Opinion No. 12-925

July 27, 1912

BY: FRANK W. CLANCY, Attorney General

TO: State Corporation Commission, Santa Fe, N. M.

JURISDICTION OF CORPORATION COMMISSION.

Should make reasonable rules requiring the supplying of cars for traffic, either intrastate or interstate.

OPINION

*{*66}* Your letter of the 25th instant was received the afternoon of the same day, and as you desire my opinion promptly I feel compelled to answer your letter without having given the subject as much investigation as I would like.

In your letter you quote the language to be found in Section 7 of Article XI of the Constitution which gives you the power and charges you with the duty "to make and enforce reasonable and just rules requiring the supplying of cars and equipment for the use of shippers and passengers," and you say the question comes before you on a complaint from Farmington as to the furnishing of refrigerator cars for the handling of fruit of shippers in that section, and you ask whether or not the above provision of the constitution applies exclusively to intrastate traffic, or whether you have authority to require the furnishing of proper cars regardless of whether they are for intrastate or interstate traffic.

I am of opinion it is your duty and within your power to make and enforce reasonable rules requiring the supplying of cars for traffic regardless of whether the traffic is intrastate or interstate. You can have no control over what is done with such cars after they are supplied and the traffic has begun, if it is interstate traffic.

The principal decision to be found in reports of adjudicated cases is that of the Houston & Texas Central Railroad vs. Mayes, which is to be found in 201 U. S. beginning on page 321. The court had under consideration the validity of a Texas statute which required the railway company upon an application in writing, to supply the number of cars required for the shipping of freight, at the point indicated in the application, within a reasonable time thereafter, not to exceed six days, with provisos that if the application be for ten cars or less they must be furnished in three days, but if for fifty cars or more the railway company may have ten full days in which to supply the cars. The statute imposed a penalty on the railway company of $ 25.00 per day for each car failed to be furnished, and in addition all actual damages which the applicant might sustain. The court held against the validity of this statute because it was unreasonable and in its practical operation was "likely to work a great injustice to the roads and to impose heavy

penalties for trivial, unintentional and accidental violations of its provisions, when no damage could actually have resulted to the shippers." The concluding paragraphs of the opinion of the court are as follows:

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably *{*67}* arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of legislation."

It will be seen that from the opinion of the Supreme Court there is an implication that a just and reasonable regulation as to the supplying of cars upon demand might be upheld, although the cars are to be used in interstate commerce; but it is quite clear that no such regulation as that attempted by the Texas statute would be valid. A rule that the railroad companies must furnish cars for the shipment of freight, on demand by the would-be shipper, and of the kind necessary and appropriate to the class of freight to be shipped, within a reasonable time, would probably meet the approval of the Supreme Court of the United States, which is the court of last resort as to any such matter.

A little later the same court in the case of Missouri Pacific Railway vs. Larabee Flour Mills Company, which is reported in 211 U. S. beginning on page 612, had occasion to review a judgment of the courts of Kansas compelling the railway by mandamus to resume the transfer and return of cars loaded and unloaded from the line of a connecting carrier to the flour mill of the flouring company. This case is in point only on the question of whether local state regulation could be applied to the movement of cars to be used in interstate commerce, it appearing that about three-fifths of the flour of the mill company was shipped out of the state. Mr. Justice Moody dissented from the opinion of the majority of the court upon the ground that the cars were already dedicated to interstate commerce, while Mr. Justice Holmes concurred in the judgment on the ground that the cars had not yet been appropriated to interstate commerce, and so were subject to state control.

In the case of the St. Louis Southwestern Railway Company v. State of Arkansas, reported in 217 U. S., beginning at page 136, there is another decision substantially like the Texas case hereinbefore referred to. In this case it appeared that the railroad commission of Arkansas made a rule by which, within five days after written application by a shipper, it was made the duty of a railway company to deliver freight cars to such shipper for the purpose of enabling him to load freight. After a considerable discussion of the facts peculiar to this particular case, the opinion of the court declares that the ruling of the state court involved the assertion of power in the state to absolutely forbid

the efficacious carrying on of interstate commerce or to cause the right to conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties. The opinion shows as a matter of fact that the excuse of the railroad company for failing to furnish cars *{*68}* was ample, and that the failure was wholly due to inability to regain its own cars which had been sent to other roads carrying freight from its own lines.

I find that the Supreme Court of Kansas in the case of Patterson v. Missouri Pacific Coal Company, reported in 77 Kansas at page 236, has upheld the validity of a statute which differed slightly from the Texas statute hereinbefore referred to, the Kansas court relying upon the statement in the opinion of the Supreme Court of the United States that the Texas statute was "not far from the line of proper police regulation." This is substantially the view which I have taken of this matter.

The letter to you from a citizen of Farmington goes far beyond the mere question of furnishing cars for the shipment of fruit, and complains about the necessity of two transfers from a broad gauge road to a narrow gauge, and from a narrow gauge to a broad gauge, at Durango and Alamosa respectively, but those are difficulties with which I cannot see that you have anything to do. They are certainly beyond your jurisdiction and could be dealt with only by the interstate commerce commission. The utmost that you could do would be to investigate and ascertain the facts and submit a report, possibly with recommendations or requests, to the interstate commerce commission.

It is to be noted, however, that the letter from Farmington does not indicate definitely that anything has been done or refused by the railway company which would justify any direct action on your part. Even in the absence of any rule or regulation on your part it is the duty of the railway company to furnish adequate means of transportation of such freight as may be ordinarily expected to seek transportation upon its line, and in the absence of some adequate excuse it must furnish cars when called upon to do so. Until there has been a distinct demand for cars and a refusal or failure, without adequate reason, to furnish the cars, the fruit growers of Farmington are not in position to assert any grievance against the railway company. I may add properly that if refrigerator or ventilated cars are necessary to the transportation of the freight offered, it is the duty of the railway company to furnish such cars. These subjects are very satisfactorily considered in volume 2 of Hutchinson on Railroads (third edition) at sections 495 to 506.