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HIGHWAYS—"MAINTENANCE", "RESTORATION", "REPAIR" DISTINGUISHED—APPLICATIONS OF SECTIONS 17-3 AND 17-5 G. C. AS TO "PREVAILING WAGE" FOR LABORERS AND MECHANICS ON EMERGENCY ROAD WORK—MINIMUM WAGE—UNDER SECTION 17-3 G. C., BOARD OF COUNTY COMMISSIONERS IS "PUBLIC AUTHORITY" IN COUNTY HIGHWAY WORK PERFORMED BY DIRECT LABOR, EXCEPT WHEN DONE BY FORCE ACCOUNT—WHEN UNDER SECTION 7198 G. C. COUNTY ENGINEER HAS DUTY TO DETERMINE WAGES TO BE PAID TO MECHANICS AND LABORERS.

**SYLLABUS:**

1. *The term "maintenance," as applied to highways, means such acts as will preserve the improvement in its completed condition against wear and deterioration, as distinguished from the restoration to their original state after having been damaged by wear or deterioration—which is usually referred to as "repair."*

2. *When a county employs mechanics or laborers for the construction, reconstruction, improvement, enlargement or alteration of a road estimated to cost more than three hundred dollars by reason of the provisions of Sections 17-3 and 17-5, General Code, it must pay such mechanics and laborers a wage not less than that ascertained and determined as the prevailing wage in that county.*

3. *Section 17-3, General Code, has no application to the fixing of a minimum wage to be paid to mechanics and laborers employed in the maintenance of county highways.*

4. *Under the terms of Section 17-3, General Code, the board of county commissioners is the "public authority" in the making of a construction, reconstruction, improvement, enlargement or alteration of a county highway by direct labor, except when done by force account.*

5. *When the estimated cost of the improvement of a county highway is less than three hundred dollars, and is being made through "force account" under authority of Section 7198, General Code, and related sections, the county engineer has the duty of determining the wages to be paid the mechanics and laborers employed thereon.*

COLUMBUS, OHIO, December 2, 1939.

HON. H. LLOYD JONES, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR: Your request for my opinion reads:

"Your opinion is desired upon the following questions:

Do county road employees come within the provisions of Section 17-3, General Code?

Is the department of industrial relations to determine the wages paid to said employees?

Is the 'public authority' as defined in said section the county commissioners or county surveyor, with reference to the matter of county road employees?

What test should be followed in distinguishing between 'maintenance', which is not included in the definition of 'construction', and 'repairs' as therein defined? (1938 O. A. G. No. 2161 noted.)

Do the county commissioners or county surveyor set the wages of said road employees for 'maintenance' operations and for 'construction' involving under \$300.00."

Section 17-3, General Code, defines "public authority" as follows :

"The term 'public authority', as used in this act, shall mean any officer, board, or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor. \* \* \* The term 'public authority' shall also mean any institution supported in whole or in part by public funds and this act shall apply to expenditures of such institutions made in whole or in part from public funds."

The term "construction" is also defined in such section :

"\* \* \* The term 'construction', as used in this act, shall mean any construction, reconstruction, improvement, enlargement, alteration or repair of any public improvement fairly estimated to cost more than three hundred dollars. \* \* \*"

Such section then defines the term "public improvement" :

"\* \* \* The term 'public improvement', as used in this act, shall include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and all other structures or works constructed by the state of Ohio or any political subdivision thereof. \* \* \*"

When the act, of which Section 17-3, General Code, is a part, was originally enacted (114 O. L., 116), it concerned wages to be paid by contractors who were constructing improvements under contract with the state

or a political subdivision thereof only. In 116 O. L., 206, this act was amended, among other things, by adding the phrase "or to construct the same by the direct employment of labor" to the definition of "public authority."

The term "maintenance" when used in its broad sense might well include reconstruction, enlargement, improvement, alteration, repair of highways, and all other types of duties with reference to highways other than original construction. It is an established rule of statutory interpretation that "words of commerce or trade, in a statute relating to those subjects, are primarily to be taken in their accepted commercial or trade signification." (Black, Interpretation of Laws, Section 58.) In the case of Seaboard National Bank v. Woesten, 147 Mo., 467, the court pointed out that the term "maintenance" has a different meaning than "repairs" and states that it means the doing of such acts as will preserve the highway from decay and the effects of ordinary use, while "repairs" means the restoration of a street already defective from use and decay. Webster defines the term as "to hold, or keep in any particular state or condition, to keep up." From an examination of the cases which have distinguished between the meaning of the words "maintenance" and "repair" with reference to highways, it would appear that the term "maintenance" has an established meaning of performing such acts as will preserve a constructed highway in its original condition and from the effects of use and decay; while the term "repair" means to restore the highway to its original condition after it has become in an unsound or poor condition by reason of decay, injury, dilapidation or partial destruction.

Barber Asphalt Paving Co. v. Hezel, 155 Mo., 391;  
Louisville N. A. & C. R. Co. v. Godman, 104 Ind., 490;  
Moon v. Durden, 2 Exch., 21.

In other words, the doing of such acts as would preserve the improvement in its original condition and prevent it from becoming out of repair is maintenance; the returning of the improvement to its original condition after it has been permitted to become damaged constitutes a repair.

Section 17-4, General Code, reads:

"It shall be the duty of every public authority authorized to contract for or construct with its own forces for a public improvement, before advertising for bids or undertaking such construction with its own forces, to have the department of industrial relations ascertain and determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement, in the locality where the work is to be performed; and such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the

bidding blanks where the work is done by contract. But a minimum rate of wages for common laborers, on work coming under the jurisdiction of the state department of highways, shall be fixed in each county of the state by said department of highways, in accordance with the provisions of section 17-4a of this act. This act shall not apply to public improvements in any case where the federal government or any of its agencies furnishes by loan or grant all or any part of the funds used in constructing such improvements, provided the federal government or any of its agencies prescribes predetermined minimum wages to be paid to mechanics and laborers employed in the construction of such improvements."

Section 17-5, General Code, provides :

"Where a public authority constructs a public improvement with its own forces it shall be the duty of such authority to pay a rate or rates of wages which shall not be less than the rate or rates of wages so fixed as herein provided. Any mechanic or laborer paid less than such rate or rates by any public authority shall have a right of action against such public authority for the difference between the fixed rate of wages and the amount paid to him, and in addition thereto a penalty equal in amount to such difference."

The language of these two sections requires that the Department of Highways shall fix the minimum wage for laborers on work coming under its jurisdiction; that if the improvement is being constructed by the public authority itself rather than through the medium of a contractor, it must pay a rate of wages not less than that so fixed by the Department of Industrial Relations. Since such language is unambiguous in providing for the determination of the minimum wage to be paid for labor of the type referred to in such section it is my opinion that as to all construction, reconstruction, improvement, enlargement or alteration of a public improvement the minimum wage to be paid must be that determined by the Department of Industrial Relations for the locality in which the improvement is being made, if the fairly estimated cost thereof is more than three hundred dollars.

You will note that there is an express enumeration of the classes of work, the wages of which are regulated by the act. It is a well established rule of law that where there is an express enumeration of cases or objects in a statute, which fails to make any provision for other cases or objects which are analogous to those enumerated, or which stands upon the same reason and which would be apparently within the scope of the purpose of the act and even though it may appear that the omission was through in-

advertence or mistake, such omission may not be supplied by the court. The statute must be construed to include only those expressly mentioned and as excluding those not mentioned.

Weirick v. Lumber Co., 96 O. S., 386;  
Board of Education v. Boal, 104 O. S., 482;  
Black, Interpretation of Laws, Sec. 31.

By reason of such rule, it is my opinion that such class of labor as comes within the definition of maintenance is not included within the minimum wage regulation provided in sections 17-3, et seq., General Code.

You inquire whether the "public authority" with reference to county roads is the board of county commissioners or the county engineer. Section 17-3, General Code, defines the authority to be the board or offices "authorized by law to enter into contract for the improvement \* \* \* or to construct the same by direct employment of labor." It should be remembered that the county is a quasi corporation; the management of its property and affairs is in the board of county commissioners. For such reason, in law, the terms "county" and "county commissioners" are oftentimes used as interchangeable terms. *Carder v. County Commissioners*, 16 O. S., 353; *Commissioners v. Andrews*, 18 O. S., 49.

The provisions of law with respect to contracts for the improvement of roads place the authority for letting such contracts in the board of county commissioners. (See Section 6945 et seq. General Code.) Section 6947-3, General Code, authorizes the board of county commissioners to complete the improvement after a contractor has defaulted his contract. Section 6964-1, General Code, places the duty on the board of county commissioners to repair county roads. It is true that the statute places the general supervision of the construction of improvements on highways, repair, and maintenance of roads on the county engineer. (See Sections 7184 and 7192, General Code.) Section 7198, General Code, grants authority to the county engineer to employ laborers, etc., when the improvement, etc., is being done by force account, but only "when authorized by the county commissioners." It therefore appears to me that the board of county commissioners of a county are the only officers or commission authorized to enter into a contract for the improvement of highways on behalf of the county or to construct the same by the direct employment of labor, and this seems to be true even though when they decide to construct the improvement through force account the duty to purchase the materials and machinery and to hire the necessary labor is in the county engineer through their designation; and they are therefore the public authority of the county, as that term is used in Section 17-3, General Code.

You next inquire whether it is the duty of the county engineer or the board of county commissioners to fix the wages of road employes for projects involving the expenditure of less than three hundred dollars. As

above pointed out, Section 6964-1, General Code, places the duty on the board of county commissioners to make these improvements, irrespective of the cost thereof. Section 17-3, General Code, exempts projects estimated to cost less than three hundred dollars from the minimum wage limit therein set forth. It is thus apparent that someone other than the Department of Industrial Relations must determine the wage to be paid in constructing such improvement when the cost is less than such sum. Section 7198, General Code, under certain circumstances authorizes the county engineer to employ labor for the improvement, etc., of highways. Such section reads:

“The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account.”

In Opinions of the Attorney General for 1931, Volume I, page 527, a preceding Attorney General ruled:

“When the county commissioners have authorized the surveyor to construct or improve a road by force account, under the provisions of Section 7198 of the General Code, the surveyor has the sole power to contract with laborers with reference to the construction of such improvement, and the approval of the county commissioners is not required as a condition precedent to the payment of such wages.”

Similarly in Opinions of the Attorney General for 1930, Volume II, page 1136, the Attorney General ruled:

“In the maintenance and repair of county roads which is authorized by the county commissioners to be done by force account and without contract, the employment of the necessary laborers for the prosecution of the work rests with the county surveyor and not with the county commissioners.”

The same conclusion was reached by a preceding Attorney General. In Opinions of the Attorney General for 1927, Volume II, page 1100, the second branch of the syllabus reads.

“By the express terms of Section 7198, General Code, when it has been determined to construct, reconstruct, improve, maintain or repair a road, bridge or culvert by force account, the power and duty to employ the necessary laborers and teams, lease the

necessary implements and tools and purchase such material as may be required are exclusively vested in the county surveyor, who as a condition precedent thereto must be authorized so to do by the county commissioners.”

It is therefore my opinion that it is only when the work is being done by force account and under authority of Section 7198, General Code, county commissioners have authorized the county surveyor, or, as he is now known, the “county engineer” to make or complete an improvement by “force account” is he authorized to hire and determine the wages to be paid to laborers employed on highway work.

Specifically answering your inquiry it is my opinion that:

1. The term “maintenance”, as applied to highways means such acts as will preserve the improvement in its completed condition against wear and deterioration, as distinguished from the restoration to their original state after having been damaged by wear or deterioration—which is usually referred to as “repair.”

2. When a county employs mechanics or laborers for the construction, reconstruction, improvement, enlargement or alteration of a road estimated to cost more than three hundred dollars by reason of the provisions of Sections 17-3 and 17-5, General Code, it must pay such mechanics and laborers a wage not less than that ascertained and determined as the prevailing wage in that county.

3. Section 17-3, General Code, has no application to the fixing of a minimum wage to be paid to mechanics and laborers employed in the maintenance of county highways.

4. Under the terms of Section 17-3, General Code, the board of county commissioners is the “public authority” in the making of a construction, reconstruction, improvement, enlargement or alteration of a county highway by direct labor, except when done by force account.

5. When the estimated cost of the improvement of a county highway is less than three hundred dollars, and is being made through “force account” under authority of Section 7198, General Code, and related sections, the county engineer has the duty of determining the wages to be paid the mechanics and laborers employed thereon.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*