

Decision No. 9691

ORIGINAL

BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
ATCHISON, TOPEKA & SANTA FE RAILWAY)
COMPANY with respect to overhead) Application No. 5825.
crossing at Mount Vernon Avenue,)
City of San Bernardino.)

E. W. Camp and Robert Brennan, for Applicant.

Wm. Guthrie, for City of San Bernardino.

BY THE COMMISSION:

O P I N I O N

The Atchison, Topeka and Santa Fe Railway Company has applied for an order apportioning the cost of maintenance of the Mt. Vernon viaduct in San Bernardino.

A public hearing upon the application was held by Examiner Westover at San Bernardino.

It appears from the testimony that in 1907, to enable the railway company to extend and improve its yards in San Bernardino, the city, by Ordinance No. 360, closed that portion of Mt. Vernon Avenue between Third and Fourth streets upon condition that the company would build a viaduct over the closed portion of the Avenue and for a distance of about 450 feet easterly on Third Street, the company to convey to the city all of its right, title, and interest in the viaduct, giving to the city license and permission to maintain the viaduct as located upon and over company property so long as the

viaduct should be used for public travel; the city agreeing to maintain the viaduct in good condition and repair at all times.

Most of the above facts are recited in the company's deed to the city, dated November 5, 1908. The viaduct was accepted "in condition satisfactory to the Mayor and Common Council of the City of San Bernardino," by resolution and order of the Mayor and Council. It further appeared from the testimony that the cost of said viaduct was about \$57,000; that in 1907, when the agreement was reached and before the yards were enlarged, there were not to exceed 6 tracks across Mt. Vernon Avenue; that when the viaduct was finished in 1908 there were 15 tracks across Mt. Vernon Avenue under the viaduct.

In the fall of 1916, the company's frame station building was destroyed by fire, together with the company's shops and other property. With the purpose of increasing its facilities and enlarging its yards, the company subsequently acquired land on the east and west sides of Mt. Vernon Avenue and extending southerly a block to West Broadway, now known as new Third Street, and built a new station at a cost of \$240,000 on the north side of West Broadway or new Third Street, reconstructed its shops and facilities at a cost of ^{over} \$1,200,000, and extended the viaduct southerly over the enlarged yards at a cost of about \$59,000.

The additional lands needed for tracks and yards were acquired with the active co-operation of the Chamber of Commerce of San Bernardino, which appointed a committee to aid in seeing that fair prices for lands were established. The negotiations with the city officials for the vacation of additional streets involved numerous interviews, at which it appears that nothing was said on either side as to the maintenance of the extended or new portion of the viaduct. Plans and specifications prepared

by the company, showing its new track layout, extended viaduct, and other improvements and portions of streets to be vacated, and other lands to be dedicated by it or its subsidiary for street purposes in lieu of the streets vacated, were approved and adopted by resolution of the council, and the company caused to be deeded to the city for street purposes by the Santa Fe Land Improvement Company, a subsidiary company of applicant, land which is not now part of new Third Street. These deeds, resolutions and proceedings relating to relocation of the street and extension of the viaduct do not contain any reference to the maintenance of the new or old portion of the structure. In June, 1921, the city expended about \$5000 in repairing the old portion of the viaduct which the city considered had to be repaired or closed on account of the condition of the roadway.

The viaduct, as originally constructed, began at Fourth Street, extended along Mt. Vernon Avenue to Third Street, and thence by a right angle turn to the east, was located in Third Street. Beginning at Fourth Street, the grade ascended at a rate of about 6% to the northerly main track, was then level, and about 25 feet above the tracks to Third Street; the portion in Third Street descending to the street level at a grade of about 6%. When reconstructed, the level portion was extended to the south about 300 feet, the inclined approach being near West Broadway or new Third Street. The substantial result was to add about 300 feet to the level portion, and move the southerly approach southward.

At the time of the hearing the old portion was badly in need of repair, and it is clear from the evidence that in order to properly maintain the entire structure in the future, repairs will, from time to time, have to be made. It is exceedingly important that ~~that~~ this viaduct be adequately maintained,

for, if it should, for any reason be closed to public travel, a very dangerous grade crossing would result, which would interfere with the operation of trains and greatly imperil the safety of the public traversing such crossing. The Commission is, therefore, of the opinion that public convenience and necessity require that an order be made apportioning the cost of maintaining this viaduct.

It is urged by the city upon various grounds that the Commission is without jurisdiction to make an order apportioning cost of maintenance of this viaduct. Without going into an extensive discussion of the legal questions involved, we are satisfied, upon the authority of section 23, Article XII of the Constitution, section 43(b), Public Utilities Act, and Civic Center Association v. Railroad Commission, 175 Cal. 441, that it is within the power of the Railroad Commission to make an order apportioning the expense of the repair and maintenance of the viaduct between the parties in such manner as the Commission may deem just.

It only remains for the Commission to determine what would be a fair and just apportionment of the cost of maintaining said conduit. Applicant urges that the city is bound to maintain the structure by reason of the fact that it originally contracted to do so. The city maintains that this contract is ultra vires and void.

Irrespective of these questions, we believe that the Commission has the power, under the authorities above cited, to divide this expense in any manner that it deems just. Without attempting to pass upon the validity of this contract, we are of the opinion that the arrangement to which the parties agreed, is, at the present time and

and under existing circumstances, a fair and just arrangement, and the expense will be apportioned in accordance therewith.

What has been said, of course, applies only to the old portion of the viaduct and the equivalent portion as it stands today. As to the part which has been added, the above considerations do not necessarily apply. It is significant, in view of the earlier contractual relations between the same parties, that nothing was said or written concerning the maintenance of the new and additional level portion of the viaduct. The city had contracted to maintain the original viaduct under very similar circumstances, but did not agree to maintain the new level portion. Under the circumstances, it seems just to require the company to maintain that portion, and the order will so provide.

ORDER

Public hearings having been held upon the above-entitled application, briefs having been filed subsequent to the hearings, the matter having been submitted and is now ready for decision,--

IT IS HEREBY FOUND AS A FACT, that public safety, convenience and necessity require the maintenance and repair of the overhead crossing or viaduct over the tracks of The Atchison, Topeka and Santa Fe Railway Company at Mt. Vernon Avenue, in the City of San Bernardino;

IT IS FURTHER FOUND AS A FACT, that public safety, convenience and necessity require that an order be made by this Commission apportioning the cost of such maintenance and repair between The Atchison, Topeka and Santa Fe Railway Company and the City of San Bernardino, in accordance with the order hereinafter contained; and basing its order upon the

foregoing findings of fact and upon the opinion preceding this order,

IT IS HEREBY ORDERED that the cost of maintenance of the overhead crossing or viaduct over the tracks of The Atchison, Topeka and Santa Fe Railway Company at Mt. Vernon Avenue in the City of San Bernardino be borne as follows, to-wit:

1. Applicant shall maintain, at its sole cost and expense the new level portion of said viaduct, as shown outlined in red, and marked "Level" on applicant's Exhibit No. 1, otherwise described as that portion of said viaduct extending along Mt. Vernon Avenue from a point 513 feet south of the south line of Fourth Street to a point 39 feet north of the north line of West Broadway.

2. The City of San Bernardino shall maintain, at its sole cost and expense, the old level portion and both sloping approaches to both old and new level portions, as shown on applicant's Exhibit No. 1, otherwise described as that portion of said viaduct not herein ordered to be maintained by applicant.

3. The word "new", as used above in this order, refers to those portions of said viaduct constructed in or subsequent to the year 1916.

Dated at San Francisco, California, this 4th day of November, 1921.

H. B. Judge
H. D. Loveland
Warren Martin
Clarence T. ...
D. J. ...
Commissioners.