

Decision 98-09-059 September 17, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of San Diego for an order authorizing the re-opening of the existing at grade pedestrian crossing at 54th Street (between Market Street and Naranja Street) to vehicular traffic in the City and County of San Diego, California.

ORIGINAL

Application 96-05-001
(Filed May 1, 1996)

(See Appendix A for Appearances)

OPINION

Summary

The application of the City of San Diego to reopen an at-grade crossing at 54th Street is denied without prejudice.

Discussion

The City of San Diego (City) filed this application to reopen a grade crossing at 54th Street over tracks utilized by the San Diego Trolley (Trolley) and the San Diego and Imperial Valley Railroad Company (SD&IV). This crossing was closed to vehicular traffic in 1987, following negotiations between Staff of the Public Utilities Commission (Staff) and the Metropolitan Transit Development Board (MTDB) of San Diego. The San Diego City Council agreed. It has remained open to pedestrians. Since the closing, operations of Trolley over the former crossing have begun.

The application to reopen the crossing was filed on May 1, 1996. A prehearing conference was held in San Diego on July 24, 1996 before Commissioner Josiah L. Neepser and Administrative Law Judge (ALJ) Sheldon

Rosenthal. At that time several deficiencies in the application were made known to City in order that it might present an application that could be considered by this Commission. City was given the choice of amending its application or withdrawing it and submitting a new application that would correct the problems in the existing application. An amended application was filed on June 1, 1997. There followed a period in which City and Staff attempted to find a mutually satisfactory time for an evidentiary hearing. This was finally agreed to be the 26th and 27th of March, 1998, at which time the matter was heard in San Diego before Commissioner Neeper and ALJ Rosenthal. Because this application was filed in 1996 and a prehearing conference was held that year, it is not subject to the procedures under SB 960 (Rule of Practice and Procedure (Rule 4(b)(2).)

At the conclusion of the hearing, City was directed to file two exhibits. These were given numbers 10 and 12. Late-filed Exhibit 10 covers the variance procedures and approval processes regarding what has been referred to in the record as "The Potter Tract." Late-filed Exhibit 12 is a list of the Board of Directors of the MTDB and the cities represented on that Board. Without objection, both of these late-filed exhibits are admitted into evidence.

Parties were given 30 days from receipt of transcript for concurrent briefs. Reply briefs, if desired, could be filed 15 days thereafter. We received concurrent opening briefs dated May 18, 1998 and reply briefs dated June 2, 1998.

City presented witnesses from its police and fire departments who testified that reopening the 54th Street crossing would assist the provision of emergency services in the area of the 54th Street crossing. The nearest vehicle crossings are .3 miles to the west of 54th Street and .5 miles to the east (Ex. 7, pp. 10 and 11.) This distance of .8 miles is not the longest distance between vehicle crossings along the rail lines in question. (Tr. 40.) They demonstrated by use of a map and photograph (Exs. 2 and 4), the manner in which they must presently respond to

emergencies and the options that would be available to them if the application were granted. Both indicated that reopening the 54th Street crossing was a matter of vital public interest. In making this representation there was no consideration of whether the reopening of 54th Street would present a danger to the users of the crossing. (Tr. 40.)

Detailed drawings of the prospective crossing (Ex. 5) were sponsored by an Associate Civil Engineer of City. He testified that an overpass would be feasible, but not practical for 54th Street (Tr. 54.) He estimated that an overpass would cost approximately \$2.3 to 2.8 million, as opposed to \$500,000 for an at-grade crossing. (Ex. 6.) He also stated that it might be necessary to acquire some additional land to construct a separation. (Tr. 59.)

The Chief of Design of MTDB was called by City and testified that the design of the proposed crossing met the standards set by this Commission. However, MTDB is "neutral" on the project, and the witness agreed with counsel for City that "...they [MTDB] don't care one way or the other." (Tr. 65.)

The Operations Manager of SD&IV testified that his freight trains traveled at a maximum of 40 miles per hour over the proposed crossing (Tr. 111.) This traffic was no more than twice per day, between 1:20 a.m. and 4:09 a.m. (Tr. 109, 111.) He testified that he has not had a problem with visibility of pedestrians at 54th Street, and that there has not been a visibility problem as to vehicles on the line. (Tr. 113.)

The Superintendent of Transportation for Trolley testified that there were approximately 150 trolleys per day over the proposed crossing (Tr. 73) at a maximum speed of 50 miles per hour. (Tr. 74.)

A Senior Planner of City described various developments that were under discussion or permit application in the area of the proposed 54th Street crossing. It was her belief that all of these developments would benefit from a reopening

of 54th Street, (Tr. 128-129) but she could not state that any of the projects was dependent on the reopening. (Tr. 331.) She was not aware of whether buildings that might be constructed along the railroad right of way would impede visibility at the crossing or what the set-back requirements around building might be. (Tr. 313-315.) (Late-filed Exhibit 10 indicates a set-back requirement of 10-15 feet unless a variance is obtained.)

A City Associate Traffic Engineer testified that an estimated 1,000 vehicles per day would use the reopened 54th Street crossing. (Tr. 135.) She also testified that the crossing would improve the traffic flow in the general vicinity in question. (Tr. 138.)

Finally, Mr. George Stevens, Councilperson for the district in which the 54th Street crossing is located, testified that the closing of 54th Street in 1987 occurred when there was a vacancy in the Council office for that district. (Tr. 209.) He implied that City would not have agreed to the closing if he had been in office at that time. He testified to the growth in the community around 54th Street, and how the closed crossing impeded commercial and residential revitalization. Councilperson Stevens emphasized the real concern of the community for emergency vehicles to be able to utilize the 54th Street crossing. (Tr. 212.) He also testified that a reopened crossing would relieve traffic on adjoining residential streets. (Tr. 209-210.)

After the record in the proceeding was closed, City provided us with a letter from the United States Postal Service indicating that customers of the proposed post office to be built in Potter's Tract and postal carriers would be benefited by the reopened crossing. This letter will be placed in the correspondence file.

Opposing the application was the Staff. Its witness expressed concern for the safety of the public should the crossing be reopened at grade. He testified

that the frequency of high speed train movements over the proposed crossing and the poor line of sight create a dangerous situation. (Tr. 239.) These movements are in contrast to the limited number of train movements before the line was used by Trolley. (Tr. 285.) He was also concerned with what he considered limited visibility at the crossing because of the size and proximity of a warehouse to the tracks and road at the northwest corner of the crossing area. (Tr. 238-239.) He pointed to existing grade crossings that are available for the convenience of the public .3 miles west and .5 miles east of 54th Street (Ex. 7, p. 3). The Staff witness cited recent Commission decisions stating a policy in favor of grade separations as opposed to at-grade crossings, (Ex. 7, pp. 14-15) and showed that this was in accord with the policy of "...the American Association of Railroads, Caltrans, and the United States Department of Transportation." (Exh. 7, p. 15.)

We agree that City has demonstrated the convenience to its citizens in having a reopened 54th Street crossing. It would help traffic circulation, divert traffic from residential streets, help unite the local community, and be of use to emergency vehicles. What must also be considered is the safety of all users of the State at the intersection (Public Utilities Code Secs. § 1201 et seq.), not just benefits to the inhabitants of the locality.

We have no doubt that reopening 54th Street to vehicular traffic would increase the risk of accident over the present situation. Now the street leading to the tracks is blocked, so there is no threat of vehicular accident. Should it be reopened, even with the protection proposed by City, we would have vehicle traffic confronting approximately 150 train crossings per day. There would be the ever present danger of a collision on the tracks, whether by negligence on the part of a driver or train operator or malfunction of either the train, a vehicle, or of the crossing protection. (Tr. 296.) While conformance with the highest level of

protection contained in the Commission's General Order 75-C maximizes the safety of vehicles using the grade crossing, it cannot provide a guarantee against an untoward event. The only way this can be assured is if the tracks and the street do not meet. This can be accomplished by two means; closure of the crossing to vehicles, as is the present situation, or separation of the roadway and the tracks.

On cross-examination, the Staff witness stated that he never favors reopening a crossing at grade. (Tr. 297-298.) We note that this is in contrast to his statement in his Exhibit 7, where he states:

"A departure [from this policy] may be permitted only when a compelling public need so dictates." (Pg. 14.)

We disagree with the absolutism of his position on cross-examination. We believe that a given fact situation can overcome this acknowledged Commission preference for grade separations, as opposed to crossings, as he stated in his exhibit. However, a party asking that an at-grade crossing be reopened bears a very heavy burden of proof. City of San Mateo, 8 CPUC 2d 573 (1982). The facts must be overwhelming, since the public is being subjected to a risk that had previously been eliminated.

City has made a strong case for reopening. Revitalization and reuniting a neighborhood are important points. Alleviating traffic bottlenecks and improving traffic patterns are significant goals. Most impressive is the testimony regarding the value of the reopened crossing to emergency vehicles, such as police, fire, and ambulance. While it is possible that they can perform their services with the crossing closed, as at present, the time saved and ease of operation of these vehicles if the crossing were open was fully presented at the hearing and is credible.

City has stressed its view that its determination of what is in its own vital interest is a subject-matter that should receive great deference by this Commission. With this proposition we heartily agree. It is the local authority that is most in touch with the needs of the local citizenry. Where, as here, a city tells us that a particular crossing is in its vital public interest we must, and do, give deference to that opinion. That does not mean that the opinion of the city precludes any contrary determination by this Commission. However, the desire of the city must be acknowledged and considered fully in light of the rest of the record. (City Opening Brief, pg. 11.)

City presented no independent study of the safety of the proposed crossing for vehicles and pedestrians. Rather, it relied on a lack of objection on the part of MTDB to the detail of its plans (Tr. 58) and to its compliance with our General Order 75-C crossing protection standards. (City Response Brief, pg. 7.)

In its Opening Brief City acknowledges that the lines of sight might be impaired by buildings in the vicinity of 54th St. crossing, but argues that this is no different from "*other like type situations on the system that are adequately protected with crossing gates.*" Pg. 4 (Emphasis in original). City's brief further argues that when multiple crossings are present the speed of the trains should be decreased. Pg. 13-14. City also contends that "*Where railroad crossing is dangerous because of obstructed view and depressed tracks, both motorist and railroad had a duty of taking extra precautions upon approaching crossing.*" (Citing Thuet v So. Pac. Co., 135 Cal. App., 527 (1933) Pg. 15.)

These arguments do not provide us with much comfort. Just because other crossings have impaired sight lines does not justify intentionally creating an additional hazard. Our goal is to improve public safety at crossings, not add to the risks.

At the hearing City did not offer any evidence of the reaction of MTDB or passengers of the trolley to City's suggestion, first mentioned in its brief, that there could be a speed limitation on trains to reduce the possibility of accident at the crossing. We can only speculate on MTDB's reaction to this proposal, and to the reaction of commuters who use these trolleys. Finally, if the Commission could count on both the railroads and motorists using extra caution at crossings there would be no need for proceedings such as the instant one. Experience has shown that existence of a duty is not sufficient to bring about compliance.

We must note at this point that there would be even greater value to the emergency vehicles, as well as to traffic flow and neighborhood revitalization, if there were a grade separation constructed, rather than a grade crossing. With a separation, an emergency vehicle attempting to use the crossing would not find itself blocked, and possibly trapped, in the event of an approaching train. Safety of the general public would be improved, since there would be no temptation to sneak around a closed gate. A stalled vehicle would not present a hazard to an oncoming trolley or its passengers.

Furthermore, we call attention to the testimony of the City Engineer. He stated that a grade separation was "feasible" but not "practical" because of the discrepancy in costs of a separation as opposed to reopening at grade. (Tr. 54.) He made no study of the safety of vehicles or pedestrians if the crossing were reopened. (Tr. 58.) This was a straight cost comparison, not a cost benefit comparison. (Tr. 58.) As such, no value was given to the potential costs to City or the public of an accident at the reopened at-grade crossing (Tr. 58-59) or the benefits to the public of a crossing where traffic is not detained by crossing gates at least 150 times per day.

In its Opening Brief Staff directed us to Rule 38, which requires applicant's explanation of why a grade separation is not practicable. (Pg. 21.) Staff referred

us to the distinction between "practicable" and "practical," as set forth in City of San Mateo, 8 CPUC2d 573, 581. "Practicable" pertains to the feasibility of construction while "practical" refers to the possibility of financing. Indeed, City of San Mateo, *supra*, is precisely in point with our present proceeding. There, the applicant claimed that the cost of separation made it impossible to build. We agreed that a crossing was desirable to relieve traffic, facilitate emergency vehicles and provide for growth, but we denied the application because there was no showing that a separation was not practicable. (8 CPUC 2d at 581.) The Commission then went on to say:

"The Commission's principal concern in railroad-highway crossing regulatory matters must be the adequate safeguarding, as far as it can be done practicably, of human life and limb. Safety is an issue of overriding importance. Despite substantial advances, there are numerous situations remaining where grade crossing protection can never provide a satisfactory solution due to limiting physical and operating conditions. In such locations, grade separations are the only solution. The Commission is of the opinion that this is one such location, and that the advantages to be obtained by opening a grade crossing at Laurie Meadows Drive are not sufficient to warrant creation and acceptance of the significant safety hazard that would result. To do so would create a situation entirely inconsistent with Commission, state, and federal policy. After giving this record full consideration, we are of the opinion that the application must be denied." (8 CPUC2d at 583-584.)

We express no opinion as to City's future ability to make an appropriate showing that would convince us that an at-grade crossing is warranted. We do say that such showing has not yet been made.

A further factor mitigating against a reopening of the at-grade crossing is found in the application itself. Despite the strong showing of need of the crossing for emergency services and convenience for normal traffic, City does not propose to construct the crossing until three years after approval is granted by

this Commission. As previously noted, this application was filed in May, 1996. City spent a full year amending the application. It then was unable to agree on hearing dates until March of 1998. Looking at a realistic schedule from the time that briefing was to be concluded (early June, 1998) and a proposed decision and comments on that decision filed, City could hardly have expected a Commission decision until the end of 1998 or the beginning of 1999. Three years from that date could bring us to 2002 before construction starts and actual usage of the crossing could be expected. A delay of this extent certainly tends to blunt any claim of urgency that might be advanced. This apparent dichotomy was brought to the attention of City by Commissioner Neeper and the ALJ on two separate occasions in hopes that an explanation would be made. (Tr. 38-39, 339-344.) City's sole response, in its entirety, is printed below:

"The grace period on its face appears to be inconsistent with public safety. However, the real importance is not that the crossing be open today as it is that the street be open as a vehicular crossing for future needs of the City whether those needs be for police, fire or safety or for traffic access. The City requested a grace period but will work expeditiously to complete the crossing. The City has limited resources and cannot immediately address every vital need of the people as soon as it would like." (Reply Brief, Pg. 9.)

This argument, which states in practical terms the difficulty any city has in meeting all of its pressing needs, capsulizes a major deficiency of the application. It was filed before the applicant was prepared to act. Who knows whether other vital interests will arise during what City calls a "grace period" that might be even more pressing to City? We can only guess what the factual situation will be around 54th Street at the time City is actually ready to consider construction of the crossing. The application is premature. We will deny it without prejudice so that when an application for an at-grade crossing is ripe for consideration, the

City may again attempt to carry its burden of proof under City of San Mateo based on facts and circumstances in effect at that time.

A delay of the type contemplated by City may well provide sufficient time to accumulate sufficient funds needed to create a grade separation at 54th Street if that still is a priority interest of City. This is a matter for determination by City. While we cannot give advance approval, there certainly seem to be no impediment from our perspective to a future authorization to construct a separated crossing at 54th Street, should such an application be filed.

The Proposed Decision of the ALJ was mailed to the parties on August 18, 1998. Comments were received from City and Staff. The Comments of City were late, but will be accepted and considered in this Opinion.

City asserts that the methodology by which the Commission determines the practicability of a grade crossing (Pg 9 of this Opinion) is "flawed" (Comments, Pg 1) and "problematic" (Comments, Pg 4). The essence of City's arguments is that the Commission does not give sufficient weight to the financial burden that a separation imposes on a city, that it ignores the practical solution of grade crossings, and that the ALJ did not consider the option of apportioning some of the costs to the railroads over whose tracks the crossing would pass.

The simple and complete answer to the last assertion of City is that there was no notice to Trolley or SD&IV that they might be asked to contribute to this project. Neither Trolley (Tr. 65) nor SD&IV (Tr. 114) opposed City's application. Had either been aware of a potential financial risk their positions might have been different. It is now too late for City to change its showing.

We agree that we have imposed a heavy burden on applicants who wish to create at-grade crossings. This was openly stated at Page 6 of the Proposed Decision, as was a recitation of the evidence indicating this position is in accord with that of the American Association of Railroads, Caltrans, and the United

States Department of Transportation (Proposed Decision, Pg 5). Nothing in the arguments of City convinces us that we have committed legal error in our past and present approach to this issue, or that we should change this policy because to do otherwise might strain the budgets of an applicant city. If the need be sufficient an exemption from our policy can be obtained. The ALJ's Proposed Decision thoroughly recites the advantages to reopening offered by City, and also addresses the disadvantages. We agree that reopening of the crossing would be a convenience to City but have not been presented with sufficient evidence to induce us to depart from our policy.

Staff takes issue with the ALJ's use of the term "absolutism" in describing an answer given by a Staff witness. (Proposed Dec., Pg 6) The citations provided in the Proposed Decision bear out the fact that the witness made the statement. We noted that this testimony contrasts with other statements of the same witness on the same issue. Staff's Comments assert that these answers were given in the midst of a confrontational cross-examination. We have indicated that we believe a reopening of a crossing can be justified, but was not in the present application. That is the position which the witness adopted. The statement in the ALJ's Proposed Decision was not wrong and therefore will not be amended.

Staff further asks that we make it clear that the same standard exists for opening a new crossing as for reopening a closed crossing. We believe that would be a gratuitous statement in this proceeding, in that we are only concerned with a reopening at this time. Staff's request will be denied.

Findings of Fact

1. An at-grade crossing at 54th Street in the City of San Diego was closed in 1987, pursuant to an agreement between the Staff and MTDB, in which City concurred.

2. At the time of this agreement there was no Councilperson for the city district in which 54th Street is located.
3. City filed an application to reopen the 54th Street crossing in May, 1996.
4. A prehearing conference was held in July, 1996, at which deficiencies in the application were noted.
5. City filed amendments to its application in June of 1997.
6. Staff and City were not able to agree on hearing dates before March, 1998.
7. The 54th Street grade crossing would be convenient for use by emergency vehicles.
8. Re-opening the crossing would be advantageous to traffic patterns that could develop if 54th Street were reopened.
9. A reopened crossing will help reunify the neighborhood and assist in its revitalization.
10. City proposes to construct the most rigorous crossing protection contained in the Commission's General Orders.
11. City's Engineer testified that a grade separation was feasible, but not practical, because of the disparity of cost of \$500,000 for a grade crossing and \$2.3-2.8 million for a grade separation. He also stated that some additional land might be necessary.
12. The City Engineer's cost comparison did not consider the costs to the public or City of potential accidents.
13. There are approximately 150 Trolley movements across 54th Street, at speeds up to 50 miles per hour.
14. Approximately 1,000 cars per day are estimated to use the 54th Street crossing if permitted to reopen.
15. The line of sight at the crossing is partially inhibited by a warehouse on the northwest quadrant of the crossing.

16. The nearest existing crossings are .3 miles to the west and .5 miles to the east.

17. The existing distance between crossings around 54th Street is not the longest distance between crossings along the rail line in question.

18. The Commission has a policy against reopening at-grade crossings and favoring grade separations because of the increased safety provided by separations.

19. City asks for a grace period of three years after authorization to begin construction of a crossing at 54th Street.

20. City agrees that construction of a grade separation is feasible, but asserts that it is not financially practical.

21. City did not present a witness who testified to the safety of the proposed crossing.

22. Both City and Staff filed comments to the Proposed Decision.

Conclusions of Law

1. Even the most stringent crossing protection measures cannot insure freedom from accidents at a grade crossing.

2. Grade separations provide the maximum degree of safety possible at crossings of highways and rail tracks.

3. The only reason advanced for an at-grade crossing, as opposed to a grade separation, is the cost.

4. City did not meet its burden of proof that a grade separation is not practicable.

5. City did not meet its burden of proof that a crossing with impaired visibility and 150 Trolley movements per day operating at up to 50 miles per hour would be safe.

6. Since this application was originally filed in May, 1996, not amended until June of 1997, not brought to hearing until March, 1998, and not intended for construction until three years after permission to reopen 54th Street is obtained from this Commission, we conclude that there is no present emergency facing City by the continued closure of 54th Street to vehicular traffic.

7. Without an overwhelming showing of necessity and safety we will not permit a reopening of a crossing at grade. The delays contemplated by City convince us that City's burden has not been met.

8. The risks to the public safety involved in re-opening the crossings outweigh the benefits demonstrated by the City.

9. All comments requesting changes in the ALJ's Proposed Decision should be denied.

O R D E R

IT IS ORDERED that:

1. The application of City of San Diego to reopen an at-grade crossing at 54th Street is denied without prejudice to filing again at a later date.

2. Comments proposing changes to the Administrative Law Judge's Proposed Decision are denied.

A.96-05-001 ALJ/SHL/avs

3. This proceeding is closed.

This order is effective today.

Dated September 17, 1998, at San Francisco, California.

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

APPENDIX A

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***** INFORMATION ONLY *****

(END OF APPENDIX A)