

BEFORE THE  
STATE RAILROAD COMMISSION OF COLORADO

CASE NO. 29

-----

THE BRECKENRIDGE CHAMBER OF COMMERCE,	)	
Petitioner,	:	
	)	
-VS-	:	INADEQUATE
	)	FACILITIES
	:	
THE COLORADO & SOUTHERN RAILWAY COMPANY,	)	
Defendant.	:	
	)	

-----

Submitted November 16, 1911      Decided November 29, 1911.

FINDINGS AND ORDER OF THE COMMISSION

On August 7, 1911 petitioner herein filed its complaint in which it alleged among other things, that petitioner is a corporation organized and existing under and by virtue of the laws of the State of Colorado, and is engaged in the business of promoting the commercial, social and moral welfare of the citizens of Breckenridge and of Summit County, Colorado, and that its principal place of business is Breckenridge, Colorado.

SECOND: That defendant is a common carrier engaged in the transportation of passengers and property by railroad between Denver, Colorado and Leadville, Colorado, and is subject to the Act to Regulate Common Carriers.

THIRD: That during the winter of 1910 and 1911

the defendant arbitrarily and without just cause therefor closed and wholly ceased, refused and declined to operate or to carry freight or passengers over that portion of the said railroad from and between Como and Breckenridge in the State of Colorado, and petitioner is informed and believes and therefore alleges the fact to be, that the said defendant is about to, and soon will, unless prevented therefrom by an order from this Honorable Commission, so close and cease to operate the said portion of its said railroad from Como to Breckenridge aforesaid, and for and during the winter of 1911--1912, and probably for all time to come; which will result in great damage to Breckenridge and Summit County and to all the citizens thereof. That defendant refuses and declines to transfer or receive for transportation freight over its said line from Denver or any intermediate point to Breckenridge or any point on its said line beyond Breckenridge, and between there and Leadville, but that freight from Breckenridge to Denver or from Denver to Breckenridge or any point on the west side of Boreas Pass, is billed and shipped by said defendant over another and different line of railroad and a much greater distance than the line of defendant, to wit: more than 200 miles, resulting in great injury to residents and citizens not only of Breckenridge, but of Summit County. That defendant has failed and refused and still so fails and refuses to provide or maintain adequate or convenient passenger service over or along its said line of railroad; that from Grant to Como the only service is a combination freight and passenger service; that defendant refuses to provide passenger service on the Sabbath Day; that defendant

refuses to place cars for loading or to receive freight at any place along its line between Como and Breckenridge for shipment at all, thus preventing the operation of mines and mills along said road. Petitioner asks that defendant be ordered to continuously transport and receive for transportation freight as well as passengers from Denver and all intermediate points to any and all other points along this line; to provide continuous exclusive and more convenient passenger service from Denver to Leadville and for Sunday passenger service and for other relief as may seem just.

Defendant by way of answer alleges:

That the Commission has no jurisdiction of the matters complained of in the complaint. For further answer defendant says,

FIRST: It denies that plaintiff is a corporation.

SECOND: It admits it is a common carrier and operates its railroad for passenger purposes from Denver by the way of Breckenridge into Leadville, Colorado, but denies it is engaged in the transportation of property between Denver and Leadville.

THIRD: It denies the closing of the road between Como and Breckenridge, but admits it was compelled to close the same for a short time during the winter months of account of snow.

FOURTH: It admits it has refused and declined to transport or receive for transportation freight over its line from Denver through Como to Breckenridge and to points beyond there. It admits that freight from points between Breckenridge and Leadville including Breckenridge when con-

signed to Denver, or from Denver to Breckenridge, or any point west of Breckenridge to Denver, is billed over its line of railroad through Colorado Springs and Leadville to Breckenridge and to points between Leadville and Breckenridge. It denies that shipments in this manner cause any delay or damage. It admits it refuses to receive for transportation over its line from Denver through Como to Breckenridge freight consigned to Breckenridge or points west of there originating between Denver and Breckenridge, and alleges that such traffic is inconsequential. It denies inadequate passenger service. It admits the refusing to place cars for loading or reception of freight at points between Como and Breckenridge, alleging there is no traffic to be transported.

Further answering the complaint herein the defendant says: their line of railroad is built through what is known as Platte Canon, through narrow and rocky mountain gorges, to Webster, thence over Kenosha Hill to Como, thence over Boreas Pass of the main range to Breckenridge, and again over the range to Leadville, which country from Platte Canon to Leadville is wholly mountainous except a few miles in South Park which is sparsely settled, without any town of any considerable size till Breckenridge is reached. From Como to Leadville the grade is very heavy, reaching a four per cent grade each way, and rising 11400 feet to the top of the Pass. In the winter said line from Como to Leadville is subject to heavy and continuous snow storms, necessitating heavy expense in the operation of the same and that said line between Como and Leadville in the past has cost the Company more to operate it than the revenues

received therefrom; that the present year said line between Como and Leadville shows a deficit of nearly eighty thousand dollars and is a very heavy and continued and wasteful charge on the rest of defendant's line of road. That the railroad tax in Summit County amounts to \$25,000.00 annually; that defendant has endeavored to have its taxes reduced, but has met with refusal; that there is no prospect of improvement in the business of said line and that there are less inhabitants along the line now than ten years ago. It therefore prays that the complaint be dismissed.

The hearing of the case was commenced October 5, 1911 at Breckenridge, Colorado where the Commission sat for the taking of the testimony of the petitioner's witnesses. The Commission then adjourned until November 14, 1911 to sit at Denver, where the witnesses for the defendant were examined, the hearing being concluded November 16th, 1911. All of the members of the Commission were present.

Mr. Barney L. Whatley appeared as counsel for petitioners. Mr. E. E. Whitted appeared as counsel for defendants.

#### JURISDICTION

The Commission has heretofore held that it has jurisdiction to hear and determine cases of the nature of the present one before the Commission, and it so holds now.

#### FINDINGS OF FACT

It appears from the evidence that the South Park branch of defendant's railway extends from Denver

through Como and Breckenridge to Leadville, a distance of 151.18 miles. That there is also a branch of this line from Como to Alma, a distance of 31.69 miles. That said South Park line is a narrow guage road; that the distance from Denver to Como is 88.22 miles; from Como to Breckenridge the distance is 21 miles, and extends over Boreas Pass which is 11,400 feet high; from Breckenridge to Leadville the line extends over Climax Pass which is 11,292 feet high, and the distance is 41.22 miles.

It also appears that each day excepting Sunday a passenger train is operated from Denver to Grant, a distance of 66 miles, and at Grant the passenger coaches are attached to the rear of the freight train and are hauled in this manner to Como, a distance of 22 miles; from Como to Leadville through Breckenridge a regular passenger train is operated. From Leadville back to Denver the passengers are carried in the same manner.

It also appears that a daily, except Sunday, freight train is operated from Denver to Alma by the way of Como, and from Alma to Denver, a freight train is also operated by the way of Como. That from Leadville to Breckenridge a freight train is run daily, excepting Sunday, returning to Leadville each day; that from Como to Breckenridge, a distance of 21 miles, no freight train is operated either way and no freight is received or discharged at any station between these points; that it is the probable intention of the Company to take off the passenger train from Como through Breckenridge into Leadville. It also appears that no freight is received at Denver or any intermediate points for any points west of Como, and that no freight is

received at Leadville or any intermediate points for points east of Breckenridge.

It seems, therefore, that by failing to operate trains between Breckenridge and Como, a distance of 21 miles, it is therefore impossible for a shipper to ship his freight over the South Park line either from Denver to Leadville, or from Leadville to Denver. It also seems that to avoid operating a freight train for the distance of 21 miles between the stations at Como and Breckenridge, that all freight received by defendant at Denver, destined to Breckenridge or Leadville, or intermediate points, is turned over to the Midland and by that road carried to Leadville, and if the same is destined to Breckenridge, must be transferred to defendant's narrow gauge line and carried to Breckenridge, a distance of 41.22 miles from Leadville; or is turned over to the Rio Grande and by them carried to Leadville where it must be transferred again if destined to Breckenridge. The reason given by defendant for carrying their freight a distance of 317 miles around by way of Pueblo, or by the way of Colorado Springs, and paying the other roads for their share of the haul, instead of shipping from Denver to Como, then through Breckenridge to Leadville direct, only a distance of 151.18 miles, is the great expense of hauling the same over their own line over Boreas Pass from Como to Breckenridge, a distance of 21 miles.

A great deal of evidence was introduced tending to show that the South Park branch was losing money by the operation of the same, but the figures and tables introduced by defendant had to do with that part of the line from Como to Breckenridge and to Leadville. There was a

statement made by one of the witnesses that the whole South Park line was losing money. At the same time the Auditor, Mr. Bradbury, stated that outside of the line from Como to Leadville, the road was a paying proposition, the profits in the summer months compensating for any loss in the winter months. However, the facts are undisputed, while there is at present a passenger service from Denver to Leadville over Boreas Pass, there is no freight service that way; that the freight service from Como to Breckenridge is entirely discontinued, and the testimony of one of the general officers was to the effect that it was the intention of the Company to abandon the passenger service over Boreas Pass also.

The relief asked for in the petition is for increased facilities, passenger and freight, claiming the present facilities inadequate; that they have no freight service at all between Como and Breckenridge. The petitioner introduced some witnesses whose testimony tended to show, and in the minds of the Commission did show, that great inconvenience and loss existed to the citizens of the town of Breckenridge and Summit County on account of the kind of service provided by defendant.

There are some very serious questions which must first be determined by the Commission in determining the case before us.

First, can a railroad whose charter provides that they are to "Maintain, operate, extend and complete the railroads and telegraph lines" as is provided in defendant's charter, abandon a part of a contiguous line without forfeiting its charter.

Second, if it cannot, what would constitute a reasonable service if it is shown that that particular part of a line is unprofitable although the whole system is pay-

ing a dividend?

The question whether or not a railroad company may abandon its line and forfeit its charter at will, is not necessary to be decided by us. It seems though, they may do so unless it has received state aide, or there is a provision in the charter prohibiting such abandonment. However, the question which enters into this case is: can a railroad abandon a part, a connecting link, in a main line of its road and not provide adequate service, and if it does, does it not forfeit its charter? It seems in the present case that the main line of the South Park division according to the charter begins at Denver and ends at Leadville; that that part between Como and Breckenridge where defendant has entirely ceased operating freight trains is on the main line as described in the charter, from Como to Breckenridge. By ceasing to operate freight trains over this connecting link the effect of course, is to prevent any through freight moving from Denver to Leadville or from Leadville to Denver over the defendant's line.

The defendant urges that it is offering as a compensation to the patrons of their road a through route around by way of Colorado Springs or Pueblo, but is this an adequate compensation? It was testified to by the witnesses that when this line was operated as a through route from Denver to Leadville, that a merchant could order his merchandise in the evening in Denver and receive the same the next morning in Breckenridge or Leadville by freight. Now all perishable merchandise must be sent by express if it goes over defendant's line, and if sent by freight it takes from three to six days to go around by way

of Pueblo or Colorado Springs, and may thus be destroyed.

In the case of The Albany & Vermont Railroad Company, 24 N. Y. Court of Appeals, page 267, Wright Judge in a case somewhat similar to this, says:

"A Company endowed with a franchise or privilege to maintain a railroad on a fixed route and between places named in its charter, cannot exercise the franchise or privilege by the operation of a road upon another route and between other places. The franchise can only be legally exercised by the corporation operating its entire road.

There is no privilege granted or right obtained to operate a part thereof, and if it should undertake to do so, it is exercising a franchise or privilege without legal sanction."

The court goes on further to say that by abandonment of a part of a line specified in the charter, it forfeits its charter. We believe this is good law.

Should a railroad company which receives a charter from a state which provides that they must operate their road be allowed to cease the operation of a link in the middle of the road and thereby defeat the purposes for which the road was chartered, without forfeiting its franchise. It was the evident intention in granting this charter, that a shipper would have the opportunity to make a shipment from Denver over the entire line into Breckenridge or Leadville direct.

The next question arises what is a reasonable service to be required of defendant under the conditions as shown by the evidence in this case? Defendant claims they are operating at a loss and have introduced figures and tables tending to show this. The figures have to do only with that part of the South Park line, however, from Como to Leadville, and does not include the whole lines of the Colorado & Southern Railroad, nor the entire line of the

South Park division, although one witness testified that the South Park division was losing money.

The petitioner has not attempted to disprove this condition of loss, while it did not concede such loss. While it may be that this line is operated at a loss it is hard to understand how defendant can ship its freight destined from Denver to Breckenridge via Pueblo, which is 317 miles, and pay the Denver & Rio Grande Railroad to haul it into Leadville and then transfer it to their own line, a narrow gauge, and then haul it 41.22 miles back into Breckenridge; how it can do this and meet this expense at a profit or at a less expense than it can haul it over its own line over Boreas Pass, even if it had to double up on its engines and maintain extraordinary heavy expense in keeping open the Pass.

In Atlantic Coast Line vs. N. C. Corporation Commission vol. 206, U. S. Report, it is said:

"It is insisted that although the case be not controlled by the doctrine of Smyth vs. Ames, nevertheless, the arbitrary and unreasonable character of the order results from the fact that to execute it would require the operation of a train at a loss, even if the result of the loss so occasioned would not have the effect of reducing the aggregate net earnings below a reasonable profit."

To this the court replies:

"The mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness. Of course the fact that the furnishing of the necessary facilities ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one, as the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the service required and the public need for its performance."

It is not shown, nor is it contended by the defendant that the proper or reasonable operation of this road would in itself reduce the net earnings of the whole system below a profit.

In Missouri Pacific Railway Company, plaintiff in error, vs. State of Kansas ex rel, Carr W. Taylor, 216 U. S. Supreme Court, 262. The Court says:

"The duty of a railway company under its charter to furnish passenger service is not completely discharged by running a mixed train, so an order of the Kansas Railroad Commission compelling passenger train service at a pecuniary loss is not so arbitrary and unreasonable as to take property without due process of law."

The case cited by defendant, State ex rel, Northern Pacific Railway Company vs. Railroad Commission of Washington, seems to be relied on by them as a reason why any order made by this Commission on the defendant to increase its facilities would be unreasonable and would be held so by the courts. The facts in this case are as follows:

The Railroad Commission ordered relator to operate a mixed train daily, except Sunday, between two stations on a branch line about 14 miles apart. Relator now runs one mixed train each way twice a week, but for four previous months maintained a daily train service during which time the passenger traffic produced an income of nine cents a mile per day in one direction and eleven cents in the other direction, and the income from its passenger traffic by running trains daily would be no greater. The operation cost of a train is not less than thirty cents a mile, not including maintenance expense, and the two trains a week now operated are sufficient to take care of the freight

traffic, and the receipts from both freight and passenger traffic as is now operated are less than the expenses.

In this case the court held that this order was unreasonable. We think there is quite a difference between this case just cited and the case before us. In that case the branch was only 14 miles long--it was a branch line. In the present case the line which the defendant has ceased freight operation on, is a connecting link--it is a contiguous part in the middle of the main line, in the case just referred to there were already two trains a week run by the Company which the evidence showed were run at a loss. In the case before us there are now no freight facilities at all, with the probability that defendant will discontinue all passenger facilities. There must be a distinction between a case where there are some facilities which the court regarded as adequate, and the present case, where it is admitted, at least as far as freight is concerned, that there is none at all.

The Commission is of the opinion that the facilities now furnished by the defendant are inadequate. It is not its desire, nor will the Commission order in the present case any increase in facilities which would unduly burden the defendant. However, the Commission feels that the defendant should continue the operation of its freight service in a manner that a shipper may bill a shipment from Denver over the South Park line through to Leadville, and that a shipper in Leadville may make a through shipment over defendant's line into Denver.

ORDER

IT IS ORDERED, that the defendant, the Colorado & Southern Railway Company, be, and they are hereby notified and directed to, on or before the first day of January, 1912, and during a period of two years thereafter, maintain, operate and conduct a through freight service from Denver to Leadville by the way of Como and Breckenridge, at least three days each week, and from Leadville to Denver by the way of Como and Breckenridge at least three days each week. That they publish on or before the first day of January, 1912 freight tariffs from Denver to Leadville and intermediate points and from Leadville to Denver and intermediate points, and receive and transport shipments to and from all stations between Denver and Leadville.

IT IS FURTHER ORDERED that defendant, the Colorado & Southern Railway Company, do operate and maintain a through and exclusive passenger train service daily, excepting Sunday, from Denver to Leadville by the way of Como and Breckenridge, and a through and exclusive passenger train service daily, excepting Sunday, from Leadville to Denver by the way of Breckenridge and Como.

Effective January first, 1912  
and for two years thereafter.

BY ORDER OF THE COMMISSION,

(Signed)

AARON P. ANDERSON  
DANIEL H. STALEY  
SHERIDAN S. KENDALL

Dated at Denver, Colorado,  
November 29, 1911.