

Opinion No. 18-2126

August 30, 1918

BY: HARRY L. PATTON, Attorney General

TO: State Corporation Commission, Santa Fe, New Mexico.

Increase of Fare by Albuquerque Street Car Company Must Be Authorized by State Corporation Commission, and Authorization by City Council Is Insufficient.

OPINION

I am writing you in response to your recent request for an opinion involving the question of your authority to fix passenger rates on street cars operated by the City Electric Company of Albuquerque. Your request is accompanied by the brief of Mr. Laurence F. Lee, attorney for said company, which we have carefully read.

From information available we learn that the Commissioners of the City of Albuquerque have granted authority to raise the street car rates for this company. If the State Corporation Commission has exclusive jurisdiction in this matter, it follows that there will be a clash of authority between your Commission and the authorities of the City of Albuquerque.

From statements made by Mr. Lee in his brief, it appears that a franchise was granted by the County of Bernalillo in the year 1881 to the Albuquerque Street Railroad Company, in which said company was authorized to charge not over fifteen cents to any one individual as fare from one point on said line to another for one trip, etc. I also have information that subsequent to this action by the Board of County Commissioners of Bernalillo County, and prior to the adoption of our State Constitution, the City of Albuquerque on one or two occasions granted franchises to said Albuquerque Street Railroad Company, which amounted to a ratification of the authority originally granted by Bernalillo County with reference to the maximum fare. I am further advised that the Albuquerque Street Railroad Company afterwards became insolvent, and that at a foreclosure sale all its assets, including its franchise, were sold to City Electric Company; whether correct or not, I am assuming for the purposes of this opinion that all of such facts are true.

Article 11, Sec. 7, of the New Mexico Constitution, contains the following clause:

"The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of railway, express, telegraph, telephone, sleeping-car, and other transportation and transmission companies and common carriers within the state."

As before stated, I am assuming that the Albuquerque Street Railroad Company held a franchise which authorized it to charge not exceeding fifteen cents for fare. There is a familiar rule of law to the effect that a franchise is a vested property right that cannot after-wards be taken away, impaired or diminished either by subsequent constitutional amendment or by legislative or municipal action. The leading case holding to this doctrine is the Dartmouth College Case, 4 Wheat, 518, 4 L. ed 629. Had the Albuquerque Street Railroad Company continued to exist until this time, it might possibly contend that it acquired certain vested property rights which could not have been taken away by the Constitution, and for the sake of argument we will concede as much. This company, however, has been dissolved, or at least is not the present owner of the franchise. The City Electric Company was incorporated on September 13, 1915. This, as you may observe, is subsequent to the adoption of the Constitution. The courts have expressed some doubts as to the authority of a corporation to sell or assign a franchise. However, it has been almost uniformly held that the franchises of an insolvent public utilities corporation may be assigned and transferred through foreclosure or judicial sales. And again we are assuming that all necessary and proper steps were taken to effectuate this transfer to the City Electric Company. Again, it has been held by numerous authorities in cases of this kind, that the corporate franchise is deemed to be granted anew, the new corporation holding the franchise subject to any statute or constitutional provision which may have been enacted since the granting of the original franchise and prior to the organization of the new corporation. Sec. 2912, Thompson on Corp. 833.

Norfolk & C. R. Co. v. Pendleton, 86 Va. 1004 11 S. E. 1062;

Trask v. McGuire, 18 Wall. (U.S.) 391, 21 L. ed. 938;

Atlantic & C. R. Co. v. Georgia, 98 U.S. 359, 25 L. ed. 185;

Great Northern Ry. Co. v. Minnesota, 216 U.S. 206, 54, L. ed. 446;

Rochester Ry. Co. v. Rochester, 205 U.S. 236, 51 L. ed. 784;

Memphis & Little Rock Ry. Co. v. Beny, 112 U.S. 609, 28 L. ed. 837.

Mr Lee, in his brief, contends that Sections 5388 and 5389, Codification 1915, which prescribe rules for the filing of schedules and rates, are not broad enough or do not apply to a local street-car company, but are directed at railroads.

Sec. 5388. "Every transportation, transmission company and **common carrier** engaged in **transportation of passengers** and property from points in this state to points within, or beyond its limits, and from points in other states to points in this state and every such interstate company or common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classifications for the transportation of persons and property within the state between each point upon its route and all other points thereon."

A street railway company has been held to be a common carrier: 1. Words and Phrases (2nd Series) 806; 2. Words and Phrases 1318, 1320. It will also be noted that the statutory authority extends to the transportation of passengers also. I cannot agree with the contention of the attorney for the City Electric Company that this act is not broad enough to cover street railway companies. On the contrary, I think that no plainer intention of the law-makers could be manifested than the section last referred to.

Our conclusion is that the State Corporation Commission has authority to fix, determine, and regulate the passenger fare upon street cars of the City Electric Company, under the provisions of our Constitution above cited. We are further of the opinion that Section 5388, et seq. provide a method of procedure. Also, we are of the opinion that before this company was authorized to increase its passenger fare, it should take steps prescribed by Section 5389, by giving thirty days' notice to your Commission of the proposed change in rates to be made.

It follows, in my opinion, that the Commissioners of the City of Albuquerque acted without authority in granting the increase in rate, and that the increase in rate which is being charged by the City Electric Company is not authorized by, and is in violation of our statutes.