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1. RAILROAD CROSSINGS — SECTION 8846 G. C. AND ITS RELATED SECTIONS GOVERN CONSTRUCTION AND REPAIR OF PUBLIC RAILROAD CROSSINGS — EXCEPTION — ANY MODIFICATION BY SECTION 6956 G. C.
  
2. IMPROVEMENT, PUBLIC RAILROAD CROSSINGS — WHERE ORIGINAL CONSTRUCTION MATERIALLY CHANGED — SUCH ACTION WILL CONSTITUTE AN “ALTERATION” IN LEGAL CONTEMPLATION — GOVERNED BY SECTION 8868 G. C. AND ITS RELATED SECTIONS — EXCEPTION — ANY MODIFICATION BY SECTION 6956 G. C.

## SYLLABUS:

1. Section 8846 of the General Code and its related sections govern the construction and repair of public railroad crossings except as the same may be modified by Section 6956, General Code.

2. Where an improvement of a public railroad crossing materially changes the original construction, such action will constitute an “alteration” in legal contemplation and be governed by Section 8868 of the General Code and its related sections, except as the same may be modified by Section 6956, General Code.

Columbus, Ohio December 27, 1944

Hon. H. Lloyd Jones, Prosecuting Attorney  
Delaware, Ohio

Dear Sir:

Acknowledgment is made of your communication requesting my opinion, which reads as follows:

“It has been determined by the township trustees that the grade approaching a railroad crossing over a township road is too steep and must be repaired by filling in to make the approach more level.

Does Section 8846 or Section 8868 control as to who should pay the expense thereof?”

In view of the legislative history, considerable confusion has resulted with reference to Section 8843 of the General Code, which is in pari materia with Section 8846 of the General Code to which you refer. For instance, in Pages Ohio General Code, two sections are carried under the same number with a notation as to the history.

The 87th General Assembly in Amended Substitute House Bill No. 67, which was an Act to revise the laws relating to the Department of Highways, etc., amended the then existing Section 8843. This section as amended in said Act provided that the railroad company at any crossing at grade of any street or road:

“\* \* \* shall construct, reconstruct, improve, maintain and repair that portion of the highway at such crossing and line between the outside end of the ties and also that portion lying between the tracks \* \* \*”.

and that the cost of such repair shall be borne by the railroad company. This section further provided for the approval of the plan by the Director of Highways in case of a state highway and by the County Surveyor in case of county and township roads. The section further authorizes the Director of Highways or the County Surveyor to make such improvements if the railroad company failed to do so and further authorizes the collection of the costs and expenses as in a civil action. Said bill was passed April 21, 1927, approved May 10, 1927 and filed in the office of the Secretary of State on May 24 and by its express terms went into effect on the first Monday of January, 1928. However, the same General Assembly in House Bill No. 511, which was passed on May 10, of said year, approved on May 10 filed in the office of the Secretary of State on May 24 and by its express terms went into effect on the first Monday of January, 1928, amended said Section 8843 as passed in Amended Substitute House Bill No. 67.

It is believed that by reason of the declarations in the second bill and the reasoning in the opinion of the Supreme Court in *State ex rel v. Moore*, 124 O. S., 256 that the latter enactment became law. Said Section 8843 of the General Code provides:

“Companies operating a railroad in this state, shall build and keep in repair good and sufficient crossings over or approaches to such railway, its tracks, sidetracks and switches, at all points

where any public highway, street, lane, avenue, alley, road or pike is intersected by such railway, its tracks, sidetracks or switches; also good and sufficient sidewalks on both sides of streets intersected by their roads the full width of the right of way owned, claimed or occupied by them. Crossings and approaches outside of municipal corporations, the township trustees shall have power to fix and determine as to their kind and extent, and the time and manner of constructing them."

It will be observed that the section last above quoted relates to "crossings and approaches", whereas, the former related only to that part of the crossing between the ends of the ties and between the rails. Complications further arise by reason of the fact that in House Bill No. 511, hereinbefore referred to, Section 6956 of the General Code was amended and in its amended form provides exactly the same thing as was provided in Section 8843 as amended in Substitute House Bill No. 67. It follows that the latter section having been enacted at the same time and in the same act that Section 8843 was amended as hereinbefore set forth, they must necessarily be construed together. It is also evident that the sections are inconsistent in some respects. That is to say, Section 8843 relates to building and keeping in repair crossings over railroads and approaches. Outside of municipalities, the township trustees have the power to fix and determine the nature of the construction and repair and the related sections authorize the township trustees to enforce their orders in this respect.

Section 6956 clearly sets forth the duty of the railroad company and limits the construction, repair or improvement to the space between the end of the ties and makes no mention of approaches or other portions of said crossing located upon the right of way.

As hereinbefore pointed out, the supervision of such construction is imposed upon the Director of Highways in connection with state highways and the county surveyor in roads other than state highways. It will, therefore, seem imperative that any interpretation of Sections 8843 and its related sections must take into account the express provisions of Section 6956 and the former section would seem to have application only to crossings erected upon the railroad right of way outside of the space between the ends of the ties.

Section 8845 provides for notice to be served when a crossing is to be "built or repaired."

Section 8846 to which you refer reads:

“A railway company so notified must comply with such notice within a period of thirty days after receiving it. On failure so to do, the township trustees, or council as may be the case, may cause such crossing, approach or sidewalk to be constructed or repaired as before ordered, and recover the cost of so doing with interest thereon, in a civil action against the railroad company, in the name of the trustees or municipality.”

Sections 8858 to 8862 of the General Code relate to private crossings and have no application to the question propounded.

Section 8863 of the General Code, et seq., relate to the “alteration” or “elimination” of public grade crossings.

Section 8868 to which you refer reads:

“The cost of the construction of the improvement in the crossing, including the cost of land or property purchased or appropriated, and the payment of damages to abutting property shall be apportioned as follows: The railroad company or companies, if several railroads cross a public way at or near the same point, shall pay unless otherwise agreed upon, fifteen percent and the municipality or county eighty-five percent of such cost.”

An examination of the numerous sections hereinbefore mentioned clearly discloses that there are two distinct procedures outlined with reference to public grade crossings. One relates to the construction and repair of such crossings and the other to the alteration or elimination of an existing crossing. It follows that it is a question of fact to be determined in each instance as to whether the contemplated improvement is an alteration or a repair in view of the statutes.

While it is not the function of the Attorney General to determine questions of fact, it is obvious that if the work proposed simply restores the crossing to its original condition, such action would be a repair. On the other hand, if the proposed work results in materially changing the original grade from its former status, such procedure would be an alteration within the meaning of the statutes.

In the case of *Grinnell et al v. County Commissioners*, 6 C. C. (n.s.), 180 the court had under consideration the sections being considered

herein as they were originally enacted. By analogy it is believed that this case clearly recognizes the distinctions hereinbefore drawn with reference to repair and alteration.

In view of the foregoing you are advised that:

1. Section 8846 of the General Code and its related sections govern the construction and repair of public railroad crossings except as the same may be modified by Section 6956, General Code.

2. Where an improvement of a public railroad crossing materially changes the original construction, such action will constitute an "alteration" in legal contemplation and be governed by Section 8868 of the General Code and its related sections, except as the same may be modified by Section 6956, General Code.

Respectfully,

THOMAS J. HERBERT

Attorney General