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Decision 92-09-067 September 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Ernest R. Heinzer & James W. Heinzer, )

Complainants,

vs.

Southern Pacific Transportation  
Company,

Defendant.

**ORIGINAL**

Case 91-06-026  
(Filed June 12, 1991)

James W. Heinzer, Attorney at Law (inactive),  
for Ernest R. Heinzer and himself,  
complainants.

John MacDonald Smith, Attorney at Law, for  
Southern Pacific Transportation Company,  
defendant.

Catherine Johnson, Attorney at Law, and Jack  
Rich, for the Commission Railroad Safety  
Branch.

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O P I N I O N

Statement of Facts

The Railroad Company

At the time relevant to this complaint, the Southern Pacific Transportation Company (SPT) operated the Southern Pacific system, including the Denver, Rio Grande and Western Railroad Company, St. Louis Southwestern Railroad Company, and SPCSL Corporation, in 15 states over 15,000 miles of track. As part of its ongoing business activity, SPT is divesting itself of property and facilities no longer required in its railroad transportation business in order to allow the liquidation benefits from such divestments to be used for transportation activities.

Old Main Line

Of interest in the captioned proceeding, within the City and County of San Francisco in past years SPT has provided rail freight service over a 2.22-mile segment of rail line locally known as "Old Main Line," trackage leading into the heart of the old warehouse area south of Market Street. The rail line segment extends from a main line junction just south of Tunnel 1 on SPT's Coast Line (Mile Post (MP) 1.27), along 7th and 16th Streets to the intersection of Rhode Island Street (MP 1.88); thence to Division Street (MP 2.16),<sup>1</sup> along Division and Harrison Streets (including

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<sup>1</sup> Over the 0.28-mile stretch of rail line between Rhode Island and Division Streets (MP 1.88 - MP 2.16), SPT has trackage rights over the underlying right of way owned by Showplace Properties, Showplace having succeeded to the interest of the former owner, the Western Pacific Railroad Company (WP) on June 17, 1988 (the assignment to Showplace having been made by the Union Pacific Railroad Company, which succeeded to all WP interests as a result of the merger approved in Union Pacific - Control - Missouri Pacific; Western Pacific (1982) 366 I.C.C. 459). SPT entered into

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track along Florida Street parallel to Harrison); thence southwesterly and diagonally through city block Harrison-Treat-22nd and 23rd Streets; across Treat Avenue, to terminate at 23rd Street in city block Treat-Folsom-22nd-23rd Streets (MP 2.81).

The area surrounding Old Main Line has been undergoing redevelopment, and adjoining properties once used as warehouses have been converted to retail and showroom facilities. In addition, there has been some residential intrusion.

Ernest A. Heinzer & Sons Company

Just before the terminal point of Old Main Line, the Heinzer brothers own and operate a wholesale furniture business from a 16,000-square foot, 2-story warehouse that includes office and showroom facilities at 933 Treat Avenue. Primarily involved with baby furniture in the past but of late moving toward adult furniture, the business has operated at this location since 1953. At the rear of their warehouse, the Heinzers own a 215-foot spur track (Spot 874) that connects with Old Main Line near the 22nd and Harrison Street intersection (see map, Appendix A). Since 1953, the Heinzers have received rail shipments under several formal Track Agreements with SPT.<sup>2</sup> However, these rail freight

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a 25-year trackage rights agreement with WP on March 19, 1982 for joint use of the subject line segment to allow SPT to continue to have a rail connection between its main line and its track serving customers in a light industrial area south of Market Street (SPT's own line being taken out of service and removed).

2 The current Track Agreement (dated August 20, 1981) places no requirement that Heinzer use any specific number of rail cars annually, but as relevant here provides "...this agreement at the option of Railroad shall terminate in the event that (a) industry shall cease to do business on said track in an active and

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deliveries declined to none by 1990 as Heinzers turned increasingly to motor freight for its deliveries. During the last several years, Heinzers allowed several neighbors, Surber & Associates and Western Plywood, to use its spur for their infrequent rail freight deliveries.

The Root Problem

Prior to 1990, Old Main Line carried a substantial volume of freight producing significant revenues for SPT,<sup>3</sup> although almost all the volume and revenue were attributable to one customer, the Best Foods Company. But on June 30, 1990, Best Foods closed its processing plant on Florida Street, and relocated it to Southern California, which dried up all but a trickle of rail traffic to others on Old Main Line. Apart from Best Foods, rail traffic in 1990 shrank to six carloads.

In the 1981 to 1988 period, the Heinzers' spur received approximately five to seven carloads of freight annually, culminating in seven in 1988 of which only five were to Heinzers. In 1989, Heinzers received only one shipment (its last), although it allowed Surber & Associates to receive four. In 1990, Surber received four and Western Plywood two on the Heinzers' spur.

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substantial way for a continuous period of one (1) year, unless prevented from so doing by law, strikes or any causes beyond the control of industry;..."

3 For example, in 1988 SPT delivered 349 carloads over the line generating revenues of over \$565,000. And in the first five months of 1989, 157 carloads were carried generating about \$290,000. But of these, 291 tank cars in 1988 and 119 in the first five months of 1989 were delivered to customer Best Foods on the Florida Street part of Old Main Line.

SPT's Reaction to Cessation of Volume and Revenue

With the departure of Best Foods and reduction to a trickle of remaining Old Main Line traffic, SPT determined to obtain authority to abandon the branch line. With no prospect of significant future rail traffic and considering the poor condition of the trackage, buried as much of it is in street pavements, SPT concluded that expenditure of maintenance money to restore or keep the line in service was not warranted.<sup>4</sup> Continued operation on a limited scope would also encumber 2.19 acres of property (for which SPT claims to hold marketable title) for little rail usage. Valued at \$3,525,000, these SPT properties are desirable to developers with projects adjacent to the Old Main Line right-of-way.<sup>5</sup>

Early in 1991, SPT sought to have Heinzers agree to a voluntary termination of the August 20, 1981 Track Agreement. Heinzers refused and demanded that rail service continue to be made available to its spur, for its own use and for Surber & Associates'

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4 As long as the line produced significant traffic, SPT resisted efforts made to cause it to discontinue service on Old Main Line. For example, after Showplace Properties succeeded to WP's interest on that part of the line between the intersection of Alameda and Vernon and the intersection of 16th and Rhode Island, and in 1989 sought discontinuance of SPT rail service before the Interstate Commerce Commission (ICC), SPT successfully resisted the Showplace efforts (ICC Finance Docket No. 31486, Southern Pacific Transportation Company - Discontinuance of Service - In San Francisco County, CA (not printed), served September 12, 1989).

5 Because of vandalism, a murder, and vagrancy, the right of way between 22nd and Treat Street near 23rd has been closed off by fencing and railroad gates installed earlier by SPT (as permitted under the Industrial Track Agreement of August 20, 1981).

use.<sup>6</sup> On May 6, 1991, SPT refused, stating that it had exercised its contractual right to cancel the agreement because Heinzers had failed to do business on the track in an active and substantial way for a continuous period of one year; that the Harrison Street access track was not in service; that the potential traffic from Heinzers did not warrant any expenditure for track rehabilitation; that SPT offered team track and intermodal alternatives; and that SPT would be willing to sell Old Main Line to Heinzers and provide rail service if Heinzers assumed the rehabilitation, maintenance, and liability exposure after such acquisition. Subsequently, SPT offered to sell the 1.4-mile segment of rail line needed to reach Heinzers' spur for a net liquidation value of \$3,525,000 plus \$11,950 for the track materials. SPT on June 6, 1991 also advised Heinzers it intended processing the line for abandonment with the ICC; that to continue service to Heinzers would require SPT to subsidize Heinzers' business with revenues from other customers, a concept, SPT stated, rejected by Congress when it enacted the Staggers Rail Act of 1980.

The Heinzers' Complaint

On June 12, 1991, in what appears to have been an attempted preemptory move in reaction to SPT's stated intention of filing for abandonment with the ICC, the Heinzers filed the captioned complaint with this Commission. By it they ask that the Commission find that SPT's refusal to provide further rail freight service to Heinzers' spur is not justified; that proper notice pursuant to provisions of Public Utilities (PU) Code § 7532.5 was never given Heinzers; and that it has been SPT's systematic policy

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<sup>6</sup> Heinzers stated that in November of 1990 SPT denied a Surber & Associates' request to make a carload delivery to the Heinzers' spur. The delivery was completed by unloading at an SPT team track in the vicinity of 7th and Townsend Streets - but not to the Heinzers' spur.

to destroy Old Main Line's profitability so that SPT could terminate the rail service and sell off the right-of-way real estate.

The Heinzers ask this Commission to declare Old Main Line an "active right-of-way," arguing that it has been converted into something similar to a spur track, and thus outside of ICC jurisdiction. They ask that SPT be ordered to immediately restore service to the Heinzers-owned spur at the end of Old Main Line. In the alternative, the Heinzers ask that the Commission require SPT to sell that portion of the Old Main Line right-of-way within the Heinzers' block to the "affected parties" at a "reasonable price."

In answer, SPT asserts that the Commission has no jurisdiction over Old Main Line and, therefore, cannot consider the Heinzers' requests and should dismiss the complaint. SPT points out that in 1989 the ICC asserted its jurisdiction over that branch line of its system,<sup>7</sup> and that the ICC has exclusive and plenary jurisdiction over abandonments and rail service on so-called main or branch lines of railroad lines that are designed and used for continuous transportation service between points of shipment and delivery. With reference to the requirements of PU Code § 7532.5, SPT states that it is on its face applicable only to intermodal facilities. In that the Heinzers received only direct carload service, shipper to consignee, over Old Main Line, SPT asserts that the PU Code § 7532.5 requirements are not applicable. SPT surmises that the Heinzers are more interested in rent-free use of SPT real estate for material storage and truck ingress and egress to their buildings than in active rail service. Finally, SPT accuses Heinzers of forum shopping noting that the complaint was filed only after Heinzers were informed of SPT's intention to file an abandonment proceeding with the ICC.

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7 ICC Finance Docket No. 31486, supra note 4.



The Concurrent SPT-ICC Filing

On June 21, 1991, SPT filed with the ICC,<sup>8</sup> seeking an exemption from the requirements of 49 U.S.C. §§ 10903-10907 relating to the abandonment and discontinuance of main or branch railroad lines.<sup>9</sup> This was the ICC petition that SPT told the Heinzers on June 6, 1991 it would file to begin formal abandonment proceedings.

The November 19, 1991 Hearing before the PUC

On November 19, 1991, a duly noticed public hearing attended by the Heinzers, SPT, and the Commission's Railroad Safety Branch was held in San Francisco before Administrative Law Judge (ALJ) John B. Weiss. On the eve of this hearing, SPT filed a motion (November 15, 1991 filing) asking that the Commission take official notice of two ICC decisions rendered in its June 21, 1991 Docket No. AB-12 (Sub-No. 137X) abandonment filing before the ICC.<sup>10</sup> The first of these decisions with a service date of

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8 Docket No. AB-12 (Sub-No. 137X) Southern Pacific Transportation Company - Abandonment and Discontinuance of Trackage Rights Exemption - In San Francisco County, CA.

9 Under the requirements of the Interstate Commerce Act (49 U.S.C. §§ 10101 et seq.), a railroad may not abandon a rail line without prior ICC approval. But, for instances where application of the regulatory requirements and procedures set forth in 49 U.S.C. § 10903 and the ICC's regulatory procedures applicable thereto would involve unreasonable and disproportionate expense and administrative burden, Congress adopted 49 U.S.C. § 10505 which provides an exemption when the ICC finds that application of the former is not necessary to carry out federal transportation policy, and the service at issue is of limited scope or regulation is not necessary to protect shippers from the abuse of market power.

10 First, a decision with service date of November 12, 1991 (decided October 29, 1991) in the current docket filing with the ICC, and second, an earlier decision with service date of September 12, 1989 (decided September 7, 1989) in ICC Finance

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November 12, 1991 (but decided October 29, 1991) grants SPT the exemption provided under 49 U.S.C. § 10505, and permits abandonment.

SPT by its motion points out that the Heinzers appeared in the current ICC proceeding to oppose SPT and presented essentially the same facts and arguments as they present in the captioned proceeding. SPT points out that the Heinzers failed to persuade the ICC that Old Main Line was a spur, or that the fact that the Heinzers' spur connected to the Old Main Line served to convert Old Main Line to a spur. The ICC found that Heinzers already used motor freight primarily and nearly exclusively. It dismissed assertions of future increased use of rail freight as "speculative." It stated that the facts failed to establish deliberate SPT downgrading, finding that most shippers had just moved off the line.

Finally, citing Chicago & North Western Transportation Company v. Kalo Brick & Tile Company (1981) 450 U.S. 311 as holding that in rail abandonment of service cases, shippers cannot seek to defeat an ICC ruling authorizing abandonment of service by invoking conflicting state law remedies which also relate to rail service, SPT asked for dismissal of the complaint.

The effective date of the ICC exemption decision was subject to several possible procedural delays. First, a filing of a formal expression of an intent to file an offer to subsidize or purchase was open until November 22, 1991. Second, a petition to stay could be made until November 27, 1991. Third, a petition for

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unsuccessfully to force discontinuance of SPT rail service on Old Main Line during the time that Best Foods was still operating and providing heavy and profitable freight volume on Old Main Line.

reconsideration could be filed before December 9, 1991. And finally, actual offers of financial assistance (or to purchase) could be made until December 12, 1991.

The ALJ took official notice of the ICC decisions offered, and at the request of SPT, with concurrence of the Heinzers and the Railroad Safety Branch, took the matter off the calendar, to be held in abeyance before possible further proceedings pending administrative finality of the ICC decision in Docket No. AB-12 (Sub-No. 137X), or further ICC proceedings. SPT was instructed by the ALJ to notice the Commission and the parties of the ICC's actions and to furnish all parties with a copy of any further ICC orders that might issue.

The May 7, 1992 SPT Status Report

On May 7, 1992, SPT filed the Status Report previously requested by the ALJ. This report attached copies of three ICC procedural decisions issued after the October 29, 1991 ICC decision which had set up a procedural sequence of conditional delays to the effective date of the abandonment authority. Two of these ICC decisions are germane to our proceeding.

The ICC decision with a service date of March 3, 1992 dealt with Heinzers' opportunity to offer financial assistance or to purchase Old Main Line. Given the substantial disparity between Heinzers' \$11,950 offer to purchase (based on track and tie values less removal costs) and SPT's evidence of firm commitment offers of \$2.5 million plus \$450,000 (for the underlying right-of-way),<sup>11</sup>

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<sup>11</sup> The Heinzers' assignment of zero value to the underlying right-of-way is based on argument concerning quality of title. Some of SPT's deeds assertedly contained reversionary clauses that had the properties going back to heirs who had granted the rights-of-way to the railroad. But the California Marketable Record Title Act of 1982 (Civ.Code § 880.020) did away with those reversionary

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the Director of the ICC's Office of Proceedings<sup>12</sup> found that the Heinzers' offer failed to meet the standards of 49 U.S.C. § 10905(d) for purposes of instituting negotiations and that the Heinzers failed to show, with resources of \$53,562 available to them, that they were financially responsible or that their offer was bona fide and reasonable to initiate any negotiations.

On March 13, 1992, the Heinzers appealed the ICC Director's March 3, 1992 decision. Previously, on March 10, 1992, they had filed a pleading styled "Request for Administrative Law Judge Adjudication," requesting that the ICC transfer the Net Liquidation Value (NLV) issue to the California Public Utilities Commission (CPUC) for determination by a CPUC ALJ, and that this determination then be transferred back to the ICC for final disposition of the proceeding.

The ICC, with a decision bearing a service date of April 15, 1992, affirmed the Director's findings that the Heinzers' offer was not bona fide or reasonable, stating that on appeal the Heinzers continue essentially the same arguments regarding marketability of title considered by the Director; that they have not presented sufficient probative evidence that reversionary

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clauses, and the rights-of-way are now owned by SPT in fee simple. SPT provided the ICC with evidence of its deeds and documents showing that it can obtain title insurance. The ICC concluded that the Heinzers had not presented probative evidence that their theories concerning title to the underlying right-of-way have been subject to any judicial determination.

12 The Director of the ICC's Office of Proceedings under the delegation of authority at 49 C.F.R. § 1011.8 makes the initial determination whether an offer meets the standards for purposes of initiating negotiations. Appeals from his decision are acted upon by the entire Commission.

interests exist nor have they sufficiently supported their title defect theories to warrant initiation of negotiations. The ICC concluded that SPT's showing of its ability to obtain title insurance and its executed contract for the sale of part of the right-of-way for \$2.2 million constituted strong evidence of marketability of title and fair market value. Accordingly, the ICC denied the Heinzers' appeal of March 13, 1992 from the Director's decision, and also denied the Heinzers' March 10, 1992 request to transfer the NLV issue to the CPUC. With regard to the latter, the ICC stated that 49 U.S.C. § 10905 and its offer of financial assistance procedures, and strict statutory deadlines do not provide or allow assignments to a State Court or Utility Commission.

The decision of the ICC served on November 12, 1991 exempting SPT from the prior approval requirements for abandonment of and discontinuance of trackage rights over Old Main Line (subject to certain conditions not relevant here) has become final, and SPT by this Status Report advises that it has exercised its ICC-granted abandonment authority on this branch rail line.

On July 10, 1992, the Heinzers wrote to ALJ Weiss requesting continuation of ALJ adjudication, and continued their arguments previously presented to the point that they had not violated the track agreement with SPT, that SPT did, and that enforcement of the spur agreement is within the purview of the CPUC. They also advised that they have asked the President of the CPUC and the Public Inquiry Unit of the State Attorney General's Office to look into the "rightful" ownership of the line if it closes.

#### Discussion

By this complaint, the Heinzers seek alternative relief. On one hand, they ask that we find SPT's denial of rail service "not justified," asserting that they have not violated their Industrial Track Agreement with SPT. And they ask that we declare

SPT's Old Main Line "active right-of-way" and order SPT "to immediately restore their rail service." In the alternative, they ask us to require SPT to sell that portion of the Old Main Line right-of-way in their block to them at a "reasonable price." These requests may be considered by this Commission only if we have jurisdiction to do so.

In addressing the first request, we note that the Interstate Commerce Act (49 U.S.C. §§ 10101 et seq.) gives the ICC exclusive and plenary authority to regulate interstate rail carriers' abandonment of railroad lines, including branch lines. There can be no abandonment without issuance of a certificate or an exemption authorization by the ICC. And so broad is this power granted to the ICC that it extends even to approval of abandonment of purely local lines operated by regulated carriers when in the ICC's judgment, the overriding interests of interstate commerce require it. Finally, the acts of the Congress on that subject are supreme and exclusive. State efforts to regulate must fall when they conflict with or interfere with federal authority over the same activity (Kalo Brick & Tile (supra)).

But Congress provided further setting forth that the ICC does not have authority over abandonments or discontinuance of spur, industrial, team, switching, or side tracks, if these tracks are located entirely in one state (49 U.S.C. § 10907(b) (Supp V 1981)). (Illinois Commerce Commission v. Interstate Commerce Commission (1989) 879 F.2d 917, 922-924 (D.C. Cir.)) And the designation of a track is not determinative as to jurisdiction - whether designated "line of railroad or extension thereof," or "spur, industrial, team, switching, or side track." Determination of jurisdiction depends upon the intended use of the track segment at issue. If the segment at issue carries traffic movements which are part of actual transportation from shipper to consignee, then the trackage is a "line of railroad, or extension thereof" under ICC jurisdiction. If the trackage is used to load, unload, store,

or switch cars incidental to receipt of shipments by the carrier or delivery to consignee, the trackage is "spur, industrial, team, switching, or side tracks," not under ICC jurisdiction but left to state jurisdiction (New Orleans Terminal Co. v. Spencer (1967) 366 F.2d 160, 165-166 (5th Cir. 1966), cert. denied, 386 U.S. 942).

In the pleadings before both this Commission and the ICC, the Heinzers infer that the Old Main Line trackage could be considered a "spur" because they (and several neighbors) were served with deliveries on the Heinzers' privately owned 215-foot spur connected to Old Main Line near the present terminal point of Old Main Line in an adjacent block. But what they do not allege and cannot show is that the intended use of Old Main Line was to operate it as a spur. Old Main Line clearly was an extension of SPT's Coast Line to provide access or the final portion of the actual transportation haul from shippers to various consignees along the right-of-way. Indeed, the invoices attached as exhibits to Heinzers' complaint all indicate direct carload movements from various shippers to Heinzers or their neighbors as consignees, with delivery to be made at Spot 874, the Heinzers' separate privately owned spur - a spur maintained and operated under a separate Industrial Track Agreement with SPT. The unloading was to be performed on that separate private spur. And the earlier unloading for Best Foods was done on nearby Florida Street at the Best Foods spur. Such spurs for unloading of cars were along Old Main Line to handle the activities incidental to deliveries. And it is these spurs which are not under ICC jurisdiction, but left to the states as provided by 49 U.S.C. § 10907(b) (Supp V 1981).

The various ICC decisions before us in the abandonment proceeding pertaining to Old Main Line<sup>13</sup> all reflect the Heinzers' extensive and persistent participation in the proceeding, and also

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13 ICC Docket No. AB-12 (Sub-No. 137X).

the fact that the various theories and positions they advanced did not prevail. In its proceeding, the ICC considered and rejected essentially the same arguments presented to this Commission in this complaint. And after extensive consideration, the ICC Commissioners, pursuant to provisions of 49 U.S.C. § 10505, granted SPT's petition to exempt the abandonment and discontinuance of trackage rights on Old Main Line from the prior approval requirements of 49 U.S.C. §§ 10903-10904 applicable to rail lines or extensions thereof. The ICC Commissioners also denied the Heinzers' appeal, leaving SPT free to abandon Old Main Line.

The ICC having found Old Main Line to be a branch or extension of a rail line and, therefore, within its exclusive jurisdiction, this Commission has been preempted from exercising any jurisdiction relating to abandonment by the Interstate Commerce Act. Accordingly, the Heinzers' complaint as it relates to abandonment or restoration of service over Old Main Line must be dismissed for lack of jurisdiction.

The Heinzers further complain, however, that "proper notice" of termination of service (the 90-day notice to which they contend they were entitled under PU Code § 7532.5) was never given. Obviously, this applies only to spur service and reference to that section of the Code discloses that it applies only to situations where a railroad "intends to abandon or discontinue service on any spur, industrial, team, switching, or side track providing intermodal service to any community or shipper" (emphasis added). Since the complainants received only direct carload rail service, not intermodal service, on this spur, the notice requirements were not applicable.

While this Commission does technically retain jurisdiction over the Heinzers' 215-foot spur (49 U.S.C. § 10907(b) (Supp V 1981)), including the Industrial Track Agreement with SPT applicable to maintenance and operation of the spur, without an active and substantial volume of business, it is not economically



reasonable or practicable to maintain and operate the spur. The Industrial Track Agreement's Paragraph 9<sup>14</sup> provided two grounds under which, at the option of SPT, the agreement could terminate: (1) the cessation of business in an active or substantial way over a year, or (2) lawfully authorized changes in such a manner as would render it impracticable to continue to operate the spur. It appears that both are here applicable.

The ICC made its determination to permit abandonment of Old Main Line because by allowing SPT to avoid maintenance and operating costs of this low volume line and sale of its nonrail assets, sound economic conditions would be fostered and efficient management encouraged, and because team track facilities were nearby and motor carrier intermodal services were also available. The vestigial rail volume in 1989 and 1990 after loss of Best Foods and speculative future traffic<sup>15</sup> did not warrant retention. There

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14 "9. Railroad shall have the right to disconnect said Track or refuse to operate over same, and in either case this agreement at the option of Railroad shall terminate in the event that (a) Industry shall cease to do business on said Track in an active and substantial way for a continuous period of one (1) year, unless prevented from so doing by law, strikes or any causes beyond the control of Industry; (b) Industry shall fail to observe and perform each and every covenant and promise herein contained which is by Industry to be observed and performed; or (c) Railroad is required or authorized by law, ordinance or police regulation, or order of any lawfully constituted public authority having jurisdiction in the premises, to discontinue operation of said Track, or to change its tracks in such manner as to render it impracticable, in the judgment of Railroad, to continue to operate said Track."

15 The Heinzers themselves recognized the impracticability of continued spur maintenance and operation with a half dozen or so carloads annually when they offered 18 carloads (aggregating their

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no longer existed any economic basis for "business in an active and substantial way." And with a pending lawfully authorized abandonment of Old Main Line, the Heinzers' spur tracks would also be changed, being suspended nowhere, so that it would be no longer practicable to maintain and operate the spur in a vacuum. Thus, any possible Commission jurisdiction over the spur and the Industrial Track Agreement has been rendered moot by the passage of events. There literally is nothing left over which to take jurisdiction.

Finally, as an alternative to restoration of service, the Heinzers ask that the Commission require SPT to sell them a segment of the right-of-way real estate at a "reasonable price." These requests we also lack jurisdiction to entertain. Not only is it long settled that the Commission cannot order or compel the owner of public utility property to sell (P. T. Durfy (1914) 4 CRRC 447; Hanlon v. Eshleman (1915) 169 C.200; and Wm. L. Carpenter (1946) 46 CRRC 775), but as a common carrier by railroad subject to Part 1 of the Interstate Commerce Act (Title 49, U.S.C.), SPT is not constrained or subject to the provisions of PU Code § 851 should it decide to sell or not sell, lease, assign, mortgage, or otherwise dispose of the whole or any part of its railroad, whether necessary or useful or not in the performance of its duties to the public. Furthermore, it is doubtful if the Public Utilities Act confers jurisdiction upon the Commission to enable it to fix the price to be charged for public utility property, particularly where, as here, ratemaking elements such as the issue of securities, charges

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own and that of their neighbors' best speculation) annually to continue. This contrasts to the 349 carloads in 1988 when Best Foods was on Old Main Line and operation of the line was profitable.

to fixed capital accounts, or inclusions to rate base are not involved (American States Water Service Co. (1930) 35 CRRC 659, Truckee Elect. Light & Power Co. (1932) 37 CRRC 255, and Carmel Mt. Ranch v. S.D. Gas & Elect. Co. (1988) 27 CPUC 2d 500); ordinarily, the Commission encourages a public utility to sell its properties at the best price obtainable (Northern Cal. Power Co. (1919) 17 CRRC 279).

The motion of SPT to dismiss the complaint will be granted.

Findings of Fact

1. SPT, a railroad operating in 15 states, for many years has provided rail freight service into a former largely warehouse area south of Market Street in the City and County of San Francisco, over a 2.2-mile segment of branch trackage known as Old Main Line extending off SPT's Coast Line main line.

2. Freight traffic movements over Old Main Line were part of actual transportation hauls from shippers to consignees, with unloading being performed on spur tracks connecting to Old Main Line at the warehouses of various businesses along the Old Main Line right-of-way.

3. As the character of the former largely warehouse area changed with redevelopment to lighter nonindustrial uses with a mixture of retail and wholesale outlets, showrooms, warehouses, and residences, increasingly motor freight took over and most industrial customers moved off the line, resulting in less and less reliance on rail traffic.

4. When Best Foods, the largest customer on Old Main Line, in 1990 closed its plant and relocated to Southern California, rail freight volume on the line plunged from 349 carloads in 1988 to 6 in 1990, leading SPT to conclude that continued maintenance and operation over the line were not economically justified.

5. With public team tracks and intermodal service readily available as an alternative to direct rail service in the area, SPT

determined to seek authority to abandon Old Main Line and liquidate its valuable right-of-way assets for use elsewhere in its ongoing rail business.

6. The Heinzer brothers, with a furniture showroom-warehouse located near the terminal point of Old Main Line, have enjoyed availability of direct rail service to their spur behind the business for over 40 years, although in the past decade the Heinzers have relied almost exclusively on motor freight.

7. With their spur maintained and operated pursuant to a 1981 Industrial Track Agreement with SPT which calls for business in an active and substantial way annually, and in the face of their own nonuse, the Heinzers have made the spur available to neighbor businesses in order to bolster volume, albeit by so doing producing only six carloads total annually.

8. The Interstate Commerce Act gives exclusive and plenary jurisdiction over abandonments on railroad lines and branch rail line extensions thereto (which provide the actual transportation haul from shipper to consignee) to the ICC, while reserving jurisdiction over abandonments on spurs, industrial, team, switching, or side trackage (which provide loading, unloading, storage, or switching incidental to shipment or delivery) to the states.

9. The ICC, pursuant to 49 U.S.C. § 10505, may exempt a railroad from the formal abandonment requirements of 49 U.S.C. §§ 10903-10904 in its purview, thereby permitting a railroad to abandon a rail line when continued regulation is not necessary to carry out rail transportation policy, and either the service is of limited scope, or ICC regulation is not necessary to protect shippers from abuse of market power.

10. In September of 1990, SPT ceased Old Main Line service and on June 21, 1991 filed with the ICC for an exemption from prior approval requirements, intending to abandon the line.

11. The Heinzers protested to the ICC and have actively opposed SPT's petition while concurrently filing the present complaint with the PUC seeking restoration of Old Main Line service.

12. The ICC, by its decision of service date November 12, 1991 in Docket No. AB-12 (Sub-No. 137X), concluding that the fact that Heinzers' spur connects with Old Main Line does not serve to convert Old Main Line into a spur, and that the Heinzers had not met their burden of establishing Old Main Line was a spur exempted from ICC jurisdiction, granted SPT an exemption from formal requirements to abandon, subject to an offer of reasonable financial assistance.

13. Heinzers' offer, an offer to buy, based on arguments concerning the quality of SPT's title and theories relating to reversionary interests, was found by the ICC not to be bona fide or reasonable, and accordingly was denied; the denial was affirmed on appeal.

14. The volume of traffic on Heinzers' spur, after the ancillary but supportive Best Foods' volume elsewhere on Old Main Line ceased, no longer was sufficient and lacked firm prospects of being sufficient, to meet the requirements of doing business in an active and substantial way as were required under provisions of the Industrial Track Agreement, thereby enabling SPT to terminate the agreement pertaining to Heinzers' spur.

15. As the Heinzers' spur received only direct rail service from SPT, not intermodal service, the provisions of PU Code § 7532.5 regarding application and notice of intention to abandon or discontinue service on any spur, industrial, team, switching, or side track providing intermodal service did not apply to SPT in the present case.

16. Not only does the Commission lack jurisdiction to order a public utility to sell its utility property or to determine the price it will charge, but in addition, as a railroad subject to

Part 1 of the Interstate Commerce Act, SPT is not constrained by or subject to the provisions of PU Code § 851 in determining whether or not or to whom it may sell its railroad property.

17. Any further delay could jeopardize impending offers to purchase involving the subject railroad property.

Conclusions of Law

1. The ICC has jurisdiction over the abandonment of Old Main Line rail service.

2. To the extent that state statutes and procedures are inconsistent with the exercise of abandonment rights granted by the ICC, they are, as Kalo Brick & Tile makes clear, displaced by the ICC's decisions.

3. PU Code § 7532.5 not being applicable to direct rail service, SPT did not violate the Code by not making the application or giving the notice set forth in the Code section.

4. The Commission lacks jurisdiction to order SPT to sell the latter's property to the Heinzers.

5. It would serve no useful purpose to hold further Commission hearings when SPT has been authorized by the ICC to terminate direct rail line service to the complainants, and the Commission cannot provide the relief the complainants seek.

6. The complaint should be dismissed with prejudice for lack of jurisdiction.

7. The order which follows should be made effective immediately.

ORDER

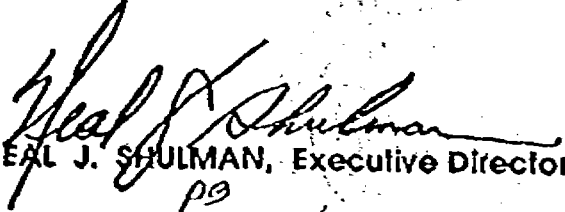
IT IS ORDERED that Case 91-06-026 filed June 12, 1991 is dismissed with prejudice for lack of jurisdiction.

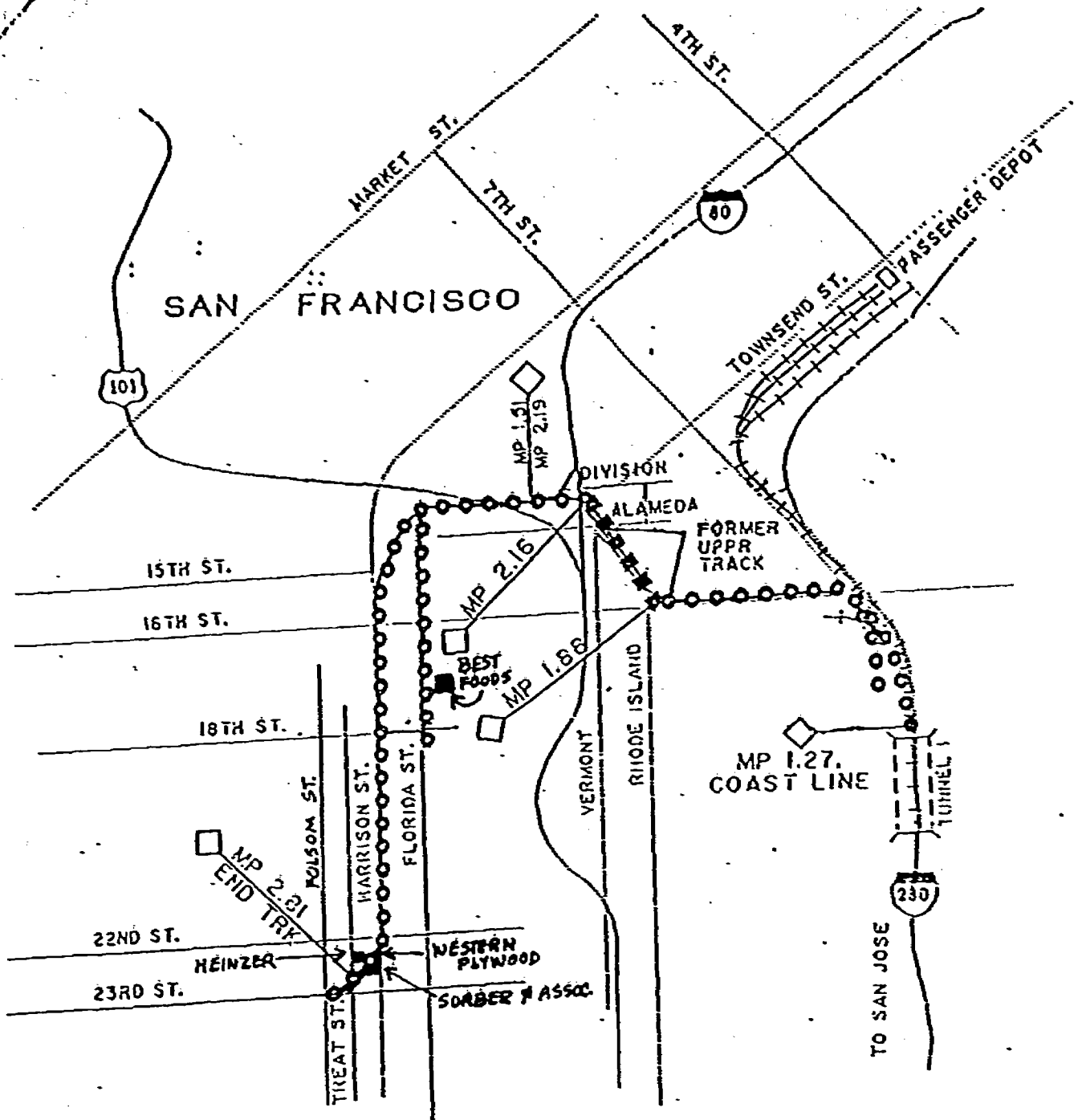
This order is effective today.

Dated September 16, 1992, at San Francisco, California.

DANIEL Wm. FESSLER  
President  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
NORMAN D. SHUMWAY  
Commissioners

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

  
NEAL J. SHULMAN, Executive Director  
ps



**LEGEND**

- Track to be Abandoned
- Discontinuance of Trackage Rights
- ⋯⋯⋯ SPT Co. Track
- Freeways
- Surface Streets



**SP** Southern Pacific  
 Transportation Company  
 Engineering - Survey Service  
 ENCL. SF. ABANDON-OLD-TRK

**SOUTHERN PACIFIC LINES**

**PROPOSED ABANDONMENT  
 SAN FRANCISCO  
 "OLD MAIN"**

SCALE	1" = 100' FILE	DATE	APR 12 1981
PROJECT	73	SHEET NO.	13
DATE	JUNE 12, 1981	BY	...
REVISION	...	DATE	...

**APPENDIX A: CASE 91-06-026**