

Railroad Company, Duty of to Supply Passenger Service. Railroad Company, May Operate Exclusive Freight Line. Railroad Company, Rate of Fare to be Charged by. Fare, to be Charged by Railway Company. Railroad Commission, Power of to Order Passenger Service.

A railway company, building for its own convenience a line for the exclusive handling of freight, is not obligated to carry passengers over such line, and where, between given points such freight line is shorter in mileage than its main line, used as a

carrier of passengers, a railway company may transport passengers over the longer distance, and at a rate not in excess of three cents per mile for the distance actually traveled.

The railroad commission has power, after a hearing afforded a railroad company, to order the installation of passenger service where the public necessity warrants the same.

Helena, Montana, October 30, 1909.

The Railroad Commission of the State of Montana,

Helena, Montana.

Gentlemen:—

I am in receipt of your letter of October 8, wherein you make the following statement of facts:

That there has recently been constructed by the Northern Pacific Railway Company a line extending from St. Regis, on the Coeur d'Alene branch of said railroad, to Paradise, on the main line of said railroad; that the distance between these two points is approximately twenty-two miles; that this line is used by the Northern Pacific Railway Company for the purpose of transporting freight from Paradise to Missoula; that no passenger service is operated over said line, but that permits are issued to men, permitting them to ride on cabooses attached to freight trains operating between the two points, but that women and children are not received as passengers, and your query is as to the obligation of the railway company to operate passenger service between Paradise and St. Regis or to sell tickets between these points, based upon actual mileage along the line of this new branch.

The question as to whether or not the railway company is under any obligation to operate freight trains over this line depends, to a considerable extent, upon the provisions of its charter. The charter granted to the St. Croix & Railroad Company, the predecessor of the Northern Pacific Railway Company, by the State of Wisconsin, is silent both as to the kind of trains and the manner and frequency of operation. We are unable to find any discussion by courts of last resort on a question identical with the one which you present, but there are many decisions dealing with questions of a similar nature.

The general rule prevails in most of the American states that an explicit charter provision requiring the operation of a public system will be enforced, and if necessary mandamus will issue to compel operation. The leading case holding this view is *United States v. Union Pacific Company*, 160 U. S. 1. However, where no express charter provision is found, it appears that the railroad company may operate its trains under such rules and regulations as to it seems best in the transaction of its general business.

Section 4275, revised codes of Montana, grants to every railroad corporation the power (subdiv. 10) to regulate the time and manner in which passengers and property shall be transported, subject, of course, to the will of the legislative assembly.

It appears that the line in question was constructed for the purpose of avoiding the heavy grade encountered on the main line on what is known as Evaro mountain, and is used exclusively for the transportation of freight trains, the new line affording a water grade between Paradise and Missoula. No freight trains are operated eastward over the main line between Paradise and DeSmet, and only one train, a fast freight, known as No. 53, is operated west over this stretch of track. It is reasonable to suppose, under this statement of facts, that the railway company built this new line at considerable expense to itself for its own convenience in handling heavily laden trains, reducing the grade materially, and by segregating the traffic facilitating the movement of its trains, both freight and passenger. In other words, the construction of the link between St. Regis and Paradise constituted practically the installation of a double track system between DeSmet and Paradise; the one line used exclusively for the passenger traffic, the other used entirely for the transportation of freight.

It is true the railway company has heretofore established the practice of allowing adult male passengers to ride on its freight trains between St. Regis and Paradise. This regulation, however, is one entirely within the discretion of the railway company's officials. The authorities are all agreed that a railway company is under no obligation to receive and transport passengers upon its freight trains, and when this is done it is simply an accommodation afforded to the public by the company and could not be taken by your commission as a precedent showing the establishment of passenger transportation over this line, and if used as a basis for the issuance of an order directing the installation of a passenger service, which would accommodate women and children as well as men, this practice would undoubtedly be discontinued.

It is fair to assume that the operation of a passenger service between St. Regis and Paradise could be conducted only at a loss to the company. The reasonableness of an order requiring passenger service over this new line would, in our judgment, in view of all the authorities, be inquired into by the court, in the event that the order is resisted. And, further, if the commission is inclined to require the railway company to install passenger service over this line, to be operated upon a regular schedule, it would undoubtedly be necessary, under the provisions of the act establishing a railroad commission in this state, to afford the railway company a hearing, at which the reasonableness or unreasonableness of the service would be inquired into by the commission.

You are therefore advised that in my judgment, assuming, of course, that a regular passenger train upon this line could only be operated at a loss, that it is beyond the power of the commission to require such service.

The second question presented by your letter goes to the rate of fare for transporting persons between Paradise and St. Regis, and other points east of St. Regis and west of DeSmet.

Section 4349, revised codes, fixes the maximum rate which the

railroads may demand for the carriage of passengers in this state at three cents per mile, the exact wording of this particular part of said section is as follows:

"A sum not exceeding three cents per mile for the distance to be traveled by such person."

The distance to be traveled by a passenger embarking at Paradise, bound for St. Regis, is at present 150 miles, and the fare charged, we assume, is not in excess of three cents per mile for that distance. I believe that the railway company is within its rights, under this statute, when it charges not more than three cents for the distance thus actually traveled.

In the handling of freight from DeSmet, and points east thereof, to Paradise, or from Paradise to DeSmet, and points east thereof, the actual mileage of the new line is not considered, but the freight operations are based upon the short line wholly between these points, being the main line of the Northern Pacific Railway, and this is proper, for the reason that both lines are suitable for the transportation of freight, as has been shown by the operation heretofore over the main line and the present operation over the line along the Missoula river. But the railway company is acting within its rights when it elects to haul its heavy tonnage over the longer line for its own convenience and profit in eliminating the heavy grade.

This consideration brings us to what is, perhaps, the actual fact, that this new line was constructed simply for the convenience of the railway company in transporting heavy trains. So far as we know, the railway has not held itself out as a carrier of passengers over this line, and does not solicit that class of business in this particular place.

The authorities which we have examined seem to indicate that a transportation company may limit its operation to any general class of transportation.

The English cases, which have been generally followed in this country, hold, for instance, that a carrier may operate a railroad, or other means of transportation, for the purpose of carrying coal only, and that such company is within its rights in refusing to carry other merchandise of a different class.

A volume on railroad rate regulations (Beale & Weyman), devotes a chapter to the discussion of the withdrawal of certain forms of service by railway companies.

In the case of *Commonwealth v. Fitchburg Railroad*, a Massachusetts case, 12 Gray 180, the defendant railway company, after due notice, discontinued passenger service over a part of its line, but still continued the freight service. This action was taken by the railway company, as it appears, for the reason that a competing electric line, paralleling the railroad, affords competition rendering the passenger service unprofitable, and the court held that this was a justifiable procedure on the part of the railroad company under the conditions.

If this decision expresses the law, then the facts in the case under discussion would be governed thereby, for the reason that the Northern Pacific Railway Company has, if anything, a stronger case than the

Fitchburg Railroad Company, for the reason that no passenger service has ever been installed over this new line.

Assuming that the railway company does not care to transport any passengers over this line, and that they would hereafter discontinue the issuance of permits, in the event that the question of discrimination between male and female passengers were raised, we believe that the regular fare over the main line, the Coeur d'Alene branch of the Northern Pacific Railway Company, may be charged passengers between Paradise and St. Regis, and intermediate points.

Summarizing, briefly, you are advised that we believe that it is beyond the jurisdiction of the railway commission to require the installation of a passenger service between St. Regis and Paradise, assuming, of course, that this operation would be unprofitable, and that the public service does not require it. And,

Second: That the railway company, transporting its passengers over the longer route, may charge at a rate of not exceeding three cents per mile, on the basis of mileage over the longer route.

Yours very truly,

ALBERT J. GALEN,

Attorney General.