Railroad Commission, Power of. Hearings by Railroad Commission, Necessity for.

It is beyond the power of the Railroad Commission to make orders relative to train service and station facilities by railroads without first giving notice and holding hearing upon the question.

January 4, 1916.

Hon. Board of Railroad Commissioners,
Helena, Montana.

Gentlemen:

I am in receipt of your communication under date the 22nd ultimo, submitting for my opinion the question:

> "whether this Board has the authority to make an order under Section 4382, without going to the formality of calling and holding a formal hearing?"

Section 4382, Revised Codes of 1907, is as follows:

> "The Board shall have the power, and it shall be its duty, to compel any and all railroads subject hereto, to provide, maintain and operate sufficient train service, both freight and passenger for the proper and reasonable accommodation of the public, and to provide and maintain suitable waiting rooms for passengers, and suitable rooms for freight and baggage at all stations."

You state that matters are constantly coming before the Commission relative to train service and station facilities, in which the facts surrounding the subject are almost entirely within the knowledge of the Commission, both through observation and through records and files in your office. You state further that hearings of this nature are usually held at the point from which the complaint comes, necessitating long trips at considerable expense to the state. It will be observed that Section 4382, does not itself contain any mention of a hearing on the merits. The ultimate question involved is, whether an order made, as outlined by your inquiry, would be contrary to the constitutional provisions against the taking of property without due process of law. The phrase "due process of law", as used in the constitution, is not confined to judicial proceedings.

Chauvin v. Valiton, 8 Mont. 450, 20 Pac. 658;
Cunningham v. N. W. Improvement Co. 44 Mont. 180;
State ex rel Marshal, 50 Mont. 289.

It applies as well to legislative and administrative acts as to judicial ones.

> "The functions committed to executive officers by the laws may involve decisions of questions of fact which concern the private rights of individuals and which might, if the legislature so directed, be made the subject of actions in formal courts. Questions of this character are administrative in so far that it is competent for the legislature to commit their decisions to administrative officials, but are judicial or quasi-judicial in so far that the power to decide arbitrarily does not exist, and

notice and a hearing are necessary to constitute due process of law. The decision of administrative officials may in the absence of constitutional restriction be made final by the legislature, or it may be reviewable in the courts; but, if notice and an opportunity to be heard are present, in neither case is the constitutional guaranty infringed."

McGehee, Due Process of Law, page 72.

What is included under the constitutional guarantee of due process of law, is defined by McGehee, as follows:

"The clauses in our constitutions guaranteeing "the law of the land" and "due process of law", have always been held to include the opportunity to present any defense which might affect the decision of the court or tribunal. The opportunity to defend implies notice of an official inquiry into the facts, and "notice and hearing" are necessary to due process of law; are, indeed, the "essential elements" thereof. The notice and hearing requisite are present generally when the person whose life, liberty, or property is to be taken, has upon reasonable notice, at some stage of the proceedings, an opportunity to present objections to the proposed action before a tribunal authorized to give effect to the objections, if it regards them as valid." McGehee, Due Process of Law, page 76.

Courts have even gone so far as to hold that notice and hearing must be required by law, and not merely a matter of grace, one court saying "it is not enough that the owners may by chance have notice; or that they may as a matter of favor have a hearing; the law must require notice to them and give them the right to a hearing, and an opportunity to be heard * * * . The constitutional validity of law is to be tested, not by what has been done under it, but what may by its authority be done."

Stewart v. Palmer, 74 N. Y. 183;

Rees v. Watertown, 19 Wall U. S. 107.

Citations are hardly necessary to the point that orders of a railroad commission requiring additional station facilities are a taking of property. The Supreme Court of the United States, in a case involving the validity of a law of Nebraska requiring railroad companies to build spurs at their own expense to elevators erected along their lines of railway, said:

"And to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return of the outlay."

Missouri Pac. Ry. v. Nebraska, 217 U. S., 196, citing

Woodward v. Central Vermont Ry. Co. 180 Mass. 589.

Furthermore, the Railroad Commission law of Montana is not without provision for hearings in such cases. Section 4378, Revised Codes of Montana, 1907, prescribing the general powers of the Board, is in part as follows:

"The Board shall also have the power and authority, and it shall be its duty, to examine and inspect, or cause to be examined and inspected, under its authority, all books, records,

files and papers of the persons and companies specified above, in so far as the same may be pertinent to any matter under investigation before said Board and to hear and take testimony in the progress of any inquiry or investigation authorized by this act."

I am of the opinion, therefore, that it is beyond the power of your Commission to make orders relative to train service and station facilities by railroads without first giving notice, and holding a hearing upon the question, in which the carriers and all other persons interested may have an opportunity to present their side of the case.

Yours very truly,

J. B. POINDEXTER,

Attorney General.