

1960

The Denver and Rio Grande Western Railroad Co. v. State Tax Commission of Utah : Brief of Petitioner

Utah Supreme Court

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In the
Supreme Court of the State of Utah

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,

Petitioner,

—vs.—

THE STATE TAX COMMISSION
OF UTAH,

Respondent.

Case No.
9312

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Parties herein will be designated as follows: Petitioner, The Denver and Rio Grande Western Railroad Company as the “Rio Grande,” and Respondent, State Tax Commission of Utah as the “Tax Commission.” Emphasis has been supplied.

This is a proceeding to review an order and decision of the Tax Commission imposing sales tax liability upon

Rio Grande for charges made by Rio Grande in the repair of cars and locomotives of other railroads. The question presented is whether the Tax Commission may under the provisions of Chapter 113, Laws of Utah, 1959, lawfully impose a sales tax upon Rio Grande for the charges made by Rio Grande against other railroads for the repair of their cars and locomotives which come into the possession of Rio Grande while in the movement of commerce.

STATEMENT OF FACTS

The facts are not in dispute. They are essentially set forth in a written stipulation of the parties entered into on April 13, 1960, and made a part of the record in the proceedings before the Tax Commission. (R. 7-11) From this stipulation the following facts appear.

Rio Grande is a common carrier of property in interstate commerce between points and places within the United States. In the transportation of such commerce Rio Grande receives railroad cars of various kinds in interchange from other railroads and moves such cars over its lines either under load or as empty cars. These cars so received by Rio Grande are designated in the railroad industry as "foreign line cars." Such cars may for short periods be used in the movement of property in intrastate commerce within the State of Utah, but are primarily engaged in the movement of interstate commerce, and constitute instrumentalities devoted to the movement of such commerce.

Railroad cars while engaged in the movement of commerce necessarily require occasional repair. These repairs generally fall into one of two classes, namely, repairs which are chargeable to the railroad which owns the cars, referred to in the railroad industry as "owner line responsibility," and repairs chargeable to the railroad then engaged in the movement of the cars referred to as "handling line responsibility." Generally a handling line is responsible for those repairs to cars which result from its own fault, while owning lines are responsible for repairs resulting from ordinary wear. The repairs involved in this case relate entirely to owner line responsibility. The classification of car repairs into one category or another is set forth in detail in the booklet entitled "Interchange Rules," published and revised annually by the Association of American Railroads, and the making of and responsibility for all such repairs are governed and controlled by such rules. The current volume of the Interchange Rules is attached as Exhibit "A" to said stipulation and made a part thereof. Rio Grande is a party to these rules. (R. 27)

If a car is tendered in interchange to Rio Grande by another railroad which is in need of repair, and the repair is owner line responsibility, Rio Grande has the right to receive the car in interchange and make such repairs. Repairs may also be made after interchange while a car is in the possession of Rio Grande. When repairs are made by Rio Grande the details of such repair, including materials and labor, are shown upon a Billing Repair Card, which is sent by Rio Grande

to the railroad which owns the car, and the owning railroad then pays the bill to Rio Grande. However, the amount chargeable for each kind of repair, both for labor and material, is set out in the Interchange Rules, and may not exceed the amounts there shown.

The repairs herein referred to relate only to cars of other lines which come into the possession of Rio Grande on interchange with other railroads. The cars when received by Rio Grande are then in the course of an actual movement between points and places within the United States over Rio Grande and the lines of other railroads. The repairs involved in this case are made in the course of such movement. When the repairs are made the movement of the car is continued. The cars do not come to rest at any destination point on the Rio Grande, and may be moving either empty or under load. Loaded cars are usually repaired and continue under the same load after repair. Empty cars after repair continue their journey usually to the nearest point of rail connection on the line of the owning road. If loaded cars require removal of lading in connection with repair, then the repaired car proceeds to destination as an empty car.

Rio Grande under contractual arrangements with The Western Pacific Railroad Company makes minor repairs at Salt Lake City, Utah, to Western Pacific locomotives. These repairs relate to road locomotives in continuous use in the transportation of persons and

property in interstate commerce between points and places in California, Nevada and Utah.

In rendering bills to other lines for repairs to cars and to Western Pacific for the repair of locomotives in accordance with said interchange rules and agreement, Rio Grande has not heretofore added any State of Utah sales or use taxes.

Rio Grande has heretofore paid use tax to the State of Utah on materials which it has used in the repair of the cars and locomotives referred to herein.

On or about the 29th day of October, 1959, Rio Grande returned to the Tax Commission its sales and use tax return for the quarterly period of July, August and September, 1959. In the computation of sales tax under said return, Rio Grande deducted as exempt transactions amounts charged to other railroad lines for costs incurred in the repair of their railroad cars and locomotives in accordance with the foregoing facts.

Thereafter, respondent Tax Commission audited said return and assessed a deficiency against Rio Grande in the sum of \$467.63, being sales tax of 2½% of the amount charged by Rio Grande for the repair of said railroad cars and locomotives, claiming that such repairs were taxable under the provisions of Chapter 113, Laws of Utah, 1959, which amended Section 59-15-4, Utah Code Annotated, 1953.

Rio Grande, deeming itself aggrieved by the assessment so made upon it, within ten days after the date of

such assessment applied to the Tax Commission by petition in writing for a hearing and correction of the amount of said tax so assessed. Pursuant to said petition, hearing was had before the Tax Commission on April 14, 1960. Under date of June 21, 1960, the Tax Commission made and entered its findings of fact and conclusion of law wherein it concluded:

“2. That a tax on such repairs is not a tax prohibited by the commerce clause as being a tax on interstate commerce.

“3. That the Utah Sales Tax is a tax upon a transaction, and the transaction in the present case is completed before its becomes part of interstate commerce.”

and accordingly ordered and decreed that the deficiency against Rio Grande be sustained.

From said order and decision of June 21, 1960, this review is taken.

STATEMENT OF POINTS

POINT I

THE IMPOSITION OF A TAX UPON THE AMOUNT CHARGED BY RIO GRANDE TO OTHER RAILROADS FOR THE REPAIR OF THEIR CARS AND LOCOMOTIVES IS PROHIBITED BY ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

- (a) The Tax Upon the Repair by Rio Grande of the Cars and Locomotives of Other Railroads is a Direct Imposition on the Very Process of Interstate Commerce.

- (b) The Tax Upon the Repair by Rio Grande of the Cars and Locomotives of Other Railroads is a Direct Interference with Congressional Legislation Now Occupying the Field for the Regulation of Commerce.

ARGUMENT

POINT I

THE IMPOSITION OF A TAX UPON THE AMOUNT CHARGED BY RIO GRANDE TO OTHER RAILROADS FOR THE REPAIR OF THEIR CARS AND LOCOMOTIVES IS PROHIBITED BY ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

- (a) The Tax Upon the Repair by Rio Grande of the Cars and Locomotives of Other Railroads is a Direct Imposition on the Very Process of Interstate Commerce.

By Chapter 113, Laws of Utah, 1959, the Legislature amended the provisions of Section 59-15-4, Utah Code Annotated, 1953, by adding thereto subsections (e) and (g). Subsection (e) only is involved in this case and said section as material here now provides that:

“From and after the effective date of this act there is levied and there shall be collected and paid: . . . (e) A tax equivalent to 2% of the amount paid or charged for all services for repairs or renovations of tangible personal property, or for installation of tangible personal property rendered in connection with other tangible personal property.”

The additional ½% of tax imposed by the Tax Commission against Rio Grande arises under the provisions of Chapter 114, Laws of Utah, 1959, which is not material here.

Prior to the enactment of said Chapter 113, no sales tax had been imposed upon services performed in the repair of personal property.

Use or sales taxes had, prior to the enactment of said Chapter 113, been imposed by the State of Utah upon either the use or sale of tangible personal property. The provisions of law with respect to the imposition of such taxes were not disturbed by said Chapter 113. The additional tax imposed by that chapter, so far as material here, falls only upon *services* in connection with repairs, renovations and installations of personal property.

Rio Grande in connection with its railroad operations purchases materials and supplies, some of which are used by it in the repair in the State of Utah of (a) its own cars and locomotives, (b) the cars of other railroads which are the responsibility of Rio Grande, and (c) the cars of other railroads which are the responsibility of such roads. These materials and supplies are brought into the State of Utah prior to use in such repairs and Rio Grande has heretofore paid use tax to the State of Utah on all such materials and supplies.

Sales and use taxes are compensatory, one supplementing the other. The rate of taxation is the same under each tax and both taxes cannot be imposed with respect to the same property. (Page 35, Sales and Use Tax Regulations, 1959, R. 28)

After the passage of said Chapter 113, the Tax Commission issued its Regulation 78, which provides in part that:

“78. Services, repairs and renovations of tangible personal property (Applies to sales tax only). — Persons engaged in the business of repairing, renovating, altering or improving tangible personal property of consumers, or for consumers, are required to collect the sales tax upon the total charge made for the rendition of such services, even though no tangible personal property in the form of materials or supplies is sold or used in connection with such services. Where tangible personal property in the form of materials and supplies is sold or used in connection with such services, the sales tax applies to the total charges made for the sale of the materials and supplies, and the services rendered in connection therewith.” (R. 28)

The language of the foregoing regulation doubtless complies with the legislative intent, for as we understand the purpose of Subsection (e) it was designed to reach those persons engaged in the business of repairing personal property such as automobile garages, shoe repairmen and the like. Rio Grande is surely not engaged in the business of repairing, renovating, altering or improving tangible personal property. Rio Grande is engaged in the business of railroad transportation. The repair of cars or locomotives of other railroads arises only as an incident to its transportation business. We would suppose that the shoe or automobile repairman would claim a resale exemption on the materials and

supplies purchased by him and furnished to the ultimate consumer. Rio Grande has not and, we believe, could not properly claim any such exemption on its purchases of materials and supplies, and has accordingly paid use tax thereon. The said Regulation 78 is not by its terms applicable to Rio Grande.

Rio Grande necessarily paid use tax upon the materials and supplies used in connection with making the repairs here involved. Its liability in connection with such materials and supplies has been discharged. The tax imposed by said Subsection (e) falls only upon *services*. The question presented here should therefore be limited to the issue of whether the Tax Commission may impose a sales tax upon the *services* rendered by Rio Grande in the repair of cars and locomotives under the facts involved.

By the provisions of Articles I, Section 8, of the Constitution of the United States, the Congress shall have the power:

“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

This grant of congressional power to regulate commerce has long been recognized as one of the most important functions vested in the Federal government. It is trite to point out that a principle cause for the breakdown of the government under the confederation was the imposition of trade barriers and restrictions imposed by the several states upon the movement of

commerce across their borders and the inability of the government to free commerce from the stifling effect of such restrictions.

In considering whether the imposition of the tax in question will substantially interfere with the process of commerce, it is important, we believe, to visualize the picture of railroad transportation in its national aspect. There are thousands of railroad cars which are in continuous movement in the transportation of property and persons in a vast network of rail transportation extending throughout the entire nation. This is a vital part of our great national transportation system, and is responsible for the movement of a large part of the commerce throughout the United States. It would be impossible to conduct such commerce with the facility and efficiency required by present day demands if the cars of each railroad were confined to the lines of such railroad. To so confine such cars would require that goods moving beyond the lines of a particular railroad must be unloaded and reloaded into the cars of connecting lines. The elimination of this transfer of lading necessitated the adoption of the system whereby cars might move freely, either under load or as empties, from one railroad to another. This interchange of cars between railroads is a vital necessity in the free flow of rail commerce which we know today. This interchange of cars also necessitated the development of uniform system whereby rail cars would be repaired while in the possession of foreign lines. So the adoption of the uniform interchange rules likewise became an essential

part of our national system of rail transportation. The subject tax must be tested in the light of its effect upon this system of national rail transportation.

The number of cases dealing with the effect upon commerce of various legislative enactments are now myriad. To cite, much less to attempt to distinguish all such cases, would only serve to confuse the problem under consideration.

We think it more appropriate to return to certain fundamental conceptions regarding burdens which may or may not be imposed upon such commerce by the several states.

The decisions now make it quite clear that a state may lawfully impose ad valorem taxes upon the property of railroads although this property is employed in interstate transportation. So also may a state impose a tax upon gross receipts from commerce if such tax is properly apportioned to the business done within a state. Sales taxes may be imposed upon tangible personal property purchased within a state although such personal property may thereafter be employed in the furtherance of interstate commerce and a state may impose a tax upon the storage, use or consumption of property transported from another state for use within the taxing state. *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939); *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182 (1939); *Union Stock Yards v. State Tax Commission of Utah, et al.*, 93 Utah 174, 71 P.2d 542 (1937).

The facts in *Union Stock Yards, supra*, clearly define the limit of the rule there announced. They are stated by the Court at page 176 of the Utah Report as follows:

“The State Tax Commission levied against plaintiff a tax on the value of the hay, grain, and straw furnished by plaintiff to livestock under such contracts. The tax levied includes a small amount assessed for the furnishing of hay, grain, and straw to livestock moving in intrastate commerce. *The tax was imposed on the sales price of the feed alone and not on the value of the entire service rendered by plaintiff to the interstate carriers; that is, the Tax Commission did not levy any tax on the value of the service of loading, unloading, or use of the pens for the resting and watering of the animals.* The shipments were all made to packers who butchered the livestock for sale to wholesalers who sold to retailers, who in turn sold to the ultimate consumers. The packers in the interstate shipments, resided in other states, the intrastate consignees being packers in Utah. In the case of the interstate shipments, neither the shippers of the livestock nor consignees were citizens of Utah.”

The rule is found at page 178 of the Utah Report as follows:

“It is not contended that the hay, grain, and straw, before being used by plaintiff in feeding the livestock in question, had any interstate commerce status. We think it did not become a part of interstate commerce until after it was fed to the livestock. *The tax was on the sale in this state*

and not on the use of these products in interstate commerce."

In *Southern Pacific Co. and Pacific Tel. and Tel. Co., supra*, materials and supplies were shipped in interstate commerce into California for use in that state by interstate rail and telephone carriers. Such transactions were held to be subject to California use tax. On the authority of the two latter decisions Rio Grande has paid use tax to the state of Utah on materials and supplies purchased elsewhere and shipped into this state for its use here.

In *Southern Pacific Co. v. Utah State Tax Commission*, 106 Utah 451, 150 P.2d 110 (1944), Cert. Denied 323 U.S. 792, this Court held that the imposition of use tax upon foodstuffs consumed by dining car crews in interstate passenger movements violated the commerce clause and distinguished *Southern Pacific Co. v. Gallagher* and *Pacific Tel. and Tel. Co. v. Gallagher* by observations appearing at page 456 of the Utah report as follows:

"The furnishing in Utah of the prepared meals to the crew differs then from an event which takes place before transportation in interstate commerce of goods in relation to which the events occurs, or one which occurs in relation thereto after such transportation ceases. The event here sought to be taxed is one in furtherance of interstate commerce, the consumption of the goods not merely in the course of an interstate journey but in interstate commerce. Indeed, it is an expense involved in the transportation of passengers. We need not concern ourselves,

therefore, with cases dealing with the taxability of income derived from interstate commerce since here is involved a levy on outgo rather than income.”

Following the dining car foodstuffs case this Court next had occasion to consider *Union Pacific Railroad Co. v. Utah State Tax Commision*, 110 Utah 99, 169 P.2d 804 (1946) wherein it is held that the imposition of use tax upon diesel switching locomotives, delivery of which was taken in Nebraska, and which were there used in interstate commerce, and which were thereafter transferred to Utah and here placed in interstate switching service, violated the commerce clause. In so holding, this Court at page 103 of the Utah report said:

“Clearly the movements of these engines either within the terminal or from terminal to terminal were in the furtherance of interstate commerce.”

The controlling principle developed in the foregoing cases is this: If the tax involved falls upon a transaction which occurs prior to the movement of interstate commerce the tax is valid although the property involved may thereafter be employed in such commerce. If, however, the tax is imposed upon the process of such commerce, it cannot be sustained. In our view the tax here falls upon the very process of commerce and is therefore invalid.

For further application of this principle see also *Reading Railroad Company v. Pennsylvania*, 15 Wal. 232 (1872); *Helson v. Kentucky*, 279 U.S. 245 (1929); *Mc-*

Carroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Nippert v. City of Richmond*, 327 U.S. 416 (1945); *Freeman v. Hewit*, 329 U.S. 249 (1946); *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947).

In the latter case the Supreme Court had under consideration a tax upon gross receipts arising from the business of stevedoring. The Court reviewed its previous decisions wherein it had held state statutes imposing a tax or some other imposition to be valid and distinguished such cases from the case under consideration at page 433 of the U. S. Report as follows:

“Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

“Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce.

measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman v. Hewit*, supra, 329 U.S. 249, 256, 67 S.Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. . . ."

So in the case at bar, the repair of railroad cars engaged in interstate commerce is a part of commerce itself.

The Tax Commission's conclusion that the tax in question is upon a transaction which is completed before it becomes a part of interstate commerce cannot be sustained by the fact. If it is intended by this conclusion to mean that railroad cars are not engaged in actual commerce when delivered to Rio Grande in interchange such a position is fundamentally unsound. There could be no interchange to Rio Grande unless there was a prior movement over some other railroad. Where Rio Grande receives cars in interchange it necessarily continues a movement of transportation commenced on another railroad. If the conclusion is intended to mean that there is a taxable moment when commerce has stopped, at which moment the tax may lawfully be imposed, such position is likewise unsound. A moment of stoppage in the movement of commerce may always be found. Trains stop at stations, fuels and water are

added en route, inspections are made, crews are changed, trains are stopped on sidings for passing purposes, cars are switched, classified and interchanged in yards. No movement of commerce flows without stoppage or interruption. So too of repairs en route. These are part of the continuous process of the movement of commerce. The repair of cars of a foreign line, accepted by a road in interchange, is an essential and integral part of the movement of that commerce, a part of its very process. The services performed in the repair of cars moving in that commerce are as essential as the services of the crews engaged in the operation of the trains. Without such repairs the movement of such cars must come to an end. A tax upon such services is a burden upon the movement of such commerce which Utah has no power to impose. The best answer to the argument of the taxable moment theory is that announced by the Supreme Court in *Nippert v. City of Richmond*, *supra*, and quoted with approval in *Union Pacific Railroad Co. v. Utah State Tax Commission*, *supra*, as follows:

“ ‘If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from “the transportation or intercourse which is” the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effect of the tax upon the commerce.
* * * All interstate commerce takes place within the confines of the states and necessarily involves “incidents” occurring within each state through

which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.' "

The questions presented here deal primarily with taxes imposed upon the repairs by Rio Grande of cars received in interchange with other roads. As indicated in the statement of facts, Rio Grande also makes minor repairs on the locomotives of The Western Pacific Railroad Company which move between California and Utah points and which turn around at Salt Lake City. These repairs are made under contractual arrangements with Western Pacific rather than under the interchange rules. Rio Grande has paid use tax on materials and supplies which go into such repairs. While the repairs which are made to such locomotives may not be so inseparably a part of commerce as repairs made to cars accepted in interchange, we believe the same principles as stated above prevent Utah from imposing sales tax upon such repairs.

- (b) The Tax Upon the Repair by Rio Grande of the Cars and Locomotives of Other Railroads is a Direct Interference with Congressional Legislation Now Occupying the Field for the Regulation of Commerce.

Rio Grande does not enjoy a free hand in the matter of the interchange of cars with other railroads nor in the repair of cars accepted in interchange. This whole subject is woven into the fabric of the national field of

railroad transportation, and has been the subject of comprehensive Federal legislation. 49 U.S.C.A., Section 1 (4), in establishing the duty of carriers to furnish transportation and establish through routes, provides that:

“It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classification applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.”

49 U.S.C.A., Section 3 (4) requiring interchange of traffic provides that:

“All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between

their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

The Safety Appliance Acts, 45 U.S.C.A., contain many sections imposing strict requirements for the condition of railroad cars and locomotives. Section 1 deals with brakes and appliances for operating train brake systems. Section 2 covers couplers; Section 4, grab irons or handholds; Section 5, drawbars; Section 9, power brakes; Section 11, sill steps, hand brakes, ladders and running boards; and Section 23, locomotives. Section 6 and 13 impose severe penalties upon a carrier for the movement of cars or locomotives in violation of the Safety Appliance Acts. The latter Section provides that a car which becomes defective while in the possession of a foreign line may be moved to the nearest repair point without liability for penalty. Otherwise defective cars cannot be moved over the rails of a connecting railroad.

The interchange rules were designed to enable railroads to comply with these statutory requirements and to provide for a uniform system of car repair in connection therewith.

Under these statutes we find a situation in which Congress through comprehensive legislation has occupied a field in the regulation of commerce. Rio Grande and other railroads operating the system of national railroad transportation are bound by these statutory regulations. All such railroads are required to provide through routes, to interchange traffic and to provide facilities for doing so. They are strictly prohibited from operating defective equipment. This prohibition necessitates repair and uniform rules for doing so. They are therefore under the compulsion of performing the services which Utah seeks to tax. The Congress in its regulation of commerce has deemed it necessary to impose certain duties and responsibilities upon rail carriers engaged in the movement of commerce. The Tax Commission seeks to impose a tax burden upon the performance of such duties. This is a direct burden upon that commerce and a direct interference with the regulation of commerce by Congress.

The situation is somewhat analogous to that presented in *City of Chicago v. Atchison, Topeka and Santa Fe Railroad Company*, 357 U.S. 77 (1958). There the City of Chicago sought to require railroads engaged in interterminal transfer of passengers to obtain a certificate of convenience and necessity. The Supreme Court held such a requirement to be inconsistent with the provisions of the Interstate Commerce Act and invalid. The Court considers the statutes quoted above requiring the establishment of through routes and the

interchange of traffic and at page 87 of the U. S. Report makes the following statement:

“The various provisions set forth above manifest a congressional policy to provide for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation. In our view it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers. We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities.

“National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals. . . .”

The principle involved here is suggested by the decision of this Court in *Union Stock Yards v. State Tax Commission of Utah*, *supra*. In that case it was pointed out that under the provisions of the Twenty-Eight Hour Law, 45 U.S.C.A., Sections 71-74, railroads are required to unload, feed and water livestock moving in interstate commerce. The Court in sustaining a sales tax upon the purchase of feed used for such livestock was careful, at page 176 of the Utah report, to point out that:

“ . . . The tax was imposed on the sales price of the feed alone and not on the value of the

entire service rendered by plaintiff to the interstate carriers; that is, the Tax Commission did not levy any tax on the value of the service of loading, unloading, or use of the pens for the resting and watering of the animals. . . .”

This Court properly held that the purchase of the feed for the livestock was taxable, because it preceded the commerce. Services of unloading and loading the livestock, however, are a part of the process of commerce, required by the Act, and not subject to burden or interference through taxation.

So in the case at bar. The Tax Commission may lawfully collect as it has done, use tax from Rio Grande on materials and supplies brought into this State, some of which are thereafter used in the repairs in question. It may not, however, collect a sales tax upon the performance of services in car repair required by the Acts of Congress.

CONCLUSION

The levy of sales tax upon Rio Grande for the repair of cars and locomotives of other railroads is invalid as being in contravention of the commerce clause of the Federal Constitution.

Respectfully submitted,

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