

**ORIGINAL**Decision No. 72750

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application  
of the Board of Supervisors of  
the County of Lassen, State of  
California, for authorization to  
construct a public highway across  
the right of way and track of the  
Southern Pacific Company.

Application No. 48849  
(Filed October 7, 1966)

William D. McIntosh, for the County of Lassen.

Harold S. Lentz and L. W. Telford, for Southern  
Pacific Company; Melvin R. Dykman, for the  
Department of Public Works, interested parties.

David R. Larrouy, Counsel, for the Commission staff.

O P I N I O N

Following a public hearing before Examiner Daly at San Francisco on April 27, 1967, the Commission issued an interim order dated May 16, 1967, authorizing the County of Lassen to construct a public highway across the tracks of the Southern Pacific Company. No evidence was taken at the hearing and the matter was submitted on the filing of concurrent briefs relating to the apportionment of costs.

The basic issue in this proceeding is whether the Commission has discretion in apportioning maintenance costs when the crossing is a Federal-aid secondary project and the costs of installation are fixed by Federal law, which has been explicitly accepted by State law.

The project herein considered involves the relocation and improvement of an existing crossing to a point approximately 300 yards distant where it will be protected with lights and

automatic gates. The existing crossing which has no protection other than No. 1 crossbucks, will be abandoned. The parties are in agreement with respect to the location of the crossing, the manner and method of construction and the type of protective devices to be provided. As part of a Federal-aid project the County's entire share of the automatic protection construction cost may be paid from Federal highway funds (23 U.S.C.A. § 130(a)). If such funds are used, however, the railroads' apportioned share of automatic protection construction costs may not exceed 10 percent (23 U.S.C.A. § 130(b)). Should the Commission issue an order apportioning installation cost of the automatic protection on the basis of 90 percent to the County and 10 percent to the railroad, then, according to Section 1202.2 of the Public Utilities Code, if applicable, the cost of maintaining said protection must be apportioned in the same manner.

The question is whether this Commission must include in its final order a provision covering the apportionment of installation costs for automatic protection or may it remain silent with respect to the apportionment of installation costs and provide only for the apportionment of maintenance costs.

Although Section 1202 of the Public Utilities Code gives this Commission exclusive jurisdiction over grade crossings the Legislature through Section 820 of the Streets and Highways Code has agreed that work performed on Federal-aid projects shall be in accordance with Federal laws and regulations. Section 820 of the Streets and Highways Code provides:

"The State of California assents to the provisions of the Federal Highway Act, as amended and supplemented. All work done under the provisions of said act or other acts of Congress relative to federal aid, or other cooperative highway work, or to emergency construction of public highways with funds apportioned by the Government of the United States, shall be performed as required under acts of Congress and the rules and regulations promulgated thereunder. Laws of this State inconsistent with such laws, or rules and regulations of the United States, shall not apply to such work, to the extent of such inconsistency. This further re-enactment of this section is for the purpose of bringing the assent of the State of California to the provisions of the applicable federal statutes up to the effective date of this amendment."

In addition, Paragraph (b) of § 1.25 of 23 Code of Federal Regulations provides:

"(b) Applicability of State laws. State laws pursuant to which contributions are imposed upon railroads for the elimination of hazards at railway - highway crossings shall be held not to apply to Federal-aid projects."

It is clear, therefore, that Federal funds cannot be used for the crossing unless the apportionment of construction costs is in accordance with the Federal formula. To this extent it would appear that the Federal Government has preempted the field. However, application for Federal funds may be initiated either by an agreement between the parties or by an order of the State public utility commission. Paragraph (a) of § 1.25 of 23 Code of Federal Regulations reads as follows:

"§ 1.25 Railway - highway crossing projects.

(a) Requirements for agreements or orders.

Before a project for the elimination of hazards at a railway-highway crossing shall be approved for construction with the aid of Federal Funds, irrespective of the Federal share of the cost of such construction either (1) an agreement shall have been entered into between the State highway department and the railroad concerned, or (2) an order authorizing the project shall have been issued by the State public utility commission or other agency or official having comparable powers. Such agreement or order shall contain provisions specifying responsibility for and pertinent details

concerning construction, maintenance, and railroad contribution relating to the project, which subject to 23 United States Code, section 130, and other applicable Federal law, conform to, and are not inconsistent with, the policies, classifications of projects and procedures prescribed by the Administrator. In extraordinary cases, where the Administrator finds that the circumstances are such that requiring such agreement or order would not be in the best interest of the public, projects may be approved for construction with the aid of Federal funds without requiring such agreement or order prior to such approval, provided provisions satisfactory to the Administrator may have been made with respect to constructions relating to the project."

Although the parties have not as yet entered into a written agreement there is nothing to prevent them from doing so. The record is clear that all concerned, including the staff, are in accord with respect to the work to be done as well as the Federal apportionment of the installation cost for the automatic gates. Once an agreement has been executed application for Federal aid may be made without need for an order from this Commission.

If construction costs are not apportioned by the Commission, then Section 1202.2 of the Public Utilities Code is not applicable<sup>1/</sup> and the Commission may exercise its inherent power to apportion maintenance costs in any manner that it deems appropriate.

For many years the Commission has allocated the costs of improving grade crossing protective devices at a crossing on a 50/50 basis between the railroad and the public agency involved. The maintenance costs of the protective devices were always apportioned 100 percent to the railroad. With the advent of Section 1202.2 the Commission commenced allocating maintenance costs on the basis of 50 percent to the local agency and 50 percent

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<sup>1/</sup> "1202.2 In apportioning the cost of maintenance of automatic grade-crossing protection constructed or altered after October 1, 1965 under Section 1202, as between the railroad or street railroad corporations and the public agencies affected, the commission shall divide such maintenance cost in the same proportion as the cost of constructing such automatic grade-crossing protection is divided. ...."

to the railroad. Of course, the local agency's share is for the most part paid from Section 1231.1 funds. It is this fund that would be seriously affected if the Commission were unalterably committed to an apportionment of 90 percent to the local agency and 10 percent to the railroad.

We find that the ensuing order should make no provision for the allocation of installation costs of the automatic protection (inasmuch as that is provided by Federal law and beyond our jurisdiction). We find further that maintenance cost of the protection involved should be apportioned 50 percent to the County of Lassen and 50 percent to the Southern Pacific Company.

We conclude that Decision No. 72429 should be amended as provided by the order herein.

On May 26, 1967, the Southern Pacific Company filed a petition for rehearing to the Commission's interim order authorizing construction of the crossing (Decision No. 72429). Since there was no evidence received during the course of the original hearing the petition appears to be merely an attempt to file an additional brief on the issue herein considered. The petition will be denied.

O R D E R

IT IS ORDERED that:

1. Decision No. 72429 is amended by incorporating therein the following:

"The County of Lassen shall bear the entire maintenance cost of the crossing outside of lines two feet outside the crossing. Southern Pacific Company shall bear the maintenance cost of the crossing between such lines. Maintenance costs of the automatic protection shall be borne 50 percent by the County of Lassen and 50 percent by the Southern Pacific Company."

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2. The petition for rehearing of said decision filed by Southern Pacific Company is denied. ✓

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

Dated at San Francisco, California, this 11<sup>th</sup> day of July, 1967.

[Signature]  
President

[Signature]

[Signature]

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Commissioners

I dissent

[Signature]