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Decision No. 66446

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation to determine jurisdiction to issue and propriety of a General Order prescribing regulations requiring sanitary facilities in railroad locomotives.

Case No. 7357

John J. Balluff and Henry M. Moffat, for The Atchison, Topeka and Santa Fe Railway Company; William R. Denton and Frank Francis, for Southern Pacific Co.; Marshall W. Vorkink, for Union Pacific Railroad Company, and Richard W. Bridges, for The Western Pacific Railroad Co. and Great Northern Railway, respondents.

G. R. Mitchell, for Brotherhood of Locomotive Engineers; Leonard M. Wickliffe, for California State Legislative Committee, Order of Railway Conductors & Brakemen; William V. Ellis, for California State Legislative Board, Brotherhood of Locomotive Firemen & Enginemen, and George W. Ballard, for Brotherhood of Railroad Trainmen AFL-CIO, interested parties.

Bernard F. Cummins, for the Commission staff.

## OPINION

This is an investigation on the Commission's own motion to determine (1) whether the Commission has jurisdiction to issue a General Order prescribing regulations for the installation and maintenance of sanitary facilities on locomotives to assure the health and safety of railroad employees, and, if so, (2) whether the merits of the situation require that such a General Order be adopted.

A duly noticed public hearing was held in this matter before Examiner Jarvis at San Francisco on November 8, 1962. Because of the doubt over the Commission's jurisdiction to act in this matter, the hearing was confined to legal arguments dealing with that point. No evidence was taken. The matter was submitted, subject to the filing of briefs, on the question of jurisdiction only. All parties who so desired have filed briefs and the matter is ready for decision.

The parties who appeared in the proceeding may be divided into three groups: (1) various respondent railroads, (2) various railway brotherhoods, and (3) the Commission staff. The contentions of each group are hereinafter considered.

The respondent railroads contend that the Federal Boiler Inspection Act (45 U.S.C. §§ 22-34) has so occupied the field that the states may not constitutionally require the installation of any equipment for the protection of the health or safety of employees on any locomotive operated by a railroad subject to the Interstate Commerce Act.[1/] The railroads cite numerous authorities in support of their position, including _Napier_ v. _Atlantic Coast Line R. Co._, 272 U.S. 605, and _Urie_ v. _Thompson_, 337 U.S. 163.

The various railway brotherhoods, which appeared as interested parties, contend that the State of California has jurisdiction over equipment and facilities on locomotives as evidenced by various code sections enacted by the Legislature. (Public Utilities Code Section 7605, which requires equipping steam locomotives with

1/ The Commission takes official notice of the fact that the various respondent railroads who filed appearances in this proceeding are railroads subject to the Interstate Commerce Act, and that almost all of the railroads operating in California are subject to that Act. It is also noted that the Boiler Inspection Act exempts from its operation "street, suburban, and interurban electric railways unless operated as part of a general railroad system of transportation." However, the exemption is not involved in this proceeding.

bell ringer apparatus; Public Utilities Code Section 7606, which requires the installation of solid water glasses on steam locomotives; Public Utilities Code Section 7607, which requires certain types of headlights on locomotive engines; Public Utilities Code Section 7609, which, in part, requires equipping locomotives with first aid kits; Labor Code Section 6950, which requires roof openings in certain types of engines; and Labor Code Section 6952, which requires handrails and footboards on engine cabs.) The brotherhoods contend that the doctrine of the Napier case does not apply to the question of sanitary facilities and does not apply to the modern diesel locomotive.

The Commission staff takes the position that it "must concede that the great weight of judicial authority appears to preclude the exercise of this Commission's jurisdiction in the premises." However, the staff "is of the opinion that the issue presented by this investigation is not free from doubt and that the authorities relied upon /by the railroads/ are not necessarily conclusive or controlling. The staff argues that the Boiler Inspection Act pertains only to steam locomotives and that the doctrine of the Napier case should not apply to modern diesel locomotives.

The Boiler Inspection Act serves two related purposes. First, it regulates the equipment used on locomotives engaged in or related to interstate commerce and authorizes the Interstate Commerce Commission to determine matters dealing with the design, construction and material of every part of a locomotive, its tender and all its appurtenances. (United States v. Baltimore & O. R. Co., 293 U.S. 454.) Second, it supplements the Federal Employers' Liability Act and imposes upon railroads subject to the Boiler Inspection Act an actionable, absolute and continuing duty to provide safe equipment. (Urie v. Thompson, 337 U.S. 163, 188.)

"Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act." (Lilly v. Grand Trunk Western R. Co., 317 U.S. 481, 485.)

The Boiler Inspection Act, as originally enacted, applied only to locomotives propelled by steam power. (Act of Feb. 17, 1911, 36 Stat. 913.) In 1915 the Act was amended to include the entire steam locomotive and tender and all parts and appurtenances thereof. (Act of March 4, 1915, 38 Stat. 1192.) In 1924 the Act was further amended by making it applicable to all locomotives and their parts and appurtenances, instead of only to locomotives propelled by steam power. (Act of June 7, 1924, 43 Stat. 659.)

In the Napier case,[2/] the court had before it a Georgia statute which prescribed an automatic door to the firebox and an order of the Wisconsin Railroad Commission, pursuant to a Wisconsin statute, prescribing the specifications of a cab curtain. "In each case, an interstate carrier sought to enjoin state officials from enforcing, in respect to locomotives used on its lines, a state law which prohibits use within the state of locomotives not equipped with the device prescribed. Some of the engines were being operated entirely within the state, some across the state line to and from adjoining states. It is conceded that the Federal Safety Appliance and Boiler Inspection Acts apply to a locomotive used on a highway of interstate commerce, even if it is operated wholly within one state and is not engaged in hauling interstate freight or passengers." (272 U.S. at 607.) The main points raised in the Napier case were that the Boiler Inspection Act did not occupy the entire field and

2/ Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926).

that the Act was directed to questions of safety only, whereas the actions of the states involved were directed primarily to promoting the health and comfort of railroad employees and were thus permissible. Mr. Justice Brandeis, speaking for a unanimous court held:

> "The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
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> "The federal and the state statutes are directed to the same subject--the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. Compare Louisville & N. R. Co. v. State, 16 Ala. App. 199, 76 So. 505; Whish v. Public Serv. Commission, 205 App. Div. 756, 200 N. Y. Supp. 282; 240 N. Y. 677, 148 N. E. 755; Staten Island Rapid Transit Co. v. Public Serv. Commission. 16 F.2d 313.

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample. Obviously, the rules to be prescribed for this purpose need not be uniform throughout the United States; or at all seasons; or for all classes of service." (272 U.S. at 612-613.)

The Napier case continues to be controlling on these points. (Urie V. Thompson, 337 U.S. 163; Lilly v. Grand Trunk Western R. Co., 317 U.S. 481.)

The staff argues that the legislative history of the Act indicates it was directed exclusively to the prevention of boiler explosions and is thus limited in its application to steam locomotives. It points to the 1911 Congressional Record to support this contention. As indicated, the Act, as originally enacted in 1911, applied only to steam locomotives. This argument fails to take cognizance of the 1924 amendment making the Act applicable to all locomotives, subsequent actions of the Interstate Commerce Commission, and controlling decisions of the federal courts.

Subsequent to the 1924 amendment to the Boiler Inspection Act, the Interstate Commerce Commission promulgated regulations for non-steam locomotives. (In the Matter of Rules and Instructions For Inspection And Testing of Locomotives Propelled By Power Other Than Steam Power, etc., 122 I.C.C. 414 (1927). The Interstate Commerce Commission continues to promulgate rules and regulations for non-steam locomotives under authority of the Boiler Inspection Act. (49 C.F.R., Part 91, Subpart C.)

In Staten Island Rapid Transit Ry. Co. v. Public Service Comm., 16 F.2d 313, the court struck down a New York statute requiring the electrification of railroads in certain cities as being contrary to the Boiler Inspection Act. It was held that under the Act it was

for the Interstate Commerce Commission, and not the state, to prescribe the type of locomotive construction--steam or electric--to be used. In Hoffman v. New York, N. H. & H. R. Co., 74 F.2d 227 (cert. denied, 294 U.S. 715), the court held a gasoline tractor to be a locomotive for the purposes of the Boiler Inspection Act. In Gowins v. Pennsylvania Railroad Company, 299 F.2d 431 (cert. denied, 371 U.S. 824), the court held the Boiler Inspection Act applicable to a diesel locomotive.

The sections of the California Public Utilities Code and Labor Code cited by the railway brotherhoods are not persuasive. All of these statutes, except one,[3/] were enacted prior to (or are successor sections to statutes enacted prior to) the 1924 amendments to the Boiler Inspection Act and the decision of the United States Supreme Court in the Napier case. None of these statutes has been judicially construed with reference to their validity in the light of the Boiler Inspection Act. Similar statutes have been struck down as void and held to have no force and effect when applied to railroads subject to the Boiler Inspection Act. (Brown v. Chicago, R. I. & P. R. Co., 108 F.Supp. 164 (Iowa statute); Wallar v. Southern Pacific Co., 37 F.Supp. 475 (Nevada statute); Northern Pac. Ry. Co. v. Cooney, 12 F.Supp. 73 (Montana statute); Smith v. Thompson, 182 S.W.2d 63 (Missouri statute); Franklin v. Norwalk, 53 Ohio App. 44, 4 N.E.2d 232 (Ohio statute); N. Y. Central & St. L. R. Co. v. Van Dorp, 36 Ohio App. 530, 173 N.E. 445 (Ohio statute); Pennsylvania R. Co. v. Pelsor, 90 Ind. App. 111, 168 N.E. 249 (Indiana statute).)

3/ Public Utilities Code Section 7609 was enacted in 1951. It is an amplification and extension of Section 7608 which is derived from a statute enacted in 1921.

In view of the foregoing authorities, it is apparent that this Commission lacks jurisdiction to issue a General Order dealing with sanitary facilities on locomotives operated by railroads subject to the jurisdiction of the Interstate Commerce Commission, and appropriate findings and conclusions to this effect will be entered. It should be noted that if there is a problem respecting sanitary facilities on locomotives, a remedy is available before the Interstate Commerce Commission. Subsequent to the Napier case, which, in part, struck down the Wisconsin requirement for cab curtains, the Interstate Commerce Commission, acting upon a complaint of the Wisconsin Railroad Commission, entered an order requiring cab curtains. (Wisconsin R.R. Comm. v. Aberdeen & Rockfish R.R. Co., 142 I.C.C. 199.)

The Commission makes the following findings and conclusions.

Findings of Fact

1. The United States Supreme Court has held that the Federal Boiler Inspection Act preempts the field of regulation involved in this proceeding and that states may not regulate the design, construction or material of any locomotive or tender or the appurtenances thereof when operated by a railroad subject to the Interstate Commerce Act, excluding street, suburban and interurban electric railways not operated as a part of a general railroad system of transportation.

2. The respondents who filed appearances herein are railroads subject to the Interstate Commerce Act and the Boiler Inspection Act, and almost all of the railroads operating in the State of California are subject to said Acts.

3. Since almost all of the railroads operating in California are subject to the Interstate Commerce Act and the Boiler Inspection Act, promulgation of a General Order dealing with sanitary facilities on locomotives relating to intrastate railroads not subject to the Boiler Inspection Act, if any exist, would not be in the public interest.

Conclusions of Law

1. The Commission has no jurisdiction to enter a General Order dealing with sanitary facilities on locomotives which would apply to railroads subject to the Interstate Commerce Act and the Boiler Inspection Act.

2. This proceeding should be discontinued.

ORDER

IT IS ORDERED that Case No. 7357 is hereby discontinued.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 10th day of DECEMBER, 1963.

William W. Bennett
President

Peter E. Mitchell

Everett C. McKeage

George G. Grover

Frederick B. Holoboff
Commissioners