RAILROADS:
SAFETY DEVICES AND
INTERSTATE COMMERCE
COMMISSION:

Safety devices for engines of railroads should be required and ordered by the Interstate Commerce Commission.

May 22, 1939

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Honorable George A. Rozier
State Senator
Jefferson City, Missouri

Dear Senator Rozier:

This is in reply to yours of recent date requesting an official opinion from this department based upon the following letter:

> "In 1913 the State Legislature enacted what is usually referred to as the 'Engine Equipment Law' covered in Sections 4834 to 4844 inclusive; Chapter 32, Article 2, R. S. Mo. 1929.
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> "In the 1929 Revision Session these sections were not disturbed, however, in the present Revision Session as proposed in Senate Bill No. 112, it is proposed to repeal this whole code. Under the terms of the famous Napier case (Attorney General George N. Napier, appellant vs Atlantic Coast Line R. R. Co., et. al.) which is an appeal from the District Court of the United States for the Northern District of Georgia, it is apparent the jurisdiction of States to pass such regulatory measures pertaining to Locomotive equipment is somewhat restricted either by quasi judicial Commissions and Boards or by the Legislature.

"It does not seem plain however, that the State may not retain and enforce existing statutes of long standing, covering safety appliances and/or equipment such as set out in the first paragraph of Section 4840 or in Section 4841, R. S. 1929, where such provisions or requirements have not been made or the field invaded by the Interstate Commerce Commission or the Bureau of Locomotive Inspection thereof, in their regulations and rules.

"It is very plainly set out in the rules of the Commission and Bureau before referred to, that every section in this code has been covered in the rules of the Bureau of Locomotive Inspection except the provisions in Section 4840 and 4841, before referred to.

"I have before me a letter dated March 22, 1939 over the signature of Mr. John M. Hall, Chief Inspector of the Bureau of Locomotive Inspection wherein he says, in part: 'You are respectfully advised that the Federal rules for the inspection of Locomotives do not contain a requirement relative to foot-warmers or steam radiation in locomotive cabs or spring seats, and therefore the Federal Government has not covered that field, and it seems to me that if the Legislature does not include that provision (in their repeal) it would still be effective in your state.'

"In view of the fact that the previous Revision Session did not see fit to drop the Sections hereinbefore referred to from the Statutes, and in view of the further fact that it is plain that the provisions before referred to in

> Section 4840 (first provision) and Section 4841 have not been covered by rules and requirements of the Interstate Commerce Commission or the Bureau of Locomotive Inspection thereof, and as there is a divergence of opinion upon the matter, I will appreciate an opinion from your Department at an early date, in which I hope you will set out whether or not the Sections referred to should be retained in the Missouri Statutes."

As stated in your request the two sections of the statute applicable to the question which you have submitted are being proposed to be repealed by Senate Bill No. 112 are Sections 4840 and 4841, R. S. Missouri 1929. The first clause of Section 4840, supra, provides as follows:

> "It shall be unlawful for any person, firm or corporation, operating a line of steam railroad in this state, to use or permit to be used within the state of Missouri, any steam locomotive engine, between the first day of October and the first day of April of the next succeeding year, unless the inside of the cab on such locomotive engine shall be supplied and equipped with not less than sixteen square feet of heating radiation on each side thereof; * * * * * * * "

Section 4841, supra, provides as follows:

> "It shall be unlawful for any person, firm or corporation, operating a steam railroad within the state, after the first day of August, nineteen hundred and thirteen, to use or permit to be used any locomotive engine within the state of Missouri, unless such loco-

> motive engine shall be equipped with a seat on each side of the cab thereof, which seats shall consist of a series of spiral, coil or elastic springs, on the top of which shall be constructed a padding or cushion consisting of leather or a suitable substitute thereof, stuffed or packed with hair, moss or other suitable material commonly used for such purpose, which said seat, including the springs thereof, shall not be greater than six nor less than four inches in thickness."

The last clause of Section 4840, supra, has been covered by a rule of the Interstate Commerce Commission but the other portion of these two sections has not been covered by any rule of the Commission or any Federal Legislation. The provisions of these two sections are for the purpose of protecting the health and safety of the railroad employees. It seems from your request that the provisions of these two sections might be no longer enforcible for the reason that the federal regulations have entered into this field, and, therefore, the state is ousted. We think the history of the safety appliance legislation, as it applies to railroads, is fairly well set out in the case of Napier v. Atlantic Coast Line R. Co., 71 Law Ed., 433, l.c. 437 and 272 U. S. 608. Since this subject is quite fully treated in the Napier case, supra, we will quote from it quite extensively. At l.c. 437 the court said:

> "Prior to the passage of the Boiler Inspection Act, Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce. It had required a power driving-wheel brake, automotic couplers, grabirons or handholds, drawbars, safety ash pans, and sill steps. Acts of March 2, 1893, chap. 196, 27 Stat. at L. 531, Comp. Stat. Section 8605, 8 Fed. Stat. Anno.

2d ed. p. 1155; March 2, 1903, chap. 976, 32 Stat. at L. 943, Comp. Stat. Section 8613, 8 Fed. Stat. Anno. 2d ed. p. 1183; May 30, 1908, chap. 225, 35 Stat. at L. 476, Comp. Stat. Section 8624, 8 Fed. Stat. Anno. 2d ed. p. 1199; April 14, 1910, chap. 160, 36 Stat. at L. 298, Comp. Stat. Section 8617, 8 Fed. Stat. Anno. 2d ed. p. 1189. Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment in 1911. The original act applied only to the boiler. It is entitled: 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Locomotives with Safe and Suitable Boilers and Appurtenances Thereto.' The provisions of that act were extended in 1915 to 'include the entire locomotive and tender and all parts and appurtenances thereof.' In 1924, section 2 of the original act was amended to read as follows:

"'That it shall be unlawful for any carrier to use or permit to be used on its lines any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this

> act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.'
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> "Other sections confer upon inspectors and the commission power to prescribe requirements and establish rules to secure compliance with the provisions of section 2. From time to time since the passage of the original act, the commission has required that locomotives used in interstate commerce be equipped with various devices. But it has made no order requiring either a particular type of fire box door or a cab curtain. Nor has Congress legislated specifically in respect to either device."

It will be seen that by this act not only is the safety of employees and travellers of railroads protected by legislation but Congress has granted the power to the Interstate Commerce Commission to prescribe requirements and establish rules to secure compliance with the provisions of the act. As stated in the Napier case, supra, the Commission has made certain rules and regulations as to the equipment used by the railroads. In the Napier case, supra, the question was up whether or not a state regulation was enforcible which provided for a certain type of fire box door and a cab curtain could be enforced. In that case the Commission had made no order pertaining to such equipment nor was there any federal legislation pertaining to that sort of equipment. In that case because the Commission had made no order nor was there any federal legislation relating to such equipment, then the state claimed that its acts were enforcible because Congress had not entered into that field of equipment. Quoting again from the Napier case at l.c. 438:

> "Each device was prescribed by the state primarily to promote the health and comfort of engineers and firemen.

> Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause. It may be assumed, also, that there is no physical conflict between the devices required by the state and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only. The intention of Congress to exclude states from exerting their police power must be clearly manifested. * * * * * * * * * * "

In speaking of that class of legislation relating to fire box and cab curtains, the court further said at l.c. 438:

> "* * * * Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances.
>
> "The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic fire door and an

> effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. * * * * * * * * * * * * *"

In the Napier case, supra, the court said it thought the power was conferred upon the Interstate Commerce Commission to specify the equipment to be used on locomotives. Quoting again from the Napier case, supra, at l.c. 439:

> "The argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that here might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> "The federal and the state statutes are directed to the same subject-- the equipment of locomotives. They

> operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automotic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. * * * * * ** * * * "

We note from your request and the letter enclosed with it that it does not seem that the Commission has seen fit to make any rule or regulation pertaining to the subjects which are covered in said Sections 4840 and 4841, but as stated in the Napier case, supra, that would not determine the question of whether Congress intended to cover that field.

Quoting again from the Napier case, supra, at l.c. 439, the court said:

> "If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. * * * * * * "

It seems from the Napier case that the state regulation providing for the fire box door and the cab curtains was not enforcible because it was within the field that Congress had entered into in regard to such equipment. It was argued in that case that this equipment was for the health and safety of the employees. So it might be argued in support of the provisions of Sections 4840 and 4841, supra, that they are for the health and safety of the employees,

but in the Napier case the court held that such state legislation was not enforcible and for the same reason we do not think that Sections 4840 and 4841, supra, would be enforcible.

We note in your request that the previous Revision Sessions did not see fit to drop these sections. We hardly think that that would be controlling on the question of whether or not they would be enforcible. Even though it is our opinion that these sections would not be enforcible, yet it might be the best policy for the lawmakers to leave them in the statutes until it was determined by some court whether or not their provisions can be enforced.

CONCLUSION.

From the foregoing it is the opinion of this department that Congress has covered the field of legislation which is attempted to be covered by Sections 4840 and 4841, R. S. Missouri 1929, and that the railroads should be required to install the equipment mentioned in said sections by a rule of the Interstate Commerce Commission instead of by an attempt to enforce the provisions of said sections through the state courts.

As to the advisability of repealing the foregoing sections it is the opinion of this department that since there is a question of whether or not these sections are enforcible that it might be the best policy of the Missouri Legislators to leave these sections in the statutes until it was determined by some court of competent jurisdiction whether or not there provisions are enforcible.

Respectfully submitted

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APPROVED:

HARRY H. KAY
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