

Opinion No. 49-5222

June 9, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: Burton G. Dwyre New Mexico State Highway Department Santa Fe, New Mexico

RE: New Mexico Projects S-100 (1), Roswell-southeast; S-101 (1), southeast of Roswell; S-102 (1), Roswell-south; S-109 (1), Santa Rosa-Puerto de Luna; S-127(1), Belen-Veguita; S-68(1), La Union-Texas State Line; S-141(1), South of La Union.

OPINION

{*49} In connection with the above captioned projects the State Highway Department has required the Mountain States Telephone and Telegraph Company and the Roswell Electric Light Company to move certain poles and wires located on the right-of-way of the various roads. The respective utilities have now made a demand on the Highway Department for the cost and expense incurred in the removal of its facilities.

The franchise of the Mountain States Telephone and Telegraph Company given by the Board of County Commissioners of Eddy County grants the Telephone Company the right to erect and maintain the telephone line or lines across and along the public highway or adjacent thereto, the same in no way to impede or inconvenience traffic or travel along said highway. The franchise granted to the Roswell Electric Light Company by the County Commissioners of Chaves County is substantially the same.

The provision that "the same is in no way to impede or inconvenience traffic or travel along said highways" is the best indication that the utility and the commissioners understood that the rights of the public and of the state were paramount. The question has been a source of repeated litigation and in each instance the utility has claimed that it was deprived of property without due process of law and without compensation.

In *New Orleans Gas Company vs. Drainage Commission*, 197 U.S. 453, the utility company was required to remove certain subsurface installations in order that the drainage commission could make installations essential to the public health. The Supreme Court held that such action was not depriving the utility company of property without due process of law. The drainage commissions were created by the Legislature and its actions were an execution of the police power of the state, properly exercised in the interest of the public health and welfare.

In *Chicago, Milwaukee, and St. Paul Railway vs. Minneapolis*, 232 U.S. 430, a railway company was required to build bridges and viaducts in order that the state might install a highway for the public use. In that case the court stated:

"It is well settled that railroad corporations may be required, at their own expense not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways. (citing cases). The rule, as established in the State of Minnesota, was thus declared in the case of *State ex rel Minneapolis v. St. Paul, Minn. & Man. Ry. Co.*, 98 Minnesota 380: 'A railroad company receives its charter and franchise subject to the implied right of the State to establish and open such streets and highways over and across its right of way as public convenience and necessity {*50} may from time to time require. That right on the part of the State attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed.'"

Perhaps the best statement of the principle is contained in *Illinois Central Railway Company v. City of Mayfield*, 35 F.2d 808. In this case the railway ran tracks through the Town of Mayfield and the city required the railway to remove these tracks. There it was stated:

"It is said, however, that the state having granted the plaintiff the right to establish its line of road with the necessary tracks for switching and storing of cars, it is not within the power-of-the city, though acting with all the authority that the state possessed, to limit the use of the passing or switching tracks, or to require their removal. It is true that plaintiff's franchise vested it with all the rights and privileges of a common carrier and with the right to receive and deliver freights not only at its freight depot but to lay and maintain such side tracks and team tracks and to cross the street or highway therewith at such points as was reasonably necessary to accommodate its patrons. However, plaintiff never acquired, by its franchise, any specific or permanent location in the street for these tracks. The state never surrendered its dominant right to regulate and control the use and location of these tracks, which it has now delegated to the city, and the plaintiff took the risk of having the situation disturbed if it should become necessary in the public interest. (citing cases). Moreover, these ordinances, as we have said, do not prohibit the railroad company from laying and operating switching and passing tracks in the city, but only prohibit it from maintaining such tracks across Broadway.

The evidence is that plaintiff can rearrange its tracks so as to comply with the ordinance without loss of revenue or serious inconvenience to any shipper. In fact such an arrangement was in force during a test period. In this situation, it seems entirely fair to say that the city is acting within the legitimate scope of its power.

What has been said substantially disposes of the due process contention. The ordinance took no property in which plaintiff had a vested right. It did not even deprive plaintiff of the physical property, the rails and ties located in the street. It only ordered their removal as an incident necessary to the new arrangement, but in the same connection it provided for freight service south of Broadway street over the main line. There is no evidence that the change either seriously interfered with or endangered

main line traffic or curtailed any of plaintiff's local freight service. Reasonable regulation, though it involves added cost or expenses, is not forbidden by the Fourteenth Amendment. *Richmond, F & P.R.R. Co. v. Richmond*, 96 U.S. 521, 24 L. Ed. 734. The cost of reconstruction, to wit, \$ 9,450, according to plaintiff's engineer, or perhaps more according to the plan adopted, and the increased cost of annual maintenance, to wit, \$ 3,800, with which the ordinance burdens plaintiff, are {*51} not so excessive as to amount to confiscation.

The ordinance, it is true, may be somewhat burdensome, but if it was really intended for the promotion of the public safety, convenience, and welfare and had a real tendency to carry these purposes into effect, it is not within the province of the court to strike it down. (citing cases). Nor can it be destroyed because a more effective or more economical plan of effecting that purpose might suggest itself to the court. *Lehigh Valley R.R. Co. v. Comm'rs.*, 278 U.S. 24, 33, 49 S. Ct. 69,

Under the provisions of Section 58-207 the Highway Commission has the right of eminent domain. It has the right to condemn any land necessary for the development of a highway. Prior to the creation of the Highway Commission the state itself had the right of eminent domain to condemn any property for the development of highways and for the benefit of the traveling public. The cases are too numerous to mention holding that the creation, operation and development of highways are an integral part of the public welfare. The various utilities, when accepting their franchise, of necessity accept them subject to all existing rights. The fact that later developments require the removal and readjustment of lines and poles is unfortunate but is one of the incidents and hazards inherent in the acceptance of the franchise.

It is, therefore, the opinion of this office that the Highway Department is under no obligation to reimburse the various utilities for the cost of removing their poles and lines when such removal is the result of the creation of a highway to be used by the general public.