Opinion No. 65-235

December 8, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: Murray E. Morgan, Chairman, New Mexico State Corporation Commission, State Capitol Building, Santa Fe, New Mexico

QUESTION

STATEMENT OF FACTS

A common motor carrier has made application to the Corporation Commission of the State of New Mexico under Section 64-27-8 New Mexico Statutes Annotated, 1953 Compilation, for authority to transport retired railway cars between Clovis, New Mexico, and points within five miles thereof, on the one hand, and points and places in the State of New Mexico, on the other hand, over irregular routes on a non-scheduled service. Another common motor carrier has authority in the same territory to transport dwellings, buildings and houses. The latter carrier desires to intervene in the hearing to be held upon the application made by the first carrier.

QUESTION

May the carrier desiring to intervene in the above proceeding be permitted to intervene and present evidence in opposition to the application for a Certificate of Convenience and Necessity filed by the other carrier?

CONCLUSION

Yes.

OPINION

*{*384}* ANALYSIS

For the purpose of this opinion we assume that a retired railroad car is one which the railroad has discontinued from service and which has had its wheels removed and has been sold to some individual who desires to have it moved. Therefore, our conclusions will not in any way effect railroad cars which are retained by the railroad for possible future use as part of its rolling stock.

Section 64-27-8 New Mexico Statutes Annotated, 1953 Compilation, provides for the filing of an application for Certificate of Public Convenience and Necessity and for

holding of a hearing on that same application. That section also states in pertinent part as follows:

". . . The commission shall cause notice of such hearing to be served at least five (5) days before the hearing upon any officer or owner of every common carrier that is operating, or has applied for a certificate to operate, in the territory proposed to be served by the applicant, and on other interested parties as determined by the commission, and any such common carrier or interested party is hereby declared to be an interested party to said proceedings and may offer testimony for or against the granting of such certificate. Any other interested person may offer testimony at such hearing . . ."

The Commission has also promulgated rules concerning intervention in hearings upon applications for Certificates of Public Convenience and Necessity. Section 2 of Rule 1 of the Commission's Rules and Regulations governing transportation for hire on the high-ways of the State of New Mexico provides:

"In the conduct of all hearings upon applications for Certificates of Public Conveniences and Necessity, extensions of such Certificates *{*385}* and all other hearings as required by law relating to the Motor Carrier Act, any interested party desiring to participate at such hearings shall before (5) days of the date set for hearing file in writing with the Commission his response, protest, objection, or intervention, as the case might be, to the application or other matter to be heard by the Commission. In the event any interested party fails to file in writing his response, protest, objection or intervention within the time hereinabove set out, such party shall be excluded from participation in the hearing: provided, however, that for good cause shown upon application, the Commission may permit such party to file his response, protest, objection or intervention at a later date, but not beyond the date set for hearing."

It is clear from the above quoted rule that only interested parties may appear to oppose the granting of a Certificate of Convenience and Necessity under the New Mexico Motor Carrier Act. It is, therefore, apparent that we must determine whether or not the carrier seeking to intervene in this particular hearing is an interested party within the meaning of Section 64-27-8 New Mexico Statutes Annotated, 1953 Compilation, and Section 2 of Rule 1 of the Commission' rules governing transportation for hire over the public highways of the State of New Mexico.

If the party seeking to intervene in this hearing would have an interest in the subject and object of the hearing, then he is an interested party within the meaning of Section 64-27-8 N.M.S.A., 1953 Compilation, and he must be permitted to intervene under the provisions of that section. **State ex rel. Reynolds v. W. S. Ranch Company,** 69 N.M. 169, 364 P.2d 1036; **Teaver v. Miller, et al.,** 53 N.M. 345, 208 P.2d 156; **Sellman v. Haddock,** 62 N.M. 391, 310 P.2d 1045.

We must, therefore, look to the authority of the carrier seeking to intervene in this proceeding in order to determine whether or not his authority would permit him to be

interested in a proceeding brought to determine whether or not another carrier could transport retired railway cars in New Mexico. From your request for this opinion, we note that the party seeking to intervene in this proceeding has authority to transport "dwellings", "buildings" and "houses" from to locations in the State of New Mexico. It is clear, therefore, that if his authority entitles him in any way to transport retired railway cars, then he certainly has an interest in any proceeding brought by another carrier in order to obtain authority to haul retired railway cars. Turning to the Second Edition of **Webster's Unabridged New International Dictionary,** we find the definition of the word "building" as follows:

". . . a fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land, for use as a dwelling, storehouse, factory, shelter for beasts, or some other useful purpose. . ."

This definition has been adopted by many of the cases defining the word "building". These cases also stress that whether or not a particular object is a building, dwelling or house depends largely upon the use and intention of the owner of the object rather than the original purpose for which it was constructed. **Davis v. State,** 38 Ohio St. 505, **New York Fire Department v. Buhler,** 35 N.Y. 177, 33 How. Pr. 378; **Simmons v. State,** 234 Ind. 489, 129 N.E.2d 121; **In Re Wiley,** 120 Vt. 359, 140 A.2d 11. We note also that a railroad car has been treated as a dwelling under the strict construction which is afforded in the area of the criminal law. **Gibbs v. State,** 8 Ga. App. 107, 68 S.E. 742; **Carter v. State,** 106 Ga. 372, 32 *{*386}* S.E. 345. In **Carter v. State,** supra, the Court pointed out that a freight car body detached from its wheels was a house within the meaning of the Georgia arson statute even though it was used merely for storage purposes. That court pointed out that the particular freight car body with which they were concerned had all the elements of permanency necessary to make it a dwelling.

From the foregoing definitions and cases it is apparent to us that a retired railway car has all the elements of permanency necessary to make it a building, and possibly a house or dwelling. We, therefore, conclude that intervention should be permitted.