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Decision 97-06-068 June 11, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENGRACIA PORTER,

an individual,

v.

BAY AREA RAPID TRANSIT DISTRICT (BART), a
regulated public rapid transit district,

Defendant.

ORIGINAL

Case 96-08-014
(Filed August 12, 1996)

OPINION

Statement of Facts

On July 15, 1992, Engracia Porter fainted and fell forward onto the tracks at the San Leandro Bay Area Rapid Transit District (BART) station. She was struck by a BART train entering the station, suffering loss of her left leg above the knee, and was rendered a quadriplegic.

Thereafter, Porter brought suit against BART and the BART train operator operating the train when she was struck. After three years of litigation in Alameda County Superior Court, the jury hearing the case returned a special verdict including findings (1) that the train operator had been inattentive and negligent; (2) that the train operator's inattention caused the accident and injury; (3) that the train operator did not violate Public Utilities (PU) Code § 7679;¹ and (4) that BART negligently and carelessly destroyed and concealed material evidence regarding the Porter accident and injury.

¹ "7679. Any person employed upon any railroad as engineer, conductor, baggage-master, brakeman, switchman, fireman, bridge-tender, flagman, or signalman, or having charge of the regulation or running of trains upon any railroad, in any manner whatever, who either becomes or is intoxicated or who is impaired due to the unlawful use of a controlled substance

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Porter's lawsuit brought her Judgment on Special Verdict in July of 1996 in the total amount of \$3,003,481.58 (including the Jury damage finding of \$1,700,000 divided \$950,000 economic and \$800,000 non-economic; a Court determined Additur of \$850,000; and litigation costs of \$403,481.58).

During the lengthy course of litigation against BART, Porter asserts that numerous and serious deficiencies in BART's policies and procedures governing accident investigation and prevention were discovered. Specifically alleged are (1) that BART investigates only whether patron injuries on trackways were suicides or caused by third-party criminal acts, and that BART refuses to investigate its own involvement in such accidents; (2) that BART conceals cause information from the Public Utilities Commission, thereby preventing independent oversight and accountability; (3) that BART refuses to test operators after serious-injury accidents for drugs, and where reasonable cause exists that a serious crime was involved, refuses to refer the operator to the District Attorney's office; (4) that BART refuses to follow established proper investigation procedures to preserve material evidence and establish the cause of accidents; (5) that BART carelessly and recklessly allows vital evidence to be destroyed following accidents; and (6) that BART refuses to properly and carefully train, investigate, and discipline train operators for inattentively operating trains after use of drugs or alcohol.

Accordingly, on August 12, 1996, Porter filed the present Complaint 96-08-044. In support of the allegations of deficiencies, Porter included in the complaint numerous extracts from depositions and courtroom testimony; copies of motions and court orders and BART police reports from the Superior Court proceeding; an extract from the Amalgamated Transit Union Local 1555 AFL-CIO and BART arbitration proceeding; a report of the American Public Transit Association's Panel of Inquiry pertaining to a

while engaged in the discharge of his duties, is guilty of a misdemeanor. If any person so employed does any act or neglects any duty, by reason of such intoxication or illegal drug use, which act or neglect causes the death of, or bodily injury to, any person or persons, that person so employed is guilty of a felony."

BART derailment accident in 1992; a copy of BART's System Safety Department's 1992 Accident Investigation Procedures; a copy of Commission Decision (D.) 89778 (May 4, 1976) pertaining to BART reporting accidents to the Commission; and copies of various newspaper clippings pertaining to a 1978 BART drug-ring problem. The complaint asserts in part that, since 1977, there have been 44 accidents involving BART patrons and trains, and that in each, BART concluded it had not contributed to the cause; that there is concealment of accident information from the Commission's failure to preserve material evidence; and minimal drug use testing; and that the BART administrator of its drug testing program testified that under the confidentiality limitations of its drug program it was only required to report drug test results, quantitative or otherwise, to the National Traffic Safety Board if that Board was conducting its own investigation apart from the BART process, but that results were not reported to the Commission.

The complaint seeks from the Commission an order to:

1. Institute a full, fair, and independent investigation of BART's accident safety policies and procedures to determine inadequacies and deficiencies in these, and to order remedies;
2. Require BART police to take urine and blood samples of operators involved in accidents to determine if the operators are under the influence of alcohol or drugs;
3. Require BART police to refer operators, if found to have operated while under the influence of alcohol or drugs, to the District Attorney's office for prosecution;
4. Require BART to establish and maintain procedures to gather and preserve material evidence following injury accidents;
5. Reexamine BART and Commission procedures governing accident reporting and cause determination;
6. Require mandatory drug testing of BART operators following injury accident;
7. Direct that BART police and other personnel be trained regarding California laws governing train operators while under the influence of drugs and alcohol;

8. Require inquiries in hiring, training, and supervision of operators regarding misuse of drugs or alcohol; and
9. Provide for recovery of costs and attorney fees for Porter's role in vindication of the public interest in this proceeding.

By its answer to the complaint filed September 30, 1996, BART generally and specifically denies the allegations set forth in Porter's six Stated Claims for Relief and in her concluding statements. Among its defenses, BART asserts that the Commission lacks jurisdiction to order an investigation of BART accidents, or require BART to perform any drug testing, or adopt rules and regulations associated with the hiring, supervision and training of BART employees, BART generally asserts that the Federal Transportation Administration (FTA)² has preempted our jurisdiction or that there are constitutional impediments to our exercise of such jurisdiction. BART further contends that Porter's allegations were previously litigated in the Superior Court proceedings in 1996, and that any further consideration by the Commission is precluded by the doctrine of *res judicata* issue preclusion. Asserting that the complaint fails to state facts upon which relief may be granted and is barred by the doctrine of laches, BART asks that the complaint be dismissed.

Discussion

Jurisdiction

We dispose here of BART's challenge to the authority of this Commission to investigate any accidents, incidents, or hazardous conditions, whether present, past, or potential, or to require BART to conduct such an investigation. We also address BART's contention that we may not require BART to take remedial action should we deem it necessary, or have the authority to order or adopt additional rules and regulations as we might deem necessary for the purpose of safety. Later, we discuss our current safety and regulating oversight of BART and similar systems.

² The FTA is a federal agency of the United States Department of Transportation that makes grants of federal financial assistance under various statutory provisions.

We obtained our initial jurisdiction when BART was established in 1957 from the Legislature through PU Code § 29047. By that delegation of authority, the district was made subject to Commission regulation relating to safety practices and procedures, and the Commission was specifically authorized to make additions or changes to those practices and procedures as necessary for the purpose of safety to employees and the general public. Subsequently, by PU Code § 99152 in 1976, all public transit guideways planned, acquired or constructed on or after January 1, 1979, were made subject to the Commission's safety regulation, and the Commission was required to develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators in the design, construction, and operation of those guideways, using existing industry standards where applicable.

The Urban Mass Transportation Act (Pub. L. No. 88-365, 78 Stat. 302 (1964)) provided for federal financial assistance to state and local agencies to assist in planning, establishing, and financing mass transit systems. The Act is administered by the Urban Mass Transportation Administration (UMTA), now renamed the Federal Transit Administration (FTA), which operated under a delegation of authority from the Secretary of Transportation. UMTA had the authority to impose terms and conditions on its awards to ensure successful projects. Under its formula grant program, applicants merely had to certify to UMTA that they met these conditions.

In time, believing that its grant conditioning authority provided it with statutory authority to promulgate safety regulations, and based on the premise that the use of drugs could potentially degrade safety performance, UMTA determined to initiate a drug testing program for workers in safety-sensitive positions in transit agencies, with further financial assistance to depend upon local agency compliance. UMTA proposed regulations and, after hearings and opportunity for comment, on November 22, 1988, UMTA issued its final rule requiring recipients of aid to develop and implement drug testing programs. By December 1989, approximately 200 large transit systems certified compliance and began testing pursuant to UMTA's regulation, codified at 49 CFR Part 653.

Shortly thereafter, labor organizations and individuals filed suit in district court, challenging UMTA's statutory authority to impose a federally designed comprehensive drug testing program on recipients of federal mass transit funds. When the district court upheld UMTA, plaintiffs appealed, and the Court of Appeals reversed the district court, observing that, unlike other Transportation Department Agencies, UMTA never had directly licensed or regulated industry employees on safety; and that, in UMTA's case, such safety matters had always been handled by local transit agencies. The court noted that the "form and language of the [UMTA] criteria seem to have been inartfully copied from regulations issued by Department of Transportation agencies which have direct regulatory authority, not possessed by [UMTA]." The Appeals Court concluded that Congress intended for such matters to be handled locally with UMTA's "guiding hand," but not with an "iron fist." The Appeals Court ruled that UMTA had exceeded its statutory authority.³ On January 25, 1990, the FTA published a notice in the Federal Register suspending Part 653, its anti-drug regulation.

In response to specific accidents, and to ensure the safety of the transit-riding public, Congress passed the Omnibus Transportation Employee Testing Act of 1991 (Pub. L. 102-143, Title V) on November 28, 1991, and the Intermodal Surface Transportation Efficiency Act of 1991 (Pub. L. 102-240) on December 18, 1991. The latter law added Section 28 to the Federal Transit Act.

With regard to drug testing to enhance mass transportation safety, the Omnibus Act required the FTA to issue a rule requiring the testing of safety-sensitive employees of transit agencies which are recipients of certain federal funds for the use of controlled substances and alcohol, while also requiring the safeguarding of the privacy of these employees to the maximum extent possible. The FTA was also authorized to preempt state or local laws, rules, regulations, ordinances, standards or orders inconsistent with

³ Amalgamated Transit Union v. Skinner (1990) 894 F.2d 1362 (D.C. Cir.)

provisions of its rule, except for provisions of state criminal laws which impose sanctions for reckless conduct leading to actual loss of life, injury, or property damage.

In a significant change from prior Transportation Department policy, the Intermodal Efficiency Act required the FTA to issue regulations creating a state oversight program to oversee the safety of rail fixed-guideway systems which are not regulated by the Federal Railroad Administration.

To respond to the Congressional mandate on illegal-drug and alcohol abuse, the FTA, following notice and rulemaking, issued its final rule implementing drug testing, replacing suspended Part 653 with a new Part 653 (49 CFR Part 653), and its final rule implementing its alcohol misuse program with Part 654 (49 CFR Part 654), both effective March 17, 1994.⁴ BART's Substance Abuse Program Policies and Procedure Manual became effective on January 1, 1995, and applies to both drug and alcohol abuse, and makes all BART employees in safety-sensitive positions subject to the federal rules.

To respond to the Congressional mandate requiring states to oversee the safety of rail fixed guideway systems through a designated oversight agency, but designed to give a state maximum flexibility in designing its own oversight program, the FTA, following notice and rulemaking, issued its final rule effective January 26, 1996, as Part 659 (49 CFR Part 659). By this rule, each state's designated oversight agency is required to develop a system-safety-program standard establishing the relationship between the oversight agency and local transit agencies. Further, the oversight agency was ordered.

⁴ Both final rules on drug and alcohol testing require testing in the following situations:

- a. Pre-employment (including transfer to a safety-sensitive position within the organization);
- b. Reasonable suspicion;
- c. Random;
- d. Post accident; and
- e. Return to duty/followup.

to issue rules and regulations for its local transit agencies to follow as they prepared the mandated system-safety-program plans. The oversight agency's standard at a minimum was required to comply with the American Public Transit Association's (APTA) "Manual for the Development of Rail Transit System Safety Program Plans."

As the officially designated California oversight agency, the Commission on April 10, 1996, instituted its Rulemaking proceeding, R.96-04-021 to respond to the FTA's 49 CFR Part 654 requirements and avoid financial penalties that the FTA otherwise could impose for non-compliance. After notice and hearing, by D.96-09-081 issued September 20, 1996, the Commission adopted General Order (GO) 164, the Commission's "Rules and Regulations Governing State Safety Oversight of Rail Fixed Guideway Systems." Pursuant to its provisions, each California local transit agency receiving FTA funding was required to prepare and submit for Commission review its System Safety Program Plan conforming to the APTA Guidelines and the rules and regulations in the general order.

BART's program and procedures, prepared to conform to the new federal requirements and GO 164, are dated December 2, 1996. It makes BART's System Safety department responsible for conducting accident investigations. Section 659.41 of 49 CFR Part 659 and Sections 5 and 6 of GO 164 cover requirements that BART and other California rail transit systems must comply with for investigating accidents and unacceptable hazardous conditions. These requirements make it mandatory that accidents are investigated to determine the most probable cause and that a corrective action plan and schedule are implemented in an affirmative effort to prevent a recurrence of the accident.

BART's Substance Abuse Program Policies and Procedures Manual prepared to comply with drug use (49 CFR Part 653) and alcohol misuse (49 CFR Part 654) became effective on January 1, 1995. The program makes employees in safety-sensitive positions subject to the new federal rules. Testing is required pursuant to the FTA's final rule. Refusal to submit to testing is equivalent to a confirmed positive test, and will cause the employee to be immediately suspended without pay for gross

insubordination. BART's drug and alcohol prevention program goes beyond federal requirements.

The Commission's staff procedures for overseeing accident investigations performed by each rail transit agency (including BART) is Rail Transit Safety Section 3, Revision 3 (Procedures for Overseeing Investigations of Accidents and Unacceptable Hazardous Conditions), dated October 4, 1996. It requires our Commission staff to participate in investigations of accidents and unacceptable hazardous conditions to assure that: (1) each investigation is conducted in a credible manner, (2) the pertinent facts are gathered and properly analyzed, (3) accurate conclusions are drawn from the available evidence, (4) the most probable cause and other contributing causes are correctly identified, (5) an appropriate corrective action plan is developed, (6) a reasonable schedule is adopted for implementing the correction action plan, and (7) a comprehensive, objective investigation report is prepared.

Conclusions

As is evident from the foregoing, the Commission holds abundant authority and jurisdiction derived from both federal and state law to oversee BART's System System Safety Program Plans. Moreover, we also have jurisdiction to perform separate, independent investigations at our own discretion in any area concerned with safety, make such orders as we deem necessary with respect to BART's investigations, and at least once every three-years conduct an on-site review of the implementation of BART's System Safety Program Plan to verify compliance and to evaluate the effectiveness of the plan.

This complaint and virtually all its many exhibits, as well as the Superior Court's 1996 decision in Case No. 712582-5, address a situation and conditions that existed in mid-1992, when the unfortunate accident involving Engracia Porter occurred. During the course of that civil suit, extensive evidence was presented concerning BART's accident reporting and investigation procedures in effect in 1992, and BART's drug testing policies and procedures in effect in 1992. The complaint contends that all these revelations and facts expose deficiencies that warrant a Commission investigation.

But the applicable Commission regulations, federal rules, and BART procedures that were in effect at that time have changed so substantially in the intervening time that the factual basis of the complaint no longer exists today. The FTA ordered state oversight of 49 CFR Part 659, and the Congressionally mandated drug and alcohol testing procedures of 49 CFR Parts 653 and 654, taken together with D.96-09-081 and the rules and regulations contained in that decision's new GO 164, present an entirely new safety environment under which not only BART but all of California's rail fixed guideway systems now operate.

It is our conviction that these new procedures and policies must be given opportunity to demonstrate their effectiveness before we should consider any investigation of safety policies and procedures at BART. The remedial steps sought by the complaint are substantially all embraced in the new rules, procedures and policies now in effect. Several of the requested steps are beyond the purview of this Commission as preempted areas by the FTA. Finally, the Commission staff is required to conduct a formal on-site review of BART at least once every three years and to report to the Commission at the end of each such review.

Therefore, having determined that a Commission investigation is neither necessary nor desirable at this time, the complaint should be dismissed.

Findings of Fact

1. BART is a Bay Area rail fixed guideway system made subject to the Commission's jurisdiction by PU Code § 29047 as regards safety practices and procedures.
2. The Urban Mass Transportation Act (Pub. L. No. 88-365, 78 Stat. 302(1964) provided for federal financial assistance to states and local agencies to assist in planning, establishing, and financing mass transit systems.
3. In response to specific accidents, and to ensure the safety of the transit riding public, Congress passed the Omnibus Transportation Employee Testing Act of 1991, and the Intermodal Surface Transportation Efficiency Act of 1991.

4. In response to the Congressional mandate on illegal drug and alcohol abuse, the FTA issued its final rules implementing drug testing, 49 CFR Part 653, and alcohol misuse, 49 CFR Part 654, both effective March 17, 1994, requiring testing, subject to new federal rules, of employees of rail fixed guideway systems, including BART, who are in safety-sensitive positions.

5. BART's Substance Abuse Program Policies and Procedures Manual prepared to comply with Parts 653 and 654 became effective January 1, 1995.

6. In response to the Congressional mandate contained in the Intermodal Surface Transportation Efficiency Act requiring states to oversee the safety of rail fixed guideway systems, the FTA issued its final rule, 49 CFR Part 659 effective January 26, 1996.

7. As the officially designated California oversight agency, the Commission, after Rulemaking proceedings, on September 20, 1996 issued D.96-09-081 adopting GO 164, the Commission's "Rules and Regulations Governing State Safety Oversight of Rail Fixed Guideway Systems."

8. BART's safety program and procedures dated December 1, 1996, conform to the new federal requirements and GO 164.

9. The present complaint is derived from, and based upon, the circumstances attending a serious injury incurred in 1992 by a BART passenger as the result of being struck by a train entering a station, where subsequently in a Superior Court proceeding the train operator was found to have been inattentive and negligent.

10. Applicable Commission regulations, federal rules, and BART procedures that were in effect in 1992, have changed so substantially in the intervening time that the factual basis for the complaint no longer exists today.

11. A Commission investigation, under the changed circumstances, is neither necessary nor desirable at this time.

Conclusion of Law

The complaint should be dismissed with prejudice.

O R D E R

IT IS ORDERED that Complaint 96-08-044 is dismissed with prejudice.

This order is effective today.

Dated June 11, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners