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Decision No. 81717

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the blocking of public grade crossings by railroads.	Case No. 8949 (Filed August 5, 1969)

(Appearances are listed in Appendix C of Proposed Report)

INTERIM OPINION

This is an investigation on the Commission's own motion into the blocking of public grade crossings for the purpose of determining:

1. Whether Commission Resolution No. S-1278, which now prescribes rules to be adopted by railroads regarding occupancy of public grade crossings, should be revised or revoked; and

2. Whether a general order should be promulgated regulating the occupancy of grade crossings by trains.

Public hearings were held, briefs were filed, and on November 9, 1970 Examiner Thompson issued his Proposed Report. Exceptions to the Proposed Report and replies thereto were filed. The Examiner proposes the revocation of Resolution No. S-1278 and the adoption of a General Order, the stated purposes of which are:

> To prohibit any unnecessary blocking of public grade crossings by any railroad corporation, to provide for the clearing of any blocked public grade crossing with minimum delay to the traveling public consistent with the requirements of safety and subject to federal and state regulations governing the operations by railroad corporations, to promote the cooperation and joint action by railroad corporations and local agencies in connection with problems resulting from the blocking of public grade crossings, and to provide means whereby any railroad corporation or local agency may obtain relief from said regulations or have additional regulations imposed in connection with operations over a public grade crossing where local conditions so require.

In its exceptions the Commission staff asserts that the Examiner's proposed regulations are not workable and recommends adoption of the regulations in Resolution No. S-1278 with the revisions it suggested at the hearing (Appendix A to the Proposed Report). The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) suggests regulations in the format of Resolution No. S-1278 but with provisions somewhat different from those suggested by the staff. Southern Pacific Transportation Company (S.P.) also asserts that the Examiner's proposal is unworkable and suggests modifications of the staff's proposal. The city of Fremont objects to the Examiner's recommendation that enforcement of the regulations be subject to approval by the Commission and contends that effective regulation of blockings necessitates enforcement by local agencies without prior intervention on the part of the Commission. The city of Los Angeles recommends the adoption of the Examiner's proposal, asserting, "The Hearing Examiner has proposed a workable practical solution to a difficult problem." The League of California Cities, by letter, stated that the Examiner's recommendation is an acceptable compromise and that it assumes that if a party does not file exceptions that that party is deemed to have approved the proposed report. It did not file exceptions or replies to exceptions.

The scope of this proceeding is limited to the blocking of public grade crossings by railroads as a result of trains, cars, or locomotives being stopped in the crossing, or stopped within the circuits operating automatic gates protecting the crossing, or as a result of switching operations over the crossing. In its exceptions S.P. contends that the State is without jurisdiction to regulate blocking resulting from moving trains. We do not reach that issue because the matter of blocking by trains moving over the crossing is not within the scope of this proceeding.

The parties do not seriously dispute that regulations are required to control blocking; the contested issues concern which entity should do the regulating and enforcing; and if the Commission exercises its jurisdiction what should be the form and content of its regulations.

The Examiner's recommended findings and conclusions concerning the operational problems of the railroads and the traffic problems encountered by cities as a result of blockings are fully supported by the evidence of record. The deficiencies listed by the Examiner of the regulations, both in form and in substance, in Resolution No. S-1278 and his conclusion that the regulations should be revoked concurrently with the establishment of new regulations in a General Order is also fully supported by the evidence. The same may not be said regarding his conclusions on the regulations that should be established, nor do we entirely agree with his conclusions regarding enforcement of regulations governing the occupancy of public grade crossings by railroads. The principal reason for the lack of support for his proposed regulations is that his proposals, particularly those involving procedure, were not before the parties at the hearings. The staff presented evidence to support only its position that the regulations in Resolution No. S-1278 are suitable and proper; the presentations by the cities were directed towards their positions that the local ordinances regulating blocking are necessary for them to be able to cope with the traffic problems; and the railroads concerned themselves mainly with the presentation of evidence of their operational problems. The evidence presented by the parties was not directed specifically to the regulations proposed by the Examiner. His recommendation cannot be said to be a modification of a proposal made by any party. The parties have not had opportunity to make representations regarding the regulations the Examiner recommends other than in their exceptions to his proposed report. Staff and the railroads in their exceptions question the workability of the

regulations. S.P. specifically requested opportunity to present evidence showing that at least two of the provisions of the proposed General Order are unrealistic and impractical.

The status of this proceeding at this juncture is that it has been shown conclusively that the proposals for regulation advocated by the staff, by the railroads, and by the other participants at the hearing are not suitable for governing the occupancy of public grade crossings by railroads; and while some regulations proposed by the Examiner have some support they have not been subjected to test at public hearing. We are satisfied, however, that the format and the stated purposes of the General Order proposed by the Examiner point the way towards reasonable and suitable regulations. It will be our purpose here to make preliminary observations on the evidence received thus far regarding issues in this proceeding, to set aside submission of this proceeding to receive further evidence concerning the regulations that should be promulgated, and to direct the Commission staff to consult with the railroads and other participants, and to present at such further hearings a proposed "General Order Governing the Occupancy of Public Grade Crossings by Railroads and Rules Relating Thereto" which will effect the purposes stated in the Examiner's Proposed Report. We anticipate that the railroads and other participants will cooperate with the staff in the development of reasonable regulations consistent with our conclusions.

We will not undertake to rule on each exception but will consider those relating to the substance of the Examiner's recommendations in our discussion. There were a number of exceptions regarding language and word definitions in the proposed regulations; those should be considered by the staff and the parties in the preparation of a suggested General Order which will be the subject of further hearings.

The portion of the Proposed Report from the beginning through the section entitled "Regulations Concerning Blocking" is factually correct; however, lack of emphasis therein can lead to a misunderstanding of the issues and of the problems involved in the regulation of the occupancy of grade crossings by railroads. The Examiner states, "No one disputed the fact that blockings of crossings do occur and can cause chaotic traffic conditions. Communities can be, and have been, virtually isolated as a result of blockings at crossings." This and other statements in the Proposed Report, while factually accurate, would lead one to believe that the principal issue herein is tantamount to resolving conflicting interests of the railroads and the cities.[1/] The substantial portion of the commerce of California moves by railroad and by motor vehicles and such movements affect the public interest statewide. There is a statewide public interest in the use and occupancy of crossings. With respect to the use of a grade crossing, the position taken by municipalities to keep the crossing clear for the safe and expeditious movement of motor vehicle traffic ordinarily coincides with the interest of the public dependent upon motor transportation, and the position taken by the railroads to make such use of the crossing to conduct railway operations safely and expeditiously ordinarily will coincide with the interest of the public dependent upon rail transportation. There is no question that the well-being of the people of this State is dependent upon both rail and motor vehicle transportation as well as other forms. The use of a crossing which will provide expeditious and safe movement of

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1/ In the exceptions of Santa Fe: "The Examiner's Proposed Report attempts to resolve the interests of the cities and railroads--a most difficult task. While the report clearly recognizes these interests and sets forth a possible solution, in fact, the proposed General Order therein is believed to create the potential for conflicts and more problems than presently exist between the cities and the railroads."

both rail and motor vehicle traffic is in the best interest of the people of this State and such use and interest should supersede any individual interests inconsistent with the statewide public interest.

From a reading of the Proposed Report one might draw an inference that if a train stop is necessary by reason of casualty, signals, train meets, or federal or state regulations, and as a result a public crossing is blocked, that the blocking is a necessary result of the stop. That is not the case. As was adverted to in the report concerning the charging of air brake lines, within limits, the railroad may have a choice of where to stop when such stop is necessary. As modified and amplified by the foregoing, the findings and conclusions set forth in this portion of the report are supported by the evidence.

CAN AND SHOULD REGULATIONS REGARDING THE BLOCKING OF GRADE CROSSINGS BE MADE BY LOCAL AGENCIES?

The Examiner concluded that it is not necessary to reach the question as to whether the Commission has exclusive jurisdiction over the regulation of the use of public grade crossings because the evidence demonstrates that the Commission should exercise its jurisdiction by prescribing regulations over the subject matter. That conclusion is based upon findings that the regulation of blocking affects the safety of operations of railroads which is a matter of statewide concern which the Commission has a duty to supervise, and that in the absence of regulation by the Commission there might be gaps in regulation. (Cf. People v Germick (Appelate Department of the Los Angeles Superior Court, Case No. CR A 8075, October 7, 1968) and the Hewitt Elections Act of 1911.) No party took exception to these findings and conclusion and they are supported by the record.

There is a paragraph under the captioned heading in the Proposed Report which could be interpreted to be inconsistent with California law. The Examiner stated:

> "The evaluation of conditions to determine when and how a crossing can be cleared safely calls for expertise and is not merely a judgment that can be made by a man

> of ordinary prudence. The evaluation of the actions actually taken by railroad operating personnel in instances of blocking calls for the same expertise. It is not to be expected that local authorities possess such expertise. The Commission has the power and the responsibility to regulate the safety of railroad operations, and it has the ability to determine whether an action claimed to have been done by reason of safety was justified or whether such claim is merely a facade for an irresponsible action."

The above paragraph could be construed to mean that the railroads have a responsibility to exercise a higher than ordinary degree of care with respect to their operations over public crossings, and that the evaluation of the action taken by the railroads with respect to operations on or over a public crossing is not one which can or should be made by a court or a jury. Such is not the law in California. In Peri v L.A. Junction Ry. (1943) 22 C 2d 111, Justice Carter in speaking for the court held:

> "Generally speaking the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing. The standard of care is that of the man of ordinary prudence under the circumstances (cit). The question of negligence of the railroad operator is ordinarily one of fact in crossing cases as it is in other negligence cases."

As was stated in the Proposed Report, the regulation of blocking affects the safety of operations by railroads which is a matter of statewide concern. Regulations have been promulgated by the Federal Government and by the Commission regarding the safety of such operations. The rules established by the railroads concerning train operations are subject to supervision by the Commission. It has been established in this record that compliance by the railroads with the ordinances enacted by cities can result in conflicts with those regulations and rules.

As modified and amplified by the foregoing, the findings and conclusions proposed by the Examiner are supported by the evidence.

SHOULD RESOLUTION NO. S-1278 BE REVISED OR REVOKED?

The Examiner recommends revocation of the resolution. The staff takes exception to that conclusion and recommends the adoption of the regulations in the resolution with the revisions shown in Appendix A of the Proposed Report. S.P. in its reply asserts that the staff's proposal is unworkable because of the time limits set forth therein. S.P. and Santa Fe recommend the format of regulation in Resolution No. S-1278 which requires the railroads to file acceptable rules regarding occupancy of grade crossings. The rules they suggest conform more to the guidelines suggested by the Examiner in this portion of the Proposed Report than to the rules suggested by the staff. One of the suggested rules, however, would permit operating personnel to engage in switching so as to occupy a crossing for 10 minutes.

The staff's proposal is unworkable because of the time limits. S.P.'s and Santa Fe's suggestion that the proposal be revised to make the rules give effect to railroad operating problems does not meet the objections stated in the Proposed Report. The format of regulation in Resolution No. S-1278 is that the railroads file with the Commission acceptable operating rules to be followed by railroad employees. First, it was shown on this record, and found by the Examiner, that such rules are considered by railroad officials, railroad operating employees, and the Commission staff to be guidelines rather than rules that must be obeyed under any circumstances. Second, the ordering portion of the resolution provides only that the railroads must file rules but does not require the railroads to comply with the rules. The requirement that the railroads comply with their rules is provided only in the order instituting this investigation. The resolution states that the clearing of an individual crossing may not be necessary or required "where nearby alternate open routes are available in a series of public crossings", and "in unforeseen emergencies". Even if the order were to require adherence to the

rules by the railroads, those provisos are so broad and undefined as to make it exceedingly difficult, if not practically impossible, to determine whether a railroad failed to comply with the rules. Third, although the format of Resolution No. S-1278 gives consideration to the operating problems of the railroads it does not give any consideration to the problems confronting the cities and other public agencies that result from necessary train stops, as well as unnecessary stops, at grade crossings. We point out two examples of many in this regard. The ordering paragraph of the resolution provides that where there is an agreement between a railroad and a public agency permitting certain crossings to be blocked longer than specified in the rules, such agreement shall prevail (emphasis added). There are, or have been prior to the adoption of Resolution No. S-1278, understandings and agreements between railroad officials and city officials calling for operations by the railroad which would keep certain crossings clear at all times and certain other crossings clear during particular times of day. Such agreements would have no force or effect under the resolution. Santa Fe's proposal regarding switching is:

> "Switching over public grade crossings should be avoided whenever possible. If not possible, such crossings must be cleared frequently to allow vehicles to pass and must not be occupied continuously for longer than 10 minutes unless (1) it can be seen that no vehicles are waiting at or closely approaching the crossing, or (2) the safety of persons or property will be endangered by unblocking the crossing."

The only mandatory language of Santa Fe's proposal is that the crossing shall not be occupied continuously for longer than 10 minutes unless there are no vehicles being blocked or unless it would be unsafe to clear the crossing. This record shows that there are numerous crossings when at peak traffic hours a blocking of a crossing for a period of 10 minutes would result in chaotic traffic conditions and would not be warranted by circumstances attendant to switching of cars by a railroad except under

very extraordinary conditions. Such circumstances have largely been avoided as a result of discussions among the railroad officials, city officials, and members of the Commission staff. The results of such discussions have been agreements upon the part of the railroads to conduct operations so that the crossing is not blocked by switching during the peak traffic hours. The format of the resolution, however, does not recognize such agreements, nor does it require the railroad to comply with the terms of the agreements.

The aforesaid three shortcomings of the approach to the problem taken by Resolution No. S-1278 are stated in the Proposed Report and there were no exceptions to the Examiner's findings in that regard. There is a fourth aspect to the format of the resolution which was not discussed by the Examiner which we consider to be an important reason why such format is unsuitable, that is, the format would be cumbersome and burdensome upon the railroads, the Commission, and the public agencies. As this record shows, and as pointed out by S.P. in its exceptions, at certain times and places efficient railroad operations call for rail cars to be stopped in crossings for long periods of time and for switchers to occupy a crossing for relatively long periods of time. In many instances the railroads have tacit understandings, if not verbal agreements with city officials, condoning such occupancy of crossings provided they occur at particular times and provided that certain other crossings are kept clear. Under the format of Resolution No. S-1278 the rules filed by the railroads would have to specify the operations which are exceptions to the general rules (with 30 days' notice to the Commission prior to modification of the rules), or an agreement entered into between the railroad and the public agency would have to be approved by the Commission before "such agreement shall prevail." Furthermore, if the regulations and rules are to give effect to solutions to the problems of the public agencies, the modifications of the rules to meet those special circumstances, and the agreements between the railroads and

the public agencies regarding the special circumstances will be numerous, with the result of overburdening the railroads and the Commission with paperwork.

We conclude that the regulations in Resolution No. S-1278 are unsuitable and should be revoked concurrently with the establishment of suitable regulations.

WHAT REGULATIONS SHOULD BE ESTABLISHED?

The Examiner characterized blockings as being either necessary or unnecessary. It is clear that the "necessary" blockings are those which cannot be avoided because of casualty or the requirements of safety. We do not regard blockings resulting merely because of railroad operating convenience as necessary. The blocking of crossings disrupts the flow of commerce on the public highways of this State and when such blocking is unnecessary it ordinarily adversely affects the public interest. We say ordinarily because this record shows that there are some exceptional circumstances when the convenience of the public is better served by having a crossing blocked for a period of time. Some of such exceptional circumstances mentioned in the Proposed Report include the blocking of Fourth Street in San Francisco by commute trains during certain times of day, the blocking of certain crossings by S.P. commute trains so as to protect debarking passengers, and the blocking of certain crossings near packing sheds in agricultural communities during times of harvest. All of such exceptional circumstances have the approval of the local governmental authorities. The record shows additional instances when local authorities have requested or approved what might be considered an unnecessary blocking of a particular crossing in order to avoid lengthy necessary blockings at adjacent crossings.

With respect to the problem of unnecessary blockings the Examiner proposes:

> Unless otherwise directed or authorized by the Commission, by agreement (with a local agency), or by a traffic officer at the scene, no railroad corporation shall unnecessarily block, or cause to be blocked, any public grade crossing.

S.P. points out that the regulation should not apply to moving trains. Its point is well taken in that this proceeding does not contemplate the establishment of regulations for the occupancy of grade crossings by moving trains except in the operation of setting out or picking up cars or when engaged in switching operations. This may be remedied by including a provision in the General Order stating that the order does not apply to moving trains except as indicated above. S.P. also asserts that the regulation would prohibit a train occupying a crossing when there are no motor vehicles or pedestrians desiring to use the crossing. It contends that the regulation would be invalid because no public right is involved if no one wants to use the crossing at the time and place in question. It is true that there would be no disruption of the flow of commerce on the public highways, nor would the ability of any individual to utilize the crossing be impaired under these circumstances. S.P. suggests changing the word "unnecessarily" to "unreasonably", or to provide in the General Order, "These regulations shall be effective only when the blocking by a train results in a hindrance or inconvenience to anyone in lawful use of the particular public grade crossing." With respect to the substitution of the word "unreasonably" for "unnecessarily" the former could be construed that a blocking may not be unreasonable if it resulted in a more efficient operation from the standpoint of the railroad. A better manner might be to incorporate within the suggested rule a proviso indicating that for a crossing to be unnecessarily blocked there must be some motor vehicle or pedestrian desiring to utilize the crossing at that time.

We come now to the crossings that are necessarily blocked by stopped trains or cars. Such blockings ordinarily result from casualty or for reasons of safety. For the same reasons why it is not in the public interest to have crossings blocked unnecessarily, public interest and welfare require that a crossing that is necessarily blocked be cleared with the least possible delay. The Proposed Report and the evidence of record show that what a railroad can or cannot do to clear a crossing depends upon a number of circumstances. The time required to clear a crossing can vary from a few minutes in the case of a simple cutting operation, to several hours in the cases of a complete loss of motor power or a derailment. That is one of the reasons why a requirement that a crossing be cleared within a specified period of time is unrealistic. The law does not require the impossible. With respect to this problem the Examiner proposes the following regulation:

> Unless otherwise authorized by the Commission, by agreement (with the local agency), or by a traffic officer at the scene, whenever a train of a railroad corporation is stopped for reasons other than setting out cars, picking up cars, switching, or boarding or debarking passengers, and thereby blocks one or more public grade crossings, said railroad corporation shall cause the train to be cut immediately so as to permit traffic at the heavier traveled crossing to proceed without delay unless the cutting of the train will endanger the safety of persons or property, or unless the operation of cutting the train, and/or recoupling the train will result in greater delay to vehicle traffic than if the train were left intact.

In substance the proposed regulation would require, subject to the stated exceptions, railroads to cause a stopped train "to be cut immediately" at one crossing, namely, "the heavier traveled crossing." S.P. asserts that as in the case of unnecessary blockings this regulation should be applicable only if there are people or vehicles being delayed. We do not agree. Adoption of S.P.'s suggestion would mean that the railroad would not have to commence the operation of cutting the train until a pedestrian

or vehicle arrived at the crossing resulting in a greater delay or hindrance to the vehicle than if the railroad had immediately commenced its cutting operation after making its necessary stop. The evidence shows that it is not at all uncommon that the operation of cutting a train requires 10 minutes. In a case where the railroad occupies a crossing for five minutes before a vehicle arrives at the crossing, then starts to cut the train and requires 10 minutes to accomplish it, the railroad has subjected the vehicle to five minutes of unnecessary delay; in fact, it has occupied the crossing for 15 minutes of which five of those minutes could have been avoided and has unnecessarily delayed or disrupted the flow of commerce on the public highways for a period of five minutes.

S.P. asserts that the phrase "to be cut immediately" seemingly may require that the cutting operation be completed at the time when the train stops which is clearly impossible. Changing the phrase to "shall immediately cause the train to be cut" will remove any ambiguity.

The blocking of crossings resulting from switching and setting out and picking up of cars in train operations is the subject of many informal complaints, and, from the evidence and from the briefs appears to be one of the more difficult problems to solve. The Examiner proposes:

> Unless otherwise directed or authorized by the Commission, by agreement, or by a traffic officer at the scene, whenever a railroad corporation is engaged in setting out cars, picking up cars, or switching, said railroad corporation shall conduct such operation in a manner that each public grade crossing shall be cleared following each setout, pickup, or switch so as to permit standing vehicles and pedestrians at the crossing to proceed over the crossing before starting the next setout, pickup, or switch.

The railroads take exception to this proposal. They assert switching is a very complicated maneuver, and rarely involves the same movement either at a particular area or in other areas; and that the rigid rule proposed by the Examiner does not take into consideration the many variables that occur in switching. As already indicated they suggest a rule which would provide a time limit of 10 minutes for the railroad to clear a crossing.

It is true that there are many variables in connection with switching and that a switching operation over one crossing at a particular time of day may be acceptable and consistent with the requirements of public convenience and safety for motor vehicle and pedestrian traffic, whereas at a different time or at a different place that same operation may be incompatible with the general public interest. Regardless of what type of regulation may be established there will be need for exceptions to that regulation. It is in the area of switching that negotiated agreements between the railroads and the public agencies and the cooperation of the industries being served will probably result in a more satisfactory answer to the blocking problem at individual crossings. The Examiner's proposal

has a number of advantages: The rule is simple of application, it permits the railroad to pursue its switching operation until there are standing vehicles or pedestrians at the crossing and then it may complete the individual pickup or setout prior to clearing, and it imposes the burden of initiating negotiations regarding "problem crossings" upon the railroads which in most instances would be more knowledgeable concerning the various alternatives that may remove or alleviate the problems at individual crossings. The great disadvantage, and indeed it appears to be a serious one, is that it would probably necessitate the railroad negotiating agreements with virtually every local agency in California to cover exceptions that are now tacitly acceptable. One such example that occurs to us is the switching in industrial areas during evening or early morning hours when there is little traffic on the streets or roads and there are numerous avenues around the blocked crossing. In those circumstances it would appear that the public would be better accommodated by permitting the railroad to conduct its switching operations unhampered so as to be off of the crossings and away from the area before the commencement of heavier motor vehicle traffic in the area.

The railroads' proposal, however, would shift the burden entirely upon the local agencies. It would permit the blocking of any street, road, or highway for ten minutes at any time of day regardless of the amount of traffic desiring the use of the crossing unless there was an exception agreed to by the railroad or imposed by the Commission. It may reasonably be assumed that in the jurisdiction of every local agency served by a railroad there is at least one crossing the blocking of which for ten minutes during a particular period of the day would be contrary to public convenience and safety and conflict with the public interest. In order to be completely assured that such circumstance would not occur the local agency would have to initiate negotiations towards an agreement.

Either proposal would appear to lead towards agreements between every railroad and every local agency where switching operations are performed by the railroad. Of the two proposals the Examiner's proposal provides the advantage of imposing the burden of initiating negotiations upon the party greater able to alter operations over the crossing. It would be desirable if there is a middle ground, such as a description of operations by the railroad which normally would not block any crossing so as to substantially inconvenience or impede other commerce desiring to utilize the crossing. Such middle ground is not apparent in the evidence received thus far. The railroads have requested opportunity to present further evidence; they and the other parties should be afforded opportunity to do so in order that the described disadvantage of the Examiner's proposal may be lessened.

The Examiner proposes two regulations to provide a traffic officer at the scene of a blocked crossing with adequate tools to cope with the traffic problems resulting therefrom. He proposes:

> When requested by a traffic officer at the scene of a blocked crossing the railroad corporation shall furnish said traffic officer with information concerning the reason that the crossing is blocked, the approximate period of time before the train, locomotive, or car blocking the crossing may proceed, the time that will be required to cut the train to clear the crossing, and the amount of time the crossing would be blocked as a result of recoupling the cut train; and if requested by the traffic officer at the scene of a blocked crossing the railroad corporation shall furnish him notice of its intention to recouple a train five minutes before the train is moved to block the crossing for the purpose of recoupling.

The effect of the proposal is to require, by a General Order, the railroad to extend to a traffic officer what appears to be ordinary common courtesy. S.P. in its exceptions declares that under ordinary circumstances the railroad cannot comply with the suggested regulation

in that the railroad employee at the grade crossing would be a brakeman who would not have the information required to be given the traffic officer. Although the extending of a common courtesy is seldom inappropriate, there is nothing in the record in this proceeding to support the proposition that such regulation is necessary or desireable. If such type of regulation is desireable, evidence should be presented to support one.

The Examiner also proposes:

> Each railroad corporation shall comply with the directive of a traffic officer at the scene of a blocked crossing regarding the movement of a train, locomotive, or car to clear said blocked crossing provided that compliance with such directive will not endanger the safety of persons or property, and further provided that such directive does not require the delay of recoupling a train otherwise ready to proceed that has been cut at the direction of a traffic officer at the scene.

Staff and respondents foresee practical problems in connection with this proposal. Whether their apprehensions have validity we need not determine at this time. As was stated by Santa Fe in its exceptions, these proposed rules call for the cooperation between a traffic officer and the train crew in getting a crossing unblocked as quickly as possible. There is no evidence indicating that rules are needed to set forth the manner in which these individuals should cooperate. No proposals of any sort concerning regulations requiring a train crew to cooperate with a traffic officer were presented or advocated by any party at the hearings. It may be, as was suggested by the Examiner, that such rules would be desirable; but there is no evidence in the record which would support such conclusion.

The Examiner proposes a regulation requiring railroads to respond to written requests of a local agency within a prescribed period of time.

> Within ten days of the receipt of a request in writing by a local agency to a railroad corporation to take certain actions to alleviate traffic problems resulting from railroad operations at a public grade crossing, said railroad corporation shall respond in writing to that request and shall therein state whether such request is granted or denied, and if denied shall set forth the reasons for such denial and also set forth a description of any other action or actions the railroad can perform that may assist the local agency in connection with such traffic problem.

S.P. asserts that the ten-day mandatory requirement for reply is unrealistic. It also points out that there is nothing in the record regarding the necessity for the proposed regulation. We agree; there is nothing in the record indicating that local agencies have encountered any difficulties in having their requests given timely consideration by the railroads.

The Examiner also proposes:

> Whenever any railroad corporation enters into an agreement concerning the occupancy of a public grade crossing or matters connected therewith said railroad corporation shall comply with the terms and requirements of said agreement.

S.P. states that a more precise statement of the problem involved requires that both parties to an agreement should observe and follow any agreement rather than single the railroads out for compliance. It suggests:

> Whenever any railroad corporation enters into an agreement concerning the occupancy of a public grade crossing or matters connected therewith, the terms and requirements of said agreement shall control and be complied with by the parties thereto.

It is important that any regulations to be prescribed provide that whenever there are agreements between the railroad and officials of the local agency that such agreements be observed and enforced. There are to be further hearings in the proceeding so that the adoption of language which would accomplish the desired result is not necessary at this time.

IN WHAT FORM OR MANNER SHOULD REGULATIONS BE EFFECTED?

The Examiner proposes that regulations be promulgated in the form of a General Order. There were no exceptions. The findings and conclusions in the Proposed Report with respect to that issue are amply supported.

WHAT PROCEDURES, IF ANY, SHOULD BE ESTABLISHED IN ORDER TO GIVE EFFECT TO UNUSUAL CIRCUMSTANCES AT A CROSSING OR CROSSINGS THAT MAY JUSTIFY REGULATIONS DIFFERENT FROM THOSE PRESCRIBED?

Sections 5 and 6 of the Examiner's recommended General Order provide a number of procedural rules with respect to the filing of applications, petitions, and protests. Even though the record shows that unusual circumstances at individual crossings should initially be considered by the parties affected, including the Commission staff, looking towards individual solutions, it is a fact of life that parties cannot always agree on all things. It must be recognized that railroads and local agencies, even with the assistance of the staff of the Commission, at times will be unable to enter into an agreement with respect to operations over individual crossings. Sections 5 and 6 of the recommended General Order set forth suggested procedures in the event agreement cannot be attained. There is nothing in the record regarding provisions for such procedures, nor is there any indication in the record that the established Rules of Practice and Procedure of the Commission will not be adequate in such circumstances. We find no support for the Examiner's recommendations in this regard.

SHOULD THE REGULATIONS BE ENFORCEABLE BY LOCAL AGENCIES?

Section 2101 of the Public Utilities Code provides:

> "The commission shall see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the people of the State of California. Upon the request of the commission, the Attorney General or the district attorney of the proper county or city and county shall aid in any investigation, hearing, or trial had under the provisions of this part, and shall institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this State affecting public utilities and for the punishment of all violations thereof."

The Examiner recommends that when an apparent violation of a regulation comes to the attention of a local agency that it inform the Commission by letter. The Commission's Safety Section upon receipt of that letter would immediately investigate the matter to determine only whether the thing done or omitted by the railroad was necessary by reason of safety of operations or federal or state regulations. If that is the case the local agency would be so informed. If the investigation indicates that safety or regulations were not factors involved, the Commission by resolution would direct the Secretary to send a letter to the district attorney of the proper county, with a copy to the local agency, stating that it has been reported by the local agency that the railroad may have violated a general order of the Commission and if the local agency files a complaint with the district attorney the Commission requests him to consider the complaint and if it is deemed warranted by him to prosecute an action under Section 2110 of the Public Utilities Code.

City of Fremont takes exception to the procedure recommended by the Examiner and asserts that the local police or district attorney should be permitted to seek judicial enforcement of any alleged violation without Commission intervention. S.P. takes exception asserting that the resolution requesting the district attorney to consider a complaint by the local agency in effect is a finding by the Commission after investigation that safety or regulations were not necessarily involved in the things done or omitted by the railroad in connection with the alleged violation. It asserts that such finding without hearing may be violative of the due process clause. It further asserts that the procedure of requesting the district attorney to consider the complaint and if deemed warranted by him to prosecute an action for violation of a Commission regulation concerning blocking of a public grade crossing conflicts with Section 1202(a) of the Public Utilities Code that has placed exclusive power in the Commission regarding crossing matters, and Section 1219 of the Public Utilities Code where the legislature declares that the authority and jurisdiction vested in the Commission involves matters of statewide importance and concern.

Section 1202 of the Public Utilities Code, referred to by S.P., provides that the Commission has the exclusive power to determine and prescribe the manner and terms of installation, operation, maintenance, use, and protection of each crossing of a public or publicly used road or highway by a railroad and of a street by a railroad. The power conferred under that section is to determine and prescribe regulations. We do not conclude that it places any limitations or restrictions upon the manner in which those regulations are enforced. For many years the offices of the district attorneys have prosecuted misdemeanor actions brought under Section 2110 of the Public Utilities Code for violations of the provisions of the statute or for violations of orders issued by the Commission. The Commission's Annual Report to the Governor for the fiscal year July 1, 1971 to June 30, 1972 shows 81 misdemeanor actions initiated with respect to

violations of the Public Utilities Code or violations of orders of the Commission of which 42 were handled through district attorney citation and 39 of which resulted in misdemeanor complaints filed.

The conclusion by the Examiner that enforcement proceedings for any violation by railroad corporations of regulations or requirements governing the occupancy of grade crossings should have prior consent or approval of the Commission appears to be based upon evidence that the arrest and taking into custody of a member of a train crew by a local police officer results in a very hazardous and dangerous situation, and upon the fact that there are federal regulations, as well as regulations issued by the Commission, prescribing procedures for the safe operation of trains concerning which the local authorities may not be cognizant. We note also, at Pages 14 and 15 of the Proposed Report:

> "The evaluation of conditions to determine when and how a crossing can be cleared safely calls for expertise and is not merely a judgment that can be made by a man of ordinary prudence. The evaluation of the actions actually taken by railroad operating personnel in instances of blockings calls for the same expertise. It is not to be expected that local authorities possess such expertise. The Commission has the power and responsibility to regulate the safety of railroad operations, and it has the ability to determine whether an action claimed to have been done by reason of safety was justified or whether such claim is merely a facade for an irresponsible action."

We have already pointed out that any construction of that paragraph to mean that the evaluation of the action taken by a railroad with respect to operations on or over a crossing is not one which can or should be made by a court or a jury would be an interpretation inconsistent with the law in California. We are confident that the railroad corporations operating in California have counsel qualified and capable of directing the attention of the courts to safety regulations promulgated by federal authorities and by this

Commission, and of providing witnesses qualified to give expert opinions on issues involving whether an action taken by the railroad was necessary by reason of safety. On the basis of the record thus far made we can find no good cause why an investigation by the Safety Section is necessary preliminary to a request to the district attorney that he investigate the matter and, if he deems it to be warranted, to prosecute an action for a violation.

City of Fremont's suggestion that the local police should be permitted to arrest trainmen at the site of the blocked crossings gives us pause. The evidence shows that in most instances involving blocked crossings it is the local police officer that obtains facts concerning the blocking and the duration of time the crossing is blocked, either from his own observations or from witnesses at the scene. As the Examiner points out in his report the officers of local agencies necessarily will become instrumentalities for the policing of the regulations. We are of the opinion that for enforcement purposes it is necessary that the Commission encourage the local police to provide the necessary information for the prosecution of violations of the regulations. We are of the opinion, however, that any enforcement procedures that may be adopted should not authorize a police officer to arrest or take custody of any trainman while the trainman is engaged in the duty of conducting train operations or switching operations. In the first place, the prevention of the trainman from pursuing his duties will not quicken the clearing of a crossing blocked by that train but will impede the clearing of the crossing. Secondly, and more important as the incident related in the Examiner's report demonstrates, the arrest of a trainman while he is engaged in his duties of operating a train can jeopardize the safety of persons and property.

We have discussed only the Examiner's recommendation and the exceptions to that recommendation. While the determination by the Commission of the method by which it will enforce the Constitution, the statutes, and its orders is not a rule making decision requiring a public hearing and is, as the Examiner terms it, an internal function of the Commission in the exercise of its duties, the parties have a legitimate interest in the matter of the enforcement of regulations governing the blocking of grade crossings. The Commission does not desire to restrict itself as to enforcement methods in any given case. In an instance of a flagrant violation uncovered by our staff we may wish to initiate proceedings for the imposition of penalties and/or contempt under Sections 2107 and 2113 of the Public Utilities Code. We are persuaded by this record that proceedings brought under Section 2110 for violations of regulations governing the blocking of crossings provide the more expeditious and salutory method of enforcement in those cases in which the assistance of the local agencies would be necessary in the prosecution of violations of the blocking regulations. In keeping with the duty of the Commission to see that its regulations are obeyed and enforced, we desire to be informed of all reports of alleged violations, of the initiating of actions by district attorneys, and their results.

We do not adopt the procedure recommended by the Examiner. The Commission staff is directed to present to the Commission at a further hearing a suggested procedure that would accomplish the aims set forth in the above paragraph.

SUMMARY

It has been shown that the regulations set forth in Resolution No. S-1278 have substantial deficiencies. It has been shown conclusively that the several proposals for regulations advocated by the Commission staff, by the respondents, and by the interested parties are not suitable for governing the occupancy of public grade crossings by railroads. The regulations recommended by the Examiner in his Proposed Report in many instances are not supported by the evidence and in some instances do not have any support from the record as being either desirable or necessary. This record shows that untoward circumstances, including the obstruction of commerce over the streets and highways of this State, result from the blocking of public grade crossings by railroads, and that statewide public interest and concern require the regulation by the Commission of the occupancy of public and publicly used grade crossings by railroads for the purposes of:

(1) Prohibiting any unnecessary or avoidable blocking of public or publicly used grade crossings by stopped trains, cars, or locomotives, or in the operation of setting out cars, picking up cars, or switching;

(2) Providing for the clearing of any blocked crossing by railroads with minimum delay consistent with the requirements of safety and subject to federal and state regulations governing operations by railroad corporations;

(3) Promoting the cooperation and joint action by railroad corporations and local agencies in connection with problems resulting from the blocking of crossings; and

(4) Providing suitable means whereby any railroad corporation or local agency may obtain relief from the prescribed regulations, or have different regulations provided, in connection with operations over a crossing where local conditions so require.

The record does not permit the determination of suitable regulations which will accomplish those purposes. We conclude that the submission of this proceeding should be set aside and that further hearings be scheduled at times and places to be determined for the receipt of additional evidence from which reasonable and suitable regulations governing the occupancy of public and publicly used grade crossings by railroads can be established and promulgated in the form of a General Order, and for the further purposes of receiving advice regarding procedural rules that may be necessary to implement the provisions of the General Order and concerning procedures which will implement enforcement of the regulations by district attorneys pursuant to Section 2101 of the Public Utilities Code. The Commission staff is directed to consult with the parties to this proceeding and thereafter prepare for consideration by the Commission at further hearings:

(a) A suggested General Order providing for the regulation of the occupancy of public and publicly used grade crossings by railroad corporations;

(b) Suggested procedural rules that may be reguired to implement the provisions of the General Order; and

(c) Suggested procedures to be followed by the Commission to implement enforcement of the regulations by the district attorney of the proper county or city and county pursuant to the provisions of Section 2101 of the Public Utilities Code.

The Order Instituting Investigation in this proceeding provided that pending further order each railroad corporation operating in California is ordered to comply with its rules filed pursuant to Commission Resolution No. S-1278. Until such time as the Commission prescribes different regulations governing the occupancy

of public and publicly used grade crossings by railroad corporations, each railroad corporation operating in California should be ordered to continue to comply with its rules filed pursuant to Commission Resolution No. S-1278.

This investigation being reopened for further hearing on the issues presented, separately stated findings of fact and conclusions of law are unnecessary at this time.

ORDER SETTING ASIDE SUBMISSION

IT IS ORDERED that submission of this investigation is set aside and that further hearings be scheduled at times and places to be determined.

IT IS FURTHER ORDERED that each railroad corporation operating in California shall comply with its rules filed pursuant to Commission Resolution No. S-1278.

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

Dated at San Francisco, California, this 14th day of AUGUST, 1973.

President

Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

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