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Gulf, M. & N. R. Co. V. Illinois Cent. R. Co.--Specific Performance--Denial upon the Ground of Public Interest in Preventing a Railroad Strike

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NOTES

GULF, M. & N. R. CO. V. ILLINOIS CENT. R. CO.—SPECIFIC PERFORMANCE—DENIAL UPON THE GROUND OF PUBLIC INTEREST IN PREVENTING A RAILROAD STRIKE

The increasing recognition of public interests and the tendency of courts to deny specific performance of contracts on that ground is illustrated by the recent case of *Gulf, M. & N. R. Co.* v. *Illinois Cent. R. Co.*[1] This was a suit in a federal district court to obtain specific performance of a trackage contract which provided for a joint use of certain of the defendant's tracks by the plaintiff and defendant companies. The contract expressly provided that the plaintiff's trains were to be in charge of its own employees. In pursuance of this contract the plaintiff secured an order from the Interstate Commerce Commission certifying that public convenience and necessity required the operation by the plaintiff under trackage rights over the tracks of the defendant company. The order contained no language directing the plaintiff to operate trains manned by its own employees, but it did expressly incorporate a report which contained such a provision. The order became effective in 1933 and the plaintiff began operations under the contract, using its own employees. The controversy arose when the defendant notified the plaintiff that upon April 30, 1936, it would require the plaintiff to use employees of the defendant.

The reason given by the defendant for its action was that its employees, who were nearly all members of the Railroad Brotherhoods, had threatened to strike unless all trains upon the defendant's tracks were manned by the defendant's employees. The defendant submitted affidavits of officials of the various brotherhoods, which were to the effect that unless the defendant acceded to their demands a strike vote would be taken which would probably result in favor of a strike. The defendant avers that such a strike would cause irreparable injury to the defendant, the gen-

[1] 21 F. Supp, 282 (W. D. Tenn., 1937).

eral public, and the plaintiff, and that the defendant's solvency would be greatly jeopardized, if not impaired.

The court decided that, since the order of the Interstate Commerce Commission did not expressly provide that the trains should be operated by the plaintiff's own employees, a refusal to require such operation would not amount to a setting aside of the order, and therefore it would not be necessary that the case be determined by a three-judge court.[2]

The court then, having satisfied itself as to its jurisdiction, held that specific performance of the contested provisions of the contract should be denied, as contrary to the public interest.

This case is interesting, both for its interpretation of the order of the Interstate Commerce Commission, and for its application to a new situation of the doctrine that a court should not compel specific performance of a contract, if such action would be contrary to the public interest.[3] In connection with the order certifying that public convenience and necessity required the operation of the plaintiff's trains over the defendant's lines, there are three possible situations.

First, the Commission may clearly have intended to omit from the operation of the order parts of the contract. Such an intention could be shown either by an express provision to that effect in the order, or by the failure of both the order and the report upon which it was based to mention such provisions of the contract.[4] If these provisions related to subjects on which

[2] 38 Stat. 220 (1913), 28 U. S. C. A. Sec. 47 (1927).

[3] See note 11, *infra.*

[4] If the report fails to mention the provisions, the order should certainly not be construed to include them, since in such case there would be no findings of essential facts upon which to base the order. An order cannot be sustained in the absence of findings of essential facts: Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547 (1912); Florida East Coast Line v. United States, 234 U. S. 167 (1914); Wichita R. R. v. Pub. Util. Comm., 260 U. S. 48, 59 (1922); New England Divisions Case, 261 U. S. 184, 203 (1923); Beaumont, S. L. & W. Rwy. Co. v. United States, 282 U. S. 74, 86 (1930); Panama Refining Co. v. Ryan, 293 U. S. 388, 432 (1935); Atchison Railway v. United States, 295 U. S. 193 (1935). But cf. Colorado v. United States, 271 U. S. 153 (1926). (In this case the court upheld an order of the I. C. C. allowing an abandonment of an intrastate branch line, though there was no specific finding that earnings were inadequate or that a continuance of the line in operation would prejudice interstate commerce. The court said that the I. C. C. Act did not make issuance of the certificate dependent upon a specific finding as to these particular facts.)

action cannot be taken without a certificate of the commission,[5] a plainly intentional failure to include them might render them of no effect whatever.[6] Charter or contract provisions must yield to the paramount right of Congress to control interstate commerce.[7] But since there was no express intention to omit, and no omission of the contested provisions from the report, the principal case can not be placed in this category.

Second, the order may fail to include in unmistakeable language all the terms of the contract, and yet not show an intention to omit any. Obviously the court considered that the order in the principal case was of this nature, and that nothing should be supplied by implication to such orders.[8] To substantiate its position the court cited cases holding that the lack of an express *finding* by the Commission may not be supplied by implication.[9] It is submitted that in this connection the presence or absence of an express finding is immaterial, since an order is binding upon this court even though made without an express finding. Any proceeding to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission must be heard and determined by a three-judge court.[10] In view of this requirement the court's decision that the order did not concern the plaintiff's right to use its own employees could only have been based upon some omission in the order itself, and not upon an omission to find requisite facts.

Third, the order may expressly contain all the terms of the contract. If it does so a district court has no discretion to ignore

[5] 41 Stat. 477 (1920), 49 U. S. C. A. Sec. 1 (18) (1929).

[6] Western Pac. R. Co. v. Nevada-California-Oregon Rwy., 40 F. (2d) 731 (N. D. Cal., 1930). (Here the defendant obtained an order to abandon a line, thereby necessarily breaching an exchange of traffic contract. No mention made of the contract in the order. Held: Plaintiff could not even recover damages.) But cf. Central New England R. Co. v. B. & A. R. Co., 279 U. S. 415 (1929).

[7] New York v. United States, 257 U. S. 591, 601 (1922); Colorado v. United States, 271 U. S. 153, 165 (1926); Village of Mantorville v. Chicago Great Western R. Co., 8 F. Supp. 791 (D. Minn. 1934).

[8] Central New England R. Co. v. B. & A. R. Co., 279 U. S. 415 (1929). (The court said: "It is not to be supposed that the Commission intended to do more than was stated in its order . . . without dealing with the question specifically." But this case is distinguishable from the principal case, because here the report as well as the order failed to mention the contested provisions of the contract.)

[9] Wichita R. R. Co. v. Pub. Util. Comm., 260 U. S. 48 (1922); Atchison Railway v. United States, 295 U. S. 193 (1935); Baltimore & O. R. R. Co. v. United States, 298 U. S. 349, 358, 359 (1936).

[10] 38 Stat. 220 (1913), 28 U. S. C. A. Sec. 47 (1927).

any of the provisions of the contract, since to do so would be to set aside or annul, in whole or in part, an order of the Commission. It appears that the principal case might more logically have been placed in this category. The distinction drawn between an order expressly containing certain provisions, and an order expressly referring to and making a part of itself, a report containing these same provisions, is extremely tenuous, and of doubtful validity.

By the strained interpretation of the order the court was able to conclude that a controversy determinable by a single judge was presented, and to deny the relief sought. It is settled doctrine that a court should not compel specific performance of a contract, if such action would be contrary to the public interest.[11] However, in this type of problem the courts have been reluctant to extend the definition of "public interest" to cover new situations. The principal case appears to be the first to declare that the prevention of strikes is a matter of sufficient public interest to warrant a refusal of specific performance. The doctrine is most often applied in cases involving a suit by a private individual against some corporation of a quasi-public nature. Pennsylvania early decided that the interest of the public, stockholders, and depositors in the control of a bank was sufficient reason for denying specific performance of a contract to convey bank stock, where such a conveyance would have given the plaintiff control of the bank.[12] Most of the cases concern railroads which have contracted to maintain shops in a certain place,[13] or to erect and maintain depots,[14] or not to erect them,[15] or to stop trains a cer-

[11] Texas & Pacific Rwy. Co. v. Marshall, 136 U. S. 303 (1890); Beasley v. Texas & Pacific Rwy. Co., 191 U. S. 492 (1903); Harrisonville v. Dickey Clay Co., 289 U. S. 334, 338 (1933); United States v. Dern, 289 U. S. 352, 360 (1933); Pennsylvania v. Williams, 294 U. S. 176, 185 (1935); Armour & Co. v. Texas & P. Rwy. Co., 258 Fed. 185 (C. C. A. 5th, 1919); Seaboard Air Line Rwy. Co. v. Atlanta, B. & C. R. Co., 35 F. (2d) 609 (C. C. A. 5th, 1929); Whitlow v. Board of Education, 108 Kan. 604, 196 Pac. 772 (1921); Rockhill Tennis Club of Kansas City v. Volker, 331 Mo. 947, 56 S. W. (2d) 9 (1932); Conger v. New York, W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983 (1890); Ford v. Oregon Electric Rwy. Co., 60 Ore. 278, 117 Pac. 809 (1911); Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671 (1879); M. M. & D. D. Brown v. Western Maryland Rwy. Co., 99 S. E. 457, 459 (W. Va. 1919).

[12] Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671 (1879).

[13] Texas & Pacific Rwy. Co. v. Marshall, 136 U. S. 393 (1890).

[14] Harper v. Virginian Rwy. Co., 86 S. E. 919 (W. Va. 1915) (Specific performance was granted but the decree was to continue in force "so long and so long only" as consistent with the public interest).

[15] Beasley v. Texas & Pacific Rwy. Co., 191 U. S. 492 (1903).

tain number of times daily.[16] Specific performance of contracts between railroads and private parties may be refused, when their enforcement would tend to render the operation of the railroad inefficient, dangerous, or expensive.[17] The public interest is by no means confined to railroads, however, and the doctrine of these cases has been applied in order to permit a school board to retain, for the purpose of erecting a schoolhouse thereon, land which it had contracted to sell.[18] Recently, and for the first time, civic beauty was declared to be a sufficient public interest upon which to base a denial of specific performance.[19]

There are some elements of similarity between the principal case and *Seaboard Air Line Rwy. Co.* v. *Atlanta, B. & C. R. Co.*[20] In the latter case the court refused to require the specific performance of a contract to put expensive safety devices at a crossing, where the crossing was not shown to be dangerous. The defendant's financial condition was such that the expenditures for the safety devices would probably have disabled it from performing its duties to the public. The court declared that a paramount public interest required the continued operation of defendant's lines.

It is to be noted that the financial element is present to some extent in the principal case, though it seems not to have been pressed by the defendant, nor used as a basis for the decision of the court. An affidavit filed by the defendant stated that "in the event the threatened strike actually takes place, defendant's solvency will be greatly jeopardized, if not actually impaired". This situation differs, however, from the *Seaboard Air Line* case in that the threatened insolvency would be a direct result of the

[16] Conger v. New York, W. S. & B. R. Co., 120 N. Y. 29, 23 N. E. 983 (1890); Ford v. Oregon Electric Rwy. Co., 60 Ore. 278, 117 Pac. 809 (1911).

[17] Pomeroy, Specific Performance of Contracts (3rd ed. 1926) Section 181a.

[18] Whitlow v. Board of Education, 108 Kan. 604, 196 Pac. 772 (1921). (But even if specific performance had been granted, the school board could have regained possession of the property immediately by condemning it for school purposes.)

[19] Rockhill Tennis Club of Kansas City v. Volker, 331 Mo. 947, 56 S. W. (2d) 9 (1932). (Specific performance of a contract to convey land was denied upon the ground that the land was essential to the beautification of the art gallery which was to be erected by the defendants upon adjacent land.) Discussed in notes (1933) 47 Harv. L. Rev. 141, (1933) 18 Minn. L. Rev. 90.

[20] 35 F. (2d) 609 (C. C. A. 5th, 1929), Cert. den. 281 U. S. 737.

performance of the contract in the latter case, while in the case at hand the performance of the contract would not of itself impair the defendant's solvency, but would merely bring about actions of third parties which would have that result. It is this same indirection by which the harmful result is brought about which distinguishes this case from the other cases cited in which specific performance is refused on the ground of public interest in the continued unhindered operation of railroads. In these latter cases it was the specific performance of the contract which of itself hindered the operation of the railroads and thereby conflicted with the public interest. It cannot be contended that the enforcement of the plaintiff's right to designate twelve employees to handle its trains would of itself be contrary to the public interest. It is only by action of persons not parties to the contract that the situation harmful to the public is to result. However, the Supreme Court of the United States is authority for the statement that "the peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern".[21] The fact that the strike is not absolutely certain to take place, its occurrence being dependent upon the outcome of a vote, does not militate against the decision of the court. Specific performance will be refused where paramount public interest "will or even may be" interfered with by granting such relief.[22] The decision reached by the court upon this question is evidence of a more conscious recognition and protection of public interests. If the court may include under this doctrine a thing so intangible as civic beauty,[23] it seems not unreasonable that it should also concern itself with labor peace.

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[21] Virginian Rwy. Co. v. System Federation No. 40, 300 U. S. 515, 552 (1937). (But this was merely an action to compel the railroad company to treat with a union under the Railway Labor Act).

[22] Beasley v. Texas & Pacific Rwy. Co., 191 U. S. 492, 497 (1903); Seaboard Air Line Rwy Co. v. Atlanta, B. & C. R. Co., 35 F. (2d) 609 (C. C. A. 5th, 1929).

[23] Rockhill Tennis Club of Kansas City v. Volker, 331 Mo. 947, 56 S. W. (2d) 9 (1932).