Issues Involving Railroad Rights-of-Way in Virginia (Mostly)

Description

This two-part article is an expansion of the materials included in the VLTA seminar, *The Sound and the Fury: Railroads, Rights-of-Way, and Revesting*. Some sections have remained the same, others enlarged, and one downsized. The first part of the article covers a short economic and social history of railroads in Virginia, acquisition of a railroadâ??s right-of-way (ROW) and formal abandonment of an acquisition today, and a review of Virginiaâ??s participation in a quasi-public version of Rails-To-Trails.

The second part will focus on the real estate interest held by the railroad in the ROW, what happens to the interest upon actual and/or legal abandonment of the ROW by the railroad, tort liability for grade crossing incidents, and suggestions for title underwriting with a ROW present. Also, in part two, a recent US Supreme Court decision important in defining whether an ROW is a fee or an easement will be reviewed. The case was projected to impact abandoned rail lines nationally, but its impact in Virginia will be slight.

A Brief History of Railroads in Virginia

Blessed with several west-to-east navigable rivers, Virginiaâ??s commerce thrived from the earliest Colonial days until 1800 by moving tobacco by water. Into the 1800s, roads were not well maintained, and were usually dirt, often muddy. Except for the Potomac River, canals did not successfully move cargo from above the fall line to points below it.

The new technology, appearing in the 1830s, wood-burning, steam-driven locomotives and iron rails offered an alternative. In the South, Charleston, South Carolina first used the train to â??stealâ?? shipping business from Savannah, Georgia. The Virginia General Assembly created the position of State Engineer to encourage rail development as infrastructure for further economic growth in the Commonwealth. The State engineer was ineffective in achieving this goal. The General Assembly abolished his job in 1843 due to its lack of economic success.

Such railroads as did appear in Virginia before the Civil War were generally focused on direct lines from Piedmont points to the Coast or Fall Line cities. There was not a plan in place to use railroads to connect major cities in the state. Virginiaâ??s early railroads mimicked the existing road and waterway systems. They fell into the historic by water model: Farm to Market. Passenger trains were available but only from City A to City B, where City B was the railroadâ??s terminal in City B. To travel through to City C, a passenger would have to switch to another railroad, often having to travel to a different terminal in City B or outside City B.

The Roanoke â?? 1854

State funding for rail was intended to support local markets not statewide railroad operations. Railroad companies were independent of the Commonwealth even though the General Assembly funded between 40%-60% of railroad development before the Civil War. In other words, state tax dollars were used to establish the infrastructure for start-up railroads without return economic benefit to the Commonwealth. Railroads paid interest on bonds but were often excused from taxation.

One railroad, however, differed from the others in that it ran north-south and thrived on passenger business. This was the Richmond, Fredericksburg & Potomac Railroad. Its Potomac River terminus at Aquia in Stafford County would play a pivotal role in the Civil War.

The first military railroad in Virginia was built in 1862. It extended tracks from Manassas to the front lines in Centreville. Manassas, then not largely significant, was the terminus of the Manassas Gap RR and a focal point for two Civil War battles. Notably, the Union may have won the War upon the singular fact that, between 1850 and 1860, four major rail lines were aligned across state lines in the Union states in moving freight east to west and north to south.

Railroad truss reconstruction on the Orange & Alexandria RR during Civil War

The resistance to inter-city and interstate traffic by rail was so great that, even during the War, North Carolina resisted extension of the Southside RR from Roanoke to Greensboro, because the North Carolina legislature did not want Wilmington shipping to lose business to Virginia ports. Eventually, due to military needs, the Confederacy prevailed upon North Carolina and the Piedmont RR was built north into Virginia. Ironically, after the Civil War, eastern North Carolina cities did lose business to Petersburg and Portsmouth due to rail traffic.

After the Civil War, the General Assembly continued the funding of short, direct lines to Fall Line cities. Only after a near bankruptcy of Virginiaâ??s railroads during Reconstruction, with the growth of Northern capitalistsâ?? socioeconomic and political power, did the Northern model of inter-city and interstate transportation by rail take hold in the state.

As lines began to intertwine, massive freight yards emerged. Also, combined passenger stations, known as â??union stations,â?? came to be. To merge more easily into an interstate system, Virginiaâ??s trains converted to the Penn RRâ??s standard 4â?? 8.5â?• gauge. The Virginia & Tennessee RR, for example, joined with the Shenandoah Valley RR, and the two crossed the Potomac to join with the Penn RR. The two lines then served as a growth factor for Roanoke as their single terminus. Later, they morphed into the Norfolk & Western Railway.

Beginning in the 1880s, coal trains became common to move ore. Oddly, the coal industry returned the railroad industryâ??s focus back from mine/farm to market/port.

After World War II, rail passenger numbers have fallen. Roads are efficient and planes move passengers more quickly. Today, there are only two remaining, substantial freight carriers in Virginia: CSX and Norfolk Southern. These two behemoths of interstate shipping include most defunct prior rail carriers in Virginia by traditional merger or acquisition, or as a result of bankruptcy by the defunct lines.

For some enjoyable further reading on the sub-topic of railroad history in the Commonwealth, here are some online sites to visit:

- www.virginiaplaces.org/rail
- http://www.virginiaplaces.org/rail/civilwarrail.html
- www.abandonedrails.com/Virginia
- www.abandonedrails.com/Virginia/Newington-to-Fort-Belvoir (and similar others for specific abandoned rights-of-way)

Also, extensive archival records of the RF&P during the 19th Century can be found at the site of the Virginia Historical Society.

Acquisitions and Modern Closure of Rights-of-Way

The physical presence of a railroad â?? track and ties, side yards, turntables, stations, signals, etc. â?? is often called its right-of-way. We do not usually think about the company â??owningâ?? the ground under the tracks in the same way we think about â??owningâ?? our own ground (or as our lenders do). Maybe it is because the railroad feels more like a force and less like an entity or person: It is ever moving, not stopping to possess; going somewhere, not nesting; uses the land, does not nurture it.

Nevertheless, at least in our business, we want to know: Does a railroad company own its ground in fee or is it only an easement holder? Both fee and easement interests are called rights-of-way for railroads. The difference between the two does matter.

There is never a doubt that a railroad occupies land. Whether it is the belching smoke of an old-time steam locomotive darkening the sky, the piercing warning whistle of an approaching, powerful diesel engine, or the sound and fury signifying the raw power of a mile-long freight consist, you know there is a railroad using land to move something â?? freight, people, or your own five senses. Moreover, its use of the land is rarely in doubt due to a lack of a recorded instrument creating the right to use its right-of-way.

For a title searcher of the public land records, most of the source of title instruments for a railroad, however, antedate the standard search term. That is, railroad acquisition of an interest in land usually are found in the 19th Century. Since then, it is a rarity to find a rail line that has not undergone a handful of mergers and a bankruptcy or two. Even then, if the original instrument can be found, murky language conflates the readerâ??s understanding of the interest created and time hides the partiesâ?? intentions.

What is meant by language such as a grant of a right-of-way defined by metes and bounds but without covenants or warranties of title? Is it any less a fee ownership if the grant of the right-of-way is to the railroad company, its successors and assigns, in fee simple, to conduct all railroad related business but the legal description is given as 50â?? to either side of the already laid tracking? No matter how worded

in the recorded documents, the railroad â??ownsâ?? something in the land upon which, at least, it can lay track and operate trains.

Purchase (and Governmental Regulation)

Like any other individual or business entity, a railroad company can acquire a right-of-way the old-fashioned way: It can buy it. [Or have it quitclaimed, ceded, contributed, etc.] Consequently, initial capitalization of a line was daunting. Due to a railroadâ??s characteristic as a public carrier, it likely would have assistance from the state when established. This assistance might be outright grants of taxpayersâ?? money, loans, or the power of eminent domain.

No matter how acquired, operation of the railroadâ??s right-of-way is subject to regulation by the Commonwealth and, to the extent such would affect interstate commerce, by the federal government. Federal activity is through the Surface Transportation Board (STB), including the processing of petitions to abandon rights-of-way. [For more on the STB, see its website: https://www.stb.gov/stb/index.html.] The STB replaced the former Interstate Commerce Commission in 1966, which agency had been the regulator of railroads. In 2015, the STB became an independent federal agency, no longer aligned with the Department of Transportation.

In Virginia, supervision of railroad operations is with the Department of Rail and Public Transportation (http://www.drpt.virginia.gov/), a division of the Commonwealth Transportation Board (http://www.ctb.virginia.gov/), which is under the Department of Transportation. Governance, generally, over railroads is found in Chapter 13 (Railroad Corporations) of Title 56 (Public Service Corporations) of the Code of Virginia. What is observable in reviewing Chapter 13 is that most statutory law impacting the railroad industry is old and long-standing with most sections being part of the 1919 Code of Virginia. The last substantial rewrite of Title 56, Chapter 13 was in 1996. There are detailed provisions related to organization and merger of railroads, powers, highway crossings, and maintenance of rights-of-way. There are several sections that detail the use of cattle guards (fences) to deter animals on adjacent lands from wandering onto the tracks. Va. Code Â§Â§ 56-429, *et seq*. Aggregate liability to passengers for negligent operation for any one event is $250 million dollars. Train conductors are conservators of the peace â?? i.e., you can be married while on a scenic passenger trip. Va. Code Â§ 56-354.

A section of unusual interest is Va. Code Â§ 56-352:

Every railroad company is hereby invested with an insurable interest in the property upon the route operated by it, and may procure insurance thereby in its own behalf for protection against any damage to such property by fire or otherwise, for which such company shall or might be liable.

Insurance begins with an insurable interest. Not owning the underlying land gives rise to an argument that the owner of personalty only (or less than a fee interest) has no legal interest to insure the personalty even if â?? or especially if â?? it is permanently affixed to the real estate. Under this statute, however, a railroad can obtain liability insurance and fire/damage insurance to protect its physical structures, operating machinery, and financial health against losses due to the occupation of the land by the railroad. A railroad can obtain title insurance on its fee or easement interest.

Eminent domain

Virginia Code Â§Â§ 56-346 and 56-347 codify the power of a railroad to take private property by condemnation upon payment of fair consideration, with the *imprimatur* of the Virginia Constitution, Article 1, Section 11:

A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.

The State Corporation Commission supervises and regulates eminent domain practices by railroads. Because rail lines are declining, not expanding, and without any empirical data to support this statement, it is probable that there has been little activity of this type before the SCC for several years. Records on the SCC website confirm a lack of railroad eminent domain activity.

The process of eminent domain is beyond the scope of this topic. What is pertinent here is that a railroad can acquire a fee title or an easement right in land of private citizens by exercise of a power that is constitutionally invested in the sovereign. The railroadâ??s taking must be â??for â?¦ railroad purposes and purposes incidental thereto, for its use in serving the public.â?• Va. Code Â§ 56-347. Note that this language (and it existed in the 1919 Code) would probably not allow a railroad to transfer an easement only right-of-way into the Rails-to-Trails program or other use. Virginiaâ??s Supreme Court has limited easement areas to use as described in the granting documents. This is to protect the underlying fee interest of the grantor or condemnee as it is presumed that the intent of the grantor was to create an easement for railroad purposes and for no other. Consider this language, however, in *King v. Norfolk & Western Railway*, 90 Va. 210, 17 S.E. 868 (1893), which language confirms the principle while expanding the area that the railroad could take to serve its purposes:

The decree is as definite and certain as was necessary or proper between the appellant and the appellee; and the court did not err in not ascertaining what part, and how much, of the land was necessary for the railroad purposes of the appellee. The exigencies of business may at any time require a railroad company to change or enlarge its terminal arrangements and facilities, and its duties to the public, as common carrier, may require it to increase its track and extend its accommodations; and the court could not undertake to fix definitively the mutatis mutandis discretion of the appellee to use and control any part of the land conveyed whenever any part of it should be needed or required by it, as expressly provided in the deeds.

17 S.E. at 871.

The Golden Spike, Promontory Point, Utah

An interesting case in the U. S. Fourth Circuit Court of Appeals highlighted â?? but did not resolve â?? competing granted private powers of eminent domain and federal preemption of control of interstate operations of railroads. In *Zoya Group, LLC v. Norfolk Southern Railway Company*, No. 22-1837 Unpublished, (4th Cir. 2023), Zoya Group sought to condemn property of the NSR to continue a twenty-year lease of a nonexclusive easement for a two-inch-wide area in which to lay and maintain fiber optic cable. The twenty-year lease had NSR as Lessor and Zoya Group as Lessee. The lease also contained options for two ten-year extensions. When negotiations for the two extensions broke down over rental price, Zoya Group sought condemnation of NSRâ??s property under its own Commonwealth granted power of eminent domain to provide cable infrastructure. As required, Zoya instituted its petition for grant to seek condemnation through state courts with the State Corporation Commission. Prior to action by the SCC, NSR sought removal of the proceedings to federal court alleging that the action, if any, by state regulators was preempted by federal law governing instate rail operations. The Federal District Court agreed, and Zoya Group appealed the issue to the Fourth Circuit. While saying that federal power to regulate matters involving operations of railroads in interstate commerce was preemptive, the Fourth Circuit returned the case to the District Court with directions to return the case to the SCC. Its rationale was that the petition for condemnation did not overtly interfere with railroad operations. That would be

determined upon filing a condemnation action in a Virginia court. Evidence developed there might demonstrate interference with railroad operations, then necessitating removal to the STB or federal court. The current removal attempt by NSR was premature.

Termination of Railway Operations by Regulatory Action

Railroads now being highly regulated as to their acquisition of right-of-way and operations, the cession of those rights is also highly regulated. Due to the fact that railroads are by nature interstate common carriers, the STB has *de facto* control of formal abandonment of ROWs even if the specific line being abandoned is within one state and operates only to support instate markets. For example, see STB AB-290 Sub-No. 412X (abandonment of one mile in Baltimore), STB AB-290 Sub-No. 415X (abandonment in two counties each in NC and SC by NSR), and STB AB-290 Sub-No. 244X (abandonment in Pike County, KY, by NSR).

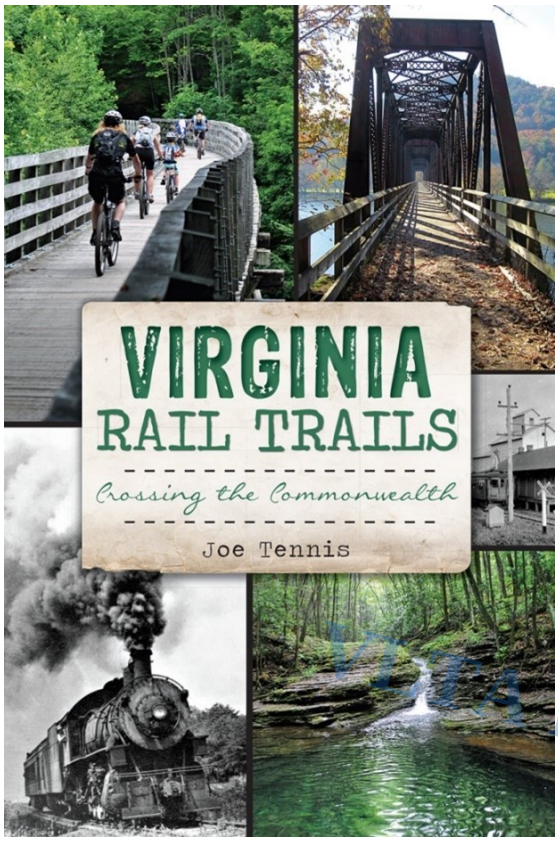
The government approved abandonment has contributed substantively to â??railbankingâ?? and rails-to-trails program nationally. Much of the abandoned railway ROWs in the last few decades have been conveyed directly to states for use in such programs avoiding state condemnation for such use. If a railroad were granted an ROW for easement only, grant of such to the state by the railroad for use as a bike path easement may well exceed the railroad purposes of the original grant, resulting in costly litigation without a successful outcome.

An example of this issue can be examined more fully in J. P. Burleigh, â??Bike Paths and Eminent Domain, U.Cinn.L.Rev., March 21, 2020. Professor Burleigh studies an Ohio case in which the stateâ??s attempt to condemn an abandoned railroad right-of-way to repurpose as a bike path met resistance from owners of the land through which the railroadâ??s ROW ran. Their objection was based upon an expansion of the original purpose of the ROW as an easement only for railroad operations. The new proposed use, while socially commendable for the public at large, would, they said, interfere with their operation of their family farm. The article was written before the case was tried, so the outcome is unknown.

Rails-to-Trails

Virginia does not have a â??Rails-to-Trailsâ?? program *per se.* On the other hand, Virginia does have a statewide system of trails organized and maintained by the Department of Parks and Recreation. Since 2012, the trails added to the system should also be accessible to mobility disabled persons using electric powered bicycles or other personal mobility devices (such as wheelchairs). Va. Code Â§ 10.1-204. Other than that permission, access to the trailsâ?? system in Virginia is limited to foot, horseback, or nonmotorized bicycles. The federal Rails-to-Trails program is used to fund acquisition of abandoned railroad lines to add to the trails system. In addition, the Commonwealth provides funding, and railroads are encouraged to grant property to the state upon abandonment for the program if the site is suitable.

Notwithstanding no formal program, Virginia has 52 total rails to trails paths within the Commonwealth, many within state parks. There is currently more than 400 miles of trails, with other projects in the works that would add another 100 plus miles available for public enjoyment. The Department of Conservation and Recreation highlights nine rail-trails within the Commonwealth all of which are part of the stateâ??s park system. These include the New River Trail (57 miles), High Bridge Trail State Park (31 miles, with an amazing high and long bridge), and the Virginia Creeper Trail (34 miles, part of the Mount Rogers National Recreation Area near Abingdon).



Websites about Virginiaâ??s rail-trails:

https://www.dcr.virginia.gov/state-parks/blog/9-great-rail-trails-in-virginia.

https://www.virginia.org/things-to-do/outdoors/biking/rails-to-trails/;

https://www.railstotrails.org/our-work/united-states/virginia/.

Watch for the second part of this article in a future issue of *The VLTA Examiner*.

R. Michael Smith joined AmTrust Title Insurance Company in December 2017, now employed as Senior Vice President and National Underwriting Counsel. He has been a member of the Virginia State Bar since 1973, having attended the University of Virginia for both undergraduate and law degrees. After ten years of general legal practice, Michael spent most of the last 35 years in title insurance and financial services employment. He has served as underwriting counsel for Chicago Title, Stewart Title, and LandAmerica in Virginia, and Conestoga Title in Pennsylvania. He also serves as an Advisor for the American Land Title Associationâ??s Title Form Committee and is a member of the ALTA PRIA Liaison Task Force. He is a former Chairman of the Education Committee of the VLTA and its Underwriter Section.

Category

1. In the News
2. Uncategorized

Tags

1. featured

Date Created
2024/12/23
Author

vltaexaminer