

San Francisco, California.
March 14, 1913.

Division No. 504

Clerk of the United States Circuit Court of Appeals:

St. Louis, Mo.

Dear Sir:

Representatives of the Union, Southern and Central Pacific appeared before this Commission last night asking for a statement of its position with reference to a certain modified unmerging agreement and the position of this Commission is embodied in the following statement:

Heretofore on the twenty-fourth day of February, 1913, this Commission approved with certain conditions the application of the Central Pacific Railway Company, the Southern Pacific Railroad Company and the Southern Pacific Company to enter into certain relationships set out in full in the opinion heretofore rendered. This Commission granted the application upon seven conditions, all of which appear in the order heretofore rendered, reference to which is had for particulars.

On February twenty-second the Union Pacific Railroad Company and the Central Pacific Railway Company filed an application wherein approval of this Commission was asked of a lease set out therein by the Central Pacific Railway Company to the Union Pacific Railroad Company of all the property of the Central Pacific Railway Company located within the State of California south of Tehama. By reason of Mr. Lovett's statement that the imposition of any conditions by this Commission would defeat the agreement, no specific action has been taken upon the application for approval of the lease.

On March thirteenth, 1913, the Union Pacific Railroad Company and the Central Pacific Railway Company appeared before this Commission urging the approval of said lease and presenting a telegram from R.S. Lovett, chairman of the Board of Directors of the Union Pacific Railroad Company to the attorneys of the Union Pacific Railroad Company and the Central Pacific Railway Company in San Francisco, in form as follows:

The parties have practically agreed upon a modification of

agreement of February 8, 1913, which eliminates most of the features deemed objectionable by the Railroad Commission or as to which the Commission imposed conditions. Circuit judges have expressed a willingness to grant hearing on modified plan on Saturday morning. Underwriting Syndicate expires on Saturday unless we obtain by that time decree of district court and all necessary approval of California Commission as hereinafter stated, namely.

- First - Approval of Lease of Line from Tehama to Oregon Boundary, form lease and provisions concerning same being unchanged from agreement of February 8, 1913, except by addition of provisions that valuation determined as provided in the agreement shall be subject to review by Commission.
- Second - Sale of California Portion of Line from Weed to Klamath Falls and Natron at a price representing the cost of said portion of the line.
- Third - A lease by the Central Pacific Railway Company to Union Pacific Railroad Company in the form proposed in the application filed with the Commission on February 19th which covers all the property of the Central Pacific except the lines North of Tehama. The modified agreement will eliminate all provisions as to the joint use of the Bonicia line. The joint use of terminals and the trackage and running rights from Newark to Redwood and from Redwood to San Francisco, thus leaving for the Commission's approval only the three matters above mentioned. The lease of the Central Pacific to the Union Pacific does not supersede the sale of the Central Pacific stock but is required in addition thereto in order to secure the necessary consent of the French Banks. The approval of the Commission as to valuation of the line north of Tehama may of course be reserved by the Commission for future action if the lease and sale of these lines are approved subject only to the reserve power to review the valuation. But the approval of the lease of the Central Pacific to the Union Pacific must be given immediately and unconditionally. If the Commission will give its approval of the foregoing matter there is a possibility that we may obtain the approval of the court on Saturday but if the approval of the Commission and of the court are not obtained by Saturday the Underwriting Syndicate is lost and the entire plan is defeated. Please take the matter up with the Commission at once and advise result. Special haste required because in case we are to attempt to have a hearing in St. Louis on Saturday representatives and revised papers must leave for St. Louis at six thirty New York time tonight".

At an informal hearing, the matter was presented to the Commission and objections to certain features of the revised plan were presented by attorneys for the Western Pacific Railway Company, which company was an intervenor in the main case. The Commission, after carefully considering the representations of the parties herein, and desiring not to impede a settlement of the matters arising out of the merger suit, so-called, will state generally what its attitude is with reference to this application. We cannot pass formally or specifically on the matter for the reason that the presentation which has been made to the Commission has been wholly inadequate to acquaint the Commission with the agreements

which have been entered into or are to be entered into in connection with the matter.

We reiterate our adherence to all of the conditions set out in our main opinion and order in application number four hundred nine, and any promise of approval herein is subject to all of the conditions therein set out. The Commission will adhere to each of said conditions and to the principles underlying them.

Taking the telegram as interpreted by the attorneys for the applicants, we are willing to approve the matters contained in the first and second divisions thereof, these two propositions being in substantially the same form in which they were originally presented to this Commission.

We have heretofore in our main and supplemental opinions set out in full our objections to the sale of the stock of the Central Pacific to the Union Pacific. We likewise discussed the possible effect of the acquisition by the Kuhn-Loeb syndicate of the stock of the Southern Pacific now owned by the Union Pacific. Nothing has subsequently happened to cause us to change our opinion. We expressed the fear that the purchase of the Southern Pacific stock by the Kuhn-Loeb syndicate would result in the practical control of the Southern Pacific by stockholders of the Union Pacific so that there would in reality be but one agency in control of these two alleged or supposedly competing companies, thus entirely defeating the object sought to be brought about by the supreme court of the United States. We also expressed the fear that even if a complete disassociation were effected the acquisition of the Central Pacific by the Union Pacific would result in breaking up a well constructed single system of railroads in this state into two disassociated and incomplete systems neither of which would be adequate conveniently to serve the traffic needs of the state of California.

To these two important matters we respectfully call the attention of the federal court and of the Attorney General.

These being matters over which we have no jurisdiction, we have contented ourselves by calling them to the attention of the federal government which has the sole power to prevent the consumma-

tion of these arrangements in these respects. As we said in our former opinion, however, if after calling these matters to the attention of the federal authorities such authorities insist on the sale by the Southern Pacific to the Union Pacific of the Central Pacific stock we will not be disposed to withhold our approval of those matters which come within our jurisdiction after they shall have been formally and completely presented in the usual manner, provided that no material changes appear in the plan thus to be presented.

If then, the federal authorities insist upon a sale of this Central Pacific stock, we see no reason why a lease of the property of the Central Pacific should not be had to the Union Pacific, which through stock ownership would control the policy of the road in any event, but we do not feel disposed to pass definitely upon any particular lease at this time. Subject to what is herein said we are willing to say that a lease substantially in the form presented in the application here under consideration will be approved in the event the federal authorities require the sale of the Central Pacific stock to the Union Pacific. The approval of this lease, it should be specifically understood, shall not in any wise impair or change any of the conditions heretofore set out in the order in application number four hundred nine.

It is not our disposition to stand in the way of the substitution of the Union Pacific for the Central Pacific in the control of the property of the Central Pacific in the event the Union Pacific is permitted to secure all of the stock of said Central Pacific. The grant of the lease under such circumstances will, in our opinion, be a mere matter of convenience and will not add to the substantial control of the property which can be exercised through entire stock ownership.

We do not desire to quibble and we desire to go on record with sufficient definiteness to enable both the parties to this agreement and the federal authorities to determine just what our position is so that any action which may be taken in contemplation of a modified agreement may be taken with full understanding of

what to expect from this Commission. We have heretofore indicated our entire disapproval of any plan whereby the Union Pacific through the Central Pacific, shall be given exclusive privileges by the Southern Pacific to which, in our opinion, as a competing line it is no more entitled than any other competing line. We have, however, indicated that any necessities which arise by reason of the fact that some of the facilities of the Southern Pacific and the Central Pacific are inextricable combined will be recognized by us. But there is certainly no reason why the Union Pacific through the Central Pacific at Sacramento, should be treated by the Southern Pacific as a preferred connection as regards the short line of the Southern Pacific by way of Benicia to Oakland. We have absolutely no objection to a traffic arrangement whereby the Union Pacific traffic is turned over to the Southern Pacific at Sacramento and conveyed thence to San Francisco over the Benicia line, and the same may be said for Union Pacific traffic originating at Bay points. Yet, if such an arrangement is desirable from the standpoint of the Southern Pacific, certainly it should be willing to perform a like service for the Western Pacific, or any other competing line, for a like payment, and the Union Pacific, desiring only that the service be performed for it for the stated compensation, of course can have no interest in preventing the Southern Pacific from making more money by ^{or} performing for another line a like traffic service for adequate consideration. In this connection we call attention to the provisions of Article twelve, section seventeen of the constitution of the State of California, which reads as follows:

"Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad and shall receive and transport each the other's passengers, tonnage and cars without delay or discrimination".

We likewise respectfully call attention of the federal authorities to the case decided by the Interstate Commerce Commission on February tenth, nineteen thirteen, entitled "St. Louis, Springfield and Peoria Railroad, et al vs. Peoria and Springfield Union Railroad Company," wherein the Interstate Commerce Commission, at least as far as terminals are concerned, took the same position that we here assume.

The Supreme Court wants these lines to be unmerged and we will prevent, if we can, combinations in such unmerging. As a condition to any approval which we may give to any matter for which our approval is required by law, the substance of our conditions respecting the Benicia cutoff and the terminal facilities must be complied with. Therefore, any traffic arrangement which will, in our opinion, serve to evade our conditions heretofore imposed, and accomplish by indirection that which we have refused to approve when squarely presented, will be considered by us sufficient ground to warrant our withholding our approval of the lease.

We cannot understand why, in fairness to this Commission, the new traffic arrangements were not disclosed to us when this matter was presented. We assume, of course, that these roads, acting in good faith, expect to comply fully with the provisions of the constitution and statutes of California so far as applicable to their affairs, and it may be that our fear with reference to this matter is unfounded. If, as a matter of fact, the design of the proposed new traffic arrangements, the terms of which we do not know, is not to circumvent the previous decision of this Commission, then, of course what we have to say herein will not at all interfere with the unmerging plan as amended. If, on the other hand, the design is to evade the effect of our former conditions, then we think we should prevent the new plan from being consummated if it is within our power to do so.

We cannot understand why absolutely open and frank dealings cannot be had with reference to these matters. We cannot conceive any reason why the Southern Pacific and the Union Pacific in keeping with the mandate of the Supreme Court cannot actually unmerge and why there should be any attempt to reserve to the Union Pacific an advantage or preference which it would not be given if it were dealing, so to speak, at arms length with the Southern Pacific. Let us suppose a condition wherein the Southern Pacific owned the Benicia line from Sacramento to Oakland, and the Union Pacific owned all of the property of the Central Pacific, and that there were no entangling alliances whatsoever between the two corporations.

Is it to be supposed that under those circumstances the Southern Pacific would have any reason for making the Union Pacific a preferred connection at Sacramento, and would it not desire to get on the best terms it could all of the traffic from any road at that point? It is in this aspect that we feel that the decree of the Supreme Court requires these roads to be considered, and we hope that the roads take the same position and that no attempt will be made to assume a different position by exclusive or preferential traffic arrangements.

As we have already said, we do not know the terms of this new plan, but according to the only information we have, gleaned from the press, the Union Pacific is to pay the same amount for the property as was contemplated in the original plan. If this be true coupled with the statement of Judge Lovett before this Commission that they were buying two things, namely, first, certain property, and, second, certain exclusive privileges, and that unless they could get these exclusive privileges they would not pay the same amount for the property, we are certainly justified in the assumption, if the press reports are true, that the Union Pacific at least thinks it is getting the same thing by this alternative method which the Commission prevented it from getting by the former method. If our information is incorrect as to the price this is the result of the failure to present to us the entire scheme.

Respectfully

RAILROAD COMMISSION OF CALIFORNIA.

John M. Eshleman,
E. D. Loveland,
Alex Gordon,
Max Thelen,
Edwin O. Edgerton.

Commissioners.

A true copy

W. C. MacArthur
and Secretary.