

Railroads Crossed by Public Highways, Expense of Construction and Maintenance of Crossing, By Whom Borne. Highways Crossing Railroads, Expense of Construction and Maintenance of Crossing, by Whom Borne.

The county must bear the expense of the construction and maintenance of highways crossing railroads. It is the duty of the railroad companies to prepare the track at the point of crossing so that no delay or damage will result to the constructing of the highway.

Where a highway is already in existence it is the duty of the railway company, at its own expense, to install and maintain the crossing in as good condition as the highway was previously at that point.

Helena, Montana, April 27, 1908.

Hon. W. T. McKeown,
County Attorney,
Kalispell, Montana.

Dear Sir:—

I am in receipt of your favor of April 15th, requesting an opinion of this office upon the following question:

“A county road or public highway is already established by the board of county commissioners or a court of competent jurisdiction, or it has become such by usage according to law, or it is being opened and laid out by such county board, for public use as a county road or highway. does the county or the railway company, in the state of Montana, defray the expenses of putting in and maintaining such county road or public highway crossing over or across any such railroad in this state?”

Section 71, Chapter XLIV, Laws 1903, is, as you suggest, the only statute governing the matter. I give you my interpretation of that law. Section 2477, Revised Statutes of the United States, provides that “the right of way for the construction of highways over public lands not reserved for public use is hereby granted.”

See also Revised Statutes U. S., Sec. 2288.

The legislature of this state in enacting the section above referred to endeavored to supplement the law of congress and by special enactment to expedite construction of roads over public lands where the public lands were traversed also by the line of some railroad or canal, requiring the owner of such railroad or canal at his own expense to put in readiness that portion of his line of railroad or canal where the road will cross, so that the construction of the highway will not be delayed or rendered impracticable. Section 71, supra, requires the owner of such railroad or canal to “so prepare their roads, canals or ditches that a public highway may cross the same without damage or delay.” This section is not in my opinion broad enough to impose upon a railway company the burden of constructing and maintaining at its own expense the crossings and approaches to its tracks or right of way. The only preparation in the case of a railroad would be to bring the level of the road at the crossing up to the top of the rails. If, however, the crossings were at a point where a cut or fill had to be made in the highway to reach the grade of the rails, this work, I think, would be properly done at the expense of the county and that the cost could not properly be charged to the railway company. The railway company is liable for its pro rata share of the taxes from which the fund for the construction of highways is taken. The only requirement that the statute does or can impose is that such preparation

be made at the expense of the company so that no delay or damage may result in the construction of the highway.

In the above I am assuming that the railroad has been constructed over public lands prior to the laying out or construction of the highway. If the public highway is already established before the construction of the line of railway or canal crossing it, the rule is different. In that event the company would have to, at its own expense, put the road in as good condition as it was before and so maintain it.

See Am. Digest, Cent. Ed., Vol. 41, Secs. 284 to 290, and cases there cited.

Yours very truly,

ALBERT J. GALEN,

Attorney General.