

ORIGINAL

Decision No. 53476

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 requir-)
 ing the widening, reconstruction,)
 alteration and improving of the cross-)
 ing of Hawthorne Avenue and the Harbor)
 Branch Line of The Atchison, Topeka)
 and Santa Fe Railway Company, some-)
 times referred to as "El Nido)
 Underpass" and designating the por-)
 tions of the work to be done, respec-)
 tively, by said Applicant, State of)
 California, Department of Public)
 Works, and by said railroad corpora-)
 tion and for determination and alloca-)
 tion of the costs thereof and author-)
 izing Applicant to commence the)
 immediate construction of proposed)
 improvements and requiring said)
 railroad corporation to proceed forth-)
 with with railroad work.)

Application No. 35729

George D. Moe and Emerson W. Rhyner, for
 applicant;
Robert W. Walker and Joseph H. Cummins, for
 The Atchison, Topeka and Santa Fe Railway
 Company, defendant;
H. F. Holley, for Los Angeles County Grade
 Crossing Committee, and John P. Commons,
 for Regional Planning Commission of Los
 Angeles County, interested parties;
Luther H. Gulick, for the Commission staff.

O P I N I O N

Hawthorne Avenue between 190th Street in the City of
 Torrance and 174th Street in Redondo Beach constitutes a portion of
 State Highway Route 164 and runs generally in a north and south
 direction. The intersection of Hawthorne Avenue and 190th Street
 forms a reverse curve, the two streets running together for a dis-
 tance of about 400 feet. The approximate center of this 400 feet
 is crossed by the Harbor Branch line of The Atchison, Topeka and

Santa Fe Railway Company. This crossing, which is known as the El Nido Underpass, consists of an existing bridge separating the grade of the railroad and the highway, which bridge was constructed wholly at the expense of the railroad in about 1926. This bridge is constructed of steel girders placed on concrete abutments and provides a road width at ground level of 49.8 feet, and a vertical clearance of 15 feet 8 inches. There is one rail track crossing on top of the bridge.

The Department of Public Works of the State of California plans to widen Hawthorne Avenue, as above described, from a two-lane highway to a six-lane highway. This will necessitate the construction of a new bridge adjacent to the existing structure. Three lanes of the proposed highway will be under the existing bridge and three under the new structure.

This proposed widening is in connection with the highway improvement program and is particularly motivated because of the proposed San Diego Freeway which will run in a north-south direction from the San Fernando area to the Hawthorne-Torrance area, thence easterly through Long Beach and southerly to San Diego. Hawthorne Avenue will connect with this freeway in the vicinity of 161st Street at a point approximately one and one half miles north of the El Nido Underpass.

The application presents two issues: (1) is the proposed construction necessary and in the public interest, and (2) if so, how should the costs be apportioned.

Public hearings were held before Examiner Grant E. Syphers in Los Angeles on January 12, 13, 14 and 31, February 2 and 28, March 1, April 18, 19, 20 and 21, and May 9, 1955. Following these hearings the parties submitted briefs, and subsequent thereto oral argument before the Commission en banc was had on January 31, 1956. The matter now is ready for decision.

At the outset the applicant moved to separate the issues, requesting that the issue of necessity be tried separately and prior to the issue on apportionment of costs. This motion was denied and both issues were tried on this record.

While considerable testimony was presented relative to the need of the proposed construction, it should be noted that the railroad stipulated that Hawthorne Avenue will, in a very short period of time, "require additional lane capacities, such as those suggested by the state in their application."

Supporting this stipulation the evidence herein shows the background of this particular project starting in 1946 when the Legislature directed the Division of Highways to survey the various state highways. Pursuant to this survey, a report was issued which included Hawthorne Avenue as one of the deficient highways. This led to further studies, and a project report was issued in 1950 recommending a widening of Hawthorne Avenue. Subsequent traffic increases have occurred and the testimony disclosed that now the El Nido Underpass has reached its capacity as to vehicular traffic.

A traffic engineer for the Division of Highways estimated that future traffic will be of such a volume as to necessitate a six-lane highway at the underpass. The standards of the Division of Highways were explained as to lane widths and side and center clearances. Under these standards each lane should be 12 feet in width, the right-hand clearances should be 10 feet, the left $4\frac{1}{2}$ feet, and the median strip should be 22 feet wide.

Since the existing underpass is 49.8 feet in width, it will satisfactorily accommodate three lanes with reasonable side clearances. Another structure would be required for the three other lanes and clearances.

A witness for the Los Angeles County Grade Crossing Committee testified in favor of the proposed construction, and a witness for the railroad stated that in his opinion the existing underpass, which can accommodate four lanes, would reach its practical capacity in within a year or two.

In the light of this record, giving consideration to all of the testimony and the briefs and oral argument, we find that there is a need for the construction of an additional underpass as proposed herein. While there was some testimony as to possible alternate methods of providing additional highway capacity, we conclude that the proposed underpass is the most feasible type of structure.

The remaining issue concerns the allocation of costs. The estimate of the amount of cost is not in dispute. The proposed underpass will cost \$113,895.39, which amount includes \$14,945.70 for drainage.

The position of the applicant, supported by considerable testimony, in regard to the apportionment of costs was that the problem here has been created by the railroad since that agency created a fill for its track, which now necessitates an underpass in order to complete the street improvement. The applicant argued that the railroad has the privilege of a superior right of way and that concurrently the railroad should accept the obligations thus created. The exercise of the railroad privilege has created a barrier, the cost of removal of which should be borne by the railroad. The applicant further contended that the amount to be apportioned between the parties was within the prerogative of the Commission, and accordingly it suggested no specific amount. However, it did argue that precedent for this case can be found in the so-called Washington Boulevard case¹ wherein this Commission allocated the costs of widening an existing underpass, excluding the costs

¹ In Re Washington Boulevard Underpass, Decision No. 47344, dated June 24, 1952, in Application No. 29396.

attributable to the paving and widening of the street upon the basis of 50 per cent to the railroad and 50 per cent to the City of Los Angeles. The decision of the Commission in that matter was sustained by the United States Supreme Court (Atchison, Topeka and Santa Fe Railway Company vs. Public Utilities Commission, 346 U.S. 346).

In opposition to this position the railroad contended that the costs of this grade separation structure should be assessed according to the benefits received by the respective parties, which theory was announced by the United States Supreme Court in the case of Nashville vs. Walters, 294 U.S. 405. This theory, it was alleged, provides a standard or a set of rules which can be followed in each case. According to the railroad, observance of the benefit theory would provide a much more satisfactory situation since the parties in future cases would have guideposts in this type of matter. The railroad further pointed out that the need for highway improvement in this instance arises solely because of increased highway traffic. The railroad allegedly will receive no benefits from the proposed structure. Likewise, it was contended that there has been a transportation revolution in this country during the past 30 years which has seen the highway vehicle come into prominence and railroad revenues relatively decline. In view of this situation, the cost of highway improvements should be paid for by the highway users. Additionally, the railroad pointed out the essentiality of railroad operations and alleged that certain of the competing forms of transportation have been given artificial competitive advantages in the form of subsidies.

In considering this record we are reminded that the experience of this Commission shows that in proceedings involving new grade

separations or the widening or reconstruction of existing separations the apportionment of costs is not free from difficulty. We are fully aware of the principles which are applicable in these matters and which were prescribed by the Supreme Court of the United States on appeals from decisions of this Commission. The authority of this Commission to allocate costs in such matters stems from Section 1202 of the Public Utilities Code, and is an exercise of the police power on the part of the State of California through the medium of its agency the Public Utilities Commission (In re Washington Boulevard Underpass, supra). In the exercise of this police power it is within the province of this Commission to allocate the costs of such improvements subject to the "proper limitation that such allocation of costs must be fair and reasonable" (Atchison, Topeka and Santa Fe Railway vs. Public Utilities Commission, 346 U.S. 346, 352). This Commission is not required to allocate costs on the basis of benefits alone (Atchison, Topeka and Santa Fe Railway vs. Public Utilities Commission, supra, 354).

A major difficulty in these matters lies in the fact that some grade separations are constructed from funds paid entirely by the public authority involved, and others are brought before this Commission for an allocation of the costs between the public authorities and the railroad. There has been no uniform practice.

If federal funds are utilized the railroad's contribution is based upon the assumed benefit it receives. In such cases involving the elimination of existing grade crossings or the installation of automatic signal devices, the benefit to the railroad is held to be an amount which cannot exceed 10 per cent of the total cost of the project. In cases where an existing grade separation structure is reconstructed or where an existing railroad is crossed by a new highway, there is held to be no benefit to the railroad and consequently

it bears no part of the costs. Where an existing highway is intersected by a new line of railroad the project is not eligible for federal funds. (Public Roads Administration, General Administrative Memorandum No. 325). Generally speaking, federal aid is given to "such projects as will expedite the completion of an adequate and connected system of highways, interstate in character." (Federal-Aid Highway Act of 1944, title 23, U. S. Code.) No federal funds are being used in the El Nido Underpass project.

If no federal funds are used, there is no discernible pattern of uniformity followed by public authority in determining which project shall be constructed entirely by public funds and which shall be referred to this Commission for a determination of cost apportionment between the parties.

The result of this lack of uniformity may be that two grade separations similar in all substantial respects may receive radically different treatment. In one case the entire cost, or a major portion thereof, may be defrayed by public funds, whereas in another case this Commission may be called upon to apportion the costs of the separation, with the public authority taking the position that a substantial portion of the cost should be assessed against the railroad.

In our judgment, remedial legislation should be enacted providing more equitable treatment in this field of public administration. More specific legislative standards for the public authorities performing the construction, as well as for this Commission, would lend certainty and uniformity to the subject. However, since the statutes presently provide no such standards, this matter will be determined in accordance with the case law hereinbefore cited.

In the light of the evidence in this record and of the law which we hold to be applicable, we find that of the estimated cost

of \$113,895.39 the amount estimated for drainage of \$14,945.70 should be borne by the Department of Public Works of the State of California. Of the remaining amount of \$98,949.69, the railroad should bear the sum of \$10,000, and the Department of Public Works should pay the balance.

A principal element in this case which distinguishes it from the Washington Boulevard case, supra, is that the existing railroad bridge in the instant case compares favorably with many other present-day bridges, whereas in the Washington Boulevard case the two railroad bridges were generally conceded to be inadequate.

ORDER

Application as above entitled having been filed, public hearings having been held thereon and the Commission being fully advised in the premises,

IT IS ORDERED that the Department of Public Works of the State of California be, and it hereby is, authorized to construct a new underpass at the intersection of Hawthorne Avenue and 190th Street adjacent to the existing El Nido Underpass so as to separate the grade of Hawthorne Avenue and the tracks of The Atchison, Topeka and Santa Fe Railway Company in the manner and at the locations more particularly described in the foregoing opinion, and substantially in accordance with the plan introduced in evidence in this proceeding, subject to the following conditions:

1. Of the costs of the proposed structure, which are estimated to be approximately \$113,895.39, the sum of \$10,000 shall be borne by The Atchison, Topeka and Santa Fe Railway Company, and the balance shall be borne by the Department of Public Works of the State of California.
2. Upon completion of the construction of said grade separation, the cost of maintaining those portions

of the separation, which for the purpose of this decision shall be referred to as the superstructure and be deemed to be everything above the bridge seats, shall be borne by The Atchison, Topeka and Santa Fe Railway Company. The remainder of the maintenance of the grade separation structure shall be borne by applicant.

3. Prior to the commencement of construction, the applicant shall file with this Commission for approval a set of plans and specifications for the proposed construction, which plans shall have been approved by The Atchison, Topeka and Santa Fe Railway Company, or bear a statement as to why the said railway company refuses to approve the plans. In the event the said railway company refuses to approve such plans this Commission may issue supplementary orders in this matter.
4. The grade separation structures shall be constructed with clearances conforming to the provisions of General Order 26-D of this Commission.
5. Within thirty days after completion of the proposed structure the applicant shall notify this Commission in writing of that fact and of compliance with the conditions herein.
6. The authorization herein granted shall expire if not exercised within one year after the date hereof unless further time is granted by subsequent order.
7. The proposed structure should be identified as a portion of Crossing No. 2H-19-0-B

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

Dated at San Francisco, California, this 23rd day of July, 1956.

E. P. Mitchell
President

Justin F. Carron

Robert J. Linterman

Wm. H. DeLoach

R. V. Hardy
Commissioners