

Decision No. 83995**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
the City of Anaheim to Construct a
City Street Across the Right-of-Way
of The Atchison, Topeka and Santa
Fe Railway Company and Union Pacific
Railroad at La Palma Avenue.

Application No. 45088
(Petition for Modification
filed March 4, 1974)

ORDER DENYING PETITION FOR MODIFICATION

The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Union Pacific Railroad Company (UP) have petitioned the Commission for a modification of Decision No. 67574 dated July 21, 1964 insofar as that decision resolved issues concerning the maintenance costs of the automatic crossing protection at La Palma Avenue in the city of Anaheim. Ordering Paragraph 7 of that decision apportioned 100 percent of the maintenance cost for automatic protection to the railroads. The following grounds are urged for modification:

1. Prior to the issuance of Decision No. 67574, the city of Anaheim and the railroads stipulated to a different apportionment of costs, which the Commission ignored.
2. Subsequent to the Commission's decision in this case the legislature enacted Public Utilities Code Section 1202.2 which provides, inter alia, that in apportioning the cost of maintenance of automatic grade crossing protection constructed or altered after October 1, 1965, the Commission shall divide such cost in the same proportion as the cost of constructing such automatic grade crossing protection is divided; that the aforementioned Decision No. 67574 ordered the cost of crossing protection to be

borne by the city but the maintenance cost to be borne by the railroads, and that since the crossing was completed on May 24, 1966, some seven months after October 1, 1965, the Commission should assess the cost of maintenance wholly against the city of Anaheim.

The city opposes the petition, contending that since prior to the effective date of Section 1202.2, the Commission had already made an order with respect to the maintenance costs and that rehearing had been denied on that order, the Commission's decision should stand. The city urges that the Commission has held that the costs of maintenance shall be apportioned pursuant to Section 1202.2 in all cases where the construction or alteration was completed after October 1, 1965 without regard to the degree of completion of work as of October 1, 1965, provided there has been no previous order of the Commission apportioning costs and no unreasonable delay in the completion of the work, and provided also, that the costs of construction and alteration are found to be reasonable by the Commission.

In furthering their respective positions, the railroads and the city both rely upon certain interpretations of In re Southern Pacific Company and County of Los Angeles (1968) 68 CPUC 707.

The first of the two grounds is disposed of by pointing out that it is not properly raised at this time. The matter of whether the Commission acted reasonably in apportioning costs to the railroad notwithstanding a stipulation was fully litigated in the timely petition for rehearing filed by Santa Fe and UP on August 10, 1964. Rehearing on this ground was denied by Decision No. 68000 dated October 6, 1964. This issue having been completely presented to the Commission at that time by way of petition for rehearing, Decision No. 68000 is res judicata on this issue as to UP and Santa Fe.

Furthermore, the Supreme Court of this State has ruled that a party who has failed seasonably to seek judicial review of a Public Utilities Commission decision cannot cure such failure by the device of a series of late-filed petitions to reopen, and for rehearing with respect to denial of reopening, basing its right to review on the latest decision, when, in fact, the petitioner is seeking review of an earlier basic decision. (Northern California Association to Preserve Bodega Head and Harbor, Incorporated v PUC (1964) 61 Cal 2d 126, 37 Cal Rptr 432.)

Although the petition before us is titled as one for modification and not rehearing, as to this particular ground it actually seeks the identical relief requested in the previously mentioned petition for rehearing. Thus the logic of the Bodega Head case, as well as the principle of res judicata, applies to this particular ground.

The Commission is also convinced that the second ground, mentioned above, is unmeritorious.

This application was filed on January 3, 1963. The decision on the merits (Decision No. 67574) was issued July 21, 1964. That decision apportioned all maintenance costs to the railroads (Ordering Paragraph 6). Rehearing of that decision was denied on October 6, 1964 (Decision No. 68000). According to the Commission's records, the work was completed both on the Santa Fe and UP tracks on May 24, 1966.

The Commission's records do not show the starting dates of the work on these crossings. The Commission Secretary wrote to Santa Fe and UP asking if this information were available or whether a hearing would be necessary to determine these dates. The return correspondence from the railroads indicates that UP's work commenced on July 20, 1965 and Santa Fe's work began in September of 1965. This being the case, the facts herein fall within the scope of the problem which was studied at great length in several reopened proceedings which

terminated in Decision No. 72226 dated March 28, 1967 (67 CPUC 62, 69) in which the Commission stated:

"We find in the matters here reopened that where any work of construction or alteration had commenced prior to October 1, 1965 based on the facts of record herein, without regard to the degree of completion of such work, and the Commission had apportioned maintenance cost, Section 1202.2 is not applicable."

The problem presented in this petition for modification was also raised previously in Application No. 50012, Decision No. 74659 dated September 11, 1968 (68 CPUC 707, 710). The Commission, citing the aforementioned Decision No. 72226, made the following conclusion of law:

"The cost of maintenance will be apportioned pursuant to Section 1202.2 of the Public Utilities Code in all cases where the construction or alteration was completed after October 1, 1965, without regard to the degree of completion of work as of October 1, 1965, provided there has been no previous order of the Commission apportioning cost of maintenance and there has been no unreasonable delay in the completion of the work, and provided also that the division of the cost of construction and alteration is found to be reasonable by the Commission."

Thus the Commission has twice determined that if work was done before October 1, 1965, and the Commission had issued an order concerning the apportionment of maintenance costs, Section 1202.2 would not be applicable. The Commission's reasons for reaching this rule of interpretation are more than adequately explained in Decision No. 72226.

There is, therefore, no reason for the Commission to grant reopening in this application at this late date. The Commission should be consistent in its approach to dealing with these cases, and it would be unfair to grant such a reopening without reopening generally all the applications and cases which were disposed

of in 1967 by way of Decision No. 72226. The Commission exhaustively considered the problems of interpreting Section 1202.2 at that time, and should adhere to those interpretations.

Findings

1. The work on the crossings which are the subject of this application commenced prior to October 1, 1965.

2. The Commission records indicated that the work on these crossings was completed on May 24, 1966.

Conclusions

1. The issue as to whether the Commission should have recognized the stipulation for the apportionment of the maintenance cost was finally decided by way of Decision No. 68000, which denied the petition for rehearing on this issue.

2. Based upon previous Commission interpretations of Public Utilities Code Section 1202.2, as hereinabove discussed, the Commission concludes that this section is not applicable to the crossings in this application.

IT IS ORDERED that the petition for modification is denied.

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

Dated at San Francisco, California, this 30th
day of DECEMBER, 1974.

James L. Stevenson
President
William J. Symons
Thomas M. Moran
Robert E. McFarland
Commissioners