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John M. Heffelfinger

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Elimination of Railroad Grade Crossings

*John M. Heffelfinger**

WHY DO FEDERAL, STATE AND LOCAL AGENCIES fail to bend every effort towards the elimination of all important grade crossings at railroads? With present day traffic, both on the railroads and on the highway, and the fine roads coupled with the motorist's desire to save time, every crossing is an important factor in our daily lives and the safety of our people.

The new program for the expenditure of 34 billions of dollars for the construction of highways throughout the United States will have little or no effect on elimination of existing grade crossings. This is because most of these highways will be built on new rights of way. Where they cross either highways or railroads, instead of creating new crossings at grade, grade crossings will be eliminated as these crossings are encountered. In some cases some existing roadways will be relocated, which will in many cases do away with existing grade crossings. Only in these cases will the new freeways help in reducing the tremendous number of grade crossings.

One of the main obstacles to progress is probably the fact that the entire law concerning grade crossing separations is in a state of chaos.

The statute in Ohio governing grade crossing separations is contained in 77 sections of the code. There are 88 counties in the state—nearly one section for each county.

Next, there is division of the code sections as among work in which the state has jurisdiction, work in which the county has jurisdiction, and work in which the municipality has jurisdiction. Then there are borderline highways, which are state highways in municipalities or counties, which require special considera-

* Chief Engineer of Bridges, City of Cleveland; Member of the Ohio bar; B.C.E. and C.E., Ohio State University, LL.B and LL.M., John Marshall Law School (Now: Cleveland-Marshall Law School), D.J.S. Cleveland-Marshall Law School; Member, Am. Assn. Advancement of Science, Am. Society of Civil Engineers, National Society of Professional Engineers, Am. Bar Assn., Ohio State Bar Assn., etc.

[*Editor's Note:* This article consists of extracts from Chapter VIII of the author's work entitled *Law of Grade Crossing Elimination* submitted in partial fulfillment of the requirements for the degree of Doctor of Juridical Science, Cleveland-Marshall Law School.]

tion, and cases where there are borderline roads between two counties or between cities and counties, which require still more provisions.¹

It is obvious that each county should not be a law unto itself. Nor should the state, through a commission, as is the custom in a number of states, govern and regulate the entire procedure.

It would seem that the Code Commissioners who revised the latest section of the Ohio Code (now the Revised Code), did not give it very much thought, study or effort. The revised provisions could hardly have been made more confused and complicated than their present form. Nor is it apparent that they reviewed the codes of various other states or the basic needs in this state before writing or revising the code.

A criticism of this sort should not be made without some suggestion as to its correction or remedy, and a serious attempt has been made to do this for a portion of the code.

Basically, there are three main agencies in Ohio: 1st, the state; 2nd, the county; and 3rd, the municipality (city). Each agency has its own problems which differ materially from those of the others.

A railroad as such is not much concerned whether, when it enters, leaves or crosses the state, it crosses city streets, county roads or state highways. Nor is it greatly concerned how much its tracks and service interfere with the habits, safety or economy of a community in relation to how it is served by the highways.

¹ The authority conferred on municipalities with respect to the elimination of grade crossings is a police power and must be exercised for a public purpose. It cannot be limited or restricted by action of the municipality itself, except under its specific statutory powers.

Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89, *affd.*, 167 U. S. 88, 17 S. Ct. 748 (1895);

Cincinnati v. Cincinnati Traction Co., 96 Ohio St. 602, 118 N. E. 1082 (1917);

Louisville & N. R. Co. v. Cincinnati, 76 Ohio St. 481, 81 N. E. 983 (1907);

Quimby v. Cleveland, 191 F. 68 (D. C. Ohio, 1911).

As to the powers of County Commissioners, see:

Williams v. Chesapeake & O. R. Co., 7 N. E. 2d 570 (Ohio, 1936);

Stoner v. Pittsburgh C. C. & R. Co., 9 N. P. (N. S.), 337 Ohio D. 440 (1909).

Power of Railroad Company:

Cincinnati, Lebanon & R. Co. v. Cincinnati, 6 N. P. (N. S.), 289 (Ohio, 1907);

Norfolk & W. R. Co. v. Zanesville Elect. R. Co., 18 N. P. (N. S.), 289 (Ohio, 1915).

The purpose of all this critical comment is to lay the groundwork for suggestions for code corrections. It is well to outline a procedure and form in order to see if a basic code cannot be evolved, a code which can be used not only in Ohio, but in any other state. Certainly some aspects of such a sound code would be as follows:

1. A code should be uniform, so that it can be applied anywhere in the state, whether on a state highway, county road or city street.
2. A code should permit the affected section or subdivision of the state to decide whether or not it wants a crossing eliminated, based on its own ideas of whether or not it is necessary and its ability and willingness to pay for it.
3. A code should be as simple as it is possible to make it, and as easy to understand and apply as is possible.
4. There should be limitations set by the code, so that large corporations cannot take advantage of weaker communities.
5. A uniform method of acquiring property should be ordered or suggested, and limitations placed upon purchases.
6. A simple, uniform procedure for all courts should be set up.
7. A single rule for acquisition of property and payment of damages should be used.
8. A single rule as to setting up of a financial procedure should be incorporated.
9. Maintenance problems and rules of procedure to take care of all situations should be provided.
10. Methods of handling the construction work and of accounting at the completion of work should be provided.
11. Physical construction regulations should be made.
12. New highways should be outlined.

No attempt will be made in this article to re-write the entire code as it relates to grade crossings, but two or three sections will be cited and re-written into the form that I feel would make for clearer rules to follow in this class of work.

The following is a suggested revision of the sections of a new code which will cover all points bearing on the subject, whether related to the state, county or a municipality:

Grade Crossing Elimination (outline of section) (proposed)

1. Alteration or elimination of a grade crossing.
2. Enabling legislation.
3. Preparation of agreement.
4. Preparation of plans and estimates of costs.
5. Regulations as to clearance grades on railroad and highways.
6. Regulations as to approach grades on railroad and on highways.
7. Acquisition of land.
8. Determination of damages.
9. Dual ownership of highway.
10. Multiple railroads.
11. Apportionment of construction cost.
12. Maintenance by railroad and public body (municipality, county, state).
13. Failure to maintain.
14. Cost of maintenance.
15. Power to relocate railroad and highways.
16. What cost of construction includes.
17. Company failing to comply with agreement.
18. Petition to court.
19. Contents of petition.
20. Procedure.
21. Order of the court.
22. Notice of intention to make improvement, to property owners.
23. Filing of claims.
24. Judicial inquiry into claims.
25. Petition for grade crossings.
26. Contracts approved by attorney general.
27. Failure to pay its proportionate part of cost on the part of the railroad.
28. Appeal to Public Utilities Commission.
29. Towns and Villages.
30. Accounting.
31. Forms.

Section 1. Alterations and Elimination of Grade Crossing (proposed)

The first item which is revised refers to the initial procedure to be followed in getting a grade separation project started. There

now are three code sections referring to this division of the subject—Ohio R. C. Secs. 4957.01, 5523.01 and 5561.01. I would combine all three into one paragraph as follows:

Suggested Section 1: "If the legislative authority of a municipal corporation, Board of County Commissioners, or Director of Highways of the State of Ohio, in which a railroad and street, road or highway cross each other at grade or otherwise, and the Board of Directors of the railroad company, by mutual agreement determine that it is the opinion of the parties affected that the security and convenience of the public require alterations in such crossing, including the approaches, in the manner agreed upon by the railroad and public body affected, then the improvement shall proceed as set forth in the following sections of the code."

There is no need to recite four or five times whether the street will go over or under the railroad, and whether or not the street parallels the railroad. These points will have been thoroughly gone into by both parties before an agreement has been reached upon which the physical work can be started. There is no need to provide an entire section of the code merely to take care of the State Highway Director. Each public body has its own rules of procedure which must be followed before a working agreement can be made with the railroad.

Section 4. Preparation of Plans, Specifications and Estimate of Cost (proposed)

The next section to be revised is that pertaining to cost of improvement. In the outline above, it is designated as Section 4. Before work can proceed in anything like an intelligent manner, a set of plans and specifications must be prepared, and from these an approximation of an estimate of cost must be made. The present code contains the following sections covering this phase of the improvement.

Section 4957.05—Apportionment of Cost.

Section 4957.12—Preparations of Plans and Specifications.

Section 5523.05—Plans and Specifications.

Section 5523.11—Plans of Proposed Improvement.

Section 5523.18—Cost of Improvement.

Suggested Section 4: "The legislative authority of a municipal corporation, Board of Commissioners or State Highway Director shall cause to be prepared: (1) complete plans showing

the location of the railroad facilities and the highway, the character and location of all supporting and bridge structures, size and location of retaining walls or slopes in lieu of walls, all clearances over the railroad tracks or highways as provided in Section 5 of this title, all streams or other natural objects or barriers to be encountered including switch tracks and sidings, all grades on approaches, and all properties affected by the improvement; (2) complete specifications covering the kinds and classes of work, methods of handling the work and such other information as is necessary for a complete and understandable order for doing the physical work; and (3) the preparation of an estimate of cost in sufficient detail and accuracy so that it will permit the public authorities to acquire funds through the issuance of bonds or appropriation of funds to pay its proportionate share of the total cost; (4) plans, specifications and costs shall be subject to review and alteration, where necessary, not by the agency preparing them, but by the agency charged with a proportion of the cost; (5) plans, specifications and estimates of cost shall be the subject for and the basis of the agreement between the parties as set forth in Section 3, *supra*.”

Section 12. Maintenance by Railroad and Public Body (Having Jurisdiction) (proposed)

A third and last portion of the Code which I shall attempt to re-write in order to eliminate the present duplication and confusion relates to the maintenance of the improvement upon the completion of same.

This portion of the work now is covered by Code Sections 4957.06, Cost of Maintenance of Bridge borne by County or State; 4957.24, Cost of Maintenance; 5523.17, and 5561.12, Cost of Repairs.

Suggested Section 12: “Upon completion of the improvement, the crossings and approaches shall be kept in repair as follows:

A. Where the public-way crosses the railroad, or railroads, or interurban railroad, by an overhead bridge, the responsibility for the maintenance, repairs and renewals must be borne by the municipality, by the county or by the state as may be provided by law.

B. When the public-way passes under the railroad, railroads, or interurban railroad, the bridge, including its piers and abut-

ments, shall be maintained, repaired or replaced by the railroad company, or the railroad company and the interurban as agreed between them; or in case there is no agreement, the responsibility and cost of such work may be fixed by the Court of Common Pleas in the county in which the improvement is located.

C. The approaches to either an underpass or overpass shall be maintained, repaired and replaced by the municipality, county or state as provided in the original agreement designating the public agency responsible for the improvement; and the cost of all maintenance, repairs and renewals shall be borne by the same agency.

D. The portion of the highway beneath the bridge carrying the railway over the highway, including all drainage structures installed as part of the improvement shall be maintained, repaired and renewed by the municipality, county or state having original jurisdiction of the improvement, and the cost of such maintenance, repairs or renewals shall be borne by the same agency.”

The foregoing contains suggested changes for three sections of the revised outline for a revised code. If a new code is to be written, the entire 77 sections should be thoroughly reviewed for duplications first, next for clarity, and third, for practicability. For example, the code as it now stands, repeats three times the clearances which are mandatory for the railroads, but says nothing about what clearance is necessary for highways. A new code should set forth what each situation demands, such as 21 feet for clearance for railroads and 14 feet for clearance for highways. It has long been recognized in practice that these clearances are not always possible to get, so a new code should recognize this situation and place an absolute minimum clearance 16.5 feet for the railroad and 12 feet for a highway, but provide that these clearances shall not be used except upon order of the Common Pleas Court of the county in which the improvement is to be made and then only upon agreement between the railroad and public body, after exhaustive study has shown that there is no other course to follow except to close the highway and re-route it to another location where recognized standards for clearances can be obtained.

The entire code should have the same treatment for such elements as grades, safety features such as handrailings and curbs, sight distances, divided roadways, types of roadway surfaces, and many other matters. These are all physical features.

Then there are operating features which could be spelled out in the code in the sections as outlined above. These are such items as what the agreement shall contain, including accounting, final records for public use, who shall handle the purchase of property, settlement of damage claims, who shall handle applications in court for the determination of damage to property in the event the property owner refuses to accept the settlement proposed by the party who is designated to handle these matters, and many more.