HIGHWAY COMMISSION, STATE: Railway crossing devices cost of repair.  

June 1, 1938.

Mr. T. A. Dicus,  
Chairman of the State Highway  
Commission of Indiana,  
Indianapolis, Indiana.

Dear Sir:

This is in answer to your request of May 14, 1938, for an opinion as to the legality of certain repair and replacement costs which arose in connection with a railroad grade crossing protective device. You say:

"The Grand Trunk and Western Railway has requested that we seek an opinion from you regarding the validity of certain charges against the state for replacements and repairs of a crossing protective device installed at the intersection of their road and State Highway No. 130 near Valparaiso, Indiana.

"This was installed by Order No. 11622 of the Public Service Commission under authority of Chapter 89, Acts of 1931 as amended by Chapter 61, Acts of 1933 which provide that the railroad shall pay all maintenance costs but that the railroad and state shall share equally all cost of repairs and replacements.

"The distinction between repairs, replacements, and maintenance was defined by Mr. Lutz, then Attorney General, in his opinion dated November 13, 1935, and this distinction has been accepted by all parties.

"The matter under dispute is what, if anything, the railroad is entitled to add to its direct labor and material costs for overhead and social security taxes. The railroad has added to its bill 4.95 per cent of the direct labor to cover railroad retirement and unemployment compensation taxes and 10 per cent of the direct labor for superintendence. It has also added to the cost of direct materials an item of 15 per cent for handling and transportation costs."

The statute involved in Chapter 89 of the Acts of 1931. It is provided in this statute that where a grade crossing of a highway over a railroad is found to be extra hazardous, cer-
tain stop signs or other modern automatic safety crossing devices may be installed on order of the Public Service Commission. The original cost of the devices is to be paid equally by the State Highway Commission and the railroad affected. Section 4 of the Act provides as follows:

"Sec. 4. After such signs, or other devices are installed, they shall be maintained by the railroad company. When it becomes necessary to replace or repair any such signs, or other devices, the cost thereof shall be divided equally between the railroad and the state highway commission. The share of expense paid by the State Highway Commission shall be paid out of the maintenance fund."

The usual method of handling the repair and replacement problem, because of its convenience, is for the railway company to make the repairs and then present an itemized bill to the highway commission and, on approval of the cost, one-half is paid by the highway commission.

In making necessary repairs to the protective devices near Valparaiso, the railroad took into account the actual amount of time put in by its mechanics and apprentices who worked on the job and the hourly wage. Also, the cost of material which was necessary to be applied to the devices. No question has arisen as to these items which amount to $28.72 for labor and $11.19 for material cost. To this the railway company added 10 per cent for superintending labor which amounts to $2.87 and 4.75 per cent for railroad retirement and unemployment compensation taxes, amounting to $1.36, and 15 per cent for handling and transportation cost of material, amounting to $1.68.

The question before me is whether or not the cost of superintendence, the retirement and compensation taxes, and the 15 per cent added to the material is a "cost" within the meaning of section 4 as set out above.

Statutes of this nature are to be liberally construed and words should be given their plain commonly understood meaning, except that technical words should be considered as used in a technical sense. I do not not believe the word "costs" was used in any technical sense in the provision above quoted, and the statute contains no language to indicate that anything
less than the total cost or outlay actually incurred in making the replacement or repair is to be divided equally between the railroad and State Highway Commission.

As to the 10 per cent for superintendence which was added to the labor cost, in my opinion, some amount for superintendence or overheads is a proper item to be added. In the case of Hoggson Bros. v. Spickerman, 161 N. Y. S. 930, 985, the New York court had before it a building contract which provided that the builders should receive "costs" plus 10 per cent profit. The builder added to the labor and material cost a per cent for "overheads." The court approved this and said:

"The real cost to the plaintiff of doing the work, in the very nature of things, would not be ascertained unless some part of the ordinary charges of maintaining an establishment for carrying on their business was given consideration."

In the repair of the protective crossing device, certain superintendence or overhead expense was necessary and, on account of this, the railroad company incurred an expense or cost, one-half of which it was entitled to receive from the State Highway Commission.

I believe also that the 4.75 per cent is a proper cost item to be added on account of unemployment compensation and retirement taxes. These per cents, based on the wages paid the workmen who made the repair and replacement, is a legitimate outlay for which the railway company should be reimbursed. In memorandum No. 39, dated December 25, 1937, by the Bureau of Public Roads of the United States Department of Agriculture, the contribution from railroads on grade crossing projects is discussed, and in Sections 16 and 17 of the memorandum, it is provided that railroad retirement taxes and social security taxes on salaries and wages of labor employed directly on the project, were proper items to be reimbursed. Of course, this memorandum is not an interpretation of the Indiana statute, but the ruling shows that the Federal bureau considers the taxes based on wages to be a legitimate part of the cost of a project.

As to the 15 per cent set up in the account, this like the 10 per cent for superintendence, is an arbitrary figure and may not represent an actual outlay on account of the repair job. It may be a usual per cent as between railways in arriving at
their joint accounts, but the word "costs" when used with reference to material or supplies, generally refers to the invoice price. If there is an actual transportation cost to the place of use that cost would be a proper addition to invoice price, but having received a 10 per cent for superintendence or overhead on the labor, I do not believe the "cost" of material contemplates any other charge in the nature of surcharge, handling cost or overhead. The memorandum of the Bureau of Roads, heretofore referred to, provides for no addition to the book cost of materials other than actual transportation expense not exceeding seven miles per ton mile (Sections 19 to 21).

In my opinion, therefore, the 10 per cent and the 4.75 per cent are proper cost items to be included, and the 15 per cent additive to material is not allowable, except an actual transportation charge should be added to the invoice cost of material.

ACCOUNTS, STATE BOARD OF: Schools. Employment of teachers in absence of appropriation.

June 1, 1938.

Hon. William P. Cosgrove,
State Examiner, Division of Accounting and Statistics,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of May 26 in which you submit the following question:

"The advisory board of a certain township has endeavored to force the abandonment of a two-teacher school, by reducing the budget request of the township for the 'pay of teachers' for 1938 by the amount of the salary to which these teachers would be entitled. The trustee contracted for the teachers for this particular school, and paid them in full for services performed to December 31, 1937, but has made no payment for 1938.

"Can the trustee legally pay these teachers for services performed in 1938 out of the appropriation made for the 'pay of teachers,' even though such payment