

**Constitutional Law—Commerce Clause—Railroad Held Liable for Safety Appliance Acts Violations (United States v. Seaboard Air Line R.R., 361 U.S. 78 (1959))**

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—RAILROAD HELD LIABLE FOR SAFETY APPLIANCE ACTS VIOLATIONS.—Defendant railroad prevailed at trial and primary appellate levels in a suit for statutory penalties under the Safety Appliance Acts. The violations alleged were based on movements of rolling stock by yard crews and engines without operable air-brakes save those on the engines. The acts, by permissive regulation of the ICC, require that all cars involved in interstate commerce be equipped with power-brakes and that eighty-five per cent of the cars in any train have them in operating condition. The journeys in question, while only covering two miles, were intersected by roads and railroad tracks. The Supreme Court, in reversing the Court of Appeals, *held* that such movements constituted train movements within the purview of the acts and were therefore subject to the brake regulations. *United States v. Seaboard Air Line R.R.*, 361 U.S. 78 (1959).

The Safety Appliance Acts,<sup>1</sup> the first of which was promulgated in 1893, had as their ultimate object the increased protection of railroad passengers and employees.<sup>2</sup> Their immediate objective related to the compulsory use of certain safety devices, commencing with the equipping of all rolling stock with power brakes and automatic couplers,<sup>3</sup> and secondly, the use of air-brakes operable from the engine<sup>4</sup> in varying quantities.<sup>5</sup> The purpose was to discourage use of hand brakes and pin-bar couplings through imposition of a \$100 fine

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<sup>1</sup> 27 Stat. 531 (1893), 32 Stat. 943 (1903), 36 Stat. 298 (1910), as amended, 45 U.S.C. §§ 1-16 (1958). Modifications have been made by means of ICC regulations.

<sup>2</sup> Preamble, 27 Stat. 531 (1893). See, *e.g.*, *Delk v. St. Louis & S.F.R.R.*, 220 U.S. 580, 582 (1911); *Andersen v. Bingham & G. Ry.*, 169 F.2d 328, 330 (10th Cir. 1948); *United States v. New York Cent. & H.R.R.*, 205 Fed. 428, 429 (W.D.N.Y. 1913); *United States v. Chicago, M. & St. P. Ry.*, 149 Fed. 486, 488 (S.D. Iowa 1906).

<sup>3</sup> See *Delk v. St. Louis & S.F.R.R.*, *supra* note 2.

<sup>4</sup> 27 Stat. 531 (1893), 45 U.S.C. § 1 (1958). *But see* *Richmond, F. & P.R.R. v. Brooks*, 197 F.2d 404, 407 (D.C. Cir. 1952) (split control of brakes between engineer and conductor, apparently a departure from the act, is allowed because it fulfills the original legislative intent).

<sup>5</sup> 27 Stat. 532 (1893), 45 U.S.C. § 1 (1958) (called for sufficient air-brakes to be installed so as to preclude use of the common hand brake); 32 Stat. 943 (1903), 45 U.S.C. § 9 (1958) (wherein the percentage was set at 50% and the ICC was empowered to alter the rate following suitable hearings and deliberations); 11 ICC Rep. 429 (1905) (the percentage was raised to 75%); 49 CFR 132.1 (1958) (raised in 1910 to 85%, the present ratio).

per violation.<sup>6</sup> The remedial and humanitarian nature of the acts led to a liberal construction of their protection,<sup>7</sup> *e.g.*, to include vehicles and persons at grade crossings,<sup>8</sup> and men unloading freight cars.<sup>9</sup>

The present issue, *viz.*, does the movement of cars in the manner indicated constitute a switching action or a train movement, has many times been before the courts.<sup>10</sup> There is apparently no solution either extant or in the offing principally as a result of two factors: first, there are no clear and authoritative definitions indicated in the acts,<sup>11</sup> and neither Congress nor the ICC has undertaken to compose any; second, the judiciary's approach to the question places stress on the particular facts of the situation, thereby endorsing and effecting a policy of broad discretion.<sup>12</sup>

Despite inescapable variations in construction, some points were established against which no argument was raised. Thus, it was accepted that the brake provisions applied only to "train movements," "switching actions" being exempt.<sup>13</sup> It was also settled that the general test to be applied in deciding between a "train" and a "switching" action would be "the essential nature of the work done rather than in the names applied to those engaged in it."<sup>14</sup> Also in line with the policy of judicial discretion, the pronouncements of courts placed the "train versus switching action" dispute in the realm of law, deter-

<sup>6</sup> The penalty was changed to \$250 after the instant action was commenced. 71 Stat. 352 (1957), 45 U.S.C. § 6 (1958).

<sup>7</sup> See, *e.g.*, *United States v. Houston Belt & Terminal Ry.*, 210 F.2d 421, 425 (5th Cir. 1954); *Southern Pac. Co. v. Carson*, 169 F.2d 734, 736-37 (9th Cir. 1948); *United States v. Chicago, St. P., M. & O. Ry.*, 43 F.2d 300, 302 (8th Cir. 1930); *Bocook v. Louisville & N.R.R.*, 67 F. Supp. 154, 159 (E.D. Ky. 1946).

<sup>8</sup> See *Andersen v. Bingham & G. Ry.*, 169 F.2d 328, 330 (10th Cir. 1948).

<sup>9</sup> *Rush v. Thompson*, 356 Mo. 568, 202 S.W.2d 800, 806 (1947).

<sup>10</sup> See, *e.g.*, *Chicago & E.R.R. v. United States*, 22 F.2d 729 (7th Cir. 1927); *Illinois Cent. R.R. v. United States*, 14 F.2d 747, 748 (8th Cir. 1926).

<sup>11</sup> See *United States v. Panhandle & S.F. Ry.*, 203 F.2d 241, 246 (5th Cir. 1953); *United States v. Chicago, B. & Q.R.R.*, 199 F.2d 223, 226 (7th Cir. 1952).

<sup>12</sup> See *United States v. Chicago, B. & Q.R.R.*, *supra* note 11. The court indicates dissatisfaction with the continuance of the problem, as well as its remaining in the hands of the judiciary.

<sup>13</sup> *United States v. Chicago, B. & Q.R.R.*, *supra* note 11, at 224; *Philadelphia & R. Ry. v. Bartsch*, 9 F.2d 858, 860 (3d Cir. 1925).

<sup>14</sup> *United States v. Chicago, B. & Q.R.R.*, 237 U.S. 410, 413 (1915); *accord*, *United States v. Texas & N.O.R.R.*, 13 F.2d 429, 431 (S.D. Tex. 1926). This principle meant purpose, not appearance, but also came to mean inherent character of the activity, *i.e.*, hazardous to life, therefore within the legislative intent of the acts. See *United States v. South Buffalo R.R.*, 168 F.2d 948 (2d Cir. 1948). As a corollary, the motive vehicle was not restricted to regular locomotives, but applied to any device moving a string of cars. See *Spokane & Inland Empire R.R. v. Campbell*, 241 U.S. 497, 507 (1916) (electric engine); *Hoffman v. New York, N.H. & H.R.R.*, 74 F.2d 227, 232 (2d Cir. 1934) (gasoline engine); *United States v. Great No. Ry.*, 73 F.2d 736, 739 (9th Cir. 1934) (switching engine); *United States v. Fort Worth & D.C. Ry.*, 21 F. Supp. 916, 918 (N.D. Tex. 1937) (locomotive crane).

minable by a court, not a jury.<sup>15</sup> These are generically "rules," but actually they lead back to the original query what is a "train"; what is a "switching" action.

Within the two areas, however, certain fundamentals have been evolved. The unrefined norm for deducing the presence of a "train" suggested that it "consists of an engine and cars which have been assembled and coupled together for a run or trip along the road."<sup>16</sup> Conversely, it was reckoned that "various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up,"<sup>17</sup> or, "sorting, or selecting, or classifying of [cars], involving coupling and uncoupling, and the movement of one or a few at a time for short distances,"<sup>18</sup> evidenced a switching action.<sup>19</sup> Other factors which are given weight include distance and size of convoy, normal rate of speed and traffic on the track used, and hazards afforded other trains, persons and vehicles at grade crossings.<sup>20</sup> Judicial application of these diverse terms to individual litigations has provided widely divergent results, even between cases amazingly similar in fact.<sup>21</sup> The trouble lies not in the recognition of rules, for they are plentiful, but in their application within each of the two areas.

In *United States v. Erie R.R.*,<sup>22</sup> "movements in railroad yards whereby cars are assembled and coupled" defined the activity of the "switching action." Negative attempts at definition have cautioned that the distance travelled and the number of cars moved are not to be controlling;<sup>23</sup> nor is the fact that a mainline has been used.<sup>24</sup> Illustrative of "switching actions," are instances where forty-seven to eighty-seven cars were moved within a single yard over two miles without stopping, encountering two private roads but no tracks, with

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<sup>15</sup> *United States v. Thompson*, 252 F.2d 6, 9 (8th Cir. 1958).

<sup>16</sup> *United States v. Erie R.R.*, 237 U.S. 402, 407 (1915).

<sup>17</sup> *Id.* at 408.

<sup>18</sup> *Louisville & J. Bridge Co. v. United States*, 249 U.S. 534, 538 (1919).

<sup>19</sup> *Louisville & J. Bridge Co. v. United States*, *supra* note 18; see *United States v. Erie R.R.*, *supra* note 16.

<sup>20</sup> *United States v. Panhandle & S.F. Ry.*, 203 F.2d 241, 246 (5th Cir. 1953); *United States v. South Buffalo R.R.*, 168 F.2d 948, 952 (2d Cir. 1948) (hazard to plant workers at entrance gate); *Illinois Cent. R.R. v. United States*, 14 F.2d 747, 749 (8th Cir. 1926). Noting that most cases mention the presence of main track, this is but an evidentiary fact, not operative, toward estimating the potential hazards to life and property. See, *e.g.*, *United States v. Northern Pac. Ry.*, 254 U.S. 251, 254 (1920); *Louisville & J. Bridge Co. v. United States*, 236 Fed. 1001, 1006 (W.D. Ky. 1916); *United States v. Texas & N.O.R.R.*, 13 F.2d 429, 431 (S.D. Tex. 1926); *United States v. Northern Pac. Ry.*, 54 F.2d 573, 574 (9th Cir. 1931).

<sup>21</sup> Compare *United States v. South Buffalo R.R.*, 168 F.2d 948 (2d Cir. 1948), with *United States v. Elgin, J. & E. Ry.*, 182 F.2d 1 (7th Cir. 1950).

<sup>22</sup> 237 U.S. 402, 408 (1915).

<sup>23</sup> *United States v. Elgin, J. & E. Ry.*, *supra* note 21, at 4.

<sup>24</sup> See note 20, *supra*.

the purpose of servicing two industries,<sup>25</sup> and where thirty-nine cars were run four miles within a yard over secondary tracks without stopping, in order to reach an inspection area.<sup>26</sup> Additional single-yard examples include the taking of twenty-three cars at a maximum of ten miles per hour over a two-mile lead track which was intersected by an extremely busy highway and a less vital road, and running thirty-three cars within the sight of the yard master a distance of one and one-half miles over a secondary track unused by road trains and under the control of yard crews, both times passing through a guarded crossing.<sup>27</sup>

"Train movement" was judicially determined in *United States v. Boston & M.R.R.*<sup>28</sup> as an "aggregation of cars drawn by the same engine, and, if the engine is changed, . . . there is a different train." *United States v. Grand Trunk Ry. of Canada*<sup>29</sup> saw "cars coupled together and locomotives drawing them," as the essence, while the case of *United States v. South Buffalo R.R.*<sup>30</sup> characterized the "train movement" as the transfer of cars from one switching point to another. In evaluating the essentials of "trains," movements by the carrier for a commercial purpose are important, while the fact that the cars are empty is not;<sup>31</sup> movements within an area designated by the company as one yard are not automatically beyond the designation "train";<sup>32</sup> performance of switching actions before the completion of an overall "train" movement will not effect the removal of that movement from within the brake provisions of the acts;<sup>33</sup> classification of movements as "switching" for reasons of accounting, even if done with the consent of the ICC, does not preclude actual treatment as "trains."<sup>34</sup> To exemplify a combination of factors: forty-three, thirty-one, and forty-nine car movements of two to four miles, partially on main lines intersected by roads and other railroads, accomplished by yard crews and engines, were deemed "trains," although speeds reached only six to nine miles per hour and the ultimate purpose

<sup>25</sup> *United States v. Elgin, J. & E. Ry.*, *supra* note 21.

<sup>26</sup> *United States v. New York Cent. & H.R.R.*, 205 Fed. 428 (W.D.N.Y. 1913).

<sup>27</sup> *United States v. Chicago, B. & Q.R.R.*, 199 F.2d 223 (7th Cir. 1952).

<sup>28</sup> 168 Fed. 148, 153 (D. Mass. 1909).

<sup>29</sup> 203 Fed. 775, 776 (W.D.N.Y. 1913).

<sup>30</sup> 168 F.2d 948, 951 (2d Cir. 1948).

<sup>31</sup> See *Chicago & N.W. Ry. v. United States*, 168 Fed. 236, 237 (8th Cir. 1909).

<sup>32</sup> *United States v. Panhandle & S.F. Ry.*, 203 F.2d 241, 245-46 (5th Cir. 1953); *United States v. Southern Pac.*, 60 F.2d 864, 865 (9th Cir. 1932); *Illinois Cent. R.R. v. United States*, 14 F.2d 747, 749 (8th Cir. 1926); *Great No. Ry. v. United States*, 288 Fed. 190, 191 (8th Cir. 1923).

<sup>33</sup> *United States v. Texas & N.O.R.R.*, 13 F.2d 429, 431 (S.D. Tex. 1926) (dictum).

<sup>34</sup> *United States v. South Buffalo R.R.*, 168 F.2d 948, 949, 951 (2d Cir. 1948).

was to detach cars at intervals.<sup>35</sup> Another case<sup>36</sup> involved sixteen cars being drawn one and one-quarter miles by a switch engine without halting, but crossing four streets and the tracks of two other railroads. The facts were declared sufficiently similar to the case of *Louisville & Jeffersonville Bridge v. United States*<sup>37</sup> to warrant a like decision, *viz.*, that a train movement had occurred. In *United States v. South Buffalo R.R.*,<sup>38</sup> the cause arose when cars bound for distribution to industries were moved two miles at five miles per hour within private property, and in so doing passed guarded gates used heavily by the employees. In *United States v. Thompson*<sup>39</sup> the facts were these: nineteen cars covered one and one-quarter miles of main line in a three mile run, and the same crew and engine returned over the same route with twenty-five cars, crossing two private and barred roads in both processes.

For the sake of comparison the details of the instant case were these: four groups of cars ranging from twenty-three to forty-nine units moved a maximum distance of two miles without stopping in order to deliver or recover cars from two industrial consignees. The only operable air-brakes were those on the engine; further, several road crossings were encountered as well as an inter-railroad transfer track.<sup>40</sup> The Supreme Court held a "train movement" had occurred.

The result of the foregoing leaves us basically with our original query.<sup>41</sup> We have certain general tests, which the courts apply to litigations having hundreds of variables. A clearly defined distinction has remained highly elusive. From the myriad of cases is to be deduced neither concrete principle nor clear-cut policy. Indeed, case constructions serve to compound the confusion, to create doubt and uncertainty.

At best the instant case can be assayed as having limited value: limited, because it leaves the crux of the problem, *i.e.*, non-definition, intact; yet of some value because it provides another interpretive example for use in future judicial actions faced with the issue whether a train movement or a switching action is at hand.

It is submitted that the problem has been too long unanswered, and that this case does little towards resolving it. Left to the courts for over sixty-five years, the results have been unfortunate and un-

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<sup>35</sup> *United States v. Galveston, H. & H.R.R.*, 255 Fed. 755 (5th Cir. 1919). The opinion reasoned that *any* movement, even two to four miles, of freight towards its ultimate destination signified a train. *Id.* at 758.

<sup>36</sup> *Chicago, St. P., M. & O. Ry. v. United States*, 36 F.2d 670 (8th Cir. 1929).

<sup>37</sup> 249 U.S. 534 (1919).

<sup>38</sup> 168 F.2d 948 (2d Cir. 1948) (held a train movement).

<sup>39</sup> 252 F.2d 6 (8th Cir. 1958) (held a train movement).

<sup>40</sup> *United States v. Seaboard Air Line R.R.*, 361 U.S. 78 (1959).

<sup>41</sup> Indeed, some jurists feel that perhaps there is no exact rule for differentiating between a train movement and a switching action. See *Chicago & E.R.R. v. United States*, 22 F.2d 729, 730 (7th Cir. 1927).

successful. The need lies in the lack of clarity surrounding the conditions suggested by the letter and spirit of the air-brake provisions. This corrected, the medial difficulties of judicial construction would be eliminated. But the solution can only be supplied by the Congress or the ICC.



CONSTITUTIONAL LAW—FREE SPEECH—ORDINANCE PROHIBITING DISTRIBUTION OF ANONYMOUS HANDBILLS HELD UNCONSTITUTIONAL.—Defendant was convicted of violating a Los Angeles ordinance prohibiting distribution of anonymous handbills.<sup>1</sup> On certiorari the Supreme Court *held* that the ordinance was an unconstitutional restraint on free speech. *Talley v. California*, 362 U.S. 60, (1960).

By virtue of the first and fourteenth amendments of the United States Constitution all persons are guaranteed the freedoms of speech and of the press.<sup>2</sup> It is also well settled that municipal ordinances adopted under state authority constitute state action and are also restricted.<sup>3</sup> While the prohibitions of the Constitution are primarily designed to prevent previous restraints on publication,<sup>4</sup> official reprisal against a person for having exercised the protected rights is also forbidden.<sup>5</sup> Nor is freedom of expression limited to the right of publication; the Constitution is also violated by restrictions placed upon circulation.<sup>6</sup>

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<sup>1</sup> LOS ANGELES, CAL., MUNICIPAL CODE § 28.06: "No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:

"(a) The person who printed, wrote, compiled or manufactured the same.

"(b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon." Cited in *Talley v. California*, 362 U.S. 60-61 (1960).

<sup>2</sup> The first amendment expressly restricts the federal government, and the fourteenth amendment has been held to restrict the states from unreasonable infringement of these rights. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>3</sup> *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462 (1916).

<sup>4</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>5</sup> "[T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927).

<sup>6</sup> See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).