

ORIGINALDecision No. 70075

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the County of Marin)
 for a public grade crossing over)
 the Northwestern Pacific Railroad)
 north of Marin County Civic Center)
 and north of San Rafael, County of)
 Marin.)

Application No. 46010

Douglas J. Maloney, for County of Marin, applicant.
Randolph Karr and Harold S. Lentz, for Northwestern
 Pacific Railroad, protestant.
George D. Moe, Melvin R. Dykman and Alfred Gawthrop, Jr.,
 for State of California, Department of Public Works,
 interested party.
Kenneth Soderlund, for the Commission staff.

OPINION AFTER HEARING ON PETITION FOR MODIFICATION

The Commission, by Decision No. 67888, dated September 22, 1964, authorized the construction at grade of Civic Center Road across the tracks of Northwestern Pacific Railroad Company in the County of Marin.

On October 1, 1964, the Northwestern Pacific Railroad Company filed a Petition for Rehearing. Said petition was denied on November 30, 1964 by Decision No. 68297. A Petition for Writ of Review was filed with the Supreme Court of the State of California on December 30, 1964. The Supreme Court issued its writ on April 16, 1965. The matter is presently pending oral argument before the Court.

On August 4, 1965, Northwestern Pacific Railroad Company filed a Petition for Modification of Decision No. 67888 asking the Commission to modify said decision in light of Public Utilities' Code Section 1202.2 which was added to said code during the 1965 legislative session and which became effective on September 17, 1965

(Chapter 1644 of Stats. 1965). On August 18, 1965, the Commission issued an order setting hearing on the Petition for Modification. Said hearing was held on September 30, 1965 at San Francisco before Examiner Gravelle. The matter was submitted subject to the filing of briefs on or before October 15, 1965. Briefs have been filed on behalf of Northwestern Pacific Railroad Company and the State of California, Department of Public Works.

On August 23, 1965, the State of California Department of Public Works (Department) filed its appearance in Application No. 46010. On August 26, 1965 Northwestern Pacific Railroad (Railroad) filed its Notice of Objections and Motion to Strike Appearance of the Department of Public Works of the State of California and for Order Setting Hearing on Said Objection and Motion in Advance of the Hearing of Petition for Modification. On August 30, 1965, Department filed Motion to Specifically Deny, or In The Alternative a Motion to Consolidate and Join for Hearing the Petition for Modification of the Northwestern Pacific Railroad Company in This Proceeding with Petition for Modification of Numerous Other Cases Involving the Same Issue Now Pending Before the Public Utilities Commission of the State of California. On September 15, 1965, Railroad filed Motion to Strike Motions of the State of California Department of Public Works, Division of Highways, and, In The Alternative, Answer to Motions of the State of California Department of Public Works, Division of Highways.

Decision No. 67888 found that the construction of the proposed crossing was required by public convenience and necessity and authorized the County of Marin to assume all construction and installation costs relative thereto. It further found that Railroad should assume all costs of maintenance for said crossing inside of lines two feet outside of rails and of the crossing protection as authorized. County of Marin and Railroad had entered into a stipulation that the County would assume all costs, both installation and

maintenance occasioned by the construction of the crossing. In effect, the Commission decision accepted the stipulation with regard to installation and rejected it with regard to maintenance. The rejection by the Commission of the stipulation as to maintenance is the crux of the appeal to the Supreme Court as well as the Petition for Modification.

At the hearing on September 30, 1965, Exhibits Nos. 10 and 11 were introduced in evidence. Exhibit No. 10 is a resolution of the Board of Supervisors of the County of Marin dated June 16, 1964 authorizing the execution of an agreement dated June 4, 1964 between Railroad and the County. The agreement is also a part of Exhibit No. 10. Exhibit No. 11 is a supplemental agreement dated August 19, 1965 between the Railroad and the County relating to specified changes in the agreement of June 4, 1964. Both of these exhibits have reference to the construction of the instant crossing and the assumption by the County of all costs associated therewith.

In addition stipulations were received that construction of the crossing had not commenced as of September 30, 1965 and would not be commenced until sometime after October 1, 1965, and that the railroad line between San Rafael and Ignacio was not in operation as of September 30, 1965 and would not be in operation, if at all, until sometime after October 1, 1965.

At the original hearings in this matter on April 9 and 10, 1964, Railroad attempted by motion made and argued, to bring in the Department as an additional, necessary and proper party. Said motion was resisted at that time by the Department and was denied by the Commission in Decision No. 67888.

The legislative enactment of Public Utilities Code Sections 1202.2 and 1231.1 has given rise to both the Petition for Modification and the change of position of the Department relative to its appearance in this proceeding.

Railroad, joined by the County of Marin, argues that the enactment of the new legislation in no way changes the nature of the proceeding with regard to the appearance of the Department and that since the Commission declined to require the Department to appear at the original hearings it should not now permit it to appear at the hearing on the Petition for Modification.

The Department contends that it is vitally interested in the proceeding now, because the new legislation, specifically Section 1231.1, makes it the agency responsible for budgeting the payment to the County of Marin should the Commission order the County to assume the costs of maintenance at the subject crossing. In reply Railroad and the County maintain that proceedings under Section 1231.1 are not a proper subject of hearing within the framework of the pleadings and issues and would unduly broaden the subject matter of the hearing with a question collateral at best and immaterial at worst.

The Commission finds that the Department is entitled to appear in this proceeding even though its interest may be remote. Rule 46 of the Commission's Rules of Procedure permits appearances in application proceedings when certain specified conditions have been complied with; Department has so complied. The objections of Railroad and the County of Marin to the appearance of the Department are hereby overruled and the motions to strike such appearance and to strike the arguments and presentation of the Department are hereby denied.

As to the merits of the arguments advanced by Railroad and the County of Marin in this proceeding, the one most impressive to the Commission is that centered about the language of Section 1202.2 as follows: "The railroad or street railroad corporations and the public agencies affected may agree on a different division of maintenance costs." Such language is directly contrary to the effect of Decision No. 67888. It was enacted after Decision No. 67888 had been issued and presumably with legislative knowledge of such

decision. That language expresses a legislative intent to change the policy enunciated by the Commission in Decision No. 67888. Regardless of the issue of the possible retroactive application of the new legislation on various crossing matters in which Commission decisions have heretofore issued (a question raised by the Department), it is within the Commission's jurisdiction to rescind, alter, or amend any of its orders after notice to the public and an opportunity to be heard. (Public Utilities Code Section 1708.) Notice has been given in this proceeding and a hearing held. In view of the action herein taken pursuant to Section 1708, it is unnecessary to determine whether or not we are bound by the quoted language of the new legislation. We may note in passing, however, that such a policy determination by the Legislature, even if not binding herein, is of course entitled to receive, and has received, respectful consideration by this Commission.

We find it unnecessary to decide the questions raised by the Department in this proceeding as to the interpretation and application of Sections 1202.2 and 1231.1. Those questions will be answered in other proceedings more specifically concerned with such interpretation. (Case 8249, and the Order Reopening Proceedings for Further Hearing dated September 8, 1965, in which 22 separate crossing matters have been reopened to determine the effect thereon of Section 1202.2.)

The motion made by the Department on August 30, 1965, and again argued at the hearing of September 30, 1965, to deny the petition for modification or join it with other proceedings is hereby denied.

After consideration the Commission finds that Decision No. 67888 should be modified and that Finding No. 3 of Decision No. 67888 should be stricken from said decision and the following finding substituted therefor:

3. The Northwestern Pacific Railroad Company and the County of Marin have agreed that there is no necessity for the Commission to apportion installation and maintenance costs. Northwestern Pacific Railroad Company and the County of Marin should be allowed to apportion the costs of installation and maintenance by agreement between themselves.

The Commission further finds, and concludes, that the following language should be substituted for the conclusion in Decision No. 67888 (i.e., for the paragraph immediately following Finding No. 4 in said decision):

The Commission concludes that authority to establish and construct said crossing as a public grade crossing should be granted and that Northwestern Pacific Railroad Company and the County of Marin should be allowed to apportion the costs of installation and maintenance by agreement between themselves.

O R D E R

IT IS ORDERED that:

1. Finding No. 3 of Decision No. 67888 dated September 22, 1964 is hereby rescinded and deleted from said decision and in place thereof the following language is substituted:

3. The Northwestern Pacific Railroad Company and the County of Marin have agreed that there is no necessity for the Commission to apportion installation and maintenance costs. Northwestern Pacific Railroad Company and the County of Marin should be allowed to apportion the costs of installation and maintenance by agreement between themselves.

2. The conclusion in Decision No. 67888 (i.e., the paragraph immediately following Finding No. 4 in said decision) is hereby rescinded and deleted from said decision and in place thereof the following language is substituted:

The Commission concludes that authority to establish and construct said crossing as a public grade crossing should be granted and that Northwestern Pacific Railroad Company and the County of Marin should be allowed to apportion the costs of installation and maintenance by agreement between themselves.

3. Paragraph No. 1 of the order in Decision No. 67888 is hereby rescinded and deleted from said decision and in place thereof the following language is substituted:

1. The County of Marin is authorized to construct Civic Center Road at grade across the tracks of the Northwestern Pacific Railroad Company at the location, and in accordance with the plans and specifications, set forth in the application. Said crossing shall be protected by two standard No. 8 (General Order No. 75-B) flashing light signals equipped with automatic gate arms; except that until such time as the railroad line between San Rafael and Ignacio is opened to through traffic, the crossing may be protected by two standard No. 1 (General Order No. 75-B) crossing signs reflectorized with reflex-reflecting sheet material.

In all other respects Decision No. 67888 shall remain in full force and effect.

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

Dated at San Francisco, California, this 7th day of DECEMBER, 1965.

Fredrick B. Hallock
President

George G. Loper

Mogata

Commissioners

I dissent upon the basis that this matter is under beyond our jurisdiction. Review has been granted by the California Superior Court.

William L. Blum

-7-