

Decision No. 89203

AUG 8 - 1978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of THE ATCHISON, TOPEKA  
AND SANTA FE RAILWAY COMPANY for an  
order abolishing grade crossing at  
Walter Avenue, Pinole, Contra Costa  
County.

Application No. 57839  
(Filed January 30, 1978)

Leland E. Butler and Charles L. Hemmings,  
Attorneys at Law, for The Atchison,  
Topeka and Santa Fe Railway Company,  
applicant.

E. James McGuire and William R. Benz,  
Attorneys at Law, for Jones Development  
Company; and Charles Schreiner, James  
Jenkins, and Alan Lindsay, for themselves;  
protestants.

Charles R. Abar, for Owners at Crossing,  
Charles R. Abar and Elizabeth M. Abar;  
and Paul E. Kilkenny, for Contra Costa  
County, Public Works Department;  
interested parties.

Steven Weissman, Attorney at Law, for the  
Commission staff.

### O P I N I O N

The Atchison, Topeka and Santa Fe Railway Company (Santa Fe or applicant) herein requests an order from the Commission that the crossing of Walter Avenue over the tracks of applicant near the city of Pinole, Contra Costa County, be ordered closed pursuant to Section 1202 of the Public Utilities Code. The application was opposed by Jones Development Company, Charles Schreiner, James Jenkins, Alan Lindsay, and Charles Abar.

Public hearing was held before Administrative Law Judge Bankd at San Francisco on March 1 and 2, 1978. The matter was submitted on March 2, 1978 subject to the filing of concurrent briefs 30 days after receipt of the transcript.

Evidence, both oral testimony and exhibits, was presented on behalf of Santa Fe, Jones Development Company, et al. (protestants), Charles Abar (Abar), and the Commission staff. Briefs were filed by each of the aforementioned parties.

Background

Walter Avenue is an unimproved dirt and gravel road near the city of Pinole in the county of Contra Costa. It runs perpendicular to the right-of-way and mainline tracks of Santa Fe. To the north of the right-of-way, there is a large undeveloped area interrupted only by the railroad right-of-way. It is disputed whether Walter Avenue crosses Santa Fe's tracks. Prior to Santa Fe barricading the crossing in 1975, a private crossing existed at the end of Walter Avenue traversing Santa Fe's right-of-way by virtue of various private crossing agreements.<sup>1/</sup>

In The Atchison, Topeka and Santa Fe Railway Company v Charles Abar, et al., (1969) 275 CA 2d 456, a superior court determination that Walter Avenue is a publicly used street leading to and crossing over the Santa Fe right-of-way was upheld. That decision also affirmed Santa Fe's title to the right-of-way and enjoined Abar from interfering with Santa Fe's use of Walter Avenue.

On September 11, 1975, Santa Fe barricaded the Walter Avenue crossing. A 1977 appellate decision in The Atchison, Topeka and Santa Fe Railway Company v Abar, Court of Appeal of California, First Appellate District, Division Three, 1 Civil 40244 (unpublished) held that the 1969 determination

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<sup>1/</sup> Santa Fe witness Mr. C. F. Lilley testified that the railroad records show that the Walter Avenue crossing had been covered by private crossing agreements since at least December 30, 1949. On that date, Secretary's Contract No. 52688 was executed between Mr. C. H. Collier and Santa Fe. This contract was canceled on September 24, 1962 when Mr. Collier informed Santa Fe he had sold the adjacent property and no longer had an interest in the crossing.

On December 15, 1961, Mr. Herbert Wimmer and Mr. C. E. Schreiner executed a private crossing agreement, Secretary's Contract No. 68528. On May 25, 1966, Mr. Wimmer asked that his name be removed from the agreement and the contract was assigned to Mr. Schreiner. Contract No. 68528 was canceled on April 30, 1975 for failure to install locked gates to restrict public use.

that the crossing had been dedicated to public use was correct. That decision reaffirmed a lower court ruling that the barricade must be removed and the crossing restored to its 1975 state.

That this Commission has jurisdiction over the disposition of all existing and potential railroad crossings is undisputed. (For example, see Southern Pacific Trp. Co. v PUC (1976) 18 C 3d 308, and cases cited therein.) Based on the Commission's continuing jurisdiction and to avoid reopening the crossing, Santa Fe filed the subject application.

It is Santa Fe's position that there is no present need for a crossing at Walter Avenue and that the crossing was closed only after the private crossing agreement was canceled.

Mr. C. F. Lilley, train master on the Valley Division of Santa Fe, testified that Santa Fe's records disclose that the Walter Avenue crossing had been covered by private crossing agreements since at least 1949; that the last private crossing agreement with protestant Schreiner was canceled in 1975 for Schreiner's failure to install locked gates; that following such cancellation Santa Fe barricaded the crossing; that the crossing would be unsafe and dangerous if reopened to its condition immediately prior to its closing; that if the crossing remains closed, the property owners will continue to have access to the property at three different locations; that public safety has not been adversely affected by its closing; and that the proper approach for a public crossing would be for the county to make application before the Commission.

Mr. Lilley also testified that the crossing was barricaded only after the parties failed to keep the crossing gated and locked. He stated that because Santa Fe has 995 private crossings in California it is beyond the ability of Santa Fe to constantly police all crossings to assure that conditions of the private crossing agreements are being observed.

In its brief Santa Fe avers that protestants seek a crossing for future development purposes; that neither the county nor the city of Pinole have been approached with development plans; that neither the county nor the city of Pinole have plans to apply to the Commission for a public crossing; and that neither the city of Pinole nor the county see a present need for a public crossing.

Testifying on behalf of Santa Fe was Mr. Wiley Hom, Supervising Sanitarian of Contra Costa County. Mr. Hom stated that when the Walter Avenue crossing was open there was a chronic condition with respect to trash and garbage on the vacant property just north of the Santa Fe tracks and that if not removed it becomes a food source for rats and insects. He stated that since the crossing was barricaded in 1975 the litter problem has improved.

William Radcliffe, Assistant Fire Chief for the city of Pinole, was Santa Fe's final witness. Chief Radcliffe stated that his department is responsible for fires surrounding Walter Avenue; that the department now responds to calls through one of three vacant lots in the adjacent residential area; and that the crossing is not essential for adequate fire protection at the present time, but its closing can add about two minutes in time to respond to a call in the area.

It is protestants' position that the application should be denied; that the crossing should be ordered reopened; that the cost of reopening and protecting the crossing should be apportioned pursuant to Section 1202.3 of the Public Utilities Code; and that Santa Fe should be ordered to maintain the crossing and signals at its expense.

In support of their position, protestants presented Mr. Walter Bobotek, City Planner for the city of Pinole. Mr. Bobotek stated that when the area north of the Santa Fe tracks is developed there must be access to the property from San Pablo Avenue for good traffic circulation; that a crossing now is important for the purpose of a general plan in view of the area's light industrial zoning; and that improvements should be made in conjunction with the area's development. Mr. Bobotek also stated that the city has no present motivation to expend public money to build a crossing. ✓

Mr. Theodore M. Gerow, Director of the Environmental Health Division of the Contra Costa Health Department, testified on behalf of protestants. Mr. Gerow is the superior of Mr. Hom who testified on behalf of Santa Fe. Mr. Gerow stated that there was no evidence in the county files to indicate that the county was involved in ordering the Walter Avenue crossing closed.

Mr. Paul E. Kilkenny, Assistant Public Works Director for the county of Contra Costa, also testified on behalf of protestants. Mr. Kilkenny stated that the county general plan designates the property north of the Santa Fe tracks as industrial and that it is zoned H-1; that as industrial property there must be an access from San Pablo Avenue; that Walter Avenue is a logical location for ingress and egress from San Pablo Avenue; that Walter Avenue is not part of the county-maintained road system; that the county would accept Walter Avenue as a public street when, and if, it is brought up to county standards; and that the county has no current plans to apply to the Commission for a public crossing.

Protestant Mr. Charles Schreiner stated that he is part owner of improved property in the tract of land north of the Santa Fe tracks known as Bay Villa; that when he purchased the property in 1960, Walter Avenue was the only means of ingress and egress from San Pablo Avenue to his property; that he had a private crossing agreement with Santa Fe; that from the time he purchased the property until it was barricaded, Walter Avenue was used by the general public; that prior to the crossing being barricaded, the property was used for manufacturing; that after the barricades were erected, he was unable to rent or use his property; that Santa Fe did not tell him that Walter Avenue had been declared a public crossing; that subsequent to the barricading, he discussed with his renters the possibility of using vacant lots as a means of access, but that it was impossible; and that prior to the closing he used to rock and grade Walter Avenue north of the Santa Fe tracks to his property.

On cross-examination Mr. Schreiner stated that he had a private crossing agreement with Santa Fe and that he was notified in 1974 that the contract would be canceled if the property was not kept gated.

Mr. Harold Rex Jones, president of the protestant Jones Development Company, testified that the first Bay Villa parcel was purchased by the company in 1956 and the balance within the next two or three years. He stated that at the time of purchase, the Walter Avenue crossing was the only means of ingress and egress; that the purchase was made in reliance on ingress and egress over Walter Avenue; that when the crossing was open Jones Development Company used the property as a source of dirt and fill; that with the closing there is no way of getting trucks in and out; that the crossing by the dog kennels is inadequate; and that the blockading interfered with the development of the property as an industrial park. ✓

Mr. Abar is the owner of a parcel of land subject to the Santa Fe right-of-way in the Bay Villa tract wherein Walter Avenue crossing is located. Mr. Abar would like to have a crossing at Walter Avenue in order to improve his property by moving fill dirt across the Santa Fe tracks.

The Commission staff supports the application stating that there is no current need for a public crossing at Walter Avenue. The staff witness, Mr. Robert W. Stich, Supervisor of the Traffic Engineering Section, stated that, in his opinion, the Walter Avenue crossing must become a public crossing or it must be closed. He stated that should it be declared a public crossing, Santa Fe should construct the crossing in accordance with Standard No. 3 of General Order No. 72-B, and the crossing should be protected by two No. 9 automatic gates, as prescribed in General Order No. 75-C. On cross-examination, Mr. Stich stated that by the evidence of record, and his observations of the crossing, he did not see a public need for a crossing and that, at such time as the property is developed, the county should seek authority from the Commission for whatever crossing it feels is necessary.

The question to be resolved is whether public health and safety require a public crossing at Walter Avenue.

In affirming a superior court order that Santa Fe restore the Walter Avenue crossing to its 1975 condition, the court in The Atchison, Topeka and Santa Fe Railway Company v Abar (1 Civil 40244, supra) stated:

"We conclude, however, that the superior court acted within the scope of its jurisdiction in ordering the removal of the blockage and the restoration of the crossing to its prior condition. In so doing the court was not determining the 'manner' of the crossing, nor was it determining the particular point, the terms of installation, operation, maintenance, use or protection of the crossing. The manner of the crossing had been determined many years ago; it had been used by the public for at

least thirty years. (See Atchison, T. & S.F. Ry. Co. v Abar (1969) 275 Cal. App. 2d 456.) The order of the superior court was aimed merely at returning Walter Avenue to its former condition which was consistent with its status as a public road. (See Atchison, T. & S.F. Ry. Co. v Abar, supra.) The impact upon the crossing was incidental to this purpose. The responsibilities for operation, maintenance, use and protection were unaffected by the order. The Public Utilities Commission continues to have jurisdiction to regulate the crossing and order a modification or closing of it." (Emphasis added.)

It is clear from the foregoing that the Commission has jurisdiction to determine the public need for crossings.

The protestants each testified to the present need for a crossing arguing the need for ingress and egress to their respective parcels in the Bay Villa property. In summary, their testimony is that the Walter Avenue crossing was unlawfully barricaded by Santa Fe; that the area north of the Santa Fe tracks has been zoned light industrial; that a logical and best access to the property from San Pablo Avenue is via Walter Avenue; that there must be access to the property from San Pablo Avenue when, and if, the property is developed; that, prior to being barricaded, the crossing was used by the public for over 30 years; that the Pinole Fire Department used the crossing for access to Bay Villa for fire fighting; that access to the Bay Villa property by means of the Del Monte overcrossing or the private crossing by the dog kennels is inadequate; that the closing will increase the flow of traffic through the adjacent residential area; and that the closing has delayed the development of the area as an industrial park.

The arguments propounded by protestants to the present need for a public crossing are not persuasive. Any benefit to the general public's health and safety would be minimal. Only the protestants would derive a benefit if there was a public crossing.



The evidence is that Walter Avenue is an unimproved gravel and dirt road leading up to the Santa Fe tracks near the city of Pinole in Contra Costa County. Exhibits 5 through 12, introduced by applicant, and Exhibits 23 through 29, introduced by protestants, show that after crossing the Santa Fe tracks Walter Avenue branches off into two small dirt paths. The road up to or beyond the tracks has not been publicly dedicated nor is it a part of the county-maintained road system. Further, there is no evidence of dedication of a road or street to public use by the owners or acceptance by the affected public agency of the property adjacent to the Santa Fe right-of-way.

With respect to a present need, the testimony given by each of the protestant landowners was self-serving. The need, for the most part, was for the future development of their respective parcels. As pointed out by the staff, it would appear that the present needs of the protestants can be satisfied by private crossing agreements and that if the parties are unable to reach an agreement, they can apply to the Commission for a determination of the necessity for a crossing. This lack of action on the part of protestants does not suggest a need for continuing the existence of a public crossing at Walter Avenue.

With respect to past public use, the testimony was that prior to the closing in 1975, there was considerable public traffic over the crossing to reach the area across the tracks for recreational purposes, such as biking and to reach the bay for fishing. Since the closing in 1975, those persons have apparently found alternate means to reach the bay. Nonetheless, the determining factor is not that the Walter Avenue crossing was used to reach the bay, but that the recreational use alluded to required trespassing over private land as well as the unauthorized crossing of the tracks of Santa Fe. It would appear that a public crossing would further encourage members of the public to trespass.

The testimony of the public officials was that a public crossing would be desirable for future development of the area north of the tracks. None, however, stated there was a present need. Indeed the only public witness whose testimony could be construed to show a present need was Mr. Radcliffe of the city of Pinole who stated that up to two minutes could be saved in reaching parts of the area to fight fires. The most telling testimony was given by protestants' witness Paul Kilkenney, Assistant Public Works Director for Contra Costa County, who stated that while Walter Avenue is a logical means of ingress and egress into the property over the tracks, he observed that Walter Avenue is not a part of the county-maintained road system, nor are any of the roads north of the crossing; that the county has no current plans to apply to the Commission for a public crossing; and on cross-examination he stated, "In my opinion, there is no public need for Walter Avenue at this time."

All of the parties agree to the need for a protected public crossing when and if a development north of the Santa Fe tracks is approved and an application is filed by the county. In this regard, counsel for Santa Fe stated, "I will be glad to stipulate that when a proper application with the county by the county for a protected grade crossing at Walter Avenue, that Santa Fe Railway will render no objection."

Finally, as testified to by Commission witness Mr. Stich, the Commission records indicate that the Walter Avenue crossing is private. The Commission has made no prior determination that the Walter Avenue crossing is a public crossing.

Based on the record herein, we conclude that the crossing should be abolished.

#### Findings

1. Walter Avenue is an unimproved dirt and gravel road located in Contra Costa County near the city of Pinole. It is not part of the county-maintained road system.

2. The crossing at Walter Avenue, Gately Station, Milepost 1182 + 4255.8, was created as a private crossing. The Commission has made no prior determination that the Walter Avenue crossing is a public crossing.

3. The crossing at Walter Avenue has been judicially determined to be a public crossing and Santa Fe has been ordered by the Superior Court to remove the barricade and to restore the crossing to its 1975 condition.

4. Daily train traffic over the crossing is 16 trains per day, six days per week, and 14 trains one day per week. All moves are freight trains. The maximum allowable speed through the crossing is 60 miles per hour.

5. Train crew sight distances are 1,300 feet on westbound trains and 535 feet on eastbound trains.

6. Walter Avenue runs in a north-south direction, perpendicular to the main line of Santa Fe.

7. Walter Avenue appears as a road south of the Santa Fe tracks, branching off into two narrow dirt paths to the north.

8. The property north of the Walter Avenue crossing owned by protestants Schreiner and Jones Development Company is zoned in the Contra Costa County General Plan as industrial (H-1) and is unimproved except for two buildings on protestant Schreiner's property. The county of Contra Costa has no present plans to develop Walter Avenue.

9. Alternate means of access to the property north of the Walter Avenue Crossing are available through the adjacent residential subdivision by crossing the Santa Fe main line over Del Monte overpass.

10. The city of Pinole's Land Use and Circulation Plan shows Walter Avenue as an arterial across the main Santa Fe line into protestants' property. Walter Avenue crossing is not within the city limits of the city of Pinole at this time.

11. Members of the public have used Walter Avenue and the crossing for access to the property north of the Santa Fe tracks for recreational purposes.

12. The crossing at Walter Avenue is a publicly used private crossing. (Findings 2, 3, and 11.)

13. There is no present public need for a public railroad crossing at Walter Avenue at this time. (Findings 4 through 11.)

14. The proper procedure to establish a crossing at grade over Walter Avenue is the filing of an application before this Commission by an appropriate political subdivision.

15. Santa Fe has stipulated that when, and if, a proper application is filed for a protected grade crossing at Walter Avenue, Santa Fe will render no objection.

#### Conclusions of Law

1. This Commission has exclusive jurisdiction to establish or abolish crossings of public or publicly used roads across the tracks of railroad corporations.

2. Walter Avenue is an unimproved dirt and gravel road that is not dedicated nor maintained by a public agency.

3. There has been no private dedication of the land and no public agency acceptance adjacent to the crossing at Walter Avenue.

4. The grade crossing located at Walter Avenue, Gately Station, Milepost 1182 + 4255.8 is a publicly used private crossing within the purview of Public Utilities Code Section 1202.

5. The needs of protestants for a crossing at Walter Avenue can be achieved through a private crossing agreement until such time as there is a public dedication and a public agency acceptance.

O R D E R

IT IS ORDERED that the crossing located at Walter Avenue near the city of Pinole, Contra Costa County, should be abolished.

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

Dated at San Francisco, California, this 8th  
day of AUGUST, 1978.

Robert Bahumel  
President

Virgil L. Stiggen  
Charles D. Good

Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.