

ORIGINAL

Decision No. 68238

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
THE WESTERN PACIFIC RAILROAD COMPANY )  
for approval of the grade separation )  
of the Oroville-Cherokee County Road )  
and its relocated line of railroad in )  
the County of Butte, State of California.)

Application No. 44918  
(Filed November 5, 1962)

Walter G. Treanor, for The Western Pacific Railroad  
Company, applicant.  
Brobeck, Phleger & Harrison, by Gordon E. Davis,  
for County of Butte, protestant.  
P. A. Towner, by Iver E. Skjeie, for Department  
of Water Resources, State of California,  
interested party.

O P I N I O N

This application was filed by The Western Pacific Railroad Company (hereinafter referred to as Western Pacific). It requests an order (1) approving the grade separation of the Oroville-Cherokee County road and the relocated line of railroad constructed by the Department of Water Resources (hereinafter referred to as Department) and to be conveyed to Western Pacific pursuant to Section 11590 of the Water Code and (2) providing that the County of Butte (hereinafter referred to as County) shall be responsible for, and bear the cost of, any and all future maintenance and repair of such overhead grade separation structure and the appurtenances thereto located within the boundaries of the relocated right of way. County filed a statement opposing that portion of the application which seeks to place on it future maintenance costs. The statement contended that these costs are chargeable to Department or Western Pacific. A copy of the statement filed by County was served upon Department.

A duly noticed public hearing was held in this matter before Examiner Jarvis at Oroville on December 18, 1963. The matter was submitted subject to the filing of a late-filed exhibit and briefs, all of which have been received.

At the hearing, Western Pacific, County and Department each took the position that the maintenance and repair costs here involved should be charged to one or the other of the parties but not to itself.

Because of the construction of the Oroville Dam by Department, it became necessary to relocate a portion of Western Pacific's railroad line which was to be inundated by a reservoir. Prior to the relocation of the Western Pacific tracks the railroad line did not cross Oroville-Cherokee Road at all. The former route was not encumbered by any crossing at grade. Department constructed the replacement line, including attendant structures, while Western Pacific continued operations over the old line. Department, in constructing the replacement line, made a cut in the terrain at the point where the replacement line crossed the pre-existing Oroville-Cherokee Road, thereby severing the county road. In order to continue the continuity of the road at this point it was necessary to change its grade, thereby providing a crossing at grade, or provide an overpass. Department constructed the overpass. It is conceded by all the parties that this was the proper choice, because a crossing at grade would have been very dangerous at this location. Department also made a minor relocation of Oroville-Cherokee Road in the vicinity of the overpass.

The proposed relocation of the Western Pacific line was approved by the Interstate Commerce Commission on August 21, 1961.

Construction of the relocated line was completed in 1962 and Western Pacific commenced operating over it on January 30, 1963. Western Pacific does not yet have title to the relocated line but is in possession of the right of way under authority of a "right of entry" granted by Department pending the ability of Department to convey full legal title to Western Pacific.

Construction of the overpass here in question was commenced by Department in the latter part of 1960 and was completed in the early part of 1962. The overpass is approximately 145 feet long and 38 feet 8 inches wide with a clear roadway of 32 feet. It has an overall height of 33 feet 9 inches from the top of the rails to the top of the roadway with a 30-foot clearance between the rails and the underside of the structure. There is a three-foot concrete guard railing on top of a 9-inch wheel guard at the sides of the roadway. The structure stands on two thin reinforced concrete piers running the width of it. The cost of the overpass was approximately \$60,000.

The overpass and minor relocation of Oroville-Cherokee Road were constructed by Department under an encroachment permit issued by County in 1960, which contemplated that within a few weeks County and Department would enter into an agreement in connection with the relocation. No agreement was reached. County did not give its approval to the plans for the overpass or the manner of its construction, although it did give its approval to the geometrics and location of the bridge. County has not yet accepted the relocated road or the overpass into the County road system, nor have they been as yet offered by Department.

Since the overpass was constructed, erosion of the ground has occurred around the south abutment. A witness on behalf of County testified that the erosion problem resulted from "lack of proper design" of the structure. Witnesses on behalf of Department indicated that the erosion problem was one of "deferred construction". A supervising engineer employed by Department said that he thought something should be done about the erosion. Counsel for Department indicated that he would recommend to its director that the erosion problem should be handled by Department at its cost. In addition, it appears that vandals have written on the structure, and painting will be required from time to time.

Western Pacific contends that it is only the "nominal" applicant herein; that it filed the application under a contractual obligation with Department to do so; that the overpass was constructed solely for the purpose of getting the railroad line out of the way of Oroville Dam; and that under Section 1202 of the Public Utilities Code and Section 11590 of the Water Code, County or Department should bear the cost of maintaining the overpass.

County admits that the construction of the overpass and relocation of Oroville-Cherokee Road are expected to have a negligible effect upon the annual cost of normal maintenance of the road. County argues, however, that there probably will be significant abnormal maintenance costs resulting from erosion, vandalism, damage to the substructure of the bridge from a train derailment or earthquake, and damage from an accident which might require replacing part of the railing. Also, County asserts that future growth in the area may require expansion of the road which would call for the construction of a parallel overpass. County contends

that Western Pacific should bear the cost of maintaining the overpass, except for the roadway itself, under Section 1202.5 of the Public Utilities Code; that Department should bear the cost of any future expansion of separation structure in excess of that which would have been required to widen a roadway at ground level, pursuant to Section 11590 of the Water Code; and that if Public Utilities Code Section 1202.5 is not controlling, the Commission would be required under Section 11590 of the Water Code to allocate the costs of maintaining the structure to Department.

Department argues that in relocating Oroville-Cherokee Road it has provided for County a new road built to modern standards, and it has built a substantially better road than the one which previously existed. Department states that it has treated Western Pacific equitably because it has adequately provided for the relocation of the railroad line. Department contends that it is not required to be responsible until the end of time, or even in the foreseeable future, for the maintenance and replacement of facilities provided by it; that it is not responsible for remote, consequential, conjectural and uncertain effects of the construction of State water facilities; that Sections 11590 to 11592 of the Water Code are not applicable to this proceeding; that if those sections are applicable, they would only apply to providing a substitute facility, which is already done, and to a suitable adjustment for any increase or decrease in the cost of operation and maintenance of the facility and not to future costs for repair or expansion; that Section 1202.5 of the Public Utilities Code is not applicable to this proceeding; that if Section 1202.5 is applicable, Western Pacific is liable for any costs. Department

also contends that the Commission should grant that portion of the application which requests approval of the Oroville-Cherokee Overpass.

Before examining the various contentions of the parties, it is necessary to consider the significance, if any, of the contract executed by Department and Western Pacific on June 28, 1957. The Contract provided that, because of the construction of Oroville Dam, Western Pacific would give up its railroad line and improvements between Milepost 205.4 and Milepost 232.5 and convey it to Department, which, in return, would provide a new, relocated line. The contract provided for the construction of certain specified facilities on the relocated line (tunnels, bridges, stations) which would be turned over to Western Pacific as part of its relocated line. The overpass here in question was not one of these enumerated facilities. Furthermore, the record indicates that it was the contemplation and understanding of all the parties that the overpass is to be turned over to County and become part of the County road system. Section 8 of the contract provides:

"8. Contingent Upon Governmental Approval. The covenants and agreements of Railroad Company to transfer its operations from the existing railroad line to the new railroad line and to abandon and convey to the State of California the existing railroad line between approximate Mile Post 205.4 and approximate Mile Post 232.5 shall be and are expressly subject to and contingent upon Railroad Company receiving authorization therefor from all regulatory bodies having jurisdiction in the premises. The Railroad Company shall proceed diligently to secure such authorization. In the processing of necessary applications to secure authorization, the Department shall cause all required maps, surveys, plans, profiles and the like, to be furnished to permit early handling of needed applications and securing of such Governmental authorizations, to be delivered to the Railroad Company for use in making required applications. All cost incurred by Railroad Company shall be borne by the Department in accordance with prior provisions of this agreement."

Western Pacific's chief engineer testified that the reason for including Section 8 in the contract was that Department indicated its legal staff was not cognizant of procedures before this Commission and the Interstate Commerce Commission, and Western Pacific agreed, as an accommodation, to make the requisite applications to secure approval of the relocated line. While the parties at times refer to the contract, a careful analysis of the issues in this proceeding indicates that the contract is not determinative of any issue herein presented.

The Commission is of the opinion that Section 1202.5 of the Public Utilities Code is not applicable to this proceeding. The section, in part, provides that:

"In prescribing the proportions in which the expense of construction, reconstruction, alteration or relocation of grade separations shall be divided between railroad or street railroad corporations and public agencies, in proceedings under Section 1202, the commission, unless otherwise provided in this section, shall be governed by the following standards:"

This section relates to the allocation of expenses for construction, reconstruction, alteration or relocation of grade separations and not to maintenance. In this proceeding there is no question over who is to pay for the overpass. Department has already done so. Since we deem Section 1202.5 to be inapplicable, there is no need to analyze the contentions relating to whether Western Pacific initiated the project and whether it is a "nominal" applicant.

Absent a specific statute, the Commission has the power to allocate costs of maintenance for grade separations under Section 1202 of the Public Utilities Code. There are, however,

specific statutes which apply to the situation here under consideration: Sections 11590 to 11592 of the Water Code. These sections provide that:

"Section 11590. The authority has no power to take or destroy the whole or any part of the line or plant of any common carrier railroad, other public utility, or State agency, or the appurtenances thereof, either in the construction of any dam, canal, or other works, or by including the same within the area of any reservoir, unless and until the authority has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with suitable adjustment for any increase or decrease in the cost of operating and maintenance thereof, or unless and until the taking or destruction has been permitted by agreement executed between the authority and the common carrier, public utility, or State agency."

"Section 11591. The expense of the authority in complying with the requirements of this article is part of the cost of constructing the project."

"Section 11592. In the event the authority and any common carrier railroad, other public utility, or State agency fail to agree as to the character or location of new facilities to be provided as required in this article, the character and location of the new facilities and any other controversy concerning requirements imposed by this chapter shall be submitted to and determined and decided by the Railroad Commission of the State."

Department contends that if Water Code Sections 11590 to 11592 are applicable they only apply to the overpass structure and not to Oroville-Cherokee Road itself. This point was determined adversely to Department by this Commission in In The Matter of The Petition of The County of Butte, Decision No. 67048 in Application No. 45701, rehearing denied August 11, 1964. In Decision No. 67048 the Commission held that Water Code Sections 11590 to 11592 applied to county roads.

Department next contends that if the cited Water Code sections are applicable, Section 11590 only requires two things: (1) that Department, before taking or damaging, provide and substitute for the line or plant a new facility of like character



and at least equal in usefulness; and (2) that a suitable adjustment be made for any increase or decrease in the cost of operating and maintaining the new facility over or under the cost of operating and maintaining the replaced facility. It argues that it has replaced the portion of the old Oroville-Cherokee Road here involved with a facility of like character and at least equal in usefulness. We believe Department is correct on this point. There is, however, controversy regarding whether there should be an adjustment for operating and maintenance costs.

On the question of an adjustment for operating and maintenance costs, Department attempts to distinguish between "repairs" and "maintenance" which it says includes only "ordinary" repairs. Department contends that future repairs which become necessary because of erosion, <sup>1/</sup> damage due to vandalism, train derailments, accidents involving logging trucks or earthquake would not be ordinary repairs and thus not includable in an adjustment for maintenance costs. This is not correct. "Maintenance" is defined as "act of maintaining... 4: the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: CARE, UPKEEP...." (Webster's Third New International Dictionary, p. 1362). To keep something in a state of repair includes all repairs and not just "ordinary" repairs. Furthermore, Water Code Section 11590 provides an adjustment for operating costs as well as maintenance costs. The word "operating" in the term "operating costs" refers to the present participle of the transitive verb "operate". "Operate" is defined as "...vt...2...b: to manage and put or keep in operation...." (Webster's Third New International Dictionary, p. 1581). It has heretofore been established that the overpass and

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<sup>1/</sup> See Page 10.

1/ Department takes an ambivalent view on the question of erosion. As indicated, it takes the position that the erosion around the south abutment involves not repairs but "deferred construction". In its Opening Brief, Department stated that: "It is submitted that the work required in the vicinity of the southeasterly corner of the subject overpass, and which is described in Exhibit A, is of this kind. Accordingly, the Department offers to and will perform the work described in Exhibit A unless advised within 30 days of the date of this brief by W.P. or the County that the work so described is not that which is required."

Exhibit A of that brief stated: "To correct erosion and drainage problems in the vicinity of the southeasterly corner of the Oroville-Cherokee County Road Overpass over the Western Pacific Railroad line, Butte County, the following deferred construction is required:

1. Fill and compact with selected materials eroded portions of slope around bridge wingwall.
2. Construct curbing to channel drainage from wingwall area.
3. Grade and pave approach shoulder, sloping to provide drainage away from overpass and into adjacent drainage ditch.
4. Reset fence posts and fencing as required."

In its Reply Brief, Department states that:

"...the Department does not ask that either W.P. or the County be made responsible for deficiencies which may now exist or may occur during the period of stabilization of the overpass.

In engineering construction, the concept of deferred construction is acknowledged. As noted on page 30 of the Department's opening brief, the Corps of Engineers recognizes it. The contract made between W.P. and the Department provides for it. (Exhibit 13, pages 37-41). The County's Director of Public Works, Mr. O'Neill, had no difficulty in defining it. According to Mr. O'Neill, deferred construction is work required in connection with a new project until it has 'stabilized itself and settled down.' It includes work which results in costs in excess of those for normal maintenance, 'such as to repair slip outs, slides [and] wash outs' of newly constructed pieces of road. (Tr. p. 81, lines 10-24.)

The evidence was that some erosion has occurred at the southerly end of the overpass. (Tr. p. 42, lines 10-11; p. 43, line 21, p. 44, line 1; p. 46, lines 17-19.) According to Mr. O'Neill's definition, this constitutes merely deferred construction. The Department has indicated that it is ready and willing to, and that it will handle this and other similar problems during the stabilization period. (Tr. p. 157, lines 10-24; Department's Opening Brief Section IV G, page 30.) There is, thus, no basis for the implication that the overpass has any substantial deficiency or that the Department asks W.P., or the County, to assume responsibility for items of deferred construction..."

Department does not explain how remedying erosion which is called deferred construction during "the period of stabilization of the overpass" becomes repairs thereafter.

relocated portion of Oroville-Cherokee Road constitute "plant" within the purview of Water Code Section 11590. Therefore, regardless of whether "maintenance" includes other than "ordinary repairs", if such repairs are necessary to keep the structure in operation an adjustment relating to costs must be made.

Department contends that no adjustment for the increase in future operating and maintenance costs should be made because such a provision would be speculative and uncertain. This contention has no merit. There is a reasonable certainty that County will incur greater expenses in operating and maintaining the overpass structure than a plain road at grade. The only uncertainty is the amount of additional expense. If we look, by analogy, to rules of law relating to damages we find that "one whose wrongful conduct has rendered difficult the ascertainment of damages cannot escape because the damages could not be measured with exactness." (Zinn v. Ex-Cell-O Corp. 24 Cal 2d 290, 297-98.) However, we are not here concerned with a question of damages but the application of Water Code Section 11590 which specifically calls for an adjustment relating to future operating and maintenance costs. Such costs are not constant, and the Legislature must have known that the amount involved in the adjustment contemplated by Water Code Section 11590 would be a variable figure.

Department next contends that if Water Code Section 11590 applies to the overpass and road, the section does not make Department liable for costs in connection with future expansion of the road or overpass. We agree with this contention. The record discloses that an average of approximately 360 vehicles per day now use the overpass and portion of Oroville-Cherokee Road here

involved. The County Director of Public Works testified that if a large subdivision were fully developed in the area, there could be daily traffic across the overpass of 3,000-4,500 vehicles. He admitted that the overpass now has the capacity to handle 5,000 cars a day. The Commission is of the opinion that, in providing the overpass and new portion of Oroville-Cherokee Road here in question, Department has provided new facilities of like character and at least equal in usefulness to those which were taken from County.

County argues that Department, in relocating the Western Pacific line, built a bridge across the Feather River and provided piers for another bridge if it becomes necessary to construct one in the future. It contends that this is an indication that Department considered Section 11590 applicable to future expansion. The record discloses that the second set of piers was put in to provide for any possible future contingency, because the reservoir through which they pass could not be drained without causing tremendous losses in the revenues of the Oroville Power Plant. In addition, counsel for Western Pacific admitted that if another bridge is built on these piers, Western Pacific must pay the cost thereof. Furthermore, the second set of piers was installed by agreement under the terms of the contract between Department and Western Pacific.

Water Code Section 11590 deals with replacing that which was in existence and does not apply to the possibility of future expansion. The provisions of Section 11590 relating to the adjustment for operation and maintenance refer to the replacement of that which was taken or destroyed and cannot reasonably be construed as requiring additional facilities in the future. Department has replaced that which was taken or destroyed with facilities of like

character and at least equal in usefulness. These facilities are adequate for the foreseeable future. Section 11590 does not make Department responsible if changing conditions in the future cause additional facilities to become necessary.

Department argues that no adjustment should be made for any increase in operating or maintenance costs because Department has conferred benefits on County by shortening Oroville-Cherokee Road, eliminating three curves in the road, changing a four-way intersection to a three-way one, providing a wider road with greater capacity and giving County a record rather than a prescriptive title to the road. This position has no merit. Department was required under Water Code Section 11590 to replace that which was taken or destroyed. It is also required to make an adjustment for any increase or decrease in the cost of operating and maintaining the new facility as compared to that which was replaced. The fact that incidental benefits may be conferred in constructing the new facility does not lessen the statutory duty to make an adjustment for operating and maintenance costs.

No other points require discussion. The Commission makes the following findings and conclusions:

Findings of Fact

1. Construction of the Oroville Dam on the Feather River and the creation of a reservoir in connection therewith will inundate and make inoperable the presently authorized line of Western Pacific between Milepost 205.47 and Milepost 232.43 in the County of Butte.

2. Department has constructed a substitute line to replace the said portion of the line which will become inoperable. In constructing said substitute line it was necessary for Department

to relocate slightly Oroville-Cherokee Road, in the County of Butte, and in connection with relocating said county road, construct an overpass over the substituted line. The overpass portion of said substitute line is more particularly described as:

Commencing at center line of the Western Pacific Railroad Company's relocated right of way at Engineer's Station 115+75.65; thence North  $29^{\circ} 27' 35''$  East 172.27 feet to a point on the northerly right-of-way line and the point of beginning of this description; thence due east along said northerly right-of-way line 34.45 feet; thence South  $29^{\circ} 27' 35''$  West 344.54 feet to a point on the southerly right-of-way line; thence due west along said southerly right-of-way line 68.90 feet; thence North  $29^{\circ} 27' 35''$  East 344.54 feet to a point on said northerly right-of-way line; thence due east along said northerly right-of-way line 34.45 feet to a point of beginning.

3. It is necessary for Western Pacific to acquire said substitute line in order to continue the useful performance of its duties to the public. The overpass constructed over said substitute line on Oroville-Cherokee Road at Milepost 211.14 was necessary to permit the use and operation of Oroville-Cherokee Road with respect to said substitute line.

4. The old Western Pacific line had not, at any point, crossed Oroville-Cherokee Road and there was no separation structure of any kind in the vicinity of the overpass to cross the substitute rail line. The building of said overpass was solely due to the construction of Oroville Dam by Department.

5. The substituted portion of Oroville-Cherokee Road, including said overpass, is a facility of like character and at least equal in usefulness to that portion of the old Oroville-Cherokee Road which was taken or destroyed by Department.

6. Department presently holds title to said overpass and relocated portion of Oroville-Cherokee Road. Department and County

contemplate that, at some time in the future, Department will turn over to County the overpass and relocated portion of road. When said overpass is transferred to County, there is a reasonable certainty that County will, as a result of having such substituted facility provided, incur increased operating and maintenance costs for said overpass. The costs to County for operating and maintaining said overpass will be greater than the costs of operating and maintaining Oroville-Cherokee Road would have been if the road had not been slightly relocated and the overpass constructed.

#### Conclusions of Law

1. Western Pacific should be authorized to abandon its presently authorized railroad line between Milepost 205.47 and Milepost 232.43 in the County of Butte and permitted to acquire and operate over the substitute line constructed by Department. The overpass over the substitute line at Milepost 211.14 should be authorized and approved.
2. Department is not responsible to County or Western Pacific if changing conditions in the future cause expansion of the overpass on Oroville-Cherokee Road or construction of a parallel structure.
3. When Department transfers to County the relocated portion of Oroville-Cherokee Road, including the overpass on said road, and County accepts said relocated road and overpass into the County road system, Department shall each year be liable to County for an amount equal to the difference between the amount County paid to operate and maintain said relocated road and overpass and the amount County expended in operating and maintaining that portion of Oroville-Cherokee Road which was abandoned because of the need to relocate the same.

O R D E R

IT IS ORDERED that:

1. Within one year after the effective date of this order, The Western Pacific Railroad Company is authorized to abandon that portion of its railroad line in Butte County between Milepost 205.47 and Milepost 232.43 and to acquire and operate over the substitute line constructed by the California Department of Water Resources. The overpass constructed at Milepost 211.14, more particularly described as:

Commencing at center line of The Western Pacific Railroad Company's relocated right of way at Engineer's Station 115-75.65; thence North 29° 27' 35" East 172.27 feet to a point on the northerly right-of-way line and the point of beginning of this description; thence due east along said northerly right-of-way line 34.45 feet; thence South 29° 27' 35" West 344.54 feet to a point on the southerly right-of-way line; thence due west along said southerly right-of-way line 68.90 feet; thence North 29° 27' 35" East 344.54 feet to a point on said northerly right-of-way line; thence due east along said northerly right-of-way line 34.45 feet to the point of beginning.,

is hereby authorized and approved and will be identified as Crossing Number 4-211.1-A.

2. After the California Department of Water Resources transfers the relocated portion of Oroville-Cherokee Road, including the overpass constructed therewith, to the County of Butte, and the County of Butte receives said portion of Oroville-Cherokee Road, including the overpass into its county road system, the California Department of Water Resources shall pay to the County of Butte for the balance of the fiscal year in which said transfer is effectuated and for each succeeding fiscal year a sum equal to the difference between the amount the County of Butte paid to operate and maintain said relocated road and overpass and the amount the County of Butte expended in operating and maintaining



that portion of Oroville-Cherokee Road which was abandoned because of the need to relocate the same.

3. None of the parties is entitled to any other relief in this proceeding.

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

Dated at San Francisco, California, this 17<sup>th</sup> day of NOVEMBER, 1964.

*[Signature]*  
President  
*[Signature]*  
*[Signature]*

Commissioners

We concur in the order except as follows:

1. The benefits claimed to have been conferred upon the county were never presented, on this record, in any measurable amount. Any decision that we may or may not consider such benefits should be based upon a more specific record.

2. A more appropriate manner of providing the "suitable adjustment for . . . operating and maintenance" would be to order a lump sum payment by the department to the county. Paragraph 2 of the Commission's order leaves too much for future speculation, particularly as to what the maintenance cost of the old road would have been.

Frederic B. Holcroft

George L. Trover

Commissioners.