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**ORIGINAL**

Decision No. 73985

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  
Southern Pacific Company.

Application No. 48849  
(Filed May 9, 1967)

Joseph R. Uptegrove and John D. Mitchell,  
for the County of Lassen, applicant.  
Harold S. Lentz and L. W. Telford, for  
Southern Pacific Company, and Melvin  
R. Dykman, for the Department of  
Public Works, interested parties.  
David R. Larrouy, Counsel, for the  
Commission staff.

OPINION ON REHEARING

Two previous decisions have been rendered in this proceeding. Decision No. 72429, an interim order, issued on May 16, 1967, authorized the County of Lassen to construct a grade crossing at a new location. The question of apportionment of costs was reserved for a later decision. This later decision, No. 72750, was issued on July 11, 1967. By Decision No. 73084, dated September 19, 1967, rehearing of Decision No. 72750, limited to oral argument, was granted and was held on October 25, 1967.

This new crossing is part of a Federal aid secondary highway. The Federal Law applicable<sup>1/</sup> provides, among other things, that Federal funds will be advanced to cover 90 percent of the cost of the highway. It further provides that any railroad crossing installation cost must be assessed not less than 90 percent to the public agency.

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1/ Title 23, United States Code, Section 101, and following.

The State of California has enacted and reenacted Section 820 of the Streets and Highways Code accepting the conditions laid down by the Federal Act.

Section 820 reads as follows:

"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 reenactment 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."  
(Emphasis added.)

There has never been any dispute in this matter on the need for relocation of the crossing, the point of crossing, or the protection to be installed. The sole dispute has concerned the allocation of the costs of (a) installation and (b) maintenance cost of the signal protection to be installed at this crossing. No evidence was ever offered or received and the issues were defined by stipulation. All issues involve matters of law.

The County appeared but did not file briefs or argue orally. The Railroad contended that the Commission was bound to allocate installation cost under Section 1202 of the Public Utilities Code. If that were done the maintenance cost must be allocated in the same percentage under Section 1202.2 of the same code.

The staff contended that it was not necessary to allocate installation cost. It recommended an equal division of the maintenance cost.

The State Department of Public Works contended that the Commission should apportion costs by the Federal 90-10 formula but should not apportion maintenance cost.

The Commission, in Decision No. 72750, adopted the staff theory that, in effect, the installation cost is apportioned by Federal Law. It refused to apportion installation cost and apportioned maintenance cost one-half to the County and one-half to the Railroad.

It should be noted that any maintenance cost allocated to the County of Lassen will automatically become a charge on the fund set up by Section 1231.1 of the State Public Utilities Code. This section sets up a fund from which the share of local governments in the cost of automatic railroad crossing protection maintenance is paid.

Southern Pacific and Lassen County have no agreement and, since they have not, Railroad claims that the Commission must apportion the installation cost. This would have the effect of permanently assessing 90 percent of the maintenance of every FAS railroad crossing protection device to the 1231.1 fund. It may be assumed that the attorneys of all railroads will advise their companies not to make contracts respecting FAS road crossings. Thus the Commission would be forced (under the Railroad theory) to allocate installation cost, and maintenance cost under Section 1202.2 of the Public Utilities Code would follow. The Commission held in Cities of Vernon and Huntington Park, Decision No. 71801 (unreported), that it is not bound to accept such a fait accompli. Vernon is distinguishable in its facts from this proceeding but the principle is the same.

In Vernon the Commission was confronted by a contract between a city and a railroad allocating 100 percent of the installation cost of crossing protection to the city. By operation of Section 1202.2 the maintenance cost would have followed the installation formula and the total maintenance cost would have become a charge on the Section 1231.1 fund.

What was accomplished in Vernon by means of a contract is accomplished in the instant proceeding by failure to make a contract. In Vernon the Commission refused to apportion installation costs because the effect of doing so would have been to put the entire burden of the maintenance cost of the crossing there involved upon the 1231.1 fund. We accordingly suggested a different contract and refused to apportion until the suggestion was accepted.

In this proceeding the same result is reached by the opposite means. If an agreement had been reached between the County and the Railroad there would be no occasion for the Commission to make an apportionment.

The Railroad contends that, since the Commission has exclusive power to ". . . determine and prescribe . . . the terms of installation, . . ." (Public Utilities Code §1202) that we must exercise our jurisdiction. This argument is open to two objections. First, there is considerable doubt that we have jurisdiction and second, assuming that we do have, it is not mandatory to exercise it.

The Commission certainly does not have "exclusive" jurisdiction where Federal funds are used because the Federal Statute itself wipes out the Commission's jurisdiction almost completely. It is obvious that the intent of the Federal legislation is to pay for everything from its own funds. The ten percent is nothing more than a nominal or token contribution whose purpose it is to avoid

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waste of Federal funds. Under Section 1202 of the Public Utilities Code we can and do apportion 100 percent to railroads in some cases, 100 percent to public bodies in others and anything in between.

The Code of Federal Regulations has provisions designed to implement the provisions of the Federal Code. One of these, 23 CFR 81.25(b) provides:

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

It will have been noted that Section 820 of the Streets and Highways Code accepts not only the provisions of the Federal Code but "the rules and regulations promulgated thereunder". It is the view of the Commission that Section 1202 is a "State law" of the type to which the Federal Regulation is intended to apply. It therefore follows that Section 820 of the Streets and Highways Code has made the language from Section 1202 of the Public Utilities Code quoted above inapplicable.

In conclusion nothing has been brought to our attention which would persuade the Commission to alter Decision No. 72750.

In view of the fact that there are no issues of fact in this proceeding and no evidence was ever received, the separately stated findings of fact required by Section 1705 of the Public Utilities Code are not necessary.

The Commission finds that a fair and reasonable division of the cost of maintaining automatic signal protection at the crossing here involved is 50 percent to the County of Lassen and 50 percent to Southern Pacific Company.

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

O R D E R

IT IS ORDERED that 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 rails. 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."

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

Dated at San Francisco, California, this 16<sup>th</sup> day of APRIL, 1968.

[Signature]  
President

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Commissioners