Decision No. 923

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BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA.

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RED LINE TOURISTS AGENCY, a corporation,

Complainant,

- vs. -

SOUTHERN PACIFIC COMPANY, a corporation, and UNION TRANSFER COMPANY, a corporation,

Defendants.

Case No. 414.

Lloyd S. Ackerman for complainant.
Geo. D. Squires and C. W. Durbrow for Southern Pacific Company.
Frank C. Cleary for Union Transfer Company.

THELEN, Commissioner.

O P I N I O N

This proceeding raises the question whether a railway company may enter into a contract with one transfer and baggage company giving to that company the exclusive right to solicit baggage on the trains, boats, depot grounds and other premises of the railway company and to check baggage at residences, hotels and other places for delivery to the carrier.

The complaint was filed on June 19, 1913. The complaint alleges in effect that the complainant is a California corporation engaged in the baggage and transfer business; that the defendant Southern Pacific Company is a common carrier of persons and property and that the defendant Union Transfer Company is a California corporation engaged in the business of transporting baggage and other personal property; that on the 9th day of December, 1912, the Board of Supervisors of the City and County of San Francisco passed Ordinance No. 2101, new series, providing in part that no person shall solicit patronage for any hotel, vehicle or other business upon any railroad train, steamboat or vehicle within the corporate limits of the City and County of San Francisco without having first secured

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permission in writing so to do from the owner or lessee of such railroad, steamboat or other vehicle; that a similar ordinance is in effect in Oakland, California; that the Southern Pacific Company has entered into a contract with the Union Transfer Company by which the latter company is given the exclusive right to solicit baggage and transfer business on the trains and boats of the Southern Pacific Company; that complainant has requested the written permission of the Southern Pacific Company to allow its agents and employes to solicit baggage and transfer business on the boats and trains of the railway company but that the latter has declined to accord this privilege; that complainant claims the same right as said Union Transfer Company to solicit baggage and transfer business from passengers on the boats and trains of the Southern Pacific Company and that the railway company's refusal to grant this privilege is an unlawful discrimination against complainant and in favor of Union Transfer Company in violation of Section 2170 of the Civil Code of this State. Complainant in its prayer asks that the contract between the Southern Pacific Company and the Union Transfer Company be adjudged to be discriminatory and unlawful, that the Southern Pacific Company be required to afford to the complainant equal facilities with the Union Transfer Company for soliciting baggage and transfer business on the boats and trains of the Southern Pacific Company, that the defendant be adjudged to have wilfully violated Section 2170 of the Civil Code of this State and that the complainant have judgment against the defendants in the sum of $500.00.

The answer of the Southern Pacific Company was filed on July 3, 1913. The answer in effect denies that the Southern Pacific Company has violated Section 2170 of the Civil Code; denies that complainant is entitled to solicit baggage and transfer business on the defendant's boats and trains or to enter thereupon in any other capacity than as a passenger; alleges that the complaint does not state a cause of action against the defendant; admits that the railway company has entered into an exclusive contract with the Union Transfer Company and alleges that said contract is a valid

exercise of the railway company's rights and that it was entered into for the purpose of facilitating the convenience and comfort of the Southern Pacific Company's passengers arriving at San Francisco and that it is in all respects calculated to promote the public safety and convenience, and that the public safety and convenience would not be promoted by executing any contract or granting any privilege to complainant.

On the same day the defendant Union Transfer Company filed its answer adopting the answer of the Souther Pacific Company, admitting that it has entered into an exclusive contract with the Southern Pacific Company and alleging that said contract is lawful.

The hearing was held in San Francisco on August 12, 1913. It was agreed that the contract between the Southern Pacific Company and the Union Transfer Company might be considered as being in evidence. The attorneys for the respective parties thereupon presented argument on the question of law as to whether or not the complainant is entitled to relief. Each side presented authorities, whereupon the matter was submitted.

The contract between the Southern Pacific Company and the Union Transfer Company was entered into on August 17, 1906. Its terms in so far as material to this inquiry are as follows: the railway company leases to the transfer company for ten years, beginning January 1, 1907, the exclusive right to send agents out from San Francisco, Oakland or Alameda as far as necessary within California to meet all incoming trains or steamers for the purpose of soliciting transportation of passengers and baggage from said trains and steamers on their arrival in the City of San Francisco, and also the sole right to check baggage at hotels, residences and the transfer company's offices in San Francisco for all outgoing trains and steamers of the railway company; the transfer company agrees to pay to the railway company, in consideration for said privilege, certain annual payments varying from $16,500 for the year ending December 31, 1907, to $22,500 for the year ending December 31, 1916; the agents and employes

of the transfer company while receiving and checking baggage may do so only under the rules of the railway company; the transfer company agrees to make immediate delivery to the railway company at its baggage rooms of all baggage received and checked and to make immediate delivery of passengers and baggage immediately after the arrival of the train or boat upon which said passengers and baggage are carried; the charges for the transfer of baggage shall not exceed 50¢ for each trunk and 25¢ for each satchel or hand grip, except as to certain outlying territory as to which an additional charge of 25¢ may be collected by the transfer company; the transfer company guarantees the safe keeping of all baggage received by it and assumes all responsibility for loss or damage to such baggage while in its possession; the transfer company agrees that its agents and employes when soliciting from passengers shall do so in an orderly and respectful manner; the transfer company guarantees the proper and orderly conduct of its agents and employes and agrees that the railway company may eject any agent or employe who has violated any rule or refused to obey any requirement of the railway company and agrees to dismiss immediately any employe when demanded by the railway company; the transfer company agrees that its agents and employes shall not solicit patronage for any hotel; the transfer company agrees that its agents and employes while on the trains, steamers or grounds of the railway company shall wear a neat uniform with an appropriate cap; the transfer company agrees to provide and keep in service a sufficient number of carriages or coupes but not less than six hacks for the accommodation of passengers arriving on the railway company's trains or steamers in the City of San Francisco; and ~~xxxx~~ the transfer company/~~xxxx~~ agrees that it will give the railway company a bond for the faithful performance of its obligations. The agreement contains certain other provisions involving the relationship between the railway company and the transfer company but of no particular interest to the traveling public.

As hereinbefore stated, the question in this case is whether or not the railway company may grant to a baggage and transfer

company the exclusive right to solicit business upon its trains, boats and grounds and to check baggage from residences, hotels and other points of origin.

I shall now consider such authorities as I have found which seem to have bearing on this question, taking up first the federal authorities and then referring to the decisions of the state courts.

The leading case upon this question is Donovan vs. Pennsylvania Company, 199 U.S. 279, decided on November 27, 1905. This was an action by the Pennsylvania Company to enjoin the defendants who were hackmen and expressmen in the City of Chicago from soliciting incoming passengers and baggage in plaintiff's depot in the City of Chicago and on the sidewalks surrounding the same, on the allegation, among others, that the defendants by reason of their number and their loud and boisterous conduct were interfering with and annoying plaintiff's passengers. The Pennsylvania Company had entered into an exclusive contract with the Parmelee Transfer Company similar to the contract between the Southern Pacific Company and the Union Transfer Company. The Supreme Court affirmed the decree of the United States Circuit Court of Appeals enjoining the entry of defendants into the railway company's passenger station for the purpose of soliciting the custom of the incoming passengers for cabs, carriages, express wagons or hotels, and ordering them to desist from congregating upon the sidewalk in front of or adjacent to the entrances to said passenger station and from there soliciting the custom of passengers so as to interfere with the ingress and egress of passengers and employes.

After referring to the fact that the railway company holds the legal title to its property and that it is entitled to use such property to the best advantage of the public and of itself, and that it is the duty of the company to see that passengers were not annoyed, disturbed or obstructed in the use of its passenger depot, the court refers to the railway company's exclusive contract with the Parmelee Company, at page 295, as follows:

"We cannot say that that arrangement was either unnecessary, unreasonable or arbitrary; on the contrary, it is easy to see how, in a great city, and in the constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers."

Referring then to the contention of the defendants that they should have the same rights as were accorded by the special agreement with the Parmelee Transfer Company, the court at page 296 says:

"This contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling. The defendants did not have, or profess to have any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining the highway, under the authority of the state, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it could accept the aid or stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it."

Referring then to the argument that the exclusive arrangement with the Parmelee Company was void as constituting a monopoly, the court continues as follows:

"In a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve the improper use by the railroad company of its property. That arrangement is to be deemed, not unreasonably, the means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and ownership of the property in question. If the company, by such use of its property, also derived pecuniary profit for itself, that was a matter of no concern to the defendants, and gave them no ground of complaint."

The complainant in the present proceeding admits that under the decision of the Supreme Court of the United States in the Donovan case it can no longer be contended that an exclusive arrangement such as that between the Southern Pacific Company and the Union Transfer Company is void as being opposed to public policy or as creating an unlawful monopoly. The complainant, however, contends that the agreement is nevertheless unlawful by reason of specific statutory provisions in this State in the matter of discrimination by common carriers. The Supreme Court in the Donovan case draws attention to the fact that no statute of Illinois applies to the matter and hence decides the question on the general principles of law applicable to the situation.

Consequently it becomes necessary to consider the effect of the statutes of this State on the question now pending. Before doing so, however, I desire to draw attention to the decision of the Interstate Commerce Commission on a similar question to be found in Cosby vs. Richmond Transfer Company, decided on January 15, 1912. In that case it appeared that the defendant railroads had granted to the Richmond Transfer Company the exclusive privilege of soliciting business on their trains and in their depots in Richmond, Virginia, and of issuing baggage checks at the residences of prospective passengers. Cosby, the owner of a baggage transfer business in Richmond, complained as a citizen to the Interstate Commerce Commission that the rates charged for the transfer of baggage in the City of Richmond were unreasonable, and contended that the Interstate Commerce Commission had jurisdiction to fix the rates charged by the Richmond Transfer Company on the ground that said company was engaged in "a service in connection with the receipt and delivery of property transported", as those words are used in Section 1 of the Interstate Commerce Act. Mr. Commissioner Lane in rendering the report of the Commission held that while the language of Section 1 was broad the section could not properly be interpreted to bring such agencies as the Richmond Transfer Company

under the control of the Interstate Commerce Commission, and also that the service performed by the Transfer Company is not one which the railroad undertook to perform. After pointing out that if the railroad company itself undertook to make delivery of passengers' baggage at residences for the rate or fare stated in its tariff the Interstate Commerce Commission would have jurisdiction over the same, Mr. Commissioner Lane uses the following language at page 75 of Volume 23 of the Interstate Commerce Commission's reports:

> "Does it follow, however, from the fact that the railroad company makes this exclusive contract under which the soliciting of baggage on its trains and within its depots is granted to one agent, that this is an assumption by the railroad of a new service or the recognition of an obligation to perform such a service subsequent to the delivery of the baggage at its own depot? If there was a duty imposed by law upon the railroad to provide such service, as has been aforesaid, the interposition of an agent would not withdraw the carrier in providing such services from governmental control. But there is no such duty arising either under statute, common law or custom. The carrier has performed what is required of it when it accepts baggage at its depot, transports it and makes delivery at destination upon its own terminal."

Referring to the alleged violation of the provisions of Section 3 of the Interstate Commerce Act, referring to undue or unreasonable preferences, Mr. Commissioner Lane points out at page 77 that no public duty is owed by the railway companies to the complainant in his capacity as a transfer agent, and then concludes as follows:

> "It is as much beyond our power to order a railroad to give the Cosby Transfer an opportunity to bid against the Richmond Transfer Company for the privilege of soliciting on trains as it is beyond our power to compel a railroad to place its fruit vendors' privilege up at auction for neither one is transportation under the Act and over neither one have we jurisdiction."

While there has been an apparent conflict of authority between the decisions of various state courts on questions analogous to the one under consideration, the later decisions nearly all support the conclusion reached by the United States Supreme Court in the Donovan case and by the Interstate Commerce Commission in the Cosby case. In view of the decision of the Supreme Court of the United States in the Donovan case it will not be necessary to consider the state decisions except in so far as they may throw

light on the effect which statutory provisions may have on this question.

I shall now consider the effect, if any, which constitutional or statutory provisions in this State may have on this question. Section 21 of Article XII of the Constitution of this State, as amended on October 10, 1911, provides in part as follows:

> "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state."

Section 17a-2 of the Public Utilities Act provides in part as follows:

> "Nor shall any common carrier.....extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons."

It seems clear that the foregoing constitutional and statutory provisions do not apply to the question now before this Commission. Both provisions refer to the transportation of passengers and property by the railroad company and do not apply to the transportation by a baggage or transfer company from or to the railroad company's depot at which point, as indicated by Mr. Commissioner Lane in the Cosby case, the railroad company's duty ends or begins, as the case may be.

The complainant does not contend that these constitutional and statutory provisions apply to its case but relies entirely on Section 2170 of the Civil Code, reading in part as follows:

> "A common carrier must not give preference in time, price or otherwise, to one person over another."

Complainant contends that the general language of this sentence covers the relationship between a railroad company and a baggage and transfer agency; that if a railroad company gives to one baggage and transfer company the right to solicit business upon its property and to check baggage it must give a similar privilege to all other baggage and transfer companies applying therefor.

It is evident that Section 2170 of the Civil Code cannot be construed so broadly as to mean that a common carrier cannot in any of its dealings give any preference to one person over another. If this construction were to be given to the Section it would be impossible for a railroad company to buy supplies for its commissary or ties for its track or stationery for its office use in any way in which a preference might be held to be given to one firm or company or individual as against another. It seems clear that this section must be interpreted in the light of the railroad company's duty to the public and that it was not intended to apply to any transactions of a railroad company other than those performed in connection with the carrier's duty to the public. As pointed out by Mr. Commissioner Lane in the Cosby case, there is no duty imposed by law upon the railroad company to have the passengers' baggage transported to or from the baggage depot. As Mr. Commissioner Lane says:

> "There is no such duty arising either under statute, common law or custom. The carrier has performed what is required of it when it accepts baggage at its depot, transports it and makes delivery at destination upon its own terminal."

It may be that the carrier, if it so desires, may hold itself out to the public as taking care of its baggage to and from its ultimate destination and that thereafter the carrier will be under as much of a duty to the public in that connection as it now is to transport persons and property on its trains and vessels. No such question arises in this case for the reason that there is nothing to show that the Southern Pacific Company has held itself out as offering to take care of baggage between its grounds and the residences, hotels or other places from or to which it is destined. I am accordingly of the opinion that Section 2170 of the Civil Code does not apply to the relationship between the railroad and the baggage or transfer company, and that the railroad company has the right to enter into an exclusive contract with a single baggage and transfer company without being obliged to enter into similar contracts with other baggage and transfer companies, subject

to the qualifications announced by the Supreme Court in the Donovan case and by the Interstate Commerce Commission in the Cosby case.

There is much reason andcommon sense in support of this conclusion. The solicitation of passengers on incoming trains and vessels by a number of competing baggage agents would be an intolerable nuisance, and the public should not be subjected thereto unless it is absolutely necessary under the law. The solicitation of passengers and baggage by a single company, if the agents are courteous and considerate and the company is responsible, may be a convenience to the passengers, but the moment the field is thrown open to competing companies this convenience will be turned into an annoyance to which the passengers ought not to be subjected.

Before concluding I desire to refer to two recent cases bearing on the question whether statutory provisions against discrimination by common carriers should be construed to include the relationship between a common carrier and a baggage and transfer company.

In Depot Carriage and Baggage Company vs. Kansas City Terminal Railway Company, 190 Fed. 212, decided on July 7, 1911, one baggage company insisted that under a Missouri statute against discrimination it had the same rights as any other person or company to maintain a booth and stand within a railway depot for the transaction of its business and the solicitation of the same. The railway company had originally entered into an exclusive contract with one baggage company and thereafter cancelled that contract and entered into an exclusive contract with another company. Referring to the question whether the railroad company had the right to make an exclusive contract with a single concern Judge Smith McPherson, after referring to the decision of the Supreme Court of the United States in The Express Cases, 117 U.S. 1, and Donovan vs. Pennsylvania Company, 199 U.S. 279, says at page 214:

"Transportation companies, such as express or carriage companies, do not have the rights, which must be enjoyed by the public at large of being allowed egress and ingress at the railway stations. The railway company has the right to make the one contract with one concern to serve the general public at fixed and certain and reasonable charges for the transportation of persons and baggage from one depot to another, and from depots to hotels and residences and business houses. Under these decisions the question is no longer debatable."

It thus appears that notwithstanding the Missouri statute against discrimination the Circuit Court in the foregoing case reached the same conclusion which was reached by the United States Supreme Court in the Donovan case, supra.

In Dingman vs. Duluth,etc., R. Co., 130 N.W. 24, decided on February 1, 1911, the Supreme Court of Michigan held that Sections 62-66 of the Compiled Laws of 1897 requiring all railroad companies to grant equal facilities for the transportation of freight and passengers without discrimination in favor of any individual or company, does not prevent a railroad company from making an agreement with a person engaged in transferring passengers, by which he may enter the passenger trains and solicit passengers and baggage to the exclusion of all others engaged in the same business.

Referring to the result which would follow if the agents of several competing companies were allowed to solicit, the court says at page 25 of the Reporter:

"But suppose the railroad, instead of refusing to carry all, permitted two or more baggage agents upon its trains. The conditions which would result from such a course would at once become intolerable. Rival agents would beseech the passenger for his business to his infinite annoyance, and when he finally made a selection he would have no means of knowing that he had chosen either a competent or a responsible agency for its transaction."

The court then continues as follows:

"These considerations certainly militate most strongly against such a construction of the statute as would result in harm or inconvenience to the general public, unless that construction is forced upon us by plain and unequivocal language or pertinent judicial determination. Neither, in my opinion, compels us to adopt the plaintiff's contention."

The Supreme Court accordingly affirms the judgment of the lower court in favor of the railway company.

On the authorities hereinbefore quoted and on the

reason and common sense of the situation I find that there is no merit in the complaint and that it does not state a cause of action, and recommend that it be dismissed.

I submit herewith the following form of order:

O R D E R

A public hearing having been held in the above entitled proceeding, and it appearing that there is no merit in the complaint and that the complaint does not state a cause of action

IT IS HEREBY ORDERED that said complaint be and the same is hereby dismissed without leave to amend.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 30th day of August, 1913.

H. D. Loveland

Alex Gordon

Max Thelen

Commissioners.