

ORIGINAL

Decision No. 1423

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

COUNTY OF SACRAMENTO,

Complainant,

vs.

Case No. 526.

NORTHERN ELECTRIC RAILWAY  
COMPANY, and SACRAMENTO AND  
WOODLAND RAILROAD COMPANY,

Defendants.

.....

Eugene S. Wachhorst, District Attorney, and  
Frank F. Atkinson, Deputy District Attorney,  
for County of Sacramento;  
Charles W. Slack and A. M. Seymour for  
Northern Electric Railway Company;  
T. T. C. Gregory and C. J. Goodell for  
Sacramento and Woodland Railroad Company.

THELEN, Commissioner.

O P I N I O N.

This complaint raises the question whether a certain agree-  
ment entered into on July 13, 1912, between Sacramento and Woodland  
✓ Railroad Company and Northern Electric Railway Company is void for the  
reason that the consent of this Commission was not applied for or  
secured, under the provisions of Section 51 of the Public Utilities  
Act.

The complaint alleges, in effect, that the defendant rail-  
road companies entered into the agreement on July 13, 1912, a copy  
whereof is attached to the complaint and marked "Exhibit A"; that the  
Railroad Commission has never authorized the execution of said agree-  
ment; and that the county of Sacramento is a party in interest and is  
interested in and a part owner of the so called M Street bridge across  
the Sacramento river, referred to in said agreement. The complainant  
asks that this Commission determine that said agreement is void and

that neither of the railroad companies, parties thereto, acquired any rights thereunder, and for such other and further relief as this Commission has jurisdiction to give.

The joint answer of both defendants alleges that the approval of the Railroad Commission is not necessary to the validity of this agreement; that said agreement does not fall within any of the provisions of Section 51 of the Public Utilities Act; that the railroad of the Sacramento and Woodland Railroad Company had never been operated prior to the date of said agreement and that said railroad company has never owned and does not now own any rolling stock or operating equipment; that the Sacramento and Woodland Railroad Company owns no rights in the M Street bridge; and that the county of Sacramento has no interest in the subject matter of this proceeding.

The hearing in this proceeding was held in Sacramento on January 26, 1914. The parties asked and were granted permission to file briefs, the last of which brief was filed on April 4, 1914.

Northern Electric Railway Company was incorporated under the laws of this State on September 19, 1907, for the purpose of constructing and operating all kinds of railroads in designated portions of northern California, as far south as the city of Sacramento. The estimated length of the proposed railroads and branches thereof is declared to be 230 miles. The amount of capital stock authorized is 250,000 shares, of the par value of \$100 each, being a total par value of \$25,000,000. On January 25, 1913, amended articles of incorporation were adopted, giving to the railroad the right to construct additional lines, the total mileage to be 349 miles. Among the additional rights conferred is the right to acquire all the rights, privileges, franchises and other property of the Vallejo and Northern Railroad Company, and to construct a railroad between Sacramento and Vallejo.

Sacramento and Woodland Railroad Company was incorporated under the laws of this State on July 20, 1911, for the purpose, among

othere, of constructing and operating railroads of all classes, "commencing in the city of Woodland, in the county of Yolo, State of California and running thence in a general easterly direction by the most advantageous, convenient, practicable and feasible route to the Sacramento river, at or near the town of Elkhorn, in said county of Yolo; thence in a general southeasterly and easterly direction, by the most advantageous, convenient, practicable and feasible route, to and in the city of Sacramento, in the county of Sacramento; an estimated length of seventeen miles." The authorized capital stock consists of 10,000 shares, of the par value of \$100 each, making a total authorized par value of \$1,000,000.

The Sacramento and Woodland Railroad Company constructed its railroad ~~xxx xxx xxxxx~~ from the city of Woodland to the west end of the M Street bridge at a point in Yolo county across the Sacramento river from the city of Sacramento, and operation on this line of railroad was commenced on July 15, 1912, under the agreement between the Sacramento and Woodland Railroad Company and the Northern Electric Railway Company, hereinafter more particularly referred to. The annual report of the Sacramento and Woodland Railroad Company for the year ending June 30, 1913, on file with this Commission, shows that all the authorized capital stock of this company has been issued and that of the total of 10,000 shares, 25 shares are held by the five directors and the remaining 9,975 are owned by the Northern Electric Railway Company.

The agreement which is drawn to the attention of this Commission by the county of Sacramento was entered into as hereinbefore stated, on July 13, 1912, between Sacramento and Woodland Railroad Company, hereinafter referred to as the Sacramento and Woodland, and the Northern Electric Railway Company, hereinafter referred to as the Northern Electric. The agreement first contains certain recitals, among which are the following: that the Sacramento and Woodland is the owner of a line of railroad from the city of Woodland to a point at or near the westerly end of the so called

M Street bridge, which is constructed across the Sacramento river and connects the city of Sacramento with the town of Broderick, in the county of Yolo; that the Sacramento and Woodland has no cars or equipment for the operation of said line of railroad, while the Northern Electric has sufficient cars and equipment for this purpose; that the Northern Electric is the lessee of passenger and freight terminals in the city of Sacramento and is also the owner of a one third interest in the M Street bridge; and that the parties deem it to their mutual interest to enter into the agreement. The agreement between these parties then provides in part as follows: that the Northern Electric "shall forthwith enter into the possession" of the railroad of the Sacramento and Woodland "and shall operate and maintain the said railroad for the account of the party of the first part (Sacramento and Woodland)" on the terms and conditions specified; that the Northern Electric "shall forthwith enter into the possession of the said railroad, and shall furnish, without charge to the party of the first part (Sacramento and Woodland), except as hereinafter otherwise provided, all motors, cars and other equipment necessary for the operation of the said railroad, and shall operate and maintain a sufficient and adequate service for the transportation of passengers, freight, baggage, mail and express" over the tracks of the Sacramento and Woodland and of the Vallejo and Northern Railroad Company between the city of Woodland and the terminals of the Northern Electric in the city of Sacramento; that the Northern Electric shall keep and maintain the railroad in good order, condition and repair, at the expense of the Sacramento and Woodland, and "shall perform all the lawful requirements pertaining to the operation of said railroad of the United States, State of California, said county of Yolo, the said county of Sacramento, the said city of Woodland, the said city of Sacramento and all other cities and towns in which the said railroad may be operated, and of all boards and officers thereof"; that the Northern Electric shall pay and discharge

for account of the Sacramento and Woodland all lawful taxes, assessments and other governmental charges levied or assessed against the Sacramento and Woodland; that the Northern Electric shall pay the interest and sinking fund on the bonds of the Sacramento and Woodland; that the Northern Electric will, when called upon by the Sacramento and Woodland, execute or cause to be executed to the Sacramento and Woodland a lease of certain real estate located in the city of Woodland and belonging to the Vallejo and Northern Railroad Company; that the Northern Electric shall pay to the Sacramento and Woodland fifty per cent of the net income derived by the Northern Electric from the operation of the railroad, the net income to be determined by certain deductions from the gross income, as specified in the agreement; that the agreement shall remain in effect until July 1, 1941, and thereafter until a notice of at least 60 days has been given by the party desiring to terminate the arrangement, subject to the right on the part of the Sacramento and Woodland to terminate the agreement at any time upon the failure of the Northern Electric to perform any of its obligations under the agreement; and that the agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties thereto.

The county of Sacramento claims that this agreement is void under the provisions of Section 51 of the Public Utilities Act, reading in part as follows:

"Section 51(a) No railroad corporation, street railroad corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation or water corporation shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant or system, necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, direct or indirect, merge or consolidate its railroad, street railroad, line, plant or system, or franchises or permits or any part thereof, with any other public utility, without having secured from the commission an order so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void."

The question to be determined in this proceeding is whether the agreement hereinbefore referred to comes within any of the foregoing provisions of Section 51 of the Public Utilities Act. The county of Sacramento claims that the agreement amounts to a lease, and that if this contention is not correct, it at least amounts to a "disposition" of the railroad of the Sacramento and Woodland, or to an "encumbrance" of the same. The Northern Electric claims that the agreement is neither a lease nor a disposition nor an encumbrance of any part of the Sacramento and Woodland's property, but that it amounts simply to an operating agreement and does not fall within any of the provisions of Section 51. The Northern Electric's counsel stated frankly that, in his opinion, the Railroad Commission ought to have control over such operating agreements, but contended that the provisions of Section 51 are not broad enough to cover such an agreement. The briefs filed on behalf of the parties to this proceeding have gone exhaustively into the question at issue and have been carefully considered.

The Northern Electric relies on certain authorities referring to the well known rule that a railroad corporation cannot lease its property used or useful in the public service unless it has been specifically granted power so to do, and holding that the particular agreements under consideration did not amount to leases and that they could accordingly be entered into. The county of Sacramento refers to other authorities, and particularly to St. Louis, Vandalia and Terra Haute R. Co. vs. Terra Haute and Indianapolis R. Co., 145 U.S.393, and Winch vs. Birkenhead, etc., Junction Railway Co., 64 English Reports Reprint, 1243, holding that agreements containing many of the elements of the present agreement are leases. The Northern Electric refers to that portion of the agreement which provides that the line of the Sacramento and Woodland shall be operated by the Northern Electric "for the account of the party of the first part (Sacramento and Woodland)", draws attention to the fact that the agreement does not contain the words "lease," "tenant," "rent" or similar words generally used in leases, and contends that the agreement is more analogous to a cropping agreement than to a lease and that it is in no event more than an

operating agreement. The county of Sacramento replies that the agreement is not to be judged solely by the language which it uses and that it shows on its face that the arrangement is not one simply for the account of the Sacramento and Woodland but that it is just as much for the account of the Northern Electric, which is to enter into the possession of the line of the Sacramento and Woodland and operate the same, keeping fifty per cent of the net profits for itself.

The Northern Electric also relies on a certain agreement, dated January 2, 1913, between the Vallejo and Northern Railroad Company, the Sacramento and Woodland Railroad Company and the Oakland, Antioch and Eastern Railway, entered into subsequent to the agreement between the Northern Electric and the Sacramento and Woodland, in which agreement certain rights of way and trackage rights in Yolo county west of the M Street bridge are granted by the Vallejo Company and the Sacramento and Woodland to the Oakland, Antioch and Eastern Railway, including the right to use for apparently several hundred feet the right of way and tracks of the Sacramento and Woodland. The Northern Electric draws attention to the fact that this agreement was entered into subsequent to the date of its own agreement with the Sacramento and Woodland, hereinbefore referred to, and that the Northern Electric is not a party to the later arrangement with the Oakland, Antioch and Eastern Railway. From these facts the Northern Electric deduces the conclusion that it was the understanding of all the parties that the Northern Electric could not have secured any right amounting to a leasehold interest in the property of the Sacramento and Woodland, as otherwise the Northern Electric would have been made a party to the agreement with the Oakland, Antioch and Eastern Railway. I am not impressed by this argument. In the first place, practically the same people own and control the Northern Electric, the Sacramento and Woodland and the Vallejo and Northern. No arrangement which they may make between themselves can foreclose the right of the public authorities to exercise the powers granted by the Public Utilities Act and no course of action between themselves

can take out from under the operation of Section 51 of the Public Utilities Act any agreement which otherwise would come within the provisions of that section. I desire to draw attention also to the fact that the part played by the Sacramento and Woodland in the later agreement with the Oakland, Antioch and Eastern Railway is relatively insignificant. Only a small amount of track of the Sacramento and Woodland, amounting apparently to not over 200 feet, is involved, and the entire compensation to be paid by the Oakland, Antioch and Eastern Railway, amounting to \$58,307.00, is to be paid to the Vallejo and Northern, and no provision is made for the payment of any compensation to the Sacramento and Woodland.

The parties have referred to numerous authorities giving conflicting definitions of the words "lease," "disposition" and "encumbrance." The general significance of the term "lease" is too well known to require definition here. The term "disposition" is defined in 14 Cyc 516, as follows:

"Generally used in connection with the preposition 'of' and means to determine the fate of; to exercise the power of control over; to fix the condition, application, employment, etc., of; to direct or assign for a use; to exercise finally one's power of control over; to pass over into the control of another."

The American and English Encyclopedia of Law, Vol. 9, p. 540, while drawing attention to the fact that the word is frequently used as a synonym for alienation and complete transfer, also draws attention to the fact that it is used in another sense to mean "to exercise the power of control over; to fix the condition, application, employment, etc.; to direct or assign for a use."

The word "encumbrance" is also used in a large number of different ways. Among its other meanings, as shown by 22 Cyc 72, are: "Anything that impairs the use or transfer of property" and "an embarrassment of an estate or property so that it cannot be disposed of without being subject to it."

It will be unnecessary for the decision of this case to refer to the large number of authorities in which these words have



been used in their varying senses. Before drawing attention to certain specific provisions in the agreement, I desire to refer to the argument of the Northern Electric as to the proper interpretation of Section 51 of the Public Utilities Act, based on the language of the public utilities acts of other states, particularly the Public Service Commission Law of New York.

The Northern Electric draws attention to the fact that the Public Service Commission Law of New York specifically provides that no franchise nor any right to or under any franchise to own or operate a railroad or street railroad shall be assigned, transferred or leased unless the consent of the appropriate commission has first been secured. From the fact that the word "operate" does not appear in Section 51, the Northern Electric draws the conclusion that this section was not intended to cover an operating agreement. In this conclusion I cannot concur. Section 51 was drawn with a full realization of the difficulties arising from the application to statutes of the rule of *inclusio unius est exclusio alterius*. Accordingly, instead of classifying each kind of agreement as to which the Commission's prior authority should be necessary, the section specifies the more important and usual of these agreements, viz., those of sale, lease, assignment and mortgage, and then, in order to cover all other arrangements affecting the title or possession of property used or useful in the public interest, the section adds the blanket words "or otherwise dispose of or encumber the whole or any part of its railroad .....necessary or useful in the performance of its duties to the public." It is apparent that the California section was drawn with the specific purpose of obviating the embarrassment to which the New York Commission may well be subject by reason of the failure of the New York statute to contain any "catch-all" words and from the application of the rule of *exclusio alterius*.

I now desire to point out certain provisions of the foregoing agreement which must weigh heavily in the decision of this case.

The Northern Electric agrees that it will "forthwith enter into the possession of the said railroad." No provision whatsoever is contained for the joint possession between the Northern Electric and the Sacramento and Woodland or any other railroad. The agreement provides that the Northern Electric shall provide all the motors, cars and other equipment necessary for the operation of the said railroad. There is no suggestion here that the Sacramento and Woodland is to acquire motors, cars and other equipment of its own and to operate the same over its line concurrently with the Northern Electric, or that any other railroad is to operate any portion of the motors, cars and other equipment necessary for the operation of the railroad. The agreement further provides that the Northern Electric is to operate and maintain "a sufficient and adequate service" for the transportation of passengers, freight, ~~xxx~~ baggage, mail and express over the railroad of the Sacramento and Woodland. If the Northern Electric is to maintain a service which is to be sufficient and adequate for all transportation purposes over the line of the Sacramento and Woodland, it would hardly seem reasonable or sensible that the Sacramento and Woodland should thereafter itself enter into the possession of the property and install a service in addition to a sufficient and adequate service already installed by the Northern Electric. The inference seems clear that the possession is to be in the Northern Electric alone and that the Northern Electric is to have the rights generally belonging to a tenant of property in this regard. The fact that the Northern Electric is to maintain and repair the property at the expense of the Sacramento and Woodland is not necessarily conclusive, for the reason that the Northern Electric might undertake this obligation either as agent or as tenant. In the next breath, however, the Northern Electric agrees to perform "all the lawful requirements pertaining to the operation of the said railroad" on the part of the United States, the State of California or any county or city. In other words, the public authorities, in all matters referring to the operation of the line of the Sacramento and Woodland, are to deal

exclusively with the Northern Electric. If a railroad in this State, subject to duties to the public of this State, is to have the right by entering into so called "operating agreements" to eliminate itself entirely from any relationship with the public and to substitute an "agent" so that the public may henceforth look only to such "agent" and not to the railroad owning the property, without any right on the part of the public authorities to have anything to say in connection with such arrangement, the result will be that a power most necessary to the Railroad Commission in the exercise of its functions has been withheld from the Commission. In my opinion, the authorities charged with the execution of the Public Utilities Act should be slow to reach the conclusion that the Act does not cover such an arrangement.

The agreement also provides that it shall continue in force for almost 30 years, until July 1, 1941, and thereafter unless terminated by either party on 60 days' notice, and that the Sacramento and Woodland shall have no right to terminate the agreement for any reason except on the failure of the Northern Electric to keep and perform its covenants and agreements. In other words, unless the Northern Electric fails to keep and perform its covenants and agreements, the Sacramento and Woodland is to have no right to put the Northern Electric out of possession of the property and to prevent it from operating all the equipment necessary to operate the railroad, from maintaining a sufficient and adequate service for all transportation necessities and from itself dealing with all public authorities with reference to all requirements in connection with the operation of the railroad.

Under the authorities hereinbefore referred to, it may well be held that this agreement actually amounts to a lease. It is not necessary, however, to decide this point, for the reason that the agreement is certainly a disposition or encumbrance of the property. The agreement certainly establishes the condition and use of the property, passes the same into the control of the Northern Electric, and embarrasses the estate or property so that the railroad cannot be

disposed of without being subject to this agreement... The agreement specifically provides that it shall be binding both upon the Sacramento and Woodland and upon its successors and assigns. This is not a case in which a principal has an agent whom he can discharge at pleasure, but is a case in which the principal has tied up his property in such a way that the party who has been placed in possession thereof may insist on his right to remain in possession and to operate the property in his own way for a period of almost 30 years, notwithstanding any number of transfers of the property in the meantime from one owner to another.

I am of the opinion that this agreement comes both within the language and the spirit of Section 51 of the Public Utilities Act, and that the agreement is void for the reason that this Commission's consent to its execution has not been secured.

This Commission does not desire to embarrass the Northern Electric or the Sacramento and Woodland, and desires to give to these carriers full opportunity to accomplish in a legitimate way such arrangements as this Commission may, after hearing, approve. I accordingly recommend that the Northern Electric and the Sacramento and Woodland be given 30 days within which to file with this Commission an application for authority to enter into such arrangement with reference to the railroad of the Sacramento and Woodland as these parties may desire to present to this Commission for its approval, and that in the meantime, the Northern Electric be permitted to continue its operation of this line under the arrangement now obtaining between them. If such application is not filed within said 30 days period, it will be necessary for this Commission to take the steps prescribed by the Public Utilities Act for the enforcement of the provisions thereof.

I submit herewith the following form of order:

O R D E R.

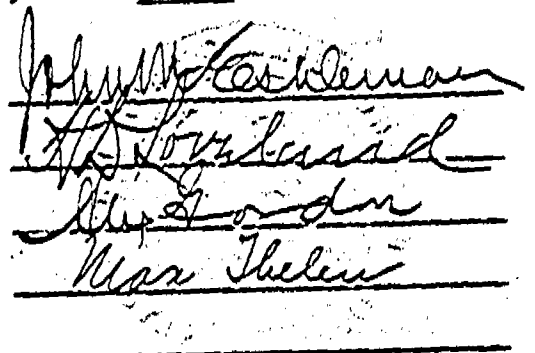
The COUNTY OF SACRAMENTO having filed with this Commission its complaint against the Northern Electric Railway Company and the

Sacramento and Woodland Railroad Company, alleging that a certain agreement entered into between said companies on July 13, 1912, affecting the line of railroad of the Sacramento and Woodland Railroad Company, is void for the reason that this Commission's authority to the execution thereof has not been secured, and the defendants having answered and a public hearing having been held, and the Commission being fully advised in the premises;

THE RAILROAD COMMISSION HEREBY FINDS that said agreement is void, for the reason that this Commission's authority to the execution thereof has not been secured, as provided in Section 51 of the Public Utilities Act. The Northern Electric Railway Company and the Sacramento and Woodland Railroad Company are hereby given thirty(30)days from the date of the service upon them of a copy of this order within which to apply to this Commission for authority to enter into such arrangement as they may desire to propose to this Commission in connection with the line of railroad of the Sacramento and Woodland Railroad Company. And in the meantime, the Northern Electric Railway Company may continue to operate the line of the Sacramento and Woodland Railroad Company under the operating conditions at present obtaining as between these two railroads.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 10th day of April, 1914.

  
The block contains four handwritten signatures, each written over a horizontal line. The signatures are cursive and appear to be: 1. Wm. M. Cushman, 2. H. S. Lusk, 3. J. H. ... (partially illegible), and 4. Max Thelen.

Commissioners.