

Decision No. 72783

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ASSOCIATED THEATRES, INC., a  
California corporation,

Complainant,

vs.

SOUTHERN PACIFIC RAILWAY  
COMPANY,

Defendant.

Case No. 8589  
(Filed February 3, 1967)

Silen and Norwitt, by David A. Norwitt, for  
complainant.  
John J. Corrigan, for defendant.  
G. R. Mitchell, for Brotherhood of Locomotive  
Engineers, intervenor.

O P I N I O N

This complaint was heard and submitted April 7, 1967,  
before Examiner Thompson at San Francisco.

Complainant alleges that defendant unnecessarily shines  
the bright headlights of its locomotives upon complainant's out-  
door movie theatre screen, thereby obliterating the picture  
projected thereon and causing annoyance and inconvenience to  
complainant and to its patrons.

Defendant denies the allegation and presents a number of  
affirmative defenses, including: It is required by State law to  
utilize the bright headlights; it is required by federal regulations  
to use the bright headlights; the bright headlights are necessary to  
the safety of the railroad employees and the public in the operation  
of locomotives on the section of line involved; if the bright head-  
lights interfere with complainant's movie operations it is only

because complainant improperly positioned its movie screen and has failed to shield it after full knowledge of the location of defendant's railroad and the necessity to use train headlights for reasons of safety; the complaint is defective because it does not join The Western Pacific Railroad Company as a defendant; and complainant is not entitled to any relief because it has not shown that it has suffered any damages.

Intervenor asks the Commission in making its decision to give due consideration to the necessity of protecting the safety of the railroad employees while they are engaged in the hazardous duty of conducting train operations.

A sketch, which is attached hereto as Appendix A, will be helpful in describing the locations of the properties involved and in describing train operations conducted by respondent that are in issue herein.

Complainant operates an outdoor movie theatre, known as the Spartan Auto Movie, located on the north side of East Alma Avenue just east of South First Street in the City of San Jose.<sup>1/</sup> The easterly edge of complainant's property borders on the right of way of defendant and is separated therefrom by a 16-foot high fence. This fence also extends around East Alma Avenue for a short distance. The movie screen is at the northeast corner of complainant's property and faces southwest. It is higher than the fence. To the north of the theatre are private residences.

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<sup>1/</sup> For convenience herein, all references to compass directions correspond to the directions given to the names of the streets. Actually, South First Street runs in a northwesterly-southeasterly direction and East Alma Avenue runs in a southwesterly-northeasterly direction.

Immediately adjacent to the east of defendant's right of way is the right of way of The Western Pacific Railroad Company, sometimes hereinafter called WP. In those rights of way there are a number of tracks which in Appendix A for convenience we have numbered from west to east. Track No. 1 is an industrial track operated by defendant and serving two industries located south of East Alma Avenue. The switch is located on East Alma Avenue. Tracks Nos. 2 and 4 are runaround tracks operated by defendant. Their principal use is to enable the trainmen to move a locomotive from one end of a string of cars to the other end so as to be at the head end of the train. Track No. 3 is a lead track operated by defendant. It was formerly defendant's main line on its Coast Division but now extends from about 1-1/2 miles north of East Alma Avenue to the junction of the new main line south of the County Fairgrounds. Track No. 5 is an interchange track where cars are transferred from defendant to WP. Track No. 6 is an interchange track where cars are transferred from WP to defendant. Track No. 7 is a WP lead track. Tracks Nos. 8, 9 and 10 are WP industrial tracks serving industries adjacent to its right of way.

Defendant operates over all of the tracks except Nos. 8 and 9. <sup>2/</sup> All of said tracks are in the yard limits of defendant and train operations conducted thereon are under the direction and supervision of the yardmaster at San Jose. The maximum speed limit for defendant's train operations on said tracks is 15 miles per hour. All of the operations are switching movements and the actual speeds of the trains operating between Keyes Street and East Alma Avenue seldom exceed 5 miles per hour. The locomotives used in such

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<sup>2/</sup> Defendant has an agreement with WP which enables it to operate on Tracks Nos. 7 and 10 to serve an industry located on Track No. 10.

operations are usually yard switchers. Occasionally a road engine is used to perform switching operations on these tracks. The switchers have a headlight at both ends, each light being regulated by the engineer in the cab by means of a switch which will permit the light to be on "Bright", "Dim" or "Off". When the light is switched on "Bright", the light beam is of such intensity as to illuminate a dark object the size of an average man, at a distance of not less than 800 feet, on a clear dark night. When the light switch is on "Dim" the intensity of the light is approximately one-half of that of the bright light. The road engines are equipped with similar headlights but also have a "Mars' Light" which is a light that projects a beam in an oscillating figure-eight pattern.

Defendant's locomotive engineers and trainmen are required by it to observe the rules for train operations issued by its general manager for its Pacific Lines. Rule No. 17 contains instructions to engineers concerning the operation of headlights. With respect to the issues in this case Rule No. 17 requires engineers to operate the bright headlights at night and at all times when entering a grade crossing; provided, however, the light shall be dimmed when passing another train or when operating on hand signals. According to the testimony, said rule may be modified to meet special conditions only on order of the general manager or by bulletin from the superintendent of a division, and neither the general manager nor the superintendent has modified Rule No. 17 with respect to the operations involved in this complaint.

The crossings of defendant's tracks with East Alma Avenue and Keyes Street are material to the issues. It was stipulated by the parties that the Commission may refer to its own records to determine the protective devices at those crossings. Those records

disclose that the crossing at East Alma Avenue has tracks Nos. 1 through 7. There are four sets of Standard No. 8 automatic crossing signals protecting this crossing, two of which are located in the median line of the street. The crossing is illuminated by two mercury vapor lamps of not less than 20,000 lumen. Exhibit 1 discloses that there are markings in the street warning motorists that they are approaching a grade crossing. Defendant's trainmaster testified that the average number of train movements by defendant across East Alma Avenue between the hours of 4 p.m. and 12 midnight is six. Defendant's lead track (No. 3) crosses Keyes Street. That crossing is protected by two sets of Standard No. 8 automatic signals, two mercury vapor lamps of not less than 23,000 lumen, and by markings on the street at the approaches to the crossing. From the trainmaster's testimony, an inference may be drawn that the average number of train movements by defendant across Keyes Street between the hours of 4 p.m. and 12 midnight is 4.<sup>3/</sup> There is nothing in the record concerning train movements by WP.

The following is a summary of the events that led to the filing of this complaint. Spartan Auto Movie was constructed approximately 13 or 14 years ago. For some 12 years Jesse Levin booked motion picture films for showing at that theatre. In June or July 1965, complainant, of which Jesse Levin is president and principal stockholder, purchased Spartan Auto Movie. Sometime soon thereafter the projectionist reported to complainant's general manager that the light from the locomotives operating on tracks

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<sup>3/</sup> One of the operations conducted by defendant during those hours is the transfer of cars on the interchange tracks. That operation requires the locomotives to make use of the run-around tracks so as to get to the head end of the string of cars. In that operation the locomotive crosses East Alma Avenue at least twice without crossing Keyes Street.

adjacent to the movie had shown on the screen resulting in the picture being "washed out". The general manager investigated the matter and on several occasions observed that lights on the locomotives were obliterating the picture being projected on the screen. In a number of such instances the patrons of the theatre sounded the horns in their automobiles resulting in considerable din. He testified that he had telephoned the office of defendant at San Jose and complained to someone--he believed it was the yardmaster--and was courteously informed that remedial action would be taken. Thereafter, he observed further incidents when the lights obliterated the picture being projected on the screen. On one such occasion when he was in the projection booth he left, got into his automobile and drove around to the crossing at East Alma Avenue where he saw a locomotive, not in motion, on either Track No. 2 or Track No. 3 on the north side of East Alma Avenue with its headlight on directed towards the movie screen. With the use of a bull-horn that he had in his automobile he hailed the engineer and requested that the light be put out. The engineer complied with the request. The manager testified that it is his estimate that the headlight had shown on the screen for about ten minutes. He stated that he next complained to the Operations-Safety Section of the Commission. The record discloses that a representative of that section called upon defendant's trainmaster at San Jose, presumably after making an investigation, and suggested to him that the locomotive headlights be kept on dim while in operation between Keyes Street and East Alma Avenue. The trainmaster referred the suggestion with his endorsement to the yardmaster who, on March 29, 1966, issued General

Notice No. 36 addressed to all concerned and had said notice posted on bulletin boards at the roundhouse, all depots and shanties.

The notice reads:

"Engines, when working between Alma and Keyes Streets, will keep headlights on dim so as not to interfere with screen of Drive-In Theatre." 4/

The theatre manager testified there was some relief from the unsatisfactory conditions for a short period of time and then the flashing of the bright headlights on the screen resumed. Complainant then filed an action for the issuance of an injunction in the Superior Court in and for the City and County of San Francisco (No. 571,562). A judgment dismissing the action was entered and from which judgment an appeal is pending. Complainant then filed the instant complaint.

During 1966, the projectionist made notes concerning instances when locomotive headlights interfered with the picture being projected onto the screen. A number of such instances are reported in those notes. It would appear that many of such instances were flashes of light that might result from the oscillating beam of a Mars light rather than the steady beam of a headlight. There were instances where the light on the screen was of such duration as to indicate that the interference resulted from a bright steady light. Complainant has shown that lights from defendant's locomotives have reflected upon the theatre screen to the inconvenience of complainant and its patrons, and have caused the sounding of automobile horns to the possible annoyance of the neighborhood.

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4/ It is defendant's position that the instructions in this notice are effective only where compliance does not conflict with the "General Rules". In this case there appears to be a conflict because of the location of the screen with respect to the crossings and the rule requiring the use of bright headlights well in advance of the crossings.

Defendant contends that the use of the bright headlights is required by federal regulations, more particularly those issued by the Interstate Commerce Commission found in 49 C.F.R. Section 91.231 promulgated pursuant to the Federal Boiler Inspection Act, 45 U.S.C.A. Section 23 and Section 28. Said regulation covers only locomotives in road service. It is not applicable here because defendant does not conduct any operations in road service on the tracks involved in this complaint.

Defendant contends that it is required to operate with its bright headlights by reason of Section 7607 of the Public Utilities Code. That section requires every railroad corporation to equip all locomotive engines with headlights which will project sufficient light to enable the locomotive engineer to observe clearly a dark object the size of a man, at a distance of not less than 800 feet, on a dark, clear night while his train is running at a rate of speed not less than 30 miles per hour. The section is not applicable to engines regularly used in the switching of cars or trains, nor to engines used on short lines or local lines where in the judgment of the Commission the said headlight is not necessary for the preservation of public safety.

Defendant also contends that the railroad tracks and the railroad operating conditions existed prior to the acquisition of the theatre by complainant; that complainant was aware of those conditions, and whatever inconvenience and annoyance to it that may result from the railroad operations was caused by the locating of the theatre and the theatre screen adjacent to defendant's tracks. It also urges that complainant can obtain relief from the lights shining on its screen by increasing the height of the fence or by constructing "wings" onto the theatre screen. Neither damages nor



the rights of the parties to the use of their land or facilities are issues in this case. The Commission under Section 701 of the Public Utilities Code has the power to supervise and regulate defendant and its operations. It has authority under Sections 761 and 768 to regulate the safety of operations by defendant. It may exercise its judgment under Section 7607 to determine whether the bright headlight is necessary for the preservation of public safety in connection with operations conducted by defendant on the tracks involved in this complaint. Whether complainant can obtain relief by constructing wings which will shield the theatre screen from the lights from the locomotives, or whether defendant occupied the area with its railroad operations before complainant acquired the theatre are immaterial to the issues here. In the exercise of its powers to supervise and regulate operations by railroad corporations, the Commission has directed the railroad to eliminate any unnecessary noise, obstruction or other annoyance that may inconvenience the public. (Massena v. A.T.&S.F. Rwy. Co. (1929), 25 CRC 526.

Defendant asserts that the safety of the train crew engaged in switching operations requires the operation of the bright headlights; and that safety of the trainmen and the public requires the operation of the bright headlights, and the Mars light when the engine is so equipped, at the crossings at Keyes Street and at East Alma Avenue. It contends that railroad corporations have a responsibility to exercise a higher than ordinary degree of care with respect to their operations. As stated hereinabove, neither federal regulations nor California statutes provide any requirements concerning the use of bright headlights with respect to the defendant's operations involved in this complaint. We are not aware of any general orders, or other orders issued by this

Commission that impose any regulations on the use of headlights by defendant in conducting the train operations involved herein. The standard of care required to be exercised by railroads with respect to operations at grade crossings is set forth in Peri v. L.A. Junction Ry. (1943) 22 C.2d 111. Justice Carter in speaking for the court stated, at page 120:

"Generally speaking the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing. The standard of care is that of the man of ordinary prudence under the circumstances (cit). The question of the negligence of the railroad operator is ordinarily one of fact in crossing cases as it is in other negligence cases."

and at page 121, after quoting Young v. Pac. Elec. Ry. Co., 208 Cal. 568, 572, concerning the shifting of the standard of care regarding speed depending upon the circumstances in each case:

"Likewise, it is only reasonable to say that the necessity, nature, character and extent of the warnings such as flagmen, flares, lights and signals, shifts with the circumstances of the particular case, and is a question of fact in each case."

and at page 123:

"Where the conditions existing at the crossing create an unusual hazard or danger, the operator of the railroad must exercise care commensurate with those circumstances, and whether he had done so is a question of fact."

and at page 126:

"A railroad company will not be held free from negligence even though it may have literally complied with safety statutes or rules. The circumstances may require it to do more."

Defendant's contention that the use of the bright headlights on operations involved herein is required as a matter of law is incorrect. Allogi v. Southern Pacific (1918) 37 C.A. 72 and other cases cited by defendant are not in point. Defendant's

responsibility with respect to the use of the bright headlights at the crossings involved herein depends upon the circumstances in each case where the train approaches and passes over the crossing.

The record shows that under normal operating conditions the train movements at and near the crossings at Keyes Street and East Alma Avenue seldom, if ever, exceed 5 miles per hour. The evidence herein establishes that the dimmed headlights have sufficient intensity to illuminate, on a clear dark night, a dark object the size of an average-size man at a distance of not less than 400 feet. A simple mathematical calculation discloses that under normal operating conditions, and under usual and ordinary circumstances, the beam of the dimmed headlight will be in the crossing for a period of a minute before the engine enters the crossing. The beam from the dimmed headlight will be in the crossing when an automobile traveling at 35 miles per hour is over 3,000 feet from the crossing. The intensity of the bright headlight is twice that of the dimmed headlight so that under usual or ordinary circumstances the beam of the bright headlight would be in the crossing when the motorist is over a mile from the crossing. Considering the fact that neither Keyes Street nor Alma Avenue extends in a straight line for much over one-half mile on either side of the crossings it is doubtful that the crossings could be seen from an automobile on a bright clear day with the aid of a telescope, making the added intensity of the bright headlight of dubious value. Additionally, both crossings are illuminated by two mercury vapor lamps of not less than 20,000 lumen and there are automatic signals protecting the crossings. Under usual and ordinary circumstances the headlight of the locomotive would only serve to alert motorists and pedestrians at the crossing where the

train is on the tracks and to indicate the direction in which it is proceeding. The use of the bright headlights at these crossings under usual and ordinary circumstances would provide no greater safety than the use of the dimmed headlights. Because of the conditions at these crossings, and the approaches thereto, under usual and ordinary circumstances the use of the Mars light would not add to the preservation of safety thereat.

Defendant's contention that the use of the bright headlights, and of the Mars light when the locomotive is so equipped, is necessary for the protection of the train crews is not well taken. Rules with reference to the necessity of giving warning of an approaching train by means of whistles or bells or otherwise are not always applicable to engines and cars which are being moved about the tracks of a railroad yard while switching. (Barbosa v. Pacific Portland Cement (1912), 162 Cal. 36.) Under usual and ordinary conditions, on a clear dark night the engineer can see at least 400 feet in front of his train with the dimmed headlight. Under normal operating conditions on the tracks involved herein the engineer would have more than sufficient time to stop his train within the limits of his visibility. Under normal operating conditions the switchman working in front of the locomotive would have adequate and sufficient illumination from the dimmed headlight in order to perform his work safely. It must be noted that for reasons of safety it is normal operating procedure for locomotives engaged in switching to dim the headlights when operating pursuant to hand signals.

Although the use of the bright headlight, and of the Mars light when the locomotives are so equipped, is not necessary to the preservation of public safety when the train is operated

under normal conditions and usual or ordinary circumstances, it does not necessarily follow that defendant should be enjoined from any use of those lights when operating over the tracks involved here. Abnormal operating conditions or unusual or extraordinary circumstances might call for the man of ordinary prudence to make use of those lights. The railroad's responsibility concerning the use of the lights shifts with the circumstances presented in each case.

Defendant asserts if the Commission finds that under ordinary circumstances the use of the bright headlights or the Mars light in operations conducted in the area involved herein is unnecessary, it should give consideration to the fact that it would be a special case, and that exceptions to the general rules to meet special cases can result in confusion and complexities in operating instructions which would defeat the promotion of safety of operations. It urges that there may be other "special cases" involving similar circumstances and if there are a multiplicity of instructions to engineers as to when the headlights should be dimmed and when they should be placed on bright, confusion resulting in misunderstanding and mishaps would inevitably result. Whether the facts herein constitute a "special case", whether there are other cases similarly situated, or whether the circumstances and conditions pertaining to the switching operations performed by defendant on the tracks involved herein are similar to those in switching operations conducted by it throughout the yard limits of San Jose, or for that matter throughout its entire system, we cannot say. We assume that defendant employs men of at least ordinary prudence to perform the hazardous duty of operating its trains and that such employees have sufficient experience so as to be able to distinguish between normal operating conditions and usual and ordinary circumstances that require the exercise of one standard of care from

abnormal operating conditions or unusual or extraordinary circumstances that call for some other degree of care. If it desires to reduce the area in which the exercise of judgment by the engineer is required, defendant may establish the normal operating speed of 5 miles per hour as a maximum speed limit over the section of track involved and direct its employees to eliminate any use of the bright headlights and Mars lights except in cases of emergency, eminent danger or impaired visibility resulting from weather conditions. If defendant believes that instructions in the form of a bulletin are insufficient or may result in confusion, it may post signs along its right of way (providing the rules concerning clearances are observed), designating when the engineers are to change the headlights from bright to dim. We see no reason for resulting confusion, misunderstandings or mishaps as suggested by defendant.

The foregoing may be simply stated: It is expected that the railroad in the operation of its trains will exercise that degree of care which is necessary to safeguard its employees and the public; however, it is also expected that the railroad will conduct those operations in such manner as to avoid any unnecessary inconvenience to the public.

Defendant also urges that because The Western Pacific Railroad Company was not joined as a defendant, and because complainant has not shown that it has suffered damages by reason of defendant's use of the bright lights, the complaint should be dismissed. The Commission is not required to dismiss a complaint because of nonjoinder of parties or because of absence of direct damage to complainants (Public Utilities Code, Section 1703).

We find that:

1. Defendant has issued rules to its employees requiring the use of the bright headlight on its locomotives when approaching and entering the grade crossings at Keyes Street and at East Alma Avenue, San Jose.

2. In conducting operations at night in the area of said grade crossings defendant has utilized the bright headlights and, when locomotives are so equipped, has used the Mars light.

3. No road service is performed by defendant on the tracks in or near said crossings and all of its operations conducted on and along said tracks are switching movements.

4. In conducting said switching operations at night with bright headlights and with Mars lights, defendant has caused the beam of said lights to be flashed upon complainant's theatre screen resulting in the obliteration of the motion picture being projected thereon to the inconvenience of complainant and its patrons.

5. Under normal operating conditions, and under usual or ordinary circumstances, the operation of the bright headlight or the Mars light is not necessary and is of little or no value to provide warning to pedestrians or motorists of the train's approach to the grade crossings at Keyes Street and at East Alma Avenue.

6. Under normal operating conditions and under usual or ordinary circumstances the operation of the bright headlight or of the Mars light on and along said tracks is not necessary and is of little or no value to the protection and preservation of the safety of railroad employees and the public on and along said section of right of way.

7. Under normal operating conditions and under usual or ordinary circumstances, including the illumination from the

mercury vapor lamps, the automatic signal devices and the markings on the streets, operation on said sections of track and in said crossings by defendant at night with dimmed headlights provides adequate warning and sufficient illumination to protect and preserve the safety of railroad employees and the public on and along said sections of right of way and is consistent with the standard of care of the man of ordinary prudence under such circumstances.

8. The bright headlights and the Mars light are of such intensity as to provide full illumination at distances of not less than 800 feet and can reasonably be expected to interfere with the projection of complainant's motion picture at distances of less than 1,000 feet.

We conclude that defendant should be directed to eliminate any unnecessary use of bright headlights or Mars lights when conducting train operations within 1,000 feet of complainant's theatre screen; that it should modify its rules or operating instructions consistent with this order; and that it should issue such instructions to its yardmaster, trainmaster, or such other agent at San Jose, empowering him with full supervision and authority over all yard, train and engine employees respecting compliance with the order herein.

We further conclude that complainant is not entitled to any other relief.

O R D E R

IT IS ORDERED that:

1. Defendant, Southern Pacific Company, shall eliminate any unnecessary use of the bright headlights or Mars lights on its locomotives while engaged in operations within 1,000 feet of the screen of the Spartan Auto Movie at San Jose.

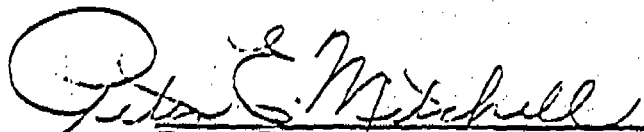




COMMISSIONER PETER E. MITCHELL DISSENTING:

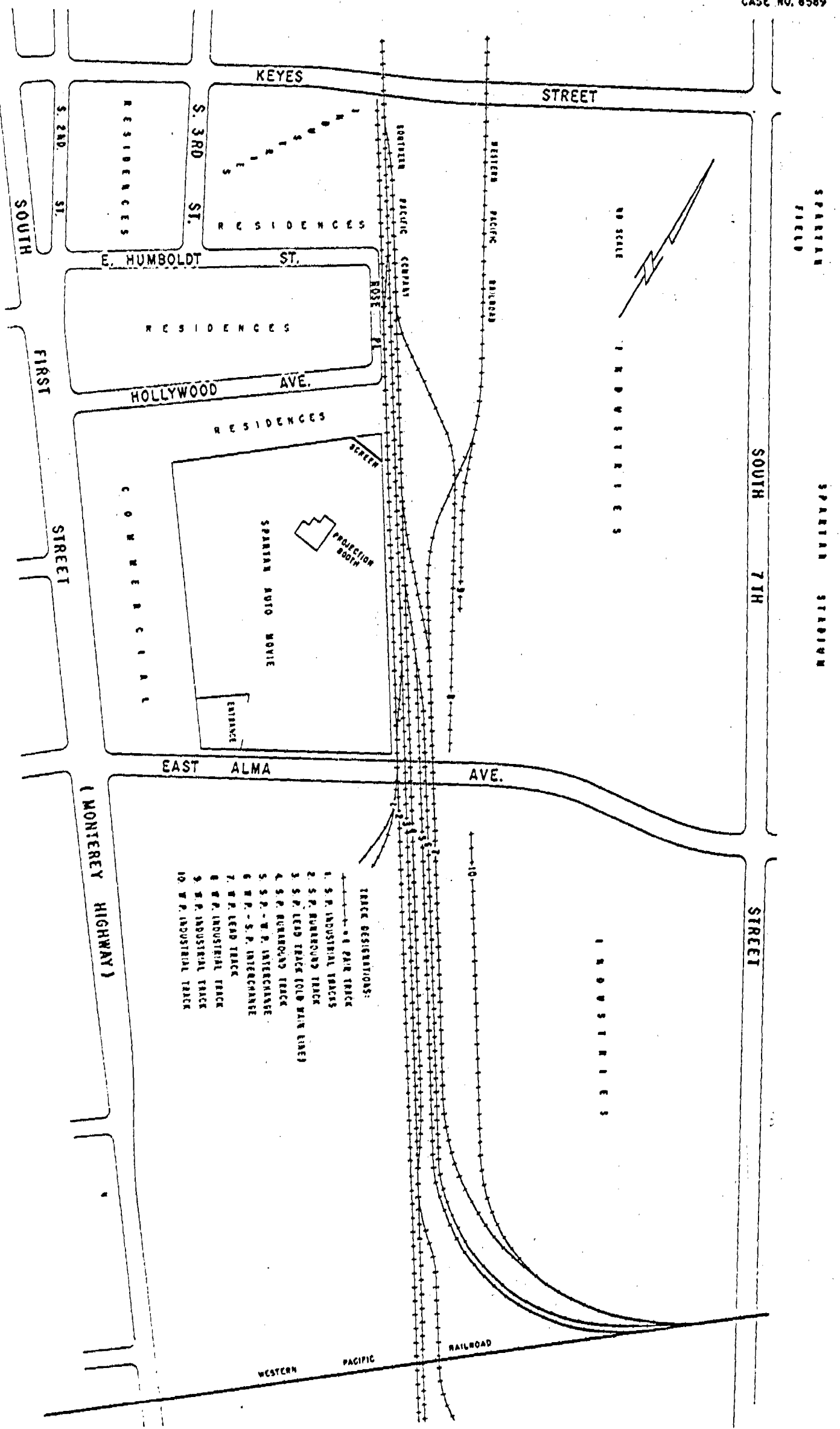
The complaint fails to state a cause of action and should be dismissed.

In this instance we have reduced the reliance the railroad may place upon its own safety regulations. Exceptions to such regulations must eventually increase exposure to danger. Such exceptions, if at all, should be approved, only when there is no alternative.

  
Peter E. Mitchell, Commissioner

San Francisco, California

July 18, 1967



- TRAIL DESIGNATIONS:
- 1. S. P. INDUSTRIAL TRACK
  - 2. S. P. HUNTERD TRAIL
  - 3. S. P. LEAD TRAIL (OLD MAIN LINE)
  - 4. S. P. HUNTERD TRAIL
  - 5. S. P. - W. P. INTERCHANGE
  - 6. W. P. - S. P. INTERCHANGE
  - 7. W. P. LEAD TRAIL
  - 8. W. P. INDUSTRIAL TRAIL
  - 9. W. P. INDUSTRIAL TRAIL
  - 10. W. P. INDUSTRIAL TRAIL

TRAIL DESIGNATIONS:

INDUSTRIALS

SOUTH 7TH STREET

STREET

SPARTAN FIELD

SPARTAN STADIUM

SOUTH

FIRST

STREET

(MONTEREY HIGHWAY)

RESIDENCES

S. 3RD ST.

RESIDENCES

RESIDENCES

HOLLYWOOD AVE.

RESIDENCES

COMMERCIAL

SPARTAN AUTO MOVIE

PROJECTION BOOTH

ENTRANCE

EAST ALMA AVE.

AVE.

WESTERN PACIFIC RAILROAD

NO SCALE

INDUSTRIALS