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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

SEP 4 1987

Mac V. Danford, Clerk

SUPREME COURT, STATE OF COLORADO

Case No. 87 SA 102

PETITIONER-APPELLANT'S REPLY TO 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.

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SANTA FE RAILWAY COMPANY

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TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT 1

II. ARGUMENT 1

A. THE PUC DISREGARDED ITS STATUTORY DUTY IN ASSUMING THAT THE CITY AND COUNTY OF DENVER AND THE RAILROADS SHARE BENEFITS EQUALLY. THERE WAS NO EVIDENCE TO SUPPORT EITHER THE ASSUMPTION OR THE CONCLUSION THAT BENEFITS ARE SHARED EQUALLY. 1

B. THE PUC'S CONCLUSION THAT, BETWEEN THEMSELVES, THE RAILROADS SHARE BENEFITS EQUALLY IS WITHOUT SUPPORT IN THE EVIDENCE AND IS UNREASONABLE AND ARBITRARY. . . . 5

III. CONCLUSION 7

TABLE OF AUTHORITIES

CASE LAW

Morey v. Public Utilities Commission,
629 P.2d 1061 (Colo. 1981) 4

People’s Natural Gas v. Public Utilities Commission,
698 P.2d 255 (S.Ct. 1985) 7

STATUTORY PROVISIONS

Subsection 3(c)(II) 40-4-106 C.R.S. 1973, as
amended 1983. 5

I. SUMMARY OF ARGUMENT

A. THE PUC DISREGARDED ITS STATUTORY DUTY IN ASSUMING THAT THE CITY AND COUNTY OF DENVER AND THE RAILROADS SHARE BENEFITS EQUALLY. THERE WAS NO EVIDENCE TO SUPPORT EITHER THE ASSUMPTION OR THE CONCLUSION THAT BENEFITS ARE SHARED EQUALLY.

B. THE PUC'S CONCLUSION THAT, BETWEEN THEMSELVES, THE RAILROADS SHARE BENEFITS EQUALLY IS WITHOUT SUPPORT IN THE EVIDENCE AND IS UNREASONABLE AND ARBITRARY.

II. ARGUMENT

A. THE PUC DISREGARDED ITS STATUTORY DUTY IN ASSUMING THAT THE CITY AND COUNTY OF DENVER AND THE RAILROADS SHARE BENEFITS EQUALLY. THERE WAS NO EVIDENCE TO SUPPORT EITHER THE ASSUMPTION OR THE CONCLUSION THAT BENEFITS ARE SHARED EQUALLY.

The gist of Denver's argument is that the PUC did discharge its statutory obligation to consider benefits, and that the PUC decision to divide costs equally between Denver and the railroads is supported by the evidence. The sole rationalization for this argument is Staff's assumption that the alternative to a new viaduct would be an at-grade crossing. Based on that assumption, Denver contends that there are certain obvious benefits to the railroads from a viaduct, as opposed to an at-grade crossing, and that the PUC's decision, therefore, is reasonable and supported by the evidence.

In its brief, Denver quotes from the testimony of Mr. Stamm that he would not recommend an at-grade crossing. (pp. 2,3) Mr. Stamm's testimony is in harmony with the PUC's own finding that ". . . No at-grade crossing is used in the vicinity of West Eighth Avenue and none is proposed to be constructed." (Finding 35, Record Page 12)

The flaw in Denver's argument is highlighted in its own brief. The PUC's finding of equal benefit is based on the assumption that the alternative to the viaduct was an at-grade crossing. That assumption is not borne out by the facts. Rather, it is clear that there was no at-grade crossing in existence, and the construction of an at-grade crossing was not even considered a viable alternative. Nevertheless, the sole basis for the PUC's conclusion that the benefits were shared equally was the assumption that an at-grade crossing was the alternative to a viaduct.

The problem is that Staff and the PUC have tried to come up with a methodology which would be workable in all of the different circumstances under which a grade separation or viaduct might be constructed. In fact, it might be argued that the methodology is logical and reasonable in that circumstance when an application is filed to grade separate an existing at-grade crossing. In that circumstance, logic would dictate that there would be some benefit to the railroad in the replacement of an at-grade crossing with a grade separation structure.¹

However, in the case at bar, it appears that Denver had closed the old West Eighth Avenue viaduct as being unsafe. At the time of the application, there were no crossings of the railroad

¹ Even in the case of an existing at-grade crossing, the extent of benefit to a railroad from a grade separation would no doubt vary, depending upon the facts. For example, the benefit to a railroad of necessity, would vary, depending upon whether the existing at-grade crossing is identified only by passive crossbuck signs or whether there are automatic flashing lights and gates at the crossing.

facilities for West Eighth Avenue either at-grade, above-grade or below-grade. The purpose of the application simply was to seek approval for the construction of a new viaduct. Under these circumstances, the evidence simply does not show that the railroads would receive any benefit from a new viaduct either from the standpoint of operations or reduction in exposure to liability. The methodology of the PUC does not fit the facts of this application. Neither the facts nor reason indicate that the railroads will receive any of the benefits suggested by the PUC's methodology from the reconstruction of the West Eighth Avenue viaduct. Perhaps there is some other basis on which the railroads receive some benefit from the reconstruction of the West Eighth Avenue viaduct, but there is nothing in the record in this case to support such a conclusion.

In its brief, Denver contends that the fact that there is not an existing at-grade crossing should not obviate the statutory requirement that railroads contribute to grade separations. On the facts of this case, Santa Fe agrees. In its opening brief, Santa Fe admitted that the railroads have some responsibility for the need for a viaduct. Santa Fe admitted that, under the statute, the railroads should share some part of the cost of the West Eighth Avenue viaduct. Nevertheless, it continues to be Santa Fe's position that the record fails to demonstrate any benefit to the railroads, and that cost allocations should not be made on the assumption that Denver and the railroads share the benefits equally. The unrebutted evidence in the record is to the contrary.

In its answer brief, Denver quotes extensively from Morey v. Public Utilities Commission, 629 P.2d 1061 (Colo. 1981). (pp. 3,4) Santa Fe agrees with the propositions of law quoted from the Morey case, but Santa Fe contends that the quotation from Morey does not help Denver. It is Santa Fe's position that, viewing the evidence in the light most favorable to the PUC decision, there is no evidence to support a finding that the railroads receive any benefit from the reconstruction of the West Eighth Avenue viaduct. Santa Fe is not asking the Court to substitute its judgment or expertise for the judgment or expertise of the PUC. Santa Fe is simply asking the Court to recognize that there is no evidence to support the PUC's finding on the question of benefit, and that an assumption by the PUC of equal benefit is an irregular pursuit of its authority under the law.

Denver argues that:

The interpretation and application of the statute, the analysis of the staff of the PUC and the application to this project are logical, reasonable, supported by the facts and carry forth the intent of the statute and, therefore, the District Court was correct in affirming the PUC decision. . . . p.4

Santa Fe responds that the logic of the Staff and PUC is best demonstrated by the testimony of Mr. Jack Baier, wherein he stated: "It is extremely difficult to measure and quantify these benefits. However, the benefits are shared equally." (Record page 884) The premise does not support the conclusion. Furthermore, there are no facts in this record to support the conclusion that Denver and the railroads share benefits equally.

B. THE PUC CONCLUSION THAT, BETWEEN THEMSELVES, THE RAILROADS SHARE BENEFITS EQUALLY IS WITHOUT SUPPORT IN THE EVIDENCE AND IS UNREASONABLE AND ARBITRARY.

In its argument, Denver correctly states that Staff and the PUC base the allocations between the Santa Fe and Burlington Northern ". . . upon ownership and control of the affected trackage. . . ." (Page 5) This is not the prescribed standard. The statute requires that in making an allocation between the affected railroads ". . . the Commission shall consider the benefits, if any, which shall accrue between the Class I railroad corporations affected." Subsection 3(c)(II) 40-4-106 C.R.S. 1973, as amended 1983.

In making the allocation between Denver and the railroads, the PUC found that the benefits to the railroads from a grade separation would be greater freedom in rail operations and reduction in exposure to liability. If the Court should hold that the railroads benefited, as assumed by the PUC, then the statute requires that the benefits also be considered by the PUC in allocating costs between the railroads. If, on the facts of this case, the railroads truly benefit by having greater freedom of operation and a reduction in exposure to liability, then it is apparent that the measure of these benefits is proportionate to the extent of operations. The PUC's refusal to consider the nature and extent of operations in making the allocations between the railroads is inconsistent with its methodology in making the allocations between Denver and the railroads. If the allocation between Denver and the railroads is correct, then the PUC should

consider the nature and extent of operations in quantifying benefits between the railroads. As it is, the PUC considered only ownership and control of trackage and made no effort to weigh or consider evidence of benefit to the railroads in having a grade separation rather than an at-grade crossing.²

In its answer brief, Denver contends that operational matters between the railroads are covered by private agreement, and that therefore the PUC should not consider benefits which may be affected by private agreement in making an allocation. The statute does not say that, in making an allocation between railroads, the PUC should consider only benefits which stand unaffected by private agreements between the railroads. Rather, the statute says that the PUC shall "consider the benefits, if any, which shall accrue between the Class I railroad corporations affected." The fact that there is, in this case, a private agreement does not alter the obligation of the PUC to consider benefits based on facts as they appear in the record. In this case, it is clear that the PUC chose to disregard that obligation. The PUC did not consider benefits as disclosed by facts on the record, but arbitrarily made a 50/50 allocation between the railroads based only on ownership and control of tracks. This was a departure from the requirement of the statute. If the benefits to the railroads are as defined in the allocation between Denver

² Of course, as stated in the opening brief and in Part A of this reply, it is the threshold position of Santa Fe that, on the facts of this case, the railroads receive no benefit from the reconstruction of the West Eighth Avenue viaduct.

and the railroads, then the allocation between the railroads should be set aside as representing an internal inconsistency in the decision of the Commission and an irregular pursuit of authority under the statute. People's Natural Gas v. Public Utilities Commission, 698 P.2d 255 (S.Ct. 1985)

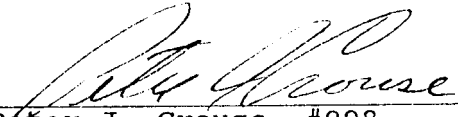
III. CONCLUSION

The order and decision of the trial court should be reversed and remanded as requested in the opening brief.

Respectfully submitted, this 3rd day of September, 1987.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing PETITIONER-APPELLANT'S REPLY TO DENVER'S ANSWER BRIEF in the U.S. mail, postage prepaid, this 3rd day of September, 1987, addressed to the following:

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