Decision **DRAFT DECISION OF ALJ DEULLOA** **(Mailed 12/9/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order to Show Cause Why the Burlington Northern Santa Fe Railway Company and the Union Pacific Railroad Company Should Not be Ordered to Comply With California Labor Code Section 6906.	Investigation 99-06-005 (Filed June 3, 1999; reopened November 13, 2001)

O P I N I O N

Summary

We conclude that California Labor Code Section 6906(b)[1] is repealed by implication. Consequently, respondents Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UPRR) have no legal duty to comply with Section 6906(b). Decision (D.) 01-10-066 is vacated and Investigation (I.) 99-06-005 is closed.

Background

We initiated this formal investigation because the United Transportation Union (UTU) reported to us that the respondents were violating Section 6906(b) which states in relevant part:

[1] All references are to the California Labor Code unless otherwise noted.

> No common carrier shall employ any person as:
>
> * * *
>
> (b) A conductor who has not had at least two years' actual service as a brakeman in road service on a steam or electric railroad other than a street railway, or one year's actual service as a railroad conductor in road service.

In Ordering Paragraph 1 of I.99-06-005, we issued a formal order to show cause "for the limited purpose of determining why the BNSF and the UPRR should not be ordered to comply with the conductor qualification requirements of [Section 6906]."

On September 3, 1999, respondents filed a motion to dismiss. Respondents argued that the Commission should dismiss this proceeding on constitutional grounds in the nature of due process, supremacy, and commerce clause violations of the United States Constitution. Respondents argued that the United States Supreme Court long ago invalidated a Texas statute that closely resembles Section 6906(b), and that the California Attorney General has formally opined that Section 6906(a) is invalid. In a ruling dated May 25, 2000, the assigned Administrative Law Judge (ALJ) denied the motion on the grounds that Article III, Section 3.5 of the California Constitution expressly prohibits the Commission from refusing to enforce a statute on the basis that it is unconstitutional, unenforceable or preempted by federal law.

Subsequently, two rounds of written testimony and briefs were filed and the matter submitted on November 13, 2000. No evidentiary hearing was held. Respondents argued that the Commission should not require them to comply with Section 6906 because the statute is unconstitutional, preempted by certain federal legislation, and inconsistent with the manning of trains permitted under

California's Anti-Featherbedding Act.[2] On October 25, 2001, the Commission issued D.01-10-066 which echoed the ALJ's May 25, 2000 ruling and stated that:

> "Although these contentions are not without merit, … the Commission is foreclosed under these circumstances from conceding federal preemption. Article III, Section 3.5 of the California Constitution expressly provides that state administrative agencies may not declare a statute to be unconstitutional, unenforceable or preempted by federal law, or to refuse to exercise their enforcement powers on such grounds, unless an appellate court has declared the statute to be unconstitutional or unenforceable. No appellate court has expressly invalidated Section 6906(b)." (D.01-10-066, mimeo. at pp. 7-8.)

Further, although we noted that Section 6906 may have become obsolete over time, we concluded that respondents must resort to a different forum to raise the issue. Consequently, D.01-10-066 ordered respondents to comply with Section 6906.

On January 9, 2002, the Commission issued D.02-01-045, which stayed D.01-10-066 pending resolution of the respondents' application for rehearing. In D.02-04-066, we denied respondents' application for rehearing on the grounds that the Commission could not declare a statute unconstitutional. Subsequently, respondents petitioned the Court of Appeal of the State of California Third Appellate District for a writ of review. On October 21, 2003, the appellate court issued its decision in Case No. C041233, which annulled D.01-10-066 and remanded the matter to the Commission for further proceedings consistent with the appellate court's order.

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[2] This Act was codified as Section 6900.5.

Discussion

The appellate court held that Article III, Section 3.5 of the California Constitution does not constrain the Commission to enforce Section 6906(b). According to the appellate court, a plain reading of Article III, Section 3.5 of the California Constitution does not prohibit the Commission from refusing to enforce a statute where the statute is inconsistent with another statute. The constitutional provision only restricts the Commission's use of two sources as justification for refusing to enforce a statute: the constitution and federal law.

In addressing the application of Article III, Section 3.5, the appellate court stated:

> "[a]llowing the PUC to choose between two inconsistent statutes, both of which it is required by law to enforce, does not defeat or materially impair the inherent function of the judicial branch. Furthermore, the decisions of the PUC in choosing between inconsistent statutes are reviewable in the Supreme Court and Court of Appeals, as in this case. (Pub. Util. Code Section 1756.) Accordingly, a decision by the PUC to refuse to enforce Section 6906(b) because it was repealed by implication would not have violated the separation of powers doctrine." (*Burlington Northern and Santa Fe Railway Co. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 888-89.)

Regarding the issue of whether the Anti-Featherbedding Act repealed Section 6906(b) by implication, the appellate court stated there is a presumption against repeal by implication. (*Id.* at p. 889.) However, "[w]hen a later statute enacted by initiative is inconsistent and cannot operate concurrently with an earlier statue enacted by the legislature, the later statute prevails." (*Id.* at p. 890, citing *People v. Bustamante (1997) 57 Cal.App.4th 693, 700-701*.) In the present case, the Commission "should have refused to enforce Section 6906(b) because the state's electorate repealed Section 6906(b) by implication when it adopted the

Anti-Featherbedding Act." (*Burlington Northern*, 112 Cal.App.4th at 889.) The Court stated that the "Railroads' presentation of the repeal-by-implication argument, which the PUC found to be 'not without merit,' should have prompted the PUC to refuse to enforce the statute." (*Id.* at p. 891.)

Based on the appellate court's findings and direction, we conclude that the Anti-Featherbedding Law repealed Section 6906(b) by implication. Further, we conclude that D.01-10-066 should be vacated.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Joseph R. DeUlloa is the assigned Administrative Law Judge in this proceeding.

Finding of Fact

Labor Code Section 6906(b) is inconsistent and cannot operate concurrently with the later enacted Anti-Featherbedding Act.

Conclusions of Law

1. As held in *Burlington Northern and Santa Fe Railway Co. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, the Commission has authority to declare a California statute repealed by implication.
2. Section 6906(b) of the California Labor Code is repealed by implication.
3. D.01-10-066 should be vacated, and this investigation should be closed effective immediately.

O R D E R

IT IS ORDERED that:

1. Decision 01-10-066 is vacated.
2. Investigation 99-06-005 is closed.

This order is effective today.

Dated _____, at San Francisco, California.