

Decision No. \_\_\_\_\_

ORIGINAL

Decision No. 14355

BEFORE THE RAILROAD COMMISSION OF THE  
STATE OF CALIFORNIA

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In the matter of the application of :  
SOUTH PACIFIC COAST RAILWAY COMPANY :  
and SOUTHERN PACIFIC COMPANY for an :  
Order approving agreement entered in- :  
to by said companies under date of : Application No. 1006  
December 4, 1913, modifying the lease :  
made by South Pacific Coast Railway :  
Company to Southern Pacific Company, :  
dated July 1, 1887. :

Guy V. Shoup, for applicants.

Pillsbury, Madison & Sutro and Felix T.  
Smith, for Savings Union Bank & Trust  
Company, protestant.

Tobin & Tobin, W. B. Ryder and Alexan-  
der McCulloch, for Theresa Alice  
Oelrichs, Farmers Loan & Trust Com-  
pany of New York, Bankers Trust Com-  
pany of New York and Union Trust  
Company of New York, protestants.

D. C. Murphy, for Mutual Savings Bank,  
protestant.

EDGERTON, Commissioner

O P I N I O N

This is a supplemental application whereby request  
is renewed that the Commission authorize modification of a  
certain lease.

Heretofore, on the 23rd day of March, 1914, this  
Commission made an order which provided among other things  
that applicants should have six months time within which to  
obtain the written consent to this proposed change in the  
terms of lease of the owners of a majority of the outstand-  
ing bonds of the South Pacific Coast Railway Company. In

the event such majority consent was obtained the order stated that applicants request would then be granted.

It was further provided that if applicants failed within said time to obtain said majority consent they might apply to the Commission for an order granting the application, notwithstanding the failure to obtain such consent, whereupon the Commission would give consideration to such application on its merits.

Applicants have now filed a supplemental application in which its efforts to obtain the consent of the owners of a majority of South Pacific Coast Railway Company's bonds were set out and it was announced that it was impossible to obtain the consent of such majority and the request was renewed for an authorization by this Commission for the modification of the lease.

Savings Union Bank and Trust Company, claiming to be the owner of bonds of the face value of \$375,000. and Theresa Alice Oelrichs, claiming to be the owner of bonds in the face amount of \$1,802,000. filed written protests and appeared by counsel at the hearing to oppose the granting of this application.

On July 1, 1887 there were outstanding South Pacific Coast Railway Company Fifty Year 4% Gold bonds in the total face amount of \$5,500,000 and on that date it leased all of its property to Southern Pacific Company for the term of fifty-five years from July 1, 1887.

Subsection 5 of Article 3 of the lease reads as follows:

"That it (Southern Pacific Company) will during the continuance of this lease, pay as rent for the said demised premises, including said ferry boats and telegraph lines, an annual sum equivalent to four per cent. on

the five million five hundred thousand dollars of bonded debt of said party of the first part, secured by a mortgage on the said demised premises and every part thereof; that is to say, the sum of two hundred and twenty thousand dollars per annum, in the gold coin of the United States, of the present standard and fineness, in semi-annual installments on the thirty-first day of December, and the thirtieth day of June of each year, to be used by the party of the first part in paying the interest on the said bonds, and that from and after the first day of July, one thousand nine hundred and twelve, the said party of the second part shall further pay as rent for the said demised premises a further sum annually of two hundred and twenty thousand dollars, in the like gold coin in four equal quarterly payments, viz: on the thirtieth day of September, the thirty-first day of December, the thirty-first day of March and the thirtieth day of June, and said payments are to be made to the Farmers' Loan and Trust Company in the City of New York, the trustee named in the mortgage, to secure the said bonds issued by the party of the first part, or to its successors in the trust; which said payments shall be used for and constitute a sinking fund for the redemption of the said five million five hundred thousand dollars of said bonds issued by the party of the first part, such payments to continue at the times hereinbefore specified, until the payments previously made shall, with interest earned thereon, and the accretions thereto be sufficient to fully pay and redeem said bonds, also that it shall and will during said period, keep and maintain an office for the transaction of the business of the party of the first part, both in the City of New York and in the said City and County of San Francisco."

Southern Pacific Company took possession of said property immediately and since that time and now operates the same. Southern Pacific Company asks this Commission for authority to so change the wording of this section of the lease that Southern Pacific Company will be obligated in terms to pay to South Pacific Coast Railway Company an annual sum equivalent to four percent. on the outstanding bonds; the sinking fund payment of \$220,000 per year to remain as now stated in this provision of the lease.

The difference in this section as it now stands, and the section if amended as proposed, is that now Southern Pacific Company is required to pay annually to South Pacific Coast

Railway Company in addition to the sinking fund payment, the full sum of \$220,000 whereas the amendment would obligate Southern Pacific Company to pay a sum equivalent only to the interest on outstanding bonds and obviously as bonds were retired out of the sinking fund this interest payment would constantly grow less.

Southern Pacific Company claims that the intent of the parties executing this lease was that Southern Pacific Company should be called upon only to pay the amount equivalent to the interest on the outstanding bonds and that the above quoted language of the lease which in terms provides for the definite sum of \$220,000 per year to be paid was inadvertently used and does not clearly express the intent of the parties.

On the other hand protesting bondholders insist that Southern Pacific Company has in terms agreed to each year pay South Pacific Coast Railway Company the definite sum of \$220,000 and that while the purpose for which this money is to be used is stated to be the payment of bond interest and that it is possible and probable that there will not accrue each year this full amount of bond interest, nevertheless, the full sum agreed to be paid by Southern Pacific Company must be paid, and that any overplus not used in any one year should be held as a trust for the payment of bond interest in the event that Southern Pacific Company should fail for any reason to pay one or more annual installments under the lease.

Protestants call our attention to Article 6 of the lease which reads as follows:

"It is distinctly covenanted and agreed between the parties hereto, that this lease is made subject to the terms and lien of

the said mortgage or deed of trust, executed by said party of the first part to the said Farmers' Loan and Trust Company as trustee, and that the terms of this lease shall not, prior to the payment of the said bonds, be in any manner changed or altered so as to impair the security of the said mortgage or deed of trust, without the written consent of a majority in amount of the said bondholders."

Applicants admit that after over eighteen months of diligent effort it has been impossible to obtain the consent of the owners of a majority of the outstanding bonds to the proposed change in the language of this lease. Therefore we are not asked to authorize an agreed upon change in the terms of the lease. In fact the proposed change is vigorously opposed by the owners of a very considerable number of bonds.

Authorization by this Commission as requested, upon the assumption that the owners of the necessary number of bonds would hereafter agree to this proposed change would be idle because applicants hold out no hope of obtaining such agreement.

On the other hand, if the contention of applicants is sound that the proposed change in the language of this lease represents the true intent of the parties who originally executed it, then we are not asked to authorize a change in the terms of the lease but we are really asked to authorize a change in the language employed, so as to truly represent the intent of the executing parties.

The Court and not this Commission is the appropriate tribunal to interpret the language of this lease. While it does at times become necessary for this Commission to determine the effect of written instruments in order to carry out its regulatory functions, no such situation exists here.

Furthermore if the contention of applicants is sustained and the intent of the parties who executed the lease

is made clear by a change of language, the authorization of this Commission to such change of language would not be necessary as this would not involve any change in the terms of a lease, but would simply be the employment of different language to express these terms.

I recommend that the application be dismissed and submit herewith the following form of Order:-

O R D E R

Application having been made by South Pacific Coast Railway Company and Southern Pacific Company for an Order authorizing the modification of a lease as described in the foregoing Opinion and a public hearing having been had and the Commission being fully advised in the premises,

IT IS HEREBY ORDERED BY THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA that for the reasons set out in the foregoing Opinion the application herein is hereby dismissed.

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 29th day of May, 1917.

Max Thelen

H. B. Barclay

Wm. Gordon

Edwin O. Edgerton

Frank R. Deane

Commissioners.