

FINANCE DOCKET No. 17480
OREGON SHORT LINE RAILROAD COMPANY ET AL.
CONSTRUCTION AND OPERATION

Submitted February 20, 1953. Decided April 10, 1953

Certificate issued authorizing construction by the Oregon Short Line Railroad Company and operation by the Union Pacific Railroad Company of a line of railroad in Salt Lake County, Utah.

A. U. Miner, F. J. Melia, and Bryan P. Leverich for applicants.
W. G. Van Cott for intervener.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MAHAFFIE, PATTERSON, AND JOHNSON

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed and the case was argued orally.

The Oregon Short Line Railroad Company and the Union Pacific Railroad Company on September 4, 1951, applied for authority to the former to construct and to the latter to operate a line of railroad, hereinafter referred to as the industrial lead track, along 3d West Street from a connection with an existing line of the applicants at a point immediately north of the intersection of 3d West and 9th South Streets, Salt Lake City, in a southerly direction to 21st and 3d West Streets, a total of approximately 9,080 feet¹ all in Salt Lake County, Utah. No representations have been made by any State authorities. The Denver & Rio Grande Western Railroad Company, called the intervener or the Rio Grande, intervened in opposition to the application and a hearing was held. Unless otherwise stated, all points hereinafter mentioned are in Utah.

The Union Pacific owns all the capital stock of the Oregon Short Line. The former operates, under lease, the properties of the latter in Utah and other States. *Union Pac. R. Co. Unifloation*, 207 I. C. C. 543.

Prior to the filing of this application, the applicants obtained a franchise from the Board of Commissioners of Salt Lake City to construct and operate the industrial lead track along the existing Third

¹ Approximately 4,088 feet will be outside the city limits, but the entire line will be located within the switching limits of the Salt Lake City terminal area.

West Street. The Union Pacific also secured a permit from the Public Service Commission of Utah to construct and operate the trackage across the intervening streets between 9th South and 17th South Streets² and for authority to extend its track across a Rio Grande interchange track, hereinafter referred to as the interchange track, over which cars are exchanged between the Rio Grande and the Bamberger Railroad Company. The order of the State Commission granting the permission sought by the Union Pacific was affirmed by the Supreme Court of Utah in *Denver & R. G. W. R. Co. v. Public Service Commission*, 230 P. (2d) 557, decided April 20, 1951. Thereupon, the applicants commenced the construction of the industrial lead track, which has now been completed from 9th South Street to a point immediately north of the proposed crossing of the interchange track, a distance of approximately 5,140 feet. The Rio Grande refused to permit the applicants to cross the interchange track. The Oregon Short Line obtained a judgment in the Third Judicial District Court of Salt Lake County, Utah, condemning a right-of-way across the tracks of the Rio Grande. The judgment was affirmed by the Supreme Court of Utah in *Oregon Short Line R. Co. v. Denver & R. G. W. R. Co.*, 237 P. (2d) 829. In the meantime, the applicants served notice of their intention to proceed with the construction across the interchange track, whereupon the Rio Grande filed a suit in the United States District Court for the District of Utah seeking an injunction on the ground, among others, that the proposed construction and operation constituted an extension of a line of railroad within the meaning of section 1 (18) of the Interstate Commerce Act for which no certificate of public convenience had been obtained. That court held that the industrial lead track constituted an extension under section 1 (18) of the act, and that it did not constitute a spur, industrial, team, switching, or side track under section 1 (22). It enjoined permanently the Union Pacific from completing the construction of the track unless a certificate from the Interstate Commerce Commission was obtained.

The court's judgment was affirmed on July 18, 1952, by the United States Court of Appeals for the Tenth Circuit. *Union Pacific R. Co. v. Denver & R. G. W. R. Co.*, 198 Fed. (2d) 854. The Union Pacific decided not to pursue the court litigation further and accepted the decision of the circuit court of appeals as the final judgment. It therefore requested that its application for authority to construct and operate, previously filed, as stated, but temporarily held in abeyance pending the final disposition of the court proceeding, be now given consideration.

² There are no existing streets south of 17th South.

The territory, referred to as the industrial area, which the applicants propose to serve, is located principally within the city limits of Salt Lake City and contains approximately 275 acres. It is bounded by 9th South Street on the north, 21st South Street on the south, 2d West Street on the east and 4th West Street on the west. The applicants' main line to Provo, called the Union Pacific Provo line, constructed in 1871, extends in a southerly direction along 3d West to 9th South Streets, where it deviates across the northeast corner of the industrial area to 1st West, thence proceeds on the east side of the industrial area along 1st West parallel to the industrial lead track at a maximum distance of 1,600 feet, or 2 city blocks. The intervener's main line to Provo, called the Rio Grande Provo line, which was constructed in 1881-83, is on the west side of the industrial area. It extends along 4th West to 9th South, thence in a southwesterly direction to 5th West Street and proceeds thereon parallel to the industrial lead track at the same maximum distance as the Union Pacific Provo line.

The interchange track, heretofore referred to, extends from the Rio Grande Provo line in a northeasterly direction, crossing the industrial area in about the center, or from a point near 17th South and 4th West Streets to 2d West Street and Whitney Avenue, and proceeding northeasterly to a point where it intersects the Union Pacific Provo line, thence northerly to a connection with the line of the Bamberger Railroad. It was constructed by the former Salt Lake & Utah Railroad Company in 1914 and acquired by the intervener in 1940. The industrial lead track would cross the interchange track near 15th South Street and extend approximately 3,940 feet beyond the end of the completed portion of the track.

At the present time, the industrial area is largely undeveloped partly because most of it has no convenient trackage facilities available. There are only five industries with rail service within the area. The Peppers Allied Metals and the Lang Lumber Company, 2 of the 5 industries, are both located at the extreme northern end of the area. The former is served by the Union Pacific and the Rio Grande, and the latter by the Union Pacific only. A team track, referred to as the American Avenue team track, which is served by the Union Pacific, is also located in that section of the industrial area. The three remaining industries are the Western Salvage & Supply Company, the Beehive Coal Company, and the Utah Construction Company. The first two are reached by Rio Grande spurs leading off the interchange track, and the third one, situated at the extreme southern end of the area, is furnished rail service over a track extending from the Rio Grande Provo line. The Union Pacific Provo line provides rail transportation to industrial establishments in the territory adjoining the industrial area on the east, but none of its spur tracks enter that section of

the area south of the interchange track. Industries outside the industrial area served by the interchange track are the Chicago Bridge & Iron Company, a large fabricating plant on land adjoining the industrial area on the west, and three or four industries east of the industrial area.

The principal purpose of the proposed construction and operation is to encourage location of plants in the industrial area. As stated, the area is now largely undeveloped industrially, but the applicants expect that the construction of the lead track will induce the desired development in the foreseeable future and result in substantial freight revenues. Owners and one or two real-estate brokers, representing aggregate holdings in the area of probably 100 acres, testified at the hearing in support of the application. All prefer industrial spurs on the Union Pacific, as that carrier can provide longer single-line movements without interchanging cars with connecting carriers, resulting in probable savings in time en route, such as in connection with stopping-in-transit movements, and in switching charges, if any are applicable. These advantages would be realized only when both the point of origin and the destination are on Union Pacific lines. Most of the 100 acres referred to are located south of the interchange track, but the applicants' manager of industrial development has been approached for trackage facilities in the industrial area north of the interchange track by the Chrytraus Construction Company, owner of substantial holdings, the Young Electric Company, a neon sign company which has its own place of business in the area and additional ground for other industries, the Carleson Brothers, property owners, the Jacobsen Construction Company, which also conducts its own business in the area, and other realtors with substantial property holdings. Realtors attribute their unsuccessful efforts to locate industries in the industrial area to the unavailability of railroad trackage. One realtor cited instances involving the location of the Kraft Cheese Company and the D. N. & E. Walter Company, both of which finally established plants at other locations, apparently outside the industrial area. The Safeway Stores has been looking for an industrial site, but the applicants' industrial manager has been unable to establish that company within the area. Another realtor approached the Rio Grande for trackage facilities, without revealing the name of the prospective industry because of the keen competition between carriers for industrial plants, but without success. One other realtor has plans drawn for the construction, in the industrial area, of a plant, which will require trackage for its operation. The plant will be served by the Union Pacific from either its Provo line on First West or the industrial lead track, if this application is approved, depending upon the location of the site selected. The witness expected the plant con-

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struction to commence in the fall of 1952. One property owner, whose property adjoins the industrial lead track on both the east and west sides, considered the construction of spur tracks from the present Rio Grande track too expensive because of the distance involved. The property owners and realtors who testified at the hearing urge the construction and operation of a lead track, such as that proposed by the applicants, and consider the development of their properties dependent upon such construction and operation.

The vice president in charge of operations of the Union Pacific expressed the opinion that the proposed extension of line would result in substantial revenues to the carrier. The opinion of the witness was based on his general familiarity with industrial developments at North Omaha, Nebr., Spokane, Wash., Denver, Colo., Kansas City, Mo., and Los Angeles, Calif., which he considered similar to the industrial development in question, and on his knowledge of the applicants' records on traffic handled at those points. The witness would not venture an estimate on the anticipated traffic, as he could not determine in advance the type and kind of industrial plants that would be constructed in the area. In its complaint in the Federal court proceedings, the intervener alleged that the construction and operation of the proposed extension would cause it damage and injury in excess of \$500,000. The applicants' counsel admitted in that proceeding that the intervener would lose prospective business in the amount claimed. This was merely an estimate or guess, unsupported by any definite basis.

The industrial lead track will extend lengthwise through the center of the industrial area, which is 12 city blocks in length and 2 in width. One of the applicants' division engineers expressed the opinion that from an engineering point of view the area could be served best and more economically by extending the track in the manner proposed. The completed portion of the track was constructed at a cost of \$55,188, of which \$18,427 was for grading, \$12,054 right-of-way, \$10,311 track laying and surfacing, \$6,679 ties, and \$3,171 gravel ballast. The track was laid with 90-pound second-hand rail and has no excessive curves or grades. The estimated cost of the uncompleted portion is \$37,000. The estimate includes the cost of crossings over a Rio Grande industrial spur and the interchange track, but does not cover the cost of crossing over two stub spurs off the interchange track constructed by the intervener directly across the projected center line crossing of the industrial lead track as an obstruction to the applicants' proposed extension of line. The entire industrial lead track will consist of a single line laid on level ground with little or no grade or curvature and will require no bridges or trestles. It will be operated in freight switching service only, and

no stations will be located thereon. The uncompleted portion of the track could be constructed in about 10 days.

The intervener is opposed to the application principally on the grounds that there is no transportation need for the services of the applicants; that its railroad is in a position to render whatever rail service may be required by any industry which might locate in the area; and that approval of the application would place the applicants in a more favorable position to compete not only for future business but also for business already established in the area or adjacent thereto, such as traffic of the Chicago Bridge & Iron Company, heretofore referred to.

At present, the intervener is enlarging its team track and rearranging its unloading facilities off the interchange track at 2d West and 14th South because of unusual traffic demands, but apparently is not contemplating the construction of a lead track in the industrial area. The intervener's vice president stated that none of the realtors and property owners who testified at the hearing had approached the Rio Grande for trackage facilities, and that at present there is no demand for such services, nor did he know of any industry contemplating the construction in the industrial area of an industrial plant requiring trackage. The intervener proposes to wait until an industry locates in the area and, if such industry presumably warrants it, then to construct a lead track from either stub, leading off the interchange track, along 3d West or over the same route on which the applicants propose to construct their lead track. It appears that since the applicants applied for a franchise and a street-crossing permit, the intervener filed applications for similar authority.

In the construction of industrial spurs, it is the policy of the Rio Grande to require the industry to deposit the entire cost of the trackage construction and for the former to refund to the latter, on a car basis upon the use of the track, for that portion of the track which becomes the carrier's property, located between the switch point and the right-of-way line. The applicants, on the other hand, pay for the construction up to the clearance point and require the industry to pay for the portion from the clearance point to the end of the track. There has been no recent construction of industrial spurs in the industrial area, other than the two stubs or turnouts, which do not extend beyond the right-of-way and, as presently constructed, are not suited for constant traffic. The last trackage construction to industrial plants was evidently more than 6 or 7 years ago.

The exceptions to the proposed report are based on the grounds, among others, that the report would (1) deny due process of law because the presiding examiner did not require the witnesses on cross-examination to divulge the names of industries awaiting construction

of trackage facilities in the industrial area and (2) violate principles of law of *res judicata* for the reason that the examiner's findings were unsupported by the evidence and were contrary to the findings of fact adjudicated by the court. The intervener also requested a further hearing in which full right of cross-examination of the witnesses as to the identity of any shippers desiring trackage facilities may be permitted. While conceding that we have complete jurisdiction to determine the question of public convenience and necessity, the intervener's counsel urged at the oral argument that we are required to accept the findings of the court on the question of (a) adequate trackage facilities in the area, (b) availability of the area to the applicants, and (c) resulting damage to the intervener, if the applicants are authorized to construct the extension, on the ground that such issues have already been adjudicated and the parties estopped in any further proceeding to contend the contrary of the adjudication.

In reply to exceptions, the applicants contend that (1) the intervener was not denied due process of law for the reason that (a) in the one instance the witness, who was the applicants' manager of industrial development, answered all questions on cross-examination except the name of the prospective industry, which he learned from a real-estate broker and could not disclose its identity without permission, as it was a trade secret and (b) in the other instance the witness, a real-estate broker and owner of an investment company, also answered the questions put to him, except that he would not disclose the name of the prospective industry for fear of losing his prospect to competitors; and (2) that the findings proposed by the examiner would not violate the principles of law of *res judicata* and were not contrary to the findings of fact adjudicated by the court because the evidence adequately supported the examiner's findings, that the proceeding is *res judicata* only to the extent that the court held the applicants' proposed trackage was an extension of a line of railroad; and that we are bound to consider and determine the facts which affect and bear upon public convenience and necessity in order to determine whether the proposed construction is in the public interest.

In regard to the intervener's first contention, we are of the opinion that the examiner's ruling was proper and consequently there has been no denial of due process of law, as alleged. As to the second contention, we have exclusive jurisdiction to determine originally the question of public convenience and necessity. Findings of fact made by the court in determining that the line in question is an extension of a line of railroad within the meaning of section 1 (18) of the act, do not control us in determining whether public convenience and necessity require the proposed construction. In view of these conclusions the request for a further hearing will be denied.

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As heretofore stated, the court has already determined that the proposed construction and operation constituted an extension of a line of railroad. The question presented for determination in this proceeding is whether the public convenience and necessity require such construction and operation.

The traffic prospects in the industrial area warrant the construction and operation of a lead track, as proposed by the applicants. The industrial development of the area is dependent upon such construction and operation, which would induce and encourage the location of industries. Prospective users have made repeated inquiries as to the availability of the property, but have been discouraged from building thereon primarily because of the absence of rail facilities, which is retarding progress in the area. The existing tracks of the intervener are not conveniently located to reach most of the area, and in such cases prospective industrial plants would require sidings longer than sidings constructed off the industrial lead track. Except for territory immediately surrounding the interchange track, the area cannot be conveniently and economically served without the construction of a lead track along Third West, and the Rio Grande lines, other than the interchange track, are as far from the area as the Union Pacific lines. The applicants propose immediate construction, but the Rio Grande, while conceding that a lead track should be constructed along Third West, stands ready to construct when industries indicate that sufficient traffic will be furnished to justify the expense. The latter prefers to await the location of industries warranting construction. The early history of railway construction illustrates that prospective tonnage depending for its development upon transportation facilities, rather than tonnage immediately in view, has been the main justification for railway construction. The industrial lead track would create new business, and it is unlikely that it would divert the intervener's existing traffic.

There is under contemplation the construction of an express highway or freeway through Salt Lake City sometime in the future. According to one of the applicants' witnesses and statements of counsel at the hearing, the highway was projected, subject to change, partly along Fourth West and Third West Streets east of the Utah Construction Company and the Chicago Bridge & Iron Company, both being served exclusively by the intervener. If such a highway is constructed, the applicants apparently would not be permitted to cross it to serve any industry west of the highway. The applicants' line will furnish single-line service in instances where the destination or origin is located on Union Pacific lines. The advantages to prospective shippers from immediate construction of a lead track are apparent. Carriers have no legal right to exclusive occupancy

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of a territory. *Gulf, M. & O. R. Co. Construction*, 271 I. C. C. 541, and cases cited therein. Public convenience and necessity would be served by the proposed construction and operation, which should furnish desirable facilities, stimulate development, and increase traffic for both carriers.

We find that the present and future public convenience and necessity require construction by the Oregon Short Line Railroad Company and operation by the Union Pacific Railroad Company of the line of railroad in Salt Lake County, Utah, described herein. A further hearing is denied.

An appropriate certificate will be issued which will provide that the construction authorized shall be commenced on or before 30 days after the effective date thereof, and be completed on or before 60 days after that effective date. An order will be entered denying the request for a further hearing.

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