

Decision 02-10-038 October 24, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Kenneth Dale Siemens and
Janis Mae Siemens,

Complainants,

vs.

Union Pacific Railroad Company,

Defendant.

Case 01-12-047
(Filed December 19, 2001)

OPINION GRANTING MOTION TO DISMISS

I. Summary

Kenneth and Janis Siemens (Complainants) seek an order from the Commission directing Union Pacific Railroad Company (UP) to: (1) remove a private rural grade crossing located on its main line in Red Bluff, and (2) direct its train crews to cease sounding the locomotive horn when trains approach the crossing. The Commission concludes that it lacks jurisdiction to grant either request. UP's motion to dismiss the complaint is granted.

II. Background

The Commission categorized this case as adjudicatory and assigned it to Administrative Law Judge (ALJ) Bertram D. Patrick. Originally, the Commission expected that a hearing would be necessary; however, the matter now comes

before us on UP's Motion to Dismiss, on which briefing was completed and the matter submitted for decision on April 17, 2002.

III. Crossing Removal

A. Facts

The crossing at issue is located in a rural area within Red Bluff city limits at railroad milepost 225.71. It connects two sections of an unpaved maintenance roadway located on railroad right-of-way that is used by UP to access its track and signal facilities. UP's operating rules require train crews to sound the locomotive horn as they approach this crossing. Whistle boards (which tell the engineer when to commence sounding the horn) are placed alongside the tracks in advance of the position at which the locomotive horn must be sounded, *i.e.*, at least 1,320 feet from the crossing pursuant to Public Utilities (PU) Code Section 7604. Complainants' home is located to the south of the crossing in the vicinity of one of the whistle boards.

B. Position of Complainants

Complainants state that when they moved into their new home in September 1999, they were able to adjust to the sounds of the trains running nearby. However, they say the situation changed in May 2001, when UP placed a "private crossing" near their home. Train crews now sound locomotive horns at the crossing causing a major impact on Complainants' health and well-being. Complainants argue that UP has access to its track approximately 3 miles north of this location and does not need the crossing. According to Complainants, the noise pollution from the locomotive horns and the safety hazard caused by the access road also affect homeowners in the nearby residential development.

C. Position of UP

UP states that, contrary to Complainants' assertions, a private maintenance crossing has existed at this location for many years while the line was operated by the former Southern Pacific Transportation Company (SPTC). According to UP, the crossing was temporarily taken out of service in connection with a major rail renewal program that was undertaken by UP following its acquisition of the former SPTC; the crossing was restored by UP in 2001. UP argues that there is no alternative to this crossing that meets its needs for performing critical maintenance and repair work along this stretch of track.

D. Discussion

There can be no dispute that the Commission has exclusive jurisdiction over public railroad crossings. Cal. Pub. Util. Code sections 1201 and 1202; *Los Angeles Ry. Corp. v. Los Angeles*, (1940) 16 Cal. 2d 779, 785; *City of San Mateo v. Railroad Com. Of California*, (1937) 9 Cal. 2d 1, 5-6; *City of Union City v. Southern Pac. Co.*, (1968) 261 Cal. App. 2d 277, 279. However, the crossing here does not concern a "public or publicly used road or highway." Similarly, the crossing is not a farm or private crossing as contemplated within Pub. Util. Code § 7537 to "permit reasonably necessary or convenient . . . ingress to or egress" from a farm or private property. Instead, this crossing is the railroad's own crossing, serving the railroad's line for purposes of maintenance and service, located on the railroad's private property.

Complainant has not demonstrated that public safety requires this crossing to be closed, reconfigured or relocated. Likewise, the complainant has not shown a legal basis for the Commission's interference with the railroad's chosen use of its private property in furtherance of its rail operations. While complainant has raised issues of noise and enjoyment of his private property,

discussed *infra*, he has otherwise failed to provide us with the necessary authority on which we might require the railroad to close, reconfigure, or relocate this crossing. Without such authority, the Commission is precluded from interfering with the railroad's operations at its own access road and crossing.

IV. Sounding of Locomotive Horns

A. Position of Complainants

Complainants argue that any reasonable person would conclude that the sounding of a horn is not required at this crossing, where there is no exposure to anyone. According to Complainants, the only possible reason for sounding a horn at the subject crossing is for the purpose of intentional harassment.

B. Position of UP

UP responds that it does not intend to harass the Complainants or their neighbors. UP's policy of requiring train crews to sound the locomotive horn as trains approach grade crossings is dictated by a concern for safety and based on UP's experience with incidents involving trespassing pedestrians, motorcycles and off-road vehicles on its right of way.

C. Discussion

PU Code Section 7604 requires a locomotive crossing any street, *road*, or highway to sound a bell, steam whistle, air siren or an air whistle.¹ Under California law, railroads are potentially liable for personal injury damages if they are involved in an accident at a private grade crossing where the train crew

¹ Hereafter referred to as a locomotive horn or audible warning device.

failed to sound the locomotive horn as the train approached the crossing. (*See, Emmolo v. Southern Pacific*, (1949) 91 Cal. App. 2d 87.)

However, Pub. Util. Code Section 1202 (d)(2)(A) recognizes that “there is a growing need to mitigate train horn noise without compromising the safety of the public.” This statutory provision establishes “pilot programs” to test the utility and safety of stationary, automated audible warning devices as an alternative to trains having to sound their horns as they approach highway-rail crossings.” (*Ibid.*) At present, there are only limited federal regulatory requirements concerning the use of locomotive horns or creating exceptions to their use by railroads. (*See* 49 C.F.R. Parts 214.339,² 234.105(d),³ and 234.106,⁴ and 234.107(d).⁵) Under Pub. Util. Code § 1202(d)(2)(A) and other provisions of the Public Utilities Code, the locomotive operator shall always have discretion to sound the horn.

But the pilot program established under the California statute, the only exception to the requirement that locomotive horns be sounded at all crossings under Pub. Util. Code § 7604, requires a “stationary, automated audible warning

² “Each railroad shall require that the locomotive whistle be sounded, and the locomotive bell be rung, by trains approaching roadway workers on or about the track. Such audible warning shall not substitute for on-track safety procedures prescribed in this part.”

³ “A locomotive’s audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.”

⁴ “Upon receipt of a credible report of a partial activation, a railroad having maintenance responsibility for the warning system shall promptly initiate efforts to warn highway users and railroad employees at the subject crossing in the same manner as required for false activations (§ 234.107).”

⁵ “A locomotive’s audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.”

device” as an alternative to the sounding of the locomotive’s horn at a crossing. The purpose of the stationary, automated audible warning device is to direct the sound of the audible warning device to the motor vehicles and pedestrians using the street or road intersecting the railroad line. Thus, an audible warning device is still required but the noise produced is not directed in all directions, as in the case of a locomotive horn, but is focused, instead, parallel to the street or road. Thus, a stationary, automated audible warning device located at this crossing would not significantly relieve complainant of noise near his home.

Therefore, considering the federal regulatory requirements, Pub. Util. Code § 7604 and 1202(d)(2)(A), the potential liability to the railroad for accidents at this location, and the need to protect railroad employees maintaining and servicing the line at this crossing, the Commission cannot impose a no-horn rule for this railroad crossing as requested by complainant. The motion to dismiss the complaint should be granted.

V. Comments to the Draft Decision

The draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 371 (g)(1) and Rule 77.7 of the Rules of Practice and Procedure.

Complainants filed comments on September 17, 2002 and an addendum on September 19, 2002. UP filed a reply on September 23, 2002. Complainants filed an amendment dated September 25, 2002.

We have carefully reviewed the pleadings and reject Complainants’ argument that a hearing should be held to determine jurisdiction. The parties have had ample opportunity to address this issue through their pleadings. Accordingly, we adopt the draft decision of the ALJ.

VI. Assignment of Proceedings

Loretta Lynch is the Assigned Commissioner and Bertram Patrick is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Complainants seek an order from the Commission directing UP to: (1) remove its grade crossing located at milepost 225.71 on its main line in Red Bluff; and, (2) direct train crews to cease sounding locomotive horns when trains approach the crossing.

2. The crossing at issue is located in a rural area within Red Bluff city limits, and it connects two sections of an unpaved maintenance roadway located on railroad right-of-way.

3. At the subject crossing, the railroad does not cross a public or publicly used road or highway, or street.

4. Pub. Util. Code § 1202(d)(2)(A), the only exception to the requirement that locomotive's sound their horns at all crossings under Pub. Util. Code § 7604, would require a loud automated, audible warning device to be installed at the crossing which would not significantly reduce the noise at complainant's home.

Conclusions of Law

1. Pub. Util. Code § 1202(a) provides the Commission with authority to close certain types of crossings, including crossings by a railroad of a public or a publicly used road or highway, or street.

2. Pub. Util. Code § 1202(a) does not apply to the subject crossing because it is the railroad's own crossing located on the railroad's property used to access the railroad line for maintenance and service in furtherance of rail operations.

3. Pub. Util. Code § 7604 mandates locomotives crossing any road to sound an audible warning device.

4. The only exception to the requirement under Pub. Util. Code § 7604 that locomotives sound their horns at all crossings requires the installation of a stationary, automated audible warning device pursuant to Pub. Util. Code § 202(d)(2)(A) that would still sound a loud warning of on-coming trains at the crossing.

5. Considering relevant federal regulatory requirements for audible warning devices at railroad crossings, Pub. Util. Code §§ 7604 and 1202(d)(2)(A), the potential liability to the railroad for accidents at this location, and the need to protect railroad employees at this crossing, the Commission cannot impose a no-horn rule for this railroad crossing as requested by complainant.

6. The Complaint should be dismissed for lack of Commission jurisdiction.

O R D E R

IT IS ORDERED that:

1. The motion of Union Pacific Railroad Company to dismiss the complaint is granted.
2. No hearing is required, therefore, Article 2.5 ceased to apply.
3. Case 01-12-047 is closed.

This order is effective today.

Dated October 24, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners