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Decision No. 49682

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CITY OF FRESNO, a municipal corporation, and COUNTY OF FRESNO, a political subdivision,	)	
Complainants,	)	
vs.	)	Case No. 5467
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,	)	
Defendants.	)	

Brobeck, Phleger & Harrison, by George D. Rives, Paul M. Staniford, and C. M. Ozias, for the City of Fresno, complainant.

John E. Loomis, for the County of Fresno, complainant.

Allan P. Matthew and Gerald H. Trautman, Robert W. Walker, and John A. Willey, for The Atchison, Topeka and Santa Fe Railway Company, defendant.

E. J. Foulds, for the Southern Pacific Company, defendant.

O P I N I O N

The complaint filed in the above-entitled matter by the City and County of Fresno requests approval by this Commission of a so-called consolidation plan under which the railroad operations of the Santa Fe and the Southern Pacific Railways through the City of Fresno and parts of the county area adjacent thereto

will be consolidated and conducted on the main line track of the Southern Pacific and the two railroads will jointly use one station in Fresno. In addition, the plan contemplates the gradual elimination of grade crossings.

Each of the defendant railroads herein owns and operates main line tracks through the City of Fresno. The Southern Pacific tracks generally traverse the heavy industrial section of the city, whereas the Santa Fe tracks are northeasterly and traverse the residential and business parts of the city. Both companies maintain stations within the city limits. It is alleged in the complaint that the Santa Fe tracks cross thirty-two streets in the city and in the immediate contiguous county areas. By the proposed consolidation twenty-eight of these crossings will immediately be eliminated.

The complaint points out that on February 26, 1895, the City of Fresno and the County of Fresno granted franchises to the predecessor of the Santa Fe. Subsequently the city enlarged its boundaries to include all of the area covered by these franchises. On February 26, 1945, these franchises expired and they were not renewed by the city inasmuch as the city was of the opinion that the present operations of the Santa Fe and the location of the tracks constitute a safety hazard. It is contended that the number of crossings and the fact that the tracks run through the central portions of the city, dividing the residential and the commercial areas, present an undesirable situation. It is further alleged that the trains create noise, smoke and vibration. The tracks in places present an embankment as high as eight feet above the street level and this

necessitates grade crossing approaches as steep as nine and one-half percent. The city also contends that because the franchise was not renewed the Santa Fe is now operating illegally.

In 1946 the city and county appointed a fact-finding committee consisting of representatives of those two bodies and the State Department of Public Works. This committee made a report on July 15, 1947, which contained no recommendations, but which pointed out the possibility of a consolidation plan. Since that time the city and county have continuously studied the problem and in the present complaint the consolidation plan is advocated. In substance, the consolidation plan proposes the removal of the Santa Fe tracks with the exception of certain sections at the northern and southern ends of the areas concerned which will be retained for switching purposes, the construction of connecting tracks between the two main lines and the rerouting of all trains over the Southern Pacific tracks. It further proposes the elimination of the Santa Fe depot and the joint use of the station facilities of the Southern Pacific. As a long-term project, it proposes a gradual elimination of all grade crossings on the Southern Pacific tracks.

On July 18, 1953, an answer was filed by the Southern Pacific Company objecting to the jurisdiction of the Commission on the grounds that the Interstate Commerce Act has granted exclusive jurisdiction to the Interstate Commerce Commission in matters of joint track usage and construction and abandonment of lines of railroads operating in interstate commerce. Additionally, it was contended that the jurisdiction of the

Public Utilities Commission has not been properly invoked since the complainants city and county have attempted to reserve an option either to conform or not conform with any order this Commission might make. This answer also points out that the Department of Public Works, Division of Highways, of the State of California should have been made a party to the proceedings. Finally, the specific allegations of the complaint are answered, the defendant railroad contending it will receive no benefit from the proposal, is not willing to bear any part of the costs and that its facilities are adequate. In general, the allegations in the complaint are denied.

Under date of July 20, 1953, the Santa Fe filed an answer which, in general, denied the principal allegations of the complaint and specifically denied that the Santa Fe's tracks constituted any safety hazard. The answer stated that the proposed consolidation has detriments which would far outweigh any advantages and pointed out that these included (1) excessive costs, (2) the fact that the city can be served better by the Santa Fe and the Southern Pacific conducting separate operations, (3) the fact that the joint track operation would produce congestion, (4) the fact that the removal of the Santa Fe's tracks would deprive certain industries of railroad service and (5) the fact that a joint station would be less convenient to the public.

The answer raised a legal point, alleging that the Commission is without jurisdiction to effect the proposed consolidation and denied that the operations of the Santa Fe are illegal since it is conducting operations under authority of the

Interstate Commerce Act and under what the answer calls a "franchise of perpetual duration" from the State of California.

The Santa Fe, in effect, submitted a counter proposal, stating that the problem should be approached by a program looking toward the closing of certain crossings, the installation of protective devices at other crossings and perhaps grade separations where necessary. It also alleged that the Santa Fe is ready and willing to remove its tracks from "Q" and Diana Streets to a private right of way.

Subsequent to the filing of the answer the Santa Fe filed a motion to dismiss and a memorandum in support thereof. The motion to dismiss is based upon the contention that this Commission lacks authority to compel all or part of the consolidation, inasmuch as the Interstate Commerce Commission has exclusive jurisdiction in this case. It points out that Section 5 (2) (a) of the Interstate Commerce Act requires the approval of the Interstate Commerce Commission "for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto." It is further contended that Section 5 (11) provides that this authority of the Interstate Commerce Commission is "exclusive and plenary."

Relating to the proposed abandonment of the Santa Fe's present tracks and the construction of new tracks to connect with the Southern Pacific, the motion contends that Section 1 (18) of the Interstate Commerce Act requires Interstate Commerce Commission approval for these actions. Finally, it is alleged that

the complaint is premature since there has been no commitment by the complainants city and county to pay any part of the costs.

In answer thereto the complainants have filed a brief which, in substance, states that the California Commission has the authority to grant the relief requested, conditional upon approval of the Interstate Commerce Commission, and that action by this Commission is a necessary antecedent to action by the Interstate Commerce Commission. In answer to the allegation that the complaint is premature, the complainants allege that they "believe they will be ready, willing and able to bear such portion of the costs" as may be apportioned.

The Santa Fe on September 24, 1953, filed a reply brief which contended the Public Utilities Commission does not have initial jurisdiction.

Another brief was filed by the Southern Pacific Company which supported the Santa Fe's position that the complaint should be dismissed and raised the additional points that this Commission has already established precedent supporting such a motion, that the authority for such a proposal is not only exclusive and plenary with the Interstate Commerce Commission but can be invoked only by voluntary action on the part of the carriers affected and that the complaint is defective since the State of California is a necessary party and has not been added thereto.

Oral argument before the Commission en banc was held in San Francisco on November 17, 1953, at which time the complainant and the defendant railroads were heard and the matter taken under advisement.

The argument of the defendant railroads included (1) the allegation that the capital outlay for this proposed consolidation might exceed 30 million dollars and that any benefits derived therefrom would be illusory, (2) the contention that the Southern Pacific Company is neither willing to permit the joint track usage proposed nor to bear any portion of the costs and (3) that the completion of the proposed plan would involve state highways and the State has not been made a party to this proceeding.

In addition to these contentions, the principal argument of the defendants related to the proposition that the jurisdiction of this matter is exclusively with the Interstate Commerce Commission. It was argued that the California Public Utilities Commission has no authority to require an abandonment of any part of a railroad engaged in interstate commerce but rather that this is a field wherein the consent of the Interstate Commerce Commission must be obtained in every case. (Colorado vs. United States 271, U. S. 153.) Under the authority of this decision and other related decisions, the railroads took the position that the Interstate Commerce Act has vested exclusive jurisdiction in the Interstate Commerce Commission over the acquisition of trackage rights and joint use of terminals incidental thereto, the construction of extensions of lines of railroad and the abandonment of railroad lines and facilities and operations thereby.

In addition to this claim of exclusive jurisdiction of the Interstate Commerce Commission, it was further contended that this was essentially a consolidation problem and that such

a consolidation could not be compelled even by the Interstate Commerce Commission but would have to be carrier-initiated. As support for this proposition, there was cited the case of Schwabacher vs. United States 334, U.S. 182, wherein the Supreme Court of the United States said, at page 193:

> "The Transportation Act of 1940 relieved the Commission of formulating a nation-wide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation ..."

In opposition to the position of the railroads, the City of Fresno contended that the proposed consolidation plan involved many grade crossings which clearly present problems subject to the jurisdiction of the California Public Utilities Commission. It was further argued that there is an issue raised in this matter as to which of the possible plans should be adopted to relieve this grade crossing situation. It was observed that if the State of California is a necessary party it can be joined to this proceeding at a later date. The City of Fresno agreed that any order issued by the State Commission should be conditioned upon approval by the Interstate Commerce Commission and took issue with the railroad upon the proposition that the sole jurisdiction was in the Interstate Commerce Commission and also upon the proposition that the proposal must be carrier-initiated. The County of Fresno concurred in the arguments of the City.

After a full consideration of the evidence and arguments presented in this matter, it is the conclusion of this Commission that the motions to dismiss interposed by defendants be denied.

We are of the opinion that there resides in this Commission considerable jurisdiction of the subject matter of this proceeding. Equally, we are of the opinion that the plan envisioned by the complaint herein could not be carried into effect without invoking the jurisdiction and authority of the Interstate Commerce Commission. We hold that, as a general proposition, the law and the procedures which were applied in the Los Angeles Union Terminal case are, with certain exceptions, applicable here.

From the standpoint of practical procedure, we hold that the necessary Federal authorization should be secured first because any action taken by this Commission would amount to a waste of time and public funds should the paramount Federal authorization be denied. We hold and find that the public interest requires that such procedure be invoked by the complainant. Pending the exhaustion of such procedure by complainant, we shall defer further action in this proceeding. This matter will be held open for the purpose of entertaining further proceedings herein as shall to the Commission appear appropriate, meet or proper in the premises.

INTERLOCUTORY ORDER

Pursuant to the foregoing findings and conclusions,

IT IS ORDERED that the motions to dismiss, interposed by the defendants, be and the same are hereby denied.

IT IS FURTHER ORDERED that further action herein be deferred pending the exhaustion by complainant of any action or proceeding it may take before the appropriate Federal authority.

IT IS FURTHER ORDERED that this proceeding be held open for the purpose of entertaining further proceedings herein, as shall to the Commission appear appropriate, meet or proper in the premises.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 16th day of February, 1954.

President

Commissioners