# THE REDEDICATION OF LIGHTLY USED OR ABANDONED RAIL RIGHTS OF WAY TO OTHER USES

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Railroad rights of way represent one of the most valuable resources of our national transportation system, and yet great portions of the network are unused or underutilized and in a position to be lost entirely. This paper explores some of the legal and practical problems involved with the rededication of these important strips of land to other, and hopefully, higher, uses.

## *The Right of Way as a Valuable Resource.*

Although few parcels of land along a right of way may have great value in an alternative use, the monetary value of a right of way actually exceeds the sum of the values of each contributing parcel of land by a sum known as an assemblage cost. This cost can increase the real value of the strip by as much as a factor of two to three times the sum of the segment costs[1] and reflects the obvious fact that a right of way must be continuous. The segment costs, themselves, have increased in value many times over since the assembling of the rights of way as long ago as the first half of the nineteenth century. In short, the mere monetary value of the real estate that comprise the rights of way would demand a high use for them.

The value of the rights of way, however, transcend their monetary worth. At a time when travel time to the center of metropolitan areas is constantly increasing due to auto congestion (energy crisis or not), the potential of the rights of way that probe to the very core of many of our cities becomes obvious.

No better example of this potential could be found than the Philadelphia to Lindenwold high speed rail line of the Delaware River Port Authority (DRPA). PATCO (Port Authority Transportation Company), as it is now called, combined an unused subway line in Philadelphia with an underutilized branch of the Pennsylvania Reading Seashore Line to create a highly successful high speed passenger service. A more detailed analysis of the experience of the DRPA in organizing PATCO appears hereafter.

Assembled rights of way are of value in other than an urban com-

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1. Private Communication, Office of Chief Counsel, Federal Railway Association, May, 1974.

muting environment. The United States Department of the Interior reports:

> The need for more facilities plus new and imaginative outdoor recreational programs to fulfill the public's demand for urban recreation is an ever-growing reality. Trails, especially those using rights of way, are beginning to and increasingly will play an important role in meeting this need. Although the National Trails System Act of 1968 encouraged the use of rights of way for the development of recreational trails, little has been done by states and municipalities to utilize these routes for this purpose.[2]

The State of Wisconsin has converted four abandoned rail lines into state parks for hiking and bicycling,[3] one of which was a 32-mile line acquired in 1965. More than 50000 people each year, use the park which cost $62,000 to acquire and convert and $5000 each year for maintenance.[4] Similar conversions are planned by the states of Illinois, Texas, Iowa and Minnesota.[5]

*The Right of Way as an Available Resource*

Nothing could be more basic to the operation of a railroad than rights of way, and yet there are many thousands of miles of unused lines or lines on which operations are unprofitable, and are therefore potentially available for other uses. The U.S. DOT reports that the:

> . . . railroad industry in 1971 was operating 205,000 route miles of line. Of these, approximately 21000 miles were light density branch lines on which the carrier incurred losses. It is estimated that by ceasing operation of these uneconomic lines the railroads would save up to $42 million annually.[6]

Some commentators would go further: "Abandonment now threatens whole systems: and even the surgery required to save them may involve abandonment on an unprecedented scale."[7] Some of the reasons

2. Bureau of Outdoor Recreation, U.S. Department of the Interior, Establishing Track on Rights of Way, 1972.

3. Improving Railroad Productivity, Final Report of the Task Force on Railroad Productivity, November, 1973, p. 185.

4. N.Y. Times, May 20, 1973, Section 10, p.34.

5. Productivity Task Force, supra note 3 at 185.

6. U.S. Department of Transportation, Fact Sheet: Transportation Improvement Act of 1974, Department of Transportation News, January 10, 1974.

7. Economics of Railroad Abandonments, Department of Transportation Sympos-

for this state of affairs will be presented hereafter.

The Federal Government has responded to the present rail situation by enacting "The Regional Rail Reorganization Act of 1973." The ways in which this Act makes rights of way more available will be described and contrasted to the prior procedures.

*Legal Problems in Rededication.*

From the moment the very first rail was put in place, the law has taken special note of the railroads. The relevant authorities are often found in court decisions of the last century. On the other hand, economic conditions along the way have created special needs which have been addressed by legislation. Federal and state regulatory law must therefore be discussed, as well as the federal bankruptcy act. The ability and power of state and local government to retain or acquire rights of way is an important issue which includes consideration of federal/state allocations of power. On top of all the above must be superimposed the true uncertainties of the Rail Reorganization Act of 1974 whose very constitutionality is presently being litigated.

*The Broader Implications of Rededication Policy.*

Beyond the "mechanics" of rededication lies an important administrative agency policy issue. In brief, the question is, to what extent should (or can) the procedures and rules of an independent agency promote the development of new technology. In part this is a question relating to the delegation of power issue and in part to the question of how an agency should make use of expertise.

The policy of the ICC relating to the ease by which a carrier may abandon unprofitable operations affects the development of transportation technology in at least two ways. A carrier which is being made to absorb great losses on a branch for a long period of time has that much less profit with which to experiment with new forms and techniques of service. In addition, a restrictive policy towards abandonment makes branch lines that much more unavailable to short line operation who often have the willingness as well as incentive to experiment with new technology and new operating procedure. In other words, instead of protecting the shipping public, the ICC could very well do it great harm through an unduly restrictive abandonment policy.

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ium, Boulder Colorado, January 1973, p.9.

The degree to which the ICC through, for example, its rededication procedures should take into account competing or potential technology is an issue whose time for consideration has come. The further question of the degree to which the ICC should positively encourage the development of transportation technology is a crucial one for a congress legislating at this time in our railroad history. The answers lie at the heart of the nation's transportation policy. But far from being a simple matter of developing a doctrine, the issue has economic, antitrust, and procedural aspects of significant complexity. The single point of how and where an agency like the ICC is to obtain technological evaluations, much less predictions, is imbedded in the current debate over the merits of national planning.

This article concentrates on the mechanics of rededication, and leaves these other intensely interesting matters to future study.

## *PROPERTY LAW AND REDEDICATION—DEFINITIONS.*

The term "right of way" has a two-fold meaning. "It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to denote that strip of land which railroad companies take upon which to construct their road bed."[8] As a privilege to pass over another person's land, the right of way never exists as a natural right, "but always must be created by a grant or its equivalent."[9]

Herein the term right of way will refer to the strip of land on which the railroad operates. In each case, therefore, it will be necessary to define the nature of the railroad's interest in the land comprising the right of way with the additional label of fee or easement.

"An easement involves primarily the privilege of doing a certain class of act on, or to the detriment of, another's land, or a right against another that he refrain from doing a certain class of act on it or in connection with his own land."[10] In other words, one can speak of "affirmative" and "negative" easements. "An affirmative eastment is one which authorizes the doing of acts which if no easement existed, would give rise to a right of action while a negative easement is one the effect of which is not to authorize the doing of an act by the person entitled to the easement, but merely to preclude the owner of the land subject to the easement from the doing of an act which,

8. Ivy v. St. Louis, 138 U.S. 1 at 44, 34 L.Ed. 843, 11 S. Ct. 243 (1890).
9. Tiffany, Law of Real Property 8772 (3d. ed. 1939).
10. Id.§756.

if no easement existed, he would be entitled to do."[11] Since the use of a piece of a person's land as a right of way involves the creation of a privilege rather than the withdrawal of a privilege, a right of way to the extent that it is an easement would be an affirmative easement.

Although an easement is an interest in land, it is not a possessory interest. "The owner of it, therefore, is not entitled to the protection which is given to those having possessory interests. The fact that the owner of an easement is not deemed to have a possessory interest in the land with respect to which it exists indicates a lesser degree of control of the land than is normally had by persons who do have possessory interests. Thus, a person who has a way over land has only such control of the land as is necessary to enable him to use his way and has no such control as to enable him to exclude others from making any use of the land which does not interfere with his."[12]

Easements can be further distinguished as easements in gross or easements appurtenant. The latter occurs when the easement is intended to benefit the owner of a piece of land in his use of that land.[13] The former applies to an easement that belongs to a particular person independent of any land owned by that person.[14] "Insofar as the railroad company merely has an easement of a right of way, that is, the privilege of having its train pass over another's land, it is necessarily on easement in gross and not easement appurtenant."[15]

In order to have a possessory interest in land (or a "fee") a person must have "a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an interest as to exercise such control as to exclude other members of society in general from any present occupation of the land."[16] There are three interests of importance to this study. The first is the "fee simple absolute" which is a possessory interest of potentially infinite duration which is not subject to any limitation or condition.[17] The other two interests evidence less than absolute ownership. The "fee simple subject to a special limitation" is ownership that automatically expires if and when the stated event occurs. On the other hand, the "fee simple

11. Id.
12. American Law Institute, Restatement of the Law of Property §450 Comment b (1944).
13. Id. §453.
14. Id. §454.
15. Tiffany, supra note 9 §772.
16. Restatement, supra note 12 §7(a).
17. Id. §15.

subject to a condition subsequent" is a form of conveyance which enables the conveyor, or successor in interest, to terminate the interest subject to the named condition. However, the interest continues until this power is exercised. The fee simple subject to special limitation gives the conveyor or his successor a possibility of reverter, while the fee simple subject to a condition subsequent gives the conveyor a power of termination.

*Means of Acquiring Rights of Way.*

Subject, of course, to its charter of incorporation, a railroad may acquire land for its rights of way by public, private or implied grant, by purchase, by dedication, by adverse possession, by license, by estoppel of a dispossessed owner to sue, or by condemnation to a public use under a power of eminent domain.[18]

The nature of the railroad's interest in the acquired land varies according to how the land was obtained. If conveyed through a contract, the land is subject to the conditions of the contract. The grant may be good only for as long as the land is used for railroad purposes or for railroad operations with possibilities of reverter or powers of termination. Other provisions that have been held enforceable are the stipulation of the running or stopping of certain trains on the right of way, the granting of free transportation to the granter, the erection and maintenance of a station, the continuation and maintenance of fences, sidings, and private crossings.[19] Furthermore, some courts have held that a successor to the original promisor railroad is bound by the promise to perform certain of these services. For example, one court found that covenants requiring the removal of ice and snow from and furnishing light for, platforms, ramps and access ways to and from railroad station facilities, whether on the parcel conveyed by the railroad or on the parcel retained by the railroad bound successors of the corporation to whom the railroad originally conveyed the parcel.[20]

Another issue with respect to these promises is whether they run with the land of the promisee. That is to say, is the physical use of promisee's land involved to the extent that the usual "touch and concern" requirement is satisfied. The present state of the law in New

18. B. Elliot, Law of Railroads, §1150 (3d ed. 1921).

19. 65 Am. Jur. 2nd. Railroads, §54. (1972).

20. Boston and Maine R.R. v. Construction Machinery Corp., 194 N.E. 2d 395, 346 Man. 513 (1963).

York, for example, is that "affirmative covenants may be enforced against subsequent holder of the originally burdened land whenever it appears that (1) the original covenantor and covenantee intended such a result; (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened; (3) the covenant touches or concerns the land to a substantial degree."[21] On the other hand, New Jersey courts will not enforce affirmative covenants.[22]

If it is an easement that has been obtained by grant, a change in the use of the right of way which results in the easements being used more constantly could affect the existence of the easement. For example, it was held in Illinois[23] that the grant of the right to use a switch track in front of a lumber yard did not justify the use of the same track for carrying coal to an electric plant, built on the site of the lumber yard. However, the issue is one of construction of the grant.

Another means of acquiring a right of way is through adverse possession. "A railroad company may acquire title to land by adverse possession for the full period presented by the statute of limitation in the same manner as an individual. But such possession must be continuous and under claim of right, and of such a character as to give notice to the land-owner of the company's claim of title to the land."[24] However, in a 1907 Pennsylvania case,[25] the court held that a railroad cannot acquire title by adverse possession if it can take land by a power of eminent domain without compensation.

The problem in states where a railroad may acquire interest in land through adverse possession is the nature of that interest. The mere act of laying track does not seem to distinguish between claiming an easement through prescription and a fee through adverse possession. Presumably the exclusivity of the railroad's possession will be the same in either case as will be its use. "On the face of the matter, then, no definite conclusion can be drawn merely from the acts of user or possession."[26] However, the general conclusion is that the railroad acquires only an easement through prescription.[27]

21. Nicholson v. 300 Broadway Realty Corp., 7 N.Y. 2d 240, 164 N.E. 2d 832, 196 N.Y.5. 2d 245 (1959).

22. Furness v. Singrett, 60 N.J. Super. 410, 159 A.2d 455 (1960).

23. Goodwillie v. Commonwealth Electric Co., 241 Ill. 42, 89 N.E. 272.

24. Elliot, supra note 18 §1174.

25. Connellsville Car Co. v. Baltimore & C.R. Co., 216 Pa.309, 65 Atl. 660 (1907).

26. Note, Extent of Title Acquired by Railroad by Adverse Possession, 39 Mich. L. Rev. 297 (1940).

27. See Elliot supra note 18 §§462, 463.

The ability to acquire land by condemnation under a power of eminent domain is conferred by statute. Usually the extent of the interest acquired is an easement which, however, can be perpetual in duration.[28] The nature of the acquired right is particularly important if a private easement is being condemned. "When the [private easement] is condemned for a railroad right of way, and the owner of the easement is made a party to the proceeding, the easement is extinguished if the railroad acquires the fee, while if the railroad acquires merely the easement of a right of way, it does not seem that the private easement is extinguished, though its exercise is for the time being rendered impossible. If the owner of the easement is not a party to the proceeding, his easement, it seems, is not affected thereby."[29]

*Nature of the Interest When Right of Way Conveyed by Deed.*

One must also determine whether a fee or an easement is obtained when conveyance is by deed.

The two polar situations are the deeds in which "land" if conveyed and where a "right" is conveyed. The former generally speaking results in a fee title while the latter results in an easement. The problem, of course, appears between these extremes. It is further complicated when reference to the purposes of the conveyance are made or the conveyance occurs around the time condemnation proceedings were initiated. For a more complete analysis of this problem, the reader is referred to the reference in the notes.[30]

When it is a strip, piece, path, or tract of land that is being conveyed without other description or reference to the land in the way of diminishing the interest conveyed, the interest passed is generally a fee. For example, in *Kyerd v Hulen*,[31] the following language appeared in a warranty deed and was held to pass a fee and not an easement: "all that certain tract, lot or parcel of land . . . being more particularly described as follows, to wit: A strip of land one hundred feet wide, being fifty feet on each side of the center of the main line track of [a certain railroad] as the same may hereafter be constructed, laid and fixed by said company upon, over and across the following tract of land owned by us."

The two-fold meaning of "right of way" discussed above[32] is the

28. Id. §1222.
29. Tiffany, supra note 9 §823.
30. See generally Elliot, supra note 18 §1158, 6 A.L.R. 3d. 973.
31. 2 F.2d 160 (5th Cir. 1925).
32. Ivy, Supra note 8.

possible source of the problem in analyzing deeds conveying a strip, tract, piece or parcel of land which also contains reference to "right of way". Some of the ways that this reference can appear are as follows: "Deed to right of way" may be the heading of the document; words like "I hereby grant and convey the following described strip to be used for right of way purposes" may be used; the land may be described as being a "right of way". Courts will often inquire into whether the term is used to define and therefore limit the estate conveyed, or whether the term is only a description of the intended purpose of the property. If the term makes the deed ambiguous, other factors are sometimes considered to determine the parties' intention. In the cases in which a court arrived at the conclusion that the interest conveyed was a fee rather than an easement, two theories prevailed: (i) the granting clause is to take precedence over a later clause in conflict;[33] or (ii) reference to a "right of way" after an unambiguous granting clause is taken as describing the land rather than limiting the estate (i.e. the second meaning of "right of way" is assumed).[34]

Another problem in deeds granting a strip, tract, piece or parcel of land is the notation that the land is for "railroad purposes". Three approaches have been taken by courts to this notation: 1. "When the granting clause provides for a certain or specific estate, and the character or nature of real estate is changed or lessened by some interlocutory clause, . . . , the granting clause should prevail".[35] 2. The language creates a fee simple subject to a special limitation or subject to a condition subsequent;[36] 3. The language displays intent to convey an easement rather than a fee.[37] The following language was construed to grant only an easement by the court in *Alabama Corn Mill Co. v. Mobile Docks Co.*,[38] "Also that certain strip of land one hundred feet wide, commencing at a point on the north side of Marrion Street, . . . ; the object of this last-described piece being to give track facilities in to and from the property herein first conveyed."

Finally, in other cases where the railroad company is supposedly being granted "land" (as opposed to a "right"), courts have sometimes seized on certain rights retained by the grantor to hold the conveyance to be one of easement instead of in fee. For example, the right to take stone and earth or to cultivate up to the roadbed have

33. E.g. Midstate Oil Co., v. Ocean Shore R. Co., 93 Cal. App. 704, 270 P.216 (1928).
34. E.g. McCotter v. Barros, 247 N.C. 480, 101 S.E.2d 330 (1958).
35. Rowell v. Gulf, M & O R. Co., 248 Ala. 463, 28 So.2d 209, 210 (1946).
36. Des Moines City R. Co. v. Des Moines, 183 Iowa 1261, 159 N.W. 450 (1918).
37. St. Louis-San Francisco R. Co. v. White, 199 Ark. 56,132 S.W. 2d 807 (1939).
38. 200 Ala. 126, 75 So. 574 (1917).

been held to reduce the conveyance to an easement.[39] However, in *Gabbard v Hart*,[40] the court construed general warranty deeds as passing fee title. "The added provision in the deeds covering removal of timber and buildings and additional land for slope protection of cuts, fills and slides, the use of stone from granters' land, ingress and egress, and compensation for future damages, to remaining land are not inconsistent with a fee simple title."[41]

The court in *United States v. 1.44 Acres of Land*,[42] had to construe the effect of two deeds relating to the same piece of land. The first read in part: "Give, grant, bargain and sell, alien, enfeoff, release and convey unto the party of the second part, the successor and assign, forever the following described land and premises . . . containing 12,840 square feet, together with the rights to cut and fill in and upon said lands as may be required for the railway of the said party of the second part . . . " Although rights were granted to the railroad "which are completely unnecessary if a fee has been granted and which are indeed repugnant to a claim of fee",[43] the court held the conveyance to be one of fee title. However, the second deed was held to grant only an easement. The deed read in part:

"I . . . , do hereby grant and convey unto the plaintiff, the Washington Railway and Electric Company . . . a right of way for its chartered purposes upon and over the strip of land in controversy in said case . . ."

The court wrote: "While a railroad may have the power to take in fee, it need not necessarily do so, and in fact railroads customarily hold their right of way by easement. And while the terms 'right of way' may be used in either fee or easement context, as a general rule only an easement is meant . . . The court cannot help but equate the term 'for its chartered purposes' with the term 'for railroad purposes' . . . These factors all reinforce the plain language of the Talbot deed granting an easement."[44]

At the other polar position, courts usually construe a grant as conveying an easement rather than a fee when instead of conveying a

39. E.g. El Dorado & Wesson Ry Co. v. Smith, 233 Ark. 298, 344 S.W. 2d 343 (1961), Rogers v. Pitchford, 181 Ga. 845, 184 S.E. 623 (1936).
40. 351 S.W.2d 510 (1961).
41. 351 S.W.2d 510, 511.
42. 304 F. Supp. 1063 (1969)
43. 304 F. Supp. 1071-72.
44. Id. p. 1071.

strip, piece, parcel or tract of land, the deed conveys a right (including the "right or privilege of constructing, operating, or maintaining a railroad" as well as a right of way).[45] The effect of a later reference to a right of way on an unambiguous granting clause was discussed above. In the analogous case of a granting clause clearly giving an easement with a reference to a fee simple, courts generally do not allow an enlargement of the title to a fee.[46]

Of course, there are cases of deeds conveying both a right and land[47] as well as obscurely worded deeds mentioning neither.[48] Finally, three factors other than the actual language of a deed can influence a court. A state statute which empowers a railroad company to hold land only as an easement, has been used to overule clear language in a deed conveying a fee, and vice versa.[49] Sometimes the relative position of the parties[50] or even the amount paid for the conveyance[51] have been determining factors.

*Why Classification of Interest is Important.*

Knowing the nature of a railroad's interest in a right of way is of course crucial if one wishes to take over the railroad operation as the DPRA did to create the Lindenwald Line. However, the nature of the original interest of the railroad is equally important in the case in which the railroad no longer operates on the right of way. This section discusses the status of land to which the railroad had less than fee simple absolute title and on which operations have since been "abandoned". What constitutes abandonment will be discussed later, but it is important to note here that the use of the word abandon in property law is not the same as the use of the word by the Interstate Commerce Commission.

At this point, therefore, it is assumed that the railroad had obtained an easement or a fee subject to a condition subsequent or subject to a special limitation by grant or had acquired the right of way by condemnation and then ceased operations on the land.

"Where land has been conveyed to a railroad company under a

45. e.g. Lockwood v. Ohio River R. Co., 103 F. 243 (4th Cir. 1900).
46. East Alabama R. Co. v. Doe, 114 v.s. 340, 29 ed. 176, 55. C.4. 869 (1885).
47. e.g. Alabama G.S.R. Co. v. McWhorter, 202 Ala. 455, 80 So. 839 (1919).
48. e.g. Detroit, H. & I.R. Co. v. Forbes, 30 Mich. 165 (1874).
49. e.g. Chouteau v. Missouri P.R. Co., 122 Mo. 375, 22 S.W. 458, 30 S.W. 299 (1894).
50. e.g. Highland Realty Co. v. San Rafael, 46 Cal. 2d 669, 298 P. 2d 15 (1956)
51. e.g. Battelle v. New York, N.H. & H.R. Co., 211 Mass. 442, 97 N.E. 1004 (1912).

deed which creates an easement in favor of the company rather than a title in fee, and such land is subsequently abandoned for railroad purposes prior to any other conveyance thereof by the original owner, there is no doubt but upon abandonment title reverts to such original owner or his heirs, or, more accurately speaking, the title of the original owner is relieved of the easement to which it had previously been subject."[52] The court of appeals of Kentucky clearly faced the issue in a case[53] involving a railroad which had acquired a two mile strip for a right of way from a number of landowners. It later stopped operations, tore up the tracks and attempted to convey its interest to a National Park. The deed read in part: "for and in consideration of running their contemplated Road on and along their land, as well as in consideration of the sum of One Dollar, to them in hand paid . . . hath given, granted, bargained and sold, and by these presents doth give, grant bargain and sell to the said Mammoth Cave Railroad Company, and their successors and assigns, the Right of Way, described below, over which to pass, at all times, in any manner they may think proper, and particularly for the purpose of running, erecting, and establishing a Railroad. To have and to hold the same unto the said Mammoth Cave Railroad Company, their successors and assigns, to their own proper use, benefit and behoof forever, in fee simple, under condition, and it is expressly understood that should the said railroad contemplated as aforesaid, be not located and established on and along said strip, tract, or parcel of land, described in the above and foregoing indenture, then said indenture is to be wholly null and void, and of no effect."[54] The court decided that the deed gave only an easement to the railroad and distinguished the case from another[55] in which the railroad was clearly given a fee interest. The only issue left was whether the road had been abandoned and, if so, to whom the title reverted. "Forfeiture of easements like other forfeitures are not favored by the courts, and mere non-use or temporary suspension of use without adverse possession is not alone sufficient to establish abandonment . . . . While long-continued non-use or suspension of use are not of themselves conclusive evidence, they are factors to be considered when coupled with other acts evidencing the intention to abandon, in determining whether an easement has been relinquished . . . The record clearly discloses that the railroad com-

52. 136 A.L.R. 296.

53. Mammoth Cave National Park Assn. v. State Highway Commission, 261. Ky. 769, 88 S.W. 2d 930 (1935).

54. Id. p. 933.

55. Rollion v. Van Jellico Mining Co., 194 Ky. 41, 238 S.W. S.W. 193.

pany, by abandoning the use of its railroad, tearing up and removing the tracks, and attempting to convey the land to others to be dedicated for other purposes, abandoned its right of way, and the lands thereupon reverted to the grantor or their successors in title."[56]

If the original owner of a right of way easement across or along the edge of his property conveys the entire tract (including the strip or a tract abutting on the right of way), the grantee would hold the fee discharged of the easement upon the forfeiture of the easement. The only modification of this would seem to be the language in some decisions to the effect that the grantee acquires a fee title only to the center of an abandoned right of way that abuts on the tract conveyed.[57]

If the railroad company holds the right of way in fee subject to a special limitation or to a condition subsequent, violation (or occurance) of the condition returns the title to the grantor in the first case, or gives him a power of termination in the other. For example land has been conveyed for the "purpose of erecting and maintaining a section house"[58] and for "railroad purposes".[59] Occasionally a court has considered the condition that the land be used for "railroad purposes" fulfilled if it was so used for a number of years. Such "sufficient" compliance supposedly increased the railroad's title to fee simple absolute.[60]

The question of the effect of the attempted conveyance of the property which has been already conveyed to a railroad in fee subject to a special limitation or to a condition subsequent is hard to answer. One court has held that the conveyance to the railroad of the rest of a person's land after the person had granted the railroad a right of way in fee subject to a condition subsequent ended the person's interest in the compliance of the railroad to the condition.[61] However, the broader problem is the alienability of possibilities of reverter and powers of terminations. Generally the latter are considered to be neither alienable nor assignable[62] and are extinguished by an attempt to convey them.[63] The authorities are in conflict over the alienability

56. 88 S.W. 2d 934-35.
57. 136 A.L.R. 296.
58. St. Louis Southwestern R. Co. v Carter 113 Ark. 92, 167 S.W. 489 (1914).
59. Romero v. Department of Public Works, 17 Cal. 2d 189, 109 P.2d 662 (1941).
60. Jeffersonville, M & I. R. Co. v Barborn, 89 Ind. 375 (1883), Sheth v. Vandalia R. Co., 74 Ind. App. 597, 127 N.E. 609 (1920).
61. Stevens v. Galveston, H & S.A. R. Co., 212 S.W. 639 (Tex.1919).
62. 33 Am. Jur. 689, Life Estates, Remainder, and Reversion, §209.
63. Id. §210.

of the former.[64] However note that even in jurisdictions in which those rights or powers are not alienable, a court could construe the deed so as to give the railroad and easement (rather than a defeasible fee) and so leave the grantor with an alienable interest.

The effect of abandonment of land acquired through condemnation is controlled by the state statute authorizing condemnation. Generally, if the statute gives the land in fee simple absolute, subsequent abandonment does not cause the land to revert to the grantor. However, if the interest in the land was less than a fee simple absolute "the title to the land condemned reverts to the original owner, or his heirs or assigns, upon abandonment therefore for railroad user."[65]

*What Constitutes Abandonment*

The question of what constitutes abandonments in the property law sense is, in the first instance, one of fact.[66] Furthermore since the crucial fact is one of intent, there must be found acts which evidence the intent to abandon[67] and which are clear and convincing.[68]

Generally speaking, proof of mere nonuser of a right of way is not sufficient to prove abandonment.[69] However, nonuser along with certain other circumstances have proven sufficient. For example, where there existed a contract between the grantor and grantee that nonuser would amount to abandonment, the court enforced the reversion upon the cessation of railroad operations.[70] Similarly where the consideration for the grant of the land was the construction of a depot and maintenance of rail service and the depot was never built and the service ceased.[71] Growth of trees of up to 17 inches in diameter between the rails has been held to be conclusive proof of abandonment.[72]

Seemingly one exception to the requirement of proof of intention to abandon, at least in California, is where the right of way was an easement acquired by prescription. One court held nonuser to be sufficient to terminate the easement.[73] It is also possible for the legis-

64. Id. §206.
65. 136 A.L.R. 296 §III.
66. 17 Am. Jur. 1026, Easements §142.
67. Hatton v. Kansas City C & S. R. Co., 253 Mo. 660, 676, 162 S.W. 227, 232.
68. St. Louis-San Francisco R. Co. v. Relland, 43 S.W. 2d 1034, 328 Mo. 1154.
69. 95 A.L.R. 2d 468, §3.
70. Atlantic Coast Line P. Co. v. Sweet, 177 Ga. 698, 117 S.E. 123 (1933).
71. Lyman v. Suburban R. Co., 190 Ill. 320, 60 N.E. 515 (1901).
72. Missouri P.R. Co. v. Bradbury, 106 Mo. App. 450,795 S.W. 966 (1904).
73. People v. Ocean Shore R. Inc., 32 Cal 2d 406, 196 P.2d 570 (1948).

lature to deem a right of way abandoned that has not been used for a certain period of time.[74]

Courts have found it easier to hold that an abandonment has occurred where there has been adverse possession of the right of way. However, this fact is far from conclusive.[75]

A much clearer indication of intention to abandon is the removal of tracks from the land. Nonuse of right of way in conjunction with the use or acquisition of a new route has also been taken as evidence of abandonment.[76]

Although application for authorization from a regulatory agency to discontinue service is a factor to be weighed in considering whether abandonment has taken place[77] it is usually not sufficient by itself.[78] However, removal of tracks pursuant to agency authorization has been held to prove abandonment.[79]

In spite of cases like those previously cited indicating that use of a right of way different from that contemplated when granted or condemned may cause abandonment, "the courts have usually refused to base a finding of abandonment on such evidence, particularly where the new use is in some way associated with the business of the railroad."[80]

Connected with the problem of new use of a right of way is that of a new owner of the right of way. As long as the new owner continues to use the right of way as a right of way, the courts seem to refuse to find abandonment.[81] A Minnesota Court[82] faced the problem of conveyance of a right of way obtained through condemnation to another railroad company which constructed and ran a railroad on the right of way. The court reversed a lower court's finding of abandonment:

> In theory the land was taken, and the right to apply it to the public use proposed acquired, for the state. It is true, the title to the right thus acquired yested in the corporation, but it so

74. e.g. Central I.R. Co. v. Moulton I.A.R. Co., 57 Iowa 24a, 10 N.W. 639 (1881).
75. 95 A.L.R. 2d 468, §4.
76. Id. §6.
77. Lake Merced Golf & Country Club v. Ocean Shore R. Co., 206 Col. App. 2d 421, 23 Cal. Rpts. 881 (1962).
78. Cheer v. Commonwealth, 47 Ry. Co. 195 (1959).
79. Faver v. Pacific Electric R. Co., 146 Ca. App. 2d 370, 303 P.2d 814 (1956).
80. 95 A.L.R. 2d 468, §9.
81. Boston v. Jarvis, 218 Ky. 239, 291 S.W. 38 (1927) held that a railroad had only an easement rather than a fee title and so conveyance for a non railroad use made the land revert to the grantor or his successors.
82. Crolley v. Minneapolis & St. Louis Ry. Co., 30 Minn. 541, 16 N.W. 422 (1883).

vested in it only for the purpose of employing it in the public use. So far as taking and holding lands under the sovereign right of eminent domain is concerned, railroad corporations must be deemed agencies through which the state exercises that right to subserve the public needs. When taken for railroads the land is taken under authority of the state, to be applied under the same authority to a public use, to wit, to a highway, public in a certain sense. Upon no other theory can the taking and holding of real estate of private persons, without their consent, be justified. It is the purpose for which the land is taken, and not the particular corporation which the state authorizes to take it, that determines whether the use is public or not. In this case the state authorized the taking for the purpose of a railroad from the city of Minneapolis to the south shore of Lake Minnetonka. The use would have been the same had it authorized any other company than the Northwestern to take it for that purpose. Who holds and uses the land for the purpose for which it is taken, does not affect the character of the use.

So long as the land continues to be applied to the purpose for which it was taken—to wit, as a right of way for a railroad between the two points indicated,—the use remains the same whether it be so applied by the corporation which originally took the land or by some other. Who owns the railroad, whose duty it is to maintain and operate it for the benefit of the state and the public, and who does in fact so maintain and operate it, is immaterial so far as the character of the use if concerned. When the St. Louis Company took the transfer of the right of way, and constructed, maintained, and operated a railroad over it, having authority from the state to acquire and hold rights of points, it applied the right of way to the very use for which it was taken. The right of way seems to have been transferred for the purpose of having it so applied; not for the purpose of giving up the enterprise, but for the purpose of having it carried out by the grantee company. We fail to see how that can be deemed an abandonment of the use or of the right of way. A sale of a right of way is not equivalent to an abandonment.

In a more recent case,[83] a railroad company conveyed to the city surface rights to a portion of its rights of way for use as a highway. The court reaffirmed the principle that "the law abhors forfeitures

83. Midwestern Developments Inc., v. City of Tulsa, 374 F.2d 683 (10th Cir. 1967).

and favors the duration of rights of way so long as compatible with railroad use".[84] However, the court found a clear manifestation of intent to abandon railroad use, albeit involuntary (since under the threat of condemnation). In spite of this, the plaintiff was denied relief due to application of the rule of an earlier case[85] which treated the facts as if the city actually had used its authorized power of condemnation against the railroad. In such a case the railroad easement would have been terminated simultaneously with the taking of the highway rights of way and plaintiff could only recover in a reverse condemnation action.

The conclusion, therefore, is that conveyance of a right of way to a public or non-public entity would not amount to abandonment as long as rail operations were continued. However, only a public agency with authorized power of eminent domain could take over private rights of way for non-rail uses like bus rights of way, or bike paths. It is to be noted that resort to eminent domain would not be necessary if the court could be persuaded to equate rail rights of way with a more general category of rights of way for mass transportation. This would save the agency money and also probably would be in keeping with the grantor's original intention.

*Power of a State to Acquire and Retain Rights of Way*

It can be seen from the previous section that a state can most likely acquire a right of way from a railroad for continued use in rail operations without fear of interference from the granter of the right of way. However, the use of the right of way for purposes other than those for which the land was granted can raise problems based on the title of the land acquired. In addition to the problem of how a state can perfect is title to the land, the question of how a state becomes aware of impending line abandonment in time to act and of whether a state can enlarge its acquisition in anticipation of future needs are herein discussed.

New Jersey[86] and New York[87] are two states which have sought to solve the problem of being notified of disposition of railroad property in sufficient time to take action to acquire it for the state by means of "first option" statutes. In passing the statute, the New York Legis-

84. 374 F.2d 689.
85. Woodville v. U.S., 152 F.2d 735 (10th Cir.).
86. 48 N.J.S.A. 12-125.1
87. Guandolo & Fair, Transportation Law, §18 (1972).

lature[88] found that "abandoned railroad transportation property often possesses unique and irreplaceable value particularly suitable for public transportation purposes and nontransportation purposes, as well as for joint public uses. Such utilization of these existing land corridors, especially when used jointly, significantly reduces land acquisition and development costs to be public and, at the same time, minimizes disruption and displacement of families and businesses. Accordingly, it is the purpose of this act to establish a procedure by which state and local government agencies, and public utilities, will receive timely notification of railroad transportation property which has been or is almost to be abandoned, and to assure the availability of such property for public utilization whenever desirable."

These first option laws forbid the railroad from disposing of property, at least within a certain period commencing with the notification of the state and local governments, without a release of the preferential right. (While the intent of the shorter New Jersey statute seems clear, its words do not request notification by a railroad disposing of land for which no permission of the ICC is needed.)

Once the state finds out about the proposed disposition and acts to acquire it, the question is what title can the railroad convey. Presuming that the state does not plan to continue the exact use for which the land was obtained by the railroad, conveyance to the state could mean an end to the easement, if that is how the right of way was held. The land would revert to the grantor or his successor in title. If the railroad has a possessory interest but one that is less than simple absolute, it is the heirs of this grantor (and not usually his assignee, as discussed above) about which the state must be concerned. Assuming that the railroad is still using the land for the use for which it was granted, the title conveyed would be subject to a possibility of reverter or power of reentry. The value of such a conveyance especially under the assumption that the state will use the land for some purpose other than that for which granted is difficult to ascertain. The answer may be that for grants dating back to the nineteenth century, the possibility of an heir of the grantor exercising his right or power is too remote for concern. In at least one case, it has been determined that the expense in tracking down the heirs of the grantor of a right of way exceeded the risk of their exercising their rights.[89]

88. L. 1973, c. 998, Section 1, eff. June 23, 1973.

89. See Department of Urban Planning, University of Pennsylvania, Studies of Philadelphia-Lindenwald Rapid Transit Line (1972).

On the other hand, if the railroad has already ceased using the land for the granted purpose, its title in fee simple subject to a special limitation raises additional problems. In particular, upon cessation of use, the title automatically reverts to the grantor or his heir. Therefore, the railroad no longer legally owns the land. If, as found along one track of the New Jersey Central, one grantor out of many retained a possibility of reverter instead of a power of termination, and the railroad had abandoned operations along the line, the state should at the least refuse to pay for this one piece of land. Since the railroad owned the rest of the right of way (because the other grantors or their heirs had not yet exercised their power of termination), a conveyance of the railroad's interest in these parcels would be of value. The state could then seek to trace the one grantor with the reverter, or merely commence adverse possession.

Ordinarily, one would not anticipate any problem in the cases in which the railroad owned the land in fee simple absolute. However, one must keep in mind those instances mentioned above in which courts have construed such interests as mere easements.

Of course, instead of negotiating for the sale of a right of way, the state could condemn it. The power of eminent domain[90] (or the taking of private property for a public use) is an ins cident of sovereignty but, it is nonetheless, subject to the due process and just compensation clauses of the Fifth Amendment as applied through the Fourteenth Amendment to state as well as federal action.[91] A typical pre-1937 statement of the limitation of eminent domain was: "There must be a use, or a right to use, by the public, or some limited portion of the public. An incidental benefit, resulting to the public from this mode in which individuals in pursuit of their own interests use their property is not a public use."[92] The Federal Housing Act of 1937 started a movement away from the definition of public use as requiring public user to one requiring the accomplishment of a public purpose.[93]

In any event, the state should have no problem in condemning a right of way for any *present* public use. The only question would be that of allocating the compensation between the railroad and the grantor or his heir or assignee. The much harder problem is whether

90. See 26 Am. Jur. 638.

91. Missouri Pacific Ry. v. Nebraska, 164 U.S. 403, 17 S.Ct. 130 (1896).

92. Pennsylvania Mutual Life Insurance Co. v. Philadelphia. 242 Pa. 47, 54, 88 A. 904 (1913).

93. Frasnowciki, Ownership and Development of Land

the state can use eminent domain to acquire or preserve rights of way for which it has no *present* use. A recent study[94] looked at the related problem of whether a state agency can condemn property for *possible future* expansion of a rail line. Since a specific reason for condemnation is often all that is needed to satisfy a court,[95] the necessity of advanced state planning becomes apparent.[96]

*Procedure for Abandonment—History of Federal Regulations*

It was the conventional wisdom of many American Historians that the imposition of federal regulation of the railroad was done over the strenuous opposition of the railroads in order to restrain their monopolistic practices. This concept along with one which held that the railroad industry was and is inherently non-competitive has been recently challenged.[97]

Indeed, organizations like the Order of Patrons of Husbandry (Grange) advocated Federal Regulation.[98] However, the most important single advocates of regulation was the railroad industry itself. "Consciously or operationally most railroad leaders increasingly relied on a Hamiltonian conception of the National Government. They saw in a certain form of federal regulation of railroads the solution to many economic problems as well as the redirection of public reform sentiments toward safer outlets."[99]

The results of over a decade of discussion was the Act to Regulate Commerce (Interstate Commerce Act) of 1887[100] The act required the publication of tariffs and adherance to the tariff as publicized. Notice had to be given of fare increases and a major price abuse of charging more for short than long hauls was greatly controlled. However, the statute also prohibited pooling, (i.e. the "agreement between competing railways for a division of the traffic or for a pro rata distribution of their earnings united into a 'pool' or common fund"[101]). It was the inability of the railroads themselves, to stabilize pooling arrange-

94. Department of Urban Planning, University of Pennsylvania, Studies of Philadelphia - Lindenwald Rapid Transit Line (1972).

95. State Road Department v. Southerland, Inc., 117 So. 2d 512 (Fla. 1960).

96. E.g. J. Fuller, State Response to Railroad Abandonment, Unpublished Report.

97. See G. Kolko, Railroads and Regulations 1877 - 1916, P.U. Press 1965, Rail Productivity Report supra note 3.

98. G.H. Miller, Railroads and the Granger Laws, U. of Wis. Press 1971.

99. Kolko, supra note 97 at 5.

100. Interstate Commerce Act, 1887.

101. Black, Law Dictionary (4th ed. 1951).

ments (at least legally within the common law)[102] that had led to the call for federal regulation. The excessive investment in overextended branch lines that characterized the industry in 1887 made the stabilization of pools imperative. The Act to Regulate Commerce of 1887, therefore, resulted in a non-pooling (i.e. non quota issuing) cartel. "Many of the most undesirable aspects of American freight transport regulation are a consequence of the non-pooling nature of the cartel."[103] Senator T.C. Platt recognized the problem at the time:[104]

> And right here I want to call attention to a glaring inconsistency in this proposed legislation. The proposed prohibition of pooling does not prohibit the railroad companies from making rates. Indeed, the whole bill compels agreements between competing roads for the making of rates. The section does not propose to prohibit hard and fast agreement between railroads to maintain rates. Indeed, it almost compels it. It does not propose to interfere with any other means which railroads may adopt, which are inducements to the railroads themselves to maintain rates. All that it does propose to do is to make criminal the apportionment of freight between competing railroads. With that criminal clause in the bill, it would still be open to railroads to enter into any other kind of contracts which they might invent for the purpose of maintaining rates agreed upon . . . It does not apply to a hundred means by which railroad companies may in some way make it for their interest to maintain the rates which they themselves have fixed and legally agreed to maintain under the bill.

It was not until the Transportation Act of 1920 that Section 5(1) was amended to legalize agreements between carriers (if approved by the ICC) for the pooling of freights of different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof.

The years between 1887 and 1920 were hard ones for the ICC. It did not take the courts long after the passage of the Sherman Act of 1890 to hold the rate bureaus to be a combination in restraint of trade.[105] "This left the Interstate Commerce Commission in the unenviable situation of being established to facilitate something which had be-

102. Chicago M. and St. P. R. Co. v. Walach St. L. and P.R. Co., 61 Fed. 993 (1894).
103. Rail Productivity Report supra note 3 at 189.
104. 3 Interstate Commerce Commission.
105. See U.S. v. Trans Missouri Freight Assn. 166 U.S. 290 (1897).

come unambiguiously illegal."[106] Other deficiencies of the act were addressed in three major amendments: the Elkin Act of 1903[107] the Hepburn Act of 1906[108] and the Mann-Elkin Act of 1910[109] "Through these enactments Congress had succeeded by the eve of the First World War in the pointless, if not perverse course which it had set itself in 1887, stabilizing the railroad cartel without pooling."[110]

By the time the Transportation Act of 1920 turned the ICC into a public cartel from its initial role of facilitator of private cartilization, the railroads had just almost peaked in mileage. The problem of the succeeding decades of contraction of the railroads were met by giving the ICC jurisdiction over competing means of transport: motor carrier in 1935[111] water carrier in 1940[112] and freight forwarders in 1942[113] The ICC has, therefore, become an allocater of traffic between the modes with only the vaguest of guidelines at its disposal such as the prohibition of destructive competitive practices that appeared in the "National Transportation Policy" set forth in the preamble to the Transportation Act of 1940[114] In some sense, the policeman has become the guardian.

It was not until the Reed-Bulwinkle Act of 1948[115] that transportation cartels were finally exempted from Sherman Act prosecution. It took 61 years for Congress to clarify the legality of what it organized the ICC to do.

This approach to transportation regulation in the United States has not been without criticism:[116]

> In the light of nearly 80 years of experience, complaints that the Interstate Commerce Act was an inadequate cartelizing device pale beside the observation that it was a cartelizing device at all. The Act is open to the most hostile criticism that one may lay against any statute: it perpetuated the problem with which it was designed to deal. In retrospect, the railroad problem of the 1880's was a temporary and self-limiting one. The industry

106. Hilton, The Consistency of the ICC Act, p. 109.
107. 32 Stat. 847, 49 U.S.C. 41-43 (1964).
108. 34 Stat. 586, 49 U.S.C. 6 (3, 15.41).
109. 36 Stat. 547, 49 U.S.C. 4, 15.
110. Hilton, supra note 106 at 111.
111. 49 Stat. 453, 49 U.S.C. 301-327.
112. 54 Stat. 952, 49 U.S.C. 901-923.
113. 56 Stat. 284, 49 U.S.C. 1001-1022
114. 54 Stat. 898.
115. 62 Stat. 472, 49 U.S.C. 56.
116. Hilton, supra note 106 at 112-113.

had attracted enough resources that the railroads would shortly have had to behave competitively whether they wished to do so or not. This prospect was widely looked upon as intolerable because it promised widespread bankruptcy and a long period of outflow of resources as a consequence of a chronically low rate of return. In retrospect, these circumstances were unavoidable, once the industry began to decline . . .

An organization of the industry in which firms were free to quote prices, to enter or leave the industry, and to diversify, but not to collude, is diametrically opposite the present organization of the transportation industry. Thus, what the market processes and the Sherman Act would have created in absence of the Interstate Commerce Act is at present a goal which may be achieved only after arduous political effort and difficult transitional adjustments of the sort usually encountered upon ending cartels."

The particular portion of transportation regulation pertinent to this paper is that of abandonment control. The rest of this section analyses the history and procedure for abandonment of rail service.

*Abandonment Before and After the 1920 Transportation Act*

Problems of rate making, discrimination, and safety were early abuses attacked by state regulations and, eventually, federal regulation. Regulation over abandonment followed this pattern of state then federal attention but it lagged behind the above problems. Primarily, of course, this is because in the early days of railroading the systems were expanding and it was construction not abandonment, that drew attention. When the issue of abandonment did arise, the issue was local in nature and was decided by means of private litigation. Since a court is limited to the particular facts of the case before it, and is interested primarily in settling the narrow dispute, simple rules were developed dealing with duties to individuals rather than the public as a whole. (This was to be an important factor in the abandonment policy adopted by the ICC). One such rule was that as long as the railroad as a whole was profitable, the company could be prevented from abandoning an unprofitable branch.[117]

The basis for such a rule was sought in the obligation the company

117. Colorado & S. Ry. Co. v. State R. Commission of Colorado, 129 Pac. Rep. 506 (1917).

acquired in return for privileges like eminent domain. A Connecticut Court[118] described the situation as follows:

> One public right consists in the continuous uses of the railroad, its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter. All these corporate franchises and this property are held subject to and charged with this obligation.
>
> It is true that the charter is permissive in its terms, and probably no obligation rests upon the corporation to construct the railroad. The option to exercise the right of eminent domain and other public rights is granted. And when that option has been made, and the corporation has located and constructed its line of track, exercising the power of the state in taking property of others; and, in so locating and constructing its road, has invited and obtained subscriptions upon the implied promise to construct and operate its road, has commenced to operate the road under the granted powers, thereby inducing the public to rely, in their personal and business relations, upon that state of affairs, by so accepting and acting upon the chartered powers a contract exists to carry into full effect the objects of the charter, and the capital stock, franchises, and property of the corporation stand charged primarily with this trust. The large sovereign powers given by the state to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Having exercised those powers, the corporation has no right, against the will of the state, to abandon the enterprise, tear up its tract, and sell its rolling stock and other property, and divide the proceeds among the stockholders.
>
> The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the state, certain destruction of private property, in which whole communities, created and existing upon the faith of the continuous use of the chartered powers, are interested, and indeed, the life of the citizen, as well as his property rights, are thus jeoparized. Upon principle it would seem plain that railroad property, once devoted and essential to public use, must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that

118. Gater v. Boston & N.Y. Air-Line R. Co., 5 Atl. 695, 53 Comm. 333 (1885).

> this public right, existing by reason of the public exigency, demanded by the occasion, and created by the exercise by a private person of the powers of a state, is superior to the property rights of corporations, stockholders, and bondholders.

A rise in the number of abandonments in the year just before the enactment of the Transportation Act of 1920[119] may have had something to do with the inclusion of control over abandonment in Sec. I, although it probably was an afterthought.[120] In any event, Paragraph 18, Section I included the following: "No carrier by railroad subject to this Chapter shall abandon all or any of a line of railroad, or the operation thereof, unless and until there shall first be obtained from the commission a certificate that the present and future public convenience and necessity permit of such abandonment."

This is hardly a detailed legislative mandate. Of great significance to the operative effect of this provision is the interpretation of the term "public." In view of the brief description of the prior history of abandonment given above, it is hardly surprising that the ICC decided to concentrate on the local public rather than on the nation as a whole. In addition, the uncertain position of the ICC vis-a-vis possible conflict between state and federal regulation may have kept the attention of the ICC focused on the narrow facts of each abandonment application.[121] In any event, the policy of the ICC towards abandonment remained focused on local needs and divorced from other aspects of its regulatory work.[122]

The process by which abandonment decisions are made by the ICC has from the beginning been best described as a "balancing of interests." "The benefits to particular communities and commerce of continued operation must be weighed against the burden thereby impossed upon other commerce . . . . Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests - the effort being to decide what fairness to all concerned demands."[123] Some writers have advocated the elimination of this balancing and the granting of an absolute right to the railroads to abandon after a waiting period.[124] Others would broaden

119. For a full discussion on the history of the Abandonment Section see C.R. Cherington, The Regulation of Railroad Abandonment, Harvard Univ. Press, 1948.

120. 49 U.S.C. I.

121. Cherington supra note 119 at 42.

122. Id. p. 242.

123. Colorado v. U.S., 271 U.S. 153 at 168 (1925).

124. e.g. Conant, Railroad Consolidaton and the Regulation of Abandonments, 32 Land Econ. 318-25 (1956).

the ICC's enquiry from the particular local facts (i.e. the "particularist" approach) to resolution in terms of a national policy.

The fact is, however, that the ICC has chosen neither of these alternative approaches, and so one is left to discerning the standards used in its particularist balance. The discouraging fact is that no such standard can be articulated in spite of an initial legislative goal of the competitive ideal.[125] The ICC approaches each application on a case by case basis with its discretion well protected from probing judicial review by the traditional respect afforded administrative decisions. On the other hand, the courts have injected elements into the process. The old idea that a railroad was not a strictly private enterprise has been continually reinforced. Frankfurter in 1951 stated "unlike a department store or a grocery, a railroad cannot, of its own free will, discontinue a particular service to the public because an item of its business has become unprofitable."[126] In addition, the Supreme Court has required the ICC to consider displaced workers and if necessary attach conditions protecting their interests to the abandonment certificate.[127]

A recent study looked at the effectiveness of the ICC abandonment procedure and concluded in part:[128]

> Rail line abandonments are rapidly becoming sensitive political issues as well as economic issues, and there is substantial justification in favor of careful assessment of the continued operation of some rail lines just as there is substantial justification for the discontinuance of some other lines. The cases that we assessed are almost as remarkable for the information they failed to consider as for the information they did consider. There is never a finding of the aggregate impact of the discontinuance on the community, but there is always a finding of the aggregate effect on the railroad.
>
> In these older cases there was never an environmental assessment of the impact of shifting substantial tonnages to highway transportation from rail. In fact, there is no assessment of how much of the traffic moving by rail is likely to continue moving by rail after transshipment to the next closest railroad. In the

125. See J. Weissman, Railroad Abandonments: The Competitive Ideal, 43 Minn. L. Rev. 217 (1958).

126. Alabama Public Service Comm'n. v. Southern Ry., 341 U.S. 341, 353 (1951).

127. I.C.C. v. Railway Labor Exec. Ass'n., 315 U.S. 373 (1942).

128. Simat, Retrospective Rail Line Abandonment Study, p. 13-16.

case of some Wisconsin lines it appears that a "domino" effect may be observed: one rail abandonment was justified partially on the basis of the close proximity to an alternative line which line itself, five years later, appears to be under consideration for abandonment.

The parties appear almost invariably to be pushed into extreme positions: the railroad seeks abandonment because the consideration of alternatives (such as increased rates or arbitraries) is too cumbersome or contrary to ICC practice. The shipper, who may be willing to pay an increased rate rather than lose rail service altogether, is afforded little opportunity for compromise. Because of the rigidities of the negotiating process, and because of the virtual certainty that the ICC will permit abandonment, a vast middle ground for compromise is left unexplored once the machinery of the abandonment proceeding is set into motion.

The lack of specific standards for abandonment can be costly to everyone. A contested abandonment can cost a railroad in excess of $50,000,[129] and this does not include the extreme ill will generated in the community towards the company. A recent attempt has been made by the ICC to "permit a more expedient and economical disposition of the majority of abandonment application while maintaining the protections of due process."[130] By order of the ICC in Ex Parte 274, a "34 car rule" was advanced which, operationally, would serve to shift to the shipper and public the burden of going forward to prove that the proposed abandonment was not in the public interest.[131] A Temporary Restraining Order was entered against imposition of the procedure,[132] but the rule was implemented anyway.[133] Later, the court challenge was dismissed.[134]

The rule provides that a presumption that the public convenience and necessity does not require the continued operation of a line upon the showing that fewer than 34 carloads of weight per mile were carried over the line during the prior twelve months.[135]

129. Rail Productivity Report, supra note 3 at 168.
130. 37 Fed. Reg. p. 1046, Jan. 22, 1972.
131. For a detailed critique see Simat, Evaluation of Proposed I.C.C. Railroad Line Abandonment Standards.
132. 37 Fed. Reg. p. 3932.
133. 37 Fed. Reg. p. 18918.
134. 37 Fed. Reg. p. 16947.
135. 49 C.F.R. 1121.23.

*Complications for a Railroad in Reorganization*

The fact that a railroad is in reorganization adds another layer of complication on the abandonment problem. In particular, the Federal District Court becomes an active factor in the railroad operation. When individuals and most companies are unable to meet their financial obligations, the Federal Bankruptcy Act[136] affords a means of voluntary or involuntary relief. Railroad companies are subject to a special section of the Bankruptcy Act for reasons discussed below. This section, §77[137] provides for the reorganization of the company, instead of dismemberment and distribution to its creditors. In brief, the sixteen lettered paragraphs of §77 deal with five subjects: initiation of proceedings in reorganization; appointment and power of trustees; development of a reorganization plan; acceptance and confirmation of the plan of reorganization; dismissal of proceedings in reorganization.

The major provision affecting the rededication of rights of way is §77(C)(2) which provides for the continuing operation of the railroad, but under a court appointed trustee. The significance of this is that the provisions of the Interstate Commerce Act are still applicable, including, of course, those dealing with abandonment of service. In addition, however, before the railroad can apply to the ICC, it must secure the permission of the trustee, and in some cases, the court. The experience of the Penn Central[138] has been that the court has approved all the abandonments approved by the trustee. This is hardly surprising since it should not take much persuasion to lead a court to agree that it makes sense for a company in reorganization to stop performing services on which it is losing money. It should also be obvious that the mere process of reorganization tends to make abandonment more likely. This is due to the requirement of financial supervision by the trustee and court over all expenditures. In such a situation, funds for track repair and maintenance seem not to be provided and the road bed deteriorates.

Therefore, when it comes to stopping operation, the major hurdle is still the ICC, albeit with the added task of persuading the trustees to support the program. If the railroad owns the land in less than fee simple absolute, the cessation of operation leads to the kind of legal

136. 11 U.S.C. §1.

137. 11 U.S.C. §205.

138. J. Sullivan, A. Carrier's Perspective, Symposium on Economic and Public Policy Factors Influencing Light Density Rail Line Operation, U.S. DOT (1973).

problem discussed above with no further regard to the reorganization problem.

The picture is considerably different if the railroad owns the right of way. Although the court is quite willing to see unprofitable activities halted, the piecemeal disposal of a debtor's property is not a likely outcome. The creditors are quite aware of the value of the assembled right of way and are not likely to agree to the sale at anything approaching a bargain rate. There are ways of approaching this problem. However, it is enough to state here that the fact of reorganization makes the sale of unwanted rights of way much more difficult.

There are two reasons why analysis of §77 of the Bankruptcy Act is of little further concern to this study. The first is that a major revision of the Act has been proposed.[139] The second is that the Rail Reorganization Act of 1973 (discussed in Section F) creats an entirely new approach to abandonments.

While the mechanics of the previous Bankruptcy Act are of little concern, the history behind the Act is important as background to the Rail Reorganization Act. The fact that a special section is devoted to railroads in the Bankruptcy Act is not surprising.

The common law placed a duty to serve the public on common carriers.[140]

> Looking then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only . . ." Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affects the community at large. When, therefore, one denotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by determining the use; but, so long as he maintains the use, he must submit to the control.[141]

Public interest and the interests and rights of the owner of a profitable railroad are usually reconcilable. Requirements to operate cer-

139. Proposed Bankruptcy Act.

140. See also Southern Ry. v. Hatchett, 174 Ky. 463, 192 S.W. 695 (1917), Brownwell v. Old Colony R.R., 164 Mass. 29, 41 N.E. 107 (1895).

141. Munn v. Illinois, 94 U.S. 113, 125-26 (1876).

tain unprofitable lines can be viewed as the price a railroad pays for its franchise. However, when the railroad is insolvent, unprofitable operation in favor of the public works a relatively greater hardship on the owner and creditor of the company. There can be little doubt how the present §77 operates. Although §77(9) provides for the dismissal of the reorganization proceedings if there is "undue delay in a reasonably expeditious reorganization of the debtor", proceedings are rarely dismissed. The Missouri Pacific spent 23 years in reorganization, Florida East Coast spent 20 years, and the Rock Island and St. Louis-San Francisco each spent 14 years. The Rock Island, of course, is now back in reorganization.

However bad this may seem for creditors, the provisions of the Rail Reorganization Act have been received with even greater dislike. In viewing the historical development of railroad reorganization it is important to remember that there has not always been a Federal Statute in the Acts. One expert[142] has in fact recognized five historical periods of railroad reorganization, with a Federal Act appearing only in the fifth period.

The first period, which ended with the panic of 1857, actually involved failures of promoters, rather than of railroads. Since the usual cause was insufficient capital to cover underestimated costs of construction, the usual cure was sale of more stock.

The second period, following the panic of 1857, involved large reorganizations of the "conventional" type, i.e. caused by insufficient earnings. The Pittsburgh, Fort Wayne & Chicago and the New York & Erie collapsed in 1861 and 1862.

The railroad panic of 1884, started the next period of reorganization which was marked by the insolvency of many partly finished systems. For example, the Atchison, Topeka & Santa Fe expanded from a $5 million profit earning system of 2800 miles to a 7000 mile system showing a $3 million deficit. The period was also marked by the emergence of "buccaneering enterprises" like the New York, West Shore & Buffalo, built on the opposite side of the Hudson from the Hudson River Railroad. "Certain . . . competitive railroads were built in fully developed territory for the single and avowed purpose of being bought out by stronger rivals. They were too weak even to initiate the struggle, much less carry it to a successful issue."[143]

The panic of 1893 started the fourth stage of railroad reorganiza-

142. Arthur Stone Dewing as reported by Oscar Lasdon, The Evolution of Railroad Reorganization, 88 Bnk. L.J. 1.

143. Id. at 4,5.

tion, according to A.S. Dewing, which for the first time affected completed and established systems.

Throughout the first four periods of reorganization, the means of effecting reorganization was the equity receivership. Under the equity procedure, the court appointed a receiver who could continue to operate the railroad while a plan of reorganization was developed. The important advance of this procedure was the prevention of dismemberment of the railroad system through seizure by individual creditors. These seizures were possible because by the time of the second period of reorganization the railroad mortgage had appeared as a popular means of financing, and default of interest meant possession by the creditor in courts which construed liens strictly.

Although the equity receivership provided the environment in which reorganization could take place by preventing the assertion of individual claims and the dismemberment of the system, this procedure did not advance the actual reorganization of the railroad. "Among [the shortcomings of the equity, receivership] were: heavy legal and other costs; the long time consumed by the proceedings; the necessity of appointing ancillary receivers in other federal districts in which the railroad had property; minimal court control over security holders in protective committees; lack of court authority to subordinate any liens in favor of new creditors who could supply fresh funds (the court could only grant priority to those who extended credit for receivership expenses and some priority to receivers' certificates); and little court control over the reorganization plan. Whichever group controlled the reorganization committee could designate preferential treatment under the plan."[144]

The fifth period of reorganization marked the direct entry of the federal government into railroad reorganization. Section 77 of Bankruptcy Act was passed in 1933 with no public hearings and little debate. As amended in 1935, the section gave greater power of control to the ICC and the courts and greatly diminished the ability of creditors to block reorganization.

Enough has been written in previous sections to indicate that the railroads have entered a sixth stage of reorganization. One cannot help but read the words of ICC Commissioner Joseph B. Eastman in 1933 as applying to §77 reorganizations today as well as equity receivership in 1933. He complained of the "great incidental expense which they have involved, the continued domination of the property by the

144. Id. at 9.

interests which may have been responsible for its financial trouble, failure to deal fairly with the interests of the various classes of security holders, and failure to accomplish a reorganization which sufficiently protects the future of the property."[145]

The response to the crisis in 1973 as well as in 1933 was federal legislation. Enough has been written to question the ability of regulations to correct structural problems of the railroad industry.[146] At least the present response attempts to eliminate some of the layers of regulation and supervision which have been discussed.

*The Uncertainties Due to the Rail Reorganization Act of 1973*

The Rail Reorganization Act of 1973 (RRA), or H.R. 9142, was reported out of the committee of conference on December 20, 1973, as Report No.93-744. The committee hoped that the Bill would "restore, support and maintain modern, efficient rail service in the Northeast region of the United States: . . . designate a system of essential rail lines in the northern region; . . . provide financial assistance to certain rail carriers."

The Act became law in January 1974, and created two new organizations: the United States Railway Association (USRA) and the Consolidated Rail Corportation (Conrail). The former was to organize and plan for the acquisition by the latter of a viable rail network in the Northeast.

The major responsibilities under the Act were distributed among the Department of Transportation, the ICC (Rail Service Planning Office), USRA, Conrail. and a Special Court.

The purpose of Congress for erecting this structure, as stated in the Act, is to provide for

> (1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;
> (2) the reorganization of railroads in this region with an economically viable system capable of providing adequate and efficient rail service to the region;
> (3) the establishment of the USRA . . . ;
> (4) the establishment of Conrail . . . ;

145. Id. at 11.

146. See, for example, T. Schmidt, Government Regulation v. the Free Market, St. Louis University, December 9, 1974.

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the taxpayer.[147]

Congress set up a tight two-year timetable to achieve the above.[148]

A closer look at the provisions on termination of rail service is necessary for this report. Section 304, dealing with discontinuance and abandonment, emerged from the conference committee in form similar to the Senate amendment to the original House Bill. Both documents had provided for expedited procedures as part of the reorganization process.

The final version of the Act takes away from the ICC jurisdiction over certain discontinuances and abandonments taking place within two years of the effective date of the Final System Plan. Provided that the particular property is not designated to carry rail service by the FSP, all that is required is that notice by certified mail of the intention to discontinue be sent to the Governor, the State DOT, the government of each political subdivision in which the property exists, and each shipper who has used rail service during the previous 12 months. This notice gives a shipper or a government the opportunity to apply for a rail continuation subsidy or outright purchase of the line.

The abandonment of service along a line designated by the FSP as one to be operated, requires ICC approval and is therefore subject to the requirements discussed in an earlier section. Of greater current interest are procedures for interim abandonment. Before the FSP is approved, §304f requires the authorization of the USRA before discontinuance or abandonment can occur. Therefore, the issue is taken away from the ICC, but the Act also requires that "no affected State or local or regional transportation authority reasonably [oppose] such action". During 1974 the meaning of this requirement has been addressed by a Court, and regulations for interim abandonment have been filed.

147. 87 Stat. 985 §101(n).

148. Department of Transportation News, Timetable of Major Events Under H.R. 9142.

This article was the winning entry in The Harold S. Shertz Transportation Law Journal Essay competition for the year 1974-1975.