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May 13, 2009

Liberty Township Trustees
110 East Buckeye Avenue
PO Box 327
Ada, Ohio 45810

RE: Correspondence of April 21, 2009

Dear Trustees:

Question posed: What liability if any does the township incur if they undertake the obligation of the railroad to repair its crossing?

It is without question that township trustees have a mandatory duty to keep the roads in repair and the amount to be spent for maintenance and repair can only be determined by the trustees in their exercise of their sound discretion. Even if the trustees undertake to hire a third party to do their roadwork they must pursuant Ohio Revised Code §5575.01 have the maintenance and repair project be performed under the supervision of a member of the board or the township road superintendent. In other words, every road repair in the township must have a board member of the trustees supervising it, unless you have a road superintendent. This aside, the question asked is, "if we undertake the duty of a private railroad company, in this case, Chicago Midwest Railroad, what liability do we incur?"

A railroad company may be liable of negligence to injured parties due to the railroad companies failure to build and keep in good repair the railroad right of way. See **Brady v. Consolidated Rail Corp.**, 35 OS 3d 161, 519 NE 2d 387 (1988). In our situation the railroad's excuse for not carrying out their duty is that they have no money. Therefore, the trustees question to me is if we had a piece of paper signed by the railroad that they assume all liability would this somehow shield us from liability or a lawsuit (or, better yet, reimburse us with money)? The answer to all of those questions is in the negative. If the railroad has no money to make repairs of its crossings, I doubt the railroad has any money to pay off any tort claims brought by third parties against the railroad company and/or your township. The existence of an indemnification agreement where they indemnify and hold harmless the township is only as good as the railroad is solvent. If the railroad is broke, where are they going to get monies to pay you back for any indemnification? If you undertake the repair of the railroad, and the repair work is negligent, the township will be incurring some sort of liability in the matter. Therefore, whatever road repair work you do on this railroad, you want done by a top-notch contractor, if you undertake this route.

The Ohio Revised Code has addressed the railroad repair issue. However, the remedy is not a remedy the trustees will be happy to hear about. Ohio Revised Code §4955.20 states it is the duty of railroad companies operating in the State of Ohio to build and keep in repair good and sufficient crossings over or approaches to such railroad, its tracks, side tracks, and switches and all points where any public highway, street, lane, avenue, or alley, road, or pike, is intersected by such railroad, its tracks, side tracks, or switches. 4955.20 states the board of township trustees have the power to fix and determine the kind and the extent of railroad crossings that are in unincorporated properties (the township lands outside of a municipal corporation).

Pursuant Ohio Revised Code §4955.21 the township government must serve notice upon the railroad with sufficient detail to make repairs to a crossing. Specifically, under Ohio Revised Code §4955.21 the township government can give written notice to the nearest station agent or section

foreman having charge of that portion of the railroad, where such intersection occurs at the crossing, approach, or sidewalk described in 4955.20 of the Ohio Revised Code, which must be built or repaired, setting forth its kind and extent and the time and manner of constructing it, as ordered by the legislative authority of the municipal corporation or in your case the board of township trustees. The railroad so notified must comply with that notice within 30 days.

In other words, the township government should have a professional engineer look at this crossing, get a written estimate of the damages, the repair work that needs to be done, the nature of the problem, and give the railroad company written notice of the nature of the problem, the extent and time and manner of repairing it, and a deadline to have the problem resolved. If the railroad company, after written notice does not do the repair within 30 days, the trustees may cause this crossing (approach) to be repaired and the township can recover the costs with interest in a civil action against the railroad brought in the name of the board. (see O.R.C. 4955.21)

Additionally, under 4955.22 of the Revised Code states the following:

§4955.22 Failure to construct or repair crossings or sidewalks; forfeiture.

A railroad company which neglects to comply with sections 4955.20 and 4955.21 of the Revised Code is liable to pay damage to the municipal corporation or township in which the highway is situated in the sum of thirty dollars for such neglect, and a further sum of ten dollars per day for each day such company fails to comply with the terms of such sections, to be recovered in an action brought in the name of the municipal corporation or township. The prosecuting attorney of the county shall prosecute to judgment any claim arising under such sections without charge to the municipal corporation or township.

Ohio Revised Code 4955.22 thus provides a penalty in addition to the actual cost of repair which is the sum of \$30 for the initial neglect and \$10 a day for each day the company fails to comply with the terms the township requested.

Now, in addressing the original question the township posed to my office, if the railroad company does not have any money to pay or repair the tracks having a piece of paper to indemnify you with no money to back it is worthless paper. If, indeed, you are going to repair this railroad I

would advise the approach to be that you have an engineer look at the project, define the problem, extent of the problem, how to correct the problem, and an estimate of the cost to fix the problem. Identify the railroad crossing in question, put a written notice together to the railroad company giving them 30 days to comply. If they do not comply, then this would give you the right to repair the railroad and go against the railroad company for your costs plus statutory penalties. These statutory penalties are in addition to your regular out of pocket costs to fix the railroad. To undertake the railroad's proposal for the repair by having an employee present (No matter what, a trustee, not an employee, must be present.) does not give you any recourse to recover interest, statutory damages, plus costs to repair.

Therefore, if it is the desire of this township to actually expend the monies to fix the crossing you will need proper notice, have the notice written up with the guidelines of an engineer or a very astute civil contractor to comply with 4955.21 of the Ohio Revised Code. Second, you would have to have a very reputable contractor actually repair whatever is necessary to make the crossing tracks not so rough. Third, you would have to (in addition to the notice) actually have to advance the costs of the repair. Finally, you would have to then bring a suit against the railroad company to recover your costs, interest, and statutory damages.

Hopefully this letter gives you some guidance on some of the problems you may be facing and some of the approaches you should take in arriving at your decision.

Sincerely,

Bradford W. Bailey
Hardin County Prosecuting Attorney

enclosure(s)
BWB/jp