

ORIGINAL

Decision No. 76695

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the State of California
Department of Public Works for an order
authorizing the temporary alteration of
two crossings at grade and construction
of a crossing at separated grades whereby
State Route 04-SC1-280 will be carried
under tracks of the Southern Pacific
Company in the City of San Jose, herein
referred to as "Virginia Street Under-
pass".

Application No. 48797
(Filed September 19, 1966;
Amended January 18, 1967)

George D. Moe, William E. Sherwood and Melvin R.
Dykman, for State of California, Department
of Public Works, applicant.
Harold S. Lentz, for Southern Pacific Company;
Thomas V. Tarbet, for City of Los Angeles;
Ronald L. Schneider and Richard W. Andrews,
for County of Los Angeles; Ferdinand P. Palla,
by Donald C. Atkinson, for City of San Jose;
interested parties.
M. E. Getchel, for the Commission staff.

SUPPLEMENTAL OPINION

By Decision No. 72179, dated March 21, 1967, and issued ex parte in Application No. 48797, as amended, the State of California Department of Public Works (Department) was authorized to construct a crossing at separated grades of State Route 4-SC1-280 under the tracks of Southern Pacific Company, referred to as the "Virginia Street Underpass", in the City of San Jose, said crossing to be identified as Crossing No. E-47.5-B.^{1/}

^{1/} Applicant was also authorized to temporarily relocate two existing crossings at grade across tracks of Southern Pacific during construction of the underpass, one at Auzerals Avenue (Crossing No. E-47.45) and the other at West Virginia Street (Crossing No. E-47.6).

Decision No. 72179 further provided that construction expense should be borne in accordance with an agreement to be entered into between the parties and that, since the parties were not in agreement as to the apportionment of the cost of maintaining the Virginia Street underpass, such cost would be apportioned by further order of the Commission.

Evidence on the question of apportionment of maintenance costs was received at a series of 12 days of hearing held before Examiner Bishop at San Jose and San Francisco in March, May, June and November, 1968. Evidence on behalf of applicant was presented through six engineers^{2/} from its Division of Highways and an official of the Department of Public Works of the City of Los Angeles. Evidence was offered by Southern Pacific through its public projects engineer and by the County of Los Angeles through an official of its Road Department. A senior transportation engineer from the Commission's staff assisted in the development of the record. With the filing of reply briefs the matter was taken under submission on March 12, 1969.

Crossing No. E-47.5-B is located on Southern Pacific's main line about one-half mile south of the carrier's San Jose passenger station. The section of State Route 4-SC1-280 (also known as "State Route 280" and the "Junipero Serra Freeway") involved herein is the portion being constructed from a junction with State Route 17, on the west, to a junction with Route 101 (Bayshore Freeway), on the east, a total distance of approximately 5 miles. The underpass is located about midway between these two limits. It is estimated that this freeway section (also identified herein as the "freeway project") will

^{2/} One of the engineers, who was actively involved in the design of the section of highway on which the underpass is located, had retired in May, 1967.

be completed by December 31, 1971. When the several segments of State Route 280 are connected, a freeway, additional to the Bayshore Freeway, will be provided through from San Francisco to San Jose. At Bayshore Freeway in the latter city State Route 280 will connect with the State Route 680 freeway, which extends or will extend northerly to Fremont, San Ramon Valley and beyond.

With respect to the question at issue it is the position of Department that it should bear the costs of maintaining that portion of the railroad bridge structure over the Virginia Street Underpass which lies below the bridge seats and that Southern Pacific should bear the maintenance expense of that portion of the structure above the bridge seats. Southern Pacific contends that maintenance expense of the entire structure, excepting, of course, the roadbed and tracks, ^{3/} should be assumed by the Department.

The six engineer witnesses for applicant described the various steps involved, from preliminary planning to completion of construction, in the building of the segment of the State Route 280 freeway in question, including the underpass and overpass structures along the route. These witnesses described, in turn, the work of six departments or sections of the Division of Highways in the project, namely: planning, traffic planning, design, bridge design, bridge maintenance, and bridge department-agreements.

The underpass structure is a through girder steel bridge, having double-column reinforced bents, with bents and abutments supporting on piling. The main track, and a future additional main track, will be maintained at ground level on the structure. The

^{3/} The bridge seats are the top surfaces of the concrete abutments and bents (columns) which support the horizontal bridge members.

length of the structure is 352 feet and the width is 35-1/2 feet.^{4/} At the underpass the freeway will have a total of 12 lanes, including an on-ramp and an off-ramp from and to the Bird Avenue interchange with the freeway, located approximately 800 feet east of the underpass. In addition to the 12 lanes there will be the customary divider strips. It is estimated that by 1985 the volume of traffic on State Route 280 in the vicinity of the underpass will amount to some 115,000 vehicles per day. The relationship of this freeway to neighboring north-and-south arterials, present or proposed, and the anticipated heavy volume of vehicular traffic, the record shows, have required that provision be made for the above-mentioned number of traffic lanes.

The underpass structure lies between two nearby crossings at grade, those of Auzerais Avenue, to the north, and of West Virginia Street to the south. Neither of these crossings will be eliminated by reason of the construction of the freeway underpass. The average daily highway traffic over the Auzerais Avenue crossing is 9,500 vehicles. The corresponding figure for West Virginia Street crossing is 2,500 vehicles.

According to the record, rail traffic over the Auzerais and West Virginia grade crossings and over the underpass structure consists of 6 passenger trains, 9 freight trains and 6 switching movements per day.^{5/} Maximum train speeds are 50 miles per hour for passenger trains and 45 miles per hour for freight trains. Each of the two grade crossings is protected by two flashing light signals augmented with automatic crossing gates.

^{4/} By letter dated August 18, 1969 the Department advised the Commission that the railroad structure over the underpass had been completed.

^{5/} The Commission takes official notice of the fact that, subsequent to the commencement of hearings, two of the aforesaid passenger trains, Nos. 75 and 76 (the "Lark" trains) have ceased operation under authority of Decision No. 73850, dated March 12, 1968, in Application No. 49654.

Contractual arrangements between the parties provide that all construction costs of the underpass structure shall be borne entirely by applicant. It is further provided that upon completion of the structure the State shall maintain, at its expense, the 42-inch reinforced concrete storm drain.

The underpass will not be opened to highway traffic until completion of the adjacent portions of the State Route 280 freeway, estimated to be December 31, 1971. Meanwhile the railroad structure over the excavated highway right of way permits the contractor to haul excavation and construction materials from one side of the railroad to the other without having to cross the railroad at grade.

The grade to be observed in the different parts of the freeway project here in issue may be described as follows: moving easterly from the western limit of the project at State Route 17: State Route 280 will pass under State Route 17 and will be depressed below grade from that point for a distance of about two miles to Race Street, passing under Meridian Street and the Vasona Branch of Southern Pacific just westerly of said street. Easterly of Race Street the freeway will rise to grade and continue upward over Lincoln Avenue, the line of The Western Pacific Railroad and a spur of that line and cross Los Gatos Creek on a bridge. East of the creek the freeway will again be depressed, passing under the Southern Pacific mainline, as previously stated, and Bird Avenue. About 1,800 feet easterly of the latter the freeway will encounter State Route 87 freeway, at which there will be a complicated interchange structure. Just easterly of State Route 87 is the Guadalupe River. The State Route 280 freeway will rise easterly of Bird Avenue and pass over State Route 87 and the Guadalupe River. It will continue as an

elevated structure the remaining distance to its connection with State Route 101, the end of the project. Easterly of that point the freeway, continuing as State Route 280, will remain elevated above grade to Jackson Avenue, about a mile east of Route 101.

In the planning stages Southern Pacific requested that the grade separation take the form of an overpass. Applicant advised the carrier that an overpass would not be practicable. The reasons for this decision were stated as follows:

1. The City of San Jose and County of Santa Clara^{6/} insisted that Route 280 be depressed wherever possible, and the freeway agreement so provided.

2. The cost of an overpass at this location would be prohibitive, amounting to approximately \$4,500,000 more than the cost of the underpass.

3. An overpass at this location would not have been approved by the City of San Jose, the State Highway Engineer or the Federal Bureau of Public Roads.

4. The configurations of the Bird Avenue interchange and the interchange with State Route 87 make the construction of an overpass at this point impracticable, if not impossible.

Comprehensive evidence was offered by applicant to establish the validity of the aforesaid reasons. It is not deemed necessary to review herein the evidence thus presented.^{7/} With respect to the reason number "1" above, however, the record clearly shows that both

^{6/} A portion of the freeway route lies in unincorporated territory.

^{7/} The record shows also why it was deemed necessary for State Route 280 to pass over the Western Pacific tracks, as hereinbefore mentioned.

the City of San Jose and the County of Santa Clara insisted that wherever practicable the freeway should be depressed below grade level; that easterly of Josefa Street (which is a short distance east of Bird Avenue) it was found that the water table or other soil conditions prevented such type of construction in that area; and that generally between the western limit of the project at State Route 17 and the vicinity of Josefa Street it was feasible to depress the freeway. The record further shows that the matter of esthetics was an important factor in the insistence of the local political entities that the freeway be depressed, particularly in residential areas.

Witnesses for the department testified as to various alleged advantages which would accrue to the railroad because of the construction of the underpass, such as reduced highway traffic volume at nearby grade crossings, resulting in lower crossing maintenance costs for the railroad and reduced collision hazard; frequent and thorough inspection of the railroad bridge structure by state bridge inspectors; and minimal maintenance costs because of the use of Cor-Ten Steel in the bridge structure. To the extent that advantages may accrue in some of the respects alleged by applicant, these advantages would be enjoyed whether the separation was an underpass or overpass.^{8/}

^{8/} One of the alleged advantages accruing to the railroad by reason of the underpass was stated as freedom from liability under local crossing blocking ordinances (because there would be no crossing at grade). Counsel for Southern Pacific took strong exception to this allegation, stating that thereby a substantial and material issue had been raised, as to which the railroad expected a decision by the Commission. In its brief Southern Pacific argued that all municipal and county crossing blocking ordinances are void since by the terms of Section 1202 of the Public Utilities Code the exclusive power to prescribe the terms of operation and use of public grade crossings is given to the Commission. The status of local crossing blocking ordinances is now under consideration by the Commission in another matter, Case No. 8949. Therefore, the matter will not be further considered in Application No. 48797.

Southern Pacific presented evidence to show the disadvantages which will be experienced by the railroad by reason of the grade separation being an underpass, which would not result if an overpass had been adopted. These included, among others, restriction of use of off-track maintenance equipment on the bridge, and movement of off-track equipment from one side to the other; restriction of use of on-track equipment, such as tie inserters, on the bridge; increase in cost of tie replacement on the bridge to about five times normal cost; creation of subsidence problems where none previously existed; the requirement of regular inspections by railroad engineers. Most of the disadvantages enumerated by the railroad witness appear to be valid, although in some instances their importance is partially offset by disadvantages which existed on the same stretch of track before the underpass excavation was made. In a few instances it appeared that the occurrence of the disadvantages would be very infrequent.

The Department introduced exhibits designed to show that, with few exceptions, the long standing practice has been, in the case of underpasses, to apportion maintenance costs of the railroad structure to the public body up to the bridge seats and that part of the structure above the bridge seats to the railroad. This has generally been the practice both where voluntary agreement is reached between the parties and in those instances where it has been necessary for the Commission to apportion maintenance costs by formal order.

One exhibit, No. 38, purports to tabulate all existing grade separations in California where a state highway passes under a railroad. The information was taken from Department records, which in a very few instances failed to show how maintenance costs were divided. A total of 168 underpasses are listed, in construction dating back to

1906 and the most recent having a Commission decision date (authorizing the grade separation) in 1964. In three instances the maintenance costs were divided 100 percent to the State and in 16 instances the apportionment was 100 percent to the railroad. In all these instances the assignment of costs was made many years ago. Except for two or three special cases, all the rest of the separations listed in the exhibit for which the desired data were available show assignment of maintenance cost of the substructure to the State and of the superstructure to the railroad.^{9/}

In Exhibit 39 the Department has tabulated what purports to be all of the underpass grade separation structures involving city or county roads, where State assistance under the five million dollar gas tax fund had been secured.^{10/} The Commission's decisions authorizing the underpasses date from 1958 to September 12, 1967. No authorizations made subsequent to the latter date are included. Altogether 46 underpasses are tabulated. In one instance all maintenance expense was apportioned to the railroad and in four instances maintenance cost was assigned 100 percent to the public body, exclusive of the railroad tracks. In the case of one underpass no data were available on the question at issue. With respect to the rest of the underpasses listed, apportionment of maintenance costs was: substructure to the public body, superstructure to the railroad.

The four underpass structures as to which the maintenance expense was to be borne 100 percent by the city or county involved were authorized by Commission decisions issued on July 30, 1963 and

^{9/} "Substructure" refers to that portion of the railroad bridge structure below the bridge seats; "superstructure" means the portion above the bridge seats.

^{10/} The fund to which reference is made is that provided by Section 190 of the Streets and Highways Code.

on April 5 and September 6 and 13, 1966, respectively.^{11/} However, these were all ex parte decisions, in which the Commission made no apportionment of maintenance costs. Such apportionment was made by voluntary agreement of the public body and the railroad.^{12/}

The County of Los Angeles presented evidence concerning the apportionment of maintenance costs of railroad-highway underpass structures, through the testimony of an administrative civil engineer, whose duties involve, among others, the negotiation of agreements with railroads relative to such structures. He testified that historically, since the early 1930's, when a highway passes under a railroad the local agency has been responsible for maintaining the substructure and the railroad the superstructure. He cited certain instances of underpass agreements made by Los Angeles County with railroads on this basis in connection with underpasses which were constructed prior to the establishment of the above-mentioned \$5,000,000 gas tax fund. The witness also drew attention to the underpasses authorized by Decisions Nos. 70210 and 70211, dated January 11, 1966, in Case No. 8214, et al. These proceedings involved grade crossings on Southern Pacific's Palmdale-Colton cutoff line. They authorized, among others, the construction of underpasses at Avenue S, Avenue T and Pear Blossom Highway, all Los Angeles County roads. A proposed agreement had been prepared in which provision was made for division of maintenance costs on what the witness had, as hereinabove mentioned, referred to as the "historical" basis. That agreement, he said, had, as of the date of his testimony, been executed by Southern Pacific

^{11/} By Decisions Nos. 65801, 70541, 71244 and 71286 in Applications Nos. 44707, 48154, 48694 and 48591, respectively (all unreported).

^{12/} The 1963 decision involved Southern Pacific. In the three 1966 decisions the railroad was The Atchison, Topeka and Santa Fe Railway (Santa Fe).

and was then in the hands of the County. He stated that the basis for division of maintenance costs had been proposed by Southern Pacific.

As hereinbefore stated, the underpass agreement provided that the railroad bridge over the underpass should be of structural steel. This was to be of Cor-Ten steel, which is generally considered to be rust-resistant. It is the position of the carrier that this type of steel is rustproof and that it does not require paint as a preservative. Nevertheless, the agreement provided that the outwardly visible parts of the structure were, for esthetic reasons, to be painted. The City of San Jose insisted that this be done. Southern Pacific contends that this will result in an unnecessary increase in maintenance costs. The record indicates that the initial cost of painting would be about \$20,000, that it should not be necessary to repaint the structure for 20 years, and that no "spot" painting would be necessary in the intervening period.

In its brief the Department argued that it has been the historical and traditional obligation and duty of railroads to construct and maintain railroad crossings for the benefit of the public; that the Commission is not required to allocate maintenance costs to the railroad based solely on the special benefits accruing to it from the creation of the separation; that the cost of maintaining an underpass structure may be allocated all to the railroad, subject to the proper limitation that allocation of costs shall be fair and reasonable; that the proposed underpass was being constructed to meet local transportation needs and to further safety and convenience made necessary by the rapid growth of the surrounding communities; that due regard was given also to the needs and requirements of the railroad; and that, in grade separation situations where the railroad crosses

above the highway, the Commission has consistently allocated maintenance costs against the railroad from the bridge seats upward and such allocation is fair and reasonable. Applicant cited various court and Commission decisions, and evidence of record in support of its contentions.

The County of Los Angeles, appearing as an interested party, argued that the historical and present policy of the Commission relative to the responsibility of public agencies and railroads to maintain various parts of grade separation structures, implemented through agreements between the public bodies and the railroads, has placed the maintenance function on the party most concerned with that part of the structure; that the railroad is in fact the entity which has sole use and control of the structure above the bearing assemblies, and is, of course, most concerned with that portion of the structure. The County urges that the Commission decide in favor of applicant "in order that the present uniformity of application of maintenance responsibility be continued and that public agencies and railroad need not be subject to an ad-hoc, case-by-case evaluation and Commission determination of such responsibilities in cases involving grade-separated structures."

The City of Los Angeles, also appearing as an interested party, argued to the same general effect as did the County, in support of applicant's contentions.

Southern Pacific argued that there is no reasonable basis for assigning to the railroad a greater maintenance responsibility in this case simply because it involves the underpass of a railroad rather than an overpass structure. The railroad pointed out that it is standard procedure for the State to maintain all except the deck surface and curb of an underpass of a city street or county road;

that comparable treatment of a railroad underpass would require the railroad to maintain only from the waterproofing on up; and that maintenance of overpasses is uniformly borne by the builder of the separation whether or not it involves a railroad. The railroad further draws attention to the fact that the practice of requiring railroads to bear the maintenance responsibility from the bridge seats on up has not been uniform. Particularly, the fact is cited that since 1966 the Santa Fe has been involved in a total of four underpasses, in all of which instances it has not been required to bear any maintenance responsibility below the top of the structure's deck. ^{13/}

Southern Pacific further argued that no apportionment of maintenance costs to it could be justified on the ground that the railroad would receive certain benefits since the record indicates that such benefits, if any, would accrue whether the separation was an underpass or an overpass. Attention was also directed to testimony of the railroad's witness to the special problems and detriments which it will encounter by reason of the underpass.

In its reply brief Southern Pacific cited the case of Nashville, C. & St.L. Ry. v. Walters (29 US 405) (1935) in which the United States Supreme Court said, in part:

"Federal aid highways are designed so that motor vehicles may move thereon at a speed commonly much greater than that of railroad trains. The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. ... The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which

^{13/} Three of these underpasses were previously mentioned in connection with Exhibit 39, above. Reference to the fourth, the so-called Paramount Boulevard underpass of the Santa Fe (agreement signed by the railroad, State Department of Public Works, and County of Los Angeles as of December 18, 1956) was introduced by Southern Pacific (Exhibit 42).

now requires protection from dangers incident to motor transportation. ... Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed."

This case involved a Federal-aid highway grade crossing separation in Tennessee. The U. S. Supreme Court reversed the state court judgment, which had required the railroad to bear one-half of the cost of the grade crossing, and remanded the case to the state court because that court had refused to consider whether the special facts shown "were of such persuasiveness as to have required the state court to hold that the statute and order complained of are arbitrary and unreasonable."

Discussion, Findings and Conclusions

The record clearly shows that it has been generally the practice, for many years past, in connection with underpasses involving state highways, for maintenance costs to be assigned as contended herein by the Department. Out of the 165 instances listed in Exhibit 33 only three showed an apportionment of 100 percent to the State^{14/} and in the case of 16 underpasses maintenance was assigned 100 percent to the railroad. The record shows also that the same is true with respect to the 46 instances tabulated in Exhibit 39 relating to railroad underpasses of streets and roads of local political entities. That exhibit shows the underpasses which were constructed with state aid from the grade separation fund during the period from 1953 to September 1967. In one instance maintenance was assigned 100 percent to the railroad and in the case of four underpasses maintenance was assigned 100 percent to the public body.

^{14/} These three underpasses date back to 1929, 1937 and 1946, respectively.

Three of these latter underpasses, which are located in the cities of Colton, Anaheim and Richmond, respectively, date from 1966.

It is evident also that assignment of maintenance responsibilities in connection with the great majority of underpasses has been made by agreement of the parties, rather than by Commission order. Apportionment of maintenance costs of each of the group of four city and county underpasses mentioned above was the result of voluntary agreements. The survey of maintenance apportionments made over the years is, therefore, more a matter of what the practice has been rather than what has been the Commission's policy.

An important case cited by the Department in its brief is that of The Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission (346 US 346) decided November 9, 1953, in which the United States Supreme Court upheld two decisions of this Commission in which the latter apportioned underpass maintenance responsibilities to the railroad from the bridge seats up and to the public body from the bridge seats down.^{15/} In its opinion the Court said, in part:

"...in the cases at bar, the improvements were instituted by the State or its subdivisions to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities. In such circumstances, this Court has consistently held that in the exercise of the police power, the cost of such improvements may be allocated all to the railroads [Citations omitted]. There is the proper limitation that such allocation of costs must be fair and reasonable. [Citations omitted] This was the standard applied by the Commission. It was not an arbitrary exercise of power by the Commission to refuse to allocate costs on the basis of benefits alone. The railroad tracks

^{15/} The Commission proceedings involved two underpasses of the Santa Fe on Washington Boulevard in the City of Los Angeles (51 CPUC 771), and an underpass of the Southern Pacific on Los Feliz Boulevard in that city and in the City of Glendale (51 CPUC 788).

are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements."

Admittedly, the circumstances are somewhat different in the instant proceeding, where there was no street prior to the construction of the underpass and the problem is created because of the necessity for the State Route 230 freeway.^{16/} However, basically, the same principle applies here, since the presence of the railroad is a matter of permission from the State or its subdivisions. As pointed out by applicant in its brief, although Southern Pacific is privately owned, it is publicly used and as such is deemed to have subjected itself to the police powers of the State in consideration of its right to conduct its business. One of these powers is the right of the State and its subdivisions to cross the tracks of the railroad wherever and whenever the public convenience and necessity deem it necessary, even though such action may involve some expense to the railroad.

It is the position of Southern Pacific that the Department could have designed and built the Virginia Street crossing as an overpass, and that if it had done so Southern Pacific, on the basis of established practice, would not be required to share in the maintenance cost of the overpass structure. The railroad believes, therefore, that it should not be expected to participate in the cost of maintaining the underpass structure. The record, however, clearly shows, for the reasons hereinabove stated, that an overpass was impracticable at the crossing in issue and that it was indeed necessary,

^{16/} The record shows that alternate routes for the freeway were considered and that, in any event, it would have been necessary to pass over or under the main line of Southern Pacific.

as well as generally desirable, for the grade separation to take the form of an underpass.

In its brief, Southern Pacific states as reasons for the decision to build an underpass (1) insistence of the City of San Jose and (2) an overpass would have increased the cost of the state highway project by more than \$4,000,000. Later in the brief it is stated that the latter was the primary reason for building an underpass. It is abundantly clear from the record that the geometrics of the freeway in the neighborhood of the Virginia Street crossing made it imperative that an underpass be constructed and that, apart from the cost factor, an underpass would be built in any event.

A fundamental control which has been paramount throughout the planning, design and construction of the State Route 280 freeway has been the element of esthetics. This, as previously mentioned, dictated the placing of the freeway below grade level wherever practicable, particularly in residential sections.^{17/} The reason for this is apparent: it avoids the necessity of constructing an unsightly elevated structure, the presence of which would detract from the natural attractiveness of the area through which it passes, create shadows where sunshine would otherwise prevail, and tend to generate slum conditions beneath and in the vicinity of the structure. It is only necessary to recall the strong aversion historically of the public to the erection of elevated railroad structures, for these and other reasons, to realize that the same objections apply, if possibly with less force, to elevated freeway structures.^{18/} The

^{17/} The record shows that the section of San Jose in which the Virginia Street underpass is located is residential in character.

^{18/} It is appreciated, of course, that the designers of elevated highway structures endeavor to make them esthetically attractive, to the extent possible.

other alternative, that of building the freeway at grade level, has objectionable features also. Although often hidden from the view of nearby residents by landscaping, such a freeway requires more elaborate overpass structures for those cross streets which it is deemed necessary to continue as through streets after the freeway has been constructed. Obviously, by the very nature of freeways, they cannot cross either streets or railroads at grade. From the foregoing it is apparent that, apart from other valid considerations, esthetic considerations required, in the public interest, that the freeway be depressed below grade level in the vicinity of the Virginia Street crossing.

Southern Pacific argues that the underpass involved in this proceeding is far different from the "usual" railroad underpass. The railroad bases this distinction on the fact that the underpass structure will be approximately 352 feet in length over a freeway which will have 12 lanes of roadway and necessary divider strips passing underneath the railroad. It would be inappropriate, the railroad urges, to blindly apply a past practice, if there be such, in the case of this "unique separation which may well be the largest railroad underpass in the state". This argument raises the question as to where the Commission is to draw the line between a "usual" and an "unusual" or "unique" underpass structure. At what length does it cease to be an ordinary structure and must be treated as in a class by itself? 200 feet? 300 feet? 400 feet? The Commission has set no such standards in the past and the evidence in this record does not provide a basis for such a determination, even if it were deemed logical or desirable. The mere fact that the structure is 352 feet in length does not, in our opinion, place the underpass

in a unique category, such as to free Southern Pacific from any participation in maintenance costs.

Reference has been made hereinbefore to Nashville, C. & St.L. Ry. v. Walters, decided by the United States Supreme Court in 1935, on which the railroad also places reliance for its position. If the philosophy set forth in the portion of that decision hereinabove quoted were to be considered valid, then in every situation in which a freeway passes under or over a railroad, the railroad would automatically be excused from sharing in any portion of the maintenance costs of the grade separation structure. Such obviously has not been the general practice in this State in the intervening years.

In Decision No. 47344, dated June 24, 1952, in Application No. 29396 (51 CPUC 771), the so-called Santa Fe Washington Boulevard case, also hereinabove referred to, the Commission commented on the fact that the Santa Fe had relied rather strongly on the Nashville case. The Commission pointed out, however, that in the Nashville case the highway involved was not designed to meet local transportation needs, but was a state highway intended to be a link in the national transportation system, whereas the proposed widening of the Washington Boulevard was designed to meet local needs and the City's contribution thereto was to come entirely from local funds. While the present proceeding involves a state highway, the record shows clearly that its construction will expedite the movement of local San Jose metropolitan traffic, as well as through traffic. The Washington Boulevard case is one of those in which the United States Supreme Court upheld, in The Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission, above, the Commission's apportionment of maintenance costs, together with construction costs, on the

basis proposed herein by the Department. In any event, stronger weight should be given to that case, in which the court held that costs were not to be apportioned alone on the basis of benefits conferred and that, under some circumstances, the cost of improvements might be allocated all to the railroads.

Considering the record as a whole, we see no compelling reason for departing, in the present instance, from what has been the past practice in an overwhelming majority of railroad-highway underpasses in the past, whether by agreement of the parties, or by Commission order, of assigning the maintenance costs of the superstructure to the railroad.

We find that:

1. The California Department of Public Works is constructing a freeway through San Jose (State Route 4-SCL-280) which will be carried under the track of Southern Pacific Company via the "Virginia Street Underpass." The underpass was authorized by this Commission's Decision No. 72179.

2. In entering into agreement with applicant for construction of the freeway the City of San Jose and the County of Santa Clara required that wherever practicable the freeway be depressed below the surface, particularly in residential sections.

3. The freeway crossing (grade separation) at the Southern Pacific tracks is in a predominantly residential section.

4. On some portions of the route it is not practicable to depress the freeway because of ground water or other adverse soil conditions or because of local circumstances.

5. The soil conditions in the vicinity of the crossing here in issue are such that a depressed freeway section is practicable.

6. From the standpoint of the local political entities and the general public a major factor in requiring a depressed freeway is that of esthetics. This factor is becoming increasingly important.

7. The underpass structure (highway under railroad) has been completed.

8. Grading of the freeway in the vicinity of the underpass has been done but the freeway project is not expected to be completed until about December 31, 1971.

9. It would have been impracticable to construct the Virginia Street grade separation in the form of an overpass because of the configurations of the nearby Bird Avenue interchange and, easterly of that interchange, the State Route 87 freeway interchange.

10. An overpass at the Southern Pacific crossing would not have been approved by the City of San Jose, the State Highway Engineer or the Bureau of Public Roads.

11. An overpass would have cost approximately \$4,500,000 more than the cost of the underpass.

12. The underpass structure is a through-girder bridge, of Cor-Ten steel, having double-column bents, with bents and abutments supported on piling. It is approximately 352 feet in length.

13. Esthetic principles require that the outwardly visible portions of the steel structure be painted.

14. The State will bear the entire cost of construction of the underpass structure, including the initial painting.

15. The State will bear the cost of maintaining the 42-inch reinforced concrete storm drain.

16. At the underpass the freeway will have 12 traffic lanes, including on and off ramps for the Bird Street interchange, plus divider strips.

17. It is estimated that by 1985 the volume of traffic on the freeway in the vicinity of the underpass will reach 115,300 vehicles per day, approximately 60,000 of these to be oriented toward or from the central business district of San Jose.

18. The grade crossings nearest to the underpass are those of Auzerais Avenue, nearby to the north, and of West Virginia Street, immediately to the south. ✓

19. The average daily vehicular traffic over these crossings is 9,500 and 2,500 vehicles, respectively.

20. After the project portion of the freeway is opened, the volume of traffic on the West Virginia and Auzerais crossings, particularly the latter, may reasonably be expected to decline.

21. Railroad traffic on the Southern Pacific main line track and nearby spur track, at the underpass, consists of four passenger trains, 9 freight trains and six switching movements per day.

22. Maximum authorized train speeds over the grade separation are 50 miles per hour for passenger trains and 45 miles per hour for freight trains.

23. The generally prevailing practice, with a few exceptions, for many years past, in the case of railway-state highway underpasses, has been to apportion maintenance costs of the superstructure (from the bridge seats up) to the railroad, and of the substructure (from the bridge seats down) to the State.

24. The evidence indicates that the same method of apportioning maintenance costs as in Finding 23 has been generally observed in the case of underpasses of railroads by city streets and county roads.

25. Apportionment of underpass maintenance costs between railroads, on the one hand, and the State, counties and cities, on the other hand, has, in the great majority of instances, been determined by voluntary agreement between the railroad and the public body or bodies, rather than by order of this Commission.

26. The underpass in question has been constructed to meet local transportation needs, as well as other transportation needs, and to further safety and convenience made necessary by the rapid growth of the San Jose metropolitan area, as well as of the larger San Francisco-San Jose metropolitan area.

27. The presence of the railroad has created the necessity of constructing the subject grade separation in the interest of public safety and convenience.

28. The record fails to establish that the Virginia Street underpass, by reason of its length, or for any other reason, is a unique structure, and, as such, should be treated differently as to apportionment of maintenance costs than has generally been the practice for many years past.

29. The basis for allocation of the costs of maintaining the Virginia Street underpass structure proposed by applicant will be fair and reasonable.

We conclude that maintenance costs of the Virginia Street underpass should be apportioned as follows:

1. Southern Pacific Company to bear the cost of maintaining the roadbed, tracks and all superstructure above the abutments.
2. The Department to bear the cost of maintaining the structure below the bearing assemblies.

SUPPLEMENTAL ORDER

IT IS ORDERED that maintenance costs of the underpass, subject to this application, construction of which was authorized by Decision No. 72179, is apportioned as follows:

1. Southern Pacific Company shall bear the cost of maintaining the roadbed, tracks and all superstructure above the abutments, including the bearing assemblies.

2. Department of Public Works, State of California, shall bear the cost of maintaining the structure below the bearing assemblies.

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

Dated at San Francisco, California, this 20th day of JANUARY, 1972.

William J. Lyons
President

James L. Steiger
Commissioners

I dissent:

J. B. Harrison

Commissioner A. W. Gatov, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER J. P. VUKASIN, JR., DISSENTING

It is fundamentally unjust to require a railroad to bear the cost of maintenance of a bridge that is required only because of the construction of a new freeway which will pass under presently existing railroad tracks. If a railroad were to lay a new track which required a bridge over an existing road, we would expect the railroad to pay the cost of maintaining that bridge. Conversely, maintenance cost of a bridge required by a new road should be borne by the entity constructing the public thoroughfare.

The holdings in the two major cases most often cited in apportionment cases clearly require some reasonable basis for the assignment of costs. The instant decision, while giving recognition to these cases, fails to afford reliance to the principles enunciated. In Nashville, C. & St. L. Ry. v. Walters (1935) 294 US 405, the Supreme Court stated (pp. 428-430):

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it."

A later case, Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission (1953) 346 US 346, decided (p. 352):

"There is the proper limitation that such allocation of costs must be fair and reasonable. Nashville, C. & St. L. Co. v. Walters, 294 US 405, 415 and the cases there cited."

In the instant case, it was upon the demand of the affected governmental bodies that a crossing was constructed at the Virginia Street underpass in the City of San Jose. Indeed, the railroad requested that the grade separation be an overpass. If this had been approved, the Southern Pacific would not, under past Commission policy, be required to share in the maintenance cost of the structure. However, the City of San Jose and Santa Clara County insisted the freeway route be depressed;

further, the cost of an overpass was estimated at \$4,500,000 more than an underpass; an overpass would not be authorized by municipal, state or federal agencies; and esthetics were an important factor in depressing the freeway.

It is apparent that the benefits resulting from the installation of the underpass rather than the overpass accrued, not to the railroad, but to the other parties. There is evidence to show that the railroad will be disadvantaged by the underpass.

As in the Nashville case, supra, this apportionment involves a Federal-aid highway grade crossing. In that case the Supreme Court rejected a requirement that the railroad bear one-half the cost of the grade crossing. The facts are similar herein, yet the majority reaches a conclusion different than the United States Supreme Court.

The Atchison case, supra, is relied on by the Department of Public Works, the Southern Pacific Railroad, and the majority decision (finding 26, page 23) as substantiation. But as the majority decision confesses (p. 16):

"Admittedly, the circumstances are somewhat different in the instant proceeding, where there was no street prior to the construction of the underpass and the problem is created because of the necessity for the State Route 280 freeway."

Cf. that portion of the rationale in the Atchison case (quoted at p. 16 of the decision) to wit:

"The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements."

If, indeed, the railroad has not brought about the problem and there are no special benefits accruing to it, it is in a position to complain if it must shoulder undeserved costs.

This Commission should be guided by the basic tenets in the Nashville and Atchison cases set out above. The duty imposed for the construction of an underpass at the Virginia Street crossing and the benefits realized therefrom are within the confines of the governmental agencies represented. The record fails to establish an obligation on the part of the railroad to install an underpass. Nor can it be said any benefits will flow to the railroad from the operation of the underpass. But under this railroad bridge, the largest in the State, will run a 12-lane freeway, expediting automobile traffic traveling throughout the State.

For these reasons any assessment of maintenance cost to the railroad for the Virginia Street underpass, which the railroad does not desire and which, ipso, will be an additional burden to the railroad, is unreasonable.



J. P. Vukasin, Jr., Commissioner

San Francisco, California

January 20, 1970