ENS/cm

Decision No. 93391

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

County of Los Angeles,
State of California,

Complainants,

v.

Southern Pacific Transportation
Company, a corporation,

Defendant.

Case No. 10575

ORDER DENYING REHEARING

A petition for rehearing of Decision No. 93211 has been filed by the State of California Department of Transportation (Caltrans). An Answer thereto has been filed by Southern Pacific Transportation Company. We have considered each and every allegation raised therein and are of the opinion that good cause for granting rehearing has not been shown. Therefore,

IT IS ORDERED that rehearing of Decision No. 93211 is hereby denied.

This order is effective today.

Dated AUG 4 1981, at San Francisco, California.

President

Commissioners

ENS/cm

Decision No. 93211 June 16, 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

County of Los Angeles, State of California, Complainants, v. Southern Pacific Transportation Company, a corporation, Defendant.	Case No. 10575 (Filed May 18, 1978)

(For appearances see Decision No. 91847)

ORDER MODIFYING DECISION 91847
AND DENYING REHEARING OF DECISION 92862 AND DECISION 92863

A petition for rehearing of Decision (D.) 92862 and D. 92863 has been filed by the Southern Pacific Transportation Company (SP), together with a petition for receipt of additional evidence and a petition for stay of D. 92863. In D. 93118, issued May 22, 1981, the Commission issued a stay of the time for compliance with ordering paragraphs 2 and 7 of D. 91847 (incorrectly referred to in D. 93118 as "ordering paragraphs two and seven of D. 92863"). We have carefully considered all the allegations of error contained in SP's petition for rehearing and are of the opinion that good cause for granting rehearing of D. 92862 and D. 92863 has not been shown. However, we shall modify our Discussion, Findings of Fact and Conclusions of Law in D. 91847, as modified in D. 92863 following the limited rehearing of D. 91847 granted in D. 92230, to reflect the further study which has been given to this matter upon consideration of the petition for rehearing and, in particular, the Exhibits attached thereto which were proposed for receipt into evidence by SP.

SP's petition for rehearing contains three claims: (1) findings in D. 91847 and 92863 regarding operational feasibility of the proposed commuter service are not supported by the record; (2) in ordering the service instituted before all operational difficulties have been completely resolved, the Commission abused its discretion and failed to lawfully exercise its powers, and (3) D. 92863 imposes an unreasonable burden on interstate commerce. SP claims these issues can only be resolved through new evidentiary hearings.

We first note that SP's first claim, when closely examined, is not so much a claim that the present factual record is inadequate per se, as it is a claim that the record should be reopened to take account of allegedly changed circumstances which have arisen since 1979, as set forth in the new exhibits attached to the petition for rehearing. As a matter of law, rehearing need not be granted just because the circumstances upon which a Commission order was based have changed, barring, of course, a truly cataclysmic change in circumstances. Public Utilities Code Section 1736 gives the Commission discretion to allow rehearing on the basis of changed circumstances, but does not require it. There is always some change in circumstances between the time of a Commission decision and the time when its practical effect is felt. To grant rehearing simply because the circumstances had changed in some small degree would open the possibility that no order would ever be effectuated, because of continuous petitions for rehearing based on allegedly changed circumstances.

As a matter of fact, however, the Commission is of course sensitive to changes in the world which may undermine its orders or render them impractical or unwise. We have closely scrutinized SP's claims of changed circumstances and the responses filed by complainant Caltrans claiming that no new evidence has been put before the Commission. We conclude, as explained below,

that SP has not demonstrated changed circumstances and that the petition for receipt of additional evidence should be denied. Some of SP's arguments are based upon misunderstandings of the Commission's true intent, due in part to our failure to say what we meant and due in part, we suspect, to a desire on the part of SP to exaggerate the consequences of our order. Accordingly, D. 91847 is modified as provided below.

We begin with the comments which SP has directed toward modified Finding of Fact 17. There it is stated that "Complainant's ... analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise" between SP freight operations and the commuter trains. It appears SP has interpreted the words "inevitable conflicts" as implying something much, much more than "minor, inconsequential, infrequent and usually costless conflicts," which is the sense in which the finding of fact was made. Simply because some operations must briefly cease on certain portions of the main line during certain portions of the morning and evening "window" noted in Finding 17 does not mean that all SP freight operations must cease or suffer chaos, that SP cannot structure its freight operations to avoid conflicts or that, as SP claims (Petition for Rehearing, p. 23), the commuter trains will have a "devastating impact" on freight operations. This claim, like SP's claim that the Commission has shown "utter indifference" (Petition for Rehearing, p. 10) to freight interference, is groundless and inconsistent with the voluminous record. Further, as explained in greater detail below, those freight delays which are not costless to SP and which are attributable to operation of the commuter trains are a proper subject for compensation from complainant to SP.

Finally, we openly state that institution of the commuter passenger service is in the nature of an experiment (see Finding of Fact 19). It may be, as we believe the evidence

overwhelmingly shows, that commuter trains and freight trains can again successfully be operated on the Coast Line, or it may be that they cannot. We cannot predict all future conditions on that line or whether SP can operate the commuter service without delay. But the experimental (or more properly, the experiential) nature of the orders in Decisions 91847, 92230 and 92863 does not leave them invalid. As the California Supreme Court stated in Southern Pac. Co. v. Public Utilities Co. (1953) 41 Cal. 2d 354, 367, "The fact that the effect of the order ... is to a more or less degree experimental does not destroy it. If it does not work out as contemplated the commission has jurisdiction to entertain a future application concerning the same subject matter." In light of the foregoing discussion, Finding of Fact 17 is modified to read:

> 17. SP's interference study is a "worst case" analysis of the train conflicts which would result if the proposed commuter service is authorized. It shows a two-hour window in the morning and evening during which time freight operations must cease on the main line while the commuter trains operate. Complainant's similar analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise. Complainant's study shows a thirty-three minute window in the morning and a forty-five minute window in the evening when freight trains must cease operations on the main line because of commuter operations. Under either analysis, some delays to freight service will occur, but, on balance, the existing line is capable of accommodating both the commuter service and freight service. Such conflicts and delays as do occur will generally be minor and inconsequential and, with experience, more and more infrequent.

We next answer SP's comments regarding possible delay, not of its freight trains, but of the commuter trains. SP states that it is "simply impossible to create delay-free meets between

opposing trains" (Petition for Rehearing, p. 16). This comment again ignores the experimental nature of the service. It is certain that perfect meets between the Amtrak and commuter trains will not always be possible. The fact that the meets are not always delay-free is no reason not to institute the service; the fact that commuters might grow disillusioned with the service due to delays to their train is Caltrans', not SP's concern. Which train has priority can be negotiated; there is no law giving the Amtrak train priority. In some cases, where, for example, the Amtrak train reaches Oxnard on time (with 58 minutes to then travel the short distance from Glendale to Los Angeles),the most sensible thing for SP to do may be to hold the Amtrak train briefly in a given siding until the passenger train has passed. In other cases the passenger train will have to accept delay and wait until the Amtrak train has cleared. Depending on the Amtrak train performance on any given day, many possibilities will arise.

SP claims (Petition for Rehearing, p. 16) there is a "lack of sidings in the territory where the meets are to take place." Again, this is a mischaracterization of the record. There are five sidings, including Hewitt, between Burbank Junction and Oxnard; these sidings are approximately 10 to 15 minutes apart for trains going 50-60 mph. These sidings are adequate and available for meets between the opposing trains, even with the new Amtrak schedule in effect (See SP's proffered Exhibit B and Caltrans' Supplemental Response). In its Exhibit B, SP again projects delays on the basis of a two-hour trip between Los Angeles and Oxnard, rather than the shorter trip we foresee. So again we conclude that only actual experience will tell. We cannot predict whether SP, in operating both the Amtrak and commuter trains, will attempt to make the meets happen with minimum delay. As

noted below, where the Amtrak train is delayed due to the commuter train and SP accordingly loses incentive payments to which it otherwise would be entitled, those payments are a matter for compensation to be paid to SP by complainant. Finally, we reject as speculative the possibility of an increased number of Amtrak trains. In light of the foregoing discussion, Finding of Fact 35 as it appears in D. 92863 is modified to read as follows:

> 35. The fact that the afternoon commuter trains may suffer delays due to the oncoming Amtrak train is not cause not to institute the requested passenger service. Schedules can be adjusted to minimize delays. Five sidings between Burbank Junction and Oxnard are adequate for arranging meets between the trains. Even with the new Amtrak schedule, such delays will generally be of minimal duration and, with experience, more and more infrequent.

We next direct our attention to SP's comments regarding Finding of Fact 18, the increase in traffic expected at GEMCO Yard, expanded Anheuser-Busch operations, and allegedly new "time sensitive exempt perishable, trailer-on-flatcar ("TOFC") and contract traffic" on guaranteed schedules on the Coast Line (including the "Golden State" and "Energy Saver" trains). The comments do not truly present changed circumstances.

First, the fact that GM has now returned to two shifts a day is of no significance. Prior to D. 91847, as the parties tried Case (C.) 10575, it was universally assumed that GM would be on two shifts. The record was put together on this basis. The Commission found the trackage and yards adequate in D. 91847. It is still adequate. Second, the expansion of Anheuser-Busch activities is not directly linked in SP's petition and exhibits to any particular delay of either freight or passenger service. Anheuser-Busch itself does not predict such delay in its sworn statement. Third, the GULAP, LAOAT and OALAT trains

referred to by SP were all in operation when the record was put together prior to D. 91847. We have said before and we say again that the evidence convinces us that SP can, if it wishes, schedule its freight operations (such as the "Energy Saver" train to Oakland) around or between the commuter service without significant inconvenience or cost. Delays to GM freight or agricultural produce for the "Golden State" train are at most speculative, based on the degree to which SP can institute, or wishes to institute, new operational efficiencies. We are still at an experimental stage. Further, as explained below, such freight delays as are truly unavoidable despite SP's best efforts and which are truly attributable to the commuter service are a matter for compensation to be paid by complainant to SP. In light of these comments, Finding of Fact 18 in D. 91847, as modified by D. 92863, is modified to read as follows:

> 18. SP's GEMCO and Taylor Yards pose a potential problem for conflicts with the proposed commuter trains, but a major contributing factor is SP's practice of making up trains on the main tracks adjacent to both yards. Better utilization of GEMCO Yard facilities and less interference with the main line operations can be achieved by construction of a 2-mile long ancillary track within GEMCO Yard. More efficient yard operations, and a stricter discipline in the calling and operation of freight trains would minimize possible delays to passenger and freight trains because of conflicts.

SP also raises questions regarding what we still consider as minor operational difficulties, such as the question of train storage and crew replacement at Oxnard. We believe that our previous comments regarding the experimental nature of the service answer SP's comments.

We come now to SP's claims that D. 92863 imposes an unreasonable burden on interstate commerce. As stated above, we reject absolutely SP's claim that the commuter service will have a "devastating impact" on intrastate and interstate shippers using SP freight service. This exaggeration is not supported even by SP's proffered exhibits. Such disruption of its freight service as occurs will be minimal. Its ability to fulfill contract obligations to shippers and Amtrak will not be significantly impaired, if at all. There will be no interference with SP's exercise of rate and service flexibility under the Staggers Act due to the minor, inconsequential and infrequent delays noted in Finding of Fact 17.

However, we believe other comments made by SP regarding compensation for costs attributable to the commuter service and return on property devoted to the service are well taken and require modification of D. 91847. We believe these modifications resolve SP's claims regarding financial loss as constituting a burden on interstate commerce. In our view, SP must be compensated for all costs and paid the return required by law, whether federal or state statutory or constitutional law, for the property devoted to this service.

Finding of Fact 13 in D. 91847 was based in part on the discussion appearing on pages 65 and 66 in that decision. The finding and the discussion mistakenly provide that SP should be able to bear certain expenses from the commuter service because of its overall financial health. While as a matter of fact this might be true, it certainly is not compatible with due process. Caltrans provided at the start of C. 10575 that it would pay all "actual and reasonable operating deficits of this service." (Exhibit 9, p. 3). We interpret this to mean that Caltrans will pay all costs actually and reasonably attributable to the institution of the commuter service. In light of the foregoing discussion, Finding of Fact 13 is modified to read:

> 13. Complainant will reimburse SP for all costs actually and reasonably attributable to the commuter service.

Finding of Fact 30 in D. 91847 provides that "No allowance should be made for costs attributable to the interference with SP's freight trains." This finding fails to reflect the discussion appearing at page 65 of D. 91847, which merely provides that no such allowance should be made during the period of negotiations. Our thought was that such a provision might provide SP with an incentive, during the period of negotiations, to tighten up its freight operations so that unnecessary delay would be eliminated. But again, upon reconsideration, we find such a provision inconsistent with due process. SP must be compensated for all costs actually and reasonably attributable to the institution of the commuter service. This includes freight delay costs and any lost incentive payments due to delay of the Amtrak train.

We are sensitive to the possibility that lax operations could result in SP's attempting to recover freight or Amtrak delay costs not truly attributable to the commuter service. Such matters might ultimately require a hearing upon application by SP for an order from the Commission to Caltrans to pay specified freight or Amtrak delay costs. If the facts warranted such an order, we would unhesitatingly issue it. In light of the foregoing discussion, Finding of Fact 30 is modified to read:

> 30. SP will be compensated for all freight and Amtrak delay costs actually and reasonably attributable to the commuter service.

In Finding of Fact 32 in D. 91847, the Commission stated that the subsidy paid to SP by Caltrans "should provide SP with a 7½ percent rate of return, which we find just and reasonable." In its petition for rehearing, SP indicates that

the ICC has determined that it is entitled to a return of 11.7 percent. Upon the present record, which was developed in 1979, a return of 7.5 percent is reasonable. But it is now 1981 and the rate of return clearly must be brought up to date. This is nothing new in the field of utility regulation. We do not grant continual rehearings of past general rate cases simply because of the passage of time. Instead we provide for new applications asking for offset rate increases or permit new general rate applications to be filed. The same holds true in this case. SP can file an application requesting a higher rate of return and should adduce whatever evidence in support of that application it feels is appropriate, including such evidence as apparently convinced the ICC to grant it an 11.7 percent return. We have no intention of forcing SP to subsidize the commuter service with profits from other areas of its operations, such as its interstate operations. Such a cross-subsidization might well run afoul of the Staggers Rail Act of 1980, P.L. 95-473. We will require Caltrans, not SP, to subsidize the commuter service. We cannot determine now what the actual rate of return will be, but it will be all that federal and state statutory and constitutional law require it to be.

Practically, however, the amount of money to be paid by Caltrans to SP for operating the commuter service is subject to negotiation. The "plus" in a "cost-plus" contract between SP and Caltrans is analogous to the rate of return and must be set through negotiation. We urge SP and Caltrans to enter into negotiations in the same spirit which led to SP's agreement to operate commuter trains for Caltrans on the San Francisco peninsula. Such negotiations can include all costs, such as freight delay costs, operating costs, rentals for SP properties used for stations and parking lots and capital improvement costs for accommodation of the service. In light of the foregoing discussion, Findings of Fact 32 and 33 are modified to read as follows:

> 32. In addition to meeting all costs actually and reasonably attributable to the commuter service, Caltrans will pay SP a just and reasonable return on the property devoted to the service. Based on a factual record compiled in 1979, we previously determined in D. 91847 that 7.5 percent constituted a just and reasonable rate of return. In light of changed circumstances, this rate is inadequate. SP and Caltrans should negotiate the question of return in negotiating a contract meeting all costs. Alternatively, SP may file a new application asking for a higher rate of return. The Commission will determine a just and reasonable rate of return in light of federal and state statutory and constitutional law, including the return allowed to SP by the ICC.
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> 33. Certain SP properties, upon which station platforms and parking areas would be installed, are presently subject to written leases containing 30-day cancellation clauses or are being held for future industrial or commercial development. Caltrans will pay SP a reasonable rental for all properties used for the commuter service.

Based on all of the foregoing discussion, we further modify D. 91897 to add Finding of Fact 36, reading as follows:

> 36. Institution of the commuter service will not place an unreasonable burden on interstate commerce.

We next consider SP's understanding of Ordering Paragraph 7(a) as it appears in D. 92863. SP interprets it to provide "that capital improvements would be directed only after SP has endured a year of crippling interference to its coast line operations and deterioration of its freight business, and/or it is established that an acceptable on time commuter service cannot be provided on the existing single track facilities. It further contemplates that SP would be required to bear at least part of the cost of these improvements."

Such colorful language notwithstanding, we do not find that "crippling interference" or "deterioration" of SP's freight service will occur. During the experimental state of this service, it may be that SP will incur freight and Amtrak delay costs attributable to the commuter service which are unavoidable despite all possible operational efficiencies. As modified, our order provides that SP must be compensated for such costs. After one year, all parties, including the Commission, will be in a position to determine what improvements, if any, are required on the Coast Line and whether SP should bear any costs of those improvements based on the benefit it obtains from such improvements. We express no fixed opinion on this matter at this time. There will be time for SP to argue it should bear no costs of such improvements. In light of the foregoing discussion, we do not believe that Ordering Paragraph 7(a) requires further modification.

Finally, SP suggests in Exhibit D, but does not claim in its Petition for Rehearing, that the enactment of the Staggers Rail Act of 1980, P.O. 95-473, divests the Commission of jurisdiction to order the institution of the commuter service because the Commission has not been certified under Section 214 of the Act. (49 U.S. C. Sec. 11501, as amended). We disagree. The legislative history of the Staggers Act is absolutely silent on the question of whether its provisions apply to common carrier passenger service. There is no indication that Congress intended the Staggers Act to apply to passenger service. Its provisions deal entirely with freight service. Its freight rate provisions are entirely inapposite to passenger service. (See, e.g., 49 U.S.C. §§ 10701, 10709 and other sections of Title 49 referred to in Exhibit D). Further, as modified today, our orders provide for a full "cost-plus" contract between SP and Caltrans, so that SP bears no financial loss or responsibility for this service. This will put the Los Angeles-Oxnard service on virtually the same footing as the San Francisco Peninsula passenger service. Finally,

under Article III. Section 3.5 of the California Constitution, we cannot find ourselves divested of jurisdiction by federal legislation in the absence of an appellate court decision to that effect. In these circumstances, we reject the suggestion that we no longer have jurisdiction to order this passenger service instituted.

No further comment is required in support of Decisions 91847, 92230, 92862 and 92863.

ORDER

It is hereby ordered that Decision 91847, as modified by Decision 92863, is further modified as provided herein.

1. Findings of Fact 13, 17, 18, 30, 32, 33, 35 and 36 are modified and added, to read as follows:

> 13. Complainant will reimburse SP for all costs actually and reasonably attributable to the commuter service.
>
> 17. SP's interference study is a "worst case" analysis of the train conflicts which would result if the proposed commuter service is authorized. It shows a two-hour window in the morning and evening during which time freight operations must cease on the main line while the commuter trains operate. Complainant's similar analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise. Complainant's study shows a thirty-three minute window in the morning and a forty-five minute window in the evening when freight trains must cease operations on the main line because of commuter operations. Under either analysis, some delays to freight service will occur, but, on balance, the existing line is capable of accommodating both the commuter service and freight service. Such conflicts and delays as do occur will generally be minor and inconsequential and, with experience, more and more infrequent.

18. SP's GEMCO and Taylor Yards pose a potential problem for conflicts with the proposed commuter trains, but a major contributing factor is SP's practice of making up trains on the main tracks adjacent to both yards. Better utilization of GEMCO Yard facilities and less interference with the main line operations can be achieved by construction of a 2-mile long ancillary track within GEMCO Yard. More efficient yard operations, and a stricter discipline in the calling and operation of freight trains would minimize possible delays to passenger and freight trains because of conflicts.

30. SP will be compensated for all freight and Amtrak delay costs actually and reasonably attributable to the commuter service.

32. In addition to meeting all costs actually and reasonably attributable to the commuter service, Caltrans will pay SP a just and reasonable return on the property devoted to the service. Based on a factual record compiled in 1979, we previously determined in D. 91847 that 7.5 percent constituted a just and reasonable rate of return. In light of changed circumstances, this rate is inadequate. SP and Caltrans should negotiate the question of return in negotiating a contract meeting all costs. Alternatively, SP may file a new application asking for a higher rate of return. The Commission will determine a just and reasonable rate of return in light of federal and state statutory and constitutional law, including the return allowed to SP by the ICC.

33. Certain SP properties, upon which station platforms and parking areas would be installed, are presently subject to written leases containing 30-day cancellation clauses or are being held for future industrial or commercial development. Caltrans will pay SP a reasonable rental for all properties used for the commuter service.

35. The fact that the afternoon commuter trains may suffer delays due to the oncoming Amtrak train is not cause not to institute the requested passenger service. Schedules can be adjusted to minimize delays. Five sidings between Burbank Junction and Oxnard are adequate for arranging meets between the trains. Even with the new Amtrak schedule, such delays will generally be of minimal duration and, with experience, more and more infrequent.

36. Institution of the commuter service will not place an unreasonable burden on interstate commerce.

2. The petition for receipt of additional evidence is denied.

3. Rehearing of Decisions 91847, 92862 and 92863 is denied.

4. The stay granted in Decision 93118 shall remain in effect until further order of the Commission.

This order is effective today.

Dated June 16, 1981 at San Francisco, California.

John E. Bryson
President
Richard D. Gravelle
Leonard M. Grimes, Jr.
Victor Calvo
Priscilla C. Grew
Commissioners