

ORIGINAL

Decision No. 23573

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation
on the Commission's own motion into
the protection of the crossing of
ROSECRANS STREET across the tracks
of The Atchison, Topeka and Santa Fe
Railway Company in the City of San
Diego, and the apportionment or as-
sessment of the cost of constructing
and maintaining such protection as may
be found necessary.

Case No. 2982.

C.L. Byers, Assistant City Attorney,
for City of San Diego.
M.W. Reed, for The Atchison, Topeka and
Santa Fe Railway Company.
J. Ogden Marsh, for Board of Public
Utilities of the City of Los Angeles.

HARRIS, Commissioner:

O P I N I O N

On February 3, 1927, City of San Diego applied for authority to construct Rosecrans Street at grade across the tracks of The Atchison, Topeka and Santa Fe Railway Company, "subject to such terms and conditions as may be deemed just by the Commission" (App. No. 13517). Authorization was granted subject to certain conditions, one of which provided that the crossing should be protected by a Standard No. 3 wigwag as specified in General Order No. 75, the cost of installing the protective device to be borne by the city and its maintenance cost by the railroad (Decision No. 18342, May 13, 1927). It was further provided that the authorization granted should lapse and become void if not exercised within one year from

the date thereof. On March 16, 1928, the city was granted an extension of time of one year within which to construct the crossing, which, however was not constructed within the two-year period.

A second application for this crossing was filed by the city on November 21, 1929 (App. No. 16106). On December 5, 1929, authorization was again granted under substantially the same terms and conditions as in the former order (Decision No. 21866). Petition for rehearing was filed by the city on October 24, 1930, in which it was contended, among other things, that the Commission lacked jurisdiction to condition its authorization upon the payment by the city of any of the costs involved in construction, maintenance or protection of the crossing. Rehearing was denied (Decision No. 23056, November 6, 1930). The time limit within which the city might act under the authority granted expired December 5, 1930. The record herein shows that five days later the city commenced construction and that the crossing was opened to public travel on December 17, 1930 (Crossing No. 2-264.2). No special protection was provided.

On January 8, 1931, the Commission instituted the present proceeding on its own motion, to inquire into the necessity for, extent and type of protection that should be installed at the crossing. The city and the railroad were ordered to show cause why the Commission should not prescribe the type of protection and apportion or assess the cost of construction and maintenance of such protection as may be found necessary to either the railroad or the city, or both. A public hearing was had in

San Diego on February 20, 1931.

The Commission's Transportation Engineer testified and presented exhibits in connection with an investigation made by him. The view of a motorist in approaching the crossing from the east is seriously impaired by structures, particularly advertising bill-boards, located on private property. The existence of an important highway intersection (Taylor Street and San Diego Avenue) within one hundred feet of the crossing adds materially to the hazard, as the motorist's attention is deflected from the track crossing in entering or leaving this highway intersection, which carries a large amount of through-traffic (Exhibit No. 1). That this crossing is a link in an important highway (Rosecrans Street) appears from the Major Street Plan of the City of San Diego, issued by the City Planning Commission in July, 1930 (Exhibit No. 4). Although but recently opened and Rosecrans Street only graded, traffic counts taken between the hours of 7 a.m. and 7 p.m. on January 16 and 20, 1931, show that more than 300 vehicles passed over this grade crossing during each of the respective counts (Exhibit No. 3). The train-master on this division, a witness for the railroad, testified that eight regular passenger trains and six regular freight trains, in addition to extra movements, normally pass over this crossing each day. The witnesses are in agreement that the crossing should be protected by an automatic flagman, commonly referred to as a wigwag. This is a proven and standard type of protection in California and one which can be installed and maintained without excessive cost.

There is no question under the record, and all parties

admit the necessity for such protection. The City of San Diego contends that the cost of construction and maintenance of a protective device is a liability and an expense to be borne entirely by the railroad. ⁽¹⁾ It is claimed that the safeguarding of crossings is an obligation imposed upon railroad companies, and that a city may not be burdened with any portion of the cost or expense. ⁽²⁾ The city also urges that Section 43 of the Public Utilities Act does not contemplate that the cost and expense of a safety device should be included in the cost and expense of opening a street and constructing a railroad crossing; ⁽³⁾

1. Section 1 of Charter Ordinance No. 58 (Nov. 11, 1890), granting a right of way to construct a railroad through the City of San Diego, reads in part as follows:

"Whenever said road shall cross or pass along any street, highway, sidewalk or alley in said City now or hereafter used for travel said company shall put and maintain such street highway, sidewalk or alley at such crossings in good condition for public convenience and travel.

"Said Company shall be liable for all damages which may be adjudged in favor of owners of property or to other persons because of the granting of this ordinance."

2. Civil Code, Section 465, reads in part: "Every railroad corporation has power * * *

4. To lay out its road, not exceeding ten rods wide, and to construct and maintain the same, with one or more tracks, and with such appendages and adjuncts as may be necessary for the convenient use of the same;

5. To construct their roads across, along or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue or highway, or across any railway, canal, ditch or flume which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise; * * *."

3. "Sec. 43. (a) No public road, highway or street shall here-

further, that in any event Section 43 does not apply, and that the question of whether or not the city in making such crossing shall bear any portion of the expense of a safety device is purely a municipal affair to be determined by the legislative body of the city and by no other body.

Counsel for the city has cited many cases in support of the proposition that it is the duty of carriers to provide and maintain protection at all crossings at their own expense. Certain of these cases hold that, in eminent domain proceedings for the taking of a portion of a carrier's right of way for a public street, the carrier is not entitled to recover damages from the political subdivision for the expense of installing

after be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

"(b) 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 one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad, or street railroad and of a street by a railroad or vice versa, subject to the provisions of section 2694 of the Political Code so far as applicable, and to alter, relocate or abolish any such crossing, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and 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

and maintaining safety devices rendered necessary by the construction of the crossing. The theory there expressed is that it is within the police power of the state to require safety devices and that one may not recover damages in eminent domain proceedings because of regulations which the state may impose under such power.

In No. Pac. Ry. Co. v. Minnesota ex rel. Duluth (1908), 208 U.S. 583, 52 L. ed. 630, review was had of a state court judgment compelling a carrier by mandamus to repair a viaduct carrying a city street over its tracks. The question presented was whether the order violated the obligation of a prior contract under which the city had agreed to maintain portions of the viaduct over a period of years. It was there held that the police power of the state may not be contracted away, and that a require-

corporations and the state, county, municipality or other political subdivision affected. It shall be the duty of each corporation and political subdivision to which any of the expense is apportioned to pay from the funds available therefor in its treasury the amount apportioned to it at the time and to the parties specified by the order of the commission and if the same is not paid in accordance with the commission's order the corporation or political subdivision entitled thereto under the commission's order shall have the right to sue therefor in any court of competent jurisdiction. If no such funds are available as aforesaid, it shall be the duty of the appropriate boards, officers and employees entrusted with the levy and collection of the taxes or assessments of such political subdivision to do all acts necessary to include in the next succeeding tax or assessment levy the amount due and to collect the same, whereupon the amount due shall be paid over to the corporation or corporations, the state, political subdivision, or political subdivisions entitled thereto under the commission's order. The commission shall have the power by order to designate the state, certain of said corporations, and political subdivisions, affected, to do all or specified portions of the acts required by any order of the commission made under the provisions of this subsection, and to prescribe the manner and the time within which the parties so designated shall be paid or reimbursed by the other corporations, the state and political subdivisions among which the expense of the work has been apportioned by the commission. * * * * *

ment that a company comply with reasonable police regulations without compensation is a legitimate exercise of the police power, and not in violation of the contract clause of the federal constitution. The state law there involved conferred power upon the city to require carriers to construct bridges and viaducts at their own expense at railroad crossings.

We have also been referred to cases involving the liability of railroads for negligence by failure to provide protection (Grand Trunk Ry. Co. v. Ives, 144 U.S. 408, 36 L. ed. 485), and to expressions that under the common law it is the duty of railroads to provide safety devices (State v. St. P.M. & M.R. Co., 98 Minn. 380, 108 N.W. 261).

Regardless of the rules expressed in other jurisdictions in different types of cases and construing other state statutes, this proceeding must be decided under the pertinent provisions of the California statutes and upon the law as interpreted by our own courts. Pursuant to the enabling provisions of the constitution of the state, the legislature has vested in the Railroad Commission the exclusive power to determine and prescribe the manner and the terms of installation, operation, maintenance, use and protection of crossings. It has further empowered the Commission to prescribe the proportions in which expenses shall be divided between the carriers and the political subdivisions affected. The Commission, under the statute, may also require a separation of grades and apportion the expenses thereof.

The city, while it urges that the Commission has not certain of the powers set forth above, claims that in any event Section 43 of the Public Utilities Act does not apply to the

City of San Diego because it attempts to regulate and govern municipal affairs within the city. However, the Supreme Court has decided that the regulation of railroad crossings is a state affair and not a municipal affair (City of San Bernardino v. Railroad Commission, 190 Cal. 562, and cases there cited).

It has been a long established practice of the Commission at new grade crossings to assess the installation cost of a wigwag to the political subdivision and to assess to the railroad the maintenance cost thereof. No reason appears why this practice should be deviated from in this instance.

The following form of order is recommended.

O R D E R

Good cause appearing,

IT IS HEREBY ORDERED that The Atchison, Topeka and Santa Fe Railway Company shall, within sixty (60) days from the date of this order, install a wigwag conforming to the requirements of Standard No. 3 of our General Order No. 75 at the crossing of Rosecrans Street across its main line track in the City of San Diego (Crossing No. 2-264.2), and shall report said installation to the Commission and to the City of San Diego within ten (10) days from the date of said installation.

IT IS HEREBY FURTHER ORDERED that the City of San Diego shall reimburse The Atchison, Topeka and Santa Fe Railway Company with the cost of installation of said wigwag within thirty (30) days after receiving notice of said installation

from the railroad company.

IT IS HEREBY FURTHER ORDERED that the cost of maintenance of said wigwag shall be borne by The Atchison, Topeka and Santa Fe Railway Company.

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.

Dated at San Francisco, California, this 10th day of April, 1931.

C. L. Seaman
Leon Whitely
M. J. Lee
M. B. Harris
Frederic G. Stewart
 Commissioners.