Opinion No. 68-118

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BY: OPINION OF BOSTON E. WITT, Attorney General

TO: L. C. Cypert, Director Traffic and Rate Division State Corporation Commission P.O. Box 1269 Santa Fe, New Mexico 87501

QUESTIONS

1. Prior to closing an agency station, must a railroad company make application for such closing to the State Corporation Commission?

2. Must a hearing be held before the State Corporation Commission prior to the closing of a railroad agency station?

CONCLUSIONS

1. See analysis.

2. See analysis.

OPINION

*{*190}* **ANALYSIS**

The answer to your questions has been clearly and conclusively settled by our Supreme Court. Prior to discussing these cases, we will review the constitutional and statutory authority of the State Corporation Commission in the area of railroad facilities. The State Corporation Commission has jurisdiction over railroads and railroad facilities and the extent of its powers and duties in this regard is found in Art. XI, § 7. New Mexico Constitution. This section provides in pertinent part as follows:

The Commission shall have power and be charged with the duty . . . to require railroad companies to provide and maintain adequate depots, stockpens, station buildings, agents and facilities for the accommodation of passengers and for receiving and delivering freight and express.

These powers and duties are conditioned, however, by the requirement that the State Corporation Commission hold a hearing prior to issuing any order affecting railroad facilities. Art. XI, § 8, supra, provides:

The commission shall determine no question nor issue any order in relation to the matters specified in the preceding section, until after a public hearing held upon ten [10] days' notice to the parties concerned, except in case of default after such notice.

Both of the above quoted constitutional provisions were discussed and interpreted in **State Corporation Commission v. Atchison, Topeka & Santa Fe Railroad Company,** 32 N.M. 304, 255 Pac. 394 (1927). In that case, the railroad had discontinued a station agency at Fulton, New Mexico, without first obtaining approval of the State Corporation Commission. Following the agency closing, the State Corporation Commission cited the railroad to show cause *{*191}* why the agency was discontinued and why it should not be reinstated. At the show cause hearing the railroad took the position that the burden was upon the Commission to show why the agency should be reinstated whereas the Commission ruled that the railroad had the burden of showing why the station should be discontinued. Following the hearing at which the Commission offered very little evidence the Commission ordered the station reopened until the railroad could show that it should be closed. Thus, the question was presented to the Court as to whether the railroad company had the right to discontinue its agency service without first justifying its action before the Commission. The ruling of the Court was that the railroad could discontinue its station without prior approval of the Commission.

Citing from previous opinions, the Court in **Atchison,** supra, stated that the burden of proof is upon the Commission to show why the discontinued service should be reinstated. In arriving at this conclusion, the Court interpreted §§ 7 and 8, supra, as follows:

Article 11, § 7, is the source of the commission's power to require maintenance, as well as of its power to require provision, of service. The requirement of notice and hearing found in article 11, § 8, is the same as to both; that is to say, the commission cannot make any order that a corporation "maintain" service unless it gives notice to the company and gives it a hearing.

The word "maintain" in section 7, supra, occurs merely in defining the jurisdiction of the commission. It would be a violent assumption, particularly in view of well-known conditions, to suppose that the Constitution makers did not know that many and frequent changes would occur affecting the necessities and needs of railroads from an operating standpoint, and of the public from a service standpoint. **There is nothing to indicate that every change in the service being afforded when the Constitution was adopted, or the service thereafter voluntarily installed, was to have consideration and approval in advance by the commission.** The contrary seems quite plain when we recall that every order in relation to such matters, however trivial, would involve notice and hearing. (Emphasis added.)

In an obvious attempt to override the 1927 **Atchison** opinion, the 1929 Legislature enacted §§ 1 through 3 of Ch. 26, Laws 1929. This Act, compiled as §§ 69-4-10 through 12, provides as follows:

69-4-10. Hereafter no railway, transportation or transmission company shall discontinue any railway station, agency or agent at any railway station in this state without first submitting to the state corporation commission a petition alleging that such station or agency or agent is no longer a necessary facility for the accommodation of passengers,

and for receiving freight and express, and constitutes an unnecessary burden and expense upon such railway, transportation or transmission company, and praying for an order of the state corporation commission permitting the discontinuance of said station, agency or agent. Such station, agency or agent shall not be discontinued until a hearing shall be held by the state corporation commission and an order of said commission entered authorizing the discontinuance of such station, agency or agent.

69-4-11. Within 60 days from the date of the filing of said petition, a hearing shall be held by the state corporation commission after due notice *{*192}* to the said petitioner and all other parties concerned, and at the said hearing **the burden of proof to sustain the right to discontinue said station, agency or agent shall be upon the said petitioner to establish by substantial evidence.** (Emphasis added.)

69-4-12. Any railway, transportation or transmission company violating provisions of this act [69-4-10 to 69-4-12] shall be guilty of a misdemeanor and shall be fined in a sum of not to exceed $ 1,000 and not less than $ 500.00.

The Act attempted to establish procedures to be followed whenever a railroad attempted to discontinue any of its stations or agencies. It required that a petition be filed with the State Corporation Commission and that such a station or agency could not be closed until the Corporation Commission had issued an order allowing such discontinuance. Further, a hearing was required to be had prior to such a closing at which the burden of proof was upon the railroad to sustain its request to discontinue an agency or station. Lastly, the Act provided for criminal sanctions should a station be discontinued without following the above procedures.

Two 1933 cases, however, tested the constitutionality of the above 1929 law. In **re Atchison, Topeka & Santa Fe Railway Company,** 37 N.M. 194, 20 P.2d 918 (1933), the railroad discontinued operation of two stations without first obtaining the permission of the State Corporation Commission. Following the closing of these stations, the State Corporation Commission ordered the railroad to show cause why Ch. 26, supra, was not compiled with prior to discontinuing the stations. The railroad maintained that Ch. 26 was void and of no effect since it conflicted with §§ 7 and 8 of Art. XI, supra. The Court held that §§ 4, 7 and 8 of Art. XI, supra, vested exclusive power in the Corporation Commission to determine its own rules of procedure and to determine and decide any questions properly before the Commission on hearing. Thus, an attempt by the Legislature to intercede into the Commission's exclusive jurisdiction was void and of no effect thereby nullifying the effect of Ch. 26, supra.

The other 1933 case, **In re Denver & Rio Grande Western Railroad Company, et al,** 37 N.M. 472, 24 P.2d 727 (1933), the railroad had made application to the State Corporation Commission, pursuant to the above 1929 Act. The petition of the railroad was denied by the Corporation Commission and the matter was removed to the Supreme Court. In remanding the matter to the Corporation Commission, the Court stated:

The present order was made and is sought to be defended on the evident theory that Laws 1929, c. 26 . . . controls, and that a railroad proposing discontinuance of an agency has the burden of proceeding and of proof. We have recently rejected that theory. In re Atchison, T&S.F. Ry. Co., 37 N.M. 194, 20 P. (2d) 918. **The matter stands as it did before the passage of the 1929 act.** As to enforcement of the present order, the situation is not varied by the fact that the railroad, instead of closing its agency as it might have done, . . . did apply for affirmative authority to close it. (at 473) (Emphasis added.)

As stated by the Court the matter of discontinuance of railroad stations and agencies remains as it was prior to the passage of the above 1929 Act; therefore, it is necessary to resort to the ruling in **State Corporation Commission v. Atchison, Topeka & Santa Fe Railway Company,** the 1929 case discussed above, which held that the railroad could properly discontinue its station without the prior approval of the State Corporation Commission.

*{*193}* Such is he present status of the law. No amendments to Art. XI of the Constitution have been made in regard to establishment or continuance of railroad station facilities. We do note that in 1964, an amendment was approved by the electorate to § 7 of Art. XI, supra, in regard to changes in telephone and telegraph rates. This amendment provided that new rates be submitted to the Corporation Commission for approval prior to their effectuation. No such proposal was made in regard to railroad facilities, however. In specific response to your questions, therefore, we must conclude that a railroad need not obtain the approval of the Corporation Commission prior to closing of a station or agency nor is a hearing required prior to the closing. If an investigation by the Corporation Commission reveals that the public interest would best be served by continuance of a particular agency or station, then the Corporation Commission may order a hearing for the purpose of presenting this evidence. The burden of proof again, as in 1927, would be upon the Commission to show that the public interest requires the continuance of a particular station or agency. If a station is ordered reinstated following hearing by the Commission, however, the railroad would have to apply for discontinuance of that particular station prior to its closing. See **State Corporation Commission v. Atchison, Topeka & Santa Fe Railway Company,** supra (1927 case).

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