

ORIGINALDecision No. 71990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the status, maintenance,
operation, use, safety and protection
of that crossing, at grade, of the
track of the Southern Pacific Company
by New Haven Road in Union City at
Mile Post L. 25.3.

Case No. 7910
(Filed May 26, 1964)

Investigation into the status, safety,
maintenance, use and protection or
closing of seven crossings at grade of
the track of the Southern Pacific
Company in Union City.

Case No. 8291
(Filed November 2, 1965)

Harold S. Lentz, for Southern Pacific Company.
Anthony J. Garcia, for the City of Union City
in Case No. 7910, Anthony J. Garcia, and
John A. Rowe, Jr., for the City of Union City
in Case No. 8291, respondent. ^{1/}
John C. Gilman and M. E. Getchel, for the
Commission staff.

O P I N I O N

Public hearings were held before Examiner Power on a consolidated record at Union City on April 5 and at Oakland on May 31, 1966. Oral arguments were made on July 1, 1966 at San Francisco and the matter was submitted.

A previous series of hearings on Case No. 7910 alone had resulted in an examiner's proposed report. On November 2, 1965 the submission of that case was set aside. On the same day Case No. 8291 was instituted to investigate seven other crossings of Union City streets over Southern Pacific tracks.

^{1/} This is a Commission designation. The City's designation of itself was an "intervenor".

On November 22, 1965 Union City filed a petition to set aside the order reopening proceedings, and requesting entry of decision.

On March 30, 1966 Union City filed a motion to strike in each case. These were identical in wording and sought to have the cases dismissed as to Union City.

These motions were based upon following grounds, viz.:

1. The Commission has no authority to enter any order requiring the City, without its consent, to expend public money for a private purpose or requiring the closure of a public city street which the City has not abandoned.

2. The City asserts its governmental immunity against suit by the Southern Pacific Company even in this situation where the complaint is filed on Southern Pacific's behalf by the Commission.

3. The Order of Investigation is a complaint filed pursuant to Section 1702 of the Public Utilities Code which Section only permits proceedings alleging wrongful acts or things "done or omitted to be done by any public utility" and does not authorize the making of a complaint against a governmental body such as the City of Union City.

4. The Order of Investigation seeks an order directing the closing of City streets, a matter within the primary and exclusive authority of the City of Union City and consequently in excess of Commission jurisdiction.

Union City has contended throughout that grade crossings are primarily a municipal affair. The staff and the railroad contend the opposite, namely, that regulation of grade crossings is primarily a matter of statewide concern.^{2/}

2/ The Legislature has so stated. See Section 1219 of the Public Utilities Code.

There is no doubt that the Legislature has attempted to confer the power to regulate highway-railroad crossings on this Commission. For instance Section 1202 of the Public Utilities Code provides that:

"1202. The Commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad affected or between such corporations and the State, county, city, or other political subdivision affected. (Former Sec. 43(b), 1st sent.; amended 1965, Ch. 117.)"

If the introductory clause is read with paragraph (b) there appears to be a direct grant of power. This is especially so if one strikes the word "such" and adds after the word "crossing", "of a street by a railroad or vice versa" (from the end of paragraph (a)). This is on its face a direct grant of power.

Union City concedes that this language applies to cases where the City has filed an application, but denies that it governs those cases where, as here, the proceeding was initiated by the Commission. This is only another way of stating the City's main

contention. If, by the expedient of not filing applications, the local governments can forestall Commission jurisdiction, then the ultimate power of decision rests with the local governments. It follows that if the main proposition cannot be successfully defended, neither can the variant.

In support of its first contention the City cites four cases and five sections of the State Constitution.

The five constitutional provisions cited are Article II, Sections 6, 8, 11, 12 and 13. Sections 6 and 8 are the "home rule" sections of the State Constitution, Section II authorizes the enforcement of local police, sanitary and other regulations, not in conflict with general laws. Section 12 forbids the legislature to tax cities for municipal purposes. Section 13 protects cities from legislative interference with the property of cities in the performance of municipal functions or by subjecting them to taxation.

"The constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate." Pacific Telephone & Telegraph Co. v. San Francisco (1959) 51 Cal. 2d, 766, 771, 336 Pac.2d 514.

There is probably no field of public concern to which the above quotation applies more aptly than to the field of highway traffic in general and the subject of highway-railroad intersections in particular. The two cases which lean most strongly to the Union City side are City of Los Angeles v. Central Trust Co. (1916) 173 Cal. 323 and City of Los Angeles v. Zeller (1917) 176 Cal. 194.

In 1917 the automobile age was yet only in its infancy. The great road improvement programs lay almost entirely in the future. The control of highway traffic was indeed primarily a matter of local interest. In 1917 few could have foreseen a time like the present

when a man may travel through three or four municipalities on his way to work while his wife traverses others on her way to the supermarket. Who could then have envisaged travelers on freeways who often do not know what city they are in or even whether they are in a city? Yet even this early, doubts were beginning to appear. See for example, Civic Center Assoc. v. Railroad Commission, (1917) 175 Cal. 441, 166 Pac. 351.

The Civic Center case trend was carried on in City of San Bernardino v. Railroad Comm. (1923) 190 Cal. 562. By 1937 Court had said in City of San Mateo v. Railroad Comm. 9 Cal. 2d 1, that:

"Unchartered cities may adopt regulations, local, police and sanitary in character, which are not in conflict with general laws. In a limited sense such power is vested in the municipality but always subject to the power of the legislature to wipe it out by a conflicting general law on the same subject." (Page 8)

Union City was not incorporated until 1959 and hence is directly affected by this quotation.

Compare also Pipoly v. Benson (1942) 20 Cal. 2d 336, 125 P. 2d 487; a state law on jaywalking renders municipal ordinances on the same subject inoperative; and Los Angeles Ry. Corp. v. City of Los Angeles (1940) 16 Cal. 2d 779, 108 P. 2d 430, in which a Commission authorization of one-man street car operation was held to prevail over a city ordinance forbidding such operation and requiring 2-man crews.

The cases are simply reflecting the elementary fact that the automotive age arrived many years ago. It increases the mobility and range of highway travel by fantastic percentages. In the pre-automotive age a round trip of 20 to 25 miles required the better part of a day. The expenditure of vast sums of money (chiefly by the State and the United States) for the improvement and maintenance of highways has contributed to further expansion of that range and mobility.

The City of San Mateo case, supra, disposes of the City's contention that the Commission cannot require the closing of a city street which the city has not abandoned.

The second ground of the city is based on a fundamental misconception of the nature of these proceedings. This misconception is illustrated by the case it cites: Heieck and Moran v. City of Modesto, 49 Cal. Rptr. 377 and Kotronakis v. San Francisco, 13 Cal. Rptr. 709. Both of these cases were brought on tort claims. There is a fundamental distinction between a proceeding of the Heieck and Moran and Katronakis type and a crossing investigation. The tort cases face backwards in time, addressing themselves to the redressing of injuries done in the past. A crossing investigation looks to the future. The first is remedial, the second, preventive. The tort claims seek a remedy inherently judicial in character; the cases before us now are fact-finding inquiries of the type conducted by legislative committees and some other bodies.

The position taken by Union City is a novel one. The Commission, almost since it was recast in its present form more than 50 years ago, has assessed costs to public bodies such as cities and counties in connection with the crossings of public streets and roads across railroads. The local governments have acquiesced.

It would appear that the Legislature has felt the same way about it. Section 1231 for example, makes no sense unless costs of protection can be assessed to local governments. It is a fact that while most new crossings come as a result of applications, most upgrading of protection came as a result of Commission investigations. Since shortly after World War II the Commission has had a continuous program under way for the improvement of protection in the State. Where agreements have not been reached hearings have usually been held under the investigatory procedure.

The addition to the Code of Section 1231 in 1961 and 1202.2 and 1231.1 in 1965 long after the upgrading program got under way show that the Legislature assumed that costs were allocable to local governments. Most local governments have also agreed.

The relationships of the railroad and the City to this inquiry are in fact identical, both are respondents, one because it controls the rail highway, the other because it controls the vehicular highway.

The third proposition put forward by the City is that this proceeding is a "complaint filed pursuant to Section 1702" of the Public Utilities Code. In part this section reads:

"Complaint may be made...by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility,... in violation or claimed to be in violation, of any provision of law or of any order or rule of the Commission..."

The term "public utility" is defined in Section 216 of the Public Utilities Code in a manner which makes it clear that the term means private companies engaged in supplying the commodities and services collectively called public utilities. The section has nothing at all to do with cities or with this case.

The fourth ground for the motion is an assertion that the Commission is seeking to close a street in Union City, a matter which the City claims, is in excess of the Commission's powers. In this contention the City is wrong; the Commission does have such power; City of San Mateo v. Railroad Comm. (1937) 9 Cal. 2d 1, 68 Pac. 2d 71, 108 P2d. 430, cf. Breidert v. Southern Pacific Company (1964) 61 Cal. 2d, 659.^{3/}

^{3/} This is an inverse condemnation case. In disposing of a preliminary matter it mentions the Commission's exclusive jurisdiction.

It follows from what we have said that the motions to strike are without merit and should be denied. The petition to set aside order reopening proceeding and requesting entry of decision is based upon the same contentions and therefore it, too, will be denied. We now proceed to consider these cases upon the merits.

The Southern Pacific Company operates a line of railroad from Oakland to Niles in Fremont in Alameda County and beyond toward Stockton and San Jose. It operates another one from San Francisco to San Jose on the western side of the San Francisco Bay. There is a connecting line between these two lines extending from Elmhurst in Oakland to Santa Clara. The Oakland-Niles Line is the "D" Line, while the Elmhurst-Santa Clara Line is designated "L".

When Union City was incorporated, it included two existing communities, namely, Alvarado on the "L" Line and Decoto on the "D" Line plus considerable intervening land, trending to industry and settlement but with much of the acreage still under the plow. Five of the crossings here involved are on the "L" Line and three on the "D" Line. New Haven Road, the sole subject of Case No. 7910, is on the "L" Line. The Nimitz Freeway is between the two railroad lines.

The crossings dealt with in Case No. 8291 are:

<u>Crossing No.</u>	<u>Street</u>	<u>Present Protection</u>	<u>Daily Train Traffic</u>	<u>Daily Highway Traffic</u>
D 25.6	Whipple Road	2 No. 8	16	4445
D 26.4	"H" St.	1 No. 3	16	4291
D 26.6	Decoto Road	2 No. 8	16	5244
L 24.6	Union City Blvd.	2 No. 8	18	7667
L 25.2	Smith St.	2 No. 8	18	3237
MP25.6	Fair Ranch Rd.	2 No. 1A	18	134
L 26.1	Alvarado Blvd.	2 No. 8	18	4061

The Xing in Case No. 7910 is:

L 25.3	New Haven Road	2 No. 1A	31(1)	423
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(1) An actual 16 hour count. Many of these may have been switching movements.

No. 8 = Standard No. 8 flashing light signals.

No. 3 = Standard No. 3 wigwag signals.

No. 1A = Standard No. 1A reflectorized crossing signs.

These standards are from General Order No. 75-B.

For New Haven Road the staff recommended physical closing as its first choice. For a second choice it advocated Standard No. 8 flashing light signals equipped with automatic gate arms (hereinafter referred to as 8s and gates). For all the other crossings 8s and gates were recommended.

In general the staff recommendations will be followed. There are, however, certain exceptions to this which will be noted.

The first concerns New Haven Road. The Commission is of the opinion that the original recommendation of the staff is the correct solution. If this street is left open appropriate protection is 8s and gates with grade crossing predictor units (GCP units). This is a very expensive installation. The limited use (423 vehicles per day) made of this crossing does not justify the necessary expenditure.

The second concerns Fair Ranch Road. The evidence at the last series of hearings showed 134 vehicles per day using this crossing. Visibility in all four quadrants is excellent. The staff recommendation for 8s and gates was based on the fact that a large subdivision is projected east of the tracks in this area. At the time of the hearing this subdivision had only reached the planning stage. It is possible that the plans of the subdividers may include one or more street connections with Alvarado Boulevard east of the tracks. If this were done the crossing should be closed. The evidence is completely speculative on this crossing and no intelligent decision can be made until more facts become available.

The third variance from staff recommendations is that Union City Boulevard should be moved from the second to the first phase. The staff included New Haven Road in the first phase. With New Haven Road eliminated no further protection is needed. Union City Boulevard has by far the greatest vehicular traffic of any of the crossings here involved (7667 vs. 5244 at Decoto Road, the runner-up).

The first phase will involve upgrading protection at "H" Street, Smith Street, Decoto Road and Union City Boulevard plus the closing of New Haven Road. This phase should be completed within six months of the effective date of the following order.

The second phase should include Whipple Avenue and Alvarado Blvd. This phase should be completed within thirty months of the effective date of the order.

To summarize, the Commission is of the opinion that the flow of highway vehicular traffic is a field where the state interest is paramount to the local. That portion which concerns the inter-

section of streets and highways with railroads has been confided to this Commission. Six of the crossings in Union City should have their protection upgraded. One crossing should be closed. On the eighth no decision is possible at this time.

The Commission finds that:

1. Public safety requires that the following crossings at grade of public streets of the City of Union City with tracks of Southern Pacific Company should be protected by flashing light signals augmented by automatic gate arms. Such work should be completed within 6 months of the effective date of the following order.

<u>Crossing No.</u>	<u>Street Name</u>
D 26.4	"H" Street
D 26.6	Decoto Road
L 24.6	Union City Blvd.
L 25.2	Smith Street

2. Public safety requires that the following crossings at grade of public streets of the City of Union City with tracks of the Southern Pacific Company should be protected by Standard No. 8 flashing light signals equipped with automatic gate arms. Such work to be completed within 30 months of the effective date of the following order.

<u>Crossing No.</u>	<u>Street Name</u>
D 25.6	Whipple Road
L 26.1	Alvarado Blvd.

3. All crossings should be provided with circuitry adequate to prevent over-actuation of the protection.

4. Public safety requires that the New Haven Road crossing No. L 25.3, be abolished by physical closing. Such closing to be completed within six months of the effective date of the following order.

5. A fair and reasonable division of the installation and maintenance costs of the improvements listed in findings Nos. 1, 2, 3 and 4 hereof would be as follows:

- a. Closing of New Haven Road 100 percent to Southern Pacific Company.
- b. All the other six crossings 50 percent to Southern Pacific Company and 50 percent to the City of Union City.

The Commission concludes that:

1. Both of the motions filed in Case No. 7910 and the motion filed in Case No. 8291 should be denied.
2. The seven crossings referred to in findings Nos. 1, 2, 3 and 4, at grade, with tracks of Southern Pacific Company should be closed or protected and costs allocated as provided by the following order.
3. No order affecting the Fair Ranch Road crossing (No. MP 25.6) will be made until additional facts are available.

O R D E R

IT IS ORDERED that:

1. The Petition to Set Aside Order Reopening Proceedings, etc., filed in Case No. 7910 on November 22, 1965 is denied.
2. The identical Motions to Strike filed in Cases Nos. 7910 and 8291 are, and each of them is, denied.
3. Southern Pacific Company shall within six calendar months after the effective date of this order:
 - a. Abolish by physical closing its New Haven Road Crossing No. L 25.3.

- b. Improve the protection of the crossings of "H" Street, No. D 26.4 and Decoto Road, No. D 26.6, Union City Boulevard, No. L-24.6 and Smith Street, No. L-25.2, to flashing light signals equipped with automatic gate arms, with circuitry adequate to prevent over-actuation of the protection.

4. Southern Pacific Company shall within thirty calendar months after the effective date of this order:

Augment the present automatic protection of the crossings at Whipple Road, No. D 25.6 and Alvarado Boulevard No. L 26.1 with automatic crossing gate arms.

5. a. Southern Pacific Company shall bear the entire cost of closing the crossing at New Haven Road.

b. The cost of improving protection at the crossings of "H" Street, Decoto Road, Union City Boulevard, Whipple Road, Alvarado Boulevard and Smith Street shall be borne 50 percent by Southern Pacific Company and 50 percent by the City of Union City.

6. The maintenance costs for said automatic protective devices shall be divided in the same proportion as the cost of construction has been apportioned herein, in accord with and pursuant to the provisions of Section 1202.2 of the Public Utilities Code.

7. Case No. 8291 is continued for the purpose of making an appropriate order respecting the Fair Ranch Road Crossing No. MP 25.6 when sufficient information becomes available.

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

Dated at San Francisco, California, this 7th day of FEBRUARY, 1967.

Arthur E. Badelich
President

William A. Brown

Augusta

William Linn

Fred P. Monrosey
Commissioners