10-8-1987

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

SUPREME COURT, STATE OF COLORADO

Case No. 87 SA 102

PETITIONER-APPELLANT'S REPLY TO ANSWER BRIEF OF THE PUBLIC UTILITIES COMMISSION

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 Petitioner-Appellant
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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II. IF THERE IS A RAILROAD BENEFIT, A 50% ALLOCATION OF THE RAILROADS' SHARE TO SANTA FE IS UNREASONABLE, ARBITRARY AND INCONSISTENT WITH REQUIREMENTS OF THE STATUTE.

ARGUMENT

I.

THERE WAS NO EVIDENCE IN APPLICATION NO. 36071 TO SUPPORT THE COMMISSION'S FINDINGS OF FACT AND CONCLUSION THAT DENVER, ON THE ONE HAND, AND THE SANTA FE AND BURLINGTON NORTHERN, ON THE OTHER, BENEFITED EQUALLY FROM THE RECONSTRUCTION OF THE WEST EIGHTH AVENUE VIADUCT.

A.

In its answer brief, the Commission argues that the railroads benefit ". . .from the construction of a grade separation . . ., since it would eliminate all of the problems to which staff witness Baier testified; e.g., train/motor vehicle accidents, property damage, tort liability and interference with train movements." (PUC Brief, P. 8) In support of this argument, the Commission cites and quotes from Atchison, Topeka and Santa Fe Railway Co. v. Public Utilities Commission, 194 Colo. 263, 572 P.2d 138 (S.Ct. 1977).

The 1977 AT&SF decision involved an application by El Paso County to the Public Utilities Commission for authority to re-open the Bradley Road grade crossing of the Santa Fe tracks. In its

decision, the Commission approved the re-opening of the Bradley Road grade crossing. The Commission also assessed the railroads with 10% of the cost of installing automatic crossing warning devices at the crossing to be re-opened. On review, the trial court reversed the Commission's Order. On appeal, the Supreme Court reversed the judgment of the trial court and remanded the cause, directing the trial court to affirm the Commission decision.

On the appeal to the Supreme Court, it was the position of the railroads that several of the Commission's findings of fact concerning the re-opening of the crossing were unsupported by the evidence. Additionally, ". . .the railroads argued that since they did not benefit from re-opening the crossing, it would be unconstitutional to require them to pay for installation of the safety devices at the crossing. . . ." P. 266.

In its decision, the Supreme Court held that there was sufficient evidence to support the decision of the Commission authorizing El Paso County to re-open the crossing. The Supreme Court also held that the installation of warning devices at the re-opened crossing would reduce the risk of accidents and therefore inure to the benefit of the railroads. The Court affirmed the assessment of costs to the railroads.

The decision in the 1977 AT&SF case bears no relationship to the issues in the case at bar. In the 1977 case, an at-grade

crossing was being re-opened, and the Court correctly concluded that the railroads would benefit from the installation of warning devices because they would reduce the risk of accidents.

In the case at bar, the construction of an at-grade crossing has never been an alternative. The railroads have never been faced with any risk of accidents, delays or other problems which might flow from an at-grade crossing. Therefore, the construction of the grade separation does not serve to reduce any risk or inconvenience which the railroads might otherwise have had.

In its answer brief, the Commission states that:

> The main problem with Santa Fe's argument is that it would exclude from the ambit of the 1983 amendments to subsection 40-4-106(3), any application to construction a grade separation at the same location as (and to replace) an existing grade separation structure and any application to construct a grade separation at a point of crossing where there was not an existing at-grade crossing. (PUC Brief, PP. 8, 9).

The Commission's concern is misplaced. Santa Fe has not suggested that benefits can never flow to a railroad from the reconstruction of an existing grade separation structure or from the construction of a new grade separation at an entirely new point of crossing. Santa Fe's contention is that there is no support in the record in this case for a finding of benefit to the railroads from the reconstruction of the West Eighth Avenue viaduct. On the other hand, it is clear that there are situations in which a railroad might very well benefit from the

reconstruction of an existing grade separation structure or the construction of a new grade separation structure at a new point of crossing. The clearest example of benefit to the railroads would be where the reconstruction of a grade separation structure or the construction of a new grade separation structure at a new point of crossing would lead to the closing of one or more nearby grade crossings. Under such circumstances, it most likely could be demonstrated that the railroad would benefit from the reconstruction or construction of a grade separation by virtue of the closing of the nearby at-grade crossings. It is not logical for the Commission to state that "Santa Fe's argument would require that only an application for the construction of a grade separation at the same location as an existing at-grade crossing would benefit railroad corporations, ..." (P. 9).

B.

In its brief, the Commission argues that its finding of 50% benefit to the railroads is sufficiently supported by Mr. Baier's expert opinion. It is true that, in his written testimony, Mr. Baier expressed the opinion that the public and the railroads share benefit and responsibility equally. It is also clear, from his written and oral testimony, that Mr. Baier's opinion was based solely on the premise that the alternative to a grade separation structure was an at-grade crossing.

If the record in this case actually showed that the railroads were being shielded from the risks and inconvenience of an at-grade crossing by the construction of the West Eighth Avenue viaduct, there might be some factual basis to say that the railroads were receiving some kind of benefit from the reconstruction of the viaduct. However, there is no evidence in the record to support any inference or finding that at-grade crossings were an alternative to the reconstruction of the West Eighth Avenue viaduct. Under these circumstances, Mr. Baier's opinion that the railroads and the City benefited equally was without any support in the evidence. As pointed out in Santa Fe's opening brief, Mr. Baier himself admitted on cross-examination that, on the facts of this case, the railroads do not receive benefit from the reconstruction of the viaduct. (Tr. 1/20, P. 60, Line 17 to P. 62, Line 18; Tr. 1/20, P. 78, Line 15 to P. 79, Line 2).

In its brief, the Commission cites Morey v. Public Utilities Commission, 629 P.2d 1061, 1068 (S.Ct. 1981) for the proposition that it is within the province of the Commission to decide what weight is to be accorded to the evidence. That may be true as an abstract principle, but on the facts of this case, the Commission's ultimate conclusion of equal benefit has no support in the evidence, and the decisions of the District Court and the Commission should therefore be reversed. RAM Broadcasting v.

Public Utilities Commission, 702 P.2d 746 (S.Ct. 1985); Peoples Natural Gas v. Public Utilities Commission, 698 P.2d 255 (S.Ct. 1985); AT&SF v. Public Utilities Commission, 194 Colo. 263, 572 P.2d 138 (S.Ct. 1977).

C.

In Part C of its Argument concerning the allocation of costs between the City, on the one hand, and the railroads, on the other, the Commission reviews Mr. Baier's methodology for allocating costs. Specifically, the Commission explains that Mr. Baier:

> . . .started from the premise that each should be allocated 50 percent. . . . The 50/50 allocation, though, was to be applied only to "that portion of project which separates a reasonably adequate roadway and a reasonably adequate railroad." (PUC Brief, P. 15).

In its brief, the Commission then goes on to describe in some detail how the cost of the "basic, no-frills grade separation" was developed under the methodology. The Commission points out that the railroads' 50% share was applied against the lesser cost of the "no-frills theoretical structure," and not against the estimated cost of the entire project.

Santa Fe has never quarreled with that part of the methodology which segregates out costs over and above those necessary for a "project which separates a reasonably adequate roadway and a reasonably adequate railroad." It has always been

the position of the Santa Fe that, in this respect, Mr. Baier correctly interpreted the sense of the legislature. Certainly, the legislature never intended that the railroads should have to bear any part of a project cost not necessary to effect a reasonably adequate separation.

Santa Fe, therefore, agrees that, under the statute, allocations between the railroads and the public entity should be based only on those costs necessary to separate "a reasonably adequate roadway and a reasonably adequate railroad."

In Part C of its brief, at Pages 17 and 18, the Commission quotes from Northeastern Motor Freight, Inc. v. Public Utilities Commission, 178 Colo. 433, 498 P.2d 923 (1972) and cites a number of other cases for the proposition that "'. . .findings and conclusions of the Commission based upon questions of fact which are in dispute, when supported by competent evidence in the record, must not be disturbed by a reviewing court. . .'" Again, Santa Fe does not disagree with the quotation from the Northeastern Motor Freight, Inc. case as an abstract principle. However, as noted above, it is the position of the Santa Fe that there is no evidence of any benefit to the railroads on the facts of this case, and that the Commission's allocation of costs to the railroads, based on an assumed benefit, must be reversed. As noted above, a decision of the Commission which has no support in the evidence should be reversed. RAM Broadcasting v. Public

Utilities Commission, supra; Peoples Natural Gas v. Public Utilities Commission, supra; AT&SF v. Public Utilities Commission, supra.

II.

IF THERE IS A RAILROAD BENEFIT, A 50% ALLOCATION OF THE RAILROADS' SHARE TO SANTA FE IS UNREASONABLE, ARBITRARY AND INCONSISTENT WITH REQUIREMENTS OF THE STATUTE.

In its answer brief, the Commission quotes from that part of the statute which requires that, in making an allocation of the railroads' share between the railroads, ". . .the commission shall consider the benefits, if any, which shall accrue between the Class I railroad corporations affected." (PUC Brief, P. 19).

The Commission points out that there was evidence that the Santa Fe owns one main line track under the viaduct, and that the Burlington Northern owns one main line track under the viaduct. The Commission also points out that there was evidence that the Burlington Northern handles considerably more traffic under the viaduct than the Santa Fe.

After noting this evidence, the Commission states that:

> Thus, based upon the evidence, there were at least two reasonable methods upon which to assess benefits for the purpose of allocating costs to the Santa Fe and Burlington. The first was proposed by the Staff and assessed benefits on the basis of the number of main line tracks owned by each railroad corporation involved. . . . The second method was advanced by the Santa Fe and would have assessed benefits either on the basis of revenues generated from the operation of the

> trains under the viaduct or the number of trains operated under the viaduct. . . . (PUC Brief, PP. 20, 21).

The Commission then quotes from Public Service Company of Colorado v. Public Utilities Commission, 687 P.2d 968, 974 (Colo. 1984) in support of the proposition that, since there were two reasonable methods for assessing benefits, the choice of a method falls within the administrative expertise and discretion of the Commission, and the Court should not therefore ". . .substitute its judgment for that of the commission. . . ."

The Commission misinterprets that part of the statute providing for allocation of the railroads' share between affected railroads. The statute requires the Commission to "consider the benefits" in making the allocation of the railroads' share between the affected railroads. The Commission apparently believes that one reasonable method of determining benefits between railroads is simply to determine the ratio of main line tracks owned by the railroads under the viaduct. As illustrated by the facts in this case, the ratio of the number of main line tracks owned by the railroads doesn't necessarily bear any relationship to benefits realized by the railroads from a grade separation, as opposed to an at-grade crossing--if that is the alternative.

Obviously, there could be a situation where one railroad operates a lot of trains and generates a lot of revenue and another railroad operates very few trains and generates very

little revenue. On those facts, it is neither reasonable nor logical to conclude that both railroads benefit equally from the construction of the grade separation, even though they may both own a main line under the grade separation.

If it is assumed that railroads are recognizing benefit from a grade separation because the alternative would be at-grade crossings, then the measure of benefits between the railroads would have to be in terms of reduction of risk and facilitation of operations. Both of these elements would, of necessity, be in proportion to the level of activity of the railroad companies. If one company has a much greater level of activity than the other, it obviously will have a greater degree of benefit than the other company.

A simple count of main line tracks provides neither a reasonable nor rational method of weighing benefit between railroads from a grade separation structure as compared to at-grade crossings. If the legislature had intended for the Commission to allocate costs between railroads simply on the basis of numbers of main line tracks, it would have said so. Rather, the legislature gave the Commission the broader standard that it consider the benefits. The requirement to meet this standard cannot rationally be met by simply counting main line tracks. As pointed out in Santa Fe's opening brief, the Commission decision is internally inconsistent in assuming benefits from reduction of

risk and other considerations for the first allocation and in failing to consider those same "benefits" in making the second allocation. If the railroads do benefit, as assumed by the Commission in the allocation between the City, on the one hand, and the railroads, on the other, then it would be inconsistent for the Commission to fail to consider those same benefits in making the allocations between the railroads. If the Court determines that the Commission properly found railroad benefit vis-a-vis the City, then the Commission decision should be reversed because of this inconsistency in the allocation between the railroads. Peoples Natural Gas v. Public Utilities Commission, 698 P.2d 255 (S.Ct. 1985).

CONCLUSION

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

Respectfully submitted this 8th day of October, 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 ANSWER BRIEF OF THE PUBLIC UTILITIES COMMISSION in the U.S. mail, postage prepaid, this 2nd day of October, 1987, addressed to the following:

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