(Decision No. 10871)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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| BOARD OF COMMISSIONERS OF PARK COUNTY,<br>BOARD OF COMMISSIONERS OF SUMMIT COUNTY,<br>FAIRPLAY GOLD MINES, INC., A CORPORATION,<br><br>Petitioners,<br><br>vs.<br><br>COLORADO & SOUTHERN RAILWAY COMPANY,<br>A CORPORATION,<br><br>Respondent. | IN THE MATTER OF THE USE OF THE PUBLIC HIGHWAY OF THE DENVER-LEADVILLE NARROW-GAUGE RAILROAD.<br><br>CASE. NO. 2037 |

November 8, 1937

Appearances: Warwick M. Downing, Richard Downing, Esqs., 824 Equitable Building, Denver, Colorado, Carl Kaiser, Esq., Breckenridge, Colorado and George A. Miller, Esq., Fairplay, Colorado, for the Petitioners;
J. L. Rise, Philip S. VanCise, Kenneth Robinson and R. D. Charlton, Esqs., E. and C. Building, Denver, Colorado, for the Colorado and Southern Railway Company.

STATEMENT

By the Commission:

The petition herein, which was filed on April 10, 1937 by the Boards of County Commissioners of Park and Summit Counties and Fairplay Gold Mines, Inc., in part, recited that respondent, Colorado and Southern Railway Company, a corporation, owns and operates a narrow-gauge railroad in the State of Colorado known as "Denver-Leadville Line" in intrastate and interstate commerce; that respondent is a public utility; that said railroad, under provisions of Section 4, Article 15 of Colorado Constitution, was, and is, a public highway; that said public highway "is subject to all the duties and requirements contained in Chapter 137, Colorado Statutes, Annotated, 1935" (Public Utilities Act); that without prior thereto applying for or ob-

taining a certificate of public convenience and necessity from the Commission (and in violation of the Constitution and laws of the State of Colorado) respondent proposes, commencing at midnight, April 12, 1937, to abandon its intrastate operations over said line and to dismantle said railroad and remove its rails, ties and other property from and along its right of way; that "the prospective dismantlement is to be done without authority or right"; "that said respondent has only the right to abandon its operations along said right of way in interstate commerce"; that "continuance of said public highway as an intrastate carrier is absolutely vital to all residents, approximately five thousand (5,000) who live or work along the line of said road"; that "it is admitted fully that this Commission has no power or jurisdiction to compel the respondent to operate said public highway, nor to provide that further operations may become a burden on interstate commerce."

Petitioners, among other things, asked that the Commission take jurisdiction and cognizance of the matters complained of, and that an order be entered prescribing an investigation to determine to what extent, if any, the State of Colorado should assert and exercise its constitutional rights in respect to the use of said public highway, and "the use to be made of said public highway for the benefit of the public," and that an order issue, "against respondents to keep intact along the line of said right of way all its properties, including its rails, ties, rolling stock and all other property owned by it until the further order of the Commission."

The Commission, when p etition was filed, took no action except ex-parte to request the Attorney General, on April 10, 1937, to institute appropriate action in a proper court to obtain an order requiring respondent to keep all tracks, ties, rolling stock and other property owned by it along right of way of its narrow-gauge railroad known as "Denver-Leadville Branch" intact and not dismantle, remove or destroy any of such property.

On June 23, 1937, said petitioners filed a supplemental petition with the Commission, stating that such action was commenced by the Attorney General in District Court of Summit County and temporary injunction obtained on April 22, 1937; that "the investigation prayed for in the petition on file

herein should be commenced, and that an engineer of recognized authority should be employed" to make such investigation, and asked that said matter be set for hearing upon the original petition.

On June 29, 1937, respondents, following filing of supplemental petition, having been served with copies of said petitions, filed its "Protest, Objection and Answer". It admitted that it is the owner in possession of the line of railroad extending from Denver to Leadville referred to as the "Denver-Leadville Line" and alleged that on April 12, 1937, it permanently discontinued all train and other service and operations on said line between Climax and Waterton (the segments extending from Denver to Waterton and from Climax to Leadville still being maintained and operated) and then, and thereby, entirely abandoned said line of railroad between Waterton and Climax as a carrier; that on and prior to the twelfth day of October, 1936, there was duly pending before the Interstate Commerce Commission (being the body and tribunal having exclusive jurisdiction in the premises) a proceeding entitled:

> "In the matter of the application of Colorado and Southern Railway Company for a certificate of public convenience and necessity authorizing it to abandon a part of its branch line of railroad extending from Denver to Leadville, Colorado, commonly known as the Platte Canon Line, together with certain branches thereof"

and known as Finance Docket No. 7132 on the Docket and records of said Commission; that the State of Colorado, the Public Utilities Commission of the State of Colorado, the Board of County Commissioners of Park County, the Board of County Commissioners of Summit County and divers others were parties to said proceeding; that thereafter, on October 12, 1936, final order was entered therein by said Interstate Commerce Commission, wherein and whereby it was ordered, adjudged and certified that the present and future public convenience and necessity permit abandonment by respondent of the part and segment of said Denver-Leadville Line extending from Waterton to Climax, which said order became effective on April 12, 1937, and at all times since has been, and still is, in full force and effect; <u>that the Public Utilities Commission of the State of Colorado is without right, power or jurisdiction to set aside, annul, suspend or interfere therewith in any manner or to any</u>

extent whatsoever; that the part of said line between Climax and Waterton is not a public utility or common carrier or carrier of any kind, and the public has no interest or rights therein, and the same is not impressed with any public interest whatever, and this Commission has no jurisdiction thereover or over respondent with respect thereto; that the suit of the State of Colorado vs. the Colorado and Southern Railway Company mentioned in petitioners' supplemental petition was commenced and a temporary restraining order and a temporary injunction issued therein; that respondent is the exclusive owner of all rails, ties, bridges and materials of every nature in said abandoned line of railroad between Waterton and Climax and the structures thereon, and desires and intends to salvage the same and to sell and convert the same into money and to use parts thereof in its other lines of railroad; that this proceedings and said injunction have prevented, and are preventing, the respondent from salvaging the property and materials contained in said abandoned line of railroad and from realizing and obtaining the value thereof in money and because thereof, the respondent already has suffered and sustained damages and losses to the amount of $100,000.00 or more because of the decline in the market value of second-hand rails and scrap iron and steel since April 12, 1937; that the "funds obtainable from the salvage and sale of said steel, iron and material contained in said abandoned line of railroad are needed by the respondent for use in connection with the operation of its interstate railroads; and this proceeding and said injunction have interfered with, hindered and impaired the respondent in the performance of its duties to the public as a common carrier by railroad in interstate commerce, and the same, and any orders made by this Commission tending to delay the dismantlement of said line of abandoned railroad will, in like manner, interfere with and hinder and impair the respondent in the performance of its duties in interstate commerce in the future."

In its reply, petitioners admitted Interstate Commerce Commission in Finance Docket No. 7137 had extended order authorizing abandonment of the part and segment of said Denver-Leadville Line extending from Waterton to

Climax and averred that "The Interstate Commerce Commission has no right, power or authority under the statutes to grant to respondent the right to dismantle its physical properties, but that the right to make such an order is reserved solely to the Honorable Public Utilities Commission of the State of Colorado, and denied that said Public Utilities Commission is without right, power or jurisdiction to act in the matter, insofar as intrastate commerce only is affected, and denied that, "respondent has suffered and sustained losses to the amount of $100,000.00 and more, or any other amount, or that the continuance of the injunction will cause respondent to lose still further large sums, or any sums."

The matter was set for hearing and heard in Denver on October 19, 1937.

The evidence disclosed that rail operations over the Waterton-Climax segment of the Denver-Leadville Branch was discontinued April 12, 1937; that part of said line is not in useable condition, on account of washins and washouts; that the net salvage value of rails, ties and other equipment of the abandoned line had decreased nearly $100,000.00 since April 12, 1937; that Colorado and Southern Railway operated in interstate commerce and that its operations, as a whole, during the past five years, had been, and then were, being conducted at a loss; that the "re-lay rails" and ties of abandoned line were needed by the railroad for repair of its interstate lines, and that the money it could realize from sale of scrap rails and other equipment, if available, could and would be used by the railroad to meet its current operating expenses and discharge other obligations incurred in its interstate operations; that the certificate of the Interstate Commerce Commission issued pursuant to order of date July 24, 1936, provided:

> "that it shall take effect and be in force from and after sixty days from the date thereof, and that within that period, the applicant shall sell said line of railroad or any portion thereof to any person, firm or corporation desiring to purchase the same for continued operation at a price representing the fair and net salvage value thereof;"

said effective date subsequent by order of the Interstate Commerce Commission being postponed to April 12, 1937; that, notwithstanding, said railroad company, at all times subsequent to July 24, 1936, had been and on date of hear-

ing, still was ready and willing to comply with all provisions of said order and to sell said line at a price representing the fair net salvage value thereof, neither petitioners nor any other persons had offered to purchase said line of railroad or any part thereof at "the fair net salvage value thereof"; that no suit to enjoin enforcement of or to set aside said order or any part thereof had been filed by anyone in the United States Courts in the manner provided by law.

Respondents contended that the questions presented by the record were settled by the United States Supreme Court in the case of State of Colorado vs. United States, et al, 46 Supreme Court Reporter, 452, 271 U. S. 153.

In that case, the court, Mr. Justice Brandeis speaking, stated the issues:

> "This suit was brought by Colorado against the United States, in the federal court, for that state, to enjoin and set aside, in part, an order of the Interstate Commerce Commission issued February 11, 1924. The order is a certificate that present and future public convenience and necessity permit the abandonment by the Colorado & Southern Railway Company, six months thereafter, of a branch line located wholly in that state. The certificate was issued under Interstate Commerce Act 1, pars. 18-20, as amended by Transportation Act of 1920, c.91, 402, 41 Stat. 456, 477 (Comp. St. Ann. Supp. 1923, 8563).
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> "The company is a Colorado corporation. It owns and operates in intrastate and interstate commerce a railroad system located partly in Colorado and partly in other states. The branch was constructed under the authority of Colorado and was acquired by the company under its authority. The line is narrow gauge. It is now physically detached from other lines of the company, but it is operated in both intrastate and interstate commerce as a part of the system by means of connections with other railroads. The certificate was granted on the ground that the local conditions are such that public convenience and necessity do not require continued operation, that for years operation of the branch had resulted in large deficits, that the future operation would likewise result in large deficits, that the operating results of the branch are reflected in the company's accounts, that it would have to make good the deficits incurred in operating the branch, and that thus continued operation would constitute an undue burden upon interstate commerce. ****
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> "The main contention of the state is that the Commission lacks power to authorize the company to abandon, as respects intrastate traffic, a part of its line lying wholly within the state." ****

The Court said:

> "The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issued <u>not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination</u>. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. <u>Prejudice to interstate commerce may be effected in many ways</u>. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss. ****
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> "This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably interwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

The decree of the lower court dismissing the bill on the merits was affirmed.

We think it is obvious from the foregoing that unless we can say (which we cannot), that the granting of the request of petitioners and the delay incidental thereto and the consequent withholding of the use of sound rails and equipment salvaged from the line and the use of money obtained from sale of junk in its interstate operations does not constitute a burden on interstate commerce, then we are without jurisdiction and must dismiss the petition.

Counsel for petitioners say that Supreme Court of the United States has held in other decisions that, under Section 1 of the Transportation Act, the Interstate Commerce Commission is concerned only with interstate business; that there isn't anything in the act which prevents this Commission from exercising full powers in the premises, as far as intrastate operations of the railroad are involved, and that before a dismemberment or dismantlement can

be had, certificates authorizing such action must be obtained by the railroad from both Commissions. They cite State of Texas vs. Eastern Texas Railroad Company, 258 U. S. 204, 42 U. S. Supreme Court Reporter 281; St. Louis-San Francisco Railway Company vs. Alabama Public Service Commission, et al, 279 U. S. 560, 49 Supreme Court Reporter 383 and Lawrence, et al, vs. St. Louis-San Francisco Railway Company 274, U. S. 588, 47 Supreme Court Reporter 720.

It is true that in the first mentioned case, although the Interstate Commerce Commission had authorized abandonment by railroad of its intrastate operations, the court held under the facts there appearing, that the State Railroad Commission had jurisdiction over intrastate operations and such intrastate operations could not be abandoned in absence of permission from said Railroad Commission, but case is not in point, in facts or law, as shown by the following quotation from the opinion:

> "The road lies entirely within a single state, is owned and operated by a corporation of that state, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

Likewise, the facts or law of the case from the 49th Supreme Court Reporter cited by counsel cannot be applied in the instant matter. We believe this to be apparent from the following quotation:

> "Railroad should not have discontinued operation of interstate trains by which intrastate service had long been furnished without first applying to the State Public Service Commission for permission to do so, as required by Code Ala. 1923, 9713, and by sections 9730, 9731, 5350, 5399, prescribing severe penalties in case abandonment is willful, since no constitutional right could have been prejudiced by so doing, and no emergency existed requiring immediate action, and no serious financial loss would have been incurred by the slight delay involved."

If it be conceded that the case is in point, still we think it fairly may be implied that if probable large financial loss (undue burden on interstate commerce operations) due to delay had been shown, the court

would not have required an application to the State Commission before allowing abandonment of service. While now it is the usual practice of railroads to seek consent of State Commissions before abandoning intrastate service furnished through operation of interstate trains, it is the general rule to grant such petitions where heavy losses are being sustained by the railroads through such operations and we apprehend that if action upon applications for abandonment under such circumstances were long delayed by a State Commission, Federal Courts would grant relief to the railroad.

In the Lawrence Case (47 Supreme Court Reporter 720) the railroad had maintained shops and a division point in Sapulpa, Oklahoma since 1890. The railway indicated a purpose to remove these shops and the division point to Tulsa, September 19, 1917. The Oklahoma Corporation Commission issued, upon complaint of citizens of Sapulpa and upon notice to and after hearing of the railway, a temporary restraining order enjoining the removal. The railway acquiesced in this order, the Commission retained jurisdiction of the cause, and neither party took any action therein for nearly ten years. In December, 1926, while the restraining order issued in 1917 was in force, the railway, without leave of the Commission and without making any application in the cause, directed that the division point for passenger trains be changed in January, 1927 to Tulsa, and it indicated a purpose to remove its shops to West Tulsa. Thereupon, the complaining citizens of Sapulpa filed a motion with the Commission, reciting the facts, asking that the matter be set for hearing and that meanwhile, the Commission prohibit the railway from making any change. The Commission set the hearing for January 17, 1927, and renewed the temporary restraining order. The railway, shortly before the day set for hearing, brought suit to restrain the State Commission before the Federal Court, reciting that the Commission is without jurisdiction in the premises.

The court held to require that regulating body of State be advised of the proposed change seriously affecting transportation conditions is not such obvious interference with interstate commerce as, on application for preliminary injunction, should be assumed beyond state's power, and said:

"the controversy concerns the respective powers of the nation and of the states over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the state and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But the public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily or harshly. It is important, also, that the demands of comity and courtesy, as well as of the law, be deferred to."

While this case does not support counsel's position in the instant case, if we were to concede that it does, still, it appears from the record herein nearly six years elapsed between the time of filing application for abandonment by the Colorado and Southern with the Interstate Commerce Commission and entry of order granting the request. The Public Utilities Commission and the Counties of Summit and Park were parties in that proceedings. They had ample opportunity to present their views at a number of hearings. We believe "that the demands of comity and courtesy, as well as of the law," have been deferred to by the Interstate Commerce Commission and the railway. Petitioners herein, notwithstanding the order authorizing abandonment was entered in October, 1936, and the original petition herein was filed in April, 1937, still have nothing concrete to offer. They have not shown a desire to or offered to purchase the line and do not now indicate how operations of said railroad can be conducted. They concede that such operations by the Colorado and Southern Railway cannot be required by this Commission. They ask that the Commission appoint an engineer to determine how that can be done, but offer no help or suggestions in the premises. In all fairness, it seems that they seek only to delay action by the railroad indefinitely, hoping that something may develop during the period of delay that will allow or bring about a renewal of railroad operations. We believe, in view of the record and our opinion, that such delay imposes an injurious and unreasonable burden upon interstate commerce, that we are without jurisdiction to grant the petitioners the relief herein sought.

After a careful consideration of the record, the Commission is of the opinion, and finds, that the Commission is without jurisdiction in the

premises and that said petition should be denied and dismissed.

O R D E R

IT IS THEREFORE ORDERED, That the petition herein should be, and hereby is, dismissed.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

Dated at Denver, Colorado,
this 8th day of November, 1937.

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