

ORIGINAL

Decision No. 89137 JUL 25 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Crow-Spieker #9 and  
 #10 for an order authorizing rail  
 service to additional industrial  
 buildings over the Railroad Avenue  
 grade crossing, Cross No. L-18.38-C,  
 County of Alameda, State of  
 California.

Application No. 57477  
 (Filed July 25, 1977)

Philip M. Jelley, Attorney at Law, for  
 Crow-Spieker #9 and #10, applicant.  
Harold S. Lentz, Attorney at Law, for  
 Southern Pacific Transportation  
 Company, respondent.  
Barbara Shockley, for San Lorenzo Traffic  
 Action Committee, protestant.  
Ben H. Zuppan, Attorney at Law, for  
 Alameda County, interested party.  
Stephen Wong, Jr., for the Commission staff.

## O P I N I O N

Statement of Facts

In 1972 Trammel Crow Company and Crow-Spieker No. 9 and Crow-Spieker No. 10, Texas general partnerships with principal place of business in Menlo Park, California, associated as Crow-Spieker #9 and #10 (Crow-Spieker), determined upon development of a 43-acre parcel of industrially zoned land within an industrial park-like area located entirely within the southwestern part of the city of San Leandro. The industrial park-like area, inland from but paralleling the San Francisco Bay shoreline, lies southwest to, but bordering on, a residential part of the unincorporated township of San Lorenzo. Access to the entire industrial park-like area is only by way of Grant Avenue, a major thoroughfare leading northeastward through the unincorporated residential area approximately 1½ miles to Nimitz

Freeway. Preparatory to undertaking development, Crow-Spieker obtained approval on November 20, 1972 for a rail-served industrial park development from the San Leandro City Council following the city's consideration of an Environmental Impact Report (EIR), a noticed public hearing, and a finding by the city that the benefits accruing from Crow-Spieker's development would outweigh any adverse effects. Under provisions of the California Environmental Quality Act of 1970, the city of San Leandro was the "Lead Agency" for the entire industrial development project undertaken by Crow-Spieker.

In 1973 construction began on two large warehouse buildings, one of 110,750 sq.ft. and the second of 98,000 sq.ft. Subsequently completed, these buildings were leased to industrial tenants with the understanding that rail service would be provided to them. In due order Crow-Spieker requested that Southern Pacific Transportation Company (Southern Pacific) construct an industrial drill track approximately 1,600 feet long crossing a cul-de-sac dirt road (Railroad Avenue) to serve the Crow-Spieker warehouses from Southern Pacific's main line. Thereupon, on July 3, 1974 Southern Pacific filed Application No. 55012 with this Commission seeking authorization to construct the industrial drill track. This application was strenuously opposed by the San Lorenzo Traffic Action Committee (STAC) and various school and environmental groups. Extended hearings were held with some public witnesses urging that this Commission designate itself as the "Lead Agency" for the rail spur crossing project. Initially by Decision No. 84168 dated March 4, 1975, the Commission authorized construction. The county of Alameda and STAC immediately filed for rehearing. By Decision No. 84394 dated April 29, 1975, rehearing was granted; the Commission, while expressing no opinion as to the validity of the city of San Leandro's 1972 EIR, as it related to the proposed industrial park development, noted the lack of any Commission consultation or participation in that EIR, with respect to environmental impact resulting from a crossing and rail traffic, and

determined it was the "Lead Agency" with respect to the crossing project. Thereafter, a stipulation was arrived at by the parties, which, recognizing that rail service had the potential of decreasing truck traffic on Grant Avenue, provided for rail service limited to the two existing warehouses with limitations on switching hours--limitations to materially minimize potential noise and vibration impact from the crossing--thus placing the rail crossing in a posture where it would have no significant effect upon the environment. Accordingly, the hearing officer on August 26, 1975 issued a Negative Declaration on the crossing project. On October 7, 1975 the Commission issued Decision No. 84978 granting authorization for construction of the industrial drill track to serve the existing two warehouses.

Immediately thereafter, the industrial drill track crossing Railroad Avenue was constructed and rail traffic began in November 1975. However, rail traffic has been substantially less than that contemplated when authority for the crossing was initially sought. In the final two months of 1975, a total of 7 rail cars were received; in all of 1976, a total of 66 cars were received; and in all of 1977, 44 cars were received.

Crow-Spieker now has determined to proceed and complete development of the nine vacant acres remaining in their San Leandro Business Park. They plan erection of one or two additional industrial buildings suitable for warehousing or light manufacturing, although the exact use or tenants for the projected industrial buildings is not known at this time. Rail service to the new structures would be provided by merely extending their existing private industrial spur track. Alternative plans exist, one to erect a single large industrial building of approximately 180,000 sq.ft., and another to erect two industrial buildings, one of approximately 148,000 sq.ft. and the second of approximately 57,500 sq.ft. By its application in the instant proceeding, Crow-Spieker seeks only the elimination or modification of the restriction upon use of the rail crossing at Railroad

Avenue for service to the two existing warehouses. Crow-Spieker seeks no change in the limitations on the hours during which railroad operations may be conducted over the crossing.

In this instance, as in the earlier 1974 application proceeding, the application of Crow-Spieker was protested by STAC. In addition to STAC's protest, letters expressing concern about potentially increased truck traffic on Grant Avenue which would evolve were the application granted were received from several San Lorenzo school PTA groups, the principal of the Barrett School in the area, a county supervisor and his public works director, and the administrator of a homes association. A duly noticed public hearing was held in San Francisco on January 9, 1978 before Administrative Law Judge John B. Weiss at which time the matter was submitted.

At the hearing the main thrust of the opposition to the application again was to the detrimental effects anticipated on Grant Avenue from truck traffic which would be attributable to the industrial development which the protestants in turn would attribute to the increased rail crossing traffic. The protestants are opposed to construction of the projected additional industrial building facilities. However, that project is not within the jurisdictional authority of this Commission. The industrial park development of Crow-Spieker, including construction of industrial buildings, was approved in 1972 by the city of San Leandro after approval of an EIR covering the entire industrial park project. On August 12, 1975 the First Appellate District of the Court of Appeal found against STAC's court challenge,<sup>1/</sup> ruling that the adequacy of the city's EIR could not be challenged in that

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<sup>1/</sup> The Court of Appeal, First Appellate District, Division Three, on August 11, 1975, in an unpublished decision (San Lorenzo Traffic Action Committee, et al. v The City Council of the City of San Leandro, et al. (1 Civil 35466 (Sup. Ct. No. 43991))) determined that Section 21169 of the California Public Resources Code, and the defense of laches, serve to validate the EIR and it now cannot be challenged.

Section 21169 of the California Environmental Quality Act (CEQA) validated those projects which were carried out or approved before December 5, 1972, with the exception of those projects the legality of which was being contested in a judicial proceeding prior to December 5, 1972 (see CEQA Section 21170<sup>2/</sup>). The court noted that Sections 21169 and 21170 were passed as part of the 1972 urgency amendment to the CEQA, following the refusal of the California Supreme Court to delay the effective date of its ruling in Friends of Mammoth v. Bd. of Supervisors (1972) 8 C 3d 247. (See Friends of Lake Arrowhead v. Bd. of Supervisors (1974) 38 CA 3d 497, 509.) In the instant situation the Crow-Spieker industrial park project approval

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2/ Section 21170 of the Public Resources Code states:

- (a) Section 21169 shall not operate to confirm, validate or give legal effect to any project the legality of which was being contested in a judicial proceeding in which proceeding the pleadings, prior to the effective date of this section, alleged facts constituting a cause of action for, or raised the issue of, a violation of this division and which was pending and undetermined on the effective date of this section; provided, however, that Section 21169 shall operate to confirm, validate or give legal effect to any project to which this subdivision applies if, prior to the commencement of judicial proceedings and in good faith and in reliance upon the issuance by a public agency of any lease, permit, license, certificate or other entitlement for use, substantial construction has been performed and substantial liabilities for construction and necessary materials have been incurred.
- (b) Section 21169 shall not operate to confirm, validate or give legal effect to any project which had been determined in any judicial proceeding, on or before the effective date of this section to be illegal, void or ineffective because of noncompliance with this division.

was given on November 20, 1972, but the judicial proceeding undertaken by STAC was not initiated until after December 5, 1972. The Court also concluded, against STAC, that the Crow-Spieker project was not invalid for lack of notice in 1972. Therefore, in this proceeding this Commission has no jurisdiction as to whether or not additional industrial buildings are constructed, even though their construction would undoubtedly result in additional truck traffic on Grant Avenue. The city of San Leandro, which could authorize construction of secondary access roads to and from Crow-Spieker's proposed development, is the proper party to assert its jurisdiction to alleviate any increase in traffic flow on Grant Avenue. The jurisdiction of this Commission, to the extent it exists, rests only with the issue of rail crossing traffic on the industrial drill track over Railroad Avenue (see Section 1202 of Public Utilities Code).

It should be noted here that Crow-Spieker intends to proceed with the erection of additional industrial warehouse or light manufacturing buildings whether or not this Commission approves this application, proceeding within the context of their 1972 San Leandro authorization. During the January 9, 1978 hearing, Crow-Spieker's agent, Mr. Dennis E. Singleton (Singleton), testified that two alternative plans have been prepared for their industrial building construction on their remaining nine acres: one plan with rail service and one plan without rail. If rail service restrictions are not raised as requested, they will proceed with construction of three additional buildings; two of 96,000 sq.ft. each and a third of 80,000 sq.ft. In this latter instance all transportation to and from the three non-rail facilities would necessarily have to be by truck. However, they would prefer a rail-served facility; it obviously presenting a more versatile facility for leasing purposes to prospective tenants. Thus, their application to this Commission is to lift or modify the existing rail restriction of service to only existing buildings.

In this latter regard Crow-Spieker makes the cogent argument that a rail-served facility would serve to actually reduce the

potential volume of truck traffic to be added to Grant Avenue.<sup>3/</sup> It is their estimate that operation of the preferred 180,000-sq.ft. building facility would require approximately 107 additional rail cars per year to use the Railroad Avenue crossing. This estimate is based upon the maximum (year 1976) experience at their Budway warehouse (the existing 110,750-sq.ft. facility served by rail since 1975). From their experience in this business, Crow-Spieker testified that if they have alternate means of access to their properties for goods in transportation, such as a rail alternative, it decreases the amount of truck traffic required in and out substantially. They estimate that 3 truckloads are necessary to replace each rail car. Thus, at least 321 truckloads annually each way would be added to Grant Avenue traffic were rail service to be denied to the projected 180,000-sq.ft. facility. In addition, testimony was introduced that a non-rail facility would add auto traffic to Grant Avenue. The San Leandro Planning Commission requires more parking spaces for non-rail-served warehouse or light manufacturing facilities than for rail-served facilities; it being its experience that rail-served facilities utilize a smaller number of employees than non-rail-served facilities. This means that were we to deny lifting or modification of the crossing restriction, the resultant non-rail facility would add additional employee auto traffic, morning, at lunch time, and evenings, to Grant Avenue. It is also significant that the Crow-Spieker facilities in the overall San Leandro industrial park in the Grant Avenue area

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<sup>3/</sup> Strangely, although at the time of the hearing, the rail crossing had been in operation over two years and truck traffic on Grant Avenue assertedly had been very heavy, imposing--according to more than one writer--"hazardous" conditions, the county road department had not made a traffic study or even a traffic count to substantiate these conditions.

occupy less than 5 percent of the industrial area already developed. There are other very substantial industrial facilities there. For example, apart from smaller facilities, there are the Bohannon property, now a Grodin's men's clothing warehouse; a large manufacturing plant formerly occupied by Fraser & Johnson (furnace manufacturers); a division plant of Fairmont Foods producing potato chips and other snack foods; a State of California surplus equipment and supply warehouse; and a car manufacturing operation.<sup>4/</sup> All of these facilities produce traffic on Grant Avenue, both truck and auto.

Based upon Crow-Spieker's estimate of the additional number of rail cars which would possibly be required to serve their preferred 180,000-sq.ft. facility and assuming at the extreme that each rail car was timed so as to require an individual switching over the crossing, there would be at most an average of approximately three switches each week over the Railroad Avenue crossing. It is noteworthy that there was but one complaint, and no evidence presented from protestants or those concerned to indicate that the present switching has caused any problems—the thrust of protestant's objections was entirely to the anticipated truck traffic. In that the application if granted would require no physical changes in the drill track crossing and that the restriction upon hours during which the crossing could be utilized would continue in effect, we conclude that an average of three switchings a week would cause no significant or unreasonable problems to the residential community or significant effect upon the environment. ✓

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<sup>4/</sup> South of Grant Avenue and west of the Southern Pacific mainline (i.e., just adjacent to and extending in a southern direction from the Crow-Spieker development, there are numerous other industrial facilities. Within 2,500 ft. south of Grant Avenue, there are two other mainline railroad switches serving these other facilities, both similar to Crossing No. L-18.38-C. Thus, the crossing serving the Crow-Spieker property is consistent with the long-standing industrial land use of the area.



The applicant has referred us to Sections 560, 761, 765, and 1202 of the Public Utilities Code. Our analysis of the applicability of these references follows:

"Section 560 states insofar as relevant here, that 'Upon the application of any shipper or receiver or contemplated shipper or receiver of freight for a connection between the railroad of a railroad corporation and its existing or contemplated private track... the railroad corporation shall make the connection...and deliver and receive cars thereover...' (Emphasis added.)

"Section 762 we do not find applicable in the instant proceeding in that no '...additions, extensions, repairs, or improvements to, or changes in, the existing...facilities, or other physical property...' of the Southern Pacific are required to provide the relief sought.

"Section 765 also appears not to be applicable in the instant proceeding as Southern Pacific has not refused to provide applicant with a connection or spur, but rather has already constructed and provided in the drill track crossing over Railroad Avenue a 'connection or spur', and stands ready, willing and able to provide switching and rail service over the existing crossing if this Commission removes or modifies the restriction limiting service to but the two existing industrial buildings.

"Section 1202 as relevant here gives the Commission 'the exclusive power: (a) To determine and prescribe the manner... and the terms of...operation...[and] use... of each crossing of a public or publicly used road...' It is not in issue here. The applicant by filing its application to this Commission has submitted to the jurisdiction of the Commission."

Therefore, nothing in the above code sections provides any obstacle or limitation to our granting the relief sought by the

applicant, apart from other considerations, nor do the code sections require anything more from the applicant than has already been presented to the Commission. In fact, absent other considerations, to the extent the code sections are relevant, they would indicate that the relief sought by the applicant should be granted.

In summary, we conclude that the relatively small amount of additional switching traffic herein to be involved across Railroad Avenue would inconvenience no one on this cul-de-sac dirt road and would not to any significant degree affect the overall environment, especially if--as proposed here--the same hours restrictions on switching and rail operation were retained. It also appears reasonably certain that the alternative to granting the relief sought, that is to disallow the requested lifting of the service restriction to the existing industrial buildings, would merely result in substantially increased volumes of both truck and auto traffic on Grant Avenue. The industrial buildings will be built with or without rail service. The more beneficial end result to both applicant and protestants will be to permit rail service to the new industrial building or buildings to be erected on the remaining nine acres of Crow-Spieker's San Leandro Business Park.

#### Findings

1. The industrial drill track across Railroad Avenue in Alameda County to connect a spur track in Crow-Spieker's San Leandro Business Park to Southern Pacific's main line was completed in 1975 and has been in service since.
2. By the provisions of Decision No. 84978 dated October 7, 1975, service within specifically defined hours was restricted to the two existing industrial buildings in that business park.
3. At this time Crow-Spieker intends to erect the final industrial building or buildings in the remaining nine-acre segment of their

San Leandro Business Park and desires that the restriction imposed by this Commission limiting rail service to the existing two industrial buildings be removed so as to provide rail service to their projected building or buildings to be erected in that business park.

4. Crow-Spieker requires no authorization from this Commission to erect their projected industrial buildings in their San Leandro Buisness Park.

5. The projected new industrial buildings will add truck and auto traffic to Grant Avenue, the access thoroughfare which has ingress and egress to Nimitz Freeway through the San Lorenzo residential area adjacent to the industrial park.

6. Permitting rail service to be extended to the projected new industrial building or buildings would serve to add substantially fewer trucks and autos to Grant Avenue traffic than would be the situation were rail service to be denied the projected building or buildings leaving the only access to be truck and auto.

7. Existing rail switching and crossing traffic over Railroad Avenue is minimal and has resulted in no complaints or known problems to this Commission.

8. The estimated additional rail switching and crossing traffic over Railroad Avenue from the requested extended service appears to offer no significant or unreasonable problem to the residential community nor have any significant effect upon the environment.

#### Conclusions

1. The restriction upon rail service being extended beyond the two existing Crow-Spieker industrial buildings should be removed.

2. The limitation on hours of rail operation and switching traffic set forth by Decision No. 84978 dated October 7, 1975 should be retained.

O R D E R

IT IS ORDERED that:

1. The restriction limiting rail service over Railroad Avenue in the county of Alameda, Crossing No. L-18.38-C, to the existing two Crow-Spieker #9 and #10 industrial buildings is eliminated.

2. Southern Pacific Transportation Company is authorized to provide rail service to such Crow-Spieker #9 and #10 industrial building or buildings as may be constructed on the remaining nine acres of their San Leandro Business Park adjacent to the tract holding the existing Crow-Spieker #9 and #10 industrial buildings.

3. Rail operations over the Railroad Avenue crossing, Crossing No. L-18.38-C, shall be permitted only between the hours of 6:30 a.m. and 8:00 p.m. daily including Saturdays, Sundays, and holidays.

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

Dated at San Francisco, California, this 25th day of JULY, 1978.

Robert Bateman  
President  
William J. Gannon Jr.  
Vernon L. Hutzman  
Richard D. Howell  
Chairman  
Commissioners