Opinion No. 12-970

December 20, 1912

BY: FRANK W. CLANCY, Attorney General

TO: State Corporation Commission, Santa Fe, New Mexico.

RAILROADS.

Corporation Commission has power to prescribe a form of mileage ticket and price thereof, to be used by railroads.

OPINION

*{*126}* Referring to the inquiry contained in your letter of November 27th, I must first say that neglect sooner to answer has not been intentional, but entirely due to the fact that it has been literally impossible for me sooner to give proper attention to the subject. The quantity and variety of daily pressing business, which cannot be put off or avoided, compels me, frequently, to delay official action on other things to an extent which sometimes appears to be almost inexcusable.

The question which you ask is whether or not you have constitutional authority to prescribe a specific form of mileage ticket to be used by all railroads within the state.

At the outset, I think I should recall to your attention that at the hearing where practically all railroads, operating within the state, were represented, only one company made any suggestion of a lack of power in the commission, and I believe that the representatives of the companies were, generally, desirous of raising no objection of that kind and were quite willing that some uniform mileage transportation should be prescribed, the subject of contention with them being only as to what would be the best form. Even the gentlemen, who suggested the lack of power, was not at all insistent about it, *{*127}* but of course you are not willing to act on such an important matter without being satisfied of your lawful authority to do so.

When the suggestion was made as to this question of power, a number of authorities were cited, all of which, as well as some others, I have carefully examined and, with the exception of one Massachusetts case, I believe that they can be so distinguished, on account of differences in constitutional and statutory provisions, as to be inapplicable in New Mexico. The principal case relied on, and one which may be considered as a leading case which has been followed in some of the state courts, was decided by the Supreme Court of the United States in 1899. Lake Shore R. W. Co. vs. Smith, 173 U.S. 684.

That was a case which came up from the Supreme Court of the State of Michigan, and the question involved was as to the power of the legislature to prescribe a mileage

ticket, in view of the provision of the state constitution, which is to be found in Section 1 of Article XIX of the Constitution of Michigan, and which is as follows:

"The legislature may, from time to time, pass laws establishing reasonable maximum rates or charges for the transportation of passengers and freight on different railroads in this state."

At this point it may be well to quote the language of our constitution on this subject so as, distinctly, to indicate the difference between the Michigan constitution and ours:

"The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates on railway, express, telegraph, telephone, sleeping car and other transportation and transmission companies and common carriers within the state."

The following quotation from the case in 173 U. S., beginning on page 690, shows just what was the question decided by the Supreme Court:

"The question is presented in this case whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has power to lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.

It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without *{*128}* discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called

wholesale rates -- a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law."

It will be seen that the matter under discussion in the Michigan case was as to the extent of the constitutional power given to the legislature which was limited to the fixing of maximum rates and did not give any such plenary power to the legislature as our constitution gives to the corporation commission. The court having so clearly set out what the question presented was, it becomes apparent that the decision would not be applicable to a state having a different constitutional provision. It is true that there can be found, in the opinion of the court, expressions concerning the power of interference with the management of the business of railroad companies which would seem to go beyond the distinct question which was presented and intended to be decided. The court says, however, that, prima facie, the maximum rates which had been fixed by the legislature were reasonable and any reduction of rates, in favor of a few persons instead of in favor of all, would be a taking of property without due process of law and that the legislature would not have any right to make such an alteration as, to do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of the court. A further quotation from page 696, same volume, further shows what was really involved in the decision of the court:

"The legislature having fixed a maximum rate at what must be presumed, prima facie, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or *{*129}* whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law."

A careful examination of the whole opinion in the light of what I have hereinbefore suggested, will show that it would be inapplicable to action by a legislature or your commission when the constitutional power given is of such unlimited character as that contained in our constitution.

There is, however, a New York case, where a mileage book act of the legislature was held unconstitutional on the authority of the Smith case in 173 U.S. Beardsley vs. N. Y., etc. R. R. Co., 162 N Y. 230.

In that case, however, the opinion of the court indicates that it had not carefully considered the limited scope of the opinion of the Supreme Court of the United States, but declared that "the decision proceeded solely on the ground that the statute was an illegal invasion of the property rights of the company," and yet the same court in another case in the same volume (Purdy vs. Erie R. R. Co., 162 N. Y. 42) and in still another case (Minor vs. Erie R. R. Co., 171 N. Y. 566) held the same act to be valid and constitutional as applied to railroad companies incorporated after the adoption of the act of the legislature and in the opinions of these cases showed plainly that the court took the view that the real ground of decision was that the right of a railroad corporation to charge the rate of fare authorized by the statute, under which the corporation came into existence, could not be impaired by statutes of the character of the mileage book acts, but that as to later created corporations there was no such right existing in the corporation. This puts the matter under the New York decisions, as resting upon a vested right which could not be impaired by the legislature. It is difficult to understand these New York cases in the light of the general rule that the legislature always has control over public utilities corporations, and can alter or change such things as railroad rates except in those cases where something in the nature of a contract between the state and the corporation exists. Nothing of that kind can be said to exist in New Mexico. There is a statute which is compiled as Section 3902 of the Compiled Laws of 1897, which provides that no railroad shall charge more than six cents per mile for the transportation of any passenger, but this cannot possibly be construed as creating anything like a contract with the railroad companies that a less rate shall not be fixed by the legislature or by such an agency as the corporation commission created by the constitution and acting within its constitutional powers. As far back as 1886 it was declared by the Supreme Court of the United States that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce, and that this "power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive *{*130}* grant, or something which is in law equivalent." The court also says that if there is reasonable doubt it must be resolved in favor of the existence of power. Stone vs. Farmers L. & T. Co., 116 U.S. 325-6.

The only real restriction, therefore, upon your powers as to the fixing of railroad rates is that they shall be reasonable, that is to say they shall be such as to permit a reasonable profit to the railroad companies in the operation of their railroads.

In this connection, I feel that I should call your attention to the impossibility of anything like uniformity of railroad rates and on this point I cannot do better than to make the following quotation from an Indiana case which, briefly but clearly, acts out the correct doctrine:

"It is plain that uniform rates, applicable alike to all the railroads of the state, within the sanction of the constitution, is a legal fiction. Such a tariff would be impracticable. It is perfectly well known that the cost of construction and the earning capacity per mile of all

the railroads in the state are not the same. Roads in smooth, densely populated parts of the state, where the volume of business, in both freight and passengers, is large, may be constructed and maintained for a much less sum than similar roads in rough, broken parts of the state, where there is much less population and business; yet the roads in the latter districts are just as much needed by the fewer residents, and the owners just as much entitled to a fair profit on their investment in the property, as the owners of the higher class roads. If the maximum rate should be made high enough to enable the weaker ones to make a profit, however small, the more lucrative properties would be authorized to exact charges of the public that would amount to a clear violation of both constitutions; while, if the uniform maximum rate should be established so low as to enable the most profitable roads to make but a reasonable return on their cost, the same would utterly destroy the weaker ones, which would amount to confiscation."

So. I. R. Co. vs. R. R. Com., 172 Ind. 128-9.

In the case hereinbefore mentioned as the one principally relied upon against the power of commission, reported in 173 U.S., something is said about the act of the legislature being an invasion of the general right of a company to manage its own affairs and compelling it to give the use of its property for less than the general rate to those who come within the provisions of the statute, but this language is to be taken in connection with what I have already quoted as to the real question involved in that case and with the statement made by the court that at the same time it is to be understood that the company is subject to the unquestioned jurisdiction of the legislature to provide for the safety, health and convenience of the public. In the same connection it is clear that the court did not consider some elements of the problem, which were not presented possibly because they did not exist at that time to the same extent that they now do and which might have brought a different conclusion.

As an illustration attention should be called to the statement made before you by a representative of some bureau, the name of which I do not recall, which adjusts and handles interchangeable mileage *{*131}* books or scrip. He said that there passed through their hands about five thousand such books, each month and it is to be remembered that the books or scrip, of which he spoke, were sold at two prices, one at $ 40.00 and the other at $ 90.00, so that even at the lower rate something like $ 240,000.00 worth of such scrip must have been purchased annually, but when we consider that much of the scrip was sold at the higher price this amount must be very much greater. We should remember also that in addition to this particular kind of scrip or mileage, there are many others sold by different railroads, the total amount of money thus invested by the public being, obviously, very large, probably amounting in the aggregate to millions of dollars per annum. In the case above referred to the Supreme Court advances an argument in support of its decision that the convenience afforded by the sale of mileage books would benefit only a small portion of the public and was therefore not worthy of consideration. It does not appear that the record had any evidence on that point, but if it did, conditions must have greatly changed since that time. Even if limited to our own state it seems reasonably certain that a very large portion of railroad travel in New Mexico at the present time is upon mileage books of

one kind or another, and the amount of such travel would be greatly increased by a simplification of the books and a requirement making them interchangeable so as to be used upon all railroads in the state.

My conclusion is that you have the power, under the constitution, to prescribe a uniform specific form of mileage ticket to be used by all railroads within the state, and to fix the rates at which they shall be sold and at which they shall be accepted on the different roads, careful attention being given so to fix the rates that they will be reasonable, not only to the traveling public, but also to the different lines of road, and also to the form and conditions of use so as to occasion no actual hardship upon either the holders of such mileage tickets or upon the companies, whose interests must also be protected.