

ORIGINALDecision No. 73614

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

Randolph Karr, for Southern Pacific Company, respondent.
Donald T. Stone, for The Atchison, Topeka and Santa Fe Railway Company, respondent.
D. Bianco, for Giumarra Vineyards Corporation, respondent.
Vincent V. MacKenzie, Counsel, for the Commission staff.

O P I N I O N

By Decision No. 72102 dated February 28, 1967, the Commission ordered Southern Pacific Company to install Standard No. 8 flashing light signals augmented by automatic gate arms at the Giumarra Vineyards Corporation crossing, Mile Post 319.56, within ninety days from the effective date of the order. On July 6, 1967, the Commission granted rehearing, which was held before Examiner Daly at San Francisco on October 23, 1967, and the matter was taken under submission.

Rehearing consisted of supplemental data to Staff Exhibit No. 1 and oral argument.

The supplemental data (Exhibit No. 25) indicates that subsequent to submission of the prior proceeding two accidents occurred at the crossing herein considered. The results thereof are as follows:

<u>Date</u>	<u>Number Killed</u>	<u>Number Injured</u>
11-2-66	0	2
12-30-66	2	1

During a manual 24-hour traffic count conducted on August 16 and 17, 1967, 55 train moves were observed, of which 44 were high speed through freight or passenger trains. A total of 1,343 vehicles used the crossing. Although this number is less than the 3,040 equivalent two-axle vehicles observed using the crossing on July 18 and 19, 1966, it was pointed out that on July 18, 1966, the Giumarra Vineyards Corporation was operating two shifts of personnel whereas on August 16, 1967, only one shift was working.

Oral argument was primarily directed towards a finding made by the Commission in Decision No. 72102 that the crossing is a "publicly used" crossing within the meaning of Section No. 1202 of the Public Utilities Code. Respondents contend that the crossing is a private one and the Commission's finding in effect constitutes a taking of private property for public purposes without compensation and is therefore unconstitutional.

The record discloses that the crossing is located approximately 6 miles easterly of Bakersfield and 1/2 mile west of Edison on State Route 58. The crossing involves a double track high speed main line with two additional spur tracks. Daily train movements range between 42 and 65 per day. Vehicle traffic ranges from 150 vehicles per day to 3,040 equivalent two-axle vehicles per day during the harvest season. This crossing is the only improved access to the Giumarra Packing Plant, winery and offices. A protected county road provides access to the property but at a location less convenient to the winery. The crossing is subject to a private crossing agreement dated August 3, 1947, (Exhibit 17) by which the parties agree that

public use of the crossing is not to be permitted, and that "no persons except Licensee, Licensee's family, guests, tenants, employees and persons having business with Licensee" shall be permitted to use it. Occasional trespassers have, however, used the crossing. The agreement may be terminated by either party upon 30 days' written notice.

The principal users of the crossing are employees of Giumarra Vineyards Corporation and people with whom it does business. While the record clearly discloses that the physical aspects of the crossing have not been restricted against any type of use, we cannot find that persons other than employees, guests, business invitees, agents, or gratuitous invitees of the licensee have any use for the crossing.

For these reasons, despite the heavy use of the crossing, the Commission will not find that it is "publicly used" within the meaning of Section 1202.

Section 768 of the Public Utilities Code provides:

"The Commission may, after a hearing . . . require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and may prescribe . . . the installation, use, maintenance, and operation of appropriate safety . . . devices . . . including . . . protective devices at grade crossings . . ."

Section 7537 provides that the railroad shall maintain farm and private crossings in "a good, safe, and passable condition. The Commission shall have the authority to determine the necessity for any crossing and the place, manner and conditions under which the crossing shall be constructed and maintained, and shall fix and assess the cost and expense thereof."

After consideration the Commission finds as follows:

1. The Giumarra Vineyards Corporation crossing, Mile Post 319.56 serves the property of the Giumarra Vineyards Corporation and is the subject of a revocable license agreement between the Southern Pacific Company and the corporation.

2. With the exception of inconspicuous signs reading "Private Property, Permission to Pass Over Revocable at Any Time," the crossing is not restricted against any use, and occasional trespassers have used it. However, the principal users of the crossing are employees, guests, business invitees, agents and gratuitous invitees of the licensee, Giumarra Vineyards Corporation.

3. According to the terms of the license agreement, Giumarra Vineyards Corporation agreed to indemnify and save harmless Southern Pacific Company, and any other railroad company that may lawfully be operating upon and over the tracks at said crossing, from and against any and all loss, damage, injury, cost and expense of every kind and nature, from any cause whatsoever, resulting directly or indirectly from the maintenance, presence or use of said crossing.

4. The Giumarra Vineyards Corporation crossing, Mile Post 319.56, accommodates an average of 42 through trains per day.

5. Vehicle traffic over the crossing varies between 150 and 3,040 equivalent two-axle vehicles per 24-hour period.

6. Vehicles occupy the crossing while awaiting an opportunity to turn into State Highway Route 58.

7. Views of approaching trains at the stop signs on either side of the crossing are restricted at three quadrants.

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

9. Four accidents have occurred at this crossing, the last of which took place on December 30, 1966 and resulted in the deaths of two individuals.

10. The present protection consists of two crossbucks and stop signs.

11. The present protection consisting of two each cross-buck and stop signs is inadequate and the crossing is hazardous.

12. Southern Pacific Company is not maintaining the crossing in such manner as to promote the health and safety of its employees, passengers, customers and the public as required by Section 768 of the Public Utilities Code, nor is said crossing being maintained by Southern Pacific Company in a good, safe or passable condition, as required by Section 7537 of said Code.

13. Said crossing should be closed unless protected as described in Finding 14 hereof.

14. Flashing light signals, Standard No. 8 of General Order No. 75-B, California Public Utilities Commission, augmented by automatic gate arms, are necessary if said crossing is to remain open.

Conclusions

1. The crossing herein is a private crossing within the meaning of Section 7537 of the Public Utilities Code.

2. Under Sections 768 and 7537 of the Public Utilities Code the Commission may require Southern Pacific Company to promote the health and safety of its employees, passengers, customers and the public, and the maintenance of the crossing in a good, safe or passable condition, by ordering the closing of a hazardous crossing or the installation of adequate protection, to effect compliance with said sections.

On October 20, 1967, Southern Pacific Company filed a petition for a proposed report. After due consideration the Commission is of the opinion that the petition should be denied.

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.
2. The motion by Southern Pacific Company that Agricultural Fertilizers Chemical, Inc., be brought in as a necessary party is denied.
3. The petition of Southern Pacific Company for a proposed report, and joined in by Giumarra Vineyards Corporation is denied.
4. Unless within 40 days from the date hereof, Southern Pacific Company shall, at its own expense, physically close said crossing at Mile Post 319.56 and barricade the travelled path easterly of said crossing between the main line and the spur tracks, it shall, within 180 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.
5. Southern Pacific Company shall notify the Commission within 40 days from the date hereof if the crossing is closed.
6. All costs for the protection ordered by Paragraph 4 hereof, in the event Southern Pacific Company elects not to close said crossing, shall be assessed to Southern Pacific Company. This, however, is not to be construed to preclude Southern Pacific Company from asserting whatever right to indemnification it may have under its license agreement.

The Secretary of this Commission shall forthwith serve, or cause to be served, a certified copy of this order upon each respondent.

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

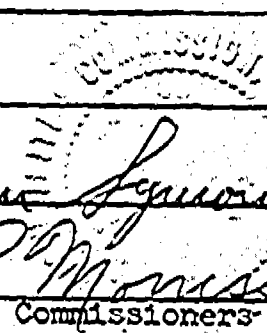
Dated at San Francisco, California, this 9th day of JANUARY, 1968.

President

Augusta

William Seymour

Fred P. Monsey
Commissioners

A circular seal of the Commission is stamped over the signatures. The seal contains the text "COMMISSION" at the top and "COMMISSIONERS" at the bottom.

DISSENT

RENNETT, William M.

I DISSENT

Although this decision may be of moment only to the parties affected nonetheless the parties hereto have a real interest in these proceedings and are affected thereby. The decision signed today is a return to the so-called "institutional decision"-- whatever that means!

The Examiner who sat in hearing and entertained the testimony and evidence submitted did not in reality write the decision promulgated today. The judgment of the Examiner as to credibility, appraisal of the issues, his finding that the private crossing here is "being publicly used" within the meaning of Section 1202 of the Public Utilities Code is rejected based upon the afterthought of the staff that it is not so used. It does violence to basic concepts of fair play and due process that decisions whether of greater or lesser consequence are not in fact written by the Examiner previously designated to take testimony and evidence but rather by Commission Counsel. Certainly parties now knowing that contested matters are to be decided by Commission personnel other than the assigned Examiner have no way then of making arguments or pleas to a faceless author. But perhaps my objection to the manner in which this decision has been completely written by the legal division and the counsel thereof would not be well taken if in the future the parties were to be afforded opportunity to submit briefs or other form of argument to the Commission attorney writing the opinion.

It was not too long ago that parties before this Commission were bedeviled by the "institutional decision". That practice of rendering opinions the product of directors, staff members, others-- almost all but the hearing agent of the Commission frequently led to unprovable unfairness. Accordingly the Commission under a previous climate sought to eliminate such anonymous decision making. Now that it has returned parties should be on notice as here that Commission decisions may or may not have relevance to the views and opinions of the assigned Examiner. Parties should be on notice that pleas and arguments in support of particular issues or

positions possibly need be addressed to others than those sitting to receive evidence.

I have no objection indeed I have long encouraged the vigorous participation of staff members in hearings where properly staff positions are to be asserted. But the practice which is represented by this case discloses no staff position contrary to the views of the Examiner herein even though in the writing of the opinion signed by the majority the staff very conveniently for reasons obscure to me elected to repudiate the proof it presented. I append hereto in support of my dissent and hopefully informative the significant portion of the decision of the Examiner which was rejected:

"Oral argument was primarily directed towards a finding made by the Commission in Decision No. 72102 that the crossing is a 'publicly used' crossing within the meaning of Section No. 1202 of the Public Utilities Code. Respondents contend that the crossing is a private one and the Commission's finding in effect constitutes a taking of private property for public purposes without compensation and is therefore unconstitutional.

"The record discloses that the crossing is located approximately 6 miles easterly of Bakersfield and 1/2 miles west of Edison on State Route 58. The crossing involves a double track high speed main line with two additional spur tracks. Daily train movements range between 42 and 65 per day. Vehicle traffic ranges from 150 vehicles per day to 3,040 vehicles per day during the harvest season. This crossing is the only improved access to the Giumarra Packing Plant, winery and offices. Other roads provide access to the property, but they are ungraded dirt roads. The crossing is subject to a private crossing agreement dated August 3, 1947. (Exhibit 17.) According to the terms of the license agreement, Giumarra Vineyards Corporation is to indemnify and save harmless Southern Pacific Company, and any other railroad company that may lawfully be operating upon and over the tracks at said crossing, from and against any and all loss, damage, injury, cost and expense of every kind and nature, from any cause whatsoever, resulting directly or indirectly from

the maintenance, presence or use of said crossing. The agreement may be terminated by either party upon 30 days written notice.

"Although the principal users of the crossing are employees of Giumarra Vineyards Corporation and people with whom it does business, the record clearly discloses that the physical aspects of the crossing have not been restricted against public use.

"Respondents' contention that the Commission's finding of public use constitutes a taking of property without compensation is untenable.

"Section 1202 of the Public Utilities Code reads in part as follows:

'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. (Emphasis added)
- (b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.'

"The above sections obviously apply to two types of crossings. i.e. (1) public crossings and (2) private crossings that are publicly used. The Commission made no finding that the crossing was public. There is no question that the record clearly demonstrates the crossing to be private, but the record is equally as clear that it is one that is 'publicly used' within the meaning of Section 1202 of the Public Utilities Code.

"The Commission takes no exception to the claim of respondents that the people who use this crossing do so under the color of right, but regardless of what their legal relationship to the land may be, whether they be employees, guests, business invitees, agents of the licensee or trespassers, it is the position of the Commission that they also represent a portion of the public within the meaning of Section 1202 of the Public Utilities Code.

"After consideration the Commission finds as follows:

1. The Giumarra Vineyards Corporation Crossing, Mile Post 319.56 accommodates an average of 42 through trains per day.

2. Vehicle traffic over the crossing varies between 150 vehicles per day to 3,040 vehicles during the grape harvest season.
3. The present protection consists of two crossbuck stop signs.
4. Views of approaching trains at the stop signs on either side of the crossing are restricted at three quadrants.
5. The visibility in both northern quadrants at this crossing is impaired and there is also impairment to a lesser degree to the southeast quadrant.
6. Four accidents have occurred at this crossing, the last of which took place on December 30, 1966 and resulted in the deaths of two individuals.
7. The crossing serves the property of the Giumarra Vineyards Corporation and is the subject of a license agreement between the Southern Pacific Company and the corporation.
8. With the exception of inconspicuous signs reading 'Private Property, Permission to Pass Over Revocable at Any Time,' the crossing is not restricted against public use.

"Conclusions


1. Although the crossing herein considered is private in nature, it is being 'publicly used' within the meaning of Section 1202 of the Public Utilities Code.
2. The present protection consisting of two each crossbuck and stop signs is inadequate.
3. Flashing light signals, Standard No. 8 of General Order No. 75-B, California Public Utilities Commission, augmented by automatic gate arms, are necessary.
4. In accordance with the license agreement executed by the parties Giumarra Vineyards Corporation shall pay all installation costs.
5. In the event Giumarra Vineyards Corporation is unwilling to pay said costs the crossing shall be closed pursuant to the provisions of Section 1202(b) of the Public Utilities Code.

"On October 20, 1967, Southern Pacific Company filed a petition for a proposed report. After due consideration the Commission is of the opinion that the petition should be denied.

" 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 hereby denied.
2. The motion by Southern Pacific Company that Agricultural Fertilizers Chemical, Inc., be brought in as a necessary party is hereby denied.
3. The petition of Southern Pacific Company for a proposed report, and joined in by Giumarra Vineyards Corporation is hereby denied.
4. Within 180 days after the date hereof Southern Pacific Company shall install flashing light signals, Standard No. 8 of General Order No. 75-B, California Public Utilities Commission, augmented by automatic gate arms at the crossing herein considered.
5. All costs for the protection ordered by paragraph 1 hereof and installation thereof shall be paid for by Giumarra Vineyards Corporation.
6. In the event Giumarra Vineyards Corporation decides not to pay said costs it shall so notify the Commission in writing within thirty days after the effective date of this order, and within thirty days after receipt of such notice said crossing shall be physically closed by Southern Pacific Company."


WILLIAM M. BENNETT
Commissioner

COMMISSIONER PETER E. MITCHELL DISSENTING:

I did not sign the order granting rehearing in Decision 72102, Case 8276. The instant decision results from a rehearing in that matter.

Decision 72102, Case 8276, found that the crossing in question was publicly used and further ordered additional hearings on the assessment of costs. Rehearing of Decision 72102 was limited to supplemental data to staff Exhibit No. 1 and oral argument. The testimony in the original hearing and its application based on the precedent of Commission decisions cited below^{1/} was not diminished by the subsequent oral argument.

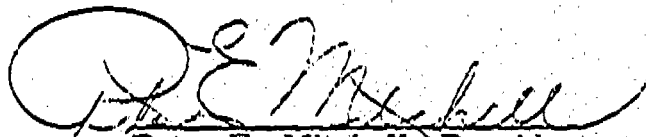
There is no need to review the evidence for it is well stated in Decision 72102 and in the present opinion of the majority.

It is essentially a determination of fact whether a crossing is publicly used. If as herein the crossing may be used by any member of the public and there is no restriction on its use, certainly these factors are persuasive that the said crossing is available for the public. In addition the majority opinion shows 3,000 vehicles using the crossing within a 24-hour period (Exhibit No. 19). This is a greater volume of vehicles than traverse most streets, let alone most crossings in the county in the same period. Whether the persons using the Giumarra crossing are licensees, trespassers or others they still fall within the general definition of members of the public. As the Commission stated in the Napa Case, supra, "The determinative factor is that the crossing is open to use without any restrictions; not the particular class or classes of persons who as a practical matter will make use of the crossing".

^{1/} In re APP. Napa UN. H. SCH. LIST, 219 C. R. C. 151; D. 66962, Case 7575, March 17, 1964; D. 69868, Case 8049, October 26, 1965.

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I would support the original Decision 72102. I would also urge that all parties either physically close the said crossing or install automatic protection at the earliest moment.



Peter E. Mitchell, President

San Francisco, California

January 10, 1968