

Decision No. 70961

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation for the purpose of  
 establishing a list for the year  
 1966 of railroad grade crossings  
 of city streets or county roads  
 most urgently in need of separa-  
 tion, or existing separations in  
 need of alteration or reconstruc-  
 tion as contemplated by Section  
 189 of the Streets and Highway  
 Code. )

Case No. 8244  
 Filed August 10, 1965

George D. Moe, Melvin R. Dykman and Joseph C. Easley, for the State of California, Department of Public Works, Division of Highways; Warren P. Marsden, for San Francisco Bay Area Rapid Transit District; James P. O'Drain, for the City of Richmond; John W. Scanlan, for the City of Hayward; Harold S. Lentz, for the Southern Pacific Company; and Neal W. McCrory, for The Atchison, Topeka and Sante Fe Railway Company, interested parties.  
Vincent V. MacKenzie and William L. Oliver, for the Commission staff.

OPINION ON REHEARING

By Decision No. 70134, dated December 21, 1965, the Commission established a list for the year 1966 of railroad grade crossings of city streets or county roads most urgently in need of separation, or existing separations in need of alteration or reconstruction as contemplated by Section 189 of the Streets and Highways Code.

On January 3, 1966 a petition for rehearing was filed by the State of California, Department of Public Works, requesting oral argument. By its order dated January 25, 1966, the Commission granted rehearing limited to oral argument on the issue of the

effect of Bay Area Rapid Transit construction on the determination of priorities in establishment of the grade separation priority list.

Oral argument was held before Examiner Daly on April 12, 1966, at San Francisco, and the matter was submitted.

According to the Department of Public Works five crossings in the City of Richmond and five crossings in the City of Hayward are not eligible for listings on the priority list because the sole purpose of said separations is assertedly to obtain railroad and state funds for the benefit of Bay Area Rapid Transit (BART).

The crossings in question are as follows:

| <u>City of Richmond</u> |                     |                    |                        |
|-------------------------|---------------------|--------------------|------------------------|
| <u>Priority No.</u>     | <u>Crossing No.</u> | <u>Street</u>      | <u>Railroad</u>        |
| 1                       | A-15.6              | Kearney Street     | Southern Pacific       |
| 5                       | A-15.1              | Barrett Avenue     | Southern Pacific       |
| 21                      | 2K-2.5              | 35th Street        | The A.T. & S.F. Ry Co. |
| 31                      | A-14.5              | 23rd Street        | Southern Pacific       |
| 41                      | A-13.8              | Cutting Boulevard  | Southern Pacific       |
| <u>City of Hayward</u>  |                     |                    |                        |
| 16                      | 4-23.2              | Tennyson Road      | Western Pacific        |
| 20                      | 4-21.9              | Harder Road        | Western Pacific        |
| 22                      | 4-21.3              | Orchard Avenue     | Western Pacific        |
| 25                      | 4-20.4              | "C" Street         | Western Pacific        |
| 26                      | 4-23.9-B            | Industrial Parkway | Western Pacific        |

During the course of the original hearing BART appeared in support of these separations, which for the most part would have to be extended to include the paralleling facilities of BART. It was established that BART would contribute the additional cost required to extend the separation, as well as the full share of the Cities of Richmond and Hayward.

The Department of Public Works argues that BART's proposal to furnish the Cities' share of the cost is a subterfuge of the law in that said crossings are not now urgently in need of separation

and that the proposed separations are occasioned only to accommodate the construction of BART. It further argues that such construction will deplete the funds available to the detriment of cities, counties and separation of grade districts, whose nominated crossings are lower on the list.

The Cities of Richmond and Hayward argue that the priorities of the grade crossings in question were established upon the merits without regard to the facilities to be constructed by BART.

The Department of Public Works readily admits that it would have no quarrel with the priority list if the Cities of Richmond and Hayward were paying for their share of the cost with funds other than those received from BART; however, it cited no authority where the contribution by BART can be said to be unlawful. Neither Section 189 nor Section 190 of the Streets and Highways Code places limitations upon the means by which local agencies raise their share of the cost.

The Commission, in its determination of the list, followed the same practice that it has in past years. Primary consideration was given to "need" as evidenced by such factors as traffic, cost, accident record, state of readiness, potential traffic, position and relation to city street pattern, relation to railroad operations, available alternate routes, accident potential and vehicular delay. In evaluating the financial aspects the Commission has given no consideration to the source of the funds, but only to their availability.

Of the crossings herein considered only Kearney Street and Barrett Avenue crossings came within the first 15 on the priority list. As a practical matter the annual allocation of funds has never covered more than nine crossings nor gone beyond the twenty-first crossing on the list. In many instances where a crossing

falls short of meeting one or more of the requirements, including the availability of funds, the Commission has placed such nominations low on the list, knowing that such crossings will not receive an allocation during the year the list is in effect. The purpose of annually establishing the priority list is to encourage the correction of deficiencies and renominating such crossings for the ensuing year. The Kearney Street and Barrett Avenue crossings have been placed very low on the priority list for several years because the City of Richmond did not have funds available. In all other respects the need for separating said crossings has been well established.

The Commission finds that:

1. Neither Section 189 nor Section 190 of the Streets and Highways Code places limitations upon the means by which local agencies raise their share of the project cost.

2. The priorities of the grade crossings in issue were established upon the merits without regard to the facilities to be constructed by the Bay Area Rapid Transit District.

3. The proposed construction of the grade separations in issue has no unlawful or unjust effect upon the determination of priorities in establishing the grade separation list for the year 1966.

The Commission concludes that the priority list established by Decision No. 70134 should remain in full force and effect.

ORDER ON REHEARING

IT IS ORDERED that Decision No. 70134 is affirmed and the priority list established therein is 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 12<sup>th</sup> day of JULY, 1966.

Paul E. Mitchell  
President

Frederick B. Holdoff

Augustus

William G. Bernard  
Commissioners

*I will file a dissenting opinion.*  
*George H. Grover*

**ORIGINAL**

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DISSENTING OPINION OF COMMISSIONER GROVER

I dissent. The high priority given the Kearney and Barrett crossings is not justified. Ordinarily we would not be concerned with where a city gets the money for its share of crossing costs, but Section 190 of the Streets and Highways Code contains an important exception: railroads. The state fund, in effect, pays half of the cost after railroad contributions are deducted. The suggestion that because BART is publicly owned it is not a "railroad corporation" within the meaning of Section 190 is unsound. The statute is concerned with gasoline tax expenditures in relation to railroad expenditures; it weighs the interest of the motor vehicle public against the interest of the railroad public. The fact that BART is a publicly owned railroad has no bearing on the proper disposition of gasoline tax revenues.

Wholly aside from any legal requirement, the assignment of a high priority to a city which will not expend its own funds ignores a critical factual element in the priority process. If there were enough state money for all needed crossings, we could legitimately limit our concern to the particular need for each one. But the state's contribution is limited -- we are not deciding need in the abstract but relative need. In determining such need, we should consider the willingness of the city to expend its own funds. Such willingness is probative.

Section 189 calls upon this Commission to consider also the

possibility of financing "under the provisions of this code". BART's gift to the city is not the kind of financing there contemplated. It should not be allowed to control our decision.

George L. Hoover

December 31, 1966