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Decision No. 17952

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

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In the Matter of the Application	)
of the CITY OF OAKLAND to extend	)
and construct 92nd Avenue across	) Application No. 12,948
the tracks of The Western Pacific	)
Railroad Company.	)

Leon Gray for the Applicant.

James S. Moore, Jr. and  
J. W. Williams, for Western  
Pacific Railroad Company.

LOUTTIT, Commissioner:

O P I N I O N  
ON PETITION FOR REHEARING

The City of Oakland filed this application requesting permission to construct 92nd Avenue at grade across the tracks of the Western Pacific Railroad Company in the City of Oakland, County of Alameda, State of California. By ex parte Decision No. 17,136, dated July 19, 1926, such permission was granted subject to certain conditions, among which were (1) applicant was to pay the entire cost of constructing the crossing; (2) maintenance of the crossing, except between lines two feet outside of the rails, was to be borne by the applicant; maintenance within such lines was to be borne by the railroad; and (3) an automatic flagman was to be installed for the protection of the crossing at the expense of the applicant and maintained thereafter by the railroad company.

On July 27, 1926, applicant filed a petition for rehearing in this matter on the grounds:

1. That it is inequitable and unfair to assess the entire cost of the construction of

the grade crossing and the installation of automatic flagman against applicant because such crossing and automatic flagman are equally necessitated by the railroad and the needs of the public, and neither one nor the other should be entirely charged with this cost, but that such cost should be equally divided between them; and

2. That the assessment of these costs entirely against applicant is contrary to law and particularly section 43, subdivision (b) of the Public Utilities Act of the State of California.

On August 2, 1926, this Commission issued its order setting aside Decision No. 17,136 and reopening this application for further hearing.

A public hearing was held in Oakland on August 24, 1926, the matter was duly submitted, and is now ready for decision.

The position of the City with reference to the assessment of costs is that under section 43 of the Public Utilities Act, the Commission must divide or apportion the same between the City and the railroad. Section 43(a) of the Public Utilities Act (referring to the establishment of grade crossings) provides in part as follows:

"\*\*\*The Commission shall have the right to refuse its permission or grant it upon such terms and conditions as it may prescribe."

And 43(b) provides in part:

"\*\*\*The commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection\*\*\* of each crossing of a public road, or highway by a railroad,\*\*\*" (Italics mine)

The authority thus conferred upon this Commission by the Legislature gives the Commission power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of such crossing, which necessarily includes the right and power to determine in each case, which party should bear the whole or any portion of the expense of such crossing. Any other construction

would deprive the Commission of that broad power of regulation, which, I believe, was intended to be conferred upon it.

There is no arbitrary rule which can be laid down as to the assessment of such costs in all cases, but such assessment must be determined entirely by the circumstances of each case. It is my opinion that the Commission has ample power to assess the entire costs of the construction of a crossing of a city street and a railroad to either party to the proceeding as the circumstances may dictate, and to impose such conditions as to it seem just and reasonable as to the maintenance and protection of such crossing.

From the application and the testimony it is shown that the City of Oakland proposes to extend and pave 92nd Avenue southerly from "G" Street, and at grade across the tracks of the Western Pacific Railroad Company to Russett Street. Russett Street is laid out and improved for travel south of, and adjacent to the southern right-of-way line of the Western Pacific Railroad Company, and extends easterly from the southerly terminus of 85th Avenue to and beyond Jones Street. Jones Street, a north and south street, is approximately four thousand (4000) feet East of 85th Avenue. This extension of 92nd Avenue to Russett Street is to be made in order to serve an industrial territory south of the railroad and Russett Street and north of the right-of-way of the Southern Pacific Company, which right-of-way is south of and almost parallel to Russett Street.

Several industries are now established in this area, as shown by the map attached to the application, another industry is in the course of construction, and the testimony of various witnesses indicates that other industries will be placed in this area in the near future. The proposed extension of 92nd Avenue

will give a direct outlet from this industrial territory, instead of diverting, as it does now, by way of 85th Avenue or Jones Street, approximately two thousand (2000) feet west or east, respectively.

From the record it appears that the vehicular traffic over the proposed crossing at the present time will be only nominal, and that the Western Pacific Railroad Company operates a maximum of ten regular passenger and freight trains per day. The volume of traffic over the crossing does not warrant at this time the establishment of separated grades.

It appears to me that in order to provide for a direct outlet from this industrial area public convenience and necessity require the construction of 92nd Avenue at grade across the tracks of the Western Pacific Railroad Company at the location shown on the map attached to the application.

Because of the fact that property adjacent to the point of crossing is unimproved, there are no fixed obstructions to the view of approaching trains. However, a potential hazard or obstruction exists. Vehicles approaching the crossing from Russett Street cannot clearly observe the trains approaching from the same direction, and it is reasonable to expect that the vacant property north of the railroad will be built up and the view of approaching trains will become obstructed. For the purpose of warning vehicle drivers of such approach of trains, an automatic flagman, of approved type, should be installed with ringing circuits of such length as to give twenty to thirty seconds advance warning.

After taking all of the evidence into consideration, I am of the opinion that the former decision and order of this Commission in this proceeding, Decision No. 17,136, dated July

19, 1926, should be sustained in all respects, and I recommend an order to that effect.

ORDER

An application having been filed by the City of Oakland as above entitled on the 16th day of June, 1926, asking authority to construct 92nd Avenue at grade crossing the tracks of the Western Pacific Railroad Company in said City, the Commission having, on July 19, 1926, rendered its decision and order, No. 17,136, granting such authority, subject to such conditions as are fully set forth in said decision and order, the City of Oakland having filed a Petition for Rehearing, and rehearing having been had, the matter having been again duly submitted, and being now ready for decision,

IT IS HEREBY ORDERED that the Commission's prior order and decision in this proceeding, being decision and order No. 17,136, dated July 19, 1926, be and the same is hereby sustained, and shall in all respects remain in full force and effect.

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.

*February*  
~~January~~, 1927. Dated at San Francisco, California, this 2<sup>d</sup> day of

*Emmerts*  
*W. B. Bourdige*  
*C. Stearns*  
*Leon D. White*  
*W. D. Harwood*  
Commissioners