

**LAND DISPOSITION FOLLOWING
RAIL LINE ABANDONMENT**

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LAND DISPOSITION FOLLOWING RAIL LINE ABANDONMENT

By

Dennis R. Ming, Lawrence Bender,
Susan Hawkins, and William Thoms*

North Dakota relies heavily on railroads to move certain commodities. Virtually all of the coal traffic and most of the grain traffic originating in the state are carried by railroads. Two major railroads serve most of the state, the Burlington Northern and the Soo Line. Both carriers operate on a network of main and branch lines with the majority of the trackage consisting of branch lines (about 67 percent).

Recently many communities throughout the state have been faced with loss of rail service through rail line abandonment. Communities such as New England, Regent, Mott, and others lost the services of the Milwaukee Road when the carrier initiated bankruptcy proceedings and abandoned the New England to McLaughlin, South Dakota line. The Milwaukee Road also disposed of other lines including a main line serving Bowman, Scranton, and Hettinger, but these communities regained rail service when the state of South Dakota purchased the line prior to abandonment and allowed the Burlington Northern to operate on the trackage.

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The Abandonment Process¹

Rail line abandonment is a process designed to allow railroads a means for disposing of unprofitable lines. Prior to 1976 abandonment was not considered to be much of a problem in North Dakota. Less than four percent of the total rail mileage was abandoned between 1930 and 1976.² However, the majority of rail line abandonments have occurred since then. Of the 510.4 miles of track abandoned since 1936, over three-fourths has been abandoned since 1976.³

Abandonment ultimately begins when the carrier makes the decision to cease rail operations on a particular line. Railroads must file an annual system diagram map identifying rail lines that are proposed for abandonment. Lines up for abandonment are identified under three categories:

1. Category 1--those lines for which carriers anticipate filing abandonment applications within three years;
2. Category 2--those lines which carriers are studying for future abandonment; and
3. Category 3--those lines which the carriers have filed for abandonment with the Interstate Commerce Commission (ICC).

¹The discussion that follows was taken primarily from General Services Administration, Office of the Federal Register, Code of Federal Regulations, 49, U.S. Government Printing Office, 1976 to 1980, and United States Code Annotated, 1980.

²Schneider, R., W.E. Thoms, and R. J. Tosterud, West of the Red: The Role of Transportation in the Development of North Dakota, Upper Great Plains Transportation Institute, Publisher, North Dakota State University, Fargo, North Dakota, 1977.

³Personal conversation, North Dakota State Highway Department, September 1982.

Carriers seeking the abandon rail lines must serve notice of its intent to abandon. Notice of intent must be given in three ways: (1) by letter to the ICC concurrent with newspaper publication, or by service on shippers who are significant users of the line; (2) by serving notice on various state officials and other agencies; and (3) by publishing the notice at least once during each of the three consecutive weeks in a newspaper of general circulation in each county in which any part of the line proposed for abandonment is situated.

The next step involves filing the application for a certificate of abandonment with the ICC. After the carrier has filed its application for a certificate to abandon, the ICC will determine whether to grant the abandonment. A rail carrier may abandon a line only if the ICC determines that "present or future public convenience and necessity" require or permit abandonment. If no protest is received within 30 days of the filing date, the ICC will permit the abandonment. If a protest is registered within the 30 days, the ICC has 45 days after filing of the application to determine whether an investigation is needed. Any investigation must be completed within 135 days of the filing date and an initial decision rendered within 165 days. If the ICC decides no investigation is necessary, it has 75 days after filing of the application to decide whether to grant the abandonment. If the ICC decides to grant the abandonment, it must issue the certificate within 90 days of the application. The certificate permits the actual abandonment to occur within 120 days after the application was filed.

Once the abandonment has been authorized, the railroad's right to dispose of its interest in the right-of-way may be delayed if a responsible party offers to subsidize the rail operation or if the party offers to buy the operation for the purpose of either reinstating rail service or putting the right-of-way to some other public use. Suitable

public interest includes use as highways or other forms of transportation, use for conservation, energy production, or recreation. In such a case, the ICC may forbid the railroad to dispose of the property for up to 180 days while the parties negotiate.

Property Disposition

Other than the right of first refusal to an interested party who wants to preserve the right-of-way for public use, there are no Federal requirements concerning disposition of the land underlying the abandoned rails. That decision is handled under state law. Unless the state has acted to preserve the right-of-way for some dedicated use, the decision to dispose of the property is that of the railroad company.

The property may be disposed of by the carrier once the abandonment process has been completed (once the application for certificate of abandonment has been approved by the ICC). Essentially, there are two types of property for disposition: (1) real property (right-of-way); and (2) personal property (the structure such as rail, crossties, etc.). Disposition of the structure is generally up to the discretion of the particular carrier abandoning the line. Disposition of the right-of-way, however, depends on the interest the railroad has in the property.

Interest in Right-of-Way

Basically, a railroad may have one or more of the following types of interest in the right-of-way: (1) fee simple absolute; (2) defeasible fee; and/or (3) easement. Final disposition of the property depends on the type of interest maintained by the carrier.

Fee Simple Absolute

A fee simple absolute offers the possessor eminent ownership of the land. A fee simple absolute is a freehold estate and is controlled by the owner subject to government regulations and duties which arise under tort law.⁴

Fee Simple Defeasible

While a fee simple absolute interest in land is for life, a fee simple defeasible interest terminates when certain conditions arise.⁵ For example, a farmer may convey land to a railroad so long as "the railroad operates and maintains the right-of-way". In other words, once the railroad ceases rail operations the fee simple terminates and use of the land reverts back to the owner.

Easement

Railroads may also gain right-of-way use by obtaining an easement interest in the land. In effect, an easement is an interest in land possessed by another party. An easement has the following characteristics:⁶

1. "the owner of the easement is entitled to use and enjoy the land on a limited basis;
2. the easement owner is entitled to protection from third parties in his use and enjoyment;
3. the easement owner is not subject to the will of the possessor of the land;

⁴Siedel, George J., Real Estate Law, West Publishing Company, St. Paul, Minnesota, 1979, p. 114.

⁵Ibid., p. 115.

⁶Ibid., p. 81.

4. an easement arises from facts other than possession of land by its owner; and
5. the easement is capable of conveyance."

The easement may terminate by several methods. Among the more common are:⁷

1. Cessation of Purpose: the purpose for which the easement was conveyed ceases;
2. Expiration of Period: the easement term expires;
3. Merger: the easement owner acquires the land for which the easement was created; and
4. Abandonment: the easement owner forfeits the easement either voluntarily or through nonuse.

Fee simple absolute interest allows the railroad unrestrained disposition subject to government regulations and tort law. A fee simple defeasible interest in the land requires that the carrier's use of the land not impede the conditions set forth in the conveyance. In other words, if the land was conveyed to the carrier "so long as the right-of-way is operated and maintained", the carrier must relinquish use upon ICC approval of the abandonment. However, the carrier may retain use of the land after abandonment if conditions imposed on the fee simple defeasible do not terminate with discontinuance of rail operations on the right-of-way. A carrier operating on a particular right-of-way through conveyance of an easement may or may not have future use of the land. For instance, if the easement was for a particular purpose such as "to operate and maintain

⁷Ibid., p. 94.

a right-of-way," the carrier would then relinquish use under terms of the easement upon abandonment. If however, the easement was for a specified period of time, such as 50 years, the carrier could maintain use of the land conveyed in the easement until the 50 year term expires.

In all states, the deeds and other indicators of ownership are required to be filed with a central office. In North Dakota, the register of deeds in the county where the property is located is the official charged by law with maintaining such records. The register maintains indices by which each document may be identified (either by names of grantor and grantee, or by reference to the tract of land). However, the register of deeds is not allowed to give legal advice concerning the state of title.

What interest the railroad has in the land is determined by the language of the deed. For example, "to X and his heirs" usually denotes a fee simple, while conditions denote a lesser estate.

Interpretation of deeds and ascertaining a title is skilled work and the person searching the records is well advised to consult an attorney to determine the interest which is held by the railroad.

Leased Property

Grain elevators and other business firms commonly lease land adjacent to the railroad right-of-way. This land is frequently owned or "held" by railroad companies. Completion of abandonment proceedings may affect the disposition of the land. For example, if the abandoning railroad has fee simple ownership in the land, the business firm may continue to lease the land in accordance with the lease provisions. The lease

terminates, however, if the railroad has an easement interest in the property that expires concurrently with abandonment of the right-of-way. Therefore, litigation concerning the disposition of leased property upon rail line abandonment depends on the type of interest held by the lessor and provisions of the lease.

State Owned Land

Some railroads may operate on right-of-way that rests on state owned land. According to state law, disposition of this property upon abandonment is subject to a sequence of options.⁸ First, the Public Service Commission may attempt to enter into a trust agreement with the abandoning carrier and transfer the right-of-way to a person or entity for continued rail operations (a trust may also be established for essential rail lines on private lands within North Dakota). If this trust arrangement is not accomplished, the next option depends on whether or not the abandonment is governed by federal law. If it is governed by federal law, the land is first offered for public purposes. If the abandonment is not governed by federal law, or public use is declined, the adjoining landowner (s) is (are) offered the right to purchase the land. However, offering adjoining landowners the right to purchase the land may result in litigation concerning the constitutionality of the North Dakota statute. The North Dakota State Constitution requires that the sale or exchange of state owned land be accomplished via public auction.⁹ Offering adjoining landowners preference in acquiring the land precludes the public auction method of sale.

⁸North Dakota Century Code, Replacement Volume 9B, 1981 Pocket Supplement, Chapter 49-09, Section 49-09-04.2.

⁹North Dakota Legislative Council, Constitution of North Dakota, Article 9, Section 6, updated through January 1, 1981.

Summary and Conclusions

When a railroad is abandoned, the ICC may delay track removal and sale of the right-of-way if a responsible buyer expresses an interest in maintaining the line for public use. The railroad is free to dispose of the line under the provisions of state law if no person or entity expresses an interest in maintaining the line. The railroad can sell no greater interest than it owns. If it is a fee simple, the railroad may sell it as it sees fit. If it is a defeasible fee, the termination of rail service may have ended the railroads interest in the party. If it is a mere easement, the railroad only owned the right to operate trains on the land and has no real property to dispose of.

What interest the railroad has is determined by the language of the deed or lease by which it obtained the land. Although these instruments are found in the register of deeds office, an interested party is well advised to consult an attorney familiar with transportation law or the law of real property, so as to determine what interest the railroad has and what legal consequences flow from such an interest.