

APR 11 1997

ORIGINAL

Decision 97-04-037 April 9, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Amended Application by the City of San Rafael to Construct one grade crossing of the Golden Gate Bridge, Highway and Transportation District Main line (formerly Northwestern Pacific Railroad Company) at Andersen Drive in said City of San Rafael, State of California.

Application 95-08-020
(Filed August 7, 1995;
amended September 25, 1996)

Lee C. Rosenthal, Attorney at Law, for the City of San Rafael, applicant.

David Schonbrunn and Hannah Creighton, for Marin Advocates for Transit, intervenor.

Don Sanders, for Sonoma County Transportation Coalition; Fred Codoni, for Northwestern Pacific Railroad Historical Society; Edward M. McLaughlin, for Northwestern Pacific Railroad; Seamus Kilty, for himself; and John C. Diamante, for Threshold International Center for Environmental Renewal; interested parties.

James T. Quinn, Attorney at Law, for the Rail Engineering Safety Branch; and Alex E. Lutkus, for Safety and Enforcement Division.

INTERIM OPINION

Background

On August 7, 1995, the City of San Rafael (The City) filed an application seeking Commission authorization to construct a street, an extension of Andersen Drive, across the tracks of the former Northwestern Pacific Railroad in an industrial area in southeast San Rafael. Although the tracks are not currently in use, they may present an opportunity for mass transit options in the future.

In a series of meetings with The City in early 1996, the Commission's Rail Branch raised several issues regarding the safety of the proposed crossing. To address these issues, The City amended its application on September 25, 1996.

On November 25, 1996, the Marin Advocates for Transit (Transit Advocates) filed their Motion for Expedited Cease and Desist Order. In their motion, the Transit

Advocates alleged that The City had commenced construction on a grade crossing at Andersen Drive in San Rafael prior to receiving authorization from the Commission in violation of § 1201 of the Public Utilities (PU) Code. Transit Advocates sought an order of the Commission directing The City to cease all construction on the grade crossing.

The assigned Administrative Law Judge (ALJ) issued a ruling on the motion which set a hearing for December 12, 1996, to consider whether any Commission directives, including injunctive relief and other sanctions, were necessary. The ruling also directed The City and Commission staff to have personnel available at the hearing to address the factual state of the grade crossing.

At the hearing on December 12, 1996, The City presented three witnesses: David Bernardi, Director of Public Works; Andrew Preston, Senior Civil Engineer; and Ron Gould, City Manager. The City also stipulated on the record that it would cease all construction in the grade crossing while its application was pending.

Commission Staff presented two witnesses: Alex Lutkus, Chief, Rail Engineering and Safety Branch; and the written testimony of Alvin Odviar, Assistant Transportation Engineer, was accepted into evidence by stipulation.

Pursuant to a briefing schedule adopted at the hearing, The City, Transit Advocates and the Commission Engineering and Safety Branch filed briefs on January 10, 1997. The assigned ALJ mailed her Proposed Decision on March 10, 1997. The City and Transit Advocates submitted comments in the Proposed Decision.

The Factual State of the Grade Crossing

The City stated that, as part of its effort to increase access from east San Rafael to central San Rafael, as well as to ease traffic on Highway 101, The City is constructing a one-and-a-half-mile long extension of Andersen Drive. The extension crosses the former Northwestern Pacific railroad right-of-way, which is currently owned by the Golden Gate Bridge, Highway, and Transportation District.

The state of the grade crossing is not disputed. The City's engineer testified that its construction contractor performed the following work in the crossing:

1. Clearing and grubbing

2. Removal of approximately 400 feet of railroad tracks
3. Initial grading
4. Placing of embankment fill, and
5. Installation of a storm-drain culvert.

The City stated a construction contractor is doing the work for the entire Andersen Drive extension. The removal of the railroad tracks and other work in the right-of-way was part of this much larger project. The City left the exact sequence in which the various components of the project would be completed to the discretion of the construction contractor. The contractor removed the railroad tracks in July 1996.

The parties disputed, however, whether the work performed amounted to constructing a public road across the tracks of a railroad corporation, the act forbidden by PU Code § 1201. The Commission's engineer testified that, in his opinion as a professional engineer, The City's work was construction of a crossing. The City's engineer testified that in his professional opinion the work completed did not constitute construction of a crossing.

Discussion

A. *Statutory Violations*

The credibility of the both the Commission's and The City's engineers are not in question. Both are well-qualified experts that presented a sound rationale, in engineering terms, for their opinions.

The legal and policy basis for § 1201 provides the best guide to resolving this difference of opinion. Although § 1201 simply prohibits the construction of a street across railroad tracks, the objective of this prohibition is more clearly stated in § 1202, where the Legislature granted the Commission the exclusive power to establish the manner, terms of installation, operation, maintenance, use and protection of each crossing.

Section 1202 illustrates the very practical need for one entity to make determinations regarding intersections of streets and railroads, balancing the needs of both and always providing for protection of the public. Such a regulatory structure

requires that no party take action detrimental to another party's interest, absent Commission approval.

Here, The City has taken action, i.e., removed tracks, which precludes the use of the railroad line without the Commission determining that interfering with railroad traffic is justified in this instance. Analyzed from this perspective, it is clear that this is just the type of action that § 1201 was intended to preclude without first securing the permission of the Commission. For this reason, we find that the actions taken by The City constitute construction within the meaning of § 1201 in this factual circumstance.

For these reasons, we find that The City has commenced construction of a street across a railroad in violation of § 1201.

B. Sanctions

Section 1201 does not directly provide the Commission authority to order sanctions for violations. This authority is found in other portions of the PU Code. The Commission is authorized to impose three types of sanctions: fines, PU Code §§ 2104, 2107; reparations, PU Code §§ 734, 701; and imprisonment, PU Code §§ 2110, 2113.

The City's actions do not rise to the level of flagrant violations which would support imprisonment. Reparations are not applicable here as The City has not charged rates for services. The Commission concludes that the public interest requires that the Commission fine The City for its failure to comply with §§ 1201 and 1202 of the PU Code.

The Commission's authority to impose fines gives the Commission considerable discretion in determining the appropriate amount. First, the Commission may impose a fine of between \$500 and \$20,000 for each offense. (§ 2111.) Second, the Commission may determine that each day of a continuing violation constitutes a separate violation. (§ 2108.) The record does not state the exact day that the tracks were removed, only that such action took place sometime in August 1996. Assuming September 1, 1996, as a beginning point and February 1, 1997, as an end point would

result in a potential fine of approximately \$3 million. Thus, the full range for the Commission to consider is between \$500 and \$3 million.

Several factors support a fine in the lower reaches of the statutory range. The City has agreed to halt construction in the right of way. The City has offered a plausible, albeit legally incorrect, explanation for its actions. The particular facts of this grade crossing, i.e., no current use of the tracks and permission from the owners, could create the impression that the Commission's approval is superfluous. The City has been cooperative and forthcoming in this proceeding. Finally, the actions of The City officials in this proceeding suggest that they have reaffirmed their commitment to full compliance with Commission directives.

The Commission concludes that the mitigating factors discussed above support a fine of \$20,000. However, the same factors support suspending imposition of the fine set out above.

The fine will remain suspended only so long as The City fully complies with all Commission directives and applicable statutes. Should The City fail to comply, the Commission will revoke this suspension and reconsider the full range of potentially applicable fines.

C. Limitations On Further Actions

1. Construction

The City is directed to engage in no further construction of the Andersen Drive grade crossing unless and until the Commission authorizes such construction at a later time.

2. Hearings on the Merits of the Application

The City has undertaken a \$10 million project in extending Andersen Drive. The usefulness of this extension would appear to require an at-grade crossing of the former NWP railroad tracks, the subject of this application. The City began construction of the overall project without first securing the Commission's authorization for the at-grade crossing. While it is within The City's discretion to begin construction of the non-Commission jurisdictional portions of the project prior to

having secured Commission authorization for the jurisdictional portion, The City did so at its peril.

In reviewing The City's application, the Commission will not consider the cost of the non-jurisdictional portions of the extension that The City has elected to complete. The City is directed to include no references to the completed portions of the project in their filings and testimony before the Commission as a basis for approving the application.

Findings of Fact

1. The City is constructing a one-and-a-half-mile long extension of Andersen Drive. The extension crosses the former Northwestern Pacific railroad right-of-way, which is currently owned by the Golden Gate Bridge, Highway, and Transportation District.

2. The following work had been performed in the crossing:

- a. Clearing and grubbing
- b. Removal of approximately 400 feet of railroad tracks
- c. Initial grading
- d. Placing of embankment fill, and
- e. Installation of a storm-drain culvert.

3. The contractor removed the railroad tracks in July 1996.

4. The Commission's engineer testified that, in his opinion as a professional engineer, The City's work was construction of a crossing.

5. City's engineer testified that in this professional opinion the work completed did not constitute construction of a crossing.

Conclusions of Law

1. The City has commenced construction of a street across a railroad in violation of §§ 1201 and 1202 of the PU Code.

2. The public interest requires that the Commission fine The City for its failure to comply with §§ 1201 and 1202 of the PU Code.

3. The mitigating factors discussed above support a fine of \$20,000.

4. The public interest supports conditionally suspending the fine against The City.

INTERIM ORDER

IT IS ORDERED that:

1. The City is liable for a fine of \$20,000 for violation of §§ 1201 and 1202 of the Public Utilities Code
2. The fine shall be suspended only so long as the City of San Rafael (The City) fully complies with all Commission directives and applicable statutes. Should The City fail to comply, the Commission will revoke this suspension and reconsider the full range of potentially applicable fines.
3. The City is directed to engage in no further construction of the Andersen Drive grade crossing unless and until the Commission authorizes such construction.
4. In reviewing the application, the Commission will not consider the cost of the non-jurisdictional portions of the extension that The City has elected to complete.
5. The City is directed to include no references to the completed portions of the project in their filings and testimony before the Commission as a basis for approving the application.
6. This proceeding remains open for the purpose of evaluating The City's application through the hearing process adopted at the Prehearing Conference.

This order is effective today.

Dated April 9, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners