

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ORIGINAL

In the matter of the application of)
San Jose Terminal Railway Company)
to issue bonds of the face value of)
\$650,000.)

Application No. 57

E. H. McClosky for applicant
D. H. Bryant for protestant Mary E. Lockwood.

Thelen, Commissioner.

OPINION

This is an application of San Jose Terminal Railway Company for an order of this Commission authorizing the issue of bonds of the face value of \$650,000.

Applicant was incorporated under the laws of this state on September 2, 1911. It has power under its articles of incorporation to construct and operate a commercial railroad of standard gauge for the transportation of passengers, express and freight, by steam, electricity or other lawful motive power over a route described as follows:

Beginning at a point on the southerly end of San Francisco Bay northerly from the Town of Alviso and running thence in a general southerly direction through the Town of Alviso, and thence in a general southerly direction to the northerly limits of the City of San Jose, and thence through the City of San Jose along, over and across the streets, alleys, squares and lands thereof, with such extensions and branches as may hereafter be decided upon in accordance with law.

The estimated length of this line of railway is twelve (12) miles. Applicant also has power among others, to operate in connection with said line of railway, steamers, ferry boats

and barges for the transportation of passengers and freight. The original incorporators were M. J. Gardner, John A. Mehling, E. H. McCloskey, Hugh Center and V. Koch.

Applicant's authorized capital stock is \$2,500,000, consisting of 2,500,000 shares of the par value of one dollar (\$1.00) each, of which shares 1,000,000 are preferred and 1,500,000 common. The preferred stock may receive out of the surplus earnings of each fiscal year, as and when declared by the board of directors, a non-cumulative dividend at the rate of seven (7) per cent per annum, payable before any dividend is paid on the common stock. The preferred stock also has preference as to assets.

Of the amount of capital stock so authorized, the entire 1,500,000 shares of common stock were issued on or about September 13, 1911 to John A. Mehling, one of the incorporators of the company, in return for Mehling's interest in certain deeds and contracts covering most but not all of the right of way between San Jose and Alviso, and for certain maps, surveys and engineer's reports and other property, fully described in the minutes of the meeting of the board of directors of September 13, 1911. Mehling's deed to the applicant covering these properties is dated May 18, 1912. Most of the deeds from the property owners to Mehling contain a proviso that the grantor may annul the grant unless the railroad is in operation within twenty-four months from the date of the deed and is kept in operation thereafter. Most of the deeds from the property owners to Mehling are dated March or April, 1912. Much of this land was donated and some of it was paid for by applicant itself in preferred stock. Most of the right of way so secured is thirty feet wide and the total length thereof outside of San Jose and Alviso is ten and three-quarters miles. The total cost to Mehling of the property which he deeded to the applicant in return for all its common capital stock was not in excess of a few

thousand dollars. Applicant contends, however, that this property is now valuable, particularly because of the possibility of industrial development on and adjoining its terminal properties in the vicinity of Alviso.

Of applicant's preferred stock, 32,800 shares are alleged in the petition to have been issued. It appeared at the hearing, however, that of this amount 20,000 shares were not actually delivered prior to March 23, 1912. H.H. McCloskey gave his note for 20,000 shares of preferred stock, and the shares were to be issued as payments were made on the note, but there was no actual delivery prior to March 23, 1912. Of the remaining 12,800 shares 2,500 were issued in exchange for stock in a company known as the Home Union, doing business in San Jose, 2705 shares were issued for nine parcels of right of way which were paid for by applicant and not by Mehling, and the remaining shares were sold for cash at par.

Applicant has authorized a total bonded indebtedness of one million (\$1,000,000) dollars, to be evidenced by one thousand five (5) per cent twenty (20) year gold bonds having a face value of one thousand (\$1,000) dollars each. This possible indebtedness is secured by mortgage or deed of trust to Garden City Bank and Trust Company of San Jose, dated March 16, 1912, and covering all of applicant's property. The trust deed provides for a sinking fund of \$25,000 for each of the years 1922 to 1925 inclusive, of \$50,000 for each of the years 1926 to 1930 inclusive and of \$100,000 for the years 1931 and 1932. Of the bonds so authorized, bonds of the face value of \$50,000 are to be delivered by the trustee to the railway company on the execution of the trust deed, to pay off existing debts, and the remaining \$950,000 may be certified and delivered only after the railway company has filed with the trustee a certificate that all preceding bonds have been used for the purposes authorized in the trust deed. Of these bonds so authorized, the petition alleges that fifty (50), having

a face value of fifty thousand (\$50,000) dollars were issued prior to March 25, 1912. The evidence, however, shows that only seventeen (17) bonds were delivered prior to said date. Of these seventeen (17) bonds, two (2) were issued for attorney's fees and fifteen (15) were issued in exchange for a forty acre farm in Santa Clara County in no way connected with the railroad. The farm was sold within a few days for twelve thousand (\$12,000) dollars and the proceeds were thereupon turned into applicant's treasury. It goes without saying that this Commission would not authorize such a transaction if it had taken place subsequent to March 25, 1912. Twenty (20) bonds were issued in June, 1912, to secure a note for \$10,204.39 given by applicant to Mahoney Brothers in payment for the grading of applicant's line of railway between San Jose and Alviso. These bonds and thirteen (13) more which were never issued were regarded by applicant as covered by note of John A. Mehling for thirty-three thousand (\$33,000) dollars. On closely examining applicant's witnesses, however, it appeared that these thirty-three bonds were not delivered to Mehling prior to March 25, 1912, as, indeed, they should not have been. The twenty bonds issued as collateral were issued without authority of this Commission and are void unless their issue is sanctioned by this Commission. At the hearing, applicant's attorney asked for such sanction, on the ground that there had been no intention to violate the law. I am convinced that this is the case and recommend that this Commission approve the issue of these twenty bonds. When the debt to Mahoney Brothers is paid, and the bonds^{are} returned to the treasury, they can not again be issued without an order of this Commission. They may be included, thereafter, in the total amount of bonds hereby authorized and reissued as part of the bonds so authorized.

It follows that applicant now has issued and outstanding its entire common stock, amounting to \$1,500,000, preferred stock in the amount of \$12,800 and bonds in the amount of \$37,000 of

which \$20,000 are being used as collateral.

Applicant plans to build a standard gauge electric road between San Jose and Alviso and to run ferry boats and freight barges via Alviso Slough and San Francisco Bay between Alviso and the Ferry Building at or near the foot of Market Street in San Francisco. Applicant does not expect to build terminals in San Francisco, but to use the state's property along East Street or the Embarcadero in the same way in which river boats now plying between San Francisco and Sacramento or Stockton or other river points use the same property. Ultimately, applicant expects to build north of Alviso to deep water in San Francisco bay and thus^{to} avoid the delay which will be caused by navigating Alviso Slough.

On June 10, 1912, applicant secured from the City of San Jose a franchise for fifty (50) years over and along the streets therein specified. This franchise provides that the actual construction of the railroad shall begin within one year and that the railroad shall be finally completed within eighteen months. Applicant avers that it also has a franchise from the City of Alviso. The grading on applicant's line of railway between San Jose and Alviso has been completed with the exception of a few hundred feet near Alviso, where the ground was too wet. Applicant has a contract with Mahoney Brothers for the completion of its line of railway. No ferry boats or barges have been secured.

Applicant now asks for an order of this Commission authorizing the issue of bonds of the face value of \$650,000, as follows:

For the purchase of real property	\$ 59,840.00
For the construction of the railway line	142,842.16
For the purchase of personal property	214,000.00
For engineering and interest during construction	70,817.84
	<u>487,500.00</u>
For discount on bonds (25%)	162,500.00
	<u>650,000.00</u>

The item for the acquisition of real property covers passenger and freight terminal buildings and repair shops at San Jose and Alviso, shop tools and equipment, dredging in Alviso Slough, wharf and steamer landing at Alviso, and terminal property in San Jose.

The item for the construction of the railway line includes everything from the grading to and including the electric power transmission and includes the sum of \$10,204.59 due to Mahoney Brothers.

The item for the purchase of personal property includes four electric motor cars, one electric locomotive, eight five-ton gasoline motor trucks, two combination baggage and passenger cars, eight passenger cars, six flat cars, eight ten-ton freight trucks for gas motor, one tug boat, three freight barges, and rebuilding and refurnishing two passenger steamers which are to be leased with an option to purchase. The application shows the foregoing items in detail and the estimated necessary expenditure in connection with each thereof. The item for engineering and interest during construction is much too high. Applicant figured on an entire year's interest on the entire amount of bonds asked for, which would be \$32,500, while the road could easily be built in six months and the interest should be computed for that time on only half the amount of money involved. On the other hand, applicant did not provide for legal expenses and contingencies. In view of all the facts, I shall not cut down this item.

For every dollar received from the sale of the bonds, applicant must account to this Commission, and this Commission will not approve any improper or excessive expenditure. It thus appears that applicant desires to raise \$487,500.00 to build and equip its railroad and boat line. Applicant has entered into no contract for the sale of its bonds, but estimated on the basis of securing 75 for them. This Commission has not hitherto authorized the issue of bonds so as to net less than 80 and accrued interest and I am not prepared to recommend a departure from that policy in this

case. If applicant's bonds can not bring 80 under the safeguards hereinafter prescribed, the project does not have a reasonable prospect of success.

At the hearing, the Commission expressed a desire to hear further evidence on the question whether there was a reasonable prospect of applicant's being able to pay interest on its bonds. The estimates in this regard presented at the original hearing, particularly with reference to the expected traffic, were in my judgment very far in excess of what could reasonably be expected. Applicant will compete for both passenger and freight traffic with the Southern Pacific Company, which runs a large number of trains daily between San Jose and San Francisco. The Southern Pacific Company's passenger trains make the run in between one hour and a quarter and one hour and a half, while applicant would take between two hours and a half and three hours. In this connection should also be considered the possible electric railroad development on the Peninsula. In the freight business, the Southern Pacific Company will have the advantage of extensive terminals at both termini and of spur tracks leading to the principal industries. The carload rates of this company between San Francisco and San Jose are in no case in excess of one dollar per ton.

At an adjourned hearing, applicant presented revised estimates of possible earnings. Applicant's witnesses testified that because of the proposed reduction of the fare by applicant from the present one-way rate of \$1.25 to \$.75 and also because of the attractiveness of the water trip, a considerable portion of the passenger traffic between San Jose and San Francisco would move over applicant's line. With reference to freight, applicant proposes to pick it up from one business house to another by means of gasoline motor trucks. These trucks will run onto applicant's freight barges without unloading and will then deliver at the door

of the consignee at either terminus of the line. Applicant's witnesses testified that by means of this expedited freight service, applicant could at rates of \$5.00 or \$6.00 per ton cut heavily into the express business and also into the less than carload freight business. These witnesses presented estimates of operating expenses and earnings as justifying their conclusion that applicant will be able to meet its obligations on the proposed bond issue. The correctness of these estimates depends entirely on whether applicant will be able to secure the amount of traffic on which its witnesses rely. This Commission can not undertake to say whether these estimates are correct. On the other hand, this Commission will be inclined, in pursuance of its policy to do all in its power to assist in the development of the State by public utilities, properly safeguarded, to resolve such doubts as it may have in favor of the utility, and to impose such conditions as it may consider necessary to prevent abuse of its order. Intending purchasers of such utility's securities must expect to make an independent investigation and not to rely on this Commission's order as guaranteeing success. I am moved by these considerations to recommend the grant of applicant's petition, subject, however, to the conditions hereinafter specified.

Applicant alleges that it needs \$487,500. to put into its property. To secure this money it asks authority to issue bonds having a face value of \$650,000, being considerably in excess of the amount of money which is to go into the property. The cases in which this Commission will authorize an issue of bonds whose face value exceeds the amount of money which will go into the property will be rare. Applicant claims that there is a margin of security in its right of way. At a liberal figure, I do not believe that this asset has a value in excess of fifty thousand dollars. I am of the opinion, after a careful consideration of all the facts, including the fact that this is a

new enterprise where success is uncertain, that the Commission can not safely authorize an issue of bonds having a face value in excess of \$400,000 on this proposed expenditure of \$487,500 and the existing property. If applicant nets on these bonds the minimum price of 80, it will secure therefrom \$320,000, leaving a balance of \$167,500 to be raised in some other way. The Commission will leave to applicant the preparation of a plan to secure these additional funds. In my judgment, at least half of these funds should have passed into applicant's treasury in cash before any bonds are permitted to issue. This will give a reasonable assurance that the enterprise will go ahead, that a proper margin between the value of the property and the face value of outstanding bonds will be preserved and that the enterprise will not be dropped after a portion only of the bonds have been sold and their proceeds invested. I recommend that before applicant be permitted to issue any bonds it shall have secured and placed in its treasury by methods satisfactory to this Commission the sum of \$85,000 of new money, which money shall go into the property for the purposes for which bonds are herein authorized. Applicant may proceed with its construction work and pay out such moneys, from time to time for the purposes hereinafter specified, reporting the expenditures to this Commission monthly in accordance with General Order No. 24, in so far as applicable, but no bonds shall issue until the full amount of \$85,000 shall have been so paid into applicant's treasury. I understand that applicant intends to form a syndicate of ten or a dozen men, largely owners of the waterfront property north of Alviso, who will take over the bonds and finance the enterprise.

At the hearing, Mrs. Mary E. Lockwood appeared by her attorney-in-fact, Mr. D.E. Bryant, to protest against the grant of this application unless applicant be ordered to pay her claim of \$4,000. Hugh Center took the same stand with reference to a claim of \$10,000. These claims grow out of an arrangement which was entered into in or about 1903 between F.M. Lockwood, protestant's husband, and John A. Mehling, one of the promoters of the present enterprise. Lockwood and Mehling at that time tried to promote a railroad between San Jose and Alviso, with water connections with San Francisco, in accordance with a plan very similar to that which applicant is now pursuing. Lockwood furnished the money, Mehling did the work and they were partners. On November 5, 1904, Lockwood transferred his half interest to his wife, Mrs. Mary E. Lockwood, the present protestant. On May 8, 1905, Mrs. Lockwood conveyed all her interest to Hugh Center for \$8,000, of which \$4,000. was paid in notes on the execution of the agreement. Mrs. Lockwood obligated herself not to claim the remaining \$4,000. "until the said Hugh Center, or his assigns or heirs, have financed the said Berryessa and Alviso roads". Center agreed that he would pay said further sum of \$4,000 at any time he might elect within two years "from the time the said roads are financed". Later, on August 4, 1911, Center delivered to the Bank of San Jose in escrow a deed, conveying to W. J. Gardner, who is applicant's secretary, all Center's interest in the Lockwood and Mehling franchises, rights of way, options for rights of way, maps, etc., accompanied by written instructions to deliver the deed to Gardner at any time within a year from date upon the payment to Center of \$10,000. in cash and the assumption by Gardner of Center's indebtedness to Mrs. Lockwood, or the payment to her of \$4,000. in cash. Gardner has not paid the money and the escrow deed has never been delivered. Protestants claim that they are entitled to have applicant pay to them the amounts specified, on the ground that John A. Mehling purported to convey to applicant not merely his one-half of the rights involved but also the half formerly owned

by Lockwood and now owned by Center. Applicant contends that Mehling conveyed only his own half interest and relies on the minutes in support of its contention: also that all the Lockwood and Mehling rights growing out of the transactions in and about 1903 have long since lapsed and are of no value now: also that no novation ever took place and that Mrs. Lockwood's claim is still against Center alone. The solution of these conflicting claims depends upon a proper interpretation of the documents referred to and of the acts of the parties connected therewith. This is a matter for the courts and not for this Commission. If protestants have any valid claim against applicant, they can readily assert it in the proper forum, which is not this Commission. I accordingly recommend that these protests be disregarded.

I submit the following form of order:

O R D E R .

San Jose Terminal Railway Company having filed with the Railroad Commission of the State of California its application for an order authorizing the issue by said company of its first mortgage gold bonds of the face value of \$650,000. and also to validate the issue of its first mortgage gold bonds of the face value of \$20,000. heretofore issued as collateral security subsequent to March 23, 1912, without the prior authorization of this Commission, all of said bonds to be payable on the 16th day of March, 1932, unless sooner redeemed, and to bear interest at the rate of five (5) per cent per annum, payable semi-annually on the 16th day of March and the 16th day of August, and secured by a trust deed or mortgage upon all the property of the company, and a hearing having been duly held, and it appearing to the Commission that the issue of said bonds is reasonably required by said company for the acquisition of property and the construction, completion, extension and improvement of its facilities and for the discharge of its obligations, all as

hereinafter specified, and that the same are not properly chargeable to operating expenses or to income.

IT IS HEREBY ORDERED that the Railroad Commission of the State of California does hereby authorize the issue by San Jose Terminal Railway Company of four hundred thousand (\$400,000) dollars, face value, or so much thereof as may be necessary for the purposes hereinafter specified, of principal of bonds of said company, maturing the 16th day of March, 1932, unless sooner redeemed, to bear interest at five (5) per cent per annum payable semi-annually, under and in pursuance of the terms of the deed of trust or mortgage, heretofore and on the 16th day of March, 1912, made and executed by said San Jose Terminal Railway Company to Garden City Bank and Trust Company, as trustee, upon the conditions following and not otherwise:

1. Bonds of this authorization of the face value of \$20,000 may be issued by applicant as collateral security for a debt of \$10,204.39 heretofore incurred, to Mahoney Brothers for the grading of applicant's line of railway. When said debt has been paid, said bonds shall be returned to applicant's treasury and they may thereafter be sold as part of, but not in addition to, the issue of \$400,000 face value of bonds hereby authorized.
2. San Jose Terminal Railway Company shall sell the bonds hereby authorized so as to net the said company not less than eighty (80) per cent of the par value of the principal thereof besides interest accrued thereon.
3. The proceed from the sale of said bonds shall be applied to the following purposes only:

 - (a). For the discharge of applicant's obligation to Mahoney Brothers for grading,..... \$10,204.39
 - (b). For the acquisition of property and the construction, completion, extension and improvement of facilities, for the items specified in applicant's petition, to which reference is hereby made for particulars, amounts not to exceed in the aggregate the following amounts for the following purposes, respectively:

- (1). The purchase of real property,.....\$59,840.00
- (2). The construction of the railway
line,..... 132,637.77
- (3). The purchase of personal property,. 214,000.00
- (4). Engineering, law expenses, interest
during construction and all other
contingencies,..... 70,817.84

4. Before San Jose Terminal Railway Company may issue any of said bonds, except the \$20,000 for collateral, it shall first have filed with this Commission, under oath, and in form and substance satisfactory to this Commission, a statement showing that it has received into its treasury from sources satisfactory to this Commission the sum of \$85,000.00 in new money. Such portions of said sum of \$85,000.00 as may be paid into the railway company's treasury from time to time may be spent for any of the purposes for which bonds are hereby authorized, and the amount so spent shall be reported to this Commission monthly under the Commission's General Order No. 24, in so far as applicable: but no bond shall issue until said entire amount of \$85,000.00 shall have been paid into the railway company's treasury and until said statement shall have been filed with and approved by this Commission.

5. San Jose Terminal Railway Company shall keep true and accurate accounts showing the receipt and application in detail of the sale of the bonds hereby authorized to be issued, and on or before the 25th day of every month the company shall make a verified report to the Commission stating the sale of such bonds during the preceding month, the terms and conditions of such sale, the moneys realized therefrom and the use and application of such moneys, all in accordance with this Commission's General Order No. 24, which, in so far as applicable, is made a part of this order.

6. The authority hereby given to issue such bonds shall apply only to bonds issued by applicant on or before the

thirtieth day of September, 1913.

7. The effectiveness of this order is conditioned upon the prior payment to this Commission of the fee specified in Section 57 of the Public Utilities Act.

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 9th day of October, 1912.

John M. Eschleman

Arthur Gordon

Max Hahn

Edwin O. Edgerton

COMMISSIONERS.

*Superseded
by Dec 326.
Nov 9, 1912*