

OFFICIAL OPINION NO. 49

July 15, 1948.

Mr. LeRoy E. Yoder,
Chairman, Public Service Commission,
401 State House,
Indianapolis, Indiana.

Dear Sir:

Copies of your file regarding the possible violation of the Minimum Crew Law by the New York Central Railroad have been received, likewise, your request for an official opinion as to whether or not the facts as alleged constitute a violation.

The facts, as I gather them from the files, are as follows:

The railroad company used a certain self-propelled Burro crane in laying new rail between Chesterton and Dune Park, Indiana. The crane was operated on a main track. The crane was used solely as a crane and had no cars attached. Before the operation, the knuckles of the draw bar were removed from the crane, rendering it incapable of drawing cars. In the use of the crane they did not maintain a crew consisting of an engineer, a conductor and a flagman. The crew consisted instead of an engineer and a conductor.

Whether the use of a crane without a crew of an engineer, a conductor and a flagman constituted a violation of the Indiana Minimum Crew Law depends upon a construction of two statutes which concededly are not clear.

The first is Section 8 of Chapter 58, page 306, of the Acts of 1937 (Section 55-1333, Burns' 1933 R.S.). The section reads as follows:

"It shall be unlawful for any carrier to operate as a locomotive or permit to be operated as a locomotive, on its main track, in the state of Indiana, any self-propelled crane, pile-driver, weed-burner, or other self-propelled engine or machine not used for the transportation of passengers and/or freight or property for hire, which has sufficient power to draw or propel itself and one (1) or more standard railroad cars, unless such engine or machine shall be manned by a crew of competent employees consisting of not less than one (1) engineer, one (1) conductor and one (1) flagman."

The essential elements within this penal section are five in number, to-wit:

1. The unit must be self-propelled;
2. The unit must be on the main track;
3. It must not be used for the transportation of passengers and/or freight or property for hire;
4. It must have sufficient power to draw or propel itself and one or more standard cars;
5. It must be operated as a locomotive.

All five elements must exist to warrant a judgment under this section.

It is a well settled rule that the language and terms of a penal statute must be rigidly and strictly construed and where the statute itself defines words or terms used therein, no wider or different meaning can be given such words or terms by any rule or legal construction.

Fahnestock v. State (1885), 102 Ind. 156, 1
N. E. 372.

A penal statute will be strictly construed and will not be construed to include anything beyond its letter, though within its spirit, and nothing will be added by inference or intendment.

Van Arsdall v. Indiana Bell Telephone Co.
(1926), 84 Ind. App. 257, 151 N. E. 19.

This rule requires that when there is ambiguity it must be resolved against the penalty and only those cases brought within the statute that are clearly within its meaning and intention.

Manners v. State (1936), 210 Ind. 648, 5 N. E.
(2d) 300.

If there is a defect in the statute, we may not supply it by construction to sustain a judgment of penal character.

Hargis v. State (1942), 220 Ind. 429, 44 N. E.
(2d) 307.

The Minimum Crew Law is a safety measure. This appears from the title of the act as well as by its various provisions. Such enactment is permissible under the police powers of the state.

Railroad Comm. of Indiana v. Grand Trunk
Western R. Co. (1912), 179 Ind. 255, 266, 100
N. E. 852.

Elements 1, 2, and 4 are so clearly proper grounds for classification that no question of constitutionality arises. However, the question of proper classification does present itself in Element No. 3—proper classification in differentiating on the basis of hire.

As to Element No. 5 it must be noted that the word or term "locomotive" is specifically defined by Section 1 of the same act and reads as follows:

"(b) The term 'locomotive' means any self-propelled unit operated by any form of energy or power, whether produced thereon or furnished from any outside source, and adapted for use in moving cars upon rails or for the transportation of passengers and/or freight or property, except locomotive cranes, pile-drivers, weed-burners, and other self-propelled engines or machines not used for the transportation of passengers and/or freight or property for hire."

As pointed out herein, when a word or term is defined by statute that meaning and only that meaning can be given.

To arrive at the true meaning or interpretation of Section 8 and what was intended by the Legislature requires the consideration of not only Section 1, but other sections of the act. Sections 3, 4, 5, 6 and 7, all being safety measures, specify likewise when full crews are necessary. Under Section 7 it is unlawful to operate *any locomotive* on a main track without a competent crew.

A locomotive crane "adapted" for the uses set out in Section 1 and used *for hire* would be a locomotive within the terms of the definition and, therefore, when operated on the main track would be required to have a competent crew as provided by Section 7. And as Section 8 has to do with the same type of unit under the same circumstances, but *not for hire* requires the same full crew, the constitutional question, therefore, as

to proper classification is eliminated. It can be said that the subject matter of Section 8 is that which was excepted in the definition in Section 1.

Before a conclusion or answer be arrived at to your question, the words "to operate", "adapted", and "except" should be defined and construed in their statutory use.

"To operate" means to have or produce a desired result or effect, to act effectively, to effect any result, act, to conduct or to work.

Webster, New International Dictionary;
 Union Tank Line Co. v. Richardson (1920), 191
 Pac. 697, 183 Cal. 409;
 State v. Woolley (1914), 92 Atl. 662, 88 Conn.
 715.

"Adapted to" means fitted, designed, prepared, suitable, appropriated.

Thomas v. State of Oklahoma (1926), 244 Pac.
 816.

The ordinary and general signification of "suitable" is "likely to suit" or "adapted". This is by no means equivalent to "adequate". That which is adequate must be suitable, but that which is suitable may not be adequate.

St. Anthony Falls Power Co. v. Eastman
 (1874), 20 Minn. 277, 296.

"Except" means to exclude from an enumeration, the scope of statement or enactment, a privilege, etc.; to leave out of account or consideration.

In re Garvin's Estate (1939), 6 Atl. (2) 796,
 800, 335 Pa. 542.

It is clear that the exception in the definition (Section 1) serves to exclude locomotive cranes and other self-propelled engines which are "adapted" for the uses set out in the definition, but in fact are not being used for the transportation of passengers and/or freight or property or are not so used for hire. And, likewise, the self-propelled engine not "adapted" is not a locomotive under the definition.

The question then becomes, what does "operated as a locomotive" (Element No. 5) mean in view of the statutory definitions of locomotive and the usual legal definitions of "adapted" and "operate", as previously set out? The only reasonable result to be reached under these definitions is that "operated as a locomotive" means to use as, to function as, to get the desired results, or to effectuate the purposes set out in the statutory definition of the term "locomotive." In the light of this, Element No. 5 of Section 8 requires that the unit be:

- (a) Adapted for the purposes set out in the definition of locomotive;
- (b) Actually used primarily in furtherance of those purposes.

It seems to me that under the facts as given if the locomotive crane had been rendered incapable of drawing cars by the removal of the knuckles of the draw bar, it was not then fit, prepared or suitable for use in moving cars upon rails and, therefore, was not "adapted" for use in moving cars upon rails. Without the knuckles of the draw bar the crane was unable to produce the desired results or effect, to act as or to conduct or to work as a locomotive.

However, I am unable to determine from the facts furnished whether or not the unit in question was "adapted" for transportation of passengers and/or freight or property. Here, too, transportation of passengers and/or freight or property must of course be more than incidental. The unit must be suitable or adapted for such purposes.

I am, therefore, of the opinion that unless further facts should show that the crane was suitable for hauling passengers, property or freight and was being so used, the facts shown would not sustain a judgment for violation of Section 8 of the Minimum Crew Law.