

Railroad Commission, No Authority Over Lake Transportation. Navigable Streams, No Authority Over Vested in Railroad Commission. Docks and Wharves, Authority of Railroad Commission Over.

The board of railroad commissioners has no authority over transportation by boat on Flathead lake. Said board has authority to fix dockage and wharfage charges on navigable waters, whether such docks were constructed prior to or subsequent to the enactment of chapter 38, laws of 1909.

Helena, Montana, May 5, 1910.

The Railroad Commission of Montana,
Helena, Montana.

Gentlemen:

I am in receipt of your letter of April 21, wherein you submit for my official opinion the following questions:

"1. Has the railroad commission jurisdiction over transportation by boat on Flathead lake?

"2. Must a person constructing a dock of wharf upon 'lands under water' build the same far enough out to permit the landing of all boats plying on that stream or lake?

"3. Has the railroad commission jurisdiction over the Somers dock, which was constructed prior to the enactment of chapter 38, laws of 1909?"

In reply to your first question, you are advised as follows:

Section 4373 and section 4374, revised codes, both sections being devoted to the various terms used in the act creating a railroad commission, seem to attempt to extend the provisions of this act to the transportation of property by any common carrier between points within the state of Montana.

Section 4373 clothes your commission with authority over the transportation of "passengers and property between points within this state, and to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith."

Section 4373 defines the word "railroad" as meaning any common carrier.

However, in the interpretation of these two sections, which are extremely broad, we must consider the provisions of the state constitution

in its limitations upon the action of the legislative assembly, and we must also bear in mind the scope and effect of the entire act creating your commission, and the legislative intent at the time of its passage.

Section 23, article 5, of the constitution, provides that no bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall contain more than one subject, which shall be clearly expressed in its title. The same section provides that if any subject not expressed in the title shall be embraced in any act, that the act shall be void as to so much thereof as is not expressed in the title.

The title of the bill creating the Montana railroad commission, section 37, session laws of 1907, is as follows:

"An Act to Create and Establish a Board of Railroad Commissioners for the State of Montana; Providing for the Appointment and Election of the Members thereof, and Defining their Powers and Duties, and Providing Remedies for the Enforcement of the Provisions of this Act, and Penalties for the Violation thereof."

You will notice that this title purports to create and establish a "board of railroad commissioners," and does not go so far as to establish a board having jurisdiction to regulate and control the business of common carriers, generally, or of those engaged in the business of transporting passengers and property for hire. There is expressed in the title nothing which could be construed to give the commission jurisdiction or supervision over boats or stage coaches, or other common carriers than railroads.

Looking at the title, with the constitutional provision above referred to, I am of opinion that the jurisdiction and authority of the board is confined to those common carriers who operate a railroad between points within this state.

The general power and authority conferred upon the commission by Section 4363, and following sections, seem clearly to confine the power of the board to the regulation of railroad rates, together with additional powers (section 19) giving the commission authority to regulate train service and station accommodations.

Section 4374, in my opinion, cannot extend or enlarge the meaning of the word "railroad," as used in the title of the act, as in common acceptance, and in law, the word "railroad" has a well-defined and positive meaning.

In *Funks v. St. P. C. R. Co.*, 61 Minn. 435, the following definition is found:

"The common understanding of a railroad is that it is a graded road or way on which rails of iron or steel are laid for the wheels of cars to run upon, carrying heavy loads, usually propelled by steam."

And this definition, except as to the motive power, was impliedly adopted by the supreme court of Montana in *Daly Bank & Trust Co. vs. Great Falls Street Railway Co.*, 32 Mont. 298.

In *Peoria & P. U. Ry. Co. vs. Tamplin*, 156 Ill., 40 N. E. 960, the court said:

"A railroad is a road especially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power, to run upon."

And it has also been said:

"In a broader sense a railroad includes all the land, works, buildings and machinery required for the support and use of the road and way, with its rails."

Chicago, St. L. & P. R. vs. Elsert, 127 Ind. 156, 26 N. E. 759.

After a careful consideration of the constitutional limitation, and the scope of the entire act creating your commission, as it appears to me, I am of the opinion that it was not the intention of the legislature to extend the jurisdiction of your commission beyond the matter of regulating the rates, service and accommodations of railroads, as such.

In answer to your second question, you are advised that chapter 38, session laws of 1909, grants a license and permit to every riparian owner to build a dock over the "lands under water," which becomes a public dock, but the builder is limited in this respect: That he cannot build it further out into the water than to a distance which will give sufficient depth of water to accommodate all boats plying upon said water.

I do not believe, however, that the limitation extends in the other direction, and that he must build for the accommodation of all vessels of whatever draught.

The building of larger vessels, requiring more water to float them, would, if this construction were placed upon the law, require the dock owners to keep adding continually to the length of their docks, at an expense, perhaps, which was not contemplated at the out-set and does not seem to be contemplated by the law. In fact, the provision of the bill as to the length of docks seems to be considerably involved and useless, in that a person is prohibited from extending his dock into a depth of water greater than that required by any boat plying the particular navigable stream or lake, when, as a matter of fact, there may be a great number of boats wishing to dock at the same time, and if the length of the dock were limited the accommodations would necessarily be restricted to one boat.

I believe that any reasonable regulation made by the railroad commission, in pursuance of the authority conferred upon them by section 5 of chapter 38, above referred to, would be sustained by the court. But, so far as Flathead lake is concerned, the limitation as to the length of dock, found in section 1, seems to be in itself unreasonable, while it might be reasonably applied along the banks of rivers where a dock extending into mid-channel, or beyond, would be an obstruction to navigation.

In answer to your third question, you are advised that my interpretation of chapter 38, laws of 1909, is such that your commission has jurisdiction over the Somers dock, constructed prior to the passage

of chapter 38, above referred to, but without authority of law, to the same extent as it has over docks constructed subsequent to the passage of said act.

Very truly yours,

ALBERT J. GALEN,

Attorney General.