



# Sharing the Railroad Corridors

## A Question of Ownership

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It's a given that land is a limited and valuable resource. Finding ways to share this resource makes good common sense, especially during times of economic instability.

Since railroads operate in long corridors of land, wouldn't sharing the rights of way be a smart way to maximize those resources? The answer may be more complicated than you think.

### **Rights to the Land**

Before a utility can approach a railroad in hopes of sharing the rail corridor, it should know what interests the railroad actually has. Assuming that a railroad company owns the land on which the tracks run can lead to legal and public relations problems. Only an entity or individual with full title and ownership has the right to grant or sell interest in that land, regardless of how much land is involved or its intended use. Utility companies may be required to negotiate with numerous private landowners, rather than the single owner or operator of the rail lines. It isn't always an easy process to determine who owns the land beneath the rails, but it is a necessary step.

### **Ownership Versus Possession**

There is a distinct difference between land ownership and possession, with possession bearing fewer rights than full ownership. Before delving into rail corridor ownership, let's review the different types of land rights, ownership and interests relative to a piece of land.

Ownership is basically a collection of rights to use and enjoy property, including the right to transmit it to others. In contrast, possession merely addresses physical presence, but says nothing about any right to be on the land occupied.

It is only with full fee ownership of the right of way that the railroad may consider a request by a utility or other entity to use the corridor. With any lesser interest, the railroad must acquiesce to the superior powers of the true owner of the underlying fee.

But even ownership comes in different varieties, and fee may be determinable or defeasible, meaning that certain occurrences, events or activities can end that ownership, which can then revert to the original grantor, its heirs, assigns, successors or designees. A deed stating that a conveyance is for "railroad purposes and

no other” sets the stage for reversion when the trains cease to operate or the land is used for other unrelated purposes.

In terms of possession, the law generally recognizes two types - actual and constructive. A person who knowingly has direct physical control over something is in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention to exercise control over something is in constructive possession of it. Constructive possession arises from the public notice of a document, such as a deed announcing that there is a record of some claim of right to land. However, it is possible that the document is flawed and may not bestow full ownership. Furthermore, not every written document grants ownership, and some grant only the right to possess or use the land.

While other forms of possession exist, adverse possession may be the most familiar. This occurs when there is a claim of ownership based on open, notorious, hostile and continuous use and possession of land for a statutorily defined period of years. Surveyors and other land professionals who compare the written record to the actual physical occupation of the land clearly understand the need to report any differences discovered during deed and site investigations. However, they cannot resolve legal issues associated with these discrepancies.

## **Extending Land Rights: A Historical Perspective**

What does all this have to do with placing utilities in railroad corridors? The first step in negotiating the rights to use a corridor involves understanding exactly how the railroad originally obtained rights to that corridor. Only then can it be determined whether those rights may be extended to others. A little history may illuminate the complexity of extending rights.

Railroad corridors began criss-crossing the American countryside as early as the 1830s. Before they could operate, individual railroad companies were required to obtain charters, granted to them by the states in which they were incorporated. The charters identified where the railroads could operate and what particular rights they could exercise, such as the right to purchase full interest and title to land or any limitations allowing only acquisition of the right to use land (easements).

As railroads gained recognition for their role in stimulating economic growth and industrialization, they were considered an asset that should be given enormous benefits and power in order to facilitate their construction. Congress and the States established systems of land allocation, including land grants, which could either be for full ownership or merely the right to use and operate on that land. The particular set of rights accorded to specific railroad companies is generally identified in the statutes establishing the individual land grant system.

The important public benefit of railroads also earned some of them the power of eminent domain, giving them the right to condemn property when voluntary negotiations for rights to cross private lands failed. However, depending on the charters and legislation pertaining to railroad companies, the rights gained through this process were not always for full title. Instead, they might have only had authority to condemn easement rights, those rights that can only be exercised by a specific entity for a specific purpose and cannot be transferred by the recipient (grantee) of the easement rights. The one who granted the easement rights (grantor) still retains full ownership of the land burdened by easements and is the only one with authority to grant further easement rights to others. The only restriction on the grantor's actions is to avoid interfering with the rights the grantor has given to the easement holder. The grantee has no authority to convey rights or share its rights without the permission and approval of the grantor.

Easement rights come with certain clear parameters when they are written, ones that determine the precise purpose of the easement and who may use it. There may be clauses establishing the termination of the easement, such as forfeiture of rights if not exercised continuously or if used for purposes other than those outlined in the deed, contract or other agreement.

In some instances, railroads had the right to purchase full title to land but to condemn only easements. This meant that the railroad's rights in adjoining tracts of land may not be the same: three tracts in a row might be owned in fee by the railroad, then one or two tracts only allow easement rights, and then back to fee ownership. There may even be a few leases thrown in for good measure, just to confuse the matter. Nearly any assumptions made about railroad rights will prove to be erroneous, and full examination of the written record is the only reliable means of determining the actual rights.

## **Build First - Ask Later**

In the late 1980s, AT&T planned to lay its fiber optic cables as quickly as possible to create a national transmission system. Knowing that railroads operated on lands that would be convenient to the placement of their cables, AT&T decided to negotiate with the railroads for such rights, rather than searching records to see what interests the railroads truly had in the land. In many instances, the railroads did not have anything more than an easement in the corridor. In essence, they had no legal right to allow non-rail use by anyone other than the owners of the soil beneath the tracks - those owners being private individuals, private corporations and government agencies.

One particular landowner discovered AT&T's trespass for non-rail purposes and filed suit for proper compensation. AT&T admitted its fault, resulting in class action settlements in all the states where it had decided to build first and ask questions later. While it may have been hoping to expedite the process (and probably pay less than what might have been negotiated

with individual landowners), had AT&T understood the consequences of their actions, they could have avoided the negative publicity that followed.

### **Lack of Written Documentation**

The murky and messy history of land rights beneath the tracks is revealed only through researching records thoroughly. The situation can be clouded by the frequent lack of any written documentation giving the railroad rights to use a tract of land, even though the rails may have been actively used for over a century. What kinds of rights do the railroads have under those circumstances?

The American legal system takes much of its basis from old English law. The Statute of Frauds is one of those ancient borrowed precepts. Every state, commonwealth and territory in the U.S. has statutes which clearly mandate that interests in real property can only be transferred in writing - documents meant to protect both buyer and seller. The word “interests” includes a variety of present and future rights, which separately are less than full ownership but together present evidence of ownership rather than mere possession.

Once again, history comes into play. At times, the rail companies would negotiate the rights to cross privately-owned property, and the landowners would be so appreciative for a means to get their produce to market that they would donate land to the cause. Sometimes there would even be a secondary agreement, such as “I’ll let you cross my land if you build a depot within this township so that I am guaranteed a means to access rail transportation.” Oftentimes, there would be no writing whatsoever. Either way, the rail lines would be built, the depots constructed, and everyone would be happy for the time being.

Here is an instance of equity - a matter of fairness that may not adhere strictly to our legal system. The rail was built, it did operate, and no one complained or demanded compensation, or any further compensation beyond such deals as the nearby depot. Then was the train operating illegally? No, it was actually operating according to an unwritten contract. However, the Statute of Frauds says that ownership of any interests in land cannot be transferred without a written document, so we face the dilemma of the ground truth (the railroad using the land) in conflict with the written record - or lack of a written record. In such instances, the railroads are generally held to have acquired only an easement rather than ownership of the corridor, an easement created by equitable estoppel.

### **The Issue of Abandonment**

There are other twists and turns in determining the rights and interests owned by railroads. The issue of abandonment has become a touchy topic, particularly in light of Rails to Trails, the federal program to preserve unused rail corridors for

future use in the form of long-term temporary trails. Inactive tracks do not necessarily mean the line has been abandoned. In the United States, abandonment cannot fully occur until the railroad has first applied to the Surface Transportation Board (STB) for permission to cease operation. The STB must determine if the public will be harmed by lack of service. After all, railroads were given special privileges in the early days because of their great value to the public. The STB would prefer that someone steps forward to make an offer of financial assistance to continue rail operations. But if it determines that the line is no longer viable, the STB may allow the railroad to abandon operations by a certain date.

But even after abandonment, the issue is not necessarily resolved. If the railroad had only an easement over the land, then the property is now unencumbered by the rail easement, and any other use of the former rail corridor is a new easement for which new compensation should be paid. It is only if the rail company owned the land under the newly-abandoned tracks that it can convey interests, including fee ownership, to anyone else.

### **In Summary**

History shows that with past corridor usage, certain utilities were placed in the rail corridors because they were specifically needed for railroad purposes. This usage included water to extinguish fires in flaming engines, electricity to power the trains, and telegraph lines to wire ahead to the next station that the train was in need of maintenance. But there had to be a nexus between the operation of the railroad and those utilities.

In these volatile economic times, finding ways to share existing rights of way may be one of the best ways to maximize our resources. However, just making an assumption that a railroad owns the land on which its tracks run can lead to a variety of problems. Spending the time to research who owns the land may be a time-consuming process, but not doing so can lead to a host of legal and public relations nightmares that no one wants to encounter.



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