

DRAINAGE WORKS ON RAILWAY LANDS*

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THE necessity for distinguishing between railway lands and the lands and roads of private or municipal owners in working out the provisions of the Ontario drainage laws, arises from the fact that nearly all railways are created and controlled by the Dominion government, while the municipalities, and the drainage laws which they are empowered to set in motion, are under control of the provincial government.

In the matter of direct taxation, the authority of the province extends to railway lands and companies equally with other lands and their owners, and, consequently, in so far as assessment alone is considered, there has never been any occasion to exclude railway lands from a fair schedule of assessment to meet the cost of a properly authorized municipal drainage work.

But when it becomes necessary to enter upon railway lands for the purpose of constructing any drainage work thereon, the authority for such work cannot be given by the province, but must come through Dominion legislation, either by itself or in conjunction with the laws of the province.

Amendments to Railway Act

Previous to the year 1903, private ditches, award ditches and municipal drains, or crossings for the same, could be constructed on railway lands only by agreement with the railway companies, the usual agreement providing for the work to be done by the railway and the cost to be borne by the municipality or the individual. In 1903 very important amendments were made to the Dominion Railway Act (sections 250 and 251) in respect to drainage. Section 251, with which we are more particularly concerned, is as follows:—

"Whenever by virtue of any Act of any province through which the railway runs, proceedings may be had or taken by any municipality or landowner for any drainage or drainage works, upon and across the property of any other landowner in such province, the like proceedings may, at the option of such municipality or landowner, be had or taken by such municipality or landowner for drainage, or drainage works, upon and across the railway and lands of the company, in the place of the proceedings before the Board in the last preceding section provided.

"2.—In case of any such proceedings, the drainage laws of the province shall, subject to any previous order or direction of the Board made, or given with respect to drainage of the same lands, apply to the lands of the company upon or across which such drainage is required, to the same extent as to the lands of any landowner in such province: Provided that the company shall have the option of constructing the portion of any drain or drainage work, required to be constructed, upon, along, under or across its railway or lands.

Railway Board's Approval Required

"3.—In the event of the company not exercising such option and completing such work within a reasonable time, and without any unnecessary delay, such work may be constructed or completed in the same manner as any other portions of such work are provided under the laws of such province to be constructed.

"4.—Notwithstanding anything in this section contained, no drainage works shall be constructed or re-constructed upon, along, under or across the railway or lands of the company, until the character of such works, or the specifications or plans thereof, have been first submitted to and approved of by the Board.

"5.—The proportion of the cost of the drain, or drainage works, across or upon the railway, to be borne by the company, shall, in all cases, be based upon the increase of cost

of such work caused by the construction and operation of the railway."

It is interesting to note in passing that this legislation was introduced into the House of Commons by a member who had been counsel for several municipalities in litigation against the railways, but who became, shortly after the passing of these provisions, a leading counsel of one of the great railway corporations.

Railway Company's Status

The effect of these amendments was to put railway companies in the same position as private owners, and with practically the same limited rights; there was no power of appeal against any municipal drainage scheme recommended by an engineer and adopted by a township council excepting under Section 9 of the Drainage Act, which deals with disposal of excavated material and similar matters of individual rights. The only protection that the railway company had against having an ill-considered and perhaps unnecessary and expensive scheme forced upon it was by objection taken before the Railway Board when the Board's approval of the work was sought by the municipality. Under the Ditches and Watercourses Act they might appeal to the county judge, who had full authority to modify or quash an engineer's award, but any such appeals of railway companies to county judges have been very rare.

The railway companies were thus placed in a rather difficult position, at least in so far as the municipal drains were concerned. The Railway Board did not choose to review all the merits and demerits of a drainage scheme initiated under provincial laws, taking the view that such matters should be dealt with by the various tribunals created by the province for this express purpose, and that the Board should deal only with such features of the work as affected the safe operation of the railway. Where a railway company sought for the modification of a proposed drainage scheme through appeal to the drainage referee, the referee was forced to hold that the company was only in the position of a private owner and had no right to attack the general character of the proposed drainage scheme.

Engineer's Functions are Judicial

In one case a railway company went first to the Board and afterwards to the referee, but for the reasons above stated was unable to obtain before either tribunal a trial of their appeal to prevent the work being carried across their lands. An amendment to the Drainage Act in 1912 (section 101a) gave the railway company in cases of this kind the status of a non-initiating municipality, in that it became necessary for the council of the initiating municipality to serve the railway company with reports, plans and specifications of any proposed work on the railway lands, and the company was given the right of appeal against the same to the drainage referee, but at the same time was made responsible for the costs of appeal regardless of the result in other respects.

The engineer who is properly authorized either under the Ditches and Watercourses Act or under the Municipal Drainage Act to enter upon railway lands and lay out drainage works thereon, should bear in mind that in this, as in all other matters, his functions are judicial, and he must be absolutely impartial as between the railway company on the one hand and the private owners or municipality on the other hand.

He should consider carefully to what extent, if at all, it is necessary to construct drains either along or across the railways. In the first place, the fact that a right-of-way may be 100 ft. wide, and that only a fraction of this is used for a single or double-track road, does not mean that the remaining strip of land on either side of the track is to be utilized for the construction of drains merely to save so much of the land of the adjoining owners as would otherwise be taken for the purpose.

The right-of-way is intended for railway purposes, and should not be made use of simply for the convenience or benefit of a drainage area, particularly where the railway

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