

Decision 83 02 079 FEB 17 1983

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Department of Transportation,  
State of California,

Complainant,

v

Southern Pacific Transportation  
Company, a corporation,

Defendant.

Case 82-08-01  
(Filed August 4, 1982)

(For appearances see Decisions 82-10-031 and 82-11-032.)

Additional Appearances

Edward J. Connor, Jr., Attorney at Law,  
for California Department of Transportation,  
complainant.

Brobeck, Phleger & Harrison, by Malcolm T. Dungan  
and Thomas M. Peterson, Attorneys at Law, for  
Southern Pacific Transportation Company,  
defendant.

O P I N I O N

On February 11, 1983, the California Public Utilities Commission (Commission) issued Decision (D.) 83-02-038 ordering Southern Pacific Transportation Company (SP) to appear on February 15, 1983 and show cause why SP; D. K. McNear, Chairman of SP; R. D. Krebs, President of SP; W. J. Lacy, Vice President of SP; or such other officer of SP under whose direction and control the commuter rail transportation service between Oxnard and Los Angeles ceased on February 7 and 8, 1983 should not be adjudged in contempt of this Commission for violation of the orders contained in D.82-10-041. SP was ordered to make available McNear, Krebs, Lacy,

or such other officer of SP under whose direction and control the service ceased on February 7 and 8, 1983 to answer under oath questions concerning the discontinuance.

A copy of D.83-02-038 and a true copy of the affidavit of Harvey Morris of the Commission's Legal Division, and a copy of the SP press release dated February 4, 1983 were personally served on John J. Corrigan, General Solicitor for McNear, and on E. A. Flammengo (Fiammengo), an officer of and statutory agent for SP. The certificates of service were received as Exhibits 53 and 54.

The orders contained in D.82-10-041 are as follows:

1. SP was ordered to operate a commuter rail transportation service between Oxnard and Los Angeles with intermediate stops at various communities (the service) beginning on October 18, 1982 on the schedule tendered by SP on October 17, 1982 using the passenger equipment furnished by California Department of Transportation (Caltrans).

2. SP was ordered to execute a "Locomotive Agreement" and a related "Reimbursement Agreement" (copies of which were attached to the decision).

3. Caltrans was given the right of immediate entry to SP property and SP was ordered to make the property available, to construct station and parking facilities at Northridge, Moorpark, Camarillo, Burbank, Burbank Airport, and Chatsworth in accordance with plans on file with the Commission.

SP has testified that it did not operate passenger train service between Oxnard and Los Angeles on February 7 and 8, 1983. SP's counsel stipulated that SP did not request any authority or permission from the Commission prior to the suspension of operations of February 7 or 8, 1983. There is no factual question, then, that SP failed to operate the service as ordered by the Commission on two separate days. The schedule tendered by SP on October 17, 1982 is marked Exhibit 45 in this proceeding and shows two morning trains and

two evening trains for a total of eight trains that did not operate over the two-day period. The remaining question is a legal one - did this Commission have jurisdiction to require SP to operate the service? SP contends that this Commission has no jurisdiction over the subject matter of this proceeding. It bases this contention on four things:

1. That under the Staggers Rail Act of 1980 (49 U.S.C. § 11501 et seq.) (Staggers Act) jurisdiction over intrastate rail transportation of the State of California and its agency, this Commission, ceased.
2. That the Interstate Commerce Commission (ICC) declared officially that this Commission has lost all jurisdiction over intrastate rail transportation in the State of California.
3. That the ICC, by order of May 4, 1982, effective May 11, 1982, assumed jurisdiction over the very subject matter of this proceeding, to the exclusion of the power of the State of California.
4. That SP, in compliance with federal law, filed its tariff with the ICC which did not suspend and did not investigate that tariff which became effective, and is now the measure of SP's rights with respect to intrastate rail transportation. The only body with jurisdiction to declare that tariff unlawful is the ICC.

SP concluded its opening statement by urging the Commission to exercise its jurisdiction to determine that it had no jurisdiction and therefore to terminate this proceeding. The motion was taken under submission.

Caltrans takes the position that this Commission has dealt with the Staggers Act since its enactment in 1980, has considered SP's arguments, and rejected them. Further, Caltrans notes that the California Supreme Court has considered and rejected SP's arguments concerning federal preemption. SP then went into Federal District Court, which court concluded that the California Supreme Court's

decision is res judicata. Caltrans contends that the tariff filings with the ICC are preliminary and that they are still subject to challenge and attack and that in any event, no action has been taken by any court which would stay the hand and the authority of this Commission.

The Commission staff (staff) also argues that the arguments of SP relating to the Staggers Act and various acts of the ICC is simply an attempt to raise federal preemption and supremacy argument that have been unsuccessful in the past. Staff too points out that the California Supreme Court on two separate occasions denied SP's petition for review of Commission decisions which is a finding on the merits of those decisions. Staff also points to the federal judgment from the United States District Court for Northern California stating that SP is barred from raising federal supremacy before that court since the California Supreme Court decision was final and intact and since the federal constitutional arguments were or could have been raised in that forum.

SP's arguments concerning jurisdiction are a smoke screen behind which it seeks to hide its outright willful violation of a lawful, final order of this Commission. The proper time for SP to have asserted its Staggers Act preemption arguments was in petition for rehearing or petition for writ of review by the California Supreme Court of decisions of this Commission asserting jurisdiction to order SP to conduct this service. The judgment of the United States District Court for the Northern District of California dated August 9, 1982, of which we take official notice, recognizes that fact and the fact that SP did raise those arguments in its petition to the California Supreme Court. Review was denied by the California Supreme Court which is a judgment on the merits. The Commission has the jurisdiction confirmed by the Court to order that the service be operated. Appeal to the United States Supreme Court of the decision of the California Supreme Court's decision was available to SP under

28 U.S.C. § 1257. That appeal was not taken, and SP is now barred from asserting to us that we lack jurisdiction because of Staggers Act preemption.

SP's arguments that the filing and acceptance of a tariff with the ICC removes jurisdiction from this Commission to enforce its lawful orders likewise will not stand. SP has cited no authority for the proposition that the filing of a tariff with the ICC divests this Commission from jurisdiction to enforce its lawful order to a railroad common carrier to provide intrastate train service. SP is free to enter any other forum than this to make precisely this argument, and indeed it apparently has, to no avail. SP simply fails to recognize that once our assertion of jurisdiction has been confirmed by the Supreme Court of this State, that jurisdiction continues until set aside by superior authority. That has not occurred as of February 7 and 8, 1983 nor has it to date.

SP's single witness in response to our Order to Show Cause, William Weber, is an Executive Assistant, Executive Department. His counsel identifies him as an officer of the company although in what sense is unclear since he does not know whether he is an officer under the articles of incorporation or the bylaws of the corporation. He testified that he informed the operating personnel not to operate the train service known as Caltrain on February 7 and 8, 1983. SP's counsel stipulated that SP did not request any authority or permission from the Commission prior to the suspension of operations on February 7 and 8, 1983.

The evidence required to prove a contempt is dependent upon the nature of the contempt. Acts which are committed beyond the physical present of the tribunal are constructive contempts. SP's failure to operate service between Los Angeles and Oxnard on February 7 and 8, 1983 is a constructive contempt. California Code of Civil Procedure § 1211 requires that prosecutions for constructive contempts be commenced upon the filing of an affidavit setting forth

the facts constituting the contempt. That affidavit was prepared by Harvey Y. Morris and is attached to the Order to Show Cause in re Contempt. The Commission takes official notice of its own order D.82-10-041 requiring the service and of its own records which establish that service of the order in D.82-10-041 was made on SP. SP did not allege any inability to comply with the order as a defense and it voluntarily admitted suspending the service. These facts are sufficient to establish contempt, and we will so find.

In the matter of a penalty for contempt, staff urges imposition of a fine of \$2,000 for each offense as provided by Public Utilities (PU) Code § 2107. Staff notes that four trains per day between Oxnard and Los Angeles are required by the schedule filed by SP. Staff believes that the intentional failure to operate each train required by the schedule for the two days SP did not operate constitutes separate and distinguishable offenses for which SP should be fined. Staff argues that to do otherwise could induce utilities committing a contempt to "offend to the maximum" since the penalty for failure to run four trains would then be no greater than the failure to run a single train. Caltrans did not address the matter of a penalty.

Although specifically invited to do so, SP did not address either the matter of a penalty or the issue of mitigation should the Commission find it in contempt. Instead, in a section of its written argument captioned "Penalties and Mitigation" it reiterates its arguments about lack of jurisdiction. It closes by stating that it incurred serious losses from its overall rail operations in 1982 and cannot afford to support losing services. We fail to see how this even addresses the issue and conclude that SP either could not or was insufficiently interested in presenting any case in mitigation.

We will adopt the staff recommendation and will impose the maximum penalty of \$2,000 for each train required by the schedule on

file with the Commission which did not run on February 7 and 8, 1983. The penalty will be \$16,000.

Further, this Commission expects SP to continue to operate passenger train service between Oxnard and Los Angeles until we issue a formal order authorizing suspension or discontinuance of the train service. Failure to render service without authorization to suspend or discontinue operations will be considered further contemptuous actions punishable under the PU Code.

Caltrans has filed a statement, received as Exhibit 51 in this proceeding, which raises the question whether it would be in the public interest to continue the service while major issues such as provision of equipment and funding of the service remain unresolved. This matter will be reopened to take evidence and testimony on the issues raised in Exhibit 51 before Administrative Law Judge John Mallory on Monday, February 28, 1983. Should SP desire to discontinue or suspend service prior to our decision after hearing in this reopened proceeding, it may file an emergency petition to do so and it will receive our prompt consideration.

We recognize that a dispute exists about the amount of the subsidy owed by Caltrans to SP to provide the service. It further appears that Caltrans no longer enthusiastically supports the service. This order provides for further hearings on February 28 to consider the implications of Caltrans position.

It should be understood that our action today does not deal with the merits or demerits of the subsidy issue. Rather it concerns a single, basic foundation of utility regulation. When a utility

wishes to discontinue service it has been ordered to provide, the utility may not, under the law, unilaterally suspend the service without prior approval by this Commission. We do not impose today's penalty lightly or with any sense of satisfaction; but we do so because we would be derelict in our duty were we not to enforce so fundamental a principle of utility regulation.

This matter is not listed on the public agenda as required by PU Code § 308; however, an emergency exists which justifies our consideration of this matter without public agenda notice. Specifically SP is currently under a temporary restraining order (TRO) granted by Federal District Court Judge T. E. Henderson (C83 0581 TEH) requiring the continued provision of service between Oxnard and Los Angeles pending argument on Tuesday, February 22, 1982, at which time the TRO may be lifted by the federal court. SP is entitled to know that its unilateral suspension of service without authorization from this Commission in violation of an order of this Commission is an act of contempt which we view most seriously. Accordingly, we are acting now, without public agenda notice, so that SP will know what it faces for the future should it again decide not to operate the service required by D.82-10-041.

To ensure that the Oxnard to Los Angeles commuter rail transportation service continues without further unauthorized interruption, this order should be effective when it is signed.

Findings of Fact

1. D.82-10-041 ordered SP to operate commuter rail transportation service between Oxnard and Los Angeles beginning on October 18, 1982 on the schedule filed by SP on October 17, 1982, using the passenger equipment furnished by Caltrans.

2. SP began operating the service on October 18, 1982 and continued thereafter to operate it according to the schedule on file with the Commission.



3. On Monday, February 7, and on Tuesday, February 8, 1983, SP admits that it did not operate the service.

4. SP has not alleged any inability to provide the service required by D.82-10-041.

5. The schedule filed by SP on October 17, 1982 provides for four trains per day to operate between Oxnard and Los Angeles.

6. Each failure to run a scheduled train is a separate contempt.

7. A total of eight trains were not operated as required by D.82-10-041.

8. PU Code § 2107 provides for a maximum fine of \$2,000 for each separate offense.

9. No evidence, testimony, or argument has been offered in mitigation of SP's failure to operate the service on February 7 and 8, 1983.

#### Conclusions of Law

1. SP should be held in contempt for failure to operate eight trains over the period February 7 and 8, 1983.

2. SP should be fined in the maximum amount for each separate offense.

3. This matter should be reopened to address issues raised by Caltrans in Exhibit 51.

#### C O R D E R

Therefore, IT IS ORDERED that:

1. Southern Pacific Transportation Company (SP); D. K. McNear, Chairman of SP; and William Weber, officer of SP, are adjudged in contempt of this Commission for violation of the orders contained in D.82-10-041 on eight separate occasions on February 7 and 8, 1983.

2. SP, McNear, and Weber are fined \$2,000 for each offense under the provisions of Public Utilities Code § 2107, for a total fine of \$16,000.

3. SP shall continue to provide commuter rail service between Oxnard and Los Angeles as ordered in D.82-10-041 until authorized by further order of this Commission to suspend or discontinue the service.

4. This proceeding is reopened for the purpose of taking evidence and testimony on the issues raised in Exhibit 51. Hearings on these issues will be before Administrative Law Judge John Mallory, Commission Courtroom, 350 McAllister Street, San Francisco 94102, on Monday, February 28, 1983, at 10 a.m.

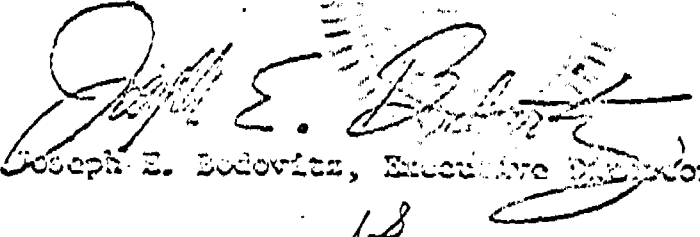
This order is effective today.

Dated February 17, 1983, at San Francisco, California.

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

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

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

  
Joseph E. Bodovitz, Executive Director

decision is res judicata. Caltrans contends that the tariff filings with the ICC are preliminary and that they are still subject to challenge and attack and that in any event, no action has been taken by any court which would stay the hand and the authority of this Commission.

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SP's arguments concerning jurisdiction are a smoke screen behind which it seeks to hide its outright willful violation of a lawful, final order of this Commission. The proper time for SP to have asserted its Staggers Act preemption arguments was in petition for rehearing or petition for writ of review by the California Supreme Court of D.82-06-045 which required that construction of improvements needed to institute the service begin on or before June 15, 1982 and be completed on or before October 15, 1982. The judgment of the United States District Court for the Northern District of California dated August 9, 1982, of which we take official notice, recognizes that fact and the fact that SP did raise those arguments in its petition to the California Supreme Court. Review was denied by the California Supreme Court which is a judgment on the merits. The Commission has the jurisdiction confirmed by the Court to order that the service be operated. Appeal to the United

States Supreme Court of the decision of the California Supreme Court's decision was available to SP under 28 U.S.C. § 1257. That appeal was not taken, and SP is now barred from asserting to us that we lack jurisdiction because of Staggers Act preemption.

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2. SP began operating the service on October 18, 1982 and continued thereafter to operate it according to the schedule on file with the Commission.
3. On Monday, February 7, and on Tuesday, February 8, 1983, SP admits that it did not operate the service.
4. SP has not alleged any inability to provide the service required by D.82-10-041.
5. The schedule filed by SP on October 17, 1982 provides for four trains per day to operate between Oxnard and Los Angeles.
6. Each failure to run a scheduled train is a separate contempt.
7. A total of eight trains were not operated as required by D.82-10-041.
8. PU Code § 2107 provides for a maximum fine of \$2,000 for each separate offense.
9. No evidence, testimony, or argument has been offered in mitigation of SP's failure to operate the service on February 7 and 8, 1983.

Conclusions of Law

1. SP should be held in contempt for failure to operate eight trains over the period February 7 and 8, 1983.
2. SP should be fined in the maximum amount for each separate offense.

3. This matter should be reopened to address issues raised by Caltrans in Exhibit 51.

O R D E R

Therefore, IT IS ORDERED that:

1. Southern Pacific Transportation Company (SP), D. K. McNear, Chairman of SP; R. D. Krebs, President of SP; W. J. Lacy, Vice President of SP; and William Weber, officer of SP, are adjudged in contempt of this Commission for violation of the orders contained in D.82-10-041 on eight separate occasions on February 7 and 8, 1983.

2. SP, McNear, Krebs, Lacy, and Weber are fined \$2,000 for each offense under the provisions of Public Utilities Code § 2107.

3. SP shall continue to provide commuter rail service between Oxnard and Los Angeles as ordered in D.82-10-041 until authorized by further order of this Commission to suspend or discontinue the service.



4. This proceeding is reopened for the purpose of taking evidence and testimony on the issues raised in Exhibit 51. Hearing on these issues will be before Administrative Law Judge John Mallory, Commission Courtroom, 350 McAllister Street, San Francisco 94102, on Monday, February 28, 1983, at 10 a.m.

This order is effective today.

Dated February 17, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.  
/ President  
VICTOR CALVO  
DONALD VIAL  
Commissioners

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