

ORIGINAL

Decision No. 67339

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

Investigation into the safety, main-)
tenance, operation, use and protection)
of the following crossings at grade)
with the lines of SOUTHERN PACIFIC)
COMPANY in the County of Inyo,)
California, on U. S. Highway 395:)
Crossings Nos. BAM 499.8, BAM 489.7,)
BAM 481.3, and BAM 464.2.)

Case No. 7641
(Filed June 4, 1963)

Randolph Karr, for Southern Pacific Company;
respondent.
George D. Moe and Warren P. Marsden, for the
State of California, State Department of
Public Works; Robert W. Fisher, for the
County of Inyo, Road Department; G. R.
Mitchell, for Brotherhood of Locomotive
Engineers; interested parties.
Richard D. Gravelle and Robert C. Marks,
for the Commission staff.

O P I N I O N

The Commission, upon its own motion, ordered an investi-
gation into the safety, maintenance, operation, use and protection
of these four crossings at grade of Southern Pacific Company across
the public highway, namely, U. S. Highway 395, in the County of
Inyo, California, said crossings being designated as Crossings Nos.
BAM 499.8, BAM 489.7, BAM 481.3, and BAM 464.2.

This order states that it was issued for the following
purposes:

1. To determine whether or not the public health, safety
and welfare require the installation and maintenance of additional
or improved protective devices at any or all of said crossings.

2. To determine whether or not the public health, safety and welfare require the relocation, widening, or other alteration of any or all of said crossings.

3. To prescribe the terms on which any such installation and maintenance of additional or improved protective devices, relocation, widening, or other alterations shall be done, and to make such apportionment of costs, including maintenance costs, among the parties, or any of them, as may appear just and reasonable.

4. To issue any other order or orders that may be appropriate in the lawful exercise of the Commission's jurisdiction.

Public hearings were held at Lone Pine, California, on July 30 and 31, 1963, and at Los Angeles, California, on December 5 and 6, 1963, before Examiner DeWolf, at which time evidence, both oral and documentary, was adduced and the matter was submitted for decision on December 6, 1963, as to all matters, except that the cost of maintenance phase was continued to a date to be set, and subject to the filing of written briefs which are now on file.

The Commission staff prepared, and introduced into evidence as Exhibit No. 1, an engineering report locating these four crossings on U.S. Highway 6-395 in Inyo County between the Inyo Kern County line and Lone Pine. The area is

described as uninhabited desert. The tracks run in the same general direction as the road, but not at equal parallel distances or in sight of the road. The terrain is somewhat rolling and the highway is hard surface and in excellent condition with four-lane stretches in several locations. The use of each crossing is approximately the same and Exhibit No. 1 describes the 1962 annual traffic census as 5,000 daily average at seasonal peak traffic and 2,500 annual daily average. The staff witness testified that he observed the automobile traffic traveling in excess of the posted 65 m.p.h. speed limit at these crossings.

Exhibit No. 1 states that one freight train travels north from Mojave at 7:01 a.m. on Monday, Wednesday, and Friday, and returns Tuesday, Thursday, and Saturday, leaving Lone Pine at the same time, and that the maximum permitted train speed is 30 m.p.h. Exhibit No. 1 also contains the accident records for these four crossings. The only accidents reported on the two south crossings were one in 1940 and one in 1941, and at the northerly crossing, one each in 1935-1960 and 1961, resulting in injuries but no deaths; the record of the Olancho crossing was very bad having nine accidents during the period 1942 to 1962, involving two deaths each in 1945, 1958 and 1962. Further subsequent testimony indicates a death in 1963.

The potential accident factors listed in the report are as follows: high speed of vehicular traffic; acute angles at which the track crosses the highway; varying distances of eight to 17 miles between crossings in which the track and highway are generally parallel; desert growth of sagebrush and Joshua trees; and curves in the highway adjacent to the two northern crossings.

The staff recommendations are as follows:

1. Crossing No. BAM-464.2 (4 miles south of Little Lake):

Install two Standard No. 8 flashing light signals, with back lights.

2. Crossing No. BAM-481.3 (2 miles north of Dunmovin);
Crossing No. BAM-489.7 (4 miles south of Olancha);
Crossing No. BAM-499.8 (2 miles north of Cartago):

Install two Standard No. 8 flashing light signals, augmented with 12-foot cantilever arms, with back lights, at each crossing.

Exhibit No. 2 is a California highway map, and, together with the remaining exhibits, was offered and introduced by respondent Southern Pacific Company. No. 3 is a copy of a letter, dated February 1, 1963, from the Secretary of the Commission to the State Highway Engineer and General Manager of the Southern Pacific Company advising of the need for protection at these crossings. No. 4 is a copy of another letter, from the Commission Secretary, dated March 13, 1962. Nos. 5 and 6 are Southern Pacific timetables and instructions. No. 7 is a highway map of these crossings. Nos. 8, 9, 10 and 11 are photostats of crossing profiles which were offered but not admitted in evidence. Copies of Commission decisions regarding these crossings were received in evidence as exhibits as follows: No. 12, Decision No. 22262, dated March 29, 1930; No. 14, Decision No. 19243, dated January 11, 1928; No. 16, Decision No. 19238, dated January 10, 1928; No. 19, Decision No. 20466, dated November 15, 1928.

The Southern Pacific Company introduced in evidence copies of road highway indentures containing grants to the State of California of a right to construct and maintain a highway, and also in No. 13 to the County of Inyo, which were dated and numbered

as follows: No. 13, dated July 21, 1930; No. 15, dated April 11, 1928, recorded August 3, 1928, in Vol. 14, page 469, O.R., Inyo County; No. 17, dated April 11, 1928, recorded July 11, 1928, in Vol. 14, page 473, O.R., Inyo County; No. 18, dated January 28, 1954; No. 20, dated May 24, 1929, recorded August 5, 1929, in Vol. 17, page 274, O.R., Inyo County.

The Southern Pacific Company contends that all costs, including installation and maintenance of crossing protection, must be charged to the State of California or the County of Inyo under the provisions of these indentures in which the public agencies are the grantees and the second parties, and said indentures, among other things, provide as follows:

Exhibits Nos. 13, 15, 17 and 20 contain the following:

"Second party 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 at its sole cost and expense, and in this behalf agrees to indemnify and save harmless first party against any and all such cost or expense, excepting, however, that first party shall maintain 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."

Exhibit No. 13 also contains the following paragraph:

"In consideration of this grant second party further 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 the cost or expense incurred by second party in connection with the construction and/or maintenance of said highway."

Exhibit No. 13 contains the following provisions:

"Railroad, at State's expense, shall

- (a) relocate the existing crossing signs;
- (b) raise and surface the track beyond widened portions of said highway; and
- (c) furnish such flagmen as Railroad deems necessary to protect and safeguard property, engines, trains and cars during the period of the improvement of said highway.

"Except as herein otherwise provided, Grantee agrees to reimburse Railroad for all cost and expense incurred by Railroad in connection with the construction and improvement of said highway, including, but not limited to, the Items (a) to (c), inclusive, listed above."

- "2. Grantee shall bear the entire cost of constructing and reconstructing said highway upon the land described herein. The crossing of said highway over any tracks of Railroad shall be constructed and maintained at the grade of said tracks now or hereafter existing."
- "3. Grantee agrees to reimburse Railroad for any and all assessments which may be levied by order of any authorized, lawful body against the property of Railroad (and which may have been paid by Railroad) to defray any part of the cost or expense incurred by Grantee in connection with the construction, reconstruction, widening, rewidening and/or maintenance of said highway upon the property hereinabove described."

Exhibits Nos. 21 through 24 are cost estimates for flashing light signals at these crossings. Exhibit No. 25 is a 39-page booklet of statistical data reflecting the growth and profit aspects of the Southern Pacific Company and comparing them with trucking transportation and other industries.

The staff witness testified, and was cross-examined extensively with regard to his qualifications and the Commission's method of procedure in crossing investigations and his conclusions

in recommending upgrading of the protection at all of these crossings.

Respondent called three witnesses, two of whom were a public project engineer and an assistant signal engineer of the Southern Pacific Railroad, and the third, a transportation analyst, who testified regarding the data compiled in Exhibit No. 25. Respondent's engineers testified that they had not made a study of these crossings, but gave their opinion that improved protection at these crossings without speed control of highway traffic at the crossings would not reduce accident hazards.

Respondent's engineers testified that further study of these crossings could develop information regarding new advance warning signs that could be used to alert the drivers in this area during daylight hours and prevent accidents better than the cantilever flashing lights recommended by the staff. Respondent's engineers further testified that the accident hazards at all of these crossings are not caused by the operation of the railroad but are caused by the high speed of the highway traffic, which is frequently 65 m.p.h., or higher, the long stretches of highway with little or no deviation, the extreme brilliancy or brightness of the sun, and the hypnotic effect of driving under these conditions.

Numerous motions were made by counsel for respondent during the course of the hearings, which were requested to be submitted to the Commission for decision. A motion was made to inspect the correspondence files of the Commission which was denied by the Examiner on the grounds that such material was irrelevant

and immaterial. Respondent's counsel offered Exhibits Nos. 3 and 4 in an effort to show that Commission records do disclose that the Commission has prejudged this case and for the further reason that no joint engineering conference was held by the Southern Pacific engineers and the Commission staff prior to issuance of the order of investigation in this case. The staff witness testified that joint conferences were held.

Numerous motions to dismiss were made on constitutional grounds under the Fourteenth Amendment, and in this connection Exhibits Nos. 12 through 20 were offered to show that the easements of the railroad here are on congressional land grant property and that the Railroad in its conveyances to the State of California for easements at these crossings had agreed with the State of California and the County of Inyo that all future improvements constructed at these crossings would be borne by the State of California or the County.

A motion was made to dismiss on the grounds that: (1) To assess Railroad with the cost and maintenance of crossing protection would deprive Southern Pacific Company of its property without due process of law and without just compensation. (2) Taking the above action would subject Southern Pacific Company and its facilities and property to undue, unreasonable, and excessive burdens, in violation of the Constitution of the United States and this State. (3) Such assessment would contravene Article I, Section 10, of the United States Constitution, which provides in part: "No State shall ... pass any ... law impairing the obligation of contracts ...". (4) Such assessment would contravene Section 16 of Article I of the Constitution of the State of California, which provides in part: "No ... law impairing the obligation of contracts shall ever be passed."

Counsel for respondent further argued that Exhibit No. 25 and the testimony of witness Whipple shows that there is no economic justification for the upgrading of these crossings and that proof of economic justification is an essential element of participation of crossing improvement by the Railroad.

Counsel cross-examined the staff witness in an effort to show that the highway is a Federal aid project.

Upon consideration of the evidence the Commission finds as follows that:

1. The Olancho Crossing No. BAM-489.7 is a dangerous and hazardous crossing having a serious accident death record which could not reasonably be improved by advance warning signs on the highway.

2. The estimated cost of installation of signal lights with cantilever arms with back lights at the Olancho Crossing No. BAM-489.7 is the sum of \$11,505 and the estimated average annual cost of maintaining the signal protective devices is the sum of \$336.00.

3. The recommendations of the Commission staff for improving the Olancho Crossing No. BAM-489.7 with two Standard No. 8 flashing light signals, augmented with 12-foot cantilever arms, with back lights are reasonable.

4. The other three crossings, listed as No. BAM-499.8, No. BAM-481.3, and No. BAM-464.2, are much less hazardous than the foregoing crossing, have not had any serious accident experience, and sufficient advance warning of the railroad crossing can be given to approaching traffic by proper advance warning signs

located along the highway or by a reduction of the speed limit in the area.

5. The highway in the vicinity of all of these crossings is a smooth, hard surface ideally suited to high speed operation of automobiles and many are operated thereon at 65 miles per hour and over.

6. The present crossing protection at the Olancha crossing cannot be seen by drivers exercising due care and traveling at a legal speed in sufficient time to stop safely before entering the crossing area.

7. A conference of representatives or an on-sight inspection of the premises by all parties at a crossing is not required before institution of an investigation and the holding of a hearing on the question of upgrading protection at crossings.

8. There is no evidence in this case to show that any of the highways in question here are improved by a Federal aid project.

9. The effect of the land grant statutes do not give the railroads a superior right at the crossing over the vehicular traffic.

10. The agreement (Exhibit 18) between the Southern Pacific Company and the State of California was limited to actual highway construction work and did not include protective signals. In 1950, the year the agreement was executed, the maintenance of protective signals was a cost customarily paid by the railroads. Cost incident to the installation of such signals was customarily shared by the parties. If the parties had intended that this agreement was to include the installation and maintenance costs of protective signals, that would have been specifically set forth in the agreement, as were other items set forth therein.

11. The public interest requires that the cost of installing automatic grade crossing signals at Olancho Crossing No. BAM-489.7 should be apportioned 50 percent to the Southern Pacific Company and 50 percent to the Department of Public Works, State of California, which apportionment we hereby find to be equitable.

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

13. 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.

14. The railroads have always enjoyed an unimpaired right-of-way over their tracks. It became well-recognized that in the exercise of this right, railroads had the duty of providing protective signal devices where the public safety so required. Such practice has been modified at times, by public agencies under particular circumstances sharing installation costs on automatic protective devices. The public convenience, interest and safety 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, dated December 10, 1963, and Decision No. 66881, dated February 25, 1964, we conclude that the cost of maintaining protective devices at the crossings, here concerned, should be borne exclusively by the railroad.

O R D E R

IT IS ORDERED that:

1. The motion to inspect the Commission files is denied.
2. The motions to dismiss this proceeding on constitutional grounds are denied.
3. The Olancha Crossing No. BAM-489.7 on U. S. Highway 395, in the County of Inyo, be further protected by the installation of two No. 8 flashing light signals, augmented with 12-foot cantilever arms, with back lights.
4. The installation of the flashing lights heretofore described in paragraph 3 hereof shall be effected by the Southern Pacific Company within six months after the effective date of this order.
5. The installation costs for installing automatic protection at Olancha Crossing No. BAM-489.7 shall be apportioned on the basis of 50 percent to be paid by the Department of Public Works, State of California, and 50 percent to be paid by the Southern Pacific Company.

6. The maintenance costs for automatic protection installed at the crossing herein considered shall be paid by the Southern Pacific Company.

The Secretary is directed to cause certified copies of this order to be served upon Southern Pacific Company and upon the County of Inyo, and the effective date of this order shall be twenty days after such service.

Dated at San Francisco, California, this 3rd day of June, 1964.


 President

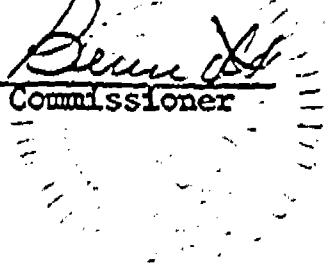
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 Commissioners

CONCURRING OPINION

I concur in the order herein but take note that in my opinion it does not go far enough. The case has been made for the installation of signal lights at the Olancha crossing. There are equally compelling reasons which lead me to object to the failure to provide suitable protection for the other three crossings which are the subject of discussion in the instant order. Life and limb are subjected to a guessing game and, if the motorist perchance is at the wrong crossing at the wrong time, then absent protection, his mischance may well cost him his life.


WILLIAM M. BENNETT, Commissioner



DISSENTING OPINION OF COMMISSIONERS GROVER AND HOLOBOFF

We agree that the protection ordered for the Olancha crossing should be installed. We also concur in Finding 4, relating to the less hazardous conditions at the other three crossings. However, we dissent as to paragraph 6 of the order, which allocates all maintenance costs to the railroad; in our view, these maintenance costs should be apportioned in the same manner as the installation costs.

George L. Grover

Friedrich B. Holboff

Commissioners