

Public Service and Railroad Commission, Powers of. Railroads, Powers of Commission to Compel Operation.

Where a railroad company has not sufficient traffic to pay operating expenses, keep the road in a safe condition and return a reasonable interest upon the investment, the Railroad Commission has no power to compel operation.

October 5, 1914.

Hon. Board of Railroad Commissioners,

Helena, Montana.

Gentlemen:

I am in receipt of your communication under date August 24th, asking for my opinion as to whether or not the owners of the Yellowstone Park Railway can be compelled, under the laws of this state, to operate the said railroad as a common carrier. You state that the railway in question was built about sixteen years ago, and for a time was operated by the Northern Pacific Railway Company, under an agreement. That thereafter, on or about the 15th of April, 1913, the Northern Pacific discontinued this operation, and that the line is now being operated in a measure by the coal mine owners, under a lease, which will expire November 1st. You also state that the railroad company owning this line has no power or rolling stock of its own.

All railroads incorporated under the laws of this state are common carriers, Article XV, Section 5, of the Constitution, providing:

"All railroads shall be public highways, and all railroad, transportation and express companies shall be common carriers and subject to legislative control. * * *

The legislature pursuant to the power granted by the Constitution, has enacted Section 4324, 4325, 4343 and 4344, which provide generally that railroads must furnish service, and name penalties for a failure to do so. The power of the state to require railroads to furnish service adequate to the needs of the communities served by them, and for a reasonable compensation, rests upon the grounds that they are in a public calling, and that the state lends its power of eminent domain to such corporations, in order that they may have rights of way. The state also gives them the power of incorporation, which carries with it many privileges, such as the right of corporate succession, and the powers generally granted by law to corporations.

Because of the powers granted to railroad corporations, it has often been held that a corporation using the power of the state was bound to substantially live up to the terms of its franchise, and courts have in many cases held that once a railroad was started, under the grant of power from the legislature, it could not deliberately abandon a part of its road, or give a service different than that contemplated by its articles of incorporation. As a consequence courts have exerted their power to prevent railroads from abandoning certain portions of their line which had been built and operated, or to compel operation of two separate portions of a line as a continuous one, or replacement of bridges which had been taken out, or the repairment

of highways. In fact, the courts will by proper orders, compel railways to perform those duties which are placed upon them by law. However, in none of such cases was the point here involved squarely before the court, and as a consequence, much of the language used by the courts which might seemingly be applicable here, is merely obiter dictum, and could not be cited as authority for the proposition that the state may compel the operation of a railroad. The distinction must also be kept in mind between the actual operation of the road as a whole and those things which are incidental to its operation.

The reasons for the discontinuance of operation of the Yellowstone National Park railway, are not given in your inquiry. The most obvious reason, and the one which we assume to be the case here, is that the traffic upon the line is not sufficient to justify its operation. This is the question which must ultimately decide the attempt of the state to compel operation, for the state cannot compel the operation of a business, no matter what public function it may be engaged in, unless there is an express contract on the part of the concern to perform the act required. To hold otherwise would be sanctioning a taking of property without due compensation, and this no state may do. One court in dealing with this subject, under a very similar state of facts, expressed itself as follows:

"If we are at liberty to suggest on what the legislature very probably relied for the continued operation of a railroad once constructed, we should say it was the interest of the owners. If it can be operated profitably, the interest of those concerned will rarely if ever fail to keep it in operation, so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss, and certain there is no mode provided by which it can be operated at the risk of the state."

Coe v. Columbus, P. & I. R. R. Co., 75 Am. Rep. 524.

The Supreme Court of the state of New York, in an early case, where the state applied for an injunction to prevent a railroad from discontinuing the operation of a portion of its line, used this language:

"The people cannot maintain an action to compel a railroad company to operate its road for the use of the public after it shall have abandoned it for reasons peculiar to itself."

People v. Albany etc., R. R. Co., 24 N. Y. 261.

This may be said to be a leading case upon this subject, though it does not involve the exact point here. The reasoning of the court has been quoted in numerous subsequent decisions, and we know of no case where it has been overruled. The court bases its conclusion that the state cannot by action compel the operation of a railroad upon the ground that since the operation of the road is not a condition upon which the franchise is granted, and there is no express contract providing for operation, the state is without a remedy. In other words, when applying for a franchise, a railroad company has the option of building and operating its road, or of forfeiting the right which the

state has given it. Another New York case, following the one quoted, said:

"A court may by mandamus, act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation."

People vs. Railway Co., 104 N. Y. 58.

State vs. Dodge City M. D. Ry. Co., 53 Kansas, 329 and Jack vs. Williams, 113 Federal Recorder, 823, were two cases almost precisely on all fours with the one in hand. In the former of these two, the court in considering the right of the state to compel the operation of the line after it had been shown by conclusive experiment that the traffic did not justify operation, concluded:

"Where a railway company is insolvent and never has and cannot pay operating expenses, a court will exercise its discretion and refuse a writ of mandate to compel repair and operation thereof, as such a writ would be vain, and no public benefit would be subserved thereby."

In Jack vs. Williams, supra, the court held to the same effect, and boldly took the ground that the test of the right of the state to demand operation was ultimately whether the traffic furnished by the region served by the railroad would pay a reasonable return, and that if such traffic did not make a reasonable return upon the investment, then the community was not entitled to railroad facilities.

The question then of whether your commission may by an order or appropriate court proceedings compel the operation of the Yellowstone National Park Railway, is one dependent upon the income afforded by the traffic which it carries. If this is sufficient to maintain it in a safe condition, pay operating expenses, and return a reasonable interest upon the investment, probably such an order may be had. If the traffic will not supply these very necessary funds, then there is no means by which operation may be compelled.

Yours very truly,

D. M. KELLY,
Attorney General.