

Opinion No. 74-07

February 6, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. John Abraham Chairman State Corporation Commission Room 405, PERA Building Santa Fe, New Mexico 87501

QUESTIONS

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What is the nature and extent of the State Corporation Commission's jurisdiction over railroad crossings?

CONCLUSION

See Analysis.

OPINION

{*10} ANALYSIS

The State Corporation Commission's jurisdiction over railroad crossings is set forth in Article XI, Section 7 of the New Mexico Constitution, Sections 69-3-38 to 69-3-41, N.M.S.A., 1953 Comp., and Sections 69-7-1 to 69-7-15, N.M.S.A., 1953 Comp. Article XI, Section 7, **supra**, provides that the Commission shall have the power to determine "any matters of public convenience and necessity relating to such facilities as expressed herein in the manner which has been or shall be provided by law. . ." Article XI, Section 7 lists railroad crossings among these facilities. The section gives the Commission power to require railway companies:

"[T]o provide and maintain necessary crossings, culverts and sidings upon and alongside their roadbeds, whenever in the judgment of the commission the public interests demand, and as may be reasonable and just. . ."

This power is subject to the qualification that it must be exercised in the manner provided by law. Article XI, Section 7, **supra**. We construe the term "manner" in its broadest possible sense to include all the conditions -- both substantive and procedural -- under which the Commission must exercise its power to require crossings. We adopt this broad construction in order to avoid any conflicts between Article XI, Section 7 and the legislative enactments on railroad crossings. If the term "manner" were to refer only to procedures, it would be possible to deduce from Article XI, Section 7, rights and obligations in conflict with those imposed by Sections 69-3-38 to 69-3-41, **supra**. We are obligated to uphold both the Constitution and the laws of this state. Consequently,

we will construe the constitutional and legislative provisions on railroad crossings together so that they are in harmony. For this reason we conclude that Article XI, Section 7's proviso that the Commission shall exercise its powers in the manner provided by law ordains a legislative interpretation of all the conditions attached to the Commission's exercise of its powers.

The Legislature has provided the manner in which the State Corporation Commission is to exercise its power over railroad crossings in Sections 69-3-38 to 69-3-41, **supra**, and in Sections 69-7-1 to 69-7-15, **supra**. Sections 69-3-38 to 69-3-41 define the rights and obligations of the state and railway company regarding the construction and maintenance of crossings. Sections 69-7-1 to 69-7-15 define the procedures which the Commission must follow to enforce these rights and obligations.

Section 69-3-39 A., N.M.S.A, 1953 Comp. (1973 P.S.) provides:

"a. Subject to the provisions of subsection B hereof, every railroad company in this state shall construct and maintain in good condition, at its own expense, good and sufficient crossings at all places in this state where its railroad crosses public highways, city, town or village streets at grade, now or hereafter to be opened for public use. Such crossings shall be constructed of planks, macadam, concrete or other suitable material in such manner as to be level with the top of the rails for a reasonable distance on each side of each rail."

"Public highway" is defined as, "Every place or way of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel." Section 69-3-38, **supra**.

Section 69-3-39 A. constitutes a legislative interpretation of the conditions imposed by Article XI, Section 7 on the Commission's power to require crossings. Article XI, Section 7 permits the Commission to require a crossing only when it determines that the crossing is "necessary," in the public interest," and "just and reasonable." The Legislature has determined that these conditions are ^{*11} satisfied when a railroad crosses any road open to the public for vehicular traffic as a matter of right. Sections 69-3-38, 69-3-39 A., **supra**. Thus, the Commission can order a railway company to provide and maintain a crossing whenever in its judgment the factors set forth in Section 69-3-39 A. exist.

Article XI, Section 7 does not define the term "crossing." The meaning of this term determines what materials, equipment and alterations the Commission can order the railway company to provide and maintain. Section 69-3-39 A. suggests a broad definition of the term "crossing." The section states that crossings shall be "good and sufficient." To determine the import of these words, we refer to the purpose of Article XI, Section 7 and Section 69-3-39 A., for particular words and phrases must be construed with reference to the purpose of the whole statute. **Allen v. McClellan**, 75 N.M. 400, 405 P.2d 405 (1965). The obvious purpose of these constitutional and statutory provisions is to promote the public safety by requiring adequate, safe places to cross

railroad tracks. A "good and sufficient crossing" is one that allows vehicles to safely and conveniently cross the railroad tracks. The Commission's power to require a "good and sufficient" crossing necessarily includes the power to require any item which will enable the public to safely and conveniently cross the tracks. When a power is conferred by a statute, everything necessary to make that power complete and effective will be implied. **Kennecott Copper Corp. v. Employment Security Comm'n**, 78 N.M. 398, 432 P.2d 190 (1967).

Section 69-3-39 A. requires that crossings be constructed of "planks, macadam, concrete or other suitable material in such manner as to be level with the top of the rails for a reasonable distance on each side of each rail." Section 69-3-39 A., **supra**. This requirement should not be construed to exhaust the meaning of the phrase "good and sufficient." A crossing might meet this requirement and be neither usable nor safe; for example, the approaches might be dangerous or the railroad's communication lines strung too low to permit passage across the tracks. Narrowly interpreting the phrase "good and sufficient," to mean only the materials specified in Section 69-3-39 A. could frustrate the purpose of Article XI, Section 7 and Section 69-3-39 A. It is a rule of statutory construction, however, that where two interpretations of a statute are possible, one of which implements the object of the statute and the other of which defeats it, the former construction must be adopted. **Martinez v. Research Park, Inc.**, 75 N.M. 672, 410 P.2d 200 (1965).

(Our interpretation of Section 69-3-39 A. is in accord with the case law. A federal court of appeals construed a statute similar to Section 69-3-39 A. in **Atlantic Coastline R. Co. v. Smith**, 264 F.2d 428 (6th Cir. 1959).) The statute required railroads "to make and furnish good and sufficient crossings on the public highways crossed by them . . ." Tenn. C.A. 65-1101. The court held that, "In Tennessee the word 'crossing' means the entire structure, including the necessary approaches." **Atlantic Coastline R. Co. v. Smith, supra**. In **Birlew v. St. Louis & S.F. R. Co.**, 104 Mo. App. 561, 79 S.W. 490 (1904), the Missouri Supreme Court rejected a narrow definition of "crossing" argued by the railroad and held that the railroad had a duty to build the approaches to the intersection of the tracks and road. The court defined crossing as follows:

"What is the crossing of a railway right of way? Not alone, we think the boards or other appliances which must be laid between the rails and adjacent to them on the outside, and cattle guards and wing fences to keep cattle from straying on the right of way beyond the crossing; but such structures, too, as will enable a wagon or team to go safely and conveniently on the track. . . . It is incumbent on a railroad to construct approaches needed to make a crossing usable. . ."

{*12} **Birlew v. St. Louis & S.F.R. Co., supra**. One court has even held that the duty imposed by a statute requiring "good and sufficient" crossings extended to building approaches beyond the railroad right of way. **Town of Roxbury v. Central Vermont R. Co.**, 60 Vt. 121, 14 A. 92 (1888).

Each of the cases cited holds that approaches are part of a crossing. The rationale by which the courts arrived at that conclusion is equally applicable to communication lines or any other structure which would affect the public's ability to "safely and conveniently" cross the tracks. The courts defined "crossing" with reference to the purpose of the statute -- the provision of a safe and convenient means of crossing railroad tracks. The courts defined "crossing" to include those structures which would effect that purpose.

The term "crossing" also includes crossings at separate grades. The Legislature has provided the procedures for separation of grades in Section 69-3-40, **supra**. The Commission may order a grade separation following the procedures outlined in Section 69-3-40 whenever it decides that such a crossing is "practicable and reasonably necessary for the protection of the traveling public." Section 69-3-40, **supra**.

Article XI, Section 7 and Section 69-3-39 place the burden of the construction and maintenance of crossings on the railroad company. Article XI, Section 7 empowers the Commission to require railway companies "to provide and maintain necessary crossings" in the manner provided by law. Section 69-3-39 apportions the duty and costs of construction and maintenance. Subject to certain qualifications, a railroad company must construct and maintain crossings "at its own expense." Section 69-3-39 A., **supra**. The qualifications are set forth in Section 69-3-39 B., **supra** :

B. Any highway-railroad crossing at grade that may hereafter be construed or reconstructed by the state highway department will be a full plank crossing of a material approved by the state highway department and railroad, to be installed by the railroad company at the state highway department's expense. If a joint investigation of railroad and highway engineers shows that a highway-railroad crossing at grade should be reconstructed, then the highway department shall pay the railroad for the initial full plank crossing. Said constructed or reconstructed crossing will be maintained in good condition at the railroad company's own expense."

Subsection B shifts the cost of constructing the full plank surface of a crossing at grade to the State Highway Department when that department is involved in the construction or reconstruction of a crossing. Subsection B does not shift from the railway company the burden of constructing and maintaining at its own expense all other aspects of the crossing. Nor does subsection B remove from the railroad the duty to construct and maintain at its own expense all aspects of crossings at grade in which the State Highway Department is not involved. Sections 69-3-40 and -41, **supra**, allocate the costs of constructing and maintaining crossings at separate grades.

At common law the duty and costs of construction and maintenance fell on the party which constructed a new way across one already in use. **Reed v. Allegheny Co.**, 330 Pa. 300, 199 A. 187 (1938); **Rayonier, Inc. v. United States**, 225 P.2d 642 (C.A. 9, 1955). The courts, however, have upheld the state's power to impose the burden of construction and maintenance on the railroads regardless of whether its tracks existed before the road crossing it. The United States Supreme Court described the source of

this power in **Chicago, Burlington & Quincy R.R. Co. v. Chicago**, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897):

"The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company {*13} laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the State to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the State shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people."

For a survey of the numerous cases with similar holdings, see **Prossen, et al. v. Seaboard Air Line R. Co.**, 56 S.E.2d 591, 216 S.C. 33 (1949), cert. denied, 339 U.S. 911, 70 S. Ct. 569, 94 L. Ed. 1338 (1950).

The Commission must follow certain procedures in making the findings and issuing the orders which Article XI, Section 7 and Section 69-3-39 empower it to do. Article XI, Section 8 commands the Commission to hold a public hearing before determining any question or issuing any order with respect to the matters contained in Article XI, Section 7. Article XI, Section 8, New Mexico Constitution and Sections 69-7-1 to 69-7-15, **supra**, detail the procedures which the Commission must follow in issuing orders on railroad crossings. The Commission's first duty is to attempt to resolve any question relative to crossings by mediation. Section 69-7-2, **supra**. If mediation fails, the Commission must set the matter for public hearing. Section 69-7-2, **supra**. Provisions for notice, hearing procedures, investigations, discovery of books and records, and appeal are contained in Sections 69-7-3 through 69-7-15, **supra**, and they are self-explanatory. Any orders issued by the Commission must be supported by substantial evidence adduced at the hearing, and the burden of proof is on the Commission to show that its order is reasonable and just. **In re A.T. & S.F. Ry. Co.'s Protest of Rates**, 44 N.M. 608, 107 P.2d 123 (1940).

In summary, we conclude that the State Corporation Commission has the power to require a railway company to construct and maintain a crossing at grade whenever it finds that the company's tracks are intersected by any kind of way open to the public as a matter of right for vehicular travel. The Commission's power includes the power to require the company to do anything which will make the crossing "good and sufficient," that is, safe and convenient for public use. The Commission can order the railroad company to construct and maintain a crossing at grade at its own expense, except when the State Highway Department is involved in the construction or reconstruction of

the crossing. When the State Highway Department is involved, it will pay the costs of making the crossing's surface level with the rails. The railroad must bear the remaining construction costs as well as all maintenance costs.

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