

161.

RAILROADS—A LAW PROVIDING FOR AN AUTOMATIC DISTANT OR CAUTION SIGNAL FOR MAIN TRACKS FACING POINT SWITCHES AND PROVIDING A PENALTY FOR FAILURE TO DO SO, IS A VALID EXERCISE OF POLICE POWER OF THE STATE.

SYLLABUS:

1. *The power of the Federal Government over interstate commerce, interstate carriers and interstate agencies, when exercised, either directly by Congress or through the Interstate Commerce Commission, is supreme and supersedes all state statutes, regulations or control respecting the same subject, and wherever there is a conflict, state legislation must yield.*

2. *When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist.*

3. *Until Congress enters a particular field of regulation, the state may make such regulations under its police power as it deems proper. The power of Congress becomes exclusive and conclusive only when exerted.*

4. *Senate Bill No. 47, providing for an automatic distant or caution signal for main tracks facing point switches, and prescribing a penalty for failure to do so, does not contravene any act of Congress or order of the Interstate Commerce Commission in pursuance of any act of Congress, and while it may incidentally affect, it does not unduly burden interstate commerce, and if enacted into a law will be a valid exercise of the police power of the state.*

COLUMBUS, OHIO, March 19, 1923.

HON. FRANK B. BURCH, Chairman, Senate Labor Committee, Columbus, Ohio.

DEAR SIR:—Acknowledgment is made of your recent communication, enclosing copy of Senate Bill No. 47, in which you request my opinion upon the question of the validity of said proposed act. With your letter you transmit briefs of the proponents and opponents of this bill, and these briefs have been carefully examined.

The bill proposes to supplement section 12550 of the General Code by the enactment of section 12550-1, making it a misdemeanor, and punishable by a fine, for any railroad company, after the first day of January, 1925, to fail to provide and maintain in good working condition an automatic distant or caution signal for all main tracks facing point switches; and by the enactment of section 12550-2, making it obligatory on the Public Utilities Commission of Ohio to prosecute violations.

The opponents of this bill urge that it will be invalid by reason of the fact that Congress, in section 26 of the Interstate Commerce Act, as amended February 28, 1920, authorized the Interstate Commerce Commission, after investigation, to "order any carrier by railroad subject to this Act, within a time specified in the order, to install automatic train-stop or train control devices, or other safety devices"; and that by its order in No. 13413, the interstate commerce commission had ordered the installation of automatic train-stop or train control devices on interstate railroads to be completed by January 1, 1925, and by these provisions the Federal Government occupied, or indicated an intention to occupy, the field of such safety devices as are contemplated by Senate Bill No. 47.

The consideration of the proposition involved in your inquiry raises three questions; one of law, one of fact and one of legislative policy.

The purpose of the distant or caution signal, facing a point switch, as provided in the bill, is to advise the engineman of the condition of the switch he is approaching at a sufficient distance from it to enable him to stop his train, if necessary, before the switch is reached. This bill, like all similar acts, is a safety measure. Like the block system, the automatic coupler, the air-brake, the automatic train-stop, etc., it has for its ultimate end the protection of railroad employes and of passengers and property transported by railroads.

Quoted from the brief of the carriers (p. 5 of the supplement) is a statement from Mr. Robe, representing the engineers before your Committee, as follows:

"This bill No. 47 is for the purpose of protecting against open switches where trains may run in and cause a great loss of life. It calls for automatic signals which naturally would be either electric power or compressed air or something of that sort, which would operate a distant signal if the switch happened to be open or the switch points broken or something of that sort. If the track was bonded, and the switch would be open, the arm of the block would go down to danger and stand at danger. Now this is a safety first bill, not altogether for the fellows on the engine but for them and the traveling public."

By an examination of Interstate Commerce Commission Order in No. 13413, we learn what an automatic train-stop or train control device is and its purpose:

"Definition of automatic train-stop or train-control devices.

A system or an installation so arranged that its operation will automatically result in either one or the other or both of the following conditions:

First. Automatic train stop; the application of the brakes until the train has been brought to a stop.

Second. Automatic speed control; the application of the brakes when the speed of the train exceeds a prescribed rate and continued until the speed has been reduced to a predetermined and prescribed rate."

On page 264 of the Commission's Report is a discussion of the action and purpose of these devices, wherein it is said:

"The essential safety function of any automatic train-stop device is to stop a train where a dangerous condition exists ahead of the train, when the engineman for any cause fails to take proper action to stop."

And further:

"In most recent development of automatic train-control devices, continuous control is obtained whereby the engineman is not dependent upon indications received at fixed locations, but is immediately made aware of a change in condition ahead of his train and may act promptly to govern his train accordingly, but in the event of his failure so to do the device automatically operates to protect the train either by slowing it down or by stopping it."

Then follows a description of some of these devices in use, the most common of which seems to be "by means of a ramp placed outside of and parallel to the

running rails and a shoe placed upon the locomotive or tender in a position where it will come into contact with the ramp as the locomotive or tender passes the ramp location."

On page 273 of the Commission's order, this language appears:

"Much has been done to furnish the engineman with reliable information, by means of wayside signals, of the conditions of the track ahead, but progress has been slow in providing means to automatically compel obedience to the signal indications. The fact remains that the correct operation of trains in compliance with the signals still depends entirely upon the knowledge, alertness and skill of the engine crew. The danger is ever present that the engineman may fail to observe, correctly interpret, and obey the signals. Our accident reports have repeatedly shown this to be true. From January 1, 1911, to March 31, 1922, we investigated 80 collisions, which occurred upon automatic block-signalized lines, due directly or indirectly to the failure of the engineman to observe or to be governed by signal indications."

From these quotations it appears that the two devices, while intended to subserve the same end, to-wit, the safety of the train and its cargo, either of human lives or property, the one apparently supplementing the other, are essentially different in construction, operation and purpose and may differ in location; the one is to notify the engineman so he can function; the other to do the work if he fails; one operates on the animate agency, the engineman; the other on the inanimate agency, the train itself. Whether the automatic train-stop or train control device can be made to serve the same purpose as the automatic distant or caution signal, is a question of fact; and if found to exist and it is further found that the field has not been pre-empted by Congress, it then becomes a question of legislative policy which the legislature must determine for itself. The question of cost of installation is also a question of legislative policy.

Passing now to the question of law, I may say that the law with reference to the propositions advanced is well settled and is in fact no longer open to discussion.

Recent legislation by Congress and orders of the interstate commerce commission which have been sustained by the Supreme Court, make practically all railroads interstate roads, and if Congress has entered upon the field covered by the proposed act, or manifested an intention to do so, either directly or through the interstate commerce commission, the legislature of Ohio would be doing a vain thing to attempt to legislate upon the same subject matter, because the act of Congress would simply supersede and make inoperative the action of the state.

Quoting from *Houston, etc., v. United States*, 234 U. S., 342, it is said:

"It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. * * * Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and

dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field."

And from *Erie Railroad Company v. New York*, 233 U. S., 681:

"The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist."

Also the *Northern Pacific Railway Company v. State of Washington*, 222 U. S., 370:

"It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power."

In the case of *Southern Railway Company v. Railroad Commission of Indiana*, 236 U. S., 439, speaking of the Federal safety appliance acts, the Supreme Court says:

"Until Congress entered that field, the states could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. * * * Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and ipso facto supercedes existing state legislation on the same subject. * * * The states thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties."

In the case of *Atlantic Coast Line Railroad v. Georgia*, 234 U. S., 280, the Supreme Court, speaking through Mr. Justice Hughes, at page 291 said:

"But the court ruled that these 'possible inconveniences' could not affect 'the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains, as in its judgment, all things considered, is appropriate and effective.'

"In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation."

The law being thus settled, it remains to determine whether as a fact the proposed legislation trespasses upon the field already occupied by the legislation of Congress. It is believed that the definitions and explanations hereinbefore

given show that the automatic train-stop or train control device is different and occupies a wholly separate field from the character of the device described in Senate Bill No. 47.

But it is argued by the opponents of the bill that Congress has at least manifested an intention to occupy this field by the language used in section 26 of the interstate commerce act, as amended by the use of the words "or other safety devices," after the other words "automatic train-stop or train control devices."

Automatic train-stop or train control devices are not necessarily signals, but, as before shown, are to operate *upon the train movements* in the event that a signal is disregarded; and it is believed that the addition of the words "or other safety devices", by the application of the doctrine of *ejusdem generis*, simply means devices of the same general kind as that already enumerated.

The term "ejusdem generis" (19 C. J., 1255) means

"literally 'of the same kind or species'. A well known maxim of construction, to aid in ascertaining the meaning of a statute or other written instrument, the doctrine being that, where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind."

Under this doctrine these "other safety devices", as used in section 26 of the transportation act, refer to the train-stop or control variety.

It would appear that opponents of the bill materially weaken their contention that Congress has pre-empted the field under discussion by the use in their brief at page 15 of this language:

"We therefore respectfully submit that this legislature should not enact into law any bill requiring any specific safety devices, when it is perfectly clear that such devices, *in a few years, may have to be entirely junked*, because of orders of the Interstate Commerce Commission, such as the one in Docket 13413."

The plain indication of this language, it would seem, is an admission that neither Congress nor the Interstate Commerce Commission has occupied the field, but may do so "in a few years".

It follows, therefore, from the foregoing discussion, and I am of the opinion, that:

1. The power of the Federal Government over interstate commerce, interstate carriers and interstate agencies, when exercised either directly by Congress or through the Interstate Commerce Commission, is supreme and supersedes all state statutes, regulations or control respecting the same subject, and wherever there is a conflict, state legislation must yield.

2. When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist.

Until Congress enters a particular field of regulation, the state may make such regulations under its police power as it deems proper. The power of Congress becomes exclusive and conclusive only when exerted.

4. Senate Bill No. 47, providing for an automatic distant or caution signal for main tracks facing point switches, and prescribing a penalty for failure to do so, does not contravene any act of Congress or order of the Interstate Commerce

Commission in pursuance of any act of Congress, and while it may incidentally affect, it does not unduly burden interstate commerce, and if enacted into a law will be a valid exercise of the police power of the state.

Respectfully,

C. C. CRABBE,

Attorney General.

162.

APPROVAL, BONDS OF STOCKDALE RURAL SCHOOL DISTRICT, PIKE COUNTY, \$25,500.00, TO PURCHASE SITE AND EQUIP AND FURNISH A NEW HIGH SCHOOL BUILDING.

COLUMBUS, OHIO, March 19, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

163.

APPROVAL, BONDS OF JACKSON TOWNSHIP RURAL SCHOOL DISTRICT, MAHONING COUNTY, \$47,000, TO ERECT AND FURNISH ADDITION TO SCHOOL BUILDING.

COLUMBUS, OHIO, March 19, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

164.

APPROVAL, BONDS OF BRIDGEPORT VILLAGE SCHOOL DISTRICT, BELMONT COUNTY, \$9,000, TO COMPLETE A SCHOOL BUILDING.

COLUMBUS, OHIO, March 20, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.