

N.D.A.G. Letter to Larson (Sep. 8, 1986)

September 8, 1986

Mr. Stuart A. Larson
Traill County State's Attorney
P.O. Box 188
Hillsboro, ND 58045

Dear Mr. Larson:

Thank you for your letter of August 7, 1986, wherein you made an inquiry as to what entity has the responsibility for maintaining a culvert located on railroad right-of-way and passing under a township road.

North Dakota Century Code § 49-11-04 requires that when a railroad is constructed over a street or highway, the street or highway must be restored to its former state or such condition that does not materially impair its usefulness. The statute also requires that the railroad maintain the condition of usefulness as against any effects produced by the construction of the railroad over the street or highway.

The imposition of the foregoing statutory obligations is predicated upon the factual resolution of which improvement came first, the railroad or the highway. If the railroad was constructed over a preexisting highway, it is clear that the railroad has the obligation to construct and maintain the entire crossing in a manner that will not jeopardize the usefulness of the highway. Such a duty would include the maintenance of a culvert located under the highway and used to drain the railroad ditch.

Because the application of the statute is dependent upon the factual situation, I cannot give you a conclusive response to your inquiry.

The remark by the maintenance foreman for the railroad, to the effect that they are only responsible for maintaining the crossing between the rails, is probably made in reference to the "at grade crossing." Such a crossing would only entail maintenance to a limited area occupied by the tracks. N.D.C.C. § 49-11-06 addresses the railroad's responsibility at crossing and speaks of the "at grade" aspect of their construction and maintenance. Subsection 4 of the statute provides that the maintenance of the "at grade crossing" encompasses that area lying two feet beyond the ends of the crossties. This definition is restricted to the actual crossing area of the tracks and would not have application to the highway approaches abutting the railroad, which are the subject of N.D.C.C. § 49-11-04.

Sincerely,

Nicholas J. Spaeth

dfm