

ORIGINALDecision No. 72102

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into the status, safety,)
 maintenance, use and protection or)
 closing of the crossing at grade of)
 the lines of the Southern Pacific)
 Company and The Atchison, Topeka and)
 Santa Fe Railway Company in the County)
 of Kern at Mile Post 319.56.)

Case No. 8276
 (Filed October 5, 1965)

Randolph Karr, for Southern Pacific Company;
Averil D. Vallier, for The Atchison, Topeka
 and Santa Fe Railway Company; D. Bianco, for
 Giumarra Vineyards Corporation, respondents.^{1/}
Melvin R. Dykeman, George D. Moe, J. C. Easley,
William C. Sherwood and Milton B. Kane, for
 the State Department of Public Works; L. Dale
Mills, for the County of Kern; G. R. Mitchell,
 for the Brotherhood of Locomotive Engineers;
George W. Ballard, for the Brotherhood of
 Railroad Trainmen; and James L. Evans and
Harvey D. Temple, for the Brotherhood of
 Locomotive Firemen & Enginemen, interested
 parties.
V. V. MacKenzie, for the Commission staff.

O P I N I O N

Public hearings on this matter were held at Bakersfield on March 30 and 31, July 27 and 28 before Examiner Power. The matter was submitted subject to the filing of briefs which have been received.

The crossing here involved is located about six miles east of Bakersfield and one-half mile west of Edison. It is on that stretch of Southern Pacific tracks between Kern Junction and Mojave over which the Santa Fe has trackage rights. There is an average of 42 through train movements per day, with a maximum of 65. At least four of these are passenger trains. The crossing

^{1/} Both railroads designated themselves incorrectly as protestants. In fact, they are respondents.

is over the double tracked main line with two siding tracks. The switching moves have a wide seasonal variation from 2 to 20 moves per day.

The crossing was opened as a private crossing and is currently subject to a private crossing agreement by Southern Pacific with the Giumarra Vineyards Corporation. In appearance, however, as the photographic evidence clearly reveals, it has the aspect of a public crossing. It is surfaced and improved in such a way that even a wary traveler might take it for a public road.

The protection consists of two each crossbuck signs, "Stop" signs of the type used along arterial highways and signs reading "Private Property, Permission to Pass Over Revocable at Any Time." The "Private Property" signs are inconspicuous and not likely to be noticed by a casual traveler.

As in the case of the switching moves, the volume of vehicular traffic has wide variations. There can be from 150 to 3000 vehicles during a day. The variation is seasonal with June, July and August being the heavy months. The accident potentiality is high. This trackage is part of the Tehachapi mountain route and westbound trains are descending on a gradient originating many miles to the east. Thus westbound rail traffic is usually traveling at the highest permitted speeds. Conversely, eastbound rail traffic is climbing and is therefore slower. Rail speed limits are 60 MPH for freight and 79 MPH for passenger trains.

The visibility in both northern quadrants at this crossing is impaired (at times seriously) and there is also impairment to a lesser degree in the southeast quadrant.

Before proceeding to findings and conclusions, some motions should be considered.

Southern Pacific, Santa Fe and Giumarra Vineyards^{2/} joined in a motion to stay proceedings. The motion was on two broad grounds. First, respondents argued, to proceed would violate the due process clause of the Constitution of California, the Federal Constitution, burden interstate commerce and be contrary to the National Transportation Policy. This contention seems especially premature in advance of any final order by the Commission.

The second part of respondents' motion has to do with alleged deficiencies of the Order Instituting Investigation. The material part of that order reads as follows:

"It appearing that the railroad tracks of the Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company cross a crossing at grade at Mile Post 319.56 in the County of Kern; and

"It further appearing that said crossing may be dangerous and hazardous to the health, safety and welfare of the public; and

"It further appearing that the Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company, County of Kern and Giumarra Vineyards Corporation, hereby made respondents, are necessary and indispensable parties hereto; and good cause appearing,

"IT IS ORDERED that an investigation on the Commission's own motion is hereby instituted into the status, safety, maintenance, use and protection or closing of the crossing hereinabove described for the purposes of determining:

"(1) Whether or not the public health, safety and welfare require relocation, widening, closing or other alteration of said crossing, or require installation and maintenance of additional or improved protective devices at said crossing;

^{2/} See Footnote No. 1, Page 1.

"(2) Whether, if any of the above should be done, on what terms such shall be done, and to make such apportionment of costs among the affected parties as may appear just and reasonable;

"(3) Whether any other order or orders that may be appropriate in the lawful exercise of the Commission's jurisdiction should issue."

Respondents' comments on the motion were general and indicated more dissatisfaction with the form of the order rather than its substance. The respondents cited no convincing authority for their motions. One specific criticism, however, was detailed and that was that the OII does not designate the Code Section under which the Commission is proceeding. Since one of the questions to be determined is the status of this crossing, to designate a section (i.e. 1202, 768, 7537) in advance would have amounted to predetermination of an important issue in the case. The motion of respondents will be denied.

The State Department of Public Works, Division of Highways, made a motion for dismissal of itself and the County of Kern, on the ground that no public road was involved. There is, however, a public road (State Highway Route 58) within 75 feet of the crossing and which might have been affected. As it turned out, no evidence involved the two public agencies. They are proper parties, however, until it is determined on the record whether they have financial obligations for cost and maintenance of the protection to be ordered. The motion, therefore, will be denied.

On August 3, 1947, Southern Pacific Company and Giumarra Vineyards Corporation entered into a "Private Road Crossing Tracks at Grade" agreement, some clauses of which should be discussed. Clauses 3 and 4 read as follows:

"3. Licensee shall, at Licensee's sole cost and expense, provide and erect such fence gates as may be designated by Licensor; said gates to be approved by Licensor and to be erected under its supervision and to its satisfaction, and Licensee shall thenceforth maintain and keep said gates in good repair to the satisfaction of said Licensor.

"4. Licensee shall at all times keep said gates closed and securely locked, except when said crossing is being actually used."

Regarding these clauses, the record does not indicate whether or not Licensor designated any fence gates to be erected by Licensee. Since there are no fence gates or similar structures in existence at the crossing, we can only assume that Licensor has not exercised its contractual right to require these facilities of Licensee. If this assumption is correct concerning Clause 3, then Clause 4 has no significance. Clause 6 reads as follows:

"6. Licensee shall not assign or transfer this agreement in whole or in part without the written consent of Licensor first had and obtained, and shall not permit said crossing to be used by the public or by any person or persons except Licensee, Licensee's family, guests, tenants, employes and persons having business with Licensee, it being expressly understood and agreed that said crossing is a private one and is not intended for public use. For the purpose of this agreement, all persons using said crossing shall be deemed the agents of the Licensee."

The record indicates that the restriction agreed upon as to permitted users of the crossing has not been observed or enforced by Licensee. Furthermore, there is absent in the record any indication that Licensor has at any time challenged Licensee regarding its oversight of this restriction. Notwithstanding it was expressly understood and agreed between Licensor and Licensee that said crossing is a private one and is not intended for public use, the record shows the crossing to be "publicly used" as found in §1202, Public Utilities Code. Whereas the principal users of this crossing may well be those persons described in Clause 6 of the above agreement, there are in fact other users. For example, visitors to, employees of, and persons doing business with Agricultural Fertilizers Chemicals, Inc., use the crossing. Actually, any member of the public may use this crossing because no restriction on the use of it by any members of the general public is imposed by Giumarra Vineyards Corporation.

As to the signs reading "Private Property, Permission to Pass Over Revocable at Any Time," nothing in the record indicates anyone has at any time been denied permission to pass over the crossing. The record does not indicate Giumarra has taken any action to maintain the identity or the operation of the crossing as a private one, nor that Southern Pacific has insisted Giumarra do so.

Though this crossing will be ordered properly protected, we are not unmindful that, substitute arrangements may be made which will in fact afford the safeguards necessary at this crossing, but which, it is doubted, would meet the economic requirements of the area.

For example, the crossing could be closed with ingress and egress to the desired area provided at nearby crossings which are already adequately protected. Furthermore, the crossing could be closed to the public and used solely as a private crossing as contemplated in Exhibit No. 17. This is provided, of course, that Southern Pacific would designate adequate fence gates as noted in Clause 3 of Exhibit No. 17, and that the crossing thereafter would be operated as provided in Clause 4 of Exhibit No. 17.

The Commission finds that:

(1) The crossing is a "publicly used" crossing within the meaning of Section 1202 of the Public Utilities Code.

(2) The visibility impairment at the crossing is pronounced. It is hazardous, unsafe and the accident potential is high.^{3/}

(3) The present protection consisting of two each crossbuck and stop signs is inadequate.

(4) That in order to provide adequately for the health and safety of the public, railroad crews and rail passengers, flashing light signals, Standard No. 8 of General Order No. 75-B, California Public Utilities Commission, augmented by automatic gate arms, are necessary. That prompt installation of said protective devices is required in order to protect said crossing adequately.

O R D E R

IT IS ORDERED that:

(1) The motion to stay proceedings made by Southern Pacific Company herein on March 30, 1966 and joined in by The Atchison, Topeka and Santa Fe Railway Company and Giumarra Vineyards Corporation is denied.

3/ The Commission takes official notice that accident reports required to be made to it disclose two accidents occurred at this crossing after submission of this proceeding. One resulted in the death of two truck drivers, and the other in the injury to members of a train crew.

(2) The motion by Southern Pacific Company that Agricultural Fertilizers Chemicals, Inc., be brought in as a necessary party is denied.

(3) The motion of the State Department of Public Works, Division of Highways, that that agency and the County of Kern be dismissed as necessary parties is denied.

(4) Southern Pacific Company shall within ninety days from the date hereof install flashing light signals, Standard No. 8 of General Order No. 75-B, California Public Utilities Commission, augmented by automatic gate arms at said crossing.

IT IS FURTHER ORDERED that this proceeding is hereby reopened for further hearings on all other issues that may be involved herein at such time and place as may hereafter be designated. Parties hereto shall be notified at least ten days before such hearing.

The Secretary is directed to cause a certified copy of this order to be served forthwith upon each of the respondents herein.

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

Dated at San Francisco, California, this 20th day of FEBRUARY, 1967.

Commissioner Peter E. Mitchell, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.

William B. Bennett President
William Sproule Jr.
Paul P. Moroney Commissioners