

Decision 98-11-028 November 5, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Alfred Sacker,

Complainant,

vs.

Southern Pacific Lines,

Defendant.

ORIGINAL

Case 96-05-010
(Filed May 3, 1996)

(See Appendix A for List of Appearances.)

OPINION

Summary

In today's decision, we find that Union Pacific Railroad Company (UPRR), the named Defendant's successor in interest, has repaired, albeit after many delays, the crossings in the City of Whittier that are the subject of this proceeding. We direct UPRR to develop and publicize a system to eliminate the communication problems contributing to these delays. The proceeding is closed.

Background

Complaints regarding the condition of railroad crossings belonging to the named Defendant in the City of Whittier go back a decade or more before the filing of this case. Administrative Law Judge (ALJ) Steven Kotz was assigned to the case in August 1996 and held a telephone conference with the parties on August 14, 1996. At that time the representative of the named Defendant said that the railroad was working with the City to perform repairs. According to a "Status Report" provided by the named Defendant, it had entered with the City

into a "Letter of Agreement" dated June 25, 1996 regarding "rehabilitation" of three specified crossings and had commenced "good faith negotiations" with the City regarding crossing rehabilitation at other locations, including six crossings specifically noted by the Complainant.

Around the time of the telephone conference or shortly thereafter, UPRR became the successor in interest of the named Defendant. After receiving allegations that much of the work contemplated in the "Status Report" had never been performed, Assigned Commissioner Conlon and ALJ Kotz convened a Public Participation Hearing (PPH) in Whittier on August 6, 1997. At that time, the representatives of UPRR stated that UPRR had only recently become aware of the crossing situation in Whittier. At and after the PPH, the representatives of UPRR made oral and written commitments to complete the crossing rehabilitation in that City.

More than nine months after the PPH, by letter dated May 20, 1998, the City's Director of Public Works informed ALJ Kotz that UPRR had still not completed all of the repairs. Specifically, according to the letter, work on some crossings was incomplete, was faulty, or was not even commenced. Accordingly, ALJ Kotz conducted an Evidentiary Hearing in Whittier on July 7, to determine whether UPRR had violated the commitments referenced above, and if so, what were the appropriate remedies and sanctions for such violation.

At the Evidentiary Hearing, the Complainant noted that as a result of the August 1997 PPH,

"There was an agreement on the schedule, as shown in the letter of November 13, 1997, by the City of Whittier, leaving a date of December 9, 1997, for completion of the work. That letter was a result of the hearing that took place in August.

"I would also like to remind ALJ Kotz that at that hearing Mr. Gonzales [UPRR's manager of public projects in its Western Region] stated that he was unaware of any problems with the railroad crossings in the City of Whittier since Union Pacific had only taken over the Southern Pacific rail lines a year ago. So it took him a year to make himself knowledgeable as to the fact that the City of Whittier had been complaining about the lack of repair of crossings.

"Also at that meeting he said he would promptly get on the job and make the repairs, no problem. Some repairs were made, something less than 50 percent, during the first six months or so after the hearing in August of 1997, and then nothing occurred for a long time....

"When I received my copy of [the City's letter in May 1998] and then wrote to [ALJ Kotz] complaining about the lack of the conclusion to the hearing, all of a sudden work commenced and new promises were made as to when they would be completed. A lot of work did take place, I think, after May 20th, 1998. The work is still not complete. Some work still remains to be done.

"I would like to express my disappointment, first, that the Public Utility Commission had been constantly informed as to the lack of progress...but [ALJ Kotz] did not take the initiative and contact the Railroad and insist they make good on their promises and obligations.

"Second, it was, to me, a matter of bad faith on the part of the Railroad to make promises and not keep them in spite of the rulings that were made." (Reporter's Transcript (RT) 80-81.)

In extenuation, UPRR, through its witness Mr. Gonzales and through counsel, noted that the earlier schedule was approximate and was subject to delay due to bad weather or other unforeseen circumstances. Some of the delay experienced here was due to such circumstances, ranging from major derailments that forced reassignment of personnel to a manufacturer's sending rubber flangeway material that did not fit. Regarding expediting the company's response to crossing problems in the future, UPRR requested that

correspondence, whether sent to Mr. Gonzales or to someone else, be copied to UPRR's legal department. Finally, UPRR said that it has demonstrated good faith in working with the City of Whittier by, among other things, making additional sidewalk improvements at its own expense.

The Complainant and the City's Director of Public Works both questioned the adequacy of UPRR's excuses. They suggested that the concrete and asphalt jobs chiefly involved in the crossing repairs were not specialty items; consequently, UPRR could have had a general contractor finish the repairs when the railroad crews were diverted to the derailments.¹ Further, they suggested that UPRR itself, and not the City or the general public, should manage its internal communications so that UPRR duly acknowledges and responds to notices, inquiries, etc.

When pressed on these points, UPRR witness Gonzales candidly conceded, "[W]e did fall behind our schedule for various reasons and, you know, I guess we really don't have a real valid excuse." RT 97. In colloquy with the ALJ about improving communications in the future, Gonzales indicated that the company could commit to providing periodic status reports to cities where UPRR has ongoing repair work. See RT 95.

At the Evidentiary Hearing, UPRR agreed to complete all of the outstanding repairs by August 20, when the City would inspect the work with UPRR. By letter to ALJ Kotz dated September 8, the Director of Public Works indicated that as of the "final walkthrough inspection," all but two items were completed to the City's satisfaction; these last two items (replacement of a single pre-cast concrete grade crossing panel within a bicycle crossing and removal of

¹ In fact, UPRR eventually did hire a general contractor for this purpose. See RT 92.

some graffiti in concrete sidewalk) were completed by UPRR as of September 4. The City has now fully accepted the repairs.²

Discussion

As the facts make clear, UPRR's predecessor, the named Defendant, did not perform satisfactorily in maintaining or rehabilitating these crossings, and UPRR itself finished the repair work only after months of delay and two public hearings. The named Defendant's neglect and UPRR's delay are unacceptable. The need to hold two hearings in this matter is also disturbing, considering there was never any material factual dispute: Everyone agreed that the crossings needed rehabilitation. We should not have to hold hearings in order to get the railroad's attention or to remind it of past due work. Maintenance should occur routinely, and repair should not require so much fuss.

These particular crossings at last are rehabilitated, but other remedial action is appropriate so that cases like this one do not recur. Such remedial action should address the core problem, which we believe consists of poor communication between UPRR and the California communities in which it operates.

Improved communication will bring many benefits. Most notably, we expect that most problems can be addressed before they escalate to litigation, which is a very expensive way to communicate.

We look to UPRR itself to devise and implement improved communications but we believe the following plan would make sense. First,

² The Director's letter does not indicate whether the Complainant attended the inspection; however, the Complainant indicated at the Evidentiary Hearing that he "would have no further issue" if the repairs were acceptable to the City. See RT 100.

UPRR should establish a single point of contact for receiving complaints related to crossings or other UPRR facilities in California. UPRR should inform our Rail Safety/Carriers Division and should publicize this point of contact to all California jurisdictions in which UPRR maintains or operates facilities.

Second, UPRR should respond verbally to such informal complaints within a reasonable time, probably not more than 30 days after receipt. The response should indicate any work or other action to be undertaken in response to the complaint, together with the planned completion date.

Third, UPRR should provide periodic status updates through this point of contact regarding repair work undertaken, including any change in the previously announced schedule.

Fourth, UPRR should make available through this point of contact a directory of phone numbers for the following operational responsibilities within UPRR: railroad police; permits; crossing gate repairs; crossing surface repairs; track maintenance; graffiti abatement; blocked crossings; public projects; easements; weed abatement; Operation Lifesaver; and Legal Department. UPRR should promptly update this directory as needed.

Within the above general parameters, UPRR may design whatever communications system it chooses, and may revise or automate the system as needed or appropriate. However, UPRR shall notify the affected California jurisdictions and the Director of our Rail Safety/Carriers Division whenever UPRR makes changes to the system.

At this time, we will not impose fines or other sanctions on UPRR related to this case. We think UPRR's resources are best utilized in developing the communications system described above, as well as coming to grips with the vast backlog of deferred maintenance that fell to UPRR when it assumed control of the named Defendant. We note that this is one of several pending complaints relating to that backlog, and UPRR's performance in clearing the backlog will determine whether stronger measures are needed on our part to secure compliance.

Comments on ALJ's Proposed Decision

The ALJ's Proposed Decision (PD) was timely issued on October 2, 1998, for the parties' review and comment. We have reviewed the Complainant's comments and have determined that no modifications to the PD need be made, as we discuss below. No comments were received from UPRR.³

The Complainant urges that in light of the "miserable performance" of UPRR and its predecessor, the named Defendant, UPRR should be required to

³ By letter to ALJ Kotz dated October 26, 1998, UPRR stated, "We do not take issue with factual, legal, or technical findings or conclusions [of the PD] and, accordingly, have not filed formal comments...." The letter continues as follows:

"Union Pacific regrets the delays in performing the requested maintenance, both on behalf of itself and the named defendant, the former Southern Pacific Transportation Company. We understand the concern expressed in the proposed decision for improving communications between Union Pacific and involved California communities served by the newly merged rail system, and we also agree that crossing maintenance complaints are best resolved informally. We are currently reviewing our administrative staffing and processes in order to better manage our response to these complaints.

...

"We intend to keep Commission staff apprised of our progress in this area, as contemplated by the proposed decision."

reimburse the City of Whittier for the \$120,000 that the latter had contributed toward the repairs. On this record, we are unwilling to reallocate the crossing rehabilitation expenses borne by UPRR and the City, respectively. While we have found that UPRR was lax, we do not find that UPRR acted in bad faith, as alleged by the Complainant.

Regarding the remedial action specified in the PD, the Complainant appears to be concerned that a city may not agree with UPRR regarding the adequacy of planned repairs. The record here suggests that agreement over what was needed to be done has not been difficult; the difficulty has been with follow-through and accountability. The commitment to improved communications that we are requiring of UPRR addresses these issues, as well as making it easier to bring problems to UPRR's attention in the first place.

Findings of Fact

1. Many of the at-grade railroad crossings in the City of Whittier have been in bad condition for many years due to the neglect of the named Defendant.
2. The UPRR became the named Defendant's successor in interest shortly after the filing of this complaint and before the PPH held on August 6, 1997.
3. At and after the PPH, representatives of UPRR made oral and written commitments to rehabilitate these crossings.
4. UPRR finally completed such rehabilitation more than a year after the PPH and only after an Evidentiary Hearing, which was held on July 7, 1998. UPRR could not adequately explain or justify the delay in completing the rehabilitation.
5. UPRR did not communicate with the Complainant or with the City of Whittier regarding the circumstances causing delay.
6. Poor communication and coordination between UPRR and the California jurisdictions in which the railroad operates is at the heart of the problem with crossings in Whittier and other cities. A reasonable remedy is to require UPRR to

develop, implement, and publicize to affected jurisdictions and to Commission staff, a system for receiving complaints regarding crossings and other facilities, and for providing current information on the status of repair work undertaken.

Conclusions of Law

1. UPRR should develop and implement a system for receiving complaints regarding crossings and other facilities, and for providing current information on the status of repair work undertaken. UPRR should publicize this system to Commission staff and to California cities and counties where UPRR has such facilities. By report filed with the Commission's Rail Safety/Carriers Division, UPRR should describe the system it is implementing, or any subsequent modifications to that system.

2. UPRR having completed the rehabilitation of the at-grade railroad crossings in the City of Whittier that are the subject of this complaint, the complaint should be dismissed. However, UPRR's failure to complete the rehabilitation in a timely fashion should be taken into consideration by the Commission in devising remedies or sanctions in any future proceedings regarding these kinds of problems.

3. Monetary or other sanctions against UPRR do not appear appropriate at this time but should be considered if these kinds of problems persist.

4. In light of the undue length of this proceeding, and the need for UPRR to promptly address the communication problems noted, this decision should take effect immediately upon adoption by the Commission.

O R D E R

IT IS ORDERED that:

1. Within 60 days of the effective date of today's decision, the Union Pacific Railroad Company (UPRR) shall file with the Director of the Commission's Rail

Safety/Carriers Division a report describing the communications system it is developing to improve exchange of information, between UPRR and the California communities in which it operates, as to complaints and repairs related to crossings or other UPRR facilities in California. UPRR, in developing this system, shall work within the general parameters set forth in the Discussion section of the foregoing opinion. UPRR shall serve a copy of this report on the Complainant and on the Director of Public Works of the City of Whittier.

2. This proceeding is closed.

This order is effective today.

Dated November 5, 1998, at San Francisco, California.

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

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

(END OF APPENDIX A)