ALJ/bg TR-1

Decision 84 08 122 AUG 7 1984

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

UNITED TRANSPORTATION UNION, CALIFORNIA STATE LEGISLATIVE BOARD, a labor organization, Complainant, vs SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, Defendant.	Case 84-05-105 (Filed May 31, 1984)

Hildebrand, McLeod & Nelson, Inc., by Frederick L. Nelson, Attorney at Law, J. L. "Jim" Evans, Lawrence M. Mann, Attorney at Law, and James P. Jones, for United Transportation Union, complainant.
Dorene M. Curtis, Carol A. Harris, and John MacDonald Smith, Attorneys at Law, for Southern Pacific Transportation Company, defendant.
Freda Abbott, Attorney at Law, and H. W. Privette, for the Commission staff.

O P I N I O N

Statement of Facts

May 31, 1984 complainant United Transportation Union filed this complaint, alleging that defendant Southern Pacific Transportation Company required its railroad operating personnel to make walking inspections pursuant to defendant's Operating Rules 827 and 829 in an area between Sandcut and Cable on defendant's San Joaquin Division despite the alleged lack or inadequacy of physical walkways as required by Commission General Order (GO) 118, thereby exposing these personnel to the possibility of severe personal injury or fatality from falls, a possibility compounded in nighttime hours.

Complainant asserted futile past informal attempts to obtain alleviation of these allegedly unsafe conditions, and asked that the Commission issue an immediate cease and desist order prohibiting defendant from requiring such walking inspections in the area until the matter was heard by the Commission.

Based upon the allegations and verified statements of the complainant, the Commission found that a present danger appeared to exist which merited immediate relief, and accordingly, on July 5, 1984, pending hearing and a determination of need for continued restraint, ordered defendant to cease and desist from application of those portions of defendant's Rules 827 and 829 which would require walking inspections of stopped trains in the area.

A duly noticed public hearing was begun before Administrative Law Judge (ALJ) John B. Weiss in San Francisco on July 23 and 24, 1984.[1] At the outset the parties were specifically advised by the ALJ to address as the initial issue whether or not the July 5, 1984 Cease and Desist Order should be vacated or continued, so that the Commission could take action on that issue at its August 1, 1984 meeting. The ALJ also instructed complainant that it had the burden of presenting convincing evidence of continuing clear and present danger in the Sandcut-Cable milieu. The proceeding is on calendar to resume on August 30 and 31, 1984. At the two-day hearing complainant entered into evidence numerous exhibits and the testimony of its witnesses J. P. Jones, Union Assistant Legislative Director; M. Bannister, defendant's Brakeman; V. J. Evans, Santa Fe's Conductor-Brakeman; and J. Sievers, defendant's Conductor-Brakeman. The staff entered an exhibit and the testimony of T. P. Hunt, Sr., Transportation Operations Supervisor. Defendant entered into

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[1] Both complainant and defendant appeared with well-experienced attorneys in train prepared to take up the cudgels of preemption were that issue raised. After brief dialog off record both stipulated that should the issue be raised it would be reserved to briefing.

evidence an 18-minute video tape, 11 pages of photographs, and the testimony of R. Branstetter, Southern California Regional Engineer, and G. A. Greblo, until recently Assistant Superintendant, San Joaquin Division. At conclusion of the second day of hearing defendant filed with the ALJ its Petition for Vacation of Cease and Desist Order. The ALJ provided complainant and staff one day to file a response. Both did, arguing for continuing the Cease and Desist Order.

Discussion

Safety, as relative here, simply means such freedom from danger to life, health, and welfare as the nature of the employment, and the place of the employment, will reasonably permit. An employer has a duty to provide his employees a safe place to work. This does not mean the absolute elimination of danger, but does mean that the place of work be as secure as the exercise of reasonable care by the employer can make and keep it. The duty is a continuing one. It does not suffice that the employer merely put the place of work in a reasonably safe condition once and then allow it to deteriorate or fail to maintain it. It must reasonably be kept continuously a safe place to work. And such duty is as applicable to a railroad roadbed as to a machine shop.

Here the work place is the 33-mile stretch between Sandcut and Cable. The evidence introduced at the hearing was that this stretch is an old roadbed following the original route opened in August of 1876, and that the subsurface of all except five miles is only 15 feet wide. Today, a 17-foot minimum is necessary to provide standard walkways under GO 118. To bring the entire stretch up to this standard would require multimillion dollar relocations and reconstructions which the railroad considers must be accomplished only as system priorities and available funds permit.

In addition, the stretch continually is undergoing maintenance caused by the heavy traffic demands of the two railroads (defendant and Atchison, Topeka and Santa Fe) using it so that almost always there is routine maintenance work in progress and uncompleted

on a portion at any time. The consequence is that track materials, ballast, rails, etc. are placed along the ties, and some ballast profiles not yet dressed to standard provide the only walkways.

The evidence introduced by union and staff witnesses at the hearing July 23 and 24, 1984 tended to confirm that walkway conditions in numerous areas were not only not standard, but also presented substantial hazards in some locations, and in others walkways were virtually nonexistent so that crew members walking them could sustain severe personal injury and/or fatality from falls down long and steep grades and drop offs. The railroad presented 18 minutes of video tape and a number of still photographs which tended to show its efforts to ameliorate some of the complained of situations, and that there were stretches of roadbed which constituted safe work places.

We need not consider whether GO 118 applies to all or only to newly constructed or reconstructed sections of track, as the railroad contends. We are concerned here with the basic safe working conditions of the train crews in the work place as they find it. The problem at hand rests with the railroad's application of its Rules 827 and 829 to the 33-mile stretch. We are not unaware of the importance of full support by this Commission to railroad management in requiring compliance with its established rules and regulations. We can and do require the railroad's officials to see that their rules are complied with and that violations are severely dealt with. But the application of these rules must first be a reasonable application.

Without indulging in semantics, the inspections we are concerned here with are those required when trains are stopped for any reason after departing initial station and prior to arrival on receiving track at terminating station or established inspection

points. They are the nonemergency routine inspections[2] and generally fall into three types - standing, rolling, and running.[3] The purpose of these inspections is to take the opportunity given by the stop to give the train an additional inspection even though there has been no indication of problems. The inspections are to detect possible defects which may lead to equipment failure such as hot journals and bearings, shifted loads, broken flanges, cracked wheels, loose bolts, dragging equipment, leaks of dangerous hazardous materials from the side of a car, sticking brakes, smoldering fires, air leaks, etc. It is common practice in accordance with operating rules and allegedly in the interests of safety to conduct train inspections as frequently as practicable.

In our opinion a proper consideration of overall safety should give due regard to the desirability of these inspections, but we do not conclude that this factor alone is controlling. The safety of the crew members who are called upon to perform these nonemergency inspections is fundamentally a greater consideration.

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[2] A train may be stopped under nonroutine emergency conditions, such as, for example, grade crossing accidents, break in two's of the train, actuation of hot box detectors, observation of the train being struck by work equipment or other moving objects near the tracks, the sudden appearance of dust or smoke in the train, or an undesired emergency brake action. When such a stop occurs, a train inspection is obviously necessary and important to ascertain the problem, and whether it is safe to proceed. Such emergency situations require extraordinary response and this order is not intended to embrace those situations.

[3] A standing inspection is one wherein the crew member walks along the side of the train to make his observations, paying particular attention to any defects in the equipment or in the position of the lading which may be on the train. A rolling inspection is one where similar observations are made when the train is rolling slowly past a given point or points where the train members are stationed. The running inspection is one wherein the train members observe the train and its lading while the train is in motion along the track and while the train members are on the train. Here we are concerned only with the first two.

We have no question that defendant does not want any employee injured responding to a problem, as inspecting the integrity of a train. We note its "General Notice" rule: "Safety is of the first importance in the discharge of duties" and the thrust of Rule 108. But while the railroad's witnesses state that it requires the walking inspections only when "practicable", and that it does not want employees taking personal risks in order to undertake such inspections, Rules 827 and 829 do not clearly and unequivocably state or infer any such caveat in terms the average crewman can rely and act upon. We must agree with the union witnesses that the work "practicable" as it appears in Rule 827 applies to "as much of the train" as can be inspected in the time available rather than to whether or not the inspection itself must be made. And stepping carefully or exercising care to avoid obstructions where adverse footing conditons do exist is not the point. Crew members cannot be required to make routine walking inspections where the footing is substantially below standard or just plain dangerous.

For these reasons we conclude that a clear and present danger continues to exist and the public interest requires that the Cease and Desist Order presently in effect as to this stretch of track should remain in effect until further hearing on the matter. Because of the urgent nature of this determination it is not possible to provide the normal agenda notice, and we will act today under the emergency provisions of Public Utilities Code § 306(b). The order will be made effective as of the date of signature.

O R D E R

IT IS ORDERED that defendant Southern Pacific Transportation Company, pending further order of this Commission, shall cease and desist from application of those portions of defendant's Rules 827 and 829 which would require walking inspections in nonemergency situations of stopped trains in the area between the location near Bakersfield, California, known as Sandcut (at

approximately Milepost 325) and the location near Tehachapi, California, known as Cable (at approximately Milepost 358) on the San Joaquin Division of its railroad.

The Executive Director of the Commission is directed to cause personal service of this order to be made upon Southern Pacific Transportation Company.

This order is effective today.

Dated AUG 7 1984, at San Francisco, California.

Commissioner Priscilla C. Grew, being necessarily absent, did not participate

LEONARD M. GRIMES, JR.
President
VICTOR CALVO
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

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