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Decision No. 82335

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

INEZ M. BOEHRS and LAURENCE P. MERTL, Complainants, vs. SQUAW VALLEY DEVELOPMENT COMPANY, a corporation, and STATE OF CALIFORNIA, Defendants.	Case No. 9545 (Filed April 25, 1973)

O P I N I O N

This is a complaint by Inez M. Boehrs and Laurence P. Mertl (complainants) against Squaw Valley Development Company and the State of California (defendants). The complaint seeks to have the Commission assume jurisdiction over the Headwall ski chair lift and other aerial passenger tramways or chair lifts and restrain the defendants from operating these chair lifts until certain safety devices are installed in connection therewith. Defendants contend that the Commission has no jurisdiction over this matter.

If the objection to jurisdiction is properly taken, further proceedings herein would be unnecessary. We now consider this point.

The material issue presented in connection with the question of jurisdiction is whether a ski lift is a common carrier subject to the regulatory jurisdiction of the Commission?

Complainants contend that chair lifts are common carriers within the purview of the California Constitution and Public Utilities Code. They assert that, as common carriers, chair lifts are subject to the safety jurisdiction of the Commission. For the reasons which follow the Commission finds and concludes that chair lifts are not subject to our regulatory jurisdiction.

It should first be noted that we are not here dealing with any self-executing provisions of the California Constitution as was the situation in People v Western Air Lines (1954) 42 Cal 2d 621. The Western Air Lines case dealt with provisions of the Constitution which provide that:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the Railroad Commission provided for in this Constitution, that such increase is justified,..." (Cal. Const., Art. XII, Sec. 20.)

> "Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff." (Cal. Const., Art. XII, Sec. 22.)

The California Supreme Court held that Sections 20 and 22, which deal with rates, are self-executing. (42 Cal 2d at pp. 636-37.) However, even if it be assumed, for purposes of discussion only, that a ski lift is a transportation company within the purview of Sections 20 and 22, it would not assist complainants herein. Sections 20 and 22 relate to rates. There are no self-executing constitutional provisions which deal with safety regulation, the relief sought herein.

Section 23 of Article XII of the California Constitution provides in part that:

> "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant or equipment within this State, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

It has been held that the Commission's jurisdiction under Section 23 is subject to legislative enactment. (In re Martinez (1943) 22 Cal 2d 259, 261; People v Western Air Lines, supra, at p. 641; Television Transmission v Public Util. Com. (1956) 47 Cal 2d 82.)

For example, it had long been held that the Legislature had not conferred jurisdiction on the Commission to regulate sewage corporations. (In re West San Joaquin Valley Water Co., etc. (1917) 13 CRC 693.) In 1970, the Legislature enacted Section 230.5 of the Public Utilities Code which conferred such jurisdiction on the Commission. (Stats. 1970, c. 1109.)

Has the Legislature conferred upon the Commission regulatory jurisdiction over ski chair lifts? Complainants contend that the Legislature has conferred such jurisdiction and that ski chair lifts are common carriers within the purview of Section 211 of the Public Utilities Code. They argue that the phrase "'Common carrier' includes", which precedes the enumeration of common carriers in Section 211, is one of enlargement and that, under the authorities which they cite, ski chair lifts are common carriers subject to regulation.

Section 211 of the Public Utilities Code provides in part that:

> "'Common carrier' includes:
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> (a) Every railroad corporation; street railroad corporation; express corporation; freight forwarder; dispatch, sleeping car, dining car, drawing-room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading, and every other car corporation or person operating for compensation within this State.
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> (c) Every 'passenger stage corporation' operating within this State."

The California Supreme Court has held that:

> "Although 'includes' is ordinarily not a word of limitation (People v. Western Airlines, 42 Cal. 2d 621, 639 [268 P. 2d 723]), a legislative declaration that 'public utility' includes those performing certain enumerated services is not a declaration that those performing other services, not encompassed by the services enumerated, are public utilities. In People v. Western Airlines, supra, on which the commission relies, we were concerned with the scope of a business activity declared by the Legislature to be a public utility, not with the question of expanding that section to embrace additional classes of business not mentioned in the section. Thus, unless a community television antenna falls within one of the enumerated classes of public utilities, the commission has no jurisdiction over it." (Television Transmission v Public Util. Com., supra, at p. 85.)

We must determine whether a ski lift falls within the types of business subject to regulation in Section 211.

Complainants cite McDaniel v Dowell (1962) 210 CA 2d 26 in support of their contention that a chair lift is a common carrier. In McDaniel the Court stated:

"The plaintiff argues that the 'rope tow is an elevator to transport persons from one level to a higher level on the hill' and that, therefore, instructions requested by her which embodied the law as to the duty of care of a common carrier should have been given to the jury. It is true that the operators of ski lifts have been treated as common carriers in cases in which the skier's body was transported by means of a device such as a chair lift. (Fisher v. Mt. Mansfield Co., 283 F. 2d 533, 534; Grauer v. State of New York, 9 App. Div. 2d 829 [192 N.Y.S. 2d 647, 649]; Vogel v. State, 204 Misc. 614 [124 N.Y.S. 2d 563, 569].) As aptly stated in the Vogel case (124 N.Y.S. 2d, at 569): 'The greatly expanded interest in skiing in recent years is known to all. Practically every population area in the snow belt has its own resorts, be they publicly or privately owned. Thousands take to the slopes every weekend in season. No more is heard the lament that it takes but two minutes to go down a hill that has taken twenty minutes to climb. The time for ascending and descending has been practically equalized by the installation of various devices to whisk the skiers up the slope, and, undoubtedly, there will be more complex devices to come. Some of these, such as the chair lift, have reached the stage where they physically carry the skier and, so to speak, isolate him from his own resources.' Clearly, in the present case the rope tow did not physically carry the plaintiff. It was merely an aid furnished to the plaintiff to ease the burden of moving her body up the hill while her feet were in contact with the ground and her body remained under her own control. To use it she had merely to grip the rope with her hands. Unlike the case where one uses an elevator or an escalator in a business establishment, the plaintiff did not entrust the carriage of her person to the operator of the tow. The operation was not in the nature of that of a common carrier. There is no other basis for the imposition upon the defendant More of a duty to exercise the utmost care and diligence for the safety of the plaintiff. The rope tow was an integral part of the facilities made

> available to the plaintiff so that she might engage in the sport of skiing, its purpose being to facilitate her return to the top of the slope. There is no sound reason for differentiating the duty owed to her while she was so ascending from that applicable while she was skiing down the slope on a designated trail. (See Wright v. Mt. Mansfield Lift, 96 F. Supp. 786; comment, 1 Washburn L.J. 316.) There was no error in the instructions given as to the nature of the duty of the defendant More. (See Davidson v. Long Beach Pleasure Pier Co., 99 Cal. App. 2d 384, 387 [221 P. 2d 1005]; Anderson v. Ocean Sport Fishing, Inc., 28 Cal. App. 2d 712, 713 [83 P. 2d 515]; 47 Cal. Jur. 2d, Theaters, Shows, Exhibitions, and Public Resorts, §§16-17; 52 Am. Jur., Theaters, Shows, Exhibitions, and Public Resorts, §72; 86 C.J.S., Theaters & Shows, §41, p. 725.)"
> (210 CA 2d at pp. 30-31.)

The discussion in McDaniel dealing with chair lifts is at most dictum because the Court held that the operation of the rope tow there involved "was not in the nature of that of a common carrier". (210 CA 2d at p. 31.)[1/] The New York and federal case arising in Vermont discussed in McDaniel are ones which hold that the duties of a chair lift operator in connection with tort litigation are those of a common carrier. There is no suggestion in any of the cases that chair lifts are common carriers subject to the regulation of the New York Public Service Commission or the Vermont Public Service Board. Furthermore, a subsequent California chair lift tort case did

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1/ It is difficult to perceive how a distinction between chair lifts and rope tows would be determinative for regulatory purposes. Each serves the same function.

not utilize the common carrier standard. (Houser v Floyd (1963) 220 CA 2d 778.) In any event, we do not believe the tort standard of duty is determinative of whether regulatory jurisdiction exists.[2/]

Chair lifts are not ordinarily considered similar to railroad corporations, street railroad corporations, or passenger stage corporations. The use of ski lifts is an integral part of participating in the sport of skiing. To enlarge the definition of common carrier to include ski lifts would lead the way to public utility regulation of sports and other recreational activities. White water raft trips, pack trains, trail rides, certain amusement park rides, etc. would seem to meet the same criteria as ski lifts. We do not believe that the Legislature intended that the Commission regulate sport and recreational activity.

We are further buttressed in our conclusion by the following facts. Competitive skiing began in California in the 1850's. (Intl. Encyclopedia (1969) Vol. 16, p. 513; The Encyclopedia of Sports, 4th Ed., p. 829.) The first rope tow was constructed in the United States in 1932 and the first chair lift in 1936. (Associated Press Staff, A Century of Sports (1971) p. 247.) By 1970 there were 800

2/ California cases hold that operators of passenger elevators are required, for tort purposes, to use the same standard of care as common carriers. (Treadwell v Whittier (1889) 80 C 574, 591; Champagne v A. Hamburger & Sons (1915) 169 C 683, 690-91; Gregg v Manufacturers Bldg. Corp. (1933) 134 CA 147, 152-53.) It has never been suggested that, because of this tort standard, the Legislature has conferred regulatory jurisdiction in this Commission over passenger elevators.

ski lifts in operation in the United States. (Ibid.) In 1965 the Legislature provided for regulation of "Aerial Passenger Tramways" by the Division of Industrial Safety when it enacted Sections 7340 et seq. of the Labor Code. (Stats. 1965, c. 1407.) These sections were amended in 1972. (Stats. 1972, cc. 477, 478, 479, 519, 1033.) It is clear from the foregoing that the Legislature was aware of the operation of ski lifts in California. Section 211 of the Public Utilities Code has been amended several times, including amendments in 1937 (Stats. 1937, c. 896); 1945 (Stats. 1945, c. 1175); 1949 (Stats. 1949, c. 1399); 1951 (Stats. 1951, c. 764); and 1963 (Stats. 1963, c. 2147). At the time of these amendments it was aware of ski lifts and did not include them in the section. It is clear that the Legislature intends that the regulation of ski lifts be handled by the Division of Industrial Safety and not this Commission.3/

In the light of the foregoing authorities the Commission is of the opinion that the Legislature has not conferred upon it authority to regulate ski lifts and that it has no jurisdiction over the complaint at bench. (Television Transmission v Public Util. Com., supra; In re Martinez, supra; People v Western Air Lines, supra; In re Tunnels Transportation Co. (1925) 26 CRC 527; In re West San Joaquin Valley Water Co., etc., supra.) No other points require discussion. The Commission makes the following findings and conclusions.

3/ Because of this conclusion it is unnecessary to consider questions of supremacy or concurrency of jurisdiction between the two agencies.

Findings of Fact

1. Ski lifts, including chair lifts, are an integral part of the sport of skiing.

2. Ski chair lifts are not transportation companies within the meaning of Sections 20 and 22 of Article XII of the California Constitution.

3. The Legislature has enacted Sections 7340 et seq. of the Labor Code providing for regulation of ski lifts, including chair lifts, by the Division of Industrial Safety.

4. Ski chair lifts are not common carriers within the meaning of Section 211 of the Public Utilities Code.

5. The Legislature has not acted under Section 23 of Article XII of the California Constitution to declare that ski chair lifts are public utilities subject to the jurisdiction of the Commission.

Conclusions of Law

1. Ski chair lifts are not transportation companies within the meaning of Sections 20 and 22 of Article XII of the California Constitution.

2. Ski chair lifts are not common carriers within the meaning of Section 211 of the Public Utilities Code.

3. The Legislature has not acted under Section 23 of Article XII of the California Constitution to confer upon the Commission jurisdiction over ski chair lifts.

4. The Commission has no jurisdiction to entertain the complaint at bench and it should be dismissed.

O R D E R

IT IS ORDERED that the complaint in Case No. 9545 is dismissed.

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

Dated at San Francisco, California, this 15th day of JANUARY, 1974.

President

Commissioners