

A Brief History of and Current Issues Involving Railroads in North Carolina (Part Two)

By Michael Aiken, Esq.

As we explored in the first article of this two part series, railroads in North Carolina have a long and interesting past. However, as today's real estate attorney will attest, they can pose trouble for the otherwise routine property transaction. This second article will outline current issues associated with real estate upon which a railroad right of way was or is located.

Railroad rights of way can be interests in fee, or merely easements, and can range from as little as 50 feet to more than 200 feet in width. Both the estate and width of the rights of way held by the railroad are determined by the method in which the railroad acquired the rights of way. For the real estate attorney handling a transaction in real property that is burdened by or adjoins either an existing or abandoned right of way, two issues must be considered: what estate the railroad company holds, and where the right of way is located.

Beginning the Search

To determine the extent of the right of way, the location of the existing or abandoned right of way must first be established. This can be done by looking at old surveys, obtaining a new survey, or by contacting the current or former railroad company that operates or operated the line. If it can be shown that the right of way is not on or within 200 feet of the subject property, the general rule of thumb is that the subject property will not be encumbered by the right of way. If, however, the subject property is burdened by or lies within 200 feet of a right of way, the attorney should determine the exact width and estate involved.

As mentioned, the method of acquisition used by the railroad company will usually control both the width of the right of way and the estate created in the railroad company. The three most common methods by which the railroad companies acquired property for rights of way are condemnation, purchase under contract, and by operation of law arising from the construction of the actual rail line. Typically, the estates created are fee simple absolute, defeasible fees and easements. The most common width for a right of way is 200 feet, being 100 feet on either side of the centerline. If the railroad company holds the right of way in fee, then it may do as it chooses and the right of way is not subject to abandonment.¹ Defeasible fees limit the right of way use and failure to use it in the prescribed manner can result in a reversion to the grantor, his successors or assigns. Should the railroad company hold only an easement, the rights of way will revert to the adjacent landowners upon abandonment.²

The Exercise of Eminent Domain

Most, if not all, of the railroads incorporated in North Carolina have been given the power to condemn property. Many of the original charters for railroads in this State

provided authority for the railroad to exercise the power of eminent domain. This power also exists in § 62-220(2) of the North Carolina General Statutes.

If a railroad exercises its power of eminent domain, then the estate in land that they acquire may have a limited use and the statutes under which the condemnation took place will control the interest acquired.³ Early railroad charters allowed the railroad to condemn property in fee simple. For example, the Raleigh and Columbia Rail Road Company charter provided that upon proper condemnation of land by the railroad, title "shall be vested in the Raleigh and Columbia Rail Road Company, and they shall be adjudged to hold the same in fee simple, in the same manner as if the proprietor had sold and conveyed it to them."⁴ In *Beach v. Wilmington & Weldon Railroad*, however, the North Carolina Supreme Court held that a railroad could acquire only an easement by condemnation.⁵ If, for example, the railroad exercised its eminent domain powers under § 62-220 of the Session Laws of North Carolina, the railroad may only acquire an easement for railroad purposes, which would be extinguished upon abandonment.⁶ By virtue of this statute and modern case law, a railroad may now only acquire an easement regardless of the provisions in its charter which allow for a taking in fee simple. This section of the statutes still controls and limits the modern railroads to the acquisition of only an easement.

Acquisition by Contract

Many railroad rights of way in North Carolina were acquired through direct negotiations with the landowner. In these instances, the estate granted and the width of the right of way will be controlled by a specific recorded instrument or group of instruments. N.C. Gen. Stat. § 62-220(3) provides "the real estate received by voluntary grant shall be held and used for the purposes of such grant." The difficult part in determining the interest held may be finding the initial instrument which conveyed the interest to the railroad. In many cases, these instruments date well over 100 years old and may no longer be in existence. Instruments will be difficult if not impossible to locate. Some that are located will not be legible. It is this author's understanding that many early documents recorded throughout North Carolina were destroyed during the Civil War years.

Once the instrument is located, the specific language controls the conveyance. Many of these instruments have been and continue to be the source of much litigation. Often the conveyance creates merely an easement; in others, the estate created will be in fee simple. Several factors influence the interest being conveyed. For example, a phrase in the deed, which reads "have given, granted, bargained and sold and by these present do hereby give, grant, bargain and sell," indicates a conveyance in fee, as does the use of covenants of seizin and warranty. If, on the other hand, the instrument uses a phrase such as "right and privilege to enter upon the lands and construct a railroad," this may indicate that only an easement was granted.

The presumption of fee simple conveyance is found in *McCotter v. Barnes*, where the North Carolina Supreme Court stated:

A conveyance of land for use as a railroad right of way by deed in regular form of bargain and sale, reciting a valuable consideration, is presumptively a deed of purchase

within the meaning of this section ⁷ and must be interpreted as an ordinary deed, so that when the granting clause is sufficient in form to convey the fee simple and the habendum clause and warranties are in harmony therewith, it conveys the fee and not a mere easement.⁸

The attorney should determine whether the presumption contained in N.C. Gen. Stat. § 39-1 applies to the deed at issue. N.C. Gen. Stat. § 39-1 reads:

When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance is plain and express words shows, or it is plainly intended by the conveyance of some part thereof that the grantor meant to convey an estate of less dignity.

The presumption in N.C. Gen. Stat. § 39-1 is rebuttable and there is an extensive amount of case law interpreting this provision.

Presumption of Conveyance

Many of the original charters authorizing railroad companies to acquire property for use as a right of way include a "presumption of conveyance" provision in favor of the railroad.⁹ This presumption was enacted to allow an efficient method of acquisition by the railroad companies; it is not an exercise of eminent domain, but is based purely on statutory presumption. Two conditions are necessary: first, the railroad must enter and construct its road. Second, the owner of the burdened land must fail to prosecute an action for compensation within two years of the completion of the road. If no action is taken and two years elapse, the statute provides that the railroad acquires the easement described in the charter, being "100 feet on each side of the center of the road,... and shall have, hold, and enjoy the same as long as the same be used for the purposes of said road, and no longer..."¹⁰ Since this method of acquisition occurs only in the absence of a contract between the land owner and the railroad, a search of the record will disclose no instruments by which to determine the railroad's interest.

Use of a Right of Way

Given the variation in right of way width, many adjoining landowners mistakenly believe that they are entitled to occupy and use any unused portion of the rights of way. Their occupancy is at the pleasure of the railroad. Since the railroad has the ability to allow a use of the property only if it is consistent with its chartered rights and duties¹¹, and because the railroads are not required to occupy and direct the use of every foot of the condemned area, the rights of way will be preserved for the company so long as the road runs over the land and is operated by the company.¹² The Supreme Court, in *McCaskill*, states its this way:

A permissive use of part of it by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances, would be a needless and uncalled for injury. This may suspend, but does not abridge the right of the company to demand restoration, when the interests of the road may require its use.¹³

Additionally, many of the adjoining landowners along these rights of way assume that the railroad owns only an easement and once the line is abandoned they become the owners

of the railroad property. A recent, and as yet undecided, example of this occurred when CSX Transportation Corporation, successor in interest to the Wilmington & Weldon Railroad, in 1989, abandoned a portion of its line between Wallace and Castle Hayne, North Carolina. In 1994, CSX donated its property to the North Carolina Department of Transportation. Adjoining landowners began to encroach on the rights of way and openly possess parts of the corridor. The State, presuming that CSX held fee simple title, objected and required the encroaching landowners to pay compensation or vacate the property. Several of the adjoining landowners have sought legal representation to challenge the State's ownership.¹⁴ The outcome of these challenges will be based on what interest the Wilmington & Weldon Railroad acquired in the 19th or early 20th century.

The North Carolina Railroad Company has a fairly extensive archive of maps, deeds, and correspondence. The best source of information that I have found for determining ownership of rights of way is "The North Carolina Railroad Map" with explanatory text by S. David Carriker, editor (1991). The map and accompanying text show current and past rights of way along with an easy-to-follow chart identifying the track owner, date of incorporation, the year(s) built, period of operation and current status. The Internet also has a vast amount of resources to link you to individual railroad companies, historic societies, and rail enthusiasts.

Conclusion

When today's real property attorney finds himself involved in a transaction which includes a right of way or a has client who wants to acquire fee simple title to an existing or abandoned railroad right of way, the attorney must trace a chain of title to this property through public records, railroad records, surveys or other evidence. He must then ascertain how the railroad acquired its interest and what interest the railroad possesses. Determining the estate created, as well as the width of the rights of way, will take time and research, then the attorney must advise his client how to proceed.

¹ *McLaurin v. Winston-Salem Southbound Ry. Co.* 374 S.E.2d 265, 267, 323 N.C. 609, 612 (1988).

² G.S. § 1-44.2 (NOTE: A right of way will not come under a state's legislative or judicial jurisdiction until the United States Surface Transportation Board has approved the regulatory abandonment request.)

³ Comment, The Acquisition, Abandonment, and Preservation of Rail Corridors in North Carolina: A Historical Review and Contemporary Analysis, 97 N.C.L. Rev 1999.

⁴ An Act to Incorporate the Raleigh and Columbia Rail Road Company, Pub. L., ch 40, § 18 (1836).

⁵ *Beach v. Wilmington & Weldon Railroad*, 120 N.C. 498, 503, 263 S.E. 703, 704 (1897).

⁶ *N.C. State Highway Comm. v. Farm Equipment Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

⁷ NOTE: The section referenced was at the time of the execution of the deed involved, Chapter 138, Public Laws of 1871-1872. The pertinent parts of this Act, then codified as Sections 1957(2) and (3) of the Code of 1883, are now codified as G.S. § 60-220(3)(4).

⁸ *McCotter v. Barnes*, 247 N.C. 480, 101 S.E.2d 330 (1904).

⁹ *Keziah v. Seaboard Air Line Railroad Co.*, 158 S.E.2d 539, 272 N.C. 299 (1968).

¹⁰ Section 29 in the Act of 1848-1849, Chapter 82, incorporating the North Carolina Railroad Company.

¹¹ *Atlantic Coast Line Railroad Co. v. Bunting*, 168 N.C. 579, 581 (1915).

¹² *The Carolina Central Railroad Co. v. McCaskill*, 94 N.C. 746 (1886).

¹³ Id. at 752.

¹⁴ Id.