8-24-1987

Atchison, T. and S. F. R. Co. v. Public Utilities Com.

SUPREME COURT, STATE OF COLORADO

Case No. 87 SA 102

RESPONDENT-APPELLEE DENVER'S ANSWER BRIEF

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner-Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, THE CITY AND COUNTY OF DENVER, THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, THE BURLINGTON NORTHERN RAILROAD COMPANY, THE CITY OF ARVADA, THE CITY OF COLORADO SPRINGS, STATE DEPARTMENT OF HIGHWAYS-STATE OF COLORADO, THE UNION PACIFIC RAILROAD and THE CITY OF WESTMINSTER,

Respondents-Appellees.

FOR APPELLATE REVIEW OF FINAL ORDER AND JUDGMENT OF FEBRUARY 17, 1987, OF THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, THE HONORABLE J. STEPHEN PHILLIPS, DISTRICT JUDGE, CIVIL ACTION NO. 84 CV 2787.

Attorneys for Respondents-Appellees

THE CITY AND COUNTY OF DENVER

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B. WHETHER THE PUBLIC UTILITIES COMMISSION FULFILLED ITS STATUTORY DUTY AND WHETHER THE DECISION TO DIVIDE THE RAILROAD'S SHARE OF THE COST ON A 50/50 BASIS BETWEEN THE BURLINGTON NORTHERN RAILROAD COMPANY AND THE PETITIONER-APPELLANT WAS SUPPORTED BY THE EVIDENCE.

II. STATEMENT OF THE CASE

The Respondent-Appellee, City and County of Denver, agrees with the statements made under A. Nature of the Case and B. Course of Proceedings.

Insofar as C. Statement of Facts, the Respondent-Appellee, City and County of Denver, agrees with the facts as set forth in the Statement of Facts but not with the characterization and interpretation of those facts set forth or the characterization of the testimony presented.

III. SUMMARY ARGUMENT

A. THE PUBLIC UTILITIES COMMISSION FULFILLED ITS STATUTORY OBLIGATION TO CONSIDER THE BENEFITS AND ITS CONCLUSION DIVIDING THE COSTS BETWEEN THE CITY AND COUNTY OF DENVER AND THE RAILROADS ON A 50/50 BASIS WAS SUPPORTED BY THE EVIDENCE.

B. THE PUBLIC UTILITIES COMMISSION FULFILLED ITS STATUTORY DUTY AND THE DECISION TO DIVIDE THE RAILROAD'S SHARE OF THE COST ON A 50/50 BASIS BETWEEN THE BURLINGTON NORTHERN RAILROAD COMPANY AND THE PETITIONER-APPELLANT WAS SUPPORTED BY THE EVIDENCE.

IV. ARGUMENT

A. THE PUBLIC UTILITIES COMMISSION FULFILLED ITS STATUTORY OBLIGATION TO CONSIDER THE BENEFITS AND ITS CONCLUSION DIVIDING THE COSTS BETWEEN THE CITY AND COUNTY OF DENVER AND THE RAILROADS ON A 50/50 BASIS WAS SUPPORTED BY THE EVIDENCE.

In order to understand the P.U.C. staff recommendations in this case, it is necessary to analyze the approach taken by the staff. By reducing the structure upon which the costs of the grade separation are based to the smallest structure that would separate the railroads from the vehicular traffic, they have removed all extraneous benefits other than the basic benefit resulting from the grade separation. As to that structure, they have then divided the cost 50/50. The philosophy as set forth by Jack Baier and set forth in full on page 6 of the Applicant's Brief is that under those circumstances, with the basic structure, the benefits are equal. The basic benefits being the increased speed of the trains over a surface crossing and the lessened conflict and accidents that would be caused by a grade level crossing.

The alternative would be a crossing at grade level at Eighth Avenue. In this case, it would have been a two-lane Eighth Avenue crossing the two tracks of the railroad. As Mr. Stamm stated at page 37 of the January 19, 1984 transcript:

> "Of course, to extend it on the surface would create a great deal of conflict, possible conflict, between train movements and vehicular, and pedestrian, and bicycle

> traffic. In my personal opinion, I would not recommend such a crossing."

Mr. Baier also stated that the base case analysis is based on the fact that the alternative to the separated crossing is an at-grade crossing. (Tr. of 1/20/84, p. 78).

The City could have applied for alternative relief from the P.U.C. of the construction of a viaduct or opening an at-grade crossing, however, requiring this does not make sense when it is clear that with the amount of traffic carried by Eighth Avenue an at-grade crossing would be an extreme hazard. The fact that a deteriorated viaduct had been in place previously, and that there was not currently an at-grade crossing at Eighth Avenue should not preclude the statutory requirement that the railroads contribute to grade separations. The statute clearly contains directions to the P.U.C. that the railroads should pay a share of the construction of the viaducts. This is especially true when read in the light of the last section of C.R.S. 40-4-106(3)(c)(III):

> "...Nothing in this subsection (3) shall be construed to authorize less than Twenty-five Million Dollars to be assessed against all affected Class I railroad corporations in any five year period."

As the Court said in Morey v. Public Utilities Commission 629 P.2d 1061 (Colo. 1981):

> It is axiomatic that the findings and conclusions of the Commission are presumed

> to be reasonable and valid, Colorado Municipal League v. Public Utilities Commission, 197 Colo. 106, 591 P.2d 577 (1979), and will not be disturbed if supported by substantial evidence in the record. See Sangre de Cristo Electric Association v. Public Utilities Commission, 185 Colo. 321, 524 P.2d 309 (1974). Moreover, that evidence must be reviewed in the light most favorable to the P.U.C.'s findings and decision. People's Natural Gas Division of Northern Natural Gas Co. v. Public Utilities Commission, 193 Colo. 421, 567 P.2d 377 (1977). Neither may a reviewing court substitute its judgment for that of the Commission. Id.; Northeastern Motor Freight, Inc. v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972). It is peculiarly within the province of the Commission to decide what weight is to be accorded the evidence, Contact-Colorado Springs, Inc. v. Mobile Radio Telephone Service, Inc., 191 Colo. 180, 551 P.2d 203 (1976), and to choose among the conflicting inferences which may be drawn therefrom, id., especially in cases posing evidentiary questions addressed to the expertise and judgment of the Commission and its staff. Colorado Municipal League v. Public Utilities Commission, supra; Atchison, Topeka and Santa Fe Ry. Co. v. Public Utilities Commission, 194 Colo. 263, 572 P.2d 138 (1977).

The interpretation and application of the statute, the analysis of the staff of the P.U.C. and the application to this project are logical, reasonable, supported by the facts and carry forth the intent of the statute and, therefor, the District Court was correct in affirming the P.U.C. decision. A reviewing court may not substitute its judgment for that of the fact finder. Merrick v. Department of Revenue, Motor Vehicle Division, 709 P.2d 978 (Colo.App. 1985), and the

courts cannot usurp the power of a state commission. See Banking Board v. District Court, 492 P.2d 837 (Colo. 1972) and Board of County Commissioners v. Simmons, 494 P.2d 85 (Colo. 1972).

B. THE PUBLIC UTILITIES COMMISSION FULFILLED ITS STATUTORY DUTY AND THE DECISION TO DIVIDE THE RAILROAD'S SHARE OF THE COST ON A 50/50 BASIS BETWEEN THE BURLINGTON NORTHERN RAILROAD COMPANY AND THE PETITIONER-APPELLANT WAS SUPPORTED BY THE EVIDENCE.

Section 40-4-106(3)(c)(II) requires that:

> (II) In the allocation of the Class I railroad corporations' share of expenses for a grade separation construction project pursuant to paragraphs (a) and (b) of this subsection (3), the commission shall consider the benefits, if any, which shall accrue between the Class I railroad corporations affected.

In honoring the requirements of this statutory subsection, the P.U.C. adopted the approach of its staff in assessing the benefits accruing to the affected railroad corporations. The Staff based its allocations to Santa Fe and Burlington Northern upon ownership and control of the affected trackage--rejecting Santa Fe's argument that the allocation should be based upon the current number of daily train movements. (Tr. of 1/20/84, pp. 20, 79). The rationale for this approach is clear from the record.

The evidence before the P.U.C. established that current railroad operations in the area affected were governed by private agreement. (Tr. of 1/20/84, pp. 73, 79). By the Santa Fe's own testimony, the number of trains operating on the

track owned by each railroad is subject to change as business dictates. (Tr. of 1/20/84, p. 167). In addition, the "trains" of each railroad contain cars from any or all railroads and, thereby, all railroads receive a benefit from any "train" which contains their cars. (Tr. of 1/24/80, pp. 83-86). The P.U.C. was not obliged to base a one-time allocation for the viaduct upon a private agreement due to expire in 1985 and under renegotiation at the time of the hearings. (Tr. of 1/10/84, pp. 120-1). As was succinctly stated by the P.U.C.'s staff member at the hearings, benefit logically accrues to track ownership. If the costs associated with train operations beneath the viaduct, which are governed by private agreement, become inequitable the parties are free to amend the governing agreement. (Tr. of 1/20/84, p. 82). It is not incumbent upon, and would not be proper for, the P.U.C. to interject itself into a clearly private arrangement.

V. CONCLUSION

The cases, analysis and standards of review set forth in section A, when applied, require an affirmance of the District Court's decision affirming the 50/50 division of cost between the Railroads. An examination of the record in this matter leads to a determination that the P.U.C.'s conclusions were based upon adequate evidence, and that the appropriate constitutional and legislative standards were applied. Atchison, Topeka and Santa Fe Railway Co. v. Public Utilities Commission, 194 Colo. 263, 572 P.2d 138 (1977); Mountain

States Telephone v. Public Utilities Commission, 182 Colo. 269, 513 P.2d 721 (1973). The exercise of discretion and judgment by the P.U.C. "...should not be interfered with by the reviewing court." Atchison, Topeka and Santa Fe Railway Co. v. Public Utilities Commission, supra. 572 P.2d at 141. Further,

> "...the reviewing court, since it does not have the aid of a staff and the expertise of the P.U.C., should not undertake to duplicate the evaluation and judgment processes followed by the P.U.C. in arriving at its decision." Id.

The P.U.C. relied on its expertise and that of the P.U.C. staff in reaching its decision in this case. Competent evidence supports that decision as to the allocation of costs between Denver and the railroads and the allocation between the railroads. The P.U.C. regularly pursued its authority, and the decision of the District Court affirming the decision of the P.U.C. should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of August, 1987, I have placed a true and correct copy of the foregoing RESPONDENT-APPELLEE DENVER'S ANSWER BRIEF in the mails of the U.S. Postal Service bearing sufficient postage for first class mail delivery, addressed to the following:

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