

2371.

CONTRACT—WABASH RAILROAD COMPANY WITH VIL-
LAGE OF MONTPELIER, STATUS—VIADUCT, GRADE CROSS-
INGS, DETOUR, HIGHWAY — MAINTENANCE.

SYLLABUS:

*Status of contract between the Wabash Roalroad Company and the Vil-
lage of Montpelier discussed.*

Columbus, Ohio, June 10, 1940.

Hon. Frederick R. Parker, Prosecuting Attorney,
Bryan, Ohio.

Dear Sir:

Acknowledgment is made of your communication requesting my opin-
ion in the following language:

“Prior to 1906 the Wabash Railroad Company operated a
railroad through the south edge of Montpelier. There were several
at-grade crossings over its right-of-way within the village. In
1906 the Wabash Railroad Company and a group of citizens of
Montpelier entered into a contract which was also approved and
executed by the Village of Montpelier. A copy of this contract
dated October 8, 1906 is enclosed herewith, together with a copy
of the proceedings of the council of the village had on October 9,
1906 relating to this contract.

In accordance with the terms of this contract, the railroad
company moved its division shops and terminal yards from Ashley
to Montpelier where they have been located and maintained con-
tinuously to the present time. The railroad company built the via-
duct as provided for in the agreement. The village and the indi-
vidual parties to the contract caused the real estate in the agree-
ment to be conveyed to the railroad; and the village caused several
grade crossings to be eliminated by vacation proceedings. Copies
of the proceedings of the council relating to the vacation of these
grade crossings are also enclosed herewith.

Since 1906 the approaches and substructures of the bridge have
been maintained by the village, and substantial amounts have been
expended by the village for the maintenance and repair of this
bridge. A statement of expenses incurred by the village since 1906
on this viaduct is enclosed. The substructure has been maintained
by the railroad company.

For your convenience I am enclosing a map of the Village of

Montpelier, and I direct your attention to it. This map has been prepared for this purpose by the clerk of the Village of Montpelier. From this map you will observe that there are no grade crossings across this railroad within the Village of Montpelier and that the only outlet for traffic to or from the south is the Platt Street viaduct mentioned in the agreement. A state highway approaches Montpelier from the south. From the corporation line, the state highway is marked with temporary route signs over this viaduct and through the village. I am informed that the journal entry of the highway department has made this a part of the state system only to the corporation line. If any state highway is to enter Montpelier from the south, however, as you can see from this map, it must cross this viaduct. A few years ago the commissioners of Williams County paid a part or all the cost of replacing the wearing surface only of the approaches to the viaduct. The commissioners have not otherwise participated in the construction or maintenance of this viaduct.

The viaduct in question is now in a very poor state of repair and probably in a very dangerous condition for public travel. School busses have been forbidden to travel over it; "Travel At Your Own Risk" signs have been erected; and the load limit on the viaduct has been reduced to five tons gross. Engineers for the village of Montpelier have informed the village that the viaduct cannot be satisfactorily repaired; and that the only solution is to replace it by new construction.

There is no public watercourse of any nature flowing under this bridge but only the tracks and yards of the Wabash Railroad Company. This railroad is now operating under a federal court receivership.

With reference to the above state of facts, I would appreciate your opinion on the following matters:

1. Is the contract between the village and the railroad a valid, binding obligation on the village?

2. Is it the obligation of the railroad, the village, the county or the state highway department or two or more of them to maintain this viaduct?

3. If a new viaduct is necessary, is it the obligation of the railroad, the village, the county or the state highway department, or two or more of them, to construct such viaduct?

4. May the railroad, the village, the county and the state highway department divide the expense of maintenance or reconstruction of this viaduct; and if so, in what proportions? Must any one or more of them participate in the expense of maintenance or reconstruction of this viaduct?

5. In the event any person or corporation is injured in person or property by reason of the condition of this viaduct, would the railroad company be liable; would the village be liable; would

the county be liable; and would there be any secondary liabilities against the village or the county?"

At the outset, it must be kept in mind that it is necessary to look through the statutes in existence at the time of entering into agreements for the elimination or separation of grade crossings.

Section 3337-17a of the Revised Statutes, as enacted in 95 O. L., 359 in 1902, was in effect at the time the contract to which you refer was executed. The Act, of which said section was a part, was entitled "An act to abolish grade crossings in municipal corporations" and for general provisions with reference to the initiation of the proceedings to abolish grade crossings such as preparations of plans and specifications and the preliminary resolutions of the legislative authority. The Act in Section 6, among other things, provided:

"After the completion of the work the crossings and the approaches shall be kept in repair as follows: When the public way crosses a railroad by an overhead bridge, the cost of maintenance shall be borne by the municipality. * * *"

The contract to which you refer provides for the vacation of certain streets and alleys, and also obligates the railroad company to establish a division point in the village and a number of matters which it is believed unnecessary to consider herein for the purpose of this opinion.

With reference to the maintenance of the structure, said contract provides in part:

"Proper approaches both on the north and south ends of the bridge or overhead crossing to be constructed by the railroad company on Platt Street, as hereinafter provided, shall be built by and at the expense of the Village of Montpelier, and said approaches together with the superstructure of said bridge or overhead crossing *shall thereafter be perpetually maintained by and at the expense of said village and said village shall by vacation of said street or such other action as may be necessary or proper, prevent and discontinue all surface use and travel across the railroad company's tracks or right of way at said point, from and after the completion of said bridge and approaches.*" (Emphasis the writer's.)

Said contract in another paragraph thereof further provides that the railroad company after the construction of the improvement shall, "thereafter perpetually maintain the said sub-structure of said bridge at its own cost and expense."

You enclose with your communication a number of copies of ordinances

passed by the village with reference to the vacation of streets, but do not enclose a copy of the ordinance authorizing the execution of the contract. However, there is a presumption of law, in the absence of evidence to the contrary, that public officials have performed their duties and it will be assumed for the purpose of this opinion, that the proper steps were taken to authorize the contract which was entered into. It will be observed that said contract, in so far as the question of maintenance of the superstructure and sub-structures are concerned is in accord with the provisions of the law then in force.

It will further be noted that Section 8889 of the General Code contains the same provision with reference to such maintenance as the section which was in effect at the time of the execution of this contract.

Section 1229-19 of the General Code has established the rule for the maintenance of such structures in a class of cases therein referred to but said section by its express terms, excludes from the provisions thereof separated crossings which were not constructed in accordance with the provisions of Sections 8863 to 8894, both inclusive.

Inasmuch as the group of sections last above mentioned supplanted Sections 3337-17a to 3337-17f, inclusive, of the Revised Statutes, in the adoption of the General Code it is unnecessary to consider the provisions of Section 1229-19, *supra*, in so far as the obligation between the railroad company and the village is concerned. In any event, it is believed that the section last mentioned deals with bridges, a part of the state highway system, and need not be considered herein, except in so far as it may be necessary, in view of the status of the temporary detour to which you refer.

Inasmuch as the contract, as hereinbefore indicated, was entered into in pursuance to statutory authority, there is little doubt as to its validity.

The above conclusion brings us then to the question further presented with reference to the reconstruction of the superstructure which you state is necessary. In other words, the question presented is what is included within the scope of the term "maintain" as used in the contract and in the statute.

In Opinions of the Attorney General for the year 1928, page 2531, the then Attorney General had under consideration a number of questions with reference to the reconstruction of a bridge carrying a highway over the tracks of a railroad company, which said bridge was located partly within

and partly without a municipality on the state highway which, among other things, involved the question as to the meaning of the term "maintenance" in connection with said structure. The following is quoted from said opinion:

"* * * While the section requires the railroad to 'maintain and keep in good repair, good, adequate and sufficient crossings,' I have no difficulty in arriving at the conclusion that the language used is sufficiently broad as to include what is tantamount to reconstruction if the same be necessary.

'Maintain' has been defined in 38 Corpus Juris on page 334 as follows:

'As its structure suggests, 'maintain' signified literally, to hold by the hand. While it is a word of common use and said to have a well defined meaning, oftentimes its meaning depends upon the intention of the parties and the context of the instrument. It is variously defined as to bear the expense of, to continue; to furnish means for the subsistence or existence of; to hold in an existing state or condition; to hold or preserve in any particular state or condition; to keep from change; to keep from falling, declining, or ceasing; to keep in existence or continuance; to keep in proper condition; to keep in repair; to keep up, to preserve; to preserve from lapse, decline, failure, or cessation; to provide for; to supply with means of support; to supply with what is needed; to support; to sustain; to uphold. Negatively stated, it is defined as not to lose or surrender; not to suffer or fall or decline.'

It is believed that in the use of the language in connection with maintenance of a bridge, maintain relates to the furnishing of the means for keeping such bridge in repair, and preserving the same in good condition so as adequately and safely to provide for the traffic of the public over the same. It follows that if it is the duty of the railroad to maintain said bridge and the bridge is in such condition that the only manner in which it may be continued is by rebuilding the same, that duty would be imposed upon the railroad by virtue of the section.

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From the above, the conclusion would seem to be impelled that it would be the duty of the village to reconstruct the superstructure under consideration, unless, of course, other conditions entered into the matter with reference to the State Highway Department, which will be hereinafter discussed.

You state that the Department of Highways has established the road as a detour, which said detour directs the traffic over the bridge in question and apparently from the plat you submit, the Department of Highways

also indicates the street as a detour after the entrance to the village. You further state that the resolution of the Director in establishing such detour, fixes the municipal corporation as the limits of the detour. Section 1225 of the General Code authorizes the establishment of such temporary detour and in part reads:

“If the director determines that it is impracticable to construct, either within the limits of the highway or upon a new location over private lands, a temporary highway, bridge or culvert to be used by travelers in lieu of the closed highway, bridge or culvert, he shall, before the closing to traffic of the highway, bridge or culvert to be constructed, improved or repaired, place in passable condition for traffic the detour route so selected and marked by him and he shall be required to maintain in a passable condition for traffic such detour route during the entire time that the highway, bridge or culvert under construction is closed to traffic. He shall furthermore be required, at the time of the opening to traffic of the highway, bridge or culvert so constructed, to restore such detour route to as good condition as it was at the time of its selection by him as a detour route. The expense of repairing, maintaining and restoring such detour route may be paid from the maintenance and repair fund of the department, as may be determined by the director.”

In view of the section last above quoted, it is rather difficult to see how the Department of Highways may direct traffic to the edge of a corporation and over a bridge as a detour route and then maintain that the temporary route terminates at the edge of the village. If the traffic actually is diverted over this bridge by the detour signs of the Department of Highways, in all probability it would be regarded as a State Highway subject, of course, to the temporary uses referred to. Inasmuch as the section requires a temporary route to be maintained in a passable condition, it may be that the Director of Highways, if such detour route is needed, may be authorized to reconstruct or contribute toward the reconstruction of a bridge, if such is necessary in order to carry the traffic. It further may be that in the event that while such bridge is carrying traffic directed over it by the Department of Highways, in the event of an accident due to the incapacity of the bridge, that one injured thereby may have a sundry claim against the State.

In your inquiry you do not state whether the street in question is a county road. If it is a county road, by reason of the provisions of Section 2421 of the General Code, county commissioners are required to maintain

it. County commissioners shall construct and keep in repair such bridges. If such bridge is located wholly upon a municipal street, there is no obligation upon the county with reference to its reconstruction or maintenance. However, it has been held that if the municipality does not demand and receive a portion of the bridge fund, the county has authority to keep a bridge in the city in repair, although it may not be situated on a State or County road. *Hall v. Hall*, 15 O. D. (N. P.) 167. It would, therefore, seem that in any event the county may assist the municipality in the reconstruction of such viaduct. Furthermore, it may be pointed out in this connection that the Director of Highways has been made an allotment of Federal Aid Grade Crossing Funds which in all probability may be used in such manner as may be agreed upon between the Village and the State.

I come now to your fifth question which deals with the liability of the respective parties in the event of injury to person or property by reason of the use of said bridge. Inasmuch as such liability is one which can be determined only upon consideration of the facts peculiar to each case and would have no direct bearing upon the responsibility for maintenance and repair of the bridge, I feel that it is unnecessary to answer this question.

Based upon the foregoing, and in specific answer to the inquiries propounded, it is my opinion that:

1. The contract under consideration between the Village of Montpelier and the Wabash Railroad Company is a valid and binding obligation of the village.
2. By reason of the terms of the contract and the law in effect at the time of its execution, the village is directly obligated to maintain the superstructure of the viaduct under consideration and rebuild it if necessary.
3. The village and county may cooperate in the rebuilding of such structure in any amounts agreed upon and the railroad company may also contribute but cannot be forced to do so.
4. If the detour route, as established by the Director of Highways, directs traffic over this bridge, the State may contribute toward its reconstruction cost, if such is necessary in order to make the road safe for the traveling public.

Respectfully,

THOMAS J. HERBERT,
Attorney General.