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AN OLD INDIANA RAILROAD CHARTER.

THE BUFFALO & MISSISSIPPI RAILROAD COMPANY.

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[A paper prepared for the Elkhart County Historical Society in 1911.]

AT the present time there is a sharp conflict between those who claim to own the railroads of the country and the people for whose benefit they exist. And quite generally it is the fashion to insist that the controversy is one for which the present generation is not to blame, but that the problem set for us to solve is before us as the necessary consequence of the lack of foresight of those who were charged with the duty of protecting the public interests when the building of these highways was first begun.

One of the ablest of our public journals, and one which stands stoutly for the protection of the interests of the whole people, recently said, editorially, of the railroads: "They were in the beginning private enterprises. . . . They were therefore neither controlled by the community nor open to all members of the community on equal terms."*

This is the popular impression, but, like many other popular impressions, it has no historical basis. The fact is that at the beginning the true relation of the railroads to the people was as clearly understood as it is to-day; and in every early charter this relation was not only recognized, but its continuation was generally carefully provided for. The present unfortunate relation existing between the railroad companies and the people is the result of the persistent encroachment by the former upon the rights of the people, and the final and comparatively recent repudiation by these companies of a relation which they at first

willingly accepted. The problem which we have to solve is not how we can create a new relation, but how we can restore the old one.

It is astonishing, when our forbears had written with most painstaking care into every charter granted in this State to the early railroad companies the true theory of the relation they must bear to the people, that now their wisdom should be denied and their efforts to safeguard the public interests be forgotten; and it is due to them that these false impressions be corrected.

Those of us who have made a study of the subject are familiar with the story of the magnificent struggle which those who represented the people of Indiana made in the early years of the State to provide for them the means of transportation, without which they knew there could be no permanent prosperity; for it was as apparent to them as it is to us that cheap and efficient facilities for transportation is the first essential to commercial activities, and that the relation between commerce and civilization is so close that it may almost be said that a people's commerce is the measure of their progress toward the highest civilization. And you may remember how our earliest Governors, year after year, sought to impress upon the successive Legislatures the importance of building roads, opening the rivers for navigation, digging canals, and at last, when the railway locomotive was made a practical means of locomotion, of building railroads. The task was an immense one, and the people soon realized that the State could not by the use of its own credit alone accomplish all that was urgently needed. Private capital was invited to cooperate in the work and liberal inducements were offered, but always, whether in providing turnpikes to be maintained by private companies, canals by slack-water navigation companies, or railroads by railroad companies, the waters and roads were alike declared to be public highways subject to the control of the State authorities and for the use of all of the people on equal terms.

In the case of the railroads the right of the public extended to the privilege of using their own vehicles in much the same way as in their use of the turnpikes; and when it came to granting the

charters to the railroad companies, an amount of practical economic wisdom and statesmanlike foresight was exhibited which we cannot but wonder at and applaud, and from which legislators of to-day can learn much. Every public right was recognized and every possible danger from private greed was guarded against so far as human foresight could guard against it; and they failed to accomplish all that they aimed at only in that they could not guard against the lethargy or venality of their successors, and the corrupting influences of corporate wealth and power.

I am sure we can spend a half-hour profitably in a study of one of these old charters, and I will take for that purpose one of which a copy has very recently come into the possession of the Elkhart County Historical Society. It is that of the Buffalo & Mississippi Railroad Company. It is a typical one, although it does not contain some restrictions which I find in some of the later charters. Locally the charter is of peculiar interest because the railroad was to pass through Elkhart county and was subsequently built as originally planned. The road is that now known as the Lake Shore & Michigan Southern. The local interest is enhanced by the fact that among the original incorporators were the ancestors of families whose descendants are still among us; and for me there is the special interest due to the fact that one of them was my maternal grandfather.

The entire charter is too long to give here in full, as it contains much that is purely formal and also sets out in detail the proceedings by which right of way might be acquired by condemnation proceedings. It was approved February 6, 1835, and may be found in the Local Laws of 1835, pp. 16-24.

The road which the company was to build was to connect the navigable water at the west end of Lake Erie with the navigable water below the rapids of the Illinois river. In the words of the charter, it was to commence "on the eastern line of the State, in a direction to the head of Maumee bay as near on a line between the head of Maumee bay and the rapids as circumstances will permit, and running on the best ground for the interests of the company and the convenience of the people to the west line of

the State in the most approved direction to strike the rapids of Illinois, or highest steamboat navigation of said river in the Illinois State: Provided, however, that if either of the State Legislatures of Ohio or Illinois do grant the privilege to said corporation to construct said railroad through that portion of their States to either or both of the designated points, then and in that case, the said corporation shall commence at a suitable place at the head of Maumee bay on Lake Erie, and running on the best ground for the interest of the company and convenience of the public, through the State of Indiana to the Rapids of Illinois in the State of Illinois."

The road was to be for the use of the public, and the people were to be entitled to travel upon it either in vehicles provided by the company or by those using the road, but the company was given the right to charge for its use and to designate the kinds of vehicles which could be used on it. This was provided for in these words:

"Section 23. That it shall be lawful for said corporation to place or prescribe the kind of carriages that may be used on said railroad, whether propelled by steam or other power, for the transportation of passengers, for all kinds of produce, lumber, goods, wares, merchandise, or any other kind of property, and for this purpose the corporation may construct said railroad of wood, stone, or iron, or of all, with such locks, turns, gates, bridges and aqueducts, culverts, toll and warehouses, as may be considered necessary for the interest of the company and convenience of the public; and the corporation may charge tolls and freights on such part of the road as may be in a sufficient state of forwardness, although the whole be not finished; and they may charge for travel and transportation on the same when it is graded and bridged, although the rails may not be laid so as to admit carriages thereon."

Section 24 authorized the company to make such charges as it deemed advisable, but section 25 put a perfect and automatic check on this rate-making power by providing that when the aggregate amount of dividends paid to its stockholders had amounted to enough to reimburse them for their investment

with stipulated interest, the Legislature could interfere in behalf of the people to reduce the rates. And then the representatives of the people, with rare wisdom, protected the public against the possibility of a misuse of this power by either the railroad corporation or by subsequent Legislatures by providing that after a fixed maximum dividend had been paid to the stockholders out of the earnings of the road, the surplus should be paid to the State for the benefit of the public schools. This provision absolutely removed all inducement for the corporation to charge excessive rates, as the stockholders would not receive the benefit; and by giving the excess for the support of the public schools, the largest possible number of the people were interested in seeing that the contract was carried out by the corporation, as the effect of the payment for the support of the schools would be to reduce taxes.

These sections are of such peculiar interest that I will read them:

"Section 24. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities, and carriages, on said road or any part thereof as shall be for the interests of said company, and the same to change, lower or raise at pleasure: Provided, That the rates established from time to time shall be posted in some conspicuous place or places on said road.

"Section 25. That when the aggregate amount of dividends declared shall amount to the full sum invested and 10 per cent. per annum thereon, the Legislature may so regulate the tolls and freights that no more than 15 per cent. shall be divided on the capital employed; and the surplus profits, if any after paying the expenses and reserving such proportion as may be necessary for future contingencies, shall be paid over to the Treasurer of State for the use of the common schools; but the corporation shall not be compelled by law to reduce the tolls and freights so that dividends of less than 20 per cent. cannot be made; and it shall be the duty of the corporation to furnish the Legislature, if required, with a correct statement of the amount of profits after

deducting all expenses; which statement shall be made under oath of the officers whose duty it shall be to make the same."

As the corporation under this charter assumed the relation to the State of a trustee to receive and account for school funds, it was important that it be required to keep, and, whenever called upon by the Legislature to do so, exhibit to it itemized statements of all its receipts and expenditures. This was fully provided for in another section. If our Legislature had gone no farther than this it would have been entitled to our highest praises.

After the acceptance of this charter by the corporation, no act of the company could relieve it from the obligations assumed by that acceptance without the active concurrence of the legislators of the State as the representatives of its people. Any attempt of the company to escape from these obligations by a transfer of its charter would have been futile, for the law has always been clear on that subject. As was said by the Supreme Court of the United States in the case of *Thomas vs. Railroad Company*, 101 U. S. 71 (at page 83): "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." And to this opinion may be added the statement of a text writer of law of high authority, that "Mere legislative consent to the transfer is not sufficient; there must be a release from the obligation of the company to the public." (Joyce on Franchises, sec. 464. See also 29 Ind. 465.)

But the Legislature did not stop with merely declaring the relation to exist between the company and the State and imposing the obligations placed upon the company. It fixed a definite term during which the company could exercise the privileges

conferred by the charter. Section 38 of that instrument provided: "This charter is limited to seventy-five years duration."

The relation between the parties to the contract during the life of the charter was clear; but what about the rights of the State and the company after the expiration of the charter? When the charter was granted there could have been but one answer given to that question, for at that time no one doubted, or questioned, the right, the propriety, or even the duty of the State to construct, maintain and operate all of the public highways within the State. At that very time the State was not only constructing and operating canals, but it was also constructing and operating railroads. Its contract with the Buffalo & Mississippi Railroad Company was merely an agreement that the company should build this particular highway and advance the money for the purchase of the necessary rights of way, and reimburse its stockholders out of tolls and rates which it was empowered to charge and collect. After the stockholders had been fully reimbursed and given the liberal interest agreed upon in the contract, the State was to be entitled to take possession of the road, which then became its property, to operate for the benefit of the people of the State. It was supposed that this time would come long before the period fixed by the charter, but whether this was done or not, all rights of the company, that is of its stockholders, would then come to an end and the State would take possession of the property, subject to no liability to the company, which must then dissolve. This was the law of corporations of that day.

I can best state the law, as it was then accepted, in the words of the Court of Appeals of New York, as laid down in the case of *Nicholl vs. New York & Erie R. R. Company*, 12 N. Y. 121. In that case the company had taken title to a tract of land and the court was asked to declare the deed void because the title was taken as a fee, whereas the company's existence was for a limited term only, and the contention was that it was unable to acquire a title in perpetuity. But the court, while recognizing fully the temporary character of the company, held that as the company might sell the land before its charter expired, and as

the purchaser from it would be capable of enjoying a title in fee by such conveyance, no objection to the possession of the land by the company before its charter expired should be considered. In the course of its opinion the court said: "Kent says: 'Corporations have a fee-simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation the reverter is to the original grantor or his heirs, but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter.'" In illustrating the application of this proposition to a private corporation the court said: "Suppose A. to sell to a banking corporation in fee by express words, a lot of land on which to build a banking house. If the bank does not sell that land, but retains it till the expiration of its charter, it will return to him, or, if he be dead, to his heirs."

But in the case of the Buffalo & Mississippi Railroad Company there would, of course, be no such reverter, because the land was acquired for the State, the company acting only as its agent and exercising for the State the power of eminent domain which the State delegated to it for that purpose. This land was to be paid for by the company by the advance of funds which the State was ultimately to repay, and after the expiration of the charter and the franchise granted by it the State would take possession of the property. All this was in the law and the charter.

While the right of the State to take possession at the expiration of the company's franchise in 1910 was absolute, the State was not obliged to wait until that time. The charter provided that at the end of thirty-five years the State might call upon the company for an accounting, and if on such accounting it was found that the company had been fully reimbursed for the money advanced by it, and had received the dividends allowed by the charter, the State could then take possession of the property; or if there was still due something to the stockholders on such an accounting, the State could pay the deficiency and take over the property,—it by such payment becoming the owner of all of the stock. All this is carefully provided for in the charter. Section 39 is as follows:

"Section 39. The corporation shall cause to be kept a fair account of the whole expense of making and repairing said railroad and every section thereof, with all incidental expenses; and also a fair and accurate account of tolls received; and the State shall have the right to purchase the stock of said company at any time after thirty-five years by paying said corporation a sum of money which, together with tolls received, shall equal the costs and expenses of said railroad as aforesaid, with an interest of eighteen per cent. per annum; and the books of said corporation shall be always open for inspection by any agent of the State appointed for that purpose by the Legislature, and if said corporation shall neglect or refuse to exhibit at any time their books and accounts agreeably to this section, when thereunto required, then all rights and privileges granted by this act shall cease and be ended."

It is apparent that the State allowed the stockholders a dividend amounting to 15 per cent. on the money invested, and by allowing an additional 3 per cent. per annum this in thirty-five years would amount to a return of 100 per cent. on the principal sum and thus extinguish the entire obligation. And to this the company agreed.

It is certain that it was understood in 1835 that there should be an accounting under this charter in 1870, but I am unable to find that the State called for one. Assuming that none was had, it is apparent that if the charter continued until 1910 the right of the State was to take over the property and call for an accounting in the interest of the public schools, and demand the payment of the sums provided for in the charter, which by that time would have been a princely amount.

So much for the charter and the benevolent intentions of our grandfathers in granting and accepting it.

Now let us see what happened, and why the expectations of those worthy men were not realized. In the first place, although I have not been able to see them, it may be assumed that the Legislatures of Ohio and Illinois authorized the construction of the railroad in their respective States by appropriate acts.

In 1837 the Indiana Legislature amended the original act by

enacting: "That the Buffalo & Mississippi Railroad Company be hereafter known and designated by the name and style of the Northern Indiana Railroad Company, under which name and style the said corporation shall hereafter transact all business under and by virtue of the act incorporating the same."

Again in 1838 the act was amended. Under the original charter the company was required to provide funds for building the road by the sale of stock, except that it was authorized to borrow \$200,000 on the general credit of the corporation, but it was prohibited from paying more than 6 per cent. interest on this borrowed money. By the act of 1838 it was enacted that "the power of said company to contract for a loan or loans is hereby extended to any sum not exceeding one million of dollars, and for the payment of such interest on the same as the parties contracting may agree upon, not exceeding eight per cent. per annum for one hundred dollars." This loan was not to be otherwise secured than by the general credit of the company.

In 1839 the company asked permission to secure the loan authorized by the act of 1838 by a mortgage on the property of the corporation. This permission was granted, and the company was authorized in such mortgage to give the mortgagees the right, in case of default in payment, to take possession of the road and operate it "during the whole residue of the term for which said company is chartered or incorporated in as full and complete a manner as the stockholders of said company could or might have had, used or enjoyed the same, subject, nevertheless, to all the restrictions, limitations and conditions claimed in the act incorporating said company," etc.

In 1845, by an act entitled "An act to amend an act entitled 'An act to incorporate the Buffalo & Mississippi Railroad Company,' approved February 6, 1835, and all acts amendatory thereto," the State granted an extension of five years time for the completion of one-half of the road, and of ten years for the other half, and authorized the company to make a traffic and operating agreement with any other company having the right to construct a railroad from Buffalo to the Mississippi river, "on

such terms and conditions, with division of profits and receipts as such companies may stipulate."

In 1846 the original act was again amended, to allow the company to cause its line west of Laporte to diverge from the original route "in a direction toward Chicago in said State of Illinois." This act also authorized the company to consolidate with any other company or companies so as to form a continuous line from the Maumee bay, in Ohio, to Chicago, in Illinois, and provided that "said company, when so consolidated, shall possess and enjoy all powers, rights, privileges, immunities and franchises granted to or vested in said Buffalo & Mississippi Railroad Company by said original act of incorporation, and all amendments thereto."

The construction of the road was now being actively carried on; in the fall of 1851 it was brought into Elkhart, and the next year it was extended to Goshen.

In anticipation of the extension of the road east from Goshen to Toledo, a consolidation of the Indiana company with an Ohio company which had been organized to build west from Toledo was next effected. In the agreement of consolidation the contracting parties were described as "the Northern Indiana Railroad Company (formerly the Buffalo & Mississippi Railroad Company) and the Northern Indiana Railroad Company in the State of Ohio." By the terms of this agreement a new company was formed "under the name of the Northern Indiana Railroad Company, which," as the agreement recites, "shall possess and enjoy all powers, rights, privileges, immunities and franchises granted to or vested in the said Buffalo & Mississippi Railroad Company by its original act of incorporation, and all amendments thereto," etc. This consolidation seems to have been made June 13, 1853.

In 1854 another agreement of consolidation was entered into, by which the Northern Indiana Railroad, created by the consolidation of 1853, consolidated with another company of the same name organized under an act approved February 11, 1843, entitled "An act providing for the construction of a railway in Laporte county," and an act amendatory thereof, approved Janu-

ary 15, 1849. This agreement, also, declared that the "said companies and bodies corporate shall be consolidated into and form one corporation, under the name of The Northern Indiana Railroad Company, which shall possess and enjoy all rights, powers, privileges, immunities and franchises granted to or vested in the said Northern Indiana Railroad Company (formerly called by and known by the name of the Buffalo & Mississippi Railroad Company) by its original act of incorporation and all amendments thereto by any statute, law, contract, deed or conveyance whatsoever."

April 25, 1855, this Northern Indiana Railroad Company consolidated with the Michigan Southern Railroad Company, a company chartered by the State of Michigan in 1846, adopting for the new company the name Michigan Southern & Northern Indiana Railroad Company. Its railroads formed a "continuous line of railroads extending from the city of Chicago to the head of Lake Erie at Monroe, and also making connections through Ohio to Toledo in the State of Ohio."

April 6, 1869, another consolidation was effected by which the Michigan Southern & Northern Indiana company was consolidated with the Lake Shore Railway Company, a company owning a railroad extending from the city of Erie, in the State of Pennsylvania, to the city of Toledo, in the State of Ohio. The company formed by this consolidation was named the Lake Shore & Michigan Southern Railway Company; and this company is still in existence, operating as an essential part of its principal road the railroad from Chicago to Toledo which the Buffalo & Mississippi company was authorized to build and operate, and which was built under its charter.

A statement of the various consolidations of the companies interested in this work in the State of Ohio will be found in the case of *Shields vs. Ohio*, 95 U. S. 319; and a statement of the various consolidations in Michigan which culminated with the formation of the present organization will be found in the case of *Smith vs. Lake Shore Company*, 114 Mich. 460.

So far as I have been able to discover, the right of the Lake Shore & Michigan Southern Railway Company to operate the

railroad in the State of Indiana is conferred by the original charter authorizing its construction across the State; and I am unable to see how its rights, as against the people of the State, are any greater than were the rights then granted to the stockholders of the Buffalo & Mississippi Railroad Company, or than would have been possessed by that company if there had been no change in its organization. Such property rights as the Lake Shore company possesses came to it as the successor of the Buffalo & Mississippi company. This is the claim of the company itself.

In the case of *Shedd vs. Webb, and L. S. & M. S. Ry. Co.*, 157 Ind. 585, the contention of the railway company was that it was the owner of the land in controversy as the successor of the Buffalo & Mississippi company; and the trial court so held, and made a special finding of that fact. The case was taken to the Supreme Court on appeal. In their brief in that case the attorneys of the Lake Shore company said:

"The first finding is as to the charter of the Buffalo & Mississippi Railroad Company to construct a line of railroad across Lake county and elsewhere, the change of its name to Northern Indiana Railway Company, and that afterwards consolidations were authorized and made in 1853, resulting in the Northern Indiana & Michigan Southern Railway Company; that about 1875, the defendant Lake Shore & Michigan Southern Railway Company succeeded to the rights of the above company," etc.

The title of the company to the land was sustained on that theory. Again, in the very recent case of the *L. S. & M. S. Ry. Co. vs. City of Whiting*, the attorneys of the company in their brief filed in the case in the Supreme Court say:

"It appears from its charter and the several agreements which are in evidence that the Buffalo & Mississippi Railroad Company was granted the right to acquire right of way, lands, stone, gravel and other material, as might be necessary for the construction and location of the road, or which might be of benefit to the corporation, and that this right of way and the rights and privileges so conferred are protected from interference or mo-

lestation by section 20 of said charter, which reads as follows: (This section is omitted.)

"It further appears that appellant, through successive agreements of consolidation, acquired and at the commencement of this action possessed the property, rights, franchises and privileges of the said Buffalo & Mississippi Railroad Company, and thereby became entitled to the same protection and exemptions in the use, occupancy and ownership of its right of way and lands, rights and privileges."

If the State was entitled to an accounting with the company in 1870, the agreement of consolidation made in 1869 affords a basis for determining the financial condition of the company with which the accounting would have been made.

At that date the bonded indebtedness of the Michigan Southern & Northern Indiana Company was only \$8,876,580. On a mileage basis not more than \$6,000,000 of this would have been a charge against the road of the Northern Indiana Company, and not more than \$4,000,000 of this against that part of the road which is in the State of Indiana. The capital stock of the Michigan Southern & Northern Indiana Company, at par value at that time, was only \$12,125,600, of which, on the mileage basis of the part in Indiana, not more than \$6,000,000 could have been charged against it. There cannot be much doubt but that if a computation had been made at that time on the basis agreed upon in the charter, there would have been found to be enough then due to the State of Indiana to have entitled it to the entire capital stock.

At the time of the consolidation, in 1869, which brought the Lake Shore & Michigan Southern Company into existence, and gave it all of the property of the constituent lines, the property of the companies was represented by a total of issues of capital stock aggregating \$27,125,600; the bond issues aggregated \$15,476,580. This gave a total capitalization of \$42,602,180.

Some estimate of the profits accruing from the operation of this property since that time may be formed from the fact that in 1908, that is, for the forty years after the consolidation, the company was paying dividends on \$50,000,000 stock, and interest

on bonds aggregating \$150,400,000. This represents a total par capitalization of \$200,400,000.

But, as the dividends on this stock have steadily mounted until in 1910 they were 18 per cent. on the stock, it is apparent that the actual value of the stock on a 6 per cent. basis is worth three times its face value, so that the total actual valuation of the property is at least \$300,000,000. The capital stock, on the basis of the charter agreement, would unquestionably have long before now have become the property of the State, and its earnings paying the cost of maintaining the public schools of the State. As to the bonds, if they are a charge against the property of the railroad prior to any claims of stockholders, it may be suggested that in 1908 the company had in addition to its railroad properties the sum of \$128,982,450 invested in the stocks and bonds of other railroads. The sum so invested was enough to pay off all but a small part of the bonds of the company and may be assumed to have been invested to create a sinking fund for that very purpose.

I refer to these facts and figures, not because they are a part of the early history of the Buffalo and Mississippi Railroad Company, but to emphasize the difference between the condition of affairs at the end of the seventy-five year period and what my grandfather and his associates and the Legislature of 1835 anticipated.

THE PIONEER FOURTH OF JULY.

BY GEORGE S. COTTMAN.

THE present-day movement for a "safe and sane Fourth of July," and the proposal in Indianapolis to revive certain observances that antedated the deadly cannon cracker, makes pertinent a little information regarding the old-time national holiday.

The drudging, narrow life of the Indiana pioneer was not lightened by the various legal holidays we now observe. The first Christmas in Indianapolis was signalized by a "stag party," promoted by the gentlemen who had political aspirations, the festiv-