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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Fairfield,)
 a municipal corporation, for a time)
 extension for the completion of a)
 grade separation of State Highway 12)
 over Southern Pacific Transportation)
 Company's tracks, crossings)
 Nos. A49 and A49.1, in the City of)
 Suisun, County of Solano.)

Application 84-06-083
(Filed June 26, 1984)

William L. Owen and Susan Hamlin, Attorneys at Law, and Thomas Haas, Attorney at Law, for the City of Fairfield, applicant.
Harold S. Lentz, Attorney at Law, for Southern Pacific Transportation Company, protestant.
Roy Evans, for the Transportation Division Staff.

OPINION ON LIMITED REHEARING

Decision (D.) 90133, dated March 27, 1979, in Application (A.) 58662 authorized the City of Fairfield (the city) to construct State Highway 12 and a separate pedestrian crossing at separated grades over the railroad tracks of Southern Pacific Transportation Company (SP) in the City of Suisun, Solano County. SP was not a party in A.58662.

Referring to the project for which authority was sought to construct in A.58662, D.90133 recites as follows:

"The priority list of grade separation projects for the fiscal year 1978-79, as set forth in Decision 88956, shows this project as Priority No. 10."

As Project No. 10 on that list, the city estimated the cost of the project to be \$6,975,000. There was no estimated cost of the project recited in A.58662.

The Findings, Conclusions, and Order of D.90133 in A.58662 are as follows:

FINDINGS

- "1. Applicant should be authorized to construct State Highway 12 and a pedestrian crossing at separated grades over the tracks of Southern Pacific Transportation Company in the City of Suisun, Solano County, at the location and substantially as shown by plans attached to the application, to be identified as Crossing Nos. A-48.9-A and A-49.0-AD, respectively.
- "2. Upon completion of the overheads, applicant should close and physically remove the existing Union Avenue and Rio Vista Road grade crossings, identified as Crossings A-49.0 and A-49.1, respectively.
- "3. Clearances should be in accordance with General Order 26-D.
- "4. Walkway areas should conform to General Order 118. Walkway areas adjacent to any trackage subject to rail operations should be maintained free of obstructions and should promptly be restored to their original condition in the event of damage during construction.
- "5. Construction and maintenance costs should be borne in accordance with an agreement to be entered into between the parties relative thereto, and a copy of the agreement, together with plans of the crossing approved by the Southern Pacific Transportation Company, should be filed with the Commission prior to commencing construction. Should the parties fail to agree, the Commission will apportion the costs of construction and maintenance by further order.
- "6. Applicant is the lead agency for this project pursuant to the California Environmental Quality Act of 1970, as amended.
- "7. The Commission is the responsible agency and has independently evaluated and assessed the lead agency's Environmental Impact Report.

- "8. The project may have significant impacts on the environment; however, mitigation measures should adequately offset the adverse impacts.

"C O N C L U S I O N S

"On the basis of the foregoing findings, we conclude that the application should be granted as set forth in the following order:

"O R D E R

"IT IS ORDERED that:

- "1. The City of Fairfield is authorized to construct State Highway 12 and a pedestrian crossing at separated grades over the tracks of Southern Pacific Transportation Company in the City of Suisun, Solano County, as set forth in the findings of this decision.
- "2. Within thirty days after completion, pursuant to this order, applicant shall so advise the Commission in writing.

"This authorization shall expire if not exercised within three years unless time be extended or if the above conditions are not complied with. Authorization may be revoked or modified if public convenience, necessity or safety so require."

No agreement and no copy of the plans of the crossing approved by SP were filed with the Commission prior to the city commencing construction of the project as required of the city, being the only party to the application, by Finding 5 and the last Ordering Paragraph 1 of D.90133.

A writing, termed an agreement, (Exhibit 2 in A.84-06-083), was signed by the city and SP on March 13, 1979 ostensibly to cover SP's contribution to the project. Part of Paragraph 1 of the agreement reads as follows:

"Said structure shall be constructed...in accordance with plans and specifications which shall be subject to the approval of Railroad."

The first paragraph of paragraph 5 of the agreement provided as follows:

"5. Upon completion of said structure, and in full discharge of its obligations under the California Grade Separation Act, Railroad agrees to contribute ten percent (10%) of the cost of that portion of said structure attributable to the presence of the railroad facilities, as provided for in Section 1202.5(B) of the California Public Utilities Code. The limits of the project in which participation by Railroad is required shall be between Jackson Street and Rio Vista Road, as shown on attached print. Railroad shall not participate in any portion within said limits that is not necessary to make the grade separation operable."

The print referred to in the above quotation is a scale drawing of an aerial view of the project.¹

The second paragraph of Paragraph 5 of the agreement begins as follows:

"The cost of that portion of the structure to which Railroad shall contribute is estimated at Six Million Four Hundred Seventy-four Thousand Dollars (\$6,474,000). Railroad's ten percent (10%) contribution will be calculated when the actual final costs of the project are known..."

As matters turned out, the ultimate cost of that portion of the structure to which SP would contribute, as figured by the city, was approximately \$15,078,788, or more than \$8.6 million in excess of the \$6,474,000 estimate set out in the agreement. SP balked at

¹ The preliminary project plans attached to A.58662 requesting authority to construct the separation and the print attached to the agreement are consistent and show the same project limits and boundaries, namely, between Jackson Street and a point on Rio Vista Road just south of a water tank.

its share based on the \$15,078,788 figure and the city has sued SP in court for recovery based on that figure (Solano County Superior Court No. 99185).

The agreement was not conditioned on Commission approval of the project and contained no time limit or expiration date.

In the case at hand--A.84-06-083, filed June 6, 1984--the city requested an extension of time to finish up the virtually completed project.² SP protested the application on the grounds that the project as built was not the project authorized by D.90133; that the authorization for the project had expired so there was nothing to extend; and that the city had not met the condition of filing the agreement and SP approved plans prior to commencing construction.

By letter dated August 10, 1984, in order to avoid potential liability problems, at the suggestion of the Commission staff, SP consented to issuance of an ex parte interim order permitting the separation as built to remain in place and be completed on the condition that this consent would not restrict SP's right to pursue its contentions and would not prejudice SP in any way. This consent was reduced to formal written stipulation which was sent to the Commission by letter of March 18, 1985. It was sent by the attorney for the city, signed by the attorneys for both parties, and specifically stated that "the parties further stipulate that any such interim order, if issued, shall not prejudice the right of any party to assert or raise any contention or issue which could have been or may be properly raised in this proceeding." The Commission then issued its D.85-06-100 on June 5, 1985 an interim opinion and order allowing construction of the separation to be completed and remain in place pending further

² The time limit specified in the last ordering paragraph of D.90133 for completion of the project was extended by Commission Resolution. Such time limit extension, however, had run out by the time A.84-06-083 was filed.

order of the Commission, and the Commission specifically stated:
"This order shall not prejudice the right of any party or Caltrans to assert or raise any contention or issue which could have been or may be properly raised in this proceeding."

Ex parte D.86-07-023 was issued in A.84-06-083 but was modified on rehearing by D.86-10-061 effective October 16, 1986. The Findings of Fact, Conclusions of Law, and Order in D.86-07-023 as modified by D.86-10-061 are as follows:

"Findings of Fact

- "1. No one has filed final plans for the construction of the project.
- "2. Deleted.
- "3. Deleted.
- "4. SP has not agreed to pay for any portion of any design changes not submitted to it in accordance with the agreement and with D.90133.
- "5. It is undisputed that neither public safety nor any other public interest require additions or modifications to the structure as built.
- "6. It is not disputed that City and Caltrans have agreed that City should bear any costs of this project which might otherwise be allocable to Caltrans.
- "7. Deleted.
- "8. Granting final authorization to construct will not complicate either negotiations or hearing costs.

"Conclusions of Law

- "1. The project, as built, should be retroactively authorized by a final unconditional order.
- "2. The authorization should be issued now without delays for hearing or agreement on allocation of the costs.
- "3. Deleted.
- "4. Deleted.

- "5. Deleted.
- "6. Deleted.
- "7. Refusing to join Caltrans as a party will not limit the Commission's power to issue an order disposing of all issues. Caltrans should not be compulsorily joined.
- "8. Cost allocation should be accomplished by agreement between the railroad and responsible public agency.
- "9. City had the burden of pleading that SP had an opportunity to review any changes in plans from those presented to the Commission with A.58662, and of filing a copy of the approved plans. Failure to file a copy of the plans constitutes the failure of a condition to the City's authority to construct.
- "10. The effective date of this order should be 60 days from today to allow negotiations for a cost allocation agreement.
- "11. SP was not prohibited by our Rules of Practice and Procedure from contending that:
 - "a. City's authority to construct had been terminated by failure to comply with a condition, or that
 - "b. There was a dispute over whether part of its obligation to pay was governed by a Section 1202.5 contract or by another provision of that section.

"O R D E R

"IT IS ORDERED that:

- "1. The City of Fairfield (City) is authorized to construct State Highway 12 and a pedestrian overpass at separated grades over the tracks of Southern Pacific Transportation Company (SP) in the City of Suisun, Solano County, to be identified as Crossing A-48.9-A. Upon completion of the structure, City shall close and physically remove Crossings A-49.0 and A-49.1. All clearances shall comply with General Order 26-D, and walkways with General Order 118.

- "2. Within 30 days after the signing of this order or after completion of the project, City shall serve and file in Application 58662 the plans of the crossing as built, together with an itemization and total of all construction costs, and a projection of annual maintenance cost. Such filing shall serve as a record of specific cost items authorized by this decision and by Decision 90133.
- "3. The authorization granted in Ordering Paragraph 1 is final, except that it may be revoked or modified if public convenience, or necessity, or safety so require. All conditions set forth in Decision 90133 are revoked when this order becomes effective.
- "4. Allocation of construction and maintenance costs shall be made as provided in Section 1202.5(h). If SP and City are unable to agree upon the amount in dollars to be contributed by SP, either of them has the right to request that A.58662 be reopened to apportion costs. SP shall file a copy of any supplementary or novated agreement concerning construction and maintenance costs in A.58662.
- "5. SP's motion to join the California Department of Transportation is denied."

Ordering Paragraph 2 of D.86-10-061 provided as follows:

- "2. Rehearing is granted, limited to the legal and factual issues pertaining to allocation and maintenance costs of the subject project:"

The limited rehearing was held in San Francisco in January, 1988 and the case submitted April 4, 1988 upon the filing of briefs.

Following are excerpts from a letter dated November 8, 1983 from Roland L. Hurlbut, Director of Public Works (DPW) of the city, to SP explaining the reasons for the difference between the original estimate and the alleged approximate \$15 million actual cost:

"The Highway 12 Bypass project was originally conceived by the City as a highway facility with a design speed of 45 to 55 mph. Original cost estimates were made with this concept. During the final design phase of the project, and as more data became available on traffic safety and

volumes, Caltrans required that the project be designed to freeway standards. The project was therefore designed for speeds of 65 mph for horizontal control and 55 mph for vertical control. This decision had a significant impact on the final cost of the project as summarized below:

- "1. The length of the project was increased by approximately 700 feet at the easterly end, terminating at the existing Highway 12 - Marina Boulevard Intersection.
- "2. Import Fill. There was a substantial increase in the amount of import required due to the increase in the design speed.
- "3. Utility Relocation. The expansion of the project affected some major utilities not originally anticipated to be relocated, most of these belonging to P.G.&E.
- "4. Drainage Facilities. Project geometry required reconstruction of major drainage facilities which were not originally included in the project.
- "5. Right-of-Way. The increase in the length of the project required an increase in the acreage as well as an increase in the individual number of parcels affected. In addition, appraisals of the properties were higher than anticipated and in some instances severance damages were awarded which were unexpected.
- "6. Since freeway standards were being adhered to, Caltrans demanded administrative control of the project which added nearly \$2.1 million to the overall cost for construction engineering and right-of-way acquisition costs.
- "7. The general increase in scope redesign resulted in increased engineering design costs."

* * *

"In summary, the primary reasons for the large increase in the cost of the project are freeway design requirements, which accounts for seventy-five percent of the increase, and the remaining twenty-five percent being attributed to inflation. We maintain that the 16 million figure represents only eligible costs. As a further suggestion it may be beneficial to have a meeting with the

interested parties: Southern Pacific, Caltrans, P.U.C. and the City of Fairfield."

The testimony of the Assistant Director of Public Works (ADPW) for city at the hearing differed somewhat from the statements in the letter. He testified that if the project had been built as originally proposed, it would have cost between \$13 million and \$14 million. He also testified that the original design was operable and that the extra 700 feet in the length of the project was not due to the presence of railroad facilities and was outside the limits of the project qualifying for railroad contribution. The extra 700 feet, he said, accounted for approximately 50% of the difference between the original estimate and the \$15,078,778 final cost. He stated that a large percentage of the increased cost was due to drainage requirements imposed on the project.

The city testified that after D.90133 became effective, the city submitted construction plans covering each phase of construction to SP prior to commencing construction of the phase according to the plans as submitted.

In preliminary negotiations leading to the agreement, the city's consulting engineers sent SP a letter dated December 20, 1978 along with plans similar to those attached to A.58662. The engineer's estimated cost of the project was \$6,474,000.

SP contends that the overpass as envisioned by the original plans accompanying A.58662 was operable.

SP argues that all costs in excess of the estimated figure for the project should be viewed as the cost of an unauthorized second project. Since D.90133 had expired before A.84-06-083 was filed and D.86-07-023 gave authorization for a project in July, 1986 at the time when the two at-grade crossings had been closed, the second project was merely a reconstruction or upgrade of the initial project and did not result in the elimination of an existing grade crossing. Without the elimination

of a grade crossing PU Code Section 1202.5(a) would be applicable and relieve SP from any obligation to contribute toward costs in excess of the estimated figure.

SP also argues that while the city did submit engineering plans to SP for approval, prior to the construction of individual portions of the project, it did not submit any estimated cost figures with the plans. Neither the city nor Caltrans informed SP of the increased cost of the project until it was almost finished.

The city contends that it submitted all designs to SP for approval as required by the agreement and SP expressed its approval of all the designs submitted. The city further contends that SP is obligated, both under the agreement and under PU Code Section 1202.5, to contribute 10% of the cost of the grade separation project. The city points that this 10% contribution is to be calculated, according to the agreement, when actual final costs are known. The city contends that the final cost of the project less that portion of the project west of Jackson Street equals \$15,078,788, and SP's 10% contribution equals \$1,507,879. Furthermore, the city contends that this is essentially a breach of contract dispute and the Commission lacks jurisdiction to decide breach of contract disputes. City cites PU Code Section 1203 and Ashley v Railroad Commerce (1922) 188 Cal. 234. Lastly, city contends that even in the absence of any agreement, PU Code Section 1202.5 requires payment of 10% by SP.

Discussion

In D.90133, we approved an overpass project as shown by the plans attached to A.58662. Those plans showed that the overpass we approved extended easterly to a north-south line equivalent to the north-south water tank line shown on the print marking the eastern limit of SP's participation. The print was attached to and made a part of the agreement and is consonant with the plans attached to the application. Thus, the city entered into

an agreement which did not envision in any respect SP contributing anything to the project east of the north-south water tank line.

According to PU Code Section 1202.5(h), an agreement entered into between a public agency and a railroad apportioning costs of a grade separation must be recognized as valid for all purposes.³ Since the agreement only requires SP to contribute to the construction cost within physical limits as defined in the agreement, the city or the Commission cannot require SP to contribute any percentage of the cost of the construction east of the north-south water tank line. PU Code Section 1202.5(h) applies alike to the city as well as the Commission.

The ADPW testified that half of the increased cost of the project, \$4,302,389, resulted from the 700-foot extension eastward. This means that the cost of construction to which SP is required to constitute according to the agreement is only to the cost of the project which lies between Jackson Street and the north-south water tank line, which is \$10,776,389 (\$15,078,788--\$4,320,389).

SP was timely furnished copies of the upgraded engineering plans covering the construction between Jackson Street and the north-south water tank lines. The possession of these changed plans should have made SP aware of the substantial changes from the initial plans and spurred SP then to take such action as it saw fit if it disagreed that such construction was not covered by the agreement.

3 PU Code Section 1202.5(h) provides as follows:

"No provision of this section or of the Public Utilities Code shall be construed as in any way limiting the right of public agencies or railroads to negotiate agreements apportioning costs of grade separations, and the validity of any and all such agreements is hereby recognized for all purposes regardless whether the method of apportionment prescribed therein conforms to the standards hereinabove prescribed."

We accept the agreement as being an agreement referred to in PU Code Section 1202.5(h) covering allocation of the project. Since the city agreed to require SP to contribute to the project only on the basis of the construction cost between Jackson Street and the north-south water tank line, it is limited to so doing.

There is nothing in PU Code Section 1202.5(h) which prohibits the parties from framing an agreement to include provisions which cover the contractual rights of the parties in situations such as this case. Where such matters arise, the parties should not look to the Commission to read into the agreement what the Commission thinks is a fair outcome. The validity of such an agreement must be recognized for all purposes and it is up to the parties to frame an agreement to take care of disputes such as we have in this case, for we are precluded from amending it to suit our hindsight view as to what we might think is fair or proper.

Comments to the Administrative Law Judge's Proposed Decision were received and their contents noted.

Findings of Fact

1. In D.90133 in A.58662, the Commission authorized the city to construct a highway and pedestrian overpass over the tracks of SP in the City of Suisun.
2. SP and the city entered into an agreement under PU Code Section 1202.5(h) apportioning the construction costs of the project, estimated in the agreement to cost \$6,474,000, wherein SP agreed to contribute 10% of the cost.
3. Per the agreement, the project was limited in physical scope to the work between Jackson Street and a point on Rio Vista Road just south of a water tank as shown on the print attached to the agreement and as shown on the preliminary plans submitted by the city attached to A.58662.
4. During the course of construction, the city upgraded the project from arterial to freeway standards.

5. The agreement provided that the overpass would be constructed "in accordance with plans and specifications which shall be subject to the approval of the Railroad."

6. Before each phase of construction, the city furnished SP with plans which showed that the structure as originally planned was to be modified.

7. Except in minor details, SP offered no objection to the modified plans.

8. After the highway overpass was built but before the pedestrian overpass was completed, the extended time limit to complete the project imposed by D.90133 expired.

9. This proceeding was filed by the city requesting further time to complete the pedestrian overpass as part of the project.

10. This proceeding was protested by SP.

11. Interim D.85-06-100 authorized the completion of the project.

12. D.86-07-023 cancelled all conditions in D.90133 and authorized the project as built.

13. City claims that SP's 10% contribution should be based on the alleged construction cost of \$15,078,788, which is the alleged cost of constructing the project from Jackson Street to a point 700 feet further to the east on Rio Vista Road than the north-south water tank line set forth as the eastern boundary in the agreement and in the plans attached to A.58662.

14. The city was shown to have attributed 75% of the increased cost of the project over the estimated cost to the upgrading of the project to freeway standards and 25% of the increase to inflation.

15. Half of the increased cost of the project, or \$4,302,389, resulted from the construction of the 700 foot extension east of the north-south water tank line.

Conclusions of Law

1. The agreement is an agreement contemplated by PU Code Section 1202.5(h).
2. The agreement applies to the project as built between Jackson Street and the north-south water tank line running across Rio Vista Road.
3. Construction costs resulting from the 700 foot extension easterly of the north-south water tank line should not be included in the apportioning of costs.

ORDER

IT IS ORDERED that the March 13, 1979 agreement between the City of Fairfield and Southern Pacific Transportation Company, so far as it applies to the cost of construction of the overpass between Jackson Street and a north-south line running from a water tank across Rio Vista Road as shown on the print attached to the agreement and the preliminary plans attached to Application 58662, shall be used as a basis of allocation of costs between the parties to the agreement.

This order becomes effective 30 days from today.

Dated AUG 10 1988, at San Francisco, California.

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

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


Victor Weiss, Executive Director

We accept the agreement as being an agreement referred to in PU Code Section 1202.5(h) covering allocation of the project. Since the city agreed to require SP to contribute to the project only on the basis of the construction cost between Jackson Street and the north-south water tank line, it is limited to so doing.

There is nothing in PU Code Section 1202.5(h) which prohibits the parties from framing an agreement to include provisions which cover the contractual rights of the parties in situations such as this case. Where such matters arise, the parties should not look to the Commission to read into the agreement what the Commission thinks is a fair outcome. The validity of such an agreement must be recognized for all purposes and it is up to the parties to frame an agreement to take care of disputes such as we have in this case, for we are precluded from amending it to suit our hindsight view as to what we might think is fair or proper.

Findings of Fact

1. In D.90133 in A.58662, the Commission authorized the city to construct a highway and pedestrian overpass over the tracks of SP in the City of Suisun.

2. SP and the city entered into an agreement under PU Code Section 1202.5(h) apportioning the construction costs of the project, estimated in the agreement to cost \$6,474,000, wherein SP agreed to contribute 10% of the cost.

3. Per the agreement, the project was limited in physical scope to the work between Jackson Street and a point on Rio Vista Road just south of a water tank as shown on the print attached to the agreement and as shown on the preliminary plans submitted by the city attached to A.58662.

4. During the course of construction, the city upgraded the project from arterial to freeway standards.