Great Northern Railway Line

Great Northern Railway.
Eastern Railway of Minnesota.
Montana Central Railway.
Willmar and Sioux Falls Railway.
Duluth Watertown and Pacific Railway.

W. P. Clough, Vice President.
Great Northern Railway Co.

St. Paul, Minn. Nov. 4th. 1895.

Jas. J. Hill, Esq.,

President, Great Northern Ry. Co.

Dear Sir:-

A careful study of the charter of the "Superior and St. Croix Railroad Company", leads to the following conclusions:-

The several acts forming the same are respectively subject to the provisions of Section 1, Article II, of the Constitution of Wisconsin, which reads as follows:-

> "Corporations without banking powers or privileges may "be formed under the general laws, but shall not be created "by special act, except for municipal purposes; and in cases "where, in the judgment of the legislature, the objects of "the corporation cannot be attained under the general laws. "All general laws, or special acts enacted under the provi- "sions of this section, may be altered or repealed by the "legislature at any time after their passage."

All provisions of this charter are therefore constantly subject to alterations and repeal by the legislature of the State of Wisconsin. This power would give the legislature of that State practical control of the railroads and other property of the corporation, wherever situated, whether within or without the State of Wisconsin. The danger to any large property from the concentration of complete authority over it, in the legislature of a single Northwestern State, would largely decrease the value of the entire enterprise. But a still greater difficulty lies in

the fact that the charter contains only limited power authorizing a union between the properties held under it and the properties of another company. In fact, an obvious construction of this charter might fairly include an affirmative prohibition of anything of the kind.

Section 13 authorizes the Superior and St.Croix Company to acquire an interest in other railroad properties in a certain specified case, to-wit:- That the line or lines acquired may be"lawfully" connected with its own lines. The meaning of the term "lawfully", in this connection, can, I think, be plainly seen when certain other portions of its charter are considered.

Section 13 authorizes lease or purchase of railway franchises, stocks, bonds, etc., when the respective railroads within or without the State can be "lawfully" constructed and operated together as a continuous line, or when the railroads so leased or purchased will constitute branches or feeders, etc.; evidently presupposing that the Superior and St.Croix Company had built and was operating some railroad line.

Section 8 provides for sale of branch roads however acquired, etc., but is silent as to main line, etc.

Neither Section 13 nor Section 14 of the charter authorizes the Superior and St.Croix Company to part with anything whatever belonging to itself. Those sections are wholly occupied with what that company itself may acquire. Neither section authorizes the Superior and St.Croix Company to lease or sell, or in any manner dispose of or part with the least of its properties or franchises, or a share of its stock to any other company whatever. The subject of what the Superior and St.Croix

Company may itself dispose of is treated of in Section 15. The latter section in substance adopts, so as to make the same a part of the charter itself, the provisions of Chapter 87, of the revised statutes of 1878. Section 1833, of the last revision of Wisconsin Statutes, forming a part of the Chapter named, confers upon railroad corporations, organized under the laws of Wisconsin, the power to lease and sell their property and franchises to each other, and also to consolidate with each other their stocks and properties; but the section is concluded by the following clause:-

> "But no railroad corporation shall consolidate with or "lease or purchase, or in any way become owner of, or con- "trol any other railroad corporation, or any stock, franchi- "ses, rights or property thereof, which owns or controls a "parallel or competing line, to be determined by a jury."

If the railroads of the Northern Pacific Company and those of its separately organized branches or of the Great Northern Company are in any degree parallel or competing lines, the provision quoted, which has been made a part of this charter, prohibits their consolidation in any form, or the control in any form, of the one by the other. An arrangement by which a portion of the stock of the reorganized Northern Pacific Company may pass under the ownership or control of the Great Northern Company, or its stockholders as a body, will likely be regarded by the courts as in the nature of a consolidation. Judge Sanborn in his opinion came to that conclusion, and likely other courts will hold similar views.

What the legislature meant by the term "lawfully connected", in Section 13, appears from the language of Section 1833, Rev.Stats., incorporated with the charter by Section 15. The roads which

may be leased, purchased or controlled, under the terms of Section 13, are those which might be acquired under the provisions of Section 1833, Rev.Stats., and none other. But what the Wisconsin corporation may acquire is of no special importance, so far as concerns the question in hand. What it can part with is the thing.

It seems therefore clear that if the Northern Pacific properties are to be reorganized under this Wisconsin charter, all idea of an arrangement looking to a mutual control of the two companies, through transfer of stock to the Great Northern Company, or to its shareholders as a body, will have to be abandoned.

In my judgment, it would be of the utmost value to the Northern Pacific properties, themselves, to reorganize under the Congressional charter, even if no plan existed for unifying the control of the two properties. That such reorganization is perfectly practicable, in all respects, and for all purposes, many years' of familarity with the questions has made plain, at least to my own mind.

Upon this proposition, two points are of importance:-

Firstly, Whether the pruchasers at foreclosure sale, under existing mortgages, could reorganize the property as a United States corporation; and

Secondly, Whether, when so reorganized, its charter would confer adequate powers to make the mortgages desired for reorganization purposes.

Upon the first of these points, it is to be observed that the joint resolution of 1870, which conferred upon the Northern Pacific

Company whatever power it has to make mortgages, expressly authorizes that company to mortgage all of its franchises, including its franchise as a corporation. The language used had a well established history before its incorporation into the joint resolution of Congress.

In the year 1857, the Territory of Minnesota incorporated the Minnesota and Pacific Railroad Company, by a special act of legislature. Section 21 of that act conferred upon the Minnesota and Pacific Company power to mortgage its property and franchises. The language of the section was almost exactly the same in form, and was identical in substance with that afterward used by Congress in the joint resolution of 1870.

By authority of Section 21, of its charter, the Minnesota and Pacific Company, in the year 1858, executed a mortgage of its railroads, and of all of its franchises. This mortgage, a year or two later, was foreclosed, and all the property and franchises, including the franchise to be a corporation, of the Minnesota and Pacific Railroad Company, were sold. The purchasers at foreclosure sale, and their successors in interest, claimed to have acquired ownership, not only of all of the properties, but of all of the franchises, including the franchise to be a corporation. This claim was disputed by the taxing officers of the State of Minnesota. The controversy became a suit in the Minnesota courts, under the title of "Parcher vs. The First Division of the Saint Paul and Pacific Railroad Company". The litigation ended in the year 1868, by a decision of the Supreme Court of the State of Minnesota, reported in 14 Minnesota Reports, beginning at page 297. In its decision, the Supreme Court adjudged that the language of its char-

ter had empowered the Minnesota and Pacific Company to mortgage every franchise it had, and that the foreclosure sale, made under such mortgage, would confer upon the purchasers the power to reorganize themselves into a corporation, and proceed under the original charter.

Mr.Jay Cooke, and his associates, interested themselves in the Saint Paul and Pacific properties shortly after having become interested in the Northern Pacific scheme. They familarized themselves with the charter of the Northern Pacific Company, and regarded the power of reorganization, conferred by the Minnesota and Pacific charter, as especially desirable. Hence, when they applied to Congress, in the year 1870, for authority to mortgage the Northern Pacific property, they followed closely upon the lines of the Minnesota and Pacific charter, in the terms of the legislation sought. Hence, the use of the term "Franchise as a corporation" employed in the joint resolution. These words had acquired a fixed, precise and judicially declared meaning before Congress employed them.

A well-known canon of statutory interpretation is that, when one legislative body borrows from the enactments of another, words which have been judicially interpretated, such words are to be taken in the sense of the judicial interpretation, which becomes in substance a part of the act itself as much as if expressly enacted therein. Mr.Cooke, and his associates, always understood the force of these words, and hence, when the first reorganization of the Northern Pacific Company occurred, no other legislation than the original charter was used. Every act which has since been done by the present Northern Pacific Company, including the execu-

tion of all the mortgages now outstanding upon its properties and franchises, depends for its validity upon the proposition that purchasers under foreclosure of Northern Pacific mortgages may reorganize under the several acts of Congress relating to the Northern Pacific Company, without further enabling legislation. Any reorganized company, after foreclosure of existing mortgages, will surely be as good and as valid a corporation as the one which has made the instruments from which all its title will have to be derived.

In regard to the second point: The fact is well known that the divisional mortgages, and the general first, second, and third mortgages, were all made for the purpose of securing money to pay for the construction and equipment of the lines of road which the Northern Pacific Company was by Congress authorized to construct, namely: A main line from Lake Superior, via Portland, to Puget Sound, and a branch line across the Cascade range. All the debt represented by those mortgages, and contracted for construction purposes, may be treated as outstanding and unpaid at the time of reorganization. Any new bonds issued to replace the whole or a portion of the outstanding bonds, of the classes mentioned, would represent the same debt, and would consequently be issued for the construction of the Northern Pacific Railroad and branch. Such being the case, the joint resolution of 1870 would plainly and clearly authorize the execution of a mortgage to secure the new bonds. The bonds secured by the present consolidated mortgage, in so far as they do not replace bonds previously issued for construction purposes, might stand upon a somewhat different footing; but that is perfectly true of those bonds at the present time. If the Northern Pacific Railroad Com-

pany can lawfully acquire branch lines, not covered by its Congressional charter, it can lawfully go into debt to pay the cost of building the same, or the purchase price thereof, if bought, and can lawfully mortgage the property acquired to secure the payment of such bonds. In any event, whatever form of lien might be employed to secure the new bonds issued for retiring consols, it would be at least as good as that existing at the present time for the same bonds. Hence, looking at the question of power, it seems to me, nothing would stand in the way of a perfectly practicable reorganization of the Northern Pacific Company under the Congressional charter. So far as the question becomes one of policy, no form of reorganization can compare in value with one had under the Congressional charter.

In all of the territory west of the west line of the State of Minnesota, Congress was supreme in the period 1864 to 1870, when the acts forming the Northern Pacific charter were passed. This charter antedates and is superior to all the States which have since been created in the region mentioned. Neither of these States can in any manner control or regulate the powers conferred upon the corporation by Congress. All legislative acts attempting to control the mode in which the stock of the Northern Pacific Company shall be disposed of, or attempting to forbid the Northern Pacific Company from doing any corporate act, authorized by its charter, are and will be so much waste paper. Under thatCongressional charter the Northern Pacific Company has a perfect right to dispose of any part or all of its stock, to any person or corporation, anywhere in the world, that may be authorized to buy it by the laws of the place where the transfer shall be made.

If the Northern Pacific Company, when reorganized under the Congressional charter, thinks the bonds to be issued by it will gain a greater value by the guaranty of some other person or corporation, its charter fully authorizes it to secure such guaranty. It may secure the same from the Guaranty Company of North America, from Cornelius Vanderbilt, or from the Great Northern Railway Company, if the latter is permitted by the terms of its own charter to make the same.

The Northern Pacific Company, furthermore, may pay for such guaranty. It may make payment in money, in property, or in its own stock. If the reorganized company shall desire to secure the guaranty of its bonds, and to pay for such guaranty in its own stock, and the contemplated guaranty should be by a corporation, nothing need be considered save the two propositions:

Firstly, Whether the guarantying company is empowered by its charter to make such guaranty; and

Secondly, Whether the guarantying company, by its charter, is empowered to take, as pay for the risk assumed, stock of the reorganized Northern Pacific Company. Such a transaction, if it occur, will be purely personal in its nature; and no corporate act will take place elsewhere than in the State where the guarantying company has the seat of its corporate business. If the Great Northern Company be the guarantor, the transaction will be confined to the State of Minnesota, and no part of it will occur in any other State in the Union. A strictly corporate act, done by a Minnesota corporation, within the State of Minnesota, cannot become the subject of question in any other jurisdiction.

In conclusion: To attempt to reorganize the Northern Pacific Company, under any other charter than the existing Congressional charter, would be a grievous mistake, from every point of view.

Yours respectfully,

W. P. Clough

Vice President.