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ORIGINAL

Decision No. 68298

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the application of the CITY OF ANAHEIM to widen a City Street Across the Right of Way of the SOUTHERN PACIFIC COMPANY and the apportionment of future maintainance costs.

Application No. 46574

ORDER DENYING REHEARING

A petition for rehearing of Decision No. 68035, having been filed by Southern Pacific Company, a corporation, and the Commission having considered said petition and each and every allegation thereof, and being of the opinion that good cause for rehearing has not been made to appear,

IT IS ORDERED that said petition is hereby denied.

Dated at San Francisco, California, this 30th day of NOVEMBER, 1964.

I concur
will file
opinion
Peter E. Mitchell

Commissioners

I dissent.
George G. Grover

I dissent. I also wish to correct an error in my dissent to Decision No. 68035 wherein I referred to the determination that the city bear all maintenance costs. I meant to ~~the~~ object to the requirement that railroad bear all maintenance costs.

Frederick B. Holoboff

A-46743
A-45895
A-46010
A-46574

McKEAGE, Commissioner, concurring:

I concur in the orders denying rehearing in the above-subject proceedings for the reason that the asserted assignments of error contained in the several petitions for rehearing are without merit. However, I desire to discuss in some detail the assignment of error which involves the Commission's denial to the railroad of the opportunity to introduce evidence and argument on the subject of apportionment and allocation of cost of maintaining protective devices at the crossings involved in these cases. This, I desire to do because of the apparent sincerity with which counsel urge the position of the railroad.

In approaching this subject, we must ever bear in mind that a state, pursuant to its police power, may require a railroad to bear all the costs incident to the construction or reconstruction of a crossing of a railroad and a public highway. (A.T. & S.F. Ry. v. Public Utilities Commission, 346 U.S. 346, 352; Erie R. Co. v. Board of Public Utility Commissioners, 254 U.S. 394, 409-411; Lehigh Valley R. Co. v. Board of Public Utility Commissioners, 278 U.S. 24, 33-36--holding that the care of grade crossings is peculiarly within the police power of the states.)

It is important that we keep before us the fact that we are here dealing with a railroad corporation (a public utility), which was formed for public purposes and which performs a function of the state, a public function which the state, itself, would perform were it not for the fact that private capital has been accorded the very valuable privilege of performing it. (Smyth v. Ames, 169 U.S. 466, 544; Western Canal Co. v. Railroad Commission, 216 Cal. 639, 647.) In operating as a public utility, a railroad exercises

an extraordinary privilege and occupies a privileged position. (United Fuel Gas Co. v. Railroad Commission, 278 U.S. 300, 309.) In such circumstances, a railroad is held to a much higher standard of conduct than is the private person. A public utility devotes its property and service to the public use and, thereby, "grants to the public an interest in that use . . . ." (Munn v. Illinois 94 U.S. 113, 126; Southern California Edison Co. v. Railroad Commission, 6 Cal. (2d) 737, 754.) In legal essence, a public utility is charged with the administering of a public trust delegated to it by the state. (Acme Brick Co. v. Arkansas Public Service Commission, Supreme Court of Arkansas (1957), 18 P.U.R. (3d) 13, 17.) By the foregoing standards, the duties and obligations of a public utility are measured. It does not enjoy the same constitutional safeguards as does the private person.

If the policy of this Commission of requiring the railroad to bear all the costs of maintaining protective devices at crossings could reasonably be said to constitute an unfair burden upon the railroad, I should be the first to depart from it. Nothing has been presented in any proceeding before this Commission which, in my opinion, indicates that said policy is unfair to the railroads.

I desire to emphasize the fact that this policy does not prevent the railroad from offering evidence and argument on the issue of the need for protective devices or on the issue of the reasonableness of the cost of such devices; the policy relates only to apportionment and allocation of cost of maintaining such devices after they have been installed.

The record in each crossing case contains, among other things, evidence or stipulations on the justification and public need for establishing the crossing, the nature and condition of the

community and territory surrounding the crossing, the type of construction reasonably required, the reasonable cost of the construction and the apportionment of such cost to the parties, the need for the installation of protective devices and the type of such devices, the reasonable cost of such devices and the apportionment of such cost to the parties, and the reasonable cost of maintaining such protective devices. As an informed public agency with such a record before it, the Commission may lawfully draw upon its expertise and informed judgment in determining who shall be required to bear the responsibility for and cost of maintaining such protective devices. It is on this latter subject that the Commission has restricted the introduction of evidence for the reason that such evidence is wholly unnecessary, time consuming and not in the public interest.

There are several reasons why the public interest requires that the Commission's policy be maintained. These protective devices are erected on railroad property and are under the control of the railroad. Public safety requires that they always remain under the control of the railroad. If a municipality or other public agency should be required to maintain such devices, the Commission would be placed in the position of policing these public agencies to the end that their responsibility be carried out. It is quite obvious that such policing by the Commission would be difficult, if not infeasible. A railroad is subject to the plenary regulatory jurisdiction of the Commission. (Sections 22 and 23 of Article XII, California Constitution, and Sections 701 and 702 of the Public Utilities Code.) Requiring the railroad to assume the burden of maintaining these protective devices is clearly in the public interest for no other reason than that such

requirement promotes efficiency and convenience in executing the jurisdiction of the Commission to the end that these railroad crossings shall be maintained in a safe condition, both from the standpoint of the traveling public and the traffic moving over the railroad. It would be most inefficient and contrary to good policy to require public agencies to assume the responsibility of maintaining these protective devices at crossings. Public convenience and necessity requires that the lawful responsibility for this maintenance be imposed upon the railroad. Additionally, no public agency would be as well qualified as a railroad to discharge such responsibility. The point stressed is that, as between the railroad and the Commission, the agent of the public, the responsibility should be that of the railroad. Requiring the Commission to seek out and police hundreds of public agencies who may have been charged with this safety responsibility would be the poorest type of regulation.

So far as the writer of this opinion is concerned, he has no objection whatsoever to a public agency reimbursing a railroad for these maintenance costs, if the public agency should be so advised. That would be a matter of a contract between the railroad and the public agency.

Strong contention is made that the Commission does not have lawful authority to execute its policy in a given case without permitting the railroad, in each and every proceeding, to offer evidence and argument attempting to demonstrate that it should not be solely charged with the burden of maintaining these protective devices. The contention is made that to deny the railroad this opportunity denies it due process of law.

Legal history demonstrates that the term "due process" means

many things in different frames of reference. Also, we know that due process has been expanded and contracted according to the predilections of the particular public officers undertaking to adjudicate the subject in any given case. Truly, due process is a most fugitive legal animal. However, it is firmly established that due process does not mean, necessarily, judicial process. The legislative and executive departments of government are capable, equally with the judicial department, of affording due process and doing justice under law. (McMillen v. Anderson, 95 U.S. 37, 41; United States v. Ju Toy, 198 U.S. 253, 263.)

The action taken by the Commission, concerning which complaint is made, is legislative in nature. Unless the statute requires the Commission to proceed in a certain way, the only requirement imposed is constitutional due process. (Sale v. Railroad Commission, 15 Cal. (2d) 612, 618.) Furthermore, it must be borne in mind that the Commission is a regulatory body established by law and informed by experience, and that it lawfully may, and in fact is expected to, bring to bear its expertise, judgment, knowledge and experience in executing the jurisdiction delegated to it by law. That rule has best been stated by Mr. Justice Holmes, speaking for the Supreme Court of the United States, in the case of Chicago, Burlington & Quincy R. Co. v. Babcock, 204 U.S. 585, at page 598:

> "Various arguments were addressed to us upon matters of detail which would afford no ground for interference by the court, and which we do not think it necessary to state at length. Among them is the suggestion of arbitrariness at different points, such as the distribution of the total value set upon the Chicago, Burlington & Quincy system, among the different roads making it up. But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,--impressions which may lie beneath consciousness without losing their worth. The board was created for the purpose of using

> its judgment and its knowledge. State Railroad Tax Cases, 92 U.S. 575, 23 L. ed. 663; State ex rel Bee Bldg. Co. v. Savage, 65 Neb. 714, 768, 769, 91 N.W. 716; Re Cruger, 84 N.Y. 619, 621; San Jose Gas Co. v. January, 57 Cal. 614, 616. Within its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end. We are of opinion that, whatever grounds for uneasiness may be perceived, nothing has been proved so clearly and palpably as it should be proved, on the principle laid down in San Diego Land & Town Co. v. National City, 174 U.S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804, in order to warrant these appeals to the extraordinary jurisdiction of the circuit court."

That the railroad, here involved, is entitled to due process is supported by the elementary rules of fair play. However, we must ascertain the ingredients of that due process to which it is entitled. In this context we are confronted with two competing public policies: (1) that public policy which demands that the carrier be treated fairly, in accordance with established rules of law, and (2) that public policy which demands that the public's business be not unreasonably vexed, delayed or restrained by dilatory tactics and meaningless and barren procedure. Due process must not be permitted to degenerate into an exercise in futility.

I do not believe that it may be seriously contended that a rule issued by a regulatory body in its legislative rule-making capacity can have no constitutional application to a person who was not a party to the rule-making proceeding and who had no notice of such proceeding. The authority is to the contrary. A rule issued by a regulatory body pursuant to its rule-making authority is binding upon all those who fall within its ambit. (Columbia Broadcasting System v. United States, 316 U.S. 407, 418.) If it is to be supposed that the policy of a regulatory body,

established under its rule-making authority, can only be binding upon persons who were parties to the rule-making proceeding, regulatory business would be hampered to the point of inability to proceed. (See Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194.)

Rules, legislative in nature, lawfully may be issued by a regulatory body without a hearing, depending upon the nature of the subject matter involved and statutory provisions or absence thereof. Surely, it will not be contended that the general orders of this Commission can apply only to those who are parties to the rule-making proceeding out of which they issue. General Order No. 95 of this Commission, applying to construction of overhead electric lines, has been held by the Supreme Court of this state to apply in the same way as does a statute. As a matter of fact, the rules of a regulatory body are considered in the same category as statutes. (Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-186; Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69; Grand Trunk etc. Ry. Co. v. Railroad Commission, 221 U.S. 400, 403; Bluefield W.W. & Imp. Co. v. Public Service Commission, 262 U.S. 679, 683; United States v. Howard, 350 U.S. 212, 215.) It might be further observed that in light of the fact that the Legislature of California has been given plenary authority by the State Constitution to confer powers upon the Commission, which the Legislature could not directly exercise itself because of limitations imposed upon it by that Constitution, it well may be argued that a rule or decision of the Commission enjoys a firmer legal foundation than does a general statute enacted by the Legislature.

Many injurious actions may lawfully be taken by public authority without a hearing. Some examples are: indictment by a grand

jury, filing by a public prosecutor of a criminal information, seizing property being criminally used or being used or sold in violation of law. Many other examples could be cited. All these actions by public authority are calculated to do injury to the person involved and, usually, result in injury. The rule in such cases is well stated by the Supreme Court of the United States in the case of Ewing v. Mytinger and Casselberry (339 U.S. 594, 598-599). The fact that the railroad might suffer some injury by the action of the Commission is not alone sufficient to require a hearing. As a matter of fact, the railroad is benefitted by having placed in its keeping, at its own expense, the safety protection at its crossings, thereby being able to prevent accidents which could subject it to damage claims.

If it be contended that a public hearing is required as a condition precedent to issuing a rule which would embody the long-standing policy of this Commission requiring the railroad to bear the burden of maintaining protective devices at a crossing, the answer is that such a hearing has been held. Obviously, a rule of reason must prevail in a matter of this kind. Substance, not form, must take precedence.

In Application No. 43559, involving the request of the City of Concord, for the establishment of a crossing at grade over the tracks of Sacramento Northern Railway Company, the policy of the Commission, here concerned, was re-examined at great length by the Commission at the request of the railroads of California. The concerned public agencies of California were generally represented at the hearing in this proceeding. Voluminous briefs were filed by the railroads urging upon the Commission the changing of its policy. The public agencies resisted the request of the railroads.

Decision No. 66454 was issued by the Commission under date of December 10, 1963, restating and maintaining its traditional policy regarding the issue involved (62 Cal.P.U.C. 30). In that proceeding, the following railroads were parties of record: Southern Pacific Company, Union Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and Sacramento Northern Railway. Surely, no one could contend that the interests of the railroads of California were not fully represented and presented. Thereafter, in Cases Nos. 7463 and 7464, involving Southern Pacific Company and The Western Pacific Railroad, Decision No. 66881 was issued by the Commission under date of February 25, 1964, again re-affirming its long-standing policy with regard to requiring a railroad to bear the entire burden of maintenance of protective devices at a crossing (62 Cal.P.U.C. 409). In that decision, the Commission made the following pronouncement:

> "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."

In said proceeding the following-named railroads were parties: Southern Pacific Company, The Western Pacific Railroad Company and Union Pacific Railroad Company. The fact that the Commission did not denominate the proceeding in Application No. 43559 a rule-making proceeding is of no moment. The fact is that the frame of reference of that proceeding made it, in law, a rule-making proceeding.

There is a familiar principle of law that where the reason for a rule ceases, so does the rule. If there could be demonstrated any reasonable justification for requiring the Commission to take up the time of the public and expend public funds in hearing the repetitious evidence and argument of the railroads regarding the subject involved, I would be the first to agree that such procedure should be observed. Based upon some fifty years of experience, the Commission is fully aware that the evidence regarding the relationship between the railroad and the cost of maintaining these protective devices at crossings, necessarily, will be the same at each crossing. The many records in these crossing proceedings bear out these facts. There could be no difference, other than the difference of location and name of the crossing. The alleged justification put forward by the railroads for not requiring the railroad to bear the responsibility for maintaining these protective devices would be the same at each crossing.

One of the most extreme examples of valid rule-making without a hearing is the rule issued by the Federal Power Commission which ordered all independent gas producers to file their rates with it, apply for a certificate of public convenience and necessity, make no changes in their rates, and continue their service then furnished until authorized to do otherwise by the Federal Power Commission. The producers denied jurisdiction on the part of the Federal Power Commission to so order, and denied that such producers were subject to the jurisdiction of the Commission. This rule was upheld. (Amerada Petroleum Corp. v. Federal Power Commission, 231 F. (2d) 461, 463; Federal Power Commission v. Union Producing Co., 230 F. (2d) 36; Gulf Oil Corp. v. Federal Power Commission, 230 F. (2d) 40.) Review was denied by the

Supreme Court of the United States (351 U.S. 927, 973) in the latter two cited cases. Of like nature is the rule of the Federal Power Commission (issued pursuant to a rule-making proceeding) which rejects an application for a certificate of public convenience and necessity where support for such application is based upon certain types of indefinite pricing clauses in a natural gas contract. (Federal Power Commission v. Texaco, Inc. (April 20, 1964), 32 U.S. Law Week, 4370.) The Supreme Court of the United States, in the case cited, upheld the lawfulness of the rule in question, pointing out that due process does not require futile repetition of the same contentions which would unduly prolong and cripple the regulatory process.

Hearkening unto the wise observation of Mr. Justice Holmes that "A page of history is worth more than a book of logic.", let us examine one of the illuminating pages of history in the public utility regulatory field. In 1898, the Supreme Court of the United States decided the case of Smyth v. Ames (169 U.S. 466). By the decision in that case, the court directed that, in valuing public utility property for purposes of rate-fixing, evidence of the cost of reconstructing new the property of the public utility must be considered. Failure to do so was held to be reversible error. For years thereafter, regulatory bodies and the courts struggled with that requirement. Those who remember the days when such requirement was honored will recall the months and years required to comply with that regulatory task in a given case because of the uncertainty as to standards upon which regulatory bodies and courts might agree. The tremendous waste of time incurred in repetitious evidence, both oral and documentary, and the utter futility of the end result involved in that

requirement laid down by the Supreme Court invited continual attack upon it until, at long last, that court relieved regulatory bodies of the necessity of engaging in that futility. (Railroad Commission v. Pacific Gas and Electric Co., 302 U.S. 388, 397-401; Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 596-598, 601-607.) The Pacific Gas and Electric Company case was decided in 1938 and the Hope Natural Gas Company case was decided in 1944. If the nullification of the requirement of reconstruction cost evidence dates from the Hope case in 1944, which is the more reasonable case to choose, rather than the Pacific Gas and Electric Company case, we see that for nearly fifty years public authority was required to engage in an exercise in futility which vexed and hampered public utility regulation, all to the detriment of the public interest and that detriment was shared by the public utility industry, whether that industry knew it or not. One of the best commentaries on the subject was authored by Mr. Justice Brandeis and Mr. Justice Holmes in their concurring opinion in the Southwestern Bell Telephone case decided in 1923 (262 U.S. 276, 289-307). Since the Hope case, regulatory bodies, unless a statute requires the contrary, may reject or give no consideration to evidence on reconstruction cost in public utility regulatory proceedings. By the same token, evidence on the matter of apportionment and allocation of cost of maintaining protective devices at railroad crossings should be disregarded. The continuing obligation of the railroad to bear such cost is obvious as a matter of law. Surely, there should be some room for the exercise of legal and judicial statesmanship.

In light of the foregoing cited authorities and the facts surrounding the subject here involved, it is submitted that the

the Commission may lawfully issue a policy rule in the premises without the necessity of a public hearing. However, should it be contended that a public hearing is necessary, the ready answer is that the railroads of California were given such public hearing. The law requires no more.

McKEAGE
Commissioner

Dated: November 30, 1964.