

Decision No. 93087 MAY 19 1981

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of David O. Daily,)
Manuel Cordoza, Robert J. Carter,)
Gordon M. Jarrell, Kenyon Lewis,)
and Louie Pearl to establish a)
Farm or Private Crossing.)
(Public Utilities Code Section)
7537))

Application No. 57381
(Filed June 15, 1977)

Jerry Hanford, Attorney at Law,
for applicants.
Leland E. Butler, Attorney at Law,
for The Atchison, Topeka &
Santa Fe Railway Company,
protestant.
Frank O. Haymond, Jr., for the
Commission staff.

INTERIM OPINION

Applicants herein allege that each of them owns real property adjacent to or in the vicinity of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) right-of-way in Helendale, San Bernardino County, California; a private railroad crossing now exists and has existed since at least 1898 over the Santa Fe right-of-way at Darghty Road, Helendale, as set forth in Exhibit A attached to the complaint; they and their predecessors have used and they are now using the said crossing as the sole means of ingress and egress to and from their farms, residences, and places of business; the crossing is reasonably necessary and convenient for such purposes; and that the closing of said crossing would deny applicants any

reasonable or convenient means of ingress or egress. Applicants further allege that on May 11, 1977 Santa Fe attempted to close the crossing but was restrained from doing so by an order of the Superior Court in San Bernardino County, as set forth in Exhibit 6 attached to the complaint. (This order was later vacated.)

Applicants, fearful that Santa Fe will close the crossing, request an order that the railroad crossing at Darghty Road, Helendale, California, be permanently designated as a farm or private crossing, and that Santa Fe be ordered to maintain the crossing in a good, safe, and passable condition at all times.

A hearing in the matter was originally scheduled for November 8 and 9, 1977 but was temporarily removed to January 5 and 6, 1978, and then removed and reset to August 15, 1978. At the hearing on August 15, 1978 the matter was again taken off calendar upon stipulation by counsel that a tentative agreement had been reached for the establishment of a private crossing at Darghty Road. Upon notice that negotiations between the parties were at an impasse, a hearing on the matter was finally held in Los Angeles on October 7, 1980 before Administrative Law Judge William A. Turkish, and the matter was submitted on that date.

Applicants seek the order requested pursuant to Section 7537 of the Public Utilities Code^{1/}, which provides:

"The owner of any lands along or through which any railroad is constructed or maintained, may have such farm or private crossings over the railroad and railroad right-of-way as are reasonably necessary or convenient for ingress to or egress from such lands, or in order to connect such lands with other adjacent lands of the owner. The owner or operator of the railroad shall construct and at all times maintain such farm or private crossing in a good, safe, and passable condition. The commission shall have the authority to determine the necessity for any crossing and the place, manner, and conditions under which the crossing shall be constructed and maintained, and shall fix and assess the cost and expense thereof."

Mrs. Elizabeth Daily, spouse of applicant David O. Daily, applicant Miles Kenyon Lewis, and Phil Cordoza, son of applicant Manuel Cordoza, testified on behalf of applicants. Earl Nichols, Santa Fe's public project engineer for public and private grade crossings, testified on behalf of protestant, Santa Fe.

The relevant portions of testimony given by the witnesses on behalf of applicants follows.

The properties of applicants are bounded on one side by the Mojave River and on the other side by Santa Fe's right-of-way. In addition to their residences, some applicants are engaged in farming and commercial activities in this area. All of the applicants, their families, and their business and social invitees use the existing crossing at Darghty Road to

^{1/} All code references hereafter will refer to the Public Utilities Code unless otherwise indicated.

gain access to and from their properties from National Trails Highway, which runs north from San Bernardino to Barstow. A dirt railroad service road which runs along the west side of Santa Fe's track within its right-of-way must be used for a short distance by some of the applicants to get to their property once they cross over to the west side of the track. This service road, which runs southward from Darghty Road to Turner Road and northward from Darghty Road to Vista Road, is poorly maintained, is in bad condition, and becomes flooded and impassable at times due to washouts.

Applicants entered into a long period of negotiations with Santa Fe to effect a private crossing agreement, but negotiations broke down when applicants objected to Santa Fe's proposals calling for a locked gate to be installed by applicants on the east side of Santa Fe's right-of-way, to a 10-day notice of closure provision in the agreement, and to an insurance clause which required applicants to insure a liability indemnification clause in favor of Santa Fe. As far as the witnesses knew, the Darghty Road crossing has been in existence for many years. It apparently existed prior to the time any of the current residents moved into the area. Although at least one of the applicants maintains sufficient liability insurance coverage to satisfy Santa Fe's insurance requirement, it was not known if the remaining applicants could afford to pay the premium for the amount of insurance required by Santa Fe. Witness Cordoza testified that he thought it would be more than his parents could afford.

One witness testified that applicants' counsel looked into the matter of insurance coverage^{2/} and was unable to find any insurance company willing to provide liability insurance because of the uncontrolled use of the Darghty Road crossing. Letters from several vendors to one of the applicants engaged in a commercial activity indicate they would stop doing business with that applicant if the Darghty Road crossing was closed and that use of an existing public crossing at Vista Road and the Santa Fe dirt service road as an alternative means to get to the applicant's property was unacceptable because of its unserviceability much of the year. Applicants' wish to have the Darghty Road crossing remain open and available for their use, without any conditions or expense to them, because it is the only means of access to their properties.

Testimony of Santa Fe's witness follows. Although the exact date of construction of the Darghty Road crossing is unknown, the crossing was under license to one individual since about 1927. However, there could have been a preceding license. Until 1975 Santa Fe was aware it had unlicensed crossings but was unaware of the actual number of crossings. Following a decision of this Commission which mandated private crossing signs of a new design be installed at private crossings, Santa Fe conducted a survey of private crossings and was amazed at the number in existence. It found many of them in a deplorable and unsafe condition. As a result of this survey Santa Fe decided to close all such crossings which were not needed and to cover the remaining crossings with some form of crossing agreement because of the railroad's potential liability exposure and the increasing number of liability cases in which they were involved.

^{2/} However, there was no evidence submitted to indicate the number of insurance companies queried or the extent of efforts made to obtain insurance coverage.

Thus, in 1975 letters and copies of crossing agreements were mailed for their signatures to those persons using private crossings. There was no response from any of the residents using the Darghty Road crossing. According to the witness, Santa Fe did not wish to deny access over its right-of-way unless a situation existed with which it could not live and what Santa Fe wanted was to work out some kind of agreement that would protect the railroad and make the crossing safe for use by those who had to use it. Santa Fe required an indemnification clause because of its potential liability.

The witness acknowledged that the Santa Fe service road between the Vista Road public crossing and Darghty Road would have to be rebuilt if it were to be used by applicants in the event the Darghty Road crossing was closed. Following an exchange of letters between applicants' counsel and Santa Fe, a modified private crossing agreement was submitted by Santa Fe which deleted some of the more stringent provisions of its standard private crossing agreement that applicants objected to. The modified agreement called for liability insurance of not less than \$2,000,000 to be carried by each licensee^{3/} to insure the indemnification clause contained in the agreement, and the requirement of a locked gate across Darghty Road on the east side of the tracks. The agreement absolves all licensees from any responsibility for injury caused by the negligence of Santa Fe's employees and further spells out the requirement of approval by this Commission before the crossing could ever be closed.

^{3/} At the hearing, Santa Fe stipulated that it would accept a single licensing agreement covering all users with a single two million dollar insurance coverage rather than separate agreements.

In the past, there were no insurance requirements contained in Santa Fe's private crossing agreements. The old standard agreements merely called for indemnification in favor of Santa Fe in case of injury to third parties. However, since Santa Fe has been involved in an increasing amount of litigation due to crossing accidents in recent years, it felt it had to protect itself by insisting upon an insurance requirement. It is the position of Santa Fe that it needs some protection in agreeing to the continued existence of a private crossing which is only of benefit to the users and from which Santa Fe receives absolutely no benefit. It feels that the costs associated with maintaining a private crossing should fall upon those who benefit from it. Santa Fe has tried to tailor an agreement to the satisfaction of all parties but has been unsuccessful in obtaining agreement from applicants. Santa Fe's witness acknowledged that the Darghty Road crossing is one of the safer private crossings in its system. However, Santa Fe opposes applicants' contention that they be permitted to use the crossing without any conditions imposed upon them.

Discussion

Private railroad crossings generally result from licensing agreements between the party or parties desiring such private crossing and the affected railroad company. However, on occasion, as is the case here, where for some reason the parties have been unable to resolve disputes relating to private crossings, this Commission has jurisdiction under Section 7537 to determine the necessity for any crossing and the place, manner, and conditions under which the crossing shall be constructed and maintained. This application was apparently triggered when the parties failed to conclude a satisfactory agreement for the crossing at Darghty Road and the applicants feared a closure of the crossing by Santa Fe.

At common law, the interest of a landowner in the land of another which entitles its owner to use or enjoy the other's land is defined as either an easement or a license. While there are many distinctions between easements and licenses, the major distinction is that an easement always implies an interest in the land in and over which it is to be enjoyed, whereas a license merely confers a personal privilege, terminable at will, to do some act or acts on the land without possessing any estate therein.

Although applicants have been using the Darghty Road crossing for years, they cannot be deemed to have acquired any common law easement across Santa Fe's right-of-way since there was no showing on the record of the creation of any easement by express grant, by implication, or by operation of law. Neither can applicants claim an easement by prescription since a railroad right-of-way is such a public way as to prevent the acquisition of a prescriptive title to or easement over any part thereof in favor of private persons, and use by such persons of the paths and tracks must thus be deemed permissive (Breidert v Southern Pacific Company (1969) 272 CA 2d 398).

Permissive use can only be construed to be in the nature of a license. Two essentials of a license are that, whether express or implied, it be assented to by the licensor and secondly, with certain exceptions, a license may be revoked at any time at the pleasure of the licensor. The thrust of these principles is that only a licensor may actually grant a license to others to enter and use the premises or property of the licensor. At common law then, applicants would not prevail as they have neither easement rights nor license rights to enter upon and use Santa Fe's right-of-way.

The common law is not a codification of exact or inflexible rules for human conduct, but instead is the embodiment of broad and comprehensive unwritten principles, inspired by reason and a sense of justice and adopted by consensus for the regulation and government of the affairs of individuals. The California Civil Code provides that the common law, so far as it is not inconsistent with state law, is the rule of decision in California. However, the Legislature is at liberty to change any rule of the common law and thereby prevent it from being the rule of decision in this state. We view Section 7537 as an intent by the Legislature to depart from the common law rules where it relates to private railroad crossings. We must presume that in enacting this statute, the Legislature was familiar with the relevant rules of common law relating to easements and licenses and found them unsuited in applicability to situations involving private railroad crossings. Thus, in Section 7537 the Legislature has delegated broad authority to this Commission for determining the need for such private crossings and the manner and conditions under which such crossings shall be constructed or maintained. The common law rules pertaining to easements and licenses over railroad crossings are thus not applicable when Section 7537 is invoked.

The parties herein have been involved in negotiations to conclude a licensing agreement for several years without apparent success.

We are aware that in granting this application we would be subjecting Santa Fe to potential liability exposure arising from any accidents at the Darghty Road crossing. We believe the indemnification and insurance requirement clauses contained in the private crossing agreement submitted to applicants by Santa Fe to be reasonable and that applicants should bear some burden for

a crossing which is solely for their benefit. However, we are faced with several problems in connection with ordering applicants to execute indemnification agreements in favor of Santa Fe and obtain insurance coverage to insure such indemnification. While there is some testimony in the record as well as statements by applicants' counsel to the effect that liability insurance coverage of the type and amount requested by Santa Fe was unobtainable from insurance carriers due to a lack of control over those using the crossing, no corroborative evidence was offered to indicate the extent of efforts made to obtain such insurance or that it was in fact not available. In addition, testimony indicates that there are additional affected parties residing within the landlocked area who are not parties to this application. Thus, even if insurance coverage is obtainable, an order requiring liability insurance to insure indemnification in favor of Santa Fe as a condition for authorizing the private crossing would be ineffective with respect to those who are not parties to this application. Such order would be discriminatory since it would impose insurance requirements upon applicants but not upon those who are not parties to this action and over whom we thus have no jurisdiction. Needless to say, it would be impossible to limit use of the crossing only to applicants herein.

Another concern we have in granting this application is with safety at the crossing. The railroad right-of-way at Dargatz Road is a double-track main line of Santa Fe and although there was testimony that visibility in both directions is excellent, we would still prefer to have crossing gates installed for safety reasons.

Although we stated earlier that necessity exists for the establishment of the private crossing at Darchty Road, we shall authorize it for a limited time only. This is to give applicants time to join with all other residents who are similarly affected, but not parties to this application, to continue further negotiations with Santa Fe and attempt to solve the indemnification and insurance problem which appears to be the only major hurdle toward concluding a licensing agreement. At the same time, it will grant them sufficient time to pursue at least two other alternatives which will permit access to and from their properties while they are continuing negotiations with Santa Fe. Applicants should understand that the crossing will remain open under the status quo for a limited time only and that they are expected to face up to their alternatives by that time.

The evidence presented during the hearing indicates that some contact has been made with San Bernardino County authorities about the feasibility of extending Darchty Road beyond its terminus at the easternmost boundary of Santa Fe's right-of-way, across the Santa Fe railroad right-of-way, and incorporating it into the county road system. Interest was expressed by the county officials in such proposal. However, before this road could be accepted by the county into its road system, the roadway and crossing within Santa Fe's right-of-way would first have to be brought up to county standards and an easement obtained by the county for county road purposes. The estimated expense of bringing the roadway and roadbed between the tracks up to such standard is approximately \$15,000 to \$16,000. Since applicants and nonapplicant residents of the affected area are the sole beneficiaries of such crossing, they should bear the above one-time costs connected with bringing the roadway up to standards. Two witnesses testified that they believed this amount was reasonable if it was their total cost. This solution would then relieve them of recurring insurance premiums, crossing protection, or maintenance costs. In the long run, this alternative is the least expensive to applicants, the safest, and is the solution favored by this Commission.

Another possibility is an existing public crossing protected by two No. 9 gates approximately 1.2 miles north of Darghty Road at Vista Road and another public crossing two miles south of Darghty Road at Turner Road which applicants can use to get across Santa Fe's right-of-way. However, there is no public road from those crossover points which applicants could use to get to their properties. The only road presently existing on the west side of the railroad track between Turner Road and Darghty Road and between Vista Road and Darghty Road is Santa Fe's service road, a poorly maintained dirt road running parallel to the Santa Fe tracks and within the railroad's right-of-way. This road is overgrown with brush along much of its distance and is impassable during the rainy season due to flooding and washouts. The portion of this road between Turner Road and Darghty Road is impassable for use by any trucks or large farm vehicles due to an untraversable underpass near Turner Road. Thus, if any road is to be used under this alternative solution, it has to be the Vista Road crossing. However, in order for this crossing to be used by applicants, the Santa Fe service road would first have to be properly engineered, rebuilt, graded, and surfaced. In addition, a license would have to be obtained from Santa Fe. The granting of a license for use of this service road was stipulated to by Santa Fe during the hearing.

Under such proposal, applicants would be required to bear the cost of rebuilding approximately 1.1 miles of Santa Fe's service road, but they would then be relieved of the necessity of carrying annual insurance coverage. They would, however, be expected to maintain the road.

Of the three alternatives, it would appear that the least expensive course of action for applicants, and the one which has the greatest potential for success, is to bring the Darghty Road crossing and right-of-way up to county road standards for incorporation into the county road system. The county could then apply to this Commission for the Darghty Road crossing to be designated as a public crossing. In view of the past inability of the parties to conclude an agreement, we suggest applicants give priority to pursuing this approach. ✓

In order that the parties have sufficient time to either continue negotiations to a successful conclusion or pursue one of the other alternatives suggested herein, we will issue this interim opinion permitting the Darghty Road crossing to remain open for no more than 210 days from the effective date of the following order. Since visibility is good at the crossing, we will not require any additional protective devices during this period. Santa Fe should cooperate in any negotiations between applicants and the county for dedication of an extension of Darghty Road into the county road system and subsequent application by the county to have the Darghty Road crossing designated a public crossing. Applicants will be directed to submit a status report to the presiding Administrative Law Judge within 150 days from the effective date of the order herein, regarding the status of their negotiations, the status of any negotiations with the county, or if the third alternative is selected, a progress report concerning the rebuilding of Santa Fe's service road. The alternatives herein appear to be the only viable solutions for applicants, although they are not necessarily limited to them, and they are urged to conclude an appropriate solution within the time limits imposed.

Findings of Fact

1. Applicants' properties are bounded on the west by Santa Fe's right-of-way near Holendale.
2. Applicants' properties are bounded on the east by the Mojave River.
3. There are other resident families living on the west side of Santa Fe's right-of-way who are affected by the Darghty Road crossing and who are not named parties in this application.
4. National Trails Highway runs generally north and south, parallel with and to the east of Santa Fe's right-of-way near Holendale.
5. There is an existing railroad grade crossing on Darghty Road within Santa Fe's right-of-way which has existed for many years prior to the time any of applicants herein purchased their properties.
6. The last licensing agreement for use of the Darghty Road crossing by the then only owner of the lands lying to the west of the Santa Fe's right-of-way at Holendale was executed in 1927.
7. Applicants herein have never had and do not now have a license from Santa Fe to enter Santa Fe's right-of-way and use the Darghty Road crossing.
8. The Darghty Road crossing is the only practical means of access to the private properties of applicants from National Trails Highway.
9. There is a public crossing of Santa Fe's right-of-way approximately two miles south of Darghty Road at Turner Road.
10. There is a public crossing of Santa Fe's right-of-way approximately 1.2 miles north of Darghty Road at Vista Road.

11. There is a Santa Fe dirt service road within its right-of-way on the west side of the railroad tracks between Vista Road and Darghty Road, but this road is not usable year round due to flooding and washouts of the road.

12. Applicants and Santa Fe have been unable to successfully negotiate a licensing agreement for entry upon and crossing of Santa Fe's right-of-way at Darghty Road by applicants.

13. Some preliminary discussions have taken place between applicants, the county of San Bernardino, Santa Fe, and the Commission staff over the possibility of incorporating Darghty Road into the county road system and designation of the Darghty Road crossing as a public crossing.

14. At least the following three possibilities exist for applicants to gain ingress to and egress from their properties:

- (a) They could continue to negotiate licensing agreements with Santa Fe for use of the Darghty Road crossing.
- (b) They could bring Darghty Road within Santa Fe's right-of-way up to county standard for incorporation into the county road system and apply for designation of the Darghty Road crossing as a public crossing.
- (c) They could rebuild Santa Fe's service road between Vista Road and Darghty Road into an all-weather road and obtain a license from Santa Fe for use of such road to gain access to their properties from the Vista Road public crossing.

15. Visibility in both directions along the track at the Darghty Road crossing is good.

Conclusions of Law

1. The Darghty Road crossing should remain open for a period of time to enable the parties to either continue negotiations to conclude a reasonable license agreement for use of the Darghty Road crossing or to select one of the other two alternatives suggested herein. For the present, the clearly visible stop signs, in lieu of a locked gate, on each side of the track, designating the crossing as a private crossing, should be sufficient to cause a "stop and look" to all who use the crossing.

2. The effective date of this order should be the date of signature because there is a continuing need by applicants to use the crossing while they pursue the alternative solutions suggested herein.

INTERIM ORDER

IT IS ORDERED that:


1. The Darghty Road crossing, in Helendale, California, shall temporarily remain open without change for a period of at least two hundred ten days from the effective date of this order.

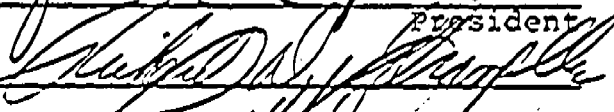
2. Applicants, David O. Daily, Manuel Cordoza, Robert J. Carter, Gordon H. Jarrell, Kenyon Lewis, and Louis Pearl, shall make efforts to contact other residents of the area who are similarly affected by the Darghty Road crossing and, acting in concert, shall continue to make reasonable efforts to conclude a mutually acceptable licensing agreement or, in the alternative, to either negotiate with San Bernardino County officials to accept dedication of Darghty Road and the crossing into the county road system or to obtain a license from The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) to rebuild and use Santa Fe's service road from Vista Road to Darghty Road.


3. Applicants shall submit a report to the assigned Administrative Law Judge within one hundred fifty days from the effective date of this order, indicating the status of continuing negotiations with Santa Fe for a licensing agreement to use the Dorchy Road crossing, or the status of the other alternatives discussed herein if they choose either of those alternatives.


The effective date of this order is the date hereof.

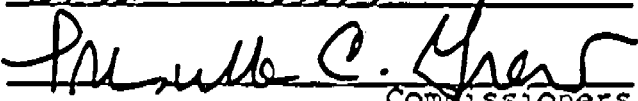
Dated MAY 19 1981, at San Francisco, California.



President








Commissioners