OPINION
51-75

May 25, 1951 (OPINION)

HIGHWAYS

RE: Compensation for Moving Poles on Right-of-way

You have forwarded to this office a letter from Mr. Frank Hall, secretary of the Edinburg-Gardar Telephone Company, Edinburg, North Dakota, dated April 27, 1951.

In that letter Mr. Hall stated:

> This is to let you know that we are not going to remove our telephone line in Walsh county along highway No. 32, at our expense. We have franchise from the township of Hampton, which is legal, and since the company was organized we have been paid for removal of all lines."

We understand that the franchise in question was granted on May 25, 1904, and is of record in the office of the register of deeds in Walsh County in Book 22 M.R. page 216.

Further, we are informed that the telephone line has been constructed on the right-of-way of a highway which is a part of the state highway system, and that the telephone lines have occupied such grounds for more than twenty years.

The question, therefore, is whether or not the telephone company has the right to compensation for moving their poles from the right-of-way, or whether such moving must be done at the expense of the telephone company.

A telephone company cannot occupy or use public streets or highways without legislative authorization granted either directly or indirectly, and cannot exist by implication alone.

The power to grant such authority, as to streets and highways, rests ultimately in the state and in the municipalities to which the state delegates its power.

The attorney for the telephone company has pointed out that the township apparently acted under the authority of chapter 156 of the 1899 Session Laws, which now appears as section 58-0601, N.D.R.C. 1943. Subsection 10 of that section provides that the board of township supervisors shall have the power: "To grant to any person the right-of-way for the erection of telephone lines * * * over or upon public grounds, streets, alleys, or highways;"

The commerce counsel for the state of North Dakota, in an opinion issued on September 9, 1936, stated:

> Where the telephone line is constructed on the right-of-way, laid out or owned by the state or municipality, no notice to

> remove is necessary at all, but as a matter of courtesy and good business the authorities in charge usually notify the company of their intention to improve all of the right-of-way and usually cooperate with the telephone or telegraph company so that ample opportunity be given to remove the poles. In cases where the line of telephone is not on the right-of-way, that is within the limits of the right-of-way but is on property immediately adjacent to the right-of-way, then if the telephone company has paid the abutting land owner for such easement, or has purchased land for a right-of-way, or has acquired such right-of-way and easement by condemnation proceedings, then the state is required to treat such easement or right-of-way in the same manner as an abutting owner and would be required to pay the telephone company for its right-of-way and for the cost of the removal of the poles, which can be done either by amicable negotiations or by condemnation. If, however, the company has not acquired the right-of-way by easement then the Highway Department or authorities in charge of the highway that would be widened would deal with the owner of the land only, and if they acquired the property from the owner of the land they would then have the same right as the owner would have to eject the telephone company from the premises."

It is our opinion that the telephone company did not acquire an easement by prescription or usage for more than twenty years so that it now holds a property right which would require the authorities to pay the company for the cost of the removal of the poles. Rather, we believe that the public has a superior interest and right for highway purposes, and although the township may have granted the telephone company the right to place its poles inside of the highway right-of-way, nevertheless such grant would still be subject to the right of the public to use the same for highway purposes.

We reaffirm the statement made in a letter from this office on July 26, 1940, that we "* * * cannot agree that the telephone company would have the right to compensation for moving their poles from the right-of-way, since, whatever right it had to locate such poles thereon, the same would be subject to the superior right of the public to use the same for highway purposes."

This opinion, of course, concerns only compensation for removing all poles from the highway right-of-way.

We understand that the company in question has located its line both on the right-of-way and on adjoining property, and it is not located entirely upon either. Where the line of the telephone company is not on the right-of-way but is on property adjacent thereto then if the telephone company has acquired an interest either through the purchase or an easement or prescription, then the state is required to treat such easement in the same manner as an abutting landowner and would be required to pay the telephone company for its property interest and for the cost of removal of the poles.

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