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ORIGINAL

Decision No. 77613

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 relocation of an existing crossing and the construction of two crossings at separated grades whereby Interstate Route 5 will be carried over the tracks of The Western Pacific Railroad Company at Deuel and over the tracks of the Southern Pacific Company's West Side San Joaquin Valley Line approximately 5 miles southerly of Deuel, referred to as "Deuel Overhead" and "State Route 5/33 Separation and Overhead."	Application No. 50471

Melvin R. Dykman and David H. Frederickson, for State of California Department of Public Works, applicant.
Harold S. Lentz, for Southern Pacific Transportation Company,1/ respondent.
Elmer Sjostrom, Counsel, and Kenneth G. Soderlund, for the Commission staff.

SUPPLEMENTAL OPINION

By Decision No. 75812, an interim order issued ex parte on June 24, 1969 in this proceeding, State of California Department of Public Works (Department) was authorized, among other things, to relocate an existing crossing at grade of Lehman Road across the West Side San Joaquin Valley main line track of Southern Pacific Transportation Company (Southern Pacific) near Lyoth.2/ The former crossing was designated Crossing No. BA-88.2; the relocated crossing is designated Crossing No. BA-88.1.

1/ The former Southern Pacific Company, which was the party appearing at the hearing, was merged into Southern Pacific Transportation Company on November 26, 1969 and has ceased to exist.

2/ Decision No. 75812 also authorized the Department to eliminate a nearby existing private crossing at grade (Crossing No. BA-88.37); to construct a crossing at separated grades of Interstate Route 5 over said West Side San Joaquin Valley main line track near Lyoth (Crossing No. BA-88.2-A); and to construct a crossing at separated grades of Interstate Route 5 over the main line track of The Western Pacific Railroad Company (Western Pacific) near Tracy (Crossing No. 4-76.7-A).

Said Decision No. 75812 stated that Department and Southern Pacific had been unable to agree as to the maintenance cost apportionment of the grade crossing protection to be installed at the relocated Lehman Road crossing and that such apportionment should be determined by further order, after hearing, pursuant to the provisions of Section 1202.2 of the Public Utilities Code. The pertinent sentence in that section reads as follows:

> "In apportioning the cost of maintenance of automatic grade-crossing protection constructed or altered after October 1, 1965 under Section 1202, as between the railroad or street railroad corporations and the public agencies affected, the commission shall divide such maintenance cost in the same proportion as the cost of such automatic grade-crossing protection is divided."

Public hearing was held before Examiner Bishop at Tracy on November 13, 1969. With the filing of reply briefs the matter was taken under submission on December 29, 1969.

Evidence was presented by applicant through an assistant bridge engineer in charge of agreements and by Southern Pacific through its public projects engineer-signal. The evidence was brief, being only that deemed necessary by the parties to establish the basic facts. Briefs were filed by the Department, by Southern Pacific and by counsel for the Commission's staff.

The record shows that Interstate Highway 5 will pass, at separated grades, over the Southern Pacific track and over State Route 33 at the approximate location of the Lehman Road grade crossing; that, as a consequence, it will be necessary to relocate said latter crossing a short distance northerly of its present position; that the existing protection at said crossing consists of two Standard No. 1 crossbuck signs; and that the protection at the new crossing will consist of two Standard No. 8 flashing light signals augmented by automatic gate arms.

The record further shows that Federal funds are being used for the project in question; that agreement has been reached between the Department and Southern Pacific which provides that 10 percent of all construction expense, including that of constructing and installing the crossing protection at the new Lehman Road crossing, will be borne by Southern Pacific and 90 percent by the State.[3/] As hereinbefore stated, the parties are not in agreement as to how the maintenance costs of the crossing protection at the relocated Lehman Road crossing is to be apportioned.

It is the position of the Department that the Commission's decision in the so-called Lassen case (Decision No. 72750 dated July 11, 1967 in Application No. 48849, 67 CPUC 375; affirmed on rehearing by Decision No. 73985, dated April 16, 1968, 68 CPUC 198) must govern the disposition of the matter at issue. That proceeding likewise concerned relocation of a grade crossing, together with upgrading of crossing protection from crossbuck signs to flashing light signals augmented by automatic gate arms. It likewise involved the use of Federal funds, and in accordance with the Federal requirement, the agreement between the public body and the railroad provided that construction and installation costs of the improved protection should be borne 90 percent by the former and 10 percent by the latter. In Decision No. 72750 the Commission held:

> "If construction costs are not apportioned by the Commission, then Section 1202.2 of the Public Utilities Code is not applicable and the Commission may exercise its inherent power to apportion maintenance costs in any manner that it deems appropriate."

3/ Agreement as to apportionment of construction costs is in accordance with Policy and Procedure Memorandum 20-10, as amended, of the United States Department of Commerce, Bureau of Public Roads, which requires that where Federal funds are utilized cost of construction and installation shall be divided 90 percent to the public body and 10 percent to the railroad.

The Commission then made the following finding:

> "We find that the ensuing order should make no provision for the allocation of installation costs of the automatic protection (inasmuch as that is provided by Federal law and beyond our jurisdiction). We find further that maintenance cost of the protection involved should be apportioned 50 percent to the County of Lassen and 50 percent to the Southern Pacific Company." (Emphasis added.)

The basis for the foregoing finding is set forth in said Decision No. 72750 in the following language:

> "Although Section 1202 of the Public Utilities Code gives this Commission exclusive jurisdiction over grade crossings the Legislature through Section 820 of the Streets and Highways Code has agreed that work performed on Federal-aid projects shall be in accordance with Federal laws and regulations. Section 820 of the Streets and Highways Code provides:
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> > '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 re-enactment 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.'
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> "In addition, Paragraph (b) of § 1.25 of 23 Code of Federal Regulations provides:
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> > '(b) Applicability of State laws. State laws pursuant to which contributions are imposed upon railroads for the elimination of hazards at railway-highway crossings shall be held not to apply to Federal-aid projects.'

"It is clear, therefore, that Federal funds cannot be used for the crossing unless the apportionment of construction costs is in accordance with the Federal formula. To this extent it would appear that the Federal Government has preempted the field. However, application for Federal funds may be initiated either by an agreement between the parties or by an order of the State public utility commission. Paragraph (a) of § 1.25 of 23 Code of Federal Regulations reads as follows:

'§ 1.25 Railway-highway crossing projects.

'(a) Requirements for agreements or orders.

'Before a project for the elimination of hazards at a railway-highway crossing shall be approved for construction with the aid of Federal Funds, irrespective of the Federal share of the cost of such construction either (1) an agreement shall have been entered into between the State highway department and the railroad concerned, or (2) an order authorizing the project shall have been issued by the State public utility commission or other agency or official having comparable powers. Such agreement or order shall contain provisions specifying responsibility for and pertinent details concerning construction, maintenance, and railroad contribution relating to the project, which subject to 23 United States Code, section 130, and other applicable Federal law, conform to, and are not inconsistent with, the policies, classifications of projects and procedures prescribed by the Administrator. In extraordinary cases, where the Administrator finds that the circumstances are such that requiring such agreement or order would not be in the best interest of the public, projects may be approved for construction with the aid of Federal funds without requiring such agreement or order prior to such approval, provided provisions satisfactory to the Administrator may have been made with respect to constructions relating to the project.'"

After oral argument on rehearing before the Commission en banc the findings and conclusions of Decision No. 72750 were affirmed in Decision No. 73985, above. In it the Commission amplified certain points and enlarged upon the reasoning for its apportionment of maintenance costs. It said:

"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 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 § 1.25(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."

Following the issuance of Decision No. 73985, Southern Pacific filed a petition with the California Supreme Court for a writ of review (S.F. No. 22603). This was denied, as was also a petition for rehearing which the railroad subsequently filed with the Court.

In the light of the above recitals relative to the Lassen case, the Department argues that Section 1202.2 is not applicable to the instant proceeding and that the Commission is free to apportion the maintenance costs of the crossing protection at the relocated

Lehman Road crossing on whatever basis it concludes to be reasonable and proper. The Department urges the Commission to make such apportionment 50 percent to Southern Pacific and 50 percent to the Department, as was done in the Lassen matter. This basis, the Department points out, has been observed for several years past in apportioning maintenance costs of improved crossing protection.

The interim order (Decision No. 75812) in this proceeding states that construction and abolishment expense of crossings and installation expense of automatic signals shall be borne in accordance with agreement to be entered into between the parties relative thereto. The order further provides that, should the parties fail to agree, the Commission will apportion the cost of construction, abolishment and installation by further order. It is the position of the Department that such statement does not constitute an apportionment of costs by the Commission, and that this fact, together with others hereinbefore recited place this proceeding, insofar as it relates to the Lehman Road crossing, on all fours with the Lassen case.

As mentioned earlier in this opinion, the interim order (Decision No. 75812) provides that apportionment of maintenance costs of the improved crossing protection shall be determined by further order, after hearing, pursuant to the provisions of Section 1202.2 of the Public Utilities Code. It is the position of the Department that the Commission has not, by such language, actually ordered apportionment of maintenance costs. The Department further contends that the Commission was in error stating that said apportionment would be made pursuant to Section 1202.2, since the Commission has held (in the Lassen case) that Section 1202.2 is inapplicable in those instances where Federal funds are used in construction of automatic grade crossing protection.

It is the contention of Southern Pacific that the circumstances presented in the Lassen case are not the same as those in the instant proceeding and that, therefore, the conclusions to be reached by the Commission in the former are not governing in the proper disposition of the latter. The railroad points out that the question in the Lassen case was whether the Commission must include in its final order a provision covering the apportionment of installation costs for automatic protection or whether it might remain silent as to such costs and provide only for apportionment of maintenance costs. In the instant proceeding, the railroad contends, the Commission has, in effect, already ordered apportionment of construction costs in ordering that apportionment of such costs shall be that agreed upon by the parties. The record having shown that agreement between the parties having provided that cost of constructing the automatic grade crossing protective devices shall be divided 90 percent to the applicant and 10 percent to Southern Pacific, the Commission has in effect ordered such apportionment. And, since the interim order provides that apportionment of maintenance costs shall be determined pursuant to the provisions of Section 1202.2 of the Public Utilities Code, it follows, says the railroad, that the maintenance costs likewise must be apportioned 90 percent to applicant, and 10 percent to it.

Southern Pacific further argues that the precedent to be followed in the present proceeding is found in Decision No. 76076, dated August 26, 1969 in Application No. 50790, the so-called "Stockton" case. That decision is an interim order, authorizing the closing of crossings, the reconstruction of other crossings and the construction of new crossings, over four different railroads, including Southern Pacific, in the City of Stockton.

Decision No. 76076, asserts Southern Pacific, is applicable to the present procedure in all material respects. In both proceedings federal funds are involved, in both the Commission has ordered that construction costs shall be divided in accordance with agreements between the parties and in both the parties have entered into agreements apportioning cost of constructing grade crossing protective devices 90 percent to the department and 10 percent to the railroad.

The only way in which the Stockton case differs from the situation before us, says Southern Pacific, is that in the former the Commission has, in its interim decision, ordered that maintenance costs shall be apportioned in accordance with Section 1202.2 of the Public Utilities Code (without reference to a further hearing, as in Decision No. 75812 in the present matter). Southern Pacific seeks the issuance of a like order here.[4/]

Finally, Southern Pacific contends that the decisions in the Lassen case are clearly erroneous and should be abrogated. The arguments advanced by the railroad in support of this position, it appears, are substantially the same as those which it employed in its petitions for rehearing before this Commission and in its petitions addressed to the State Supreme Court relative to those decisions.

4/ We take official notice of the following facts: On December 17, 1969 the Department filed a petition in Application No. 50790 (the Stockton case) seeking modification of Decision No. 76076 by deleting therefrom the provision referring to Section 1202.2 for apportionment of maintenance costs and requesting that such costs be apportioned by further order. No action has been taken as yet on that petition. Two supplemental orders in Application No. 50790 were issued on December 2, 1969 and March 10, 1970, respectively. They simply authorize operation of trains over the affected tracks under temporary conditions. No final order has, as yet, been issued in the proceeding in question.

In its brief the Commission's staff states that the only issue in the instant proceeding is whether the Commission is bound under Section 1202.2 of the Public Utilities Code to apportion maintenance costs of the relocated Lehman Road crossing protection in the same proportions as the construction costs of said protection. The staff cites the Lassen decisions as being the proper precedent and follows the same general line of argument as employed by the Department in its briefs.

The staff concludes that inasmuch as the construction of the involved automatic protection cannot be apportioned by the Commission, since such apportionment has been preempted by federal law, Section 1202.2 of the Public Utilities Code is not applicable and the Commission should apportion maintenance costs between the parties on a 50-50 basis as a matter of Commission policy.

Discussion, Findings and Conclusions

The first point to be settled is whether the Commission in Decision No. 75812, the interim order in the instant proceeding, actually apportioned the costs of installation of the crossing protection at the relocated Lehman Road crossing. It is clear to us that the words "....installation expense of automatic signals shall be borne in accordance with agreement to be entered into between the parties relative thereto, ..." manifestly do not constitute apportionment by the Commission, and cannot reasonably be construed to be such, merely because the Commission's order contains the words in question. (Emphasis added.) This conclusion is reinforced, moreover by the sentence in the order which immediately follows that in which the above-quoted words are found. Said sentence reads in part as follows: "Should the parties fail to agree, the Commission will apportion the cost of ....installation by further order." (Emphasis added.) As a matter of fact, the record clearly shows

that in a crossing project where federal funds are involved apportionment of installation expense on the 90 percent-10 percent basis is automatic under the federal law, else the federal funds will not be forthcoming.

In the light of the foregoing, the conclusion is reached that the Commission has not apportioned the installation costs of the crossing protection at the relocated Lehman Road Crossing. Thus, in this respect, as well as in others, the present proceeding parallels the Lassen case, in which the Commission refrained from apportioning costs of installation.

This brings us to the question of the validity of the Lassen decisions as a precedent in the matter now presented for decision. As hereinbefore stated, in Decision No. 73985 in the Lassen case the Commission on rehearing affirmed and upheld Decision No. 72750, the original decision directed to the question of apportionment of costs, in that proceeding. Petition of Southern Pacific for writ of review was denied by the California Supreme Court and petition for rehearing was denied. In the light of that history it is clear that we have a well-founded precedent in the Lassen decisions for the conclusion properly to be reached with respect to the question here at issue.

In the Lassen decisions the Commission concluded that where apportionment of construction and installation of improved crossing protection are accomplished with the aid of federal funds and the Commission consequently does not apportion said costs, then Section 1202.2 is not applicable and, under the circumstances, the Commission may "exercise its inherent power to apportion maintenance costs in any manner that it deems appropriate." However, the Commission has already stated in the interim order in the present

proceeding that, after hearing, apportionment of maintenance costs shall be determined by further order, pursuant to the provisions of Section 1202.2 of the Code. It appears that the reference to Section 1202.2 has been "stock" language in orders relating to apportionment of grade crossing protection costs since the enactment, in 1965, of Section 1202.2. In the light of the Lassen decisions it appears that, in this proceeding at least, in which it has been established that federal funds are involved, such stock language is improper, and that the portion of Decision No. 75812 in question should be amended by eliminating reference to Section 1202.2.

Under the circumstances, the basis of apportionment of improved protection maintenance costs utilized in the Lassen case and generally observed by the Commission for several years past in comparable situations appears to be fair and reasonable for the relocated Lehman Road crossing, that is, 50 percent to the railroad and 50 percent to the Department.

We find that:

1. The Commission did not, in Decision No. 75812, in this proceeding, apportion installation expense of the crossing protection at the relocated Lehman Road grade crossing.

2. The pertinent circumstances involved in the issue before us are not distinguishable from those which prevailed in the so-called "Lassen" case (Application No. 48849).

We conclude that:

1. The conclusions reached by the Commission in Decisions Nos. 72750 and 73985 in said Lassen case are applicable to the issue before us in the present proceeding.

2. The provisions or Section 1202.2 of the Public Utilities Code are not applicable in apportionment of crossing protection maintenance costs at the relocated Lehman Road Crossing.

3. Decision No. 75812 should be amended by deletion of the reference to Section 1202.2 in the seventh paragraph thereof.

We further find that a fair and reasonable division of the cost of maintaining automatic signal protection at the relocated Lehman Road crossing is 50 percent to the State of California Department of Public Works and 50 percent to Southern Pacific; we further conclude that the order which follows should so provide.

SUPPLEMENTAL ORDER

IT IS ORDERED that:

1. The Interim Order (Decision No. 75812) in this proceeding is amended by deleting the words, "pursuant to the provisions of Section 1202.2 of the Public Utilities Code" from the sentence in which they appear in the seventh paragraph of said order.

2. Maintenance costs of the automatic protection at the relocated Lehman Road crossing (Crossing No. BA-88.1) shall be borne 50 percent by the State of California Department of Public Works and 50 percent by Southern Pacific Transportation Company.

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

Dated at San Francisco, California, this 18th day of AUGUST, 1970.

Chairman

Commissioners