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I THINK I CAN – I THINK I CAN

Figuring Out Railroad Property Rights in North Carolina

An overview on the sources of railroad company rights in land and the types of interests held by railroad companies, as well as guidance on searching title and assessing railroad interests¹



Ascertaining a property owner's rights and the nature of the railroad's interest and boundaries is a difficult task. The author has encountered tricky (and time-consuming) title and property rights issues from time to time from the perspective of the property owner or the secured lender. In grappling with these issues, I have compiled a set of "research" files on a variety of railroad topics. These materials are intended to be an overview of the common issues, a practical guide for title research and a starting place for more extensive research. Don't give up. Adopt the rallying mantra of the Little Blue Engine, "I think I can – I think I can!"²

A Brief History of North Carolina Railroads and State Railroad Legislation

The first rail line in the United States was built in Pennsylvania in 1809, but public interest in rail lines came later in North Carolina. In 1827, the State legislature rejected a resolution to request the Corps of U.S. Engineers to survey a railroad from New Bern to Tennessee.

In the 1830s, the first railroad companies were chartered in North Carolina, with the first lines being completed in the 1840s. In 1849, the State organized The North Carolina Rail Road Company (NCRR) with a 223-mile long corridor between Charlotte and Goldsboro. NCRR had its formal groundbreaking in Greensboro on July 11, 1851.

The decades following the Civil War were financially difficult times for railroads, as well as other industries. Due to financial pressures, NCRR began leasing its lines and equipment in 1871. Eventually those leases came to be held by Norfolk Southern Railroad.

In the mid-1990s NCRR and Norfolk Southern leases were the subject of great controversy among the shareholders of NCRR, ultimately resulting in the State acquiring 100% of the shares of NCRR.³ In 1999, Norfolk Southern and NCRR reached an exclusive agreement for operation of its 312 miles of tracks (from Charlotte to Morehead City) for a 15-year

¹The author expresses her appreciation for the extensive research assistance provided by **Catherine B. Mitchell, Esq.** and supplementary materials and resources provided by **David J. Neill, Esq.**, both of whom practice law at Fox Rothschild LLP.

²Piper, Watty. *The Little Engine That Could*. Grosset & Dunlap.

³For a more detailed overview of the history of railroads in North Carolina, see Aiken, Michael. "Railroads in North Carolina: A Two-Part Series," *North Carolina Lawyers Weekly*, October 5, 1998.

⁴See NCRR 2013 Annual Report, located at www.ncrr.com.

term, with two 15-year renewal options. NCRR also leases a small segment of its track corridor to the City of Charlotte under a 2012 lease for the purpose of the extension of Charlotte's LYNX Blue Line light rail transit system.⁴

Other early railroad companies that were chartered and operated in North Carolina included the Atlantic and North Carolina Railroad Company, Charlotte and South Carolina Rail Road Company, Spartanburg and Asheville Railroad Company and Western North Carolina Railroad.

State legislation governing property rights and issues pertaining specifically to railroads include:

- N.C.G.S. §1-44. No title created by possession (adverse possession) of railway corridor.
- N.C.G.S. §1-44.1. Presumption of abandonment of railway corridor under certain conditions.
- N.C.G.S. §1.44.2. Presumptive ownership of abandoned railroad easements.
- N.C.G.S. §1-51. Statute of Limitations to bring an Action for Damages.
- N.C.G.S. §14-280.1. Trespassing on railroad right-of-way a misdemeanor.
- N.C.G.S. §39-1. Fee presumed, though word "heirs" omitted. [Caution: the presumption is rebuttable, and there is much case law interpreting this statute.]
- N.C.G.S. §40A-1. Eminent Domain and N.C.G.S. §40A-3(a)(4). Railroads included in the parties who may exercise eminent domain.
- N.C.G.S. §62-180. Use of railroads and public highways for utility lines.
- N.C.G.S. §124-11, *et seq.* State-Owned Railroad Company.
- N.C.G.S. §136-44.35 *et seq.* Also known as the Rail Corridor Preservation Act of 1988, this Act allows the North Carolina Department of Transportation to acquire inactive or abandoned railway corridors for "future rail use and interim compatible use."
- N.C.G.S. §136-190, *et seq.* (formerly N.C.G.S. §62-220). Powers of railroad corporations. See also the immediately following sections addressing intersections with highways and regulation of crossings.
- N.C.G.S. §136-220 *et seq.* Virginia North Carolina Interstate High Speed Rail Compact.
- N.C.G.S. §160A-498. The right of cities and counties to acquire property from the NCDOT for purposes of railroad corridor preservation.

North Carolina – Sources of Title and Title Research

A property owner or title searcher should inquire into railroad property right-of-way issues any time it is suspected that a property may be burdened by a railway corridor, a rail track line or a former railway corridor. Often it is obvious: there is a visible rail track crossing the land or forming a boundary of the land. Other times it is not so obvious that a railroad may have an interest in a property. Less obvious clues include:

- A rail track nearby, but not seemingly adjoining the land
- Language in the legal description referring to a railway corridor or to the centerline of a railroad though no railroad is visible on the land
- A trail or greenway on or near the land that once was a railroad track
- Railroad tracks shown on historic tax maps or aerial photographs, including those maps and photos that may be included in environmental site assessment reports or in tax records

⁴See NCRR 2013 Annual Report, located at www.ncrr.com.

Types of Right Into Land

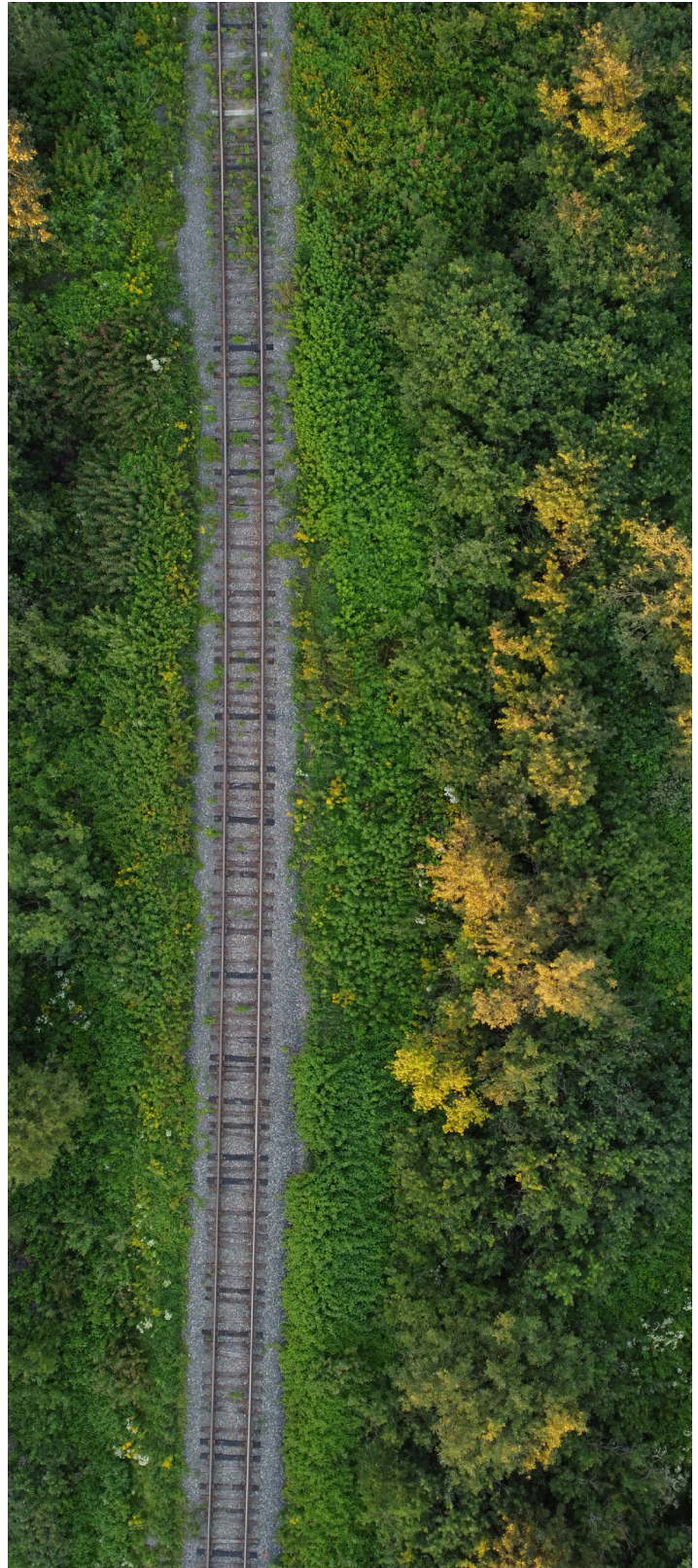
One reason for the difficulty in interpreting what property rights the railroad has is the dual meaning of the term “right-of-way.” The term can mean the right of one party to pass over the land of another. But the term can also be used to mean the strip of land upon which a railroad has its track, and in this latter use of the term, it refers to the land itself, not to the right of passage over the land. The second usage of the term, meaning a railway corridor, was a common usage in 19th century documents.⁵ In various cases, courts in North Carolina and elsewhere interpret the term “right-of-way” to sometimes mean a fee simple interest and sometimes to mean an easement interest. For purposes of this article, the term “railway corridor” will be used to refer to the physical land occupied by, or the maximum width to be occupied by, the rail company, whether the interest is in the nature of a fee estate or easement estate.

Types of Estates

The most common types of estates in land by which rail companies hold railway corridors are fee simple absolute, defeasible fee, permanent easement or lease. In theory, other possible estates include a limited or conditional easement, a license and any other type of estate in land recognized under the laws of the State. However, from a review of cases, it appears that the two most common interests railroads possess in North Carolina are fee simple absolute and conditional easement extinguishable under statutory principles of abandonment.

As discussed below, when a railroad’s interest is an easement, the easement is broad and exclusive in favor of the railroad, and the servient owner has only very narrow rights to use the railway corridor or to expect a residuary interest in the land.

N.C.G.S. §124-12(1) allows a state-owned railroad company to lease, license or improve its railway corridor, whether held by easement, presumptive grant, express grant or otherwise. A “state owned railroad company” is one which the State owns 100% of the voting stock. As noted above, NCRR has currently leased most of its railway corridors to Norfolk Southern Railroad Company.



⁵Wright, Danaya C.; and Hester, Jeffrey M. “Pipes, Wires, and Bicycles: Rails-To-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth Century to the Twenty-First Centuries,” 27 Ecology L.Q. 351 (2000).



Methods of Acquiring Interest or Title

There are three common methods by which rail companies acquired railway corridors in NC: (1) voluntary grant or purchase, (2) operation of law (charter or statute) and (3) condemnation. In some states, early railroads received railway corridors across public lands due to state or federal land grants.

Voluntary Grant or Purchase

In the early years of railroad development, many rail companies acquired railway corridors by express grants from the servient landowners, either for consideration or gratuitously for the anticipated “advantage and benefit” that the rail track would bring to the remainder property. In the case where there exists an express grant, the instrument will control in determining the quality of the railroad’s estate in the railway corridor, the width of the railway corridor and any other limitations placed on the use of the railway corridor. There are numerous cases interpreting the language of these 19th century instruments.

Operation of Law by Charter or Statute

The early railroad charters generally allowed the railroad to acquire railway corridors by either deed, condemnation or a presumption of ownership after tracks were laid and the passage of a period of time (usually two years) without the servient owner bringing an action for damages. N.C.G.S. §1-51 has codified the statute of limitations for an owner bringing an action for damages to be two years after the railroad began operations and five years after the railroad’s entry on the land.

The railroad charters established the reasons and purposes for the railroad’s ability to condemn property broadly for railroad purposes. The 1850 Charter for the NCRR describes the quality and purpose of title by condemnation thusly:

“Section 29. . . that the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used for the purposes of said road and no longer, unless the person or persons owning the said land at the time that part of the said road which may be on the said land, was finished, or those claiming under him, her or them, shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of the said road, which may be on the said land, was finished.”⁶

⁶Though quality of title was apparently not an issue, the court in *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 2, 675 S.E.2d 59, 61 (2009) recognized that virtually identical language in the 1849 Charter for the Charlotte and South Carolina Rail Road Company gave the railroad an easement interest and cited to prior cases for support of this interpretation.

The 1850 Charter for the NCRR describes the method of acquiring title by presumption thusly:

“Section 30. That all lands not heretofore granted to any person, nor appropriated by law to the use of the State, within one hundred feet of the center of said road, which may be constructed by the said company, shall vest in the company as soon as the line of the road is definitely laid out through it, and any grant of said land thereafter shall be void.”

The railroad charters set the maximum boundaries for railway corridors acquired through condemnation or presumption. Most charters in North Carolina set the maximum corridor established in this manner to be 100 feet on each side of the track (for a total of 200 feet), with additional amounts allowed if necessary to accommodate the topography of the land in construction of the track, and in the case of condemnation for the purpose of constructing depots and other buildings, then the maximum amount is two acres for any one lot.⁷

Copies of railroad charters and bylaws for the Atlantic and North Carolina Railroad Company, the North Carolina Rail Road Company and a portion of the Charter for the Western North Carolina Railroad are linked to the end of this article.⁸

Condemnation

As discussed above, early railroad companies enjoyed the right to acquire property interests by condemnation allowed under their respective charters. Modern railroad companies enjoy similar rights as codified in N.C.G.S. §40A-3(a)(4) (private condemners) and in N.C.G.S. §124-12(2) (state owned railroad companies). These statutes allow the rail companies to acquire a fee simple interest in land for the construction of railroads and related facilities. The width of the condemned corridor is limited to not less than 80 feet and not more than 100 feet, except for when the railway corridor runs through a town, it may have less width, and where there may be deep cuts or high embankments, it may be of greater width. The statute prohibits condemnation of the following without the landowner’s consent or other statutory authorization: burial grounds, usual dwelling house and yard, and kitchen and garden.



⁷See *Carolina & Northwestern Ry. Co. v. Piedmont Wagon & Manufacturing Co.*, 229 N.C. 695, 51 S.E.2d 301 (1949) for the court acknowledging that the railroad does not need to initially use the entire 200-foot corridor in order to acquire the entire width of the corridor. See also *Keziah v. Seaboard Air Line R. Co.*, 272 N.C. 299, 158 S.E.2d 539 (1968).

⁸Railroad charters and bylaws may be obtained from railroad companies, state library archives in Raleigh and law school libraries. Some charters may be obtained from the North Carolina Secretary of State’s Office.

Abandoned Property Interests

Adverse Possession and Statutory Abandonment

If the railroad owns a fee interest in the railway corridor, then abandonment of the railway corridor will not result in a loss of title, just as with any owner of a fee interest in land. However, unlike other fee simple owners or other easement owners, railroads are protected by statute from adverse possession claims. See N.C.G.S. §1-44, which provides that railroads may not be presumed to have conveyed any interest in property it owns (in fee, easement or lease) by virtue of the passage of a statute of limitation or by occupation of said property by another.

Easement interests in railway corridors can be abandoned by the railroad in certain very limited circumstances. In the case of an abandoned railway corridor, then N.C.G.S. §1-44.2 establishes a rebuttable presumption of ownership by adjoining property owners as follows:

- Where there are property owners on each side of the railway corridor, then the presumption is that each property owner acquires an interest to the center line;
- Where the railway corridor is adjacent to a property and to a public road, then the presumption is that the adjacent property owner acquires the railway corridor to the nearest edge of the public road; and
- The side lines of adjacent property owners are also extended to the center line or nearest edge of a public road (as applicable), unless the side lines of adjacent owners intersect before reaching the railway corridor, in which case the side lines will run together until they intersect with the centerline of the railway corridor or the nearest edge of the public road (as applicable).

Rails-to-Trails Program and Abandonment

Determining whether a railway corridor has been abandoned for the purpose of the termination of the easement is not easy. Mere non-use of a railway corridor, or a portion of a railway corridor, does not automatically give rise to the railroad having “abandoned” the easement in whole or as to the unused portion of the easement. Nor does the dissolution of the chartered railroad that initially held the easement result in the abandonment of the railway corridor.⁹

The following is a list of queries to determine whether a railway corridor has been abandoned:

- The Surface Transportation Board (STB) governs all common carrier rail lines, including having the authority to approve discontinuance of service and abandonment of a track. Determine whether the STB has authorized the discontinuance of service and abandonment of the track. See the discussion below regarding the federal authority to approve the discontinuance of rail services.
- Determine whether the North Carolina Department of Transportation has acquired the railway corridor and/or leased the railway corridor for recreational purposes. See the discussion below on the “rails to trails” program.
- Assuming the STB has authorized abandonment and the NCDOT has not acquired the railway corridor, then determine whether the seven-year statutory limitations period for presumption abandonment has been satisfied.¹⁰ The statute requires that the railroad have removed the tracks and not replaced the tracks or otherwise have used the railway corridor for “any railroad use” for a period of seven years after the removal of the tracks.

⁹*Norfolk Southern Ry. Co. v. Smith*, 169 N.C. App. 784, 787, 611 S.E.2d 427, 430 (2005)

¹⁰See N.C.G.S. §1-44.1.

How To Do Title Research

It can be difficult to determine the nature of a railroad's interest; therefore, allot sufficient time for research and advise your client of the likely need for extensive research beyond the scope of a typical title search. The search period may need to extend back to the 1830s, and research in and to historic records (maps, railroad charters and statutes) may also be necessary. Available documentation may not be complete, due to fires, flood, war and other disasters over the course of time. Finally, in cases where you determine that the railroad's interest is an easement, most cases addressing the servient owner's right to use the easement area are highly fact dependent and hinge on a question of whether the railroad is exercising "honest exercise of judgment" and not in bad faith. Considerations include the railroad's needs and use, including the railroad's legitimate interest in risk management with regard to safety of its employees, passengers, freight and people and improvements that might be within the right of way.

Title insurance should be obtained. The practitioner should work with the insuring title company to obtain the appropriate and best coverage available based on the particular situation. In that regard, the practitioner should carefully review all exceptions pertaining to the railroad's rights in and to the insured property.

The following steps provide a suggested approach to title research. However, depending on available information and issues, the steps may be taken out of order or simultaneously.



Step 1: Getting Started

Request copies of any documentation the property owner may have related to the railway corridor. The author has had one industrial client that had extensive railroad-related records in its archives. The records included executed, but unrecorded, easement agreements, lease agreements and correspondence between a predecessor company and the predecessor railroad, all dating from the early 1900s to the 1930s.

If the client is obtaining an environmental site assessment, check with the environmental engineer to inquire whether access to historic maps or aerial photos is available.



Step 2: Review Any Readily Accessible Public Records

Determine whether there is any easily available information recorded in the Register of Deeds Office and tax department during your search period about the railway corridor in your chain of title, such as deeds or easement agreements. Useful information includes any recorded instruments indicating location of the railway corridor and the name of the railroad company using the corridor and tax maps.



Step 3: Identify Rail Company

Determine which rail company or companies have interest in the track. Keep in mind that the current track user may be a lessee. In this step, attempt to determine when the rail tracks were constructed, as this will give guidance on the length of the title search period.

Resources for determining the original location of track lines include the railroad company's own archives, state archives and other historic maps.

- See *The North Carolina Railroad Map, "A History of North Carolina Railroads: 1830-1989"* with explanatory text, cited in the reference materials at the end of this article. This is a terrific resource for determining the owner, lessor and operator of particular track lines. The publication includes a 3' x 2' map of North Carolina, presenting a comprehensive picture of past and present track lines throughout the state, including abandoned lines. Not all rail lines are depicted; in particular, private lines are not shown, and lines within city limits are not shown. For each track

depicted, the following information is given: Camp, construction dates, route and distance, gage, track owner, operation dates, disposition date, leasing company and controlling company.

- See also *North Carolina Railroads*, also cited in the reference materials at the end of this article, for a list of railroad companies that have had some type of activity in the state.
- See also North Carolina Department of Transportation, Rail Division, archives in Raleigh.
- See also Interstate Commerce Commission, National Archives and Record Administration. Some records are available online. Available records include maps and assessments of the value of rail lines and quality of title based on a survey undertaken by the ICC pursuant to the Valuation Act of 1913.



Step 4: Undertake a New Survey

Determine location of track or where an abandoned track was laid. Enlist the assistance of a surveyor and obtain a new survey. Give the surveyor any historic maps you have located. Surveying companies often have access to maps as well.



Step 5: Conduct a Full Title Search

For more extensive title research:

1. In the Register of Deeds, take the chain of title back to the date of the charter of the original railroad company that constructed the track to locate any instruments passing title (fee or easement) to the railroad company; and
2. In the Clerk of Courts office, search special proceedings back to date of the charter or track construction to locate any condemnation proceedings brought by the railroad or for any damages proceedings brought by property owners against railroad. A word of caution: Due to railroad company mergers, even in the 1880s, you may need to search the names of multiple railroad companies.



Step 6: Review of Other Deeds in Chain of Title

Carefully review all deeds in the chain of title to determine whether the railway corridor is excluded from the legal description in any deed. If so excluded, then this will call into question whether the property includes the railway corridor or not. Therefore, even if the railroad interest is merely an easement, it does not necessarily mean that the inquiring owner has an interest in the land under the railway corridor.¹¹

Additionally, information contained in deeds or other instruments in the chain of title may provide additional clues as to the source of the railroad's interest, the width of the railway corridor or scope of the easement. See *Norfolk Southern Ry. Co. v. Smith*, 169 N.C. App. 784, 788, 611 S.E.2d 427, 430 (2005), for an example of the use of information contained in other recorded instruments to support the presumption of a 200 foot railway corridor (100 feet on each side of the track).

¹¹ The author encountered one title where the railway corridor was created by an express grant of an easement interest, for an unusually narrow width (20 feet). The survey revealed that there was a substantial gap (about 10 feet) between the edge of the property and the outer edge of the railway corridor. A spur track line crossed over the gap onto the property for the purpose of providing loading/unloading of goods. At the time this title search was undertaken, the spur line had fallen into disuse.



Specific Issues: Easements

Dimensions – Subsurface and Width

Once one has established that the railroad's interest is an easement right, then consider the boundaries of the easement: height, depth and width. Look to the instrument that created the interest for guidance, whether a private grant (deed or easement) between the railroad company and landowner, or state or federal grant, or charter or statutory grant. Usually the width of the railway corridor is expressly stated or is set by statutory presumption and thus creates little controversy. Areas of controversy can arise in the following fact patterns: (1) where the width needs to be larger than the statutory presumption due to the topography of the land, or (2) where the original tracks have been removed and the existing tracts are in a different location. The boundaries of the railway corridor (when established by charter or statutory presumption) are set when the first track line is built, and remain thus even if the rail company should add a track or move the track.

The height and depth of the railway corridor are rarely expressly stated in granting instruments. The height of the railroad corridor is typically not a problem for landowners; and to the extent there is any litigation around the country on the question of height, it is usually related to aesthetic

issues, such as views obstructed by utility poles and wires.¹²

Questions of subsurface rights have generated much litigation over issues of valuable mineral rights, payment for the right of utility companies to lay underground lines within the railway corridor, and resulting from practical issues, such as need for underground drainage (sometimes the need being caused by the railroad embankment altering the natural drainage pattern of the land) or livestock tunnels to link pastures bisected by the railway corridor.

If a railroad's activities spill beyond the boundaries of the easement, then the railroad can be liable to the servient landowner for trespass and/or damages to the property.¹³ Conversely, a servient landowner can be liable to the railroad for trespass and/or damages for its use of the railway corridor, in situations where the rail company is deemed to have exclusive right to use the surface of the easement corridor.

Cases around the country have established the general principle that railroads generally do not have the right to mine minerals from under the railway corridor.¹⁴ However, other uses by the railroad of the subsurface or uses by servient owner of the subsurface are not so clear.¹⁵ Other questions of subsurface rights arise out of one of two

¹²Wright, Danaya C.; and Hester, Jeffrey M., *supra*, at 404.

¹³See *Keziah v. Seaboard Air Line R. Co.*, 272 N.C. 299, 158 S.E.2d 539 (1968).

¹⁴See *United States v. Union Pacific Railroad Co.*, 77 S.Ct. 685, 353 U.S. 112 (1957) for discussion of the exclusion of mineral rights from a railroad's easement interest, as well as for an interesting discussion of early Federal grants to railroads and the public policy behind such grants.

¹⁵Wright, Danaya C.; and Hester, Jeffrey M., *supra*, at 409-415.

contexts: (1) whether the railroad has the right to grant easements to third parties in the subsurface and the right to receive compensation for such grant, and (2) whether the servient owner has the right to use the subsurface or to grant to a third party the right to use the subsurface. Most states disallow the servient owner to grant subsurface rights to third parties. In a majority of states, “subsurface” means everything in the subsurface, except minerals. North Carolina is in the minority of states that will allow some limited right of the servient owner to grant subsurface rights to third parties.¹⁶ In a minority of states (including possibly North Carolina), “subsurface” means something less than everything below the surface except minerals,¹⁷ and consideration is given to the needs of the railroad for support and the breath of the meaning of the term “railroad purposes.”

Scope of Use

Although the scope of the railroad easement includes the physical dimensions and reach (width, height and depth), it also includes the limits put on the railroad’s use by the limitations of the purpose for the easement.¹⁸ Use beyond the easement limits creates additional burdens on the land and may be a trespass or, in the case of a condemnation action, require additional compensation to the servient owner.¹⁹ One way to view the railroad’s permitted use is that the railroad may exercise exclusive domain within the physical boundaries of the easement, including to the depth required by the railroad for subjacent support. Another way to view the railroad’s permitted use is that the railroad may use the surface and subsurface only for uses that are related to the railroad’s own operation of the rail line, interpreted broadly to include tracks, protective fences, foundations, depots, maintenance facilities and buildings, station buildings, machine shops, telephone and telegraph lines and other uses “reasonably necessary for the purposes for which the easement was granted.”²⁰ The federal “incidental use doctrine” recognizes that railroads

may use portions of their easements for generating revenue, such as railroad leases of portions of the railway corridor for silos, warehouses, gas stations or other commercial non-railroad uses, and in this context, the doctrine holds that these kinds of leases do not impose any additional servitude on the property that entitles the servient estate owner to additional compensation. The test is whether the use is inconsistent with the railroad’s use. Justification for this doctrine is threefold: (1) the commercial, non-railroad use is nominal compared to the burden on the land of the railroad’s use, (2) a railroad easement allowing the railroad exclusive use of the land for railroad purposes is so broad that it is tantamount to a fee interests, and (3) commercial uses often are related in some way to the railroad’s business, and the additional burden on the land is minimal compared to the railroad’s primary use of the land.²¹

Nationally, cases (including class actions) are arising to challenge two relatively new uses for railway corridors: (1) conversion of railway corridors for recreational use, and (2) use of railway corridors for utility wires and lines and cellular transmitters.²²

As a general proposition, the railroad’s easement is considered exclusive, unlike other easement rights. For example, a servient owner may drive on a motor vehicle roadway on her parcel, or may choose to picnic under power lines, but no similar right exists to use a railroad’s railway corridor. The reasons for this exclusivity revolve around the railroad’s need to protect itself and the public and ensure the safe management of the railroad.²³ Encroachments, even temporary, onto the railroad corridor can create hazards and liability for the railroad, such as injury and damages due to vehicular and pedestrian traffic; line of sight issues for trains as well as for vehicles at crossings; safety in the transportation, storage and handling of dangerous materials; fire hazards arising from sparks from the trains alighting on nearby vegetation, structures, animals or people; and

¹⁶See *Atlantic Coast Line R.R. v Bunting*, 168 N.C. 579, 84 S.E. 1009 (1915) allowing a servient owner to reconstruct a building within the unused portion of a railway corridor easement.

¹⁷See *Virginia & C. S. R. Co. v. McLean*, 158 N.C. 498, 74 S.E. 461, 462 (1912) addressing method of valuing the condemned railway corridor and noting that the market valuation may be “subject to modification that, under special circumstances, showing for instance the existence of mineral or other deposits of value below the surface to the extent that they could be made available to the owner without interference with the easement, such conditions should be considered by the jury in estimating the damage....”

¹⁸See generally *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 2, 675 S.E.2d 59, 61 (2009) for discussion of the court’s determination that (a) the quitclaim of a portion of the railroad easement to the City of Charlotte was not inconsistent with the charter creating the easement interest and (b) that the increased rail traffic did not constitute overburdening of the easement which would have entitled the servient owner to additional compensation.

¹⁹See *Teeter v. Postal Telegraph Co.*, 172 N.C. 783, 90 S.E. 941 (1916) and *Query v. Postal Telegraph-Cable Co.*, 178 N.C. 639, 101 S.E. 390 (1919).

²⁰See *Hodges v. Western Union Tel. Co.*, 133 N.C. 225, 45 S.E. 575, 576 (1903) finding that the railroad owed the servient owner additional compensation in order to contract with Western Union to place additional telegraph lines in the railway corridor which were intended for “general commercial purposes” rather intended for purposes related to the operation of the railroad.

²¹See *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N.C. 589, 61 S.E.2d 700 (1950) finding that the lease by the railroad of a building within the railway corridor to a tobacco company to be a misuse of the railroad’s easement.

²²Ackerson, Nels. “Right-Of-Way Rights, Wrongs and Remedies: Status Report, Emerging Issues and Opportunities,” 8 *Drake Journal of Agricultural Law* 177 (2003).

²³Wright, Danaya C.; and Hester, Jeffrey M., *supra*, at 397-402. See *supra* pages 19-20.

stability of the rail lines, embankments and trestles. North Carolina is among the handful of states that have allowed limited use of unused portions of a railroad easement for purposes not inconsistent with the railroad's purposes.²⁴ These cases have tended to limit the servient landowner to using or occupying portions of the railway corridor not currently being used by the railroad and only for so long as the railroad does not seek to use said portion of the railway corridor. And the purpose for which the servient owner may use the railway corridor cannot interfere with the railroad's use. The railroad has the sole discretion to determine whether "proper management and business necessities" require expansion of the railroad's facilities over previously unused portions of the railway corridor.²⁵ For a court to find that the railroad abused its discretion, the standard is set high, requiring "a finding, supported by evidence that the use and occupancy of its right of way is not necessary for railroad purposes, and that such use is in bad faith, and not the result of the honest exercise of judgment."²⁶

Crossings

As noted above, a railroad's easement interest is considered exclusive, unlike other easement rights. There is no automatic right of a servient landowner to have a drive or road crossing over a track (even when the railway corridor is an easement interest), unless (1) the servient owner reserved a crossing in the deed conveying the railway corridor to the railroad, or the railroad subsequently granted a crossing easement or license, or (2) the servient owner is able to establish an easement by necessity. The location of any crossing is usually at the discretion of the railroad. The fact that a crossing may have existed over the track for many years will not prevent the railroad from later closing the crossing point.²⁷ Crossing agreements tend to address the following: construction and maintenance of the crossing; required insurance coverage; whether it is a license or an easement and any compensation to be paid to the railroad company for the right to have a crossing; requirements for barricades, gates and signals; and operational safety covenants.



²⁴See *Norfolk Southern Ry. Co. v. Smith*, 169 N.C. App. 784, 788, 611 S.E.2d 427, 430 (2005) citing to the general rule that "areas of a right-of-way not required for railroad purposes may be used by the servient owner in manners not inconsistent with the right-of-way. However, the owner's use is subject to the railroad's easement" but nonetheless finding that the railroad in that case was entitled to enjoin the servient owner from undertaking construction activities within the railway corridor and burying a water line under the track because such activities impeding the railroad's right to manage safety risks. But see also *Carolina & Northwestern Ry. Co. v. Piedmont Wagon & Manufacturing Co.*, 229 N.C. 695, 51 S.E.2d 301 (1949) allowing the servient owner's use of unused railway corridor until the railroad provided notice that the railroad needed to expand its operation to encompass the unused portion of the railway corridor.

²⁵*Carolina & Northwestern Ry. Co. v. Piedmont Wagon & Manufacturing Co.*, 229 N.C. 695, 701, 51 S.E.2d 301, 306 (1949).

²⁶See *Hodges v. Atlantic Coast Line R. Co.*, 196 N.C. 66, 144 S.E. 528, 529 (1928) where the court allowed the railroad to erect shanties and a fence around a railway corridor for the purpose of providing readily available housing for foremen and section hands even though such fencing and structures effectively prohibited the fee owner from using the railway corridor for agricultural purposes.

²⁷See *Schwarz & Schwarz, LLC v. Caldwell County Railroad Co.*, 197 N.C. App. 609, 677 S.E.2d 546 (2009), *disc. rev. denied*, 363 N.C. 856, 694 S.E.2d 391 (2010).



Federal Law/Surface Transportation Board

Rail operations are overseen by the Surface Transportation Board (STB) under the Transportation Act of 1920. (Previously the Interstate Commerce Commission was the regulatory authority.) The process by which a railroad discontinues services and use of a railway corridor is governed by federal regulations. A railroad must seek approval of the STB to discontinue service along an established rail route and abandon a railway corridor for future use by the railroad. The railroad must receive a Certificate of Discontinuance from the STB. Once the process of abandonment of the line is completed in accordance with the Certificate of Discontinuance, then the certificate becomes a Certificate of Abandonment. But the discontinuance of services and railway corridor is not the same as “abandonment” of the railway corridor for property law purposes. Whether the easement interest in the railway corridor is abandoned is a matter of state property law. (See N.C.G.S. §1-44.1 and §1-44.2.)

The National Trails System Act of 1968 and 1983, 16 U.S.C.A. 1241 *et seq.*²⁸ and corresponding state statutes were promulgated to assure the availability of railroad corridors for future use for rail transportation. These statutes provide the basis for the program commonly known as the “Rails to Trails Program” which allow for the temporary conversion of railway corridors to recreational trails. The STB oversees abandoned or inactive corridors permitting them to be used as recreational trails until a need arises for the corridor to be reactivated for railroad uses. In North Carolina, the corresponding statute is N.C.G.S. §136-44.35 *et seq.* (known as the Rail Corridor Preservation Action of 1988), which authorizes the North Carolina Department of Transportation to acquire inactive railroad corridors by purchase, gift, condemnation or other method to preserve the railway corridor for future rail purposes. The NCDOT may lease portions of railway corridors to local governments for recreational trail use so long as certain conditions are satisfied, including that the NCDOT has determined that there will not likely be a need to resume active rail service on the railway corridor for a period of at least 10 years.²⁹

²⁸Wright, Danaya C.; and Hester, Jeffrey M., *supra*, at 447-459.

²⁹See N.C.G.S. §136-44.36D and N.C.G.S. §160A-498.

Resources

Railroad Archives and Charters

- Amtrak <http://www.amtrak.com/>
- CSX Transportation <http://www.csx.com/>
- Federal Railroad Administration (FRA) <http://www.fra.dot.gov/>
- FRA Accident/Incident data search <http://safetydata.fra.dot.gov/officeofsafety/publicsite/Query/stateoverview.aspx>
- Interstate Commerce Commission, National Archives and Records Administration – Some records are available online. Available records include maps and assessments of the value of rail lines and quality of title based on a survey undertaken by the ICC pursuant to the Valuation Act of 1913.
- North Carolina Digital Collections www.digital.ncdcr.gov/cdm for digital archives of historic statute books and other historic materials.
- North Carolina Department of Transportation
 - NC DOT Rail Division <http://www.bytrain.org/> - This site includes information on current projects, corridor preservation, the state rail plan, and a listing and contacts for shortline railroads in the State.
 - NC DOT BeRailSafe <http://www.berailsafe.org/>
 - Maps and other information may be requested from:

Rail Division
1553 Mail Service Center (Mail)
Raleigh NC 27699-1553

1 South Wilmington Street (Delivery)
Raleigh NC 27601
- The North Carolina Railroad Company www.ncrr.com for rail maps and Right-of-Way and Utility Forms
 - See www.ncrr.com/corridor-management/right-of-way-and-utility-forms/
- North Carolina Operation Lifesaver <http://www.ncol.org/>
- National Operation Lifesaver, Inc. <http://www.oli.org/>
- Norfolk Southern Railroad <http://www.nscorp.com/>
- Rails-To-Trails Conservancy www.railtrails.org

Reference Materials

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- Carriker, S. David. *North Carolina Railroads*. Charlotte, NC: Heritage Publishing Company, 1991. ISBN: 0-936013-08-7. This publication is a list of the railroad companies that have had some type of activity in North Carolina.
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- Wright, Danaya C.; and Hester, Jeffrey M. *Pipes, Wires, and Bicycles: Rails-To-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth Century to the Twenty-First Centuries*, 27 Ecology L.Q. 351 (2000).

Railroads in Culture – Songs, Film, Literature, History

Songs

- *Chattanooga Choo Choo* – Glenn Miller
- *The City of New Orleans* – Arlo Guthrie
- *I Heard That Lonesome Whistle* – Johnny Cash
- *I've Been Working on the Railroad* – American Folk Song
- *The Last Train to Clarksville* – The Monkees
- *Take the "A" Train* – Duke Ellington
- *Wabash Cannonball* – Doc Watson

Film and TV

- *The Great Train Robbery* (1903), Director: Edwin S. Porter (short film).
- *Hell on Wheels* (Television series premiered on AMC on November 6, 2011), Creator and Producer: Joe and Tony Gayton.
- *Johnny Cash – Ridin' the Rails: The Great American Train Story* (TV Movie 1974), Director: Nicholas Webster. Featuring Johnny Cash's train-related songs.
- *Murder on the Orient Express* (1974), Director: Sidney Lumet.
- *Petticoat Junction* (Television series aired on CBS from September 1963 to April 1970), Creator: Paul Henning, Producer: Wayfilms.
- *Planes, Trains & Automobiles* (1987), Director: John Hughes.
- *The Polar Express* (2004), Director: Robert Zemeckis.
- *Strangers on a Train* (1951), Director: Alfred Hitchcock.
- *Thomas and the Tank Engine and Friends* (Television series, premiered on the ITV network in September 1984 in England, and shown on PBS Stations in the United States), based on The Railway Series of books by the Reverend Wilbert Awdry and his son, Christopher Awdry.
- *White Christmas* (1954), Director: Michael Curtiz.

Literature

- Christie, Agatha. *Murder on the Orient Express: A Hercule Poirot Mystery*. Harper.
- Piper, Watty. *The Little Engine That Could*. Grosset & Dunlap.

History

- Coleman, Alan. *Images of Rail: Railroads of North Carolina*. Charleston, SC: Arcadia Publishing, 2008.
- Strouse, Jean. *Morgan: American Financier*. New York: HarperCollins Publishers, Inc., 2000. A biography of J. Pierpont Morgan, this book goes into details on his more significant business deals and financing ventures, including his investments in some of the significant railroad companies in the United States.
- Trelease, Allen W. *The North Carolina Railroad, 1849-1871, and the Modernization of North Carolina*. Chapel Hill, NC: The University of North Carolina Press, 1991. ISBN 0-8078-1941-7.



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