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ORIGINAL

Decision No. 73521

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the CITY OF LOS ANGELES, a municipal corporation, to widen and improve Southern Pacific Company's El Paso Line crossing of OSBORNE STREET.	Application No. 48286 (Filed March 7, 1966)

Roger Arnebergh, City Attorney, by Charles E. Mattson, Deputy City Attorney, for applicant.
Randolph Karr and Walt A. Steiger, by Walt A. Steiger and Harold S. Lentz, for Southern Pacific Company, protestant.
Joseph C. Easley, for State of California, Department of Public Works; City of Anaheim; Marshall W. Vorkink, for Union Pacific Railroad Company; Robert B. Curtiss, for Santa Fe Railway Company; and Walter G. Treanor, for The Western Pacific Railroad Company, intervenors.
Verne Pynn, for City of Concord; F. R. Brown, for County of Contra Costa; William R. MacDougall, by Allan P. Burdick, for County Supervisors Association of California; and Jerald E. Wheat, for Los Angeles County; interested parties.
Richard D. Gravelle and John P. Ukleja, for the Commission staff.

OPINION ON REHEARING

By Decision No. 72404 dated May 16, 1967 the Commission authorized the widening of Osborne Street across the tracks of the Southern Pacific Company in the City of Los Angeles and apportioned the cost of relocating the existing grade crossing protection and

installing additional grade crossing protection 50 percent to the City of Los Angeles and 50 percent to the Southern Pacific Company. Maintenance costs were apportioned pursuant to the provisions of Section 1202.2 of the Public Utilities Code.

A petition for rehearing was filed by the Southern Pacific Company and petitions for leave to intervene and for rehearing were filed by The Atchison, Topeka and Santa Fe Railway Company, the Union Pacific Railroad Company, and the Western Pacific Railroad Company. The City of Anaheim and the State of California Department of Public Works petitioned to intervene in support of Decision No. 72404. Because of the important questions presented by the various petitions intervention was permitted for all petitioners, and rehearing was granted limited to oral argument before the Commission en banc regarding the issue of apportionment of costs of relocation, installation, and maintenance of automatic protection. Rehearing was held November 7, 1967 and the matter was submitted.

We adopt Decision No. 72404 to the extent set forth herein. Words in brackets [ ] have been changed.

"The City of Los Angeles (City) seeks to widen the existing crossing of Osborne Street (Crossing No. B-464.5) over the Southern Pacific Company's (Southern Pacific) El Paso Line. . . . Public hearing was held at Los Angeles before Examiner Robert Barnett on October 3 and November 4, 1966. The matter was submitted on the latter date.

"Osborne Street is designated as a major highway in the City's Master Plan of Highways. It currently carries a heavy volume of traffic between Foothill Boulevard and the Golden State Freeway. It serves Roger Jessup Park and Hansen Dam Park. It also serves as a route to and from the industrial area along Glenoaks Boulevard and San Fernando Road.

"The Crossing

"The existing crossing is 38 feet wide and is protected by two Standard No. 8 flashing light signals augmented by automatic gates (Griswold type). Each flashing light signal has a back light. The crossing ostensibly is capable of carrying only one lane of traffic in each direction but when traffic is heavy two lanes are formed in the direction of the heavy flow. The City proposes to widen the crossing to 82 feet; Southern Pacific does not oppose. The widened crossing will have two lanes of traffic in each direction, a six-foot median, and a ten-foot left turn lane on the northerly side of the crossing. The lanes nearest the curbs will be 23 feet wide and the lanes nearest the medians will be 10 feet wide. It is expected that during peak traffic hours the curb lanes will carry two lanes of traffic rather than one. A recent traffic count shows a 24-hour volume of 10,238 vehicles with a morning and evening peak volume of 900 vehicles each. Traffic volume at this crossing is increasing steadily and it is estimated that by 1985 there will be an average daily traffic of 23,000 vehicles and a peak-hour volume of 1,400 vehicles. There are more than 26 train movements a day over the crossing; some trains travel at 60 mph.

"Three plans for protecting the widened grade crossing were proposed:

"1. Southern Pacific proposed that the widened crossing be protected by four Standard No. 8 flashing light signals each augmented by hydraulic gates. Two of the signals would be placed at the edge of the pavement and two would be placed on the medians. The signals at the pavement edge would be equipped with back lights; the signals on the medians would not. The cost of installation of this protection was estimated to be $11,090; annual maintenance $1,407.

"2. The City proposed that the widened crossing be protected by moving the protection now in place to the edge of the pavement and by placing one additional No. 8 flashing light signal augmented by a hydraulic gate on the median on the northerly side of the railroad track. All the flashing light signals would be equipped with back lights. The cost of installation of this protection was estimated to be $6,130; annual maintenance $1,247.

"3. The staff proposed that if the City's plan be adopted that it be modified by removing the back light from the flashing light signal on the northerly median and installing a No. 8 flashing light signal on the southerly median. The additional cost of this modification was estimated to be $1,500.

"An engineer for Southern Pacific testified that no mechanical problems would be created by installing a hydraulic gate in conjunction with Griswold gates, as the City proposed. It was the witness' opinion that as far as gate arms are concerned the City's proposal provides as much safety as Southern Pacific's proposal. However, in the witness' opinion, Southern Pacific's proposal was better because it provided for a gate mechanism and flashing lights on the southerly median. The physical presence of the gate mechanism and the flashing lights on this median would be added warning to motorists. At this point the staff suggested that a modification of the City's proposal, by removing the back light from the flashing light signal on the northerly median and placing a No. 8 flashing light signal on the southerly median, would meet the objection of Southern Pacific. The City accepted this modification. Southern Pacific agreed that it would be an improvement, but not to the extent that a gate mechanism would be.

"The evidence shows that the City proposal, when modified by the staff suggestion, gives as much protection as Southern Pacific's; and it is much cheaper to install. There is no measurable difference in degree of safety by having a gate mechanism on the southerly median rather than a pole with a No. 8 flashing light signal attached.

"Apportionment of Costs of Construction

"The parties do not agree on the proper method of apportioning the construction costs of the grade crossing protection. The City asks that these costs be apportioned 50 percent to the City and 50 percent to the railroad. Southern Pacific takes the position that these costs should be borne 100 percent by the City. The staff supports Southern Pacific.

"The City requests that the Commission follow a consistent policy on apportionment of construction costs in grade crossing cases. This will permit the parties to reach agreement on such costs without resorting to a full hearing before the Commission in those cases where there is no substantial disagreement on all other matters. It is the City's theory that the widening of the crossing and the installing of additional equipment to protect the grade crossing increase the protection at the crossing and that the cost of such an increase of protection should be apportioned, in accordance with prior decisions of the Commission, 50 percent to the City and 50 percent to Southern Pacific. In support of its position the City cites Woodman Avenue Crossing (Decision No. 68728 dated March 9, 1965 in Application No. 46151) and Torrance Boulevard Crossing (Decision No. 70865 dated June 14, 1966 in Application No. 48099).

"Southern Pacific also would like consistency in the Commission's decisions on apportionment of costs. However, they contend that to be consistent the Commission, in the case at bar, should apportion the costs of construction 100 percent to the City. They reason that since the widening project was instigated by the City for the sole benefit of the City and the traveling public, and since the proposed changes will not bring about an increase in the /quality/ or degree of the crossing protection, Southern Pacific should not be assessed any of the crossing protection installation costs. In support of its position Southern Pacific cites City of Riverside (Decision No. 57902 dated January 20, 1959 in Application No. 40292) and Torrance Boulevard Crossing (Decision No. 70865 dated June 14, 1966 in Application No. 48099).

"A review of past Commission decisions involving grade crossing protection shows a thread of consistency. A good starting point is County of Los Angeles (Center Street) (Decision No. 27320 dated September 4, 1934 in Application No. 19383) where the County of Los Angeles sought to widen the Center Street grade crossing and improve the grade crossing protection from two crossing signs to two automatic signals. The railroad argued that its portion of the construction expense should be limited to improving the existing used crossing, which expense did not include the improved protective devices. The Commission, in ruling against the railroad, said, 'that as a fundamental principle the railroad and the public have a joint obligation to make grade crossings safe for both vehicular and rail movements. The railroad's obligation is not limited to the initial cost of constructing and protecting grade crossings - it must expect to participate in the cost of improvements to meet changed conditions on both the highway and railroad which affect the adequacy and safety of a grade crossing.' The Commission went on to set forth certain guidelines: When protective devices or other facilities 'must be moved to accommodate the widened crossing, the expense of such movement should be borne by the party desiring the change. As a general principle, it seems equitable that where traffic conditions are materially changed at a crossing, the expense of providing additional (emphasis added) or improved protective devices should be borne one-half by the railroad and one-half by the public. Other and special conditions should be decided upon the merits in each particular case.' The Commission then apportioned the cost of the automatic protection 50 percent to the County and

50 percent to the railroad. The policy set forth in Center Street (supra) was followed in City of Riverside (Riverside Avenue) (Decision No. 57902 dated January 20, 1959 in Application No. 40292) where a grade crossing was widened and the existing protection was relocated but no new protection was added. In apportioning the expense of relocation of the existing protection 100 percent to the City the Commission said, 'A mere change in location of adequate protection devices made necessary by increased vehicular or pedestrian traffic should be authorized at applicant's sole expense. This conclusion is in no way inconsistent with the view that a portion of the cost of additional or improved protective devices should be borne by the railroad.' . . . Consistent with the above cases is City of Los Angeles (Woodman Avenue) (Decision No. 68728 dated March 9, 1965 in Application No. 46151), where Woodman Avenue was widened and the two Standard No. 8 flashing light signals in place were relocated and two additional No. 8s were installed. In this instance the Commission apportioned the 'cost of installing, moving, rearranging, and improving the automatic crossing protective signals and appurtenances' 50 percent to the City and 50 percent to the railroad.

"Other cases cited by the parties involved the installation of grade crossing protection under circumstances in which those concerned agreed that the level of crossing protection had been increased. In those cases costs were apportioned 50-50 in accordance with Commission practice, which practice is not challenged herein.

"The City argues that by adding new protective devices to present protection, all costs of the new protection, plus the cost of relocating the old protection, should be shared 50-50 with the railroad because the new protective devices increase the protection at the grade crossing. Under the circumstances of this case the City's argument is not convincing. Nor is Southern Pacific's argument that the railroad should not be assessed any of the crossing protection costs when there is no increase in the /quality/ or degree of crossing protection and when there is no benefit to the railroad from the crossing project. Neither argument considers the situation of a mere addition of protective devices without reference to any increase in the level of protection.[1/] This situation has been referred to in prior decisions and, when it has arisen, we have apportioned costs on a 50-50 basis. (See Woodman Avenue Crossing, supra.) Whether in this case the new protective devices raise the level of protection need

"1/ The 'level of protection' argument is not particularly helpful in determining a case such as this because even if we were to apply that standard we must still determine whether or not the proposed changes at this grade crossing increase the level of protection. In other words, we must define the phrase. But no adequate definition is available. In place of a definition, an arbitrary standard is used which currently consists of a comparison of the new protection installed with the old protection, in the following ascending order: cross-bucks, Standard No. 8 flashing light signals, cantilevered No. 8 flashing light signals, and No. 8 flashing light signals augmented by automatic gates. However, it could be plausibly argued that straightening the street as it crosses the railroad track raises the level of protection; or changing the degree of approach; or clearing away obstructions to lateral visions; or adding additional protective devices similar to those already installed, without widening; or adding additional protective devices similar to those already installed and also widening the crossing - as in this case.

not be decided. All that need be decided is whether the grade crossing should be widened and additional protection provided, because public safety and convenience, made necessary by the growth of the community, require it. The evidence pertaining to traffic flow, width of roadway, and community growth shows that public safety and convenience so require. We recognize that under the authorities cited above we have the power to apportion the grade crossing protection costs in any manner that is fair. However, to provide guidance for those parties negotiating grade crossing improvements we feel that it is conducive to prompt agreement to work from settled principles. Therefore, we hold that when a grade crossing is widened and additional protective devices are installed, and there are no special conditions which require a different result, the cost of relocating existing protective devices and installing new protective devices shall be /apportioned equally between the railroad and the public entity/

"By placing our decision on this ground we avoid a metaphysical discussion concerning the definition of the phrase 'level of protection', we follow our prior decisions, and we reach a result that fairly represents the obligation incurred by the railroad when it laid its track. When Southern Pacific went on the /land/ in question 'they assumed the burden of sharing on a fair and reasonable basis the costs of any changes for the reason of public safety and convenience made necessary by the growth of the communities'. (A.T.&S.F. Ry. Co. v. C.P.U.C. (1953) 346 US 346, 355, 98 L ed 51, 61, 1 PUR 3d 414, 420.)"

At the oral argument on rehearing the attorneys for the railroads emphasized one theme: that the additional protection at the Osborne Street crossing will not benefit the railroad. They argue that benefits are the underlying basis for allocating costs; it is a matter of who benefits by what is being done; it is unfair to allocate costs 50-50 in this case because the City, the one widening the street, is getting all of the benefits; benefits should be equated with the degree of protection that the railroad obtains from the protective devices. In this case, they argue, the protection at the crossing, before additions, is automatic gates, and after additions is still automatic gates, so there has been no change as far as the railroad is concerned.

The railroads contend that if a rule is to be established the principles set forth in the Memorandum of Understanding, dated August 28, 1950, between the railroads and the State of California Department of Public Works should be followed, and if followed, would result in a cost apportionment of 100 percent to the City. The railroads admit that the Memorandum is not binding, even between the signatories, but assert that it came into being after months of investigation and conferences between the interested parties, and in the years of its existence it has resolved many disputes and greatly eliminated the need for formal hearings.

The Department of Public Works argues that the Memorandum should not be followed; it was a compromise to avoid litigation and delay in road construction. Often, the Department asserts, grade crossing costs are only a small part of a highway improvement project and it is less expensive to pay more to satisfy the railroad than to suffer delay, contested hearings, and appeals.

The City argues that the railroad has not followed the Memorandum of Understanding nor a policy of sharing costs equally when the "level of protection is increased." In a number of recent cases where the protection at a grade crossing was increased to automatic gates from protection that was less than gates, the railroads did not pay 50 percent of the cost, and in many cases paid nothing. A general rule is needed, the City asserts, because street projects are too large and too important to be delayed by grade crossing hearings when the only issue is apportionment of costs. Since 1934 the City has had its own agreement with the railroads which provides for a 50-50 apportionment of costs in factual situations such as the case at bar. The agreement with Southern Pacific terminated in 1959, but the other agreements are still in effect. These agreements, the City claims, provide a reasonable basis for deciding this case.

In our opinion both the Memorandum of Understanding and the agreements of the City were entered into as a result of bargaining, based, to a large degree, on expediency and economic power. While they are helpful in focusing on the problems of cost apportionment, they should not be used as a basis of decision in a case where public safety and convenience are paramount considerations.

The assertion by the railroads that when a grade crossing is widened and more equipment of the same quality is added, a rule apportioning costs on a 50-50 basis does not take into consideration the benefit, or lack of benefit, of the change to the railroad, is inaccurate. Even assuming that the quality

of protection remains the same, an equal allocation of protection costs does not mean that we have not considered the lack of benefits to the railroad. When the Commission finds that grade crossings must be widened and additional protection installed to meet local transportation needs and further safety and convenience made necessary by the rapid growth of the community, the cost of such improvements may be allocated all to the railroad. (A.T.&S.F. Ry. Co. vs. C.P.U.C. supra, 346 US at 352, 98 L ed at 60; Erie R. Co. vs. Board of Public Utility Comrs. (1921) 254 US 394, 409-411, 65 L ed 322, 333, 334.) By allocating only 50 percent of the costs to the railroad we have recognized the equities of the situation.

Further, the railroads, in their argument seeking to impose all costs on the public entity, make no mention of their obligations. They overlook the fact that when they went on the land in question, they assumed the burden of sharing on a fair and reasonable basis the costs of any changes for the reason of public safety and convenience made necessary by the growth of the communities. (A.T.&S.F. Ry. Co. vs. C.P.U.C. supra, 346 US at 355; Erie R. Co. vs. Board of Public Utility Comrs. supra, 254 US at 411.) Also, when the railroad lays its tracks and begins to operate, it has the right of unimpeded travel up and down the state. Every other form of transportation which uses a street or highway must stop for the train. This is a substantial benefit to the railroad; they could hardly operate without it. To share in the cost of widening a grade crossing when the public safety and convenience require such widening seems a small price to pay for this enormous privilege.

The final argument of the railroads that warrants discussion is the assertion that a decision changing a time-proven pattern of allocation of costs in street widening cases should only be made after hearing in a rule-making proceeding of general application. No collection of past decisions of this Commission showing a "time-proven pattern" has been cited to us, and independent research has not uncovered any. If the Memorandum of Understanding is the pattern referred to, then the City's agreements with the railroads should also be considered, which show a contrary pattern. The few Commission decisions cited above, while not deciding the precise point in question, support our holding that when a grade crossing is widened and additional protective devices are installed, and there are no special conditions which require a different result, the cost of relocating existing protective devices and installing new protective devices shall be apportioned equally between the railroad and the public entity. A rule-making proceeding of general application is one method of promulgating Commission policy, but not the only one; the adjudicatory case-by-case method is also proper (California vs. Lo-Vaca Gathering Co. (1965) 379 US 366, 371, 13 L ed 2d 357, 361; Pac. Tel. & Tel. Co. v. P.U.C. (1965) 62 C 2d 634, 669, 401 P 2d 353; Alabama - Tennessee Nat. Gas Co. v. F.P.C. (5th Cir. 1966) 359 F 2d 318, 341, 343; Re Pac. Tel. & Tel. Co. (1964) 62 CPUC 775, 852-53), especially when it is not a new rule we are promulgating, but merely reaffirming principles expounded in decisions reaching back over thirty years.

Findings of Fact

1. The City proposes to widen Osborne Street across the tracks of Southern Pacific's El Paso Line to relieve poor traffic conditions created by the existing narrow roadway and to provide for the future growth of the community.

2. The existing crossing is 38 feet wide and is protected by two Standard No. 8 flashing light signals, with back lights, augmented by automatic gates. The crossing is designed to carry only one lane of traffic in each direction, but when traffic is heavy, two lanes are formed in the direction of the heavy flow. The City proposes to widen the crossing to 82 feet. The widened crossing will have two lanes of traffic in each direction, a six-foot median, and a ten-foot left turn lane on the northerly side of the crossing. The lanes nearest the curbs will be 23 feet wide and the lanes nearest the medians will be 10 feet wide. It is expected that during peak traffic hours the curb lanes will carry two lanes of traffic rather than one. A recent traffic count shows a 24-hour volume of 10,238 vehicles with a morning and evening peak volume of 900 vehicles each. Traffic volume at this crossing is increasing steadily and it is estimated that by 1985 there will be an average daily traffic of 23,000 vehicles and a peak-hour volume of 1,400 vehicles. There are more than 26 train movements a day over the crossing; some trains travel at 60 mph.

3. Public convenience and safety require that the Osborne Street crossing be protected by four Standard No. 8 flashing

light signals. Two of these signals should be placed at the edge of the pavement and two should be placed on medians. The two signals placed at the edge of the pavement should be augmented by automatic gates (Griswold type) with predictors. The signal on the northerly median should be augmented by a hydraulic gate. The two flashing light signals on the median need not be equipped with back lights.

4. Osborne Street was constructed over the tracks of the Southern Pacific Company; the tracks were in place before the street was constructed.

5. In 1961, when the protection at Osborne Street was changed from Standard No. 8 flashing light signals to Standard No. 8 flashing light signals augmented by automatic gates, the railroad and the City shared the costs of the additional protection 50-50.

6. The cost of relocating the existing grade crossing protection and installing the additional grade crossing protection shall be apportioned equally between the City of Los Angeles and the Southern Pacific Company.

7. In addition to the foregoing findings of fact, the Commission finds and concludes that it shall be the policy of the Commission, when a grade crossing is widened and additional protective devices are installed, and there are no special conditions which require a different result, to apportion the cost of relocating existing protective devices and installing new protective devices equally between the railroad and the public entity.

The Commission concludes that the application should be granted subject to the conditions set forth in the following order.

O R D E R

IT IS ORDERED that:

1. The City of Los Angeles is authorized to widen Osborne Street across the tracks of the Southern Pacific Company (Crossing No. B-464.5) in accordance with the plans set forth in its application as modified herein.

2. There shall be installed at the crossing four Standard No. 8 flashing light signals. Two of these signals shall be placed at the edge of the pavement and two shall be placed on medians. The two signals placed at the edge of the pavement shall be augmented by automatic gates (Griswold type) with predictors. The signal on the northerly median shall be augmented by a hydraulic gate. The two flashing light signals on the medians need not be equipped with back lights.

3. The cost of relocating the existing grade crossing protection and installing the additional grade crossing protection shall be apportioned equally between the City of Los Angeles and the Southern Pacific Company.

4. The maintenance cost of the grade crossing protection shall be apportioned pursuant to the provisions of Section 1202.2 of the Public Utilities Code.

5. The railroad signals and adjacent traffic signals shall be interconnected so that in the preemption phase initiated by an approaching train, the traffic signals regulating movement of traffic from the crossing area shall first display a green interval of sufficient length to clear all vehicles from the track area.

6. The Southern Pacific Company shall bear 100 percent of the costs of preparing track necessary within the limits of the widened crossing, and any paving work within lines two feet outside of outside rails in the existing crossing.

7. The City of Los Angeles shall bear 100 percent of all other costs of widening the crossing and approaches including the cost of traffic signal coordination.

8. The Southern Pacific Company shall bear the cost of maintenance of the widened crossing within lines two feet outside of outside rails and the City of Los Angeles shall bear the maintenance costs of the crossing and approaches outside of said lines.

9. Within thirty days after completion of the work herein authorized, the City of Los Angeles and the Southern Pacific Company shall each notify the Commission in writing of its compliance with the conditions hereof.

10. All crossing protection and coordination thereof specified in this order shall be fully installed, completed, and placed in operable condition before the widened crossing is fully opened to the public.

11. The improvements and changes herein provided for are to be completed within one year of the effective date of this order unless time is extended.

The effective date of this order shall be ten days after the date hereof, except that the effective date of paragraphs 3 and 4 of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 19th day of DECEMBER, 1967.

President

I dissent and would have allocated all cost to city. Gregorian

Commissioners