

File No. 10151 Continued.

OPINION.

as referring merely to the laying of tracks and not to the construction of a culvert or gutter beneath the tracks, but I think when such culvert is clearly necessary, as in the present case, to carry surface water beneath the tracks, an improper culvert would be regarded as an obstruction or impediment arising from the improper construction of the tracks.

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The opinion of Mr. Bernard Carter, a copy of which was sent by the United Railways Company, as being decisive of the question at issue, seems to me not to relate to this situation at all. This opinion relates to the removal of drains beneath the railroad tracks, which drains have become unnecessary by reason of the adoption of a new system of storm water sewers. I see no similarity between that situation and the one now under discussion.

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Presumably the present drain was constructed pursuant to Ordinance No. 44, approved April 15th, 1902, which authorized the United Railways and Electric Company to lay curves, switches and tracks along a number of streets, including the point now at issue. This ordinance expressly provided (Section 2) that the said curves shall be built under the supervision of the City Engineer, and the rails shall be so constructed and laid as not to obstruct or impede the free flow of water across the street or down the gutters. This language, I think, would cover the present situation also. A thorough search has failed to reveal any record of a plan devised by the City Engineer for the culvert in question.

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Section 3 provides that in case the several streets to be occupied by the railroad tracks shall, in the future, be paved or repaved with any improved pavement, the proprietors of said railway shall repave the space between the tracks, etc., with said improved pavements, at their own exclusive expense.

It would seem from these two quotations that the ordinance above referred to contemplated the paving or repaving of the highway in question, and expressly vested in the City Engineer the power to supervise the mode of constructing the tracks, particularly at points where gutters might be obstructed.

As to whether the Annex Commissioners may validly exercise the power which is vested in the City Engineer, Ordinance No. 216, approved March 6th, 1905, provides that in grading, paving and curbing