

Decision No. 15981

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
the Board of Supervisors of Fresno
County, California, for permission
to construct a public highway cross-
ing at grade over the tracks of
Southern Pacific Company at Isabella
Street near the City of Fresno,
Fresno County, California.

ORIGINAL

Application No. 1351.

Geo. R. Lovejoy, District Attorney by
C. M. Ozias, Deputy District Attorney,
for Applicant.

H. W. Hobbs, for Southern Pacific Company.

WHITSELL, COMMISSIONER:

FIRST SUPPLEMENTAL OPINION

The County of Fresno on July 29th, 1925, filed with this Commission a petition requesting that the above-entitled matter be reopened for further hearing. The petition recites that on October 10th, 1914, this Commission made an order in this proceeding in Decision No. 1856, granting authority under certain conditions for the construction and maintenance of Isabella Street, now Van Ness Avenue, at grade across the tracks of the Southern Pacific Company; that within the three months preceding the filing of the petition, Isabella Street has been widened and paved up to certain points outside of the outer tracks of the railroad company and that it is now necessary, fitting and proper that the railroad crossing be widened to a point ten feet outside the present width of the highway at said crossing and that the whole of said crossing as widened to a point two feet outside of the outer tracks of said Southern Pacific Company be paved.

The County of Fresno takes the position in its petition, that the widening and paving of said crossing as above described constitutes and is "maintenance" of said crossing, as defined and specified in Decision No. 1856 and that the widening and paving of said crossing should be borne by Southern Pacific Company. The petition states that Southern Pacific Company has refused to widen or pave said crossing as described. The County petitions that the Commission make an order requiring the Southern Pacific Company at its own expense to widen and pave said crossing.

The Commission on August 3rd, 1925, made its order reopening this proceeding for further hearing for the purpose of determining whether or not certain structural changes should be made in the crossing heretofore authorized in Decision No. 1856, dated October 10th, 1914, and for the apportionment of the cost thereof. A public hearing was held on September 15, 1925, at Fresno, California. An agreed statement of facts stipulated by and between the County of Fresno and the Southern Pacific Company was filed at this hearing, which stipulation, in addition to a recital of certain facts and conditions set forth in said Decision No. 1856, contains the following:

"Pursuant to authority granted by said order, the County of Fresno, at its own expense, constructed said crossing and paved a strip twenty (20) feet in width, from the right of way line to right of way line over and across the tracks. The crossing, although opened for the full width of the street, was not at that time paved or passable for vehicular traffic, except for the twenty (20) foot strip mentioned above.

Subsequently, the railroad company constructed macadam shoulders alongside the twenty (20) foot paved strip, over and across the tracks, such shoulders varying in width on the east side from ten (10) feet to three and six-tenths (3.6) feet, and on the west side, from five and two-tenths (5.2) feet to five and nine-tenths (5.9) feet, thereby widening the strip of paving passable to traffic across the tracks. The remainder of the width of said street has never been paved from the right of way lines to the tracks, nor over the tracks, nor filled up flush with the tops of the rails so as to make the same passable to vehicular traffic.

On or about the 25th day of November, 1924, the County of Fresno, proceeding under the Road District Improvement Act of 1907 (Statutes 1907, page 806, and acts supplementary thereto and amendatory thereof) passed a resolution of intention ordering the paving of Van Ness Avenue for a width of fifty-two (52) feet from the northerly line of the existing pavement on the State Highway, northerly to the northerly line of Southern Pacific Company's right of way, and for a greater width on to the City limits of Fresno.

That said improvement excepted, however, all work over and across the tracks of Southern Pacific Company lying between lines two (2) feet outside the outermost rails of said tracks. That said improvement consists in a widening of the existing twenty (20) foot strip of pavement to a uniform width of fifty-two (52) feet and involves paving for the first time of strips adjacent to the existing paving, varying in width so as to make the paved strip across the railroad within the right of way lines of a full width of fifty-two (52) feet.

That Southern Pacific Company will at its own expense, remove the macadam shoulders and pave in a manner comparable with the paving installed under said resolution of intention, the strips over and across the tracks and within lines two feet outside the outermost rails theretofore improved with the macadam shoulders, but has not paved, except temporarily, pending decision of the Commission herein, and refuses to pave the strips of varying width adjacent to the macadam shoulders necessary to bring the pavement to a full fifty-two (52) foot width over and across the tracks and between lines two (2) feet outside the outermost rails, which strips were never heretofore paved by the County of Fresno, nor heretofore except for the temporary paving above mentioned usable by vehicular traffic because of difference between the level of top of rail and surface of the ground.

County of Fresno contends that under the order of the Railroad Commission, Decision No. 1856 above referred to, and quoted from, Southern Pacific Company is required to pave such additional strips as maintenance work. Southern Pacific Company contends that the initial paving of such additional strips constitutes construction within the terms of said order and that the obligation of maintenance on its part does not commence until the initial paving has been done by the County of Fresno.

That under said proceedings, the entire expense of the improvement, which improvement does not include any work across the tracks and within lines two (2) feet outside the outermost rails, but does include paving from each right of way line to lines two (2) feet outside the outermost rails, will be paid by annual assessments on the land within a district embracing the land abutting the street on both sides throughout the length of the improvement, including the right of way of the railroad company, and a part of the expense will be made a lien and charge upon the railroad property.

That no part of the expense of the work will be paid by the County of Fresno.

Southern Pacific Company contends that under the terms of Decision No. 1856, the County of Fresno is obligated to pay for

the paving of the additional width of said street where the same lies within the right of way lines and by these proceedings, it is shifting a part of that obligation back to the railroad company, and the balance of it to the owners of other property in the assessment district, contrary to the terms of that order. County of Fresno contends that, notwithstanding Railroad Commission Decision 1856, it has power to assess to the railroad company property any part of the expense of the improvement."

The evidence shows that the original paving in 1915 of the twenty foot strip across the tracks was of oiled macadam and cost the County of Fresno \$478.00. In March, 1920, a 20-foot strip of asphaltic concrete was installed in place of the oiled macadam and treated as maintenance by the railroad company.

Counsel for applicant and Southern Pacific Company endeavored to prove their respective positions by citing definitions of maintenance and construction. However, it is my opinion that this particular case is not covered by either maintenance or construction but is rather a case of alteration of an existing crossing. The order of the Commission as set down in Decision No. 1856, above referred to, it appears, was completely carried out and became a closed matter when the street was opened across the railroad and the original crossing constructed and that any widening or other change found necessary at this time comes under the term "alteration" as embodied in Section 43 (b) of the Public Utilities Act and that such alteration or change is a separate and distinct matter to be decided by the Commission as prescribed in said Section 43 (b).

It has been the general policy of the Commission, when a grade crossing is opened across a railroad, to assess the cost of constructing the crossing to the applicant. No exception to this policy was made in Decision 1856 on this proceeding and the cost was assessed to the applicant, County of Fresno.

The growth of traffic has now required a widening of the crossing for the benefit of the public using the crossing. It is my opinion that the cost of widening the crossing to suit the public needs should, in this case, after considering all that has gone before, be assessed to the County of Fresno and the maintenance of the widened

crossing should be borne by the Southern Pacific Company. However, Southern Pacific Company, as above stated, is willing to bear the expense of renewing the macadam shoulders with asphaltic concrete or other suitable pavement.

When the Commission undertakes to apportion the cost of constructing a crossing it makes such an apportionment on what to it appears to be a proper and equitable basis and expects each party to the proceeding to bear such share of the cost and now words its orders in such a manner that the burden of one party's share may not be passed on to another party. That this attitude is correct is indicated by the fact that Section 43 (b) of the Public Utilities Act states that "The Commission shall have the exclusive power*****to prescribe***** the proportions in which the expense of the construction, alteration, relocation or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, County, Municipality or other Political subdivision affected."

In my opinion the cost of widening the present crossing to a width of 52 feet should be borne by the applicant and therefore the following form of order is recommended:

FIRST SUPPLEMENTAL ORDER

County of Fresno, having on July 29th, 1925, filed a petition for the reopening of the above-entitled proceeding, the Commission having on August 3rd, 1925, made its order reopening said proceeding for further hearing, a public hearing having been held on September 15th, 1925, the Commission being apprised of the facts, the matter being under submission and ready for decision, therefore,

IT IS HEREBY FOUND AS A FACT, that public convenience and necessity require the widening of the public crossing of Isabella Street, now Van Ness Avenue, with the tracks of the Southern Pacific Company,

authorized in Decision No. 1856, dated October 10th, 1914, therefore,

IT IS HEREBY ORDERED, that the paving on the existing crossing, authorized in Decision No. 1856, of this Commission, dated October 10th, 1914, be widened to a width of 52 feet from right of way line to right of way line of Southern Pacific Company, subject, however, to the following conditions:

(1) The cost of widening, paving and maintaining that portion of the crossing between the respective right of way lines and lines drawn two feet outside of the outside rails shall be borne by the County of Fresno.

(2) The cost of repaving and maintaining those portions of the crossing shown in blue on Southern Pacific Company's Exhibit No. 1, filed September 15th, 1925, shall be borne by Southern Pacific Company.

(3) The cost of paving those portions of the crossing shown in pink on said Southern Pacific Company's Exhibit No. 1, filed September 15th, 1925, shall be borne by the County of Fresno. The cost of maintaining said sections shown in pink shall be borne by Southern Pacific Company.

(4) No portion of the costs assessed to applicant, County of Fresno, in this order shall be assessed by applicant, in any manner whatsoever, to the operative property of Southern Pacific Company.

(5) If said crossing shall not have been widened and paved within one year from the date of this order, the authority herein granted shall then lapse and become void, unless further time is granted by subsequent order.

(6) Applicant shall, within thirty (30) days from the date thereof, notify this Commission, in writing, of the completion of the widening and paving of said crossing.

(7) The Commission reserves the right to make such further orders relative to the location, construction, operation, maintenance and protection of said crossing as to it may seem right and proper,

and to revoke its permission if, in its judgment, the public convenience and necessity demand such action.

The foregoing opinion and order are hereby approved and ordered filed, as the opinion and order of the Railroad Commission of the State of California.

The authority herein granted shall become effective on the date hereof.

Dated at San Francisco, California, this 3rd day of February, 1926.

H. H. Brown

O. S. Sawyer

Frank W. Adams

Leon A. White

Commissioners.