

Mr. James H. McKay, Highways Engineer (cont'd)

Ordinance in Section 24 thereof contained very broad indemnity clauses by the Railroad in favor of the City, including in sub-section (c) thereof the saving of the City harmless -

"from all liability, damage, cost and expense to which it may be put * * * by reason of the construction or maintenance of any structure constructed or required to be maintained by the Railroad in pursuance of this ordinance."

This Ordinance further provided in Section 17 that the City should have the right to extend any public highway across the railroad tracks, either by bridge or underpass as determined by the City, with certain provisions as to the preparation of the plans, the performance of the work and the sharing of costs.

The 1950 Ordinance, which deals specifically with the Mulberry Street Underpass, provides in Section 4 for the liability of the City and the Railroad, respectively, for its cost. Sub-section (a) contains the provision that -

"unless otherwise mutually agreed, (the cost) of the necessary alterations, re-arrangements and/or relocation of existing facilities of the Railroad, within 100 feet of either end of the bridge structure along the Railroad's right of way"

shall be borne equally by the City and the Railroad. Section 9 provides that all of the provisions of the 1929 Ordinance shall continue in full force and effect -

"except as necessarily modified by the provisions of this agreement."

We understand further that the proper interpretation of the indemnity clauses of the 1929 Ordinance as understood and acted upon by both the City and the Railroad over the years is that whenever any work which the City has to do is made more costly, directly or indirectly, by reason of any action of the Railroad pursuant to the electrification ordinance, the Railroad has borne the additional cost.

However, as the expense items here in question are clearly included within the above quoted clause of Section 4(a) of the 1950 Ordinance, it is our opinion that the City must bear one-half the cost of these items and that the contrary