order of giving the instructions was unfair in that *its requested instructions were given first* followed by those of D. & R.G.W. and then those of plaintiff.

Union Pacific argues specifically, for the first time on appeal, that Instruction No. 11 and No. 33 are contradictory (R. 927-29). It submitted Instruction No. 11

(R. 107, 184) and failed to raise any issue of the alleged contradiction in the trial court. In *Pettingill* v. *Perkins*, 2 Utah 2d 266, 272 P.2d 185 (1954) this Court stated:

> "The duty is incumbent upon counsel to give the trial court the opportunity to correct the error before asking the appellate court to reverse a verdict and judgment thereon. Furthermore, it is well established that a party cannot assign as error the giving of his own requests. He cannot lead the court into error and then be heard to complain thereof."

Union Pacific's only objection to the trial court in this regard was the broad assertion that the instructions generally were inconsistent and contradictory (R. 929). Rule 51, Utah Rules of Civil Procedure, provides, however, that "In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection."

This Court pointed out in *Employers' Mut. Liability Ins. Co.* v. *Allen Oil Co.*, 123 Utah 253, 258 P.2d 445, 450 (1953), that the purpose behind the Rule 51 requirement is to give the court an opportunity to correct error. The broad general exception made by Union Pacific was of no value to the trial court in correcting the specific error it now asserts.

Union Pacific's objection to the order of giving the instructions is novel. Its instructions were given first—

a factor that would be considered highly favorable by many attorneys. Whether the instructions given first or last have the greatest impact upon the jury is a matter upon which opinion may vary. To say the order of the instructions here prejudiced any party assumes the jury would know whose requests were being given or that the requests were themselves unduly favorable to the party on whose behalf they were submitted. Such simply is not the case.

Instruction No. 50 (R. 147) specifically stated that "The order in which the instructions are given has no significance as to their relative importance."

If the order of giving the instructions constitutes a basis for reversal then every appeal would involve this issue. In such cases, the argument whether the instructions first given were the most or least effective, prejudicial or fair would depend upon the order in which the appellant's instructions were given.

D. & R.G.W. argues that the trial court went beyond its authority by instructing the jury on the claims of the parties in Instruction No. 26. Its position appears to be that *any* instruction other than on the law is prejudicial error. If this were the rule then almost every case would require reversal upon appeal. Interestingly, D. & R.G.W. does not argue that Instruction No. 26 misstated its position or the position of other parties. It is difficult

to see how it was error to advise the jury as to the position of the parties.

The purpose of instructions are to assist the jury in understanding their task—to "enlighten the jury on its problems." *Johnson* v. *Cornwall Warehouse Co.,* 16 Utah 2d 186, 398 P.2d 24 (1965). Part of the jury's task is to understand the claims of all the parties. If one party is asking for a money amount the jury has the need and right to know in the instructions the amount claimed and how the total was arrived at. This was the effect of Instruction No. 26—it summarized the parties' allegations.

The jury must be assumed to have followed the instructions. *Williams* v. *Ogden Union Railway and Depot Co.,* 119 Utah 529, 230 P.2d 315, 322 (1951). This being the case, how could it be reversible error that the jury was instructed on the parties' assertions when by other instructions they are required to make their decision based upon the evidence and upon proper proof?

Indeed, it is "incumbent upon the court to instruct the jury on the law applicable to the theories of both parties insofar as such theories are supported by some evidence." *Hall* v. *Blackham,* 18 Utah 2d 164, 417 P.2d 664 (1966).

On appeal, a challenged instruction "should be considered in its entirety, and along with all of the other instructions given to determine whether they accomplished what is essential: explaining to the jury in a manner understandable to them the issues of fact and the law applicable thereto with reasonable accuracy, and with fairness to both sides." *Badger* v. *Clayson,* 18 Utah 2d 329, 422 P.2d 665, 666 (1967). Instruction No. 26 was fair to all parties.

Instructions Nos. 28 and 29 on apparent authority are complained of by defendants as not supported by evidence. This Court explained apparent authority in *Melia* v. *Moulton,* 100 Utah 562, 114 P.2d 208, 211 (1941):

> "Either by action or inaction where there is the duty to act, the principal may create a situation the reasonable interpretation of which, by a third party with whom the agent is about to deal, is such as to lead that third party to believe that the agent has authority to deal with him as contemplated. Under such circumstances the law will hold the principal responsible to that third party for the results of that deal with the agent."

In *Santi* v. *Denver & Rio Grande Western,* 21 Utah 2d 157, 442 P.2d 921 (1968) it was held that whether a circumstance would be such as to cause a plaintiff to place "reasonable reliance" upon the representations of an agent was a question of fact. In this case the jury found the issue against the railroads.

The activities of the railroads in this matter gave the jury substantial evidence upon which to find apparent authority. Defendants' contention that their agents were without actual authority to contract for them is not responsive to this issue of apparent authority.

If the agents sent by the railroads to the meetings were unauthorized to contract on behalf of the railroad, contrary to what would have been the reasonable expectation of those in attendance, then any such limitation of the agents' authority should have been disclosed. The same agent alleged to be without authority testified that he at times is the only one who would deal with a contractor such as plaintiff (R. 755-56), that he normally does not tell a contractor who will sign on behalf of the railroad (R. 756) and that he never told Ewell of his lack of authority though he was the "eyes and ears" of D. & R.G.W. in this matter (R. 758-59).

Union Pacific's agent testified that a contract could be signed on Union Pacific's behalf in Salt Lake City (R. 774) and that he had many times entered into contract negotiations for his company (R. 785).

CONCLUSION

During six days of trial the defendant railroads were given a full opportunity to present their respective positions to the Court and the jury. An abundance of

issues, factual and legal, were disputed. Eight witnesses testified and a large number of documents were produced on behalf of the plaintiff. Seven witnesses and additional documents were produced on behalf of the defendant railroads. The issues having been thoroughly explored the matter was submitted to the jury which was given 51 instructions, most of which were requested by the respective parties.

In the over-all view the instructions fairly outlined each of the theories of the parties, pro and con. Upon consideration of the evidence the jury found in plaintiff's favor. That verdict is supported in every particular by substantial, credible and convincing evidence. That verdict and the Judgment entered thereon are fully supported by the weight of the evidence and applicable law and should be affirmed.

Respectfully submitted,

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