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ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CITY OF BUENAVENTURA,

Complainant,

v.

Case 83-08-05 (Filed August 10, 1983)

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Defendant.

Donald S. Greenberg, City Attorney, by
Michael R. Dougherty, Asst. City
Attorney, and Kenneth G. Makature,
Deputy City Attorney, for City of
San Buenaventura, complainant.
William E. Still and Anthony P. Parrille,
Attorneys at Law, for Southern Pacific
Transportation Company, defendant.

OPINION

This is a complaint by the City of San Buenaventura (San Buenaventura) against Southern Pacific Transportation Company (Southern Pacific). San Buenaventura seeks an order (1) requiring Southern Pacific to accept a franchise as a condition of its continued operation within San Buenaventura and (2) requiring Southern Pacific to pay back franchise fees and current and future ones.

A duly noticed public hearing was held in this matter before Administrative Law Judge (ALJ) Donald C. Meaney in San Francisco on April 16, 1984. Submission was deferred pending receipt of briefs and successive stipulations by the parties. ALJ Meaney having left the employment of the Commission, the matter was reassigned to ALJ Donald B. Jarvis. The proposed decision of ALJ Jarvis was filed on February 5, 1988. Neither party filed comments to it.

I. Material Issues

The material issues presented in this proceeding are:

- 1. Does Public Utilities Code (PU Code) § 7555 require Southern Pacific to have a franchise to conduct operations, in whole or in part, within San Buenaventura?
- 2. If a franchise is required, is the one enacted by San Buenaventura reasonable?
- 3. To what extent, if any, should Southern Pacific be required to pay past, present, and future franchise fees?

II. Pindings of Fact

- 1. San Buenaventura is an incorporated city. It was formerly known as the Town of San Buenaventura (Town).
- 2. Southern Pacific is a railroad corporation as defined in PU Code § 230 subject to the jurisdiction of the Commission. It is the successor in interest to Southern Pacific Branch Railway Company (SPBR). The Commission takes official notice that SPBR was incorporated on April 12, 1886 and Southern Pacific consolidated with Southern Pacific on May 14, 1888. (Dunscomb, "A Century of Southern Pacific Steam Locomotives" (1972 Ed.); Evidence Code § 1341.)
- 3. On October 4, 1886, Town enacted Ordinance No. 16 (Ordinance 16) which granted SPBR, during the term of its corporate existence, a franchise to lay track and operate and maintain a railroad through Town. Ordinance 16 applied to Southern Pacific's main line tracks within the original Town limits.
- 4. On January 25, 1937, San Buenaventura enacted Ordinance No. 482 (Ordinance 482) which granted Southern Pacific a 10-year franchise to construct, operate, and maintain a railroad within its city limits. Ordinance 482 did not refer to Ordinance 16. It

encompassed Southern Pacific's main line and siding and spur tracks which were in existence on that date. Ordinance 482 included the following provisions:

"Section 4: The grantee further agrees and it is made a condition hereof that the speed of trains upon said tracks shall not exceed twenty-five (25) miles per hour for passenger trains or twenty (20) miles per hour for freight trains, and that the grantee shall comply with the following requirements:

- "(a) The construction, installation and maintenance by the grantee, at its sole cost and expense, of two automatic crossing signals approved by the State Railroad Commission, one on each side of the tracks at the entrance to Seaside Park, at or near the intersection of South Ventura Avenue with Front Street at locations approved by the City Street Superintendent.
- "(b) The securing and supplying at Ventura, at grantee's sole cost and expense, of eight (8) legal boulevard Stop signs, with the word 'STOP' outlined with reflector buttons, of a type approved by the State Motor Vehicle Act, said signs to be installed and maintained by the City at its expense, through its Street Department, at the intersections of Walnut, Figueroa, Palm and Oak Streets with Front Street.

"The construction of said structures shall be commenced within ninety (90) days from the date of this grant of franchise and the requirements of this Section shall be fully complied with within 90 days thereafter."

"Section 8: That the grantee hereof by the acceptance of this franchise authorizes the City to retain the sum of \$100 deposited with it upon the application for this franchise, and the City of San Buenaventura accepts the same in full for all expenses connected with the granting of this franchise, including the publication of this Ordinance.

"Section 9: This franchise is granted subject to the State Constitution, and to the provisions of Article XIX of the Charter of said City and of Ordinance No. 475 of said City, applicable thereto, and the right is reserved to revoke this franchise for non-compliance with any of the conditions hereof.

"Section 10: That the grantee herein shall file with the City Clerk a written acceptance hereof within ten days after the granting of this franchise."

Southern Pacific accepted this franchise.

- 5. On February 24, 1947, San Buenaventura enacted Ordinance No. 670 (Ordinance 670) which granted Southern Pacific a 10-year franchise to construct, operate, and maintain a railroad within its city limits. Ordinance 670 did not refer to Ordinances 16 and 482. It encompassed Southern Pacific's main line and the siding and spur tracks which were in existence on that date. Ordinance 670 contained provisions identical to Sections 8, 9, and 10 of Ordinance 482. Southern Pacific accepted this franchise.
- 6. On August 13, 1957, San Buenaventura enacted Ordinance No. 984 (Ordinance 984) which granted Southern Pacific a 21-year franchise to construct, operate, and maintain a railroad within its city limits. Ordinance 984 provided that it superseded Ordinance 670. Ordinance 984 encompassed the same tracks described in Ordinances 482 and 670. It contained provisions identical to Sections 8, 9, and 10 of Ordinance 482. Southern Pacific accepted this franchise.
- 7. When Ordinance 984 expired, San Buenaventura and Southern Pacific attempted to negotiate the terms of a new ordinance. On May 9, 1983, San Buenaventura enacted Ordinance 83-18, which provided for a 25-year franchise. A copy of the ordinance is appended as Attachment A and by this reference made a part hereof. Southern Pacific refused to accept Ordinance 83-18. The parties have extended Ordinance 984 by letter agreements. The complaint at

bench resulted from the refusal of Southern Pacific to accept Ordinance 83-18.

8. Ordinance 16 provided that the speed of trains operated by Southern Pacific over the franchised tracks should not exceed 10 miles per hour within the Town limits. Ordinance 482 provided for a speed limit of 25 miles per hour for passenger trains and 20 miles per hour for freight trains. Ordinance 670 provided for the same speed limits as Ordinance 482, with the condition that the speeds could be varied by city ordinance. The speed limit provisions of Ordinance 984 are identical to those of Ordinance 670.

III. Discussion

Southern Pacific contends that it acquired a perpetual franchise from the State in 1886 to construct its mainline railroad under the then existing provisions of Civil Code (CC) § 465(5) and its right to cross the streets of San Buenaventura by virtue of the then existing provisions of CC § 470 and Ordinance 16. At the time CC § 470 did not authorize municipalities to impose any conditions beyond granting or withholding permission to use its streets. Southern Pacific argues that the franchises so created constitute vested property rights, which cannot be taken away by subsequent legislative changes. Southern Pacific contends that later changes in CC § 470 and the enactment of PU Code § 7555 cannot alter these vested rights and permit San Buenaventura to require another franchise for the main line or to impose any franchise conditions on the main line. Southern Pacific also asserts that PU Code § 7555 does not apply to main line track.

San Buenaventura contends that PU Code § 7555 applies because Ordinance 16 has expired under its terms and the express conditions are no longer being observed. San Buenaventura argues

that the ordinance expired with the end of SPBR's corporate existence and did not inure to Southern Pacific.

The Commission is of the opinion that PU Code § 7555 applies to the proposed ordinance enacted by San Buenaventura and includes main line track. We arrive at this conclusion on grounds other than those asserted by San Buenaventura.

Under CC 465(5) as it existed in 1886 SPBR acquired a perpetual franchise to construct and operate its railroad. Under CC § 470, as it existed in 1886, SPBR needed a franchise from Town in order to have the railroad cross Town's streets. CC § 470 authorized Town to grant or refuse a franchise. It did not authorize the imposition of any conditions if a franchise were granted. Ordinance 16 granted SPBR a perpetual franchise. The current validity of perpetual franchises was discussed at length and upheld in City of Lompoc v So. Pac. Transp. Co. (1981) 7 Cal. PUC 2d 233 at pages 240-41; review denied June 23, 1982, SF No. 24406.

As indicated, SPBR was consolidated with Southern Pacific on May 14, 1888, 19 months after the enactment of Ordinance 16. This had to be a matter of common knowledge because railroad operations were then being conducted by Southern Pacific and any dealings with Town and the railroad were with that entity. Because of the view we take about other events, we assume for the purposes of this decision that Town did not consider the franchise granted in Ordinance 16 forefeited or revoked when SPBR was consolidated with Southern Pacific, but considered the ordinance continued with SPBR's successor in interest.

If Southern Pacific had not applied for and accepted the franchise in Ordinance 482 its reliance on a perpetual franchise might be persuasive. However, the record clearly shows that Southern Pacific, by its actions, entered into a waiver and/or novation with respect to Ordinance 16.

"The surrendering or foregoing of a legal right constitutes a sufficient consideration for a

contract if the minds of the parties meet on the relinquishment of the right as a consideration."

"Relinquishment or forbearance of a claimed right is sufficient consideration for the creation of a new right, regardless of whether the claimed right actually was legally effective or not." (13 Cal. Jur. 3rd, Contracts § 90, pp. 298-99.)

"Generally, a novation has four requisites:
(1) a previous valid obligation, (2) agreement
of all the parties to the new contract,
(3) extinguishment of the old contract, and
(4) validity of the new agreement. It is made
by contract, is subject to the rules concerning
contracts in general, and must have all the
elements of an original contact." (13 Cal.
Jur. 3d, Contracts, § 233, p. 522.)

Since Southern Pacific applied for and accepted the franchise granted in Ordinance 482, which modified the grant of Ordinance 16, it cannot now rely on the perpetual franchise in Ordinance 16. (Contra Costa Co. v American T.B. Co. (1937) 10 Cal. 2d 359, 366-67.) The record also discloses three reasons why Southern Pacific was willing to enter into a novation and waiver with respect to Ordinance 16:

- 1. To increase the train speed limit in San Buenaventura.
- To provide for San Buenaventura's cooperation with respect to installing crossing protection and for the city's installing and maintaining certain devices.
- 3. To obtain without controversy a franchise for trackage not covered by Ordinance 16.

Ordinance 482 was adopted long before the enactment of PU Code §§ 7658 and 7660, which were enacted in 1976 and 1978 and provide:

"7658. No city or county or city and county ordinance which establishes a limit on the speed of trains shall be valid unless that ordinance has been approved by the commission.

"7660. The commission, in authorizing any restrictions on the speed of rail services, shall do so only upon receipt of evidence and a finding (a) that the restriction is required due to track condition, alignment, curvature of tracks, superelevation, or inadequate right-of-way protection, or any combination thereof, as the case may be, and (b) that higher speeds will have an adverse impact upon the health and safety of the public until the specified conditions are changed."

In 1937, the applicable rule applied by the California courts was that municipalities could regulate the speed of trains because neither the Legislature nor the Commission had occupied the field.

"Section 23 of article XII must be read as a whole, and if it appears, as we have stated, that the subject legislated upon is exclusively local, and a police regulation in character, the authority to so legislate is vested in incorporated cities. We may further state that there is nothing in the record showing that the legislature has ever passed any act regulating the speed of trains through incorporated municipalities, nor does it appear from the record that the Railroad Commission has ever enacted or promulgated any rules or regulations relative to the speed of trains through incorporated cities. From this it follows that the ordinance of the city of Stockton is not shown to be in contravention of any act of the legislature or of any rules or regulations promulgated by the Railroad Commission." (Switzler v Atchison, etc., Rv. Co. (1930) 104 Cal. App. 138, 155-56; Wright v Los Angeles Rv. Corp. (1939) 14 Cal. 2d 168, 177.)

Ordinance 16 provided for a speed limit of 10 miles an hour for all trains. Ordinance 482 provided for a speed limit of 25 miles per hour for passenger trains and 20 miles per hour for

freight trains. Obtaining an increase in speed limits was sufficient motivation and consideration for Southern Pacific's giving up rights under Ordinance 16.

Section 43 of the Public Utilities Act, enacted in 1911, gave the Commission exclusive jurisdiction over railroad crossings (now PU Code §§ 1201 et seq.). Crossing protection benefits railroads as well as the public. It enables speedier, uninhibited movement of trains and minimizes the possibility of accidents. The Commission's reports abound with controversies between railroads and municipalities over whether crossing protection should be provided at various locations, the type of protection and who should bear the costs of installing or maintaining the protection.

The provisions of Ordinance 482 removed the potential for controversy before the Commission over the crossing protection provided for in the ordinance. This was sufficient motivation and consideration for Southern Pacific giving up rights under Ordinance 16.

Ordinance 16 only applied to Southern Pacific's main line tracks in San Buenaventura. Ordinance 482 includes siding and spur tracks as well as the main line. At that time San Buenaventura could have refused to grant a franchise for the sidings and spurs, thereby preventing their construction and use. Obtaining a franchise for additional trackage was sufficient motivation and consideration for Southern Pacific giving up rights under Ordinance 16.

A major effect of Southern Pacific's applying for and accepting Ordinance 482 was to go from a perpetual franchise to one of limited term. It is well settled that the law in existence at the time a franchise is issued is that which controls. (Terminal Rys. v County of Alameda (1924) 66 Cal. App. 77, 82.) Ordinances 482, 670, and 984 were for fixed terms and have expired. There is no existing franchise. Therefore, to resolve the dispute before us we look to current law.

PU Code § 7555 provides that:

"No railroad corporation may use any street, alley, or highway, or any of the land, whether covered by water or otherwise, owned by any city or county, unless the right to do so is granted by a vote of the governing body of the city or county. If any railroad corporation operating within a city or county applies to the governing body of the city or county for a franchise or permit to cross any such street, alley, or highway, with main, branch, side, switching, or spur trackage, the governing body of the city or county, within a reasonable time, shall hold a public hearing upon the application after reasonable notice to the applicant and to the public and shall thereafter grant the franchise or permit applied for upon reasonable terms and conditions unless such governing body reasonably finds that the grant of the franchise or permit would be detrimental to the public interest of the city or county. Nothing in this section imposes any duty upon or limits the authority of, any city organized and existing pursuant to a freeholder's charter, or any officer thereof."

Southern Pacific contends that PU Code § 7555 does not apply to main line tracks. It argues that its franchise for main line operations is derived from PU Code § 7526(e) and is not subject to local franchise. There is no merit in this contention.

PU Code § 7526(e) is the successor to former CC § 465(5).

PU Code § 7555 is the successor to former CC § 470. Just as in

1886, CC § 470 required Southern Pacific's predecessor to obtain

the franchise contained in Ordinance 16 for main line tracks, pu

Code § 7555 requires a franchise today.

"Section 7555 is consonant with Section 7551. The State itself has provided for the veto of a selected railroad route by the State Lands Commission. Where regulation of a public utility is a matter of statewide concern, a local franchise is a limited property right for the use of the streets of a municipality. (So.Cal. Edison (1943) 44 CRC 733, 735-36; see

also, Western Motor Transport Co. (1921) 20 CRC 1038, 1040; Oakland v San Francisco-Oakland Terminal Rys. (1923) 23 CRC 936, 940; Greyhound Lines, Inc. v Public Utilities Com. (1968) C 2d 406, 412 fn. 3; Oro Electric Corp. v Railroad Com. (1915) 169 Cal 466; Pacific Tel. & Tel. v City of Los Angeles (1955) 49 Cal 2d 272; Pacific Tel. & Tel. v City & County of San Francisco (1961) 197 CA 3d 133; Los Angeles Ry. Co. v Los Angeles (1907) 152 Cal 242.) I have already held that Section 7555 is made applicable to counties by virtue of Government Code Section 26001.

"This delegation of legislative power to municipal governments has been sustained by the Supreme Court. (Pacific Rock and Gravel Co. v City of Upland, supra; Southern Pacific Company v City & County of San Francisco (1964) 62 Cal 2d 50, 58.)" (So. Pac. Transportation Co. (1974) 76 CPUC 736, 747-48, review denied January 29, 1975, SF No. 23191, commonly referred to as the Doogan case.)

San Buenaventura contends that Ordinance 83-18 is presumptively valid and that the trend of California Supreme Court decisions would be to uphold it. In Lompoc we held that:

"Ordinance 1067 purports to apply to all trackage in Lompoc. The Proposed Report carefully delineates matters which are within the exclusive jurisdiction of the Commission and those within its primary jurisdiction. The Proposed Report concludes that specified sections of the ordinance are in excess of Lompoc's jurisdiction and void."

* * *

"Ordinance 1067 seeks to regulate the construction, use, and maintenance of SP trackage in Lompoc as well as impose a fee for the use of the streets. The ALJ correctly found the fee provision to be reasonable. He found many of the regulatory provisions to be invalid because they conflict with the jurisdiction of the Commission and, therefore, are in excess of Lompoc's jurisdiction.

"The ALJ set forth how Ordinance 1067 conflicted with the jurisdiction of the Commission. We summarize these points.

"As indicated, the language of the ordinance applies to all trackage in Lompoc. Public Utilities Code § 1202 grants the Commission exclusive jurisdiction of grade crossings and trackage at those crossings. To the extent Ordinance 1067 purports to regulate trackage at grade crossings, it is in excess of Lompoc's jurisdiction.

"The Proposed Report finds that: (1) The regulation of railroads in California is a matter of statewide concern and not a municipal affair. (2) The Commission has primary and paramount jurisdiction of railroad tracks which run longitudinally in city streets. The Proposed Report finds that the Commission has adopted the following GOs which relate to longitudinal trackage:

"GO 26-D

"Regulations governing clearances on railroads and street railroads with reference to side and overhead structures, parallel tracks, crossings of public roads, highways, and streets.

"GO 33-B

"Regulations governing the construction, reconstruction, maintenance, and operation of interlocking plants at crossings, junctions, drawbridges, in yards and at sidings of railroads and street railroads.

"GO 36-E

"Establishment or abolition of agencies, nonagencies, sidings, spur tracks, and other station facilities and the curtailment of agency service of common carriers.

"GO 118

"Regulations governing the construction, reconstruction, and maintenance of walkways

adjacent to railroad trackage and the control of vegetation adjacent thereto.

"In sum, the Commission has exercised its primary and paramount jurisdiction by regulating longitudinal trackage. It has occupied the field. Thus, for example, the provisions of the ordinance which call for strict construction and forfeiture for failure to comply, coupled with requirements for work to be done to the satisfaction of the city engineer, are attempts to arrogate to the city jurisdiction over matters in which the Commission has jurisdiction, which has been exercised. The Superior Court shared this view when it sustained SP's demurrer to Lompoc's action for a writ of mandate to compel SP to accept the franchise. The Superior Court held that it lacked jurisdiction because the jurisdiction was in the Commission."

"This proceeding involves more than an academic joust over jurisdiction. The regulation of railroads which has been given to the Commission is a matter of statewide concern. (Cal. Const., Art. XII, Sec. 8.) To ensure an adequate system of statewide rail service, it is necessary to have uniform standards of construction and maintenance of trackage. If municipalities, through franchise ordinances, can intrude into the system of statewide regulation, a series of reasonable but disparate requirements could ensue. This would defeat the purpose of statewide regulation.

"The Proposed Report recognizes that Lompoc has legitimate concerns about the use of its streets. It indicates that if problems arise between Lompoc and SP a remedy may be had before the Commission. We agree with this position." (7 CPUC 2d at pp. 235-37.)

The rule stated in <u>Lompoc</u> is applicable to the matters raised by this complaint:

"In determining whether a franchise would be detrimental to a municipality or the reasonable terms and conditions thereof, the governing

body cannot consider or intrude into matters which are of statewide concern and beyond its jurisdiction. (Hempy v Public Utilities Com. (1961) 56 Cal 2d 214; Agnew v City of Los Angeles (1958) 51 Cal 2d 1, 10; City of Madera v Black (1919) 181 Cal 306, 313-14; Verner. Hilby & Dunn v City of Monte Sereno (1966) 245 CA 2d 29, 33; Lynch v City of Los Angeles (1952) 114 CA 2d 115; People v Willert (1939) 37 CA 2d (Supp.) 729, 733-34.) (So. Pac. Transportation Co. (1974), supra at pp. 736, 748; So. Pac. Transportation Co. (1975) supra.

"Lompoc, of course, has legitimate concerns about the use of its streets. However, concern does not confer jurisdiction. Where Ordinance 1067 exceeds Lompoc's jurisdiction those provisions are not 'reasonable terms and conditions' and SP should not be ordered to accept them." (7 CPUC 2d at p. 243.)

Southern Pacific contends that Section 1 of Ordinance 83-18 is unreasonable because it "includes tracks not in use and not in place...and it includes Kalorama Street which has been barricaded since 1973."

Item 8 of the stipulation executed by the parties on May 7 and 21, 1985 states that:

"The language in Section 1 of Ordinance 83-18 describes the same areas and tracks as Ordinances Nos. 482, 670 and 984 (including main line, siding and spurs). Certain of these tracks are not presently physically connected."

It is not clear whether the part of Southern Pacific's argument relating to Kalorama Street rests on its contention heretofore rejected of a perpetual franchise for its main line. There are tracks not physically connected to the main line or other trackage. If these tracks have been abandoned and no longer part of Southern Pacific's operations they ought not be subject to the franchise. However, if these tracks are used and useful in Southern Pacific's operations or are being held for future use they are reasonably subject to inclusion in the franchise.

Southern Pacific argues that Section 3 of Ordinance 83-18 is in excess of San Buenaventura's jurisdiction. That section provides that:

"Section 3: Continuous Welded Rail. Pursuant to prior promises of grantee and its officers, employees, and agents, continuous welded rail shall be installed by grantee between the crossings of Lemon Grove Overpass and Garden Street excluding the area within crossings if grantee so chose. The installation of said continuous welded rail shall be phased as follows:

- "(a) The area from Kalorama Street to Garden Street is to be installed prior to December 31, 1984, and
- "(b) The balance of the installation is to be installed prior to December 31, 1985.

"All fixtures and things to be constructed by grantee hereunder shall be maintained as provided by lawful governmental authority as may have jurisdiction in the premises; and willful failure and neglect of the grantee hereunder to observe all the requirements of such standard, after reasonable notice requiring it to observe the same shall be a ground for the review of this franchise and of all rights, privileges and benefits accruing to the grantee hereunder, said review being pursuant to section 20 hereof."

San Buenaventura argues that this section does not invade Commission jurisdiction and that it only reserves to the city the right to review the franchise if Southern Pacific does not comply. There is no merit in this contention.

A similar provision was held to be in excess of a city's jurisdiction and void in <u>Lompoc</u>. (7 CPUC 2d at pp. 241-43.) The record indicates that there are five crossings at grade over the main line tracks sought to be encompassed by Ordinance 83-18. The Commission has exclusive jurisdiction over these crossings and has established detailed rules for their construction and maintenance.

(PU Code § 1202; GO 72B.) Any changes in trackage between crossings will have a relationship to the crossings. The holding that the regulation of longitudinal track between crossings is a matter of statewide concern and not a municipal matter is applicable. The purpose of statewide regulation would be defeated if cities along Southern Pacific's main line could, through franchise ordinances, impose disparate trackage requirements. We find Section 3 of Ordinance 83-18 to be in excess of San Buenaventura's jurisdiction and void. Southern Pacific should not be required to accept a franchise with this provision in it.

Southern Pacific next contends that Section 4 of Ordinance 83-8 is unreasonable because it delegates San Buenaventura's police power to permittees or franchisees and may be in conflict with GOs of the commission. San Buenaventura argues that Southern Pacific accepted a similar provision in a franchise it accepted from the City of Los Angeles.

Section 4 provides that:

"Section 4: Reservation of Certain Rights. The privilege granted by this franchise does not limit or affect the right and power of the City or its permittees or franchisees to construct, install, maintain, repair, renew, operate, use or remove proprietary properties in any public street, provided that any such work shall not unreasonably interfere with the use of any existing tracks in such public street. Grantee shall be notified of any such proposed construction and afforded an opportunity to be heard thereon."

The City of Los Angeles franchise referred to by San Buenaventura was not the subject of litigation before the Commission. In Lompoc we considered a similar provision and held that:

"Section 16 provides that:

The City Council, in granting the franchise, expressly reserves the right to pave, macadamize, oil, gravel or otherwise improve or

renew any of the city streets or to lay gas, water, sewer, storm lines and drains and other public utility lines and structures, said work to be done so as to affect any tracks as little as practicable.

"The section is invalid because it is too broad. Lompoc certainly has the right to pave and maintain those portions of a street outside the area related to railroad operations and to put other utilities in those portions of the street. However, the area encompassed by the tracks and required clearances (GOS 26D, 118) are subject to the jurisdiction of the Commission." (7 CPUC 2d at pp. 247-48.)

Section 4 of Ordinance 83-18 has similar deficiencies and the same result should be obtained.

Southern Pacific argues that Section 5 of Ordinance 83-18 is unreasonable and similar to ones held to be void in <u>Lompoc</u> and <u>Doogan</u>. That section provides that:

"Section 5: Changes Required by Public Improvements. The grantee shall at its expense, protect, support, temporarily disconnect, relocate in the same street, or remove from any street any franchise property when required by the City by reason of traffic conditions, public safety, change or establishment of street grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity, provided that all such work required by this section shall be subject to federal and state laws and standards when and as applicable; provided that grantee shall have the privileges and be under the obligations as are provided elsewhere herein; provided, however, that with respect to franchise property within a state freeway which was not a state highway at the time such franchise property was originally installed therein, the obligations of the grantee shall be as provided by applicable law and by such agreements between the grantee and the state as may be applicable thereto.

"This section shall have no application to any grade separation project as to which cost allocation provisions of any statute of the State of California might otherwise be applicable."

San Buenaventura argues that the provision requiring work to be subject to federal and state standards, when applicable, cures the deficiencies in the sections held to be void in <u>Lompoc</u> and <u>Doogan</u>. This is not correct.

In Lompoc we held:

"The provision is invalid. It is an attempt to regulate railroad operations which are beyond the jurisdiction of Lompoc. The grade of railroad tracks is a matter of statewide concern. There are specific statutes and GOs dealing with the grade at crossings. (PU Code § 1201, et seq., GOS 72B, 88.) (7 CPUC 2d at p. 246.)

The language added by San Buenaventura does not cure the defect. The city simply has no jurisdiction by franchise, or otherwise, to determine whether or when changes should be made to the grade of railroad tracks which is a matter of statewide concern.

Southern Pacific contends that Sections 8 and 12 of Ordinance 83-18 are invalid. These provisions provide that:

"Section 8: Rights Reserved to City. There is hereby reserved to the City every right and power which is required to be herein reserved or provided by any legal provision of the Charter of the City or ordinances, rules or regulations of the City, including but not limited to provisions relating to street work, street excavation permits, or use, removal or

¹ In <u>Doogan</u> the Commission held that Section 139 of the Los Angeles County Ordinance to be "illegal, improper and void..." (76 CPUC at p. 757.) Section 139 is similar to Section 5 of Ordinance 83-8. The entire ordinance is attached to the <u>Doogan</u> decision but is omitted in the printed reports.

relocation of franchise property, and the grantee by its acceptance of this franchise agrees to be bound thereby and to comply with any action or requirement of the City in its exercise of any such right or power.

"Neither the granting of this franchise nor any provision hereof shall constitute a waiver or bar to the exercise of any right or power which irrespective of this franchise heretofore could have been or hereafter may be exercised by the City.

"The rights of the City to review this franchise as provided in this ordinance are in addition to all other rights and remedies which may otherwise accrue to the City by reason of any failure or refusal of the grantee to comply with any provision hereof."

"Section 12: Reservation. This franchise is granted subject to reservation to the City of San Buenaventura of all the rights and powers and subject to the provisions of Article XIV of the Charter of the City of San Buenaventura and is also granted subject to the State Constitution and the right is reserved to review this franchise pursuant to section 20 hereof for noncompliance with any of the conditions thereof."

Southern Pacific contends that these sections are invalid. It argues that Section 8 improperly requires it to acquiesce in actions not yet taken or contemplated by San Buenaventura, which might include impermissible ordinances dealing with street work and the relocating or removal of tracks. Southern Pacific also argues that insofar as Section 8 refers to the city charter, it, as well as Section 12, are invalid. Southern Pacific cites the following city charter sections in support of this position.

Sections 1400 and 1401 allegedly deal with procedures for franchises which are governed by PU Code § 7555 and its predecessors. Section 1403 allegedly conflicts with franchise

rights granted by the State in PU Code § 7526(e) and its predecessors. Section 1404 allegedly grants the City unqualified rights to condemn the railroad without authority from the Commission or the ICC. Section 1405(a) allegedly requires railroads to agree to any later changes in ordinances and to obey ordinances which may conflict with the Commission's jurisdiction. Section 1405(b) allegedly does not provide for challenging claims by the City and is therefore unreasonable. Section 1405(c) is alleged to be far too broad because it does not exclude City's own negligence. Section 1405(d) is alleged to be in direct conflict with rulings in Lompoc and Doogan. Section 1405(e) allegedly provides for compensation without limit and subject to change at any time under Section 1405(a). Section 1406 is alleged to conflict with PU Code § 7226 with respect to granting railroad franchises and allegedly invades the jurisdiction of the Commission and Interstate Commerce Commission.

We need not tarry on this point. San Buenaventura does not need a franchise provision to retain or exercise its jurisdiction and authority to legislate on municipal affairs. Sections 8 and 12 of Ordinance 83-18 are impermissible attempts to obtain jurisdiction over matters of statewide concern.

Southern Pacific contends that Section 10 of Ordinance 83-18 is void because it attempts to regulate an area fully occupied by GO 135. San Buenaventura contends that section is consistent with Commission jurisdiction. Section 10 provides that:

"Section 10: Obstruction of Crossings. In furtherance of the rules, regulations and orders of the California Public Utilities commission, the grantee shall never suffer or permit any car or engine to stand upon or obstruct any open or traveled street or track for a longer period than set forth in General Orders of the Public Utilities Commission of the State of California."

Blockage of grade crossings is a matter of statewide concern. The Commission has occupied the field in GO 135.

Violations of the GO are punishable by contempt. (Cal. Const., Art. XII, Sec. 6; PU Code § 2113; Re So. Pac. Transp. Co. (1981) 6

CPUC 2d 336.) In addition, GO 135 delegates to local prosecutors the authority to prosecute for noncompliance with it:

"10. The district attorney of the proper county or the city attorney designated to prosecute misdemeanors in his stead shall prosecute noncompliance with this General Order by means of a misdemeanor complaint issued against the railroad corporation in accordance with Chapter 11, Part 1, Division 1 of the Public Utilities Code."

The attempt to use franchise revocation to enforce provisions of a GO dealing with a matter of statewide concern is impermissible. This is particularly so where there is a comprehensive statutory scheme providing for the enforcement of GO 135. (PU Code §§ 2101-2115.)

Southern Pacific contends that Section 11 of Ordinance 83-18 is void because it attempts to include trackage of the alleged perpetual franchise. It also argues that the formula adopted is unreasonable. That section provides:

"Section 11: Consideration and Expense.

"A. The grantee, by the acceptance of this franchise, hereby agrees to pay to the City of San Buenaventura the sum of Nineteen Thousand Five Hundred Seventy-Five Dollars and Ninety-Seven Cents (\$19,575.97) and the expenses necessary for the publication of this ordinance in the manner required by law.

"B. In August of each year, beginning in 1983, the grantee shall pay to the City for each track in place the preceding January 1, the sum of .283 cents per foot for each foot or fraction thereof, as measured along the center line of the track and within a City street or City property as payment for that fiscal year (i.e., August 1983 payment shall be for fiscal

year July 1, 1983-June 30, 1984). The annual payment accruing to the City shall be increased or decreased by the same percentage difference that the final 'producer price index-all commodities' (1967 = 100) for that year varies from the level in 1967 of 100. Checks shall be made payable to the City Treasurer.

"C. Should any payment required not be made within the time provided therefor, the grantee shall further pay interest on any such amount due at the rate of one and one-half percent per month from the last day of the franchise payment period for which said payment was due.

"D. Additionally, no further annual charges will be made after July 1, 1978, by Southern Pacific Transportation Company for future or existing agreements between the parties hereto, including the following described easements:"

[12 described easements are omitted]

"With respect to said described easements, City will notify grantee upon removal of said facilities from service."

As indicated, Southern Pacific perpetual franchise was supplanted by waiver and/or novation in 1937 when it accepted the franchise in Ordinance 482. Therefore, main line trackage is subject to franchise fees.

The argument about the formula being unreasonable relates to the inclusion of main line trackage. The formula sought to be applied by San Buenaventura is the same as utilized in Los Angeles and found to be reasonable in <u>Lompoc</u>. Southern Pacific should be required to execute a franchise with this provision.

Southern Pacific contends that Section 19 of Ordinance 83-18 is invalid because it conflicts with PU Code §§ 761, 762, 768, and construction practices governed by GOs. San Buenaventura argues that the section uses language found to be permissible in Lompoc.

Section 19 provides that:

"Section 19: Construction. The work of erecting, constructing, laying, replacing, repairing, or removing facilities authorized under the franchise in, upon, over, under, along or across any streets shall be conducted with as little hindrance as practicable to the use of the City streets for the purpose of travel, and as soon as the erecting, constructing, laying, replacing, repairing, or removing of any of said facilities is completed, all portions of the City streets which have been excavated or otherwise damaged thereby shall be replaced in as good condition as the same was before such work. All such work shall be protected as provided in the Manual of Warning Signs, Lights and Devices for Use in Performance of Work Upon Highways issued by the California Department of Transportation, Division of Highways. The grantee shall be responsible for, and shall save the City, its officers and employees free and harmless from, all damages or liability or claims thereof or arising from any damage or injury suffered by any person by reason of any excavation or obstruction being improperly guarded during said work, or the failure of the grantee to properly perform, maintain or protect any phase of the work; except that the City shall be responsible for its own acts or omissions."

Section 19 is reasonable. Unlike <u>Lompoc</u>, it does not attempt to set local standards for construction. The requirement for utilizing warning devices for street construction specified in the manual issued by the California Department of Transportation is reasonable.

Southern Pacific contends that Section 21 of Ordinance 83-18 is invalid because it invades the exclusive jurisdiction of the Commission. That section provides that:

"Section 21: Apportionment of Costs by Contract. In furtherance of public policy to promote the settlement of cost apportionment by contract rather than regulation, if, either before or after the granting of a franchise, the grantee of such franchise and the City or a

public entity enter into a contract as to how the costs or expenses, or both arising from the erection or maintenance, or both, of warning or protective devices authorized or ordered by the public utilities commission of the state, or the permanent or temporary relocation of any facilities, shall be apportioned to or between the parties while such contract is in effect, the terms thereof shall control insofar as they may be inconsistent with any other provision of this Ordinance."

San Buenaventura relies on dicta in <u>So. Pac. Trans. Co.</u>
(1975) 78 CPUC 593 at page 600 to support the challenged language. In that case the Commission stated: "It is noted that Section 10-63 is not challenged by SP. We will not rule on these two sections..." (Ibid.) However, in <u>Doogan</u> an attempt to regulate the apportionment of costs for crossing protection by franchise was at issue and found to be void. (76 CPUC at p. 757 where Sections 217 and 218 of the county ordinance were found to be void. See also discussion at pp. 748-49.) While public policy may favor the resolution of individual cases by contractual agreement it does not support the ousting of the Commission's exclusive jurisdiction over grade crossings by local franchise provisions.

Southern Pacific contends that Section 23 of Ordinance 83-18 is unreasonable because it does not name applicable federal agencies and ignores rights or obligations subject to federal preemption. That section provides that:

"Section 23: Conflicts. In furtherance of the rules, regulations and orders of the California Public Utilities Commission, said rules, regulations and orders shall govern whenever any conflict may exist between them and the ordinances, codes, rules and regulations adopted as prescribed by the City."

We find that if the appropriate federal agencies were added to the text, Section 23 would be reasonable.

Southern Pacific contends that Section 24 of Ordinance 83-18 is unreasonable. That section provides that:

"Section 24: Severability. To the extent that any provision hereof should improperly or invalidly impair any obligation of contract or any 'vested right', or be illegal, invalid or unconstitutional, in any fashion or as applied to any person or circumstance, then the same shall not apply so as to have any such effect and any such provision or application shall be deemed severable. It is the intent of the City Council in enacting this Ordinance to legislate within the bounds of its legal power and authority, and no further. It is the further intent of the City Council that the invalidity or inapplicability of any provision of this Ordinance to any person or circumstance, shall not affect other provisions or applications which can be given effect without the invalid provision or application, and to this end, each section, subsection, sentence, clause, phrase and provision of this Ordinance is declared to be severable. The invalidity of any provision of this Ordinance shall not abate, reduce, or otherwise affect any consideration or other obligation required of a franchisee of any franchise."

We do not fathom Southern Pacific's objection to this section. Unlike <u>Doogan</u> where the county sought to revoke the entire franchise if certain provisions were held to be void or invalid, Section 24 appears to be a standard severance clause which gives vitality to those provisions and applications held to be permissible.

As in <u>Lompoc</u>, the Commission will not attempt to draft an ordinance but require Southern Pacific to execute a properly drafted one.

"The Proposed Report does not attempt to draft an ordinance for Lompoc. It holds that various sections are invalid. Similar provisions were held to be invalid in prior Commission decisions. (So. Pac. Transportation Co. (1974) 76 CPUC 736, review denied January 29, 1975 SF 23191 and 23192; So. Pac. Transportation Co. (1975) 78 CPUC 593.) In view of the many invalid provisions of Ordinance 1067, the Proposed Report correctly holds that SP is not

required to execute a franchise containing these provisions but shall be required to execute one that Lompoc may hereafter enact, which is not in excess of its jurisdiction.

"'When, as here, a statute contains unconstitutionally broad restrictions and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction, the statute is void in its entirety regardless of whether it could be narrowly applied to the facts of the particular case before the court. The only way in which the statute now at issue could be limited to a proper scope with respect to the officials and employees of plaintiff city would be by reading into it numerous qualifications and exceptions, thereby performing a wholesale rewriting of the statute which the courts cannot reasonably be expected to undertake. (Bagley v Washington Township Hospital Dist., supra, 65 Cal. 2d 499, 508-509, and cases cited; Fort v Civil Service Com., supra, 61 Cal. 2d 331, 338-340.) We conclude that the statute is unconstitutional in its entirety. (City of Carmel-By-The-Sea v Young (1970) 2 C 3d 259, 272.) " (7 CPUC 2d at p. 237.)

No other points require discussion. The Commission makes the following additional findings and conclusions.

IV. Additional Findings of Fact

- 9. There are five crossings at grade with Southern Pacific's main line tracks in the area encompassed by Ordinance 83-18.
- 10. The following statutes confer jurisdiction in the Commission generally over all railroad operations. PU Code § 315, 556-57, 560-61, 581-84, 701-02, 706, 761-65, 767, 768-69, 7526 et seq. The following GOs were adopted pursuant to the authority of these statutes: GOS 22B, 26D, 33B, 36E, 72B, 75C, 88, 108, 110, 118, and 135.

- 11. Cal. Const. Art. XII, Sec. 6 and PU Code §§ 2101-2115 provide a comprehensive constitutional and legislative scheme for the enforcement of matters of statewide concern with respect to railroad operations.
- 12. Section 1 of Ordinance 83-18 would be reasonable if it applied only to tracks which are used and useful in Southern Pacific's operations or are being held for future use.
- 13. Section 23 of Ordinance 83-18 would be reasonable if it included appropriate federal agencies.
- 14. Sections 3, 4, 5, 8, 10, 12, and 21 of Ordinance 83-18 are not reasonable because they contain provisions which deal with matters which are solely or primarily within the jurisdiction of the Commission.
 - 15. Sections 11 and 24 of Ordinance 83-18 are reasonable.
- 16. It would be reasonable to require Southern Pacific to accept and execute a franchise with San Buenaventura which is not inconsistent with the findings and conclusions set forth herein.

V. Conclusions of Law

- 1. Regulation of railroads in California is a matter of statewide concern and not a municipal affair.
- 2. The Commission has primary and paramount jurisdiction over the construction and maintenance of railroad tracks which run longitudinally in city streets. The Commission has exclusive jurisdiction over grade crossings and railroad tracks at these crossings.
- 3. The perpetual franchise granted Southern Pacific in Ordinance 16 was superseded by the fixed term franchise in Ordinance 482 as the result of waiver and/or novation which resulted from Southern Pacific's applying for and accepting Ordinance 482.

- 4. PU Code § 7555 provides that no railroad corporation may use the streets of a municipality or any municipal land therein without the authorization granted by a two-thirds votes of the governing body of the city. Section 7555 also provides that a franchise or permit should be granted on reasonable terms and conditions unless the governing body finds that granting the franchise or permit would be detrimental to the public interest of the city.
- 5. Franchise conditions which are beyond the jurisdiction of a municipality and which deal with matters whose regulation has been placed solely or primarily within the jurisdiction of the Commission are not reasonable terms within the meaning of § 7555. In determining whether granting a franchise would be detrimental to the public interest of a city, the governing body cannot consider matters outside its jurisdiction.
- 6. Sections 3, 4, 5, 8, 10, 12, and 21 of Ordinance 83-18 are illegal, improper, void, and in excess of San Buenaventura's jurisdiction insofar as San Buenaventura seeks to apply them to a railroad corporation whose operations are a matter of statewide concern and whose regulation has been delegated to the Commission.
- 7. Sections 3, 4, 5, 8, 10, 12, and 21 of Ordinance 83-18 are illegal, improper, void, and in excess of San Buenaventura's jurisdiction insofar as San Buenaventura seeks to apply them to grade crossings which are within the exclusive jurisdiction of the Commission and the construction and maintenance of other railroad trackage which is within the primary jurisdiction of the Commission, each being a matter of statewide concern whose regulation has been delegated to the Commission.
- 8. Southern Pacific should be ordered to accept and execute a franchise which San Buenaventura may hereafter enact containing terms and conditions not in excess of San Buenaventura's jurisdiction.

9. Southern Pacific should be authorized to continue operations in San Buenaventura until such time as San Buenaventura enacts a franchise ordinance which does not contain provisions in excess of its jurisdiction.

ORDER

IT IS ORDERED that:

- 1. Sections 3, 4, 5, 8, 10, 12, and 21 of Ordinance 83-18 enacted by the City of San Buenaventura (San Buenaventura) are invalid. Southern Pacific Transportation Company (Southern Pacific) is not required to execute a franchise with San Buenaventura that contains these provisions.
- 2. Southern Pacific is authorized to operate and maintain its trackage in Southern Pacific until such time as San Buenaventura enacts a franchise ordinance which does not contain provisions in excess of its jurisdiction. At such time as San Buenaventura may hereafter enact a franchise ordinance which is not in excess of its jurisdiction, Southern Pacific shall accept execute and comply with the franchise.

3. The Commission retains continuing jurisdiction over this matter to make such further orders consonant with its jurisdiction to implement this decision and such further orders which may be necessary for the public safety, convenience, and necessity.

This order becomes effective 30 days from today.

Dated MAR 0 9 1988 , at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

100

STATE OF CALIFORNIA)
COUNTY OF VENTURA) SS
CITY OF SAN BUENAVENTURA)

I, BARBARA J. KAM, City Clerk of the City of San Buenaventura, California, do-hereby certify that the attached is a full, true and correct copy of:

City of San Buenaventura Ordinance No. 83-18: An Ordinance of the City of San Buenaventura Granting to Southern Pacific Transportation Company the Right to Maintain and Operate Railroad Tracks Over, Across, and Upon Front Street (Harbor Boulevard) and Across Other Streets

which is on file in my office and of which I am the legal custodian.

Dated this 17th day of May . 19 83.

Barbara J. C. Kam, CMC City Clerk

ORDINANCE NO. 83-18

AN ORDINANCE OF THE CITY OF SAN BUENAVENTURA GRANTING TO SOUTHERN PACIFIC TRANSPORTATION COMPANY THE RIGHT TO MAINTAIN AND OPERATE RAILROAD TRACKS OVER, ACROSS, AND UPON FRONT STREET (HARBOR BOULEVARD) AND ACROSS OTHER STREETS

The Council of the City of San Buenaventura does ordain as follows:

Section I: Nature and Extent of Grant. That subject to each and all terms and conditions contained in this Ordinance and in other ordinances and regulations of the City of San Buenaventura (herein called "City"), the right, privilege and franchise be and the same is hereby granted to Southern Pacific Transportation Company, a corporation, (herein called "Grantee") its successors and assigns, to construct, install, maintain, replace, retain and operate, for a period of twenty-five (25) years, commencing on August 20, 1978, and ending at 12:01 a.m. on the 20th day of August 2003, standard gauge railroad tracks and to operate a railroad for the transportation of persons and property over such tracks, upon, over, and across streets and public property in the City of San Buenaventura at the locations described in Exhibit "A" attached hereto and made part hereof.

Section 2: Limitation Upon Grant. Nothing herein contained shall be construed as impairing the right of the City of San Buenaventura to apply to the Public Utility Commission, or other similar body of the State of California, for an order requiring the company to install road crossing gates or other proper warning signals, or to require the observance by the grantee hereof of any lawful regulation, including, but not limited to, those pertaining to the speed of trains, ringing of bells, or blowing of locomotive whistles.

Section 3: Continuous Welded Rail. Pursuant to prior promises of grantee and its officers, employees, and agents, continuous welded rail shall be installed by grantee between the crossings of Lemon Grove Overpass and Garden Street, excluding the area within crossings if grantee so chose. The installation of said continuous welded rail shall be phased as follows:

- (a) The area from Kalorama Street to Garden Street is to be installed prior to December 31, 1984, and
- (b) The balance of the installations is to be installed prior to December 31, 1985.

All fixtures and things to be constructed by grantee hereunder shall be maintained as provided by lawful governmental authority as may have jurisdiction in the premises; and willful failure and neglect of the grantee hereunder to observe all the requirements of such standard, after reasonable notice requiring it to observe the same shall be a ground for the review of this franchise and of all rights, privileges and benefits accruing to the grantee hereunder, said review being pursuant to section 20 hereof.

Section 4: Reservation of Certain Rights. The privilege granted by this franchise does not limit or affect the right and power of the City or its permittees or franchisees to construct, install, maintain, repair, renew, operate, use or remove proprietary properties in any public street, provided that any such work shall not unreasonably interfere with the use of any existing tracks in such public street. Grantee shall be notified of any such proposed construction and afforded an opportunity to be heard thereon.

Section 5: Changes Required by Public Improvements. The grantee shall at its expense, protect, support, temporarily disconnect, relocate in the same street, or remove from any street any franchise property when required by the City by reason of traffic conditions, public safety, change or establishment of street grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity, provided that all such work required by this section shall be subject to federal and state laws and standards when and as applicable;

provided that grantee shall have the privileges and be under the obligations as are provided elsewhere herein; provided, however, that with respect to franchise property within a state freeway which was not a state highway at the time such franchise property was originally installed therein, the obligations of the grantee shall be as provided by applicable law and by such agreements between the grantee and the state as may be applicable thereto.

This section shall have no application to any grade separation project as to which cost allocation provisions of any statute of the State of California might otherwise be applicable.

Section 6: Indemnification. It is understood and agreed that heither the City, nor any officer or employee thereof, is responsible for any damage or liability occurring by reason of anything done or omitted to be done by the grantee under or in connection with any work, authority or jurisdiction delegated to the grantee under this Ordinance and Agreement. It is also understood and agreed that the grantee shall fully indemnify and hold the City harmless from any damage or liability occurring by reason of anything done or omitted to be done by the grantee under or in connection with any work, authority or jurisdiction delegated to the grantee under this Ordinance and Agreement.

It is understood and agreed that neither the grantee, nor any officer or employee thereof, is responsible for any damage or liability occurring by reason of anything done or omitted to be done by the City under or in connection with any work, authority or jurisdiction delegated to the City under this Ordinance and Agreement. It is also understood and agreed that the City shall fully indemnify and hold the grantee harmless from any damage or liability occurring by reason of anything done or omitted to be done by the City under or in connection with any work, authority or jurisdiction delegated to the City under this Ordinance and Agreement.

Section 7: Interpretation of Franchise. Time is of the essence of this franchise. By accepting or permitting performance of any obligation due from the grantee under this franchise after the due date thereof, the City shall

not waive or bar its right to require prompt performance when due of all other obligations of the grantee arising under this franchise.

Each power, right or privilege reserved to or provided for the City, herein or by law, and each duty or obligation upon the grantee, provided herein or by law, is independent, cumulative and additional.

Section 8: Rights Reserved to City. There is hereby reserved to the City every right and power which is required to be herein reserved or provided by any legal provision of the Charter of the City or ordinances, rules or regulations of the City, including but not limited to provisions relating to street work, street excavation permits, or use, removal or relocation of franchise property, and the grantee by its acceptance of this franchise agrees to be bound thereby and to comply with any action or requirement of the City in its exercise of any such right or power.

Neither the granting of this franchise nor any provision hereof shall constitute a waiver or bar to the exercise of any right or power which irrespective of this franchise heretofore could have been or hereafter may be exercised by the City.

The rights of the City to review this franchise as. provided in this ordinance are in addition to all other rights and remedies which may otherwise accrue to the City by reason of any failure or refusal of the grantee to comply with any provision hereof.

Section 9: Construction Period. In the event that the installation, construction, reconstruction, presence, or operation of grantee's franchise property shall make necessary the construction or installation of any drainage facilities, the alteration of any street improvement, or the alteration or relocation of any physical property theretofore in place in any street, the grantee shall promptly perform such work and restore said street.

Section 10: Obstruction of Crossings. In furtherance of the rules, regulations and orders of the California Public Utilities Commission, the grantee shall never suffer or permit any car or engine to stand upon or obstruct any open or traveled street or track for a longer period than set forth

in General Orders of the Public Utilities Commission of the State of California.

Section 11: Consideration and Expense.

- A. The grantee, by the acceptance of this franchise, hereby agrees to pay to the City of San Buenaventura the sum of Nineteen Thousand Five Hundred Seventy-Five Dollars and Ninety-Seven Cents (\$19,575.97) and the expenses necessary for the publication of this ordinance in the manner required by law.
- B. In August of each year, beginning in 1983, the grantee shall pay to the City for each track in place the preceding January 1, the sum of .283 cents per foot for each foot or fraction thereof, as measured along the center line of the track and within a City street or City property as payment for that fiscal year (i.e., August 1983 payment shall be for fiscal year July 1, 1983-June 30, 1984). The annual payment accruing to the City shall be increased or decreased by the same percentage difference that the final "producer price index-all commodities" (1967 = 100) for that year varies from the level in 1967 of 100. Checks shall be made payable to the City Treasurer.
- C. Should any payment required not be made within the time provided therefor, the grantee shall further pay interest on any such amount due at the rate of one and one-half-percent per month from the last day of the franchise payment period for which said payment was due.
- D. Additionally, no further annual charges will be made after July 1, 1978, by Southern Pacific Transportation Company for future or existing agreements between the parties hereto, including the following described easements:
 - a) Lease Audit No. 69823, July 25, 1972, for 6-inch, 8-inch and 12-inch water lines, Casitas Vista Road between Mile Posts 398_0 and 402.4, Deed No. 3197.
 - b) Lease Audit No. 145998, January 1, 1965, for a 2-inch water line, Bridge No. 396.87 (Hobo Jungle), including the reinstallation thereof.

- c) Lease Audit No. 66707, March 11, 1937, for a 24-inch reinforced concrete pipe.
- d) Lease Audit No. 164343, August 3, 1970, for a private road crossing, Hobo Jungle.
- e) Agreement, October 18, 1926, for one 10-inch and two 12-inch cast iron sewage pipes, Engineer's Stations 2735+40.20, 2752+57 and 2707+00.
- f) Agreement, July 15, 1926, for an 8-inch water line at Engineer's Station 2706+15, Ocean Avenue.
- g) Agreement, August 1, 1925, for a 6-inch water line, Engineer's Station 2725+65.
- h) Agreement, May 1, 1925, for a 14-inch water line, Engineer's Station 18+14.
- i) Agreement, August 1, 1924, for a 10-inch water line, gravity flow, Engineer's Station 307+45.
- j) Lease Audit No. 1040270 and Lease Audit No. 184569, June 19, 1978, for the Saticoy sewer pipeline crossing.
- k) Donlon Plaza Storm Drain Easement.
- 1) Lease No. 094856 for sewer pipe.

With respect to said described easements, City will notify grantee upon removal of said facilities from service.

Section 12: Reservation. This franchise is granted subject to reservation to the City of San Buenaventura of all the rights and powers and subject to the provisions of Article XIV of the Charter of the City of San Buenaventura

and is also granted subject to the State Constitution, and the right is reserved to review this franchise pursuant to section 20 hereof for noncompliance with any of the conditions thereof.

Section 13: Failure to Discharge Obligations. Upon failure of the grantee in the discharge of any obligation under this Ordinance, to promptly maintain or repair street pavement, or other street improvement, or to remove any abandoned track and to restore improvements after receipt of written notice from the City, the City may do such work and the grantee shall reimburse the City therefor within ten (10) days after receipt of the statement of the City's expense.

Section 14: Taxes and Possessory Interest Taxes.

Grantee shall pay and be solely responsible for any taxes, including possessory or other leasehold interest tax that may be assessed by reason of this franchise and grantee's occupation of the premises. Pursuant to Revenue and Taxation Code section 107.6, grantee is hereby informed that a possessory interest subject to property taxation may be created by this Ordinance and that the party in whom the possessory interest is vested (grantee) may be subject to the payment of property taxes levied on such interest.

Section 15: Acceptance. This franchise shall not become effective until the grantee has filed written acceptance with the Clerk of the City Council within ninety (90) days after the granting of this franchise, agreeing to abide by the terms and conditions of this permit.

Section 16: Abandonment. The franchise shall be considered abandoned upon grantee's formal notification of said change of status by the Interstate Commerce Commission. Grantee shall, in the event of such abandonment, either:

1) Commence within ninety (90) days hereof and promptly pursue to completion the removal from the street or other public place of all abandoned property and the reconstruction and restoration of the street and other street improvements affected

by such removal, provided that all of said work shall be performed in accordance with City standards for street construction and under the supervision of the City Engineer: or

2) Authorize the City to remove all abandoned property located within a City street or other public place provided that such removal and the restoration of the street and any other affected property shall be completed at grantee's expense.

Section 17: Transfer of Franchise. The franchise is not transferable except on the condition that the transferee shall take subject to the terms and conditions of this Ordinance. By acceptance or causing the transfer of the franchise or operations thereunder, the transferee agrees to be bound by the terms and conditions of this Ordinance.

Section 18: Permits. The grantee shall not commence any work under the franchise until it shall have obtained such permit as may be required governing excavations in, and other work in and upon, the public streets of the City, and said work shall be performed in accordance with the current City adopted "Standard Specifications for Public Works Construction". This section does not apply to routine maintenance of track or the street or pedestrian way surface within two feet of the outer rail of track.

Section 19: Construction. The work of erecting, constructing, laying, replacing, repairing, or removing facilities authorized under the franchise in, upon, over, under, along or across any streets shall be conducted with as little hindrance as practicable to the use of the City streets for the purpose of travel, and as soon as the erecting, constructing, laying, replacing, repairing, or removing of any of said facilities is completed, all portions of the City streets which have been excavated or otherwise damaged thereby shall be replaced in as good condition as the same was before such work. All such work shall be protected as provided in the Manual of Warning Signs, Lights and Devices for Use in Performance of Work Upon Highways issued by the California Department of Transportatiom, Division of Highways. The grantee shall be responsible for, and shall save the City, its officers and

employees free and harmless from, all damages or liability or claims thereof or arising from any damage or injury suffered by any person by reason of any excavation or obstruction being improperly guarded during said work, or the failure of the grantee to properly perform, maintain or protect any phase of the work; except that the City shall be responsible for its own acts or omissions.

Section 20: Revocation of Franchise. The City Manager, upon any neglect, failure or refusal on the part of the grantee or its assigns to observe or comply with any of the terms or conditions of the franchise, may conduct a hearing to investigate the alleged breach. The grantee shall be afforded the opportunity to appear before the City Manager at such hearing. If the City Manager should find that a breach has occurred he shall report his recommendation to the City Council. The City Council may then, upon a two-thirds (2/3) vote, seek any remedy legally available.

Section 21: Apportionment of Costs by Contract. In furtherance of public policy to promote the settlement of cost apportionment by contract rather than regulation, if, either before or after the granting of a franchise, the grantee of such frnachise and the City or a public entity enter into a contract as to how the costs or expenses, or both arising from the erection or maintenance, or both, of warning or protective devices authorized or ordered by the public utilities commission of the state, or the permanent or temporary relocation of any facilities, shall be apportioned to or between the parties while such contract is in effect, the terms thereof shall control insofar as they may be inconsistent with any other provision of this Ordinance.

Section 22: Superseding Ordinance. This Ordinance shall supersede and replace Ordinance No. 984, dated August 12, 1957, granting a franchise to Southern Pacific Company and others.

Section 23: Conflicts. In furtherance of the rules, regulations and orders of the California Public Utilities Commission, said rules, regulations and orders shall govern whenever any conflict may exist between them and the ordinances, codes, rules and regulations adopted as prescribed by the City.

Section 24: Severability. To the extent that any provision hereof should improperly or invalidly impair any obligation of contract or any "vested right", or be illegal, invalid or unconstitutional, in any fashion or as applied to any person or circumstance, then the same shall not apply so as to have any such effect and any such provision or application shall be deemed severable. It is the intent of the City Council in enacting this Ordinance to legislate within the bounds of its legal power and authority, and no further. It is the further . intent of the City Council that the invalidity or inapplicability of any provision of this Ordinance to any person or circumstance, shall not affect other provisions or applications which can be given effect without the invalid provision or application, and to this end, each section, subsection, sentence, clause, phrase and provision of this Ordinance is declared to be severable. The invalidity of any provision of this Ordinance shall not abate, reduce, or otherwise affect any consideration or other obligation required of a franchisee of any franchise.

Section 25: This Ordinance shall take effect on the 31st day following its final passage and adoption.

PASSED AND ADOPTED this 9th day of May . 1983.

Mayor

ATTEST:

EXHIBIT "E"

STATE OF CALIFORNIA COUNTY OF VENTURA CITY OF SAN BUENAVENTURA

I. BARBARA J. KAM. City Clerk of the City of San Buenaventura, do hereby certify that the above and foregoing Ordinance was passed and adopted by the City Council of said City at a regular meeting thereof, held on the 9th day of May , 1983 by the following vote, to wit:

AYES:

Councilmembers Sullard, Longo, Chaudier,

Henson, Monahan, Orrock, and McWherter.

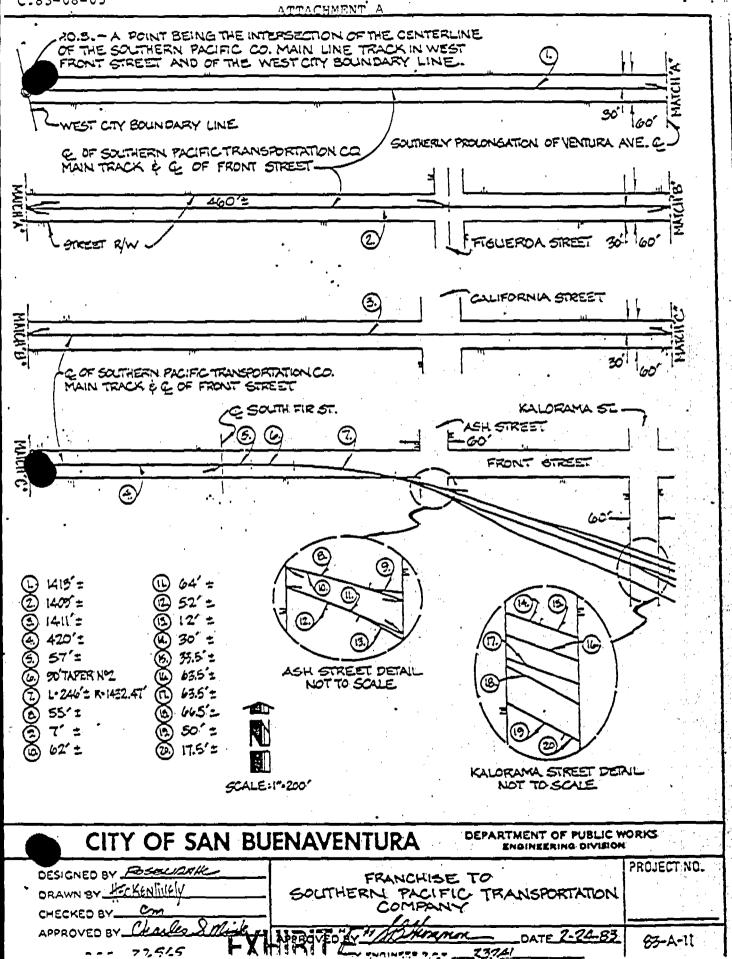
NOES:

None.

ABSENT:

None -

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this 10th day of May



Decision	
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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CITY OF BUENAVENTURA,

Complainant,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Defendant.

Case 83-08-05 (Filed August 10, 1983)

Donald S. Greenberg, City Attorney, by

Michael R. Dougherty, Asst. City

Attorney, and Kenneth G. Makature,
Deputy City Attorney, for City of
San Buenaventura, complainant.

William E. Still and Anthony P. Parrille,
Attorneys at Law, for Southern Pacific
Transportation Company, defendant.

OPINION

This is a complaint by the City of San Buenaventura (San Buenaventura) against Southern Pacific Transportation Company (Southern Pacific). San Buenaventura seeks an order (1) requiring Southern Pacific to accept a franchise as a condition of its continued operation within San Buenaventura and (2) requiring Southern Pacific to pay back franchise fees and current and future ones.

A duly noticed public hearing was held in this matter before Administrative Law Judge (ALJ) Donald C. Meaney in San Francisco on April 16, 1984. Submission was deferred pending receipt of briefs and successive stipulations by the parties. ALJ Meaney having left the employment of the Commission, the matter was reassigned to ALJ Donald B. Jarvis.