

Decision 03-01-041

January 16, 2003

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)

ORDER DENYING REHEARING OF DECISION 02-10-038

I. SUMMARY

An application for rehearing of Decision (“D”.) 02-10-038 (“the Decision”), filed by Complainants Kenneth and Janis Siemens (“Complainants”), alleges legal error in the Decision. Complainants seek an order directing Union Pacific Railroad Company (“UP”) to: (1) remove a private rural grade crossing located on UP’s main line in Red Bluff, and (2) direct UP’s train crews to cease sounding the locomotive horn when trains approach the crossing.

We initially categorized this case as adjudicatory, expecting that a hearing would be necessary. However, UP subsequently filed a Motion to Dismiss on which briefing was completed. The matter was then submitted for decision on April 17, 2002, and D.02-10-038 was issued on October 24, 2002. Our Decision granted UP’s motion to dismiss the complaint, concluding that we lacked jurisdiction to grant the relief requested by Complainants.

An application for rehearing of D.02-10-038 was filed by Complainants on November 19, 2002, alleging that we unlawfully granted UP's Motion to Dismiss by erroneously concluding that we do not have the authority to grant Complainants' requests. Complainants also present a claim against UP for damages and attorneys fees.

UP filed a reply to Complainants' request for rehearing on December 2, 2002. UP contends that Complainants have failed to meet their burden of proof in their application and that there is no lawful basis for awarding them damages or any other fees in this proceeding.

In its reply, UP further asks us to investigate and take corrective action against Complainants for sending a videotape that is not in the public record, to Commission President Loretta Lynch, in violation of Article 1.5 of the Rules of Practice and Procedure.

We have considered all of the allegations of error raised in the application and have concluded that sufficient grounds for rehearing have not been shown.

II. DISCUSSION

Complainants first argue that our finding that we cannot impose a no-horn rule for the railroad crossing in question contradicts 49 USC 20153 (f).¹ Their basis for this allegation is unclear. There is nothing in that federal law that expressly prohibits us from applying Public Utilities ("PU") Code section 7604² to require the sounding of the horn at this crossing.

Complainants then contend that we must issue an immediate order to stop the sounding of horns in this case because: (1) Section 7604 (a)(1) provides

¹ 49 USC 20153 (f) states: "The Secretary may, by regulation, provide that the following crossings over railroad lines shall be subject in whole or in part, to the regulations required under this section: (1) Private highway-rail grade crossings; (2) Pedestrian crossings; (3) Crossings utilized primarily by non motorized vehicles and other special vehicles. Regulation issued under this subsection shall not apply to any location where persons are not authorized to cross the railroad."

² All future statutory references are to the California Public Utilities Code.

us with legal authority to order UP's train crews to cease sounding the locomotive horn when trains approach the crossing; (2) such an order would not pose an immediate danger to anyone; and (3) UP does not need the crossing since it has access to its track approximately 3 miles north of the crossing's location.

UP has responded that it provided ample testimony that contradicts Complainants' claims. It recalls testimony it presented that established that 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.

Complainants are restating in their application the same arguments that they presented in the pleadings they filed in this proceeding. We already considered those arguments in granting UP's motion to dismiss. The record supports our finding that Section 7604 mandates that UP's locomotives traversing the subject crossing must sound an audible warning device.

Complainants also again raise in their application issues of noise and UP's infringement of their enjoyment of their private property. However, as noted in the Decision, they have failed to provide us with the necessary authority to require the railroad to close, reconfigure, or relocate this crossing. Without such authority, we are precluded from interfering with the railroad's operations at its own access road and crossing.

In sum, Complainants' rehearing application fails to provide a basis for a finding that the Decision contains legal error. They are therefore not entitled to relief, nor to the award of damages and attorneys fees they have requested.

In its reply to the rehearing application, UP asks that we investigate and take corrective action concerning the sending of a videotape by Complainants under separate cover to Commission President Loretta Lynch, at the time of their filing of the rehearing application. UP contends that, since the videotape, which was not served on UP, is not in the public record, Complainants violated Article 1.5 of the Rules of Practice and Procedure.³ UP asserts that ex parte communications between parties and decision-makers concerning any substantive issue involved in the proceeding are prohibited after the time the proceeding is submitted to the Commission until the issuance of a “final order.” Rule 1.3(a). All other ex parte communications must be reported. Rule 1.4. No final order has been issued in this proceeding.⁴

Complainants admit in their application that they sent the videotape to Commissioner Lynch. However, they claim that UP already has a copy of the tape in its possession. Regardless of that fact, Complainants’ action is contrary to Article 1.5. However, we recognize that the Complainants represented themselves during the proceeding and that we have not previously held in pro per applicants to the same standard as those represented by attorneys. Since we did not consider the videotape in disposing of the rehearing, no harm was in fact done and therefore no further corrective action is necessary at this time.

³ Rule 1.5 states that the Commission may impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.

⁴ Rule 1.1(d) states that the "Date of Issuance of a Final Order" is (1) the date when the Commission mails the decision after rehearing or denying rehearing; or (2) where the period to apply for rehearing has expired and no application for rehearing has been filed, the last date for filing an application for rehearing under PU Code Section 1731. However, where a decision does not close a docket, there has been no issuance of a final order with respect to any issues that remain pending in the proceeding.

III. CONCLUSION

The application for rehearing of the Decision filed by Complainants, Kenneth Dale Siemens and Janis Mae Siemens, is rejected based on their failure to demonstrate legal error in the Decision.

IT IS ORDERED that:

The application for rehearing of D.02-10-038 filed by Kenneth Dale Siemens and Janis Mae Siemens is denied.

This order is effective today.

Dated January 16, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners