



Curing Title Exceptions: Railroad Rights of Way

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RAILROAD RIGHTS OF WAY

A. Fee Simple or Easement?

1. Transferability

The vast majority of real estate titles held by individuals and entities, private and public, consist of estates in fee simple, which by definition, are freely transferable by the owner or holder thereof. In most real estate transactions, the question of whether the title to the property that is the subject of purchase agreement negotiations between a prospective buyer and seller is transferable does not arise. However, in the event that the estate or interest of the seller is an easement or a fee simple determinable, which is limited to certain purposes, such as that of railroad right of way or right of flood control by operation of a dam, the interest will be non-transferable to a purchaser that commences a use that is not within the original scope of the grant. The risk to the purchaser of such interests is that putative conveyance of the grantor's interest, unless the interest is transferable, will be a nullity. How does the prospective purchaser satisfy itself before entering into the purchase agreement or paying value that the interest it is about to acquire is in fact transferable?

2. Why many railroad titles are opaque

Historically, title to real property could be acquired by the railroad company by various means: Legislative grant, purchase, condemnation or prescriptive use. However, in contrast to the usual operative instrument that vests the real estate title in non-railroad enterprises, the deed, the types of instruments that have served to vest title or other interests in railroad companies have varied considerably, and have included deeds, United States land patents, easements, and other conveyances. In some instances, no instrument or source of title whatsoever was filed in the local public land records. Of particular interest to the circumspect title examiner, the name of the instrument and the granting clause of the deed vesting title in the railroad will not necessarily determine whether the estate or interest conveyed is a fee simple estate. Many railroads were individually chartered by the state legislature. The charter will define or limit the title that the railroad is capable of acquiring and holding. In some states, the state constitution limits the interest of the railroad to that of an easement. Nystrom v. State, 78 S.D. 498, 104 N.W.2d 711 (1960). Thus, though a deed purports to vest a fee simple absolute in the deed's railroad grantee, the railroad's charter or state's constitution may effectively limit the railroad's interest to that of a lesser interest. The ever present possibility that, contrary to chain of title, the railroad holds a non-transferable easement or fee simple determinable, and not a fee simple absolute, presents special challenges to those who examine and insure the title to railroad property.

3. Railroad property acquired by individual grant

In the event that charter or other law does not prohibit the railroad from acquiring a transferable title in fee simple, and the railroad's title is attributable to a conveyance, the interest of the railroad will be determined by the terms of the express grant of the conveyance. Thus, a granting clause of the original deed that described the conveyance as a "right-of-way" for railroad, conveyed to the railroad only an easement. Estate of Rockafellow v. Lihs, 494 N.W.2d 734 (Iowa Ct. App. 1992). Where a strip of land is conveyed for railroad purposes only and no designation of right of way, the conveyance is in fee, but where the grant is for right of way, the grant is an easement. Westman v. Kiell, 179 Mich. App. 489, 455 N.W.2d 348 (1990). Property acquired by a railroad company for railroad right of way constituted an easement rather than a fee simple estate, and could not be transferred to the State for recreational trail upon cessation for railroad purposes but upon abandonment by the railroad vested in fee simple in the abutting landowners. Pollnow v. Dep't of Natural Resources, 88 Wis. 2d 350, 276 N.W.2d 738 (1978). Non-transferability has not necessarily deterred railroads and their successors from offering their right of way for sale to unsuspecting purchasers. In one recent instance in a Midwestern community, a railroad advertised and "sold" property more than sixty years after the right of way was abandoned by the railroad, resulting in litigation among several landowners claiming to own the same land.

4. Railroad property acquired by act of Congress: Federal land grants

In 1988, Congress enacted 16 U.S.C. §1248(c), adopted as part of the National Trails System Improvements Act of 1988, which was intended to encourage trail formation on former federal land grant rail corridors. Many of the railroad rights-of-way within which recreational trails were formed were originally obtained by the railroads pursuant to the General Railroad Right-of-Way Act of 1875. Were the rights of way easements that ceased upon discontinuance for use by the railroad, or alternatively, did transformation to a recreational use preserve the right of way?

In Mauler v. Bayfield County, 309 F.3d 997 (7th Cir. 2002), the Seventh Circuit denied a claim by the abutting landowner that they rather than the county that received a grant by the railroad for recreational trail became, upon the railroad right of way's abandonment and determined that the 1988 Act changed the disposition of the federal interests, causing them to revert to the United States rather than to be transferred to adjacent landowners. However, in Samuel C. Johnson 1988 Trust v. Bayfield County, 649 F.3d 799 (2011), rejecting a claim by the county that when use as a railroad ended, the federal government retained a right of way, the Seventh Circuit found that a fee title in the land encompassed by the former right of way vested upon abandonment in the private owners whose lands abutted. (Exhibit 41). A split among the

circuits over the question of whether the government retained a reversionary interest had developed.

In Marvin M. Brandt Revocable Trust v. United States, ___ U.S. ___, 134 S.Ct. 1257 (2014), the United States Supreme Court resolved the split among the circuits by holding that the railroad right of way under the 1875 Act was terminated by the railroad's abandonment, leaving the abutting owner's land unburdened by the right of way. In that case, in 1911 the railroad constructed its railway over the right of way. In 1987, the railroad sold the rail line to another railroad. When operation by the purchaser railroad did not prove profitable, the railroad notified the federal Surface Transportation Board of its intent to abandon the right of way. The railroad then tore up the tracks and ties and after receiving Board approval completed abandonment in 2004. In 2006, the United States initiated an action seeking a judicial declaration of abandonment and order quieting title in the United States to the abandoned right of way. The United States named as defendants the owners of 31 parcels of land crossed by the right of way. The Supreme Court held that the federal government's reversionary right terminated when the railroad right of way was abandoned. The Supreme Court decision Marvin M. Brandt Trust resolved the question of whether a federal reversionary interest survives an abandonment of a railroad right of way under the 1875 Act, holding that it does not. If a railroad right of way is officially abandoned, the United States has no authority to convert it to a recreational trail without paying compensation. However, the decision did not involve grants under any other of the acts that provided for railroad grants.

B. Establishing Succession in the Absence of Title Records

Railroad titles are complicated by the fact that railroad conveyances are not always recorded in the office of the register of deeds for the county where the railroad property is located. In some states, filing of a conveyance, lease, deed of trust, mortgage or satisfaction may be filed at the transferor's option in a central statewide office, and upon filing shall be notice of the rights of the grantee, lessee or mortgagee as if it were recorded in the county. §190.11(2), Wis. Stats. In such states, no search of the title is complete without parallel searches of the office of the county register of deeds and the central state office. Railroad conveyances, when recorded tend to be difficult to read, owing to the ambiguity of the description and age and illegibility of the copies often transcribed longhand.

Problematic title records underscore the importance that prospective purchasers of both present day right of way and former railroad corridor, regardless of the property's intended future use, should attach to making a careful analysis of the title, and consider obtaining title insurance, before closing the purchase of land comprised of former railroad right of way. The cases also provide an incentive to prospective purchasers to cause a search of the title to be made spanning the

entirety of the time period commencing with grant to the railroad and culminating with the present day, rather than an abbreviated search commencing with the latest recorded deed. The fact that a deed, particularly one without warranties of title, may have been granted by a railroad and recorded in the office of the register of deeds does not, in and of itself, establish that the railroad had a transferable interest in the property.

C. Rights of Abutting Owners

More than any other landholding enterprise or tenure, the need for an analysis of the title of a seller occurs in connection with lands titled in railroad companies. Railroad holdings include many thousands of miles of corridor, and centrally located sites once used as station houses and repair facilities no longer used for railroad purposes. Rural corridor offers the potential for recreational trails for snowmobiles and hiking, and urban sites may prove valuable for development. Potential contenders for ownership these corridors and sites include: Purchasers of the railroad, abutting landowners, heirs of the railroad's grantor, and the state. The outcome of an analysis of the title will depend upon many factors, including the existence of statute laws according the state a right to acquire former railroad right of way, the nature of the estate or interest of the railroad (fee simple absolute, fee simple subject to condition subsequent, defeasible fee or easement), and in the event that a reversionary interest was created by the railroad's grantor, whether it is inheritable and not time-barred by statute. It was held that as between the heirs of the grantor and the abutting owners a possibility of reverter found in a deed that granted a defeasible fee to the railroad was inheritable, and having been inherited, did not pass to the abutting landowners upon the right of way's abandonment by the railroad. Jacobs v. Miller, 253 Iowa 213, 111 N.W.2d 673 (1961) However, where the grant to the railroad stated that the property was granted "for said railroad and for railroad purposes only" and lacked a reverter clause, the nature of the interest was an easement, not a defeasible fee, and therefore, it passed to the abutting owners upon abandonment. Johnson v. Burlington Northern, 294 N.W.2d 63 (Iowa Ct. App. 1980). It was held that title to railroad right of way that was held as a fee simple subject to condition subsequent did not revert to the abutting owner upon abandonment, because the condition subsequent had expired under applicable statute. State v. Union Pacific R. Co. 241 Neb. 675, 490 N.W.2d 461 (1992). Concerning abutting owners, in some states it is also possible for the abutting owner to acquire railroad right of way by adverse possession. Meiers v. Wang, 192 Wis. 2d 115, 531 N.W.2d 54 (1995).

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