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Decision No. 23090

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

HARRY SEE, the Brotherhood of Railroad
Trainmen, by Harry See, its State Rep-
resentative, the Brotherhood of Loco-
motive Firemen and Enginemen, by G. F.
Irvine, its State Chairman,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Case No. 2899

Harry See, for Complainant,

Henley C. Booth, for Defendant.

BY THE COMMISSION:

O P I N I O N

Complainants herein seek an order from this Commission against defendant "in accordance with the law and the facts" concerning the operation of a locomotive pile driver and a "burro" track laying vehicle, which, complainants allege, were operated between April and July, 1930, by defendant without compliance with section 3 of "An act to promote the safety of employees and travellers," etc., generally called "The Full Crew Law" (Stats. 1911, p. 65, as amended).

Defendant, in its answer, sets up a special plea as to the lack of jurisdiction in the premises and that further exercise of jurisdiction will deprive defendant of its right of trial by jury under section 1042 of the Penal Code of California, which right specifically is not waived; that this Commission has no jurisdiction to make any general or specific order commanding any

railroad carrier to obey or cease disobedience of all or any portion of said Full Crew Law, because any violation thereof is a misdemeanor presentable only in a court of competent jurisdiction, and that any order of this Commission imposing any penalty of contempt would put defendant once in jeopardy and once again, if prosecuted on a misdemeanor charge, being in violation of section 13, Article I of the Constitution. The answer also denied the general essential allegations and especially that the "burro" crane alleged to have been used was a car, train or vehicle described in section No. 3 of the "Full Crew Law." Dismissal of the complaint is prayed for.

A public hearing upon the issues as joined was held by Examiner Williams at Tracy.

The facts adduced from the testimony in the record are: In April, 1930, defendant began the reconstruction of a trestle near Dry Creek about midway between Galt and Lake Forest stations on its Stockton-Sacramento division. Only movements between Galt and the trestle are alleged and proved, and the track west of the trestle may be disregarded. Prior to the work of driving new piles, defendant constructed a siding or spur about 325 feet east of the east end of the trestle. A standard switch was installed and the operation of all the construction equipment was placed under the control of the train dispatcher. Signal dispatching by telephone is used on this division and to furnish signal contact, a telephone was installed near the switch. The siding or spur was constructed of old ties (Exhibits Nos. 1 to 6) without subgrading, and had a capacity of five cars. On it cars of construction materials were housed, and it was also the refuge of the locomotive crane and pile driver and the "burro" track layer when clearance of the main track was ordered by the dispatcher. During the reconstruction work, which ended late in July, this situation was not changed. After completion of the work the siding or spur was removed. There

was no conflict as to these facts.

The real question is whether the locomotive pile driver was used upon the main track more than one-half mile from any permanent station or siding. That this locomotive can propel one or more cars under its own power is not disputed. That it was operated by a conductor, engineer and fireman and without a brakeman also is not disputed. No brakeman was a part of the crew. That it did operate between the siding or spur to and from Galt, under dispatcher's orders, to obtain water and oil, also is undisputed and is shown by the testimony of Walter E. Hunter and D. C. Hazen, conductors at different times.

There remains only the question of distance, and this is made certain by the measurements of defendant (Exhibit No. 7) which are only in slight variation with those presented by complainant. The distance from the siding at Galt to the siding or spur is 2457.8 feet, which is less than one-half mile. The distance from the siding at Galt to the trestle where the locomotive worked, is 2916 feet. The trestle is 702 feet long, making its gross distance from the Galt siding 3618 feet. The distance from the west end of the trestle to Lake Forest siding is 2928.9 feet. It is obvious, therefore, that when working on the trestle the locomotive was more than one-half mile from any permanent siding.

It is urged by defendant that the spur or siding near the trestle was, in fact, permanent in intent and that its removal does not vitiate what may have been the purpose of defendant when it was constructed. This is sufficiently answered in the negative by the character of construction of the siding or spur, the time of its construction and removal and the reason for its being there at all.

We therefore find as a fact that defendant, between April 12, 1930, and July 21, 1930, did move a locomotive pile driver, capable of moving one or more standard cars under its

own power, at a distance of more than one-half mile from a permanent station or siding without complying with section 3 of the Full Crew Law by having in charge thereof an engineer, fireman, conductor and brakeman. As to the "burro" track layer, there is practically no evidence in the record of its movements, and consideration of this vehicle may be ignored.

In Decision No. 22855 in Case No. 2844 (35 C.R.C. 183) between the same parties involving the use of a "burro" track layer in Monterey County, we held that section 5 of the Full Crew Act provides penal action. It was further held that under section 72 of the Public Utilities Act it is the duty of the Commission to see that constitutional and statutory provisions, enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed. It was further pointed out that upon request of this Commission it is the duty of district attorneys to aid in enforcement and to institute and prosecute actions for the punishment of violations.

The record herein presents an analogous case, with only the variation as to type of vehicle used and the manner of its use, and hence, our conclusions and findings will be the same. The Secretary of the Commission will be directed to send a copy of this Opinion and Order to the District Attorney of Sacramento County,, in which the violation occurred, with request that appropriate proceedings be instituted against said defendant company, or its responsible officers under the provisions of the Full Crew Law.

O R D E R

Complaint having been made to this Commission, as above-entitled, a public hearing having been held thereon, the matter having been duly submitted, and the Commission being fully advised in the premises,

IT IS HEREBY FOUND AS A FACT that between April 12, 1930, and July 21, 1930, in the operation of a locomotive crane and pile driver, defendant did violate the provisions of the Full Crew Law, all as more particularly set forth in the foregoing opinion; and

IT IS HEREBY ORDERED that the Secretary of the Railroad Commission forward to the District Attorney of Sacramento County a certified copy of this opinion and order, together with the request that appropriate proceedings be instituted against defendant, or its responsible officers, under the provisions of the Full Crew Law.

Dated at San Francisco, California, this 18th day of November, 1930.

P. L. Sawyer

Thos. D. Lewis

M. J. Lewis
Commissioners.