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Decision 98-02-004 February 4, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Leon Selva and Norman Selva, Complainants, vs. Southern Pacific Transportation Company (Los Angeles District Office), Defendant.	Case 96-02-040 (Filed February 14, 1996)

Robert J. Pia, Attorney at Law, for Leon Selva and Norman Selva, complainants.
Carol A. Harris, Attorney at Law, for Southern Pacific Lines, defendant.

O P I N I O N

Summary

This complaint concerns a private crossing over railroad tracks and right-of-way. The crossing (at Milepost 135.99) had been used for many years to gain access to a farm that the complainants formerly worked themselves, and that they currently lease to the farmer who also works adjacent farmland.

The complainants say the defendant[1] unreasonably closed the private crossing, and they ask the Commission to require the defendant to reopen the crossing. The evidence shows that the defendant's closure of the crossing (following a car/train collision at a nearby private crossing at Milepost 135.78, north of the crossing in question) was reasonable. However, the evidence also demonstrates that reopening the

[1] After the complaint was filed, the named defendant merged with the Union Pacific Railroad. The merger has no material impact on the issues or the merits in this case.

Milepost 135.99 crossing, under an appropriate licensing agreement, is superior in safety and practicality to the present alternative means of access (namely, the private crossing at Milepost 135.78) that the complainants' tenant has had to use since the closure.

This decision approves two potential solutions. The first solution, proposed by the defendant, is to upgrade the alternative crossing, resulting in improved sightlines for vehicles approaching the crossing from the complainants' farm. This solution requires the complainants to incur paving expenses and the loss to roadway of some land now under cultivation.

The second solution is to reopen the closed crossing, on the condition that the complainants enter into a licensing agreement with the defendant. This solution requires the complainants to incur expenses for crossing control and to assume liability for risks associated with their tenant's use of the reopened crossing.

Implementation of one of these two solutions appears necessary, owing to the hazards presented by use of the Milepost 135.78 crossing to gain access.[2]

Legal Issues

Both parties rely on Public Utilities (PU) Code § 7537, 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."

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[2] There may be additional solutions besides the two here described; however, months of negotiations between the parties preceded the hearing, at which only these two were discussed. Thus, without foreclosing other solutions that the parties may yet work out, today's decision will address these two solutions exclusively.

The defendant appears to agree that under this statute, the Commission can direct the reopening of a private crossing:

> "Although most private railroad crossings are created through licensing agreements negotiated between property owners and the involved railroad, the Commission is authorized...to determine the necessity for such crossing and the place, manner and conditions under which the crossing shall be constructed and maintained...." (Defendant's Concurrent Brief at 4, citation omitted.)

The defendant further argues that the statute confers "broad discretion" on the Commission, including the power to consider alternatives that might "obviate the need for the private crossing that is at issue." (Id. at 10, citation omitted.)

The complainants also rely on PU Code § 7537, although they argue that under the facts presented here, the Commission should exercise its power by ordering the reopening of the crossing at issue, without imposing on the complainants all of the conditions which the defendant would place on reopening. In short, the legal issues boil down to the inquiry of how the statute should apply in this specific situation, that is, what "place, manner, and conditions" of crossing "are reasonably necessary" to accommodate access to this farmland?

Before proceeding to that inquiry, it should be noted that the complaint, as filed, presented additional legal arguments to support the relief requested. The complainants there contended that they (or their predecessors in interest) had obtained something in the nature of an easement at the location of the closed crossing. However, the complainants did not press these arguments on brief. The facts presented do not support the arguments, and the law appears squarely against the complainants in this regard. There is nothing in the record tending to show the creation of an easement by express grant, by implication, or by operation by law. Moreover, complainants cannot claim an easement by prescription. As explained in one of the Commission's leading decisions on this subject,

> "[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." (Decision (D.) 93087, 6 CPUC2d 184, 189 (1981).)

At the hearing and on brief, the parties focused almost entirely on what would be the most reasonable way to accommodate access to this farmland. This is the appropriate focus in light of the above precedents.

Place, Manner, and Conditions of Access

The complainants argue that the defendant acted unreasonably when it chose to close the crossing at Milepost 135.99. They apparently hope thereby to obtain an order directing the defendant to reopen the crossing without requiring the complainants to enter into a licensing agreement, or at least without imposing on the complainants any conditions related to liability for their use of the crossing. We do not need to reach the issue of whether such an unconditional order would be appropriate because we find that the original closure was reasonable.

The persuasive factors here are that a fatality accident had occurred recently at a nearby crossing, in a vicinity similar to the crossing at issue. The defendant's evidence shows that some of the worst train/vehicle collisions in California history have occurred in the general vicinity of this crossing; that the general vicinity often has conditions, such as fog and blowing dust, that limit visibility; and that the crossing at issue does not have gates or signals. There is not, and apparently never has been, a licensing agreement for the crossing at Milepost 135.99, which does not even appear on the County Assessor's Map (Defendant's Exhibit 2), although the alternative crossing (only about two tenths of a mile away at Milepost 135.78) does appear there.

There is a seeming incongruity in the defendant's choosing to keep open the crossing at Milepost 135.78, where the accident actually occurred, and closing instead the crossing at Milepost 135.99. The explanation appears to be two-fold.

First, having two private crossings in close proximity is hazardous in itself. The track in question is a main line, along which freight and passenger trains operate at speeds of 60 miles per hour and up. At these speeds, the trains need at least half a mile to stop. The two crossings are about 1,100 feet apart, close enough that a vehicle traversing the tracks at one of the crossings could dangerously obstruct the vision of a driver approaching the other crossing.

Second, given the desirability of closing one of the two crossings, the defendant's choice seems logical under the circumstances as they then appeared. A person inspecting the two crossings would observe that both crossings appear to serve a single farm. This observation is functionally correct: Although several contiguous lots are involved, they are farmed as a single unit by Arden Oreggia, who owns or leases all of the lots. The person would also observe that a paved road extends into the farmland from the crossing at Milepost 135.78, which remains open. The road leads to several buildings and appears to be in daily use. This observation is also correct: The road serves a house and several buildings, including a farm vehicle repair business operated by the complainants. In contrast, only a dirt road extends into the farmland from the crossing (now closed) at Milepost 135.99. This road ends only in a cleared area and loading dock in the middle of the lot. From these circumstances, the defendant could reasonably infer that closure of the crossing at Milepost 135.99 would cause less inconvenience.

In short, the defendant had reason to think that (1) immediate closure of one of the two crossings was a matter of some urgency, (2) the defendant was within its rights to close the crossing at Milepost 135.99, and (3) reasonable access to the adjacent farmland could be accommodated from the crossing at Milepost 135.78, which the defendant did not close.

The complainants make two points in response. First, they dispute the severity and frequency of poor visibility at either crossing. Second, they rely on the long

existence of the Milepost 135.99 crossing (without, so far as the record discloses, any mishap occurring there). The first point seems to be a judgment call on which, given the importance of public safety, the defendant should be allowed to err on the side of caution. The same reasoning disposes of the second point. If the defendant becomes aware of a danger, it should not have to wait for another accident before addressing that danger.

Although the defendant was not wrong to close the Milepost 135.99 crossing, the complainants have shown convincingly that the Milepost 135.78 crossing is very unsatisfactory, at least as the latter crossing is presently configured. The problems become clear only after closer consideration of the farming operations (as described in the complainants' testimony) and the actual layout of the farm (as described in the complainants' testimony and shown in Defendant's Exhibit 2).

The County Assessor's Map (id.) identifies the relevant parcels as Lot B and Lot C. The Milepost 135.99 crossing leads straight into Lot B. The Milepost 135.78 crossing leads straight into Lot C. These lots are contiguous, and they are both devoted mostly to growing crops. There are dirt tracks connecting the two lots, but these tracks are impassable by heavy vehicles during the rainy season and whenever the farm is irrigated. Paving some of these tracks to provide access between the two lots would be impractical, owing to the loss of cropland and the expense of laying and maintaining a pavement that could stand up to use by farm equipment. Thus, although Mr. Oreggia has farmed both lots for several years, they have continued to be accessed separately by roads crossing the defendant's tracks at a right angle over the Milepost 135.99 and Milepost 135.78 crossings, respectively, and terminating in separate staging areas, centrally located in the two lots, where the heavy vehicles are parked and loaded.

With the closure of the Milepost 135.99 crossing, vehicles now going to and from Lot B must (1) make a sharp turn at the Milepost 135.78 crossing, and (2) drive over the defendant's right-of-way. Simply making this sharp turn with a truck pulling a trailer is a problem, as illustrated by the flattened stop sign at the Milepost 135.78 crossing.

(See photographic exhibit 12 referenced in Plaintiffs' Exhibits 2 and 4.)[3] Far more serious, however, is the poor view up and down the tracks for the driver making the turn.

All the evidence agrees that for the best view along a railroad track, a driver should be approaching the track at a right angle to the track. Vehicles leaving Lot C have such a right angle approach to the track at the Milepost 135.78 crossing; such is not the case for vehicles approaching that crossing from Lot B. The drivers of such vehicles are driving parallel to the track until they make their turn. A train could be approaching that crossing from the same direction the vehicle is driving. To see that train, drivers would have to look back over their shoulders while at that same time getting set to make a sharp turn and avoiding any farm workers or equipment in or near the right-of-way.

To make matters worse, the right-of-way itself is frequently obstructed by cars, trucks, and trailers that the complainants testify are parked there by the employees of businesses situated along the former Highway 101 ("Hwy 101 Alternate" on Defendant's Exhibit 2) on the opposite side of the tracks from the complainants' farm.[4] The parked vehicles impair the view along the tracks even for drivers approaching the Milepost 135.78 crossing going to or from Lot C. For drivers approaching from Lot B, the parked vehicles can convert the right-of-way into an obstacle course and almost completely block the drivers' view along the tracks in one or both directions.

We conclude that the status quo at the Milepost 135.78 crossing is unsafe and that vigorous remedial action is necessary. We will address long-term solutions below, but one remedial action should be taken immediately. The defendant should not tolerate the use of its right-of-way in the vicinity of the Milepost 135.78 crossing as a parking lot.

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[3] Further complicating the sharp turn is that it must be made up an incline since the tracks are raised above the level of the rest of the right-of-way.

[4] The complainants testify that farm laborers are not parking on the right-of-way, nor is farm equipment parked there.

The defendant should work with the complainants, Mr. Oreggia, and the neighboring businesses to ensure that the sightlines of drivers approaching the Milepost 135.78 crossing are not impaired by parked vehicles.

Long-term Solutions

Eliminating the obstruction caused by parked vehicles, as discussed above, will create a (barely) tolerable crossing situation for the near-term. For the long-term, solutions must be found to enable all vehicles entering and leaving Lots B and C to cross the defendant's tracks at a right angle. Both the defendant and the complainants have proposed such a solution, and both solutions (with some modifications) are acceptable to the Commission.

The defendant wants to improve the Milepost 135.78 crossing and to keep the Milepost 135.99 crossing closed. There are three parts to the proposed improvement. First, the defendant would put in a prefabricated concrete crossing, paid for by the defendant. Second, the defendant would grant the complainants, at no charge, a license to use a twenty to twenty-five foot wide lane in the defendant's 50-foot right-of-way, contingent on the complainants' agreeing to pave the lane for use by vehicles going between the Milepost 135.78 crossing and Lot B.[5] Third, the complainants would pave a radius on the farm side of the Milepost 135.78 crossing; the radius would be of sufficient size to enable trucks with trailers from Lot B to swing away from the crossing, straighten out, and cross the tracks at a right angle.

Only this third part of the defendant's proposal would entail any loss of farmland to improve the crossing. The defendant presented no estimate of the paving costs to be borne by the complainants. However, the defendant favors this proposal because it solves both the access problem and the problem of having two private crossings very close together. In the words of Defendant's witness Gonzales, the

[5] The portion of the right-of-way so used would be as measured from the property line; in other words, it would be the portion of the right-of-way furthest from the track.

proposal results in one safe crossing instead of two major problems. See Reporter's Transcript (R.T.) at 58.

The complainants believe the long-term solution is simple: reopen the Milepost 135.99 crossing. With both crossings open, congestion at the Milepost 135.78 crossing would be relieved, the need to pave part of the defendant's right-of-way and the proposed radius in Lot C would be eliminated, and vehicles going to and from Lot B would be able to cross the defendant's tracks at a right angle.[4] The complainants are also willing to pay for a substantial wooden fence with locked gate at the Milepost 135.99 crossing; this gate would be unlocked only at times that vehicles are driven into or out of Lot B for planting, harvesting, or crop removal.

The defendant does not wholly reject the possibility of reopening. In fact, the complainants and defendant had lengthy pre-trial discussions concerning the terms under which the Milepost 135.99 crossing might be reopened. Both sides, without either side objecting, referred several times on the record to these discussions, so they are no longer considered confidential under the Commission's settlement rules (see Rule 51.9 of the Commission's Rules of Practice and Procedure). The record indicates that the defendant insists on construction of a locked gate (agreed to by the complainants) and three further conditions for reopening.

The first two of these further conditions are that (1) the complainants enter into a license agreement with the defendant setting out the parties' respective rights and responsibilities regarding the Milepost 135.99 crossing, and (2) that private crossing signs in conformity with Standard No. 1-C of General Order 75-C be installed. The complainants, without explicitly accepting these conditions, appear not to object to

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[4] The complainants estimate that paving an existing field road between Lot B and Lot C would cost $150-200 thousand. See R.T. at 39-40. It is not clear whether paving the lane in the defendant's right-of-way would be equally expensive, nor is there evidence on what the annual maintenance costs might be. Further, while the complainants are the sole owners of Lot B, they are only partial owners of Lot C. Paving the proposed radius would thus entail obtaining (and presumably paying for) the co-owners' consent, above and beyond the cost of the paving.

them, at least in principle. However, the third condition, that the complainants satisfy the defendant's requirements for indemnification and insurance, is the sticking point.

The complainants testify that they have explored insurance possibilities, in some cases contacting carriers suggested by the defendant. The complainants indicate that many carriers do not underwrite such policies, while those that do quote excessive annual premiums.[7]

Discussion

Both the complainants and the defendant have thoroughly and thoughtfully considered the safety problems in this case, and both sides make good points. Most important, both sides propose reasonable (if less than perfect) solutions. The choice between the solutions turns principally on economics, but the record is vague about the costs of the solutions.

The defendant gives great weight to the need to eliminate one of two private crossings in close proximity to each other. We acknowledge the desirability of such elimination and also of improving the Milepost 135.78 crossing by installation of concrete panels. Detracting from this proposal, however, is the extensive paving that it entails. Even from the standpoint of safety, we are disturbed by the prospect of farm vehicles, sometimes heavily laden, driving on the defendant's right-of-way for almost 1,100 feet to get from Lot B to the Milepost 135.78 crossing. Defendant's witness Gonzales candidly acknowledged:

> "[A]ny time you are on Union Pacific's right-of-way where we have freight trains going sixty miles an hour and commuter trains going seventy miles an hour, there's a possibility of somebody fouling the track, getting too close to the track and having a derailment. You know, I was pointing out earlier that some of these workers, contract workers, the

[7] One of the carriers suggested by the defendant quoted an annual premium of $100,000. R.T. at 38. The complainants and defendant also considered the possibility of either self-insurance or the defendant's being named as an additional insured under the general liability policy for the farm. Unfortunately, no mutually satisfactory terms for self-insurance could be reached, and the farm liability carrier was unwilling to underwrite the proposed arrangement.

> [farmer] has no control over. His people have no idea who they are, what kind of vehicles they drive. He just knows that he hires a contractor to supply these people to work out here. He has no idea--he has no control over them. So, they could encroach on top of our--get fouled of the track and without our knowledge we could hit them and kill them." (R.T. at 66.)

The witness concluded that the creation of a license agreement between the defendant and the complainants might provide an incentive for strict supervision of contract workers. Our concern is that, supervised or not, the operation of farm vehicles over an extended stretch and in close proximity to railroad tracks inevitably increases the chance of accidental fouling.

The complainants give great weight to the fact that the operation of these lots has been planned over the years on the assumption that both crossings would continue in use; consequently, removal of either crossing would have some impact on efficiency. However, we reject the complainants' argument that the closing of the Milepost 135.99 crossing diminishes the value of their property; as we noted earlier, the complainants have no prescriptive or other easement entitling them to use of that crossing. Nevertheless, adoption of the defendant's proposed solution would require the complainants to make a significant investment, and perhaps incur ongoing expenses, that under the complainants' proposed solution would be avoided.

The complainants' proposed solution provides right angle approaches to both crossings, and it does so without paving anything or utilizing the defendant's right-of-way. The proposed solution, however, perpetuates the problem of the two crossings' close proximity, and the complainants would also have us ignore Commission precedent regarding insurance obligations in connection with private crossings. To understand why such precedent should be followed, we consider briefly the nature of private crossings.

In general, and subject to Commission regulation, utilities provide facilities and services as required by public convenience and necessity. By definition, a private crossing does not serve the public. It serves only to support the private activity of the users, and is of no use at all to the railroad in serving the public. In fact, a private

crossing may be a detriment to public service. The defendant's testimony, unrebutted in this respect, explains how a crossing creates maintenance problems; and as pointed out by Defendant's witness Gonzales, the safest crossing is no crossing at all.

For these reasons, the people who benefit from a private crossing should bear their share of the costs directly attributable to the crossing. The Commission has stated that such costs may include insurance to protect the railroad from incremental risk associated with the crossing.

For example, in D.93087, above, the Commission considered an application to make permanent a private crossing that, like the Milepost 135.99 crossing, had existed for a long time but was unprotected by crossing signs or gates and was not covered by an indemnity agreement or liability insurance. The railroad there involved, like the defendant here, wanted signs and gates to be installed and users of the crossing to provide liability insurance in the railroad's favor. On the latter point, the Commission said:

> "[I]n granting this application, we would be subjecting [the railroad] to potential liability exposure arising from any accidents at the [private] crossing. We believe the indemnification and insurance requirement clauses contained in the private crossing agreement submitted to applicants by [the railroad] to be reasonable and that applicants should bear some burden for a crossing which is solely for their benefit." (6 CPUC2d at 190.)

In that application, the Commission resolved the matter by requiring the private crossing to remaining open while the applicants sought to include additional parties within the landlocked area and explored alternative solutions with the county and the railroad. In this proceeding, we will allow the complainants to continue to explore ways to lessen the expenses of the two proposed solutions, without sacrificing safety.

The defendant's proposed solution was first presented in full at the hearing; the defendant itself asks for time to further explore this solution with the complainants. The request is reasonable.

The complainants' proposed solution is appropriate with two modifications. First, the complainants must accept a license agreement with reasonable provision for

indemnification of the defendant, backed by insurance (or self-insurance where acceptable to the defendant). The indemnification provisions found reasonable by the Commission in D.93087 absolve the licensees from any responsibility for injury caused by the negligence of the railroad's employees (6 CPUC2 at 188), and we expect the indemnification provisions proposed by the defendant to contain substantially the same exclusion.

Second, we believe that concrete panels should be installed at both crossings if both crossings are to be open. The crossings must stand up to the wear-and-tear of heavy vehicles. Considering all the circumstances of the present case, it is reasonable for the defendant to bear the cost of these improvements at both crossings.

Judicial review of Commission decisions is governed by Part 1, Chapter 9, Article 3 of the Public Utilities Code. The appropriate court for judicial review is dependent on the nature of the proceeding. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in § 1757.1. Therefore, it will be subject to judicial review in the court of appeal. (See PU Code § 1756(b).)

Findings of Fact

1. The defendant's evidence shows that some of the worst train/vehicle collisions in California history have occurred in the general vicinity of this crossing; that the general vicinity often has conditions, such as fog and blowing dust, that limit visibility; and that the crossing at issue does not have gates or signals. There is not, and apparently never has been, a licensing agreement for the crossing at Milepost 135.99.

2. Having two private crossings in close proximity is hazardous in itself. The two crossings at issue are about 1,100 feet apart, close enough that a vehicle traversing the tracks at one of the crossings could dangerously obstruct the vision of a driver approaching the other crossing.

3. Given the desirability of closing one of the two crossings, the defendant's choice (to close the Milepost 135.99 crossing) seems logical under the circumstances as they then appeared. The defendant had reason to think that (1) immediate closure of one of

the two crossings was a matter of some urgency, (2) the defendant was within its rights to close the crossing at Milepost 135.99, and (3) reasonable access to the adjacent farmland could be accommodated from the crossing at Milepost 135.78, which the defendant did not close.

4. Although the defendant was not wrong to close the Milepost 135.99 crossing, the Milepost 135.78 crossing is very unsatisfactory for access to Lot B, at least as the latter crossing is presently configured.

5. The relevant lots are contiguous, and they are both devoted mostly to growing crops. There are dirt tracks connecting the two lots, but these tracks are impassable by heavy vehicles during the rainy season and whenever the farm is irrigated. Paving some of these tracks to provide access between the two lots would be impractical. With the closure of the Milepost 135.99 crossing, vehicles now going to and from Lot B must (1) make a sharp turn at the Milepost 135.78 crossing, and (2) drive over the defendant's right-of-way.

6. For the best view along a railroad track, a driver should be approaching the track at a right angle to the track. Such is not the case for vehicles approaching that crossing from Lot B. The drivers of such vehicles are driving parallel to the track until they make their turn.

7. The right-of-way is frequently obstructed by parked cars, trucks, and trailers that impair the view along the tracks even for drivers approaching the Milepost 135.78 crossing going to or from Lot C. For drivers approaching from Lot B, the parked vehicles can convert the right-of-way into an obstacle course and almost completely block the drivers' view along the tracks in one or both directions.

8. The long-term solution is to enable all vehicles entering and leaving Lots B and C to cross the defendant's tracks at a right angle.

9. The defendant wants to improve the Milepost 135.78 crossing and to keep the Milepost 135.99 crossing closed. The defendant favors this proposal because it solves both the access problem and the problem of having two private crossings very close together.

10. The complainants believe the long-term solution is to reopen the Milepost 135.99 crossing, however, they resist some of the terms of the defendant's proposed licensing agreement.

11. Both the complainants and the defendant propose reasonable (if less than perfect) solutions. The choice between the solutions turns principally on economics.

12. Detracting from the defendant's proposal is the extensive paving that it entails and the prospect of farm vehicles, sometimes heavily laden, driving on the defendant's right-of-way for almost 1,100 feet to get from Lot B to the Milepost 135.78 crossing.

13. The complainants' proposed solution perpetuates the problem of the two crossings' close proximity.

14. A private crossing is of no use at all to the railroad in serving the public; in fact, a private crossing may be a detriment to public service.

15. The complainants' proposed solution is appropriate with two modifications. First, the complainants must accept a license agreement with reasonable provision for indemnification of the defendant, backed by insurance (or self-insurance where acceptable to the defendant). The indemnification provisions should absolve the licensees from any responsibility for injury caused by the negligence of the railroad's employees. Second, concrete panels should be installed at both crossings if both crossings are to be open. Considering all the circumstances of the present case, it is reasonable for the defendant to bear the cost of these improvements at both crossings.

Conclusions of Law

1. Under PU Code § 7537, the Commission can direct the reopening of a private crossing and can also consider alternatives that might obviate the need for a private crossing.

2. In the present case, the Commission must determine what place, manner, and conditions of crossing are reasonably necessary to accommodate access to this farmland.

3. There is nothing in the record tending to show the creation of an easement by express grant, by implication, or by operation by law. Moreover, complainants cannot claim an easement by prescription.

4. The defendant should not tolerate the use of its right-of-way in the vicinity of the Milepost 135.78 crossing as a parking lot. The defendant should work with the complainants, Mr. Oreggia, and the neighboring businesses to ensure that the sightlines of drivers approaching the Milepost 135.78 crossing are not impaired by parked vehicles.

5. In general, and subject to Commission regulation, utilities provide facilities and services as required by public convenience and necessity. By definition, a private crossing does not serve the public.

6. The people who benefit from a private crossing should bear their share of the costs directly attributable to the crossing. Such costs may include insurance to protect the railroad from incremental risk associated with the crossing.

7. To facilitate the solution of short-term and long-term safety problems at these crossings, today's decision should take effect immediately.

8. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1. Therefore, the proper court for filing any petition for writ of review will be the court of appeal.

O R D E R

IT IS ORDERED that:

1. Within 60 days of the effective date of this order, the complainants and defendant shall enter into an agreement for a long-term solution to the crossing problem that is the subject of this case. Such solution may be the defendant's preferred solution, the complainants' preferred solution (as modified pursuant to the foregoing discussion, findings, and conclusions), or any other solution that the complainants and defendant may negotiate and that is substantially consistent with the foregoing discussion, findings, and conclusions.

2. Unless the Milepost 135.99 crossing is reopened pursuant to an agreement consistent with Ordering Paragraph 1, the closure of that crossing shall become

permanent, and it shall not be reopened except upon application to and approval by the Commission.

3. As soon as possible, the defendant shall take steps to ensure that there is no impairment of drivers' sightlines along its tracks due to parked vehicles in the vicinity of the Milepost 135.78 crossing.

4. At the end of 60 days after the effective date of this order, the defendant shall submit a report to the Director of the Rail Safety and Carriers Division. The report shall describe the steps that the defendant has taken pursuant to this order. The Director may require any further reports by the defendant as the Director deems appropriate to document full abatement of the safety problems addressed in today's decision.

5. This proceeding is closed.

This order is effective today.

Dated February 4, 1998, at San Francisco, California.

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