

Railway companies are not inclined to have their tracks opened up by drainage contractors, but prefer to have the work under the tracks done by their own men, and usually exercise their option in this way. Some cases have occurred, however, where the drainage engineer's estimate of the cost of crossing the railway was considerably below the cost for which the work could actually be done, and in some of these cases the companies have chosen to pay the assessment and let the municipal authorities do the work under the tracks, with the result that the drainage area has had to bear a portion of the assessment which should properly be borne by the railway.

The report of the drainage engineer should not set any temptation of this kind in the path of the railway officials. On the whole, it appears most convenient and reasonable that the engineer in his report should estimate separately the cost of the ordinary drainage work on the right-of-way, such as tile drain, team work or dredging, and the cost of the work under the tracks, and that the railway should be allowed to construct either the crossing or the whole of the work on its lands, at its own option, but in no case should the railway be allowed to perform the ordinary ditching and unload the bridge or culvert upon the municipality.

Drainage Reduces Maintenance

The "increase of cost" of drainage work across or upon the railway due to the construction and operation of the railway, is to be borne by the company. We do not understand by this that the company should be assessed for this increase and nothing more, as has been contended by some railways, but rather that the company should bear this increase of cost under the express provision of the Railway Act, as well as being liable to assessment for benefit, outlet, and injuring liability under the provisions of the drainage laws.

The direct benefit to railways due to drainage is very important, and comparable to the benefit to highways. A specific case is where a track crossed the corner of a swamp, and required ballasting almost annually, but after the drainage of the swamp, the road bed became quite firm, and no further trouble was experienced. Assessments against railway lands for outlet and injuring liability, should be on the same basis as against lands and roads similarly liable.

There is some difference of opinion amongst engineers as to how the assessment under the Drainage Act is to be harmonized with the evident intention of the Railway Act in regard to this "increase of cost." The usual practice has been, as above suggested, for the drainage engineer to estimate the increase, and assess it specially against the railway, taking care that his estimate and assessment in this respect shall be sufficient for the purpose intended. This works no injustice, unless the amount so assessed is allowed to remain in the schedule of assessment for maintenance, in which case the railway might be liable for an undue proportion of the cost of maintaining the whole drainage work.

An alternative plan, which would certainly accord with the spirit of the Railway Act, and possibly do no violence to the Drainage Act, would be to omit entirely from the formal estimate and schedule of assessment, the cost of railway crossings, merely providing that the actual cost of such work, whether performed by the railway or the municipality, should be borne by, or assessed against, the railway.

Ditches Along Right-of-Way

Under the Ditches and Watercourses Act, where the work itself is apportioned amongst the interested owners instead of an assessment being made in money, we take it for granted that the township engineer in making his award, would require the railway company to do any necessary work under the tracks and road bed, and that any further work necessary to make up the company's fair proportion of the whole work, should be assigned to the company on the right of way; that the company would not be required to do any portion of the drainage work outside of the limits of the right-of-way unless such were absolutely necessary in order to make a fair apportionment of the whole work.

If any considerable section of the ditch should be along the right-of-way, it would probably be necessary to require

private owners to perform a portion of this in order to distribute the burden of construction in proportion to the benefit. Under these particular circumstances we would hardly expect the company to exercise the privilege of performing all the work on the right-of-way.

No drainage works may be constructed or re-constructed, upon, along, under or across railway lands, until the character of such works, or the specifications or plans thereof, have been first submitted to and approved of by the Board of Railway Commissioners. When and by whom should application be made for this approval?

Ditches and Watercourses Act

The machinery provided for carrying out the provisions of the Ditches and Watercourses Act is very different from that provided under the Drainage Act, and the proceedings are quite different. Under the Drainage Act the municipal council assumes the responsibility for constructing the work in accordance with plans and specifications provided by the engineer and incorporated into a by-law. As the council thus acts as trustees for the whole drainage area, it is expected that the council, through either its clerk or its solicitor, will take all necessary steps towards securing the approval of the Board.

Under the Ditches and Watercourses Act, the award of the engineer becomes effective as soon as it is filed with the clerk, or in the event of its being appealed against, as soon as it is confirmed by the county judge or the drainage referee. The municipal council is not directly interested, unless, as owner of a road or other property, it is required to construct a particular portion of the ditch.

There appears to be no responsibility upon any individual to apply for the approval of the Railway Board, but still the award cannot be enforced until this approval is obtained. In order to make this situation clear to all the owners affected by the award, it is advisable that the award itself distinctly set forth that its provisions are not effective until the approval is secured. As the railway company has the same privilege as other owners, of appealing to the county judge, and also if necessary to the referee, not only against the apportionment of the work but also against its character and location, it appears reasonable that if the company makes no such appeal, it should not make any serious objection when the application comes before the Board.

Though no person is responsible for making this application, it usually devolves upon the individual who initiated the proceedings, or, by instructions of the municipal council, it may be undertaken by the clerk or solicitor. The estimated cost of the application may be provided for in the award and be part of the costs charged against the railway company. The company may then obtain the approval of the Board at little or no expense, and in this event the cost should not be collected from the company; or if already collected, should be returned.

Misunderstandings Cleared Up

For similar reasons it would appear that the proper time for seeking approval of work to be done under the Drainage Act should be after the lapse of the time in which the company has the right of appeal to the drainage referee, or after the disposal of such appeal, if any. If the drainage work on the railway lands is not permitted by the referee, the report of the engineer or the provisional by-law of the municipality is set aside and no further proceedings are necessary, as in the comparatively recent case of the Canadian Pacific and Grand Trunk Railways against the township of Rochester, to which previous reference has been made.

As to the particulars which might be dealt with by the Railway Board there was at first considerable confusion and misunderstanding, which was cleared up to a great extent by an order of the Board dated January 17th, 1910, which reads in part as follows:—

"The practice in the past has been to submit to the Board, along with the material, the engineer's report, and a plan of the whole drainage area, with the names of all the land owners affected by the proposed work, etc. In some