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RAILWAY RELOCATION—AT EXPENSE OF RAILWAY IF WITHIN ROADWAY—CONTRACT RIGHTS OF RAILWAY MAY BE ABRIDGED WHEN INTERFERING WITH USE OF ROAD BY PUBLIC—§5515.02 R.C.

SYLLABUS:

1. Under the provisions of Section 5515.02, Revised Code, the Director of Highways may direct a Railway Company occupying a part of a road or highway on the state highway system under and by virtue of a franchise or permit, to relocate its property within the bounds of such road or highway, when in his opinion such occupation constitutes an obstruction in such road or highway, or may interfere with the contemplated reconstruction of such road or highway, or may interfere with the use of such road or highway by the traveling public; and the costs of such relocation shall be borne by the Railway Company.

2. If all or any part of the proposed relocation is not within the bounds of such road or highway the Director of Highways is without authority under the provisions of Section 5515.02, Revised Code, to direct such Railway Company to so relocate at its own expense.

3. A permit to lay and maintain rails or tracks, in a public street issued to a Railway Company by the legislative authority of a municipal corporation, while being a contract which cannot arbitrarily be rescinded or impaired, is held in subordination to the superior rights of the public and may be modified or revoked by such legislative authority in order to make such street suitable and convenient for the use of the traveling public.

4. Section 5515.02, Revised Code, provides the only authority for the Director of Highways to order a Railway Company to relocate its tracks which are occupying a state highway, at the expense of the Company.

Columbus, Ohio, June 18, 1959

Hon. E. S. Preston  
Director, Department of Highways  
Columbus, Ohio

Dear Sir :

I have before me your request for my opinion reading as follows :

“The council of the City of Portsmouth, Ohio, by Resolution No. 482, adopted June 20, 1877, granted the Scioto Valley Railway Company, now the Norfolk and Western Railway Company, the authority to locate and construct its line of railroad in Gay Street, in the City of Portsmouth. The only restriction imposed by this ordinance being that the right-of-way therein granted would be used by any other railway in common with the Scioto Valley Railway and subject to certain general regulations and the Statutes of Ohio.

“The Ohio Department of Highways, in cooperation with the City of Portsmouth, is contemplating the reconstruction of Gay Street and in so doing, it is proposed that the railroad track be relocated about 15' east of its present location so that it will be separated, by relocation, from the traveled way of Gay Street.

“The Norfolk and Western Railway Company was furnished prints of the plans for the reconstruction of Gay Street, including the relocation of their track, and were advised that since the track now occupies the paved area of a dedicated city street, it will be necessary for them to relocate the track at their own expense.

“The Railway Company has objected to bearing the cost of relocating the track on the grounds that the original permit granted by the City of Portsmouth does not mention the length of the time this permit shall remain in force nor is there any provision for ordering the railroad to move the track from the city street. They contend that the work is being done for the benefit of the traveling public and all costs necessary to relocate the track should be borne by the public authorities desiring the relocation.

“Your opinion is requested on three questions raised concerning the relocation of the Norfolk and Western Railway Company track. In this particular instance :

- “1. Under Ohio Law, is the Railway Company obligated to pay for relocating their track.
- “2. Does the City or State have the power to amend the franchise so as to impose such obligation.

"3. May the Railway Company otherwise be required to pay the relocation cost.

"Your early consideration of this matter will be appreciated.

"As a matter of information, we are attaching one copy each of a portion of Resolution No. 482 and Ordinance No. 382 which cover the original installation of the subject railroad track."

The Department of Highways, being a statutory agency of the state, can have and exercise only such powers as have been granted to it by statute. The functions of the Department are set forth in Section 5501.02, Revised Code, partially, as follows:

"The functions of the department of highways shall be:

"(A) To establish state highways on existing roads, streets, and new locations and to construct, reconstruct, widen, resurface, maintain, and repair the state system of highways \* \* \*

"(D) To co-operate with the counties, municipal corporations, townships, and other subdivisions of the state in the establishment, construction, reconstruction, maintenance, repair, and improvement of the public roads and bridges;"

Section 5511.01, Revised Code, in part, defines the state highway system as follows:

"All state highways established by law shall continue to be known as state highways, and the state highway system established by law shall continue to be known as the state highway system.

"\* \* \*

"The state highway routes into or through municipal corporations, as designated or indicated by state highway route markers erected thereon on October 11, 1945, are state highways and a part of the state highway system. The director may erect state highway route markers and such other signs directing traffic as he thinks proper upon those portions of the state highway system lying within municipal corporations, and the consent of such municipal corporations to such erection and marking shall not be necessary. No change in the route of any highway through a municipal corporation shall be made except after notice and hearing. No duty of constructing, reconstructing, maintaining, and repairing such state highways within municipal corporations shall attach to or rest upon the director; but he may enter upon such state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain, and repair the same provided the municipal corporation first consents thereto by resolution of its legislative authority."

In addition to the aforementioned statutes the Legislature has enacted provisions in regard to the improvement of the state highway system where individuals, firms, or corporations are occupying, by franchise, or otherwise, portions of a highway. Regarding the removal of structures constituting obstructions or interferences as in the instant case, Section 5515.02, Revised Code, reads as follows:

“All individuals, firms, and corporations using or occupying any part of a road or highway on the state highway system, or the bridges or culverts thereon, with telegraph or telephone lines, steam, electrical, or industrial railways, oil, gas, water, or other pipes, mains, conduits, or any object or structure, *other than by virtue of a franchise or permit granted and in force*, shall remove from the bounds of such road, highway, bridge, or culvert, their poles and wires connected therewith, and any tracks, switches, spurs, or oil, gas, water, or other pipes, mains, conduits, or other objects or structures, when in the opinion of the director of highways they constitute obstructions in such roads, highways, bridges, or culverts, or interfere or may interfere with the contemplated construction, reconstruction, improvement, maintenance, or repair of such roads, highways, bridges, or culverts thereon, or interfere or may interfere with the use of such roads, highways, bridges, or culverts thereon, by the traveling public.

“All individuals, firms, or corporations so occupying any road or highway on the state highway system, or the bridges or culverts thereon, *under and by virtue of a franchise or permit granted and in force*, shall relocate their properties and all parts thereof within the bounds of such road, highway, bridge, or culvert when in the opinion of the director they constitute obstructions in any such road, highway, bridge, or culvert, or interfere with or may interfere with the contemplated construction, reconstruction, improvement, maintenance, or repair of such road, highway, bridge, or culvert, or interfere with or may interfere with the use of such road, highway, bridge, or culvert, *which relocation within the bounds of such road, highway, bridge, or culvert* shall be in the manner and to the extent prescribed by the director.

“If, in the opinion of the director, such individuals, firms, or corporations have obstructed any road or highway on the state highway system, or the bridges or culverts thereon, or if any of their properties, in his opinion, are so located that they do or may interfere with the contemplated construction, reconstruction, improvement, maintenance, or repair of such road, highway, bridge, or culvert, or if, in his opinion, they interfere with or may interfere with the use of such road, highway, bridge, or culvert by the traveling public, said director shall notify such individual, firm, or corporation directing the removal of such obstruc-

tion or properties, or the relocation of such properties, and, if such individual, firm, or corporation does not within five days from the service of such notice proceed to remove or relocate the same and complete the removal or relocation within a reasonable time, the director may remove or relocate the same by employing the necessary labor, tools, and equipment. The costs and expenses shall, in the first instance, be paid by the director out of any appropriation of the department of highways available for the establishment, construction, reconstruction, improvement, maintenance, or repair of highways, and the amount thereof shall be certified to the attorney general for collection by civil action. Said notice shall be served by the sheriff in the manner as summons in civil actions." (Emphasis added)

Thus, individuals, firms, or corporations occupying a road or highway on the state highway system so as to cause an obstruction or interference under Section 5515.02, *supra*, may be ordered to relocate by the Director of Highways; provided that, if an individual, firm, or corporation is so occupying under and by virtue of a franchise or permit granted and in force, the Director may order the relocation only within the bounds of such road or highway.

The last paragraph of Section 5515.02, *supra*, provides that the costs and expenses of such removal or relocation must be borne by the individuals, firms, and corporations ordered by the Director to remove or relocate. In this regard one of my predecessors in office, in interpreting the language of former Section 1199, General Code (now Section 5515.02, Revised Code), stated:

"\* \* \* Such section definitely indicates that the cost of such relocation of property shall be borne by the owner of the utility property, for in the last paragraph of such section it is provided that if the property is not removed or relocated by the owner within five days after receipt of notice from the director so to do, he may remove or relocate the same; that 'costs and expense thereof shall, in the first instance, be paid by the director out of any appropriation of the department of highways available \* \* \* and the amount certified to the attorney general for collection by civil action.'" (Opinion No. 3757, Opinions of the Attorney General for 1941, at page 357.)

Your first question asks, "Under Ohio Law is the Railway Company obligated to pay for relocating their track?" In view of the statutes discussed above, the answer to this question appears to depend on two factors. First, does the Railway Company occupy the highway under a franchise

or permit granted and in force? Second, if such a franchise or permit does exist, is the proposed relocation within the bounds of the highway?

Resolution No. 482 of the Council of the City of Portsmouth, Ohio, adopted June 20, 1877, which you attached with your letter, granted the Scioto Valley Railway Company, now the Norfolk and Western Railway Company, authority to locate its line of railroad in Gay Street in the City of Portsmouth. The Resolution did not contain a termination date.

Since the grant to the Railway Company was made by the legislative authority of the City of Portsmouth and did not contain a termination date, I believe that said grant must be considered to be "a franchise or permit granted and in force," within the purview of Section 5515.02, Revised Code, *supra*. Thus, under the provisions of Section 5515.02, *supra*, the Director may order the Railway Company to relocate its property *within the bounds of the highway (Gay Street)* but may not order the Railway Company to relocate its property outside the bounds of the highway at its own expense.

Your letter does not state whether the proposed relocation in the City of Portsmouth will be within or without, or partly within and partly without, the bounds of the highway. As discussed above, I am of the opinion that, if the relocation is within the bounds of the highway, the Railway Company is obligated to pay for the expense of relocating its property, and if the relocation is outside of the bounds of the highway, the Railway Company is not obligated to pay such expense.

If the relocation is to be partly within and partly without the bounds of the highway a more difficult question is raised regarding the Director's right to order relocation under Section 5515.02, *supra*, and regarding the liability for the expense of relocation. Section 5515.02, *supra*, contains no specific provision for such an instance, thus, the language of the second paragraph of said section must govern in such a case. In this regard, Section 5515.02, *supra*, reads in pertinent part:

"\* \* \* All individuals, firms, or corporations so occupying any road or highway on the state highway system, or the bridges or culverts thereon, under and by virtue of a franchise or permit granted and in force, *shall relocate their properties and all parts thereof within the bounds of such road, highway* \* \* \*

(Emphasis added)

It appears, therefore, that under the second paragraph of Section 5515.02, Revised Code, *all* of the relocation ordered by the Director must

be within the bounds of the highway and the Railway Company can not be made liable for the costs of relocation if *any* of the relocation is outside of the bounds of the highway.

Your second question asks whether the city or the state has the power to amend the franchise of the Railway Company so as to impose the obligation to pay the expenses of relocation, if such obligation does not already exist. As noted earlier, if the Railway Company occupies the highway other than by virtue of a franchise or permit granted and in force, the Director may order the relocation or removal at the expense of the Company regardless of whether the relocation is within or without the bounds of the highway. Thus, the question is, can the franchise or permit be repealed to allow the Director to so order?

Resolution No. 482 of the Council of the City of Portsmouth, Ohio, *supra*, did not contain a termination date but did include the words:

“\* \* \* free of charge, subject, however, to such restrictions and limitations as are placed thereon by this Resolution and Statutes of Ohio \* \* \*”

Whether the reference to “Statutes of Ohio” means only statutes existing at the time of the passage of the Resolution or includes later enacted statutes is questionable. This question need not here be considered, however, because it is well settled that a franchise or permit holder holds such franchise or permit subject to the rights of the public. Thus, the franchise may be cancelled by the city in the interests of the general public. In this regard it is stated in 27 Ohio Jurisprudence, 2nd, at pages 261 and 262:

“Rights in streets or highways granted to individuals or corporations are at all times held in subordination to the superior rights of the public. The grantee takes them subject to the paramount right of the public authorities to grade and improve the way and to make such requirements and regulations as are necessary and reasonable in order to make it suitable and convenient for the use of the traveling public. It is accordingly well established that franchises, licenses, and permits for the use of streets for private purposes, or for the operation of public utilities, are at all times held in subordination to the rights of the public to the use thereof for travel and transportation in the ordinary and usual modes, and that the grantees of such franchises, etc., take them subject to the paramount right of the municipality to grade and improve such streets, and to make and enforce such regula-

tions as are reasonably necessary in order to make the streets suitable and convenient for the use of the traveling public. \* \* \*

Also, in the case of *Mt. Vernon v. Berman & Reed*, 100 Ohio St., 1, page 9, it is stated:

“\* \* \* We think there is general concurrence in the view that when a franchise has expired, or has been revoked, the grantee corporation, in the absence of provisions in the contract to the contrary, may be compelled to remove its structures, and, on the other hand, if it desires to remove them, cannot be prevented from doing so. 19 Ruling Case Law, 1161, Section 436; *Laighton v. City of Carthage*, 175 Fed. Rep., 145; *Cleveland Electric Ry. Co. v. Cleveland et al.*, 204 U. S., 116, and *Detroit United Railway v. City of Detroit*, 229 U. S., 39. \* \* \*

For the same reasons, the Legislature could validly enact a law which would allow the Director to order relocation at the expense of the company occupying the highway, regardless of the existence of a permit and regardless of whether the relocation is within the bounds of the highway.

Your third question asks whether the Railway Company may otherwise be required to pay the relocation costs. I assume that by “otherwise” you mean other than by the procedure set forth in Section 5515.02, *supra*. On this point it appears to me that the Legislature, in enacting Section 5515.02, Revised Code, intended that the provisions of this section should govern exclusively, the removal or relocation of structures constituting obstructions or interferences on the state highway system. Thus, I can see no method by which the Director might direct a relocation at the expense of the Railway Company other than that provided in Section 5515.02, Revised Code.

Answering your specific questions, therefore, it is my opinion and you are advised:

1. Under the provisions of Section 5515.02, Revised Code, the Director of Highways may direct a Railway Company occupying a part of a road or highway on the state highway system under and by virtue of a franchise or permit, to relocate its property within the bounds of such road or highway, when in his opinion such occupation constitutes an obstruction in such road or highway, or may interfere with the contemplated reconstruction of such road or highway, or may interfere with the

use of such road or highway by the traveling public; and the costs of such relocation shall be borne by the Railway Company.

2. If all or any part of the proposed relocation is not within the bounds of such road or highway the Director of Highways is without authority under the provisions of Section 5515.02, Revised Code, to direct such Railway Company to so relocate at its own expense.

3. A permit to lay and maintain rails or tracks, in a public street issued to a Railway Company by the legislative authority of a municipal corporation, while being a contract which cannot arbitrarily be rescinded or impaired, is held in subordination to the superior rights of the public and may be modified or revoked by such legislative authority in order to make such street suitable and convenient for the use of the traveling public

4. Section 5515.02, Revised Code, provides the only authority for the Director of Highways to order a Railway Company to relocate its tracks which are occupying a state highway, at the expense of the Company.

Respectfully,

MARK McELROY

Attorney General