

Decision No. 50245

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the State of California,)
 Department of Public Works, for an order)
 or orders authorizing and requiring the)
 widening, reconstruction, alteration and)
 improving of the crossing of Hawthorne)
 Avenue and the Harbor Branch Line of The)
 Atchison, Topeka and Santa Fe Railway)
 Company sometimes referred to as "El)
 Nido Underpass" and designating the)
 portions of the work to be done, respec-)
 tively, by said Applicant, State of)
 California, Department of Public Works,)
 and by said railroad corporation and for)
 determination and allocation of the costs)
 thereof and for an Interim Order author-)
 izing Applicant to commence the immediate)
 construction of proposed improvements and)
 for the issuance of an Interim Order)
 requiring said railroad corporation to)
proceed forthwith with railroad work.)

Application

No. 34844

ORDER OF DISMISSAL

The Atchison, Topeka and Santa Fe Railway Company has filed a motion to dismiss the amended application of the State of California, Department of Public Works.

Allegations of Amended Application. Hawthorne Avenue, a portion of State Highway Route 164, crosses Santa Fe's Harbor Branch at separated grades, at Crossing No. 2H-19.0-B, also known as "El Nido Underpass." The existing underpass was constructed in 1926. State proposes to widen and improve the highway as a six-lane divided highway. The existing underpass will be widened by adding a 62'-6" steel span at the west end of the present 58'-0" span, and by constructing new pavement lanes for southbound highway traffic. Northbound traffic will use the existing underpass. The west abutment of the existing span will be remodeled to serve as a center pier, and a new west abutment will be constructed. Two 40-foot roadways through the underpass will be separated by a 22-foot median strip.

Public interest and necessity require the widening and improvement of the highway and the existing grade separation structure,

the latter being too narrow to permit the proposed widening of the highway or to accommodate the traffic that will use the highway. Public interest and necessity require the proposed alteration in a "common area", designated on Exhibit A as "New easement area", which of necessity will be occupied as a common area by State and Santa Fe. (Exhibit A, a blueprint, also contains an insert map designating "Location of parcel to be condemned." This "common area", a portion of the Santa Fe right of way, is contiguous to the existing underpass, and is in Los Angeles County, the greater portion of the present underpass being in the City of Torrance.)

Plans for the proposed construction have been prepared in cooperation with Santa Fe. Railway traffic will be routed over a shoofly during construction. The shoofly will include a trestle over the existing highway. State has obtained necessary temporary easements for the construction, operation, and removal of the shoofly on parcels of privately-owned property adjacent to the railroad right of way.

State and Santa Fe are not in agreement as to apportionment of the cost of the widening and improvement of the crossing. Santa Fe, after request, has refused State a right of entry to perform the work of widening, reconstructing, and altering the existing grade separation. The application, and the relief sought therein, are stated to be under Chapter 6 of Part 1 of Division 1 (sections 1201 through 1220) of the Public Utilities Code, and in particular under section 1202.

Prayer of Amended Application. State makes four requests, as follows:

1. That the Commission issue an order authorizing the widening and improvement of the existing crossing at separated grades.
2. That such order authorize the construction in accordance with the allegations of the application and the attached plans, subject to such changes and additional terms and conditions as may be provided for by such order.

3. That an interim order issue forthwith, authorizing State to immediately prosecute the widening, reconstruction, and alteration, and requiring Santa Fe to permit State to enter upon Santa Fe's right of way for such purposes, and further requiring Santa Fe to perform and complete the railroad work necessary to permit State to proceed.

4. That following issuance of the interim order the Commission apportion the costs to be borne by State and Santa Fe.

Summary of Motion to Dismiss. The application is premature. Commission jurisdiction has not been properly invoked in that State has not followed the jurisdictional procedures set up in the Public Utilities Code relating to the condemnation of rights necessary in connection with crossings at separated grades. Nor has State followed the Commission's procedural rules relating to applications for crossings or for apportionment of costs of grade separations. Although the application is far from clear, State's intent is three-fold:

1. State desires permission to construct a highway across Santa Fe's right of way at a separated grade.

2. State seeks to have the Commission apportion the cost of such separation between State and Santa Fe.

3. Although not set forth in the application, it must be assumed that State is endeavoring to condemn a right of way across Santa Fe's tracks for a new highway.

To invoke the Commission's jurisdiction properly to accomplish such purposes, State must make specified allegations and proof. In order to condemn property, a petition must pray:

1. That the Commission fix the just compensation to be paid for the acquisition of property specified in such a petition.

2. That the Commission designate the parties who shall pay compensation, and the owners and claimants of the property condemned to whom compensation shall be paid.

3. That the Commission make its final order of condemnation.

Santa Fe also asserts that the application is uncertain and

ambiguous in certain respects.

Applicable Statutory Provisions. Section 1201 (1951 codification of former section 43 (a)) provides in substance that no crossing shall be constructed without prior Commission authorization. Under sections 1202 through 1205 (codification of former section 43 (b)) the Commission has exclusive power to prescribe the terms of installation, use, and protection of each crossing; to alter, relocate, or abolish crossings; and also to require grade separations, to prescribe the terms upon which such separations shall be made; and to prescribe the proportions in which the expense shall be divided between the railroad and the State or other political subdivision affected.

Former section 43 (c) was codified as sections 1206 through 1220. Under section 1206 the Commission may fix the just compensation to be paid for property taken or damaged in the separation of grades at a crossing, or in the construction, alteration, or relocation of grade separations, "and upon the payment of the compensation so fixed may make a final order of condemnation." These powers may be exercised by the Commission in connection with the taking or damage of the property of public utilities, but not the private property of private persons. (Chase Lumber Co. v Railroad Commission, 212 Cal. 691.)

Sections 1207 through 1218 set forth in detail the procedure to be followed in an eminent domain proceeding before the Commission under section 1206. Such a proceeding may be commenced by the filing of a petition setting forth the purpose of the proceeding, the use for which the property is sought to be taken, a description of such property, and the names and addresses of all owners and claimants thereof. The petition shall pray that the Commission fix the just compensation to be paid for the property specified, designate the parties who shall pay the compensation and the owners and claimants to whom the compensation shall be paid, and make a final order of condemnation. (Sec. 1207.) The remaining sections specify the procedure to be followed after the filing of such a petition.

Findings and Conclusions. The amended application herein requests an interim order requiring Santa Fe to permit State to enter upon Santa Fe's right of way for the purpose of prosecuting the widening of the present grade separation. It indicates the necessity of common occupancy of a new easement area on Santa Fe's right of way and the location of the parcel to be condemned. However, the amended application is not sufficient to invoke the jurisdiction conferred upon the Commission by section 1206 of the Public Utilities Code in that it is not a petition containing the essential allegations and prayer as specified in section 1207.

If State desires to avail itself of the alternative remedy of instituting an eminent domain proceeding before the Commission under section 1206, it may file an appropriate petition for that purpose. If State so desires, it may also institute a separate proceeding under sections 1202 through 1205, by the filing of a new application seeking authorization for the widening of the grade separation and apportionment of the costs thereof. However, the two separate proceedings may not be instituted by the filing of a single pleading. The statute contemplates separate proceedings. Section 1207 provides that an eminent domain proceeding under section 1206 "may be made a part of any proceeding" for crossing authorization and cost apportionment commenced under sections 1202 through 1205. Whether or not there should be a consolidation or incorporation by reference is a question to be decided after two such proceedings may have been commenced by the filing of appropriate separate pleadings.

Good cause appearing, IT IS ORDERED that Amended Application No. 34844 is hereby dismissed without leave to amend. Such dismissal is without prejudice to the filing of a new application under sections

1202 through 1205 of the Public Utilities Code, and without prejudice to the institution of a proceeding under section 1206 by the filing of a petition in the form contemplated by section 1207.

Dated at San Francisco California, this 6th day of July, 1954.

John E. McNeill
President
Justus F. Caswell
Wm. H. Patten
Gene Roggens
Commissioners