

**ORIGINAL**Decision No. 67889

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the operations and  
services of Northwestern Pacific  
Railroad Company in connection with  
the Puerto Suello Tunnel, San  
Rafael, California.

Case No. 7907  
(Filed May 19, 1964)

Randolph Karr, for respondent.  
Graham James & Rolph, by Boris H. Lakusta and  
E. Myron Bull, Jr., for Cities of San Rafael,  
San Anselmo, Fairfax, and Sausalito; County  
of Marin, Marin Industrial Development  
Foundation, Camgros Gravel & Fuel Co., Inc.,  
Chris Craft Sales of San Rafael, Colonial Wax  
Products Corporation of California, Golden  
Gate Distributing Co., Henry Hess Co.,  
California Newspapers, Inc. (San Rafael In-  
dependent Journal), McPhail Fuel Co., PBM,  
Inc., Rice Supply, Inc., A. G. Schoonmaker  
Co., Service Lumber Co., Shamrock Materials,  
Inc.; George W. Ballard and James L. Evans,  
for Brotherhood of Railroad Trainmen AFL-CIO,  
Brotherhood of Locomotive Firemen & Enginemen  
AFL-CIO, and Leonard M. Wickliffe, for Rail-  
road Brotherhoods' California Legislative  
Association, interested parties.  
Hector Anninos, for the Commission staff.

O P I N I O N

By its order dated May 19, 1964, the Commission instituted  
an investigation into the operations and service of Northwestern  
Pacific Railroad Company for the following purposes:

- "1. To determine what plans or intent, if any, respondent  
has in connection with reconstruction of the Puerto Suello  
tunnel and restoration of service as it existed prior to  
the fire.

2. To determine whether respondent should be ordered to reconstruct the Puerto Suello tunnel and restore the prior existing service.
3. To determine whether any other order or orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction."

A public hearing was held before Commissioner Bennett and Examiner Daly on June 8, 1964, at San Rafael. The matter was submitted upon the receipt of concurrent briefs since filed and considered.

Respondent is presently engaged as a railroad corporation common carrier and public utility as those terms are defined in the Constitution of the State of California and in the Public Utilities Code. It operates generally between Arcata, on the north, and the San Francisco Bay Area, on the south. Connections are made with respondent's parent company, Southern Pacific Company, by virtue of a branch line between Ignacio and Schellville. Respondent also connects with The Atchison, Topeka & Santa Fe Railway Company at Tiburon. The connection is via a car ferry operated by Santa Fe between Tiburon and Richmond.

The record indicates that on July 20, 1961, respondent's Tunnel No. 4 (Puerto Suello Tunnel), which is located on the northern city limits of San Rafael, was damaged by fire. As the result of cave-ins the tunnel was completely closed thereby cutting respondent's main line between San Rafael and Tiburon. In August of the same year respondent filed an application (Finance Docket No. 21725) with the Interstate Commerce Commission for a certificate

of public convenience and necessity under Section 1 (18) of the Interstate Commerce Act to abandon that portion of its line south of the tunnel. Following ten days of hearing in 1962 and consideration of the extensive briefs, the hearing examiner recommended denial of the certificate (Exhibit No. 1). After the filing of exceptions to the examiner's report and oral argument before Division 3 of the Interstate Commerce Commission, the Commission on June 5, 1963 adopted the recommendation of the hearing examiner. Shortly thereafter the Interstate Commerce Commission declined to make a finding of general transportation importance, a prerequisite to the filing of a petition for rehearing by the entire Commission. Having exhausted its administrative remedies, respondent appealed to a three-judge Federal District Court in San Francisco. The matter was again extensively briefed, and oral argument was held in San Francisco on April 10, 1964. On April 17, 1964, the court dismissed the appeal and affirmed the order of Division 3 of the Interstate Commerce Commission. On June 15, 1964, respondent filed its notice of appeal to the Supreme Court of the United States.

Respondent contends that the applicable provisions of the Interstate Commerce Act preclude any action by this Commission. It further contends that if the Commission requires the tunnel to be rebuilt, then, as a practical matter, respondent will have been deprived of its right of appeal in the abandonment case.

This Commission will concede that the Interstate Commerce

Commission has exclusive jurisdiction over abandonment of a railroad line or a portion thereof under Section 1(18) (20) of the Interstate Commerce Commission. However, this Commission has jurisdiction under Section 762 of the Public Utilities Code to require a public utility to repair existing plant and facilities for the convenience of the public and to secure adequate service.<sup>1/</sup>

The United States Supreme Court in Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of California, 75 L. Ed.1128, 283 U.S. 380 (1931), has made it clear that the authority of this Commission to require a railroad to make necessary repairs has not been abrogated by the Interstate Commerce Act. In that case this Commission ordered certain railroads to construct a union station in Los Angeles. Prior to that time this Commission and the City of Los Angeles had petitioned the Interstate Commerce

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1/ Section 762 reads as follows:

"Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured." (Former Sec. 36)

Commission requesting that the Interstate Commerce Commission order the construction of the union station and for the issuance of certificates of public convenience and necessity permitting the extension and abandonment of certain lines incidental to the construction of the union terminal. The Interstate Commerce Commission issued the certificates, but refused to order the construction of the union station. The position of the Interstate Commerce Commission was sustained on appeal Interstate Commerce Commission v. United States of America, 280 U.S. 52, 74 L. Ed. 163 (1929). The issue on appeal was whether this Commission had the authority to order the construction of the union station. In affirming such power in this Commission the Supreme Court stated the following:

"The considerations which led the court to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that the authority which resided in the state had not been taken away except to the extent that the approval of the Federal Commission was required. The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state. /Citing cases./ We find no such conflict in this case, as the approval of the Interstate Commerce Commission has been obtained, and its certificate of public convenience and necessity has been issued, in relation to the rearrangement, extensions and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan, and nothing further was required by the Interstate Commerce Act." (Emphasis added.)

In the instant proceeding the Interstate Commerce Commission denied the certificate to abandon, and said order was affirmed by the District Court. The denial was based upon the grounds that restoration of the tunnel and of the service offered prior to the fire would not constitute an undue burden upon interstate commerce,

and that public convenience and necessity did not permit the abandonment. As in the Union Station case this Commission is now free to supplement the Interstate Commerce Commission order with an affirmative order, issued pursuant to Section 762 of the Public Utilities Code, requiring respondent to rebuild the tunnel and to reinstate complete rail service.

At the present time respondent is under no affirmative order to reconstruct the tunnel. If the United States Supreme Court affirms the District Court and the Interstate Commerce Commission it is likely that respondent will continue to delay in the absence of an affirmative order to reconstruct.

In response to respondent's argument that an order to reconstruct would have the effect of denying respondent its right of appeal, it may be said that if its notice of appeal to the United States Supreme Court is predicated upon merit respondent may request a stay of this Commission's order pending determination by the United States Supreme Court.

After consideration the Commission finds that:

1. Respondent is a railroad corporation, common carrier and public utility carrier subject to the jurisdiction of this Commission.
2. Respondent operates between Arcata and the San Francisco Bay Area.
3. On July 20, 1961, respondent's Tunnel No. 4 (Puerto Suello Tunnel) was damaged by fire, resulting in cave-ins which closed the tunnel and thus blocked respondent's main line at a point just north of the City of San Rafael.

4. Following extensive hearings, briefs and oral argument the Interstate Commerce Commission, Division 3, on May 22, 1963, denied respondent's application for a certificate to abandon rail service south of San Rafael. Said Commission subsequently failed to find that an issue of general transportation importance was involved as requested by respondent.

5. On April 17, 1964, following briefs and arguments a three-judge court for the Federal District Court for the Northern District of California affirmed the order of the Interstate Commerce Commission, Division 3.

6. On June 15, 1964, respondent filed its notice of appeal to the Supreme Court of the United States.

#### Conclusion

The Commission concludes that pursuant to Section 762 of the Public Utilities Code respondent should be required to commence restoration of Tunnel No. 4 (Puerto Suello Tunnel) within thirty days after the effective date of this order and should complete said restoration as soon as possible, and in no event in a period longer than 150 days, and upon completion should restore the same quantity and quality of rail service as that provided prior to the destruction of the tunnel.

#### O R D E R

IT IS ORDERED that:

1. Within thirty days after the effective date hereof

Northwestern Pacific Railroad Company shall commence reconstruction of Tunnel No. 4 (Puerto Suello Tunnel) and shall complete said reconstruction with all dispatch, and in no event longer than one hundred fifty days from the date of commencement.

2. Within five days after commencement respondent shall file with this Commission a report setting forth in detail its final plans for reconstruction of Tunnel No. 4 and the date when actual physical work of restoration first began.

3. Within five days after reconstruction of Tunnel No. 4 has been completed respondent shall restore the same quantity and quality of rail service as that provided prior to the destruction of said Tunnel No. 4, and within said period of time shall file with this Commission a report indicating the date of completion, the date that complete rail service is restored and the nature of the service provided.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 22nd day of SEPTEMBER, 1964.

[Signature] President  
[Signature]  
[Signature]

*I concur in the findings and order.*

*Frederick B. Helbock*

*I concur in the findings and order.*  
*George E. Grover*

Commissioners