ds.

Decision No. 66881

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the safety, use and protection of the following crossing of SOUTHERN PACIFIC COMPANY in or near the City of Fresno, County of Fresno: Crossing No. BA-206.9, Thorne Avenue.	Case No. 7463
Investigation into the safety, use, and protection of the following crossings of SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY in the City of Fremont: Crossing No. DA-34.7, Prune Avenue; Crossing No. DA-36.2, Warren Avenue; Crossing No. 4G-5.2, Prune Avenue; Crossing No. 4G-6.7, Warren Avenue.	Case No. 7464

Randolph Karr and Harold S. Lentz, for Southern Pacific Company; Walter G. Treanor, for The Western Pacific Railroad Company; Floyd R. B. Viau, for County of Fresno; and Raymond E. Ott, for City of Fremont; respondents.
M. W. Vorkink, for Union Pacific Railroad Company; Thomas M. O'Connor, Orville Wright and Robert R. Laughead, for City and County of San Francisco; George D. Moe and Warren P. Marsden, for State of California, Department of Public Works, interested parties.
Richard D. Gravelle and Lawrence Q. Garcia, for the Commission staff.

O P I N I O N

The above investigations were instituted by the Commission for the purpose of inquiring into the safety, and related matters, of grade crossings located in the City of Fremont and the County of Fresno. The Fremont crossings involve Warren and Prune Avenues, which cross the tracks of the Southern Pacific Company and The Western Pacific Railroad Company. As a result of a stipulation

between the parties the Commission issued an interim order (Decision No. 64942) requiring the installation of automatic signals and ordered the apportionment of installation costs on the basis of 50 percent to be paid by the City of Fremont and 50 percent to be paid by the Southern Pacific Company and The Western Pacific Railroad Company. By interim order (Decision No. 66068, as amended, dated September 24, 1963) the Commission required the installation of automatic signals at Thorne Avenue in the County of Fresno where it crosses the railroad tracks of the Southern Pacific Company.

The main issue before the Commission is the question of the apportionment of maintenance costs of new automatic signal protection. The apportionment of installation costs at the Thorne Avenue Crossing is in issue to the extent that the usual 50 percent apportionment may have been modified by an agreement between the parties. The investigations were consolidated and hearings were held before Examiner Daly on February 19, 20 and 21, 1963, and April 3 and 4, 1963. The matters were submitted on concurrent opening briefs due 45 days after receipt of transcript and concurrent reply briefs due 35 days thereafter. The time for filing briefs was extended and the final reply brief was filed on October 17, 1963.

Traditionally, the railroads have borne maintenance costs. It is the position of the staff that there should be no change in this procedure because of the inherent difficulty in equitably apportioning maintenance costs. It is the opinion of the staff that if local agencies are required to pay a portion of the maintenance costs it would have an adverse effect upon the Commission's program to upgrade crossing protection throughout the State on an informal basis. It was pointed out that during the past 10 years

approximately 1,300 crossings have been upgraded pursuant to mutual agreements, without need for public hearings.

The railroads admit that historically they have paid the maintenance costs for protective devices. They claim that it is not their intention that any change in this procedure have a retroactive effect upon existing automatic protection. It is their contention, however, that in all fairness an apportionment should be applied to the crossing herein considered and to crossings upgraded in the future. It is argued that a transportation revolution has taken place in the past fifteen years. Exhibits were introduced to show that with the tremendous population growth in California there has been a corresponding increase in vehicle registrations. During the same period, because of increased truck competition and a decrease in passenger train operations, there has been a decrease in ton miles and locomotive miles operated (Exhibit 20). Notwithstanding the decrease in rail operations since 1950, the number of grade crossings protected by automatic protection has substantially increased (Exhibit 8). According to the railroads the primary reason for the increasing need for additional crossing protection is directly attributable to the ever increasing vehicular use of railroad crossings. The railroads argue that along with the increase of automatic installations, there has been an increase in the cost of installation as the result of certain refinements, such as time-out circuits, which assertedly are installed specifically to reduce vehicular delay and are therefore a direct benefit to the public. They contend further that the need for an equitable apportionment of maintenance costs has been recognized by the states of Virginia, North Carolina, Kentucky, Illinois, Michigan and Nevada. Exhibit 15 is a resolution adopted by the National

Association of Railroad and Utilities Commissioners, which recommends that appropriate state bodies review "...the equities of present cost allocations of railroad-highway separations and crossing protection projects in the light of the change in conditions which today make such projects of primary benefit to highway users..."

The true total cost of automatic signal protection, the railroads claim, is composed of the installation and maintenance costs. Under the present arrangement, whereby the railroad pays 50 percent of the cost of installation and all of the cost of maintenance, the railroad is in effect paying 75 percent of the true total cost of automatic crossing protection. The railroads further claim that if local agencies share in one instance they should share in both. In response to the argument that maintenance costs cannot be apportioned on a fair and equitable basis, the railroads suggest application of the AAR system (Exhibits 6, 7 and 11). The system was developed by the Association of American Railroads. It was introduced in 1907 and has been used as a unit system for distribution of maintenance costs between railroads using joint facilities. The system classifies all costs in unit form. In determining unit value a railroad divides its total system units into its total maintenance costs. The cost of maintaining a particular crossing is determined by multiplying the total units involved in said crossing by the value of the system unit. In the case of the Southern Pacific Company the unit system value is $28.

In the alternative it was suggested by Western Pacific that any of the following methods could be employed to more equitably allocate total costs: (1) placing sufficient money in escrow, with the income to pay an agreed maintenance sum annually; (2) payment of

a flat sum representing the annual cost capitalized at 5 percent per annum; (3) payments upon an annual or monthly billing procedure as the money is expended; (4) having the governmental agency pay a proportion of installation costs in excess of 50 percent to more equitably adjust for the unshared maintenance costs encountered; (5) or any other method more attractive to the local governmental agency.

The City of Fremont and the County of Fresno contend that maintenance of automatic signals is an operating cost traditionally paid by the railroads as an expenditure necessary to the doing of business within the State. In comparing the benefits they argue, as does the staff, that through the installation of automatic protection the railroads experience a reduction in accidents, claims, and equipment repairs. They cited several instances where the railroads were authorized to operate at higher speeds because automatic protection had been installed.

The City of Fremont and the County of Fresno claim that there is no practical way to accurately apportion maintenance costs. They contend that the AAR system does not take into consideration factors such as atmospheric conditions, economic variations due to geographical locations and density of signal installations.

The City of Fremont and County of Fresno also claim that the railroads have failed to take into consideration the maintenance costs incurred by local governmental agencies in providing grade crossing protection. Included are items such as: (1) reflectorized signs, pavement markings and striping; (2) safety lighting; (3) traffic signals coordinated with automatic protection devices; (4) traffic islands; (5) tree pruning; and (6) drainage facilities.

The City and the County further claim that each has a serious financial problem as the result of existing and anticipated road deficiencies (Exhibit 25). Any additional cost for maintenance of crossing signal protection devices, they argue, will materially affect their financial ability to provide present and future funds for upgrading crossings.

With respect to the Thorne Avenue Crossing in Fresno County, the Southern Pacific Company contends that all costs, including installation and maintenance, are covered by an agreement with the County of Fresno. The agreement (Exhibit 16) was entered into on September 2, 1932, when Thorne Avenue was known as Tehema Avenue, and, among other things, provides as follows:

> "Second party /Fresno County/ in consideration of this grant shall construct said highway and keep the same in good condition and repair on the premises hereinabove described as long as the same shall be maintained thereon, including any and all paving thereof and other highway improvements at its sole cost and expense; provided, however, that first party shall furnish the materials and perform the work of constructing and maintaining said crossing between the rails of said tracks and for a distance of not more than two (2) feet from the outside of said rails, and second party expressly agrees to reimburse first party for the cost and expense incurred by first party in furnishing the materials and performing said construction and maintenance work promptly upon receipt of bills therefor. Second party further agrees to indemnify and save harmless first party against any and all cost and expense incurred by second party as here in this paragraph provided.
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> "As a further consideration for this grant second party agrees to reimburse first party for any and all assessments which may be levied by order of any authorized, lawful body against the property of first party (and which may have been paid by first party) to defray any part of cost or expense incurred by second party in connection with the construction, reconstruction, widening, rewidening and/or maintenance of said highway, constructed and/or maintained on the premises hereby conveyed." (Emphasis added.)

From the agreement it is not clear what the parties intended by the words, "other highway improvements". The only evidence providing an interpretation of the words was introduced

through the Director of Public Works of Fresno County. He testified that in his opinion the words were limited to such matters as right-of-way, road base, road surfacing, shoulders, drainage structures, and did not include automatic signals.

After consideration the Commission finds as follows:

1. The agreement (Exhibit 16) between the Southern Pacific Company and Fresno County was limited to actual highway construction work and did not include protective signals. In 1932, the year the agreement was executed, the installation and maintenance of protective signals were costs customarily paid by the railroads. If the parties had intended that the agreement was to include the installation and maintenance costs of protective signals it would have been specifically provided for in the agreement.

2. The public interest requires that the cost of installing automatic grade crossing signals at Thorne Avenue should be apportioned 50 percent to the Southern Pacific Company and 50 percent to the County of Fresno, which apportionment we hereby find to be equitable.

3. Automatic crossing protection at grade crossings results in benefits to the railroads and the public. Such installations reduce accidents and claims for all concerned. They permit trains to operate unimpeded and, in some instances, at higher speeds.

4. The State of California has experienced a tremendous population growth and industrial development in the past twenty years. It is true that as a result thereof there has been a corresponding increase in vehicular use of railroad crossings, requiring many of them to be upgraded; however, these very same factors also contribute to the economic growth and development of the railroads.

5. The railroads have always enjoyed an unimpaired right-of-way over their tracks. Until recently it was well-recognized that in the exercise of this right, railroads had the duty of providing protective signal devices where the public safety so required. Although the practice has recently been modified, by public agencies under some circumstances sharing installation costs on automatic protective devices, we find that the public interest places upon the railroads the duty to maintain protection at crossings and pay the entire cost of the same.

Based upon the foregoing findings of fact, and in conformity with the policy and holding announced in Decision No. 66454, rendered on December 10, 1963, in Application No. 43559, we conclude that the cost of maintaining protective devices at the crossings, here concerned, should be borne exclusively by the railroads here involved, and that the cost of installing automatic grade crossing signals at Thorne Avenue should be apportioned 50 percent to the Southern Pacific Company and 50 percent to the County of Fresno.

The Commission takes this means of placing all parties who may be involved presently or in the future in railroad crossing proceedings before the Commission, on notice that the Commission will, in all cases, assess against the railroad or railroads involved the entire cost of maintaining protective devices at railroad crossings, and that the Commission will not consider evidence or argument addressed to that issue which seeks to have such maintenance cost assessed to any party other than the railroad or railroads involved. We will maintain the Commission's historical policy of requiring the railroad to bear the entire cost of maintaining protective devices at railroad crossings.

O R D E R

IT IS ORDERED that:

1. The installation costs for installing automatic protection at the Thorne Avenue Crossing shall be apportioned on the basis of 50 percent to be paid by the County of Fresno and 50 percent to be paid by the Southern Pacific Company.

2. The maintenance costs for automatic protection installed at the crossings herein considered shall be paid by the railroad affected thereby.

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

Dated at San Francisco, California, this 25th day of FEBRUARY, 1964.

President

Commissioners

DISSENTING OPINION OF COMMISSIONERS GROVER AND HOLOBOFF

In this decision the Commission majority have now expressly declared that they will no longer permit evidence on the issue of apportionment of maintenance cost. Ironically, the declaration comes in a proceeding in which the railroads have made a compelling showing that the ancient formula is not equitable under present highway conditions. The decision is also in striking contrast to last month's determination by the Interstate Commerce Commission, after extended study, that public agencies should bear a greater share of the burden of crossing protection. (322 ICC 1, 81-83, January 22, 1964.)

The economic burden occasioned by growth in the number of motor vehicles was noted by the United States Supreme Court as early as 1935, in Nashville C. & S. L. R. Co. v. Walters, 294 U.S. 405, 79 L.Ed. 949. Speaking for the Court, Mr. Justice Brandeis also stressed the importance of special circumstances in individual crossing apportionment cases; it was held that a statute requiring a railroad to pay half of the cost of a grade separation, without consideration of the particular facts involved, would be arbitrary and unconstitutional. (See also Atchison, Topeka & S. F. R. Co. v. Public Util. Com., 346 U.S. 346, ~~352-353~~ 353-354, 98 L.Ed. ~~60~~ 51-60-61.) Today's decision adopts the very approach which the Supreme Court denounced in the Nashville case.

George H. Grover

Frederick B. Holoboff

Commissioners