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1. HIGHWAYS — DIRECTOR OF — CONSTRUCTION CONTRACT—ELIMINATION, EXISTING GRADE CROSSING—RAILROAD PROTECTIVE PUBLIC LIABILITY INSURANCE—DIRECTOR MAY FIX AMOUNT OF INSURANCE—PART OF COST OF PROJECT—CONTRACTOR MAY BE REQUIRED TO PROVIDE INSURANCE IN BEHALF OF RAILROAD—SECTIONS 5523 ET SEQ., 5525 RC.
2. DIRECTOR HAS DISCRETION AS TO LIABILITY INSURANCE—RAILROAD PROTECTION—GRADE SEPARATION PROJECT—AMOUNT OF INSURANCE SHALL BE CONSIDERED PART OF PROJECT—COST MAY BE ALLOWED IN CALCULATIONS—SECTION 5523.08 RC.
3. CONTRACTOR—WORK REQUIRES PERFORMANCE ADJACENT TO RAILROAD RIGHT-OF-WAY—COST OF INSURANCE SHALL BE CONSIDERED PART OF COST OF PROJECT—CONTRACTOR MAY BE REQUIRED TO PROVIDE INSURANCE IN BEHALF OF RAILROAD.
4. DIRECTOR—TEMPORARY ENTRANCE OR OCCUPANCY OF RAILROAD RIGHT-OF-WAY—CONSTRUCTION OF ADJACENT HIGHWAY—RAILROAD ENTITLED TO COMPENSATION FOR TAKING — COMPENSATION BASED UPON FAIR MARKET VALUE OF PROPERTY AND DAMAGE TO RESIDUE — DIRECTOR SHOULD CONSIDER INCREASED RISK OF LIABILITY OR INCREASED INSURANCE COST IMPOSED UPON RAILROAD.

SYLLABUS:

1. When the director of highways enters into a construction contract pursuant to the provisions of Chapter 5525., Revised Code, which contract provides for the elimination of an existing grade crossing pursuant to the provisions of Chapter 5523., Revised Code, he may in his discretion provide that the cost of railroads' protective public liability insurance—which insurance protects the railroads involved against liability imposed upon them by law for damages which result from the contractor's operations and not from their own negligence—in an amount fixed by the director, shall be considered as part of the cost of such project; and he may require the contractor involved to provide such insurance in behalf of any railroad involved in such project.

2. When the director of highways enters into such a contract he may in his discretion provide that the cost of regular public liability insurance taken out by any

railroad involved in such project in its own behalf—which insurance protects the railroads involved against liability for damages which result from work performed by them as a necessary part of a grade separation project—in an amount fixed by the director, shall be considered as part of the cost of such project; and he may allow such cost in calculating the amount to be allowed such railroad for doing its share of the work pursuant to the provisions of Section 5523.08, Revised Code.

3. When the director of highways enters into a construction contract pursuant to the provisions of Chapter 5525., Revised Code, which contract requires that the contractor shall enter upon or work adjacent to a railroad right-of-way, he may in his discretion provide that the cost of railroads' protective public liability insurance—which insurance protects the railroads involved against liability imposed upon them by law for damages which result from the contractor's operations and not from their own negligence—in an amount fixed by the director, shall be considered as part of the cost of such project; and he may require the contractor involved to provide such insurance in behalf of any railroad affected.

4. When the director of highways temporarily enters upon or occupies a railroad right-of-way for the purpose of constructing a highway adjacent thereto, the railroad is entitled to compensation for such taking. Such compensation should be based upon the fair market value of the property taken and the damage to the residue; and in ascertaining such damage the director should consider any increased risk of liability or any increased insurance cost imposed upon the railroad as an element which decreases the value of such residue.

Columbus, Ohio, April 14, 1955

Hon. S. O. Linzell, Director, Department of Highways
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion arising from the following circumstances:

Section 5525.16, Revised Code, a part of the chapter dealing with construction contracts of the director of highways, provides in part as follows:

“ * * Before entering into a contract the director shall require a bond with sufficient sureties, conditioned, among other things, for the payment by the contractor * * * for labor performed or materials furnished * * * that the contractor will perform the work upon the terms proposed within the time prescribed * * * and will indemnify the state, and in case of a grade separation will also indemnify any railroad company involved against any damage that may result by reason of the negligence of the contractor in making said improvement. * * *”*

*“The bond required to be taken under this section shall be in an amount equal to one half of the estimated cost of the work * * *”*
(Emphasis supplied.)

Pursuant to this section a standard form of contract bond is executed in projects involving grade separation work which are financed by state funds. The pertinent provisions of such bond are as follows:

“* * * We (1) as principal and (2) as sureties are held * * * unto the State of Ohio and in the penal sum of dollars * * *

“The Condition of This Obligation is Such That:

“Whereas, said principal has heretofore filed with the Director * * * a written bid for the construction * * * of Section S. R. No. in Township, County, Ohio, and

“Whereas, said Director * * * has accepted said bid * * * and has awarded to said principal the contract for * * * the afore-said work:

“Now, if the said principal shall * * * comply with and perform * * * all of the terms * * * of such contract * * * and will indemnify the State, County and Township, and the railroad company (or companies) involved in the Grade Separation project herein described and referred to, against any damage that may result by reason of the negligence of the contractor in making said improvement * * * then this obligation shall be void * * *”

(Emphasis supplied.)

Section 5531.03, Revised Code, a part of the chapter dealing with federal cooperation, provides in part as follows:

“The director of highways may accept any allotment of funds by the United States or any department or agency thereof * * * in accordance with the rules and regulations issued thereunder, for or in connection with the separation of grades of a public highway and a railroad * * *”

(Emphasis supplied.)

The federal regulations governing insurance protection in connection with grade crossing projects are set out in a document known as “Works Program General Memorandum No. 32,” Bureau of Public Roads, dated January 27, 1937. The pertinent parts of that memorandum provide as follows:

“* * * This memorandum * * * relates to the contractor’s liability * * * and to the liability which may attach to railroads * * * both as they may arise out of the contractor’s operations or may result from train operation, construction, or other work that

may be performed by railroads on projects for the elimination of * * * grade crossings.

“In some States the practice heretofore has been to require contractors to protect railroads against all such liability by indemnity bonds and so-called ‘hold harmless’ agreements. These usually have relieved the railroads of all responsibility by making the contractor assume full liability with respect to anything arising out of, resulting from, or in any way connected with the work under consideration, including negligent acts of agents or employees of the railroads in train operation and construction or other work that may be performed by railroad employees on the project. * * * It, therefore, is definitely concluded that for a project of the kind referred to herein, to be financed in whole or in part with Federal funds, no arrangement or agreement hereafter entered into between a State highway department and a railroad company or a contractor shall require protection to the railroad or the State highway department in the form of surety or indemnity bonds, or through the execution by contractors of ‘hold harmless’ agreements in favor of the railroad company or the State highway department.

“It is likewise concluded that the liability of a railroad for bodily injury to or death of persons and for injury to or destruction of property arising out of negligent acts on the part of such railroad, its agents or employees, shall not be transferred to a contractor in any manner. In other words, the railroad, as between itself and a contractor, must assume liability with respect to bodily injury to or death of persons and injury to or destruction of property which may result from its own negligence or from the negligence of its agents or employees in connection with the operation of trains, or in connection with any construction or other work that may be performed by it on the job.

“The railroads, however, in the absence of negligence on their part or on the part of their agents or employees, should be protected against liability imposed upon them by law for damages because of bodily injury to or death of persons and for injury to or destruction of property which may result from the contractor’s operations in connection with any such project.

“In order to afford this protection, contractors shall provide for and in behalf of railroads regular Protective Public Liability insurance policies to cover liability imposed by law upon the railroads for damages because of bodily injury to or death of persons and regular Protective Property Damage Liability insurance policies to cover liability imposed by law upon the railroads for damages because of injury to or destruction of property; such policies to furnish protection to the railroad only as respects the direct operations of the contractor and subcontractors on the job, including acts and omissions of all regular employees of the contractor

and subcontractors in connection with the work. These policies will definitely exclude coverage for liability imposed upon railroads by law due to their negligence or the negligence of their agents or employees in connection with all of their direct operations, including railroad operation, any construction or other work that may be performed by them on the job, and also in connection with the acts and omissions of all railroad employees assigned to the job; * * *

“Railroads are entitled to protect themselves by appropriate insurance coverage with respect to bodily injury to or death of persons and injury to or destruction of property which may result from work which they may perform as a necessary part of a project of the type to which this memorandum relates. Premiums on coverage of reasonable amounts consistent with the character and amount of the work which may be performed by a railroad as a necessary part of any such project, therefore, may be included in reimbursement vouchers submitted by the railroad, but reimbursement with Federal funds will not be made for coverage for train operation and other normal or usual activities of the railroad.

“Contractors are subject to certain liabilities with respect to bodily injury to or death of persons and injury to or destruction of property which may be suffered by persons other than their own employees, as a result of their own operations in connection with projects of this kind. Protection to cover such direct liability of contractors themselves shall be furnished under regular Contractors’ Public Liability and Property Damage Liability policies issued in the names of the contractors. Such policies will furnish protection to contractors only as respects their operations in performing the work covered by their contracts; * * *

“Satisfactory evidence shall be furnished to the highway departments by contractors that the insurance coverages required have been provided * * *.”

Acting pursuant to the provisions of this memorandum, the director has added a special clause to his proposals for bids involving grade separation work and financed in part with federal funds. The pertinent parts of that clause provide as follows :

“The bidder if awarded the contract for this improvement agrees: * * *

“* * * to carry insurance of the following kinds and amounts :

“(A) Contractors’ Public Liability and Property Damage Liability Insurance. * * *

“(C) Railroads’ and Subdivisions’ Protective Public Liability and Property Damage Liability Insurance.

“In addition to the above, he shall furnish evidence to the highway department that, with respect to the operations he or any of his subcontractors perform, he has provided for and in behalf of the and the State of Ohio, regular Protective Public Liability insurance providing for a limit of not less than \$. * * * and regular Protective Property Damage Liability insurance providing for a limit of not less than \$. * * *.

“The cost of the insurance hereinbefore specified will not be a specific bid item but it is agreed that the cost of such insurance will be covered in the various unit prices bid.”

The risks covered by these various policies of insurance are apparently those referred to in detail in Memorandum No. 32, supra. The amounts of insurance and the aggregate limits are established by negotiation between the highway department and the railroads.

The railroads involved in grade separation projects have requested that you extend the insurance protection afforded them on federal aid projects to similar projects financed solely by state funds. You in turn have propounded to me the following question:

“Will you please advise whether or not the Director of Highways can, in his proposals for State projects not built with Federal funds under the provisions of Section 5531.03 of the Revised Code, require contractors to provide the same insurance coverage afforded on Federal Aid projects.”

Since this question has been raised by the railroads and since your request for my opinion deals only with them, I presume that you are concerned only with the “Railroads’ Protective Public Liability and Property Damage Liability Insurance” required on federal aid projects, and I will answer you accordingly. This insurance, as described in Memorandum No. 32, is taken out by a contractor in behalf of a railroad and is intended to reimburse the railroad for loss resulting from liability imposed upon it by law, which liability arises as a result of the direct operations of the contractor and not as the result of any negligence on the part of the railroad either in conducting its ordinary operations, or in performing necessary work on the project. It eliminates certain defenses which the contractor might seek to make in an action against him by the railroad; and it insures that if the railroad is successful in asserting a claim, the contractor will be financially able to pay—at least to the extent of the insurance cover-

age. The precise question presented is whether the director can require the contractor to provide such insurance if he fails to do so voluntarily.

It appears to me that the answer to this question depends upon the director's power to recognize that grade separation projects create financial risks which otherwise would not exist, and his power to provide that insurance against such risks should be considered as part of the cost of such projects. If this were a private contract, the recognition of such cost would be considered as prudent business judgment. Does the fact that the director is a public officer, possessing only those powers bestowed upon him by statute, prevent him from exercising the same judgment here?

It is my opinion that the director may, in his discretion, require the contractor to provide the railroads' protective liability insurance in question. If he finds that additional financial risks are created, and that there is danger that without insurance coverage losses resulting therefrom will be borne by the railroads, he may require proper insurance protection. To hold otherwise would, in my opinion, place an unrealistic limit upon the director's power to prescribe the terms of these contracts and throw an unreasonable burden upon the railroads involved.

While this attempt to apply reasonable standards does not have a specific statutory authorization, neither do other cases in which insurance is required by public authorities. General Memorandum No. 32, *supra*, of the Bureau of Public Roads, is based upon the application of such standards, and not upon a specific statute. Under our own state law, it has long been the practice of the Department of Public Works to require that the contractor carry fire insurance on all public buildings under construction, and that he provide public liability and property damage insurance in proper cases. Since the forms of Public Works contracts are approved by this office, I believe that this practice amounts to a long continued recognition by the Attorney General that officers charged with the duty of making contracts for the state may make provision for what they believe to be proper insurance costs.

Inherent in this problem is also the question of the cost to the railroads of insurance coverage which they provide for themselves. This insurance is described in Memorandum No. 32 as providing protection against liability which may result from work performed by a railroad as a necessary part of a grade separation project. The Memorandum further

provides that the cost of such insurance may be included in "reimbursement vouchers" submitted by a railroad. These reimbursement vouchers are an incident to the procedure set up by Section 5523.08, Revised Code, which provides in part as follows :

"The cost of constructing the improvement authorized including * * * shall be part of and chargeable to the improvement. * * *

The raising and lowering of the grades of the railroad tracks * * * and other incidental expenses * * * shall be chargeable to the improvement. All costs and things made chargeable to the improvement by this section shall be borne, unless otherwise agreed upon, eighty-five per cent by the state and fifteen per cent by such company * * * *The director and the company involved may agree as to what part of the work shall be done by the company and also fix the amount and agree upon a method or basis for calculating and ascertaining the amount to be allowed or accredited to the company for doing such work.* * * *

(Emphasis supplied.)

Since I have already held that the director may recognize proper insurance costs if he sees fit to do so, I believe it must follow that he may also allow such costs in calculating the amount to be allowed to the railroad for doing its share of the work.

The second question which you have presented to me is as follows :

"* * * if in your opinion such insurance can be required on State projects financed with State funds only, can such insurance be required on projects other than grade separation projects where the contractor must perform work adjacent to operating tracks."

This question arises because of instances in which no grade separation is involved, but in which it is necessary for the contractor to go onto the railroad right-of-way or to work so close thereto as to interfere with the operation of rail traffic. Again, it presents a question involving two types of insurance coverage: railroads' protective public liability insurance taken out by the contractor in behalf of the railroad, and regular public liability insurance carried by the railroad in its own behalf.

As to the railroads' protective insurance, I believe that the requiring of such insurance is governed by the principles set out above. In arriving at my first conclusion I did not rely on a specific grant of power which is peculiar to the grade separation statutes. Rather, I based it upon the director's general powers to define proper construction costs. Since those

general powers are the same in both separation and non-separation contracts, it is my opinion that the director may require protective public liability insurance in behalf of the railroads on non-grade separation contracts if in his judgment such insurance is proper.

When we consider the problem of regular public liability insurance carried by a railroad in its own behalf on a non-grade separation project, a new element must be considered. For the director to allow the cost of insurance in such a situation, it would be necessary for him to reimburse the railroad for the cost of insurance which it had procured. The power to pay damages to someone not a party to a construction contract is governed by a different legal principle than the power of the director to determine contract costs. While the difference may be technical, and while the two principles may lead to approximately the same results when applied, they still must be recognized as separate principles.

Reimbursement to the railroad when it is not a party to a construction contract must be governed by the law of eminent domain. The temporary occupation of a railroad's right of way is a taking for which the railroad must be compensated. This compensation consists of two elements; the value of the property taken, and the damage to the residue. According to Nichols, the recognized authority on eminent domain, increased risk and insurance premiums covering such risk are not items of damage as such, but may be considered by a jury only as they decrease the value of the residue. (See: Nichols, *The Law of Eminent Domain*, 3rd Edition, Section 14.2361; *Ohio Public Service Co. v. Dehrina*, 34 Ohio App., 532 and cases there cited.) The same principle should govern the director here, and in fixing the amount of compensation to be awarded a railroad for a temporary occupation of its right-of-way he may consider increased insurance premiums as an element which decreases the value of the residue.

In view of the above it is therefore my opinion :

1. When the director of highways enters into a construction contract pursuant to the provisions of Chapter 5525., Revised Code, which contract provides for the elimination of an existing grade crossing pursuant to the provisions of Chapter 5523., Revised Code, he may in his discretion provide that the cost of railroads' protective public liability insurance—which insurance protects the railroads involved against liability imposed upon them by law for damages which result from the contractor's operations and not from their own negligence—in an amount fixed by the director,

shall be considered as part of the cost of such project; and he may require the contractor involved to provide such insurance in behalf of any railroad involved in such project.

2. When the director of highways enters into such a contract he may in his discretion provide that the cost of regular public liability insurance taken out by any railroad involved in such project in its own behalf—which insurance protects the railroads involved against liability for damages which result from work performed by them as a necessary part of a grade separation project—in an amount fixed by the director, shall be considered as part of the cost of such project; and he may allow such cost in calculating the amount to be allowed such railroad for doing its share of the work pursuant to the provisions of Section 5523.08, Revised Code.

3. When the director of highways enters into a construction contract pursuant to the provisions of Chapter 5525., Revised Code, which contract requires that the contractor shall enter upon or work adjacent to a railroad right-of-way, he may in his discretion provide that the cost of railroads' protective public liability insurance—which insurance protects the railroads involved against liability imposed upon them by law for damages which result from the contractor's operations and not from their own negligence—in an amount fixed by the director, shall be considered as part of the cost of such project; and he may require the contractor involved to provide such insurance in behalf of any railroad affected.

4. When the director of highways temporarily enters upon or occupies a railroad right-of-way for the purpose of constructing a highway adjacent thereto, the railroad is entitled to compensation for such taking. Such compensation should be based upon the fair market value of the property taken and the damage to the residue; and in ascertaining such damage the director should consider any increased risk of liability or any increased insurance cost imposed upon the railroad as an element which decreases the value of such residue.

Respectfully,
C. WILLIAM O'NEILL
Attorney General