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Decision 82 10 041 OCT 18 1982

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA,

Complainant,

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,

Defendant.

Case 82-08-01
(Filed August 4, 1982)

O. J. Solander, Eugene Bonnstetter, and
Robert B. Patterson, Attorneys at Law,
for California Department of Transpor-
tation, complainant.

Douglas E. Stephenson, Ann Hasse, and
Carol Harris, for Southern Pacific
Transportation Company, defendant.

James P. Jones and Roger E. Willeford,
for United Transportation Union,
intervenor.

Vincent MacKenzie, Attorney at law, for
the Commission staff.

EMERGENCY INTERIM OPINION

On Sunday, October 17, 1982, the Presiding Commissioner was advised by Caltrans that inauguration of the proposed Oxnard-Los Angeles commuter service may be delayed because of (a) the failure of timetable schedules filed by SP on October 15, 1982 to sufficiently comply with the requirements of Decisions Nos. (D.) 82-06-045 and 82-01-031 and, (b) refusal of Amtrak to release the locomotives which Caltrans has obtained for the service unless SP accepts the lease obligations imposed by Amtrak. SP was duly

notified of Caltrans' intention to seek an immediate remedial order from this Commission, and the parties have been heard under telephone conference procedures.

SP, in stipulating to the telephone conference procedure for the convenience of the parties in lieu of oral hearing, advises that it does not thereby waive its objections to the jurisdiction of the Commission to take the action requested by Caltrans. SP's objections are noted.

In response to Caltrans' contention that the schedules filed October 15 do not sufficiently comply with the requirements of the Commission's orders, SP asserts that it modified the schedule proposed by Caltrans to provide what it believed would be better "meets" with existing Amtrak trains and reduce conflicts with switching operations in the San Fernando Valley. Both of these changes, it asserts, are permissible within the scope of Ordering Paragraph 4 of D.82-10-031. However, SP notes that upon being advised by Caltrans of objections to the SP filing, it prepared an amended filing incorporating specifically the schedule times requested by Caltrans on September 27. That filing is accepted.

SP points out, correctly, that furnishing and maintaining locomotives for the service is an obligation of Caltrans, and that acceptance of the obligations of the Amtrak leases by SP would impose on SP requirements not contemplated by outstanding orders of the Commission. Caltrans, in response, states that time limitations make it imperative that SP be ordered to execute the equipment lease with Amtrak, and Caltrans has offered SP a supplemental contract whereby the obligations imposed on SP would in turn be accepted by Caltrans. In these circumstances it is reasonable to require that, on an interim basis, until Caltrans is able to secure locomotives without SP's participation, SP be required to lease the locomotives from Amtrak, provided Caltrans

is willing in turn to give SP an agreement assuming the monetary obligations of the Amtrak lease.

Caltrans further states that it has been advised by SP that SP believes it cannot, consistent with its position in its pending action in the Federal courts challenging the Commission's jurisdiction over the subject matter, undertake construction of the remaining station sites designated by Caltrans. Caltrans states that in such event it is ready and willing to proceed immediately with construction, if given an appropriate right of entry to SP's property. In order to facilitate such construction and completion at an early date, Caltrans should be given the requested right of entry, and SP should be directed to furnish necessary flagmen and construction inspectors, at Caltrans' expense, when Caltrans or its contractors are working on or near the SP tracks.

FINDINGS OF FACT

1. An emergency exists which requires immediate action by the Commission in order to commence the rail service ordered in D.91847, as subsequently modified, in D.82-06-045. Affected parties have consented to a telephone conference hearing, although in doing so, SP states that it does not wish to be deemed to have waived any objections to the Commission's jurisdiction over the subject matter.

2. The commuter train service schedule tendered by SP on October 17, 1982 is accepted for filing in lieu of the schedule filed by SP October 15, 1982.

3. Caltrans has advised the Commission that the locomotives it intends to furnish for this service are available for lease from Amtrak. Caltrans has further advised the Commission that such locomotives are available only if SP acts as Caltrans' agent as lessee of said locomotives. A copy of that lease is attached as EXHIBIT A.

4. Caltrans desires SP to act as its agent for the lease of said locomotives and has offered, under a reimbursement agreement set forth as EXHIBIT B, to reimburse SP for all costs, expenses, and monetary obligations imposed on SP by the annexed Locomotive Agreement or incurred by SP as a result of the provisions of the Locomotive Agreement.

5. Caltrans has asked that it be permitted to construct the remaining six stations at Moorpark, Burbank, Burbank Airport, Camarillo, Northridge, and Chatsworth.

6. To facilitate operation of the rail service ordered in D.91847, as subsequently modified, and in D.82-06-045, it is necessary to issue the Emergency Order contained in this decision.

CONCLUSION OF LAW

1. In the circumstances, the Commission has jurisdiction to order SP to commence the rail service and execute the Locomotive Agreement and Reimbursement Agreements attached hereto, to order Caltrans to reimburse SP as set forth in the Reimbursement Agreement, and to grant Caltrans a right of entry on SP property to construct station and parking facilities at Northridge, Moorpark, Camarillo, Burbank, Burbank Airport and Chatsworth.

2. The following order should issue, to be effective on the date of decision.

ORDER

(1) SP is ordered to operate the service commencing October 18, 1982 on the schedule tendered by SP on October 17, 1982, utilizing the passenger equipment furnished by Caltrans.

(2) SP is ordered to execute the Locomotive Agreement and the Reimbursement Agreements attached hereto as EXHIBITS A and B, and Caltrans is ordered to reimburse SP as set forth in the agreement it has offered.

(3) Caltrans shall have the immediate right to enter SP property, and SP is ordered to make such property available, to construct station and parking facilities at Northridge, Moorpark, Camarillo, Burbank, Burbank Airport and Chatsworth in accordance with plans on file with the Commission. SP shall provide at Caltrans' expense flag protection and personnel necessary for the safe completion of the construction. SP is directed to construct the track work at Camarillo in accordance with EXHIBIT A of the proposed Construction and Maintenance Agreement submitted with Caltrans' petition filed April 22, 1982.

This order is effective today.

Dated OCT 18 1982, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. CRIMES, JR.
VICTOR CALVO
Commissioners

Commissioner Priscilla C. Crew,
being necessarily absent, did
not participate

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

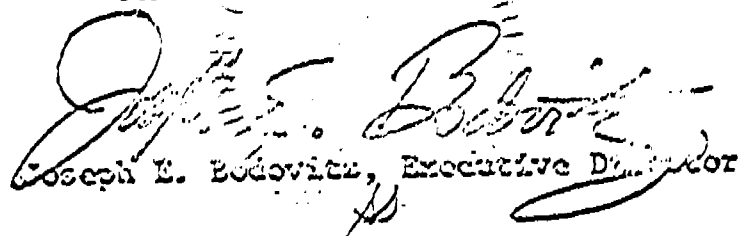

Joseph E. Bodovitz, Executive Director

EXHIBIT A
LOCOMOTIVE AGREEMENT

This agreement, dated as of October 17 1982, between National Railroad Passenger Corporation ("Amtrak") and Southern Pacific Transportation Company ("Railroad").

WITNESSETH:

~~Amtrak~~ Railroad requires additional locomotives suitable for powering commuter trains in service over ~~its~~ ~~xxxx~~ Railroad's line between Oxnard and Los Angeles, California.

WHEREAS, Amtrak has leased locomotives which it is able to make available to Railroad; to power

NOW, THEREFORE, the parties agree as follows:

1. Subject to the terms and conditions herein contained, Amtrak shall make available to Railroad up to five (5) ~~each~~ P30 locomotives ("Locomotives") for a period not exceeding one (1) year commencing as of the date hereof.

2. Railroad may operate the Locomotives solely in commuter service between ^{Montalvo} ~~Oxnard~~ and Los Angeles, California. Railroad shall comply with all governmental laws and regulations with respect to the use and operation of the Locomotives.

3. For the purposes of this agreement, Railroad shall be deemed to take possession of a Locomotive, and the agreement thereof shall commence upon departure of the Locomotive from Los Angeles, California. Railroad and Amtrak shall jointly inspect the Locomotives prior to delivery to Railroad and upon redelivery to Amtrak at Los Angeles. Railroad and Amtrak shall execute a Certificate of Inspection (Exhibit A hereto) noting the condition of the Locomotives and any damage other than normal wear and tear.

4. Railroad shall keep the Locomotives in good order, condition and repair, ordinary wear and tear excepted, and in accordance with standards generally prevailing in the railroad industry. No modification may be made to the Locomotives without the prior written consent of Amtrak. Railroad shall not alter the road number on the Locomotives and shall not allow the name of any person, association or corporation to be placed on the Locomotives as a designation that might be interpreted as a claim of ownership.

Upon reasonable notice to Railroad and during normal business hours, Railroad shall permit authorized representatives of Amtrak to inspect any or all Locomotives and all relevant data and records pertaining to the operation of Locomotives.

5. For the use of said Locomotives, Railroad shall pay Amtrak rental of three hundred fifty and 00/100 dollars (\$350.00) per unit per day. Railroad shall pay any and all taxes, licenses and permits whatsoever levied on said Locomotives or growing out of Railroad's use thereof under this agreement. Railroad further assumes the cost of any penalties assessed by national, state or local civic authorities, including but not limited to failure to provide licenses or permits, or for misuse of diesel units under applicable laws and regulations while in possession of Railroad. Bills for all amounts due Amtrak from Railroad hereunder shall be paid promptly by Railroad upon receipt thereof.

6. Amtrak shall not be deemed to have made or given, and Amtrak hereby expressly disclaims, any representation or warranty, express or implied, as to the merchantability, fitness for use.

②

operation, condition or design of the Locomotives or the quality of the material, equipment or workmanship therein. Railroad hereby waives any claim against Amtrak for any loss of or use or loss of revenue, or incidental or consequential damages arising out of any defect in or failure of the Locomotives. Railroad agrees to indemnify and save harmless Amtrak, irrespective of any negligence or fault of Amtrak, its employees, agents, or servants, and irrespective of any defects in or failure of the Locomotives, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any person or persons and from any and all liability for loss, damage or destruction to any property (other than the Locomotives) which arises from the operation of the Locomotives or other activities conducted hereunder.

7. In the event of any loss, theft, damage or destruction of a Locomotive exceeding \$1,000, the Railroad shall promptly notify Amtrak. Railroad shall promptly repair such damage or destruction at its own expense, and continue to pay rent for such Locomotives; provided however, if in the reasonable opinion of Railroad a Locomotive is damaged beyond economical repair, Railroad shall immediately pay Amtrak four hundred seventy-four thousand nine hundred and fifty dollars (\$474,950) and the terms of this agreement as to Locomotive shall terminate.

8. Railroad shall have the right to return one or more of the Locomotives to Amtrak at Los Angeles. The Locomotives shall be returned to Amtrak in as good condition as when delivered to Railroad, ordinary wear and tear excepted. All Locomotives shall be returned to Amtrak by October 23, 1983.

(2)

9. If default shall be made by Railroad in the observance or performance of any obligation under this agreement and such default shall continue for ten (10) days after written notice from Amtrak specifying the default, Amtrak, at its option may:

(1) proceed by appropriate court action to enforce performance by Railroad or recover damages for breach thereof; or

(2) by notice in writing to the Railroad terminate this agreement, whereupon all rights of the railroad to the use of the Locomotives shall cease and Amtrak may enter the premises where any Locomotives are located and thenceforth possess them free of any right of Railroad to use them. Amtrak shall also have the right to recover from Railroad any damage and expenses, including reasonable attorneys' fees, which Amtrak shall have sustained by reason of the breach of any covenant of this agreement.

10. The obligation of Amtrak to provide any Locomotives to Railroad hereunder shall be subject to the approvals of Seattle-First National Bank, as trustee, lessor of the Locomotives to Amtrak, the Federal Financing Bank as holder of the conditional sale indebtedness and the Federal Railroad Administrator as guarantor. Amtrak shall use its best efforts to obtain such approvals. In the event such approval are not obtained or are rescinded, Railroad agrees upon notice from Amtrak immediately to redeliver the Locomotives to Amtrak. Upon reasonable notice from Amtrak, Railroad also agrees to redeliver to Amtrak any Locomotives which Amtrak requires for use in its operations.

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11. This agreement embodies the entire agreement between the parties with respect to the locomotives and supersedes all prior agreements. It may be amended only by other written agreement. If any provision herein is invalid, it shall be considered deleted herefrom and shall not invalidate the remaining provisions. This agreement shall be governed by and construed in accordance with the laws of the District of Columbia.

12. In the event of a dispute arising under this agreement, which Railroad and Amtrak are not able to resolve within one month after notice pursuant to Section 13 hereof, such dispute shall at the request of Railroad or Amtrak be submitted to binding arbitration which shall be conducted pursuant to the commercial arbitration rules prescribed by the American Arbitration Association in effect on the date hereof, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

13. Any notices required by this agreement shall be in writing and shall be delivered by hand or by deposit in the United States mail addressed as follows:

If to the Railroad:

Vice President - Operations
Southern Pacific Transportation Company
One Market Plaza
San Francisco, California 94105

If to Amtrak:

Anthony Walters
Assistant Vice President
National Railroad Passenger Corporation
400 North Capitol Street, N.W.
Washington, D.C. 20001

14. The obligations of the parties shall be subject to force majeure (which shall include strikes, riots, accidents, Acts of God, or other causes beyond the control of the party claiming such force majeure as an excuse for non-performance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

15. Railroad shall not transfer or assign this agreement, or any interest therein, or any right granted thereunder, without the written consent of Amtrak, and any such transfer or assignment, whether voluntary, by operation of law, or otherwise, without such written consent, shall be absolutely void and shall, at the option of Amtrak, terminate this agreement.

16. Subject to the provisions of the last preceding paragraph, this agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

IN WITNESS WHEREOF, Railroad and Amtrak have caused this agreement to be duly executed by their respective authorized officers as of the day and year first above written.

NATIONAL RAILROAD PASSENGER CORPORATION

BY: o/a Lawrence D. Gilson 10/15/82

SOUTHERN PACIFIC TRANSPORTATION COMPANY

BY: 

EXHIBIT A

The undersigned certify that they have inspected the units of equipment listed below and have found each unit to be in fully operable condition, free of damage (other than normal wear and tear) except as herein specified:

Each locomotive

unit number _____

Exception to fully operable condition and damage other than normal wear and tear _____

Attn: Inspector

Southern Pacific Transportation Company - Inspector

Date: _____

Date: _____

(7)

EXHIBIT B 2/2/83
5/11/83

CALTRANS - SP
LOCOMOTIVE AGREEMENT

This Agreement, dated as of October 17, 1982, between Department of Transportation, State of California ("Caltrans") and Southern Pacific Transportation Company ("SP"), sets forth certain obligations and responsibilities which Caltrans accepts to permit National Railroad Passenger Corporation ("Amtrak") to furnish locomotives for rail commutation services to be operated by SP for Caltrans between Oxnard and Los Angeles, California.

Pursuant to various orders of the California Public Utilities Commission, SP has been directed to operate rail passenger commutation services over its line between Oxnard and Los Angeles, California. In order to implement such service Caltrans has undertaken to obtain suitable rail passenger coaches and locomotives to be operated on SP's line. Amtrak has advised Caltrans that it has available suitable locomotives which can be leased for the service, but Amtrak has advised Caltrans that the locomotives are subject to equipment trust agreements, whose trustees require that the locomotive leases be executed, not with a non-profit public agency, but rather with SP. As it was and is Caltrans' intention to obtain locomotives for this service, Caltrans proposes that it will advance or reimburse to SP any costs or expenses which SP may be required to pay or to which SP may be subjected by reason of the terms and conditions of the Locomotive Agreement offered by Amtrak. The term "annexed Locomotive Agreement" shall refer

to the "Locomotive Agreement" dated as of October 17, 1982, between Amtrak and SP, and which is annexed hereto and incorporated by reference.

Caltrans and SP therefore state:

1. The commutation service for which the locomotives are required is one which has been ordered by the California Public Utilities Commission in various orders which SP asserts are beyond the jurisdiction of the California Public Utilities Commission. SP is complying with such orders under protest, and proposes to continue to litigate in appropriate judicial forums the existence of the right of the California Public Utilities Commission to direct performance of the subject commutation service. Any subsequent judicial or administrative ruling finding the commutation service to have been unlawfully or improperly ordered into effect shall not relieve either party of responsibility for obligations incurred as a consequence of this Agreement, in which case the rights and obligations hereunder shall be determined as if the commutation service had been regularly ordered into effect by a tribunal of competent jurisdiction.

2. In consideration for the obligations which Caltrans next agrees to undertake, SP agrees to execute the annexed Locomotive Agreement so as to obtain use of the Amtrak locomotives for the service requested by Caltrans.

3. Caltrans agrees to reimburse SP for all costs, expenses, and monetary obligations imposed on SP by

the annexed Locomotive Agreement or ^{directly} incurred by SP as a result of the provisions of the annexed Locomotive Agreement. To the extent that the Agreement calls for payment by SP of amounts fixed and calculable in advance, Caltrans shall furnish such funds to SP ~~when~~ ^{when} ~~such amounts are due and payable from SP to Amtrak.~~ ^{such amounts are}

4. Paragraph 4 of the annexed Locomotive Agreement imposes upon SP the obligation to keep the locomotives in good order, condition and repair, ordinary wear and tear excepted. Caltrans agrees to undertake, on SP's behalf, the obligations of such paragraph, and Caltrans shall, at its sole expense, provide, or arrange to provide, the maintenance and repair obligations of that paragraph. Caltrans shall also undertake, or arrange to have undertaken, such repairs as may be called for under Paragraph 7 of the annexed Locomotive Agreement, pertaining to loss, theft, damage or destruction.

5. Caltrans agrees that it will not request or require SP to act in any manner (or refrain from acting) contrary to the provisions or requirements of the annexed Locomotive Agreement.

IN WITNESS WHEREOF, Caltrans and SP have caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

DEPARTMENT OF TRANSPORTATION,
STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION
COMPANY

BY Eugene C. Bernatides

BY Al Johnson