

Decision No. 87405 JUN 1 1977

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CITY OF MODESTO, a charter city,)

Complainant,)

vs

TIDEWATER SOUTHERN RAILWAY COMPANY,)

Defendant.)

Case No. 10027
(Filed December 24, 1975)

J. David Fitzsimons, Assistant City Attorney, for the City of Modesto, complainant.

Gene Toler, Attorney at Law, for Tidewater Southern Railway Company, defendant.

Mary Carlos, Attorney at Law, and Raymond Gentry, for the Commission staff.

INTERIM OPINION

This is a complaint by the city of Modesto (the City), a charter city of the State of California, on behalf of certain residents of the City against Tidewater Southern Railway Company (Tidewater), requesting that the Commission order the closing of Tidewater's railroad side track on Virginia Avenue between Coldwell Avenue and Roseburg Avenue (the Aurora siding) in the City because Tidewater's switching and railcar storage activities on the Aurora siding cause noise, dust, smoke, and other noxious fumes, are aesthetically undesirable, create an attractive and dangerous condition for children and others, and block grade crossings for inordinate periods of time, or, in the alternative, to restrict the use of the Aurora siding for emergency purposes only. A hearing was held on the matter in Modesto on June 10 and 17, 1976 before Examiner Pilling.

The Aurora siding, which runs parallel to the main track down Virginia Avenue, was constructed prior to 1930 at a time when the surrounding land area was outside the city limits and was devoted to agricultural use and when the population of the City, which is now in excess of 84,000, was only 13,800. The Aurora siding is now within the city limits and completely surrounded by land zoned for and occupied by single family residences, and the agricultural uses which the siding once adjoined are now no closer than two miles. The siding provides no freight service for any business, industry, agriculture, or any other land use adjacent to the siding. Witnesses living along and in the vicinity of the Aurora siding testified that the siding has been used by Tidewater for many years at an increasing frequency for the switching, storage, and coupling of freight and other railroad cars and engines during daytime hours, at night, and in the early morning hours. A recurring complaint by the witnesses is that Tidewater left refrigeration cars on the siding at night with the motors of the refrigeration units running, the noise of which kept the witnesses awake and was generally objectionable. Also, the noise caused by switching, coupling, and uncoupling of the cars on the siding is disturbing as is the sound of escaping air when cars are uncoupled and when Tidewater employees conduct air brake tests on the siding as required by federal law. Some witnesses testified that switch engines were left on the siding at night with their engines idling while the crews went for their meals. Several witnesses indicated that the noise which disturbed them most was the blowing of the horn and the ringing of the bell as crossing warnings by trains coming through on the main track. Some witnesses also complained of noxious fumes from the engines being blown into their homes when the wind was right. One witness testified that between March and August 1975 he observed railcars being switched on the siding which blocked vehicle and pedestrian crossings about 14 times; in six instances the blockage was for more than 10 minutes. Another witness testified that when a heavy train on the main track rolled by, her house shakes and dishes rattle.

An employee of the City testified that on two occasions he sound-metered stationary refrigerator cars on the siding and had a decible reading of 73 dba and 83 dba. He found the local noise level apart from the sound of the refrigeration units to be 46 dba. Out of 32 crossing blocking observations he noted that in only two instances did a train block a crossing stopping vehicles in excess of 10 minutes, the maximum time allowed when vehicles are stopped by the blocking.

Tidewater's superintendent testified regarding the necessity for the siding and why it is essential that Tidewater be allowed to continue using it without restriction. Tidewater is a single track railroad and currently uses the siding in serving five industries located nearby at their North Yard facility as well as for interchanging of cars with the Southern Pacific Company via connections also located at the North Yard. The superintendent testified that operational efficiency and public accommodation have resulted in train operations being conducted during evening and early morning hours. Primarily, it is most desirable to the shipping public that cars be delivered or picked up during the hours when shippers' employees are not either loading or unloading such cars. He also testified concerning the necessity of coordinating train schedules to coincide with freight trains moving to and from East Coast points.

Tidewater's witness stated that Tidewater has owned the right-of-way for the main track and parallel Aurora siding since 1909, which, at the time it was purchased, was then outside of the city limits. He stressed that it is very significant to recognize that a strong reason exists for operating Tidewater's trains between the hours of 10:00 p.m. and 6:00 a.m. Tidewater's main line tracks pass through the city of Modesto for a considerable distance directly upon 9th Street which is a heavily traveled major artery of Modesto.

Because of the obvious danger existing when a train is operating on a

city street, Tidewater voluntarily changed time schedules to avoid this area during peak traffic hours. When Tidewater discontinued setting out and picking up at Aurora, the cars destined to industries near its North Yard were taken south of town to a much less convenient sidetrack. The local switch engine serving industries between Modesto and Turlock now picks up those cars late in the evening on its return to Modesto, and usually between 10:00 p.m. and 12:00 p.m. takes them over 9th Street to the North Yard, using the Aurora siding only when there are too many cars to safely shove into the Yard. Trains entering the North Yard facility must approach it from the north because of track configuration. Otherwise, an engine coming north from 9th Street is behind the cars when they enter the Yard unless they use the Aurora siding to run around them. At this time this is the only use being made of the siding.

Tidewater's trainmaster testified about his own efforts, in cooperation with the Public Works Department of Modesto and the Public Utilities Commission staff, to reduce noise levels to an acceptable level at Aurora siding. He voluntarily changed train schedules, discontinued setting out and picking up cars at the siding, leaving cars on the siding overnight, running of mechanical refrigerator car motors at the siding, daytime use of the siding, and cautioned crews to reduce any noise not essential to performing their work. He also discontinued air brake tests and changed coupling-uncoupling procedures to reduce noise created by escaping air. Tidewater claims that its train crews deliberately cause the horn to be blown and the bell to be rung on its engines as warning signals to alert motorists and pedestrians at grade crossings of an approaching train. Those activities are not directly caused by the existence of the siding since the horn and bell are required by law to be sounded when a train passes through the area on the main track. Even if the siding no longer existed, the residents would still hear those sounds each time a train passed by on the main line.

At the start of the public hearings on June 10, 1976, Tidewater made a motion to dismiss this complaint on the grounds the Commission was without jurisdiction to restrict the amount of noise emitted from locomotives and railcars or to order the relocation of storage or refrigerator cars due to noise created by them or to limit the hours of operation of a carrier engaged in interstate commerce by rail because of noise created by such operations. The basis upon which Tidewater made this motion was the publication by the Environmental Protection Agency of new rules regarding noise emission standards for railroads.

The Noise Problem

In this interim opinion we need not address the defendant's contention that the Commission is preempted by federal Environmental Protection Agency standards and cannot order any changes in operating practices or procedures to minimize any noise nuisance. We will instead direct the defendant to continue the voluntary measures it has taken to reduce noise problems. ✓

Tidewater has voluntarily resolved two of the noise problems by directing that federal air brake tests be performed in an area other than Aurora siding (Superintendent's Notice No. 36) and by directing that if refrigerator cars are left on Aurora siding they will have their motors turned off (Superintendent's Notice No. 18).

We are also aware that the Environmental Protection Agency has proposed noise abatement rules that could replace those now in effect (Federal Register, November 29, 1976). Our staff will be monitoring possible changes in federal rules and we will address the complainant's preemption contention in a subsequent final decision if we direct Tidewater to change any existing operating practices. We will also review the results of the voluntary measures taken by Tidewater to minimize the noise problems.

It may be that the staff review will indicate that voluntary measures taken by the defendant have not proven adequate, and that other measures we could order would be reasonable and necessary to protect the surrounding residents from unreasonable noise.^{1/} We expect that the defendant will continue to explore alternative operational procedures that will minimize nuisance to surrounding residents.

Atmospheric Nuisance Problems

Tidewater's switching and car storage activities are complained of because they cause dust, smoke, and other noxious fumes, are aesthetically undesirable, and create an attractive and dangerous condition for children and others. As to the dust, smoke, and other noxious fumes caused by the switching operations, the same may be said about Tidewater's operations over its main track. At the hearing no standard was offered for use in gauging the degree of atmospheric pollution, consequently we are unable to determine to what extent we should order modification of the railroads operations. The absence of sufficient guidance places us in a position where we are unable to act. Additionally, persons who locate near railroad tracks must expect a certain amount of pollution from rail operations.

Safety and Attractive Nuisance Problems

One witness, Mrs. Tye, who resides on Columbia Avenue testified that she has observed children climbing up, onto, and across boxcars. She also testified that children catch rides on slow moving trains, presumably on their way to school. We observe in Exhibit 1 that there are three schools in the close vicinity of Aurora siding; further, a large public park adjoins Aurora siding.

^{1/} Generally, noise resulting from the necessary and proper operation of railroad is not a nuisance; however, loud and continuous noise heard between midnight and early morning hours is a nuisance if unnecessary and avoidable in normal railroad operation. (G. Cavanaugh v So. Pac. Co. (1966) 66 CPUC 315.)

While Mrs. Tye's testimony causes us concern, it is apparent that if Tidewater continues to confine its switching operations on the Aurora siding primarily to the hours between 10:00 p.m. and 6:00 a.m., such operations should not pose a hazard to school-age children. It would be further anticipated that in those extraordinary circumstances when Tidewater does find it essential to use the Aurora siding during hours when children might be present, members of the train crew will take every reasonable precaution to assure the safety of children who might be in the area. Our staff will also monitor the defendant's operations at the Aurora siding to assure that operations are conducted at such times and in such manner as to minimize potential hazards to children and file a report on its findings with the Commission within six months.

Crossing Blockage

The record does not now disclose a course of continuing conduct sufficient to warrant the Commission's ordering Tidewater to cease and desist blocking crossings on the Aurora siding or ordering it to change its operations. Individual blockages in excess of the maximum time can usually be effectively dealt with by local public officials.

The Commission's General Order No. 135 prescribes 10 minutes as the maximum time which a railroad is permitted to block a crossing. Section 10 of the General Order No. 135 reads:

"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 defendant is put on notice, however, that should crossing blockage in excess of 10 minutes become a continuing occurrence, thereby unreasonably inconveniencing the public and needlessly producing an unreasonable level of enforcement activity and litigation in local courts, we could issue orders to deal with the problem. We expect the defendant to comply with General Order No. 135.

Findings

1. The industrial cacophony caused by Tidewater's switching operations and running motors of refrigeration units on railcars parked on the Aurora siding is highly disturbing and mentally upsetting to occupants of nearby homes.

2. Pursuant to the Federal Noise Control Act federal rules were adopted (40 CFR 201 et seq.) setting forth regulations governing noise emission standards for railroads.

3. The only noise meter readings taken of operations on the siding were within the maximum prescribed by the current federal standards and in an acoustical environment differing from that required by federal standards.

4. Tidewater has voluntarily instituted the changes in its operation of Aurora siding that we order herein. By this interim opinion we direct Tidewater to continue the changes in its operations that it voluntarily undertook, and we need not address the preemption contention of Tidewater in this opinion.

5. The Commission's General Order No. 135 prescribes that the maximum continuous time that a train may lawfully block a crossing with stopped vehicles is 10 minutes.

6. Of the 32 observed Tidewater crossing blockings in only two instances were crossings blocked in excess of 10 minutes.

7. Criminal sanctions brought by local prosecuting attorneys against railroads blocking street crossings with engines and/or railcars should substantially insure compliance with General Order No. 135.

8. The Commission staff should monitor and review the changes in the operation of the Aurora siding which Tidewater has voluntarily instituted and present its findings and conclusions to the Commission concerning the extent to which noise and safety problems have been resolved.

INTERIM ORDER

IT IS ORDERED that:

1. Tidewater Southern Railway Company (Tidewater) shall not:
 - (a) Conduct air brake tests in the vicinity of Aurora siding.
 - (b) Allow motors on refrigeration cars parked on Aurora siding to run.
2. The Commission's staff shall monitor and review the results of the voluntary measures taken by Tidewater to minimize noise problems and potential safety hazards to children in the operation and use of its Aurora siding and advise the Commission of its findings and conclusions within six months from the effective date of this order.

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3. Further hearings, if necessary, will be held at a date and time to be set. ✓

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

Dated at San Francisco, California, this 1st day of JUNE, 1977.

Secretary
William J. ...
Commissioner

Robert Balmain

President

James L. ...

Richard D. ...

Commissioners