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ORIGINAL

Decision No. 90268 MAY 8 1979

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
(Petition for Further Hearing
filed March 2, 1978)

J. David Fitzsimons, Assistant City Attorney,
and Michael F. Dean, Attorney at Law, for
the City of Modesto, complainant.

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

Mary Carlos and Steven Weissman, Attorneys
at Law, Raymond Gentry, Herman Privette,
and John L. Carroll, for the Commission
staff.

O P I N I O N

This is a complaint by the city of Modesto (City) requesting that the Commission, as a means of abating certain noises and alleged nuisances created by Tidewater Southern Railway Company (Tidewater) in its use of the Aurora siding, order the closing of the Aurora siding or, in the alternative, order Tidewater to restrict its use of the siding to emergency railroad operations only. The prior hearing in this case resulted in interim Decision No. 87405 dated June 1, 1977, wherein the Commission ordered Tidewater to cease certain specified operations on the Aurora siding and in Ordering Paragraph 2 of that decision required the Commission staff to do the following:

- "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."

In conformity with the above ordering paragraph, the staff submitted its report (Exhibit 16). Tidewater disagreed in part with the report and requested a further hearing to examine the staff member who had prepared the report and to give testimony on its own behalf. A hearing was held on the report on November 14, 1978, before Administrative Law Judge Pilling and briefs, due January 15, 1979, were submitted.

The staff's report contained the following conclusions:

- "1. The Tidewater Southern Railway has voluntarily initiated changes in train schedules and operating procedures which have eliminated use of the Aurora siding for normal switching and train operations.
- "2. Air brake tests are no longer conducted in the vicinity of the Aurora siding.
- "3. Cars are no longer left on the Aurora siding overnight or during the day, except in an emergency—mechanical failure, derailment, et cetera.
- "4. Motors on mechanical refrigerator cars are shut down if such cars are left on the siding under an emergency condition.
- "5. Safety hazards to children have been greatly reduced because cars are no longer left on the siding.
- "6. Switch moves into the North Yard no longer use the Aurora siding to run around cars. All moves are shoved in or out of the North Yard.
- "7. Main line operation continues. Early morning trains were observed to proceed slowly with the engine at low throttle setting with minimum use of bell and horn. (Reports indicate that occasionally an extra engineer unfamiliar with the area may operate in a manner causing excessive noise in making the customary moves.)

- "8. Dust and smoke and odor were not discernibly in excess of that generated by vehicular traffic trucks and automobiles, using the streets in the vicinity of the Aurora siding.
- "9. The Tidewater Southern Railway, except in an emergency situation, operates as if the Aurora siding did not exist."

The staff's report contained the following recommendations:

"From the information derived from Staff observations, inspection of records, and the Tidewater Southern Railway representative, it appears that normal train operations can be conducted without using the Aurora siding. Main line operations, which must continue, can be carried out with a minimum of noise with implementation of proper operating and supervisory procedures with appropriate notices to all crew members and supervisors responsible for operations on this line. The Aurora siding should remain in place but be limited to emergency use only, which would not include use necessitated by trains being late, too long, underpowered or for scheduling convenience of the railroad. Additionally, Paragraph 1 of the Interim Order Dec. 87405 dated June 1, 1977 and quoted herewith:

- '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.'

should be included in the final decision in this proceeding."

The City urges the Commission to adopt the staff's recommendations.

Tidewater contends that: (1) restricting Tidewater's freedom to use the Aurora siding as an integral part of its rail system serving the shipping public is an unreasonable burden upon interstate commerce; (2) the Federal Noise Control Act of 1972 and the attendant federal regulations found in 40 CFR 201, et seq. preempt the Commission's jurisdiction with regard to railroad noise emissions; (3) complainant has waived its right to complain of Tidewater's activities on the siding; and (4) the activities of Tidewater complained of are not a nuisance as a matter of law. Tidewater claims that it has undertaken extensive voluntary measures, some at considerable expense, to reduce noise and to enhance the safety of its operation in the vicinity of the Aurora siding. As to Tidewater's contentions ((1) and (2) above), the staff and the City claim that the Commission may not refuse to enforce a state statute (in this case Public Utilities Code Section 768) because of alleged federal preemption, citing, Article III, Section 3.5 of the Constitution of the State of California, which states, in part, that "An administrative agency...has no power...to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." The staff and the City maintain that no appellate court has made a determination that the enforcement of Section 768 of the Public Utilities Code is, under the circumstances, preempted by the Federal Noise Control Act of 1972 or federal noise regulations, or any federal act or federal constitutional provision pertaining to interstate commerce. The argument has also been raised that the federal regulations have been invalidated (Ass'n of American Railroads v Costle, 562 F 2d 1310 (D.C.Cir. 1977)) and no new regulations promulgated. Thus it is impossible to know the scope, if any, of federal preemption.

After the staff report was issued, the parties met informally in order to resolve their differences. As a result

of the meeting, the staff submitted in writing a suggested revision of its recommendations. The revision reads:

"The Aurora siding should remain in place but be limited to use for^{1/} operational necessities except between 12 midnight and 4 a.m. Its use should be restricted to emergencies resulting from unforeseen circumstances such as equipment failure, unsafe track structure, derailments or other such events over which the railroad has no control.

^{1/} Operations dictated by Federal or State requirements and the railroad's operating rules to insure safety of operations, but not for mere convenience."

The staff's proposed revision was not accepted. Tidewater also offered a compromise restriction which provided that it would use the siding between 12:00 midnight and 6:00 a.m. for emergency purposes only and at all other times only for running around cars, passing trains, and emergency purposes. Tidewater's proposed revision was not accepted by the other parties.

Tidewater is a single track railroad operating between Stockton and Turlock. Its track bisects the City in a north-south direction. It operates a rail yard within the City, interchanges cars with other railroads at rail yards within the City, and delivers cars within the City. It operates one train a day each way between Stockton and the City, the train from Stockton passing the Aurora siding on its way to its yard near 10th and D Streets in the City between 12:00 midnight and 3:00 a.m., and after assembling a consist of cars for the return trip departs the City before 7:00 a.m. for Stockton.

(Subsequent to the initial hearing in the case, Tidewater voluntarily initiated changes in its train schedules which, under normal conditions, eliminate the possibility of trains or cars being available to children to climb in, across, or over on their way to or from school.) The staff report shows that when the train from Stockton arrives in the vicinity of the Aurora siding there are several courses of action available to the crew depending on consist, time on duty, and the number of cars to interchange. The train is sometimes stopped on the main track and a cut of cars is delivered after which the crew may take time off to eat before returning to take the remainder of the train into its yard. If the crew has been on duty for a long period of time, they may elect to eat before delivering the interchanged cars or before taking any part of the train further into town. In the latter case the entire train is left on the main track and the crew proceeds on the locomotive to a nearby restaurant. After eating they return to the train and take it through town in one or two sections. When an extra long train is parked on the main track while the crews go to lunch or for other reasons, the train must be cut to clear a crossing. All of these operations are performed on the main track without the use of any siding. In checking complaints made after the initial hearing from residents close to the Aurora siding about noise emanating from the siding, the staff found the noise came from operations on the main track and not from the siding which is 17 feet from the main track at its farthest point and parallels the main track for approximately 3,500 feet. The staff witness, contrary to the contentions of Tidewater, does not consider pushing a string of up to 25 cars across a street crossing any more dangerous than pulling a string of a similar number of cars across a street crossing, given the posting of a crew member lookout

on the front car or lead caboose and the availability of an auxiliary braking device on the front car or caboose in the lead. The staff witness pointed out that many grade crossing accidents involve vehicles hitting the side of a train rather than the front of the train hitting vehicles.

Tidewater's witness testified that Tidewater, as it presently operates, could "live with" not using the Aurora siding between the hours of 12:00 midnight and 6:00 a.m. except for emergency purposes and restricting its use of the siding at other hours to running around cars, passing trains, and parking equipment when the train crew runs out of hours near the siding. Running around cars would occur about a half a dozen times a month when necessary for safety reasons and would be done in the midafternoon or at night before midnight. Normally, cars to be switched to Southern Pacific Railroad (SP) are assembled each day at the Tidewater yard in the central part of the City and are pulled northward along Tidewater's main track across a switch at a point south of the Aurora siding, which is the first siding north of the switch. Ordinarily, the engine then is put in reverse and the cars shoved southward, switched onto a different track, and shoved through street intersections to the SP interchange point. However, if there are more than six cars in the string to be interchanged, they are pulled as far as the Aurora siding where they are run around by the engine and pulled through the switch to the SP interchange point. Tidewater does not consider it safe to shove a string of cars consisting of more than six across city streets because of the lack of visual communication from one end of the train to the other, the longer time element involved in communicating a stop signal from one end of the train to the other, and the ineffectiveness of a warning whistle given by the engine which is the farthest component of the string from the crossing. Instead of running around cars at the Aurora

siding, the cars could be run around at the McHenry siding several miles north of the Aurora siding. The McHenry siding, however, is substantially shorter than the Aurora siding so that the Aurora siding would have to be used for longer strings. Additionally, there are many residential street crossings between the Aurora siding and the McHenry siding over which the string of cars would have to be pulled. The last time the Aurora siding was used for passing trains was four years ago. Due to increased business, however, Tidewater is thinking of putting on an additional daily schedule and, while the plan is to have the new schedule pass another train at a point north of Escalon, there may be rare occasions when the Aurora siding would be used. Ordinarily, a train crew or engine crew has some forewarning that it will run out of hours before it will be able to get back to its home base, in which event it will use up the remaining time to seek a siding, other than the Aurora siding, for parking the train or engine. However, Tidewater does not want to be foreclosed from using the Aurora siding when unforeseen events require a nearly out-of-hours crew from using the Aurora siding to park its engine or require the passing of trains, nor does it want to be restricted from use of the Aurora siding for running around cars in the circumstances described above.

Findings

1. Tidewater is a single track railroad operating between Stockton and Turlock.
2. Tidewater constructed its Aurora siding prior to 1930 when the areas surrounding the siding and parallel main track were open fields devoted to agriculture and not a part of any municipality.

3. Since the construction of the siding, the City has annexed large portions of land which have included the siding and several miles of Tidewater's main track.

4. After annexation the area on either side of the Aurora siding was zoned by the City for single-family dwellings and the siding and main track it parallels are now within a residential area well within the city limits of the City.

5. Tidewater's main track now generally bisects the City in a north-south direction.

6. For some time prior to the filing of the complaint, Tidewater's increased switching and other railroad activities carried on in connection with its use of the Aurora siding frequently created (a) unnecessarily loud noises, particularly during early morning hours, which unreasonably interfered with the peace and quiet of nearby residents and (b) certain potential hazards to children during the daytime hours when the children normally go to and from school.

7. Activities in connection with the Aurora siding, particularly those conducted during early morning hours, to which nearby residents voiced their principal objections because of the noise involved and which Tidewater has ceased since the filing of the complaint, are:

- a. Conducting federal air brake tests.
- b. Allowing motors on parked refrigeration cars to run for long periods.
- c. Loud talking and hollering by train crews.
- d. Parking of switch engines with motors running while the crew goes to lunch.
- e. Coupling and uncoupling cars on the siding.
- f. Parking cars on the siding.

8. Since the filing of the complaint, Tidewater has placed restrictions on its operations and actions of its personnel in connection with the use of the siding which have (a) done away with activities described in Finding 7 and (b) eliminated the potential hazards to school children during hours when they normally go to and from school.

9. Despite the voluntary measures taken by Tidewater, the City and the staff want the Commission to order Tidewater to cease using the Aurora siding at any time except for emergency purposes; the phrase "emergency purposes" being deemed not to include use of the siding for running around cars, passing trains, or the parking of equipment when its crews run out of hours.

10. The placing of specific restrictions by the Commission on the use of the Aurora siding is necessary to lay to rest any doubts or misunderstandings by persons within the Tidewater organization and others as to what is expected of Tidewater in keeping down noise in the use of the Aurora siding.

11. Limitation of Tidewater's use of the Aurora siding from the hours of 12:00 midnight to 6:00 a.m. to emergencies resulting from unforeseen circumstances such as equipment failure, unsafe track structure, derailments, or such other events over which the railroad has no control, would eliminate unnecessary and objectionable noises emanating from the Aurora siding which heretofore unreasonably disturbed the sleep of nearby residents.

12. Limiting operations as set out in Findings 10 and 11 would not unduly interfere with Tidewater's railroad operations.

13. The Aurora siding is the closest siding to the switch leading to the SP interchange point.

14. Use of a siding several miles north of the Aurora siding for running around cars to be interchanged to the SP

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(a) creates unnecessary activity up and down the main track between the two sidings and (b) merely transfers noise to other residential areas.

15. The running of a switch engine over the Aurora siding creates no larger ambient noise area than the engine's operation over the adjacent main track located 17 feet from the Aurora siding track.

16. Tidewater should be permitted to operate a switch engine on the Aurora siding from the hours of 6:00 a.m. to 12:00 midnight for the purpose of running around more than six cars at a time.

17. No evidence was presented which indicated that Tidewater's reason for wanting to use the Aurora siding for running around more than six cars was prompted by any desire other than to further the safety of its operations.

18. The probability of Tidewater having to use the Aurora siding for the passing of trains is remote.

19. Tidewater should be permitted to use the Aurora siding for the passing of trains only when one or both of the passing trains is too long to be accommodated by the McHenry siding and only during the hours from 6:00 a.m. to 12:00 midnight.

20. Tidewater should take special precautions in scheduling its trains to eliminate the probability that the Aurora siding will be used for the passing of trains.

21. The parking of a switch engine with motor off on the Aurora siding when a crew runs out of hours at any time from 6:00 a.m. to 12:00 midnight will not add to unnecessary noises in the area.

22. Tidewater should issue standing instructions to its crews to endeavor to anticipate sufficiently in advance when they will be running out of hours to avoid the use of the Aurora siding for parking their engines when they run out of hours. ✓

23. Since Tidewater is a single-track railroad, the physical removal of the Aurora siding may endanger its future safety of operations.

Conclusions

1. Section 768 of the Public Utilities Code authorizes the Commission to require a railroad to operate its line or system in such manner as to promote and safeguard the health and safety of the public.

2. Except as and to the extent that operations are permitted by Ordering Paragraphs 1, 2, and 3, the industrial cacophony caused by Tidewater's operations in connection with its use of the Aurora siding is unnecessary and unreasonably interferes with the peace and quiet enjoyment of their property by nearby residents.

3. To promote the health and safety of persons residing near the Aurora siding, Tidewater should be ordered to restrict its use of that siding as required by the ordering paragraphs below.

4. The federal government has not yet issued valid regulations that would impede the actions of this Commission in the present proceeding.

5. The restrictions placed on Tidewater's operation set out in the ordering paragraphs below are necessary to promote public health and safety.

6. The City's alternative request that Tidewater be ordered to remove the Aurora siding should be denied.

7. The Commission is not precluded from ordering a railroad to adjust its activities for public health and safety reasons as we have done below simply because the railroad was in place long before the complainant's arrival in the area, or because the complainant delayed a long time in bringing formal action before the Commission to enjoin such activities.

O R D E R

IT IS ORDERED that:

1. Tidewater Southern Railway Company (Tidewater) shall cease and desist from the use of that part of its track known as the Aurora siding which is located between Roseberg Avenue and Coldwell Avenue in the city of Modesto for any operations save and except the following and between the times indicated:
 - a. Emergency operations resulting from unforeseen circumstances such as equipment failure, unsafe track structure, derailments, or such other events over which the railroad has no control, at any hour of the day.
 - b. Running around more than six cars from 6:00 a.m. until 12:00 midnight.
 - c. Passing of trains from 6:00 a.m. until 12:00 midnight.
 - d. Parking of a train (engines shut down) necessarily abandoned by their crews when their running out of hours is imminent from 6:00 a.m. to 12:00 midnight.
 - e. Repairing and maintaining track at any hour of the day; except that from 12:00 midnight to 6:00 a.m., only emergency repairs may be made.
2. Tidewater shall cease and desist from conducting air brake tests on or in the vicinity of the Aurora siding or allowing motors on refrigeration cars parked on the Aurora siding to run.

3. Tidewater shall continue to maintain its train schedules and operating procedures so that, under normal conditions, the possibility of a train or cars being a hazard to children at or between Roseberg Avenue and Coldwell Avenue in the city of Modesto will be eliminated.

4. The alternative request in the complaint that Tidewater be ordered to remove the Aurora siding is denied.

5. Tidewater shall issue standing written instructions, with copy to the Commission, to its train and engine crews to endeavor to anticipate sufficiently in advance when they will run out of hours in order to avoid the use of the Aurora siding for parking their trains or engines when they run out of hours, ✓

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

Dated at San Francisco, California, this 8th day of MAY, 1979.

Commissioner Richard D. Gravelle, being necessarily absent, did not participate in the disposition of this proceeding.

John E. Connor
President

Richard D. Gravelle
Commissioners