

ORIGINAL

Decision No. 60440

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation on)
the Commission's own motion into the)
reasonableness of minimum clearance)
on railroads and street railroads,)
with reference to side structures,)
overhead structures, parallel tracks,)
and crossings of public roads, high-)
ways and streets, as prescribed by)
General Order 26-C and Supplement 7)
thereto.)

Case No. 4919

BROTHERHOOD OF RAILROAD TRAINMEN,)
Complainant,)

v.

Case No. 5805

THE WESTERN PACIFIC RAILROAD COMPANY,)
Defendant.)

Investigation into the operations and)
practices of THE WESTERN PACIFIC)
RAILROAD COMPANY, a corporation.)

Case No. 5879

Walter G. Treanor, for The Western Pacific Railroad
Company, defendant.
George W. Ballard, for Brotherhood of Railroad
Trainmen, interested party.
Hugh N. Orr, for the affiants.

OPINION, FINDINGS AND JUDGMENT

On September 16, 1959, the affidavit of R. J. Pajalich and his application for an order to show cause was executed and filed with the Commission. Attached to and made a part of this affidavit and application was the affidavit of Lynn E. Kull.

These affidavits allege that The Western Pacific Railroad Company (defendant) is in contempt of this Commission because of its

wilful violation on two occasions of the Commission's Decision No. 55025 which ordered the defendant to cease and desist from any further violations of the Commission's General Order No. 26-D.

In response to this application the Commission, on September 22, 1959, issued its order directing the defendant to appear on November 5, 1959, and show cause why it should not be adjudged to be in contempt of the Commission and punished therefor in the manner provided by law.

On the return date set forth in the order to show cause, the defendant, by its attorney, appeared before Commissioner Matthew J. Dooley and Examiner William L. Cole. Public hearing was held at San Francisco on November 5, 1959, at which time the matter was taken under submission subject to the filings of briefs.

Findings and Conclusions

Based upon all of the evidence of record, the Commission hereby makes the following findings and conclusions:

1. On May 21, 1957, the Commission issued its Decision No. 55025 in Cases Nos. 4919, 5805, and 5879 wherein it amended Section 7.4 of its General Order 26-D to read as follows:

"7.4 All open top cars with lading extending laterally in excess of five (5) feet five (5) inches from center line of car shall be blocked together in one place in any train the consist of which includes such lading, and, if train length permits, they shall be trained together at least five (5) cars distant from both the caboose and the engine."

2. In the same Decision No. 55025, the Commission also ordered the defendant "to cease and desist from any further violations of General Order 26-D."

3. The effective date of Decision No. 55025 was twenty days after its date of issue.

4. On May 22, 1957, certified copies of Decision No. 55025 were placed in the United States Mail, as registered mail, addressed to Otis J. Gibson, Attorney, The Western Pacific Railroad Company, 526 Mission Street, San Francisco, California, and addressed to H. C. Munson, V.P., The Western Pacific Railroad Company, 526 Mission Street, San Francisco 5, California.

5. Section 7.4 of General Order 26-D has not been amended, modified, or revoked since its amendment by Decision No. 55025.

6. On September 16, 1959, there was filed with the Commission the Affidavit and Application for an Order to Show Cause of R. J. Pajalich to which was attached the Affidavit of Lynn E. Hull in which affidavits it was alleged, in substance, that the defendant, notwithstanding the order contained in Decision No. 55025 and with full knowledge of the contents thereof and subsequent to its effective date, on two occasions violated the provisions of Section 7.4 of General Order 26-D.

7. On September 22, 1959, the Commission issued an Order to Show Cause wherein the defendant was ordered to appear before Commissioner Dooley or Examiner Cole, on November 5, 1959, in the Courtroom of the Commission in San Francisco, and then and there show cause why it should not be adjudged to be in contempt of the Commission and punished therefor in the manner provided by law.

8. On September 25, 1959, certified copies of the Order to Show Cause and the affidavits and application for an Order to Show Cause were personally served on the assistant secretary of the defendant.

9. On May 22, 1959 and May 23, 1959, the defendant ran its train 1-CFS-22 from Winnemucca, Nevada, to Portola, California. The freight cars of this train located seventh, eighth, and tenth from the caboose contained overwidth loads, the width of such loads being eleven feet, six inches wide. The ninth freight car from the caboose did not contain an overwidth load. By not blocking the overwidth loads together on the train the defendant violated Section 7.4 of General Order 26-D and the cease and desist order contained in Decision No. 55025. The conductor of this train and the defendant's yardmaster at Winnemucca, Nevada, were aware of the fact that the overwidth loads were not blocked together when the train left Winnemucca for Portola, California.

10. Subsequent to the effective date of Decision No. 55025 and with its agents and employees having full knowledge and notice of the order contained in Decision No. 55025, the defendant, through the relation of principal and agent and employer and employee, with respect to its train 1-CFS-22, on May 23, 1959, was intentionally in violation and disobedience of the Commission's General Order 26-D and its Decision No. 55025; that, with respect to the movement of that train from Winnemucca to Portola, the defendant was able to comply with the terms of Section 7.4 of General Order 26-D and Decision No. 55025, and that the failure of the defendant to comply with the terms of Decision No. 55025 is in contempt of this Commission.

11. On May 24, 1959, the defendant ran its train 53-24 from Portola, California, to Keddie, California. The freight cars on that train located fourth and fifth from the caboose contained

loads which were overwidth, their width being eleven feet, six inches. This entire train contained eighteen freight cars. By not training the overwidth loads at least five cars distant from the caboose the defendant violated Section 7.4 of General Order 26-D and the cease and desist order contained in Decision No. 55025.

12. Subsequent to the effective date of Decision No. 55025 and with its agents and employees having full knowledge and notice of the order contained in Decision No. 55025, the defendant, with respect to its train 53-24, on May 24, 1959, was intentionally in violation and disobedience of the Commission's General Order 26-D and its Decision No. 55025; that with respect to the movement of that train from Portola to Keddie, the defendant was able to comply with the terms of Section 7.4 of General Order 26-D and Decision No. 55025; and that the failure of the defendant to comply with the terms of Decision No. 55025 is in contempt of the Commission and of its decision and order.

Discussion

The defendant argues that the proper contemptuous intent was not present with respect to the acts in question and that for this reason the defendant is not guilty of contempt. This contention is not sustainable. The evidence clearly shows that the intent is clearly deducible from the acts that were performed, to wit, placing the freight cars in the positions in which they were placed in the trains in question. This was done with the agents and employees of the defendant having knowledge and notice of the Commission's decision. The evidence also clearly shows that, prior

to the violations taking place, agents and employees of the defendant knew which loads were overwidth and which were not. In view of this evidence, the conclusion is inescapable that the element of intent is present in respect to the contempt resulting from both of the violations in question.

Motion

The motion interposed by defendant to strike certain testimony as being argumentative and irrelevant is denied.

JUDGMENT

The Western Pacific Railroad Company having appeared by counsel and having been given full opportunity to answer the Order to Show Cause of September 22, 1959, and to purge itself of its alleged contempt; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that The Western Pacific Railroad Company is guilty of contempt of the Public Utilities Commission of the State of California in disobeying its order made on May 21, 1957, in its Decision No. 55025, by violating Section 7.04 of General Order 26-D on May 23, 1959, with respect to the defendant's train 1-CFS-22.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that for such contempt of the Public Utilities Commission and its order as shown in findings 9 and 10, hereinabove set forth, The Western Pacific Railroad Company shall be punished by a fine of \$250.00, which fine shall be paid to the Secretary of the Public Utilities Commission of the State of California within ten days after the effective date of this opinion, findings and judgment.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that The Western Pacific Railroad Company is guilty of contempt of the

Public Utilities Commission of the State of California in disobeying its order made on May 21, 1957, in its Decision No. 55025, by violating Section 7.4 of General Order 26-D on May 24, 1959, with respect to the defendant's train 53-24.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that for such contempt of the Public Utilities Commission and its order as shown in findings 11 and 12, hereinabove set forth, The Western Pacific Railroad Company shall be punished by a fine of \$250.00, which fine shall be paid to the Secretary of the Public Utilities Commission of the State of California within ten days after the effective date of this opinion, findings and judgment.

IT IS HEREBY FURTHER ORDERED that this opinion, findings and judgment shall become effective twenty days after personal service of a certified copy thereof on The Western Pacific Railroad Company.

Dated at San Francisco, California, this 26th day of July, 1960.

President
[Signature]

[Signature]

Theodore J. [Signature]
Commissioners

Commissioner Everett C. McKeage, being necessarily absent, did not participate in the disposition of this proceeding.

I dissent:
Peter E. Mitchell

I dissent.
Peter E. Mitchell, Commissioner